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Formal Constitutional Review from the Georgian Legal Perspective

ABSTRACT

Constitutional review stands as one of the most crucial mechanisms among state authorities' activities, serving to uphold constitutional supremacy, protect human rights, and resolve competency disputes between state bodies. To fulfill these essential functions, constitutional courts examine the conformity of normative acts with the constitution. This examination encompasses not only the assessment of substantive compatibility with fundamental law, but also verification of compliance with constitutionally established procedures for the adoption and implementation of normative acts. This authority, recognized in legal doctrine as "formal constitutional review," is indispensable to the Constitutional Court's role as a comprehensive mechanism for protecting constitutional supremacy and fundamental rights.

The 2017 comprehensive amendments to the Constitution of Georgia sparked a significant debate within Georgian academic circles regarding the Constitutional Court's authority to conduct formal constitutional review. This scholarly discourse emerged from specific normative foundations: while the previous constitutional framework permitted expansion of the Constitutional Court's powers through organic law, the reformed Constitution now exhaustively defines these powers. However, this strictly normative interpretation raises several critical questions. First, should the Constitutional Court's powers be subject to such a narrow normative interpretation? Second, how does the Constitutional Court perceive its own competence? Third, what

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legal foundations for formal constitutional review exist within constitutional legislation and the Court's jurisprudence? This article aims to systematically address these fundamental questions.

Keywords: Constitucional Court, Contitutional Review, Formal Constitutional Review, Human Rights Protection

I. Introduction

Constitutional review stands as one of the most fundamental mechanisms among state authorities' activities, serving to uphold constitutional supremacy, protect human rights, and resolve competency disputes between state bodies.[1] Given this fundamental importance, both European and Georgian legal systems emphasize the development of constitutional courts and the establishment of guarantees for their effective operation. Consequently, the enhancement of constitutional review and Constitutional proceedings remains highly relevant.

The 2017 constitutional reform in Georgia sparked scholarly debate, with some arguing that the Constitutional Court of Georgia was divested of its formal constitutional review authority.[2] Previously, this authority enabled the Court to examine and determine whether legislative acts and parliamentary resolutions complied with constitutional requirements regarding their adoption, issuance, signing, publication, and enactment.[3] According to this interpretation, formal constitutional review – which encompassed the procedural aspects of normative acts' conformity with the constitution – ceased to exist after 2017, effectively removing a key parliamentary oversight mechanism.[4]

[1] კვერენჩხილაძე გ., კონსტიტუციის სამართლებრივი დაცვა (ზოგიერთი თეორიული საკითხი), ჟურნ. „ადამიანი და კონსტიტუცია", No. 3, 2006, 43 [kʻverenchkhiladze g., kʻonstʻitʻutsiis samartlebrivi datsva (zogierti teoriuli sakʻitkhi), zhurn. „adamiani da kʻonstʻitʻutsia", N3, 2006, 43].

[2] ხეცურიანი ჯ., საქართველოს საკონსტიტუციო სასამართლოს უფლებამოსილება, მე-2 გამოცემა, თბილისი, 2020, 15 [khetsuriani j., sakartvelos sakʼonstʼitʼutsio sasamartlos uplebamosileba, me-2 gamotsema, tbilisi, 2020, 15].

[3] It is noteworthy that, unlike some countries, where formal constitutional review is exercised over violations of both constitutional and legal procedures, in Georgia, when introducing this institution, it was considered appropriate to extend review only to violations of constitutional procedures. See also: ხეცურიანი ჯ., ნოვაციები საქართველოს საკონსტიტუციო სასამართლოს შესახებ კანონმდებლობაში, ჟურნ. „ადამიანი და კონსტიტუცია", No. 1, 2002, 12 [khetsuriani j., novatsiebi sakartvelos sakʼonstʼitʼutsio sasamartlos shesakheb kʼanonmdeblobashi, zhurn. „adamiani da kʼonstʼitʼutsia", No. 1, 2002, 12].

[4] Ibid.

This article examines the prospects of formal constitutional review within Georgia's constitutional framework. Through teleological, analytical, and systematic research methods, it analyzes relevant legislation and Constitutional Court jurisprudence. The study focuses on three aspects in particular: the legal nature of formal review, the Constitutional Court's constitutional status, and evolving trends in its jurisdictional competence. This analysis will facilitate an assessment of whether formal constitutional review remains within the Georgian Constitutional Court's authority.

II. Constitutional Court and Formal Constitutional Review

The scope of constitutional courts' powers varies across nations, reflecting diverse political and legal cultures. Nevertheless, certain "core powers" essential for effective constitutional oversight remain largely consistent across jurisdictions. These encompass a broad spectrum of review types: abstract and concrete, preventive and repressive, formal and substantive. This comprehensive empowerment enables constitutional courts to serve as effective guardians of constitutional principles and fundamental rights.[5]

Constitutional violations threaten the entire public order,[6] necessitating robust legal protection mechanisms.[7] Constitutional review extends beyond mere formal comparison of legal acts with constitutional text; it involves interpreting content and often evaluating the constitutionality of various interpretations.[8] Notably, ensuring formal compliance of normative acts with constitutional requirements carries equal weight to substantive review. Formal constitutional review, as a crucial aspect of constitutional court operations, exemplifies this principle in practice.

[5] კვერენჩხილაძე გ., კონსტიტუციის სამართლებრივი დაცვა (ზოგიერთი თეორიული საკითხი), ჟურნ. „ადამიანი და კონსტიტუცია", No. 3, 2006, 43 [k'verenchkhiladze g., k'onst'it'utsiis samartlebrivi datsva (zogierti teoriuli sak'itkhi), zhurn. „adamiani da k'onst'it'utsia", N3, 2006, 43]; Sweet A.S., Constitutional Courts, in: The Oxford Handbook of Comparative Constitutional Law, edited by M. Rosenfeld and A. Sajó, Oxford University Press, 2012, 822.

[6] ნაკაშიძე მ., საქართველოს საკონსტიტუციო სასამართლოს გადაწყვეტილების აღსრულების პრობლემები, ჟურნ. „მართლმსაჯულება", No. 1, 2009, 136 [nak'ashidze m., sakartvelos sak'onst'it'utsio sasamartlos gadats'qvet'ilebis aghsrulebis p'roblemebi, zhurn. „martlmsajuleba", No. 1, 2009, 136].

[7] კახიანი გ., საკონსტიტუციო კონტროლის ზოგიერთი თეორიული ასპექტი, ჟურნ. „ადამიანი და კონსტიტუცია", No. 4, 2005, 9 [k'akhiani g., sak'onst'it'utsio k'ont'rolis zogierti teoriuli asp'ekt'i, zhurn. „adamiani da k'onst'it'utsia", No. 4, 2005, 9].

[8] გეწაძე გ., საკონსტიტუციო კონტროლის ფორმები და სახეები, ჟურნ. „ადამიანი და კონსტიტუცია", No. 1, 1998, 26 [gets'adze g., sak'onst'it'utsio k'ont'rolis pormebi da sakheebi, zhurn. „adamiani da k'onst'it'utsia", No. 1, 1998, 26].

The primary objective of formal constitutional review is to safeguard constitutional integrity and maintain its supreme status. This review process establishes a fundamental "normative act validity" principle: a legal act becomes void not only when its content contradicts constitutional provisions, but also when it violates constitutionally mandated procedures for adoption and enactment.[9] This authority falls within the category of abstract constitutional review, a doctrinal classification that serves to preserve constitutional supremacy.[10]

II. Development of Formal Constitutional Review in Georgia

The Constitutional Court of Georgia acquired formal constitutional review authority in 2002, through the Organic Law "On the Constitutional Court of Georgia".[11] This expansion enabled the Court to examine not only the substantive constitutional compatibility of legal acts, but also their procedural compliance in adoption and implementation. Although Georgia's Constitution did not explicitly provide for formal constitutional review, relevant indicative norms[12] supported the Court's exercise of this authority.

The scope of formal constitutional review under the Organic Law was specifically limited to Georgian legislative acts and parliamentary resolutions.[13] Consequently, standing to bring such cases was restricted to those entities authorized for abstract constitutional review: The President, Government, and parliamentary groups. The Court's formal review jurisdiction extended only to legal acts whose procedures for adoption, issuance, signing, publication, and implementation were constitutionally prescribed, with such matters reserved for the Court's Plenum.

[9] ხეცურიანი ჯ., საქართველოს საკონსტიტუციო სასამართლოს უფლებამოსილება, მე-2 გამოცემა, თბილისი, 2020, 16 [khetsuriani j., sakartvelos sak'onst'it'utsio sasamartlos uplebamosileba, me-2 gamotsema, tbilisi, 2020, 16].

[10] კახიანი გ., საკონსტიტუციო კონტროლის ზოგიერთი თეორიული ასპექტი, ჟურნ. „ადამიანი და კონსტიტუცია", No. 4, 2005, 172-173 [k'akhiani g., sak'onst'it'utsio k'ont'rolis zogierti teoriuli asp'ekt'i, zhurn. „adamiani da k'onst'it'utsia", No. 4, 2005, 172-173].

[11] Organic Law of Georgia "On Amendments and Supplements to the Organic Law of Georgia "On the Constitutional Court of Georgia", 12 February 2002.

[12] The Constitution of Georgia provided for the possibility of expanding the powers of the Constitutional Court through the organic law.

[13] According to Art. 7 of the Organic Law of Georgia "On Normative Acts", which was in force during this period, the legislative acts of Georgia were the Constitution of Georgia, the Constitutional Law of Georgia, the Organic Law of Georgia, the Law of Georgia, the Regulations of the Parliament of Georgia, and the Decree of the President of Georgia.

The 2017 constitutional reform fundamentally altered the framework for determining constitutional court powers.[14] Previously, these powers were defined jointly by the Constitution and the Organic Law; post-reform, the Constitution became the exclusive source for establishing Court authority.[15] This shift prompted discussion about potential normative limitations on the Court's formal constitutional review capacity.[16]

Regarding practical application, the Court's exercise of formal constitutional review remained limited even before the 2017 reform, with both formal and abstract review generally categorized as "dormant" powers.[17] The Court's abstract review jurisprudence includes only a few notable cases.[18] A significant example of formal constitutional review appears in a 2004 decision, which invalidated the Autonomous Republic of Adjara's 2003 Organic Law "On the State of Emergency" due to its adoption by an unauthorized entity.[19] Since then, constitutional litigation has evolved primarily through substantive review powers.

III. The Perspective of Formal Constitutional Review in Constitutional Practice

Doctrinal concerns about formal constitutional review in Georgia, arising from the 2017 constitutional reform, rest primarily on the premise that this reform exhaustively defined constitutional court powers. While explicitly codifying formal constitutional review authority in Georgia's Constitution would resolve these uncertainties, several factors challenge the conclusion that the Constitutional Court lacks formal review powers:

[14] Constitutional Law of Georgia "On Amendments to the Constitution of Georgia", 13 October 2017.

[15] According to the Constitution of Georgia, the Constitutional Court of Georgia has 10 jurisdictions, which include 9 powers defined in Article 60 and the impeachment procedure, which is defined in Article 48 of the Constitution.

[16] ხეცურიანი ჯ., საქართველოს საკონსტიტუციო სასამართლოს უფლებამოსილება, მე-2 გამოცემა, თბილისი, 2020, 15 [khetsuriani j., sakartvelos sak'onst'it'utsio sasamartlos uplebamosileba, me-2 gamotsema, tbilisi, 2020, 15].

[17] კახიანი გ., საკონსტიტუციო კონტროლი საქართველოში, თეორია და კანონმდებლობის ანალიზი, თბილისი, 2011, 192 [k'akhiani g., sak'onst'it'utsio k'ont'roli sakartveloshi, teoria da k'anonmdeblobis analizi, tbilisi, 2011, 192].

[18] Ibid., 185-187.

[19] Decision No. 15/290,266 of the Constitutional Court of Georgia of 25 May 2004 in the case "Group of Members of the Parliament of Georgia (67 deputies in total) against the Parliament of the Autonomous Republic of Adjara, and Citizen of Georgia Tamaz Diasamidze against the Parliament of the Autonomous Republic of Adjara and the Head of the Autonomous Republic of Adjara".

1. Following the 2017 constitutional reform, significant legislative changes governed Constitutional Court operations. In July 2018, Parliament integrated the provisions of the Law "On Constitutional Proceedings" into the Organic Law "On the Constitutional Court of Georgia".[20] Article 19 of this Organic Law delineates the Court's powers, with subparagraph "a" of the first paragraph specifically authorizing the Court to review and determine compliance of legislative acts and parliamentary resolutions regarding their adoption, issuance, signing, publication, and enactment.[21] Despite multiple opportunities to eliminate formal constitutional review authority through legislation, Parliament maintained these provisions in Articles 19 and 33 of the Organic Law after the constitutional amendments, suggesting a deliberate choice to preserve this power.[22]

2. The Constitution of Georgia establishes the Constitutional Court's powers, while the Organic Law determines its operational rules.[23] Although the Organic Law cannot expand or restrict these constitutional powers,[24] the powers stipulated in these two sources need not be editorially identical. The Organic Law frequently elaborates on constitutionally defined powers, providing detailed regulations that align with the constitutional framework. For instance, it expands upon the constitutional list of acts subject to review.[25] Moreover, within the context of abstract constitutional review, the Constitution defines normative act review as having autonomous constitutional

[20] See: Organic Law of Georgia "On Amendments to the Organic Law of Georgia "On the Constitutional Court of Georgia", 21 July 2018.

[21] Organic Law of Georgia "On the Constitutional Court of Georgia", 31 January 1996, Art. 19.

[22] It should be noted that Article 26(2) of the Organic Law of Georgia "On the Constitutional Court of Georgia" provided for the possibility of the Constitutional Court, within the framework of specific powers, to review not only the substantive, but also the formal constitutionality of a norm until 2022, on their own initiative, although with the relevant legislative amendment (no information is provided in the explanatory note), the reference to formal review was removed, which is at least confusing aspect, given the existence of other references to formal review in the organic law. See: Organic Law of Georgia "On Amendments to the Organic Law of Georgia On the Constitutional Court of Georgia", 14 April 2022, and its explanatory note.

[23] The Constitution of Georgia, 24 August 1995, Art. 59(2).

[24] ხეცურიანი ჯ., რჩეული შრომები, ქ. ერემაძის და გ. კვერენჩხილაძის რედაქტორობით, თბილისი, 2021, 251 [khetsuriani j., rcheuli shromebi, k. eremadzis da g. k'verenchkhiladzis redakt'orobit, tbilisi, 2021, 251].

[25] In this regard, the legislative limitation of the acts subject to review by the Constitutional Court may conflict with the Constitution of Georgia. See, ლოლაძე ბ., მაჭარაძე ზ., ფირცხალაშვილი ა., *საკონსტიტუციო მართლმსაჯულება,* თბილისი, 2021, 179 [loladze b., mach'aradze z., pirtskhalashvili a., sak'onst'it'utsio martlmsajuleba, tbilisi, 2021, 179].

significance.[26] Thus, abstract normative review under the Constitution can encompass both formal and substantive constitutionality assessments.[27]

Therefore, the absence of explicit constitutional provisions for formal constitutional review does not preclude its specification in organic law or its interpretation within the constitutionally defined scope of abstract constitutional review.

3. According to Kelsen's doctrine, which underlies the European model of constitutional review,[28] the Constitutional Court functions as a negative legislator, distinguished from a positive legislator by its power to invalidate unconstitutional laws.[29] In this capacity, the Court exercises oversight of legislative branch activities.[30] However, the Court's role in verifying the lawful enactment of legislation should not be misconstrued as either participation in the legislative process[31] or transformation into a positive legislator.[32]

According to the Constitution of Georgia, the Constitutional Court functions as a body of constitutional review, with its organizational structure and operational procedures determined by organic law.[33] While the Constitution defines the Court's powers, their categorization into specific types of constitutional review remains a doctrinal matter. The identification of particular authorities as forms of constitutional review involves an evaluative process that encompasses both formal and substantive review aspects. Since the Constitution does not explicitly classify the Court's powers into

[26] Decision No. 2/4/532,533 of the Constitutional Court of Georgia of 8 October 2014 in the case "Citizens of Georgia – Irakli Kemoklidze and Davit Kharadze against the Parliament of Georgia", II-63.

[27] საკონსტიტუციო სამართალწარმოება, პ. ჯავახიშვილის რედაქტორობით, თბილისი 2024, 292 [sak'onst'it'utsio samartalts'armoeba, p'. javakhishvilis redakt'orobit, tbilisi 2024, 292].

[28] Passaglia P., The Italian System of Constitutional Review: a Kelsenian Model Moving Towards a Decentralized Model? in: Right-Based Constitutional Review, Constitutional Courts in a Charging Landscape, edited by J. Bell and M.L. Paris, Edvard Elgar Publishing, 2016, 247.

[29] Sajó A., Limiting Government: An Introduction to Constitutionalism, Budapest, 1999, 233.

[30] Brewer-Carias A.R., Constitutional Courts as Positive Legislators, Cambridge University Press, 2011, 8.

[31] ზოიძე ბ., საკონსტიტუციო კონტროლი და ღირებულებათა წესრიგი საქართველოში, თბილისი, 2001, 67 [zoidze b., sak'onst'it'utsio k'ont'roli da ghirebulebata ts'esrigi sakartveloshi, tbilisi, 2001, 67].

[32] გეგენავა დ., ჯავახიშვილი პ., საქართველოს საკონსტიტუციო სასამართლო, პოზიტიური კანონმდებლობის მცდელობა და გამოწვევები, წიგნში: ლადო ჭანტურია 55, დ. გეგენავას რედაქტორობით, თბილისი, 2018, 140-141 [gegenava d., javakhishvili p'., sakartvelos sak'onst'it'utsio sasamartlo, p'ozit'iuri k'anonmdeblobis mtsdeloba da gamots'vevebi, ts'ignshi: lado ch'ant'uria 55, d. gegenavas redakt'orobit, tbilisi, 2018, 140-141].

[33] The Constitution of Georgia, 24 August 1995, Art. 59.

formal and substantive categories, establishing a definitive boundary between these functions proves practically impossible.

Furthermore, any interpretation that restricts the Constitutional Court solely to substantive review should be considered incompatible with the Court's constitutional mandate and an unwarranted limitation of its constitutional scope. However, the exercise of formal constitutional review over constitutional amendments in Georgia presents a distinct challenge, as both legal doctrine[34] and the Constitutional Court's jurisprudence preclude constitutional review of Georgian constitutional law.[35]

4. Constitutional courts actualize Marshall's concept of a "living constitution" through their constitutional proceedings.[36] The effective implementation of the Court's functions, and its self-understanding of these powers, are crucial elements in shaping the nation's legal landscape.[37] Understanding the Constitutional Court's authority requires careful examination of its jurisprudential practice, which reveals multifaceted and significant dimensions.

The Constitutional Court of Georgia has consistently adopted a broad interpretation of its constitutionally defined powers, effectively expanding its jurisdiction through teleological interpretation. A notable example occurred in 2011, when the Court, citing the imperative to establish robust protection of fundamental rights, expansively interpreted its authority, regarding individual claims of constitutional rights violations un-

[34] კახიანი გ., საკონსტიტუციო კონტროლი საქართველოში, თეორია და კანონმდებლობის ანალიზი, თბილისი, 2011, 173 [k'akhiani g., sak'onst'it'utsio k'ont'roli sakartveloshi, teoria da k'anonmdeblobis analizi, tbilisi, 2011, 173]; ხეცურიანი ჯ., ნოვაციები საქართველოს საკონსტიტუციო სასამართლოს შესახებ კანონმდებლობაში, ჟურნ. „ადამიანი და კონსტიტუცია", No. 1, 2002, 13 [khetsuriani j., novatsiebi sakartvelos sak'onst'it'utsio sasamartlos shesakheb k'anonmdeblobashi, zhurn. „adamiani da k'onst'it'utsia", No. 1, 2002, 13].

[35] Ruling No. 1/1/549 of the Constitutional Court of Georgia of 5 February 2013 in the case "Citizens of Georgia – Irma Inashvili, Davit Tarkhan-Mouravi and Ioseb Manjavidze against the Parliament of Georgia"; Ruling No. 1/2/523 of the Constitutional Court of Georgia of 24 October 2012 in the case "Georgian Citizen Geronti Ashordia against the Parliament of Georgia"; Ruling No. 2/2/486 of the Constitutional Court of Georgia of 12 July 2010 in the case "Non-Profit (Non-Commercial) Legal Entity "National League for the Protection of the Constitution" against the Parliament of Georgia".

[36] გეგენავა დ., საკონსტიტუციო მართლმსაჯულება საქართველოში: სამართალწარმოების ძირითადი სისტემური პრობლემები, თბილისი, 2012, 20 [gegenava d., sak'onst'it'utsio martlmsajuleba sakartveloshi: samartalts'armoebis dziritadi sist'emuri p'roblemebi, tbilisi, 2012, 20].

[37] Sweet A.S., Constitutional Courts, in: The Oxford Handbook of Comparative Constitutional Law, edited by M. Rosenfeld and A. Sajó, Oxford University Press, 2012, 822.

der Chapter Two.[38] Through this landmark decision, the Court effectively broadened its jurisdiction beyond the traditional assessment of normative constitutionality to encompass the review of constitutional interpretation, despite the absence of explicit legislative authorization from Parliament for such expansion.[39]

The Constitution of Georgia defines the scope of concrete and abstract constitutional review as encompassing normative acts issued by state authorities. Nevertheless, the Constitutional Court extended its review powers to include individual acts with normative content,[40] despite the Constitution's explicit limitation of constitutional review to normative acts in both concrete and abstract review frameworks. A particularly significant development occurred in the Court's 2015 decision,[41] where, considering the imperative of legal stability and public order, the Court took the unprecedented step of independently modifying the constitutional norm specified in the submission that formed the basis for assessing legislative constitutionality.[42]

[38] Decision No. 1/1/477 of the Constitutional Court of Georgia of 22 December 2011 in the case "Public Defender of Georgia against Parliament of Georgia".

[39] See: ჯავახიშვილი პ., საერთო სასამართლოების გადაწყვეტილებებზე საკონსტიტუციო კონტროლი ქართულ სამართლებრივ პერსპექტივაში, თბილისი, 2022, 89 [javakhishvili p'., saerto sasamartloebis gadats'qvet'ilebebze sak'onst'it'utsio k'ont'roli kartul samartlebriv p'ersp'ekt'ivashi, tbilisi, 2022, 89]; ჯავახიშვილი პ., საქართველოს საკონსტიტუციო სასამართლო და ფაქტობრივი რეალური კონტროლი, „სამართლის ჟურნალი", No. 1, 2017, 346 [javakhishvili p'., sakartvelos sak'onst'it'utsio sasamartlo da pakt'obrivi realuri k'ont'roli, „samartlis zhurnali", No. 1, 2017, 346].

[40] See: Ruling No. 1/7/436 of the Constitutional Court of Georgia of 9 November 2007 in the case "Caucasus Online LLC against Georgian National Communications Commission"; Decision No. 2/5/700 of the Constitutional Court of Georgia of 26 July 2018 in the case of "Coca-Cola Bottlers Georgia LLC, Castel Georgia LLC and JSC Tskal Margebeli against the Parliament of Georgia and the Minister of Finance of Georgia"; Ruling No. 1/4/1691 of Constitutional Court of Georgia of 22 February 2023 in the case "Giorgi Goroshidze and Indiko Abashidze against the Parliament of Georgia, the Minister of Education and Science of Georgia and the Academic Council of the Ivane Javakhishvili Tbilisi State University".

[41] Decision No. 3/1/608,609 of the Constitutional Court of Georgia of 29 September 2015 in the case "Constitutional submission of the Supreme Court of Georgia on the constitutionality of Para. 4 of Article 306 of the Criminal Procedure Code of Georgia and Constitutional submission of the Supreme Court of Georgia on the constitutionality of Subparagraph "g" of Article 297 of the Criminal Procedure Code of Georgia".

[42] ჯავახიშვილი პ., თვითინიციატივასა და შეჯიბრებითობას შორის: ერთი გადაწყვეტილება საქართველოს საკონსტიტუციო სასამართლოს პრაქტიკიდან, წიგნში: ავთანდილ დემეტრაშვილი 75, დ. გეგენავას და მ. ჯიქიას რედაქტორობით, თბილისი, 2017, 100 [javakhishvili p'., tvitinitsiat'ivasa da shejibrebitobas shoris: erti gadats'qvet'ileba sakartvelos sak'onst'it'utsio sasamartlos p'rakt'ik'idan, ts'ignshi: avtandil demet'rashvili 75, d. gegenavas da m. jikias redakt'orobit, tbilisi, 2017, 100]; ჯავახიშვილი პ., საერთო სასამართლოების გადაწყვეტილებებზე საკონსტიტუციო კონტროლი ქართულ სამართლებრივ პერსპექტივაში, თბილისი, 2022, 99 [javakhishvili p'., saerto

These examples demonstrate that the Constitutional Court does not shy away from broadly interpreting its constitutional powers. The practice established by the Constitutional Court so far follows the normative line. Although the powers of the Constitutional Court are not subject to expansion or narrowing by organic law, broad interpretation and clarification of specific powers is not foreign to the practice of the Constitutional Court. It is noteworthy that the Constitutional Court is the only body that has the exclusive competence to interpret the Constitution of Georgia with binding force and finality.[43] It alone can see its own competent perspective in the existing normative body of the Constitution.

5. The Constitutional Court of Georgia continues to exercise review over the formality of disputed norms within its distinct jurisdictional powers. When evaluating the constitutionality of contested norms, particularly in disputes concerning fundamental rights defined in Chapter Two of the Constitution, the Court examines compliance with formal procedures for the acquisition of legal force.[44] The Court has consistently emphasized that constitutional limitations on legislative power require legislative acts to satisfy both formal and substantive constitutional requirements.[45]

The Constitution of Georgia explicitly stipulates that restrictions on certain fundamental rights must be enacted through law,[46] which makes the formal aspects of authority delegation between state bodies particularly significant.[47] Within the framework of ongoing disputes and reviews, the

sasamartloebis gadats'qvet'ilebebze sak'onst'it'utsio k'ont'roli kartul samartlebriv p'ersp'ekt'ivashi, tbilisi, 2022, 99].

[43] ლოლაძე ბ., მაჭარაძე ზ., ფირცხალაშვილი ა., *საკონსტიტუციო მართლმსაჯულება,* თბილისი, 2021, 73 [loladze b., mach'aradze z., pirtskhalashvili a., sak'onst'it'utsio martlmsajuleba, tbilisi, 2021, 73].

[44] See: Decision No. 1/4/757 of the Constitutional Court of Georgia of 25 March 2017 in the case "Georgian Citizen Giorgi Kraveishvili against the Government of Georgia"; Decision No. 3/1/659 of the Constitutional Court of Georgia of 15 February 2017 in the case "Georgian citizen Omar Jorbenadze against the Parliament of Georgia"; Decision No. 1/7/1275 of the Constitutional Court of Georgia of 2 August 2019 in the case "Alexander Mdzinarashvili against Georgian National Communications Commission".

[45] Decision No. 1/2/569 of the Constitutional Court of Georgia of 11 April 2014 in the case "Citizens of Georgia – Davit Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Goguadze, Giorgi Meladze and Mamuka Pachuashvili against the Parliament of Georgia", II-26.

[46] For example, Art. 15(2) of the Constitution of Georgia.

[47] Decision No. 3/5/1502,1503 of the Constitutional Court of Georgia of 15 December 2023 in the case "Zaur Shermazanashvili and Tornike Artkmeladze against the President of the Republic of

Court verifies compliance with formal requirements. This established practice demonstrates that the Court is well-versed in examining the formality of disputed norms, suggesting its capability to effectively perform formal constitutional review within its designated authority.

IV. Conclusion

The cornerstone of a constitutional state lies in maintaining effective human rights protection mechanisms. The Constitutional Court stands as a crucial institution in this framework, with its scope of authority holding particular significance. In prevalent constitutional review models, constitutional courts typically possess broad formal review powers alongside their material review capabilities. Indeed, formal constitutional review represents an essential authority without which a constitutional court cannot fully function as a comprehensive mechanism for protecting constitutional supremacy and fundamental rights.

Georgia's Constitutional Court was originally established under the Kelsenian doctrine, endowed with extensive formal and substantive review powers. While subsequent constitutional amendments and the absence of explicit reference to formal constitutional review in Georgia's Constitution have generated some skepticism about its continued existence, several factors support its ongoing validity. These include the Court's constitutional status, systematic analysis of Georgian legislation, established constitutional court practice, and the distinctive characteristics of Georgia's constitutional review model. This article has presented these arguments to demonstrate the enduring legal foundation and constitutional perspective of formal constitutional review within Georgian legal reality.

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Senior Policy in Polish Legislation on the Example of Local Government Seniors Councils (Taking into Account the Amendment of 2023)

ABSTRACT

Senior policy is mentioned in the area of public administration most frequently in the context of the organization of health services. While treating seniors as public sector beneficiaries, it is easy to forget about the values that people defined as seniors may offer. In my study, I posit a thesis (H1) that Poland is a country that has a planned senior policy in the form of Seniors Councils at the local government level. The supporting thesis (H2) is a statement concerning the benefits of involving seniors at the level of local government units as public administrators at local and regional levels. An additional research question is: do top-down regulations at the central level contradict the idea of grassroots public participation? The study also shows the changes and consequences of normative acts regulating the existence of senior citizens' councils at each of the three levels of local government in Poland.

The study falls within the field of social sciences. In addition to research methods appropriate to the discipline of political science and administration, the author used participant observation as a person directly involved in the establishment of consultative and advisory bodies in local government, such as senior citizens' councils.

Keywords: Seniors Council, local government, public administration, legislation, Poland, public participation

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I. Introduction

The phenomenon of population ageing has had its place in the catalogue of social issues for years. The issue of old age, determined by increasing life expectancy, has its roots in the development of civilisation and, as in other European countries, is linked to a high level of health protection and public awareness of healthy lifestyles.[1] In terms of conditions related to demographic processes, a decrease in the total population of Poland has been observed in recent years. In 2018, the population of Poland amounted to 38411.1 thousand people and was 22.4 thousand persons lower than in 2017. This indicator of Poland's population will systematically decrease, and in 2050 is expected to reach 33 million 951 thousand, which is 4.55 million (i.e. 12%) less than in 2013. According to forecasts, Poland's population will steadily decline, while the number of people over 65 will increase: from 5,131 thousand (2007), 5,673 thousand (2013) and 8,358 thousand in 2035. The number of people over 80 will also more than double: from 1,140 thousand (2007) to as many as 2,574 thousand (2035).[2]

The state's public policy towards seniors is reflected in the form of the legislator enabling an establishment of consultative bodies such as Seniors Councils (hereinafter referred to as SCs) at the level of local government units. In addition to constitutional norms, however, it is important to verify to what extent Polish legal regulations concerning the establishment and operation of the SC form part of the overall senior policy and the competencies of the local government. Is it not true that top-down regulations at the central level contradict the idea of bottom-up social participation? How are the aforementioned regulations implemented in practice? Are there any analogies between an inclusion in the processes of social participation through normative regulations of Seniors Councils and other consultative bodies with a different target group? These are the research questions that emerged at the stage of the research process. In addition, global research is being carried out to measure what impact new technologies have on the social engagement of seniors.[3]

The research process consists of two modules. Stage one was to conduct desk research on normative acts concerning the formation of SCs at all the three levels of lo-

[1] Skinder M., Polska polityka społeczna w odniesieniu do seniorów ze szczególnym uwzględnieniem prawa i uwarunkowań społeczno-polityczno-gospodarczych, Świat Idei i Polityki, No. 2, 2021, 187.

[2] Ibid., 191.

[3] See: Sun K., Zhou J., Understanding the Impacts of Internet Use on Senior Citizens' Social Participation in China: Evidence from Longitudinal Panel Data, journal "Telematics and Informatics", Vol. 59, 2021.

cal government in Poland, as well as statutory regulations. The desk research was also related to substantive and doctrinal regulations on the public policies implemented in the Republic of Poland. The second stage covered a comparative analysis of legal regulations from the period before the amendment of the regulations on the formation of SCs and the regulations introducing changes in this area in the year 2023. At this stage, the analysis of the source materials was expanded to include an analysis of the legislative process of the law and the previous legal regulations in the area in question. A non-reactive research method was applied in the form of a content analysis of legal acts, case law and available statistical data. The aforementioned methods and research tools fall within the field of political and administrative sciences.

II. Seniors Councils as Part of Public Policies

Pursuant to Art. 2 of the Constitution of the Republic of Poland,[4] "The Republic of Poland is a democratic state governed by the rule of law, realizing the principles of social justice". Based on the principle of a democratic state derived from this provision, there also emerges a need for the state to realize broadly understood political pluralism. Public policies in the form of SCs are the result of, among other things, decentralization processes of the local self-government, leading to the self-organization of local communities, increasing the subjectivity of local community autonomy for the part of the population defined as seniors. At the same time, with the increasing number of seniors, the design of public policy towards "older adults"[5] is becoming increasingly important.

Public policies in the basic model are conceptualized as a set of processes consisting of several successive distinct stages,[6] the implementation of which is undertaken by the public administration as part of its mission to satisfy public needs. They in-

[4] Constitution of the Republic of Poland, 2 April 1997.

[5] I do not use descriptors such as "elderly", 'aged', and 'senior' (they are common in media reports surrounding older people), because anti-ageism campaigners are warning that such language can cause discrimination. See more: Is "Elderly" Offensive?, The Age UK North Tyneside Group, 12 April 2019, <https://www.ageuk.org.uk/northtyneside/about-us/news/articles/2019/offensive-description-of-older-people> [23.11.2024]. In an effort to find a term that is more neutral and does not contribute to stereotypes about this age group, she decided to use the term 'older adults' consistently, hoping not to offend anyone with this phrase. However, the use of the terms "seniors policy" and "seniors councils" is unavoidable, as they are commonly used in Poland without negative connotations.

[6] Werner J., Wegrich K., Theories of the Policy Cycle, in: Handbook of Public Policy Analysis Theory, Politics and Methods, edited by F. Fisher, G.J. Miller and M.S. Sidney, Routledge, 2007, p. 43-62.

creasingly incorporate public participation and co-governance – although to varying degrees in their creation, implementation or the infrastructure of cooperation itself.[7] The recent decades have been characterized by the increasing participation of organized citizens in public policy at the national (as well as EU) level, and the growing importance of social activism in local development. In terms of the forms of operation of public administration, there has been a shift from traditional, authoritative methods to "solutions that strengthen the role of society in the formation of public policies and decisions to become their subject and not just an object."[8] However, the construction, direction and consolidation of participation (of seniors in this case) within public policy requires the right conditions: effective legal regulations, an established practice and well-developed standards of cooperation. Participation in this regard is not only one of the features of democracy; in the institutional sense, it needs to be seen as an explicitly or implicitly normalized (permissible) formula for expressing opinions or deciding on matters of public importance.[9] This task, according to the legislator, is to be fostered by amendments to the laws on local self-government in Poland, which are included in the comparative analysis in this study.

The role of seniors in public policies was highlighted by Beard and Williamson, among others. Focusing on research on seniors, they distinguished them as the role played by large institutionalized organizations and smaller grassroots groups.[10] It is important that the tools that the state, as a legislator, may offer for the implementation of senior policy coincide with the goals it intends to achieve by involving them in public life (usually at local and regional levels). The needs of older people are increasingly shaping social policy[11], although not exclusively.

Within the normative regulations of individual public policies, seniors themselves are defined in a variety of ways (including national vs. EU regulations). What

[7] See more: Włodyka E.M., Razem czy osobno? Instytucjonalne i pozainstytucjonalne formy współpracy między samorządem terytorialnym a organizacjami pozarządowymi w województwie zachodniopomorskim, Koszalin, 2020.

[8] Barczewska-Dziobek A., Rady seniorów jako instytucjonalne formy dialogu obywatelskiego na poziomie lokalnym, in: Dialog obywatelski. Formy, mechanizmy, bariery i perspektywy rozwoju, edited by M. Sidor and M.W. Sienkiewicz, Lublin, 2014, 145 et seq.

[9] Niżnik-Dobosz I., Partycypacja jako pojęcie i instytucje demokratycznego państwa prawnego i prawa administracyjnego, in: Partycypacja społeczna w samorządzie terytorialnym, edited by B. Dolnicki, Warszawa, 2014, 21-43.

[10] Beard R. L., Williamson J. B., Social Policy and the Internal Dynamics of the Senior Rights Movement, Journal of Aging Studies, Vol. 25, No. 1, 2011, 22-33.

[11] Szatur-Jaworska B., Ludzie starzy i starość w polityce społecznej, Warszawa, 2000, 11 et seq.

may be a variable here is the professional status (active or retired persons)? Taking into account solely the criterion of age, solutions vary in different countries around the world, so this is not a characteristic feature of Poland alone. Noguchi and Shang define the lower age limit as being equal to or greater than 60 years.[12] What matters in this regard is the regulations of, among other things, the retirement age in a given country, or those that define social policy. This is because the guidelines of senior policy for old-age dependents and those for independent people differ. Senior policy for both groups in the political system of the Republic of Poland is assigned to the Ministry of Family and Social Policy, with its consultative body, the Council for Senior Policy of the 2020-2024 term of office. The Ministry thus carries out the obligation imposed by the Act of 11 September 2015 concerning older adults.[13] This act defines the older adults in Poland as those citizens who have reached the age of 60 (this age is implied in Art. 4 Para. 1 of the Act).

Senior policy is also present in strategies at the local government level, as a local and regional public senior policy, not only at the level of central regulations. The constitutional laws of the individual levels of local government units (LGUs) and separate laws provide for specific forms of participation. Within the framework of senior policy, this form is to be presented by SCs. Among independent seniors, it would be appropriate to distinguish those who are open to social participation. These seem to be the ones targeted by the provisions on the functioning of SCs, which in turn represent the entire senior citizen community. According to the author's experience, it is often retired community activists who take on roles in SCs. These individuals were once highly active in their professions before retiring, or they use their newfound free time after retirement to stay involved. They are typically well-known and respected within their local communities. The influence of senior councils is likely to grow over the coming years, given the ageing of the population and the related increasing importance of older citizens in the electorate, especially for local political leaders. Seniors Councils can support better informed local decision-making by helping to identify local needs, and contributing to a better allocation of scarce resources. Additionally, Seniors Councils are advisory and consultative bodies that support local political de-

[12] Noguchi T., Shang E., Art Engagement and Psychological Well-Being Among Community-Dwelling Older Adults in Japan: An Observational Cross-Sectional Study, journal "Public Health", Vol. 222, 2023, 178.

[13] Act of the Ministry of Family and Social Policy of the Republic of Poland "On the Older People", 11 September 2015.

cision-making to assure that the views of older people are taken into account in the decision-making process.[14]

III. The State of Implementation of Senior Policy in Poland through the Legal Construction of "Seniors Councils" at the Local Government Level

In Poland, the local self-government is divided into three independent levels, which are regulated by the relevant system laws: the municipality[15] and the district[16] (as the local level) and the provincial self-government (as the regional level)[17]. The local government, being closest to the citizen and at the same time decentralized in relation to the central administration, carries a number of distinctive tasks. For example, Art. 7 of the APSG includes self-tasking as "a satisfaction the collective needs of the community." In this open catalogue, the legislator also includes senior policy. More recently, similar provisions can be found in two others local government laws. Longevity is a challenge for modern local government, and the research results show that social solidarity towards older people should be manifested in the local government's implementation of tasks aimed at intergenerational solidarity.[18]

There was a possibility to establish communal Seniors Councils in Poland for years, but only at the basic level of local government-municipalities. The SC mechanism was introduced to the APSG in 2013. Art. 5c of the law, added to the catalogue of the municipality's self-tasking, indicates that it is a body of an advisory nature, one that represents the older adults` community. Thus, in Poland, the Seniors Council is a relatively new institution on the one hand, since Article 5c of the APSG (which regulates its functioning) was added by the Law of 11 October 2013, amending the Act on Municipal Self-Government ten years ago. On the other hand, those ten years of the

[14] Frączkiewicz-Wronka A., Kowalska-Bobko I., Sagan A., Wronka-Pośpiech M., The Growing Role of Seniors Councils in Health Policy-Making for Older People in Poland, journal "Health Policy", Vol. 123, No. 10, 2019, 906.

[15] Law of Republic of Poland "On Municipal Self-Government", 8 March 1990, hereinafter referred to as: ACSG.

[16] Law of Republic of Poland "On District Self-Government", 5 June 1998, hereinafter referred to as: ADSG.

[17] Law of Republic of Poland "On Provincial Self-Government", 5 June 1998, hereinafter referred to as: APSG.

[18] Mędrzycki R., Samorząd terytorialny wobec zjawiska długowieczności, Samorząd Terytorialny, No. 3(363), 2021, 20.

functioning of the SC provision represent almost half of the time of the transition of Poland's political system from a communist regime to a democratic one (since 1989). Significantly, this mechanism was provided for by the legislature at that time at the municipal level only.

Most of the councils in Poland were therefore established on the basis of the new provision (Art. 5c) of the Act of 11 October 2013, amending the ACSG.[19] Admittedly, Seniors Councils had appeared before, but were the result of the effective determination of the local senior citizen community and the openness of local authorities rather than direct normative solutions.

IV. Status before 2023

At the municipal level, there was a provision for the possibility of forming SCs starting from the year 2013. This provision was not provided for by laws at the district and provincial levels. However, the legislator adopted an analogous approach to the existence of municipal Youth Councils, where the legislation also first allowed their functioning at the lowest level of the local government, and only after time allowing this possibility at higher levels.[20]

According to various studies, 76 SCs were identified in Poland that functioned until 2013[21], or 50 Seniors' Councils, or social dialogue bodies[22]. Wisniewski, on the other hand, analysed the dynamics of the formation of SCs and their functioning one year after the amendment of the Municipal Self-Government Act.[23] According to his research, despite the increased awareness of the importance and role of seniors in the modern world, Seniors Councils did not become a widespread phenomenon, despite the fact that there appeared a multitude of SCs in 2014. 71 such councils were formed then, with a further 131 added in 2015. In the end, however, they did not become a widespread phenomenon; the growth trend after the introduction of direct

[19] Law of Republic of Poland "On Amending the Law "On Municipal Self-Government", 11 October 2013.

[20] Włodyka E.M., Młodzieżowe Rady w samorządzie terytorialnym Pomorza jako nowe oblicze partycypacji obywatelskiej, in: 25 lat Samorządu Terytorialnego. Polska – Pomorze – Chojnice, Choinice, 2015, 126.

[21] See: Starzyk K., Zoom na rady seniorów. Diagnoza funkcjonowania, Warszawa, 2014.

[22] Zoom na rady seniorów: diagnoza i wyzwania, konferencja Ogólnopolskie spotkanie rad seniorów, edited by G. Zielińska, Warszawa, 2015, 23.

[23] Wiśniewski P., Powolny proces tworzenia Rad Seniorów, journal "Polityka Senioralna", No. 1, 2015, 11-13.

regulation allowing SCs to be formed more easily diminished after the first period of excitement. By 2019, among the 2,477 municipalities, some 380 councils had been formed. The largest numbers were recorded in the following provinces: Mazowieckie (39), Śląskie (38), and Dolnośląskie (34), with the smallest number in Podlaskie (13). According to a study conducted by Emilia Lewicka-Kalka, 64% of the initiators of the establishment of SCs were local administration representatives, 19% – seniors, and 11% – representatives of NGOs (Lewicka-Kalka, 2020). According to other measurements, as late as 2019, Poland had only about 350 seniors' councils in all its 2,477 municipalities.[24] However, in practice, what was observed was insufficient activities of senior citizens' councils, attempts to politicize them, as well as differences in their activities in various parts of the country.[25]

From a practical perspective of the research into the functioning of the SCs until the year 2023, difficulties were revealed in SCs defining goals and specifying activities they could undertake in cooperation with local governments. A thesis emerging from the study by Klaman and Mikulska is that there is an inadequacy in the current statutory regulations in this regard, pointing in the direction of such senior citizen participation (difficulties in defining objectives and specifying the activities they could undertake in cooperation with local authorities.). In their research they found that the low activity of SC has so far resulted from the regulations of the laws (on municipal, County and provincial government). The provisions were too general and laconic to give the councils a real tool for action and activation.[26]

V. Normative Changes to Constitutional Acts in 2023 Concerning SCs

The legislative process for the changes is not uniform, despite being part of various draft laws. In 2020, a parliamentary bill proposed adding Para. 7 to Art. 5c, which reads as follows: "7. The municipal council may give a municipal Seniors Council in its charter the right to take legislative initiative." The justification was motivated by an

[24] Parliamentary bill of Republic of Poland on amendments to the Law "On Municipal Self-Government", the Law "On County Self-Government" and the Law "On Provincial Self-Government" (parliamentary print No. 2919), 2019.

[25] Salachna J., Szafranek A., Instytucjonalny udział osób starszych w funkcjonowaniu samorządów terytorialnych: realia i założenia legislacyjne, journal "Ruch Prawniczy, Ekonomiczny i Socjologiczny", Vol. 85, No. 1, 2023, 202-203.

[26] Klaman M., Mikulska J., Rady seniorów w działaniu, Warszawa, 2016.

expansion of powers, as well as the facilitation of the SCs functioning at the municipal level (including Youth Councils, which were given more space in the bill itself). The draft was also intended to influence the strengthening of civil society by enabling the advisory bodies of the municipal councils (municipal Youth Councils, municipal Seniors Councils) to take the legislative initiative[27]. That same year, however, the draft amendments ended up in the first reading of the legislative process in Parliament.

A parliamentary bill on changes to the functioning and appointment of the SCs was submitted to the Polish Parliament once again on 14 November 2022. It was referred for its first reading two months later, on 11 January 2023, to the Committee of Senior Policy and the Committee of Local Government and Regional Policy. On 8 February 2023, the bill was voted on after its third reading.[28] Subsequently, it was referred to the Senate Senior Policy Committee and the Committee of Local Government and Regional Policy on 9 March 2023. The amendments introduced during the legislative process modified the original text of the bill with regard to the consequences of rejecting a proposal to establish Seniors Councils in local government units (at all three levels), which were initiated by a statutorily defined group of residents. The basis was also introduced for determining, in the statute of the Seniors Council, the maximum amount of costs for the participation of a member of the Seniors Council in meetings, and in organized events, which the relevant local government unit is obliged to reimburse. Transitional provisions were also significantly changed. The President signed the Act on 15 March 2023, and its entry into force was scheduled with a 14-day *vacatio legis*, indicating a legislative timetable that does not deviate from the usual practice.

On 11 April 2023, the 9 March 2023 amendment to the Law on Communal Self-Government, the Law on County Self-Government and the Law on Provincial Self-Government came into effect.[29] As indicated in the Senate's opinion to the bill, the purpose of the law on amending the Act on Communal Self-Government, the Act on County Self-Government and the Law on Provincial Self-Government was to create legal grounds for the appointment of Seniors Councils at district and provincial levels;

[27] What remains to be a separate point of contention is the laconic financing area of the amendments to the law as: "This regulation has no financial or legal implications" which, as is well known, would carry a direct impact on the local government.

[28] A large majority of the 460 MPs voted in favour of the draft, i.e., 444 voted "for", 3 "against" and 2 "abstained".

[29] Law of Republic of Poland "On Amending the Law "On Communal Self-Government", the Law "On County Self-Government" and the Law "On Provincial Self-Government", 9 March 2023.

secondly, to modify the existing regulation of Seniors Councils in the municipal government, aiming to ensure greater efficiency in the appointment of these councils.[30]

The amendment, introducing essentially uniform regulations at all the local government levels, is based on defining SCs as bodies of a consultative, advisory and initiative nature. Thereby, it increased the role of SCs in the functioning of local governments, and introduced a provision according to which the municipal council, the district council and the provincial assembly are obliged to establish a Seniors Council if a certain number of people have requested it. This means that the scope of the district[31] and provincial government's self-tasking has also increased. Taking the example of the added Art. 10c. 1, "The province shall foster intergenerational solidarity and create conditions for stimulating civic activity among the older adults in the community of the region." Based on the provisions referred to above, it can be concluded that the legislator obligatorily added the matters of senior policy to the self-tasking of the municipality, district and province, respectively.

Under the amended regulations, SCs are composed of representatives of entities working for the older adults, in particular, representatives of NGOs and entities running universities of the third age. Until then, the municipal council could (and therefore optionally) form an SC on its own initiative or at the request of communities interested in it. The amendment introduces obligatory changes, according to which the municipal council, the district council and the provincial assembly will be obliged to form a Seniors Council if a number of persons specified in the law request it. In the case of municipalities:

1. With up to 20,000 residents, if requested by at least 50 residents of that municipality who are at least 60 years old;
2. With over 20,000 residents, if requested by at least 100 residents of this municipality who are at least 60 years of age.

In a district:

1. With up to 100,000 residents, at the request of at least 150 residents of this district who are at least 60 years old;
2. With over 100,000 residents, at the request of at least 250 residents of this district who are at least 60 years old.

[30] Opinion related to the Law "On Amending the Law "On Municipal Self-Government", the Law "On District Self-Government" and the Law "On Provincial Self-Government", 2023.

[31] Art. 3f was added to ADSG. 1: "The district fosters intergenerational solidarity and creates conditions for stimulating civic activity of the older people among the district's residents."

In a province:

1. With up to 2 million residents, at the request of at least 500 residents of that province who are at least 60 years old;
2. With more than 2 million residents, at the request of at least 800 residents of this province who are at least 60 years old.

The municipal council will be required to consider the application within a period not longer than three months from the date of its submission. At the same time, entities authorized to initiate the SC procedure do not have to operate in the area of a given local government unit, as the law does not indicate this restriction. Instead, the amendment indicates that the council of a municipality, district or provincial assembly creating an SC shall grant it a statute. This is to specify, in particular:

1. The procedure and criteria for the election of its members, rules and procedures for its operation;
2. The length of its term of office (noting that the term of office may not last longer than the term of office of the legislative body of the local government, i.e., the municipal/district council/provincial assembly) where the SC operates;
3. The rules in relation to the end of term and dismissal of its members;
4. The rules for the reimbursement of expenses incurred by council members, including their maximum reimbursable amount.

The regulations provide that a member of the SC, in connection with their participation in meetings of this council, or in an organized event where they represent the municipal Seniors Council may, upon their request, be reimbursed for the expenses incurred, including travel expenses within the country related to their participation in a meeting of the SC, or in an organized event where its member represents this body. Reimbursement may be made on the basis of documents, in particular, receipts, invoices or tickets, confirming the expenses incurred or information on the amount of car travel costs incurred. The Sejm adopted the Senate's amendments, clarifying that if a legislative body of local government units has decided to reimburse such costs, it must specify reimbursement rules in a statute, including the maximum reimbursable amount. Starting from the year 2023, in a situation where seniors wish to function in terms of cooperation with other SCs and receiving training, there is an exception to the principle of non-financing of SCs by local governments. An SC member attending

meetings of the SC, or an organized event at which they represent the SC, may be reimbursed, upon their request, for the expenses incurred, including travel expenses within the country, related to the participation in a meeting of the municipal Seniors Council or an organized event at which they represent a municipal SC, on the basis of documents, in particular bills, invoices or tickets, confirming the expenses incurred or information on the amount of car travel expenses incurred.

Auxiliary apparatuses of local government executive bodies (i.e., municipal, district and marshal offices) are obliged to provide administrative and office services to the SC.

Although the SC is a consultative, advisory and initiative body, the new regulations equip the council with new tools. It can address inquiries or requests to an executive body in the form of a resolution. Such a resolution should contain a brief statement of the facts that are the subject of the resolution and the resulting questions. Executive bodies are obliged to respond in writing no later than 30 days after receiving the resolution.

Adrian Pokrywczyński of the Union of Polish Counties points out the danger of "arming" Seniors Councils with the power to pose questions that oblige the mayor, head of the district or the provincial marshal to provide answers in the form of resolutions. He points out that a consultative and advisory body such as a Seniors Council should be able to ask questions in relation to senior citizen policy or those matters that may be related to everyday life in a given unit. The law, on the other hand, uses the phrase: "in matters concerning the municipality/district/village," thus going beyond the topic of "senior citizen policy"[32].

Concerning the legislative changes related to the SC in 2023, it is worth mentioning that municipal councils, district councils and provincial assemblies in municipalities, districts and provinces where municipal Seniors Councils, district Seniors Councils and provincial Seniors Councils were established before the effective date of this Act, will adapt the statutes of Seniors Councils to the requirements of the Act within 6 months from the effective date of the Act amending local government regulations.

VI. Conclusion

The present study analysed the mechanism for the inclusion of older adults in decision-making processes at the local and regional levels of local government

[32] Horbaczewski R., Łatwiej będzie utworzyć w gminie radę seniorów, Prawo.pl, 28 March 2023, <https://www.prawo.pl/samorzad/rady-seniorow-nowe-przepisy,519834.html> [23.11.2024].

units. The SC tool was amended by the Polish legislator in 2023, and these changes were used in a comparative analysis of the tool under discussion, which local government units in Poland were equipped with at the level of the regulation of central normative acts.

The legal framework for elderly policy in the field of senior citizens' council arrangements at the local government level can be assessed in a similar way to the assessment of senior citizens' policy made by Mikolajczyk: it gives the impression of some success in overcoming barriers to the inclusion of Polish older people in mainstream society. However, contrary to the first impression, a number of criticisms can be made of the Polish solution, particularly in the context of the elimination of ageism.[33] The analysis demonstrates that Seniors Councils are undoubtedly desirable within the public policies of senior policy, if only considering the trends of the aging population. Seniors, who are becoming an increasingly large percentage of the population, were given a mechanism for their participation at the local (municipality and district) and regional (province) levels; they have a mechanism that allows them to also become a subject and not merely an object of normative regulations in local governments.

The legislator's intention was certainly to support existing SCs and the formation of new ones since, as past research indicates, Senior Councils proved to be the weakest form of public participation in local government units. Yet no detailed rationale in connection with this was provided. It seems that the lack of existing legal regulations is not necessarily the only reason. This can be seen, for example, in the case of youth municipal councils or the civic budget mechanism. Both of these tools are part of the idea of participation and co-management, and they began to emerge in practice without any direct legal basis. Regulations concerning them were therefore secondary to the practice of grassroots local initiatives. Thereby, this institution, in order to strengthen its importance, requires additional legislative changes. One of these could be (and was not included in the 2023 amendments) a determination of the scope of the competence of Seniors Councils and a clarification of the general composition of the Council.

Local government officials also point out that such Seniors Councils may become merely would-be creations. According to the MPs – the authors of the amendments – "despite the increased awareness of the importance and role of seniors in the modern world, Seniors Councils have not become a widespread phenomenon.

[33] Mikołajczyk B., Addressing Ageism in Polish Ageing Policy – Critical Remarks, Research on Ageing and Social Policy, Vol. 11, No. 1, 2023, 87.

There are only about 350 Seniors Councils in Poland compared to its 2,477 municipalities."[34] They emphasize that the law imposes on seniors a specific form of address, namely resolutions. This, for example, may give rise to formal disputes over whether any letter addressed from seniors is a formally adopted resolution or whether the mayor may nevertheless choose not to respond because the form of address is not adequate.

As a result of the research process, the thesis (H1) was successfully confirmed, namely that Poland is a country that possesses a planned senior policy in the form of Seniors Councils at the local government level. At the local level, these are Municipal Seniors Councils, District Seniors Councils, and at the regional level: Provincial Seniors Councils. Legislative changes introduced in 2023 regarding the establishment and operation of SCs at district and provincial levels (in addition to the municipal level starting from 2013) have significantly strengthened, by introducing a number of mandatory provisions, consultative bodies within public policy in relation to senior policy in Poland. The amended norms of the Act have provided a concrete tool for SC to become more active and thus actually implement public policies in the area of senior citizen's policy. The auxiliary thesis (H2) concerning the benefits of having seniors involved at the level of local government units as public administration at the local and regional levels could not be sufficiently proven in the form above. The same holds true for the additional research question (Is it not true that top-down regulations at the central level contradict the idea of bottom-up social participation?). Answers to these questions will have to be sought in further in-depth exploratory research.

In the course of the study, new research questions emerged that were not addressed in this paper. An in-depth study of the topic would be worth undertaking to expand on these questions. The questions are as follows:

1. Would increasing the activity of senior citizens in the form of establishing Seniors Councils be influenced by assisting funding not at the local government level but at the central level, as is the case with Rural Housewives' Associations?[35]

[34] Ibid.

[35] Country Housewives' Association is a voluntary, independent and self-governing social organisation that fosters the development of entrepreneurship in the countryside and actively works for the benefit of rural communities, bringing together mainly women. The groups operate on the basis of the provisions of the Act of 9 November 2018 on Country Housewives' Association (Journal of Laws 2021, Item 2256). The Association may receive target grants for the implementation of statutorily defined objectives due to changes in the legal status starting from 2018.

2. The purpose of a consultative and advisory body is to offer advice and not to compete with a municipal council, a district council, or a provincial assembly elected in general elections. Is this approach justifiable, given the wide scope of the 2023 amendments regarding SC inquiries, which now take the form of resolutions and extend beyond senior citizen policy? Or should the legislator focus on the delegated scope of SC inquiries, ensuring that the SC does not compete with legislative and oversight bodies or assume their competencies? After all, youth councils have a scope of action limited to youth affairs.
3. Is the idea of creating advisory bodies that represent a group of local government community members, selected according to a certain criterion, valid?[36]
4. To what extent should the legislator "interfere" with an intention to establish legal frameworks for proper functioning? How can a risk be avoided of facade and ineffective operation of SC when overly broad regulations become a brake on grassroots participation?
5. Why is there a discrepancy between the enactment of SC regulations at the municipal level and the delay of the aforementioned mechanism available at district and provincial levels? Why was the SC mechanism provided by the legislator only at the municipal level in 2013, while seniors had to wait as long as ten years for the aforementioned tool to become effective at district and provincial levels?
6. In municipalities with larger populations (e.g., in cities with district rights, as in the case of participatory budgeting), should the establishment of Seniors Councils be made mandatory, regardless of the intention and initiative of the community?

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[36] At this point, it is worthwhile to include Youth Councils in a comparative analysis which, on a very similar basis in the three local government laws, also function as consultative and advisory bodies, but this is for young people in the community.

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The Separation of Competition Law Enforcement Powers Between Competition and Regulatory Authorities in Georgia

ABSTRACT

The presented work is focused on researching the essence of public enforcement of Georgia's competition legislation, its mechanisms, and the issue of separating its enforcement competencies between the respective state authorities.

In 2020, the Georgian Law on Competition underwent comprehensive reform. This reform introduced a unique approach to the enforcement of said Law. In particular, the Competition and Consumer Protection Agency and the National Regulatory Authorities were defined as executive bodies of the Georgian Law on Competition. Furthermore, due to these reforms, the law now envisages many procedures and methods to separate the enforcement competencies between these state bodies. However, the relevant procedural provisions do not provide a straightforward solution to all the issues related to the separation of competencies. In the last five years, it has been seen that such gaps have led to significant issues in practice. Therefore, the sole purpose of the presented paper is to study these problems and offer relevant scientific solutions.

Keywords: Competition Law, Enforcement of Competition Law, Enforcement of Competition Law in Regulated Sectors, Enforcement of Competition Law by National Regulatory Authorities.

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I. Introduction

As a result of the reforms carried out in 2020 in Georgia, the National Regulatory Authorities were empowered to enforce the Law of Georgia on Competition together with the Georgian Competition and Consumer Agency (hereinafter – the Agency). The mentioned reform added a comprehensive character to the Georgian competition legislation, to the extent that it gained the ability to be enforced similarly in all sectors of the economy. Accordingly, Georgia has fulfilled the requirements envisaged in Article 204 of the Association Agreement with the European Union. However, this reform raised additional problematic issues regarding the separation of powers between the Agency and National Regulatory Authorities.

The primary purpose of the present paper is to research these problematic issues and develop proper legal means to solve them. It serves to solve the problems that may be faced by the National Regulatory Authorities and the Agency in terms of determining the respective entity which enjoys the authority to enforce the competition legislation in particular cases.

II. Public Enforcement of the Competition Law

The Georgian Law on Competition envisages several provisions that should ensure the formation and adequate protection of a healthy, competitive environment in the relevant markets of the country. These provisions have a prohibitive nature, and refer to actions taken by state authorities on the one hand, and undertakings on the other. Examples of such provisions are the clauses prohibiting anti-competitive agreements, abuse of dominant position, unfair competition, or anti-competitive concentrations. In order to maintain effective competition, along with these substantive provisions, the law also provides special procedural norms, according to which the enforcement of these prohibitive clauses occurs in the country. Hence, enforcing competition legislation means implementing such measures by the competent authority that are envisaged by the law and which aim to identify, prevent, and address actions prohibited by competition legislation. Any such measure taken individually may be regarded as an executive action or executive measure. Therefore, competition law enforcement may also be described as a combination of several executive actions or measures.

It is also necessary to clarify the meaning and content of the competence to enforce competition legislation. In this regard, the concept of this competence refers

to the authority enjoyed by the particular public body to use executive measures determined by the competition legislation. Furthermore, in this process, the sole purpose of using a particular executive action is to detect or prevent the anti-competitive conduct prohibited by the law. In addition, the use of executive measures, along with the detection of violations of the competition legislation, may also serve to assess the level of competition in the relevant markets of the country, and to prepare relevant recommendations, etc.

The primary executive measure is the adoption of an individual administrative-legal act (decision) by a body with the relevant enforcement authority.[1] Such a decision establishes a violation of competition legislation by a particular entity and imposes an appropriate sanction on it. In addition, the executive measure also refers to decisions made within the power of the control of concentrations, imposing the obligation of undertakings to perform specific actions to improve the competitive environment.

The use of executive measures provided by Georgian Law on Competition by the respective public entity is considered public enforcement of competition legislation.[2] This is because, at such times, this entity exercises public authority.

Alongside public enforcement, the theory and practice of competition law also recognize the concept of private enforcement.[3] In general, private enforcement of competition law refers to claims for damages by victims of specific anti-competitive conduct under Civil Law.[4] Since private enforcement does not involve issues related to the separation of competencies between executive bodies, this topic lies beyond the scope of this study.

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1 Whish, R., Bailey D., Competition Law, 7th Edition, Oxford University Press, 2012, 253; Emmerich V., Kartellrecht, 13. Auflage, Beck C. H., 2014, 453.

2 Colino S., Competition Law of the EU and UK, 7th Edition, Oxford University Press, 2011, 59; Moritz L., An Introduction to EU Competition Law, Cambridge University Press, 2013, 361; Adamia G., Die Aussichten der privaten Durchsetzung des Kartellrechts in Georgien am Beispiel des Missbrauchs der marktbeherrschenden Stellung, Deutsch-Georgische Zeitschrift für Rechtsvergleichung, No. 10, 2020, 22 and following.

3 საქართველოს კონკურენციის სამართალი, ლ. ჯაფარიძის და ქ. ზუკაკიშვილის რედაქტორობით, თბილისი, 2019, 486 [sakartvelos k'onk'urentsiis samartali, l. japaridzis da k. zuk'ak'ishvilis redakt'orobit, tbilisi, 2019, 486]; Moritz L., An Introduction to EU Competition Law, Cambridge University Press, 2013, 361.

4 Monti G., EC Competition Law, Cambridge University Press, 2007, 424; Adamia G., Die Aussichten der privaten Durchsetzung des Kartellrechts in Georgien am Beispiel des Missbrauchs der marktbeherrschenden Stellung, Deutsch-Georgische Zeitschrift für Rechtsvergleichung, No. 10, 2020, 22 and following.

III. Sources of the Georgian Competition Law

In Georgia, several legal acts include provisions aimed at ensuring free and effective competition in the country's markets. The Constitution of Georgia[5] entails one of the most important clauses in this regard: Article 6(1) of the Georgian Constitution guarantees economic freedom in the country. Article 6(2) further states that the state shall develop a free and open economy, as well as free enterprise and competition. The need to protect free competition obliges the state to create a legal order that ensures the establishment of free competition in the relevant markets of the country, its development, and the protection of the natural process of economic competition.[6]

The primary source of competition legislation in the country after the Constitution is the Law of Georgia "On Competition".[7] It establishes the principles of protection against unlawful restriction of free and fair competition. The law defines actions that unduly restrict free trade and competition, the legal grounds for detecting and preventing restriction of free trade and competition, and the competencies of the proper public entities.

By-laws adopted based on the Georgian Law on Competition are also part of the Georgian competition legislation. In this case, first of all, the secondary legal acts adopted by the Georgian government and the chairperson of the Georgian Competition and Consumer Agency should be taken into account.[8] In addition, the National Regulatory Authorities have also adopted relevant by-laws in the areas subject to their regulation, which are also an integral part of Georgian competition law.[9]

5 The Constitution of Georgia, 24 August 1995.

6 Adamia G., Constitutional Aspects of Economic Competition, Constitutional Law Journal, Vol. 2, 2020, 109.

7 Law of Georgia "On Competition", 8 May 2012.

8 Resolution No. 529 of the Government of Georgia "On Approval of the Rules for De Minimis State Aid and General Rules for the Provision of State Aid", 1 September 2014; Resolution No. 526 of the Government of Georgia "On Exemptions from the Prohibition of Anticompetitive Agreements", 1 September 2014; Order No. 39 of the Chairman of the Georgian Competition and Consumer Agency „On Approval of the Rules for the Submission and Review of Notifications on Concentration", 26 October 2020, etc.

9 Specifically, in the energy and water supply sector, the "Rules for Monitoring the Energy Market" approved by the Resolution No. 7 of the Georgian National Energy and Water Supply Regulatory Commission, 30 March 2021, are in force. In the financial sector, the "Rules for Investigating Possible Competition Violations, Submitting Complaints/Statements, and Reviewing Cases" approved by the Order No. 67/04 of the President of the National Bank of Georgia, 18 May 2021, and the "Rules for Submitting and Reviewing Notifications on Market Analysis and Concentration" approved by the Order No. 68/04 of the President of the National Bank of Georgia, 28 May121 2021, are in force.

IV. Enforcement Authorities and the Applicability of the Competition Law in the Regulated Sectors

1. Legal and Economic Characteristics of Regulated and Non-Regulated Sectors

Determining the extent of executive authority in safeguarding free competition relies on distinguishing between the regulated and non-regulated sectors of the economy. According to the unique approach of the Georgian legislator, the National Regulatory Authorities enforce the competition legislation in the respective regulated sectors of the economy and other sectors – the Competition Authority. Considering the above, the Georgian legislator provides the legal definition of the regulated sector in the Competition Law itself. In particular, Article 3(q) of the Law contains a list of those areas of the economy considered regulated sectors in the sense of Georgia's competition legislation. As such, the Georgian legislator defines the areas established by the Organic Law of Georgia "On the National Bank of Georgia", the Law of Georgia "On Electronic Communications", the Law of Georgia "On Broadcasting", and the Law of Georgia "On Energy and Water Supply".[10] From the mentioned explanation, it is clear that the Georgian competition legislation considers the banking and financial sector of Georgia, the communications and broadcasting sector, and the electricity, natural gas and water supply sectors as regulated sectors of the economy. In addition, according to the named Article 3(q) of the Law, a special type of regulated sector of the economy is the sphere of municipal services, in which free price formation and competition are limited, and which is defined as a regulated economic sphere by the decree of the Government of Georgia and is subject to tariff regulation.[11]

Unlike the regulated sphere of the economy, the law does not explicitly define the term of the unregulated sphere of the economy, resulting in its scope being unrestricted. Consequently, all sectors of the economy not covered under Article 3(q) of the Law are considered part of the unregulated sphere of the economy.

[10] Law of Georgia "On Competition", 8 May 2012, Art. 3.

[11] საქართველოს კონკურენციის სამართალი, ლ. ჯაფარიძის და ქ. ზუკაიშვილის რედაქტორობით, თბილისი, 2019, 500 [sakartvelos k'onk'urentsiis samartali, l. japaridzis da k. zuk'ak'ishvilis redakt'orobit, tbilisi, 2019, 500].

2. Competition Authority and National Regulatory Authorities

The Agency is the central enforcement authority of Georgia's competition legislation. However, the Agency is not the only body with the power to enforce the law. In particular, Article 4(2) of the Law establishes that, in cases expressly provided for by the law, the law is enforced by the National Regulatory Authorities. Thus, the Agency has the competence to enforce the competition legislation of Georgia on the one hand, and the National Regulatory Authorities on the other.

The term of the National Regulatory Authority is defined in the special Law on National Regulatory Authorities. According to this legal definition, the National Regulatory Authority is a legal entity of public law with special powers, created by the state to regulate particular sectors of the economy. Furthermore, the National Regulatory Authority does not have a state-controlling body and acts within the scope of powers established by legislation. This law also states that only two such regulatory authorities exist in Georgia: the National Communications Commission of Georgia and the Georgian National Energy and Water Supply Regulatory Commission. Nevertheless, for the purposes of competition legislation, the National Bank of Georgia is also considered a regulatory authority.[12] This is because competition law considers the financial and banking sectors as a regulated sector of the economy, and the National Bank is their regulator.

Based on the above, the National Bank of Georgia, the National Communications Commission of Georgia, and the Georgian National Energy and Water Supply Regulatory Commission, enforce the competition legislation in Georgia in respective regulated sectors in the exceptional cases the law provides. In all other sectors, the Agency is competent to enforce the law.

3. Mandatory and optional norms

As the main body with the authority to enforce the Competition Law, the Agency makes full use of the entire Competition Law of Georgia. One of the main reasons for this is that the Agency is created based on the Competition Law of Georgia, and this law, along with the substantive provisions protecting effective competition, also contains certain procedural norms that apply entirely to the Agency.

A different legal situation arises regarding the National Regulatory Authorities, established based on a special law regulating the respective sector. Moreover, in the

[12] Ibid.

case of the National Bank of Georgia, the relevant legal basis for establishing it is also envisaged by the Constitution of Georgia. It should be noted that special legislation applies in areas under the regulation of respective regulatory authorities, and special laws define their powers and the directions of their activity. In addition, the Competition Law states that there is a special restricted scope of competence for these National Regulatory Authorities in terms of enforcement of competition legislation.

In this regard, Article 31 of the Georgian Competition Law is particularly significant. It establishes the primary legal framework for delineating competencies between the Agency and the National Regulatory Authorities in enforcing competition legislation. Article 31(7) distinguishes between two categories of competition law norms. Specifically, one category comprises norms that regulatory bodies are directly obligated to apply. The obligation to apply the second category of provisions, as Article 31(7) provides, arises only when the special sector-specific legislation does not stipulate otherwise. Thus, the first category of the norms is mandatory for the National Regulatory Authorities to apply, while the second is optional.

In particular, the norms prohibiting anti-competitive agreements and regulating exceptions from this prohibition,[13] the norm prohibiting the abuse of a dominant position,[14] a significant portion of the norms related to the control of concentrations,[15] as well as the provisions concerning the statutes of limitations,[16] sanctions[17] and cooperation programs,[18] are of a mandatory nature. In contrast, the norms defining the content and indicators of a dominant position,[19] specific provisions related to the control of concentrations,[20] the articles establishing the authority of the Agency,[21] some procedural norms related to enforcement, and the norm concerning sanctions for the non-delivery of information, have an optional character.[22]

In this case, identifying the teleological or logical basis for classifying specific provisions of the Georgian Competition Law as mandatory or optional norms presents

[13] Law of Georgia "On Competition", 8 May 2012, Arts.7-9.

[14] Ibid., Art. 6.

[15] Ibid., Arts. 11 (1-8), Art. 11^1 (1, 2, 4, 6-12).

[16] Ibid., Art. 27.

[17] Ibid., Art. 33.

[18] Ibid., Art. 33^1.

[19] Ibid., Art. 5 (5) (i).

[20] Ibid., Art. 11^1 (13-14).

[21] Ibid., Art. 18.

[22] Ibid., Art. 32.

particular challenges. At first glance, only the substantive norms stipulated by the law might be mandatory for all bodies with executive competence, while procedural norms are not. However, this conclusion is not entirely accurate, as some substantive norms under the law do not necessarily apply to regulated sectors. Conversely, certain norms with procedural content are mandatory for regulatory bodies to enforce.

For example, Article 3 of the Competition Law defines a dominant position, while Article 5 provides the parameters and indicators for evaluating the market power of an individual undertaking in a specific case. The legal definition of this concept, and the norm establishing the relevant parameters, cannot be classified as procedural provisions. In contrast, Articles 22-25 of the Law contain procedural rules, such as those governing the submission of applications and complaints, case analysis, and other related processes, which the relevant state body must apply when enforcing the law. However, these provisions possess the same optional character for National Regulatory Authorities.

Moreover, Articles 3(i), 5 and 6 collectively establish the factual composition of the abuse of a dominant position. While Article 6 of the Law serves as a mandatory provision applicable across all sectors of the economy, articles 3 and 5 do not share the exact obligatory nature. Consequently, a legal situation arises in which the content and prerequisites of a dominant position in regulated sectors of the economy may be defined differently under sector-specific legislation. This is even though the actions prohibited for undertakings with a dominant position are uniformly applicable across all sectors of the economy.

With this approach, the Georgian legislator allows for the possibility of different indicators and parameters determining the dominant position across various sectors of the economy. As a result, under conditions of varying market power, particular undertakings in regulated and non-regulated sectors may be classified as dominant enterprises. For instance, sector-specific legislation may define a 50 percent market share as a prerequisite for establishing dominance, while in non-regulated sectors, a 40 percent market share may be sufficient to qualify an undertaking as dominant. Consequently, the prohibitions outlined in Article 6 of the Law may apply to enterprises with a 40 percent market share in non-regulated sectors, but similar prohibitions may not apply to companies with an equivalent or higher market share in regulated sectors.

4. Conflict and Convergence of Norms

The separation of enforcement powers between the competition and regulatory authorities gives rise to the conflict and convergence of norms that must be used by a National Regulatory Authority in particular cases. Such a case occurs when there is an overlap between the norms entailed in the sector-specific legislation and the optional norms provided by the Competition Law. This directly follows from Article 31(7) of the Law, which establishes that regulatory authorities are obligated to apply the optional norms contained in the law only when sector-specific legislation does not stipulate otherwise.

It should be noted that both legislative acts and subordinate normative acts govern regulated sectors. Notably, the relevant regulatory bodies are typically empowered to adopt such subordinate normative acts. Furthermore, according to the Article 7(1) of the Organic Law of Georgia "On Normative Acts", the term "legislation" encompasses both legislative and subordinate normative acts. Consequently, a situation arises where priority is given to the subordinate normative acts adopted by the respective regulatory bodies, rather than to the optional norms of the Competition Law.

The applicability of the rules outlined in Article 11^2 of the Competition Law to regulated sectors may be considered for greater clarity. This article is an optional norm that governs the grounds for exemption from the obligation to submit a notification about concentration and other related issues. Due to its optional nature, this norm will apply to regulated sectors only if the special sector-specific legislation does not stipulate otherwise.

Considering the above, it is possible for sector-specific legislation to expressly provide provisions that differ from Article 11^2 of the Competition Law, or to establish a set of provisions defining alternative grounds for exemption from the obligation to submit a concentration notification. In such cases, it is evident that the sector-specific legislation contains provisions that diverge from the optional norms of the Competition Law. However, it is also possible for sector-specific legislation to introduce norms that are not expressly contradictory to those of the Competition Law, but instead serve as complementary provisions. Such sector-specific norms may supplement the rules established by the Competition Law. Accordingly, two types of interactions between norms may arise: (1) a conflict between the Competition Law and sector-specific legislation, and (2) the convergence of norms, where sector-specific legislation complements the provisions of the Competition Law.

If a specific norm of sector-specific legislation conflicts with an optional norm provided by the Competition Law, the regulatory body of the regulated sector applies only the norm established by the sector-specific legislation. For example, Article 25 of the Competition Law sets the period for investigating a case at 6 months, which may be extended to 18 months. In contrast, Article 32(4-5) of the "Energy Market Monitoring Rules" (approved by Resolution No. 7 of the Georgian National Energy and Water Supply Regulatory Commission on March 30, 2021) set the investigation period at 7 months, with the possibility of an additional 4-month extension.

This creates a situation where there is a contradiction between the optional norm of the Competition Law and the norm established by sector-specific legislation, as the same issue is regulated differently by two distinct legal acts. In such cases, priority is given to the sector-specific legislation in the relevant regulated sector. Consequently, when enforcing the law, the Georgian National Energy and Water Supply Regulatory Commission will apply the provisions of Article 32 of the aforementioned rules, rather than Article 25 of the Competition Law.

Along with similar cases mentioned above, it is also possible that the norm stipulated by sector-specific legislation does not directly contradict the optional norm of the Competition Law, but instead serves to complement it. As an example, Article 41 of the "Energy Market Monitoring Rules", valid until March 30, 2023, and approved by Resolution No. 7 of the Georgian Energy Regulator of March 30, 2021, provided a specific basis for exemption from the obligation to submit a notification regarding concentration in the energy and water supply sectors. Specifically, the norm exempted a water supply licensee involved in a concentration in the water supply sector, who was not directly or indirectly connected to an energy market participant or energy activity, from the obligation to submit a concentration notification to the Georgian National Energy and Water Supply Regulatory Commission.

Article 11^2 of the Competition Law, an optional norm, also serves as the basis for exemption from the obligation to notify about concentration. The first paragraph of this article establishes three specific cases in which an undertaking is exempted from the obligation to notify the respective authority about a concentration. Furthermore, these grounds did not create any contradiction with Article 41 of the Energy Market Monitoring Rules.

As a result, a situation arose where the law and sector-specific legislation established rules to regulate the same issue without conflict. However, the 'Energy Market Monitoring Rules' did not reference the inapplicability of Article 11^2 of the Law in the

energy sector. Therefore, it is clear that Article 41 of the Energy Market Monitoring Rules complemented Article 11[2] of the Law in the energy sector, allowing both norms to be applied concurrently, with no conflict between them.[23]

Based on the above, it can be concluded that if a particular norm of the sector-specific legislation complements the optional norm of the competition law, and such legislation does not explicitly reserve the application of the optional norm of the competition law, then both norms are applied concurrently in the relevant regulated sector. Such a case should not be interpreted as constituting a "different regulation", as outlined in Article 31(7) of the Law.

In practice, there may be cases where the sector-specific legislation does not address the issue covered by the specific norm of the Competition Law. In such instances, if the sector-specific legislation does not explicitly exclude the applicability of a particular optional norm of the Competition Law, then it can be applied within the relevant regulated sector. As an example, Article 11[2] of the Competition Law may be considered. Suppose, in the sector-specific legislation, neither addresses the grounds for exemption from the obligation to submit a notification about concentration, nor explicitly precludes the application of Article 11[2] of the Law in that area. In that case, this article of the Competition Law will remain applicable in that sector.

V. Defining Authority for the Application of Executive Measures

1. Roles and Responsibilities of Enforcement Authorities

International experience shows that most competition laws establish a broad range of tasks and powers for competition law enforcement authorities. An analysis of these tasks and powers provides valuable insight into the roles and functions of the relevant administrative bodies. These functions typically include investigating potential anti-competitive agreements, receiving and handling complaints, imposing sanctions on violators, making recommendations, conducting research, publishing reports, informing the public within their jurisdiction, and offering assistance or consultations in legislative activities.[24]

[23] On March 30, 2023, an amendment was made to the "Energy Market Monitoring Rules". As a result, Article 42 of the amended rule clarified that the special rule contained therein does not exclude the application of the optional norm corresponding to the Law of Georgia on Competition.

[24] See: Model Law on Competition, United Nations Conference on Trade and Development, UNCTAD

In the Georgian context, the issue of separating competencies so as to enforce competition legislation does not arise regarding all the aforementioned powers. In particular, as defined by Georgian legislation, each executive body can carry out specific enforcement measures within its respective competence without overlapping the powers of the competition agency. Such measures include participation in legislative processes, providing consultations, and producing statistical data.

In contrast, the issue of separating powers between the competition agency and regulatory bodies becomes significant when implementing measures related to detecting alleged anti-competitive actions, identifying law-breaking undertakings, imposing sanctions, and other similar actions. Under Article 31 of the Law, two key procedures can be identified as central to the enforcement of competition legislation: case investigation and concentration control.

For the purposes of this paper, it is relevant to consider market monitoring as another critical executive measure.

2. Market Monitoring

Market monitoring is a mechanism within the powers of the executive body that enables the observation of processes in specific goods or services markets within the country. Through market monitoring, it is possible to conduct a general assessment of the quality of competition and identify potential issues that may hinder the natural development of competitive processes.[25]

The results of market monitoring ultimately guide the future actions of the relevant enforcement authority. Market monitoring may reveal that certain regulations adopted by state bodies disproportionately restrict the development of specific markets and hinder the establishment of a healthy competitive environment. In such cases, the executive Agency is authorized to issue recommendations and address the deficiencies identified during monitoring.

Additionally, market monitoring can lead to the investigation of individual state entities if it uncovers reasonable suspicion of a violation of Article 10 of the competition law. Such violations involve restrictions on competition imposed by state

Series on Issues in Competition Law and Policy, UN, New-York, 2007, <https://unctad.org/system/files/official-document/tdrbpconf5d7rev3_en.pdf> [10.06.2024].

[25] Guide on Market Studies for Competition Authorities, Organisation for Economic Co-operation and Development, DAF/COMP/WD (2018) 26, 23 May 2018, 4.

authorities, the government of an autonomous republic, municipal authorities, or other administrative bodies, which are deemed inadmissible under competition law.

Market monitoring is also able to uncover indications of other types of competition law violations. This may occur when the executive body identifies irregularities in the competitive processes of a specific market, suggesting artificial interference in market dynamics. Such interference is a key indicator of potential competition law violations by individual undertakings. In these instances, the executive body identifies the suspected violators and initiates an investigation to examine the alleged breach of competition legislation.

Market monitoring also helps executive authorities obtain valuable information and data about the structure and functioning of a particular product or service market, which may be used in the future in investigating cases related to alleged violations of competition law, or in controlling concentrations. In addition, the data obtained from market monitoring can be valuable for decision-making, policy planning, and the implementation of various measures by individual state bodies. Based on market monitoring, it is also possible to evaluate the effects of a decision already taken by the relevant executive body, and analyze the impact of this decision on the relevant market.

Given the nature, goals, and tasks of market monitoring, the law does not contain provisions regarding the separation of competencies for this enforcement mechanism. This is because market monitoring does not directly establish competition law violations or impose sanctions on individual undertakings. Instead, the executive body generally analyzes the goods and services markets, gathering information and data, based on which it may take various actions, such as initiating investigations or issuing recommendations.

Thus, both the competition agency and the relevant regulatory bodies have the authority to monitor markets within their respective sectors. The competition agency monitors markets in unregulated sectors of the economy, while regulatory bodies focus on the regulated sectors.

3. Investigation of Alleged Violations

3.1. The Essence of Case Investigation

The prohibitive norms in Georgian competition legislation apply to both undertakings and state bodies to ensure a healthy competitive environment in the country's

relevant markets.[26] The mandatory norms in regulated sectors primarily concern prohibitions directed at undertakings. In this regard, Articles 6 and 7 of the Competition Law, prohibiting anti-competitive agreements and abusing dominant positions, are particularly significant. Investigation is a process through which the relevant executive body identifies the abuse of a dominant position or anti-competitive agreements as offences, and imposes sanctions on the responsible undertakings.

The competition agency also uses investigations to detect unfair competitive practices[27] and anti-competitive actions by state authorities.[28] However, in these cases, the issue of separating competencies between the Agency and the National Regulatory Authorities is not relevant, as these norms are neither mandatory nor optional for enforcement within regulated sectors.[29] Therefore, this paper focuses solely on investigating alleged violations of articles 6 and 7 of the Law.

Investigation is the process of gathering evidence and giving it legal evaluation, and it is conducted by the Competition Authority on an alleged violation of competition.[30] Investigating a potential violation of the Competition Law is a complex process that requires thorough legal and economic analysis. As a result, investigations often demand significant administrative resources and time. Depending on the jurisdiction, the investigation of a case may last several years, particularly in precedential cases, or those with significant potential impact on market structure.[31]

The case investigation process includes procedural measures such as requesting information from relevant entities,[32] conducting on-site inspections of undertakings,[33] and receiving explanations. The use of specific measures by the relevant exec-

[26] ადამია გ., ექსკლუზიური ვერტიკალური დათქმების კონკურენციის შემზღუდველ შეთანხმებად კვალიფიკაცია და მისი სამართლებრივი შედეგები ქართული, გერმანული და ევროპული კავშირის კონკურენციის სამართლის მიხედვით, სადოყთორო დისერთაცია, თბილისი, 2022, 8 [adamia g., eksk'luziuri vert'ik'aluri datkmebis k'onk'urentsiis shemzghudvel shetankhmebad k'valipik'atsia da misi samartlebrivi shedegebi kartuli, germanuli da evrop'uli k'avshiris k'onk'urentsiis samartlis mikhedvit, sadoqtoro disertatsia, tbilisi, 2022, 8].

[27] Law of Georgia "On Competition", 8 May 2012, Art. 11[3].

[28] Ibid., Art. 10.

[29] Art. 31(7) of the Georgian Law "On Competition" does not include any reference to such provisions.

[30] Colino S., Competition Law of the EU and UK, 7th Edition, Oxford University Press, 2011, 77.

[31] Competition Enforcement in the Pharmaceutical Sector (2009-2017), Report from the Commission to the Council and the European Parliament, COM (2019), Brussels, 28 January 2019, 9, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52019DC0017> [10.06.2024].

[32] Colino S., Competition Law of the EU and UK, 7th Edition, Oxford University Press, 2011, 83; Moritz L., An Introduction to EU Competition Law, Cambridge University Press, 2013, 376.

[33] საქართველოს კონკურენციის სამართალი, ლ. ჯაფარიძის და ქ. ზუკაკიშვილის რედაქტორობით, თბილისი, 2019, 143 [sakartvelos k'onk'urentsiis samartali, l. japaridzis da k. zuk'ak'ishvilis reda-

utive bodies during the investigation depends on the scope of authority granted to these bodies, the nature of the case, the requirements of the investigation, and other relevant circumstances.[34]

The Agency's powers in investigating a case are determined by the Competition Law. Specifically, under Article 25(4) of the Law, the Agency is authorized to request the information and documentation necessary for the investigation. Paragraph 5 of the same article also allows the Agency to summon individuals for explanations. One essential and effective mechanism in the case investigation process is the on-site inspection of the relevant economic agent, which the Agency can carry out based on a court decision, as outlined in Article 25(6). On-site inspections include reviewing documents related to the economic agent's activities, including financial and economic records, regardless of confidentiality or storage rules, making copies of those documents, and obtaining explanations on-site. The Agency's powers in the case investigation process are further outlined in the Article 18(1) of the Law.

In accordance with Article 31(7) of the Competition Law, Articles 25 and 18 are optional norms. As such, these norms apply to regulatory bodies only when no other provisions are established in the respective sector-specific legislation. However, it is important to note that the rules outlined in articles 18 and 25 pertain to the investigation process and are also addressed in the relevant normative acts adopted by the regulatory bodies.[35] Therefore, when regulatory authorities enforce the law and a conflict arises between these norms, the rules concerning the conflict and convergence of norms, as stipulated in Article 31(7) of the Competition Law, shall apply.

3.2. Division of Competencies in Case Investigations

Issues related to the separation of competencies between the Agency and respective National Regulatory Authority in the enforcement of competition legislation are regulated by Article 31 of the Competition Law. According to the first paragraph, a

kt'orobit, tbilisi, 2019, 143]; Moritz L., An Introduction to EU Competition Law, Cambridge University Press, 2013, 376; Colino S., Competition Law of the EU and UK, 7th Edition, Oxford University Press, 2011, 83.

[34] Moritz L., An Introduction to EU Competition Law, Cambridge University Press, 2013, 367.

[35] Resolution No. 7 of the Georgian National Energy and Water Supply Regulatory Commission on "Rules for Monitoring the Energy Market", 30 March, 2021, Arts. 6, 20, and subsequent articles; Order No. 67/04 of the President of the National Bank of Georgia on the "Rules for Investigating, Submitting, and Reviewing Complaints/Statements Related to Possible Violations of Competition", 18 May 2021, Arts. 2, 9, and subsequent articles.

complaint or statement regarding a potential violation of competition legislation in a regulated sector of the economy may be submitted to either the respective regulatory body or the Agency. This provision generally allows individuals the alternative option to submit a complaint or application to either the Agency or a National Regulatory Authority. However, the first and subsequent paragraphs of the same article establish a specific rule for cases where a complaint or application is submitted solely to the Agency.

In particular, according to the second sentence of Article 31(1) of the Competition Law, if a complaint or statement related to an alleged violation of competition legislation is submitted to the Agency, and the alleged violation occurs in a regulated sector of the economy, the Agency must forward the complaint or statement to the relevant regulatory body within five working days.[36] Article 31(2) provides an exception to this general rule, outlining specific cases in which the Agency does not forward the complaint or statement to any regulatory body, but handles it per the Competition Law. These cases arise when the alleged violator is not an undertaking operating in the particular regulated sector when the case involves undertakings from different regulated sectors, or when the alleged unlawful action is carried out by undertakings operating in the regulated sector, but the action itself (the subject of the dispute) is not carried out within the regulated sector. Therefore, in the situations specified in Article 31(2) of the Law, the Agency always handles the case.

The same principle applies when the complaint or statement related to an alleged violation of competition legislation is submitted to a specific regulatory authority. If one of the cases outlined in Article 31(2) is met, the regulatory body will forward the complaint or statement to the Agency.

Despite the legislative arrangement discussed above, there may be cases when individual regulatory bodies and agencies cannot agree on which authority should investigate a case. In this regard, Article 31(3) of the Law establishes an important rule: if the competent authority cannot be determined regarding the investigation of a particular case, consultations between the Agency and the regulatory body can be held over 30 calendar days to determine the relevant authorized body.

Thus, according to Article 31(3) of the Law, the Agency and the relevant regulatory body are empowered to determine, by mutual agreement, which body is competent

[36] საქართველოს კონკურენციის სამართალი, ლ. ჯაფარიძის და ქ. ზუკაიშვილის რედაქტორობით, თბილისი, 2019, 528 [sakartvelos k'onk'urentsiis samartali, l. japaridzis da k. zuk'ak'ishvilis redakt'orobit, tbilisi, 2019, 528].

to handle a specific case. While these bodies are guided by the principles outlined in Article 31(1-2), they ultimately base their decision on the factual circumstances of each case. If the relevant authorized body cannot be determined through mutual agreement, the Agency will handle the case as per Article 31(4) of the Law.

According to the aforementioned approach, it can be argued that the legislator grants both the Agency and the regulatory bodies broad authority to determine the competent body for handling a specific case. This is evident in the fact that the legislator allows the regulatory bodies and the Agency to agree on the separation of powers and decide who will continue investigating the case. However, in practice, the provision that, in the event of a disagreement between the regulatory body and the Agency the case is always handled by the Agency, could lead to certain challenges.

Within this framework, determining competence in a specific case partially depends on the regulatory body's discretion. In particular, if the regulatory body believes that a particular case falls outside its scope of competence, the responsibility to investigate the case remains with the Agency. Unlike the regulatory body, the Agency, as the primary enforcement body, lacks any mechanism to exclude its competence over a specific case. Therefore, theoretically, there is a high likelihood that, despite the provisions of Article 31(2) of the Law, the investigation of a case within a regulated sector will be conducted by the Agency without questioning the legitimacy or appropriateness of its decision in this regard.

4. Concentration Control

Concentration control is one of the key instruments for maintaining a healthy competitive environment in markets. It refers to situations where two or more independent undertakings merge to form a single undertaking. Article 11(1) of the Law also defines another type of concentration, one that includes the acquisition of direct or indirect, full or partial control over one or more undertakings through the purchase of securities or shares, contracts, or other means, by one or more undertakings or by one or more other persons who, under competition law, are not considered undertakings but who already control at least one undertaking. Creating a joint venture is also considered a concentration if it performs all the functions of an independent undertaking for an extended period.

Unlike case investigations, merger control is an ex-ante mechanism for competition protection. In this context, the relevant executive body conducts a preliminary

assessment of specific actions (such as mergers, share purchases, etc.). If it determines that the planned concentration would significantly restrict competition in the goods or services market of Georgia or a part of it, the Agency will not approve the concentration. In such cases, the planned concentration cannot be implemented.

Article 31 of the Law also governs the competence-sharing between regulatory bodies and the Agency in implementing concentration control. In this regard, the same principles of cooperation and division of responsibilities apply as those discussed for case investigations. Specifically, when a notification of a planned concentration is submitted, the Agency or the relevant regulatory body must assess whether the concentration will significantly affect competition within the market.

In cases where the planned concentration concerns a sector under the jurisdiction of a specific regulatory body, the notification will be forwarded to that body for further review. If the concentration affects multiple sectors, or if there is any uncertainty regarding which body has the authority, the Agency and the regulatory body will consult with each other to determine which institution is best suited to handle the assessment. Should there be any disagreement between the two bodies, the Agency has the final say in handling the concentration case.

Furthermore, if the regulatory body concludes that the concentration does not fall within its domain, it will promptly refer the matter to the Agency, ensuring no delay in the review process. This ensures that competition protection remains effective across all regulated sectors of the economy.

VI. Conclusion

As a result of the reasoning developed in this paper, it can be concluded that the separation of competencies between the Agency and the regulatory bodies of the regulated sectors of the economy is one of the key cornerstones of the enforcement of competition legislation in Georgia.

In enforcing competition legislation, an important distinction is made between mandatory and optional norms of the law. Mandatory norms are those provisions that must be enforced and applied across all sectors of the economy. In contrast, optional norms apply to regulated sectors only if no other provisions are specified by the legislation governing that specific sector.

Resolving conflicts between optional norms and those stipulated by sector-specific legislation is crucial in practice. If there is a direct contradiction between these

norms, the provisions of the special legislation governing the regulated sector will prevail. If the special legislation complements the optional norms of the law, both sets of norms can be applied in parallel. If the special legislation does not regulate the issue addressed by the optional norm, the optional norm will apply unless the sector-specific legislation explicitly excludes its use.

Regarding the enforcement process, it was also found that the issue of the separation of competencies is central to concentration control and case investigations in Georgia. The rules and principles of the division of powers between the Agency and the regulatory bodies are analyzed in this paper. One important finding from the analysis of the existing legislation is that, in determining the authority to investigate a specific case, regulatory bodies enjoy broader discretion compared to the Agency. However, regardless of the Agency's position, if the regulatory body deems that a specific case falls outside its competence, the Agency is always obligated to investigate the case and make an appropriate decision.

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Dispute Adjudication Board: Innovation in Georgia's Alternative Dispute Resolution System

ABSTRACT

This article examines the Dispute Adjudication Board (DAB) as an innovative mechanism within Georgia's alternative dispute resolution (ADR) system. As large-scale infrastructure projects proliferate globally, effective and timely dispute resolution becomes essential. While ADR mechanisms like arbitration and mediation are well-established, the DAB has emerged as a crucial tool, especially in projects backed by international financial institutions. Despite its growing importance, the DAB remains underregulated in Georgia, leading to challenges in its application.

The study explores the evolution of the DAB, tracing its roots from the United States in the 1970s to its current international recognition, particularly within the FIDIC contract framework. It highlights how Georgia has begun integrating DABs into its legal landscape, despite the absence of a comprehensive regulatory framework. Through a comparative analysis of international and Georgian practices, the paper identifies key distinctions between the DAB and other ADR mechanisms, emphasizing the unique role of the DAB as a pre-arbitration step that ensures the continuation of project work while disputes are resolved.

The research also addresses the enforceability of DAB decisions, examining contractual obligations and the challenges of ensuring compliance. By analyzing case law and arbitration practices, both globally and within Georgia, the paper underscores the need for clearer guidelines, and the potential for judicial and arbitration support to solidify the DAB's role in the Georgian legal system.

In conclusion, the paper advocates for the broader adoption of DABs in Geor-

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gia, recommending the development of a legal framework aligned with international standards to enhance the effectiveness of this dispute resolution method. This will not only benefit the country's infrastructure development, but also strengthen its position in the global market by aligning with international best practices.

Keywords: Dispute Adjudication Board, ADR, FIDIC Contract Dispute resolution mechanisms, Enforceability of DAB decisions, DAB as a precondition of arbitration.

I. Introduction

In the modern world, the swift and effective implementation of large infrastructure projects is crucial. In this context, effectively addressing disputes that arise during these projects is vital, as such issues are an inherent part of the process. This need has driven the growing popularity of alternative dispute resolution (ADR) methods and the introduction of innovations in this field. In addition to arbitration and mediation, the Dispute Adjudication Board[1] (DAB) is increasingly being adopted and widely used as an alternative method of dispute resolution.[2]

In Georgia, large projects of state importance are often implemented with the financial support of international financial institutions. These institutions often require the use of contract forms developed at the international level during project implementation. Examples of such contract forms include those from the World Bank, the European Bank for Reconstruction and Development (EBRD), the Asian Development Bank (ADB), or those proposed by FIDIC (the International Federation of Consulting Engineers). These forms are based on their extensive experience and the best international practices. Such agreements include clauses for multi-level dispute resolution[3], including the use of dispute resolution boards.[4] This dispute

[1] From a terminological perspective, this institution is referred to by explicit names such as Dispute Board (DB), Dispute Adjudication Board (DAB), or Dispute Avoidance Adjudicator Boards (DAAB). In the Georgian translation, especially in agreements, it is referred to as a conciliator. However, in Georgian practice, it is recommended to use the term "Dispute Board".

[2] Patterson L. QC, Higgs N., Dispute Boards, in: The Guide to Construction Arbitration, 4th Edition, edited by S. Brekoulakis and D.T. Brynmor QC, London, 2021, 120.

[3] Blackaby N., Partasides C., Redfern A., Hunter M., Redfern and Hunter on International Arbitration, 6th Edition, Oxford University Press, 2015, 101-102.

[4] Gould N., McCrea R., Dispute Boards, in: Construction Arbitration and Alternative Dispute Resolution, Theory and Practice around the World, edited by R. Nazzini, London, 2022, 129.

resolution mechanism has been introduced in Georgia, and there have already been cases where the Georgian court[5] and local arbitration tribunals[6] had to discuss and resolve issues through the Dispute Resolution Board. However, considering the absence of a legal framework for its regulation in Georgia, as well as the lack of proper practical knowledge and experience within the legal community, ensuring the correct functioning of the Dispute Resolution Board and the proper resolution of related issues is a significant challenge.

The aim of this paper is to present and critically analyze the function and role of the Dispute Resolution Board (DRB) within the broader framework of alternative dispute resolution (ADR). The paper seeks to elucidate the distinctions between the DRB and other ADR mechanisms, as well as their interrelationships. Specifically, it examines the DRB's function as a mandatory pre-arbitration or pre-litigation stage and assesses the mechanisms available for enforcing the decisions issued by the DAB. This study employs analytical and comparative legal research methods.

II. Development Trends of the Dispute Resolution Board

1. International Development Trends

The formation of the Dispute Resolution Board in its current form began in the USA in the 1970s, when it was used as a means of dispute resolution within the Eisenhower Tunnel project in Colorado.[7] Later, it was employed in the World Bank-funded El Cajon Dam hydroelectric project in the 1980s[8] and in the Channel Tunnel and Hong Kong Airport projects in the 1990s.[9] Since 1995, the Dispute Resolution Board has been introduced in the contracts of projects financed by the World Bank and FIDIC,

[5] Decision No. 2b/9284-19of the Tbilisi Court of Appeal, 19 November 2021; Judgement No. AS-1665-2019 of the Supreme Court of Georgia, 10 February 2020.

[6] Decision No. 8865 of the Arbitration Tribunal of the Dispute Resolution Center, 12 August 2022.

[7] Patterson L. QC, Higgs N., Dispute Boards, in: The Guide to Construction Arbitration, 4th Edition, edited by S. Brekoulakis and D.T. Brynmor QC, London, 2021, 120.

[8] Ibid.

[9] Gould N., McCrea R., Dispute Boards, in: Construction Arbitration and Alternative Dispute Resolution, Theory and Practice around the World, edited by R. Nazzini, London, 2022, 129. See also: Dispute Resolution Board, Foundation Fostering Best Practices in Dispute Avoidance and Resolution Worldwide: https://appn-racop.org/upidrots/2023/11/231024-Introduction-to-DBs_APPN_Final_R2-1.pdf [22.03.2024].

in the Orange Book, and since 1999 in the Red, Yellow, and Silver Books of FIDIC.[10] Today, this mechanism is used not only in construction and infrastructure projects, but also in various other fields, including invofmation technology.[11]

The implementation of the Dispute Resolution Board by FIDIC has significantly advanced the development of this dispute resolution mechanism. Internationally recognized dispute resolution centers have also started to adopt, and have developed, specific rules for dispute resolution boards. For example, the American Arbitrators Association (AAA) has developed special rules[12] for dispute resolution boards that have been in effect since 2000. ClArb in 2014[13] and the International Chamber of Commerce (ICC) in 2015 published the relevant rules and today offer this service to their parties.[14] In some countries, the Dispute Resolution Board, as a dispute resolution mechanism, is recognized and strengthened at the legislative level.[15] The United Nations Commission on International Trade Law (UNCITRAL) is also actively considering the issue of Dispute Resolution Board regulation[16], and it may not be long before UNCITRAL proposes rules governing the Dispute Resolution Board and/or a model law, which will be an important step toward the global introduction of this mechanism.

2. Development Trends in Georgia

The international trend of the Dispute Resolution Board has also found a response in Georgia, seeing the private sector attempting to implement this means of dispute resolution. This is clearly confirmed by the development of the rules of the Dispute

[10] Ibid.; Regarding FIDIC see: <https://www.fidic.org/sites/default/files/FIDIC-rainbow-suite-2012.pdf> [22.03.2024].

[11] Gould N., McCrea R., Dispute Boards, in: Construction Arbitration and Alternative Dispute Resolution, Theory and Practice around the World, edited by R. Nazzini, London, 2022, 130.

[12] See: Dispute Resolution Boards Hearing Rules and Procedures, American Arbitration Association, 2000, <https://www.adr.org/sites/default/files/AAA_Dispute_Resolution_Board_Hearing_Rules_and_Procedures.pdf> [22.03.2024].

[13] See: Dispute Board Rules, Chartered Institute of Arbitrators, 2014, <https://www.ciarb.org/media/31vfc1x0/ciarb-dispute-board-rules-practice-standards-committee-august-2014.pdf> [22.03.2024].

[14] ICC Dispute Board Rules, International Chamber of Commerce, 2015, <https://iccwbo.org/dispute-resolution-services/dispute-boards/rules/> [22.03.2024].

[15] Housing Grants, Construction and Regeneration Act of the UK, 1996, Art. 108; New Zealand Construction Contracts Act, 2002.

[16] See: Report of Working Group II (Dispute Settlement) on the Work of Its Seventy-Seventh Session, United Nations Commission on International Trade Law, New York, 6–10 February 2023, <https://docs.un.org/en/A/CN.9/1129> [22.03.2024].

Resolution Board by the European Business Association Mediation and Arbitration Center, and the offering of this service to interested parties in Georgia from 2021 onward.[17]

The Georgian court's approach to the Dispute Resolution Board is inconsistent. In this regard, the decision of the Tbilisi Court of Appeals on November 19, 2021 is worth mentioning. The court explained in the mentioned case that alternative dispute resolution methods and implementing institutions (arbitration, mediation, simplified enforcement proceedings, writ of execution issued by notary), as well as the rules of dispute resolution established by them, are regulated by the legislation of Georgia. However, he Dispute Resolution Board and the rules governing dispute resolution are not defined and are unfamiliar to the legislation of Georgia.[18]

The court additionally indicated that "as mentioned above, it is unfamiliar to the legislation of Georgia, and, therefore, the court lacks the ability to determine the legality of a dispute decided by the Dispute Resolution Board."[19] The appellate court's indication that Georgian law does not regulate the Dispute Resolution Board as a dispute resolution mechanism is correct. However, considering that this mechanism is widely recognized at the international level and has become an integral part of the standard contracts of international financial institutions and FIDIC, as well as in Georgia, where various state bodies are party to such agreements[20], it is not advisble to completely ignore it. Having a contractual basis,[21] such as through an agreement of the parties, falls fully under the principle of freedom of contract recognized and strengthened by Georgian legislation, according to which parties can conclude agreements that are not provided for by the law, but which do not contradict it.[22]

In contrast to the decision of the Court of Appeals, it is interesting that the decision of the Supreme Court of Georgia in 2020, while not directly addressing the legality of the clause on the Dispute Resolution Board, can be seen as implicitly recognizing the Dispute Resolution Board as a means of dispute resolution through the

[17] Dispute Board Rules, EBA-MAC, 2021, <https://eba-mac.com/uploads/DB-rules-eng.pdf> [22.03.2024].

[18] Decision N 2b/9384-19 of the Tbilisi Court of Appeal, 19 November 2021.

[19] Ibid.

[20] Judgment No. AS-1665-2019 of the Supreme Court of Georgia, 10 February, 2020.

[21] Gould N., McCrea R., Dispute Boards, in: Construction Arbitration and Alternative Dispute Resolution, Theory and Practice around the World, edited by R. Nazzini, London, 2022, 130.

[22] Civil Code of Georgia, 1997, Art. 319; Commentary on the Civil Code, Book III, Art. 319, 2019, 54.

analysis performed.[23] The Supreme Court also referred to the decision of the Dispute Resolution Board:

> *"In its decision, the Board, first of all, discussed jurisdiction, and indicated that the wording of Articles 20.4, 20.5, and 20.6 of the contract between the parties is clear, but to the contractor's question as to whether the terms of these provisions were violated when the arbitration proceedings were commenced before the conditions precedent were met, the answer cannot be provided under Georgia law, which may include exceptions. Ultimately, the Dispute Resolution Board refused to grant the contractor's application on the grounds that it lacks the relevant jurisdiction."*[24]

The Court of Cassation also indicated that "it focused solely on the decision made by the Disputes Resolution Board regarding the use of the opportunity granted by law to secure the claim. As for the authority to consider the content of the arbitration agreement, including researching and checking the validity of the procedures stipulated by the parties' agreement before arbitration, this does not fall within the jurisdiction of the general courts, in this case, the Court of Appeals.[25]

This decision states that the Supreme Court considered the dispute resolution procedure provided for in the agreement concluded between the parties. This procedure included the review of the dispute by the Dispute Resolution Board before the commencement of arbitration. The court allowed the possibility that the parties could also agree to a pre-arbitration procedure, which could be expressed, among other things, in the agreement on the Dispute Resolution Board. In contrast to the above-mentioned decision of the Court of Appeals,[26] the Supreme Court did not find that the mechanism for resolving such a dispute was unfamiliar or contrary to Georgian legislation, which should be considered a step forward. In light of this, the decision of the local arbitration tribunal confirmed and supported the parties' consideration of the dispute by the Dispute Resolution Board prior to the commencment of the arbitration.[27]

Undoubtedly, the Dispute Resolution Board is gaining recognition globally and is becoming part of the modern alternative dispute resolution system. It is vital for it

[23] Judgment No. AS-1665-2019 of the Supreme Court of Georgia, 10 February, 2020.

[24] Ibid.

[25] Ibid.

[26] Decision No. 2b/9384-19 of the Tbilisi Court of Appeal, 19 November 2021.

[27] Decision No. 8865 of the Arbitration Tribunal of the Dispute Resolution Center, 12 August 2022.

to be established in Georgia, considering international practices and standards. Creating a legal framework for this is not mandatory, as in many countries around the world, this mechanism can be supported by court/arbitration practice as a contractual dispute resolution mechanism.

III. The Dispute Resolution Board and other Mechanisms of Dispute Resolution

The Dispute Resolution Board is a tribunal created based on the agreement of the parties, with the purpose of resolving any disputes and disagreements[28] arising between them during the course of the project as quickly and efficiently as possible, preventing the escalation of disputes and avoiding arbitration or court proceedings.[29]

The Dispute Resolution Board may consist, as agreed upon by the parties, of one, three, or more persons who make recommendations to the parties or make decisions enforceable by the parties.[30] The decision of the Dispute Resolution Board shall be enforced immediately, although such decision may be reversed by arbitration or court,[31] with the aim of ensuring that the project and the progress of the contract are not violated.

The Dispute Resolution Board operates on the concept of *"Pay now, argue later"*[32]/*"Comply now, argue later"*,[33] Accordingly, the parties are given the opportunity to quickly, and at lower cost, make an enforceable interim decision, which can become final if the parties agree to it, and thus agree to no longer continue the dispute.[34]

[28] Dedezade T., Enforcement of DAB decisions under the FIDIC 1999 Forms of Contract, in: Transnational Construction Arbitration, Key Themes in the Resolution of Construction Disputes, edited by R. Nazzini, London, 2018, 220.

[29] Gould N., McCrea R., Dispute Boards, in: Construction Arbitration and Alternative Dispute Resolution, Theory and Practice around the World, edited by R. Nazzini, London, 2022, 130.

[30] Patterson L. QC, Higgs N., Dispute Boards, in: The Guide to Construction Arbitration, Fourth Edition, edited by S. Brekoulakis and D.T. Brynmor QC, London, 2021, 20.

[31] Smith M. QC, McCarthy H., Ho J., Alternative Dispute Resolution in Construction and Infrastructure Disputes, in: The Guide to Construction Arbitration, 4th Edition, edited by S. Brekoulakis and D.T. Brynmor QC, London, 2021, 136.

[32] Ibid.

[33] Patterson L. QC, Higgs N., Dispute Boards, in: The Guide to Construction Arbitration, 4th Edition, edited by S. Brekoulakis and D.T. Brynmor QC, London, 2021, 120.

[34] Smith M. QC, McCarthy H., Ho J., Alternative Dispute Resolution in Construction and Infrastructure Disputes, in: The Guide to Construction Arbitration, 4th Edition, edited by S. Brekoulakis and D.T. Brynmor QC, London, 2021, 136.

In situations where mediation and arbitration play significant roles in the alternative dispute resolution system, skeptical questions are often raised about the Dispute Resolution Board. Yet there are fundamental differences in Dispute Resolution Board mediation and arbitration.

Regarding mediation, the Dispute Resolution Board is authorized to issue a recommendation or a binding decision for the parties to follow when the mediator does not issue a decision, and its main function is to help the parties reach an agreement.[35]

Unlike arbitration, the Dispute Resolution Board can handle not only legal disputes, but also conflicts[36] In many cases, a Dispute Resolution Board is set up upon contract conclusion, and is a vital part of the project. An arbitral tribunal is established only after a dispute arises between the parties. However, there is a great difference in how their decisions are enforced.

The enforcement of the decision of a Dispute Resolution Board is a contractual obligation[37] of the parties, while the enforcement of the arbitration decision is ensured by national legislation[38] or international convention.[39]

IV. Forms and Types of Dispute Resolution Boards

Today, the types and structures of the Dispute Resolution Board vary. The authority granted to the Dispute Resolution Board is entirely determined by the agreement of the parties involved.

Standing DB

One type of Dispute Resolution Board is represented by the so-called "Standing DB," which is established immediately after concluding the contract between the parties. It operates throughout the entire duration of the contract,[40] fully monitoring the progress of the contract, paying visits to the construction site, and, in many cases, offering recommendations to avoid potential disputes. As such, the Dispute Resolu-

[35] Law of Georgia "On Mediation", 18 September 2019, Art. 2(a).

[36] Gould N., McCrea R., Dispute Boards, in: Construction Arbitration and Alternative Dispute Resolution, Theory and Practice around the World, edited by R. Nazzini, London, 2022, 130.

[37] Ibid., 131.

[38] Law of Georgia "On Arbitration", 2 July 2009, Art. 44.

[39] 1958 New York Convention "On the Recognition and Enforcement of Foreign Arbitral Awards".

[40] Dedezade T., Enforcement of DAB decisions under the FIDIC 1999 Forms of Contract, in: Transnational Construction Arbitration, Key Themes in the Resolution of Construction Disputes, edited by R. Nazzini, London, 2018, 220.

tion Board is a vital part of the entire project, serving the dual function of providing recommendations and making decisions in case of disputes.[41] This format is unique to the Dispute Avoidance/Adjudication Board (DAAB).

Ad-hoc DAB

Unlike a Standing DB, an ad-hoc Dispute Adjudication Board (DAB) is formed after specific disputes arise, with the purpose of resolving those disputes only[42], and stops functioning as soon as the dispute is decided.[43] Therefore, the ad-hoc DAB service is more cost-efficient, and in many cases parties prefer it due to this factor.

DRB (Dispute Review/Resolution Board)

The Dispute Review/Resolution Board (DRB) is a dispute review board with authority limited to making recommendations to the parties.[44] It does not render a decision binding on them.[45] The formulation of this format is associated with the US construction industry, and the American Arbitrators Association Disputes Board Rules expressly state that the Disputes Resolution Board shall, within 14 days of hearing the parties, issue a confidential recommendation sent solely to the employer and the contractor, outlining the resolution process for disputes between the parties.[46]

The Dispute Resolution Board model is also outlined in the ICC Rules, wherein the DRB offers informal assistance to parties to prevent disputes, and provides recommendations accordingly.[47]

According to the same rules, a party may choose to agree with and follow the recommendation given, although it is not obligated to do so – this decision is not binding. If a party disagrees and therefore does not plan to implement the recommendation, it is required to inform the other party and issue a Notice of Dissatisfaction (NoD); otherwise, the recommendation becomes mandatory.[48]

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41 Ibid.

42 Ibid.

43 Patterson L. QC, Higgs N., Dispute Boards, in: The Guide to Construction Arbitration, 4th Edition, Edited by S. Brekoulakis and D.T. Brynmor QC, London, 2021, 122.

44 Patterson L. QC, Higgs N., Dispute Boards, in: The Guide to Construction Arbitration, 4th Edition, Edited by S. Brekoulakis and D.T. Brynmor QC, London, 2021, 122.

45 Dispute Resolution Boards Hearing Rules and Procedures, Art. 17 American Arbitration Association, 2000, <https://www.adr.org/sites/default/files/AAA_Dispute_Resolution_Board_Hearing_Rules_and_Procedures.pdf> [22.03.2024].

46 Ibid., Art. 17

47 ICC Dispute Board Rules, International Chamber of Commerce, 2015, Art. 4, <https://iccwbo.org/dispute-resolution-services/dispute-boards/rules/> [22.03.2024].

48 Ibid.

DAB

The Dispute Adjudication Board (DAB) represents the Dispute Resolution Board, also known as the "classic" form, which is the most widely used and was introduced based on the 1999 World Bank and FIDIC forms of contracts.[49] It is generally created after a dispute arises, and makes a decision regarding a specific dispute.[50] The DAB issues a binding decision that must be complied with by the parties. If a party disagrees, they can issue a NoD within the time limit stipulated in the agreement/rules. Even if a NoD is issued, the party must still comply with the decision, yet maintains the right to challenge.[51] It is at this time that the Dispute Resolution Board concept of *"Pay now, argue later"*[52] or *"Comply now, argue later"* comes into play.[53]

DAAB

The 2017 FIDIC Forms of Contract introduced the Dispute Avoidance/Adjudication Board (DAAB) form, which serves the purpose of not only resolving disputes, but also preventing them from arising.[54] This form presents the parties with the "All-Inclusive" mechanism of the Dispute Board. On one hand, the classic function of the DAB is to issue a binding decision when a dispute arises, while, on the other, the parties are afforded the opportunity, at any stage of the project, to turn to the DAAB for an informal review to prevent any disagreements.[55]

CDB

The ICC Dispute Board Rules provide for Combined Dispute Boards[56], which merge aspects of both the DRB and DAB. They are empowered to issue recommenda-

[49] Gould N., McCrea R., Dispute Boards, in: Construction Arbitration and Alternative Dispute Resolution, Theory and Practice around the World, edited by R. Nazzini, London, 2022, 131.

[50] Conditions of Contract for Plant and Design-Build Contract (Yellow Book), 1st Edition, International Federation of Consulting Engineers (FIDIC), 1999, GCC 20.

[51] ICC Dispute Board Rules, International Chamber of Commerce, 2015, Art. 5, <https://iccwbo.org/dispute-resolution-services/dispute-boards/rules/> [22.03.2024].

[52] Smith M. QC, McCarthy H., Ho J., Alternative Dispute Resolution in Construction and Infrastructure Disputes, in: The Guide to Construction Arbitration, 4th Edition, edited by S. Brekoulakis and D.T. Brynmor QC, London, 2021, 136.

[53] Patterson L. QC, Higgs N., Dispute Boards, in: The Guide to Construction Arbitration, 4th Edition, edited by S. Brekoulakis and D.T. Brynmor QC, London, 2021, 120.

[54] Conditions of Contract for Plant and Design-Build Contract (Yellow Book), 1st Edition, International Federation of Consulting Engineers (FIDIC), 1999, GCC 21.

[55] Gould N., McCrea R., Dispute Boards, in: Construction Arbitration and Alternative Dispute Resolution, Theory and Practice around the World, edited by R. Nazzini, London, 2022, 131.

[56] ICC Dispute Board Rules, International Chamber of Commerce, 2015, Art. 4-6, <https://iccwbo.org/dispute-resolution/dispute-resolution-services/adr/dispute-boards/dispute-board-rules/> [22.03.2024].

tions or decisions regarding disputes between the parties.[57] According to these rules, if one party requests a decision and the other party agrees or does not make a claim, the CDB issues a decision. If one party requests a decision and the other party believes that a recommendation rather than a decision should be issued, the CDB itself decides whether to issue a recommendation or make a decision.[58]

V. Enforcement of a Decision Made by a Dispute Board

One of the main criteria for assessing the effectiveness of any dispute resolution mechanism is the enforceability of the decision. If a party cannot achieve a final outcome, the effectiveness of any dispute resolution mechanism is called under question. The issue of enforcing the decision poses a significant challenge for disputes boards—how to ensure compliance when the party against whom the decision is made does not voluntarily comply. Regarding this matter, there is no unified approach, and various opinions exist.

1. Contractual Mechanism

Given that the DAB is a contractual mechanism for dispute resolution, enforcing its decision constitutes a contractual obligation of the party, and the contract must be performed in accordance with the principle of *Pacta sunt servanda* (Agreements must be kept). The FIDIC Agreement expressly states that a decision made by the DAB must be complied with immediately, even if a party disagrees with it and issues a Notice of Disagreement (NoD).[59] This is where the main concept of DAB, *"Pay now, argue later"*,[60] and *"Comply now, argue later"*,[61] is revealed. If a party issues a NoD, the decision of the DAB is non-final, although it is binding on the parties[62] regardless of

[57] Gould N., McCrea R., Dispute Boards, in: Construction Arbitration and Alternative Dispute Resolution, Theory and Practice around the World, edited by R. Nazzini, London, 2022, 131.

[58] Ibid.

[59] Construction Contract (Red Book), 2nd Edition, International Federation of Consulting Engineers (FIDIC), 2017, Art. 21.4.3.

[60] Smith M. QC, McCarthy H., Ho J., Alternative Dispute Resolution in Construction and Infrastructure Disputes, in: The Guide to Construction Arbitration, 4th Edition, edited by S. Brekoulakis and D.T. Brynmor QC, London, 2021, 136.

[61] Patterson L. QC, Higgs N., Dispute Boards, in: The Guide to Construction Arbitration, 4th Edition, edited by S. Brekoulakis and D.T. Brynmor QC, London, 2021, 120.

[62] Dedezade T., Enforcement of DAB decisions under the FIDIC 1999 Forms of Contract, in: Transna-

whether the party plans to proceed with the dispute in arbitration or in court. However, a mechanism in which enforcement of the decision relies solely on the will of one party obviously cannot be considered an effective dispute resolution mechanism.

2. Compensation for Damages Resulting from Non-Enforcement of the Dispute Resolution Board's Decision

Although the party is obligated to enforce the decision made by the DAB, cases of non-enforcement of the decision are still common in practice. One mechanism under consideration to prevent this is applying compensation for damages caused by non-execution of the decision on the party that fails to comply.[63] Accordingly, the party in whose favor the decision was made by the DAB is entitled to refer to arbitration and request both a decision on the matter discussed by the DAB ("Primary Dispute"), as well as damages caused by the non-enforcement of the decision made by the DAB, known as "Secondary Dispute".[64] This became the subject of significant discussion in Singapore in the case of PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation, where the Singaporean courts had to consider the issue twice. These cases are known as the *Persero I* and *Persero II* cases.[65]

In the same disputes, it was discussed whether the party has the right to directly apply to arbitration together with the main dispute ("Primary Dispute"), with a request for damages ("Secondary Dispute"), or if the party should first apply to the DAB with a request for damages, and then to arbitration.[66] It is clear that the secondary dispute is a product that arises from the main dispute, and thus it is more appropriate to consider them together. Submitting to the DAB a claim for damages resulting from non-enforcement of the primary DAB decision will create an additional barrier for the party whose claim has been upheld and who seeks immediate enforcement.

The *Persero I* case clarified that the arbitrator had no authority to consider a claim for damages until that claim had been brought before the DAB.[67] However, in

tional Construction Arbitration, Key Themes in the Resolution of Construction Disputes, edited by R. Nazzini, London, 2018, 163.

63 Ibid., 225-226.

64 Ibid., 225-226.

65 Seppala Ch.R., A Welcome Decision from Singapore: The Second Persero Case, journal "Construction Law International", Vol. 10, No. 1, 2015, 18-23.

66 Ibid.

67 Judgment No. 206 of the High Court of Singapore (SGHC 202) on the case "PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation", 20 July 2010; Dedezade T., Enforcement of

Persero II,[68] the court provided an important answer to this question, rightly changing its approach and holding that a party has the right to submit both claims to arbitration at the same time.[69] Any other definition would contradict the idea of an alternative dispute resolution mechanism in general, which aims to quickly and efficiently resolve disputes. Therefore, since the main idea of the combined use of DAB and arbitration is for the parties to resolve disputes efficiently, all issues that require clarification should be addressed with this goal in mind. While imposing damages serves a preventive function and encourages parties to comply with the DAB's decision promptly, relying on this measure alone will not be sufficient to ensure enforcement, and its effectiveness will still not be satisfactory.

3. Enforcement of the Dispute Board's Decision via an Interim/Partial Arbitration Decision

In international practice, enforcing a DAB decision before the final settlement of the dispute through arbitration can also be achieved through a decision or a partial decision[70] taken as an interim measure.[71] However, there is no unified or established approach to this matter.[72] First, it should be assessed how compatible the enforcement of the decision made by the DAB, which mostly concerns the payment of money,

DAB decisions under the FIDIC 1999 Forms of Contract, in: Transnational Construction Arbitration, Key Themes in the Resolution of Construction Disputes, edited by R. Nazzini, London, 2018, 225-226.

68 Judgment No. 148, 149, 5277, 5985 of the Court of Appeal of Singapore (SGCA 30) on the case "PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation", 27 May 2015.

69 Judgment No. 148, 149, 5277, 5985 of the Court of Appeal of Singapore (SGCA 30) on the case "PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation", 27 May 2015; Seppala Ch.R., A Welcome Decision from Singapore: The Second Persero Case, journal "Construction Law International", Vol. 10, No. 1, 2015, 18-23.

70 For details on terminology: Dedezade T., Enforcement of DAB decisions under the FIDIC 1999 Forms of Contract, in: Transnational Construction Arbitration, Key Themes in the Resolution of Construction Disputes, edited by R. Nazzini, London, 2018, 238; მაჩაიძე ო., უზრუნველყოფის ღონისძიებების გამოყენების და ცნობა-აღსრულების პირობები საარბიტრაჟო წარმოებისას, თბილისი, 2020, 36-38 [machaidze o., uzrunvelqopis ghonisdziebebis gamoqenebis da tsnoba-aghsrulebis p'irobebi saarbit'razho ts'armoebisas, tbilisi, 2020, 36-38].

71 Dedezade T., Enforcement of DAB decisions under the FIDIC 1999 Forms of Contract, in: Transnational Construction Arbitration, Key Themes in the Resolution of Construction Disputes, edited by R. Nazzini, London, 2018, 237-244; Seppala Ch.R., An Engineer's / Dispute Adjudication Board's Decision Is Enforceable by An Arbitral Award, 2009, <https://fidic.org/sites/default/files/5%20seppala_PARIS_2251210_1.pdf> [22.03.2024].

72 Ibid.

is with the nature of the interim measures, the purpose of which, in the majority of cases, is different and is aimed at ensuring the enforcement of the final award and/or ensuring the "right" of the disputing parties.[73]

However, if the parties do not comply with the decision of the DAB and proceed to arbitration, the arbitration tribunal must consider the merits of the dispute and simultaneously order the party to carry out the action mandated by the DAB following the case review, even if it reaches a different outcome. According to international standards, when implementing a provisional measure, arbitration should not involve itself in a substantive examination of the case.[74] Aside from the above-stated, the recognized approach is that an interim measure does not qualify as a final arbitral decision, and is not enforceable under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Decisions.[75] Instead, its enforceability is subject to national legislation.[76] Courts in different countries have provided different resolutions regarding the enforcement mechanism of a DAB decision. For example, in the case of *Persero II*, the Singaporean court considered it acceptable,[77] while the Romanian court looked at the same issue differently.[78] In the Georgian context, considering the established approaches to interm measures,[79] and the fact that court/arbitration practice regarding DAB is not well established in the country, it is unlikely that DAB decisions will be enforced in this form at the initial stage.

[73] მაჩაიძე ო., უზრუნველყოფის ღონისძიებების გამოყენების და ცნობა-აღსრულების პირობები საარბიტრაჟო წარმოებისას, თბილისი, 2020, 40-45 [machaidze o., uzrunvelqopis ghonisdziebebis gamoqenebis da tsnoba-aghsrulebis p'irobebi saarbit'razho ts'armoebisas, tbilisi, 2020, 40-45].

[74] Born G., International Commercial Arbitration, Second Edition, Volume II, Kluwer Law International, 2014, 2478. Caron D., Caplan L., The UNCITRAL Arbitration Rules, Oxford University Press, 2013, 523.

[75] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, United Nations, New York, 10 June 1958.

[76] მაჩაიძე ო., უზრუნველყოფის ღონისძიებების გამოყენების და ცნობა-აღსრულების პირობები საარბიტრაჟო წარმოებისას, თბილისი, 2020, 185 [machaidze o., uzrunvelqopis ghonisdziebebis gamoqenebis da tsnoba-aghsrulebis p'irobebi saarbit'razho ts'armoebisas, tbilisi, 2020, 185].

[77] Gould N., McCrea R., Dispute Boards, in: Construction Arbitration and Alternative Dispute Resolution, Theory and Practice around the World, edited by R. Nazzini, London, 2022, 153-154.

[78] Ibid.

[79] მაჩაიძე ო., უზრუნველყოფის ღონისძიებების გამოყენების და ცნობა-აღსრულების პირობები საარბიტრაჟო წარმოებისას, თბილისი, 2020, 41 [machaidze o., uzrunvelqopis ghonisdziebebis gamoqenebis da tsnoba-aghsrulebis p'irobebi saarbit'razho ts'armoebisas, tbilisi, 2020, 41].

4. The Dispute Resolution Board as a Mandatory Pre-Arbitration/Pre-Trial Procedure and Exceptional Cases

Recently, parties are ever more often turning to multi-step dispute resolution processes, which allow them to use different dispute resolution methods: negotiation, mediation, DAB, and/or arbitration.[80] It is typical for such agreements that the parties must attempt to resolve the dispute using all agreed-upon methods, and proceed to the next step only if those methods fail to resolve the dispute.[81] A similar approach is seen in Georgian legislation. For example, according to Article 7.4 of the Law of Georgia "On Mediation", if there is an agreement for mediation, where the parties agree not to use court or arbitration until a certain time or situation happens, the court or arbitration shall not handle the dispute until the conditions in the mediation agreement are met, unless the claimant proves they would face serious harm without court or arbitration.

4.1. Mandatory Pre-Arbitration/Pre-Trial Procedure

FIDIC agreements also provide for multi-level dispute resolution mechanisms:

i. Engineer Determination
ii. DAB Case Review:
iii. Amicable Settlement;
iv. Arbitration[82]

The FIDIC contract regarding the DAB expressly states that parties can only turn to arbitration after a decision has been made by the DAB and they have failed to settle the dispute by agreement within the specified period.[83] This approach is also supported by international practice. In the case of Peterborough City Council v Enterprise Managed Services Limited, the English court did not allow the parties to bring the

[80] Gary B., International Arbitration and Forum Selection Agreements, sixth Edition, Wolter Kluwer, 2021, 105.

[81] For comparison: Blackaby N., Partasides C., Redfern A., Hunter M., Redfern and Hunter on International Arbitration, 6th Edition, Oxford University Press, 2015, 101-102. DOI: https://doi.org/10.1093/law/9780198714248.001.0001, para. 2.88-2.93

[82] Construction Contract (Red Book), 2nd Edition, International Federation of Consulting Engineers (FIDIC), 2017, Art. 20; FIDIC Red Book, 1999, Art. 20. FIDIC Plant and Design-Build Contract (Yellow Book) 1st Edition 1999 and 2nd Edition 2017, Art. 20.

[83] Construction Contract (Red Book), 2nd Edition, International Federation of Consulting Engineers (FIDIC), 2017, Art. 21.5.

case to court until the DAB had completed its review and offered its recommendations. It indicated that going through the DAB stage is a mandatory prerequisite for judicial review.[84] The same approach was developed by the Swiss Supreme Court in case 4A_124/2014, where it indicated that the DAB is a mandatory prerequisite for arbitration. However, in the same decision, the court established an exception, in which case it is possible for a party to have the right to commence arbitration without the DAB hearing the case.[85]

This issue became the subject of discussion within the ongoing arbitration proceedings in Georgia. Considering international practice, the arbitration tribunal supported the recognition of the DAB as a mandatory prerequisite[86], which is a step forward and should significantly contribute to the establishment of the DAB in Georgia.

1.2. Exceptional Cases

Considering that the DAB is not regulated at the legislative level, but is a contractual dispute resolution mechanism, the procedures for the selection and operation of the DAB are determined by the parties themselves. There is a risk that the selection and operation of the DAB may become deadlocked, thereby making the DAB ineffective. This contradicts the purpose of having a dispute resolution mechanism that is meant to be swift and efficient. Therefore, international practice and literature recognize, as an exception, the possibility for a party to directly resort to arbitration or court to resolve a dispute.

The Swiss Supreme Court, in case 4A_124/2014, addressed such an exceptional circumstance, where the claimant had tried to establish a DAB for 18 months. However, due to the other party's interference and lack of cooperation, the court concluded that the defendant had unreasonably delayed the DAB process. As a result, the court determined that the initiating party had the right to directly initiate arbitration.[87] A situation where the a party declines to sign a tripartite Dispute Adjudication Agreement (DAA) with a member of the DAB is seen as a similar exception.

[84] Judgment No. 3193 of England and Wales High Court (EWHC-TCC) on the case "Peterborough City Council v. Enterprise Managed Services Limited", 10 October 2014.

[85] Decision No. 4A_124/2014 of the Federal Supreme Court of Switzerland, 7 July 2014.

[86] Decision No. 8865 of the Arbitration Tribunal of the Dispute Resolution Center, 12 August 2022.

[87] Decision No. 4A_124/2014 of the Federal Supreme Court of Switzerland, 7 July 2014.

This approach has been adopted by ICC arbitral tribunals,[88] although there are differing views on it. In some cases, the tribunal has ruled that even if the opposing party does not sign a DAA, the initiating party must proceed independently with the proceedings and abide by the DAB decision.[89] This approach is rather formalistic, and does not align with the objective of alternative dispute resolution, which aims to resolve disputes efficiently. If a party refuses to follow a DAA and attend a DAB hearing, it is unlikely that the party will stick to the decision made by the DAB. Consequently, the initiating party already expects that it will need to initiate arbitration after investing time and resources in the DAB hearing.

VI. Conclusion

Dispute resolution through a Dispute Board is becoming increasingly popular worldwide, especially with the support of FIDIC and international financial institutions. Therefore, it is appropriate for the Georgian legal system to follow this trend and change the approach that was noted in the decision of the Tbilisi Court of Appeals on November 19, 2021, which stated that Georgian legislation does not recognize DAB as a dispute resolution mechanism.[90]

The decision made by a DAB is often voluntarily complied with by the parties as a contractual obligation, so as to avoid the imposition of additional damages and time consuming and expensive arbitration or court proceedings. However, the issue of enforcing the decision made by the DAB still remains a significant challenge. Considering the established role of security measures in the Georgian legal system[91], it is not expected that this form of enforcement will be supported in Georgian reality, especially when no consensus has been reached on this issue even at the international level.

Following the international approach, it is fitting to support DAB as a mandatory pre-arbitration/pre-trial procedure in Georgia, subject to the appropriate agreement

[88] ICC Cases No. 16155 of July 2010 and No. 18505 of November 2013, cited: Gould N., McCrea R., Dispute Boards, in: Construction Arbitration and Alternative Dispute Resolution, Theory and Practice around the World, edited by R. Nazzini, London, 144.

[89] ICC Cases No. 15956 of June/July 2010 and No. 16570 of March 2012, cited: Gould N., McCrea R., Dispute Boards, in: Construction Arbitration and Alternative Dispute Resolution, Theory and Practice around the World, edited by R. Nazzini, London, 144.

[90] Decision No. 2b/9384-19 of the Tbilisi Court of Appeal, 19 November 2021.

[91] მაჩაიძე ო., უზრუნველყოფის ღონისძიებების გამოყენების და ცნობა-აღსრულების პირობები საარბიტრაჟო წარმოებისას, თბილისი, 2020, 41 [machaidze o., uzrunvelqopis ghonisdziebebis gamoqenebis da tsnoba-aghsrulebis p'irobebi saarbit'razho ts'armoebisas, tbilisi, 2020, 41].

of the parties. Signs of this can already be seen in the decision of the Supreme Court of Georgia dated February 10, 2020,[92] and the analysis of the decisions made by the local arbitration tribunal.[93]

However, it should also be recognized that the parties have the right, in exceptional cases, to directly apply to arbitration/court. This ensures that alternative dispute resolution mechanisms serve their actual purpose and do not become additional formal obstacles in the dispute resolution process.

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Criminal Offence and Health Condition Information as Special Categories of Data, and the Legal Aspects of Processing in Labor Relations under GDPR and Georgian Law

ABSTRACT

Criminal offence and health condition information as special categories of data present significant legal challenges in labor relations. The new Personal Data Protection Law outlines the general regulations regarding criminal offence and health condition information as special categories of personal data. The principles governing the processing of this personal information are very specific, and depend on several factors, especially in employment contexts. Employers have access to private data related to candidates during the pre-contractual phase, and to employees during the contractual relationship. This access carries a high risk of breaching the principles of processing special categories of personal data.

This article provides a comprehensive analysis of the processing of criminal offence and health condition information as special categories of data by the employer. This issue is analyzed within the context of the pre-contractual phase and the termination of the employment contract. All aspects are reviewed under both GDPR and Georgian legislation. At the conclusion of this article, some suggestions and recommendations are offered which might be relevant for Georgian legal practice.

Keywords: Criminal offence, health condition, private data, special categories of data, data subject.

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I. Introduction

Protection of personal data is a challenge in the realm of modern law, being relevant in almost all contractual and non-contractual relations. One of the most important contractual relationships is employment. The personal data of employees can be easily accessed by employers on the basis of employment contracts, and for this reason the standard of protection should be high. An employee's personal information as a special category of data is particularly important, and, as such, the law should determine the standard by which special categories of personal data should be processed. In addition, the law must determine the purpose and proportionality required for the processing of specific data. For example, it is generally permissible to use fingerprints to control access to protected rooms or critical systems, but using the same data to supervise employees' working time or assess their effectiveness may be disproportionate in the given context.[1] Accordingly, the law should outline very clear and relevant standards for processing personal data, particularly special categories of data. There are some countries which do not have specific regulations on private data protection for labor relations, Japan being among them.[2]

Special categories of data are given in the Law of Georgia "On Personal Data Protection". The most frequently requested information from the abovementioned data categories in Georgia includes notifications regarding an employee's criminal offences, as well as details about the type of crime a person is accused of or has been convicted of. Additionally, employers often request a health certificate, which provides information about the employee's health. Both of these categories are relevant during the pre-contractual stage, when an interview is conducted, and questions are posed[3] by the employer, as well as throughout the entire employment relationship and termination procedure. An employer may dismiss an employee based on criminal offences or health conditions, which can lead to significant consequences.

The aim of this article is to outline major aspects of Georgian law and European approaches to the protection of special categories of personal data, such as criminal

[1] Krzysztofek M., GDPR: General Data Protection Regulation (EU) 2016/679, Post-Reform Personal Data Protection in the European Union, Wolters Kluwer, 2019, 103.

[2] Kasahara C., Data Protection and Privacy, Jurisdictional Comparisons, Japan, 2nd Edition, London, 2014, 439.

[3] Morris G., Protection of Employees' Personal Information and Privacy in English Law, in: Protection of Employees' Personal Information and Privacy, edited by R. Blanpain, Kluwer Law International, 2014, 221.

offences or health conditions, during employment relations. The article analyses the pre-contractual, contractual relations and termination stages. The conclusion at the end of the article offers the main findings and recommendations.

II. General Standards of an Employer's Right to Obtain Information from a Candidate

1. General Overview

The right to data protection is increasingly relevant in employment relations, being an area that involves the processing of large amounts of personal data, with employers as the main data processors or data controllers.[4] All organizations collect and process personal data, be they large organizations or small start-ups, and in doing so, they all need to comply with the data protection laws.[5]

In general, the employer controls the labor relations and can determine their conditions, which results in the subordinate position of the employee.[6] Accordingly, it means that the employer is entitled to choose from amongst applicants so as to organize the work and instruct employees, monitor compliance with instructions, or even to sanction employees.[7] Therefore, personal data protection issues are highly relevant and important in this relationship.

The Georgian Labor Code[8] and the Law of Georgia "On Personal Data Protection"[9] stipulate the legal standards of both parties – employers and employees. More specifically, the Labor Code prohibits discrimination and stipulates that differentiating between individuals, based on the essence or specific nature of the work or its conditions, and when it serves a legitimate objective, shall not be considered discrimination[10] provided that it is a necessary and proportionate means of achieving that

4 Hendrickx F., Article 8 – Protection of Personal Data, in: The Charter of Fundamental Rights of the European Union and the Employment Relation, edited by F. Dorssemont, K. Lorcher, S. Clauwaert and M. Schmitt, Hart Publishing, 2019, 250.

5 Lambert P., Data Protection, Privacy Regulators and Supervisory Authorities, Bloomsbury Professional, 2020, 211.

6 Lukacs A., Employees' Right to Privacy and Right to Data Protection on Social Network Sites, Szeged, 2021, 78.

7 Ibid., 78-79.

8 Labor Code of Georgia, 27 December 2010.

9 Law of Georgia "On Personal Data Protection", 14 June 2023.

10 Labor Code of Georgia, 27 December 2010, Art., 6.

objective. An employer may obtain information about a job candidate, aside from that which is not related to the performance of the job or which is not designed to evaluate the ability of a candidate to perform a specific job and to make an appropriate decision in respect thereof. Accordingly, the Georgian Labor Code prohibits discrimination; however, if the specifics of the job are important and the employee is required to perform specific activities, information regarding the employee's health, criminal offences, etc., should not be considered discrimination.

The Law of Georgia "On Personal Data Protection" stipulates the definition of special categories of data, which might be data connected to a person's racial or ethnic origin, political views, religious, philosophical or other beliefs, membership of professional unions, health, sex life, status as an accused, convicted or acquitted person or a victim in criminal proceedings, biometric and genetic data, etc.[11] Accordingly, the employer is able to obtain only that information which does not breach the personal data protection law.

However, as mentioned, there may arise some exceptions. For example, information on the criminal records of job applicants and employees is particularly important in sectors where the risk of employing persons without adequate verification is high, e.g., in the financial sector.[12] Therefore, it is very important to analyze, on a case-by-case basis, whether the employer really needs the information requested on an employee.

In the European Union, personal data protection is very important in labor relations. The General Data Protection Regulation GDPR[13] entered into force on May 25, 2018. The GDPR allows EU member states to adopt specific rules for employers and employees in processing private data. Before the introduction of the GDPR, there was no specific legal framework in the EU in the context of data protection in labor relations.[14] The scope of data processing cannot extend beyond the employee's personal data related to their labor relations, even if consent was freely given in a particular case. The employer must prove that this does not invalidate the data minimization

[11] Law of Georgia "On Personal Data Protection", 14 June 2023, Art. 3.b.

[12] Krzysztofek M., GDPR: General Data Protection Regulation (EU) 2016/679, Post-Reform Personal Data Protection in the European Union, Wolters Kluwer, 2018, 103.

[13] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation).

[14] The EU General Data Protection Regulation (GDPR), a Commentary, edited by C. Kuner, L. A. Bygrave, and C. Docksey, Oxford, 2020, 1230.

requirement.[15] Article 88 in the GDPR allows member states to accommodate their requirements with the needs and peculiarities of their own legal system, which means that states are able to set standards for processing data during the labor relations, but that employers cannot derogate from the minimum standard imposed by the GDPR.[16]

2. Criminal Offences and Health Condition Records in the Pre-Contractual Relationship

In general, an employment relationship is deemed a subordinate contractual relationship. Subordination means that the employee is under the authority of the employer, which is manifested in the employer's power to give orders and the employees' correlative obligation to obey those orders.[17] When an employer receives applications, they can collect a huge amount of personal information on the applicants.[18] Accordingly, at the first stage, the employer has the power to demand any documents which are deemed necessary by said employer to conclude an employment agreement. After concluding the contract, the employer also has the authority to monitor the employees' work activities. However, at both stages, the employer is obliged not to breach the personal data protection law.

When an employer invites a candidate for an interview, an amount of personal information/documents might be needed. In Georgia, the most common stage at which special categories of data are received from a candidate for employment is the pre-contractual stage. As a rule, employers tend to request health and/or criminal records before concluding an employment contract. These two pieces of information count as special categories of data, and the legal protection standards established in this case are thus rather strict.

The Law of Georgia "On Personal Data Protection" stipulates that the processing of special categories of data shall be permitted only if the controller (employer) pro-

[15] Krzysztofek M., GDPR: General Data Protection Regulation (EU) 2016/679, Post-Reform Personal Data Protection in the European Union, Wolters Kluwer, 2018, 103.

[16] The EU General Data Protection Regulation (GDPR), a Commentary, edited by C. Kuner, L. A. Bygrave, and C. Docksey, Oxford, 2020, 1237.

[17] Lukacs A., Employees' Right to Privacy and Right to Data Protection on Social Network Sites, Szeged, 2021, 83.

[18] Lee S., Protection of Employees' Personal Information and Privacy at a crossroads in Korea, in: Protection of Employees' Personal Information and Privacy, edited by R. Blanpain, Kluwer Law International, 2014, 151.

vides safeguards for the rights and interests of the data subject, as provided for by this Law, and only if the processing of special categories of data is necessary due to the nature of the labor obligations and relations, including in order to make decisions on employment and/or assess the working capacity of the employee.[19] Accordingly, the law allows the employer to process the candidates' and employees' special categories data. It should be noted that the controller has the obligation to justify the legal basis for the processing of special categories of data, meaning that the burden of proof for processing employees' personal data falls on the employer.

At the first stage, the employer has the right to demand of a job candidate their health and criminal records. This regulation is grounded in the GDPR. The GDPR's commentary says that companies such as credit scoring agencies, insurance companies and other businesses screening prospective employees may also seek to process data concerning criminal convictions and offencies, and the storing of such data by them is only permissible if EU or Member State law allows it and provides safeguards.[20] It is also important that an infrigement of Article 10 can result in a claim for compensation under Article 82 of the GDPR.[21]

In the pre-contractual employment relationship, following the interview with the candidate, the employer might ask the candidate for information about their health, medical status[22] or criminal history. In Georgian legal literaure, committing a crime is part of a person's personal, private life. However, it becomes essential to consider if a candidate for employment has violated any laws protected by the Criminal Code, especially when such violations are directly related to the work they will be performing, as stipulated by their employment contract.[23]

Employers also need legitimate grounds to demand information/records or documents regarding health from a candidate.[24] The aim is lawful when the work which

[19] Law of Georgia "On Personal Data Protection", 14 June 2023, Art. 6(h).

[20] The EU General Data Protection Regulation (GDPR), a Commentary, edited by C. Kuner, L. A. Bygrave, and C. Docksey, Oxford, 2020, 389.

[21] Ibid., 390.

[22] Forsyth A., a Thin Wall of Privacy Protection, with Gaps and Cracks: Regulation of Employees' Personal Information and Workplace Privacy in Australia, in: Protection of Employees' Personal Information and Privacy, edited by R. Blanpain, Kluwer Law International, 2014, 18.

[23] Kereselidze T., Legal Consequences of Discriminatory Question of Employer to Candidate Before Conclusion of Employment Contract, Employment Law (Collection of Articles), edited by V. Zaalishvili, Tbilisi, 2011, 204-205; Also, Forsyth A., a Thin Wall of Privacy Protection, with Gaps and Cracks: Regulation of Employees' Personal Information and Workplace Privacy in Australia, in: Protection of Employees' Personal Information and Privacy, edited by R. Blanpain, Kluwer Law International, 2014, 21.

[24] Kereselidze T., Legal Consequences of Discriminatory Question of Employer to Candidate Before

should be performed is specific, with the employee obliged to provide detailed information regarding their health in such cases where the work may be harmful to their health. The processing of such data should be fair and lawful.[25]

Employers need the consent of the candidate or employee to obtain the above-mentioned information. In order to inform the data subject about the purpose of personal data use, the controller needs to determine the purpose as precisely as possible.[26] The subordination of the employee to the employer is one of the fundamental features of labor relations, and the employee might feel informally presured to give their consent when requested to do so by their employer.[27] This means that there is a high probability that the voluntary nature of the employees' consent could be questioned,[28] because, as mentioned, the employee is particularly vulnerable in the workplace and, due to their subordination to the employer, may feel pressured to accept restrictions on their privacy rights.[29]

As such, if the work is very specific and necessitates that the employees' inform the employer regarding their criminal or health records, the Labor Code and the Law of Georgia "On Personal Data Protection" allows the employer to obtain these information/documents. If the employer does not have a legitimate reason or violates the law, the candidate can demand compensation. The discriminated candidate has the right to various claims for damages: reimbursement of costs incurred for concluding the contract, compensation for material damages, and compensation for non-material (moral) damages.[30] The employee should be clearly notified of, among other things, the purpose of giving consent and the voluntary nature of giving that consent.[31] Ac-

Conclusion of Employment Contract, Employment Law (Collection of Articles), edited by V. Zaalishvili, Tbilisi, 2011, 207.

[25] For more details see: Bygrave L. A., Data Privacy Law, an International Perspective, Oxford, 2014, 146-147.

[26] Bussche A. F., Voigt P., Data Protection in Germany, Including EU General Data Protection Regulation 2018, 2nd Edition, München, 2017, 13.

[27] Krzysztofek M., GDPR: General Data Protection Regulation (EU) 2016/679, Post-Reform Personal Data Protection in the European Union, Wolters Kluwer, 2018, 104.

[28] Ibid., 104.

[29] Moura Vicente D., De Vasconcelos Casimiro S., Data Protection in the Internet: General Report, in: Data Protection in the Internet, edited by Moura Vicente D., De Vasconcelos Casimiro S., Springer, 2020, 22; Also, Bussche A. F., Voigt P., Data Protection in Germany, Including EU General Data Protection Regulation 2018, 2nd Edition, München, 2017, 52.

[30] Takashvili S., Discrimination under Political or other Opinions in Precontractual Labor Relationship, Journal of Legal Studies, 2024, Vol. 33, No. 47, 106.

[31] Krzysztofek M., GDPR: General Data Protection Regulation (EU) 2016/679, Post-Reform Personal Data Protection in the European Union, Wolters Kluwer, 2018, 104.

cordingly, the general right of privacy of the employee has to be weighed against the legitimate interests of the employer in the processing of said employee's data for the purposes outlined above.[32]

III. Processing Criminal Offences and Health Condition Records for an Employee's Dismissal

1. Processing a Criminal Offence Record/Information for Dismissal

The protection of special categories data is essential during labor relations, and in the process of termination in particular. The possibility of terminating an employment relationship based on criminal offense or health condition information is problematic in Georgian legislation, as both types of data are considered special categories of data. Therefore, it is unclear whether an employer can obtain this information in order to terminate a employment relationship with an employee.

According to the Labor Code of Georgia, an employment contract can be terminated if the entry into force of a court judgment or other decision precludes the possibility of the employee carrying out the work they have been contracted for. The reason for this might be grounded in information/documents which are special categories of data. The Law of Georgia "On Personal Data Protection" regulates the employment relationship when it stipulates that "processing of special categories of data is necessary due to the nature of the labor obligations and relations, including for making decisions on employment and assessing the working capacity of the employee".[33]

Does this mean that during the employment relationship, the employer is able to demand the employee provide information regarding past offences and dismiss said employee on the basis of this information? Of course, if the employee is in prison, it is clear they will be unable to continue working. The problematic issue is when there is a criminal judgement against the employee but they are not in prison, as the information regarding the data subject's criminal offences is highly sensitive and thus classed as a special category of data. As such, the employer is unable to obtain this information legally without the consent of the employee. According to the Civil Procedure

[32] Breunig C., Schmidt-Kessel M., Data Protection in the Internet: National Report Germany, in: Data Protection in the Internet, edited by Moura Vicente D., De Vasconcelos Casimiro S., Springer, 2020, 193.

[33] Law of Georgia "On Personal Data Protection", 14 June 2023, Art. 6(1)(h).

Code of Georgia, evidence that has been obtained in violation of the law shall have no legal force.[34]

Accordingly, even if an employer has information on a personal data subject's criminal offences, it does not mean that it will be valid in the eyes of the law when the court reviews any employment dispute. This issue is very strictly regulated in the GDPR, where personal data relating to criminal offences, where its processing is not expressly allowed under EU or member state law, may only be processed under the control of an official authority.[35] In legal literature there is a view that the term "conviction" (in the GDPR) does not include acquittals or judgements of the conditional or unconditional discontinuation of proceedings, and that crimes which have not resulted in convictions may arguable be classified as offences.[36]

Based on the aforementioned, an employer's handling of such a special category of personal data should be reserved for very rare and exceptional circumstances. The Law of Georgia "On Personal Data Protection" does not stipulate that the employer is able to process criminal offence record/information for the aim of dismissing an employee; however, if an employee has committed a crime and there is a criminal court judgment, such as where an accountant is found guilty in a financial matter, it might be reasonable for the employer to request either the full court judgment, or a summarized version of the court's conclusion, or information thereof. In this situation, the legitimate interest might be the future work activities and continuing the work process with this employee.

The employer is in each case obliged to prove that the processing of the data related to the criminal offence records/information is needed for their legitimate interest, and is vital to the potential continuation or termination of the employment relationship.[37] Furthermore, even if the employer possesses the information or document, it does not mean that the dismissal is fair. The burden of proof lies with the employer,

[34] Civil Procedure Code of Georgia, 14 November 1997, Art. 103(3).

[35] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC, Art. 10.

[36] Krzysztofek M., GDPR: General Data Protection Regulation (EU) 2016/679, Post-Reform Personal Data Protection in the European Union, Wolters Kluwer, 2018, 116.

[37] See: the judgement of the Supreme Court of Georgia as-169-2020, October 13, 2021, which says that a loss of trust when the employee commits a crime might be a ground for dismissal. However, the burden of proof is on employer to prove that this crime and the action of the employee contradicts the employer's business and is very harmful for its reputation.

meaning that if the employer dismisses the employee, even with a court judgment on the employee, the employer must prove the legality of the dismissal.[38]

2. Processing Health Condition Record/Information for Dimissal

Article 9 of the GDPR outlines the processing of special categories of personal data, with health data being one of the main concerns. The special categories of data outlined in Article 9 are subject to much stricter principles due to their particular importance for the right to privacy.[39] It should be noted that the GDPR provision covers all types of medical or social care, including diagnosis, treatment and prevention.[40] Accordingly, the GDPR allows the employer to process the employee's health information as a special category of personal data during labor relations. However, it should be emphasized that this processing must be justified and based on the legitimate interest of the work and the employer.

As mentioned, the Law of Georgia "On Personal Data Protection" allows the controller to process personal data related to the employee's health, but this must be lawful and based on legitimate interest. It is clear that an employer can request information from an employee regarding their health to ensure they are fit for the work. However, there is no specific legal ground for using the employee's health condition as a reason for dismissal. If the employee's health is not compatible with performing the work, the Labor Code of Georgia stipulates that this may be considered a long-term incapacity for work, unless otherwise specified in the employment agreement. This applies if the incapacity period exceeds 40 consecutive calendar days, or if the total incapacity period exceeds 60 calendar days within a 6-month period. Additionally, there is another, more specific and problematic ground stating that the contract may be terminated on the basis of other objective circumstances justifying the termination of an employment agreement.

Accordingly, if there is no a long-term incapacity for work but the employer thinks or somehow knows that the employee has health issues, is the employer able

[38] For more details regarding the allocation of burden of proof in employment relationship, please, see the several court judgements of the Supreme Court of Georgia: No. as-1230-2021 of 28 June 2022; No. as-1355-2021 of 28 June 2022; No. as-283-2022 of 27 July 2022, etc.

[39] Krzysztofek M., GDPR: General Data Protection Regulation (EU) 2016/679, Post-Reform Personal Data Protection in the European Union, Wolters Kluwer, 2018, 114.

[40] The EU General Data Protection Regulation (GDPR), a Commentary, edited by C. Kuner, L. A. Bygrave, and C. Docksey, Oxford, 2020, 379.

to obtain information or documentation regarding the employee's health? This is a very problematic issue because health information is highly sensitive and the employer may not be able to obtain this information, even if they have the employee's initial consent.[41]

In practice, at the very beginning of the labor relations, the employee signs the employment contract and gives consent for the employer to process all information related to the employee, including health data. However, it becomes problematic whether this consent remains valid 1-2 years after the start of the employment relationship. The primary requirement for consent is that it must be freely given, specific, informed and unambiguous.[42] If these criteria are met, the consent is valid throughout the entire duration of the employment contract, including during the dismissal stage. Nevertheless, the employer is obligated to prove that the employee's health information is critical to work performance and sometimes to the employee as well. Otherwise, the processing of such special categories of personal data will be unlawful.

As for dismissal, termination of the labor relations due to health conditions should be a last resort. Therefore, the employer should have no other option but to dismiss the employee, and the health condition should be the direct reason for the employee's inability to perform the work. If the health condition record indicates even a severe illness that does not prevent the employee from performing their work, it cannot serve as grounds for dismissal. Accordingly, the burden of proof in this situation also lies with the employer.

IV. Conclusion

Based on the reasoning presented, several important issues can be identified. First, it should be noted that both the GDPR and Georgian law are based on a common principle: the protection of the personal data of the data subject. The article focuses on the issue of protecting special personal data, such as providing the employer with information or documentation regarding health and criminal convictions, considering the context of the subordination relationship between the employer and employee in labor relations.

[41] Compare: Carey P., Data Protection, A Practical Guide to UK and EU Law, 5th Edition, Oxford, 2018, 86.

[42] The EU General Data Protection Regulation (GDPR), a Commentary, edited by C. Kuner, L. A. Bygrave, and C. Docksey, Oxford, 2020, 181.

One of the most problematic issues in labor relations is the processing of personal information at the pre-contractual stage and during contract termination. At the pre-contractual stage, the employer may violate the personal data of a job candidate by asking questions during the interview or obtaining information in other ways. It is significant that both the GDPR and Georgian legislation allow the employer to process special personal data for the purpose of hiring an employee. Accordingly, the research reveals that if the work is very specific and requires employees to inform the employer about their criminal or health records, the Labor Code and the Law of Georgia "On Personal Data Protection" allow the employer to obtain such information or documents. If the employer does not have a legitimate reason or violates the law, the candidate can demand compensation. The discriminated candidate has the right to various claims for damages. Therefore, the general right to privacy of the employee must be weighed against the legitimate interests of the employer in processing the employee's data.

Regarding the processing of criminal offence and health condition records for employee dismissal, it should be noted that an employee's criminal convictions and records should be reserved for very rare and exceptional circumstances. The Georgian law does not specifically stipulate that an employer can process criminal offence records for the purpose of dismissing an employee. However, if an employee has committed a crime and there is a criminal court judgment which is highly relevant to the work performance, it may be reasonable for the employer to request either the full court judgment, a summarized version of the court's conclusion, or only relevant information. In such a situation, the legitimate interest could be the employee's future work activities and continuation of the work process. The same standard applies to health condition information.

The burden of proof in both cases lies with the employer. The employer should prove both the legal grounds of processing such special categories of personal data, and that the health condition or criminal offence record are crucial for the employer and for the performing of work obligations. Accordingly, in both cases, taking into account the nature and specificity of the work, there must be a reasonable basis to suggest that maintaining the labor relationship with the employee will be harmful to the employer with relation to the criminal history, and in relation to health, that continuing work will be directly harmful to the health or life of the employee. These circumstances must exist in order for such a special category of data to be processed

and the labor relations to be thus terminated. If the employer is unable to prove the mentioned circumstances, the employer will be held responsible under Labor Code and the Law of Georgia "On Personal Data Protection".

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The Process of Criminalization and an Economic Analysis of Legal Norms

ABSTRACT

The economics of crime is still an unknown subject for the Georgian legal community. This paper represents a practical first systematic attempt within the legal space to offer mechanisms for calculating the financial value of crime. While the theory of rational choice and cost-benefit analysis of crime may be new to the Georgian legal field, they are very necessary and relevant for the Georgian legal space because the calculation of the productivity of prohibitions in the process of criminalizing actions is not conducted based on an economic model. This, in turn, imposes an unimaginable burden on the state and taxpayers, as well as more obligations on the country's budget than it can handle.

It is important to determine the economic value of the law alongside the economic value of crime. The subsequent activities of crime, prosecution, and judicial bodies are linked to the process of criminalization and represent significant factors to consider in the context of the economic value of the legal norm. This research actively examines what it costs to investigate crimes in the investigative bodies of Georgia and what indicators are used to calculate specific economic costs. The paper offers the reader an economic formula for crime investigation and, based on this, discusses how appropriate the relationship between economic interests and the interests of justice is in order to protect the national interests of the country.

Keywords: Crime, Economics, Criminology.

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I. Introduction

In criminal law, legislation involves declaring actions punishable, establishing enforcement mechanisms, and considering the state's economic capacity. Hastily criminalizing behavior without proper analysis can result in significant economic costs and strain the state budget.

The economics of crime remains an unfamiliar topic in Georgian legal discourse. This paper represents the first systematic attempt within the legal field to offer readers mechanisms for calculating the financial cost of crime. The theory of rational choice and cost-benefit analysis of crime are still unknown areas in Georgian jurisprudence, yet they are highly relevant and necessary. Currently, the productivity of prohibitions during the criminalization process is not calculated based on an economic model, which imposes an immense burden on both the state and taxpayers, and places demands on the national budget beyond its capacity.

Beyond the flaws in criminalization, it is essential to assess both the economic value of a crime and the legal norm (norm). This involves focusing on the financial aspects of state and non-state responses. Law enforcement and judicial activities are key factors in the economic value of legal norms. This study reviews crime investigation costs in Georgia and presents a formula for calculating economic expenditures. It also discusses aligning economic and justice interests to safeguard national interests and suggests a cost-saving model for courts, promoting fair trials without extra financial burden.

This paper aims to highlight overlooked indicators in the criminalization process and the resulting problems for the state. It offers key mechanisms based on economic analysis to address these issues. Another goal is to establish methods for calculating the effectiveness of prohibitions, helping lawmakers anticipate threats and implement preventive measures for effective justice.The paper utilizes comparative-legal, systematic, formal-logical, objective-teleological, and other methods to ensure a comprehensive examination of the topic. In-depth interviews with three investigators from the Criminal Police Department of the Ministry of Internal Affairs of Georgia were conducted, and their insights are included in the study. The conclusion summarizes the research, presenting key findings, conclusions, and recommendations on the relevant issues.

II. The Process of Criminalization

1. Key Components of the Criminalization Process

Criminal law is closely linked to state legitimacy, reflecting its authority through the classification of actions as crimes.[1] The state must actively involve society in the criminalization process, as prohibitions without public support are ineffective.[2] Even liberal justice systems need public justification. Since criminalization controls citizens' behavior, the state must have compelling reasons for such control. Thus, ongoing oversight of criminal legislation is essential to maintain balance in the state's approach.[3]

The key criterion for criminalization is maintaining a balance and understanding where to draw the line between criminalized and non-criminalized actions, considering their social value and the harm involved. The principle of harm is central, as it often justifies criminalization.[4] When declaring an act punishable, the severity of harm must be weighed against its social value and the implications for individual freedom.[5] Greater harm potential makes criminalization more justified, but if it unreasonably restricts freedom, the prohibition is unjustifiable. Thus, balance between criminalization and freedom is crucial.

In criminalization, it is acceptable to consider actions that do not directly harm individuals. Some actions, while harmless on their own, may pose risks of potential criminal acts and thus fall under criminal law control.[6] For instance, acquiring a weapon does not directly harm others but creates an indirect risk. The criminalization of transferring weapons without authorization is based on the potential future threat posed by the purchaser.[7] This raises the issue that sellers can be punished for harm

1 Persak N., Criminalising Harmful Conduct. The Harm Principle, Its Limits and Continental Counterparts, Springer, 2007, 10.

2 Simester A., Spencer J.R., Stark F., Sullivan G.R., Virgo G.J., Simester and Sullivan's Criminal Law: Theory and Doctrine, 6th Edition., Hart Publishing, 2016, 660-662.

3 Persak N., Criminalising Harmful Conduct. The Harm Principle, Its Limits and Continental Counterparts, Springer, 2007, 10.

4 ბახტაძე უ., კრიმინალიზაციის პროცესის კრიმინოლოგიური ანალიზი [bakht'adze u., k'riminalizatsiis p'rotsesis k'riminologiuri analizi], Tbilisi, 2019, 110.

5 Feinberg J., Harm to Others, New York, 1984, 210-217.

6 ბახტაძე უ., კრიმინალიზაციის პროცესის კრიმინოლოგიური ანალიზი [bakht'adze u., k'riminalizatsiis p'rotsesis k'riminologiuri analizi], Tbilisi, 2019, 113.

7 Simester A.,Von Hirsh A., Crimes, Harms and Wrongs: On the Principle of Criminalisation, Hart Publishing, 2011, 46.

that may never occur, a complex aspect of criminalization. Therefore, the criminalization process must align norms with the intended preventive goals.[8]

2. Economic Aspects of the Criminalization of Actions

The law is a mechanism for the management of social behavior; therefore, both lawyers and economists seek to draw effective conclusions on significant issues such as the economic aspects of criminalization based on analysis.

The economic theory of criminal behavior,[9] while modernized by Gary Becker, was inspired by earlier philosophers like Cesare Beccaria and Jeremy Bentham. These scholars introduced key concepts, notably the rational choice model. According to this model, the benefit gained from committing a crime drives a person to act, while the pain of punishment serves as a deterrent. If the benefit outweighs the pain, a crime will occur; if the pain is greater, it will not.[10] Bentham's main idea was revived and modernized in the work of Gary Becker. The approach follows the rational choice model of economists and assumes that a person commits a crime if the expected economic benefit exceeds the utility they could obtain from using their time and resources in other activities. Some individuals become criminals not because their primary motivation differs from that of others, but because their economic benefits and costs differ.[11]

The modern economic analysis of criminalization involves using economic reasoning to determine the nature of offenses and measure their consequences.[12] This approach assumes offenders are rational agents who seek to maximize their benefits, comparing the expected costs and benefits of criminal acts. They commit crimes only when the benefits, whether material (stolen goods) or immaterial (victim suffering), outweigh the costs. These costs include resources used in the crime, efforts to avoid arrest, opportunity costs[13], and, crucially, the expected costs of legal punishment. The

[8] Cohen M. A., Piquero A. R., Jennings W. G., Studying the Costs of Crime Across Offender Trajectories, Criminology and Public Policy, Vol. 9, No. 2, 2010, 296.

[9] Becker G., Crime and Punishment: An Economic Approach, Journal of Political Economy, Vol. 76, No. 2, 1968, 210-212.

[10] Bentham J., An Introduction to Principles of Morals and Legislation, Oxford, 1907, 399.

[11] Butler H., Drahozal C., Shepherd J., Economic Analysis for Lawyers, 3rd Edition, Carolina Academic Press, 2014, 384.

[12] Research Handbook on the Economics of Criminal Law, edited by A. Harel and K. Hylton, Cheltenham, 2014, 140.

[13] The opportunity cost of crime refers to the benefits an offender foregoes by choosing to commit a

focus of criminalization is on this last cost, emphasizing the importance of setting the severity of punishment at an optimal level to deter potential offenders. The economic analysis of criminal law centers on this concept of deterrence.[14]

The economic model of criminalization considers not just the choices of potential offenders but also the role of law enforcement institutions as social planners in crime control.[15] Since deterrence and crime prevention incur costs, the state must allocate resources efficiently for prevention (policing and prosecution) and enforcement (imprisonment).[16] While offenders seek to maximize their utility within certain constraints, the state aims to minimize the total costs of crime prevention and deterrence, striving for optimal, not maximum, deterrence. The goal of criminalization is thus not to eliminate crime entirely but to achieve an optimal level.[17]

The economic model of criminal behavior suggests that the decision to commit a crime results from a cost-benefit analysis, conducted consciously or subconsciously. This model considers all benefits and costs influencing the decision, assuming individuals will commit crimes until the marginal benefit equals the marginal cost.[18]

3. Method for Calculating the Productivity of Prohibitions

The results of criminalization should be assessed to measure its efficiency. The primary effect is its direct benefit to society. The key question is whether criminalization provides more benefits than costs. While calculating its productivity is challenging, evaluating outcomes based on the principle of utility is an effective approach.

The volume of crime reflects the interaction between individuals and law enforcement.[19] Central to this model is the potential offender who, according to the economic theory of rational choice, commits a crime if the expected benefit exceeds

crime instead of engaging in lawful, productive activities. This cost includes potential income, social standing, or personal development that could be achieved through legal means.

14 McAdams H., Ulen S., Behavioral Criminal Law and Economics, in: Criminal Law and Economics, edited by N. Garoupa, Edward Elgar Publishing, 2009, 403.

15 Fisher T., Economic Analysis of Criminal Law, in: The Oxford Handbook of Criminal Law, edited by Dubber M. D., Hörnle T., Oxford University Press, 2014, 4.

16 Miceli J. T., The Economic Approach to Law, 3nd Edition, Stanford, 2017, 240-241.

17 Cooter R., Ulen T., Law and Economics, 6th Edition, Boston, 2016, 460-461.

18 Butler H., Drahozal C., Shepherd J., Economic Analysis for Lawyers, 3rd Edition, Carolina Academic Press, 2014, 385.

19 Cooter R. D., Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization, journal "Oregon Law Review", Vol.79, No. 1, 2000, 7-10.

the expected cost. It is crucial to assess how effective the prohibition is for society and how accurately the expected cost of the crime is considered during criminalization.[20] For illustration, the benefit derived from criminal activity, which includes both material and immaterial benefits, is represented as y(x). The costs imposed on a potential offender as a result of the activities of investigative agencies, which is a function of the severity of the expected punishment, is represented as f(x), while the probability of imposing punishment is represented as p(x). Accordingly, the individual's net income from expected criminal activity is expressed as follows:[21]

$$y(x) - p(x) * f(x) > 0 \tag{1.1}$$

Formula 1.1 effectively captures the productivity of prohibitions: criminal activity increases as y(x) (benefit) grows, but decreases with an increase in either f(x) (cost of punishment) or p(x) (probability of punishment). If the economic benefit of a crime far outweighs its "economic cost" or the probability of punishment, the crime will certainly be committed. Therefore, during criminalization, legislators and authorities can reduce crime by adjusting f(x) or p(x). This can be done by increasing the likelihood of punishment (e.g., arrests and prosecutions) or extending the limits of punishment (e.g., larger fines or longer sentences) while also reducing the benefits of criminal activity, making prohibitions more effective.[22]

Economic Theory of Optimal Enforcement[23] suggests that criminal law, its enforcement mechanisms, and the associated punishments should be designed to minimize the economic costs of crime and its prevention. These costs include the harm to society (minus the benefits gained by the offender), as well as the costs of arrest, conviction, and punishment. If the net harm caused by the crime does not exceed the total costs of arrest and punishment, the action should not be criminalized.[24]

[20] Fisher T., Economic Analysis of Criminal Law, in: The Oxford Handbook of Criminal Law, edited by Dubber M. D., Hörnle T., Oxford University Press, 2014, 46-47.

[21] Becker G., Crime and Punishment: An Economic Approach, Journal of Political Economy, Vol. 76, No. 2, 1968, 169-170.

[22] Garoupa N., Behavioral Economic Analysis of Crime: A Critical Review, European Journal of Law and Economics, Vol. 15, 2003, 12.

[23] Hylton N., The Theory of Penalties and the Economics of Criminal Law, journal "Review of Law and Economics", Vol. 1, No. 2, 2005, 195.

[24] Fisher T., Economic Analysis of Criminal Law, in: The Oxford Handbook of Criminal Law, edited by Dubber M. D., Hörnle T., Oxford University Press, 2014, 46.

4. The Economic Value of Crime as an Illegal Act

Crime imposes significant societal costs, including harm to life, health, and property, as well as costs for prevention and punishment. The concept assumes offenders are "rational calculators" who weigh the costs and benefits of crime.[25] Based on this, a function for criminal actions has been developed to guide legislators in creating an optimal punishment scheme.

Let's assume an individual plans to commit a crime yielding a profit Y(x). The crime's cost involves the probability of arrest P(x), the fine F(x), and the imprisonment term T(x) (considering fines or imprisonment as possible penalties). If C(x) is the cost of the penitentiary institution per unit time, the total cost of the crime can be expressed as:[26]

$$\text{Cost of Crime} = P(x) \times [F(x) + T(x) \times C(x)] \tag{1.2}$$

Of course, T = 0 if a fine is imposed as a penalty, while F = 0 if deprivation of liberty is chosen. Therefore, if the cost of the crime is low and the benefit gained by the offender, Y(x), is high, the individual will commit the crime.[27]

$$\text{If, } Y(x) > P\,(F + C * T) = \text{The committed criminal act} \tag{1.3}$$

If the values of these variables are known, the economic value of the crime can be determined. This value is not limited to the incriminated act alone but is also connected to the costs of justice, highlighting the interdependence between crime and justice in economic terms.[28]

III. Costs of Criminal Justice

1. Economic Aspects of Responding to Crime

Crime investigation is a police service offered to the public, economically defined as a product or service with its own cost. This cost is the actual price of delivering the service using available resources. Analyzing the costs associated with crime response

[25] Miceli J. T., The Economic Approach to Law, 3nd Edition, Stanford, 2017, 308.

[26] Ibid.

[27] Heeks M., Reed S., Tafsiri M., Prince S., The Economic and Social Costs of Crime, 2nd Edition, Research Report No. 99, Home Office, 2018, 14. <https://www.gov.uk/government/publications/the-economic-and-social-costs-of-crime> [17.08.2024].

[28] Chaflin A., The Economic Cost of Crime, University of Cincinnati Press, 2013, 4, <http://www.antoniocasella.eu/nume/Chalfin_2013_b.pdf> [17.08.2024].

and investigation can lead to significant changes in police management, procedural legislation, and criminal policy.[29]

The pre-investigation stage involves actions to decide if an investigation is needed. Per Article 100 of the Criminal Procedure Code of Georgia, an investigation starts if there is information indicating a crime, often requiring extra police measures. Interviews[30] with three Criminal Police investigators revealed that:

> *"After receiving information about a possible crime, it's crucial to verify its accuracy and the reliability of the source. Sometimes, visiting the scene to gather more information is necessary."*

In fact, the provision of possible criminal information by citizens to law enforcement agencies serves as the basis for initiating pre-investigative activities. This activity can have various directions:

> *"When an electronic notification of an armed robbery is received from ,112', the duty inspector sends operational staff to the scene. Depending on the incident's severity, officers from other divisions may also be dispatched."*

At the scene of the incident, the search for the victim and witnesses begins. After interviewing them on-site, if information is obtained regarding the physical description of the offenders or identifiable data about their vehicle, the pre-investigation stage transitions to the active phase.

> *"After securing the crime scene and assessing the facts, operational staff start search activities, including nearby areas. Police units from other divisions may join in the pursuit of suspects. Confidential informants are contacted quickly for information, while officers secure the scene for forensic experts. The victim, often in danger, is taken to a medical facility with police accompaniment. Witnesses are brought to the police building by investigators."*

At the investigative stage, actions require mobilizing investigative teams. Interviews with criminal police investigators outlined the measures taken after initiating a robbery investigation.

[29] Ludwig J., The Costs of Crime, journa "Criminology and Public Policy", Vol. 9, No. 2, 2010, 307-312.

[30] During the interview process, investigators were asked diverse questions based on the research objectives and areas of interest, and their responses were recorded. Responses to topics that extended beyond the initial interview scope but were relevant to the research were also documented. The investigators agreed to participate only with a guarantee of anonymity, which enhanced the objectivity of their answers to each question. Naturally, the questions were not disclosed to the investigators in advance.

> *"After the investigation begins, the victim and witnesses are interviewed simultaneously to quickly gather evidence. A second group inspects the crime scene with forensic experts to collect physical evidence. A third group works with cynologist units, while operational teams review nearby cameras and monitor 112's intelligent cameras in case of a suspect's escape. Search teams also move through the city, gathering operational information."*

The investigation of armed robbery highlights the extensive resources required for effective crime-solving, often needing additional support from other police departments within the Ministry of Internal Affairs of Georgia. When the identification and arrest of offenders occur during a hot pursuit, additional police resources are needed to carry out multiple urgent investigative actions as required by the Criminal Procedure Code of Georgia.

The cycle of complex investigative actions continues even after placing the accused in a temporary detention isolator. While 60-70% of evidence is usually established before the first hearing, many key pieces of evidence are obtained afterward. Thus, the costs of handling the case extend beyond initial detention.

> *"After the primary and urgent measures, the next investigation phase involves organizing the case, gathering additional evidence, and formalizing it. An investigative experiment is conducted before applying precautionary measures. Expert examinations compare scent samples from the crime scene with those of the accused. If a firearm is involved, an odorological examination is also appointed. DNA comparisons and medical and psychological exams of the victim are scheduled."*

From an economic perspective, the costs of police services are classified as direct or indirect. Direct costs, such as operating police vehicles, are easily calculated as they relate to specific services. Indirect costs, however, are harder to identify and include various expenses incurred during the investigation. The economic analysis of armed robbery investigations focuses on the resources and financial expenditures used. In-depth interviews during the research provided insight into the costs of investigating crimes against property, with a detailed review of both procedural and non-procedural expenses.

During interviews, investigators identified various actions in the investigation of armed robbery, as outlined in Article 179 of the Criminal Code of Georgia. It

was determined that investigating armed robbery costs the state a minimum of 250,580 GEL. The criminal police alone spend 169,815 GEL on investigative, operational, and procedural actions for a single case. Additionally, the Forensic and Criminological Department incurs costs of 77,087.6 GEL, a significant amount for a country like Georgia.[31]

Considering that the state budget pays approximately 250,580 GEL for investigating a single robbery, the economic impact becomes substantial. According to the National Statistics Office, six robbery cases were initiated in September 2022,[32] costing the budget 1,503,480 GEL. For each case, it is crucial to assess the cost to investigative agencies before labeling an action as a criminal offense. Given the seriousness of such crimes, these costs reach significant and concerning levels.

The criminalization process must assess the costs of investigating a crime and its impact on the state budget. Article 179 of the Criminal Code of Georgia shows the significant resources needed for robbery investigations. Lawmakers must consider these expenditures early on; otherwise, the state may struggle to provide proper investigation services, affecting criminal policy and justice.

The formula for the economic costs of responding to and investigating crime represents the total costs of the agencies that are actively involved in the investigation process:

$$\frac{m(x) * r(x)}{t(x)} \tag{1.4}$$

In the formula, m(x) represents the agencies' costs in a robbery investigation. These costs are not limited to one crime, as Georgia has a high crime recidivism rate. r(x) is the number of crimes, and t(x) is the time from investigation initiation to the pre-trial hearing.

The total and hourly costs of crime investigation can be determined in such cases. Criminalization should not result in unjustifiable investigation costs. Thus, it is crucial to consider the norm's economic value from the start and for legislators to account for the expected consequences of the prohibition.

[31] See Table 1.

[32] Unified Report on Criminal Justice Statistics, National Statistics Office of Georgia, Monthly Report for September 2022, 2022, <https://www.geostat.ge/media/49187/Report_seqtemberi_2022.pdf> [17.08.2024].

TABLE 1

			INVESTIGATIVE ACTIONS								PROCEDURAL AND POLICE ACTIONS								
			Crime scene examination	Interviewing the victim and witnesses	"Reviewing surveillance cameras"	Search of the defendant's residence	Arrest and personal search	Vehicle search	Investigative experiment	Identification	Operative measures	Collection of samples	Appointment of expert examinations	Appointment of a lawyer	Legalization of urgent investigative actions	Placing the defendant in a temporary detention facility	Requesting information from surveillance cameras	Obtaining expert examination reports	Filing a case in court with a request for preventive measures
Investigative expenses of the Investigation Department	Human resources	Number of investigators	1	3	1		1	2			5	1		1		3	2	1	1
		Time spent (hours)	2	5	3	2	2	1	2	3	6	1	1	1	3	3	2	2	2
		Salary	14	105	21	14	14	14	28	42	210	7	7	7	21	63	28	14	14
		Equipment	1500	1500	1500	0	1500	1500	1500	0	7500								
		Total ₾	1514	1605	1521	14	1514	1514	1528	42	7710	7	7	7	21	63	28	14	14
		Total 17123																	
	Vehicle	Quantity (pieces)	1		1		1	1			2								
		Transportation cost	22000		22000		22000	22000			44000								
		Fuel consumed (liters)	10		10	10	10	10	10	10	30	10			10	10	10	10	10
		Fuel cost	33.9		33.9	33.9	33.9	33.9	33.9	33.9	101.7	33.9			33.9	33.9	33.9	33.9	33.9
		Total ₾	22033.9		22033.9	33.9	22033.9	22033.9	33.9	339	44101.7	33.9			33.9	33.9	33.9	33.9	33.9
		Total 132542																	
	Administrative (or) operational expenses	Office supplies (₾)	100																
		Sealing materials ₾	50																
		Technical support ₾	20000																
		Total ₾	20150																
			Total 20150																

Total investigative expenses of the Investigation Department																			**169815**
Expenses incurred by the Forensic-Criminalistics Department of the Ministry of Internal Affairs	Human resources	Number of forensic experts	2			2		2	2			1							
		Utilized time (hours)	2			2		1	1			1							
		Salary	16			16		8	8			4							
		Equipment	2000			2000		2000	2000			2000							
		Total ₾	2016			2016		2008	2008			2004							
			Total 10052																
	Vehicle	Quantity	1			1		1	1										
		Transportation cost	20000			2000		20000	20000										
		Fuel consumed (liters)	10			10		10	10										
		Fuel cost	33.9			33.9		33.9	33.9										
		Total ₾	20033.9			2033.9		20033.9	20033.9										
			Total 62135.6																
	Administrative (or) operational expenses	Office supplies	100																
		Sealing materials ₾	100																
		Technical support ₾	4000																
		Total ₾	4200																
			Total 4200																
	Forensic services	Cost of the forensic report										200	500						

Total cost of services from the Forensic-Criminalistics Department of the Ministry of Internal Affairs																			**77087.6**
Levan Samkharauli National Forensics Bureau	Transportation of evidence to the Samkharauli Forensics Bureau	Fuel consumed (liters)	20																
		Cost of fuel consumed	67.8																
	Cost of the forensic report	Ballistic, trace, and dactylo-scopic examinations										400							
		Biological examination										1200							
		Video phono-scopic examination										400							
		Total ₾									67.8		2000						
		Total 2067.8																	
		Expenses incurred for the Levan Samkharauli National Forensics Bureau																	**2067.8**
Expenses incurred by the Legal Aid Bureau	**Defense of the defendant at the state' s expense**	Lawyer	1																
		Time spent (hours)	10																
		Salary	70																
		Total ₾	70																
		Expenses incurred by the Legal Aid Bureau																	**70**
Expenses incurred by the Temporary Detention	**Human resources in the Temporary**	Number of escorts	4																
		Time spent (hours)	48																
		Salary	1440																
		Prisoner meals	100																
		Total ₾	1540																
		Expenses incurred by the Temporary Detention Facility																	**1540**
Total cost																			**250580.4**

2. Implementation of State Prosecution and Its Cost in Georgia

In Georgia, the prosecutor's office holds exclusive authority for criminal prosecution and supervises investigative agencies. It ensures the rule of law, public safety, and human rights protection. Its main tasks include conducting prosecutions, overseeing investigations, responding to rights violations, supporting state prosecution in court, and developing criminal policy. According to the European Commission's 2020-2022 assessment, the annual cost for these activities is 12,266,476 euros.[33]

[33] Evaluation of the Judicial Systems (2020 – 2022), Georgia, The European Commission for the Efficiency of Justice, 2022, 6, <https://rm.coe.int/georgia-2020-en/1680a85c7f> [17.08.2024].

The primary financial costs for this state agency are mainly for conducting cases and carrying out prosecutions.[34] These costs include: Case preparation costs, attorney time, court appearance costs, case review costs, prosecution decision costs, investigative activity costs. The economic model also considers the number of employees and their workload. The research found that the Prosecutor's Office of Georgia employs 414 prosecutors and 363 office staff, directly affecting the agency's effectiveness.

The European Commission's 2020-2022 assessment[35] revealed that the Prosecutor's Office of Georgia does not consider the "Economic Value of Activity" as an evaluation indicator. While they monitor tasks using indicators like the number of cases, case duration, and staff productivity, the economic impact of prosecutorial activities and criminalization is not analyzed. Thus, no economic assessment or analysis is currently conducted within the prosecutorial body.[36]

Criminal prosecution significantly affects a country's economy, both positively and negatively. While prosecuting offenders, such as those evading taxes, prevents economic crime and protects the budget, excessive prosecution costs can lead to double losses for the state: the financial damage from the crime itself and the high costs of justice. Prosecution should aim to protect justice while minimizing economic damage, ensuring it does not burden the economy. If economic well-being outweighs the need for accountability, less harmful mechanisms should be used to reduce prosecution costs while maintaining responsibility.

If we use Rational Choice Economic Model[37] to define criminal policy and adapt it to mathematical variables, the contours of the policy definition will become quite clear:

$$\text{If: } y(x) > p(x) + f(x) \tag{1.5}$$

Where: y(x) is the function for obtaining criminal benefits, p(x) is the function for the probability of initiating prosecution, f(x) is the function for the severity of punishment. Then a crime will be committed, and y(x), as the benefit obtained from

[34] Heyden C., Costs of Crime Towards a More Harmonized, Rational and Humane Criminal (Justice) Policy in Germany, PhD Thesis, Bochum, 2016, 111.

[35] Evaluation of the Judicial Systems (2020 – 2022), Georgia, The European Commission for the Efficiency of Justice, 2022, 6, <https://rm.coe.int/georgia-2020-en/1680a85c7f> [17.08.2024].

[36] Ibid., 59.

[37] Becker G., Crime and Punishment: An Economic Approach, Journal of Political Economy, Vol. 76, No. 2, 1968, 169-170.

the crime, that is, the economic value of the crime, will be supplemented by the costs of investigating the crime and the costs of conducting prosecution – d(x).

$$\frac{y(x) + m(x) * r(x) + d(x)}{t(x)} \tag{1.6}$$

If formula 1.5 is accepted, formula 1.6 perfectly represents the damage caused to the state budget by criminalization.This leads to economic damage to the state budget from both the crime itself and the subsequent investigation and prosecution, highlighting the economic weaknesses in state criminal policy.

To reduce economic damage, In formula 1.5, the function for the probability of initiating prosecution p(x), and the function for the severity of punishment f(x), should increase so that the sum of these two functions is greater than the benefit obtained by the offender from the criminal act y(x). This means that if p(x) and f(x) increase, y(x) will decrease and the individual will not commit a crime.

Regarding the costs of investigating crime (formula 1.4), the expenses incurred by the agencies during the crime investigation process m(x), should be minimized as much as possible. In the same formula, the reduction of r(x) – the number of recorded crimes will be implemented immediately as soon as y(x) is reduced, while decreasing the duration of the investigation t(x), will allow for faster investigations.

Finally regarding d(x) – the costs of prosecution, it is critically important that prosecution is conducted based on economic interests, which should not only reduce economic costs but also increase the financial benefits for the budget. The policy of criminal prosecution should be grounded in reasoning expressed as follows:

$$\frac{\blacktriangledown y(x) + \blacktriangledown m(x) * r(x) + \blacktriangle d(x)}{\blacktriangledown t(x)} \tag{1.7}$$

Accordingly, if it increases: p(x) – Probability of initiating prosecution, f(x) – Severity of punishment. if it decreases: y(x) – Benefit obtained by the offender, m(x) – Costs incurred by agencies during crime investigation, r(x) – Number of recorded crimes, t(x) – Duration of the investigation, d(x) – Costs of prosecution, These will enhance the efficiency of the criminal justice system, reduce costs, and deter criminal activities.

In conclusion, the economic policy of criminal prosecution should prioritize maximizing budget benefits over incurring costs. The outlined formulas will enhance

this goal by establishing the importance of functions early on, ultimately increasing benefits over costs.

3. Economic Analysis of Case Hearings by the Court

The judiciary is the main institution for administering justice, incurring financial costs covered by the state budget.[38] Criminalizing actions increases these costs, so it's crucial to assess court expenses concerning the country's economic capabilities. The emphasis is on efficient spending mechanisms and forecasting future costs through analysis.

Implementing an economic model in court operations optimizes costs. For example, the UK Ministry of Justice requires adult defendants to pay their proceedings' costs, reducing the financial burden on taxpayers.[39] Courts can also mandate offenders to pay fees, including victim compensation and medical expenses. Although Georgia currently lacks legal mechanisms for charging defendants for prosecution costs, similar practices exist in other countries, and discussions are ongoing about this approach in Georgia.[40]

Funding for general courts increases annually,[41] yet it's unclear how the judiciary assesses expenditure legitimacy through economic analysis. Implementing an economic model is crucial, suggesting that adult defendants should cover their proceedings' costs, which are separate from their punishment and based on the crime's severity.[42] This model also considers factors determining the amount charged to defendants, such as the crime's severity, investigation duration, the defendant's concealment, cooperation with authorities, and confession details.

The effectiveness of the economic model in justice administration not only reduces court costs but also aligns with the fundamental idea of justice, incorporating

[38] Law of Georgia "On General Courts", 4 December 2009, Art. 67.

[39] Criminal Justice and Courts Bill, Fact Sheet: Criminal Court, Ministry of Justice of United Kingdom, <https://assets.publishing.service.gov.uk/media/5a7de48240f0b62305b7f6b9/fact-sheet-criminal-courts-charge.pdf> [17.08.2024].

[40] Unified Report on Criminal Justice Statistics, National Statistics Office of Georgia, Monthly Report for September 2022, 2022, <https://www.geostat.ge/media/49187/Report_seqtemberi_2022.pdf> [17.08.2024].

[41] Kvirikashvili S., Judicial Funding and Unfulfilled Government Priorities, Georgian Court Watch, 26.10.2023, <https://courtwatch.ge/en/articles/b7e952c8-a014-46c1-afe0-658b08a79832> [05.09.2024].

[42] Landes W. M., An Economic Analysis of the Courts, Journal of Law and Economics, Vol. 14, No.1, 1971, 85-86.

mechanisms to achieve its objectives.[43] If an offender meets the state's resocialization requirements and refrains from criminal activity during probation, their behavior both in prison and after release will be exemplary. In such cases, the court may refund the costs incurred or fully exempt them from payment. This economic model is integrated into the criminalization process with incentivizing conditions, alleviating court costs and achieving a dual effect in justice administration.[44]

The use of technology in courts reduces costs and increases efficiency.[45] Electronic processing of complaints and motions lessens the workload for staff and eliminates expenses for copying and mailing. The COVID-19 pandemic showcased the flexibility and economic benefits of online court proceedings. Maintaining this trend is essential, as a technology-based justice system is a vital part of the economic model.[46]

A key mechanism for reducing court costs is budget decentralization. Under the Law of Georgia "On General Courts", funding comes from the state budget,[47] with the High Council of Justice submitting draft proposals to the Government based on the Department of General Courts' recommendations. District courts must determine their own spending priorities and work on optimizing these costs to generate the budget necessary for effective functioning.[48]

The judiciary must recognize that justice is not a burden on taxpayers. therefore, it is important to implement measures and establish mechanisms that alleviate this burden.

IV. Balance Between Justice and State Economic Interests

An independent judicial system is vital to the rule of law, aiming to fairly resolve legal disputes and protect the rights of all individuals. Courts must implement an appropri-

[43] Atkinson G., Healey A., Mourato, S., Valuing the Costs of Violent Crime: A Stated Preference Approach, Journal "Oxford Economic Papers", Oxford University Press, Vol. 48, No. 4, 2005, 562.

[44] Chubb L., Economic Analysis in the Courts: Limits and Constraints, Indiana Law Journal, Vol. 64, No. 3, 1989, 769-774.

[45] Vapnek J., 21 Cost-Saving Measures for the Judiciary, International Journal for Court Administration, Vol. 5, No. 1, 2013, 55.

[46] Clarke T. M., Reengineering: Governance and Structure, in: Future Trends in State Courts, edited by Flango R., Mcdowell A., Campbell C. and Lauder N., National Center for State Courts, Williamsburg, 2010, 33-34. <https://ncsc.contentdm.oclc.org/digital/collection/ctadmin/id/1605/> [05.09.2024].

[47] Law of Georgia "On General Courts", 4 December 2009, Art. 67.

[48] Rosselli A., Judicial Independence and the Budget: A Taxonomy of Judicial Budgeting Mechanisms, Indiana Journal of Constitutional Design, Vol. 5, 2020, 7-8.

ate economic model for each case, ensuring effective legal measures. In criminal cases, the judicial system should consider both the state's justice interests and economic factors, as neglecting the latter may undermine justice. Recognizing and prioritizing both interests is essential to prevent one from overshadowing the other.[49]

To balance economic and legal interests, aligning them during the criminalization process is essential. Justice demands fair administration, and quality assessment should consider not only court decisions but also transparency and courtroom accessibility.[50] Economic interests require the reduction of unjustified costs and the ability for agencies to generate their own funding, which ties back to justice. Initially, the state should conduct economic analyses and cost calculations, followed by a rationality test to evaluate the adequacy of expenditures. If economic interests call for cost reductions while justice interests oppose this, an optimal solution must be found to satisfy both.[51]

For balance, it is important that both justice interests and economic interests are aligned. Justice cannot undermine economic interests, and vice versa.[52] So, what is the solution? In this case, the state should consider these two interests not as opposing concepts but as complementary ones. Justice should serve the economic interests of the state, while the country's economic interests should support the effective administration of justice. The need for reform is therefore crucial.

V. Conclusion

The process of criminalization requires the state to formulate a complex response to certain actions, including societal agreement on which behaviors to criminalize and the management of their consequences. The goal is not just to prohibit behaviors but also to shape societal attitudes toward deviance and morally correct these behaviors to prevent future offenses. Achieving this aim is complex, and analyzing the process is crucial for evaluating the potential impacts of criminalization. Collecting and analyzing factual data is the first step to informing state policy on the costs of prohibiting specific actions. Research indicates that the economic value of addressing criminal-

[49] Lorizio M., Gurrieri A., Efficiency of Justice and Economic Systems, journal "Procedia Economics and Finance", Vol. 17, 2014, 110-111.

[50] Assessment of the Quality of Justice, European Commission for the Efficiency of Justice (CEPEJ), Strasbourg, 2016, 9.

[51] Farrelly G., Clark K., What Does the World Spend on Criminal Justice, Helsinki, 2004, 12-20.

[52] Polinsky A., Shavell S., The Economic Theory of Public Enforcement of Law, Journal of Economic Literature, Vol. 38, No. 1, 2000, 45-76.

ized actions in Georgia is significant, as investigating crimes incurs high costs. This results in insufficient resources for the state budget, hindering the ability to manage even one type of crime, ultimately leading to increased crime rates and ineffective crime control.

Based on the economic analysis and research, the proposed formulas and tables highlight factors to consider in the criminalization process, helping to assess whether the state budget can handle the criminalization of specific actions. The research identifies key indicators for the economic analysis of norms and the costs incurred when ignoring the economic model. The financial burden affects everyone, as it relates not only to criminal acts but also to the state's responses. Society must recognize that crime has economic implications that impact daily life, even for those not directly affected. Taxpayers bear the costs of investigating crimes against strangers and administering justice, and these substantial costs cannot be justified within the country's budget.

An overloaded justice system burdens taxpayers and is unjust. Justice should be accessible to all citizens equally. Economic opportunities must meet needs; otherwise, the principles of justice lose their significance. Economic analysis reveals that criminalization processes often overlook economic issues, leading to additional financial burdens on the state. Agencies responsible for investigation, prosecution, and justice administration spend more than necessary compared to the balance of economic and justice interests. The core principle of a legal state is to protect citizens' rights and freedoms, which requires efficient justice administration. An economic model is the most effective means to achieve this goal.

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Human Trafficking as a Global Problem and the Efficacy of NAPTIP in Tackling Human Trafficking in Nigeria

ABSTRACT

This paper evaluates the gravity of the human trafficking problem in Nigeria and examines the approaches implemented by the National Agency for Prohibition of Trafficking in Persons and Other Related Matters (NAPTIP). NAPTIP, an agency of the Federal Government, was established under the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act of 2003 to combat human trafficking. The objective of this study is to evaluate the effectiveness of the action plan of the National Agency for the Prohibition of Trafficking in Persons and Other Related Matters (NAPTIP) in Nigeria's fight against human trafficking, with a particular focus on safeguarding the rights of victims and the environment. The paper additionally investigates the efficacy of NAPTIP's nationwide initiatives thus far in addressing the issue of human trafficking in Nigeria. The research findings indicate that NAPTIP has proven to be inadequate in tackling issues of human rights violations, consequently contributing to a rise in the nationwide occurrence of human trafficking. To mitigate, if not eradicate, human trafficking, the Nigerian government and NAPTIP must undertake decisive measures. The National Orientation Agency, non-governmental organizations, and other relevant stakeholders, must raise societal awareness about the problem of human trafficking to properly inform Nigerians about its implications on the environment and the country. To reintegrate human trafficking victims into society, there should be prospects for employment.

Keywords: Human trafficking, Fundamental human rights, Victims of trafficking, NAPTIP, Nigeria.

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I. Introduction

The rate at which human trafficking is decimating the nation is alarming, and the Nigerian government and other relevant stakeholders must act quickly to address the problem. If urgent and immediate action is not taken, more Nigerians will become victims of human trafficking, which has already claimed many lives. The 1999 Constitution of the Federal Republic of Nigeria (as amended), particularly Chapter IV, which addresses citizens' fundamental human rights, has always been violated by the act of human trafficking. Human trafficking has been defined as the use of deception, force, or coercion to obtain forced labor or any commercial sex activities. Abuse of people who have been trafficked has been declared a violation of their fundamental human rights[1]. Nigeria's population growth and dire economic conditions, which exacerbate underemployment, unemployment, and insecurity, have led to an upsurge in human trafficking[2].

Nigeria's government must act quickly to manage the growing problem of human trafficking if it is to be eradicated. People are now leaving the country in search of better living conditions and earning prospects because the government has thus far failed to address the issue that has forced some into slavery and caused a variety of other problems. Human trafficking is also prevalent in nations like Thailand, Nigeria, India, and China, causing harm to people's mental health and resulting in tension, anxiety, and depression[3]. According to reports, human trafficking has sharply expanded in Nigeria over time, standing at 603 victims in 2014, 721 in 2016, and 1,076 in 2018; a dramatic increase.[4]

The ineffectiveness of the National Agency for the Prevention of Trafficking in People and Other Related Issues (NAPTIP), the primary organization tasked with addressing human trafficking in Nigeria, has been duly acknowledged on a national scale. Prominent cities in Nigeria, including Abeokuta, Calabar, Ibadan, Kaduna,

1 Office to Monitor and Combat Trafficking in Persons, Trafficking in Persons Report, Journal "Trends in Organized Crime", Vol. 10, 2006, 7.

2 Edomwonyi-Otu O., Edomwonyi-Otu L.C., Is Unemployment the Root Cause of Insecurity in Nigeria?, International Journal of Social Inquiry, Vol. 13, No. 2, 2020, 13.

3 Okafor N. I., Iwuagwu A. O., Gobo B. N., Ngwu C. N., Obi-Keguna C. N., Nwatu U. L., Rahman, F. N., Perception of Illegal Migration and Sex Trafficking in Europe Among Younger Women of Oredo Lga, Edo State, Nigeria: The Social Work and Ethical Considerations, Advances in Social Sciences Research Journal, Vol. 7, No. 6, 2020, 34.

4 Statista, Number of Victims of Trafficking in Persons Recorded in Nigeria from 2014 to 2022, 2024, <https://www.statista.com/statistics/1210624/number-of-victims-of-trafficking-in-persons-in-nigeria/> [12.04.2024].

Kano, Lagos, and Port Harcourt, often enlist Nigerians from rural regions, particularly those in the south, to exploit them for commercial sex and forced domestic labor. Among the sectors where traffickers exploit their victims as indentured and bonded labor are the tie-dye industry, artisanal mining, stone quarries, agriculture, textile manufacturing, street begging, and domestic work in the northwest and southwest of the country.[5]

The Nigerian government must collaborate with local nongovernmental organizations (NGOs) to end violations of human rights in the nation and develop a solution for compensating and improving the lives of victims of human trafficking nationwide. By giving individuals access to necessities like healthcare and education, the government can improve people's quality of life[6].

This paper is apt at this time as it identifies the key problems with human trafficking in Nigeria and suggests ways through which NAPTIP and the Nigerian government can put an end to the illegal acts of trafficking to comply with the minimum international standards for the fight against such crimes. The research is significant in that it reveals key places in Nigeria where victims of human trafficking are found. The information gathered here can help the Nigerian government slow down the rate at which human trafficking is ravaging particular regions. The study is particularly significant because it examines the efficient tactics that human rights protection organizations may use to control human trafficking and enhance the lives of victims of human trafficking around the world.

This work employs the doctrinal method of research. Doctrinal or library-based research focuses on analyzing legal doctrine and its development and application. This research is solely theoretical, and involves basic research to discover a specific legal declaration, while library-based research aims to identify the definitive solution to certain legal challenges or questions. The main sources utilized in this study comprise, but are not restricted to: The 1999 Constitution of the Federal Republic of Nigeria (as amended)[7] and the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003 (TPPEAA), which are employed for safeguarding human rights in Nigeria. The secondary sources encompass literary

[5] U.S. Department of State, Trafficking in Persons Report, 2022, 4, <(https://www.state.gov/wp-content/uploads/2022/10/20221020-2022-TIP-Report.pdf> [19.05.2024].

[6] Okogbule N.S., Combating the 'New Slavery' in Nigeria: An Appraisal of Legal and Policy Responses to Human Trafficking, Journal of African Law, Vol. 57, No. 1, 2013, 68.

[7] Constitution of the Federal Republic of Nigeria, 1999, Cap C23, LFN 2004.

works, scholarly publications, and academic journals that pertain to the topic under investigation. The internet has been immensely beneficial to facilitating the compilation of this material.

II. Human Trafficking in Nigeria

Nigeria has long been a key hub for human trafficking, with the nation acting as both a source and a destination for victims. Since the transatlantic slave trade first started in the 15th century, human trafficking has been a major issue in Nigeria. Human trafficking has, however, evolved over the past few years, and now poses a serious threat to the nation. Human trafficking, which is also referred to as "modern-day slavery", is the practice of transporting people illegally for forced labor, sexual exploitation, or any other profitable activity. The issue of human trafficking, a serious and humiliating crime that has a severe impact on the lives of millions of people worldwide, has spread to a global scale.[8]

Many victims are trafficked all over the world for a variety of purposes, including forced labor, child begging, domestic servitude, and organ harvesting. According to a survey, minors make up 20% of all human trafficking victims worldwide. Children are frequently among the top victims of human trafficking in numerous African nations, which directly impacts national growth[9]. Teenagers, men, women, and even children can all become victims of human trafficking. According to a government assessment, the International Organization for Migration (IOM) estimates that there are 1.4 million victims of human trafficking in Nigeria who endured humiliation, misery, and abuse.[10] A study claims that children make up about 58% of all human trafficking victims in Nigeria. The average age of victims of human trafficking is 27, which suggests that children and young people are the main demographics targeted by this crime.[11]

[8] UNODC, Human Trafficking: People for Sale, 2012, <https://www.unodc.org/toc/en/crimes/human-trafficking.html> [19.05.2024].

[9] UNODC, Global Report on Trafficking in Persons, 2019, <https://www.unodc.org/unodc/en/human-trafficking/global-report-on-trafficking-in-persons.html> [19.05.2024].

[10] Abeku T., IOM Raises Concern over 1.4 Million Victims of Trafficking in Nigeria, Guardian, 29 July 2021, <https://guardian.ng/news/iom-raises-concern-over-1-4-million-victims-of-trafficking-in-nigeria> [19.05.2024].

[11] Ibid.

III. Some Reasons for Human Trafficking

In different countries, different factors contribute to human trafficking. A lack of human rights, poverty, lack of opportunities in the social or economic spheres, oppression, and conflict are frequent causes of human trafficking. Political unrest, natural disasters, and threats from conflict can all contribute to an upsurge in human trafficking on a global scale, while wars between nations leave street children and orphans particularly exposed to the practice. The causes of human trafficking have also been linked to cultural and social norms in various nations, among them unsafe living situations due to the abuse, undervaluation, and exploitation of girls and women[12]. In India, for example, illiteracy, political unrest, and corruption are the main contributors to child trafficking[13]. Families who are struggling financially are known to sell their children for money[14]. Yet those involved in the human trafficking trade look in particular for those who are vulnerable. Among them are migrants who have had to flee their homes as a result of a natural disaster or due to severe economic hardship.

Globally, the primary driver of human trafficking is the need for cheap labor. There is a huge need for low-cost domestic and agricultural labor, and firms continue to follow illegal customs. With traffickers targeting the unemployed and pressing them to accept employment in other nations, unemployment is clearly a significant contributor to human trafficking worldwide[15].

As soon as traffickers reach their destination, they seize the victims' identities and passports and force them to perform illicit duties.

Abuse and undervaluation of women and girls are tolerated in some societies[16], and thus cultural practices are another factor contributing to the rise in the number of cases of human trafficking. In the traditional cultures of many nations, girls

[12] UNODC, Toolkit to Combat Trafficking in Persons. Global Programme against Trafficking in Human Beings, New York, 2008, 5-7 <https://www.unodc.org/documents/human-trafficking/Toolkit-files/07-89375_Ebook%5b1%5d.pdf> [19.05.2024].

[13] The Rise of China and India. Impacts, Prospects and Implications, edited by A.U. Santos-Paulino and W. Guang Hua, Palgrave Macmillan, 2010, 107.

[14] Soken-Huberty E., 10 Causes of Human Trafficking, <https://www.humanrightscareers.com/issues/10-causes-of-human-trafficking/> [19.05.2024].

[15] John G., Human Trafficking Prevalence in Rwanda: The Role Played by Unemployment, American Journal of Social Sciences and Humanities, Vol. 4, No. 1, 2019, 165.

[16] Mbamba C. R., Amponsah E. B., Ndemole I. K., Structural Patterns That Facilitate the Trafficking of Children: Narratives from Practitioners Involved in the Rescue and After-Care of Trafficked Children, Journal of Social Service Research, Vol. 49, No. 1, 2023, 5.

are coerced into underage marriage, which is a form of human trafficking. Human trafficking is also a result of inter-communal conflict, which makes children and women more vulnerable and LURES them into armed groups. Women are viewed as culturally obedient and just a mere chattel in the Eastern parts of Nigeria, which also equates to human trafficking[17] .

The issue of human trafficking is a worldwide concern that significantly impacts individuals' lives and negatively affects the environment. Nigeria is particularly susceptible to human trafficking due to a range of reasons, including but not limited to extreme poverty, corruption, conflict, and inadequate economic opportunities. NAPTIP statistics indicate that between 2019 and 2022, an estimated 61% of human trafficking incidents in Nigeria transpired domestically, while the remaining 39% involved transnational activities[18].

IV. International Legal Frameworks on Human Trafficking

Trafficking in Persons is the act of recruiting, transporting, transferring, harboring, or receiving individuals through force, deceit, or coercion for the purpose of exploitation in forced labor or commercial sexual exploitation. Victims of this crime were estimated by the International Labor Organization (ILO) to number 27.6 million in 2022[19]. Human trafficking is the second largest illicit industry in the world, and has a significant impact on the most vulnerable members of our society. These heinous actions erode the rule of law, contaminate global commerce, promote gender inequality, and jeopardize global security[20].

The menace of human trafficking is not limited to Nigeria alone; it cuts across numerous locations. Countries around the globe are making efforts to ensure that the rate of human trafficking within their environment is minimized. Even in the United States, both U.S. residents and foreign nationals are being purchased and sold in a manner reminiscent of modern-day slavery. Traffickers exploit victims through

[17] Kehinde A., Iyaniwura S., Adimoha C., Examination of the Right of a Female Child to Inheritance: Eastern Nigeria Context, Journal "Prawo I Wiez", No. 1 (39), 2022, 345.

[18] Pathfinders Justice Initiative, Nigeria: Human Trafficking Factsheet, 2022. <https://pathfindersji.org/nigeria-human-trafficking-factsheet/> [19.05.2024].

[19] USAID, Countering Trafficking in Persons. Democracy, Human Rights and Governance, U.S. Agency for International Development, 2019, <https://www.usaid.gov/trafficking> [19.05.2024].

[20] Ibid.

the use of violence, manipulation, fraudulent promises of lucrative employment, or through romantic relationships[21]. The laws put in place internationally to combat human trafficking are as follows:

(a) The Palermo Protocol

In November 2000, the United Nations ratified the Palermo Protocol as a component of the United Nations Convention against Transnational Organized Crime. It is the first legally binding instrument that includes a definition of human trafficking that is internationally recognized. This definition is essential for the identification of victims, as well as for the detection of all forms of exploitation that constitute human trafficking, regardless of whether they are men, women, or children. Countries that ratify this treaty are required to establish anti-trafficking laws that are consistent with the legal provisions of the Protocol and criminalize human trafficking[22].

Trafficking has been defined in Article 3 (a) of the Palermo Protocol as "the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power, or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation." Exploitation shall include, at a minimum, "the exploitation of the prostitution of others, or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude, or the removal of organs."

(b) The African Charter on Human and Peoples' Rights[23]

Article 5 of the African Charter on Human and People's Rights is also among the international instruments used against human trafficking. It provides that every individual shall have the right to the respect of the dignity inherent in a human being, and to the recognition of their legal status. All forms of exploitation and degradation of a person, particularly slavery,

[21] Federal Bureau of Investigation, Human Trafficking, 2022, <https://www.fbi.gov/investigate/violent-crime/human-trafficking> [19.05.2024].

[22] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, UN, 25 December 2003, No. 395742021.

[23] African Union, African Charter on Human and Peoples' Rights, 1981. <https://au.int/en/treaties/african-charter-human-and-peoples-rights> [19.05.2024].

the slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

(c) The ECOWAS Common Approach on Migration

The ECOWAS Common Approach on Migration, which is not a binding document, was implemented on January 18, 2008, by the ECOWAS Authority of Heads of State and Government. The document offers strategic guidance on specific priority areas to facilitate the effective management of human trafficking and migration in West Africa[24].

(d) The Ouagadougou Action Plan to Combat Trafficking in Human Beings

In 2006, the Ministerial Conference on Migration and Development in Tripoli enacted the Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children. It is a collaborative international framework between Europe and Africa that aims to accelerate the prevention, suppression, and punishment of human trafficking[25].

(e) The United States' Trafficking Victims Protection Act (TVPA) 2000

In the United States, the first comprehensive federal law to address human trafficking was the 2000 Trafficking Victims Protection Act (TVPA). In addition to the protections provided by immigration relief for foreign national victims of human trafficking, it emphasizes prevention through public awareness programs, both domestically and internationally, and prosecution through new federal criminal statutes. The President's Interagency Task Force to Monitor and Combat Trafficking in Persons was established by the Trafficking Victims Protection Act of 2000 to facilitate the coordination of anti-trafficking initiatives among federal government agencies in the United States.

(f) Ghana's Human Trafficking Act 2005

In order to combat human trafficking within, to, from, and through Ghana, the Human Trafficking Act (Act) was implemented on December 5, 2005[26]. The Act aims to achieve its objectives by establishing a widely recognized definition of human trafficking, requiring a minimum prison sentence of

[24] International Organization for Migration, ECOWAS Common Approach on Migration, 2008, <https://www.iom.int/ecowas-common-approach-migration> [19.05.2024].

[25] Ogunniyi D., Idowu O., Human Trafficking in West Africa: An Implementation Assessment of International and Regional Normative Standards, the Age of Human Rights Journal, 2022, No. 19, 171.

[26] Mohammed A.K., Is Ghana's Law Against Human Trafficking a Success? Criminal Justice Review, Vol. 47, No. 1, 2020, 27.

5 years for those involved in trafficking, and specifying measures for the protection and assistance of victims. Typically, the duration ranges from a minimum of 5 years to a maximum of 25. The 2005 Human Trafficking Act, which was amended in 2009, made sex and labor trafficking illegal.

(g) Canada's Criminal Code and Immigration and Refugee Protection Act
Canada has robust legislation in place to address human trafficking, as outlined in the Criminal Code. This legislation explicitly outlaws both the act of trafficking individuals and any other forms of exploitative behavior associated with human trafficking. Canada's Immigration and Refugee Protection Act specifically addresses the issue of cross-border trafficking. Section 118 of the Immigration and Refugee Protection Act explicitly forbids intentionally arranging for the entry of one or more individuals into Canada using methods such as kidnapping, deceit, trickery, or the use of force or coercion. The offence carries a maximum punishment of life imprisonment and/or a fine of up to $1 million[27].

V. Some Data Relating to Human Trafficking Around the Globe

The data acquired from the 155 nations that are affected by human trafficking, according to the UNODC report, give a global assessment of the detrimental effects of human trafficking[28].

In 2022, the Thai government reported conducting 253 trafficking investigations (188 in 2021), prosecuting 308 alleged traffickers (125 in 2021), and convicted 249 traffickers (82 in 2021). In 2022, courts sentenced 201 convicted traffickers, with about 99 percent receiving two or more years in prison[29]. Thailand rescued 1807 victims of human trafficking, with 60% of them being women in the year 2019[30].

[27] Public Safety Canada, About Human Trafficking, 2020, <https://www.publicsafety.gc.ca/cnt/cntrng-crm/hmn-trffckng/abt-hmn-trffckng-en.aspx> [19.05.2024].

[28] UNODC, Global Report on Trafficking in Persons, 2009, <https://www.unodc.org/unodc/en/human-trafficking/global-report-on-trafficking-in-persons.html> [19.05.2024].

[29] Thomson Reuters Foundation, Record number of trafficking victims strains resources, Bangkok Post, 7 January 2020, <https://www.bangkokpost.com/thailand/general/1830439/record-number-of-traf-ficking-victims-strains-resources> [19.05.2024].

[30] 1,807 Human Trafficking Victims Rescued in Thailand in 2019, New Straits Times, January 8, 2020, <https://www.nst.com.my/world/region/2020/01/554485/1807-human-trafficking-victims-rescued-thailand-2019> [19.05.2024].

The two largest populations of economic migrants from Cambodia and Myanmar make up most of the trafficking victims in Thailand. Poor children from rural areas are the main target of traffickers there, and women are also frequently trafficked because prostitution is permitted in the country. Moreover, Thailand needs inexpensive labor, so illegal immigrants are brought in to work in the construction and fishing industries for extremely low pay.[31]

It has been established that 183,000 non-citizens who are victims of human trafficking are present in Israel without legal status[32]. 325 victims of human trafficking were identified from 2017 to 2021, with 44% of the victims having been trafficked for enslavement and 40% for sexual exploitation[33]. Israel's police interviewed 789 suspects for human trafficking, of whom 99 were found guilty and 155 were indicted.

Nigeria as a country now serves as both a source of trafficking in persons, and a destination. Behind "drug trafficking" and "economic fraud", human trafficking is the third most common crime in Nigeria. Nigeria received 32nd out of 167rd place in the Global Slavery Index 2018 study, with over 1,386,000 slaves[34]. Child labor, sexual exploitation, and forced labor were just a few of the serious problems that Nigerian children had to deal with. Nigeria is home to many child laborers who work in a variety of vocations, including as domestic helpers, carpenters, and street laborers. According to a survey, even though forced labor is prohibited by international law, 43% of Nigerian children were affected by it[35]. Human Rights Watch interviewed victims of human trafficking in Benin City, Lagos, Ogun State, Abeokuta, Abuja, and other cities. According to the research, out of 76 survivors of human trafficking, 5 were men and 71 were women or girls[36].

[31] Ibid.

[32] U.S. Department of State, Trafficking in Persons Report, 2022, 305, <https://www.state.gov/wp-content/uploads/2022/10/20221020-2022-TIP-Report.pdf> [19.05.2024].

[33] Peleg B., Lee V., Report: Human Traffickers not Being Prosecuted in Israel, Haaretz, 29 December 2022, <https://www.haaretz.com/israel-news/2022-12-29/ty-article/.premium/report-human-traffickers-not-being-prosecuted-in-israel/00000185-5f5f-d819-a995-ffff05430000> [19.05.2024].

[34] Pathfinders Justice Initiative, Nigeria: Human Trafficking Factsheet, 2022. <https://pathfindersji.org/nigeria-human-trafficking-factsheet/> [19.05.2024].

[35] Anadolu Agency, Almost Half of Nigerian Children Trapped in Forced Labor, Int'l Labor Org. Says, Daily Sabah, 03 May 2019, <https://www.dailysabah.com/africa/2019/05/03/almost-half-of-nigerian-children-trapped-in-forced-labor-intl-labor-org-says> [19.05.2024].

[36] See: U.S. Department of State, Nigeria 2020 Human Rights Report, 2021, <https://www.state.gov/wp-content/uploads/2021/03/NIGERIA-2020-HUMAN-RIGHTS-REPORT.pdf> [19.05.2024].

VI. The Role of NAPTIP in Handling Human Trafficking Cases in Nigeria

The Trafficking in People (Prohibition) Law Enforcement and Administration Act of 2003 established the National Agency for the Prohibition of Trafficking in Persons (NAPTIP), a federal agency[37]. The major goals of NAPTIP are to protect people from human trafficking and to combat violence to reduce migrant smuggling and trafficking. The organization's main goal is to create a country free of human trafficking and violent crime. The investigation of all incidents of human trafficking, including child labor, forced prostitution, organ harvesting, exploitative labor, and illegal migrant smuggling, is a major responsibility of NAPTIP. The organization was founded in 2003 with the goal of enforcing anti-trafficking legislation, rescuing and assisting victims, and bringing traffickers to justice. Although NAPTIP has achieved several victories in its fight against human trafficking in Nigeria, more work needs to be done by the organization to significantly diminish, if not entirely eradicate, the practice there. Although the statute that founded NAPTIP and provided the agency with a legislative framework to address the issue exists, little has been accomplished by the agency since its foundation[38].

In examining the role of NAPTIP in tackling human trafficking in Nigeria, the first role to mention is rescue and assistance. Rescue and assistance of victims of human trafficking is one of NAPTIP's main responsibilities. This includes giving victims a place to live, access to healthcare, and legal counsel. Almost 900 victims of human trafficking were rescued in Nigeria in 2017, according to NAPTIP's Annual Report (2017)[39]. To aid victims of human trafficking in reestablishing their life and gaining independence, NAPTIP also offers them educational and vocational programs, while, to help them recover from trauma and exploitation, NAPTIP offers accommodation.[40]

Another major role of NAPTIP is to prosecute traffickers. Under the law, NAPTIP is authorized to conduct an inquiry into any person's suspicious activity and to

[37] Global database on Violence against Women, <https://data.unwomen.org/global-database-on-violence-against-women> [19.05.2024].

[38] See: Kigbu S.K., Hassan Y.B., Legal Framework for Combating Human Trafficking in Nigeria: The Journey So Far, Journal of Law, Policy and Globalization, Vol. 38, 2015, 205-220.

[39] See: U.S. Department of State, Trafficking in Persons Report, 2017, 304-307, <https://www.state.gov/wp-content/uploads/2019/02/271339.pdf> [19.05.2024].

[40] Ibid.

enter any property or premises for purposes of an investigation. In combating human trafficking in Nigeria, NAPTIP's four main tasks are prevention, prosecution, protection, and partnership.

NAPTIP's efforts in prosecuting the defendants in Raji v. FRN[41] were acknowledged, and the defendants were sanctioned after the prosecution. This case involved an appeal against the ruling of the High Court of Edo State, which affirmed the appellants' convictions on charges of deceptive inducement to depart from any location in contravention of Section 13(b), and compelled labor infraction of Section 22(1)(a) of the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003 (as amended), respectively. The Court of Appeals reached its decision that the appellant was a member of a criminal organization that deceives young people, especially females, into believing that a trip to Kuwait will help them advance their academic careers when, in reality, the reward is a sale. In consideration of this, the court affirmed the judgment of the trial court. Peace Eze and Adaugo Okafor were additionally implicated in the abduction of a neighbor's two-year-old son at the time of the alleged incident; the child was from Awka, Anambra State, and was subsequently transferred to Port Harcourt, Rivers State. NAPTIP stated that after demanding a ransom from the boy's parents, they had traveled to Port Harcourt, where they encountered Mr. Mayokun, who assisted them. Local church Omega Power Ministries received the child before selling him to an unidentified purchaser. The three defendants received their sentences after their conviction by the Federal High Court in Port Harcourt on all six counts in July. Additionally, in 2018, NAPTIP effectively prosecuted a child abduction case involving Peace Eze, Olujimi Mayokun, and Adaugo Okafor as the three suspects[42]. The Benin Zonal Command of the National Agency for the Prevention of Trafficking in Persons (NAPTIP) effectively prosecuted seven defendants implicated in four incidents of human trafficking. Mr. Emeka Nwawenne, the ebullient zonal commander, declared that all four convictions, encompassing seven defendants in four distinct cases, were punishable by incarceration, forced labor, and monetary penalties. In FRN V. Amaze Ogieriakhi[43],

[41] Raji v. FRN (2019) LPELR-47182(CA).

[42] Babatunde A., Analysis: Despite Successes, NAPTIP Investigates, Prosecutes Only Few Reported Trafficking Cases, Premium Times, 2 October 2019, <https://www.premiumtimesng.com/news/headlines/355530-analysis-despite-successes-naptip-investigates-prosecutes-only-few-reported-trafficking-cases.html> [19.05.2024].

[43] Charge No: NNNCN/BEN/2c/2022.

a case brought before Justice A.A. Adewemimo in the National Industrial Court on October 13, 2022, Benin Division, the Anti-Human Trafficking Agency, was successful in getting convictions. Two years of hard labor and a $200,000 fine were imposed on one of the defendants, Ogieriakhi Amaze, while three years in prison were imposed on Fatima Joy and Odiri Joseph for their roles in the case. These are a few of the cases that NAPTIP has dealt with. Nonetheless, it has been noted that the courts' and NAPTIP's efforts to end human trafficking have had little to no effect, since the number of cases in Nigeria continues to rise.

1. Has NAPTIP Succeeded in Its Established Role?

The 2004 Trafficking in People (Prohibition) Law Enforcement and Administration Act established the National Agency for the Prohibition of Trafficking in Persons (NAPTIP), an agency of the federal government. The primary objective of NAPTIP is to protect individuals from human trafficking and combat violence to reduce migrant smuggling and trafficking. The organization's main goal is to create a country free of human trafficking, where no one suffers violence. NAPTIP's primary duty is to investigate all incidents of human trafficking, including those involving illegal migrant smuggling, forced labor, organ harvesting, child labor, forced prostitution, and exploitative labor[44]. NAPTIP is established under the Trafficking in Persons (Prohibition) Enforcement and Administration Act of 2003 (TPPEAA)[45]. The Act provides for the protection and support of trafficking victims and witnesses.

The following rights are safeguarded by NAPTIP for victims of human trafficking:

Victims and witnesses of human trafficking are safeguarded and provided for under the provisions of the Act. Victims of human trafficking are afforded the following protections by NAPTIP:

The entitlement to safeguarding and aid provided by NAPTIP, including but not limited to accommodation, healthcare, and other forms of assistance, participation in the investigation and prosecution of the trafficking case as a fundamental right, entitlement to restitution and justice regarding their distress.[46]

[44] Global database on Violence against Women, <https://data.unwomen.org/global-database-on-violence-against-women> [19.05.2024].

[45] Trafficking in Persons (Prohibition) Enforcement and Administration Act of Nigeria, 2003, Section 1.

[46] Ibid., Section 1-4.

As the supreme law of the land and the framework for the protection of human rights in Nigeria, the 1999 Constitution of the Federal Republic of Nigeria (as amended) states that individuals are entitled to the dignity of the human person; none shall be subjected to torture, inhuman or degrading treatment, or punishment.[47]

These are additional rights that NAPTIP must safeguard:

Right to life[48]: Victims of trafficking frequently endure violent acts and dangerous circumstances, endangering their lives. NAPTIP must make sure that the victims of human trafficking are kept safe from harm and that their right to life is upheld.

Right to be free from exploitation and enslavement: Victims of human trafficking are frequently made to do forced labor or are sexual exploited. NAPTIP must endeavor to put a stop to these actions and defend the rights of trafficking victims.

Right to dignity of human persons[49]: Victims of trafficking frequently experience physical abuse and are exploited. NAPTIP must safeguard the right to bodily autonomy of trafficking victims and make sure they are not the targets of any kind of sexual or physical exploitation.

Right to privacy and confidentiality[50]: Victims of human trafficking frequently worry that their traffickers will punish them, which may keep them from seeking assistance. NAPTIP must make sure that the anonymity and privacy of trafficking victims are upheld, and that they are shielded from reprisals.

The right to a fair trial[51]: Victims of human trafficking may be subjected to legal actions like criminal prosecutions or civil lawsuits. NAPTIP must make sure that victims of trafficking are given proper legal representation and that their right to a fair trial is upheld.

The specified rights are detailed in various international treaties and conventions on human rights, such as the Universal Declaration of Human Rights, the Convention on the Rights of the Child, and the United Nations Protocol to

47 Constitution of the Federal Republic of Nigeria, 1999, Section 34.

48 Ibid., Section 33.

49 Ibid., Section 34.

50 Ibid., Section 37.

51 Ibid., Section 36.

Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children. The Nigerian Trafficking in Persons (Prohibition) Law Enforcement and Administration Act of 2003 provides the legal structure for safeguarding the rights of human trafficking victims in Nigeria and establishes the basis for NAPTIP. However, it has been noted that these rights have not been adequately protected by NAPTIP, as victims of human trafficking still experience massive violations of their fundamental human rights by traffickers. It is vital to enhance the legislative frameworks against human trafficking in the country so that the appropriate authorities can conduct the appropriate enforcement measures against traffickers[52]. The Nigerian government could employ this crucial tactic to lessen the issues associated with human trafficking in the nation.

The work of NAPTIP has significantly contributed to defending the rights of trafficking victims in Nigeria. To fully address this critical human rights issue, however, much more must be done. Given that the degree of human trafficking in Nigeria is still very high and is, indeed, alarming, the government and other stakeholders must continue to support NAPTIP's initiatives and give the funding and political will required to end the practice.

2. Some Challenges Faced by NAPTIP

The presence of corruption and official cooperation in trafficking crimes continues to be a serious issue, hindering law enforcement efforts and allowing for the continued lack of accountability for these crimes. The Nigerian government some time ago initiated investigations into two persons implicated in trafficking offences: one from the National Immigration Service and the other from the Nigerian Security and Civil Defense Corps, which are among those law enforcement mechanisms put into place to combat criminal activities in Nigeria[53].

The sluggish judicial process is another significant obstacle that NAPTIP encounters. Cases concerning human trafficking are not resolved promptly in Nigeria due to said judicial system.

[52] Gardner A., Northall P., Brewster B., Building Slavery-free Communities: A Resilience Framework, Journal of Human Trafficking, Vol. 7, No. 3, 2020, 338.

[53] See: U.S. Department of State, Trafficking in Persons Report: Nigeria, 2023, <https://www.state.gov/reports/2023-trafficking-in-persons-report/nigeria> [19.05.2024].

VII. How can Nigerians be Rescued from Human Trafficking and Its Impact on the Environment?

An environment that is prone to human trafficking is toxic; living in such an environment is detrimental to the entire populace. As a result of the country's rapidly expanding population, limited economic possibilities, rising unemployment, and acute poverty, the rate at which human trafficking ravages Nigeria cannot be overemphasized.[54]. To address the challenges of human trafficking in this nation, the government of Nigeria must take the required steps for the social welfare and improved economic growth of this nation. The Nigerian government must allocate enough funds to education to upgrade the educational system and reduce human trafficking, since this has devastating effects on the environment.[55] There is a need for NAPTIP, NGOs, and other relevant stakeholders in the sector to increase the awareness level and give proper information to the people on the dangers of human trafficking and why they need to be careful so as not to fall prey to traffickers; the strategies usually adopted by the traffickers should be exposed to reduce human trafficking. To reduce the unemployment rate and poverty, the Nigerian government must develop greater work prospects for its people. To gather information about people trafficking, it is also crucial to monitor and control human movement across the borders of the nation.

VIII. Recommendations and Conclusion

In safeguarding the rights of trafficking victims in Nigeria, the National Agency for the Prevention of Trafficking in People (NAPTIP) is a key player. According to the study, human trafficking violates many people's human rights in Nigeria and has a significant impact on many people's lives. One of the primary reasons for human trafficking globally is the widespread ignorance of human rights laws. Typically, bogus job promises also result in human trafficking. Human trafficking is also facilitated by language barriers, fear of other traffickers, and law enforcement. The rights of trafficking victims in Nigeria still need to be protected, notwithstanding NAPTIP's best efforts. These difficulties include inadequate staffing, poor coordina-

[54] Kigbu S.K., Hassan Y.B., Legal Framework for Combating Human Trafficking in Nigeria: The Journey So Far, Journal of Law, Policy and Globalization, Vol. 38, 2015, 205.

[55] Mba E., How to Stop Human Trafficking in Nigeria, InfoGuide Nigeria, 2015, <https://infoguidenigeria.com/stop-human-trafficking-in-nigeria/> [19.05.2024].

tion amongst relevant stakeholders, and corruption. Due to poverty, lack of efficient child and human rights protection, and increased judicial system corruption in Nigeria, human trafficking has grown drastically. As a result, it is essential to continue supporting NAPTIP's initiatives and putting the established policies and programs into action. NAPTIP is ineffective in safeguarding the rights of human trafficking victims in Nigeria and has not demonstrated significant progress on this issue. Nigeria is rated 32 out of 167 countries in human trafficking according to the global slavery index. This indicates that NAPTIP has not been successful in addressing human trafficking in Nigeria.

It is recommended to conduct robust efforts against human trafficking in Nigeria. The National Orientation Agency needs to fulfill its responsibility by creating awareness about human trafficking in the country. These efforts should primarily focus on the risks associated with human trafficking and the importance of protecting the rights of trafficking victims. Efforts should focus on marginalized people, including women and children, in rural and urban locations nationwide. Offering economic and psychological assistance, and career prospects, through human rights awareness programs can facilitate the reintegration of victims, particularly those who have been sexually exploited due to human trafficking.

Developing enough possibilities for economic growth to reduce poverty is also recommended, since it has been identified that one of the major reasons responsible for the high level of human trafficking in Nigeria is poverty. The Nigerian government must invest sufficient money in education and create better job opportunities for the common people in the country, with immediate effect.

Likewise, collaboration between NAPTIP and other international organizations is recommended so as to share experiences and adopt similar policies as those in other countries which have helped curb human trafficking, allowing Nigeria to align with international best practices in tackling human trafficking.

In addition, there is a need for NAPTIP to partner with NGOs to succeed in curbing human trafficking across Nigeria.

Also, organizations across the country responsible for combating human trafficking can launch official websites and discussion boards where people can share news about the problem and raise awareness of the issue.

NAPTIP must also assure adherence to the legal provisions. NAPTIP should enforce all rules and regulations in Nigeria to uphold ethical standards. Those who violate the laws should be held fully accountable by the law.

Deployment of adequate technology to identify criminals is important. The federal government needs to enhance its spending in the technology industry and install facial recognition technology in airports.

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