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THE NATIONAL JUDICIARY AS AN EXCEPTIONAL MEASURE IN THE FACE OF THE CRIMES OF THE ZIONIST ENTITY IN THE GAZA STRIP

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ABSTRACT

In light of the inability of the United Nations to stop the Israeli aggression on the Gaza Strip, as the official sponsor of international peace and security, many countries are calling for the application of the law of war between states to occupied Palestine. However, reality proves that the application of this law was and still is merely ink on paper in the Palestinian case, because the international will is very much in solidarity with the occupier, this does not prevent Israel's crimes from being documented to be put before international courts in the future, as happened in the war crimes of Bosnia and Herzegovina, Sierra Leone, and Rwanda, or national courts as the alternative or available option for states in accordance with what was stipulated in the four Geneva Conventions. Therefore, it must direct the national judiciary towards what is known as universal jurisdiction to pursue war criminals in the Gaza Strip.

KEYWORDS: International peace and security, War crimes, International justice, Universal jurisdiction

INTRODUCTION

The Palestinian issue is one of the most complex international issues for decades, due to its historical importance related to the rights of the Palestinian people and their existence in occupied Palestine and the Middle East region. This issue is linked to a series of events and developments that the region has witnessed since the Balfour Declaration, from a bloody conflict that has affected the lives of millions of people after the establishment of Zionism andthe immigration of Jews to Palestine and the settlement of the region, due to the role played by the major powers in these events.

What happened in the Gaza Strip starting in October 2023 is nothing more than a series of uprisings against the Israeli occupation of Palestine since the 1950s. However, the Israeli response this time has reached its peak with direct targeting of civilians due to Israel's sense of humiliation in the wake of the operation led by the resistance factions, which was named the Al-Aqsa Flood, and the accompanying invasion of several settlements and the capture of army personnel.

All of this was documented through various Arab and foreign media outlets, which played a significant role in conveying the inhumane situation that the Gaza Strip has descended into. This prompted the international community to demand a cessation of hostilities in the Strip, in the face of the inability of various international bodies to solve the humanitarian disaster, or at least for senior leaders to follow up on their violations of the customs and laws of war.

From this standpoint, the following issue can be raised: How can the national judiciary be an effective mechanism for curbing crimes committed in the Gaza Strip, given the inability of international mechanisms?

The paramount importance of the study's subject matter is manifested in clarifying the role of the national judiciary in limiting the Israeli crimes against the Gaza Strip, as an auxiliary alternative to the international mechanisms that have failed due to the lack of genuine willingness in the international community. This has been proven through the resolutions of the Security Council when they collide with a state that has a permanent seat, and the recommendations of the General Assembly in the organization.

The subject will be studied according to the requirements of the analytical approach, which is the methodology imposed by such studies and which encompasses all aspects of the subject. This necessitates the analysis of international legal texts, but nevertheless, there is nothing that prevents us from utilizing some other approaches that the elements of the subject matter dictate, such as the descriptive method.

To address the topic from all angles, we have divided this study into two sections. In the first section, we discussed the role of international mechanisms in stopping the Israeli aggression on the Gaza Strip. In the second section, we touched upon studying universal criminal jurisdiction as a mechanism to limit the crimes committed in the Gaza Strip.

Section One: The Role of International Mechanisms in Stopping the

With the continuation of the Israeli aggression on the Gaza Strip, and the unprecedented crimes it has left against the Gaza residents without distinction between civilians and combatants, various international bodies, led by the United Nations General Assembly and Security Council, have attempted to stop the military actions of Israel while seeking a ceasefire between the parties to the conflict. Based on this, we have divided this section into two demands:

The First Demand: Israel's Crimes Against the Palestinian People

In this demand, we examined the deteriorating situation in the Gaza Strip after the Al-Aqsa Intifada, and then proceeded to clarify the Israeli crimes that accompanied the armed aggression. This is what we will study in succession:

The First Branch: The Background of the Events of 07 October 2023

Despite Israel's 2005 withdrawal, the Gaza Strip remains under Israeli occupation, gaining control over land, sea, air, population registry, and communication networks. This has allowed Israel to seize daily life and infrastructure, violating international human rights law.[1]

On October 7, 2023, Palestinian resistance fighters launched the largest attack on Israel in decades, codenamed "Operation Al-Aqsa Tempest". The attack, also known as the "Third Intifada", involved thousands of rockets and Palestinian armed men advancing towards Israeli settlements. Israel declared a "state of war" and launched "Iron Sword", causing extensive aerial bombardment and evacuation of civilians.[2]

Second Section: Israel's Violation of International Humanitarian Law

Since the beginning of the aggression on the Gaza Strip on October 7, 2023, the Israeli occupation forces have carried out orders for forced mass displacement against the civilian population in the Gaza Strip, which has seriously affected their lives and safety, and forced them to live in unprecedented inhumane conditions. The forces have also repeatedly targeted the shelters for the displaced with bombardment, affecting many of them, including those belonging to the United Nations. This constitutes a serious and systematic violation of the rules of international humanitarian law,[3] particularly the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War dated August 12, 1949, which grants special protection to civilians and prohibits exposing their lives to danger, threatening them, and forcing them to evacuate.

In fact, many well-known international human rights and humanitarian organizations have already pointed to potential war crimes, including crimes against personnel, and even the International Committee of the Red Cross has expressed its concern in a rare public statement about the Israeli military actions and acts prohibited under the Geneva Conventions and Additional Protocols.[4]

UN experts warn that Israel is attempting to change Gaza's demographic composition through increasing eviction orders and attacks on infrastructure. 85% of the population has been internally displaced since October 7, 2023, facing overcrowded conditions, infectious diseases, and struggles to access basic necessities. The Israeli military operation has targeted hospitals, schools, and shelters without considering proportionality or distinction between civilians and combatants. The UN Secretary-General has called for Israel to halt its campaign, implement a permanent ceasefire, and allow unimpeded humanitarian assistance, while prioritizing dialogue for the safe release of civilians.[5]

From the foregoing, we infer that Israel not only treated the lives of the population in the

1 Euro-Mediterranean Observatory for Human Rights. Available at: <https://euromedmonitor.org/ar/gaza>. [Last seen: 3.07.2024].

2 TRT Arabic channel. The Palestinian issue... a Tale of Steadfastness and the Pursuit of Rights. Available at: <https://www.trtarabi.com/explainers> [Last seen: 11.03.2024].

3 Al Jazeera. (26.12.2023). French Researcher: War crimes in Gaza... Is it genocide? Available at: <https://www.aljazeera.net> [Last seen: 9.03.2024].

4 UN Human Rights Office of the High Commissioner. (22.12.2023). Israel Working to Expel Civilian Population of Gaza, UN Expert Warns. Available at: <https://www.ohchr.org> [Last seen: 9.03.2024].

5 UN High Commissioner for Human Rights, press release. (15.09.2009). The report of the United Nations Fact-Finding Mission on the Conflict in Gaza. Available at: <https://www.ohchr.org/ar/press-releases> [Last seen: 26.05.2024].

Gaza Strip with disdain, but also deliberately inflicted the greatest possible harm on civilians to commit genocide, which led to the exacerbation of the humanitarian crisis that provoked widespread condemnation from the international community. The international community has called for the necessity of finding a just and comprehensive solution to the Palestinian issue and ensuring accountability for those responsible for international crimes.

The Second Demand: The Role of United Nations Bodies in Stopping the Israeli Aggression on the Gaza Strip

There are more than 560 multilateral treaties on human rights, terrorism, international crime, refugees, disarmament, and many other issues that have been negotiated and concluded through the efforts of the United Nations.[6] Despite this large number, there are still major violations of international law by Israel in Gaza. Therefore, in this section, we will study the role of the two most important bodies in the United Nations in curbing the Israeli aggression against the Gaza Strip, as follows:

The First Branch: Evaluating the Efforts of the United Nations General Assembly in Stopping the Israeli Aggression on Gaza

The UN Fact-Finding Mission's report on Gaza conflict reveals Israel violated international law by not taking necessary precautions, using prohibited weapons, targeting Al-Quds and Al-Wafa hospitals, and mass detaining Palestinians in Israeli prisons, violating human rights requirements and the International Covenant on Civil and Political Rights.[7]

The United Nations General Assembly adopted by an overwhelming majority five resolutions on Palestinian issues related to refugees, settlements, and Israeli practices.[8] The Palestinian Ministry of Foreign Affairs and Expatriates reported that 168 countries supported a resolution assisting Palestinian refugees, while occupying states voted against it. The resolution also passed on the UNRWA's operations, with 165 countries supporting it. The Special Committee investigating Israeli human rights practices against Palestinians and other Arabs was supported by 86 countries, with 12 countries opposing it.[9]

Based on the above, we can conclude that the General Assembly plays an important role in spreading global awareness by expressing the will of the international community in support of the rights of the Palestinian people, although its ability to stop the Israeli aggression is still very limited, and this is due to several reasons, the most important of which can be summarized as follows:

- The resolutions issued by the General Assembly are not legally binding,[10] which means that states are not obligated to comply with their recommendations;
- The conflicting political and economic interests of the members in the General Assembly often influence their positions, leading to an inability to form a strong and unified consensus on issues such as the Israeli-Palestinian conflict;
- Diplomatic pressure from powerful states, particularly the United States

6 Anadolu Agency. (07.12.2023). The United Nations Voted on 5 Resolutions in Favor of Palestine, the Palestinian Ministry of Foreign Affairs and Expatriates called for "Urgent action at this time to impose a ceasefire on the Israeli aggression and a cessation of hostilities", Turkey. Available at: <https://www.aa.com.tr/ar/> [Last seen: 12.03.2024].

7 Al Jazeera. (29.03.2024]. After the Security Council resolution.. Will the Pressure Succeed in Stopping the Israeli Aggression on Gaza? Available at: <https://www.aljazeera.net> [Last seen: 25.05.2024].

8 Al-MasryAl-Youm channel. (27.03.2024]. Israel Disregards the Security Council Resolution and Continues its Operations in Gaza (details). Available at: <https://www.almasryalyoum.com> [Last seen: 25.05.2024].

9 Al Jazeera. (26.05.2024]. The War on Gaza live.. Massacre in Rafah as the Occupation Targets Tents Near an UNRWA Facility. Available at: <https://www.aljazeera.net> [Last seen: 26.05.2024].

10 Al-Masrychannel. (26.05.2024]. New massacre. The Occupation Bombs the Tents of the Displaced in Rafah. Available at: <https://www.masrawy.com> [Last seen: 26.05.2024].

and European countries, weakens and limits the General Assembly's ability to take strong actions against Israel;

- The General Assembly takes a long time to reach decisions due to bureaucracy. This delay can be more harmful than beneficial, especially in situations that require a rapid response to stop violence;
- The General Assembly does not have its forces or executive mechanisms to implement its resolutions, which primarily depend on the member states, making it often powerless to impose its will;
- The political divisions among the member states on how to deal with Israel and Hamas have resulted in the adoption of weak and ineffective decisions.

The Second Branch: The Security Council's Failure to Stop the Israeli Aggression on Gaza

The Security Council resolution issued on March 25, 2024[11] calling for a ceasefire and opening the door for the flow of humanitarian aid to the Gaza Strip, is considered the most prominent sign of the international shift towards intensifying pressure on Israel, in line with the Council's previous resolutions numbered 2712 and 2720 of 2023. However, upon a careful reading of the wording of this resolution in comparison to the previously issued Security Council resolutions, it is notable that the term "demands" has been replaced with "calls upon" or "urges", which is something we have not been accustomed to in Security Council resolutions, which have traditionally included the phrase "decides". There is a distinct difference between the phrases "the Security Council calls upon/urges" and "the Security Council decides". Furthermore, the resolution was not even attributed to Chapter VII of the Charter, which deals with the maintenance of international peace and security, as stipulated in Article 25 of the United Nations Charter.

All of this has led several parties, foremost among them the United States of America, to interpret and construe the resolution according to its wording, considering it to be lacking in the mandatory character.[12]

Regardless of the format in which the resolution was formulated, in the end all parties must respect it and abide by it, as it was issued by an executive body of the United Nations, which is empowered under the Charter with very broad powers, represented mainly in the maintenance of international peace and security.

However, Israel did not care about the resolution, and the evidence of this is that only two days after it was issued, it began what it is accustomed to doing in terms of crimes against civilians in Gaza, by committing 8 massacres against Palestinian families, from which 81 martyrs and 93 injuries were reported to have reached the hospitals, according to what the Palestinian news agency (WAFA) reported.[13]

Based on the aforementioned data, it can be said that Israel has not respected the UN Security Council resolution, failing to maintain international peace and security. This confirms that the Zionist entity has somehow ensured the suspension of any subsequent action that the Council may take against it due to its violation of this resolution, since the entity's allies have permanent seats on the Council, which enables them to use the veto power. The best evidence of this is the continued acts of genocide to this day.

The confirmed event was the bombing of the refugee camp north-west of Rafah, southern Gaza Strip, by the occupation army's air-

11 Ayoub, N. (31.01.2024]. The South Africa v. Israel Case Regarding the Application of the Convention on the Prevention of Genocide in Gaza. Arab Center for Research and Policy Studies, pp. 5-6.

12 UN Human Rights Office. (31.01.2024]. Experts from the United Nations: The International Court of Justice Ruling Instills Hope in Protecting Gaza Civilians Suffering from Dire Humanitarian Conditions. Available at: <https://www.ohchr.org> [Last seen: 22.03.2024].

13 Al-Masry Al-Youm Channel. (27.03.2024]. Israel Disregards Security Council Resolution and Continues its Operations in Gaza (details) <https://www.almasry-alyoum.com>

craft on 26/05/2024. The target was the tents of the displaced people near the headquarters of the United Nations Relief and Works Agency for Palestine Refugees (UNRWA) in an area claimed to be "safe". This resulted in dozens of casualties with burns and amputations, as well as deaths,[14] 27 civilians.[15]

The Second Requirement: Practical Measures Taken by International Courts to Prosecute Israel for its Crimes in Gaza

The interest has been growing in international human rights circles regarding the idea of prosecuting Israel before international courts, due to the estimated civilian death toll of over 15,000 caused by its military forces in the Gaza Strip. Human rights organizations consider this a systematic crime and killing of civilians.[16] In fact, Israel has been condemned by the two most prominent international courts – the first being the International Court of Justice, which rules on disputes between states according to the principles of state responsibility, and the second being the International Criminal Court, which holds individuals criminally responsible. We will explain these in more detail:

The First Section: Condemnation of Israel by the International Court of Justice

On December 29, 2023, the Republic of South Africa filed a lawsuit against Israel before the International Court of Justice to determine Israel's responsibility for acts of genocide against Palestinians in the Gaza Strip, thereby violating its obligations under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. It is noteworthy that this is the only treaty in which Israel has recognized the Court's jurisdiction to settle disputes arising between it and other parties regarding the interpretation or application of the treaty, while reserving its jurisdiction in the rest of the international treaties it has signed.

South Africa's request included a plea to the Court to impose provisional (precautionary) measures, which are of utmost importance in ensuring the urgent and full protection of Palestinians who are still facing serious dangers as a result of the ongoing acts of genocide in the Gaza Strip. This is also to preserve the rights of either party as stipulated in Article 41 of the Statute of the Court.[17]

The International Court of Justice has ordered Israel to cease acts deemed genocide, including those listed in the Convention on the Prevention and Punishment of Genocide. Despite this, Israel continues to face high civilian casualties and injuries. The targeting of three hospitals in Khan Yunis and the targeting of displaced civilians indicate Israel's rejection of the court's decision.[18]

Israel reaffirmed its intention to continue its aggression against the Palestinian people, ignoring the International Court of Justice's ruling, after 124 days of aggression, resulting in 70% of children and women's deaths and war crimes.[19]

It is therefore clear that the escalation of Israeli attacks aims to commit further war

14 Sudani, N. The Preliminary Investigation of the International Criminal Court on the Crimes of the Israeli Occupation in Palestine. Journal of Legal and Political Sciences, University of El Oued, Algeria, vol. 12, issue 1, p. 785.

15 RT Arabic Channel. (21.05.2024]. What Does the International Criminal Court Issuing Arrest Warrants Against Netanyahu and Gallant Mean? Available at: <https://arabic.rt.com/world/> [Last seen: 24.05.2024].

16 University of Youssef Ben Khedda, Faculty of Law. (2007/2008). The Principle of Universal Jurisdiction in International Criminal LawMaster's Thesis. Algeria, pp. 30-35.

17 International Committee of the Red Cross. (2014). La Compétence Universelle en Matière de Crimes de Guerre, Services Consultatifs en Droit International Humanitaire, p. 1.

18 Varney, H., Zdu, K. (2020). Advancing Global Accountability The Role of Universal Jurisdiction in Prosecuting International Crimes. International Center for Transitional Justice, p. 5.

19 Bouchet-Saulnier, F. (2006). The Practical Dictionary of Humanitarian Law, on the Universal Jurisdiction (translated by: Mohamed Masoud, reviewed by: Dr. Aamer Al-Zamali and Madiha Masoud). Dar Al-Ilm for Millions, 1st edition.

crimes and genocide, with the blatant disregard for the decisions of the International Court of Justice that oblige it to take measures to prevent this crime.

The Second Branch: The Efforts of the International Criminal Court in Pursuing War Criminals in the Gaza Strip

Israel was one of the seven countries that voted against the establishment of the International Criminal Court[20] and opposed the Rome Statute, citing some legal arguments in an attempt to conceal its true political motives that led it to oppose the establishment of the Court. However, despite this, Israel signed the Statute of the International Criminal Court on December 31, 2000, but has not ratified it yet.[21] The International Criminal Court can still pursue political and military leaders in Israel at the request of Palestine, as long as Palestine is a member of the International Criminal Court. This is in accordance with Article 13 of the Rome Statute. The case could also be referred to the Court by the United Nations Security Council, as per the same article. However, this latter scenario is unlikely to occur given the blessing of some influential states in the Security Council for the military actions on Gaza.

The Pre-Trial Chamber of the International Criminal Court is currently examining the Prosecutor Karim Khan's request for arrest warrants against 3 Hamas leaders and the Israeli Prime Minister "Benjamin Netanyahu" and his Defense Minister "Yoav Gallant". If the Pre-Trial Chamber judges are convinced that the evidence presented provides reasonable grounds and that the necessary criteria for issuing the arrest warrants have been met, they will approve the issuance of arrest warrants against them, which will include details of the suspects, a description of their alleged crimes, and the legal basis for issuing them. These warrants will then be sent to the 124 States Parties to the Rome Statute, who are obliged to cooperate with the Court to execute the arrest warrants. This means that Netanyahu and Gallant will have to think carefully before travelling to any of these countries, unlike the Hamas leaders who are permanently based in the Gaza Strip, with Haniyeh currently residing in Qatar.

The International Criminal Court's Prosecutor has called on all Rome Statute States to handle requests for judicial decisions with the same seriousness as in previous cases. Israeli Foreign Minister Yisrael Katz has ordered a special committee to combat Khan's decision, intending to speak with world foreign ministers to oppose the Prosecutor's decision.[22]

There is a serious desire on the part of the prosecutor of the International Criminal Court to issue an arrest warrant, although this matter is initially subject to the approval of the Pre-Trial Chamber judges according to the provisions of Article 15 of the Rome Statute. However, if the arrest warrant is issued, we believe it will significantly impact Israeli politicians and leaders, at least in their constant travels, which they are accustomed to. As for the leaders of Hamas, they do not travel extensively; nevertheless, the warrant may place Palestine in a dilemma due to its obligations towards the Court, as it has ratified the Court's Statute.

In general, and based on judicial precedents, the International Criminal Court remains constrained by several obstacles, primarily related to the provisions of its Statute, especially Article 82 concerning a set of conditions that require the approval of certain states regarding judicial cooperation. Therefore, states must strive to impose international criminal justice through what is known as universal ju-

20 Al-Aini, T.Y., Al-Hassanawy, A.J. (2009). The International Criminal Court: A Legal Study in Determining its Nature, Legal Basis, Formations, and Membership Rules, with Identifying the Guarantees of the Accused. Dar Al-Yazouri Scientific Publishing and Distribution, Jordan, p. 53.

21 International Committee of the Red Cross. (2005). Rule 157 of Customary International Humanitarian Law.

22 International Committee of the Red Cross. (13.10.2024]. The Scope of the Principle of Universal Jurisdiction and its Application. Available at: <https://www.icrc.org> [Last seen: 24.05.2024].

risdiction in the prosecution of various international crimes, and this is what we will devote to studying in the following section.

The Second Topic: Universal Criminal Jurisdiction as a Mechanism to Reduce Crimes Committed in the Gaza Strip

In the face of restricting the jurisdiction of the International Criminal Court to several conditions, some of which are objective and others are territorial, the national judiciary needed to strive to take its place, as it is the original jurisdiction for the prosecution of international crimes, in accordance with the various international documents, foremost of which are the Geneva Conventions of 1949. Not only that, but even the United Nations bodies, including the Security Council, urged states to exercise universal criminal jurisdiction to tighten the noose on perpetrators of international crimes. Based on this, we have divided this topic into two demands as follows:

The First Requirement: The Global Criminal Jurisdiction is a Mandatory Obligation to Achieve Criminal Justice

It is important to note the distinction between universal legislative jurisdiction and universal judicial jurisdiction. The former refers to the enactment of domestic legislation that incorporates international crimes, while the latter involves taking measures to prosecute, investigate, and try the accused. Both fall under the umbrella of universal criminal jurisdiction,[23] whereby all states have the right to pursue and suppress perpetrators of international crimes. This is sometimes referred to as the global repressive system or the system of universal jurisdiction. This jurisdiction is considered an indirect application of international law through domestic laws.[24]

The First Section: The Concept of Universal Criminal Jurisdiction

The jurist "Grotius" is considered the first to establish the principle of the universality of the right to justice in the face of crimes that affect the rights of peoples, based on the idea that crimes violate the natural law that is originally unwritten but firmly rooted in the human conscience,[25] International law allows states to extend their national law to events outside their territory, known as universal jurisdiction. This principle, which allows states to prosecute war crimes even without a state connection, aims to suppress crimes and prevent perpetrators from seeking refuge in third states. To implement this principle, states must integrate universal jurisdiction into their national legislation.[26]

This allows it to even request the extradition of the suspects from another country if it is proven that there has been a delay in the trial".[27]

In February 1999, the Security Council requested that states amend their legislation to incorporate the principle of universal jurisdiction into their domestic laws, to enable the monitoring and prosecution of those who violate international humanitarian law. The same matter was emphasized in the report of the

23 Al Jazeera. (17.06.2001). Survivors of Sabra and Shatila sue Sharon in Brussels. Available at: <https://www.aljazeera.net/news/> [Last seen: 25.05.2024].

24 Hassan, M.S. (2024). The Effectiveness of the Principle of Universal Jurisdiction. Journal of Legal and Social Sciences, ZianeAchour University, Djelfa, vol. 9, issue 1, p. 594.

25 Al-Quds Al-Arabi newspaper. (31.01.2009). The Decision of the Spanish Judge Against an Israeli Minister and Six Military Leaders on Charges of War Crimes Causes Uproar in Tel Aviv. Available at: <https://www.alquds.co.uk> [Last seen: 25.05.2024].

26 Al Jazeera. (14.12.2009). A British Court Order for the Arrest of Livni. Available at: <https://www.aljazeera.net> [Last seen: 25.05.2024].

27 The Covenant of the League of Nations in 1919 and then the Paris Peace Pact (Briand-Kellogg Pact) in 1928 attempted to outlaw war, and the UN Charter in 1945 reaffirmed this trend, "All Members shall refrain in their international relations from the threat or use of force (...)". Refer to: What is the meaning of "the law on the use of force" and "the law in war"?, from: International Committee of the Red Cross. (01.01.2004). International Humanitarian Law: Answers to Your Questions. Available at: <https://www.icrc.org> [Last seen: 8.05.2024].

UN Secretary-General issued on September 8, 1999, regarding the protection of civilians in armed conflicts.[28]

We can conclude that universal criminal jurisdiction can be considered an exceptional measure to enforce criminal justice, as it allows states to prosecute perpetrators of international crimes, even if the state has no connection to the accused or their conduct. Consequently, any person accused of committing violations of international humanitarian law can be tried.

The Second Branch: The Principle of Universal Criminal Jurisdiction as a Precautionary Measure

At first glance, upon reading the texts of the Rome Statute of the International Criminal Court, one might understand that they constitute a violation of national sovereignty, especially with regards to its exclusive jurisdiction.[29]

In fact, the principle of universal jurisdiction was codified in the Geneva Conventions of 1949, to fill a gap in international law resulting from the lack of an effective formula for international jurisdiction. Universal jurisdiction applies to all serious violations of the Geneva Conventions, most of which fall under the categories of "war crimes" or "crimes against humanity". These crimes have been defined within the framework of "war crimes/ crimes against humanity" (Section 3), and include other crimes over which states may exercise universal jurisdiction, such as genocide (committed during war), torture, slave trade, aircraft attacks and hijackings, and acts of terrorism. The right of states to grant universal jurisdiction to their courts over war crimes is a rule of customary international law.[30]

Even if the states with jurisdictional competence do not investigate serious violations of international humanitarian law and prosecute those responsible, universal jurisdiction can be an effective mechanism for other states to ensure accountability and put an end to impunity. In fact, the International Committee of the Red Cross has counted more than 110 countries that have established some form of universal jurisdiction over serious violations of international humanitarian law in their national legislation. Other countries have also applied the principle of universal jurisdiction through decisions and initiatives of their national courts, such as setting up assistance mechanisms and networks, and establishing specialized units within prosecution or competent judicial bodies tasked with investigating war crimes.

It is observed that there is an increase in judicial proceedings based on universal jurisdiction against war crimes. This reflects the efforts of states in utilizing universal jurisdiction to effectively address the prevailing gaps that enable impunity, and to move towards accountability for serious violations of international humanitarian law committed outside their borders, whether during past or ongoing armed conflicts.[31]

The Second Requirement: The Extent of the Effectiveness of the Universal Criminal Jurisdiction Practiced on Israeli War Criminals

Determining the effectiveness of universal criminal jurisdiction mainly depends on studying judicial precedents and international efforts made to establish this principle. This is followed by outlining the key obstacles that limit the effectiveness of this principle, which can be considered one of the most important mechanisms to achieve global criminal justice without the need for international courts, if adopted by all countries in the world. Based on this, we have divided this requirement into two parts as follows:

28 Maki, O. (13.11.2022). Elements of the International Crime: An Applied Study on the UAE Law of International Crimes, International Committee of the Red Cross, p. 4. Available at: <https://www.icrc.org/ar/publication/> [Last seen: 6.11.2024].

29 Varney, H., Zdu, K. op cit, p. 5.

30 Ibid, p. 1.

31 International Committee of the Red Cross. (13.11.1024). The Scope and Application of the Principle of Universal Jurisdiction. Available at: <https://www.icrc.org> [Last seen: 14.11.2024].

The First Branch: International Efforts to Activate Universal Jurisdiction and Follow Up on the Criminals of the Zionist Entity

Some countries have laws that allow them to prosecute international crimes even if they were committed outside their territories and against non-citizens, based on the principle of universal criminal jurisdiction. Victims or their representatives can file complaints in these countries.

In practice, universal jurisdiction has been activated by some countries by issuing arrest warrants against Israeli leaders due to their actions in Palestine. Among the most prominent of these countries, we can mention:

1 – In 2001, survivors of the Sabra and Shatila massacre in Beirut filed a complaint against Israeli Prime Minister Ariel Sharon, accusing him of covering up Christian militia violations, under the Geneva 1949 Conventions provisions related to international humanitarian law[32], Therefore Belgium is considered one of the first countries to have used the principle of universal jurisdiction effectively.

However, the Belgian laws were later amended to restrict this jurisdiction. The amendment limiting the universal jurisdiction to only those crimes that have a direct link to Belgium has raised concerns about the restriction of universal jurisdiction to the interests of states.[33]

2 – Spain: In 2009, a Spanish judge issued arrest warrants against a group of Israeli military leaders, accusing them of committing war crimes during the "Cast Lead" operation in Gaza in 2008-2009. However, the case was later closed after Spain amended its laws to restrict the principle of universal jurisdiction.[34]

3 – Britain: The British courts have issued several arrest warrants against Israeli leaders based on complaints from human rights activists. For example, in 2009, an arrest warrant was issued against former Israeli Foreign Minister Tzipi Livni, but it was not executed because Livni was not in Britain at the time.[35]

It is observed that such procedures have not achieved deterrence due to the legal and diplomatic obstacles they face, as a result of political and international pressures that have led to the closure of cases or the amendment of laws to restrict the possibility of using them in the future. However, there are at least attempts by Western countries, even if they do not bear fruit. In contrast, our research has shown that there is no precedent of exercising universal criminal jurisdiction against Israeli leaders by Arab states, which have long condemned the crimes of the Zionist entity and called for the cessation of serious violations of international humanitarian law and human rights against the Palestinian people.

The Second Branch: Challenges in the Application of Universal Criminal Jurisdiction over War Criminals in Gaza

Although national courts have the original jurisdiction to prosecute perpetrators of international crimes, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide provided for the possibility of establishing an international criminal court that the States Parties to the Convention would accept jurisdiction. However, this does not mean that international criminal courts have the original jurisdiction to follow up on these crimes, as national criminal prosecutions are a fundamental tool for enforcing laws related to international crimes, and they are also a politically, legally, and practically preferred choicegiven the national courts' broader connection to tri-

32 Le Temps journal, Sabra et Chatila: la plainte contre Ariel Sharon embarrasse la Belgique. Available at: <https://www.letemps.ch/monde/sabra-chatila-plainte-contre-ariel-sharon-embarrasse-belgique> [Last seen: 9.11.2024].

33 Hassan, M.S. (2024). The Effectiveness of the Principle of Universal Jurisdiction. Journal of Legal and Social Sciences, 2024, p. 594.

34 Al-Quds Al-Arabi newspaper. (31.06.2009). Spanish Judge's Ruling Against Israeli Minister and Six Military Leaders on Charges of War Crimes Stirs Tel Aviv. Available at: <https://www.alquds.co.uk> [Last seen: 9.11.2024].

35 Al Jazeera. (24.12.2009). British Court Order to Arrest Livni. Available at: <https://www.aljazeera.net> [Last seen: 10.11.2024].

al procedures in terms of gathering evidence, hearing victims and witnesses, and perhaps also in terms of lower costs compared to international trials[36], Despite the international community's commitment after World War II to not allow serious violations to occur, and the prohibition of war in the United Nations Charter While conflicts have become widespread across the globe, national prosecutions remain very limited, which has led the international criminal justice system to complement national justice systems in imposing punishment. This is primarily due to the inadequacy of national legislation capable of granting subject-matter jurisdiction to national courts, enabling them to initiate criminal proceedings for international crimes[37].

The national judge has the right to consider international crimes that may be brought before them, as international conventions have the same rank as the constitution in some countries or even supersede it in others. Upon ratifying international conventions, the state has the right to prosecute individuals involved in violating these conventions. However, the national judge may encounter a legislative void, as the convention may not have a punitive provision to apply to each of the criminalized acts. Hence, the importance of national legislatures adopting laws for international crimes, by establishing an appropriate penal system for each crime, becomes evident.[38]

Based on the information provided, the main obstacles to the practice of universal criminal jurisdiction can be summarized in the following points:

- Since the principle of sovereignty is the cornerstone of international law, this means that states are always hesitant to allow another state to exercise its judicial powers over its citizens or over acts that occurred within its territory;
- The difficulty of collecting evidence and witnesses from other countries, especially if those countries are uncooperative or have different legal systems, all of which can lead to the complexity and prolongation of trials;
- Sometimes, political interests and the political influence exercised by government entities at all levels can interfere to tarnish the reputation of the court;[39]
- What impedes the application of universal criminal jurisdiction is, for example, that the prosecution of individuals from other countries may lead to tensions in diplomatic relations;
- The difficulty in enforcing judgments issued by national courts, if the state where the suspect is located does not cooperate with the judicial authorities of the state exercising universal criminal jurisdiction;
- States exercising universal criminal jurisdiction may be accused of selectively choosing cases for political or racial reasons, which weakens the credibility of this practice.

All these obstacles may make the exercise of universal criminal jurisdiction a challenge, requiring strong cooperation and genuine political will from states to strengthen international justice and combat impunity.[40]

Even though universal jurisdiction faces serious challenges at the conceptual, legal, political and practical levels, it often remains the only avenue available to victims to achieve justice and address the accountability gap.

36 UN General Assembly Resolution A/65/181 of 29.07.2010.

37 The Influence of the Nuremberg Trial on International Criminal Law. Available at: <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> [Last seen: 12.03.2024].

38 Makki, O. (13.11.2022). Elements of International Crime: An Applied Study on the UAE International Crimes Law. International Committee of the Red Cross. Available at: <https://www.icrc.org/ar/publication/> [Last seen: 13.11.2024].

39 Varney, H., Zdu, K. (2020). Advancing Global Accountability. The Role of Universal Jurisdiction in Prosecuting International Crimes. International Center for Transitional Justice, p. 5.

40 Ibid, p. 1.

CONCLUSION

The national judiciary remains ineffective in curbing international crimes, despite all the privileges granted to it under the rules of international law. This is primarily due to the political considerations and interests that have long stood in the way of achieving international criminal justice, even though universal criminal jurisdiction is a guaranteed right for the national judiciary. It is an additional means of providing redress for victims and deterring war criminals, whether they are Israeli leaders or politicians, or at least restricting their international movements, which greatly assist them in communicating and uniting with their allies. Universal criminal jurisdiction is a last resort when all other options, including UN bodies and international courts, fail.

This research has produced a set of results that can be summarized as follows:

- The General Assembly and the Security Council have failed to curb the serious violations of human rights and international humanitarian law committed by Israel against the residents of the Gaza Strip;
- Although the decision of the International Court of Justice is considered part of the binding decisions since Israel is a party to the 1948 Genocide Convention, in practice the decision has not been respected, and therefore there is a flagrant violation of the rules of public international law by Israel;
- The Prosecutor of the International Criminal Court has performed admirably by requesting the issuance of arrest warrants against Israeli war criminals, despite all the political pressures from Israel's allies against the court's judges;
- Universal criminal jurisdiction is a measure of great importance due to its impact and restriction on all war criminals in the Gaza Strip, but in the absence of international cooperation, this principle cannot curb international crimes;
- The Arab states in particular, and the countries of the world in general, did not resort to the principle of universal criminal jurisdiction to issue arrest warrants against war criminals in the Gaza Strip after the Al-Aqsa Intifada and the accompanying egregious violations and breaches of international law by Israel.

Based on the above, a series of recommendations can be made:

- To facilitate the application of universal criminal jurisdiction at the local level, states should adopt specific policies and guidelines regarding public prosecution;
- In line with calls for "clarity" regarding the application of universal jurisdiction by states at the international level, the United Nations should encourage states to exercise universal criminal jurisdiction, urge members to adopt guidelines that encourage and promote the effective and practical use of universal jurisdiction in the most serious crimes under international law, including war crimes, genocide, and crimes against humanity;
- The United Nations should establish guidelines to determine the minimum standards for the application of universal jurisdiction; provided that this threshold does not reach the dilution of the local legal frameworks that provide for the strong application of universal jurisdiction;
- Research institutions should cooperate with civil society to develop model laws for criminal jurisdiction, which would greatly facilitate advocacy initiatives with policymakers and governments;
- States must comply with their international obligations to prosecute or extradite persons convicted of committing international crimes, in accordance with the principles of international law.

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HARMONIZATION OF NOTARY HONORARIUM ARRANGEMENT RELATED TO THE NOTARIAL DEED AUTHORITY: TOWARD LEGAL CERTAINTY

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ABSTRACT

This research aims to examine and analyze the legal consequences caused by the degradation of the notary honorarium from the perspective of the principle of legal certainty. In addition, this research also focuses on identifying and formulating the basis for consideration to harmonize the regulation of notary honorarium. This research uses a normative research method, which analyzes laws and regulations related to the topic dis-

cussed. The research approach uses statutory, analytical, and conceptual approaches. Primary legal materials consist of rules and regulations relevant to the research issue and secondary legal materials consist of research results, literature, seminars, discussions, and information from internet sources. The technique of collecting legal materials was carried out through literature studies, and legal documents. The legal materials that have been collected are analyzed using a qualitative descriptive analysis method. The disharmony between the Law on Notary Position and the Notary Code of Ethics regarding honorariums creates legal confusion. The Law on Notary Position only regulates the maximum honorarium without providing a minimum limit, while the Code of Ethics sets a minimum honorarium. This creates a dilemma for notaries, between complying with the Law on Notary Position or facing ethical sanctions. Weak supervision also exacerbates the problem and triggers unfair honorarium competition. Therefore, it needed legal harmonization between the Law of Notary and the Code of Notary Ethics toward legal certainty.

KEYWORDS: Harmonization, Notary honorarium arrangement, the Notarial deed authority, Legal certainty

INTRODUCTION

The authority of a Notary as a public official to create authentic deeds and other authorities is expressly regulated in Article 1 point 1 of Law No. 2 of 2014 on the Amendment to Law No. 30 of 2004 on Notary Position (hereinafter referred to as Amendment to Law on Notary Position). The authority of a Notary in making authentic deeds has an essential function, namely to ensure legal certainty, order, and legal protection through the existence of written evidence that is authentic regarding actions, agreements, stipulations, and legal events made before an authorized official. In this case, the authorized official is a notary. As a public official, Notary is not paid by the government but from the proceeds of making the deed of his client. As a public official who carries out a profession in providing legal services to the public, it is necessary to obtain protection and guarantees to achieve legal certainty, including legal certainty regarding the value of honorarium.

Based on Article 36 (1) of Law Number 30 of 2004 concerning the Position of Notary (Notary Position Law), a Notary is entitled to receive an honorarium for legal services provided by his/her authority. The determination of the amount of the Notary's honorarium is based on the economic and sociological value of each deed he/she makes as stipulated in Article 36 (2). In addition to being based on the provisions of Article 36 of the Notary Position Law, the amount of the honorarium is also based on the determination of the Indonesian Notary Association, as stipulated in Article 3 number 13 of the Notary Code of Ethics, "notaries are required to implement and comply with the provisions regarding the honorarium determined by the association".[1] On the other hand, it is also regulated in Article 37 of Law Number 2 of 2014 concerning the Amendment to Law on Notary Position which in essence stipulates that notaries are required to provide free legal services in the field of a notary to people who are unable to afford it. Notaries basically cannot refuse people who are unable to pay for their services due to a lack of economic income.[2]

The degradation of notary rights in obtaining honorarium, where currently there is often a determination of notary honorarium that is far below the specified threshold or does not reach the honorarium limit set in Article 36 of the Law on Notary Position, is interesting to be

1 Gunawan, I. K. A., Sumardika, I. N., Widiati, I. A. P. (2020). Penetapan Honorarium Notaris Dalam Praktik Pelaksanaan Jabatan Notaris. Jurnal Konstruksi Hukum, 1(2), pp. 369-373. DOI: <https://doi.org/10.22225/jkh.1.2.2547.369-373>.

2 Veryanda, V., Poernomo, S. L. (2024). Efektivitas Hukum Terkait Besaran Honorarium Notaris Dalam Pembuatan Akta. Journal of Lex Theory (JLT), 5(2), pp. 495-510. <https://www.pasca-umi.ac.id/index.php/jlt/article/view/1759>.

studied. This situation cannot be equated with the provision stated under Article 37 paragraph (1) of Law Number 2 of 2014, which stipulates that Notaries are obliged to provide legal services in the field of notarial services free of charge to underprivileged people. In the elucidation of the Law on Notary Position, the meaning contained in Article 37 paragraph (1) can be said to be unclear and needs to be clarified even though there is an appendix to the "general elucidation" and stated considering that the qualification standards of underprivileged people can be determined by various circumstances such as spiritual, economic, and sociological.[3] Therefore, the determination of a notarial honorarium that is far below the specified threshold cannot be equated with the provision of notarial legal services free of charge.

This research focuses on a legal problem rooted in Article 36 of the Law on Notary Position, which is the basis for determining the limit of notary honorarium. This article explicitly stipulates that the honorarium received by a notary must be determined by considering the economic and sociological value of the deed made and based on the agreement of the parties. This provision emphasizes the principle of balance between the appreciation of the notary profession and the economic capacity of the community as service users. However, in practice, irregularities often occur where the honorarium set is far below the proper threshold, potentially violating the principle of justice and creating legal uncertainty. This focus on Article 36 of the Law on Notary Position aims to highlight the need for consistent implementation and effective supervision of honorarium determination, to protect the rights of notaries as a profession that is expressly regulated in law. With this problem, the determination of honorarium that has been stipulated in the laws and regulations seems to be degraded and ignored. The problem occurs based on the will of the client who wants to get the lowest cost of the desired service fee, and the desire is fulfilled by the notary concerned, because in the field of notarial currently there seems to be competition between notaries in providing services specifically in making authentic deeds.

Based on the description above, the determination of a notary honorarium is regulated by 2 (two) legal provisions, namely in the Law on Notary Position and the Notary Code of Ethics. Article 36 of the Law on Notary Position regulates: (1) that Notaries receive an honorarium for legal services rendered in accordance with their authority; (2) the amount of honorarium received by a Notary is based on the economic value and sociological value of each deed he/she makes; (3) The economic value as referred to in paragraph (2) is determined from the object of each deed as follows: (a) up to Rp 100,000,000.00 (one hundred million Rupiah) or the equivalent of a gram of gold at that time, the honorarium received is at most 2.5% (two point five percent), (b) above Rp 100,000,000.00 (one hundred million Rupiah) up to Rp 1,000,000,000.00 (one billion Rupiah), the honorarium received is at most 1.5% (one point five percent), or (c) above Rp l,000,000,000.00 (one billion Rupiah) the honorarium received is based on an agreement between the Notary and the parties, but does not exceed 1% (one percent) of the object for which the deed is made; and (4) sociological value is determined based on the social function of the object of each deed with the honorarium received being at most Rp 5,000,000.00 (five million Rupiah). Meanwhile, in the Notary Code of Ethics, the provisions regarding honorarium are stipulated in Article 3 number 14 which stipulates that notaries must implement and comply with all provisions regarding honorarium set by members of the association. Furthermore, Article 4 number 10 of such Code Ethics also regulates the prohibition of notaries, namely determining the honorarium to be paid by the client in an amount lower than the honorarium set by the Association.

3 S Sari, D. A. P. (2016). Makna Pemberian Jasa Hukum Secara Cuma-cuma Oleh Notaris Pada Orang Tidak Mampu Terkait Sanksi Yang Diberikan Oleh Undang-undang Jika Tidak Dipenuhi (Analisis Pasal 37 Ayat (1) Dan (2) Undang-undang Jabatan Notaris No. 2 Tahun 2014). Doctoral dissertation, Brawijaya University.

Based on the description of the above provisions, the Law on Notary Position seems to have a vacuum of norms or the absence of rules regarding legal consequences or sanctions if there are Notaries who do not obey the provisions regarding the determination of Notary honorarium in Article 36 of the Law on Notary Provision by setting the honorarium far below the specified maximum threshold or exceeding the provisions of the upper or maximum threshold limit. Thus, this condition will open up opportunities for each Notary to determine the honorarium at his own will, specifically far below the maximum threshold limit of the honorarium value of the provision. Furthermore, the phrase "Association" under Article 3 number 14, and Article 4 number 10 of the Notary Code of Ethics seems to override the Law on Notary Position as such law has regulated the honorarium under Article 36. Moreover, the Law on Notary Position has no rules that point to other regulations regarding the provisions for determining the notary honorarium.

Indeed, Indonesian law recognizes the legal theory of norms or what is also known as the theory of hierarchy of legal norms. This theory was proposed by an Austrian jurist named Hans Kelsen who developed the theory of Hans Kelsen's Hierarchy, which is the basic idea of contemporary positive law. The Hierarchy of Legal Norms is also known as the *Stufenbau Theory*. In his view, legal norms are layered and tiered in a hierarchy (order), so that higher standards become the basis for lower norms, which in turn apply to lower norms. According to Hans Kelsen's Hierarchy Theory, the constitution is the highest rule. Every rule of law must be based on a higher rule, giving rise to a hierarchical legal pyramid.[4] The implementation of the theory of hierarchy in Indonesia is implemented in Law Number 12 of 2011 on the Formation of Laws and Regulations as the lastly amended by Law Number 13 of 2022 on the Second Amendment to Law Number 12 of 2011 on the Formation of Laws and Regulations (Law on the Formation of Laws and Regulations). Article 7 paragraph (1) and paragraph (2) of such law stipulates that: (1) Types and hierarchy of laws and regulations consist of: (a) Constitution of the Republic of Indonesia of 1945, (b) Decree of the People's Consultative Assembly, (c) Law/Government Regulation in Lieu of Law, (d) Government Regulation, (e) Presidential Regulation; (f) Provincial Regional Regulations; and (g) Regency/City Regional Regulations; (2) the legal force of Laws and Regulations is in accordance with the hierarchy as referred to in (1)". Furthermore, in Law Formation of Laws and Regulations, the types of regulations other than those mentioned in Article 7 paragraph (1) are regulated in Article 8 paragraphs (1) and (2) which stipulate as follows: (1) Types of Legislation other than as referred to in Article 7 paragraph (1) include regulations stipulated by the People's Consultative Assembly, House of Representatives, Regional Representatives Council, Supreme Court, Constitutional Court, Supreme Audit Agency, Judicial Commission, Bank Indonesia, Ministers, agencies, institutions, or commissions of the same level established by Law or Government by order of Law, Provincial Regional Representatives Council, Governors, Regency / City Regional Representatives Council, Regents/Mayors, Village Heads or equivalent; (2) The Laws and Regulations as referred to in paragraph (1) are recognized and have binding legal force to the extent that they are ordered by "higher Laws and Regulations or formed based on authority".[5]

Based on the hierarchy of laws and regulations in Indonesia regulated under the Law on Formation of Laws and Regulations, the "Code of Ethics" is not mentioned. The definition of a code of ethics based on the Indonesian Language dictionary (*Kamus Besar Bahasa Indonesia)* is "norms and principles accepted by

4 Atmadja, I. N. P. B., I. Budiartha. (2018). Teori-Teori Hukum, ed. Instrans Publishing Malang: Setara Press, p. 141.

5 Supryadi, A., Amalia, F. (2021). Kedudukan Peraturan Menteri Ditinjau Dari Hierarki Peraturan Perundang Undangan Di Indonesia. Unizar Law Review (ULR), 4(2), p. 6. <https://e-journal.unizar.ac.id/index.php/ulr/article/view/471>.

certain groups as a basis for behavior". Furthermore, Article 1 number 2 of the Notary Code of Ethics defines that "the Notary Code of Ethics and hereinafter will be called the Code of Ethics are moral rules determined by the Association of Indonesian Notary Association which hereinafter will be called 'Association' based on the decision of the Congress of the Association and/or determined by and regulated in the laws and regulations governing it and which apply to and must be obeyed by each and all members of the Association and all persons who carry out the duties of office as Notary, including Temporary Notary Officials, Substitute Notaries at the time of carrying out the office". Seeing the explanation of the limitations of the laws and regulations described above, the code of ethics cannot be categorized/included in laws and regulations because the code of ethics is a rule made for a particular group. Related to the legal issues discussed regarding the determination of notary honorarium, it can seem as if there is a conflict of norms between the honorarium provisions stipulated in the Law On Notary Position and the Notary Code of Ethics. The notary honorarium should be regulated in the Law, in this case, the Law on Notary Position, however, in reality, the Notary Code of Ethics also regulates it. In addition, the absence of a lower threshold limit on the honorarium value in the Law on Notary Position should be reconstructed to create clarity and balance between the content material of the Laws and Regulations based on one of the principles that must be contained in the Laws and Regulations, namely the principle of conformity between the type, hierarchy, and content material regulated in Article 5 letter c of Law on Formation of Laws and Regulations. Currently, the regulation regarding the lower threshold limit for determining the honorarium value follows the provisions made by the Indonesian Notary Association Organization (*Ikatan Notaris Indonesia* or *INI*) as outlined in the Notary Code of Ethics.[6] With these circumstances, the provisions regarding the minimum limit of notary honorarium become blurred or unclear and the provisions regarding notary honorarium seem to be shifted and degraded hierarchically in its regulation so that it does not reflect the harmonization and balance between the content material of the provisions or regulations that apply to notary honorarium.

Based on the above background, there are 2 (two) legal issues raised in this research, namely: (1) how are the legal consequences of the degradation of the determination of the amount of notary honorarium from the perspective of the principle of legal certainty?; and (2) how is the harmonization of regulatory provisions regarding the amount of notary honorarium based on the hierarchy of laws and regulations? Therefore, this research aims to examine, analyze, and provide an in-depth understanding of the legal consequences arising from the degradation of the determination of the amount of notary honorarium from the perspective of the principle of legal certainty. In addition, this research also aims to identify and formulate relevant considerations to harmonize the regulation of the amount of notary honorarium in accordance with the hierarchy of laws and regulations in Indonesia. The degradation of the determination of notary honorarium raises various significant legal consequences, especially in terms of violating the principle of legal certainty.

The lack of clarity in honorarium standards creates a mismatch between the regulation in Article 36 of the Law on Notary Position and the facts that occur, which are often influenced by the internal provisions of professional organizations. This has the potential to harm notaries as parties who should be protected by law, as well as reduce public trust in the notary profession due to non-uniform practices. This research underscores the importance of harmony between the Law on Notary Position, the Notary Code of Ethics, and other relevant regulations. Harmonization efforts must consider the prin-

6 Faradina, F. (2024). Analisis Tentang Persaingan Tidak Sehat Antar Rekan Notaris Sebagai Dampak Dari Penetapan Tarif Jasa Notaris Dibawah Standar. Jurnal Kajian Ilmu Hukum, 3(02), pp. 1-15. DOI: <https://doi.org/10.55583/jkih.v3i02.1013>.

ciple of hierarchy of laws and regulations as stipulated in Law on the Formation of Laws and Regulations, where laws have a higher position than internal provisions. The considerations of harmonization must also include the values of justice, professionalism, and social responsibility so that the determination of honorarium can reflect a balance between respect for the services of the notary profession and the economic capacity of the community. Thus, this study aims not only to provide practical recommendations for strengthening notary honorarium regulations but also to encourage the creation of a more consistent and fair legal system. The results of this study are expected to serve as a foundation for policy reforms that support legal certainty, protect the rights of notaries, and maintain the quality of services to the public.

This research is one of the developments and renewals of legal issues on previous research. The study of Anak Agung Ngurah Putra Satria Kusuma, and I Nyoman Bagiastra (2022) examined issues related to the regulation of honorarium in the applicable laws and regulations, with a focus on the juridical consequences for notaries who do not collect honorarium in making deeds for the parties.[7] Maya Amalia and Ngadino (2021) examined issues related to the implementation of professional ethics rules in overcoming differences in notary honorarium and the urgency of having definite legal rules regarding the minimum limit of notary honorarium. The focus of their research was to understand the extent to which professional ethics rules are applied in the practice of determining honorarium, as well as how differences in honorarium between notaries can be overcome to prevent unfair competition and maintain professionalism.[8] Unlike previous studies that only highlighted the lack of sanctions in the Law on Notary Position, this research uses Hans Kelsen's theory of hierarchy of norms to emphasize that the Code of Ethics, which has no position in the formal legal hierarchy, should not have the same power as the Law on Notary Position. This study recommends the harmonization of honorarium provisions in the Law on Notary Position to comply with the principle of conformity of type, hierarchy, and content material in the legal system, as stipulated in Article 5 Letter C of Law on the Formation of Laws and Regulations. Therefore, it is important to do research on the Harmonization of Notary Honorarium Arrangement Related to the Notarial Deed Authority: Toward Legal Certainty.

METHODOLOGY

This research uses a normative research method, which focuses on analyzing laws and regulations related to the topic discussed. The research approach includes several methods, namely the statutory approach, analytical approach, and conceptual approach.[9] The legal materials used are divided into two types. First, primary legal materials consist of laws and regulations relevant to the research issue, such as Law on Notary Position, Amendment to Law on Notary Position, and Law on the Formation of Laws and Regulations. Second, secondary legal materials to explain primary legal materials, which include research results, literature, seminars, discussions, and information from online sources and/or the internet. In this research, the technique of collecting legal materials was carried out through a literature study. The legal materials that have been collected were analyzed using a qualitative descriptive analysis method to provide an in-depth study and understanding of the research problem.

7 Kusuma, A. A. N. P. S., Bagiastra, I. N. (2022). Akibat Hukum Bagi Notaris yang Tidak Memungut Honorarium pada Para Pihak. Acta Comitas Jurnal Hukum Kenotariatan (7), 1, p. 12. DOI: <https://doi.org/10.24843/AC.2022.v07.i01.p03>.

8 Amalia, M., Ngadino, N. (2021). Implementasi Aturan-Aturan Etika Profesi Dalam Mengatasi Perbedaan Honorarium Notaris. Notarius, 14(1), pp. 119-134. DOI: <https://doi.org/10.14710/nts.v14i1.39129>.

9 Diantha, I.M.P., Dharmawan, N.K.S., Artha, I.G. (2018). Metode Penelitian Hukum & Penulisan Disertasi. Denpasar: Swasta Nulus, p. 65.

RESULTS AND DISCUSSION

Legal Consequences of the Degradation of the Notary Honorarium Determination from the Legal Certainty Perspective

The increase in the number of notaries triggers "tariff competition" among them, which can then create competition between notaries to attract clients. As a result, the honorarium received by notaries has become lower, even below the proper standard. This condition is often a source of complaint from notaries, given their weak bargaining position. This situation is different when notaries are dealing with the public who generally value notary services more and are willing to accept the rates set by notaries.[10] Adrian Djuaini revealed that tariff competition in the notary profession has reached an alarming level. To attract clients, some notaries are "slamming prices" to unreasonable levels. These very low service fees, rationally speaking, are not even enough to cover the cost of producing deeds. The fees demanded are often likened to the price of one plate of rendang rice. Although they are aware that this practice violates ethics as stipulated in the provisions of Article 3 number 14 and Article 4 number 10 of the Notary Code of Ethics which prohibits notaries from setting honorariums lower than those determined by professional organizations.[11] Currently, the determination of honorarium is regulated in the regulations of the notary office organization, where the enactment of the notary organization's regulations in each region determines the minimum rate of notary services. Then in the organizational regulation, there are sanctions for violations of the provisions on the determination of the honorarium for notary services that apply in each region.[12]

The determination of notary fees, as stipulated in Article 36 of the Law on Notary Position, is intended to reflect the balance between the economic value of the deed made and the sociological value that accompanies it. This is also reinforced by the obligation of notaries to comply with the honorarium provisions set by INI as stated in Article 3 number 13 of the Notary Code of Ethics. However, implementation in the field often encounters obstacles, especially when the honorarium received is not in accordance with the applicable provisions. The phenomenon of degradation of notary rights in obtaining honorarium shows that often the agreed value is far below the predetermined threshold, and it is not uncommon for honorarium offers to be considered not commensurate with the workload and responsibilities carried out by notaries. This becomes an increasingly complex problem when faced with the notary's obligation to provide legal services free of charge to people who cannot afford it, as stipulated in Article 37 paragraph (1) of the Law on Notary Position.

Although Article 37 paragraph (1) of the Law on Notary Position requires notaries to provide *pro bono* services to underprivileged people, this provision still leaves ample room for interpretation. The explanation in the Law on Notary Position regarding the qualification standard of "underprivileged people" is often considered to be less specific, thus opening up the possibility of different perceptions among notaries. In this context, it should be underlined that the provision of services free of charge to the poor cannot be equated with the practice of setting honorariums below the minimum standard. The provision of free services is specific and relies on the social responsibility of the notary, while the setting of a low honorarium tends to illustrate the weak supervision of the implementation of Article 36 of the Law on Notary Position and the Notary Code of Ethics.

Therefore, this research emphasizes the urgency of clarifying and strengthening regulations regarding notary honorariums. It is important to ensure that every honorarium de-

10 Candra, I. N. W., Asikin, Z., Suhartana, L. W. P. (2023). Bentuk Pelanggaran Hukum Dan Penegakan Hukum Notaris Di Wilayah Provinsi Nusa Tenggara Barat. Jurnal Risalah Kenotariatan, 4(1): 8. DOI: <https://doi.org/10.29303/risalahkenotariatan.v4i1.100>.

11 Ubaedillah, I. (2011). Efektifitas pembiayaan agribisnis bank Syariah dalam pemberdayaan petani. Studi Kasus Pada Pt. Bank Muamalat Indonesia Tbk, Pusat.

12 Faradina, F. Op. Cit. p. 10.

termination remains based on the principles of justice and takes into account the economic interests of the community without ignoring the professional rights of notaries. In this case, it is necessary to strengthen the supervisory role of INI and related authorities to avoid practices that are detrimental to notaries as a legal profession, which has a big responsibility in maintaining legal certainty and the integrity of deeds made. It is hoped that consistent and transparent implementation of Article 36 Law on Notary Position can create a better balance between respect for the notary profession and public access to quality legal services.

The degradation of honorarium regulations in the Law on Notary Position, which is then re-regulated by hierarchically lower regulations, such as the Notary Code of Ethics, has given rise to several legal consequences. The law on Notary Position itself, as a regulation with a higher hierarchy, regulates the maximum limit of honorarium without mentioning the authority of the Code of Ethics to further regulate honorarium. As a result, discrepancies arise between the provisions in the Law on Notary Position and the Notary Code of Ethics. Legally, this disharmony creates confusion in the application of the principle of *lex superior derogat legi inferiori*, which places Law on the Notary Position as a rule that should override lower rules. When the Notary's Code of Ethics still regulates the minimum limit for honorarium, this is contrary to the Law on Notary Position's higher hierarchical position and also does not have a clear basis in the Law on Notary Position itself.[13] As a result, notaries are in a dilemma situation, where compliance with the Law on Notary Position is considered valid based on the regulatory hierarchy, but they also face ethical sanctions if they do not comply with the Code of Ethics, which stipulates a minimum fee. In addition, weak supervision of honorarium violations further worsens this condition. As stated by Habib Adjie, because the nature of the honorarium provisions in the Law on Notary Position are only guidelines without strict supervision, violations tend to occur without strict sanctions, both for the minimum and maximum honorarium.[14] Furthermore, Article 4 point 9 of the Notary Code of Ethics prohibits notaries from making direct or indirect efforts that have the potential to create unhealthy competition, which is very relevant in the context of this degradation of honorarium regulations. These provisions aim to prevent practices that could damage professional relationships between fellow notaries and maintain the dignity of the profession. However, in reality, the existence of minimum honorarium limits regulated by notary associations in each region can create an imbalance. These regulatory differences result in tariff disparities between regions, which can trigger unhealthy competition.[15]

This disharmony also emphasizes the need for firmer and more uniform regulations in the Law on Notary Position regarding honorariums, including clear sanctions. If only the Code of Ethics, as the one that regulates it, without synchronization with the Law on Notary Position, which acts as a higher legal umbrella, notaries have the potential to violate ethics even though they comply with the Law on Notary Position. Therefore, the Law on Notary Position needs to adopt more comprehensive provisions regarding honorariums, which not only protect the bargaining position of notaries but also ensure alignment with the Code of Ethics, so that these regulations apply evenly throughout the region without triggering competition in rates between fellow notaries.

Based on the description above, it is necessary to construct and reconstruct the norms of Article 36 of the Law on Notary Position. Thus, hopefully, such a law will also state the determination of the minimum honorarium limit determined by the notary position organization, as well as contain provisions for sanctions so

13 Astuti, A.M. (2016). Honorarium Notaris Sebagai Upaya Untuk Melindungi Hak Notaris Guna Kepastian Dan Keadilan. Doctoral dissertation, Brawijaya University.

14 Putri, N., Prananingtyas, P. (2019). Peran Ikatan Notaris Indonesia (INI) dalam Penetapan Tarif diantara Notaris Kota Balikpapan. Notarius, 12(1), pp. 134-146. DOI: <https://doi.org/10.14710/nts.v12i1.23776>.

15 Faradina, F. Loc. Cit.

that these regulations have certainty, justice, and legal benefits. Therefore, determination by the notary organization will have binding power based on the Law on Notary Position.

Harmonization of Regulatory Provisions on Notary Honorarium Amounts Based on the Hierarchy of Laws and Regulations

Notaries do not receive honoraria from the state even though the state appoints notaries as public officials. However, notaries receive fees for authentic deeds drawn up and ratified by notaries from parties who have appeared before the notary for legal actions carried out as stated in Article 36 paragraph (2) of the Law on Notary Position.[16] The authority of a notary has been determined by Article 15 of the Law on Notary Position, especially in making deeds, namely legal acts regulated by law or the parties themselves who appear before the notary and then express their wishes to have it written down in the form of a notarial deed.[17]

Article 36 of the Law on Notary Position states that a notary has the right to receive an honorarium after completing his duties in preparing authentic deeds and other activities within his authority. The amount of this honorarium is based on the economic and sociological value of each deed prepared and ratified by a notary. For transaction values up to Rp. 100,000,000.00 (one hundred million rupiah), the honorarium received does not exceed 2.5% of the value of the object in the deed. Meanwhile, for transactions between Rp. 100,000,000.00 to Rp. 1,000,000,000.00 (one billion rupiah), maximum honorarium is 1.5%. For transactions above Rp. 1,000,000,000.00, the amount of the honorarium is agreed between the parties concerned and the notary but cannot exceed 1% of the value of the object in the deed.[18]

The regulation of honorarium for notary services in the Law on Notary Position and the Notary Code of Ethics is considered to be inconsistent, causing confusion among notaries and the public. This condition shows the potential for overlap between the provisions in the Law on Notary Position and the Notary Code of Ethics regarding honorariums. This problem conflicts with several legal theories that apply in the Indonesian legal system, one of which is the Hierarchy of Legislative Regulations Theory. In Indonesia, this theory is implemented through the Law on Formation of Laws and Regulations, especially in Article 7 paragraphs (1) and (2) as well as Article 8 paragraphs (1) and (2). Those articles do not mention the Code of Ethics in the hierarchy of regulations. The Code of Ethics, according to the Indonesian Language Dictionary (*Kamus Besar Bahasa Indonesia),* is "norms and principles accepted by a particular group as a basis for behavior". The Notary's Code of Ethics is further explained in Article 1 point 2 of the Notary Code of Ethics that it is moral rules determined by the Indonesian Notary Association, which will hereinafter be called the "Association", based on the decision of the Association's Congress and/or as determined by and regulated in the laws and regulations which regulate this matter and which apply to and must be obeyed by each and all members of the Association and all persons carrying out official duties as Notaries, including Temporary Notary Officials, Substitute Notaries while carrying out their positions.

Law on Notary Position regulates the legal basis for the determination of notary honorariums. However, this matter is then regulated again under the Notary's Code of Ethics where the notary is obliged to comply with provisions

16 Kristyanto, H.S.A., Wisnaeni, F. (2018). Pemberian Jasa Hukum Bidang Kenotariatan Berdasarkan Pasal 37 Undang-Undang Nomor 2 Tahun 2014 Jabatan Notaris. Studi Kasus Notaris Di Kota Semarang. Notarius, 11(2), pp. 266-282. DOI: <https://doi.org/10.14710/nts.v11i2.31101>.

17 Doly, D. (2016). Kewenangan Notaris Dalam Pembuatan Akta Yang Berhubungan Dengan Tanah. Negara Hukum: Membangun Hukum untuk Keadilan dan Kesejahteraan, 2(2), pp. 269-286. DOI: <10.22212/jnh.v2i2.217>.

18 Saputra, R., Fendri, A., Delfiyanti, D. (2023). Penetapan Honorarium Notaris dalam Pembuatan Akta di Kota Pariaman. UNES Law Review, 6(1), pp. 2905-2921. DOI: <https://doi.org/10.31933/unesrev.v6i1.1088>.

as regulated in the Notary's Code of Ethics. It certainly seems to be hierarchically degraded. Degradation in a legal context means a decrease in the quality or position of a rule or document in the legal hierarchy or value. In relation to notary honorariums, degradation of honorarium regulations occurs when the position of honorarium determination—which should be regulated by law as a strong professional guideline and has legal certainty—is shifted by the internal provisions of the Notary Code of Ethics regulated by professional organizations.[19]

This degradation shows that there are problems with legal provisions that are hierarchical, such as laws, with provisions that are internal or autonomous in professional organizations such as the Notary Code of Ethics. On the one hand, Article 36 Law on Notary Position regulates honorariums based on the principles of the economic and sociological value of deeds, providing a strong basis for determining minimum limits and maintaining a balance of justice. However, on the other hand, the Notary Code of Ethics, through the internal provisions of professional organizations such as INI, often takes a dominant role in determining honorariums without considering the limits determined by law. As a result, there has been a decline in the position of Law on Notary Position in practice, so the value of the law, which should be firm, is compromised.

The implications of this degradation are very significant, not only for the right of notaries to receive proper recognition for their profession, but also for public trust in the notary profession. Ambiguity and inconsistency in determining honorariums create space for practices that are not in accordance with the principles of justice and can have a negative impact on notary professionalism standards. Therefore, harmonization is needed between the Law on Notary Position and the Notary Code of Ethics, by emphasizing that internal provisions must not conflict with or weaken the position of the law. This harmonization must be accompanied by more effective supervision to ensure consistent enforcement of regulations and protect the interests of both notaries and the public who use the services.

In this case, the decline in the notary's honorarium occurred due to the duality of regulations between the Law on Notary Position and the Notary Code of Ethics. Law on Notary Position provides a strong legal basis for regulating honorariums, where notarial deeds as authentic evidence should maintain their value and authority. However, when the honorarium provisions in the Law on Notary Position are not accompanied by strict sanctions and minimum limits. The notary is free to determine a rate that is lower than it should be, following the provisions of professional organizations that regulate honorariums through the Code of Ethics. This provision causes ambiguity and a decline in honorarium standards, which reduces the status of these rules from a formal legal basis to simply an organizational guideline. As a result of this degradation, the position of the honorarium as part of a notary's professionalism and authority may become less strong in the eyes of the law. This lack of clarity can even lead to irregularities in the application of honorariums, which undermines the authenticity of deeds and affects legal protection for users of notary services.[20]

The inconsistency between the Law on Notary Position, especially Article 36, and the Notary Code of Ethics, especially Article 3 point 14 and Article 4 point 10, shows the need for synchronization. This effort can be carried out through vertical research, which analyzes the relationship between rules with different hierarchical levels but related to the same substance. Considering that the Law on Notary Position is at a higher level in the hierarchy, therefore, the Notary Code of Ethics should complement and support the honorarium provisions as regulated

19 Putri, N.A. (2023). Degradasi Moral Hukum, Osfpreprints. <https://osf.io/preprints/osf/bqcpd> [Last seen: 10.11.2024].

20 Anjulika, A.P. (2023). Penegakan Kode Etik Notaris Oleh Dewan Kehormatan Terhadap Pelanggaran Besaran Honorarium Notaris Di Kabupaten Kutai Timur. Doctoral dissertation. Universitas Islam Indonesia.

in the Law on Notary Position, not shift or create ambiguity regarding these arrangements.

In the legal system, there are three preferential principles for resolving conflicts between laws and regulations. First, *"lex superior derogat legi inferiori, lex posterior derogat legi priori"*, and *"lex specialis derogat legi generali"*. The principle of *"lex superior derogat legi inferiori"* confirms that if there is a conflict between rules at different hierarchical levels, then the rules at the higher level override the lower ones. Second, the principle of *"lex posterior derogat legi priori"* states that if there is a conflict between old and new rules in the same field, the new rules apply, even though the old rules have not been explicitly revoked. Third, the principle of *"lex specialis derogat legi generali"* applies when there is a conflict between general and specific rules regarding the same material, then the special rules will apply overriding the general ones.[21] In determining the applicable laws and regulations regarding the regulation of notary honorarium, the principle that can be applied is the principle of *"lex superior derogat legi inferiori"*. This principle states that if there are legal rules that regulate the same normative material, there should be no contradiction between the higher regulations and the lower regulations. If there is a difference between the two, then the rules at the higher level will override the rules at the lower level.[22]

Law on Notary Position is seen as a legal regulation that has a higher level than the Notary Code of Ethics. Law on Notary Position regulates the maximum limit of honorarium that a notary may charge to clients but does not set a minimum limit for service fees. Meanwhile, the Notary Code of Ethics regulates the minimum honorarium limit set by the association. Based on the principle of *"lex superior derogat legi inferiori"*, the provisions that should take priority are the regulations in the Law on Notary Position, namely the maximum limit on honorarium.

By placing the Law on Notary Position according to its hierarchy, the application of the principle of *lex superior derogat legi inferiori* is not enough to resolve the issue of regulating notary honorarium as a whole. The law on Notary Position does regulate the maximum limit for honorarium, but there is still a legal vacuum in terms of determining the lower threshold for honorarium. The construction of new legal norms is needed to overcome the uncertainty that arises due to unclear honorarium standards, especially in the face of unhealthy competition between notaries, which can impact the quality of notary services in society. The construction of new norms in the Law on Notary Position needs to include setting a minimum honorarium limit that takes into account people's ability to pay while supporting the continuity of notarial practice, especially for novice notaries. With minimum honorarium standards, disparities and competition in rates between notaries can be minimized. In addition, this regulation needs to be accompanied by clear sanctions to enforce discipline and maintain professional integrity, from administrative sanctions to revocation of practice permits for serious violations. This construction must also include control and supervision mechanisms by the relevant authorities and the Notary Supervisory Council to ensure that honorarium standards are applied consistently, thereby creating more comprehensive regulations, providing legal certainty, and supporting professionalism and healthy competition among notaries.[23]

21 Ida Bagus Agung Putra Santika. (2017). Pergeseran Makna Hak Menguasai Tanah Oleh Negara Dalam Pemanfaatan/Penggunaan Tanah Untuk Investasi. 1st ed. Badung: Serat Ismaya, p. 37.

22 Wulan, H. R., Bakry, M. R., Hardian, F. (2023). Kemanfaatan Hukum Atas Putusan Mahkamah Agung Nomor 3/P/Hum/2022 Terhadap Proses Pengangkatan Notaris di Indonesia. Comserva: Jurnal Penelitian dan Pengabdian Masyarakat, 2(09), pp. 1856-1872. DOI: <https://doi.org/10.31933/unesrev.v6i1.1088>.

23 Putra, G. I., Hasanah, S., Jiwantara, F. A. (2023). Penguatan Kewenangan Majelis Pengawas Wilayah Notaris dalam Pembinaan dan Pengawasan Notaris. Indonesia Berdaya, 4(2), pp. 679-688. DOI: <https://doi.org/10.47679/ib.2023475>.

CONCLUSION

The disharmony between the Law on Notary Position and the Notary Code of Ethics related to honorarium creates legal confusion. Article 36 of the Law on Notary Position only regulates the maximum honorarium without setting a minimum honorarium standard. Meanwhile, the Notary Code of Ethics sets a minimum notary honorarium, which creates a dilemma for notaries, between complying with the Law on Notary Position or facing ethical sanctions. Weak supervision also exacerbates the problem and triggers unfair honorarium competition. This lack of lower honorarium thresholds creates uncertainty for notaries in setting rates that are in line with professional standards and healthy competitiveness. Apart from that, the Law on Notary Position does not provide clear sanctions for notaries who violate the provisions on honorarium limits, whether related to rates that are too low or high, so there are loopholes that can be misused and hurt the integrity of the profession. Therefore, new norms construction under the Law on Notary Position is needed. Those norms include the regulation on setting a minimum honorarium limit that takes into account people's ability to pay while supporting the continuity of notarial practice, clear sanctions to enforce discipline, and maintaining professional integrity ranging from administrative sanctions to revocation of practice permits for serious violations, as well as control and supervision mechanisms by the relevant authorities and the Notary Supervisory Council to ensure that honorarium standards are applied consistently. All in all, this proposed harmonization, a new norm construction under the Law on Notary Position will hopefully provide legal certainty, professionalism, and healthy competition among notaries in Indonesia.

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THE ABORTION OF DEFORMED FETUS BETWEEN CRIMINALIZATION AND THE LEGITIMACY OF THERAPEUTIC PREGNANCY TERMINATION IN ALGERIAN LAW

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ABSTRACT

This article examines a critical and highly debated issue concerning the abortion of a deformed fetus, a topic that continues to provoke significant legal and ethical discussions. Abortion, as addressed by statutory legislation, balances two competing rights: the fetus's right to life and the woman's right to bodily autonomy. Algerian law, however, gives precedence to the fetus's right to life, whether the fetus is healthy or deformed, and criminalizes intentional abortion, whether performed by the mother or a third party. The crime is deemed complete when its legal elements are fulfilled, except in cases of necessity. The Penal Code explicitly exempts cases where the mother's life is at risk, recognizing therapeutic abortion as a lawful exception. Additionally, Health Law No. 18-11 allows for therapeutic termination of pregnancy when the mother's life or psychological and mental well-being is threatened, provided that the procedure is conducted in a public healthcare institution. However, the law does not explicitly address the issue of deformed fetuses, leaving this matter without a clear legal directive.

KEYWORDS: Abortion, Crime, Deformed fetus, Therapeutic pregnancy termination, Necessity

INTRODUCTION

The right to life is protected by international and national laws and is considered the most fundamental right associated with human beings. Violation of this right is a punishable offence. In addition, the fetus in the mother's womb is granted certain rights by law, the most important of which is the right to life, which manifests itself in its stability in the mother's womb. This protection is intended to protect it from actions that might prevent it from being born alive, referred to in positive legislation as abortion. Abortion is generally criminalized, with exceptions allowing it in certain cases.

This applies to a healthy fetus; however, medical advances may reveal the existence of a fetus with congenital malformations, resulting in the birth of a child with severe conditions that make life either impossible or difficult, requiring constant assistance from others. As a result, many couples consider terminating such pregnancies, especially in the face of women's rights advocates who consider it a right to be exercised at will, thus placing abortion in a delicate balance between two rights: the mother's right to decide whether to keep her fetus, and the fetus's right to life.

Although abortion is an affront to humanity at its most vulnerable developmental stage, the 1948[1] Universal Declaration of Human Rights, while affirming the right to life after birth, overlooks the prenatal stage, as the fetus is not considered a human being at that point. Interest in the rights of the unborn began to grow with the adoption of the American Convention on Human Rights in 1969, which in Article 4 explicitly recognized the right of every human being to a dignified life from the moment of conception.[2] Before this, the preamble to the 1959 Declaration of the Rights of the Child stated that "the child, in view of his or her physical and mental immaturity, needs special protection and care, in particular appropriate legal protection, both before and after birth".[3]

Legislation generally criminalizes abortion, but allows it in certain cases. Advances in medical technology have made early detection of fetal conditions easier, and there has been a noticeable increase in cases of fetal malformation due to various factors, including genetic problems or medication use. This has led to increased research and conferences addressing the issue from medical, ethical, legal and religious perspectives, amidst legislative silence.

The importance of this research lies in the severity of the conditions faced by a deformed fetus and the difficulties it causes to its family, as well as the desire of some individuals to terminate such pregnancies before birth. However, these actions should not be governed by personal whims, but by religious, legal and ethical provisions. The legislator has not explicitly addressed the issue of deformed fetuses in the newly introduced texts on abortion, which criminalize it as a general rule but allow it in certain therapeutic cases.

Despite the enactment of Health Law No. 18-11, which establishes the legality of therapeutic abortion and expands its conditions, the law's position on fetal malformation remains ambiguous. Thus, when is the termination of a deformed fetus considered a criminal offence, and in what cases does the law permit therapeutic abortion?

To address this issue, the analytical method was primarily used by analyzing legal texts to derive the legislator's position on the termination of deformed fetuses and the cases of criminalization and permissibility. In addition, the descriptive method was used when necessary to provide definitions or outline legal conditions and to present the opinions of scholars on the subject.

1 United Nations. (10.12.1948). Universal Declaration Of Human Rights (Resolution No. 217 A). <https://www.un.org/ar/universal-declaration-human-rights> [Last seen: 03.11.2024].

2 American Convention on Human Rights. (12.11.1966). Office of Human Rights. <http://hrlibrary.umn.edu/arab/am2.html> [Last seen: 05.11.2024].

3 United Nations. (20.11.1959). Declaration of the Rights of the Child (Resolution 1386 (D-14)). Human Rights Library <http://hrlibrary.umn.edu/arab/b025.html> [Last seen: 13.11.2024].

The topic is therefore divided into two main sections: the first section deals with the criminalization of the abortion of deformed fetuses, while the second section is dedicated to the legality of therapeutic abortion in cases of deformed fetuses.

1. CRIMINALIZATION OF THE ABORTION OF DEFORMED FETUSES

A deformed fetus is a living fetus that has certain congenital malformations, whether these malformations are externally visible or internally hidden. These malformations may be incompatible with intrauterine life, resulting in spontaneous abortion, or they may be compatible, resulting in the birth of a child with physical defects or organ dysfunction.[4] Despite the suffering of a child born with congenital defects, the law protects such fetuses both before and after birth, just as it protects any normal fetus. Abortion is considered a crime in principle whenever its elements are present (section one), and penalties are imposed once these elements are collectively established (section two).

1.1. Elements of the crime and applicable penalties

The Penal Code criminalizes abortion in articles 304, 306, 309, and 310,[5] considering it a violation of the right to life of the fetus, regardless of the means used. Article 304 of the Penal Code states that anyone who aborts a pregnant woman or a person presumed to be pregnant, with or without her consent, by giving her food, drink or medicine, or by using force or any other means, shall be punished by imprisonment for one to five years and a fine of DZD 100,000 to DZD 500,000. If the abortion results in death, the penalty is temporary imprisonment for ten to twenty years.[6]

1.1.1. Presumed element of the offence

The object of the offence is the existence of pregnancy, i.e. the fetus in the mother's womb or the presumption of its existence. The crime is not committed if the act is committed on a non-pregnant woman, as the law requires a woman who is pregnant or presumed to be pregnant, as stated in Article 304 of the Criminal Code.

The protection of the fetus against abortion begins with the fertilization of the ovum in a normal pregnancy and continues until birth. It should be noted that the act must be committed on a pregnant woman or a woman presumed to be pregnant. The presumption of pregnancy is a very short period, not exceeding ten to fifteen days from the date of the missed menstrual cycle.[7]

In the case of artificial insemination, the text does not apply to embryos fertilized outside the human body, even if they are kept for some time. The application of abortion laws only begins once they are implanted in the uterus and become an established pregnancy. This is because the article criminalizes the abortion of a pregnant woman, and a fertilized ovum does not constitute a pregnancy as long as it remains outside the human body, becoming one only after implantation in the uterus.

1.1.2. The material element of the offence

In general, the material element of the offence consists of an act performed by the offend-

4 Zaria, F., Fashar, A.A. (2022). The Deformed Fetus and the Ruling on its Abortion. Al-Wahat Research Studies Journal, 15(2), p. 489.

5 Algerian Penal Code. (11.06.1966). Official Gazette, No. 49, amending and supplementing <https://wipolex-res.wipo.int/edocs/lexdocs/laws/ar/dz/dz027ar.pdf> [Last seen: 20.11.2024].

6 Amended by Law No. 24-06 (2024) which includes amendments to the Penal Code, Official Gazette dated 30.04.2024, No. 30. <https://www.joradp.dz/FTP/jo-arabe/2024/A2024030.pdf> [Last seen: 15.09.2024].

7 Ben Zita, A. (2013). The Beginning of Human Life and its Legal Implications between French Law and Algerian Law. Journal of Truth, 12(1), p. 83.

er that results in the termination of a pregnancy.[8] This element consists of three components: a physical act, a criminal result, and a causal link between them. The physical act is the intentional criminal behavior of the offender to achieve the intended result and includes any act that results in the termination of the pregnancy.[9] Its classification varies from a misdemeanor if the abortion is caused by the administration of drugs or other means that lead to abortion, to a felony if the abortion results in death.[10]

The penal legislator has mentioned the means of abortion as an example in Article 304 of the Penal Code, which states that anyone who aborts a pregnant woman or a person presumed to be pregnant by giving her food, drink or medicine, or by using methods or acts of violence or any other means, whether she has consented or not, or by attempting to do so, shall be punished. The legislator has broadened the means of abortion to include any physical activity, the use of drugs or food, intimidation of the pregnant woman, threats and other means, all of which constitute a physical act if they lead to abortion.

Regardless of the means used for abortion, it is necessary to prove that the means used caused the abortion. This is a matter for the judge in the case, who will be guided by expert opinion.[11] According to Article 304 of the Penal Code, the mere attempt to perform an abortion is punishable.

The criminal result is the termination of the pregnancy or the expulsion of the fetus from the womb before the natural time. For the crime to be established, the fetus may be expelled alive or dead. The criminal result can take two forms: the death of the fetus in the womb while it remains in the womb, or the expulsion of the fetus from the womb, alive or dead.[12]

In addition to the above-mentioned aspects of the offence, a causal link must be established between the offender's conduct, i.e. the act leading to the abortion, and the death of the fetus or its expulsion from the mother's womb before birth. It must be proven that the means used were the cause of the abortion, and it is the responsibility of the judge to resolve this issue, with the assistance of medical experts.

1.1.3. The mental element

The mental element refers to criminal intent, as abortion is considered a premeditated crime, which requires the offender to be aware that he is committing a crime and to have the intention to achieve the result, which is abortion. Therefore, there must be a general criminal intent, which can be established simply by providing the means that lead to the result or by performing acts that lead to the criminal result. Criminal intent consists of two elements: knowledge and intent, meaning that the perpetrator knows that his act is aimed at a pregnant woman and that the means he uses can lead to an abortion.[13]

If the perpetrator does not know that the woman is pregnant, the offence is not committed. Similarly, if they do not know that the means used will cause an abortion, they cannot be punished. Thus, if an abortion is performed by mistake, whether by a doctor or someone else, there is no criminal intent.

1.2. Penalties for the crime of abortion

The law provides for primary and supplementary penalties for those who commit the act of abortion, whether as the principal actor or as an accomplice.

8 Kamel, A.S. (2011). Explanation of the Penal Code, Crimes Against Humanity, Comparative Study. 5th Edition, Dar Al-Thaqafa for Publishing and Distribution, Jordan, p. 358.

9 Yakhlef, A. (2023). A Study on the Crime of Abortion Between the Penal Code and Health Law 18-11. Journal of Legal and Economic Research, 6 (2), p. 842.

10 Yakhlef, A., Op.cit, p. 842.

11 Bousqi'a, A. (2022). The Brief on Special Penal Law, Part One. New University Publishing, Algeria, p. 44.

12 Said Namour, M. S. (2011). Explanation of the Penal Code, Special Section on Crimes Against Persons. Vol. 1, 4th Edition, Dar Al-Thaqafa, Jordan, p.185.

13 Braf, D. (2007). Abortion in Light of Islamic Law and the Algerian Penal Code. Journal of Scientific Research and Islamic Studies, 3(1), p. 313.

1.2.1. Primary penalties

Article 304 of the amended Criminal Code provides for a prison sentence of between one and five years and a fine of between DZD 100,000 and DZD 500,000 for anyone who performs an abortion on a pregnant woman. This misdemeanor becomes a felony with a prison sentence of 10 to 20 years if the abortion results in death.

According to Article 305 of the amended Criminal Code, if it is proven that the offender habitually performs abortions as referred to in Article 304, the prison sentence shall be doubled in the case referred to in the first paragraph of the same Article and increased to the maximum in the case referred to in the second paragraph.

In addition, Article 306 of the amended Penal Code states that persons who instruct others on how to perform or facilitate an abortion, such as doctors, midwives, dental surgeons, medical students, pharmacy students, pharmacy employees, drug preparers, manufacturers of medical instruments, dealers in surgical instruments, nurses and masseurs, shall be liable to the penalties specified in Articles 304 and 305, respectively. For a woman who performs an abortion on herself, Article 308 of the Penal Code provides for a prison sentence of six months to two years and a fine of DZD 20,000 to 100,000.

As for incitement, Article 310 of the Penal Code provides for a prison sentence of two months to three years and a fine of DZD 20,000 to 100,000 or one of the two penalties. The offence of incitement to abortion is committed even if the criminal result is not realized, regardless of whether the inciter is the main actor or merely directs someone to the means leading to abortion, as specified in Article 310. If the incitement is directed against a person, Article 42, which provides for the punishment of accomplices, applies.[14]

1.2.2. Additional penalties

– Ban on residence

In addition to the main penalties provided for in article 304 of the Criminal Code, the last paragraph of the same article states that a ban on residence may be imposed in all cases. Article 306 also provides for this prohibition in accordance with the provisions of the Penal Code. This additional penalty for the offence of abortion, even if the fetus is deformed, consists of a prohibition of residence for a period of up to five years in cases of misdemeanor, in accordance with article 12 of the Penal Code, to be applied from the day on which the primary penalty is fulfilled or the offender is released. The imposition of this penalty is at the discretion of the judge, i.e. it may be imposed or not.

– Disbarment

According to the amended Article 306/2 of the Criminal Code, perpetrators of the crime of abortion may be disqualified from exercising their profession if the judge finds a direct link between the crime committed and the exercise of the profession. The amendment of the above article by Law 24-06 requires proof of a direct link between the crime of abortion and the exercise of the profession to deprive the perpetrator of his or her professional rights. In the absence of such a link, the perpetrator is not disqualified from practicing his profession.

In addition, article 311 of the Penal Code stipulates that any conviction for the crime of abortion, whether by conviction, attempt or complicity, automatically leads to a ban on exercising any profession or working in clinics or maternity wards, or in any public or private institution that normally receives women in a state of actual or presumed pregnancy, whether for pay or not.

14 Belaro, K. (2024). The Crime of Abortion in Algerian Legislation, Journal of Human Sciences. 34(4), p. 357.

2. LEGALITY OF THERAPEUTIC ABORTION FOR MALFORMED FETUSES

As previously mentioned, the default position is the criminalization of abortion, penalizing it regardless of whether the fetus is healthy or malformed. The law also protects the latter and prevents any assault on it, as the legal texts broadly criminalize anyone who aborts a pregnant woman or even one presumed to be pregnant. The law provides exceptional cases in which abortion is permitted under specific conditions, which include situations where the termination of pregnancy is justified by medical ethics for various reasons, such as tuberculosis, breast cancer, or severe psychological disorders, including hypertension and others.[15]

Before considering the conditions under which abortion is permitted, it is important to distinguish between the terms "abortion" and "therapeutic termination of pregnancy", and then to examine the conditions under which therapeutic termination of a malformed fetus is permitted.

2.1. Distinction between abortion and therapeutic termination of pregnancy

The terms "abortion" and "therapeutic termination of pregnancy" overlap in several respects, as both terminate the life of the fetus. Abortion is the voluntary termination of pregnancy, known as criminal abortion, which involves the evacuation of the uterus by any means, such as the use of drugs, physical force or surgery, and is not intended to protect the life of the mother, as there is no medical need for a woman to abort herself or for someone else to assist her in doing so

Conversely, therapeutic abortion is a medical intervention to terminate a pregnancy based on the medical necessity of the mother when the pregnancy poses a risk to her health or life, such as in cases of chronic illness or ectopic pregnancy. Here, the necessity of abortion moves the act from the realm of criminality to that of permissibility. It is noteworthy that medical advances have reduced the need for abortion to save the life of the mother, as doctors can resort to inducing labor or performing a caesarean section to save both the fetus and the mother.[16]

It should also be noted that the legislator used the term "therapeutic abortion" in Article 72 of the repealed Health Protection and Promotion Act to refer to the need to save the life of the mother from danger or to preserve her physiological and mental balance, which is in serious danger.

Thus, the act moves out of the realm of criminalization when it is committed in circumstances that limit the application of its specific penal text, because the interest of society in permitting the act outweighs the interest in criminal behavior, losing it. This is known as the justification of permissibility, i.e. the permissibility of a criminalized act. It is therefore essential to establish a state of necessity, where harm can only be avoided by committing a crime. In legal terminology, necessity refers to a situation in which a person is exposed to danger or severe hardship, which causes fear of harm or injury to oneself, a part of one's body, one's reputation, one's mental state or one's property and its consequences.[17] In such cases, it becomes necessary or permissible to perform a prohibited act or to neglect or delay a duty to avert harm, according to the prevailing assumptions within the framework of the Sharia.

The Algerian legislator has defined necessity as a cause of permissibility in Article 48 of

15 Jean-Marie, V. A. U. (2023). Crime Against Life: The Case of Abortion. Legal, Biblical-Quranic, and Magisterial Considerations of Human Life. IOSR Journal of Business and Management, 25(10), p. 64.

16 Belaidi, F. (2021). Algerian Responsibility for the Crime of Abortion in Algerian Law. Mediterranean Journal of Law and Economics, University of Tlemcen, 6 (2), p. 121.

17 Al-Zuhaili,W. (1985). Theory of Legal Necessity Compared to Positive Law. 4th Edition, Al-Risalah Foundation, Beirut, p. 68.

the Penal Code, which states: "There is no punishment for anyone who is forced to commit a crime by a force he is unable to resist". This remains a general rule regarding the prohibition of criminal liability and includes the permissibility of abortion when a state of necessity is established. However, the details of the conditions for the permissibility of abortion have been specifically regulated by the legislator.

Following the repeal of the Health Protection and Promotion Act and the enactment of Health Act No. 18-11,[18] Article 77 introduces the concept of "therapeutic abortion", which states that "Therapeutic abortion aims to protect the health of the mother when her life or mental and psychological balance is threatened by pregnancy".

It is noteworthy that the legislator's intention has maintained the removal of therapeutic abortion from the realm of criminalization to that of permissibility, with the only innovation being a change in terminology to distinguish between the crime of abortion and the permissibility of therapeutic termination of pregnancy. Moreover, the term "therapeutic" suggests that it is carried out by a doctor who, after a series of examinations and analyses, is forced to terminate the pregnancy for the sake of the mother's health and life.

2.2. Conditions for the permissibility of therapeutic abortion for malformed fetuses

Algerian law does not specifically address malformed fetuses in specific texts, but uses broad terms interpreted by jurists to include cases of carrying a malformed fetus. In reality, these texts favor the life and health of the mother over that of the fetus, or in other words, protect the mother and her health. Therefore, the protected interest is that of the mother, and the legal texts apply equally to both healthy and malformed fetuses. In general terms, Health Law No. 18-11 establishes a series of conditions for the termination of pregnancy, some of which relate to the protection of the mother's life (section 1), while others relate to threats to the mother's mental and psychological balance (section 2), and require that the procedure be carried out in a public health facility (section 3).

2.2.1. Termination of pregnancy to protect the health of the mother

In certain cases, a pregnancy may endanger the life of the mother. The doctor has no choice but to terminate the pregnancy, which is in principle a criminal offence. However, the law justifies this criminalization if the pregnancy endangers the life of the mother.

Article 308 of the Penal Code states: "There is no penalty for abortion if it is necessary to save the mother's life from danger, provided it is performed by a doctor or surgeon in a non-secret manner and after notifying the administrative authority". The article requires that the act be performed by a doctor or surgeon and that the administrative authority be informed for the act to be deemed permissible.

In addition, Article 77 of the Health Code refers to therapeutic abortion when the pregnancy threatens the mother's life, thus removing the act from the realm of crime and placing it in the realm of medical treatment. If the fetus is severely deformed and threatens the mother's life, the law allows therapeutic abortion to protect the mother's life.

Islamic jurisprudence has also dealt extensively with the issue of intentional abortion. Some scholars have forbidden it outright, while others have allowed it only after the soul has been implanted in the fetus, except in cases of necessity to save the life of the mother. It is believed that the soul is implanted after one hundred and twenty days, and there is no disagreement among scholars as to the prohibition of abortion after this point.

Scholars generally agree that it is forbidden

18 Algerian Health Law. (29.07.2018). Official Gazette, No. 46, amended and supplemented <https://www.joradp.dz/FTP/jo-arabe/2018/A2018046.pdf> [Last seen: 09.10.2024].

to abort a fetus without a valid reason after the soul has been implanted, which is after four months (120 days). However, there is controversy over the permissibility of aborting a fetus after the soul has been implanted if its continued existence poses a danger to the mother. Some argue against the permissibility of aborting the fetus to save another life, while others maintain that it is permissible if it is the only way to save the mother from certain death, which could lead to her death as well as that of the fetus. Some scholars have allowed abortion unconditionally before the soul is breathed into the fetus, while others allow it only within the first forty days. There are also those who allow abortion before the breath of life only for valid reasons, while others maintain that abortion before the breath of life is not permissible at all.[19]

Scholars did not exclude deformed fetuses from these rulings, since the means of determining the condition of the fetus in the womb were not advanced. Whether the abortion is performed by a doctor, the mother or any other person, it is considered the killing of a soul, which God has forbidden. The deformed fetus is a human being with the right to life, and therefore its killing is forbidden, as stated in the Qur'an: "And kill not the soul which Allah has forbidden, except by right. That is what He has commanded you, that you may use reason".[20]

As far as contemporary jurisprudence is concerned, the issue of deformed fetuses is often discussed in legal forums. From the collective reasoning of prominent scholars of this era, we find the decision of the Islamic Fiqh Academy No. 04 in its twelfth session in Mecca, which states: "When the pregnancy has reached one hundred and twenty (120) days, it is not permissible to terminate it, even if the medical diagnosis indicates that it is deformed, unless a report from a reliable medical committee of qualified doctors confirms that the continuation of the pregnancy poses a definite danger to the mother's life. In this case, abortion is permitted, whether or not the fetus is deformed, to avert the greater of the two harms".

If, before the end of one hundred and twenty days of pregnancy, it is confirmed by a report from a trustworthy committee of specialized doctors – based on technical examinations using equipment and laboratory methods – that the fetus is seriously deformed and incurable, and that if it remains and is born at the expected time, its life will be filled with suffering for both the child and its family, then it is permissible to terminate the pregnancy at the request of the parents. In making this decision, the Council recommends that doctors and parents fear God and consider this matter carefully.[21]

In summary, modern Islamic jurisprudence has moved towards prohibiting the abortion of both healthy and deformed fetuses after the soul has been implanted, that is, after the 120th day of gestation. Regardless of the severity of the deformity, abortion is prohibited. However, if it is established that the fetus has serious, incurable deformities and will suffer greatly, it is permissible to terminate the pregnancy at the request of the parents before the 120th day, after careful examination of the situation.

As mentioned above, Algerian law prioritizes the life of the mother and constantly seeks to protect her health and that of her fetus. One of the most important mechanisms put in place to ensure a healthy family is the requirement for a medical certificate at the time of marriage, dated no more than three months previously, as provided for in Article 07 bis of the Family Code and Article 72 of the Health Code, which requires medical examinations before marriage. This was recently reinforced by the issuance of Executive Decree No. 24-366,[22] which repealed

19 Al-Qahatani, M.B.M. (2003). Abortion of the Deformed Fetus and Its Ruling in Islamic Law. Journal of Sharia and Islamic Studies, Kuwait University, 18 (54), p. 181.

20 Koran, Surah Al-An'am. Verse No. 151.

21 Islamic Fiqh Council. (1990). Regarding the Issue of Abortion of the Congenitally Deformed Fetus. Mecca <https://ketabonline.com/ar/books/24407/read?page=72&part=1#p-24407-72-4> [Last seen: 10.08.2024].

22 Executive Decree. (07.11.2024]. Concerning Medical Certificates and Examinations Before Marriage. Official Gazette, dated 13.11.2024, No76 <https://www.joradp.dz/FTP/jo-arabe/2024/A2024076.pdf> [Last

Executive Decree No. 06-154 and introduced numerous provisions aimed at protecting offspring from congenital malformations and serious diseases by informing those intending to marry of the risks of such diseases before entering into marriage.

Article 05 of Decree No. 24-366 specifies the mandatory examinations to be included in the medical certificate, namely:

- A thorough family or personal history of chronic diseases, hereditary diseases or malformations, in particular chromosomal abnormalities and genetic diseases and congenital heart disease, as well as the measurement of arterial blood pressure, weight, height and a comprehensive clinical examination.

Concerning laboratory tests, the law distinguishes between mandatory biological tests that must be included in the medical certificate for marriage, which are:

- Blood grouping (ABO Rh);
- Serological tests for toxoplasmosis, rubella, syphilis and other diseases, all of which can cause significant fetal malformations;
- Recommended biological tests, including serological tests for viral hepatitis B (VHB) and C (VHC) and tests for human immunodeficiency virus (HIV). The physician has the discretion to order additional necessary biological tests if there are signs or symptoms that could lead to sexually transmitted diseases.

Compliance with the law on medical certificates, following the principle that prevention is better than cure, will reduce future cases of fetal malformations, especially with regard to compulsory tests and family history inquiries for certain diseases that may be hereditary, especially in consanguineous marriages.

It should be noted that a significant percentage of spontaneously aborted fetuses are severely malformed with major chromosomal defects, with rates ranging from 80% to 90%.[23] Other fetuses with severe malformations die shortly after birth or within a short time.

2.2.2. Therapeutic abortion when the woman's mental and psychological balance is at risk

Article 77 of the Health Code states that maintaining the mental and psychological balance of the mother is a condition that allows a doctor to intervene to terminate the pregnancy for therapeutic purposes. The broad interpretation of mental and psychological balance opens the door to justifying abortion, which could lead to unlimited moral offences. The legal texts are vague and unclear, failing to specify the cases in which the mother's mental and psychological balance is threatened, the means of proof, and the responsibilities of both the mother and the doctor. The legislator promised in article 77/2 to issue regulations explaining the application of this article, but such regulations have not yet been issued. Until then, many questions remain about mental and psychological equilibrium, how to prove it and when it is established.

In practice, a doctor will not accept a mother's or couple's request for a therapeutic abortion on the grounds of fetal malformation under Article 77 of the Public Health Code unless a medical certificate from a specialist doctor is presented, confirming either the threat to the mother's life or her mental or psychological equilibrium.

The Algerian legislature has never stated that abortion of a malformed foetus is permissible, but has created vague provisions that are open to interpretation. By including cases of threat to the mother's mental and psychological balance, a range of situations could be covered, such as pregnancies resulting from adultery or rape, or cases of malformed fetuses. Many women may find it difficult to accept carrying a malformed fetus, leading to a psychological conflict between the options of either terminating the pregnancy or keeping it.

A careful reading of the law makes it clear

seen: 24.11.2024].

23 Al-Bar, M. A. (1985). The Abortion Problem: A Medical and Jurisprudential Study. 1st Edition, Saudi Publishing and Distribution House, Riyadh, p. 12.

that the decision to abort a deformed foetus does not belong to the mother or the father, but to the doctor alone. The law describes the procedure as "therapeutic", meaning that the abortion is intended to treat the mother, whether to save her life or to maintain her mental and psychological balance. If the therapeutic condition is not met, the doctor is prohibited from terminating the pregnancy, even if the fetus is deformed. Should the doctor proceed, he would be committing the crime of abortion, subject to the penalties set out in Article 304 of the Criminal Code, as specified in Article 409 of the Health Code.

2.2.3. Therapeutic abortion must take place in a public health facility

Article 78 of Health Law No. 18-11 states: "Therapeutic abortion can only be performed in public health facilities". Article 308 of the Penal Code also states: "Abortion is not punishable if it is necessary to save the life of the mother, provided that it is performed by a doctor or surgeon in a transparent manner and after the administrative authority has been informed."

According to the above texts, therapeutic abortion must take place in a specialized facility, specifically in a hospital, in the maternity ward. The procedure must be preceded by an examination requiring the presence of a specialist doctor.

If a doctor performs a therapeutic abortion outside a public health facility, he or she can be sentenced to between six months and a year in prison and a fine of between DZD 200,000 and DZD 400,000, according to Article 410 of the Health Code.

CONCLUSION

Despite the numerous studies on the issue of malformed fetuses, the law has not clearly stated its position on the permissibility of their abortion. It has not defined cases of severe malformation, nor has it relied on jurisprudence to determine the stage at which a malformed fetus can be aborted without constituting an assault on life. Overall, research on this issue has led to several conclusions:

- General rule: Abortion is a punishable offence, with no distinction made between malformed and healthy fetuses for criminalization. However, the act may be exempt from criminal liability if the abortion is necessary to save the life of the mother, according to the Penal Code.
- Health Law No. 18-11: This law uses the term "therapeutic abortion", which has a broader scope than therapeutic abortion and allows the doctor to intervene in cases where the mother's life is threatened or her mental and psychological equilibrium is at risk.
- Doctor's duty: A doctor is obliged to perform a therapeutic abortion if the conditions set out in Article 77 of the Health Code are met. Although the law does not explicitly mention the case of a malformed fetus, if the pregnancy threatens the mother's life or her mental and psychological balance, it is up to the doctor to intervene.
- Vagueness of legal texts: The use of vague terms may increase the doctor's liability, as he could be held responsible for not carrying out a therapeutic abortion if a woman proves that carrying a malformed fetus threatens her mental and psychological balance.

Based on these findings, the following proposals are made, which differ from the conclusions of other researchers regarding the need to explicitly permit the abortion of malformed fetuses under strict conditions. My proposals are based on the principle of prevention and tackling the causes of the phenomenon. There should be no rush to judgment, because the malformed fetus in the womb has rights, including the right to stability and survival until birth. Any attack on this vulnerable being, unable to defend itself, is an attack on life. The scientific debate on abortion remains controversial and

requires further research. It is worth noting that severely malformed fetuses may spontaneously abort, and some may die shortly after birth.

- The main recommendation is to investigate the causes of fetal malformations to prevent severe cases. This can be achieved by strengthening the role of the doctor in the medical certificate required for marriage, particularly as required by the new Executive Decree No. 24-366, which obliges those intending to marry to undergo examinations and tests, especially in cases of hereditary diseases or congenital malformations. The doctor should play a role in recommending additional tests.
- It is also essential to speed up the adoption of the regulations promised in Article 77, which will clarify the procedures for therapeutic abortion.

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THE RWANDAN COURTS POSITION ON IMPACT OF CRIMINAL PROCEEDINGS ON ARBITRATION CASES

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ABSTRACT

Rwandan courts, including the Supreme Court, have confirmed that a principle known in French as "Le criminel tient le civil en état", which is provided by the law relating to the criminal procedure and determines the relationship between criminal matter and civil matter that has a public order character. This means that neither the parties to the case nor the court can derogate from it whenever it comes to the knowledge of each. As a consequence, the criminal case has suspensive effect on the arbitration case as a civil case and ignoring this can lead to the award being set aside by a court. However, when it comes to its applicability, courts defer in interpretation on where and when to apply it.

The Rwandan Supreme Court, in a case Soras Assurances Generales Ltd v. Tromea Ltd, refused to set aside the arbitral award in 2017, putting some limitation on the applicability where it maintained that this principle does not apply to every civil case involved by criminal action. However, in a case Kalpataru Power Transmission vs. Rwanda Energy Group held on 12.04.2024, the High Commercial Court set aside the arbitral award due to this principle, despite parties citing the Supreme Court jurisprudence in their pleadings, but the court advanced that the limitations are not clearly exhaustive.

Therefore, since the Supreme Court did not clearly elaborate in

which cases, the principle should be used and in which it should not, the present research, with the support of critical analysis of these two cases, is to probe into which effects the criminal case has on the arbitration case. The article proposes the possible recommendation of which criteria this principle can be applied for the limitation provided by the Supreme Court to be clear and exact.

KEYWORDS: Criminal case, Arbitration case, Court position, Rwanda

INTRODUCTION

Rwanda is positioning itself at the international terrain for investment. This means that not only infrastructure should be developed and improved, but also the justice sector must be considered. In doing so, Rwanda has enhanced judicial independence towards justice with zero tolerance to corruption. The current judicial policy encourages the parties to use the settlement of disputes in a way other than the one known court system, where other alternatives like mediation, arbitration, and conciliation have been advanced and encouraged to be used.

Moving forward, Rwanda became a signatory to the 1976 United Nations Commission on International Trade Law (UNCITRAL) arbitration rules by becoming the 143rd State Party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention.[1] As a result of the accession, Rwanda also passed law N° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters.

In this regard, Rwanda established the Kigali International Arbitration Center (KIAC) as a sole arbitration institution in Rwanda to provide institutional support to domestic and international dispute resolution proceedings using Arbitration, Mediation, and other Alternative Dispute Resolution (ADR) mechanisms in 2010 through the law n°51/2010 of 10/01/2010 establishing the Kigali International Arbitration centre and determining its organisation, functioning and competence.

In the arbitration, a party may use institutional arbitration where they submit their case to institutional rules to be governed by them,[2] or ad hoc Arbitration where the parties and arbitrators independently determine the procedure without the help of an established arbitral institution.[3] As arbitration has both statutory justification and contractual justification, parties' choice has a significant consideration in this matter concerning the arbitral tribunal, whether it will be institutional or ad hoc. In Rwanda, Kigali International Arbitration Center (KIAC) is the sole arbitration institution with that mandate.[4]

However, in the law N° 005/2008 of 14.02.2008 on arbitration and conciliation in commercial matters[5] and UNCITRAL arbitration rules 1976[6], which is the international model, the issue of public policy is observed diligently while empowering the arbitrators to decide on the case.

In Rwanda, one of the public policy rules found in Rwandan laws is a principle known in French as "Le criminel tient le civil en état" which is found in criminal law[7] and determines

1 United Nations. (03.11.2008). Rwanda Accedes to UN Convention on Commercial Arbitration. Available at <https://news.un.org/en/story/2008/11/280302> [Last seen: 17.11.2024].

2 See meaning of institutional arbitration, available at <https://kiac.org.rw/> [Last seen: 17.11.2024].

3 LexisNexis. Introduction to the Key Features of ad hoc Arbitration. Available at <https://www.lexisnexis.co.uk/legal/guidance/ad-hoc-arbitration-an-introduction-to-the-key-features-of-ad-hoc-arbitration#> [Last seen: 17.11.2024].

4 Law (Rwanda) Nº 51/2010 of 10.01.2010 Establishing the Kigali International Arbitration Centre and determining its organisation, functioning and competence (O.G n°09 bis of 28.02.2011). Article 4.

5 Law (Rwanda) Nº 005/2008 of 14.02.2008 on Arbitration and Conciliation in Commercial Matters (Year 47 n° special of 06.03.2008). Article 51(2)(b).

6 The New York Convention. (10.06.1958). Article 5(2)(b).

7 Law (Rwanda) Nº 027/2019 of 19.09.2019 relating to the Criminal Procedure (O.G n° Special of 08.11.2019). Article 115.

the relationship of criminal matter and civil matter.

This said principle means that civil action is suspended until the criminal case is finally adjudicated, if the criminal action was instituted in a court, before or during the civil proceedings. This rule has a public order character as the Supreme Court of Rwanda confirmed it in case of Soras Ltd Vs Tromea Ltd[8] and scholars like Michel Franchimont, Ann Jacobs et Adrien Masset in their book Manuel de procédure pénale[9] and the Belgian court.[10]

Although people do agree that this principle "Le criminel tient le civil en état" is of public policy character, its applicability is viewed differently especially in Rwandan courts. For example, in case Soras Assurances Generales Ltd Vs. Tromea Ltd,[11] mentioned above, the Supreme Court in 2017 refused to set aside the arbitral award maintaining that this principle does not apply to every civil case involved by criminal action. However, in a case Kalpataru Power Transmission vs. Rwanda Energy Group[12] held on 12.04.2024, the High Commercial Court set aside the arbitral award due to this rule despite parties citing the Supreme Court jurisprudence in their pleadings, and the court also cited it and interpreted it in another way.

Since the Supreme Court did not elaborate in which cases that this principle should be used and in which it should not, this pushes the present researcher under this article to probe into which circumstance this principle can be applied concerning arbitration procedings and when should not be applicable and which effects can this rule have on arbitration case.

1. DEFINITION OF KEY CONCEPTS

In this paper, the concept rule "Le criminel tient le civil en état", the term Public policy, and arbitration will be the center of the discussion. That is why it is very important to see their definitional meaning in the case of arbitration, as the researcher refers to them in this research.

1.1. The Rule "Le Criminel Tient le Civil en État"

This is a maxim provided in the Law relating to the Rwandan Criminal Procedure, which means that as soon as the civil and criminal courts were seized, and the two actions related to the same facts, the civil judge has to stay the ruling.[13] This means that the civil judge is obliged to wait for the criminal judge to rule on the public action before ruling himself, as criminal matters enjoy priority over civil, commercial, labor, or administrative matters in court. In the Rwandan court, this principle has attained the value of public order (public policy) character that should not be derogated from by any party or court and it can be raised at any stage of trial.[14]

1.2. Public Policy in Arbitration Concept

The term public policy in the Rwandan arbitration act of 2008 is used interchangeably with the term public order used in Rwanda law

8 Soras Assurances Generales Ltd v. Tromea Ltd, RCOMAA0020/16/CS. Ruled on 21.10.2016. Available in Law Report, V. 4 – 2017, October 2017, p. 33.

9 Franchimont, M., Jacobs, A., Masset, A. (2006). Manuel de Procédure Pénale. 2e édition, Larcier, p. 203.

10 Cour du Travail de Mons (Belgium). Cass., 23.03.1992. Pas., I, p. 664; et Cour du Travail de Mons (Belgium). Cass., 01.02.1951, Pas., I, p. 357. Que "les parties ne peuvent pas y renoncer et le juge civil doit même surseoir d'office".

11 Supra note 9.

12 Kalpataru Power Transmission v. Rwanda Energy Group, RCOMA 00049/2021/HCC. Ruled on 12.04.2024. Available at <https://jusmundi.com/en/document/decision/rw-kalpataru-power-transmission-kpt-v-rwanda-energy-group-reg-urubanza-rwurukiko-rwikirenga-friday-12th-april-2024> [Last seen: 17.11.2024].

13 (O.G n° Special of 08.11.2019). Supra note 8. See also, Code of French Criminal Procedure (1994 as amended in 2020), Article 4. Available at <https://legislationline.org/france#section-3> [Last seen: 17.11.2024].

14 (O.G n° Special of 08.11.2019). Supra note 8. Article 127(5).

on civil procedure of 2018. Although this law N° 005/2008 of 14.02.2008 on arbitration and conciliation in commercial matters did not provide a meaning of the concept public policy, it referred to in its article 51; the law N° 22/2018 of 29.04.2018 relating to the civil, commercial, labour and administrative procedure did. This law No 22/2018 of 29.04.2018 mentioned above stated in its article 2(1) that public order (policy) is a set of rules governing life in society that are set out for reasons of public interest and from which parties cannot mutually agree to derogate.

1.3. The Arbitration Concept

This concept may have several definitions as per the forum and researchers. For instance, Mayer Brown defines arbitration as an alternative form of dispute resolution to litigation, which does not require recourse to the Courts and is a consensual process in the sense that it will only apply if the parties agree it should.[15] According to the US Supreme Court, the arbitration is a matter of contract where parties to a contract can agree to resolve disputes privately through arbitration, rather than through the judicial system.[16]

According to Butler, the arbitration is a procedure whereby parties to a dispute refer that dispute to a third party, known as an arbitrator, for a final decision, after the arbitrator has first impartially received and considered evidence and submissions from the parties.[17] In Rwanda, the concept is defined as a procedure applied by parties to the disputes requesting an arbitrator or a jury of arbitrators to settle a legal, contractual or another related issue.[18]

Therefore, to sum up, arbitration can be summarized as an alternative dispute resolution (ADR) method, whereby a dispute is referred by parties to a private neutral third party, subject to existing legal framework, to adjudicate on the matter and render an enforceable and binding award.

1.4. Meaning of Arbitral Award

The other concept that has to be defined is the Award. Since Rwandan arbitration act, the New York Convention, and UNCITRAL Model Law on International Commercial Arbitration nkown as (the Model Law), do not provide a definition of 'award' it is useful to describe what qualifies as an award and what does not, to get a real definition of an arbitration award.

For lay people, the award is understood as simply a decision rendered by an arbitral tribunal, not by the court. However, not all decisions rendered by an arbitral tribunal are awards. It happens that the institution makes certain decisions as to prima facie jurisdiction of either the institution or the arbitral tribunal yet to be constituted. Those decisions are not considered as arbitral awards, as the actual decision on jurisdiction is usually reserved for the competence of an arbitral tribunal.[19] Instead, an award is a decision addressing a specific request by the parties to the arbitration. The tribunal may also issue a procedural order dealing with procedural provisions to be applied in the arbitration, and that order is not necessarily based on a request by one of the parties. Thus, an arbitral award is a tribunal's decision about a specific request that a party has put to it.[20]

15 Mayer-Brown. An Introduction to Arbitration. LexisNexis. Available at <https://www.mayerbrown.com/-/media/files/news/2012/12/an-introduction-to-arbitration/files/lexisnexis_2012_intro-to-arbitration/fileattachment/lexisnexis_2012_intro-to-arbitration.pdf> [Last seen: 17.11.2024].

16 United Steelworkers of America v. Warrior & Gulf Navigation Company. 363 U.S. 574, 582 (1963).

17 Butler, D. (1994). South African Arbitration Legislation: The Need for Reform. CILSA. Available at <https://journals.co.za/doi/pdf/10.10520/AJA00104051_444> [Last seen: 17.11.2024].

18 (Year 47 n° special of 06.03.2008). Article 3(1).

19 Wong, V.V., Valincic, D. (2023). The Guide to Challenging and Enforcing Arbitration Awards. Global Arbitration Review, 3rd ed., p. 3. Available at <https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/3rd-edition/article/the-arbitral-award-form-content-effect#-footnote-037-backlink> [Last seen: 17.11.2024].

20 Ibid.

Then an award should be final and binding on the parties to the arbitration; which means it has res judicata effect. Therefore, once an award is rendered, except the procedures on correction of an award or rendering an additional award, the award may not be later revised by a tribunal. Furthermore, the arbitral award is also binding on the arbitrators themselves and they may not, except for the correction of specific errors – amend or revise it on their initiative.[21]

This means an arbitration award is a final decision made by an arbitral tribunal on a dispute. It's similar to a court judgment and is usually binding and final. Once the arbitrator decides that all of the parties' evidence and arguments have been presented, the arbitrator will close the hearings. This means no more evidence or arguments will be allowed. Then the arbitrator will issue the decision referred to as an award.[22]

To sum up, one can define an arbitral award as a ruling made by an arbitral tribunal, at the express request of the parties, which renders a final and binding decision on the matter. It may be subject to judicial review in setting-aside or enforcement actions.

2. THE POSITION OF THE PRINCIPLE THAT "LE CRIMINEL TIENT LE CIVIL EN ÉTAT" ON ARBITRATION PROCEEDINGS IN RWANDAN COURTS

This principle that "Le criminel tient le civil en état", which is translated as "the criminal holds the civil in its state", which means that civil action is suspended until the criminal case is finally adjudicated, if the criminal action was instituted before or in the course of civil proceedings.[23]

The principle "Le criminel tient le civil en état" is not only known in Rwanda but also in other countries, especially civil law countries like France,[24] Belgium, etc.[25] Its objective was to ensure consistency in civil and criminal court decisions. Anyone who could claim damages as a result of another person's illegal activities could file a civil case in court to seek compensation. To avoid contradicting verdicts, the legislature ordered the civil judge to suspend the ruling.[26]

However, the problem in different countries adopting this principle has been to know whether this rule applies to all cases, including arbitration, and to what extent. The need to explore the impact of this principle "Le criminel tient le civil en état" on arbitration proceedings in Rwanda has been stimulated by the emergence of two cases, one is of the Supreme Court ruled in 2016, and the other is of the High Commercial Court ruled in 2024.

2.1. The Rule "Le criminel Tient le Civil en État" under Soras Assurances Generales Ltd Vs. Tromea Ltd Case

2.1.1. Summary of the Case

The case of Soras Assurances Generales Ltd Vs. Tromea Ltd is a result of the insurance policy of which SORAS AG Ltd had with TROMEA Ltd on 03.01.2014 covering fire and theft in that building. On 11.11.2014, TROMEA Ltd had an experience of a theft on its minerals in its stock equivalent to 14T and a value of 263,735 USD. Based on the insurance policy on 21.11.2014, TROMEA Ltd applied for indemnification price of stolen

21 Ibid.

22 American Arbitration Association. (2023). What Happens after the Arbitrator Issues an Award. Available at <https://www.adr.org/sites/default/files/document_repository/AAA229-After_Award_Issued.pdf> [Last seen: 17.11.2024].

23 (O G, n° Special of 08.11.2019). Article 115.

24 French Code of Criminal Procedure (1994, as amended on 05.03.2007). Article 4.

25 Cour du Travail de Mons (Belgium). Cass., 23.03.1992, Pas. I, p. 664; La Cour de Cassation a admis que la règle du criminel tient le civil état est "d'ordre public". See also Cour du Travail de Mons (Belgium). Cass. 01.02.1951, Pas. I, p. 357, que "les parties ne peuvent pas y renoncer et le juge civil doit même surseoir d'office", <https://www.terralaboris.be/IMG/pdf/ctm_2012_05_16_2010_am_208.pdf> [Last seen: 17.11.2024].

26 Supra note 10.

minerals to SORAS AG Ltd. However, both parties failed to reach an agreement.

Based again on that insurance policy which included an arbitration clause, TROMEA Ltd filed a case to the arbitrators claiming to be indemnified as per contract. The arbitral tribunal ordered SORAS AG Ltd to pay TROMEA Ltd 173,236,343 Frw as the value of mineral stolen and 12.992.726 Frw as interest and 5,000,000 Frw of contract breach damages. SORAS AG Ltd was not happy and appealed the award to the Commercial High Court, requesting the court to set the award aside. The court decided on the matter on 17.12.2015 but found the appeal unsubstantiated.

Soras AG Ltd appealed again in the Supreme Court claiming that the High Commercial Court ignored that the arbitral tribunal violated the rule of "Le criminel tient le civil en état", which is of public policy. It added that the court failed to observe as there was a criminal case pending in court, but the arbitral tribunal refused to stay while waiting for the criminal case RP0643/14/TB/KMA outcome, which is a violation of public policy. Soras continued that in this regard the arbitral tribunal award should be set aside as per article 47 of the Arbitration Act of 2008 in Rwanda.

On the other hand, Tromea Ltd contested that this principle should not apply in this case because the case is not a civil damage resulting from a crime, instead it is a civil action based on contractual duty.

2.1.2. Court Decision

In deciding on the matter, the Supreme Court under paragraph 19 of its decision stated that what Soras AG Ltd argues regarding the public policy of the rule "Le criminel tient le civil en état" is correct. The court also cited different scholars like Michel Franchimont, Ann Jacobs, Adrien Masset, and foreign court decisions such as Cass., 23.03.1992, Pas., I, p. 664 and Cass., 01.02.1951, to support this decision.

Nevertheless, in the Paragraph 20 of a copy of the judgment, the court continued examining whether the rule of being of public policy is enough to be applied to the arbitration case in question. In Paragraphs 24 and 25, the court decided that the fact of the rule being of public order character is not enough to be invoked against any civil case, including the case under arbitration proceedings. Instead, the rule should only be applied when it is a civil action seeking damages resulting from a crime.

2.1.3. Analysis from the Case

Although this ruling has significant meaning on this issue but the court did not provide clear guidance as under which circumstance this principle should be applied because it is not principle that when the person sues in criminal action is requesting the damage since the criminal action can also be used in seeking the evidence to establish the truth to support the civil action which may include even the arbitration proceedings.

Parties to the contract may disagree on the performance of contractual obligations, and one party may present some specific piece of evidence that the other party claims to have obtained in criminal ways.

An example is when two parties conclude a supply contract for construction materials. In case of disagreement on payment, one party is advancing to have a delivery note, which the other party thinks to be a forged document. The same can be true of payment receipt being contested, where some say to have paid, whereas others claim the document is forged. In this scenario, the criminal action needs to establish proof of who is right and the outcome from the criminal case is the one to solve the problem, as no civil action is competent to qualify a document as forged. How can then the arbitral tribunal decide without this piece of evidence, and what should be the justification of the award?

On the other hand, one can say that the party may resort to an expert to clarify the authenticity of the document, but still the arbitrator has no power to judge on the matter relating to a criminal act as it is of public policy where even parties have no say about it.

Then it seemed that the Supreme Court still left the ambiguity on when to use the rule "Le

criminel tient le civil en état" while it confirmed that the rule is a public policy.

2.2. The Rule "Le Criminel Tient le Civil en État" under Kalpataru Power Transmission v. Rwanda Energy Group Case

Despite the ruling of the Supreme Court on the rule "Le criminel tient le civil en état" of 2016, recently in 2024 the High Commercial Court took another position which also appears to have a meaning concerning criminal action vis a vis arbitral proceedings on the said rule.

2.2.1. Summary of the Case

The Kalpataru Power Transmission v. Rwanda Energy Group has started when Rwanda Energy Group sued Kalpataru Power Transmission according to the contract relating to building an electric power plant and towers for electric wires to DRC of 19.11.2013 in Dispute Board proceedings as per their contract.

In this contract, parties have a dispute on Price Adjustment Claim where REG disagrees that it does not have remaining unpaid amount to KPTL. There was also a security guarantee of 02.10.2019 REG requested its payment. Both parties also had an issue on how the project was implemented, where REG claimed that it had been implemented with defects. REG again accused KPTL of fraud and bribery to provide misleading result of concrete strength test results.

On 25.10.2017, KPTL started DAB ("Dispute Board") proceedings as per the contract on the issue of "Price Adjustment Claim" as article 8.2 of General Conditions". KPTL claiming that the decision taken to know whether it has not complied with time frame to make a "Price Adjustment Claim" and to examin whether "Settlement Agreement" should be invalidated because it has been concluded under duress as per the Articles 55, 56 of contract law in Rwanda.

On 01.09.2019, DAB ("Dispute Board") took a decision that REG failed to prove that KPTL has engaged in fraud and corruption, and that KPTL did not go beyond the time limit for making a "Price Adjustment Claim" on money equivalent to 24 million USD. The DAB ("Dispute Board") confirmed that the settlement agreement became invalid as it was done under duress.

After the decision REG was not dissatisfied. On 04.11.2019, it filed a case under ad hoc arbitration as per UNCITRAL claiming that the arbitral tribunal has to order that KPTL delayed to provide Price Adjustment in 28 days provide in article 8.1.1 of General Conditions; confirms that Settlement Agreement is valid; and to get miscellaneous damages which the arbitral tribunal may find appropriate. In rebutting the allegations, KPTL maintained that all the allegations are false accusations and claimed damages.

On 20.09.2021 the arbitral tribunal took a decision that REG loses the case as it failed to prove its allegations. The tribunal held also that Price Adjustment was made on time as per article 8.1.1. General Conditions. On the fact of the validity of the Settlement Agreement, the tribunal held that it was done under duress, therefore invalidated it. The tribunal also stated that REG failed to prove the fraud or corruption act of KTPL.

REG was not satisfied again and filed a case to the Commercial High Court on 15.10.2021 seeking to set aside the Arbitration Award N° 2020-2021/155 which was taken. REG was based on the fact that arbitral tribunal did not observe the public policy rule under the principle "Le pénal tient le civil en état" which is of public order character. It continued also that the tribunal did not give time to explain their case as Article 47 of the arbitration act in Rwanda states, and the 34 UNCITRAL Model Law on International Commercial Arbitration. It pointed out that there is a criminal case in court for this matter registered as RP/ECON 00012/2021/TGI/NYGE which condemned some employees of KPTL for those crimes although they appealed in the High Court and the case was registered as RPA/ECON 00059/2023/HC/KIG.

However, KPTL defended that this incident or objection should not have been admitted.

They cited a case law of Engen Rwanda Ltd vs ETELEC Ltd[27] showing that the court in this case refused to set aside the arbitral award due to what was said to be public policy when an arbitral tribunal took a decision based on unsigned document and expert who did not take oath as per the law on evidence.

KPTL added also that although the rule le penal tient le civil en etat' is of public policy, it is only applied in procedure of case not in substance as a civil party want that a criminal case to be ruled first so that he/she can use it at the merit of the civil case. Then for KPTL the rule is not applicable if civil case is not aimed at claiming damages resulting from criminal case and cited the position of Supreme Court under Soras Assurances Generales Ltd vs Tromea Ltd case.

2.2.2. Court Decision

In taking a decision, the court first reminded that the law No 22/2018 of 29.04.2018 relating to the civil, commercial, labour and administrative procedure, its Article 2(1) states that public order is a set of rules governing life in society that are set out for reasons of public interest and from which parties cannot mutually agree to derogate. The court depicted that this public order rule binds not only parties to the case but also the court and everyone at the arbitral tribunal, including.

The court also finds the parties agreed that in case public policy was ignored during arbitration proceedings, the arbitration award was set aside. Concerning this "Le Criminel tient le civil en état", the court cited the case position of Supreme Court RCOMAA 0020/16/CS between Soras AG Ltd vs Tromea Ltd maintaining that it has confirmed that this rule is of public order character. The court maintained also that the Supreme Court in this case did not provide an exhaustive list to consider in applying the respective rule, instead, every court has left with appreciation to consider whether the rule will be applied or not. The High Commercial Court based on the fact that the arbitral tribunal took a decision based on the fact that there is no proof of fraud and corruption while the proof was under criminal trial; this was a violation of the aforementioned rule. Therefore, the court set aside the arbitration award.

2.2.3. Analysis from the case

It seems that in ruling on the matter, the court analysed the Article 2(1) of the law No 22/2018 of 29.04.2018 relating to the civil, commercial, labour and administrative procedure which explained the rule of public order and its effects in ruling on the matter, and the article 115 of the № 027/2019 of 19.09.2019 relating to the criminal procedure which provides for the principle "Le Criminel tient le civil en état". Then the court also considered Article 47 of the law N° 005/2008 of 14.02.2008 on arbitration and conciliation in commercial matters; and visiting the case Soras AG Ltd vs Tromea Ltd ruled by the Supreme Court and all together with the UNCITRAL Module rules.

However, the interpretation of the "Le Criminel tient le civil en état" rule by combining both Aritcle 2(1) of the law No 22/2018 of 29.04.2018 relating to the civil, commercial, labour and administrative procedure which explained the rule of public oreder and its consequesnce; and that of article 115 of the № 027/2019 of 19.09.2019 relating to the criminal procedure which provides for the principle "Le Criminel tient le civil en état"; using also the Supreme Court jurisprudence, the court took an other intereting different decion depected that this caselaw did not fully answer the question regarding this rule.

The interpretation of this High Court judge also has a meaning and does not contravene the Supreme Court decision, and the principle of stare decisis, which is maintained in Chief Justice's directive №001/2021 of 15.03.2021, that cases reported in the judicial report should be followed by lower courts. The Supreme Court in examining the rule tried to limit the applicability of the rule of "Le Criminel tient le civil en état" by not making it a strict applicability but

27 Rwanda Ltd vs Etelec Ltd. RCOMA 0006/2017/CS, ruled on 24.11.2017 (unpublished).

also did not make a list of factors to be examined exhaustive to solve the problem. This gives an arbitral tribunal a duty to be vigilant while ruling on the arbitration case before them to avoid or minimize the rendering of awards that can be set aside by the court.

3. THE EFFECT OF DIVERGING VIEW OF RWANDAN COURTS TO THE RULE "LE CRIMINEL TIENT LE CIVIL EN ÉTAT" ON THE ARBITRATION CASE

The spirit of Article 7 of the law stating that all matters governed by the law on arbitration, no court shall intervene except where the law so provide; was to minimize the court intervention in arbitration cases, which party may employ as a duratory tactics jeopardise the purpose and importance of arbitration as arternative dispute resolution.

It seems also that the Supreme Court was with the same view when ruled on the matter of "Le Criminel tient le civil en état" by putting limitation to its use.[28] However, the way the limitation was initiated in the judgment did not solve the issue well. The court confirmed that, truly, the rule is of public policy that the law allows the court to set aside the arbitral award based on this ground.[29] The court said that the principle should be used or invoked if the civil case would have an impact on the criminal ruling, and the court pointed out damages resulting from the criminal act. However, the Supreme Court failed to confirm whether the limitation stopped on this criterion, which made the High Commercial Court in a similar case take a different path.

As the Supreme Court focused on nature of the case, where it ruled that the fact filing criminal case in court which has the relationship with a civil case should not only be enough to suspend a civil case until the criminal case is adjudicated;[30] it should directly depict what a criminal case has to suspend a civil case and under which circumstance, to guide the lower courts and arbitrators. Failing of clear guidance, the High Commercial court added an interpretation on the Supreme Court ruling where in its decision, Paragraphs 88-93 included where it appeared that the criminal action may produce the evidence to the civil action, it will be another factor for civil court to wait the criminal court to take decision.[31]

This ruling of the High Commercial Court does not contravene the stare decisis rule, which provides that the lower court should abide by the decision of the higher court. Instead, it further analysed and clarified the ruling of the Supreme Court because of a loophole in the Supreme Court ruling on this principle.

Therefore, this creates a complex effect on the arbitration case. One is that the confidentiality that parties seek when they opt for arbitration will no longer exist. Second, the delay the parties avoided while choosing arbitration

28 Soras Assurances Generales Ltd v. Tromea Ltd, RCOMAA0020/16/CS, ruled on 21.10.2016. Available in Law Report, V. 4 – 2017, October 2017, p. 47, par. 24, "Urukiko rurasanga rero kuba ihame rya "Le criminel tient le civil en état", ari ndemyagihugu, iyi kamere yonyine idahagije kugira ngo ibirivugwamo byubahirizwe mu rubanza urwo arirwo rwose, kuko hashingiwe ku biteganywa n"ingingo ya 160 yavuzwe haruguru, indishyi zivugwa zigomba kuba zikomoka ku cyaha".

29 Law (Rwanda) N° 005/2008 of 14.02.2008 on Arbitration and Conciliation in Commercial Matters (Year 47 n° special of 06.03.2008). Articles 47, 51.

30 Soras Assurances Generales Ltd v. Tromea Ltd, RCOMAA0020/16/CS, ruled on 21.10.2016. Available in Law Report, V. 4 – 2017, October 2017, p. 47.

31 Kalpataru Power Transmission v. Rwanda Energy Group, RCOMA 00049/2021/HCC, ruled on 12/04/2024, paras. 88-93. It says "…Rusanga kandi ihame rya "Le Criminel tient le civil en état" ryarasobanuwe neza mu rubanza RCOMAA 0020/16/CS rwaciwe ku wa 21 Ukwakira 2016 mugika cya (19), aho Urukiko rw'Ikirenga rw'u Rwanda rwavuze ko ari ihame ndemyagihungu ababuranyi badashobora kwivutsa ko rikoreshwa ndetse ko n'umucamanza uburanisha ikirego cy'indishyi aryubahiriza abyibwirije. Urukiko rusanga Urukiko rw'Ikirenga muri urwo rubanza rwarabasobanuye ko mu gusuzuma ko ihame rya "Le criminel tient le civil en état", ari ndemyagihugu hakwitabwa ku miterere y'ikirego, kuko rwavuze ko iyi kamere yonyine idahagije kugira ngo ibirivugwamo byubahirizwe mu rubanza urwo arirwo rwose, ahubwo igomba kuzuzwa n'ibindi bishobora gushingirwaho".

will catch them. Lastly, the confidence of finality of arbitral award will be at risk.

3.1. The Confidentiality

The main purpose that parties choose to refer their case to an independent arbitrator is that their business will not be exposed to the risk of damaging their names, which can ruin public confidence and image. The fact that arbitral proceedings are held in private settings and are attended only by those designated by the parties and their counsel, in contrast to trial proceedings held at the courthouse, which are open to the public, makes parties feel at ease.[32] Having a good image in business is a good capital in itself. So, because the hearing in most courts is public unless the law provides otherwise, this put an image of a business person and their company at risk, which they did not want when they opted for an arbitration tribunal.

3.2. The Delay

According to figures provided by a renowned arbitration service, in U.S. District Court cases took more than 12 months longer from filing to the start of the trial than it took from filing an arbitration to receiving an award.[33] In some states with higher caseloads, the period is significantly longer. In New York, for example, it took 22 months longer to reach a trial than it did to issue an arbitration award.[34]

When considering the length of an appeal, cases considered on appeal in federal court took an average of 21 months longer than filing to award. Again, in states with higher caseloads, the waiting period is significantly longer. In New York, for example, the appeal process took 33 months longer than the issuance of the award.[35] This exactly happens in Rwanda, where a case may spend 2 years or more considering all available remedies to be exhausted.[36]

Then for business people to avoid this durational way, which can have financial implications to their business, they opt for arbitration, which does not allow many legal remedies as ordinary and extraordinary appeals. The arbitration act also, while limiting the court intervention, wanted to ensure that this purpose is achieved.

Therefore, if the Supreme Court limited the use of “Le Criminel tient le civil en état” rule with the same purpose, it should have determined the factor to be considered for this rule to apply. Failing to determine and state that it should be determined case by case, will give parties a chance to use it as a delay tactic and become a hindrance to the alternative dispute resolution policy.

3.3. Finality of Arbitral

The finality and binding nature of arbitral procedures are crucial to each arbitration case. Arbitration allows parties to settle disputes without going through the court system. Arbitration is considered superior to litigation due to its finality and binding character, with a short time compared to litigation.[37]

Parties that submit their case to arbitration do so with the assumption that the process will resolve the dispute rapidly and finally. Finality is a core feature of arbitration and a

32 Sarles, J.W. Solving the Arbitral Confidentiality Conundrum in International Arbitration. Available at <https://www.josemigueljudice-arbitration.com/xms/files/02_TEXTOS_ARBITRAGEM/01_Doutrina_ScolarsTexts/confidentiality/Confidentiality_in_International_Arbitrations_-_Sarles.pdf> [Last seen: 20.12.2024].

33 Roy, W. et al. (2017). Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with US District Court Proceedings. Micronomics, pp. 2-3.

34 Ibid.

35 Ibid.

36 The Judiciary Performance for the year 2023-2024. Available at <https://www.judiciary.gov.rw/index.php?eID> [Last seen: 20.12.2024].

37 Nguyo, P.W. (2015). Arbitration in Kenya: Facilitating Access to Justice by Identifying and Reducing Challenges Affecting Arbitration. University of Nairobi, p. 46.

crucial component that motivates many parties to choose arbitration as a contractual dispute mechanism.[38] This is because with the minimum challenge of an arbitral award, it helps a party, especially a Claimant, to save valuable time and costs.[39]

Therefore, the ruling of Supreme Court on the said principle did not safeguarded this purpose even if the court acted as if it wanted to limit the resort to court under the umbrella of the rule of "Le Criminel tient le civil en état" because it did not provide clear and concise factor which arbitrators as well as courts should consider when they face with this principle. Hence, still parties can use this rule as a tactic to make the arbitral award not be binding and final by subjecting it to judicial appeals that disadvantage parties to go to arbitration.

CONCLUSION

As it has appeared, the Supreme Court in case of Soras AG Ltd vs Tromea Ltd tried to limit the strict applicability of the rule "Le Criminel tient le civil en état" which to same extent has a reason to believe.

However, the problem becomes the factor to consider while determining that the criminal case should not enjoy the priority over this civil or arbitration case.

The fact of saying that the rule being of public policy is not enough to be applied to any civil case, arbitration case inclusive; without indicating that these are at least minimum criteria to consider while determining whether this criminal case should hold a civil case, creates ambiguity and each court may create its interpretation of this Supreme Court ruling as the High Commercial court did in Kalpataru Power Transmission v. Rwanda Energy Group case.

Therefore, as long as we do not have a clear ruling on this issue, we will continue to have some arbitration cases decided being set aside while others will survive.

However, as the Supreme Court confirmed that the rule "Le Criminel tient le civil en état" is of public policy character, and even though it limited its applicability, it would be good advice for arbitral tribunal facing a case in which this rule is invoked to assess with all due diligence the rule. Where necessary, the tribunal may hold its ruling until the criminal case is decided to avoid delivering an award with probability to be set aside by the court.

It is submitted as a recommendation to the Supreme Court that there should be a clear interpretation on this principle, stating criteria to be based on while examining whether the criminal case should hold a civil, commercial, or arbitration case, to avoid different interpretations and have the same court position on this principle. These criteria may be when the case is of a civil party claiming damages resulting from the crime; or when it is a criminal case that may establish material evidence to the civil or arbitration case in progress.

This will bestow a confidence to the arbitral tribunal that the award is delivered with zero or minimum probability for being set aside on this criminal principle rule.

38 Richmond, F. (2009). When is an Arbitral Award Final? Kluwer Arbitration Blog, p. 1 <https://arbitrationblog.kluwerarbitration.com/2009/09/10/when-is-an-arbitral-award-final/?print=pdf> [Last seen: 20.12.2024].

39 Ibid.

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ISSUES OF PERFECTING THE RANKS OF LEGAL HEIRS IN GEORGIAN LEGISLATION

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ABSTRACT

The article concerns the issue of the perfection of the ranks of legal heirs, the importance of marriage registration, and the prerequisites for its validity when receiving an inheritance. In Georgian reality, the law is often ignored, and spouses do not apply for official marriage registration in accordance with the procedure established by law when getting married. Marriage registration falls within the scope of state competence. For years, spouses have been living together in actual cohabitation, have children together, and are engaged in joint farming, but since they are not in a registered marriage, in the event of the death of one of the spouses, the other spouse cannot become his or her heir. The inheritance is received by the children of the deceased person or other relatives of the next order, while the surviving spouse remains without property, which, naturally, causes a great sense of injustice among people. This issue is one of the important and widespread problems in practice when talking about the improvement of the ranks of inheritance. It should be said how important the registration of marriage is for the emergence of rights and obligations between spouses, as well as for that particularly important right called the right to be an heir. The article discusses ways to equalize the actual cohabitation of spouses and registered marriage to improve the ranks of legal heirs.

KEYWORDS: Inheritance, Legal, Marriage, Registration, Spouses, Cohabitation

INTRODUCTION

Roman jurists were already discussing issues related to marriage, arguing that matters related to marriage should be regulated with precision.[1] The development of Roman law underlies much of European law. Ancient Georgian law was influenced by religion, defining marriage as the union of a man and a woman to create a family and procreation.[2] According to modern Georgian law, legal rights and obligations arise for individuals after marriage registration.[3] An unregistered family can be created through the actual cohabitation of individuals, but the term marriage obliges individuals to register. Here the question arises as to what importance is attached to marriage registration. The state has established that civil registration is necessary for the legal validity of marriage. Based on the analysis of Georgian judicial and notarial practice, it should be said that problems with marriage registration particularly often arise during the conduct of inheritance cases after the death of one of the spouses. If a couple is not in a registered marriage, they are not considered each other's heirs under the law, which creates certain contradictions regarding the issues of completing the ranks of legal heirs.

1. ISSUES OF PERFECTING THE RANKS OF LEGAL HEIRS

Based on Article 48 of the Law on Civil Acts, marriage registration is carried out in accordance with the rules established by the relevant authority.[4] According to Article 312, Subparagraph "c", Part Two of the Code of Civil Procedure of Georgia, the court is authorized to confirm the fact of marriage registration.[5] It should be noted that in the uncontested procedure, the court only establishes the fact of marriage registration. The court is not authorized to equate cohabitation with a registered marriage.[6] The Supreme Court of Georgia explained that the fact of marriage is determined by a combination of evidence.[7] According to Article 1107 of the Civil Code, marriage contains two conditions: marriageable age and the consent of the persons to be married.[8] The Supreme Court explained that before the official registration of marriage, various rights and obligations do not arise between spouses, including joint property.[9] When discussing the legal status of spouses in an unregistered (de facto) marriage, it should be noted that according to Georgian law, de facto cohabitation is not a prerequisite for the emergence of civil rights.[10] Often, couples limit themselves to a religious marriage (by baptism) and do not consider it necessary to register the marriage.

In Georgian reality, there are frequent cases where a couple lives together for years, runs a common household, and has children, but in the event of the death of one spouse, the other spouse cannot become his or her heir.[11] Article 111 of the Criminal Code of Georgia states that for this law, a person in an unregistered marriage is also considered a family member if they are engaged in household activities together. This entry further obscures the legal nature of

1 Metreveli, V. (2009). Roman Law (Fundamentals). p. 101.
2 Metreveli, V. (2014). History of Georgian Law. p. 355.
3 Shengelia, R., Shengelia, E. (2019). Family and Inheritance Law. p. 13.
4 Ibid. p. 79.
5 Supreme Court of Georgia, No. AS-136-466-09 Ruling (28.07.2009). <http://prg.supremecourt.ge/> [Last seen: 22.09.2024].
6 Shengelia, R., Shengelia, E. (2019). Family and Inheritance Law. p. 73.
7 Supreme Court of Georgia, No. AS-1153-2019 Ruling (22.11.2019). <http://prg.supremecourt.ge/> [Last seen: 22.09.2024].
8 Shengelia, R., Shengelia, E. (2019). Family and Inheritance Law. p. 58.
9 Cf. European Court of Human Rights (27.10.1994). The decision in the case Kroon and others v. The Netherlands №18535/91. <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008ebe1> [Last seen: 18.12.2024].
10 Ninua, E. (2019). General Characteristics of the Institutions of Family Law of Georgia. Justice and Law, 3(63). p. 129.
11 Ioseliani, T. (2019). Legal Regulation of the Right of Inheritance of Persons in an Unregistered Marriage. Justice and Law, 3(63). p. 85.

de facto marriage, as for criminal law purposes, a person in an unregistered marriage has other legal rights.[12] But in civil law, he has no rights.

The question arises – if registered and unregistered marriages can be equated in criminal law, why can't a similar approach be taken in civil law? If this one reason (common household) is a sufficient basis for criminalizing de facto and registered marriage, it would be fair if civil law also could equate registered and de facto marriages in special circumstances. Based on practice, it should also be regulated what kind of evidence will be required to make such a decision.

There have been several decisions to equalize registered and de facto marriages, but none have been finalized.[13] One such case concerned the receipt of an inheritance, where the plaintiff requested the establishment of the fact of marriage, and accordingly the opening and receipt of the inheritance.

The court of first instance satisfied the claim, guided by and explained that it was possible to equate registered and actual life under the decree of the Supreme Presidium of the Georgian SSR that existed before 1944. The second instance court explained that the court could have established a de facto marriage before 1944, but for this, the second spouse had to apply, not the interested party. Also noteworthy is the court decision regarding the division of property acquired in an unregistered marriage.[14] Despite the unregistered marriage, the Tbilisi Court of Appeals considered that the couple's union went beyond the scope of de facto cohabitation and equated their relationship with a registered marriage. It made an interesting decision, based on which the spouse acquired the right to co-ownership of the property acquired during de facto cohabitation.[15] This ruling was motivated by a 1994 decision of the European Court of Human Rights, which stated that in the presence of relationships such as family and other types of relationships, an unregistered family may, in exceptional cases, be equated with a registered marriage, in which case state-established regulations are not necessary for the origin of the family.[16] The Supreme Court did not share this opinion and explained that the origin of property rights depends on the registration of marriage, which is unambiguously established by Article 1151 of the Civil Code.[17] It would be better, to protect the interests of couples, if the Georgian court goes beyond the norm's framework and chooses a fair decision.

As early as 1994, the European Court of Human Rights explained that the registration of a marriage should not be decisive for a de facto marriage to be considered a family. The main thing is that the couple's marriage meets such criteria as: jointly managing a common household, having children together, registering and living at the same address, etc. Georgian legislation is very strict about the obligation to register a marriage to obtain certain rights and obligations, including inheritance rights, which I find unfair. There are countries where, despite an unregistered marriage, couples still have rights.[18] For example, in the Kingdom of the Netherlands, citizens are given the freedom to choose between civil partnerships and marriage, and a special municipal service establishes and maintains a register for persons in

12 Supreme Court of Georgia. №2K-651AP.-20 Ruling (16.02.2021). <http://prg.supremecourt.ge/> [Last seen: 25.09.2024].

13 Supreme Court of Georgia. №AS-681-637-2010 Ruling (25.01.2011). <http://prg.supremecourt.ge/> [Last seen: 25.09.2024].

14 Tbilisi Court of Appeal. №2b/2913 15 Ruling. <http://www.tbappeal.court.ge/?category=g>. [Last seen: 10.10.2024].

15 Ioseliani, T. (2019). Legal Regulation of the Right to Inheritance of Persons in Unregistered Marriages. Justice and Law, 3(63). p. 87.

16 European Court of Human Rights (27.10.1994). The decision in the case Kroon and others v. The Netherlands No. 18535/91 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008ebe1> [Last seen: 18.12.2024].

17 Supreme Court of Georgia, Judgment No. AS-7-7-2016 (2016, March 16.) <http://prg.supremecourt.ge/> [Last seen: 25.09.2024].

18 Ioseliani, T. (2019). Legal Regulation of the Inheritance Rights of Persons in Unregistered Marriages. Justice and Law, 3(63). p. 92.

unregistered marriages.[19] As for the American approach, it differs from state to state. In some states, a religious certificate is sufficient for marriage, but some states do not recognize de facto cohabitation and require registration for the validity of the marriage. Israeli law chooses a religious nature for marriage and its authority is exercised by the relevant hierarch. Based on the example of Italy, it can be said that this is a hybrid model where both religious and civil marriages operate.

According to the current legislation in Georgia, no lever would legally equate a de facto (unregistered marriage) with a registered marriage. Simply stating that the couple was not in a registered marriage and therefore cannot become the heir of the deceased is unfair. The fact of marriage registration should not be the determinant of family relations, as is also confirmed by the precedents of the European Court of Human Rights.

There are frequent cases when a couple's marriage is registered not to create a family, but fictitiously, one such example being to obtain citizenship. In such a case, if one of the heirs dies, the spouse becomes his or her first-degree heir and inherits the inheritance rights, which I think is also unfair. It is necessary to have a possibility regarding this issue that would regulate such cases in notarial and judicial practice and would allow a person who was truly married, albeit without registration, to achieve a fair result, and accordingly become the full heir of his spouse. In special cases, the judge can make such an interpretation, and in doing so, he will not violate the general principles of law.[20]

Such interpretations are easier for Anglo-American (common law) law countries, as they are more liberal in their interpretations, unlike judges in continental Europe. In Georgian law, I would like to highlight the ruling of the Court of Appeals of Georgia, which fairly explains the meaning of family and states that civil registration of marriage is not the only thing that is essential for a couple to be called a family. I believe that establishing such an explanation and a similar approach in practice will lead to a fair outcome for the couple and therefore protect their inheritance rights as spouses.[21] I think the only real solution is for an interested party to apply to the Constitutional Court to declare Article 1151 of the Civil Code unconstitutional. The interested person must indicate the real reason for his request, while the Constitutional Court, in turn, is obliged to examine the circumstances of the case and make a well-founded decision regarding the change in the content of the article, determine whether the article is within the framework of the Constitution or contradicts its principles, and in special cases, based on the conclusion of the European Court of Human Rights, an unregistered marriage should be equated with a registered marriage. It is also important to transfer to the person all the rights and obligations, including inheritance, that the couple would have had in the event of marriage registration, which will, to some extent, regulate the issues of perfecting the ranks of legal heirs.

As we mentioned, when spouses have been in a de facto marriage for years, are registered at the same address, and have children together, but after the death of one of the spouses, the surviving spouse is restricted in their right to receive an inheritance due to the lack of marriage registration. The court's approach to this issue is also rigid and does not allow for exceptions. It does not work in Georgian reality, and therefore the decisions are legal but less fair. The wording of Article 1151 of the Civil Code refers to "only" registered marriage, which limits other alternatives and rights, including the origin of inheritance rights of spouses.

On September 12, 2018, Georgian citizen Tsiala Pertia filed a constitutional complaint with the Constitutional Court, requesting to declare Article 1151 of the Civil Code unconstitutional.[22]

19 Sumner, I., Warendolf, H. (2003). Family Law Legislation of the Netherlands. p. 245.

20 Ibid. p. 17.

21 Tbilisi Court of Appeal. (27.07.2020) №2b/1156-19 Ruling. <http://www.tbappeal.court.ge/?category=g> [Last seen: 10.10.2024].

22 Constitutional Complaint #1351 of 12.09.2018, Citizen

The plaintiff stated that he and his wife lived in his wife's apartment from 1985 until her death (until 2014). Although their marriage was not registered, they lived as one family and met all the criteria for family life, which are also defined by the European Court of Human Rights. Despite the above-mentioned circumstances, the plaintiff did not receive the inheritance. The wife's property was received by the testator's sister and brother, who alienated it. Accordingly, the court of first instance decided to evict the plaintiff's wife from the house, despite the spouses' twenty-nine years of cohabitation.

This approach creates a sense of injustice, as it restricts the right of inheritance recognized by the Constitution, is discriminatory, and contradicts both the Constitution, the Convention on Human Rights, and the decisions of the European Court of Human Rights. There is no exception in the legislation regarding this issue. The plaintiff points out that a spouse in de facto cohabitation should not be denied the right to inherit due to an unregistered marriage. It would have been important for the interested person to file a constitutional complaint regarding the content of Article 1336 of the Civil Code and demand that the spouse in an unregistered marriage be added to the ranks of the heirs. The Constitutional Court made a radically different decision, and the case did not even reach the substantive hearing. On October 29, 2008, the Constitutional Court of Georgia issued a ruling, by which the constitutional complaint of citizen Lia Surmava was not accepted for consideration on the merits.[23] According to the plaintiff Lia Surmava, she had been in a de facto, but unregistered, marriage with her husband since 1993, who died in 2005, and she was unable to receive the inheritance. He and his wife were married in a religious marriage (christening), and the plaintiff requested that the baptism certificate be equated with civil registration. The Constitutional Court did not even allow this request to be considered on the merits. It should be noted that certain approaches and views on this issue change over time. The Constitutional Court is facing a serious decision regarding the legal problem of equalizing registered and de facto marriage. If the Constitutional Court finds that a norm is unconstitutional and does not comply with fundamental human rights, then the legislature will have to establish new regulations and a procedure for resolving the issue fairly. The cohabitation of any two people should certainly not be considered an unregistered (de facto) marriage, but rather it should be supported by various criteria, which practice should regulate in each case. International practice also testifies to the fact that the state should not place individuals in unequal conditions.

For example, if the right to inheritance is guaranteed by the constitution, a registered marriage should not be the only determinant for obtaining this right, since a person may become someone else's heir completely by chance, even through a fictitious marriage. If based on legislative amendments, registered and de facto (unregistered) marriages are legally equalized, then the fact of the existence of marriage must be established by the court through an indisputable procedure. It should also be noted that establishing the fact of marriage registration is different from establishing the fact of unregistered (de facto) marriage.[24]

If a provision is added to Article 312 of the Civil Code, which would allow the judge to establish the fact of a marriage, submit a statement from the interested party, and present relevant evidence, an unregistered marriage would be granted legal status and equated with a registered marriage. The burden of proof in this case will be on the applicant, which may be different.[25] Evidence may include witness testimony, a certificate of registration at a common

of Georgia Tsiala Pertia vs. the Parliament of Georgia <https://www.constcourt.ge/ka/judicial-acts?legal=15542> [Last seen: 10.01.2025].

23 Constitutional Complaint #2/8/448 of 29.10.2008, Citizen of Georgia Lia Surmava against the Parliament of Georgia. <https://constcourt.ge/ka/judicial-acts?legal=389> [Last seen: 15.01.2025].

24 Shengelia, R., Shengelia, E. (2019). Family and Inheritance Law. p.73.

25 Gagua, I. (2012). Burden of Proof in Civil Procedural Law. Dissertation. p. 99.

address, a document confirming a religious marriage (e.g., a baptismal certificate), birth certificates of common children, and any other document that will help a party confirm a family relationship with a spouse in an unregistered marriage.

As noted in the article, a lawsuit was being considered in the Constitutional Court of Georgia, which requested the legal equalization of a religious marriage with a civil marriage, which was rejected.[26] As for religious marriage issues, according to the Law of December 3, 1920: "On the Registration of Civil Status Acts", religious marriages were terminated and their registration is necessary for the validity of the marriage. In Georgia, the equalization of civil marriages and religious marriages has numerous supporters and opponents. In many European countries, religious marriage is equated with civil marriage. Although the canonical and civil-legal understandings of marriage differ, the document itself, on the one hand, a religious marriage certificate and on the other hand a civil marriage certificate, is identical in content, since both documents contain the same style of requisites, the signatures of witnesses (religiously – best men). If religious marriage and civil marriage (registered marriage) are to be equalized in terms of rights, it is essential that the principle of secularism is not violated and that this privilege is not limited to one religion.

The approach of different countries around the world is different: there are countries where religious marriage is not prohibited, but a civil registration document creates a legal right. In Germany, religious marriage rituals are performed, a marriage certificate issued by a religious institution is not valid, and marriage is performed only according to the rules established by the state.[27] Until 1982, the only way to get married in Greece was through a canonical marriage, but later a hybrid approach was adopted, and both civil and religious marriages are considered legally valid.[28] Unlike German law, American law does not require a civil marriage. A religious institution issues a religious marriage certificate, for which a special license is required.[29] As for the Georgian approach, it is too rigid. I believe that religious marriage should acquire legal significance. I think the American approach to this issue is fair.

2. FOREIGN PRACTICE AND COMPARATIVE REVIEW

As for international practice, inheritance rights are regulated differently in the case of unregistered marriages. It is worth noting that in some jurisdictions the legal system recognizes de facto cohabitation (so-called "common-law marriage" or "cohabitation"). Unregistered partners may have certain inheritance rights when they have lived together for a certain period and meet other criteria. For example, in the UK, an unregistered partner has the right to go to court and file an inheritance claim. To do this, he must provide evidence that they lived together as a family and were financially dependent on their deceased partner.[30]

In New Zealand, in the case of unregistered cohabitation, partners acquire certain inheritance rights if they have lived together for at least 3 years. Their relationship is considered a "de facto" relationship, which grants them rights similar to those of a registered marriage.

Specific rights and claims depend on the length of the relationship and other circumstances. The rules for the distribution of prop-

26 Constitutional Court of Georgia. Minutes of 28.05.2019 case #2/9/1351 <https://www.matsne.gov.ge/ka/document/download/4587694/0/ge/pdf> [Last seen: 20.01.2025].

27 Roberts, G. (2011). State and Church in the Member States of the European Union. Translation of the 2nd ed. p. 106.

28 Papastatis, K. (2011). State and Church in the Member States of the European Union. 2nd ed. translation. p. 152.

29 Waldle, L.D. (2010). Marriage and Religious Liberty: Comparative Law Problems and Conflict of Law Solutions. Journal of law&family studies. Vol. 12. p. 327.

30 United Kingdom. Inheritance (Provision for Family and Dependants) Act. (Inheritance (Provision for Family and Dependants) Act 1975). <https://www.legislation.gov.uk/ukpga/1975/63> [Last seen: 07.03.2025].

erty in the event of the death of a partner are regulated by the Relationships Property Act 2001.[31] European court decisions are the best example for regulating this issue. The state of Georgia is a party to the Convention on Human Rights and Fundamental Freedoms; therefore, it has a kind of obligation to reflect all new approaches at the national (legislative or judicial) level. Just signing is not enough and it is necessary to check other prerequisites as well. Johnston and Others v. Ireland.[32] The European Court of Human Rights explained that the plaintiffs: Roy and Janice Johnston, have been living together for 15 years, their relationship was established outside of marriage, and they have a child together. They are covered by Article 8 of the Convention and are part of the term "family", and therefore they are entitled to protection under this Article. One of the important decisions, based on its content, is Kroon and Others v.

The Netherlands, in which the court explained that it is possible to have a so-called "de facto" family union, when the main thing is not necessarily living together, but also other essential criteria. In this decision, the court defined having children together as such an essential factor.[33] In the court decision X, Y, and Z v. The United Kingdom (X, Y, and Z v. The United Kingdom), the concept of "family life" was clarified and marriage cannot be the only basis for creating a family. Other objective circumstances are generally considered to be "family life", such as living together for a long time, obligations arising towards each other, mutual support, and having children together.[34] One of the first decisions, Marckx v. Belgium,[35] explains that, if the relevant criteria are met, de facto cohabitation is the basis for family cohabitation, which gives rise to the right to inherit. The Georgian judicial body has adopted several decisions, which include quotations or various explanations, using specific precedents of the European Court.[36] The European Court of Human Rights explains that a family is not based solely on marriage and family life should not be defined based on the existence of civil registration, so it is unclear why Georgian legislation holds that only a registered marriage gives rise to rights and obligations, including the right to inherit.

CONCLUSION

In conclusion, it can be said: that based on the Georgian legislative approach, only through a registered marriage does a spouse acquire the right to be an heir. Unregistered multi-year de facto marriage should allow for the emergence of rights such as inheritance. The fact that a marriage is not registered should not be used as a basis for denying the surviving spouse the right to inherit the deceased's estate. It is necessary to establish and evaluate the family relationship between them and have the court establish the fact of marriage. The rights of registered and unregistered marriages should be equalized in terms of procedure, and an amendment should be made to the Civil Procedure Code, which would state that a judge can establish the fact of

31 New Zealand. (2001). Property (Relationships) Act 1976 <https://www.legislation.govt.nz/act/public/1976/0166/latest/whole.html> [Last seen: 07.03.2025].

32 European Court of Human Rights (18.12.1986). Judgment in the case of Johnston and Others v Ireland No. 9697/82 <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57508%22]}> [Last seen: 05.12.2024].

33 European Court of Human Rights (27.10.1994). Judgment in the case of Kroon and others v. The Netherlands No. 18535/91 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008ebe1> [Last seen: 18.12.2024].

34 European Court of Human Rights (22.04.1997). Judgment in the case of X, Y and Z v. The United Kingdom No. 21830/93 <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-58032%22]}> [Last seen: 11.11.2024].

35 European Court of Human Rights (13.06.1979). Judgment in the case of Marckx v. Belgium No. 6833/74 <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-57534%22]}> [Last seen: 01.11.2024].

36 Korkelia, K. (2007). Towards the integration of the European Court: the European Convention on Human Rights and the experience of Georgia. p. 74.

marriage (and not just the fact of marriage registration, which is essentially different). Once the court decides and establishes the fact of marriage for a couple in an unregistered marriage, in accordance with the Civil Code, the parties will be assigned the rights and obligations that would exist in the event of a registered marriage, including the right to inheritance. It would be appropriate if Georgian legislation also considered the American approach. In reality, a religious marriage certificate and a civil marriage certificate have the same content and purpose, therefore, I believe that these two documents of the same style should be legally equalized, which will lead to the perfection of the ranks of legal heirs. This opinion is also supported by the precedents of the European Court of Human Rights. I believe that any legislative norm should be maximally tailored to the individual and justice, such an approach would be fairer. If a person, due to their religious or other beliefs, does not wish to register a marriage as provided for by civil law, they should not be deprived of the rights and obligations they would have had if registered. The protection of human rights is an ongoing process, and approaches require renewal to perfect the ranks of legal heirs. The legal equalization of registered and unregistered marriages will not harm the state's interests, and people who have been connected by family relationships for years will be allowed to gain rights, including inheritance rights.

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კანონისმიერი მემკვიდრეების რიგების სრულყოფის საკითხები ქართულ კანონმდებლობაში

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აბსტრაქტი

სტატია შეეხება კანონისმიერი მემკვიდრეების რიგების სრულყოფის საკითხს, ქორწინების რეგისტრაციის მნიშვნელობასა და მისი ნამდვილობის წინაპირობებს სამკვიდროს მიღების დროს. ქართულ რეალობაში ხშირად უგულებელყოფენ კანონს, მეუღლეები დაქორწინების დროს არ მიმართავენ კანონმდებლობით დადგენილი წესით ქორწინების ოფიციალურ რეგისტრაციას. ქორწინების რეგისტრაცია სახელმწიფო კომპეტენციის ფარგლებს მიეკუთვნება. წლების განმავლობაში მეუღლეები ფაქტობრივ თანაცხოვრებაში იმყოფებიან, ჰყავთ საერთო შვილები, ეწევიან საერთო მეურნეობას, მაგრამ ვინაიდან ისინი არ იმყოფებიან რეგისტრირებულ ქორწინებაში, ერთ-ერთი მეუღლის გარდაცვალების შემთხვევაში მეორე მეუღლე ვერ ხდება მისი მემკვიდრე, სამკვიდროს იღებენ გარდაცვლილი პირის შვილები ან სხვა შემდგომი რიგის ნათესავები და ამ დროს, ცოცხლად დარჩენილი მეუღლე რჩება ქონების გარეშე, რაც, ბუნებრივია, ადამიანებში დიდი უსამართლობის განცდას იწვევს. აღნიშნული საკითხი მემკვიდრეობის რიგების სრულყოფაზე საუბრისას ერთ-ერთ მნიშვნელოვან და პრაქტიკაში გავრცელებულ პრობლემას წარმოადგენს. უნდა ითქვას, თუ რაოდენ დიდი მნიშვნელობა აქვს ქორწინების რეგისტრაციას მეუღლეთა შორის უფლებებისა და მოვალეობების წარმო-

გურანდა მისაბიშვილი

შობისათვის, აგრეთვე იმ განსაკუთრებით მნიშვნელოვანი უფლებისათვის, რომელსაც მემკვიდრედ ყოფნის უფლება ეწოდება. სტატიაში განხილულია კანონისმიერი მემკვიდრეების რიგების სრულყოფის მიზნით მეუღლეთა ფაქტობრივი თანაცხოვრებისა და რეგისტრირებული ქორწინების გათანაბრების გზები.

საკვანძო სიტყვები: სამკვიდრო, კანონისმიერი, ქორწინება, რეგისტრაცია, მეუღლეები, თანაცხოვრება

შესავალი

ჯერ კიდევ რომაელი იურისტები საუბრობდნენ, რომ ქორწინებასთან დაკავშირებული საკითხები დიდი სიზუსტით უნდა მოწესრიგდეს.[1] რომაული სამართლის განვითარება საფუძვლად უდევს ევროპული სამართლის დიდ ნაწილს. ძველი ქართული სამართალი რელიგიის გავლენას განიცდიდა და ქორწინებას განმარტავდა, როგორც ოჯახის შექმნისა და შთამომავლობის მიზნით ქალისა და მამაკაცის ურთიერთკავშირს.[2] თანამედროვე ქართული სამართლის მიხედვით, ქორწინების რეგისტრაციის შემდეგ პირებს წარმოეშობათ სამართლებრივი უფლებები და ვალდებულებები.[3] არარეგისტრირებული ოჯახის შექმნა შესაძლებელია პირთა ფაქტობრივი თანაცხოვრებით, მაგრამ ტერმინი „ქორწინება" პირებს რეგისტრაციას ავალდებულებს. აქვე ისმის კითხვა – რა მნიშვნელობა ენიჭება ქორწინების რეგისტრაციას? სახელმწიფოს მიერ დადგენილია, რომ ქორწინების სამართლებრივი ნამდვილობისათვის აუცილებელია სამოქალაქო რეგისტრაცია. ქართული სასამართლო და სანოტარო პრაქტიკის ანალიზის საფუძველზე უნდა ითქვას, რომ განსაკუთრებულად ხშირად ქორწინების რეგისტრაციის პრობლემები თავს იჩენს ერთ-ერთი მეუღლის გარდაცვალების შემდეგ სამემკვიდრეო საქმის წარმოების დროს. თუკი წყვილი რეგისტრირებულ ქორწინებაში არ იმყოფება, ისინი კანონმდებლობის საფუძველზე ერთმანეთის მემკვიდრეებად არ ითვლებიან, რაც კანონისმიერი მემკვიდრეების რიგების სრულყოფის საკითხებთან მიმართებით გარკვეულ წინააღმდეგობებს წარმოშობს.

1. კანონისმიერი მემკვიდრეების რიგების სრულყოფის საკითხები

სამოქალაქო აქტების შესახებ კანონის 48-ე მუხლის საფუძველზე, შესაბამისი ორგანოს მიერ დადგენილი წესებით ხდება ქორწინების რეგისტრაცია.[4] საქართველოს სამოქალაქო საპროცესო კოდექსის 312-ე მუხლის მეორე ნაწილის „გ" ქვეპუნქტის მიხედვით, სასამართლო უფლებამოსილია, დაადასტუროს ქორწინების რეგისტრაციის ფაქტი.[5] უნდა გაიმიჯნოს, რომ უდავო წარმოების წესით სასამართლო მხოლოდ ადგენს ქორწინების რეგისტრაციის ფაქტს. იგი არ არის უფლებამოსილი, რომ რეგისტრირებულ ქორწინებას გაუთანაბროს თანაცხოვრება.[6] საქართველოს უზენაესმა სასამართლომ განმარტა, რომ ქორწინების ფაქტი დგინდება მტკიცებულებათა ერთობლიობით.[7] ქორწინება, სამოქალაქო კოდექსის 1107-ე მუხლის შესაბამისად, ორ პირობას შეიცავს: საქორწინო ასაკსა და დასაქორწინებელ პირთა თანხმობას.[8] უზენაესმა სასამართლომ განმარტა, რომ ქორწინების ოფიციალურ რეგისტრაციამდე

1 *მეტრეველი, ვ.* რომის სამართალი (საფუძვლები). გვ. 101.

2 *მეტრეველი, ვ.* ქართული სამართლის ისტორია. გვ. 355.

3 *შენგელია, რ.,& შენგელია, ე.(2019).* საოჯახო და მემკვიდრეობის სამართალი. გვ. 13.

4 იქვე, გვ. 79.

5 სუსგ. №ას-136-466-09 განჩინება (2009, ივლისი 28.) <http://prg.supremecourt.ge/> [ბოლო წვდომა: 22.09. 2024].

6 *შენგელია, რ.,& შენგელია, ე.(2019).* საოჯახო და მემკვიდრეობის სამართალი. გვ. 73.

7 სუსგ. №ას-1153-2019 განჩინება (2019, ნოემბერი 22.) <http://prg.supremecourt.ge/> [ბოლო წვდომა: 22.09. 2024].

8 *შენგელია, რ.,& შენგელია, ე.(2019).* საოჯახო და მემკვიდრეობის სამართალი. გვ. 58.

მეუღლეთა შორის არ წარმოიშობა სხვადასხვა სახის უფლებები და მოვალეობები, მათ შორის, არც საერთო ქონების[9]. არარეგისტრირებული (ფაქტობრივი) ქორწინების დროს მეუღლეთა უფლებრივ მდგომარეობაზე საუბრისას უნდა აღინიშნოს, რომ ქართული სამართლის მიხედვით, სამოქალაქო უფლების წარმოშობის საწინდარს არ წარმოადგენს ფაქტობრივი თანაცხოვრება.[10] ხშირად წყვილი მხოლოდ რელიგიური ქორწინებით (ჯვრისწერით) შემოიფარგლება და ქორწინების რეგისტრაციას საჭიროდ არ თვლის.

ქართულ რეალობაში ხშირია ისეთი შემთხვევები, როდესაც წყვილი წლების განმავლობაში ერთად ცხოვრობს, ეწევა საერთო მეურნეობას, ჰყავს შვილები, მაგრამ ერთ-ერთი მეუღლის გარდაცვალების შემთხვევაში, მეორე მეუღლე მისი მემკვიდრე ვერ ხდება[11]. საქართველოს სისხლის სამართლის კოდექსის მე-11[1] მუხლში ვკითხულობთ, რომ ამ კანონის მიზნებისთვის ოჯახის წევრად ითვლება არარეგისტრირებულ ქორწინებაში მყოფი პირიც, თუკი ისინი ერთად ეწევიან საოჯახო მეურნეობას. ამ ჩანაწერით უფრო ბუნდოვანი ხდება ფაქტობრივი ქორწინების სამართლებრივი ბუნება, რადგანაც, სისხლის სამართლებრივი მიზნებიდან გამომდინარე, არარეგისტრირებულ ქორწინებაში მყოფ პირს სხვა სამართლებრივი უფლებები აქვს,[12] ხოლო სამოქალაქო სამართლებრივად კი მას არავითარი უფლება არ გააჩნია.

ისმის კითხვა – თუკი სისხლის სამართლებრივად შეიძლება რეგისტრირებული და არარეგისტრირებული ქორწინების გათანაბრება, რატომ არ შეიძლება მსგავსი მიდგომა სამოქალაქო სამართალში? რადგან ეს ერთი მიზეზი (საერთო საოჯახო მეურნეობა) საკმარისი საფუძველია ფაქტობრივი და რეგისტრირებული ქორწინების სისხლის სამართლის კანონმდებლობისთვის, სამართლიანად შეიძლება ჩაითვალოს, თუკი სამოქალაქო სამართალშიც იქნება იმის შესაძლებლობა, რომ განსაკუთრებულ შემთხვევებშიც რეგისტრირებული და ფაქტობრივი ქორწინებები გათანაბრდეს. პრაქტიკის საფუძველზეც უნდა დარეგულირდეს, თუ რა სახის მტკიცებულება იქნება საჭირო მსგავსი გადაწყვეტილების მისაღებად.

არსებობს რამდენიმე გადაწყვეტილება რეგისტრირებული და ფაქტობრივი ქორწინების გათანაბრების შესახებ,[13] მაგრამ საქმე ბოლომდე ვერცერთ შემთხვევაში ვერ მივიდა. ერთ-ერთი ასეთი საქმე ეხებოდა სამკვიდროს მიღებას, სადაც მოსარჩელე ითხოვდა ქორწინების ფაქტის დადგენას, შესაბამისად, სამკვიდროს გახსნასა და მის მიღებას. პირველი ინსტანციის სასამართლომ დააკმაყოფილა სარჩელის მოთხოვნა, იხელმძღვანელა და განმარტა, რომ შესაძლებელი იყო რეგისტრირებული და ფაქტობრივი ცხოვრების გათანაბრება საქართველოს სსრ უმაღლესი პრეზიდიუმის 1944 წლამდე არსებული დადგენილებით. მეორე ინსტანციის სასამართლომ განმარტა, რომ სასამართლოს შეეძლო 1944 წლამდე ფაქტობრივი ქორწინების დადგენა, მაგრამ ამისათვის მეორე მეუღლის მიმართვა იყო საჭირო და არა დაინტერესებული პირის.

ასევე, აღსანიშნავია სასამართლოს გადაწყვეტილება, რომელიც ეხება არარეგისტრირებულ ქორწინებაში შეძენილი ქონების გაყოფას[14]. მიუხედავად არარეგის-

9 შეად. ადამიანის უფლებათა ევროპული სასამართლო (1994, 27 ოქტომბერი). გადაწყვეტილება საქმეზე Kroon and others v. The Netherlands №18535/91. <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008ebe1> [ბოლო წვდომა: 18.12. 2024].

10 *ნინუა, ე.,(2019).* საქართველოს საოჯახო სამართლის ინსტიტუტების ზოგადი დახასიათება. მართლმსაჯულება და კანონი, 3(63), 129.

11 *იოსელიანი, თ.,*(2019). არარეგისტრირებულ ქორწინებაში მყოფი პირების მემკვიდრეობის უფლების სამართლებრივი რეგულირება. მართლმსაჯულება და კანონი, 3(63), 85.

12 სუსგ. №2კ-651აპ.-20 განჩინება (2021, თებერვალი 16.) <http://prg.supremecourt.ge/> [ბოლო წვდომა: 25.09. 2024].

13 სუსგ. №ას-681-637-2010 განჩინება (2011, იანვარი 25.) <http://prg.supremecourt.ge/> [ბოლო წვდომა: 25.09. 2024].

14 თბილისის სააპელაციო სასამართლო.

ტრირებული ქორწინებისა, თბილისის სააპელაციო სასამართლომ ჩათვალა, რომ წყვილის ერთიერთობა გასცდა ფაქტობრივი თანაცხოვრების ფარგლებს და მათი ურთიერთობა გაუთანაბრა რეგისტრირებულ ქორწინებას, მიიღო საინტერესო გადაწყვეტილება, რომლის საფუძველზეც მეუღლემ ფაქტობრივ თანაცხოვრებაში შეძენილ ქონებაზე მოიპოვა თანასაკუთრების უფლება.[15] ამ განჩინების მოტივაციად გამოყენებულია ადამიანის უფლებათა ევროპული სასამართლოს 1994 წელს მიღებული გადაწყვეტილება,[16] რომელიც განმატავს, რომ ისეთი ურთიერთობების არსებობისას, როგორებიცაა საოჯახო და სხვა სახის, შესაძლებელია არარეგისტრირებული ოჯახი, გამონაკლის შემთხვევებში, გაუთანაბრდეს რეგისტრირებულ ქორწინებას. ასეთ დროს ოჯახის წარმოშობისათვის არ არის აუცილებელი სახელმწიფოს მიერ დადგენილი რეგულაციები. უზენაესმა სასამართლომ არ გაიზიარა ეს მოსაზრება და განმარტა, რომ ქონებრივი უფლებების წარმოშობა დამოკიდებულია ქორწინების რეგისტრაციაზე, რომელსაც ერთმნიშვნელოვნად აწესებს სამოქალაქო კოდექსის 1151-ე მუხლი.[17] წყვილთა ინტერესების დაცვის მიზნით უმჯობესი იქნება, თუკი ქართული სასამართლო გასცდება ნორმის ჩარჩოს და აირჩევს სამართლიან გადაწყვეტილებას.

ჯერ კიდევ 1994 წელს განმარტა ადამიანის უფლებათა ევროპულმა სასამართლომ, რომ ქორწინების რეგისტრაცია არ უნდა იყოს გადამწყვეტი იმისათვის, რათა ფაქტობრივი ქორწინება ოჯახად ჩაითვალოს. მთავარია, წყვილთა ქორწინება აკმაყოფილებდეს ისეთ კრიტერიუმებს, როგორებიცაა: საერთო საოჯახო მეურნეობის ერთობლივად გაძღოლა, საერთო შვილების ყოლა, ერთ მისამართზე რეგისტრაცია და ცხოვრება და ა.შ. ქართული კანონმდებლობა ძალიან მკაცრად უდგება გარკვეული უფლებებისა და მოვალეობების, მათ შორის სამემკვიდრეო უფლებების, წარმოშობისათვის ქორწინების რეგისტრაციის ვალდებულებას,[18] რაც მიმაჩნია, რომ უსამართლოა. არიან ქვეყნები, სადაც, მიუხედავად არარეგისტრირებული ქორწინებისა, წყვილებს მაინც ეძლევათ უფლებები, მაგალითად: ნიდერლანდების სამეფოში მოქალაქეებს ენიჭებათ არჩევანის თავისუფლება სამოქალაქო პარტნიორობასა და ქორწინებას შორის, არარეგისტრირებულ ქორწინებაში მყოფი პირებისათვის რეესტრს ადგენს და აწარმოებს მუნიციპალიტეტის სპეციალური სამსახური.[19] რაც შეეხება ამერიკულ მიდგომას, იგი განსხვავებულია შტატების მიხედვით – ზოგიერთ შტატში ქორწინებისათვის რელიგიური მოწმობით გაფორმება საკმარისია, თუმცა ზოგიერთი შტატი არ ცნობს ფაქტობრივ თანაცხოვრებას და ქორწინების ნამდვილობისათვის რეგისტრაციას ითხოვს. ისრაელის კანონმდებლობა ქორწინებისას რელიგიურ ხასიათს ირჩევს და მისი ძალმოსილება უფლებამოსილია განახორციელოს შესაბამისმა იერარქმა. იტალიის მაგალითზე შეიძლება ითქვას, რომ ეს არის ჰიბრიდული მოდელი, სადაც მოქმედებს როგორც რელიგიური, ასევე, სამოქალაქო ქორწინება.

საქართველოში, მოქმედი კანონმდებლობის თანახმად, არ არსებობს ისეთი ბერკეტი, რომელიც უფლებრივად გაუთანაბრებს ფაქტობრივ (არარეგისტრირებულ ქორწინებას) რეგისტრირებულ ქორწინე-

№2ბ/2913-15 განჩინება. <http://www.tbappeal.court.ge/?category=g> [ბოლო წვდომა: 10.10. 2024].

15 *იოსელიანი, თ.,* (2019). არარეგისტრირებულ ქორწინებაში მყოფი პირების მემკვიდრეობის უფლების სამართლებრივი რეგულირება. მართლმსაჯულება და კანონი, 3(63), 87.

16 ადამიანის უფლებათა ევროპული სასამართლო (1994, 27 ოქტომბერი). გადაწყვეტილება საქმეზე Kroon and others v. The Netherlands №18535/91. <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008ebe1> [ბოლო წვდომა: 18.12. 2024].

17 სუსგ. №ას-7-7-2016 განჩინება (2016, მარტი 16.) <http://prg.supremecourt.ge/> [ბოლო წვდომა: 25.09. 2024].

18 *იოსელიანი, თ.,* (2019). არარეგისტრირებულ ქორწინებაში მყოფი პირების მემკვიდრეობის უფლების სამართლებრივი რეგულირება. მართლმსაჯულება და კანონი, 3(63), 92.

19 Sumner, I.,& Warendolf, H.(2003). Family law legislation of the Netherlands. p. 245.

ბას. მხოლოდ იმის მითითება, რომ წყვილი არ იმყოფებდა რეგისტრირებულ ქორწინებაში და ამის გამო ის ვერ ხდება გარდაცვლილის მემკვიდრე, უსამართლოა. ქორწინების რეგისტრაციის ფაქტი არ უნდა იყოს ოჯახური ურთიერთობების განმსაზღვრელი, ამას ადასტურებს, ასევე, ადამიანის უფლებათა ევროპული სასამართლოს პრეცედენტებიც.

ხშირია შემთხვევები, როდესაც წყვილის ქორწინების რეგისტრაცია ხდება არა ოჯახის შექმნის მიზნით, არამედ ფიქტიურად, ერთ-ერთი ასეთი მაგალითია მოქალაქეობის მიღების მიზნით. ასეთ შემთხვევაში, თუკი რომელიმე მემკვიდრე გარდაიცვლება, მეუღლე ხდება მისი პირველი რიგის მემკვიდრე და მას წარმოეშობა სამემკვიდრეო უფლებები, რაც ვფიქრობ, ასევე, უსამართლობაა. აუცილებელია, აღნიშნულ საკითხთან დაკავშირებით არსებობდეს ისეთი შესაძლებლობა, რომელიც დაარეგულირებს ასეთ შემთხვევებს სანოტარო და სასამართლო პრაქტიკაში და შესაძლებლობა ექნება პირს, რომელიც ნამდვილად იმყოფებოდა ქორწინებაში, თუმცა რეგისტრაციის გარეშე, მიაღწიოს სამართლიან შედეგს, შესაბამისად, გახდეს თავისი მეუღლის სრულუფლებიანი მემკვიდრე. განსაკუთრებულ შემთხვევებში მოსამართლეს აქვს ასეთი განმარტების შესაძლებლობა და ამით ის არ დაარღვევს სამართლის ზოგად პრინციპებს.[20]

ანგლოამერიკული (პრეცედენტული) სამართლის ქვეყნებისთვის უფრო მარტივია მსგავსი განმარტებები, ვინაიდან ისინი განმარტებებში მეტად თავისუფლები არიან, განსხვავებით კონტინენტური ევროპის მოსამართლეებისგან. ქართულ სამართალში მინდა გამოვყო საქართველოს სააპელაციო სასამართლოს განჩინება[21], სადაც სამართლიანად არის განმარტებული ოჯახის მნიშვნელობა და მხოლოდ ქორწინების სამოქალაქო რეგისტრაცია არ არის უმთავრესი, რომ წყვილს ოჯახი ეწოდოს. ამგვარი განმარტების დამკვიდრება და მსგავსი მიდგომა პრაქტიკაში, ვფიქრობ, სამართლიან შედეგამდე მიიყვანს წყვილს და შესაბამისად, მათი, როგორც მეუღლეთა, სამემკვიდრეო უფლებების დაცვას. ვფიქრობ, ერთადერთი რეალური გამოსავალი არის ის, რომ დაინტერესებული პირის მიერ საკონსტიტუციო სასამართლოსადმი მიმართვის საფუძველზე სამოქალაქო კოდექსის 1151-ე მუხლი არაკონსტიტუციურად აღიარონ. დაინტერესებულმა პირმა უნდა მიუთითოს რეალური მიზეზი თავისი მოთხოვნიდან გამომდინარე, თავის მხრივ კი საკონსტიტუციო სასამართლო ვალდებულია, შეისწავლოს საქმის გარემოებები და მიიღოს მყარად დასაბუთებული გადაწყვეტილება მუხლის შინაარსის შეცვლასთან დაკავშირებით. დადგინდეს, მუხლი კონსტიტუციის ფარგლებშია თუ ეწინააღმდეგება მის პრინციპებს და შინაარსიდან გამომდინარე, განსაკუთრებულ შემთხვევებში, ადამიანის უფლებათა ევროპული სასამართლოს დასკვნის საფუძველზე არარეგისტრირებული ქორწინება უნდა გათანაბრდეს რეგისტრირებულ ქორწინებასთან, ასევე უმთავრესია, პირზე გადავიდეს ყველა ის უფლება და ვალდებულება, მათ შორის სამემკვიდრეო, რომლებიც ქორწინების რეგისტრაციის შემთხვევაში წყვილს ექნებოდა, რაც, იმავდროულად, გარკვეულწილად მოაწესრიგებს კანონისმიერი მემკვიდრეების რიგების სრულყოფის საკითხებს.

როგორც აღვნიშნეთ, ხშირად მეუღლეები წლების განმავლობაში იმყოფებიან ფაქტობრივ ქორწინებაში, რეგისტრირებული არიან ერთ მისამართზე, ჰყავთ საერთო შვილები, მაგრამ ერთ-ერთი მეუღლის გარდაცვალების შემდეგ ცოცხლად დარჩენილ მეუღლეს ქორწინების რეგისტრაციის არარსებობის გამო ეზღუდება სამკვიდროს მიღების უფლება. აღნიშნულ საკითხზე სასამართლოს მიდგომაც ხისტია და არც გამონაკლისს უშვებს, ეს კი ქართულ რეალობაში არ მუშაობს. შესაბამისად, გადაწყვეტილებებიც კანონიერია, მაგრამ

20 Sumner, I.,& Warendolf, H.(2003). Family law legislation of the Netherlands. p.17

21 თბილისის სააპელაციო სასამართლო. (2020, ივლისი 27.) №2ბ/1156-19 განჩინება <http://www.tbappeal.court.ge/?category=g> [ბოლო წვდომა: 10.10. 2024].

ნაკლებად სამართლიანი. სამოქალაქო კოდექსის 1151-ე მუხლის სიტყვა – „მხოლოდ“ რეგისტრირებული ქორწინება – ზღუდავს ალტერნატივას და, ასევე, უფლებებს, მათ შორის, მეუღლეთა სამემკვიდრეო უფლებების წარმოშობას.

საქართველოს მოქალაქე ციალა პერტიამ, 2018 წლის 12 სექტემბერს, სამოქალაქო კოდექსის 1151-ე მუხლის არაკონსტიტუციურად ცნობის მოთხოვნით კონსტიტუციური სარჩელის საფუძველზე მიმართა საკონსტიტუციო სასამართლოს.[22] მოსარჩელემ აღნიშნა, რომ ის თავის მეუღლესთან ერთად 1985 წლიდან გარდაცვალებამდე (2014 წლამდე) ცხოვრობდა მეუღლის კუთვნილ ბინაში. მათი ქორწინება, მართალია, არ ყოფილა რეგისტრირებული, თუმცა ისინი ცხოვრობდნენ ერთ ოჯახად და ოჯახური ცხოვრების ყველა იმ კრიტერიუმს აკმაყოფილებდნენ, რომელთაც, ასევე, ადამიანის უფლებათა ევროპული სასამართლო განსაზღვრავს. მიუხედავად მითითებული გარემოებებისა, მოსარჩელემ სამკვიდრო ვერ მიიღო. მეუღლის ქონება კი მიიღეს მამკვიდრებლის დამ და ძმამ, რომლებმაც ის გაასხვისეს, შესაბამისად, პირველი ინსტანციის სასამართლომ მეუღლის სახლიდან მოსარჩელის გამოსახლების გადაწყვეტილება მიიღო, მიუხედავად მათი 29-წლიანი თანაცხოვრებისა. აღნიშნული მიდგომა უსამართლობის განცდას იწვევს, ვინაიდან მოსაჩელეს შეეზღუდა კონსტიტუციით აღიარებული მემკვიდრეობის უფლება, რაც დისკრიმინაციულია და ეწინააღმდეგება როგორც კონსტიტუციას, ასევე, ადამიანის უფლებათა კონვენციასა და ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილებებს.

ამ საკითხთან დაკავშირებით კანონმდებლობაში არანაირი გამონაკლისი არ არსებობს. მოსარჩელე უთითებს, რომ ფაქტობრივ თანაცხოვრებაში მყოფ მეუღლეს არ უნდა შეეზღუდოს მემკვიდრედ ყოფნის უფლება არარეგისტრირებული ქორწინების გამო. მნიშვნელოვანი იქნებოდა, დაინტერესებულ პირს კონსტიტუციური სარჩელი შეეტანა სამოქალაქო კოდექსის 1336-ე მუხლის შინაარსთან მიმართებით და მოეთხოვა, რომ მემკვიდრეთა წრის რიგებს დამატებოდა არარეგისტრირებულ ქორწინებაში მყოფი მეუღლეც. ერთ შემთხვევაში საკონსტიტუციო სასამართლომ რადიკალურად განსხვავებული გადაწყვეტილება მიიღო და საქმე არსებით განხილვამდე არც კი მივიდა. 2008 წლის 29 ოქტომბერს საქართველოს საკონსტიტუციო სასამართლომ მიიღო განჩინება, რომლითაც მოქალაქე ლია სურმავას საკონსტიტუციო სარჩელი არ იქნა მიღებული არსებითად განსახილველად[23]. მოსარჩელის – ლია სურმავას განმარტებით, იგი 1993 წლიდან ფაქტობრივ, მაგრამ არარეგისტრირებულ ქორწინებაში იმყოფებოდა მეუღლესთან, რომელიც 2005 წელს გარდაიცვალა და მან ვერ მიიღო სამკვიდრო ქონება. მას მეუღლესთან რელიგიური ქორწინება (ჯვრისწერა) აკავშირებდა, მოსარჩელე ითხოვდა ჯვრისწერის მოწმობის გათანაბრებას სამოქალაქო რეგისტრაციასთან. აღნიშნული მოთხოვნა საკონსტიტუციო სასამართლომ არსებით განხილვაზე არც კი დაუშვა. უნდა აღინიშნოს, რომ დროსთან ერთად იცვლება აღნიშნულ საკითხთან დაკავშირებით გარკვეული მიდგომები და შეხედულებები. რეგისტრირებული და ფაქტობრივი ქორწინების გათანაბრების სამართლებრივ პრობლემასთან დაკავშირებით საკონსტიტუციო სასამართლო სერიოზული გადაწყვეტილების წინაშე დგას. თუკი საკონსტიტუციო სასამართლო ჩათვლის, რომ ნორმა არაკონსტიტუციურია და არ შეესაბამება ადამიანის ძირითად უფლებებს, მაშინ საკანონმდებლო ორგანოს მიერ დასადგენი იქნება ახალი რეგულაციები და საკითხის

22 კონსტიტუციური სარჩელი 2018 წლის 12 სექტემბრის #1351: ,,საქართველოს მოქალაქე ციალა პერტია საქართველოს პარლამენტის წინააღმდეგ“ <https://www.constcourt.ge/ka/judicial-acts?legal=15542> [ბოლო წვდომა: 10.01.2025].

23 კონსტიტუციური სარჩელი 2008 წლის 29 ოქტომბრის #2/8/448: ,,საქართველოს მოქალაქე ლია სურმავა საქართველოს პარლამენტის წინააღმდეგ“ <https://constcourt.ge/ka/judicial-acts?legal=389> [ბოლო წვდომა: 15.01.2025].

სამართლიანად გადაწყვეტის წესი. ნებისმიერი ორი პირის თანაცხოვრება, რა თქმა უნდა, არ უნდა ჩაითვალოს არარეგისტრირებულ (ფაქტობრივ) ქორწინებად, არამედ ეს უნდა იყოს გამყარებული სხვადასხვა კრიტერიუმით, რომლებიც პრაქტიკამ უნდა დაარეგულიროს თითოეულ შემთხვევაში.

საერთაშორისო პრაქტიკაც მოწმობს იმ ფაქტს, რომ სახელმწიფომ არ უნდა ჩააყენოს პირები არათანაბარ პირობებში, მაგალითად, თუკი მემკვიდრეობის უფლება კონსტიტუციით გარანტირებულია, მისი მოპოვებისთვის მხოლოდ რეგისტრირებული ქორწინება არ უნდა იყოს განმსაზღვრელი, რადგანაც შესაძლოა, ფიქტიური ქორწინებითაც სრულიად შემთხვევით პირი გახდეს ვინმეს მემკვიდრე. თუკი საკანონმდებლო ცვლილებების საფუძველზე რეგისტრირებული და ფაქტობრივი (არარეგისტრირებული) ქორწინებები უფლებრივად გაუთანაბრდება ერთმანეთს, მაშინ ქორწინების არსებობის ფაქტი უდავო წარმოების წესით უნდა დაადგინოს აუცილებლად სასამართლომ. აქვე უნდა აღინიშნოს, რომ ქორწინების რეგისტრაციის ფაქტის დადგენა განსხვავებულია არარეგისტრირებული (ფაქტობრივი) ქორწინების ფაქტის დადგენისგან.[24]

თუკი სამოქალაქო კოდექსის 312-ე მუხლს დაემატება ჩანაწერი, რომელიც მოსამართლეს ქორწინების ფაქტის დადგენის შესაძლებლობას მისცემს, დაინტერესებული პირის განცხადებისა და შესაბამისი მტკიცებულებების წარდგენის საფუძველზე, არარეგისტრირებულ ქორწინებას შეიძლება მიენიჭოს იურიდიული სტატუსი და გათანაბრდეს რეგისტრირებულ ქორწინებასთან. მტკიცების ტვირთი ამ შემთხვევაში განმცხადებელზე იქნება, რომელიც შესაძლოა, განსხვავებულიც იყოს.[25] მტკიცებულებად შესაძლოა გამოიყენონ მოწმეთა ჩვენება, საერთო მისამართზე რეგისტრაციის ცნობა, რელიგიური ქორწინების დამადასტურებელი დოკუმენტი (მაგ. ჯვრისწერის მოწმობა), საერთო შვილთა დაბადების მოწმობა და სხვა ნებისმიერი დოკუმენტი, რომლებიც დაეხმარება მხარეს, რათა დაადასტუროს საოჯახო კავშირი არარეგისტრირებულ ქორწინებაში მყოფ მეუღლესთან.

როგორც სტატიაში აღინიშნა, საქართველოს საკონსტიტუციო სასამართლოში განიხილებოდა სარჩელი, რომლის მოთხოვნა იყო ჯვრისწერის (რელიგიური ქორწინების) სამართლებრივი გათანაბრება სამოქალაქო ქორწინებასთან, რაზეც მოსარჩელეს ეთქვა უარი.[26] რაც შეეხება რელიგიური ქორწინების საკითხებს, 1920 წლის 3 დეკემბრის კანონით – „მოქალაქეთა მდგომარეობის აქტების რეგისტრაციის შესახებ“ – რელიგიურ ქორწინებას იურიდიული ძალა შეუწყდა და ქორწინების ნამდვილობისთვის აუცილებელია მისი რეგისტრაცია. საქართველოში სამოქალაქო და რელიგიური ქორწინებების გათანაბრებას მრავალრიცხოვანი მომხრე და მოწინააღმდეგე ჰყავს. ბევრ ევროპულ ქვეყანაში რელიგიური ქორწინება გათანაბრებულია სამოქალაქო ქორწინებასთან. მართალია, ქორწინების კანონიკური და სამოქალაქო-სამართლებრივი გაგება განსხვავდება ერთმანეთისგან, მაგრამ თვითონ დოკუმენტი, ერთი მხრივ, რელიგიური ქორწინების მოწმობა და, მეორე მხრივ, სამოქალაქო ქორწინების მოწმობა, შინაარსობრივად იდენტურია, ვინაიდან ორივე დოკუმენტში არის ერთნაირი სტილის რეკვიზიტები, მოწმეების (რელიგიურად – მეჯვარეების) ხელმოწერა. თუკი რელიგიური და სამოქალაქო ქორწინებები (რეგისტრირებული ქორწინება) უფლებრივად გათანაბრდება, აუცილებელია, რომ არ დაირღვეს სეკულარიზმის პრინციპი და მხოლოდ ერთი რელიგიისთვის არ იყოს ეს პრივილეგია.

განსხვავებულია მსოფლიოს სხვადას-

24 *შენგელია, რ.,& შენგელია, ე.(2019).* საოჯახო და მემკვიდრეობის სამართალი. გვ.73.

25 *გაგუა, ი.,(2012).* მტკიცების ტვირთი სამოქალაქო საპროცესო სამართალში. სადისერტაციო ნაშრომი. გვ. 99.

26 საქართველოს საკონსტიტუციო სასამართლო. 2019 წლის 28 მაისის #2/9/1351 საოქმო ჩანაწერი: <https://www.matsne.gov.ge/ka/document/download/4587694/0/ge/pdf> [ბოლო წვდომა: 20.01.2025]

ხვა ქვეყნის მიდგომა: არიან ქვეყნები, სადაც რელიგიური ქორწინება არ არის აკრძალული, მაგრამ სამოქალაქო რეგისტრაციის დოკუმენტი წარმოშობს იურიდიულ უფლებას. გერმანიაში რელიგიური ქორწინების რიტუალები კი სრულდება, მაგრამ რელიგიური დაწესებულების მიერ გაცემული ქორწინების მოწმობა არ არის ვალიდური, ქორწინება მხოლოდ სახელმწიფოს მიერ დადგენილი წესებით ხორციელდება.[27] საბერძნეთში 1982 წლამდე ქორწინების ერთადერთი გზა მხოლოდ კანონიკური ქორწინება იყო, თუმცა მოგვიანებით ჰიბრიდული მიდგომა ამოქმედდა და როგორც სამოქალაქო, ასევე, რელიგიური ქორწინება სამართლებრივი ძალის მქონედ ითვლება.[28] ამერიკული სამართალი გერმანულისგან განსხვავებით არ აწესებს სამოქალაქო ქორწინების ვალდებულებას. რელიგიური დაწესებულება გასცემს რელიგიური ქორწინების მოწმობას, რისთვისაც აუცილებელია სპეციალური ლიცენზიის აღება[29]. რაც შეეხება ქართულ მიდგომას, იგი მეტისმეტად ხისტია. მიმაჩნია, რომ იურიდიული მნიშვნელობა უნდა შეიძინოს რელიგიურმა ქორწინებამ. ვფიქრობ, ამ საკითხისადმი ამერიკული მიდგომა სამართლიანია.

2. უცხოური პრაქტიკა და შედარებითი მიმოხილვა

რაც შეეხება საერთაშორისო პრაქტიკას, სამემკვიდრეო უფლებები არარეგისტრირებული ქორწინების შემთხვევაში განსხვავებულად რეგულირდება. აღსანიშნავია, რომ ზოგიერთ იურისდიქციაში სამართლებრივი სისტემა აღიარებს ფაქტობრივ თანაცხოვრებას (ე.წ. “common-law marriage” ან “cohabitation”). არარეგისტრირებულ პარტნიორებს შეიძლება ჰქონდეთ გარკვეული სამემკვიდრეო უფლებები, როდესაც ისინი გარკვეული პერიოდის განმავლობაში ერთად ცხოვრობენ და აკმაყოფილებენ სხვა კრიტერიუმებს. მაგალითად, დიდ ბრიტანეთში არარეგისტრირებულ პარტნიორს უფლება აქვს მიმართოს სასამართლოს და წარუდგინოს მემკვიდრეობაზე პრეტენზიის განაცხადი. ამისთვის მან მტკიცებულებად უნდა წარადგინოს, რომ ისინი ერთად ცხოვრობდნენ, როგორც ოჯახი და იგი ფინანსურად დამოკიდებული იყო გარდაცვლილ პარტნიორზე.[30]

ახალ ზელანდიაში არარეგისტრირებული თანაცხოვრების შემთხვევაში, პარტნიორებს წარმოეშობათ გარკვეული სამემკვიდრეო უფლებები იმ შემთხვევაში, თუკი, მინიმუმ 3 წლის განმავლობაში ცხოვრობდნენ ერთად. მათი ურთიერთობა ითვლება “de facto” ურთიერთობად, რის საფუძველზეც მათ ენიჭებათ რეგისტრირებული ქორწინების მსგავსი უფლებები.

კონკრეტული უფლებები და პრეტენზიები დამოკიდებულია ურთიერთობის ხანგრძლივობასა და სხვა გარემოებებზე. ქონების განაწილების წესს პარტნიორის გარდაცვალების შემთხვევაში არეგულირებს 2001 წლის ურთიერთობათა ქონების აქტი.[31] აღნიშნული საკითხის მოწესრიგების მიზნით ევროპული სასამართლო გადაწყვეტილებები საუკეთესო მაგალითია. საქართველოს სახელმწიფო მიერთებულია ადამიანის უფლებათა და ძირითად თავისუფლებათა კონვენციას, შესაბამისად, მას ერთგვარი ვალდებულებაც აქვს, რომ ეროვნულ (საკანონმდებლო თუ სასამართლო) დონეზე ასახოს ყველა ახალი მიდგომა,

27 *რობერსი, გ.* (2011). სახელმწიფო და ეკლესია ევროკავშირის წევრ ქვეყნებში. მე-2 გამოცემის თარგმანი, გვ. 106.

28 *პაპასტატისი, კ. (2011).* სახელმწიფო და ეკლესია ევროკავშირის წევრ ქვეყნებში. მე-2 გამოცემის თარგმანი, გვ 152.

29 *Waldle, L.D.* (2010). marriage and religious liberty: comparative law problems and conflict of law solutions. Journal of law&family studies. Vol12, P. 327.

30 დიდი ბრიტანეთი. მემკვიდრეობის (ოჯახისა და დამოკიდებულ პირთა უზრუნველყოფის) აქტი. (Inheritance (Provision for Family and Dependants) Act 1975) <https://www.legislation.gov.uk/ukpga/1975/63> [ბოლო წვდომა: 07.03.2025].

31 ახალი ზელანდია, (2001). ქონებრივი ურთიერთობის აქტი (Property (Relationships) Act 1976). <https://www.legislation.govt.nz/act/public/1976/0166/latest/whole.html> [ბოლო წვდომა: 07.03.2025].

მხოლოდ ხელმოწერა არ არის საკმარისი და აუცილებელია შემოწმდეს სხვა წინაპირობებიც. ამ მხრივ საინტერესოა ჯონსტონთა საქმე ირლანდიის წინააღმდეგ (Johnston and Others v. Ireland).[32] ადამიანის უფლებათა ევროპულმა სასამართლომ განმარტა, რომ მოსარჩელეები: როი და ჯენის ჯონსტონები ერთად ცხოვრობენ 15 წლის განმავლობაში, მათი ურთიერთობა ქორწინების გარეშე ჩამოყალიბდა, ჰყავთ საერთო შვილი. მათზე ვრცელდება კონვენციის მერვე მუხლი და ისინი მოიაზრებიან ტერმინ „ოჯახის“ ქვეშ, შესაბამისად, მათ უფლება აქვთ, იყვნენ დაცულნი მოცემული მუხლის მიხედვით.

ერთ-ერთი მნიშვნელოვანი გადაწყვეტილებაა თავისი შინაარსიდან გამომდინარე, ბ. კრონი და სხვები ნიდერლანდების წინააღმდეგ (Kroon and Others v. The Netherlands)[33], რომლის მიხედვითაც სასამართლომ განმარტა, რომ შესაძლებელია ე.წ. „დე-ფაქტო“ ოჯახური კავშირის არსებობა, როდესაც მთავარია არა მაინცდამაინც ერთად ცხოვრება, არამედ სხვა არსებითი კრიტერიუმებიც, აღნიშნული გადაწყვეტილებით ასეთ არსებით ფაქტორად სასამართლომ განსაზღვრა საერთო შვილების ყოლა. სასამართლო გადაწყვეტილებით X, Y და Z გაერთიანებული სამეფოს წინააღმდეგ (X, Y and Z v. The United Kingdom)[34] ცნება „ოჯახური ცხოვრება“ (family life) განმარტებულია და არ შეიძლება მხოლოდ ქორწინება იყოს საფუძველი ოჯახის შექმნისა, არსებობს სხვა ობიექტური გარემოებებიც, როგორებიცაა: ხანგრძლივი დროით განმავლობაში ერთად ცხოვრება, ერთმანეთის მიმართ წარმოშობილი ვალდებულებები, ურთიერთრჩენა, საერთო შვილების ყოლა-რაც საერთო ჯამში მიიჩნევა „ოჯახურ ცხოვრებად“. ერთ-ერთი პირველი გადაწყვეტილება მარქსი ბელგიის წინააღმდეგ (Marckx v. Begium)[35] განმარტავს, რომ შესაბამისი კრიტერიუმების არსებობის შემთხვევაში ფაქტობრივი თანაცხოვრება არის საფუძველი ოჯახური თანაცხოვრებისა, რაც წარმოიშობს მემკვიდრედ ყოფნის უფლებას. საქართველოს სასამართლო კორპუსს არაერთი გადაწყვეტილება აქვს მიღებული, სადაც მოყვანილია ციტატა თუ სხვადასხვა განმარტება, სადაც იყენებენ ევროპული სასამართლოს კონკრეტულ პრეცედენტებს.[36] ადამიანის უფლებათა ევროპული სასამართლო განმარტავს, რომ ოჯახი არ არის მხოლოდ ქორწინებაზე დამყარებული და ოჯახური ცხოვრება არ უნდა განიმარტოს მხოლოდ სამოქალაქო რეგისტრაციის არსებობის მიხედვით. მაშინ გაუგებარია, რატომ არის ქართულ კანონმდებლობაში მიდგომა, რომ მხოლოდ რეგისტრირებული ქორწინება წარმოშობს უფლებებსა და მოვალეობებს, მათ შორის მემკვიდრედ ყოფნის უფლებას.

დასკვნა

დასკვნის სახით შეიძლება ითქვას: ქართული საკანონმდებლო მიდგომის საფუძველზე მხოლოდ რეგისტრირებული ქორწინებით იძენს მეუღლე მემკვიდრედ ყოფნის უფლებას. არარეგისტრირებული

32 ადამიანის უფლებათა ევროპული სასამართლო (1986, 18 დეკემბერი). გადაწყვეტილება საქმეზე Johnston and Others v Ireland №9697/82 <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57508%22]}> [ბოლო წვდომა: 05.12. 2024].

33 ადამიანის უფლებათა ევროპული სასამართლო (1994, 27 ოქტომბერი). გადაწყვეტილება საქმეზე Kroon and others v. The Netherlands №18535/91. <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008ebe1> [ბოლო წვდომა: 18.12. 2024.

34 ადამიანის უფლებათა ევროპული სასამართლო (1997, 22 აპრილი). გადაწყვეტილება საქმეზე X, Y and Z v. The United Kingdom №21830/93 <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-58032%22]}> [ბოლო წვდომა: 11.11.2024].

35 ადამიანის უფლებათა ევროპული სასამართლო (1979, 13 ივნისი). გადაწყვეტილება საქმეზე Marckx v. Begium №6833/74. <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-57534%22]}> [ბოლო წვდომა: 01.11.2024].

36 *კორკელია, კ.(2007).* ევროპული სასამართლოს ინტეგრაციისაკენ: ადამიანის უფლებათა ევროპული კონვენცია და საქართველოს გამოცდილება. გვ. 74.

მრავალწლიანი ფაქტობრივი ქორწინება უნდა იძლეოდეს შესაძლებლობას ისეთი უფლების წარმოშობისა, როგორიცაა მემკვიდრეობა. ქორწინების დაურეგისტრირებლობა არ უნდა დაედოს საფუძვლად, რომ ცოცხლად დარჩენილ მეუღლეს უარი ეთქვას გარდაცვლილის სამკვიდროს მიღებაზე. აუცილებელია დადგინდეს და შეფასდეს მათ შორის ოჯახური კავშირი და სასამართლომ დაადგინოს ქორწინების ფაქტი. რეგისტრირებული და არარეგისტრირებული ქორწინებები უფლებრივად უნდა გათანაბრდეს საპროცესო კუთხით, უნდა შევიდეს ცვლილება სამოქალაქო საპროცესო კოდექსში, სადაც დაიწერება, რომ მოსამართლეს შეუძლია დაადგინოს ქორწინების ფაქტი (და არა მხოლოდ ქორწინების რეგისტრაციის ფაქტი, რაც არსებითად განსხვავდება). როგორც კი სასამართლო მიიღებს გადაწყვეტილებას და არარეგისტრირებულ ქორწინებაში მყოფ წყვილს დაუდგენს ქორწინების ფაქტს, სამოქალაქო კოდექსის შესაბამისად მხარეებს დაეკისრებათ ის უფლებები და მოვალეობები, რომლებიც ქორწინების რეგისტრაციის შემთხვევაში იარსებებდა, მათ შორის მემკვიდრეობის უფლებაც. უპრიანი იქნება, თუკი ქართული კანონმდებლობაც ამერიკულ მიდგომას გაითვალისწინებს. რეალურად, რელიგიური ქორწინების მოწმობა და სამოქალაქო ქორწინების მოწმობა ერთი და იმავე შინაარსისა და მიზნის მატარებელია, ამიტომ მიმაჩნია, რომ ეს ორი ერთნაირი სტილის დოკუმენტი უფლებრივად უნდა გათანაბრდეს, რაც გამოიწვევს კანონისმიერი მემკვიდრეების რიგების სრულყოფას. ამ მოსაზრებას ადამიანის უფლებათა ევროპული სასამართლოს პრეცედენტებიც ამყარებს. მიმაჩნია, რომ ნებისმიერი საკანონმდებლო ნორმა მაქსიმალურად უნდა იყოს მორგებული პიროვნებასა და სამართლიანობაზე. ამგვარი მიდგომა იქნება უფრო სამართლიანი. თუკი ადამიანს თავისი რელიგიური თუ სხვა შეხედულების მიხედვით არ სურს სამოქალაქო კანონმდებლობით გათვალისწინებული ქორწინების რეგისტრაცია, ის არ უნდა იქნეს მოკლებული იმ უფლებებსა და მოვალეობებს, რომლებიც მას ექნებოდა რეგისტრაციის შემთხვევაში. ადამიანის უფლებათა დაცვა მუდმივი პროცესია და მიდგომები განახლებას მოითხოვს კანონისმიერი მემკვიდრეების რიგების სრულყოფის მიზნით. რეგისტრირებული და არარეგისტრირებული ქორწინებების სამართლებრივი გათანაბრებით სახელმწიფო ინტერესი არ დაზიანდება. იმ ადამიანებს, რომელთაც წლობით საოჯახო ურთიერთობები აკავშირებდათ, შესაძლებლობა მიეცემათ, მოიპოვონ უფლებები, მათ შორის სამემკვიდრეო უფლებები.

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AGRICULTURAL CRIMES: A THREAT TO THE HUMAN RIGHT TO FOOD – THE CASE OF AGROTERRORISM

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ABSTRACT

Several biological terrorist incidents targeting the agricultural sector and food processing and distribution systems have significantly heightened global concerns about food security. This situation has intensified the focus on protecting the food supply chain, which has become an attractive target for bioterrorists. Such acts constitute a clear violation of the human right to food, particularly in countries that heavily depend on agriculture to meet their nutritional needs. The right to food is a fundamental human right, affirming that every individual is entitled to sufficient and nutritious food, free from discrimination. When agriculture is subjected to terrorist attacks, both the availability and the quality of food are jeopardized. Agro-terrorism can have severe repercussions on public health, the economy, and political stability, particularly in the absence of national policies and international legal frameworks imposing criminal penalties on biological attacks against non-human targets. This situation necessitates the establishment of an international monitoring system, the strengthening of preventive measures, and efforts to counter agricultural sabotage, all aimed at mitigating the negative impacts of agro-terrorism on the right to food and nutrition. Moreover, it is crucial to intensify efforts to ensure accountability and prevent the use of biological weapons, as human rights must be prioritized more than ever.

KEYWORDS: Right to food, Agro-crimes, Agro-terrorism, Agriculture, Food security

INTRODUCTION

Agro-crimes and agro-terrorism are two distinct terms. Agro-crimes refer to illegal activities that impact the agricultural sector, such as tampering with agricultural products, pesticide fraud, or deliberately damaging agricultural resources, all of which harm the agricultural economy or the environment. In contrast, agro-terrorism involves the use of biological weapons or deliberate attacks targeting crops or livestock to cause chaos or threaten food security. These attacks are often politically or socially motivated, seeking to exert influence by disrupting agriculture. In essence, agro-terrorism is a specific type of agro-crime but is characterized by its particular goals and methods. The threat of biological terrorism looms larger than ever, especially with growing concerns about anthrax, smallpox, and plague, as well as reports suggesting that some of the hijackers involved in the attacks on the World Trade Center and the Pentagon had a special interest in crop-duster planes, which could potentially be used to spread aerosolized diseases. This situation has led some countries to strengthen their defenses against biological terrorism.

Despite the seriousness of this issue, many nations have not paid sufficient attention to agricultural biological warfare or bioterrorism in general. There has also been little focus on the role and responsibilities of both the public and private sectors in deterring and responding to potential attacks. Few countries fully appreciate the dangers posed by biological terrorist attacks against the food and agricultural infrastructure, as attention is often directed solely toward terrorism targeting “civilian objectives”.

Agriculture is a critical infrastructure for many nations worldwide. As one of the most productive and vital sectors globally, agriculture has made officials recognize that the vast network of food and fiber production, processing, distribution, and retailing is a potential target for hostile actors using biological agents for political, economic, or criminal purposes. Even the mere threat of such an attack can undermine consumer confidence, disrupt commodity markets, and cause significant economic havoc.

This paper explores the nature and threat of agro-terrorism and examines possible solutions for addressing this threat and mitigating the impact of biological attacks on food and agricultural infrastructure. The focus of this paper is particularly on agro-terrorism and its negative impacts on the human right to food.

Thus, the central research question is: To what extent can agro-terrorism affect the right to food? And could this impact extend to other areas?

To answer this question, the study employs a descriptive-analytical method by exploring agro-terrorism and the right to food, as well as examining the implications of agro-terrorism on food security and the right to food.

The study will be divided into two sections. The first section will cover the general framework of agro-terrorism and the right to food, while the second section will address the impacts of agro-terrorism on the right to food.

1. THE GENERAL FRAMEWORK OF AGRO-TERRORISM AND THE RIGHT TO FOOD

In the main body of the text, the content of the issue is presented, where an important place is given to the description of the research and analysis of outcomes, the process of research itself, and coherent analysis, according to which theoretical conclusions, interim results and overall outcomes are shown. The main part of the text is divided into structures (chapter/subchapter, paragraph, etc.), which makes the article easier to understand.

Agro-terrorism, as a form of biological terrorism, poses significant risks to human life by causing the death or disease of livestock and crops and threatening the right to food. Agro-terrorism is closely tied to this fundamental human right, as it can lead to clear violations. Negative impacts on agricultural production can result in food insecurity, jeopardizing

individuals' and communities' ability to access sufficient and nutritious food. Therefore, it is essential to study both agro-terrorism and the human right to food.

1.1. Agro-Terrorism

The risk of terrorism targeting plants and animals is heightened by the vulnerability and accessibility of agricultural sites, as well as the ease of obtaining and spreading infectious agents. This form of terrorism involves targeting agriculture through the use of harmful viruses or bacteria, leading to the destruction of agricultural production and environmental damage.

1.1.1. Historical Perspective on Agro-Terrorism

Biological warfare is not a modern phenomenon. Throughout history, there have been numerous examples of using lethal or incapacitating biological agents against enemies. Two thousand years ago, the Romans threw corpses into enemy wells to poison drinking water supplies.

During the Siege of Caffa in the 14th century, the Tatars catapulted plague-infested corpses into the city, possibly triggering the outbreak of the bubonic plague that swept across medieval Europe, resulting in 25 million deaths. Historians believe that the smallpox epidemic that devastated Native American populations during the French and Indian War was deliberately caused by the British, who distributed smallpox-contaminated blankets to tribes thought to be loyal to the French.[1]

The term "biological terrorism" was coined in the late 19th century in the West. Initially, it referred to biological methods for waging war against agricultural pests, implying a metaphorical "war" rather than an actual conflict between nations. The term later evolved to encompass the use of, or plans to use, microbiology in both declared and undeclared wars.[2]

The idea of using biological weapons against crops or agricultural products is also not new. Since the 1920s, France, Great Britain, Germany, and Japan conducted research on biological weapons that included agricultural components, continuing through World War II. They studied plant and animal diseases, pests, and herbicides.[3]

During World War II, Germany planned to target British potato crops with Colorado potato beetles. According to some naturalists, the presence of these beetles in England indicated that a small-scale attack might have occurred in 1943, with the beetles released from aircraft. France's biological warfare program, established in 1939, also focused on the Colorado potato beetle, studying its flight behavior at high altitudes. Almost all German biological research targeted England and the U.S., with an emphasis on diseases such as potato late blight (Phytophthora infestans), rice blast (Piricularia oryzae), and wheat rust (yellow and black) (Puccinia striiformis and P. graminis), along with pests like the cabbage seedpod weevil (Ceuthorhynchus assimilis). Japan, meanwhile, explored the effects of fungi, bacteria, and nematodes on various crops in Manchuria and Siberia. Japan had begun stockpiling grain rust spores, intending to attack American and Soviet wheat fields if the war continued.[4]

By 1944, the United States had initiated biological warfare research targeting humans, animals, and crops. Several pathogens were tested in the field, and some were stockpiled. The primary target of the U.S. agricultural warfare program was wheat in Ukraine and Chinese rice fields. Between 1951 and 1969, the U.S. stock-

1 Suffert, F. (2002). Plant Epidemiology: A New War Discipline? Spotlight on Agricultural Bioterrorism, An Emerging Challenge for Agronomic Research. Courrier de l'environnement de l'INRA, No. 47, p. 57.

2 Aucouturier, E. (2012). Justice and Ethics Seized by Biological Weapons. Les Cahiers de la Justice, 2012/3, No. 3, Dalloz, France, 2012, p. 127.

3 Suffert, F. (2002). Plant epidemiology: A new war discipline? Spotlight on agricultural bioterrorism, an emerging challenge for agronomic research. Courrier de l'environnement de l'INRA, No. 47, p. 57.

4 Raoult, D. (2003). How should France organize to face epidemics? Mission Report, France, pp. 35-36.

piled over 30 tons of Puccinia tritici spores, the fungus responsible for wheat stem rust. While these weapons were not practically deployed, the U.S. considered attacking Japanese rice fields in the final months of the war. Research continued in the early Cold War years, driven by the need to balance Soviet and Chinese programs with deterrence policies. On November 25, 1969, President Nixon officially renounced the U.S. offensive biological weapons program, and all stockpiles were subsequently destroyed.[5] Terrorist actions targeting agriculture persisted into the 1970s and 1980s, with incidents such as Sri Lankan tea leaves being laced with cyanide in 1985 and Chilean grapes being tainted in 1989.[6]

Biological warfare in the agricultural sector is often a consequence of military, political, or ideological conflict.

1.1.2. Definition of Agro-Terrorism

The term "terrorism" does not appear in ancient dictionaries, likely because the concept of terrorism is a modern one, unknown in ancient Arab societies.[7] However, as terrorist acts increased, defining the term became necessary. Terrorism is defined as "a set of acts carried out by certain groups in a specific state to achieve certain goals, whether political or economic, using various methods to instill fear in the opposing side, thereby forcing them to meet their demands".[8] This definition applies to international terrorism in general. Biological terrorism, specifically, is defined as "the deliberate use of microorganisms and their toxic by-products to cause disease or mass casualties among humans, or to damage human-held agricultural or livestock assets, contaminate water or food sources, or destroy the natural environment, potentially for years".[9] It is also described as "violent actions carried out by organized groups using biological weapons to achieve specific objectives".[10]

Agro-terrorism is thus defined as "the intentional introduction of a biological agent or toxin, either targeting livestock or the food chain, with the aim of destabilizing society and/or generating fear. Depending on the pathogen or vector chosen, it is a tactic that can cause widespread socio-economic disruption or serve as a form of direct human aggression". Another definition is "an act in which terrorists target livestock, crops, orchards, forests, fisheries, or food processing or distribution centers using biological agents or toxins to further their political, economic, or social goals".[11]

Biological terrorism can take several forms, including direct attacks designed to kill as many people as possible, and attacks on the agricultural sector intended to cause economic chaos. Some security analysts view attacks on livestock and crops as ways to create economic turmoil without directly threatening human security. Others rank attacks on the agricultural sector among the most severe forms of biological terrorism.[12] There is no doubt that these attacks are highly dangerous, as they affect the fundamental right to food.

2.1. The Human Right to Food

The right to food is one of the fundamental human rights that has necessitated international intervention for its protection. It has been enshrined in numerous international and

5 Suffert, F., Ibid., p. 60.

6 Raoult, D., Ibid., p. 35.

7 El-Kheshn, M.A.M. (2005). Defining Terrorism Between Political Data and Objective Considerations. Dar Al-Gama'a Al-Jadida, Egypt, p. 5.

8 Ayyub, M.M. (n.d.). International Biological Terrorism. Journal of the Faculty of Law, University of Al-Nahrain, Iraq, p. 128. Available at: <https://www.iasj.net/iasj?func=fulltext&aId=109235> [Last seen: 25.04.2024].

9 El-Kheshn, M.A., Ibid., p. 42.

10 Ayyub, M.M., Ibid., p. 128.

11 Hassler, L.K. (2003). Agricultural Bioterrorism: Why it is a concern and what we must do. USAWC Strategy Research Project, p. 3. Available at: <https://apps.dtic.mil/sti/pdfs/ADA415398.pdf> [Last seen: 23.04.2024].

12 Centre for Strategic and International Studies. (2006). The biological weapons threat and non-proliferation options: A survey of senior U.S. decision makers and policy shapers. Carnegie Endowment for International Peace, Washington, DC, p. 20.

regional agreements and treaties. The right to food is interconnected with several key concepts, including food security, the food gap, and food sovereignty.

2.1.1. International Legal Foundation of the Right to Food

The Committee on Economic, Social, and Cultural Rights defines the right to food as follows: "The right to adequate food is realized when every individual, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement".* Additionally, the UN Special Rapporteur on the right to food defines it as "the right to regular, permanent, and unrestricted access to food, either directly or through financial purchases. This food must be quantitatively and qualitatively adequate and sufficient, aligned with the cultural traditions of the people to whom the consumer belongs. It must also ensure a fulfilling and dignified life, both physically and mentally, for individuals and communities, free from anxiety".[13] These definitions highlight three essential elements of the right to food: food availability, accessibility, and adequacy.

The right to food is a fundamental human right, protected by various international agreements and conventions. The Universal Declaration of Human Rights of 1948 explicitly recognized for the first time the right to food in international law in Article 25.[14] Similarly, the 1966 International Covenant on Economic, Social, and Cultural Rights guarantees the right to food within the broader framework of the right to an adequate standard of living in Article 11.[15] To implement the provisions of this article, the Committee on Economic, Social, and Cultural Rights adopted General Comment No. 12 in 1999, titled The Right to Adequate Food.[16]

The United Nations did not limit the protection of the right to food to general human rights instruments. It also ensured this right in specialized human rights agreements. For instance, the Convention on the Elimination of All Forms of Discrimination against Women recognizes the right to food for women in Articles 12 and 14.[17] The Convention on the Rights of the Child also guarantees the right to food for children in Articles 24 and 27.[18] Likewise, the Convention Relating to the Status of Refugees protects the right to food for refugees in Articles 20 and 23,[19] and the Convention Relating to the Status of Stateless Persons extends this right to stateless persons in Articles 20 and 23.[20] Indigenous peoples are granted this right in the Convention concerning Indigenous and Tribal Peoples, particularly in Articles 14 and 19.[21] All these international legal texts demonstrate the importance of the right to food and the necessity of its protection..[22]

2.1.2. Legal Mechanisms for Protecting the Right to Food During Crises

The Syracuse Principles, adopted by the UN Economic and Social Council in 1984, and the general comments issued by the UN Human Rights Council regarding emergencies and freedom of movement, provide reliable guidelines for government responses that restrict human rights for reasons of public health or national emergencies.

13 Office of the United Nations High Commissioner for Human Rights. (n.d.). Right to food. Available at: <http://www.ohchr.org/AR/Issues/Food/Pages/FoodIndex.aspx>.

14 United Nations. (1948). Universal Declaration of Human Rights.

15 United Nations. (1966). International Covenant on Economic, Social, and Cultural Rights.

16 United Nations. Committee on Economic, Social and Cultural Rights. (1999). General Comment No. 12 on the Right to Adequate Food.

17 United Nations. (1979). Convention on the Elimination of All Forms of Discrimination Against Women.

18 United Nations. (1989). Convention on the Rights of the Child.

19 United Nations. (1951). Convention Relating to the Status of Refugees.

20 United Nations. (1954). Convention Relating to the Status of Stateless Persons.

21 International Labour Organization. (1989). Convention Concerning Indigenous and Tribal Peoples.

22 Benguettat, K. (2018). The Right to Food in the Framework of International Human Rights Law. Al-Ustadh Al-Baheth Journal of Legal and Political Studies, 12, University of M'sila, Algeria.

These principles assert that any measure taken to protect the population and restrict individual rights and freedoms must be legal, necessary, and proportionate. Furthermore, emergencies must be time-bound, and any limitation of rights should account for disproportionate impacts on specific or marginalized groups.[23]

During crises, human rights must be prioritized more than ever. States have clearly defined obligations under international law, including duties to respect, protect, and fulfill human rights. These obligations also entail non-discrimination and international cooperation.

States also have a general obligation to make progress, as quickly as possible and even with "limited available resources", in implementing the right to food and other economic, social, and cultural rights.[24] This includes a primary prohibition on regression, meaning that if states adopt retrogressive measures, they must demonstrate that such measures are necessary, reasonable, and proportionate.[25]

The Committee on World Food Security adopted the Framework for Action for Food Security and Nutrition in Protracted Crises in 2015, a policy guideline aimed at ensuring food security during prolonged crises. This framework represents the first global consensus on supporting the progressive realization of the right to adequate food during extended crises. It emphasizes the need for consistency between humanitarian, developmental, and peacebuilding efforts that address the root causes of food insecurity and malnutrition through a human rights-based approach.[26]

In addition, many countries are striving to integrate the right to food into their national legislation, which strengthens local legal frameworks to ensure individuals' access to food. Humanitarian and developmental programs, both international and local, play a vital role in promoting the right to food by providing food aid and support to affected nations and communities. The effective realization of the right to food requires sustained international cooperation and comprehensive policies aimed at ensuring food security, with a particular focus on the needs of the most vulnerable populations. Despite these efforts, the right to food remains subject to numerous violations. The impacts of agro-terrorism range from direct disruptions in food supply to significant health, economic, and social consequences, all of which threaten the human right to food.

3. THE IMPACTS OF AGRO-TERRORISM ON THE RIGHT TO FOOD

Agriculture is the primary source of food products, which is why agro-terrorism threats are predominantly directed at food. Such threats can have devastating consequences, as food-related risks are of utmost concern to the population. Food terrorism refers to the act or threat of deliberately contaminating food intended for human consumption with chemical, biological, or radiological agents to cause injury or death to civilians and/or disrupt social, economic, or political stability. Terrorists can attack our food supply at various stages along the food chain, targeting livestock and crops during production, harvesting, storage, or transportation (this is known as agricultural or biological agro-terrorism). They can also target processed foods during manufacturing, processing, storage, transportation, distribution, or serving (this is referred to as terrorism targeting processed foods).[27]

23 FIAN International. (2020). Legal Toolkit: COVID-19 and the Right to Food: A List of International Legal Obligations. Available at: <https://www.fian.org/files/files/Legal_toolkit_Covid19-FR1.pdf> [Last seen: 15.05.2024].

24 United Nations. (1966). International Covenant on Economic, Social, and Cultural Rights. Article 2(1).

25 FIAN International. (2020). Impact of COVID-19 on the Human Right to Food and Nutrition: Preliminary Monitoring Report. Available at: <https://www.fian.org/files/files/Rapport_de_suivi_preliminaire_-_Impact_du_COVID19_sur_le_DHANA.pdf>. [Last seen: 15.06.2024].

26 FIAN International. Legal toolkit: COVID-19 and the Right to Food: A List of International Legal Obligations. Ibid.

27 Johns Hopkins Centre for Public Health Prepared-

3.1. Risks of Agro-Terrorist Acts on Food Security

Terrorist attacks can lead to widespread destruction of crops, resulting in reduced food production and threatening the essential food supply. With declining food supplies, food prices can rise significantly, making it inaccessible to the most vulnerable populations and increasing the risk of hunger and malnutrition. Such acts also erode trust between consumers and farmers, potentially affecting market behavior, causing price fluctuations, and leading to inefficient storage strategies.

The 1996 World Food Summit, through the Rome Declaration on World Food Security and the *World Food Summit Plan of Action*, acknowledged the need to develop coordinated efforts to ensure food security at individual, family, national, regional, and global levels. However, the tragic events of September 11, 2001, in New York fundamentally changed the way the world views the risks associated with the deliberate contamination of food supplies. Many countries' agriculture and food processing and distribution systems have become targets for biological terrorism. A terrorist attack on food supplies can have serious public health and economic consequences, eroding public trust in the safety of the food consumed. Therefore, the term "food security" has expanded to include the protection of food from biological and chemical attacks.[28]

Agriculture is a critical national infrastructure, serving as the driver of food availability and safety in any country—both of which are central to food security. There are five potential targets for agricultural biological terrorism: field crops, livestock, food products during processing or distribution, food products ready for wholesale or retail markets, agricultural facilities such as processing plants, storage facilities, wholesale and retail outlets, transportation infrastructure, and research laboratories.[29]

Counter-crop warfare, which involves the use of biological agents and herbicides, can lead to devastating famines, severe malnutrition, the collapse of agricultural-based economies, and food insecurity. There are documented cases of using potato late blight, anthrax, yellow and black wheat rust, and insect infestations such as the Colorado potato beetle, rape seed weevil, and corn borer during the First and Second World Wars. Similarly, substances were widely used in the Vietnam War as counter-crop agents.[30]

Food insecurity can also be considered a hidden form of economic biological warfare. Human health, food security, and environmental management are continuously threatened on both regional and global levels through the deliberate contamination of food with herbicides, pesticides, or heavy metal residues. Emerging and new plant diseases also affect food security and agricultural sustainability, exacerbating malnutrition and increasing human vulnerability to emerging diseases. The deliberate release of harmful pathogens, which can kill cash crops and destroy enemy reserves, is a potent weapon for biological warfare and agro-terrorism.[31] Agro-terrorism can also be perpetrated through imported food products, increasing the risk of introducing foodborne infectious agents.[32]

ness. (n.d.). Bioterrorism and Food Safety. Available at: <https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-public-health-preparedness/tips/topics/food_security.html> [Last seen: 21.06.2024].

28 Badrie, N. (2004). Threat of Bioterrorism on Food Safety and Food Security to Caribbean Countries. Paper presented at the CAES: 25th West Indies Agricultural Economics Conference, Suriname, p. 126.

29 World Health Organization. (2003). Bioterrorism – The Threat in the Western Hemisphere. Paper presented at the 13th Inter-American Ministerial Meeting on Health and Agriculture, Washington, DC, p. 6.

30 DaSilva, E.J. (1999). Biological Warfare, Bioterrorism, Biodefense, and the Biological and Toxin Weapons Convention. Electronic Journal of Biotechnology, Vol. 2, No. 3, Universidad Católica de Valparaíso, Chile, p. 112. Available at: <http://www.ejb.org/content/vol2/issue3/full/2/](http://www.ejb.org/content/vol2/issue3/full/2/> [Last seen: 02.09.2024].

31 Dasilva, E.J. (1999). Biological Warfare, Bioterrorism, Biodefense, and the Biological and Toxin Weapons Convention. Ibid.

32 Raoult, D. Ibid., p. 34.

Rapid advancements in the genetic engineering of commercial crops have raised the possibility of developing genetically modified plant pathogens, pests, or weeds that are resistant to conventional control methods. This possibility has already become a reality, with the development of a genetically engineered "super weed" that is said to resist current herbicides. According to research, these superweeds were allegedly designed to target large-scale corporate monoculture and genetically modified crops. Distinguishing a biological terrorist attack from a natural outbreak of animal or plant disease can be challenging, which may inadvertently protect the terrorist and delay an effective response by authorities.[33]

Based on the above, it is clear that agro-terrorism poses significant risks to the safety and availability of food, undoubtedly threatening food security and the right to food. Moreover, the negative impacts of food terrorism extend beyond food safety, reaching into the economic, political, and health domains.

3.2. The Potential Impacts of Agricultural and Food Bioterrorism

Agro-terrorism, which targets the agricultural sector, has potential consequences for human health, often causing negative effects on the economy and disrupting political stability.

3.2.1. Impact on Public Health Services and Human Health

Foodborne diseases, whether intentional or unintentional, can severely strain public health services. Many countries cannot respond to emergencies of this nature, where public health systems are forced to deal with food terrorism incidents. While many nations have some form of emergency response plan, these plans often do not account for food safety. This lack of preparedness can result in misdiagnosis, improper laboratory investigations, and a failure to identify and prevent the spread of contaminated food, thereby weakening or even preventing an effective response to achieve food security.[34]

Compared to attacks on humans, attacks on agriculture are less dangerous for the perpetrators. Agricultural agents are generally safer to handle than human pathogens, and public reaction may be less intense—unless the target is ready-to-eat food. However, some livestock and poultry diseases are zoonotic, meaning they can be transmitted to humans, leading to the spread of human diseases.[35]

3.2.2. Economic and Trade Impacts

Intentional food contamination can have enormous economic repercussions. Economic disruption is often a key motivator behind intentional acts targeting a specific product, factory, industry, or country. Widespread losses are not always necessary to achieve substantial economic damage and disrupt trade. Extortion threats directed at particular organizations, especially in the commercial sector, are common in these instances.[36]

Food contamination due to agro-terrorism not only affects human health but also erodes consumer confidence in the safety of national food supplies.[37] Once an act of agro-terrorism is discovered, it can quickly halt the movement and export of affected livestock or crops, resulting in severe economic consequences for producers, shippers, and consumers alike.[38]

33 Parker, H. S. (2002). Agricultural Bioterrorism: A Federal Strategy to Meet the Threat. McNair Papers, 65, Institute for National Strategic Studies, National Defense University. pp. 13-14. Available at: <https://www.hsdl.org/?view&did=472>.

34 World Health Organization. Ibid., pp. 8-9.

35 Parker, H.S., Ibid., p. 14.

36 World Health Organization. Ibid., p. 8.

37 Parker, H.S., Ibid., p. xii.

38 National Academy of Engineering and National Research Council of the National Academies in cooperation with the Department of Homeland Security. (2004). Biological Attack: Human Pathogens, Biotoxins, and Agricultural Threats: What is it? National Academy of Sciences, Washington. Available at: <https://www.dhs.gov/xlibrary/assets/prep_biological_fact_sheet.pdf> [Last seen: 15.09.2024].

A 1994 study estimated the economic impact of an outbreak of African swine fever on the U.S. pork industry. The authors concluded that the cost over 10 years would be approximately $5.4 billion, a figure that could be three to five times higher today.[39]

Molds and mycotoxins cause economic losses at every stage of the food chain: farms suffer crop losses, poultry or livestock are poisoned, and food industries producing food for humans and animals are affected. In addition, chronic poisoning from mycotoxins compromises consumer health. These characteristics make mycotoxins and the fungi that produce them effective agents in both agro-terrorism and biological terrorism more broadly.[40]

3.2.3. Social and Political Impacts

Terrorists may be motivated, ranging from revenge to political destabilization. They can target civilian populations to incite panic and threaten public order. Fear and anxiety can contribute to a decline in public trust in political systems and governments. When agro-terrorism results in economic impacts, specific sectors of society may lose income, exacerbating political instability. While it is unlikely that an entire food supply would be contaminated, the deliberate contamination of food can worsen existing food shortages, further affecting social and political stability.[41]

Given the relative ease of agro-terrorism and its low risk to terrorists, along with the instability in international relations between many countries, the world is likely to see more national or international agro-terrorism incidents. This reality calls for intensified efforts to combat these threats. Despite the economic, political, and health consequences of food-related agro-terrorism, the sanctions for agricultural biological warfare and bioterrorism remain unclear.

CONCLUSION

Agro-terrorism, particularly when orchestrated by hostile nations, constitutes a criminal act. It aligns with the broader strategy of agricultural biological deterrence, equating it with biological warfare or environmental crimes. Agro-terrorism is primarily aimed at causing severe economic damage, destabilizing political systems, and inflicting significant human losses. Eliminating agro-terrorism poses a substantial challenge for societies and governments worldwide, necessitating firm actions and clear regulations. This form of terrorism not only violates the right to food but also infringes upon other fundamental human rights.

Based on the findings of this study, several recommendations can be proposed to address the issue:

- Reduce dependence on imports of seeds and plants due to the potential biological risks they may carry, which could trigger food crises;
- Expand research capabilities related to animal and plant health, as well as food safety, with a particular focus on scientific research aimed at combating agro-terrorism;
- Provide increased funding for internal research in laboratories and universities to better equip them to handle biological threats;
- Establish an effective monitoring system through coordination among concerned countries. It would be beneficial to create an international surveillance system in this field and implement measures to contain the negative effects of agro-terrorism on the right to food and nutrition;
- Adopt stringent legal frameworks that impose punitive sanctions on those responsible for terrorist attacks targeting the agricultural sector;
- In the context of food governance and the growing threat of biological terrorism, states must recognize that the Committee on World Food Security is the most

39 Parker, H.S., Ibid., p. xii.

40 Clauzon, L. (2009). Biological Warfare and Bioterrorism or How Nature Becomes a Weapon. Doctoral thesis. Université Henri Poincaré – NANCY 1, p. 98.

41 World Health Organization, Ibid., p. 9.

inclusive platform for international food governance. Therefore, it should play a leading role in coordinating responses to ensure food security and the realization of the right to food, working closely with other specialized agencies such as the World Health Organization (WHO).

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THE EVOLVING ROLE OF ARTIFICIAL INTELLIGENCE IN LEGAL EDUCATION AND RESEARCH

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ABSTRACT

The integration of Artificial Intelligence (AI) into the legal profession has accelerated in recent decades, reshaping both the teaching and practice of law. This article explores the historical development of AI in the legal sector, its growing role in legal education, international best practices in AI-assisted teaching, and its transformative impact on legal research. By examining AI's progression from early expert systems to advanced machine learning and natural language processing tools, the study demonstrates how AI aids in personalized learning, efficient case analysis, and predictive analytics. However, the article also addresses the major challenges posed by AI's increasing influence, including ethical concerns, bias, data privacy, and skill gaps. It concludes by emphasizing the need for careful, ethically grounded, and strategically planned integration of AI into legal education and research, ensuring that technological innovations serve the overarching goals of justice and professional integrity.

KEYWORDS: Legal Research, Machine Learning, Ethics

Abbreviations:
AI – Artificial Intelligence
ML – Machine Learning
NLP – Natural Language Processing
GDPR – General Data Protection Regulation

INTRODUCTION

The legal profession is experiencing a paradigm shift driven by rapid technological advancements. Traditionally, legal work has relied on human expertise for tasks such as drafting briefs, conducting in-depth legal research, and analyzing complex cases. Over the past two decades, however, the advent of AI has introduced powerful new tools that augment human capabilities. Innovations in machine learning (ML), natural language processing (NLP), and predictive analytics are fundamentally altering how lawyers work and how law students learn.[1]

In this evolving landscape, legal education cannot remain static. Law schools must prepare future lawyers not only to interpret and apply legal rules but also to engage effectively with emerging technologies. AI-assisted legal research platforms, intelligent tutoring systems, and automated contract review tools are becoming standard in top law firms and legal departments.[2] Incorporating these technologies into the curriculum helps new graduates develop the technical literacy and critical thinking skills necessary for a data-driven legal marketplace.

At the same time, the adoption of AI in legal contexts raises significant ethical, regulatory, and pedagogical questions. Issues such as algorithmic bias, privacy breaches, explainability, and the redefinition of professional roles require careful consideration.[3] This article offers a comprehensive analysis of AI's historical role in law, its integration into legal education, best practices from various jurisdictions, and its impact on legal research. The discussion culminates with an examination of the main problems and a conclusion that outlines pathways toward responsible and effective use of AI in the legal sector.

1 Susskind, R. (2019). Online Courts and the Future of Justice. Oxford University Press, Oxford, pp. 57-60.

2 Ashley, K.D. (2017). Artificial Intelligence and Legal Analytics: New Tools for Law Practice in the Digital Age. Cambridge University Press, New York, pp. 23-45.

3 Surden, H. (2021). Computable Contracts and Contract Analytics: AI and Legal Text Processing. Oxford University Press (online excerpt), New York, pp. 77-89.

1. THE HISTORICAL APPROACH

The application of AI to the legal field dates to the late 20th century. Early attempts focused on expert systems designed to simulate the reasoning of seasoned attorneys, particularly in specialized domains like tax law. One of the earliest milestones was the development of rule-based programs that attempted to replicate human logic and judgment.[4] Although these initial systems were limited by computational power and data availability, they established a foundation for future advancements.

By the 1990s and early 2000s, the widespread adoption of the internet and increasing computational capacity facilitated the creation of comprehensive online legal databases and rudimentary search engines. Lawyers and researchers could access large collections of statutes, cases, and commentary at unprecedented speed, though searches often relied on keyword matching rather than semantic understanding.

The post-2010 era witnessed a significant leap forward due to ML, NLP, and neural network technologies. AI-driven tools now understand legal language with greater nuance, automate document review, and predict case outcomes with increasing accuracy.[5] These modern systems are not mere replacements for human judgment; rather, they complement and enhance human capabilities, guiding strategic decisions and highlighting previously unseen patterns in legal texts.

2. THE ROLE OF AI IN LEGAL EDUCATION

Legal education has traditionally emphasized the development of analytical reasoning, doctrinal understanding, and persuasive ad-

4 Gardner, A. v. (1987). An Artificial Intelligence Approach to Legal Reasoning. MIT Press, Cambridge, MA, pp. 10-15.

5 Alarie, B., Niblett, A., Yoon, A. (2018). How Artificial Intelligence will Affect the Practice of Law. University of Toronto Law Journal, 68(1), University of Toronto Press, Toronto, pp. 106-115.

vocacy skills. While these remain crucial, the emergence of AI demands a shift to include technological competence and digital literacy.[6] AI's role in legal education can be understood in several key ways:

- Personalized and Adaptive Learning: Intelligent tutoring systems can track student performance, identify problem areas, and offer customized feedback. Such platforms enable learners to progress at their own pace, focusing on strengthening their weakest skills.[7]
- Enhanced Research Capabilities: Familiarity with AI-driven research tools prepares students for an environment where legal information retrieval and case analytics are increasingly automated. Students learn to navigate vast databases efficiently, improving their research acumen.[8]
- Critical Engagement with Technology: Integrating discussions about AI ethics, data privacy, and algorithmic bias into the curriculum encourages students to think critically about the tools they use. This cultivates lawyers who can assess not only the legal sources but also the technology's trustworthiness and fairness.[9]
- Interdisciplinary Collaboration: As legal work increasingly intersects with technology, students who learn to collaborate with data scientists, technologists, and designers gain a competitive edge. Interdisciplinary skills enable lawyers to contribute meaningfully to teams that develop or oversee AI tools.[10]

3. BEST PRACTICES OF VARIOUS COUNTRIES

As mentioned above, the use of artificial intelligence tools in legal education is not a recent phenomenon. Worldwide, AI tools and their application within the field of legal education are continually refined and developed. Different countries have adopted varying approaches in this regard. Within the scope of our research, we would like to briefly present the best practices of various systems:

- **United States:** In the U.S., some law schools partner with technology firms to integrate AI-powered legal research platforms into their courses. Workshops help faculty learn to incorporate NLP-based tools into their teaching. Courses also cover algorithmic accountability and data protection laws.[11]
- **United Kingdom:** British law faculties emphasize critical assessment of AI. Students evaluate AI-driven legal opinions and consider the ethical implications of automated reasoning. Interdisciplinary seminars involving computer scientists and ethicists foster a nuanced perspective.[12]
- **Australia:** Australian institutions focus on experiential learning. Simulated "virtual law firms" allow students to apply AI-assisted contract analysis tools, helping them develop practical skills for a tech-enhanced legal environment.[13]
- **Singapore:** Singapore's technologically advanced legal ecosystem incorporates AI tools from the outset. Students access NLP-enhanced databases and predictive

6 Ashley, K.D. (2017). Artificial Intelligence and Legal Analytics: New Tools for Law Practice in the Digital Age. Cambridge University Press, New York, pp. 23-45.

7 Bryant, S., Davis, D., Surden, H. (2020). Emerging Technologies in Legal Education. Legal Education Review, 30(2), LexisNexis, Sydney, pp. 52-54.

8 Lauritsen, M. (2016). Artificial Intelligence in Law: The State of Play 2016. Law Practice, 42(3), American Bar Association, Chicago, pp. 42-43.

9 Gelter, M., Siems, M. (2021). Networks, Dialogue, and Learning in Legal Education. Journal of Legal Education, 70(2), Association of American Law Schools, Washington, DC, pp. 349-383.

10 Surden, H. (2021). Computable Contracts and Contract Analytics: AI and Legal Text Processing. Oxford University Press (online excerpt), New York, pp. 77-89, 105-108.

11 Ibid., pp. 105-108.

12 Leith, P. (2019). The Rise and Fall of the Legal Expert System. European Journal of Law and Technology, 10(1), European Journal of Law and Technology, London, pp. 2-4.

13 Tang, Y. (2019). Legal Technology and Education in Australia. Law Council of Australia, pp 11-13. Available at: <https://www.lawcouncil.asn.au/technology> [Last seen: 15.10.2024].

analytics, ensuring that technological fluency becomes a core component of their legal training.[14]

- **European Union Member States:** EU countries emphasize compliance with data protection laws and fairness principles. Law schools teach students to evaluate AI tools against the General Data Protection Regulation (GDPR) and emerging EU guidelines on trustworthy AI.[15]

4. THE ROLE OF AI IN LEGAL RESEARCH

Artificial intelligence is actively used in the field of research as well, and legal research is no exception in this regard. AI has revolutionized legal research by enhancing efficiency, accuracy, and insight:

- **Efficient Information Retrieval:** NLP-driven search engines refine queries semantically, retrieving documents that align more closely with the researcher's intent. Tools like Westlaw Edge and LexisNexis Context leverage ML to suggest related materials.[16]
- **Predictive Analytics and Outcome Forecasting:** Some AI models analyze judicial decisions to predict case outcomes with varying degrees of accuracy. While not definitive, these predictions help lawyers gauge litigation risks and refine their case strategies.[17]
- **Pattern Recognition and Trend Analysis:** ML can detect shifts in legal doctrines, identify patterns in judicial reasoning, and reveal correlations between precedents. This aids scholars, policymakers, and practitioners in understanding the evolving legal landscape.[18]
- **Quality Control and Consistency:** Automated review tools catch contradictory precedents, outdated citations, and errors. This consistency check reduces the risk of oversight and improves the quality of legal writing.[19]

5. MAIN PROBLEMS

As shown above, artificial intelligence has made the processes of legal education and research easier. Tasks that once required substantial time and human resources can now be accomplished much more quickly and easily with the help of AI. Nevertheless, a number of problems and challenges persist, including:

- **Bias and Fairness:** AI systems trained on historical data may perpetuate systemic biases. Oversight, diverse training sets, and regular audits are necessary to mitigate harmful outcomes.[20]
- **Ethical and Professional Responsibility:** Lawyers must ensure AI use aligns with professional standards, safeguarding client confidentiality and verifying the credibility of AI-generated insights. Ethical codes may need updating to reflect these new responsibilities.[21]

14 Chan, G. (2020). AI in Singapore's Legal Sector: An Overview. LawTech SG. Available at: <https://www.lawtech.sg/ai-legal-sector-overview> [Last seen: 15.10.2024].

15 European Commission. (2019). Ethics Guidelines for Trustworthy AI. Brussels: European Commission, pp. 5-10, 10-12. Available at: <https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=60419> [Last seen: 15.10.2024].

16 Lauritsen, M. (2016). Artificial Intelligence in Law: The State of Play 2016. Law Practice, 42(3), American Bar Association, Chicago, pp. 42-43.

17 Katz, D.M., Bommarito, M. J., Blackman, J. (2017). A General Approach for Predicting the Behavior of the Supreme Court of the United States. Plos One, 12(4), Public Library of Science, San Francisco, e0174698, pp. 3-5.

18 Alarie, B., Niblett, A., Yoon, A. (2018). How Artificial Intelligence Will Affect the Practice of Law. University of Toronto Law Journal, 68(1), University of Toronto Press, Toronto, pp. 110-115.

19 Ashley, K.D. (2017). Artificial Intelligence and Legal Analytics: New Tools for Law Practice in the Digital Age. Cambridge University Press, New York, pp. 125-128.

20 Barfield, W., Pagallo, U. (Eds.). (2018). Research Handbook on the Law of Artificial Intelligence. Edward Elgar Publishing, Cheltenham, pp. 112-115.

21 Surden, H. (2021). Computable Contracts and Contract Analytics: AI and Legal Text Processing. Oxford University Press (online excerpt), New York, pp. 130-133.

- **Data Protection and Privacy:** Sensitive legal data must be handled with care. Adherence to privacy regulations (e.g., GDPR) and robust cybersecurity measures are essential to maintain trust.[22]
- **Explainability and Transparency:** Many AI algorithms operate as "black boxes", making their reasoning opaque. Explainable AI models are needed to preserve trust in legal outcomes and facilitate meaningful judicial review.[23]
- **Skill Gaps and Training Needs:** Educators and practitioners often lack the technical literacy to evaluate AI tools critically. Continuous professional development, interdisciplinary training, and updated curricula can bridge this gap.[24]
- **Regulatory Uncertainty:** The legal framework governing AI use remains in flux. Policymakers must clarify liability standards, acceptable use cases, and professional norms to provide certainty and encourage responsible innovation.[25]

6. CHALLENGES WITHIN THE NATIONAL SYSTEM

In Georgia, legal education is regulated by the state. Since the legal profession is considered a regulated profession, the state determines a sector-specific standard for legal education. This standard sets forth the minimum competencies and benchmarks that legal education programs must meet. The standard was most recently revised in 2020.[26] Although, at first glance, the standard appears quite comprehensive, it does not establish any form of competencies related to artificial intelligence. Meanwhile, AI is employed in the legal field through educational simulations, so-called "smart contracts", investigations, research, and other areas. Yet, the Georgian standard for legal education does not address challenges associated with AI in any way. As part of the research, the country's existing legal education programs were examined. In only a small fraction of these programs does AI-related subject matter appear, and even then, only indirectly. We believe that the Georgian legal education standard should be updated in this respect to include AI-related topics. Furthermore, it would be advisable for universities to adopt global best practices in teaching law courses and to incorporate AI tools into their curricula.

CONCLUSION

The emergence of AI in law necessitates a dynamic response from both legal educators and researchers. When integrated responsibly, AI enriches pedagogy, streamlines research, and empowers practitioners to navigate increasingly complex information environments. Yet, these benefits must be balanced with vigilance. Ethical safeguards, data protection mechanisms, explainability requirements, and continuous skill development are essential for building trust and ensuring that AI serves justice rather than undermining it. As the legal profession evolves, interdisciplinary collaboration, informed policymaking and ethical reflection become indispensable. By embracing AI thoughtfully, the legal community can uphold its core values while seizing the opportunities presented by technological innovation.

22 European Commission. (2019). Ethics Guidelines for Trustworthy AI. Brussels: European Commission, pp. 10-12. Available at: <https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=60419> [Last seen: 15.10.2024].

23 Susskind, R. (2019). Online Courts and the Future of Justice. Oxford University Press, Oxford, pp. 120-123.

24 Ashley, K.D. (2017). Artificial Intelligence and Legal Analytics: New Tools for Law Practice in the Digital Age. Cambridge University Press, New York, pp. 140-142.

25 Barfield, W., & Pagallo, U. (Eds.). (2018). Research Handbook on the Law of Artificial Intelligence. Edward Elgar Publishing, Cheltenham, pp. 200-205.

26 National Center for Educational Quality Enhancement (Georgia). National Standart of Legal Education (Georgia). Available at: <https://eqe.ge>.

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4. Tang, Y. (2019). Legal Technology and Education in Australia. Law Council of Australia. Available at: <https://www.lawcouncil.asn.au/technology> [Last seen: 15.10.2024].
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ხელოვნური ინტელექტის ევოლუციური როლი იურიდიულ განათლებასა და კვლევაში

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ხელოვნური ინტელექტის ინტეგრაციამ იურიდიულ პროფესიაში ბოლო ათწლეულებში განსაკუთრებით იმატა, შეცვალა რა როგორც სწავლების, ისე სამართლის პრაქტიკის მრავალი ასპექტი. მოცემული სტატია მიმოიხილავს ხელოვნური ინტელექტის ისტორიულ განვითარებას იურიდიულ სექტორში, მის მზარდ როლს იურიდიულ განათლებაში, საერთაშორისო საუკეთესო პრაქტიკებს ხელოვნური ინტელექტის დახმარებით სწავლებაში, აგრეთვე, მის გარდამტეხ ზეგავლენას იურიდიულ კვლევაზე. ადრეული ექსპერტული სისტემებიდან თანამედროვე მანქანური სწავლების და ბუნებრივი ენის დამუშავების ტექნოლოგიებამდე განვითარების ანალიზით, ნაშრომი ხაზს უსვამს იმ გარემოებას, თუ როგორ უწყობს ხელს ხელოვნური ინტელექტი პერსონალიზებულ სწავლებას, საქმის ეფექტიან ანალიზსა და პროგნოზირებად ანალიტიკას. სტატია, ასევე, შეეხება იმ ძირითად გამოწვევებს, რომლებიც დაკავშირებულია ხელოვნური ინტელექტის მზარდ გავლენასთან, მათ შორის: ეთიკურ საკითხებს, მიკერძოებას, მონაცემთა კონფიდენციალურობასა და უნარების დეფიციტს. დასკვნაში სტატია ხაზს უსვამს ხელოვნური ინტელექტის ფრთხილი, ეთიკურად დასაბუთებული და სტრატეგიულად დაგეგმილი ინტეგრაციის საჭიროებას იურიდიულ განათლებასა და კვლევაში, რათა ტექნოლოგიურმა ინოვაციებმა ხელი შეუწყოს მართლმსაჯულების საერთო მიზნებსა და პროფესიულ ინტერესებს.

საკვანძო სიტყვები: იურიდიული კვლევა, მანქანური სწავლება, ეთიკა

გამოყენებული აბრევიატურები:
AI-ხელოვნური ინტელექტი,
ML – მანქანური სწავლება,
NLP – ბუნებრივი ენის დამუშავება,
GDPR – პერსონალურ მონაცემთა დაცვა

შესავალი

იურიდიული პროფესია თანამედროვე ტექნოლოგიური პროგრესის მეშვეობით ძირეულ გარდატეხას განიცდის. ტრადიციულად, იურიდიული საქმიანობა დაფუძნებული იყო ადამიანურ ექსპერტიზაზე ისეთი დავალებებისთვის, როგორიცაა დასკვნების მომზადება, ღრმა იურიდიული კვლევისა და რთული საქმეების ანალიზი. თუმცა, ბოლო ოცი წლის განმავლობაში, ხელოვნური ინტელექტის გამოჩენამ დამატებითი, ძლიერი ინსტრუმენტები შემოიტანა, რომლებიც ადამიანის უნარებს აძლიერებს. მანქანური სწავლების (ML), ბუნებრივი ენების დამუშავების (NLP) და პროგნოზირებადი ანალიტიკის ინოვაციები არსებითად ცვლიან იურისტების სამუშაო მეთოდებსა და იურიდიული განათლების მიღების გზებს.[1]

ამ დინამიკურად განვითარებად გარემოში, იურიდიული განათლება არ შეიძლება დარჩეს სტატიკური. იურიდიულმა ფაკულტეტებმა უნდა მოამზადონ მომავალი იურისტები არა მხოლოდ სამართლებრივი ნორმების ინტერპრეტაციასა და გამოყენებაში, არამედ ახალი ტექნოლოგიების ეფექტიანად გამოყენებაშიც. ხელოვნურ ინტელექტზე დაფუძნებული იურიდიული კვლევის პლატფორმები, ინტელექტუალური სასწავლო სისტემები და ხელშეკრულებების ავტომატური ანალიზის ინსტრუმენტები უკვე სტანდარტად ყალიბდება წამყვან იურიდიულ ფირმებსა და სამართლებრივ დეპარტამენტებში.[2] ხელოვნური ინტელექტის პროფესიაში გამოყენების უნარების შეძენა დაეხმარებათ იურიდიული ფაკულტეტის კურსდამთავრებულებს საქმიანობის ეფექტიანად წარმართვასა და კონკურენტულ შრომით ბაზარზე დასაქმებაში.

ამავდროულად, ხელოვნური ინტელექტის დანერგვა იურიდიულ სფეროში წამოჭრის მნიშვნელოვან ეთიკურ, რეგულაციურ და პედაგოგიურ კითხვებს – ისეთ საკითხებს, როგორიცაა: ალგორითმული მიკერძოება, კონფიდენციალურობის დარღვევა, განმარტებადობა და პროფესიული როლების ხელახალი განსაზღვრა[3]. მოცემული სტატია გთავაზობთ ხელოვნური ინტელექტის ისტორიული როლის კომპლექსურ ანალიზს სამართლის სფეროში, მისი ინტეგრაციის შესწავლას იურიდიულ განათლებაში, სხვადასხვა ქვეყნის საუკეთესო პრაქტიკის მიმოხილვას, აგრეთვე, მის ზეგავლენას იურიდიულ კვლევაზე. განხილვა სრულდება ძირითადი პრობლემების ანალიზითა და დასკვნით, რომელიც ასახავს გზებს ხელოვნური ინტელექტის პასუხისმგებლიანი და ეფექტიანი გამოყენებისკენ იურიდიულ სექტორში.

1. ისტორიული ანალიზი

ხელოვნური ინტელექტის გამოყენება იურიდიულ სფეროში მე-20 საუკუნის ბოლოს იღებს სათავეს. საწყის ეტაპზე ყურადღება გამახვილებული იყო ექსპერტული სისტემების შექმნაზე, რომლებიც ცდილობდნენ გამოცდილი ადვოკატების მსჯელობის სიმულაციას, განსაკუთრებით, ისეთ სპეციალიზებულ დარგებში, როგორიცაა საგადასახადო სამართალი. ერთ-ერთი ადრეული მნიშვნელოვანი ნაბიჯი იყო წესებზე დაფუძნებული პროგრამების შექმნა, რომლებიც ცდილობდნენ ადამიანის ლოგიკისა და განსჯის გამეორებას[4]. მიუხედავად იმისა, რომ ამ საწყის

1 Susskind, R. (2019). *Online Courts and the Future of Justice.* Oxford University Press, Oxford, pp 57-60.

2 Ashley, K. D. (2017). *Artificial Intelligence and Legal Analytics: New Tools for Law Practice in the Digital Age.* Cambridge University Press, New York, pp 23-45.

3 Surden, H. (2021). *Computable Contracts and Contract Analytics: AI and Legal Text Processing.* Oxford University Press (online excerpt), New York, pp. 77-89.

4 Gardner, A. v. (1987). *An Artificial Intelligence Approach to Legal Reasoning.* MIT Press, Cambridge, MA, pp 10-15.

სისტემებს აკლდათ საკმარისი გამოთვლითი სიმძლავრე და მონაცემთა ხელმისაწვდომობა, მათ საფუძველი ჩაუყარეს შემდგომ განვითარებას.

1990-იანი წლებიდან 2000-იანი წლების დასაწყისამდე, ინტერნეტის ფართოდ გავრცელებამ და გამოთვლითი სიმძლავრის ზრდამ შეუწყო ხელი ყოვლისმომცველი ონლაინ იურიდიული მონაცემთა ბაზებისა და ელემენტარული საძიებო სისტემების შექმნას. ადვოკატებსა და მკვლევრებს შეეძლოთ კანონების, საქმეებისა და კომენტარების ფართო კოლექციებზე უპრეცედენტო სისწრაფით წვდომა, თუმცა ძიების პროცესში უფრო მეტად გამოიყენებოდა საკვანძო სიტყვების შერწყმა, ვიდრე სიტყვის სემანტიკური გაგება.

2010 წლის შემდეგ, ML-ის NLP-ისა და ნეირონული ქსელების ტექნოლოგიების განვითარებამ მნიშვნელოვანია წინსვლა გამოიწვია. ხელოვნურ ინტელექტზე დაფუძნებული ინსტრუმენტები ახლა უფრო დელიკატურად იგებენ იურიდიულ ენას, ავტომატურად ახორციელებენ დოკუმენტების გადახედვას და შედეგებს უფრო მაღალი სიზუსტით პროგნოზირებენ.[5] ეს თანამედროვე სისტემები არ არიან უბრალოდ ადამიანის განსჯის შემცვლელები. პირიქით, ისინი ავსებენ და აძლიერებენ ადამიანურ უნარებს, ხელს უწყობენ სტრატეგიული გადაწყვეტილებების მიღებას და გამოავლენენ ადრე შეუმჩნეველ შაბლონებს იურიდიულ ტექსტებში.

2. ხელოვნური ინტელექტის როლი იურიდიულ განათლებაში

იურიდიულ განათლებაში, ტრადიციულად, აქცენტი კეთდებოდა ანალიტიკური აზროვნების, დოქტრინალური გაგებისა და არგუმენტაციის უნარების განვითარებაზე. მიუხედავად იმისა, რომ ეს უნარები კვლავ სასიცოცხლოდ მნიშვნელოვანია, ხელოვნური ინტელექტის განვითარებამ მოითხოვა ფოკუსის გადატანა ტექნოლოგიური კომპეტენტურობისა და ციფრული წიგნიერების მიმართულებით. ხელოვნური ინტელექტის როლი იურიდიულ განათლებაში შეიძლება რამდენიმე ძირითად ასპექტად წარმოვადგინოთ:

- **პერსონალიზებული და ადაპტირებული სწავლება:**
  ინტელექტუალური სასწავლო სისტემები აკვირდებიან სტუდენტების პროგრესს, განსაზღვრავენ პრობლემურ ზონებს და სთავაზობენ მათ მორგებულ უკუკავშირს. მსგავსი პლატფორმები დაინტერესებულ აუდიტორიას საშუალებას აძლევს ისწავლონ საკუთარი ტემპით, განსაკუთრებული ყურადღება გაამახვილონ საკუთარ სუსტ მხარეებზე და შეძლონ მათი გამყარება.[6]
- **გაძლიერებული კვლევითი უნარები:**
  ხელოვნურ ინტელექტზე დაფუძნებული კვლევითი ინსტრუმენტების გაცნობიერება ამზადებს სტუდენტებს იმ გარემოსთვის, სადაც სამართლებრივი ინფორმაციის მოძიება და საქმის ანალიზი სულ უფრო მეტად ავტომატიზებული ხდება. სტუდენტები სწავლობენ მასშტაბურ მონაცემთა ბაზებში მოქნილ ნავიგაციას, რითაც აუმჯობესებენ თავიანთ კვლევით კომპეტენციას.[7]
- **კრიტიკული ჩართულობა ტექნოლოგიასთან:**
  ხელოვნური ინტელექტის ეთიკის, მონაცემთა კონფიდენციალურობისა და ალგორითმული მიკერძოების საკითხების სასწავლო გეგმაში ინტეგრირება სტუდენტებს უბიძგებს კრიტიკულად იფიქრონ იმ ინსტრუმენტებზე, რომლებსაც იყენებენ. ეს კი

5 Alarie, B., Niblett, A., & Yoon, A. (2018). How Artificial Intelligence Will Affect the Practice of Law. *University of Toronto Law Journal*, 68(1), University of Toronto Press, Toronto, pp. 106-115.

6 Bryant, S., Davis, D., & Surden, H. (2020). Emerging Technologies in Legal Education. *Legal Education Review*, 30(2), LexisNexis, Sydney, pp. 52-54.

7 Lauritsen, M. (2016). Artificial Intelligence in Law: The State of Play 2016. *Law Practice*, 42(3), American Bar Association, Chicago, pp. 42-43.

ხელს უწყობს ისეთი პროფესიონალების გაზრდას, რომლებიც აფასებენ არა მხოლოდ სამართლებრივ წყაროებს, არამედ აანალიზებენ თავად ტექნოლოგიის სანდოობასა და სამართლიანობას.[8]

- **ინტერდისციპლინარული თანამშრომლობა:** მას შემდეგ, რაც სამართლებრივი საქმიანობა სულ უფრო მეტად იკვეთება ტექნოლოგიებთან, სულ უფრო და უფრო ინტერდისციპლინარული ხდება იურისტის პროფესია. ხელოვნური ინტელექტი იძლევა სხვადასხვა მიმართულებით ცოდნის მიღების საშუალებას. ინტერდისციპლინარული უნარები ადვოკატებს საშუალებას აძლევს მნიშვნელოვანი წვლილი შეიტანონ იმ გუნდებში, რომლებიც ავითარებენ ან ზედამხედველობენ ხელოვნური ინტელექტის ინსტრუმენტებს.[9]

3. სხვადასხვა ქვეყნის საუკეთესო პრაქტიკა

როგორც ზემოთ აღვნიშნეთ, ხელოვნური ინტელექტის ინსტრუმენტების გამოყენება იურიდიულ განათლებაში ახალი მოვლენა არ არის. მთელ მსოფლიოში მუდმივად იხვეწება და ვითარდება ხელოვნური ინტელექტის ინსტრუმენტები და მათი გამოყენების პროცესები იურიდიული განათლების სფეროში. ამ მხრივ, სხვადასხვა ქვეყანას განსხვავებული მიდგომა აქვს. ჩვენი კვლევის ფარგლებში გვსურს, მოკლედ წარმოვადგინოთ სხვადასხვა სისტემების საუკეთესო პრაქტიკა:

- **აშშ:** ამერიკის შეერთებულ შტატებში ზოგიერთი იურიდიული ფაკულტეტი თანამშრომლობს ტექნოლოგიურ კომპანიებთან, რათა სასწავლო პროცესში ინტეგრირდეს ხელოვნური ინტელექტის გამოყენებით მოქმედი იურიდიული კვლევის პლატფორმები. მასტერკლასები ეხმარება პედაგოგებს NLP-ზე დაფუძნებული ინსტრუმენტების სწავლებაში ჩართვაში. კურსები, ასევე, მოიცავს ალგორითმულ ანგარიშვალდებულებასა და მონაცემთა დაცვის კანონმდებლობას.[10]
- **დიდი ბრიტანეთი:** ბრიტანეთის იურიდიული ფაკულტეტები განსაკუთრებულ მნიშვნელობას ანიჭებენ ხელოვნური ინტელექტის კრიტიკულ შეფასებას. სტუდენტები აფასებენ ხელოვნურ ინტელექტზე დაფუძნებულ სამართლებრივ დასკვნებს და ითვალისწინებენ ავტომატიზებული მსჯელობის ეთიკურ მხარეს. ინტერდისციპლინარული სემინარები, რომლებშიც მონაწილეობენ კომპიუტერული მეცნიერები და ეთიკოსები, უზრუნველყოფენ საკითხის უფრო დახვეწილ აღქმას.[11]
- **ავსტრალია:** ავსტრალიური სასწავლო დაწესებულებები აქცენტს აკეთებენ პრაქტიკულ სწავლებაზე. „ვირტუალური იურიდიული ფირმების“ სიმულაცია სტუდენტებს საშუალებას აძლევს, გამოიყენონ ხელოვნური ინტელექტით მხარდაჭერილი საკონტრაქტო ანალიზის ინსტრუმენტები, რითაც ისინი იძენენ პრაქტიკულ უნარებს ტექნოლოგიებით გაჯერებულ იურიდიულ გარემოში.[12]
- **სინგაპური:** სინგაპურის ტექნოლოგიურად განვითარებული იურიდიული ეკოსისტემა სწავლების ადრეულ

8 Gelter, M., & Siems, M. (2021). Networks, Dialogue, and Learning in Legal Education. *Journal of Legal Education*, 70(2), Association of American Law Schools, Washington, DC, pp. 349-383.

9 Surden, H. (2021). *Computable Contracts and Contract Analytics: AI and Legal Text Processing.* Oxford University Press (online excerpt), New York, pp. 77-89, 105-108.

10 Ibid.

11 Leith, P. (2019). The Rise and Fall of the Legal Expert System. *European Journal of Law and Technology*, 10(1), European Journal of Law and Technology, London, pp. 2-4.

12 Tang, Y. (2019). *Legal Technology and Education in Australia.* Law Council of Australia. pp 11-13. https://www.lawcouncil.asn.au/technology [Last seen: 15.10.2024].

სტადიაზე ახორციელებს ხელოვნური ინტელექტის ინსტრუმენტების ინტეგრირებას. სტუდენტებს აქვთ წვდომა NLP-ით გამდიდრებულ მონაცემთა ბაზებსა და პროგნოზირებად ანალიტიკაზე, რაც უზრუნველყოფს, რომ ტექნოლოგიური წიგნიერება გახდეს მათი იურიდიული მომზადების ძირითადი შემადგენელი ნაწილი.[13]

- **ევროკავშირის წევრი სახელმწიფოები:** ევროკავშირის ქვეყნებში დიდ მნიშვნელობას ანიჭებენ მონაცემთა დაცვის კანონმდებლობასა და სამართლიანობის პრინციპებს. იურიდიული ფაკულტეტები ასწავლიან სტუდენტებს, რომ შეაფასონ ხელოვნური ინტელექტის ინსტრუმენტები ზოგადი მონაცემთა დაცვის რეგულაციის (GDPR) და ევროკავშირის მზარდი გაიდლაინების საფუძველზე, რომლებიც ხაზს უსვამენ სანდო ხელოვნური ინტელექტის პრინციპებს.[14]

4. ხელოვნური ინტელექტის როლი იურიდიულ კვლევაში

ხელოვნური ინტელექტი აქტიურად გამოიყენება კვლევით სფეროში, მათ შორის, იურიდიულ კვლევაშიც. უდავოა, რომ ხელოვნურმა ინტელექტმა რევოლუცია მოახდინა იურიდიულ კვლევაში ეფექტიანობის, სიზუსტისა და ანალიტიკური უნარების გაუმჯობესებით:

- **ინფორმაციის ეფექტიანი მოძიება:** NLP-ზე დაფუძნებული საძიებო სისტემები სემანტიკურად ამუშავებენ საკვანძო სიტყვებს, რითაც მკვლევრებს იმ მასალაზე წვდომას უადვილებენ, რომელიც მეტად შეესაბამება მათ ზუსტ დაინტერესებას. ინსტრუმენტები, როგორიცაა Westlaw Edge და LexisNexis Context, იყენებენ მანქანურ სწავლებას (ML) დაკავშირებული მასალების შესათავაზებლად.[15]
- **პროგნოზირებადი ანალიტიკა და შედეგების წინასწარ განსაზღვრა:** ზოგიერთი ხელოვნური ინტელექტის მოდელი აანალიზებს სასამართლო გადაწყვეტილებებს, რათა განსხვავებული სიზუსტით იწინასწარმეტყველოს საქმის შედეგები. მიუხედავად იმისა, რომ ეს პროგნოზები საბოლოო არაა, ისინი ეხმარება იურისტებს განსაზღვრონ სამართლებრივი რისკები და დახვეწონ საქმის წარმართვის სტრატეგია.[16]
- **შაბლონების ამოცნობა და ტენდენციების ანალიზი:** მანქანური სწავლება (ML) გამოავლენს სამართლებრივი დოქტრინების ცვლილებებს, განსაზღვრავს განმასხვავებელ შაბლონებს სასამართლო არგუმენტაციაში და აჩვენებს კორელაციებს პრეცედენტებს შორის. ეს ხელს უწყობს მკვლევრებსა და პრაქტიკოსებს, უკეთ შეისწავლონ სამართლებრივი ლანდშაფტის ევოლუცია.[17]
- **ხარისხის კონტროლი და კონსისტენტურობა:** ავტომატიზებული გადახედვის ინსტრუმენტები ამჩნევენ ურთიერთსაპირისპირო პრეცედენტებს, მოძველებულ ციტატებსა და შეცდომებს. კონსისტენტურობის ეს შემოწმება ამცირებს გაუთვალისწინებელი ხარვეზების ალბათობას და აუმჯობესებს იურიდიული წერილობითი ნამუშევრების ხარისხს.[18]

13 Chan, G. (2020). *AI in Singapore's Legal Sector: An Overview*. LawTech SG. https://www.lawtech.sg/ai-legal-sector-overview [Last seen: 15.10.2024].

14 European Commission. (2019). *Ethics Guidelines for Trustworthy AI*. Brussels: European Commission, pp. 5-10, 10-12. https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=60419 [Last seen: 15.10.2024].

15 Lauritsen, M. (2016). Artificial Intelligence in Law: The State of Play 2016. *Law Practice*, 42(3), American Bar Association, Chicago, pp. 42-43.

16 Katz, D. M., Bommarito, M. J., & Blackman, J. (2017). A General Approach for Predicting the Behavior of the Supreme Court of the United States. *PLOS ONE*, 12(4), Public Library of Science, San Francisco, e0174698, pp. 3-5.

17 Alarie, B., Niblett, A., & Yoon, A. (2018). How Artificial Intelligence Will Affect the Practice of Law. *University of Toronto Law Journal*, 68(1), University of Toronto Press, Toronto, pp. 110-115.

18 Ashley, K. D. (2017). *Artificial Intelligence and Legal*

5. ძირითადი პრობლემები

როგორც ზემოთ ვნახეთ, ხელოვნურმა ინტელექტმა გააადვილა იურიდიული განათლებისა და კვლევის პროცესები. დავალებები, რომელთაც ადრე დიდი დრო და ადამიანური რესურსი სჭირდებოდა, ახლა ბევრად უფრო სწრაფად და მარტივად სრულდება ხელოვნური ინტელექტის დახმარებით. მიუხედავად ამისა, რჩება მთელი რიგი პრობლემები და გამოწვევები, მათ შორის:

- **მიკერძოება და სამართლიანობა:** ისტორიულ მონაცემებზე დახელოვნებული ხელოვნური ინტელექტის სისტემები შეიძლება განაპირობებდეს სისტემური მიკერძოების გამეორებას. საჭიროა ზედამხედველობა, მრავალფეროვანი საწვრთნელი მასალა და რეგულარული აუდიტი, პოტენციური ზიანის შესამცირებლად.[19]
- **ეთიკური და პროფესიული პასუხისმგებლობა:** იურისტებმა უნდა უზრუნველყონ, რომ ხელოვნური ინტელექტის გამოყენება შეესაბამებოდეს პროფესიულ სტანდარტებს, დაიცვან კლიენტის კონფიდენციალურობა და გადაამოწმონ სისტემის მიერ გენერირებული ინფორმაციის სანდოობა. ეთიკური რეგულაციები შესაძლოა საჭიროებდეს განახლებას, რათა ეს ახალი პასუხისმგებლობები აისახოს.[20]
- **მონაცემთა დაცვა და კონფიდენციალურობა:** სენსიტიური სამართლებრივი მონაცემებისადმი მოპყრობა განსაკუთრებულ ყურადღებას მოითხოვს. კონფიდენციალურობის რეგულაციების (მაგ., GDPR) დაცვა და საიმედო კიბერუსაფრთხოების ზომები აუცილებელია ნდობის შესანარჩუნებლად.[21]
- **განმარტებადობა და გამჭვირვალობა:** ხელოვნური ინტელექტის მრავალი ალგორითმი „შავი ყუთის“ პრინციპით მუშაობს, რაც ართულებს მათი მსჯელობის გამოკვლევას. განმარტებადი მოდელები აუცილებელია სამართლებრივი შედეგებისადმი ნდობის შესანარჩუნებლად და მართლმსაჯულების შინაარსობრივი გადახედვის გასაადვილებლად.[22]
- **უნარების დეფიციტი და სასწავლო საჭიროებები:** პედაგოგებსა და პრაქტიკოსებს ხშირად აკლიათ ტექნიკური წიგნიერება, რათა კრიტიკულად შეაფასონ ხელოვნური ინტელექტის ინსტრუმენტები. უწყვეტი პროფესიული განვითარება, ინტერდისციპლინარული ტრენინგი და განახლებული სასწავლო გეგმები დაეხმარება ამ ხარვეზის გადალახვაში.[23]
- **რეგულაციური გაურკვევლობა:** ხელოვნური ინტელექტის გამოყენების სამართლებრივი ჩარჩო ჯერ კიდევ გაურკვეველია. პოლიტიკის შემქმნელებმა უნდა განსაზღვრონ პასუხისმგებლობის სტანდარტები, დასაშვები გამოყენების შემთხვევები და პროფესიული ნორმები, რათა შექმნან პროგნოზირებადი გარემო და წაახალისონ პასუხისმგებლიანი ინოვაცია.[24]

Analytics: New Tools for Law Practice in the Digital Age. Cambridge University Press, New York, pp. 125-128.

19 Barfield, W., & Pagallo, U. (Eds.). (2018). *Research Handbook on the Law of Artificial Intelligence.* Edward Elgar Publishing, Cheltenham, pp. 112-115.

20 Surden, H. (2021). *Computable Contracts and Contract Analytics: AI and Legal Text Processing.* Oxford University Press (online excerpt), New York, pp. 130-133.

21 European Commission. (2019). *Ethics Guidelines for Trustworthy AI.* Brussels: European Commission, pp. 10-12. https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=60419 [Last seen: 15.10.2024].

22 Susskind, R. (2019). *Online Courts and the Future of Justice.* Oxford University Press, Oxford, pp. 120-123.

23 Ashley, K. D. (2017). *Artificial Intelligence and Legal Analytics: New Tools for Law Practice in the Digital Age.* Cambridge University Press, New York, pp. 140-142.

24 Barfield, W., & Pagallo, U. (Eds.). (2018). *Research Handbook on the Law of Artificial Intelligence.* Edward Elgar Publishing, Cheltenham, pp. 200-205.

თათია დოლიძე

6. ეროვნულ სისტემაში არსებული გამოწვევები

საქართველოში იურიდიული განათლება რეგულირდება სახელმწიფოს მიერ. ვინაიდან იურიდიული პროფესია მიიჩნევა რეგულირებად პროფესიად, სახელმწიფო განსაზღვრავს დარგობრივ სტანდარტს იურიდიული განათლებისათვის. აღნიშნული სტანდარტი ადგენს მინიმალურ კომპეტენციებსა და მაჩვენებლებს, რომელთაც იურიდიული განათლების საგანმანათლებლო პროგრამები უნდა აკმაყოფილებდეს. ყველაზე ბოლოს ამ სტანდარტის გადახედვა 2020 წელს მოხდა.[25] მიუხედავად იმისა, რომ სტანდარტი, ერთი შეხედვით, საკმაოდ მოცულობითია, იგი საერთოდ არ ეხება ხელოვნურ ინტელექტთან დაკავშირებულ კომპეტენციებს. ამავდროულად, სამართლის დარგში ხელოვნური ინტელექტი გამოიყენება სასწავლო სიმულაციებში, ე.წ. „სმარტ კონტრაქტებში“, საგამოძიებო საქმიანობაში, კვლევაში და სხვა სფეროებში. მიუხედავად ამისა, ქართული იურიდიული განათლების სტანდარტი ხელოვნურ ინტელექტთან დაკავშირებულ გამოწვევებს საერთოდ არ ეხმიანება. კვლევის ფარგლებში გაანალიზდა ქვეყანაში არსებული იურიდიული განათლების საგანმანათლებლო პროგრამები. მათ უმცირეს ნაწილში შეგვხვდა ხელოვნური ინტელექტის თემატიკა, ისიც ირიბად. ჩვენი აზრით, ქართულ იურიდიულ საგანმანათლებლო სტანდარტში მიზანშეწონილია, შეტანილი იქნეს ხელოვნურ ინტელექტთან დაკავშირებული საკითხები. გარდა ამისა, სასურველია, რომ უნივერსიტეტებმა გაიზიარონ მსოფლიოში არსებული საუკეთესო პრაქტიკა იურიდიული კურსების სწავლებაში და თავიანთ სასწავლო პროგრამებში დანერგონ AI ინსტრუმენტები.

დასკვნა

ხელოვნური ინტელექტის აღზევებამ სამართალში დინამიკური რეაგირება მოითხოვა როგორც იურიდიული განათლების დარგისგან, ისე მკვლევრებისგან. სათანადო გულისხმიერებით და კეთილსინდისიერად ინტეგრირების შემთხვევაში, ხელოვნური ინტელექტი ამდიდრებს პედაგოგიკას, ამარტივებს კვლევას და აძლიერებს პრაქტიკოსებს, რათა უფრო მარტივად და ეფექტიანად იმუშაონ რთულ საინფორმაციო გარემოში. მიუხედავად ამისა, ეს სარგებელი ფრთხილ კონტროლსა და ბალანსირებას საჭიროებს. აუცილებელია ეთიკური ღონისძიებები, მონაცემთა დაცვის მექანიზმები, განმარტებადობის მოთხოვნები და უწყვეტი უნარების განვითარება, რათა უზრუნველყოფილი იყოს, რომ ხელოვნური ინტელექტი ემსახურებოდეს მართლმსაჯულებას და არა პირიქით. სამართლებრივი პროფესიის ევოლუციის პირობებში, ინტერდისციპლინარული თანამშრომლობა, ინფორმირებული პოლიტიკის შემუშავება და ეთიკური გააზრება გარდაუვალი ხდება. ხელოვნური ინტელექტის გააზრებულად დანერგვით, იურიდიული საზოგადოება შეძლებს შეინარჩუნოს თავისი ძირეული ღირებულებები და ამავე დროს გამოიყენოს ტექნოლოგიური ინოვაციების მიერ მოცემული შესაძლებლობები.

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LICENSE FOR POLYGAMY AND THE SPREAD OF THE PHENOMENON OF INFORMAL MARRIAGE: A Comparative Study between Islamic Law and Algerian Law Supported by Judicial Statistics

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ABSTRACT

In many Arab and Islamic countries, family law historically imposed few restrictions on polygamy beyond the conditions prescribed by Islamic jurisprudence. These conditions typically included limiting polygamy to up to four wives, the ability to provide adequate financial support for each wife and a commitment to ensuring justice and equity among them.

In Algeria, family law, as established in 1984, initially permitted polygamy as the default legal framework, albeit with specific restrictions designed to prevent its misuse by husbands. Among these restrictions were the requirements for financial capability and the fair treatment of all wives. However, the law did not mandate judicial authorization for the practice of polygamy.

In 2005, the introduction of Law No. 05/02, which amended the 1984 family law, altered this provision by instituting a requirement for judicial authorization before a man could take a second wife. This change necessitated that the husband obtain permission from the president of the court in the jurisdiction where the marriage was registered.

KEYWORDS: License, Polygamy, Marriage, Islamic law, Algerian law

INTRODUCTION

In many Arab and Islamic countries, family law historically imposed few restrictions on polygamy beyond the conditions prescribed by Islamic jurisprudence. These conditions typically included a limitation of up to four wives, the ability to provide adequate financial support for each wife and a commitment to ensuring justice and equity among them. However, with the independence of Arab and Islamic nations, their membership in the United Nations, and the ratification of various international human rights conventions, the landscape of family law has evolved in line with broader societal progress.

The endorsement of international agreements, most notably the 1967 Declaration on the Elimination of Discrimination Against Women and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has played a pivotal role in advancing the rights of women. These developments shifted the debate from a broader international arena to more localized, national discussions within each country.

As a consequence of these changes, many Arab countries revisited and amended their family laws to ensure alignment with the principles laid out in these global treaties, thereby granting women more rights and protection under the law.

In Algeria, family law, as established in 1984,[1] initially permitted polygamy as the default legal framework, albeit with specific restrictions designed to prevent its misuse by husbands.[2] Among these restrictions were the requirements for financial capability and the fair treatment of all wives. However, the law did not mandate judicial authorization for the practice of polygamy.

In 2005, the introduction of Law No. 05/02, which amended the 1984 family law, altered this provision by instituting a requirement for judicial authorization before a man could take a second wife. This change necessitated that the husband obtain permission from the president of the court in the jurisdiction where the marriage was registered.

While this amendment aimed to regulate polygamy more strictly, it inadvertently encouraged the growth of informal marriages (unregistered marriages), as some men sought to circumvent the new judicial requirements. These informal marriages could later be formalized, raising questions about the effectiveness of the legal amendments in controlling polygamy.

The central issue raised in this context is the following: To what extent has the Algerian legislator succeeded in balancing the religious and civil aspects of polygamy through the requirement for judicial authorization? Did this measure inadvertently make informal marriage a viable alternative to polygamy? And, to what degree has it effectively safeguarded Algerian families from potential disintegration, considering that the family is regarded as the cornerstone of society?

This study aims to explore the regulatory framework governing polygamy under Algerian law and to investigate the proliferation of informal marriages, assessing whether these marriages have emerged as an alternative to traditional polygamy.

The scope of the study is to analyze the legal texts governing polygamy in Algeria, examine the legal recognition of informal marriages, and gather field data reflecting the reality of informal marriage practices in Algeria. This will include an exploration of the factors that have contributed to the spread of informal marriages following the 2005 amendment to the family law.

1. REGULATIONS OF POLYGAMY UNDER ALGERIAN LAW

The Algerian legislator has historically allowed polygamy as a general rule but has sought to regulate the practice through a series

1 Order No. 84/11, dated 09.06.1984, Family Law, amended and supplemented by Order No. 05/02, dated 27.02.2005.

2 Article 8 of the Algerian Family Law.

of legal and religious constraints designed to limit its occurrence and ensure the dignity of women and the stability of society. These regulations ensure that polygamy is not reduced to a mere transient whim but is instead treated with the seriousness it deserves.[3]

1.1. Religious Restrictions on Polygamy

Islamic law permits polygamy but sets specific conditions:

- A man may have up to four wives;
- He must be able to provide justice and financial support to each of them.

A. Maximum Number of Wives

Islam allows polygamy but limits the number of wives to four. Any attempt to marry more than four is strictly prohibited, a prohibition that is well-established in the Qur'an, the Hadith, and the consensus of scholars.

As stated in the Qur'an, Surah An-Nisa (4:3):

"If you fear that you will not deal justly with the orphans, then marry those that please you of [other] women, two or three or four. But if you fear that you will not be just, then [marry only] one or those your right hands possess. That is more suitable that you may not incline to injustice".

It is reported that Qais ibn al-Harith, who converted to Islam and had eight wives, was advised by the Prophet Muhammad (PBUH) to select four of them and divorce the others.[4]

B. Ability to Ensure Justice

If a man is unable to maintain justice among his wives, he is prohibited from marrying more than one, as stated in the Qur'an:

"Then marry those that please you of [other] women, two or three or four. But if you fear that you will not be just, then [marry only] one or those your right hands possess. That is more suitable that you may not incline to injustice". (Qur'an, Surah An-Nisa 4:3)

In such a case, limiting oneself to one wife is recommended if the man fears he cannot be just, and the verse is explicit in its guidance.

The Prophet Muhammad (PBUH) also said:

"If a man has two wives and he inclines to one of them, he will come on the Day of Judgment with his side leaning".

The justice required between wives includes matters within human control, such as providing for their food, drink, housing, kind treatment, and time spent with each.[5]

C. Ability to Provide Financial Support

Islamic law restricts polygamy to those who have the financial means to support more than one wife. If a person lacks sufficient means to provide for multiple wives, it is not permissible for him to marry more than one.

The ability to provide financially is directly tied to the ability to ensure justice, as this involves the material capacity to meet the necessary conditions for marital life.[6] According to a 1987 ruling by the Algerian Supreme Court, financial equality between wives must be maintained, and each wife is entitled to her separate living accommodation.[7] However, achieving this is extremely difficult in the current social and economic circumstances.

2. LEGAL RESTRICTIONS ON POLYGAMY

In addition to the religious requirements, the Algerian legislator has imposed legal conditions on polygamy, including the need to pro-

3 Addadi, S.E. (2015/2016). Polygamy: Unlimited or Restricted? Master's Thesis in Family Law, Faculty of Law and Political Science, Dr. Taher Moulay Saida University, p. 10.

4 Cited in Addadi, S.E., Op. cit., p. 9.

5 Addadi, S.E., Op. cit., p. 11.

6 Chouar, D. (2010). Legislative Gaps in Family Law Regarding Some Marriage Issues: Legal or Judicial Justice? Journal of Legal, Administrative and Political Sciences, Issue 10, Faculty of Law and Political Science, University of Abou Bakr Belkaid, Tlemcen, p. 114.

7 Supreme Court Decision, Family Affairs Chamber. (1990). Case No. 45311, issued on 09.03.1987, Judicial Magazine, Issue 3, p. 61.

vide a valid reason for the marriage, to inform both the first and the prospective wife of the marriage, and to obtain judicial authorization. These legal constraints are as follows:

2.1. Proof of a Valid Reason

The Algerian legislator requires a man to demonstrate a valid reason for polygamy; however, the law does not clearly define what constitutes a "valid reason". To address this ambiguity, a ministerial circular issued by the Ministry of Justice on December 23, 1984, clarified that a valid reason for polygamy must be supported by a medical certificate from a qualified doctor, confirming the wife's infertility or a serious, chronic illness.[8]

However, after the 2005 amendment to the family law (Order No. 05/02), the previously issued circular was no longer applicable. The definition of a valid reason was expanded to include any reason provided by the husband, provided it is substantiated. Judges were granted discretionary power to assess these reasons. It is recognized that valid reasons can vary depending on the time and circumstances and may include factors such as the husband's dissatisfaction with his wife, frequent travel leading to prolonged absences, or other personal issues.[9]

By broadening the definition of a "valid reason" and granting judges discretionary authority, there is concern that many husbands wishing to practice polygamy may hesitate to disclose the true reasons behind their decision. If the reasons are less substantial than infertility or a serious illness, proving them in court becomes challenging, which may lead to the circumvention of formal marriage through informal (unregistered) marriages, especially when judicial authorization cannot be obtained.[10]

2.2. Requirement to Inform the First Wife and the Prospective Wife

According to Article 8, paragraph 2 of the Algerian Family Law, the legislator requires that the husband inform both the first wife and the woman he intends to marry about his desire to practice polygamy:

"The husband must inform the first wife and the woman he intends to marry about his intention to marry another". Thus, the husband wishing to marry a second wife must notify his first wife of his intention, and similarly, he must inform the second woman of his previous marriage. While the law does not specify the exact method of notification, this could likely be done through formal means, such as a registered letter with acknowledgment of receipt or via a judicial officer. In either case, the court must confirm that these notifications were made before approving the marriage.

If the husband fails to comply with this requirement, the marriage is considered to have been concluded under fraudulent circumstances, and Article 8 Bis of the Family Law allows the first wife to file for divorce on the grounds of fraud.

2.3. Requirement for Judicial Authorization by the Court President

Article 8, paragraph 3 of the Family Law states:

"The president of the court may grant authorization for a new marriage if he is satisfied that both parties agree and the husband proves a valid reason, as well as his ability to provide justice and meet the necessary conditions for marital life".

8 Ministerial Circular No. 84/102, issued by the Ministry of Justice on 23.12.1984, detailing the implementation of Article 8 of the Family Law.

9 Cheikh, S. (2017). Informal Marriage as an Alternative Solution to Polygamy. Presentation delivered at the study day titled Family Law between Legal Phenomena and Social Deficiencies, Mediterranean Center for Legal Studies, University of Abou Bakr Belkaid, Tlemcen, p. 2.

10 Cheikh, S., Op. cit., p. 3.

Additionally, paragraph 2 stipulates:

"The request for marriage authorization must be submitted to the president of the court where the marital residence is located".

From an analysis of this article, it is evident that the legislator grants the judge broad discretionary power to either grant or deny permission based on the fulfillment of certain legal conditions. These conditions include proving a valid reason for the marriage, the ability to maintain justice, and the financial means to support the marriage. Furthermore, the approval must be accompanied by the informed consent of both parties, knowledge alone is one thing, but consent is another, as confirmed by the Algerian Supreme Court in its ruling on January 19, 2005, which stated:

"Since the appellant did not prove the respondent's consent to the second marriage, knowing about it is one thing, and consenting to it is another".[11]

The judge must also verify the husband's financial status and his ability to ensure justice and provide for the wives based on concrete evidence, such as a salary certificate, after conducting the necessary investigations. As previously noted, the concept of a valid reason is left to the judge's discretion.

With all these conditions governing polygamy, the situation becomes more complex with the introduction of Article 8 Bis 01 of the Family Law, which states:

"The new marriage is annulled before consummation if the husband has not obtained the necessary judicial authorization in accordance with the conditions outlined in Article 8 above".

From the perspective of legal interpretation, particularly through the principle of qiyas (analogy), one might wonder about the status of the new marriage if judicial authorization is not obtained after consummation. There is a significant scholarly opinion that once the marriage is consummated, it becomes valid, even without the required authorization.

This view holds that the annulment decree issued by the judge would no longer apply once the marriage is consummated.[12] This interpretation could lead to the diminishing importance of Article 8, making informal marriage (which can later be legalized) a practical solution for some couples.

3. INFORMAL MARRIAGE AS AN ALTERNATIVE SOLUTION TO POLYGAMY

Given the constraints imposed on husbands wishing to practice polygamy, many turn to informal marriage as an alternative that allows them to bypass some of these legal requirements.

3.1. Definition of Informal Marriage

Informal marriage refers to an unregistered marital contract, which takes place through a mutual agreement between the man and the woman, typically documented through a private written contract that both parties sign. While the process follows the general formalities of marriage, including witnesses, the marriage is not formally registered with the authorities or a civil registrar, which is a legal requirement under Algerian law.[13]

As per Article 18 of the Family Law: "Marriage is contracted before a notary or a legally authorized official, in accordance with the provisions of Articles 9 and 9 Bis of this law".

Furthermore, Article 4 of the same law states: "Marriage is a consensual contract between a man and a woman, conducted according to the religious law".

11 Supreme Court Decision. (2005). Dated 19.01.2005, published in the Supreme Court Journal, Issue 1, p. 325, quoted in Sheikh, S., Op. cit., p. 5.

12 Cheikh, S., Op. cit., p. 5. See also Mehdawi, H. (2009/2010). A Critical Study of the Amendments to the Family Law Regarding Marriage and Its Effects. Master's Thesis in Family Law, Faculty of Law and Political Science, University of Abou Bakr Belkaid, Tlemcen, p. 64 and onwards.

13 Omaran, F.M. (2005). Informal Marriage and Other Forms of Unofficial Marriage. Modern University Press, Alexandria, p. 25.

Article 22 adds: "Marriage is established through an extract from the civil status register. If not registered, it is validated by a judicial ruling. The judicial ruling must be registered in the civil status register by the efforts of the public prosecutor".

From the interpretation of these provisions, marriage is fundamentally a consensual contract, and the formal requirement is for its proof, not its formation. If a marriage is not registered despite fulfilling the essential conditions, any interested party can prove the marital relationship before the court based on Islamic jurisprudence. This is known as informal marriage.[14]

3.2. Informal Marriage as a Refuge for Those Seeking Polygamy

The Algerian legislator has imposed strict regulations on polygamy, requiring prior authorization from the president of the court in the jurisdiction where the marital residence is located. This measure is designed to provide legal safeguards, primarily to protect women's rights within the institution of marriage. However, these stringent requirements have driven many individuals to seek alternative solutions, resulting in a significant rise in informal marriages, particularly after the amendments to the Family Law in 2005, especially those concerning Article 8.

Despite the mandatory requirement for mosque imams to refuse to officiate any marriage without a civil marriage certificate, an attempt to curb the rise of informal marriages, this prohibition has been largely ineffective. The disparity between the number of authorized polygamous marriages and informal marriages underscores this challenge.[15]

Statistics from the registry office of the Ain Témouchent Court reveal a troubling trend: between 2008 and May 2018, the court president issued only fifty judicial authorizations for polygamy. In contrast, during the same period, 1,350 cases were recorded for the recognition of informal marriages.[16] (See table 1.)[17]

An analysis of these statistics clearly shows that the number of recognized informal marriages consistently outnumbers the approved polygamy requests. This highlights a marked preference for informal marriages, likely driven by the bureaucratic hurdles and legal restrictions surrounding formal polygamy.

In these informal marriages, it is common for the second wife to eventually file a petition to officially recognize the union. This legal rec-

14 Cheikh, S., Op. cit., p. 6.

15 Addadi, S.E., Op. cit., p. 60.

16 Information obtained from the Registry Office of Ain Temouchent Court.

17 Data derived from the Statistical Office of the Ain Temouchent Judicial Council, specifically from Ain Temouchent Court.

More recent statistics (from 2019 to the first half of 2024) show a continued pattern:

Year	Informal Marriage Confirmations		Polygamy Requests	
	Informal Marriage Confirmations		Polygamy Requests	
	Accepted	Rejected	Accepted	Rejected
2019	179	32	05	00
2020	00	00	03	00
2021	157	15	02	00
2022	122	32	00	00
2023	163	32	00	00
First half of 2024	02	00	42	05

ognition enables the first wife to file for divorce, as polygamy is considered a valid ground for divorce under Article 53 of the Family Law.

Thus, the law, intended to restrict polygamy, has inadvertently fueled the rise of informal marriages, as individuals circumvent the formal requirements. Once the informal marriage is recognized through judicial intervention, it is formally registered in the civil status records by the public prosecutor, granting the second wife the same legal rights as if the marriage had been officially recognized from the outset.[18]

The Algerian Supreme Court further reinforced this understanding in its ruling of 1991, affirming that:

"Whenever an informal marriage meets all the necessary conditions and requirements, the court's decision to validate this marriage, register it in the civil status records, and legitimize the children born from it is consistent with both Islamic law and the civil code".

The Supreme Court's rulings have established that informal marriages can be legally recognized through testimony from relatives, two male witnesses, or one male and two female witnesses. However, it is not permissible to establish the validity of a marriage based solely on the testimony of two women or a single witness.[19]

Additionally, one of the witnesses cannot be the legal guardian of the woman involved in the marriage. Importantly, there is no time limit for recognizing informal marriages, and such unions can even be validated after the death of one of the spouses, provided sufficient testimony and an oath are presented.

For the court to accept witness testimony, the witnesses must demonstrate that they were present at the marriage contract, the reading of the Fatiha (the opening chapter of the Quran), or at the marriage celebration and that their testimony is consistent with other available evidence. Judges are required to conduct thorough investigations to verify the facts, as rejecting a claim to confirm a marriage stemming from an illicit relationship is considered a sound judicial decision.[20]

CONCLUSION

The Algerian legislator, through the amendment of the Family Law by Order No. 05/02, has narrowed the scope of polygamy to protect women's rights and preserve family stability. However, the focus has been primarily on safeguarding the rights of the first wife, overlooking the rights of the woman the husband intends to marry. If the husband cannot obtain the required authorization, informal marriage often becomes the alternative. This is particularly true in light of Article 08 bis 1 of the Family Law, which annuls a marriage before consummation if performed without the necessary permission, suggesting that after consummation, the marriage can only be later proven and registered.

Since the 2005 amendment, informal marriages have risen significantly, and these unions are increasingly brought before the courts for official recognition. This undermines women's dignity, stripping them of basic rights like alimony, public benefits, inheritance, and other legal protections. The effects also extend to children born from informal marriages, who lose rights typically afforded to those born from formal unions, such as inheritance and familial rights.

Based on the above, we recommend the following:

1. The legislator should consider religious principles underpinning the state and allow polygamy within Sharia law limits. Restricting polygamy may lead to an increase in illicit relationships, resulting in harmful consequences, especially concerning children and lineage. The European model, which prohibits polygamy, cannot be a suitable comparison given Algeria's religious and cultural context;

18 Addadi, S.E. Op. cit., p. 61.

19 Supreme Court Decision, Family Affairs Chamber. (1991). published in the Judicial Magazine, Issue 4, p. 50, referenced by Cheikh, S., Op. cit., p. 8.

20 Cheikh, S., Op. cit., p. 8, citing a series of decisions issued by the Family Affairs Chamber of the Supreme Court.

2. Annulments before consummation in polygamous cases without judicial authorization contradict Sharia principles if the marriage meets the essential requirements within Sharia law;
3. Authorities should launch awareness campaigns to reduce informal marriages and illicit relationships. These practices negatively affect family and community stability and security.

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THE STUDY OF RIGHT TO FREEDOM OF EXPRESSION, DIGITAL MEDIA LAWS AND DEMAND FOR INNOVATION

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ABSTRACT

This paper provides an overview of the concept of the right to freedom of expression, the concept of digital media, relating and applicable laws as well as needed innovation in the existing legal framework to prohibit misinformation on digital media. Nowadays digital platforms are the prime platform for communication. This study highlights the right to freedom of expression at the National and International level with certain limitations. It explains legal protection for individuals and the responsibilities of digital media. It elaborates on key issues of sharing misinformation. This paper focuses on incidents of misuse of freedom of expression on digital media, case laws, recent developments, and international standards of digital governance as well as addresses the harms associated with misinformation shared on digital platforms. It suggests effective measures against digital abuse which will help to prohibit the misuse of the right to freedom of expression on various digital platforms.

KEYWORDS: Right to freedom of expression, Media, Digital media, Laws and innovation

INTRODUCTION

Information communication technologies and the internet have become important parts of everyone's life around the world. It is useful for improving openness and public debate in the society. But this right to freedom of expression is not absolute. It is with some restrictions. The same restrictions apply to the person who is sharing any kind of information on digital media platforms. There are various guidelines, conventions, and international action plans to cope with the situation of sharing misinformation, and misleading content as well as obscene, and defamatory, provocative, alarming information. The whole World is facing issues because of misuse of digital media technology and misuse of freedom of expression. Many more States are trying to adopt laws and policies to tackle such kinds of issues on a domestic level.

Digital media has become the primary tool for sharing information in various kinds of information. People use Facebook, WeChat, Twitter, Instagram, Pinterest Hike, Messenger Whatsapp and YouTube, Vlogs, Blogs, and Websites for communication as well as sharing information. The information that is shared through all these platforms is not always appropriate; it creates tensions in society or misleads the public. There are various examples of Cybercrimes reported in various countries, which include blackmailing, fraud, harassment, cyber defamation, and misleading sexual offenses. The public misuses technology or sometimes they misuse the right to freedom of expression on digital media platforms Worldwide.

Digital media which includes social media, communication apps, video games, streaming, and augmented and virtual reality, are used by everyone for gaining knowledge, communication, awareness, education, and entertainment. This provides affordances and gratifications that promote media use and overuse, trigger dopamine reward pathways, and influence public identity, self-esteem, socialization, learning and development, and behavior. Nowadays it is the biggest issue that various apps are used to collect information and share that information for profitable advertisement, cyberbullying, and misguiding to the public or for spreading rumors.

Sikarwar Rahul defined Digital Media as "digitized content that can be transmitted over the internet or computer networks".[1] Digital media is the media which processed, stored, analyzed, and distributed by electronic machines or devices like mobile phones, computers, podcasts, or applications. Various companies, organizations, and people use digital media to share information for any kind of purpose which includes education. Awareness, politically updated entertainment, games, advertisements, and businesses.

The digital era started in the 20th century as information technology was used by industries and then after it became a part of public life. Information is shared on digital media in the form of articles, audio, videos, advertisements, music, podcasts, audiobooks, and games, audio and video stories. In the years that followed, newspapers, magazines, radio, and broadcast television were shifting nowadays into the digital world. Google, Netflix, Apple, Facebook, Twitter, and Amazon are popular digital media companies in the World.

Freedom of expression is the most important right which is protected under national as well as international laws and it has a place in various Constitutions also. This right is necessary for human development, personal fulfillment, for searching truth, and information, to sharing ideas and thoughts and it is the requisite of democracy and good governance. Citizens can raise their voice against the injustice. They can use it as a weapon for fulfilling any demand from the government which is coming under basic need. Authorities or the government can frame policies and enact new legislation as per the demand of the public. Therefore free debate is necessary with some limitations. A

1 Rahul, S. (2016). Definition of Digital Media. Available at: <https://www.linkedin.com/pulse/definition-digital-media-rahul-sikarwar-digitalmarketing-expert/>

good democratic government is identified with the right of free speech with certain limitations.

'Freedom of expression' is important to share any kind of information or to express our ideas and thoughts through offline as well as online media. There is a close connection between the right to freedom of expression and the use of digital media. People can share various types of information through digital platforms because they have the right to freedom of expression which includes the right to seek, receive, and impart information, and ideas without interference and regardless of frontiers through any media. In a broader sense freedom of expression is the freedom to make fair criticism against government and public office, posting on social media. Protesting in public, listening radio and watching TV, enjoying on the bank of a lake, or river, painting, drawing, acting, dancing, playing music, singing songs, collecting information, and sharing it the part of freedom of expression This right is with some limitations which include not harming others reputation, not to interfere in other's privacy, not to incite for violence or discrimination. These restrictions are lawful, and executed with court oversight.

INTERNATIONAL FRAMEWORKS AND FREEDOM OF EXPRESSION

The right to freedom of expression is safeguarded under various international instruments like Article 19 of the Universal Declaration of Human Rights as well as Under the International Covenant on Civil and Political Rights 1966. The UDHR states that 'everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers'.[2] Article 19 of The ICCPR holds that, 'everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or print, in the form of art, or through any other media of his choice'.[3] Article 19 (2) of the ICCPR states, 'the right to freedom of expression applies regardless of frontiers and through any media of one's choice which includes internet-based modes of communication'.[4] The same rights means freedom of expression that people have offline and must also be protected online which is applicable without interference and through any media of one's choice, in accordance with articles 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights".

Johannesburg Principles There is no clarity among people about the restrictions imposed upon freedom of expression when and how this freedom is curtailed or restricted and in which manner. There was an try to limit this freedom of expression under a specific condition as mentioned under Siracusa Principles and Johannesburg Principle which includes National Security, Freedom of Expression, and Access to Information.[5]

Frank La Rue highlighted in 2013 under the UN Special Rapporteur[6] on the promotion and protection there may be no disagreements on freedom of expression as a legal right, but it is important that is not a non-derogable right, and therefore may be restricted or limited and it is subject to safeguards as mentioned under Article 19(3) of the ICCPR.

Freedom of expression has also been pro-

2 Universal Declaration of Human Rights. (1948). Article 19. General Assembly resolution 217 A of the United Nations, p. 5.

3 International Covenants on Civil and Political Rights. (1966). Article 19. General Assembly resolution 2200A XXI of the United Nations, p. 11.

4 Ed. Article 19(2).

5 Johannesburg Principles. (1995). Adopted by international law, national security, and human rights convened by Article 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, Johannesburg. Available at: <refworld.org>.

6 Rue, F.L. (2013). UN Special Rapporteur on freedom of opinion and expression, UN Digital Library, p. 6.

tected under various regional Conventions on Human Rights. It is also protected under the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 10 of the European Convention on Human Rights and Fundamental Freedoms states that 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'.[7] European Union adopted The General Data Protection Regulation (GDPR)[8] to regulate digital media which regulates the sharing of personal information online as well as its management. It secures the privacy of individuals, data protection, and freedom of expression in the modern era. There is needed consent from the individual to process his data. It was cleared that prior censorship, any kind of direct or indirect interference upon any expression, opinion, or information transmitted through any means in oral, written, artistic, visual, or electronic form must be prohibited by law.[9] Restrictions to the free circulation of ideas and opinions, as well as the arbitrary imposition of information and the imposition of obstacles to the free flow of information, violate the right to freedom of expression.

The Indian Constitution[10] ensures the fundamental right to freedom of speech and expression under Article 19(1)(a) for every citizen of India. This is a fundamental right to share and express all kinds of thoughts, opinions, and ideas. But this freedom is not absolute. As per Article 19(2) of the Indian Constitution, it is needed to follow a few reasonable restrictions which include not harming India's sovereignty and integrity, security of the State, not disturbing public order and law, not violating decency and morality, not to defame anyone unnecessarily and not to make contempt of Court. These restrictions apply to online media or digital media users also.

Despite having laws there are various incidents of sharing misinformation through digital platforms. It is observed that many instances came into focus that digital media have been misused by users in many countries as well as in India. Fake news is the biggest problem today, it influences negatively to public. It shapes public opinion. Many people make wrong decisions, fall into wrong investments, they face fraud incidents.

Digital media, websites, blogs, vlogs, Social media, and online users all are part of the problem and contributing to the spreading of misinformation. Fake information shapes public opinion and sets local, national, and international agendas with the help of digital setup. There is a trend in business communities to spread fake information and influence the public to increase demand for any product. These businessmen use digital media to tell fake stories of scarcity of products in the future. By reading or watching such information public purchases products immediately even though they don't need them. Fake information is shared to achieve political, social, business, publicity, or any other goal. One of the actresses in India shared fake information about her death through her social media account just for publicity. This is also the trend in political information to share some fake stories against the opposition or against the ruling party which affects voters during the election period. It results in increasing demand for a particular stock or product in the market. Nowadays this has become a trend in digital media. It is very difficult for the common person to find the truth and facts. They become a victim of such fake information. Fake information is shared intentionally and sometimes unintentionally. People are trapped in fake stories because of a lack of awareness; they don't realize and know that they are under the influence of

7 European Council of Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms (Rome). (1950). Article 10.

8 European Union. (2016). General Data Protection Regulation. Available at: <gdpr.eu>.

9 Inter-American Commission on Human Rights. (2000). Declaration of Principles of Freedom of Expression. Principle 5. Available at: <oas.org>.

10 Indian Constitutional Law. Article 19(1)(a) and Article 19(2).

misleading content information. It is difficult to handle fake stories that are being circulated through digital media due to a lack of evidence and sufficient proof to prove that are fake. If there is sufficient proof or evidence available to prove the story is fake but the main issue is to take down that misleading information because of one's post, another one likes, and the third one shares.

Human Rights Watch said that 83 governments worldwide have justified free speech and peaceful assembly during the COVID-19 Pandemic.[11] Authorities have attacked detained, prosecuted, killed critics, broken up peaceful protests, closed media outlets, and enacted vague laws criminalizing speech that they claim threatens public health. The government took action against journalists, activists, healthcare workers, political opposition groups, and others for criticizing government responses to the coronavirus.

Media Defence published that the UN Educational, Scientific, and Cultural Organization (UNESCO) has found that three-quarters of women journalists have experienced online violence. Among them, 30% responded to online violence by self-censoring on social media. Black, indigenous, Jewish, Arab, and lesbian women journalists experienced the highest and most severe form of online violence. 20% of women surveyed were physically attacked or abused offline in connection with online violence that they had experienced.[12]

Reporters Without Borders sheds light on the latest danger of journalist's threats and insults on social networks that are designed to intimidate them into silence. The sources of these threats and insults may be ordinary trolls. Individuals or communities of individuals hiding behind their screens or armies of online mercenaries. Harassing journalists has never been as easy as it is now. Freedom of expression and bots are being used to curtail the freedom to inform.[13]

United Nations has provided key guidelines on freedom of expression. Incitement to discrimination, hostility, and violence which are prohibited by law under these guidelines. States have to use alternative tools or remedies by educating and creating awareness of the impact of hate speech online and offline.[14]

Individuals hesitate to express their opinions and thoughts on digital media because of trolling incidents are increased after sharing any free speech. Posetti J. and Bontcheva K. and Et. al. (2023) write that Rana Ayyub and Disha Ravi, journalists have faced legal threats for their work.[15]

According to Boivin and Johnson (2024), "Digital literacy can help to reduce heavy censorship and it will empower to public to participate in shaping values for online communities against the hate speech".[16] They demanded communication technologies should be positive for civic engagement.

The European Court of Human Rights found that the sanctions imposed on a blogger for offending the feelings of religious believers and inciting hatred toward a social group in a series of video messages had breached the blogger's right to freedom of expression.[17] European Court of Human Rights cleared that criminal prosecution and conviction of the blogger is disproportionate interference which was not necessary in a democratic society and such interference is not justified. Ruslan Gennadyevich Sokolovs-

11 Human Rights Watch. (2021). Review of Free Speech During COVID-19. International Centre for Non-Profit-Law.

12 United Nation's Educational, Scientific, and Cultural Organization Survey Report. (2021). Threats faced by women journalists. Available at: <mediadefence.org>.

13 Reporters Without Borders. (2018). Online Harassment of Journalists: The Trolls Attack. Global Investigative Journalism Network. Available at: <gijn.org>.

14 United Nation's Strategy and Plan of Action on Hate Speech, pp. 2-5. Available at: <https://www.un.org/en/hate-speech/understanding-hate-speech/hate-speech-versus-freedom-of-speech>.

15 Posetti, J., Bontcheva, K., et. al. (2023). Rana Ayyub: Targeted Online Violence at the Intersection of Misogyny and Islamophobia. International Centre for Journalists, University of Sheffield, p. 4.

16 Boivin, K.B., Johnson, M. (2024). Digital Media Literacy as a Precondition for Engaged Digital Citizenship. Centre for International Governance Innovation, pp. 1-5.

17 ECtHR. Sokolovskiy v. Russia (04.06.2024).

kiy, a content-creator and blogger. His YouTube channel had 470,000 subscribers. He was convicted for a series of videos posted on YouTube. He shared hate speech through videos. The videos contained Sokolovskiy's comments on a ban of an atheist group from a social network in the Chechen Republic, comments on hate mail he had received from religious believers, and his criticism of the Russian Orthodox Church. He also made statements about the existence of Jesus and the Prophet Muhammad. In the case of Sokolovskiy v. Russia the European Court of Human Rights dealt with the issue of religious hate speech as a criminal offense interfering with the right to freedom of expression and information under Article 10 of the European Court of Human Rights.

Incidents of sharing false information are increasing day by day. Various false or misleading advertisements are published or shared through Pinterest, Facebook page, Instagram as well as Whatsapp also. The public is coming under the influence of such advertisements and facing issues of money loss. Few fraudulent advertisements are published or shared for participating in conferences, workshops, seminars, and paper publications or to purchase clothes and various products. One of my colleagues sent money to purchase clothes after seeing an online advertisement. The product was not delivered. He was asked to pay more money to start GPS to reach the location by a delivery service person. The colleague asked to return the paid amount, then the seller man sent one transaction message of a bigger amount and told him to return immediately extra transacted amount, but there was no amount transacted in the actual, and a fake transaction message was created and sent by the mobile number. The bank never sends transaction details through mobile numbers. This incident took place online in India with the Maharashtrian victim person in November 2024.

The Ministry of Information and Technology issued a notice to WhatsApp to use such preventive technology to prevent the messages and information shared through WhatsApp groups in large numbers which was the cause of rumors and violence.[18] Then after Whatsapp technology was modified and admin could restrict group members from sharing messages. One more feature added to WhatsApp technology is to find the original source of messages or information shared through it.

'In India Government ordered the violation of free speech'.[19] YouTube is a popular digital platform for sharing videos. Many videos that are available on YouTube are misguided to the public. Untested health care tips, rumors about celebrities, untested food recipes are shared, untested and uncertified beauty formulas, magic tips are shared and wrong activities of children are promoted. Users violate the idea of freedom of expression and broadcast or share anything with the public. Many people follow YouTube videos and get affected. Provocative information is also shared through various YouTube channels which leads to violence. YouTube doesn't allow sharing that information which poses a risk of harm by spreading wrong medical information which is contrary to the local health authorities. YouTube policy doesn't allow medical misinformation that contradicts health authority guidance on the prevention or transmission of specific health conditions or on the safety, efficacy, or ingredients of currently approved and administered vaccines. YouTube policy doesn't promote information that contradicts health authority guidance on treatments for specific health conditions, including promotion of specific harmful substances or practices that have not been approved by local health authorities or the World Health Organization as safe or effective, or that have been confirmed to cause severe harm. YouTube does not allow sharing information denying the existence of specific health conditions. It applies to videos, video descriptions, comments, live streams, and any other YouTube product or fea-

18 Ministry of Electronic and Information Technology India. Available at: <meity.gov.in>.

19 Wire Staff. (2024). In India Government Ordered for the Violation of Free Speech. Available at: <https://thewirehindi.com/272168/bolta-hindustan-youtube-alternate-media-govt/>.

ture. Many YouTube users share unverified and uncertified healthcare information. Surety for weight Loss and wet gain products is shared. Risk-causing stunts are captured by cameras and shared through YouTube. Children follow the same stunts and get affected.

Various bloggers share misinformation through their blogs. There was a story of a 100-year-old granny living her life with good fitness. The secret of her fitness was the herbal medicinal product of a particular company. A Newly established company gives such a surety about the herbal medicinal product and through their advertisement, they tell that Granny has been taking that herbal product for many years. This is a great example of misinformation shared through digital media.

'The Great Hack' a documentary on Netflix is one of the examples of a breach of users' data. Netflix created political controversy through its international productions like 'The Mechanism' which is about a political scandal in Brazil. Netflix is another digital platform to share information in video forms. It is famous for documentaries, TV shows, and web series. It is the top streaming service. Many films are broadcast on Netflix. Standard of these films is less than films which are shown on T.V. or Cinema theaters and approved by the Censor board. Film is an artistic expression. It is coming within the ambit of freedom of expression. Many film producers misuse freedom of expression and share vulgar, obscene films through Netflix which is against the norms.

Significance

Based on various incidents and cases, it is observed that misinformation is shared through digital media which affects society, disturbs public order, violates morality and decency, leads to violence, and creates a threat to national security. Obscene content corrupts the minds of the public which leads to incidents of sexual harassment. Many people are defamed unnecessarily. Private is interfered with. Various people make false decisions based on false information available on digital media. It is necessary to find an urgent solution to prohibit the public from sharing inappropriate content on digital media. Therefore it is important to find out the answers few questions such as:

- Whether the public have a lack of knowledge about existing laws that regulate digital media?
- Is there any other reason for misusing freedom of expression on digital platforms?

Objectives

- To study the concept of freedom of expression.
- To evaluate International and National laws regulating digital media.
- To highlight the incidents of misuse of the right to freedom of expression.
- To find reasons for misusing of right to freedom of expression through digital platforms.

Hypothesis

- Innovation is needed in the existing legal framework to regulate digital media.
- Innovation is needed in existing digital media technology to avoid incidents of misusing freedom of expression.

Methodology

This research has been carried out with the combined method of qualitative as well as quantitative methods. Data related to the legal framework which protects the right to freedom of expression and laws relating to digital media were collected by using doctrinal research methods and hypotheses are tested by using non doctrinal methods – quantitative research which includes observation and survey by using Google questionnaire.

Results And Discussion

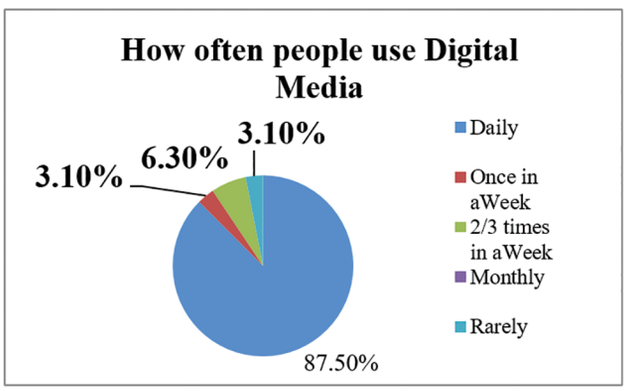
Based on International and National legal frameworks, incidents, case laws, and various reports, it is observed that digital media users share misinformation on digital platforms. Such incidents are increasing day by day. Many conventions and legal frameworks adopted to curtail this burning issue but even abusive, malicious, misleading, defamatory and obscene information is shared on digital platforms which is the biggest headache of various nationals today. The United Nations Global Action Plan is appreciated but the challenge is here rules should be matched with fast-changing communication digital media technology and should be sustained in future years; it is one of the biggest challenges here. Social media surveillance carried out by the US government will be beneficial to prohibiting the content.

32 People participated in this research from Maharashtra and Kerala region of India. They were lawyers and law students from the age group of 21 to 45 and they are users of digital media. They shared their opinion *(see Chart I, Chart II)*.

People were asked how many times they use digital media then 87.50% people answered that they use it daily, 6.30% people use it 2/3 times in a week and 3.10% people said they use once in a week and same 3.10 % people said they use rarely as shown in chart I. Participants were asked which digital platform they used to share information then 43.80% people answered that they used Instagram, 25% Facebook, 25% other apps like a We chat, WhatsApp, and Telegram, and 6.20% participants said they used Twitter for communication or sharing information on digital platform. As shown in Chart II. One notable thing is here that Instagram is the most liked and used app by youngsters for sharing information whereas Facebook is used by middle-aged people *(see Chart III, Chart IV)*.

71.90% of participants were aware of digital media laws but the remarkable point is here that 28.10 % of law field people are not aware of digital media laws as shown in Chart III. Based on this it is clear that there is a pos-

Chart I Chart II



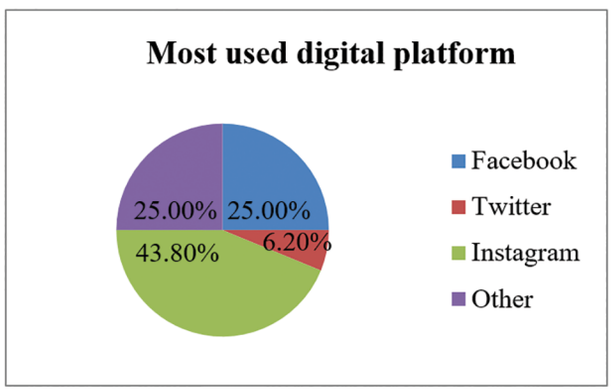
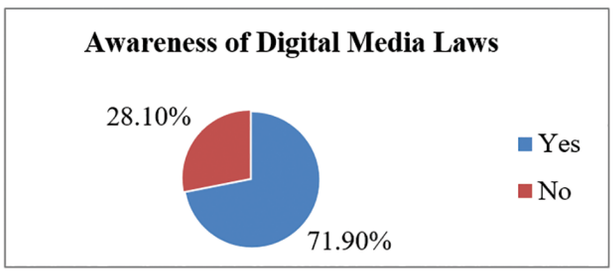
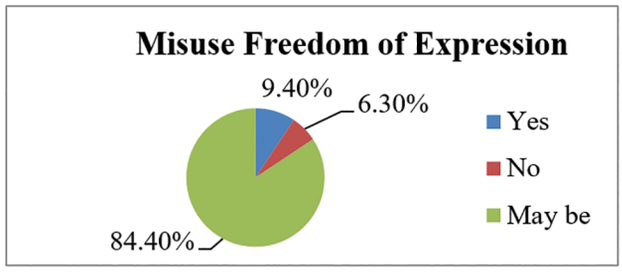


Chart III Chart IV





sibility of less awareness among the common public about digital media laws and this can be one of the reasons for misusing freedom of expression. 84.40% of participants were not sure about the misuse of freedom of expression on the digital platform but 9.40% of participants said that people misuse the right to freedom of expression and 6.30% said that people don't misuse it as shown in Chart IV. All participants demanded change in existing digital media laws and technology to prohibit the misuse of the right to freedom of expression on digital media platforms.

Participants opined that the government should educate every citizen about digital platforms and freedom of expression; governments may restrict freedom of expression when it's necessary and proportionate to protect national security, public order, and the rights of others. Social media platforms should not be used as a means for unrestricted freedom of expression. In a very short period, harmful information religious hate, and vulgarity goes viral. Many young people are using these platforms to promote and display such negativity, which has serious consequences for society. The unchecked nature of social media allows these harmful messages to reach a wide audience quickly, exacerbating social divisions and spreading intolerance. They demanded a limit to age and sharing information per day. There is a demand for monitoring such information and taking fast actions against wrong information, more strict legislation to regulate digital media as well as to prohibit misuse of language on digital platforms. They demanded protection for whistleblowers and journalists who use digital media to expose corruption and promote accountability. Laws on freedom of expression for digital media should balance free speech with accountability. A legal framework that includes immediate action and punishment is one where the law ensures swift responses to violations and provides timely consequences for wrongdoers and compliance with a particular code of conduct. One must get the proper information before commenting or writing on a particular topic. There is also a demand to impose penalties for repeat offenders who violate platform policies.

Participants demanded change in existing technology to prevent the misuse of freedom of expression in digital media which includes enhancement of content moderation, use of AI with human oversight, advanced AI systems for detecting hate speech, misinformation, and harmful information with regular audits and human oversight to reduce biases and errors, culturally aware algorithms to respect regional norms and laws, ensuring context-sensitive moderation, platforms should disclose how information is promoted or suppressed to detect that biases or malicious intention and harmful narratives, optional identity verification methods that allow accountability for users who spread harmful or illegal content, while maintaining anonymity for those who require it for legitimate reasons, governments and NGOs should educate users about responsible and online behavior, improved reporting mechanisms which will make easier for users to report harmful information faster, stricter enforcement of terms, collaboration between platforms to track and prevent coordinated disinformation campaigns, harassment, and other malicious activities, tools for Fact-Checking, integrate real-time fact-checking tools within platforms to help users verify the authenticity of information before sharing, train AI models using diverse datasets to minimize biases. Technology innovation can help to tackle the issue of misuse of freedom of expression on digital platforms.

CONCLUSION

This research brings to notice that only lawyers are aware of the digital media laws and they follow policies and principles underlined in various laws while using such technology for communication but most of the public in the world never fall into gaining knowledge about digital media technology and policies which restricts the sharing of misinformation through

a digital platform. Law field people demand change in existing laws as well as digital media technology as a remedy to prohibit the misuse of misinformation and misuse of freedom of expression on digital platforms.

Suggestions:

- Users must be educated about privacy policies, avoiding copyrighted material, defamatory information, or anything that threatens national security or friendly relations;
- Awareness among the public about laws relating to digital media should be created;
- The government should take strict action against misinformation shared through digital media;
- Comprehensive Data Protection Legislation should be enacted;
- Transparent Content Moderation Practices should be ensured;
- Appropriate changes should be made in digital media technology which is used to share various kinds of information;
- There is a need for strict laws to control hate speech, fake news, and fake posts;
- Immediate action after reporting the misuse is necessary;
- Compliance with a particular code of conduct is necessary.

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ENVIRONMENTAL, SOCIAL AND GOVERNANCE AS SUSTAINABILITY SOLUTION FOR WOMEN'S RIGHTS IN WEST AFRICA

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ABSTRACT

In the West African corporate sector, the engagement of Environmental, Social, and Governance (ESG) principles is becoming the trend and could be a transformative strategy for advancing women's rights in West Africa. This paper examined the ESG framework as potential to act as a catalyst for sustainability especially in the context of gender equality in West Africa. By examining case studies, we show how ESG-focused policies can result in improved outcomes for women, including significant workplace equality, more representation in

female leadership, and greater economic empowerment. Furthermore, we provided strategies for ESG principles in the context of West African legal structures. Our findings suggest that a primed ESG approach, tailored to the unique regional dynamics, can contribute significantly to the sustainable development goals (SDGs) and the empowerment of women in the corporate sector. This study provides actionable insights for policymakers, corporate leaders, and stakeholders aiming to leverage ESG for social change and gender parity in West Africa.

KEYWORDS: Sustainability, ESG, Women's Rights, Corporate Sector, West Africa

INTRODUCTION

Ever since the introduction of the United Nations Sustainable Development Goals, the sustainability discourse has kept expanding into various spheres of social endeavors. From gender equality to poverty reduction, there have been attempts to create credible solutions to social problems in a way that would bring a better balance in social processes. Environmental, Social, and Governance (ESG) principles are concepts that are about consideration for the environment, social issues such as the rights and safety of workers and the community, and good management practices of the firm. The practice of ESG principles in firms, positions the corporate sector to be actively involved in the advancement of women's rights. This is because ESG principles address factors that influence the realization of women's rights such as climate change, workplace power dynamics, and community engagement.

Cardoso et al. argue that companies with elevated ESG ratings show stronger performance in gender metrics and display increased transparency. This connection is especially noticeable among firms that excel in the social aspects of ESG assessment. However, Cardoso et al., noted that despite these firms being known for their commitment to sustainability, women still encounter obstacles such as underrepresentation and lower pay within these organizations.[1] They seemed to suggest that there is more to the realization of women's rights at the workplace than the implementation of ESG principles. Even at the smaller business level, the exclusion of women can prove to be fatal as it was found that the failure to include women in succession planning was a prevalent cause for the lack of sustainability in family businesses.[2] Without a doubt, discrimination is a threat to the realization of human rights.[3]

As it has been defined, gender inclusion involves incorporating women into the operations, management, and leadership roles within companies and organizations, with a particular emphasis on family businesses.[4] Gender inclusion would further mean dismantling stereotypes that restrict women and that often put them at risk in countries where they might be domiciled.[5] This gender inclusion is a particularly strong concept within the universalist conception of human rights, which Lalude has argued has a better operational value for the practice of human rights.[6]

It has been found by Salazar and Moline, that a higher female representation in leadership roles is associated with the engagement

1 Cardoso, M.D., Fernandes, G.A., Teixeira, M. A. (2023). Women Leaders and ESG Performance: Exploring Gender Equality in Global South Companies. Cosmopolitan Civil Societies: An Interdisciplinary Journal, 15(2), pp. 64-83.

2 Abiri-Franklin, S., Olugasa, O. (2022). Succession Planning and Women Inclusion in Family Businesses. Business Perspective Review, 4(1).

3 Lalude, O.M. (2023). If I Ran the Zoo: Protecting the Rights of Black African Minorities. International Journal on Minority and Group Rights, 31(1), pp. 29-50.

4 Abiri-Franklin, S., Olugasa, O. (2022). Transplanting Corporate Sustainability into the Code of Conduct for Public Officers: A Nigerian Perspective. Current Trends in Humanities and Law Research, 1(2), p. 24.

5 Lalude, O.M. (2024). Elimination of Dscrimination Against Women and the African Continental Free Trade Area: The Balance between Gender Inclusivity and Cultural Challenges. International Journal on Minority and Group Rights, aop, pp. 1-19.

6 Lalude, O. M., & Udombana, N. J. (2022). Universality and Particularity: Why Universalism Should be the Standard for Human Rights. Legal Issues Journal, 9(1).

of environmental, social, and governance (ESG) standards, resulting in better business outcomes and engendering inclusive economic advancement. Despite this, substantial gender inequality persists in corporate leadership. Worldwide, women occupy merely 19.7 percent of board seats, 6.7 percent of board chair positions, 5 percent of Chief Executive Officer roles, and 15.7 percent of Chief Financial Officer positions. Factors such as unconscious biases, cultural norms, limited opportunities, and various workforce obstacles were noted to potentially constrain women's career ambitions and restrict their paths to leadership positions.[7] However any organization aims to ensure that it preserves itself.[8] The only way this can happen is to embrace ESG practices.

ESG principles can transform the promotion of women's rights because they heighten the consciousness of the firm to its social issues. Muñoz showed that black women faced entrenched obstacles stemming from both gender and racial discrimination, as well as the intersections of these identities, within the workplace. These barriers often hindered their ability to access leadership roles and resulted in unequal career progression. He further emphasized the critical need for tailored efforts in diversity, equity, inclusion, and belonging. These initiatives should include specific support measures like mentorship programs, flexible work options, and acknowledging the valuable contributions of transformational leadership demonstrated by black women.[9] Beyond this is the acknowledgment of how ESG principles can transform the perception of women in the workplace and beyond the workplace.

The argument supporting gender equality is more compelling than ever, encompassing not just ethical principles but also investment and economic considerations. Nonetheless, advancements are sluggish and inconsistent, mirroring the gradual pace seen in addressing other types of inequality. This slow progress can be attributed to the entrenched resistance of the powerful elite, who seldom relinquish their positions without resistance. Nevertheless, this resistance is gradually proving futile in the long run.[10] The push for gender equality as one of the sustainable development goals and the promotion of women's rights has consistently met with challenges, and these challenges are the usual suspects. Lack of political will and the non-prioritization by legislators of the need to protect women's rights despite the urgent need for the protection of women's rights in Africa are challenges that have greatly undermined the realization of women's rights in the region. Unfortunately, while the realization of women's rights would make for sustainable economies in West Africa, women have been left to the crushing weight of asymmetric power in the corporate sector.

It is undeniable that Nigerian women face significant vulnerability, even though Nigeria has ratified various international standards that condemn gender discrimination and inequality. These standards include the Universal Declaration of Human Rights (UDHR), the International Convention on Economic, Social, and Cultural Rights (ICESCR), the International Convention on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the commitments made at the Fourth World Conference on Women in Beijing, China.[11] Even within the corporate sector, women in Nigeria have often faced discrimination and harassment. Adisa et al., have noted that Nigeria stands out for its

7 Salazar, L., Moline, A. (2023). Increasing Women's Representation in Business Leadership. World Bank Group Gender Thematic Policy Notes Series: Evidence and Practice Note. Washington DC: World Bank.

8 Abiri-Franklin, S., Olugasa, O. (2022). Transplanting Corporate Sustainability into the Code of Conduct for Public Officers: A Nigerian Perspective. Current Trends in Humanities and Law Research, 1(2), p. 24.

9 Muñoz, B.R. (2024). Empowering Voices: Exploring the Career Trajectories of Women of Color HR Professionals amid Disruptive Change. Dallas: Abilene Christian University.

10 Gorte, J. (2019). The Investment Case for Gender Equality. Investments & Wealth Monitor.

11 Obaoye, J. K., & Shouping, L. (2021). Gender discrimination against women and discriminatory law in Nigeria. *Journal of Law and Research, 7*(6).

pronounced bias towards males in the workplace, leading to significant career obstacles that highlight the deeply ingrained and systemic prevalence of male authority within Nigerian institutions. This phenomenon is expressed in the notion of the "hypermasculine organization", which exhibits amplified male privilege, an affinity for gender-based exploitation and mistreatment, and a rationale rooted in strictly enforced gender norms. These hindrances experienced by women in organizational settings could hold significance for other nations in the global south.[12]

Sexual harassment of women in Nigerian firms, which threatens women's autonomy over their bodies is significant, and Akpambang has observed that the issue of workplace sexual harassment has garnered significant attention both domestically and internationally from researchers and organizations. Available data indicates that this reprehensible behavior occurs in both public and private settings and has substantial detrimental impacts on employers, as well as on the health and psychological well-being of employees. Akpambang found that, unlike certain other countries, Nigeria lacks specific legislation targeting sexual harassment, and the existing national legislative frameworks addressing sexual offenses are insufficient to effectively tackle the problem.[13]

Furthermore, the marginalization of women in economic, social, and political realms is a global issue, but it is particularly severe in developing nations. In Nigeria, despite the ratification of the United Nations Convention on the Elimination of All Forms of Discrimination against Women in 1985 and the implementation of similar local policies like the National Gender Policy of 2006, inequality persists due to various cultural and structural barriers. These challenges have limited women's involvement across all aspects of life, with significant repercussions for human resource development, economic progress, and the overall status of gender equality within the country.[14]

In further examining the problem of marginalization of women in West Africa, Asiedu et al., have found that gender inequality was identified across various domains such as labor and industrialization, population dynamics and reproduction, agricultural output, water and sanitation, and energy provision, among others. Significant factors driving these inequalities include issues relating to access to social protection, economic opportunities, and legal rights. Also, obstacles to gender equality and sustainable development include unequal distribution of the burdens of poverty, educational differences, skill gaps, and entrenched gender stereotypes. Proposed solutions include empowering women, who constitute a significant portion of marginalized populations, by enhancing their development and ensuring equitable access to education and leadership roles. Addressing discriminatory cultural norms against women is also highlighted as crucial for progress.[15]

One of the strategies that have rarely been examined in the promotion of women's rights in West Africa, specifically Nigeria and Ghana is the implementation of environmental, social, and governance principles in firms in Nigerian where this could help in re-positioning a firm's priorities especially as it concerns its internal engagement of its female workforce and in the communities where they operate. The question that is rarely asked further is the role of West African firms in promoting women's rights. There is a consideration in many literatures on the role of women board members in the prioritization of ESG principles, but this hardly

12 Adisa, T.A., Mordi, C., Simpson, R., Iwowo, V. (2021). Social Dominance, Hypermasculinity, and Career Barriers in Nigeria. Gender, Work & Organization, 28(1), pp. 175-194.

13 Akpambang, E.M. (2022). Sexual Harassment of Female Employees in the Workplace: Imperative for Stringent Legal and Policy Frameworks in Nigeria. Pancasila and Law Review, 3(1), pp. 69-94.

14 Bako, M.J., Syed, J. (2018). Women's Marginalization in Nigeria and the Way Forward. Human Resource Development International, 21, pp. 425-443.

15 Aseidu, E., Boakye, A.N., Amoako, G.K., Malcalm, E. (2023). Gender and Sustainability in Africa. Corporate Sustainability in Africa. New York City: Palgrave MacMillan, pp. 319–345.

reflects the firm's inclination to promote women's rights. As it was noted by the Organisation for Economic Co-operation and Development female members of corporate boards consistently emphasize environmental, social, and governance concerns, which encompass issues related to climate change and sustainability.[16]

ESG and the Right to Gender Equality and Non-Discrimination

In the West African region, significant gender inequalities and discrimination remain prevalent. Women and girls face widespread disadvantages across various domains, lacking the opportunities afforded to men. This disparity is evident in nearly every public domain, including access to essential services such as healthcare, education, and utilities, as well as property rights and representation in the labor market and public arenas. While legal frameworks and policies addressing these issues are scarce, they do exist. Since the early 2000s, nearly all nations in West Africa have established national gender policies or strategies. Despite these efforts, gender considerations are often relegated to a secondary status, and the implementation of gender policies frequently lacks effectiveness.[17] In examining ESG principles as a catalyst for gender equality and the promotion of women's rights, there is the necessity to see the West African firm as a starting point of reference and its transformative capacities when it engages ESG principles.

Women's rights, specifically the right to gender equality and non-discrimination have been undermined in West Africa, despite the political lip service that has been paid to the prioritization of these rights and the fact that countries like Nigeria and Ghana, where women are still experiencing marginalization, have signed and ratified the United Nations Convention on the Elimination of All Forms of Discrimination against Women 1979 (CERD). Article 11 of the Convention, provides that States Parties are obligated to implement all necessary actions to eradicate discrimination against women in employment, aiming to guarantee equal rights for men and women, especially in this regard.[18] However there is yet to be significant progress in the realization of this provision as it was found that in Nigeria gender equality policies in employment have not been effectively implemented, as women continue to experience marginalization both in the private and public sectors.[19]

Ghana is no different as there has been the persistence of widespread gender inequality, leading to the ongoing marginalization of women across the social, economic, and political spheres.[20] Article 10(c) of the CERD provides that removing stereotypical ideas about the roles of men and women across all educational levels and formats, through promoting coeducation and other educational approaches. This includes revising textbooks and school curricula and adjusting teaching methods to support this goal. Gender inequality in Ghana is anchored on social perception, and social perception is driven by stereotypes drawn from cultural norms. These stereotypes pervade even workplace politics limiting opportunities for women in the corporate space and the community.

Coleman argues that while the interest of foreign aid and human rights communities has borne the weight of promoting women's empowerment in developing countries, firms have

16 Strumskyte, S., Magaña, S.R., Bendig, H. (2022). Women's Leadership in Environmental Action. Paris: Organisation for Economic Co-Operation and Development.

17 OECD. (2016). Gender Equality in West Africa. The Organisation for Economic Co-operation and Development). Available at: <https://www.oecd.org/swac/topics/gender.htm> [Last seen: 09.04.2024].

18 UN Convention on the Elimination of All Forms of Discrimination against Women. (1979).

19 Bako, M.J., Syed, J. (2018). Women's Marginalization in Nigeria and the Way Forward. Human Resource Development International, 21, pp. 425-443.

20 Krawczyk, K.A., King, B.A. (2023). Introduction: A Dichotomy of Development—Women's Empowerment and Women's Inequality. Women's Contributions to Development in West Africa. New York City: Palgrave MacMillan, pp. 1-27.

the financial capacity and the social influence to promote women's rights.[21] Firms are in the position to ensure economic justice as they provide economic opportunities and can target women as economically and socially vulnerable groups in communities for empowerment. Lalude and Fatehinse have defined economic justice as a concept that entails the fair allocation of economic resources and goods.[22] For women in West Africa to benefit from ESG principles they must have economic justice as a realization from firms embracing ESG principles.

Women empowerment is an essential objective of gender equality, and in the promotion of women's rights, there must be a women empowerment agenda. ESG principles are standard for firms in the sustainable development era, and it is through ESG principles that firms can promote women's rights meaningfully by prioritizing gender equality either within the firm or outside it. Women continue to face challenges in achieving equality and active involvement in West Africa. They frequently are confronted by inequality in healthcare, education, employment, and political entitlements, often receiving a smaller portion compared to men. Despite this, women contribute significantly to societal roles that are typically not undertaken by men. The obstacles encountered by women exist on personal, organizational, and cultural dimensions.[23]

Through community engagement, firms can be involved in the realization of economic justice in the communities where they are situated. Community engagement could mean that firms could provide scholarships for the girl child, closing up the gender gaps in many West African communities. Supporting initiatives geared at promoting women in various industries in the community that they are located in. Firms could support women within their systems to reach management levels for the sustainable development of both the firm and the community. Furthermore, the inclusion of women in management positions demonstrates a beneficial influence on Corporate Social Responsibility (CSR) initiatives aimed at promoting gender equality.[24] However for the inclusion of women to be possible within the West African firm, ESG principles have to be incorporated into organizational processes. ESG principles could be made mandatory through regulatory frameworks as a national effort to push sustainability within the private sector and ensure that there is a contributory effort by the private sector in the promotion of women's rights.

ESG-Focused Policies and Improved Outcomes for Women in West Africa

The literature on ESG principles often makes it appear that the concept of ESG has a greater purpose than the elements that it focuses on. They are mostly driven by the idea that gender equality could promote ESG practice amongst firms but do not reflect on the objectives of ESG practice. There is no doubt that ESG principles are beneficial to the promotion of women's rights both within the firm and outside the firm. One of the major ways in which ESG principles can promote women's rights is that the incentivization of ESG investing, which is the determination of a company's sustainability by investors as profitable for investment, can inspire equal pay for women within the firm and an inclination for gender diversity on its board. However, ESG principles cannot by themself incentivize a firm to promote women's rights but the leverage can be created by investors who

21 Coleman, I. (2010). The Global Glass Ceiling: Why Empowering Women is Good for Business. Foreign Affairs, 89, p. 13.

22 Lalude, O.M., Fatehinse, A. (2020). Economic Justice and Judicial Structure: Realizing Economic Growth in Nigeria. Society & Sustainability, 2(1), pp. 25-34.

23 Bature, E.A., Edoeje, G.D. (2023). Globalization and Women in Governance in Nigeria: 2015-2022. NG Journal of Social Development, 11(1).

24 Celis, I.L.-R., Velasco-Balmaseda, E., Bobadilla, S.F., Alonso-Almeida, M.D., Intxaurburu-Clemente, G. (2014). Does Having Women Managers Lead to Increased Gender Equality Practices in Corporate Social Responsibility? Business Ethics: the Environment & Responsibility, 24(1), pp. 91-110.

insist on ESG investing. The macro implication is that regulators in West Africa are then motivated to ensure that firms comply with ESG principles to attract foreign investment and inadvertently boost sustainability practices that will benefit women.

ESG principles give purpose and help in the clarification of a firm's impact in the community where it is located. Apart from the incentive of investment, there is the sharpening of a firm's interests when it engages ESG principles. For instance, ESG principles can help a firm have a good grasp of its intended impact in the community where it operates. Coleman asserts that some firms already support women's rights in the developed world, taking that as a niche corporate social responsibility and creating a public image that supports sustainability.[25] In the context of states like Nigeria and Ghana, firms adopting women-centric values could help in the promotion of women's rights and contribute to the efforts of non-governmental organizations and external political influence from developed countries. It is essential to think of what ESG-focused policies of firms would incline them to do in their engagement with host communities. Apart from the social focus of ESG principles, the environmental and corporate governance elements are beneficial to women's rights in host communities. This is because women are heavily impacted by climate change.[26]

The engagement of ESG-focused firms therefore would catalyze the advancement of women's rights and would help address issues that affect women's livelihoods and capacities in West Africa. Within the firm, ESG-focused policies can help a firm develop a positive attitude towards gender equality and can drive investor confidence. Publicly traded companies are experiencing mounting investor demands to enhance diversity within their board memberships, highlighting a significant recognition of the importance of addressing environmental, social, and governance (ESG) concerns. Investors are progressively using evaluations of companies' gender diversity and inclusivity practices to measure their responsiveness to ESG-related risks and opportunities. These companies are encountering external pressures from institutional investors, activist shareholders, and potential employees and customers to increase the presence of women in boardrooms, C-suite positions, and throughout executive leadership roles, as well as to ensure equitable compensation and advancement opportunities for women and individuals from diverse racial backgrounds. Such pressures can significantly influence the extent and manner in which companies worldwide tackle issues related to diversity, inclusion, and gender disparity.[27]

Case Studies on ESG-Focused Policies and Benefits for Women in West Africa

Luh et al., have argued that in the consideration of the current business landscape, characterized by a strong focus on eco-friendly practices, socially responsible investment, and impact investment from diverse stakeholders, it becomes evident that banks in Ghana should prioritize enhancing the presence of women in leadership roles. This strategic move can positively influence the ESG performance of banks in Ghana, thereby bolstering their capacity to appeal to a wider range of investors.[28] This would mean that the consideration for the female workforce is incentivized by the focus on ESG principles and that firms are driven to en-

25 Coleman, I. (2010). The Global Glass Ceiling: Why Empowering Women is Good for Business. Foreign Affairs, 89, p. 13.

26 UNFCCC Secretariat. (2022). Dimensions and Examples of the Gender-differentiated Impacts of Climate Change, the Role of Women as Agents of Change and Opportunities for Women. Synthesis report by the secretariat. Bonn: United Nations.

27 S&P Global. (2020). How Gender Fits into ESG? New York City: S&P Global.

28 Luh, P.K., Arthur, M., Fiador, V., Kusi, B.A. (2024). Gender of Firm Leadership and Environmental, Social and Governance (ESG) Reporting: Evidence from Banks Listed on Ghana Stock Exchange. Gender in Management, aop.

sure that their policies are conscious of ESG outcomes. Beyond the firm is the impact of the consideration of ESG principles on legislation in countries like Ghana.

In Ghana, there seems to be a significant difference in the reporting of sustainability initiatives between local mining firms and their foreign-owned equivalents. Hinson et al. found that even regardless of size, foreign-owned mining companies are more likely to make and report sustainability initiatives, especially in environmental sustainability. This difference implies that local firms may be more in the early stages of adoption when it comes to the incorporation of Environmental, Social, and Governance principles in their reporting practices. Therefore, Hinson et al., emphasized local mining firms' need to follow standardized reporting policies when discussing their sustainability initiatives, implying that a lot more development is necessary.[29] For local Ghanaian firms, the reality is a slow adaptation to ESG practices and this has significant implications for the role of these firms in the promotion of women's rights and gender equality. The low exposure to investor-influenced behavior by local Ghanaian firms could be attributed to the nature of equity holdings in these firms which are largely indigenous.

The Shell Petroleum Development Company of Nigeria Limited

For more than twenty-five years before 2005, Shell Petroleum Development Company of Nigeria Limited (SPDC) has entered into Memoranda of Understanding (MoU) with communities in the Niger Delta area Thus, from 1980 to 2005, SPDC had entered into MoUs with more than one thousand individual communities in the region, over bilateral agreements. More than that, the communities were actively trying to make relevant their demands or needs of the social value by engaging through MoUs with SPDC. Under the MoUs, many capital-intensive infrastructure projects, such as roads, health centers, and schools, continued existing or focusing on some short-term and limited activities largely unrelated to the development needs of the communities.[30] However, many communities remained dissatisfied with SPDC. For the company, the MoUs took a significant number of resources and time to manage, especially because the projects were implemented through SPDC's internal networks.[31] Unfortunately, in the Niger Delta of Nigeria, women are underrepresented at many levels and suffer access to amenities and good education but are less impacted by the corporate social responsibility drives of the multinational oil companies in the region like SPDC.

According to research, Multinational Oil Companies' (MOCs) Corporate Social Responsibility (CSR) initiatives have helped rural women in their communities overcome cultural and practical obstacles to pursuing postsecondary education. Though these interventions have generally been successful in supporting education initiatives, none of the scholarships are specifically directed toward women. As a result, there is still a human capital gap between men and women in rural areas. This shows that CSR interventions may prolong barriers to women's participation in economic, political, and social development if they do not place equal emphasis on gender diversity and economic opportunities for women in addition to education. This could therefore impede the Niger Delta region's efforts to reduce poverty and fulfill the Sustainable Development Goals (SDGs).[32]

29 Hinson, R.E., Renner, A., Kosiba, J.P., Asiedu, F.O. (2018). Mining Firms and Sustainability Reporting in Ghana. In Innovation Management, Entrepreneurship and Sustainability (IMES 2018). Prague: Vysoká škola ekonomická v Praze, p. 10.

30 Isike, C. (2016). Women, Inclusiveness and Participatory Governance in Nigeria's. Journal of Social Sciences, 49(3), pp. 205-214.

31 Ibid.

32 Uduji, J.I., Okolo-Obasi, E.N., Asongu, S.A. (2020). The Impact of Corporate Social Responsibility Interventions on Female Education Development in the Rural Niger Delta Region of Nigeria. Progress in Develop-

Tullow Oil Ghana

Tullow Oil in Ghana started a program for young women, to cover the gender gap in the technology sector in 2017, and this was to eradicate barriers that prevented more women in STEM fields in Ghana. Some of the barriers include social norms, prejudiced teaching strategies, girls' lack of confidence, and fear. This program tagged, "Educate to Innovate with STEM" was intended to reach as far as communities in Ghana lack access to good educational resources.[33]

Despite these obstacles, Ghana is home to some encouraging projects that aim to buck the trend. Tullow Oil's "Educate to Innovate with STEM Project" is one such program that was initiated to be executed in six coastal districts of the Western Region of Ghana. The project has prioritized the advancement of women in STEM education since its founding in 2017. There has been a steady rise in the number of women pursuing STEM fields, with numbers jumping from 335 in 2017–2018 and up to as high as 787 in 2021.[34]

One of the young women impacted by the program is Emmanuella Blay Andoh. Despite being physically challenged and hailing from a financially disadvantaged community in the Western Region of Ghana. She was able to get into university aided by the program, as a computer engineering student at Kwame Nkrumah University of Science and Technology (KNUST), supported by a full scholarship through the MasterCard Scholars Program.[35] The contribution of Tullow Oil towards the realization of gender equality is a concerted one that represents the consciousness of foreign firms in Ghana towards ESG principles, as against their local counterparts. From the case studies, there is no doubt that ESG principles are beneficial on the whole, as they help in the implementation of the Sustainable Development Goals, the consciousness of ESG principles can help in the realization of gender equality and the promotion of women's rights both within the firm and outside the firm. However, ESG principles must be well integrated into regulatory structures, considering the regional developmental needs in West Africa.

Strategies to Ensure Compliance with ESG Principles

Policymakers

In Nigeria and Ghana, the government has the most capacity to ensure compliance with ESG principles. This is because whether or not investment could be an incentive for the integration of ESG principles into the activities of a firm, ESG principles are beneficial for the growth of firms and will aid in the promotion of women's rights. Another reason why ESG principles should be taken seriously by regulators is that it will help ensure the sustainability of an economy through the benefits that will arise from ESG practice. Therefore, regulatory consideration for ESG principles could come through Corporate Governance codes that will embrace ESG principles, and governments in West Africa could provide annual evaluations of the activities of firms, giving percentage cuts on taxes for best performers.

Corporate leaders, and stakeholders

ESG principles are beneficial for the interest of corporate leaders and shareholders. Apart from the social impact of ESG, there is the cost-efficiency of the firm's operations that is enabled by ESG considerations. Research has shown that when businesses demonstrate strong ESG performance, it has the potential to mitigate financial risks and improve the stability of business operations. (Liu, 2024) Corporate

ment Studies, 20(1), pp. 45-64.

33 Youth Bridge Foundation. (2022). Tullow Oil Enabling Stem Education Progression for Young Females in Deprived Communities in Ghana. Available at: <https://www.youthbridgefoundation.org/tullow-oil-enabling-stem-education-progression-for-young-females-in-deprived-communities-in-ghana/> [Last seen: 01.01.2023].

34 Ibid.

35 Ibid.

leaders can influence corporate policy towards ESG considerations, following up on human resources, procurement, corporate social responsibility, and culture. This would ramp up sustainability for the firm and would save on resources for the firm while maximizing its human resources through its implementation of diversity, equity, and inclusion.

CONCLUSION

The implementation of Environmental, Social, and Governance principles in the corporate sector of West Africa is a promising step toward women's rights and gender equality. We investigated the significance of ESG-related policies in promoting potential outcomes for women such as workplace equality, greater gender diversity in senior management, and economic wellbeing. Furthermore, the incorporation of ESG principles in West Africa's legal fabric can significantly contribute to sustainability and gender equality. The results have focused attention on the importance of region-specific Customized ESG strategies in West Africa, with primed ESG approaches helping to accomplish the United Nations Sustainable development goals and empower women.

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