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The Concurrence of Legal Remedies in Cases of Unauthorized Use of Trademarks: A Georgian Legal Perspective

ABSTRACT

The aim of the article is to examine a practical issue concerning the concurrence of legal remedies in cases of unauthorized use of trademarks. The main objective of this research is to determine the circumstances under which the competition law and intellectual property law of Georgia intersect; to identify the statutory remedies established by the relevant legislation addressing unfair practices, and to analyze instances of legal-procedural remedies concurrence.

The protection of trademarks is recognized as part of the broader framework for preventing unlawful competitive practices. The concept of "unfair competition" is expressly defined in the Law of Georgia on Competition. Even though the same concept is not literally found in the Law of Georgia on Trademarks, the concept of unfair practices is nevertheless implied and governed by it. Furthermore, the Paris Convention for the Protection of Industrial Property, assumed to be a part of intellectual property law, explicitly provides a definition of unfair competition. As the concept of unfair competition is implied in both competition law and intellectual property law, the intersection between the two is evident.

In Georgia, the enforcement of claims related to the unauthorized use of trademarks often involves the participation of administrative bodies in resolving disputes between private parties, with the scope of available legal remedies being notably broad.

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The article examines and identifies the interaction of competition law and intellectual law, and the concurrence of legal protection mechanisms deriving from this interaction.

Keywords: Unfair Competition, Trademark Infringement, Intellectual Property, Reputation, Misleading.

I. Introduction

The transformation of the trademark into a significant tool for marketing goods has led to the establishment of distinct legal principles, including "trademark infringement" and "unfair competition".[1] In this context, it is noteworthy that, in practice, cases involving trademarks often involve an intersection between intellectual property law and competition law.[2] In contemporary legal doctrine, the protection of trademark rights is regarded as an integral component of preventing unfair competition.[3] Since the principles of trademark infringement and unfair competition are largely shared, dual liability under intellectual property law and competition law is primarily relevant in terms of the differing remedies.[4]

It is noteworthy that, in Georgia, the enforcement of claims regarding the unauthorized use of trademarks involves the participation of administrative bodies in resolving disputes between private law subjects, which significantly broadens the scope of legal remedies. It is important to identify the legal remedies arising from the legal institutions mentioned above, so that the party whose right has been violated can make an informed choice between the available means of remedy, based on the respective legal consequences. This initially determines the relevance of the present article. It should be noted that the article does not address these issues from the perspective of the consumer, but rather defines legal remedies from the standpoint of the party who is at the same time competitor and holder of the exclusive right to the trademark.

Given the scarcity of Georgian judicial practices and legal literature on the topic, the article is particularly relevant, underscoring the importance of academic inquiry. It aims to explore practical issues, especially the competition between legal protection

[1] Robert, 2020, 1187.

[2] მენაბდიშვილი, 2014, 167 [Menabdishvili, 2014, 167].

[3] Dornis, 2017, 9.

[4] Robert, 2020, 1187.

remedies in cases of unauthorized use of trademarks. The objective of this research is to highlight the circumstances under which competition law and intellectual law intersect, to identify legal remedies derived from intellectual property and competition legislation, and to examine the legal overlap in the enforcement of such rights.

II. Unfair Competition at the Intersection of Intellectual Property and Competition Law

1. Dual Legal Basis

Disputes arising from trademark infringement and unfair competition are similar and frequently overlap. In the case of commercial practices, examples include taking advantage of a competitor's reputation, or creating confusion by using similar trademarks, or through making misleading statements.[5] The purposes for these legal actions differ. Legislation governing the protection of trademarks is primarily aimed at preventing the misappropriation of formal trademarks, whether registered or established through use. By contrast, under the rules on unfair competition, the mere risk of deception is sufficient to trigger liability, regardless of the existence of any exclusive right.[6] It is also important to note that a claim for trademark infringement may be brought only by the holder of the exclusive right, whereas a claim to prevent unfair competition can generally only be initiated by the competing economic operator.[7] Consequently, the potential overlap between these legal protection remedies in cases of unfair commercial practices arises only when the claimant simultaneously holds exclusive trademark rights and acts as a competing economic agent.

Georgian legislation related to the protection of trademarks is consolidated in the Law of Georgia on Trademarks.[8] From the standpoint of trademark legislation, the Paris Convention for the Protection of Industrial Property merits mention, as its ratification by the Georgian government renders it part of Georgian Legislation.[9] The latter also includes provisions on unfair competition, and defines it as an act of competition which contradicts honest practices of entrepreneurial or commercial activities.[10]

5 Hilty and Henning-Bodewig (ed.), 2007, 147.

6 Dornis, 2022, 18.

7 Ibid., 17.

8 Law of Georgia "On Trademarks", 5 February 1999.

9 The Paris Convention for the Protection of Industrial Property, 20 March 1883.

10 Ibid., Art. 10bis (2).

The Paris Convention indentifies specific forms of unfair competition, including the prohibition of acts likely to cause confusion regarding a competitor, their goods or commercial activities, as well as discrediting a competitor or their products through statements or indications that may mislead the public about the origin, method of production, manufacturer, characteristics, and other attributes of the goods.[11] In contrast, the Law of Georgia on Trademarks does not directly define unfair competition. Instead, it grants the holder of an exclusive right the authority to prohibit a third party from using a trademark without consent, including any sign that is identical or similar to the protected trademark. The right holder may prevent third-party use in commerce if it creates a risk of consumer confusion, misleads the public, or results in an unfair commercial advantage and damage to the reputation of the trademark.[12]A precondition for exercising this exclusive right is the occurrence of trademark infringement.

The right to claim trademark infringement is granted if, as a result of the use of the same or a similar trademark in relation to identical or similar goods, there exists a risk or likelihood of misleading the public. The scope of protection extends to the use of similar trademarks for similar goods if such use can cause confusion.[13]

It should be noted that the Law of Georgia on Trademarks grants exclusive rights to the owner of a trademark only with respect to a protected trademark.[14] However, protection does not necessarily imply mandatory registration or formal authorization; rather, it is the factual use of a trademark that may grant the user exclusive rights.[15]

Article 11^3 of the Law of Georgia on Competition adopts a broad definition of unfair competition, encompassing activity by an economic agent that contradicts the norms of business ethics and violates the interests of both competitors and consumers. At the same time, it should not be overlooked that the Law of Georgia on Competition does not apply to relationships related to intellectual property rights, except in cases where such rights are used to restrict or eliminate competition.[16]

On the basis of this provision, it is reasonable to assume that where free and fair competition is unlawfully restricted, the Law of Georgia on Competition may also apply to relationships involving trademarks. Article 11^3 provides a list of specific forms

[11] The Paris Convention for the Protection of Industrial Property, 20 March 1883, Art. 10^{bis} (3).

[12] Law of Georgia "On Trademarks", 5 February 1999, Art. 6 (2).

[13] გაბუნია, 2001, 276 [Gabunia, 2001, 276].

[14] Law of Georgia "On Trademarks", 5 February 1999, Art. 6 (2).

[15] Judgment No. AS-306-2020 of the Supreme Court of Georgia, 18 November 2020, para. 27.

[16] Law of Georgia "On Competition", 8 May 2012, Art.1 (4) (b).

of unfair competition. Several of these are particularly relevant to the intersection between competition law and intellectual property law.

In particular, unfair competition may manifest through the use of various means of communication, including through improper, dishonest, unreliable or obviously false advertising, or in the dissemination of information about goods or services that misleads the consumer and encourages them to take certain economic actions.

According to the same article, unfair competition also includes misappropriation of the form, packaging or appearance of the goods of a competitor or third party, an act which damages a competitor's reputation (creating a false impression about the competitor's enterprise, goods, or commercial activities).[17] The term "economic agent" itself is characterized as an actual or potential economic agent operating in the relevant market.[18]

According to the abovementioned, to apply provisions to the relationships between private individuals in the case of unfair competition, the claimant and respondent must be competitors: there must be a relevant market.[19]

As discussed above, the concurrence of trademark protection and unfair competition remedies is particularly relevant in situations where the injured party is both the holder of exclusive trademark rights and a competitor of the party using the trademark without authorization.

At first glance, the possibility of the concurrent application of trademark law and unfair competition law appears to be the rule rather than the exception.[20] The preamble to the European Trade Mark Directive indicates that the Directive does not preclude the application of other provisions of Member States' laws beyond trademark legislation, including, among others, provisions relating to unfair competition.[21] A similar provision is also reflected in the German Trademark Act, which states that the protection of trademarks under this act does not preclude the application of other legal provisions related to such trademarks.[22]

[17] Ibid., Art. 11^3 (2) (a), Art. 11^3 (2) (c) and Art. 11^3 (2) (d).

[18] Ibid., Art. 3 (c).

[19] Decision of the Georgian National Competition Agency "on the admissibility of the complaint submitted by S.I.E LLC (ID: 401987597), initiation of case investigation, and formation of an investigation group, in accordance with Order N04/40 of 11 April 2022, issued by the Chairperson of the Georgian National Competition Agency, regarding the investigation carried out in the case of S.I.E LLC."

[20] Dornis, 2022, 10.

[21] Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trademarks, recitals (40).

[22] Act on the Protection of Trade Marks and other Signs, 25 October 1994, Section 2.

2. Specific Cases of Concurrent Application

As mentioned above, the Law of Georgia on Competition considers the dissemination of information about goods or services that misleads consumers, inducing them to undertake certain economic action, as unfair competition. This type of communication may include inappropriate, unfair, unreliable, or false advertising.[23] The prohibition of the risk of misleading also covers confusion caused by the use of trademarks.[24] According to the Law of Georgia on Trademarks, the holder of an exclusive right may prohibit a third party from using a sign that creates a risk of confusion or association between trademarks.[25]

Notably, where consumers are misled, the legal remedies provided by both principles of protection operate as alternatives. The test for consumer deception is largely similar under both trademark law and unfair competition. Consequently, in cases involving consumer deception, legal remedies provided under both protection principles may act alternatively.[26]

Under the Law of Georgia on Trademarks, the owner of an exclusive right is entitled to prohibit a third party from using a sign that creates a likelihood of confusion or association between the respective signs. Accordingly, where circumstances establishing a likelihood of confusion are identified within the framework of the Law on Trademarks, this may simultaneously indicate the presence of consumer deception within the meaning of the Law of Georgia on Competition. Based on the above, scenarios envisaged in subparagraph (b) and (c) of Article 6 (2) of the Law of Georgia on Trademarks may equally be assessed within the scope of the legislation on unfair competition, thereby giving rise to a concurrence of legal remedies between the Law of Georgia on Trademarks and the Law of Georgia on Competition.

The Court of Justice of the European Union (CJEU) clarified in one of its decisions that, despite the differences in the object of protection, in cases of bad-faith use of the reputation of a trademark, the legislation on unfair competition and trademark protection must be interpreted in a consistent manner.[27] The Directive on Misleading and Comparative Advertising prohibits comparative advertising if it unfairly takes advantage of the reputation of a competitor's trademark, trade name, or other distin-

[23] Law of Georgia "On Competition", 8 May 2012, Art. 11^3 (2) (a).

[24] Dornis, 2022, 28.

[25] Law of Georgia "On Trademarks", 5 February 1999, Art. 6 (2) (b) (c).

[26] Dornis, 2022, 23-24.

[27] L'Oréal and Others [CJEU], C-487/07, 18 June 2009, par. 77.

guishing marks, or of the designation of origin of a competing product.[28] Under the 2008 Trademark Directive, the holder of a trademark with special rights may prohibit a third party from using a similar or identical trademark, even if it is not being used for identical goods or services, if the trademark has a reputation in the Member States and the third party is unfairly benefiting from the reputation of a competitor's trademark, trade name, or other distinguishing marks.[29]

Although in the abovementioned case, the Court of Justice of the European Union (CJEU) based its decision on trademark law, it also clarified that comparative advertising, which presents the advertiser's product as an imitation of the product bearing a trademark, is also incompatible with fair competition, and that the benefit derived from the use of such a trademark is the result of unfair competition.[30] Additionally, the Federal Supreme Court of Germany noted in one of its decisions that the violation of trademark law, which includes the bad faith exploitation of a trademark's reputation, also falls under the scope of Germany's act against unfair competition, in addition to the German Trademark Protection Act.[31] A similar provision is also indicated in the Law of Georgia on Trademarks, which grants the holder of a trademark with exclusive rights to prohibit a third party from using a trademark that is identical or similar, and which is protected in Georgia, especially when it has a good reputation and such use unjustifiably creates favorable conditions for the third party, or harms the reputation or distinctiveness of the trademark.[32] Accordingly, it may be reasonably assumed that Article 6 (2) (d) of the Law of Georgia on Trademarks likewise falls within the scope of the concept of unfair competition as defined by the Law of Georgia on Competition. In such circumstances, the rights-holder may, at their discretion, elect the most appropriate legal remedy for the protection of their rights.

According to the Law of Georgia on Trademarks, the holder of an exclusive right may not prohibit a third party from using a protected trademark in civil circulation where such use is necessary for the identification of goods, or for indicating their characteristics.[33] In this case, the law obliges the third party to use the protected trade-

[28] Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version), Art. 4(f).

[29] Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks, Art. 10 (2)(c).

[30] ' L'Oréal and Others [CJEU], C-487/07, 18 June 2009, par. 79.

[31] Dornis, 2022, 28-29.

[32] Law of Georgia "On Trademarks", 5 February 1999, Art. 6 (2) (d).

[33] Ibid., Art. 7 (1) (c).

mark in compliance with the principles of good faith in entrepreneurial activity.[34] It is noteworthy that the German Trademark Protection Act contains an identical provision, but with the difference that it specifies the possibility for the holder of the exclusive right to impose such a restriction if the third party uses the trademark contrary to honest practices in industrial and commercial matters.[35]Accordingly, based on the reconciliation of Georgian and German trademark legislation, it is clear that if the third party does not use the trademark in good faith, the holder of the exclusive right still has the right to prohibit the third party from using the trademark. The CJEU has ruled that unfair practice among other cases exists when it affects the value of the trademark by taking unfair advantage of its reputation or distinctive character, or discredits the trademark.[36] In addition, it is worth noting that the violation of good faith and moral principles is clearly covered by the doctrine of unfair competition.[37] Based on the above, it can be reasonably assumed that the right to prohibit a person with an exclusive right based on Article 7 (1) (c) of the Law of Georgia on Trademarks falls within the scope of the Law of Georgia on Competition.

III. Legal Remedies Available to the Holder of a Violated Right

1. Claims of the Holder of an Exclusive Right

As mentioned above, exclusive rights grant the owner the ability to prohibit third party from using the trademark without consent, a sign that is identical or similar to the protected trademark resulting in the consumer undertaking certain economic action to prohibit a third party from using the trademark without his consent, a sign that is identical or similar to his protected trademark. [38] On that basis, holders may prohibit a third party from using the mark in civil circulation if this creates a risk of confusion or misleading the consumer, or results in an unfair commercial advantage and damage to the reputation of the mark.[39] It is noteworthy that, in addition to the abovementioned remedies, holding the exclusive right also includes the ability of the

[34] Ibid., Art. 7 (3).

[35] Act on the Protection of Trade Marks and other Signs, 25 October 1994, Art. 23 (2).

[36] Gillette Co. v. LA-Laboratories Ltd. [CJEU], C-228/03, 17 March 2005, par. 49.

[37] Dornis, 2022, 34.

[38] Law of Georgia "On Trademarks", 5 February 1999, Art. 6 (2).

[39] Ibid., Art. 6 (2) (b) (c).

trademark owner to request the withdrawal of the protected mark from civil circulation or the destruction of goods bearing such a mark.[40] However, it is important to note that the holder of the exclusive rights may request prohibition only with respect to these goods for which the trademark is registered or recognized.[41]

In such cases Georgian law on Trademarks indicates that disputes can be subject to judicial review.[42] Trademark owners may alternatively apply to an administrative body requesting prohibition the use of a trademark. For example, in the event of unauthorized use of trademark or the manufacture of marked goods, the trademark owner requests the tax/customs authority to detect and prevent unlawfully marked goods, which results in the imposition of a fine under the Code of Administrative Offences of Georgia and the withdrawal of counterfeit goods from civil circulation.[43] It is worth mentioning that when a trademark is used as a domain name the authority to restrict the domain or cancel its registration is vested in the Communication Commission of Georgia. The Commission upon the request of the holder of the exclusive right to trademark cancels a domain registration within administrative proceedings.[44]

Based on the analyzes above in civil proceedings the holder of an exclusive right is entitled to claim one of the following alternative remedies: compensation for damages, confiscation of income received by the infringer, or a one-time monetary award.[45] The damage mentioned in this article includes both the actual loss and the profit loss.[46] However, it's not easy to distinguish between actual damages and on-time compensation under the Law of Georgia on Trademarks. The legislator unequivocally recognizes the one-time compensation as an independent claim and offers an alternative competition between claims, [47] which means that the right holder must choose either damages or compensation. As for the claim for a one-time compensation, it should be noted that the Civil Code of Georgia does not recognize such liability for breach of an obligation. At the same time, the Law of

[40] Ibid., Art. 45 (1) (b).

[41] Michaels and Norris, 2013, 173.

[42] Law of Georgia "On Trademarks", 5 February 1999.

[43] ბუაძე, შეყილაძე და ჟორჟოლიანი 2020, 7 [Buadze, Sheqiladze da Zhorzholiani, 2020, 7].

[44] Decision No. 793/16 of the Georgian National Communications Commission of 30 November 2017 regarding the examination of the complain of JSC TBC Bank against Caucasus Online LLC.

[45] Law of Georgia "On Trademarks", 5 February 1999, Art. 45 (5).

[46] Ibid., Art. 45 (5) (a).

[47] Ibid., Art. 45(5).

Georgia on Trademarks sets a minimum amount for one-time monetary compensation. Namely, the amount of monetary compensation is deemed to be the sum the infringer of the exclusive right to the trademark would have paid upon obtaining a license to use the trademark.[48]

2. Competitors' Demands and Methods of Implementation

In light of the preceding analysis, the core provisions regarding unfair competition are provided for in the Law of Georgia on Competition. The body authorized to implement these provisions is a public legal entity – the Georgian Competition and Consumer Agency.[49] The Law of Georgia on Competition provides several mechanisms to ensure the prohibition of unfair competition through the Agency. The following chapter will discuss how these mechanisms operate to achieve that goal.

The Law of Georgia on Competition also recognizes the right of a competitor to bring a violation directly before the court without prior recourse to the Agency, designating the Tbilisi City Court as the competent authority. [50] According to the law, a complainant may be any economic agent who believes that a violation of the Law of Georgia on Competition has caused them direct damage. Such a complainant may file a corresponding complaint with the Georgian Competition and Consumer Agency.[51]

The law defines an economic agent as a natural or legal person, or other association, engaged in economic activity.[52] Unlike the Law of Georgia on Trademarks, the Competition Law authorizes the Agency to investigate a case of alleged violations, both on its own initiative and in response to a complaint from an economic agent.[53] To address unfair competition, an economic agent may apply to the Agency and request appropriate action be taken within the scope of its powers. Such actions may include measures to ensure that the conduct of a competing economic agent complies with the Law of Georgia on Competition.[54] The operative part of several decisions of the Georgian Competition and Consumer Agency, based on the provisions discussed above, prohibits an economic agent from using a trademark that is identical or con-

[48] Ibid., Art. 45 (7).

[49] Law of Georgia "On Competition", 8 May 2012, Art. 4(1).

[50] Ibid., 28 (1) and 28 (2).

[51] Ibid., Art. 3 (o).

[52] Ibid., Art. 3 (a).

[53] Ibid., Art. 18 (1) (a).

[54] Ibid., Art. 18 (1) (g).

fusingly similar to another, in order to prevent consumer confusion between competing economic agents.[55] For instance, in one case, the Agency ordered a company to bring its actions into compliance with competition legislation by modifying the appearance of a bus to minimize the risk of consumer confusion between economic agents. The defendant was also prohibited from using a graphic symbol similar to the plaintiff's registered trademark.[56] Hence, in the event of unfair competition, it is also possible to demand the termination of a continuing infringement, expressed in the destruction of marketing materials (brochures or information available on the Internet).[57] In another Agency decision, it was noted that the defendant was ordered to remove misleading information or images from a social network site that contained the disputed trademark.[58]

The Law of Georgia on Competition also grants the Georgian Competition and Consumer Agency the right to accept or reject conditional obligations. If the Agency considers that the risk of an alleged violation of the law will no longer exist as a result of the fulfillment of the conditional obligation undertaken by the defendant economic agent, it shall accept the conditional obligation undertaken by the violator to take specific actions. The Agency shall make a final decision without assessing the fact of the alleged violation of the law, and shall set a deadline for the defendant to fulfill the conditional obligation. If the defendant fails to do so, the investigation of the case shall be resumed.[59] Such obligations are known in EU competition law as "commitments", which means the undertaking of obligations by the party involved that will ensure the elimination of anti-competitive conduct. In the case of a "commitment

[55] Decision of the National Competition Agency of Georgia "on the recognition of the complaint of S.E.A. LLC (ID: 401987597) as admissible, initiation of the investigation of the case and creation of an investigation team" in accordance with the order of the Chairman of the National Competition Agency of Georgia No. 04/40 of April 11, 2022 (case of "S.E.A. LLC"); Decision of the National Competition Agency of Georgia on the investigation of the case carried out in accordance with the order of the Chairman of the National Competition Agency of Georgia N04/66 of June 29, 2021 (case of Delta Development Group).

[56] Decision of the National Competition Agency of Georgia on the recognition of the complaint of "S.E.A. LLC" (ID: 401987597) as admissible, initiation of the investigation of the case and creation of an investigation team" in accordance with the order of the Chairman of the National Competition Agency of Georgia N04/40 of April 11, 2022 (case of "S.E.A. LLC").

[57] Dornis, 2022,16.

[58] Decision of the National Competition Agency of Georgia "On the recognition of the complaint of JSC "Virsaladze Scientific Research Institute of Medical Parasitology and Tropical Medicine", the initiation of the investigation of the case and the creation of the investigation group" in accordance with the order of the Chairman of the National Competition Agency of Georgia No. 78 of June 14, 2016 (the case of the Institute of Parasitology).

[59] Law of Georgia "On Competition", 8 May 2012, Art. 23 (6), 23 (7).

decision", the authority does not assess whether a legal violation has occurred; instead, the decision is made without evaluating the alleged breach of the law.[60] The effectiveness of such decisions in the EU comes due to the fact that the parties avoid a fine or a subsequent claim for damages.[61]

Continuing with other illustrations, the Georgian Competition and Consumer Agency has the right to submit recommendations that are binding to the economic agent for consideration.[62] An example of issuing such a recommendation is the case where the Agency, although it did not find unfair competition in one of its cases, instructed the offending company to remove certain information from social networks and websites. The Agency monitored the company's electronic resources and took appropriate measures to ensure that accurate and relevant information about the company was displayed on its online platforms.[63]

In addition to the measures discussed above, it should be emphasized that the Georgian Competition and Consumer Agency is authorized to impose a fine on an economic agent for a violation of the Law of Georgia on Competition, including in the case of unfair competition.[64] The above-mentioned law determines the limits of the imposition of a fine, but defining the amount is a discretionary power of the Agency.[65]

It is beyond dispute that the question of damages plays a central role in ensuring effective protection of the rights of economic agents. However, the Law of Georgia on Competition does not explicitly provide for the right of an economic agent to claim compensation for damages suffered as a result of unfair competition. Moreover, under European law, the existence of actual damage is not required to establish unfair competition: the presumption of damage is sufficient.[66] Nevertheless, unfair competition inevitably causes harm to competing economic agents, making it important to determine the legal basis for a compensation claim for damages.

[60] Explanatory Note on the draft law of Georgia N07-3/373/9 "On the Amendments to the Law of Georgia "On Competition", 19 June 2019.

[61] Jenny, 2015, 712.

[62] Law of Georgia "On Competition", 8 May 2012, Art. 18 (1) (g^2).

[63] Decision of the National Competition Agency of Georgia No. 01/608 of December 1, 2020 "On refusal to initiate an investigation based on the complaint" (Information Communications Systems LLC case).

[64] Law of Georgia "On Competition", 8 May 2012, Art. 33 (5).

[65] Decision of the National Competition Agency of Georgia on the recognition of the complaint of "S.E.A. LLC" (ID: 401987597) as admissible, initiation of the investigation of the case and creation of an investigation team" in accordance with the order of the Chairman of the National Competition Agency of Georgia N04/40 of April 11, 2022 (case of "S.E.A. LLC").

[66] De Very, 2006, 160.

In Continental European legal systems, unfair competition is generally addressed through tort law.[67] For example, in France, judicial practice under the Civil Code allows an economic agent who suffers damage due to misleading practices, imitation, unfair competition, or disclosure of trade secrets, to claim compensation.[68] Similarly, under Georgian law, the Civil Code of Georgia provides for general tort liability, according to which a person who causes harm to another person by an unlawful, intentional or negligent act is obliged to compensate them for this harm.[69] It is not unreasonable to assume that in cases of unfair competition, the claimant may seek compensation for incurred damages before a court, provided that the prerequisites of tort liability are established: the existence of damage, an unlawful, intentional or negligent act, and a causal link between the act and the resulting harm.

When assessing the issue of compensation for damage arising from the competition law, it is important to answer the question as to whether determining unfair competition is the exclusive competence of the Georgian Competition and Consumer Agency, and accordingly, whether the Agency's decision should precede the claim for compensation for damage under civil law. In this context, legal remedies such as administrative proceedings before the Agency, administrative court review, and civil litigation may overlap or compete - a topic that is discussed in more detail in the following chapter.

IV. Competition of Legal – Procedural Mechanisms of Enforcing a Claim

The foregoing research shows that, in cases of unfair competition, where the holder of an exclusive right simultaneously acts as a competing economic operator, the injured party may restore the infringed right through various legal mechanisms. Protection may be sought either under intellectual property law or under competition law, which at first glance creates the appearance of an alternative concurrence of claims. Such alternative concurrence exists where claims pursuing the same objective are based on legal grounds of equal standing: a so-called concurrence of laws. In situations of alternative concurrence, courts generally determine which legal norm should be applied with priority. According to modern legal understanding, alterna-

[67] Hilty and Henning-Bodewig (ed.), 2007, 111.

[68] Ibid., 55.

[69] Civil Code of Georgia, 26 June 1997, Art. 992.

tive concurrence of legal ground arises where two or more legal bases simultaneously apply to the same factual circumstances, but their cumulative application is excluded because they lead to identical legal effects.[70] In cases of unauthorized trademark use in the specific cases mentioned above, alternative concurrence appears to exist where the injured party seeks an injunction prohibiting the use of the trademark. However, since the systems of legal protection under both intellectual property law and competition law also involve the participation of administrative authorities, the issue extends beyond substantive and enters the sphere of procedural-law concurrence. This may limit the injured party's ability merely to choose a legal basis for the claim and shift the responisbility to the court to select the applicable legal ground,[71] since the injured party must choose the appropriate procedural legal mechanisms, which may be available under just one of the applicable legal regimes. This is an issue that becomes particularly significant with respect to pecuniary claims. It also raises the question as to whether such claims may be brought on the basis of competition law before the competent authority or court.

As noted above, as both the intellectual property law and competition law provide for legal protection mechanisms that involve administrative authorities, the situation involves not only a concurrence of substantive legal norms, but also a concurrence of procedural rules. This raises questions of which procedural mechanism should be used, within which type of proceeding the injured party should assert its claim, and how the legal protection mechanisms provided under these two legal regimes relate to one another.

1. Body Authorized to Determine Unfair Competition

Various administrative bodies are involved in resolving disputes related to trademark protection and prevention of unfair competition, among them the Georgian Competition and Consumer Agency, which is authorized to establish a violation of the Law of Georgia on Competition. The latter grants the person with the violated right the ability to directly apply to court without applying to the Agency.[72] It is noteworthy that the above-mentioned provision does not specify what request an economic agent can apply to the court with, or whether the dispute should be considered within the framework of administrative or civil proceedings. Further ambi-

[70] ჩაჩავა, 2019, 36 [Chachava, 2019, 36].

[71] Ibid., 37.

[72] Law of Georgia "On Competition", 8 May 2012, Art. 28 (1).

guity regarding the issue is created by the Law of Georgia on Competition, which states that, when appealing an Agency's decision, the court is authorized to fully review the act of the administrative body, including the amount of compensation demanded.[73] Given that the decision of the Georgian Competition and Consumer Agency constitutes an individual legal act,[74] it is reasonable to interpret the reference in the Law of Georgia on Competition to the court's authority to review such decisions not as a power to determine the existence of a violation of the law. Rather, this authority should be understood as the court's competence, under administrative procedural legislation, to declare an act issued by the Agency invalid if it was adopted without properly examining and assessing circumstances of essential importance to the case, and to require the administrative body to issue a new decision after duly considering those circumstances.[75]

It is of particular interest that EU member states have developed different approaches regarding legal-procedural mechanisms for preventing unfair competition. In some countries, unfair competition is determined and damages are awarded in civil proceedings by interpreting the general provisions of the Civil Code, such as in France, where claims for damages resulting from unfair competition are based on tort liability.[76]

In other countries, unfair competition is based on specific legislation, such as in Germany, which has an independent law on unfair competition, from which disputes arising are subject to consideration in civil proceedings,[77] and which is not part of the German Competition Act.[78] The aforementioned law envisages consideration of both the prevention of a violation of the law and the issue of compensation for damages by a competing economic agent within the framework of civil proceedings.[79] However, it is worth noting that with regard to other actions restricting competition, which are provided for in the German Competition Act, the establishment of a violation by the agency is not a prerequisite for a claim for compensation for damages.[80] Based on the

[73] Ibid., Art. 33^2 (2).

[74] Judgment № ბს-913(კ-20) of the Supreme Court of Georgia, 11 February 2022; Judgment N ბს-1145-1139(კ-17) of the Supreme Court of Georgia, 22 February 2018; Judgment N ბს-500-497(კ-17) of the Chamber of the Supreme Court of Georgia, 14 July 2017.

[75] Administrative Procedure Code of Georgia, 23 July 1999, Art. 32 (4).

[76] LaFrance, 2011, 1422.

[77] "Act Against Unfair Competition", the version published on 3 March 2010, Section 14.

[78] Competition Act, the version published on 26 June 2013.

[79] "Act Against Unfair Competition", the version published on 3 March 2010, Section 14.

[80] Competition Litigation in Germany, <https://www.globalcompliancenews.com/antitrust-and-competition/competition-litigation-in-germany> [24.10.2025].

above, it is clear that, in the European Union, the issue of establishing unfair competition is also subject to consideration under civil proceedings.

It is noteworthy that the explanatory note to the Law of Georgia on Free Trade and Competition (the predecessor law of the Georgia on Competition) states that a person may directly apply to the court to request the prevention of a violation of the law and compensation for damage.[81] The explanatory note of the Law of Georgia on Competition indicates that a decision of the Competition Agency shall be used solely in disputes concerning claims for damages pursued under civil proceedings.[82] Since the parties to the dispute arising from the Law of Georgia on Competition are private individuals and competing economic agents, the possibility of directly applying to the court through administrative proceedings to request compensation for the damage caused should be excluded, since the main feature of the consideration of administrative cases is that one of the parties, the plaintiff or the defendant, must necessarily be an administrative body.[83] Based on the above, Article 28 of the Law of Georgia on Competition should be interpreted in such a way that a person with a violated right can bypass the Agency and apply directly to the court to request the prevention of the violation of said law, and to seek compensation for damages within the framework of civil proceedings. In addition, it is reasonable that allowing a different approach and granting the Agency the exclusive authority to establish unfair competition contradicts the right to a fair and timely review of the case guaranteed by the Constitution of Georgia,[84] since a person must first file a complaint with the Georgian Competition and Consumer Agency, whose decision is subject to administrative appeal, and only then initiate a dispute through civil proceedings, which would be associated with considerable time and costs.

2. The Binding Nature of Decisions of Administrative Bodies

An important issue concerns whether the decision of the Georgian Competition and Consumer Agency should be regarded as a prerequisite for filing a claim for damages. Equally significant is the question of whether such a decision is necessary to bring a claim for damages in civil proceedings. As noted above, the explanatory

[81] Explanatory Note on the draft law of Georgia N07-2/180/8 "On the Amendments to the Law of Georgia on Free Trade and Competition", 13 Mart 2014.

[82] Explanatory Note on the draft law of Georgia N07-3/373/9 "On the Amendments to the Law of Georgia "On Competition", 19 June 2019.

[83] ვაჩაძე და სხვ., 2005, 57-58 [Vachadze et al., 2005, 57-58].

[84] Constitution of Georgia, 24 August 1995, Art. 31 (1).

note to the Law of Georgia on Competition clarifies that the Agency's decisions are intended to be used exclusively in disputes concerning claims for damages pursued through civil proceedings.[85] However, the note does not specify under which procedural category these decisions fall, nor does it clarify their precise relationship to a claim for damages.

To address this, it is necessary to consider whether findings of unfair competition in the Agency's decision fall within the category of facts that a plaintiff is not required to prove under the Civil Procedure Code of Georgia. According to procedural law, a plaintiff is exempt from presenting evidence to prove facts that have been established by a final court judgment in the same civil case, or in another civil case involving the same parties.[86] This clearly indicates that only a final court judgment between the same parties is binding in subsequent proceedings.

The decision of the Georgian Competition and Consumer Agency, however, does not fall into this category, as it represents an act of an administrative body rather than a court judgment. Accordingly, such a decision should not be treated as an established fact, but may serve only as evidence subject to judicial evaluation.

At the same time, it can be argued that the Agency's decision provides grounds for simplified proceedings in claims for damages arising from a particular tort. Under Georgian civil procedural law, in claims for damages, the fact of damage is considered proven if it is confirmed either by a final court judgment, or by an administrative act issued by a competent authority or official in the case of administrative offense.[87]

Although such judgments are typically criminal in nature, it remains unclear whether a decision of the Georgian Competition and Consumer Agency qualifies as an administrative legal act in the context of administrative offense cases. Notably, the Code of Georgia of Administrative Offenses does not explicitly classify violations of the Law of Georgia on Competition as administrative offenses, nor does the competition law itself make reference to administrative offenses.

According to the Administrative Offenses Code, administrative offenses include violations of public order, violations of citizens' rights and freedoms, or breaches of governance rules subject to administrative liability.[88] Importantly, the Code also

[85] Explanatory Note on the draft law of Georgia N07-3/373/9 "On the Amendments to the Law of Georgia "On Competition", 19 June 2019.

[86] Civil Procedure Code of Georgia, 14 November 1997, Art.106 (a) and Art.106 (b).

[87] Ibid., Art. 309^{20} (2).

[88] Code of Georgia of Administrative Offenses, 15 December 1984, Art. 10.

recognizes that the legislation on administrative offences in Georgia is composed not only of the Code itself, but also of other legislative acts of Georgia.[89] Based on systematic analyses, for an act to be regarded as an administrative offence, it is not necessary for it to be expressly defined in the Code of Administrative Offences. Furthermore, the scope of regulation of the Law of Georgia on Competition encompasses the principle of protecting free and fair competition from unlawful restriction, while the latter includes the implementation of unfair competition as noted above – accompanied by sanctions that are an administrative liability. Accordingly, it is reasonable to consider that a decision adopted by the Georgian Competition and Consumer Agency may be regarded as an individual legal act issued in case of an administrative offence. Based on the foregoing, the party that incurred the damage should have the possibility to claim damages within the simplified procedure if they first file a complaint with the National Georgian Competition and Consumer Agency, which establishes unfair competition.

The same approach should be applied to disputes related to trademark protection laws. As noted, a person with the right to the trademark may apply directly to the court to enforce their claims. In certain cases, as mentioned above, the injured party may request that the tax or customs authorities seize and halt the circulation of illegally marked goods. Such action can result in fines and confiscation under the Code of Administrative Offenses. Since the decision of the tax or customs authority constitutes an administrative finding, it can serve as *prima facie* evidence in simplified tort claims, relieving the party which has incurred damage from proving the damage in court. Similarly, this approach should apply when a trademark is used for domain names in cybersquatting cases, and the rights-holder appeals to the National Communications Agency to cancel the domain. Said Agency has the power to impose sanctions under the law on Electronic Communications and the code of Administrative Offenses of Georgia.[90]

Therefore, as noted above, a party that has incurred damages should be entitled to claim compensation through simplified proceedings, provided that the Georgian Competition and Consumer Agency has first established the violation. Conversely, if the party does not use the simplified procedure, the administrative agency's decision should be treated solely as written evidence in the civil proceedings.

[89] Ibid., Art. 2.

[90] Law of Georgia "On Electronic Communications", 2 June 2005, Art. 11 (1).

V. Conclusion

The issue of the concurrence of legal remedies in cases of unauthorized trademark use encompasses a number of aspects. On the one hand, the provisions governing trademark protection and the prevention of unfair competition may overlap, as they establish both similar and distinct requirements and legal consequences for the holder of the infringed right. On the other hand, each legal institution provides the entitled person with a variety of legal mechanisms through which their rights may be enforced.

Competition arises between the legislation on competition and on intellectual property in cases of unauthorized use of trademarks, as well as in situations involving the risk of misleading consumers, unfair use of a trademark's reputation, and cases of unfair use of protected trademarks. In such cases, the rights-holder should have the opportunity to choose the appropriate legal remedy: either to apply first to the relevant administrative body with a request to prohibit the use of the trademark, and subsequently to the court for compensation of damages, or to apply directly to the court with both claims.

It should be noted that in both areas of law – trademark protection and unfair competition – non-pecuniary claims are primarily aimed at prohibiting unauthorized use of the trademark. The difference lies only in the procedural means by which these claims are enforced. A person holding an exclusive right may apply either to the court or, in certain cases, to the relevant administrative body. Similarly, in cases of unfair competition, the party who incurred damages should be able to apply alternatively either to the court within civil proceedings, or to the Georgian Competition and Consumer Agency with a request to prohibit the use of the trademark.

With regard to the procedural competition between remedies arising from competition law and intellectual property law, it is reasonable that the authority to determine the existence of unfair competition should not be vested exclusively in the Georgian Competition and Consumer Agency. Accordingly, the filing of a civil claim should not depend on a prior decision of the Agency. Therefore, the party that incurred damages should have the right to apply directly to a civil court, both for the cessation of the violation and for the compensation of damages.

At the same time, the decisions of administrative bodies – whether of the Georgian Competition and Consumer Agency, the Communication Commission, or the

tax/customs authorities – should not be granted the evidentiary status of a fact exempt from proof within the meaning of Article 106 of the Civil Procedure Code of Georgia. However, it would be reasonable to regard such decisions as those adopted in administrative offence proceedings, which may be used by the court for the purpose of simplified consideration of damage claims. In such cases, if the party that incurred damages first applies to the administrative body and subsequently to the court, they would no longer be required to prove the existence of damage, causation, or fault. Conversely, if the claim for damages is pursued through ordinary litigation, the administrative body's decision should be treated as one form of written evidence in civil proceedings.

Based on the above, in cases of unfair competition arising in the context of unauthorized use of a trademark, the authorized party should be afforded the opportunity, in light of their legal interest, to choose the appropriate means of legal protection mechanisms between those provided by the legislation on trademark protection and those established under the law on the prevention of unfair competition.

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Divergent Paths to a Shared Goal: Comparative Legislative Responses to Account Suspension on Digital Labour Platforms

ABSTRACT

With the widespread use of algorithmic management in the platform economy, account suspension has emerged as a core issue affecting working conditions. This article analyses the differing legislative responses adopted by the European Union and Taiwan to address this challenge. The EU approaches this issue from a "data protection" perspective, conceptualising algorithmic decision-making as a dual issue of working conditions and personal data protection. It clarifies the underlying facts of automated decision-making through mandatory algorithmic transparency obligations to resolve disputes.

In contrast, whilst Taiwan has not directly regulated algorithms, it has developed a unique "contractual regulation" approach. Through mandatory contractual terms formulated by administrative authorities, any unilaterally drafted terms contradicting these mandatory terms are rendered void. Moreover, Taiwan's new law contains an obligation to establish an appeal procedure and reverses the burden of proof, requiring platform operators to prove the legitimacy of account suspension. Although the EU and Taiwan differ in their legislative approaches, both seek to alleviate information asymmetry between platform operators and platform workers, and to ensure procedural fairness in account suspension decisions.

Keywords: Algorithmic Management, Account Suspension, Platform Worker, Transparency, Standardised Contractual Regulations

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I. Introduction

The rapid expansion of digital labour platforms over the past decade has fundamentally reshaped the modern labour market. In both the European Union (EU)[1] and Taiwan,[2] the scale of platform work continues to grow, and working through these platforms has become increasingly prevalent.[3]

The EU has defined platform work as a type of labour in which algorithms are deployed on digital platforms[4] to match the demand and supply of paid work.[5] Algorithmic management, broadly defined as the use of computer-programmed procedures to monitor, organise, direct, and evaluate workers, has become ubiquitous in platform work, and presents a fundamental challenge for regulating such work. By collecting and processing personal data[6] and real-time feedback, algorithms can generate predictions,[7] support managerial functions, such as work allocation, control the monitoring, evaluation, disciplining, and rewarding of workers,[8] and serve as the basis for automated decisions.[9] As decisions made by these systems directly and adversely affect platform workers' working conditions and economic security, the emergence of algorithmic management has raised profound legal concerns.[10]

Among the various controversies related to algorithmic management, account suspension stands out as a particularly serious issue.[11] The suspension of platform workers' accounts is not merely an interruption of their access to the platform; it may also restrict their access to work opportunities,[12] hinder their ability to retrieve accumulated earnings,[13] or unfavourably influence workers' accrued outcomes, thereby affecting the amount of their remuneration, particularly remuneration linked to the reward mechanism.[14] As such, suspension can have an adverse effect on their livelihoods.[15]

1 Council of the European Union, EU Rules on Platform Work, 2025, 1.
2 Chen, 2025, 1.
3 International Labour Organisation, 2024, 15-16.
4 Eurofound, 2025.
5 Council of the European Union, EU Rules on Platform Work, 2025, 1.
6 Eurofound, 2025.
7 Ibid.
8 Baiocco et al., 2022, 7, 11-12.
9 Eurofound, 2025.
10 Baiocco et al., 2022, 13, 21-23.
11 Ibid.
12 Hsin, 2024, 3-4, 252.
13 Hung, 2021, 55-57.
14 Chiu and Chang, 2023, 59.
15 Hsin, 2024, 4, 252.

However, automated systems inherently lack transparency.[16] Platform workers subject to algorithmic management often do not understand how these algorithms operate, which types of personal data are utilised, or how such systems influence their behaviour. Moreover, platform workers may be unaware of the reasons behind decisions related to suspension. A more significant problem is that, due to information asymmetry, platform workers fail to acquire sufficient evidence to challenge platform operators' decisions or seek redress.[17] They also find it difficult to obtain explanations or contact a person for clarification.[18] Therefore, account suspension should be taken seriously, as it concerns not only the accuracy of decisions, but also broader issues related to procedural fairness and working conditions under algorithmic management.

Although the legal frameworks addressing this issue differ between the EU and Taiwan, Directive (EU) 2024/2831 on improving working conditions in platform work (referred to as "the PWD") establishes a broad, cross-sectoral framework covering various types of digital labour platforms.[19] In contrast, Taiwan's recent legislation is limited to regulating the delivery sector.[20] As they differ in terms of coverage, this article does not use the overall legal framework as a basis for comparison, but instead adopts a comparative legal analysis, concentrating on the protective measures provided by both the EU and Taiwan concerning account suspension. This article also focuses on how both systems address common issues regarding information asymmetry, arbitrary suspension, and workers' access to effective remedies.

II. The EU's Suspension-Related Protections under the Platform Work Directive

1. The EU's Approach to Addressing Suspension-Related Issues

As the number of platform workers has grown within the EU, and platform work has been increasingly shaped by algorithms,[21] the EU has introduced a series of protections to ensure fair working conditions and adequate social protection[22]

[16] Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 "On Improving Working Conditions in Platform Work", Recital 30.

[17] Agosti et al., 2023, 6-7, 15, 34-35, 42.

[18] Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 "On Improving Working Conditions in Platform Work", Recital 8.

[19] Dubal, 2025, 410-411; Aloisi, Potocka-Sionek, 2025, 4.

[20] Ministry of Labour, 2026.

[21] European Commission, 2021.

[22] European Commission, 2020.

under the PWD.[23] This Directive is recognised as part of the European Pillar of Social Rights Action Plan,[24] which aims to achieve fairness, inclusion, and abundant opportunities in the vision of Social Europe.[25]

The PWD was adopted based on Articles 153 and 16 of the Treaty on the Functioning of the European Union (TFEU). Article 153 confers competence on the EU to legislate in the field of social policy. Article 16 provides a legal basis related to the protection of personal data.[26] The PWD operates within the legal framework of EU fundamental rights established by the Charter of Fundamental Rights of the European Union,[27] and gives legal enforcement to the social goals outlined in the European Pillars of Social Rights.[28] In this context, this article focuses on the protection against the arbitrary suspension of accounts and equivalent adverse decisions made by algorithms.

In response to legal issues arising from arbitrary suspension, the PWD has established protections through mechanisms including: (1) *ex ante* transparency; (2) human review; (3) *ex post* protection regarding suspension; (4) procedural safeguards, and (5) remedies.

Before turning to the PWD's *ex ante* transparency, it is essential to define what the automated systems are that can lead to suspension. The PWD distinguishes between two types of automated systems. Automated monitoring systems are systems used to collect personal data from platform workers, monitor, supervise, and evaluate their work performance or activities.[29] By comparison, automated decision-making systems are systems used to make or support decisions that have a significant impact on the working conditions of platform workers. The recital of the PWD also indicates that impacts on the working conditions of platform workers are not limited to matters related to work assignment, remuneration per task, safety and health, and

[23] Dubal, 2025, 410-411.

[24] European Commission, 2020.

[25] European Commission, n.d.

[26] Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 "On Improving Working Conditions in Platform Work", Recital 16.

[27] Ibid., Recital 2.

[28] These rights are strongly connected to principles 5 (protection of working conditions), 7 (effective and fair dispute resolution mechanisms, and the right to redress), and 10 (workers' right to privacy) of the European Pillars of Social Rights, see: Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 "On Improving Working Conditions in Platform Work", Recital 2-3; European Commission, n.d.

[29] Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 "On Improving Working Conditions in Platform Work", Art. 2(1)(h).

working hours. Crucially, this impact also encompasses contract status, including decisions to restrict, suspend, or terminate platform accounts.[30]

Notably, prior to the PWD, Regulation (EU) 2016/679 (GDPR) had already established a general legal framework to address the risk of processing personal data by automated means. The PWD is positioned as a rule tailored specifically for platform workers, offering more specific protection regarding the processing of personal data.[31] However, it must be emphasised that the PWD and GDPR are not mutually exclusive. Instead, the PWD functions as a sector-specific specification that refines and applies the principles of the GDPR in the context of platform work governed by algorithmic management.[32] More precisely, the PWD strengthens and clearly defines the responsibilities of platform operators to ensure fairness, transparency, and accountability when automated systems are deployed to monitor and make decisions regarding the working conditions of platform workers.[33]

2. Ex Ante Transparency in the Platform Work Directive

Although the GDPR had already imposed restrictions on automated systems without meaningful human involvement, it remains uncertain whether these regulations apply. In particular, Article 22 is often debated with respect to decisions made solely based on automated processing.[34] The principle concerning "profiling produces legal effects or similarly significant effects on data subjects" also remained contestable.[35] Furthermore, the existence of a "right to an explanation" of algorithmic decisions under the GDPR remains subject to debate.[36]

Article 9 of the PWD covers all decisions made or supported by automated systems, and requires the *ex ante* disclosure of algorithmic information.[37] Article 9(1) of the PWD imposes obligations on the platform operators to inform workers, workers' representatives, and supervisory authorities about the use of automated systems. This

[30] Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 "On Improving Working Conditions in Platform Work", Art. 2(1)(i).

[31] Ibid., Recital 38-39.

[32] Aloisi, Joppe and Abraha, 2025, 1, 15.

[33] Ibid., 15-16.

[34] Rainone and Aloisi, 2024, 5-6.

[35] Ibid.

[36] Ibid., 6.

[37] Aloisi and Potocka-Sionek, 2025, 17.

Article helps mitigate inherent information asymmetry in platform work, and specifies the information that must be disclosed.[38]

In cases of suspension, platform operators are required to disclose that such systems are being implemented or used, the types of decisions that are made or supported, the types of data and key parameters considered by the system while making suspension-related decisions, and the relative importance of these parameters in the decision-making process.[39] More specifically, this may include detailed information about platform workers, such as their punctuality, order completion rates, time spent in specific areas, order conversion rates, working periods, efficiency, customer feedback, or any other information that contributes to suspension.[40]

Therefore, there is a mandatory obligation under Article 9(1)(b) to provide reasons for any decision involving restriction, suspension, or termination of accounts, or that adversely affects contracts. Moreover, when data and behaviour collected through monitoring lead to account suspension, Article 9(1)(a) of the PWD requires platform operators to clearly explain which type of data or behaviour are being monitored, supervised, and evaluated.[41] Finally, Article 9(1)(c) of the PWD shows that its function is to serve as a general clause to prevent omissions, covering information that does not fall into either of the two categories mentioned above.

3. Regular Human Oversight

In addition to the obligation to disclose information, specific measures are introduced to strengthen the transparency of algorithmic decisions. This provision establishes a mechanism for human oversight of automated systems, which entails the following obligations:[42] (1) impact assessment with the participation of worker representatives; (2) preventive measures for repeated occurrences of high-risk infringement; (3) multi-stakeholder access to evaluation information; (4) mandatory human review for decisions significantly affecting platform workers.

[38] Ibid.

[39] Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 "On Improving Working Conditions in Platform Work", Art 2; International Labour Organisation, 2024.

[40] Zappalà, 2023, 625-626.

[41] Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 "On Improving Working Conditions in Platform Work", Art. 2; International Labour Organisation, 2024.

[42] Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 "On Improving Working Conditions in Platform Work", Art. 10.

4. The Procedural Requirements for the *Ex Post* Protection regarding Suspension

Some obligations and rights related to human review have been introduced to ensure the transparency prescribed in Article 11 of the PWD, composed of empowerment and the imposition of obligations. "Empowerment" refers to granting platform workers the right to request an explanation concerning suspension decisions made by algorithms.[43] Platform operators must ensure that meaningful information regarding the logic behind the processing of personal data is provided, along with explanations of the potential consequences.[44]

Article 11 also requires platform operators to give a sufficiently accurate response without delay, at the latest on the date on which suspension is to take effect. In principle, explanations to platform workers can be provided either orally or in writing. However, platform operators are obliged to explain such decisions in a written statement and to provide those affected with the opportunity to contest and rectify them if any decision is taken or supported by an automated decision-making system that restricts, suspends, or terminates the accounts of workers.[45]

The PWD builds upon the GDPR to establish more specific and robust safeguards applicable to platform work. However, even with a written statement, without establishing corresponding mechanisms, the effectiveness of these rules may be easily undermined. A lack of adequate channels for communicating could effectively preclude platform workers from clarifying decisions that influence their working conditions, including any decision concerning restrictions, suspensions, or terminations to their accounts. This systemic barrier hinders the rights prescribed in the PWD, rendering provisions concerning purpose and substantial protection meaningless.

Therefore, Article 11(1) of the PWD stipulates that platform operators shall designate personnel as the contact person for platform workers, and ensure that platform workers can contact them to discuss and clarify the facts, circumstances, and reasons for the decisions made. Meanwhile, the contact person designated by the platform operator must be functionally qualified, trained, and empowered. These requirements are placed to ensure that platform workers can promptly seek remedies.

[43] Dubal, 2025, 428-429.

[44] Keller and Aplin, 2026, 27.

[45] Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 "On Improving Working Conditions in Platform Work", Art. 11(1) & (3).

Furthermore, if any decisions made or supported by the automated system infringe upon the rights or interests of platform workers, the platform operator must ratify these decisions within two weeks of their adoption. If rectification is not possible, the platform operator must compensate the platform workers for any damages suffered, and take the necessary measures to amend unfavourable outcomes or prevent the recurrence of similar conditions. Therefore, although damages may still occur, taking preventative or compensatory measures can at least help mitigate the risk arising from algorithmic opacity that adversely affects working conditions and privacy rights.[46]

5. Third-Party Participation and Burden of Proof

Despite the remedies prescribed in Article 11, the PWD acknowledges the necessity of complementary external mechanisms and strengthens procedural protections for platform workers within the national procedure. To begin with, Article 19 of the PWD introduces third-party participation in judicial and administrative proceedings to facilitate the effective enforcement of obligations and rights. This provision allows representatives or any entity acting in the interests of platform workers' rights to participate in proceedings regarding suspension decisions.

However, crucial information necessary to establish the facts is often embedded within algorithmic systems and is not readily accessible. Platform operators may refuse to disclose this information or delay its disclosure under the guise of protecting trade secrets. There is little expectation that platform operators will provide complete information, either proactively or upon the request of platform workers. To address this imbalance, the PWD further provides that courts and competent authorities may order the disclosure of relevant evidence in proceedings. For instance, during administrative investigations or adjudicatory processes, an authority may require platform operators to provide relevant algorithmic information to verify compliance with transparency obligations. While adjudicating a private dispute about a restriction, suspension, or termination of platform workers' accounts, the court may also order platform operators to provide algorithmic information to clarify the case.[47]

[46] De Petris, 2024, 476.

[47] Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 "On Improving Working Conditions in Platform Work", Art. 21(1), 24(5).

This article argues that these safeguards are based on the acknowledgment that evidentiary asymmetry tilts in favour of the platform operators, to the platform workers' structural disadvantage. They are designed to fulfil the principle of equality of arms. Whilst unrestricted disclosure of information could infringe on the rights of platform operators and risk irreversible harm to confidential data due to an overly broad scope, courts are expected to require platform operators to submit confidential evidence in relief proceedings with caution. The court will assess the relevance of such evidence to the case and take effective measures to protect the information.[48] This approach demonstrates the EU's efforts to strike a balance between ensuring remedies for platform workers, with respecting the legitimate rights of platform operators.

Finally, no one shall be treated unfavourably for seeking redress through legal procedures. Article 23(1) of the PWD prohibits platform operators from taking adverse action against a platform worker who exercises the right provided for. Regulated action covers any action taken by platform operators that adversely impacts the platform workers' contract status, as indicated in Recital 66, including dismissal, termination of contract, or equivalent actions. The term "equivalent effect" leaves room for interpretation; therefore, the national court may determine it based on the specific circumstances of each case. Article 23(2) creates a right for those who are suspended from their account to request a duly substantiated explanation of the adverse action. Additionally, Article 23(3) reverses the burden of proof, requiring platform operators to demonstrate that such an adverse action was not taken in retaliation.

III. Taiwan's Suspension-Related Protections in the Delivery Sector

1. Limits of Soft Law and Legislative Development

In Taiwan, the controversy surrounding suspension has been widespread and ongoing for many years. The central government initially sought to resolve the issue through platform self-regulation. Its early attempt involved requiring platform operators to propose a self-regulatory convention to protect the rights of delivery platform riders; however, this approach failed to address the problems effectively.

[48] Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 "On Improving Working Conditions in Platform Work", Art. 21(2).

Subsequently, the National Food Delivery Industry Union was established in November 2019, and has continuously made demands to protect riders' rights.[49]

In this context, the local government sought to take further action. The Taipei City Government and the New Taipei City Government initiated a consultation mechanism to draft model terms for standardised contracts. These terms include clauses addressing account suspension and other issues, aiming to guide platform operators seeking to avoid agreements with delivery platform riders on conditions that fall below the minimum standards set out in the model terms.[50] These terms seek to limit the grounds for account suspension to breaches of contract, safety-related misconduct, and illegal activities, and require platform operators to demonstrate that any suspension is proportionate. Further, the model terms require that platform operators must not take adverse action against delivery platform riders who give seven days' advance notice of their absence from delivery services. The model contract terms establish procedures, including the provision of appeal channels and legal recourse, a prior obligation to assess the legitimacy of a suspension, and a requirement to provide a clear explanation, conduct an investigation, and offer compensation for wrongful suspension. It is notable that these model terms serve only as administrative guidelines, and do not automatically bind platform operators. If platform operators refuse to include suspension protection terms, such terms are unenforceable due to the absence of legal authorisation.

Although some food delivery platforms have released appeal mechanisms on their websites following social dialogue, and have listed eight categories of suspension criteria, many aspects of the contract terms remain incomplete and unclear. Therefore, delivery platform riders may not fully understand the criteria for losing partial or full access to their accounts. Further, in some cases, the platform operators have failed to clarify the appeals procedures and processing timelines, leaving riders to wait anxiously for the outcome, unable to know the current progress of their appeals, or when their account access might be restored.[51]

While the platform operator promises to provide advance notice, it unilaterally retains discretion to determine exceptions, and uses illustrative examples rather than an explicit list to explain these exceptions.[52] Consequently, delivery platform riders

[49] Lin, 2024, 46.

[50] Department of Labour, 2024.

[51] Uber, 2025.

[52] Ibid.

may not realise they are at risk of suspension until they receive a suspension notice or attempt to log in to accept orders, only to find themselves blocked from their accounts. Furthermore, the platform operators have not implemented a third-party review mechanism to ensure the impartiality of their review decisions, nor have they sought to provide specific and transparent explanations for their decisions, with the method of explanation not being clearly defined.[53]

Due to the strong demand for protection among delivery workers,[54] and the failure of numerous social dialogues over the years,[55]the Legislative Yuan passed a law to protect delivery platform riders,[56] called the "Delivery Worker Rights Protection and Delivery Platform Management Act" (hereinafter referred to as "the Act"), which includes regulations on suspension.

2. Taiwan's Legal Protection against Account Suspension

This section explains how Taiwan's approach addresses account suspension and equivalent adverse actions by introducing various legal instruments. To adequately protect delivery platform riders from unfair suspension and the infringement of their rights, the Act establishes both *ex ante* and *ex post* protection mechanisms.

The standardised contract regulation serves as a crucial *ex ante* protection mechanism against arbitrary suspension through administrative intervention. This approach follows the regulatory framework established by the Consumer Protection Act, which allows the government's administrative authority to intervene in private contractual agreements to mitigate information asymmetry and address economic disparities between the parties involved. It retains considerable regulatory flexibility for the central competent authority to determine contract terms in delivery service contracts, and to regulate account suspensions without valid grounds. Compared to the model contract terms drafted by local governments, the standardised contract regulation represents a shift in Taiwan's position on delivery service contracts: from relying on platform operators' self-regulation, towards adopting a legally mandated approach.

In addition, the Act establishes *ex post* protection mechanisms by combining the interpretation of the grounds for suspension, the burden of proof, the appeals

[53] Ibid.

[54] Wang and Chen, 2021, 111.

[55] Uber, 2025; Ministry of Labour, 2025.

[56] Ministry of Labour, 2026.

system, and the obligation to preserve documents. The regulation on interpreting the grounds for suspension and the burden of proof requires platform operators to address situations where delivery platform riders are unable to access information about restrictions on their accounts. The regulation regarding the appeal system aims to provide delivery platform riders with a transparent channel and set a list of items for platform operators to add to the appeal system. This provision plays an important role in ensuring that delivery platform riders have a channel to clarify the reason, contest the decision, and restore their rights or access to their accounts. The regulation on the obligation to preserve documents prevents platform operators from refusing to provide relevant documents on the grounds of data destruction. Overall, these regulations ensure both substantial justification and procedural protections.

3. Standardised Contract Regulation as *Ex Ante* Protection against Arbitrary Suspension

Standardised contract regulations impose an *ex ante* restriction on platform operators' arbitrary suspensions by setting minimum standards for suspension and limiting the inclusion of unilateral contract terms that are detrimental to delivery platform riders. Certain provisions also explicitly define the validity of terms that conflict with the required and prohibited provisions, significantly increasing the intensity of administrative intervention and demonstrating a strong orientation towards administrative control. A press release issued by the Ministry of Labour explained that platform operators possess substantial informational and technological advantages, which have led to significant market monopoly power.[57] To enhance the fairness and reasonableness of the rights and obligations of relevant stakeholders, the competent authority may develop standardised contract terms or templates.

Article 3 of the Act codifies the platform's procedures regarding adverse actions taken against delivery workers who violate delivery service contracts. This article defines "suspension" as the temporary cessation of order allocation by the delivery platform. Article 4 addresses the inherent imbalance arising from delivery platform riders' lack of bargaining power to negotiate contract terms with platform operators. Since the contract terms, unilaterally drafted by the platform operator, frequently lead to disputes over rights and obligations, this Article delegates the Ministry of Labour to set mandatory or prohibitory provisions for delivery service contracts to

[57] Ministry of Labour, 2026.

rectify the imbalance between the parties. Furthermore, this Article also stipulates that such provisions should include protections related to suspension, and specifies the legal effects of any violations.

To prevent the unilateral modification or coerced agreement to contract adjustments, Article 4(3) of the Act prohibits platform operators from taking adverse actions against delivery platform riders to force them to agree to modify or supplement the contract. It also regulates that any adjustments to the contract made without consent are invalid. The purpose of the Act specifies the regulations on suspensions that cover any direct or indirect adverse actions, such as restricting delivery platform riders' abilities to log into the app or accept orders, reducing the number of orders allocated, suspending their accounts, or terminating their contracts. To ensure delivery platform riders are aware of their key rights and obligations under the contract, Article 4(4) of the Act also imposes an obligation on platform operators to provide delivery service contracts. The platform operator may provide the contract electronically or in writing within seven days of its establishment.

4. The Procedural Requirements as *Ex Post* Protection against Suspension

The Act also introduces a set of legal instruments, including the obligation to provide reasons and bear the burden of proof, the obligation to preserve documents, and an appeal system. Since platform operators often fail to clearly explain the standards for suspension or to justify the legitimacy of suspensions, it becomes difficult for delivery platform riders to resolve disputes and protect their rights after being suspended. To prevent platform operators from arbitrarily suspending riders' accounts, or making other adverse decisions that affect their rights, Article 7 of the Act requires platform operators to notify delivery platform riders of the reasons for suspensions and other adverse decisions, and to provide them with an opportunity to appeal. Moreover, this Article shifts the burden of proof, requiring platform operators to demonstrate the justification for suspension.

Article 20 of the Act further stipulates that platform operators must retain relevant records of delivery riders for at least two years. These records include, but are not limited to: (1) delivery service contracts; (2) the periods during which delivery riders provided services on digital platforms; (3) activity times; (4) suspension records; and (5) records of adverse actions taken against delivery platform riders by platform

operators through algorithms or other methods. When the competent authority requests access to these records, the platform operator must provide them.

When platform delivery riders have disputes with platform operators regarding suspension or contract termination, the lack of effective appeal channels can easily lead to an infringement of their rights. Therefore, Article 9 of the Act requires platform operators to establish appeal mechanisms to protect riders' labour rights and ensure procedural justice. The appeal mechanism must contain appeal channels, investigation procedures, processing timelines, response methods, and compensation measures following a successful appeal, and these details should be disclosed publicly. Platform operators are prohibited from taking adverse action against riders who file appeals regarding their own suspension disputes, or who assist others in doing so. Although the Act provides multiple protections for platform delivery riders, the key to ensuring adequate protection lies in effective implementation. To ensure that platform operators comply with their legal obligations and cooperate with the competent authorities by providing relevant records, Article 24 of the Act stipulates penalties for non-compliance.

IV. Shared Protective Functions and Divergent Paths in the EU and Taiwan

1. Ex Ante Disclosure of Suspension-Related Information

Since account suspension affects platform workers' job opportunities and income, they should have a clear understanding of the suspension standards, procedures, and potential consequences. The PWD facilitates *ex ante* transparency by requiring platform workers to disclose information about automated systems in advance. Taiwan's new legislation fulfils the same function through standardised contract regulation and mandatory provisions regarding account suspension drafted by the competent authority. Both the PWD and Taiwan ensure transparency of suspension criteria.

2. Ex Post Explanations for Suspension Decisions

Effective protections require that any decision to suspend an account be provided with a clear and comprehensible reason. Without such an explanation, workers cannot assess the reasonableness of the decision. Under the PWD, platform operators are obliged to provide a written statement of the reasons when an automated system

makes or supports a decision to restrict, suspend, or terminate accounts. Similarly, Taiwan's new legislation requires platform operators to provide delivery platform riders with a reason for suspension in a complete, concise, and intelligible manner, and to bear the burden of proof to demonstrate the validity of those reasons.

3. Contestability of Suspension Decisions

Ensuring that decisions can be challenged is crucial for protecting the rights of platform workers. The PWD introduces third-party participation in relevant procedures, and provides platform workers with the right to contest and rectify unjustified decisions. To ensure an effective channel for platform workers to assert their rights, the PWD also requires that the personnel handling complaints possess the necessary skills, training, and authority. Taiwan's new legislation requires platform operators to establish an appeal mechanism and to disclose it publicly. Both the PWD and Taiwan's new legislation provide mechanisms to ensure that platform workers can contest and require platform operators to rectify the decisions.

4. Mitigating Evidentiary Imbalance

Disputes over suspension-related decisions made by an algorithm are often opaque because platform operators do not typically disclose such information. The PWD stipulates that competent authorities and courts may require platform operators to bring forward evidence. Taiwan's new legislation shifts the burden of proof, requiring platform operators to prove the justification for suspension. These provisions help effectively reduce obstacles to legal redress.

5. Prohibition on Retaliation

Without supporting measures to prevent platform operators from making adverse decisions, platform workers may be reluctant to assert their rights for fear of retaliation. The PWD shifts the burden of proof to platform operators, who must demonstrate that they are not making adverse decisions in retaliation. Taiwan's new legislation also adopted similar provisions to safeguard the exercise of platform workers' rights.

Although the EU and Taiwan adopt different approaches and operate within different legal frameworks, they share a common protective goal. In both jurisdictions, relevant rules seek to mitigate information asymmetry, prevent arbitrary suspension, and ensure effective remedies.

V. Conclusion

Account suspension has been identified as a significant concern arising from algorithmic management. Although the EU and Taiwan adopt divergent regulatory approaches, both jurisdictions share the common goal of enhancing transparency and procedural justice in relation to account suspensions. From the EU's perspective, platform operators use vast amounts of personal data collected through automated monitoring systems to make or support decisions regarding working conditions. Transparency in algorithmic management, implemented through *ex ante* obligations of disclosure and *ex post* explanations, serves as a vital mechanism for reviewing the use of personal data and clarifying the underlying facts of decisions taken or supported by automated systems. Similarly, Taiwan has developed a standardised contract regulatory mechanism and an obligation to provide explanations to prevent unjustified suspensions, which function similarly to the EU's transparency obligations.

In addition, both jurisdictions require platform operators to establish an appeals mechanism, and prohibit them from taking adverse action against delivery platform riders who assert their rights. These provisions ensure procedural justice and bolster the contestability of suspension decisions. To enable platform workers to properly exercise their rights, both the EU and Taiwan prohibit platform operators from retaliating. More importantly, information asymmetry often makes it difficult for platform workers to seek redress. The reversal of the burden of proof addresses the evidentiary asymmetry between platform operators and platform workers in both legal frameworks. Despite differences in legal instruments, both the EU and Taiwan mitigate information asymmetry and ensure procedural justice in platform work.

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Challenges for Legislation Related to Political Transformation and European Integration

ABSTRACT

The aim of the article is to identify the reasons for the declining quality of legislation in Poland since 1989. The focus is not on the substance of regulations, which reflect the political choices of lawmakers, but rather on an assessment of law from the perspective of its formulation and legislative correctness. The current state of Polish law is found to be unsatisfactory, even when compared to legislation enacted during the period of so-called real socialism, that is, under a non-democratic regime. How can this paradox be explained?

According to the author, it is partly a consequence of the inherent characteristics of democratic systems, in which law assumes a far greater role as a regulator of social relations than it does in autocratic systems. The principle of legalism precludes governance through arbitrary or discretionary acts, while the logic of the post-1989 political system frequently necessitates rapid and often imperfect changes to legal regulations. Although law embodies certain autonomous values, its instrumental use has not been entirely avoidable.

These circumstances, of course, do not excuse legislators from enacting poor-quality law; however, they undeniably create challenges that did not exist under the previous system. The flawed model for implementing secondary European Union law is also worth noting, as it contributes to further inconsistencies within the national legal system.

Keywords: Legislation, political transformation, principles of lawmaking, implementation of European Union law, repressive law, autonomous law.

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I. The Political and Legal Context of Systemic Transformation in Poland

The collapse of the communist system in Central and Eastern Europe initiated a years-long process of systemic transformation, encompassing both political and socio-economic changes. The political consensus reached by the communist authorities in Poland at the Round Table in April 1989, with the opposition representatives gathered around the Solidarity trade union, (founded in August 1980), assumed an evolutionary shift away from authoritarian rule, and the gradual implementation of free market principles. Looking back, we know that the government's intention was to share power in the face of the impending economic catastrophe, while maintaining a number of economic privileges and guarantees of security for high-ranking officials of the former regime, and of impunity for members of the state's repressive apparatus. For this reason, the process of democratization was initially planned to take several years, with the ruling party retaining a dominant share of power. Accordingly, the first parliamentary elections following the Round Table talks in June 1989 were only partially free. Communist-leaning parties were guaranteed 65% of the seats in the Sejm (the lower house of Parliament), whereas elections to the Senate (the upper house) were fully competitive. The last communist dictator was initially slated to become the first president. Although this plan was partially implemented, significant changes occured relatively quickly. The new government was headed by the first non-communist prime minister, Tadeusz Mazowiecki, while key ministries remained in the hands of communist party representatives. After a dozen or so months, the presidency changed hands, with Lech Wałęsa, chairman of the Solidarity trade union, assuming office in late 1990. Finally, in the autumn of 1991, Poland held its first fully free parliamentary elections.

Economic reforms aimed at implementing free market principles began earlier, albeit still within the framework of the socialist system. As early as 1988, citizens were allowed to establish businesses of their own, a reform of which they readily took advantage. However, the shift away from the centralized planned economy only occurred after the political collapse. From the end of 1989, the economy began, at least theoretically, to be gradually freed of direct state influence, accompanied by the large-scale (and not always transparent) privatisation of state-owned enterprises.

It is obvious that the phenomena described above required an appropriate legal framework. However, the state did not opt for a radical departure from the existing

principles: laws enacted during the period of real socialism remained in force until appropriate amendments were made. Therefore, the first years of the systemic transformation were characterised by intensive legislative activity. Constitutional changes were undoubtedly crucial – at the end of 1989, the state was given a new name (the Polish People's Republic became the Republic of Poland), and a number of regulations at the foundation of the socialist system of government were removed from the Constitution. Then, in 1992, mutual relations between state authorities were redefined, and finally, in 1997, a new Constitution was adopted. However, the author's intention is not to provide a detailed analysis of the evolution of Poland's law and political system after 1989. Rather, the aim is to examine a troubling phenomenon that has persisted since the restoration of the democratic system. According to a widely held belief, the quality of law has significantly deteriorated over the last 35 years. While this claim may seem surprising, it is confirmed by the author's personal experience.[1] The following discussion therefore seeks to explore the causes of a phenomenon that can be described as "poor" or "bad" legislation.

The article discusses the impact of systemic transformation on the state of legislation in Poland. However, the considerations contained in it may also interest readers from other countries that, almost 40 years ago, were directly or indirectly dependent on the Soviet Union and who share experiences of authoritarianism followed by the building of a democratic system.

II. Legislation at the Beginning of Systemic Transformation in Poland

The term "legislation" typically has a double meaning: first, as the lawmaking activity of competent public bodies, and second, as the result of that activity. Legislation is therefore a process or product of intentional lawmaking, meaning it is a younger phenomenon than law itself. F. A. Hayek rightly noted this apparent paradox when he wrote that "law had existed for centuries before it occurred to man that he could create or change it."[2] Legislation should thus be associated with statutory law, which is formalised using the concepts of the legal language. In legal discourse, legislation is often viewed more narrowly, being equated simply with the "legislative technique", i.e., the rules for formulating legal texts.[3] The way in which law is "expressed", that

[1] Stelina, 2022, 25 et seq.

[2] Hayek, 2020, 118.

[3] Wróblewski, 1989, 134.

is, given the form of a statement of specific formal features and meaning, is crucial to the functioning of law, as it fundamentally influences the legislator's achievement of its intended goal. It is in that very sense, i.e., as a "legislative technique", that the term "legislation" will be used in the present study.

For many decades, the principles of legislative technique were being formalised, initially in the form of written directives contained in provisions of a guidance nature,[4] and recently also in normative acts.[5] They have additionally attracted significant attention from legal scholars, and the preparation of draft legislation is now the responsibility of a large group of specialized legislators, effectively constituting a distinct legal profession. Present-day legislators have modern tools at their disposal, including word processors and electronic databases of legal acts, to help enhance the coherence of the legal system. All this suggests that the quality of law – at least technically – should be higher than before. However, as mentioned above, there is a widespread belief that the quality of legislation is steadily declining, as evidenced by the daily experience of practicing lawyers. The law is increasingly unstable; a situation that burdens politicians more than it does legislators. At the same time it is becoming progressively more difficult to understand. Errors in legal texts are sometimes corrected even before the provisions enter into force, while subsequent amendments often further complicate the legal landscape. It is hardly surprising, then, that the pre-WWII acts, and even the legislation from the era of real socialism, are often cited as a counterpoint to the currently developed legal regulations, and are held up as models for contemporary legislators. But can legal acts of a good quality really be created in a non-democratic state? *Prima facie*, a question like that may seem shocking. After all, the main characteristic of the lawmaking process of that period was its complete voluntarism and strong entanglement with ideological and political contexts. However, there were also regulations that can be, to a greater or lesser extent, viewed as neutral from this perspective. Should we distinguish between legislative technique and the values (or anti-values) expressed by the law enacted at the time, then the above observation may be justified with respect to a number of legal acts.

In my opinion, the political transformation and the principles of functioning of a democratic state have played a significant role in the phenomena described here,

[4] See: Regulation No. 55-63/4 of the Prime Minister of Poland of 13 May 1939, Regulation No. 238 of the Prime Minister of Poland of 9 December 1961, Resolution No. 147 of the Council of Ministers of Poland of 5 November 1991. In

[5] Ordinance of the Prime Minister of 20 June 2002 "Provisions on legislative technique".

related to the deterioration of the quality of law. Certainly, the enactment of poor--quality legislation is not the intention of state bodies, nor do they deliberately seek to undermine the legislative process. Rather, attention should be drawn to certain phenomena that naturally occur within democratic systems and that, in a sense, incidentally affect the quality of legislation. It is therefore worth taking a closer look at the impact of the transformation processes of the late 1980s and early 1990s on legislation, to see if the Polish experience overlaps with that of other countries which, until the late 1980s, were part of the so-called Eastern Bloc.

The period of systemic transformation, initiated by the political consensus reached at the abovementioned Round Table, symbolically ended with the Constitution of 1997 entering into force.[6] Without a doubt, it resulted in fundamental changes in all areas of public life. Building a new political, economic, and social order required designing targeted solutions, convincing society to accept them, and then consistently implementing the goals. It also entailed making appropriate amendments to the law. While, theoretically, these actions should have taken place in parallel, the dynamics of social processes did not always allow for it. Particularly at the beginning of the transformation, legal changes lagged behind institutional developments: the erosion of the political system outpaced legal changes, and the formal legal system diverged significantly from the actual political reality. This was especially evident in the second half of 1989, when, at the height of the political crisis, the Constitution of 1952, providing among other things for the leading role of the Communist Party and the state's alliance with the USSR, remained formally in force. However, following the elections of June 1989 and the appointment of a new government in September of that year, headed by the first non-communist prime minister, these constitutional provisions became, in practice, devoid of real effect.

The legal and institutional instability at the beginning of the political transformation (that is, the divergence between the political system and the formal legal order), was more an expression of political realism among opposition circles, who aspired not only to seize power but, above all, to implement fundamental changes in the state, than an acceptance of the existing systemic practice known from the previous system, when law was purely instrumental to politics. The negation of this state of affairs, and thus the departure from complete political and legal voluntarism, was intended – at

[6] S. Wronkowska refers to the period as an "interim constitution era" (*Na czym polega dobra legislacja?* [What Does Good Legislation Consist of?], Przegląd Legislacyjny, 1/2002, 112).

least at the declarative level – to be the beginning of a new constitutional order. Its main pillar was the principle of a democratic state of law, introduced into the Constitution of the Polish People's Republic by an amendment made in December 1989, and later consolidated in the new constitution.[7]

What was the impact of the changes on the rules of lawmaking? Primarily, we should point to more transparent lawmaking procedures and a streamlined system of legal sources, as well as a new axiology of the state's political system and the different perception of the role and importance of law resulting therefrom. The break with totalitarianism meant a gradual shift from the repressive legal system typical of non-democratic states. In such systems, the focus is primarily on ensuring order: the authorities expect obedience from citizens (disobedience *per se* being punished as a crime), and coercion is extensive. Repressive law is subordinated to politics and treated instrumentally. Of course, law is always a tool of governance, as it serves to achieve specific goals set by politicians. However, in a repressive system, it is devoid of certain autonomous values, and binds those in power only to a limited extent,[8] with its creation being arbitrary in nature.[9] According to Polish legal doctrine, arbitrary legislation can take many forms, its most extreme form being despotic law, in which the lawmaker acts in an ostentatiously arbitrary manner and enforces obedience to established norms by force. A milder form of arbitrary legislation is the paternalistic law. It is clear that Polish legislation in the final years of real socialism was of precisely such a nature. The lawmaker was often willing to make concessions and compromises, although it was he who set the limits.[10] Of course, even this milder form of arbitrary legislation did not fit with the axiology of a democratic state governed by the rule of law.

Although towards the end of the period of real socialism, certain institutions alien to repressive law were introduced (administrative and constitutional courts and the Commissioner for Human Rights - the ombudsman), they were, nevertheless, largely superficial; only initiating what was later called by legal scholars a *sui generis*: "reinstatement of the legal culture."[11]

[7] "The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice" - the Constitution of the Republic of Poland, 2 April 1997, Art. 2.

[8] Nonet and Selznick, 2017, 16.

[9] Kustra, 1994, 38.

[10] Wronkowska, 2009, 113.

[11] Ibid.

III. Legislative Conditions in Democratic Systems

The systemic transformation in Poland, as in most other countries of real socialism, led to the replacement of repressive law with a system of autonomous law, which, according to the scheme proposed by Philip Selznick and Philip Nonet, represents the next, more advanced stage of legal development, characteristic of democratic systems. Autonomous law arises as a result of political consensus. To enact legislation, political actors must first win elections, and thus persuade the electorate to support their proposed programmes and policies.

As a result, law is more independent of politics, coercion is subject to institutional control, and legal norms assume a general character, binding the rulers and the governed equally, and the justification of legal decisions favours compliance with the law[12] itself.

The role of the courts is also crucial. In the autonomous legal system, lawmaking is based on a legalistic model.[13] One of its fundamental constitutional assumptions is the principle of legalism, according to which all state bodies require a legal basis for decision-making. The principle that "everything that is not prohibited by law is permitted" applies in the private sphere, while a different principle applies to state authorities: "only what is permitted by law is permissible; only what is required by law is required."

The changes in the axiological foundations of lawmaking that occurred as a result of the systemic transformation initiated in 1989 consisted primarily of the recognition of personal rights and freedoms, as well as numerous principles of the rule of law, which set the limits to legislative discretion. The lawmaking system thereafter clearly took on the characteristics of a legalistic model.[14]

It is worth considering what these changes meant for legislation. Primarily, law gained importance as a genuine tool for regulating social and political relations, rather than serving merely as a façade, as had previously been the case. It became more enforceable, as the role of legal protection agencies, established to safeguard the legal order (e.g., courts, the Commissioner for Human Rights, etc.), was expand-

[12] Nonet and Selznick, 2017, 16. The highest phase of legal development, according to these authors, is the so-called responsive legal system, in which law is "open" to social needs and aspirations, coercion is replaced by self-limiting obligations, the justification of legal decisions is teleological in nature, and law-making assumes citizen involvement.

[13] Kustra, 1994, 40.

[14] Wronkowska, 2009, 114.

ed. Although some of those bodies had existed earlier, it was only with the beginning of the systemic transformation that they gained real significance in carrying out their assigned tasks.

In a totalitarian state, all state institutions inevitably reflect, to a greater or lesser extent, the totalitarian character of the system. Until December 28, 1989, only a person who guaranteed the proper performance of judicial duties in the Polish People's Republic could become a judge. Upon assuming office, a judge swore, among other things, to uphold the political, social, and economic system of the Polish People's Republic, and to protect the achievements of the working people and public property. Moreover, the political authorities retained the power to dismiss judges if they were deemed as having failed to provide such a guarantee. Judges, as guardians of the system, were therefore expected to make certain that in a dispute between citizens and the political authorities, they would side, if necessary, with the latter (assuming that such disputes were heard by the courts at all, which was itself rather unlikely).

Only the systemic transformation initiated in 1989 enabled the formal ties between the political authorities and legal protection bodies to be severed, and, at least declaratively, for there to be a shift away from the primacy of politics over law. The sole remaining link between these spheres became law itself, which, in a democratic state governed by the law, derives its legitimacy from the nation and should conform to specific standards and values, while also providing clear and precise guidelines of conduct.

Deprived of influence over the judiciary, the political authorities strive to strictly enunciate provisions so as to preclude diversion of court rulings from the lawmaker's intentions. The role of general terms is therefore limited, and regulations become increasingly detailed, often casuistic. This, in turn, contributes to what may be described as a legislative spiral, i.e. changes in law made in response to court activity. However, casuistry rarely produces good results: more often, it leads to the disintegration of regulations, thus corrupting a legal system, which – by the very nature of things – should be based on general and abstract norms.

As previously mentioned, in the autonomous legal system, legal rules bind both those who rule and those who are governed to the same extent. As a result, in accordance with the principle of legalism, each state body may act only on the basis of and within the limits of law. Such conduct behaviour is subject to judicial review and, through democratic mechanisms, also to social control. Acting outside the law entails specific consequences, both political and legal. If no legal basis exists for a particular action, the legal basis must be created. Importantly, this basis must take the form of

a specific legal provision rather than general guidelines or broadly defined competences. Consequently, the Constitution of 1997 reorganized the system of sources of universally binding law.

Ipso facto, the legal component, in the form of an appropriate legal basis, has become inherently linked to the quality of the power exercised by state authorities. Poorly drafted legislation undermines the effective performance of public tasks to a similar extent as incompetent officials or inept political leadership. It should be noted, however, that the growing prominence of legal issues has contributed to a certain fetishisation of law, understood as the tendency to treat legislation as the primary, or, even worse, the sole, means of addressing social problems.

Such a fetishisation of law is largely possible only in democratic systems, as it is precisely within them that law is taken so seriously. The difficulty arises when the enactment of a law marks the end, rather than the beginning, of a process of resolving a given problem. Political actors have successfully persuaded society that a change in the law constitutes a sufficient response to many public issues, which in turn encourages the continual adoption of regulations. The belief that the mere enactment of legislation is tantamount to solving a problem has something of a "magical" quality, and significantly influences the legislative process. First, it promotes the proliferation of regulations: while it is relatively easy to amend the law, it is far more difficult to address the underlying issue. It also creates a temptation to resort to the simplest measures, particularly since the executive power can quickly proclaim a "success".

Such a pattern of action, however, seldom aligns with the quality of law itself, as the expectation is for the law to be adopted quickly, without lengthy and in-depth analyses of its consequences.[15] Laws are thus passed frequently and, when necessary, quickly. At times, legislation is adopted merely to provide the executive branch with a form of political alibi should it later be called upon to account for its actions. In such circumstances, responsibility can easily be diffused, or even shifted, since the legislature that enacted the defective law can also be said to have contributed to the eventual failure.

IV. Legislation and European Integration

Another factor that has had a significant impact on Polish legislation deserves mention: the challenges brought about by European integration. One of the condi-

[15] Łętowscy, 1996, 22.

tions for Poland's accession to the European Union, which ultimately occurred on May 1, 2004, was the harmonisation of national law with EU legislation. This constituted a massive undertaking that required finding an effective implementation method. Unfortunately, such a method has never been fully developed, and this continues to negatively affect the situation even after Poland's accession to the European Union, as the ongoing implementation of EU law must be ensured on a continuous basis.

It should be emphasised that the author does not address substantive questions here, such as the justification for or necessity of adopting ever more regulations. Addressing such matters would require a separate study. Therefore, at this point, the author will limit himself to expressing the view that the method of implementing EU law adopted by the Polish lawmaker is fundamentally flawed. Without going into a detailed analysis, it is sufficient to note that, all too often, the implementation of European Union directives involves enacting laws that are literal translations of the directives themselves. In this way, provisions "implanted" into the Polish national legal order often remain incompatible with it terms of their nature, the identification of the law's addressees, and/or their operational mechanisms.

EU directives are intended to set out general objectives that should be achieved through appropriate amendments to national law. They use specific terminology that often deviates from the frameworks developed in individual countries, and which is not always consistent with their established legal traditions. Consequently, the literal translation of a directive and its direct incorporation into the domestic legal system, without adequate adaptation, is difficult to justify. And yet it happens. It goes without saying that such practices significantly undermine the coherence of the national legal system.

V. Final Conclusions

To summarise the current legal landscape in terms of legislative correctness, it may be observed that it is characterised by an excess of regulations, many of which are of questionable quality. As the preceding discussion suggests, this paradox is, at least to some extent, a consequence of the growing importance of law as a regulator of social relations. The principle of legalism excludes governance through arbitrary acts, while the logic of the political system that emerged after 1989 often compels rapid and, unfortunately, not always carefully developed legislative changes. Although the law reflects certain autonomous values, its instrumental use has not been effectively

avoided on a broad scale. Despite its proclaimed independence from politics, law remains closely tied to political processes, not only because it is one of the instruments of governance, but also because legislative bodies are deeply entangled in political struggles, in which the quality of law is sometimes sacrificed.

Naturally, these circumstances do not justify the enactment of poorly drafted legislation. Nevertheless, they present legislators with challenges that were largely absent in earlier periods. Any accurate account of contemporary lawmaking must also take into consideration the often flawed model of implementing secondary European Union law, which further contributes to inconsistencies within national legal systems.

Consequently, what is frequently described as "bad" law is simply the result of a dysfunction in the democratic system, rather than the quality of the legislators. In fact, the legislators serve a subservient role to politicians who, in pursuit of their own political goals, may be willing to sacrifice legislative quality in favour of effectiveness or political success.

As renowned German physicist Werner Heisenberg once said, "Everyone has the right to happiness, but not everyone has the right to happiness at the expense of others." Nonetheless, the continuous improvement of the art of legislation remains a worthwhile endeavour. The first step toward this goal is an accurate diagnosis of the current state of affairs. The present study seeks to contribute to that task.

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The Institution of Proxy Voting in Polish Electoral Law: A Guarantee of Universal Suffrage or a Threat to Election Integrity?

ABSTRACT

The aim of the article is to analyse the institution of proxy voting in Polish electoral law and to determine whether it serves as a mechanism that effectively guarantees the exercise of active voting rights, or whether it instead creates opportunities for potential irregularities. There is no doubt that, due to its nature, proxy voting is more controversial than other alternative voting methods, such as postal voting. This paper seeks to answer whether, in Polish electoral law, proxy voting broadly facilitates and strengthens the principle of universal suffrage, or whether it poses a risk to the integrity of elections.

For this analysis, I applied the method of legal interpretation to examine the provisions governing proxy voting, and reviewed the relevant literature. Where necessary, I also referred to the institution of proxy voting in other legal systems, and considered European standards set out in the Code of Good Practice in Electoral Matters.

Keywords: elections, voting, proxy, alternative voting methods, principle of universal suffrage, principle of equal suffrage, principle of election integrity

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I. Introduction

Proxy voting is an institution used in a variety of legal systems, generally intended to enable individuals who, due to personal circumstances, are unable to attend, or face difficulty attending, a polling station on election day to cast their vote. The specific characteristic of this mechanism is that the voter's ballot is cast through another person, an authorised proxy designated by the voter-principal and in accordance with their instructions.[1]

In a sense, proxy voting constitutes a departure from the principle of personal voting, according to which the right to vote is strictly personal and cannot be transferred to another person.[2] The special relationship binding the voter and their proxy has two typical features. Firstly, the appointment of a proxy and the entrusting of the act of voting must follow an official procedure, allowing verification of the rights and eligibility of both the voter-principal and the proxy. Second, the regulations typically define a narrow group of persons entitled to use this procedure, rather than extending it to the entire electorate. Moreover, national legislators typically require that a person designated as a proxy (representative) must themselves hold voter status in the relevant election, that is, they must meet the legal requirements to vote and, in many cases, be registered in the same electoral district;[3] otherwise, it would be difficult to find a justification for this person to be able to vote on behalf of another, eligible voter.

The proxy voting procedure is based on the issuance of an official document (a power of attorney) confirming the authorisation of the proxy to vote on behalf of the principal. The proxy submits this document to the electoral commission and on its basis, it is possible to give them a ballot paper. The power of attorney letter is prepared through a formal procedure which serves to verify its authenticity.

Proxy voting is therefore one of the standard alternative voting methods, usually mentioned alongside postal voting, early voting, mobile ballot boxes or electronic voting.[4] Legislators introduce it with the goal of facilitating voters' ability to cast their ballots, thereby supporting the principle of universal suffrage and reducing obstacles to the exercise of fundamental political rights.[5] This method is often particularly directed at older voters or individuals with disabilities, enhancing the inclusiveness

1 Sromecki, 2023, 89.

2 Skotnicki, 2000, 262.

3 Barrat et al., 2023, 184; Krasnowolski, 2015, 13-14.

4 Musiał-Karg and Kapsa, 2021, 348.

5 On alternative voting methods see for example Zbieranek, 2011, 95.

of the electoral process.[6] It should also be emphasised that including proxy voting among the alternative voting methods means it is an optional tool available to voters, and is not intended to replace traditional in-person voting. Eligible voters must retain the ability to vote in the standard manner, as treating proxy voting as mandatory would undermine its core characteristic as an "alternative" method.

The aim of this study is to analyse the institution of proxy voting in Polish electoral law, and to determine whether this measure constitutes a mechanism guaranteeing the implementation of active voting rights among voters, or rather that it is a measure that may constitute a source of potential irregularities that compromise the democratic character of the election process.

There is no doubt that this mechanism, due to its specific design, is more controversial than, for example, postal voting. This paper will therefore seek to examine whether proxy voting in Polish electoral law in a broader scope facilitates and strengthens the principle of universal suffrage, or instead constitutes a threat to the principle of election integrity.

To conduct this analysis, the study relied on interpreting the law in force to examine the provisions regulating the proxy voting mechanism, and reviewing the relevant literature. To the extent necessary, the institution of proxy voting applied in other legal systems was referred to, as were European standards set out in the Code of Good Practice in Electoral Matters.

II. Proxy Voting in European States

At the European level, the institution of proxy voting is addressed by the guidelines included in the Code of Good Practice in Electoral Matters adopted in the Council of Europe system by the Venice Commission in 2020.[7] This document is a soft law act that sets out key standards for democratic elections, developed based on the common experience of European countries and the principles of the European electoral heritage. Pursuant to this document, the use of the proxy voting procedure is permissible because it is, in fact, a mechanism guaranteeing the principle of free elections. It is worth emphasising that the Venice Commission attaches great importance to the need to increase the inclusivity of elections, in particular in the context of people with disabilities,[8] to whom this type of procedure can be addressed.

6 OSCE, 2020, 21.

7 Venice Commission, 2002, 12.

8 Venice Commission, 2011.

The Code of Good Practice in Electoral Matters stipulates that the application of the mechanism in question should be based on rigorous and precise regulations. The legislator should avoid granting excessive discretion in the use of proxy voting – whether concerning the eligibility of authorised persons, the procedure for granting a power of attorney, the maximum number of powers of attorney, or their validity period – to prevent this mechanism from being exploited to influence election outcomes.[9] Voting by proxy, to a greater extent than other alternative voting methods (e.g. postal voting), creates a risk of abuse because the voter-principal does not have full control over the proxy's actions. The Code of Good Practice in Electoral Matters provides that the number of permissible powers of attorney granted to a representative under national law should be limited. The purpose of this measure is to exclude cases of abuse consisting of the accumulation of several power of attorney documents in the hands of one person who supports a specific candidate or political force, as well as to prevent mechanisms of paid collection of power of attorney letters for voting.[10]

De lege lata, proxy voting is not a widespread institution in Europe or the wider world. Indeed, globally, only 15.7% of countries exercise this option.[11] Most countries that employ proxy voting are located in Africa (14 countries) and Europe (9 countries). In African nations, this mechanism is primarily used to enhance electoral accessibility under challenging logistical conditions (e.g., transportation problems, distance to polling stations). In Europe, proxy voting is practised in France, Belgium, the Netherlands, Poland, Spain, the United Kingdom, Sweden, Andorra, and Monaco,[12] demonstrating that proxy voting is used primarily by countries classified as established democracies, with Poland being an exception, where democratic traditions are relatively young. It is also worth noting that all the European countries mentioned above, where proxy voting is used, are members of the Council of Europe, which allows this option. During the COVID-19 pandemic, the proxy voting institution was introduced in Croatia as an extraordinary measure.[13]

As a rule, in countries that have decided to introduce proxy voting, this form is only available to specific groups of voters, and these groups differ from one another.

[9] Koksanowicz, 2019, 47.

[10] Jackiewicz, 2016, 268.

[11] International IDEA, <https://www.idea.int/data-tools/tools/special-voting-arrangements/proxy-voting-in-country> [3.12.2025].

[12] Rabitsch, Moledob and Lidaue, 2023, 524; International IDEA, <https://www.idea.int/data-tools/tools/special-voting-arrangements/proxy-voting-in-country> [3.12.2025].

[13] Ehin and Talving, 2024, 68-69.

In some systems, this option is available to elderly or disabled people (e.g., in Belgium, France, and Poland), those in prison (e.g. in Belgium, France, and Sweden) or those living abroad (e.g. in the UK).[14] Some systems also allow for the application of this institution to voters caring for sick or infirm persons, or persons that are on holiday (e.g. in France).[15] An exception to the principle of strict regulation of the circle of eligible persons is the Dutch system, in which this right is granted to every voter, regardless of the reason.[16] They can exercise this option if they know they will not be able to vote in person (on site) on election day.[17]

The institution of proxy voting also varies considerably across countries in its defining features. For example, in most countries, the same person can accept only one (e.g. in Belgium[18]) or a maximum of two powers of attorney (e.g. in France[19]). As a rule, power of attorney in voting is granted for one specific election, while, in Great Britain, it is a general authorisation, meaning that it is granted for an indefinite period of time.[20] Legislators in individual countries also approach the problem of withdrawing a granted power of attorney differently. In countries such as Belgium, France[21] and Great Britain,[22] revocation of a power of attorney is possible, unlike in the Netherlands, where such a declaration would be legally ineffective.

It is also important to distinguish proxy voting from another, more widely used institution: providing physical assistance to a voter directly at the polling station, a practice in some countries (e.g. in Poland[23] and Ukraine[24]). This assistance is generally intended for elderly voters or those who have disabilities, such as vision impairment, who might have difficulty reading the ballot or marking the appropriate choice. Regulations typically allow support for such a voter, but stipulate that such assistance cannot be provided by a member of the commission or an entity performing activities in the field of civic review of the electoral process at the polling station. The actual assistance is simply provided by another person that accompanies the voter (who is

[14] Przywora, 2006, 57-59.

[15] Electoral Code of France, 27 October 1964, Art. L71.

[16] Elections Act of Netherland, 28 September 1989, para. 1. Section L 1. [3.12.2025].

[17] Barrat et al., 2023, 185-186.

[18] Electoral Code of Belgium, 31 January 2014, Art. 147bis.

[19] Electoral Code of France, 27 October 1964, Art. L73.

[20] Voting by proxy, <https://www.gov.uk/how-to-vote/voting-by-proxy> [3.12.2025].

[21] Electoral Code of France, 27 October 1964 , Art. L75.

[22] Voting by proxy <https://www.gov.uk/how-to-vote/voting-by-proxy> [3.12.2025].

[23] Electoral Code of Poland, 5 January 2011, Art. 53.

[24] Such a procedure in Ukraine is addressed in Pankevych, 2020, 199-200.

present at the polling station).[25] However, this institution differs significantly to the institution of a voting proxy. First, the supporting person provides help on an ad hoc basis, without official authorisation and without applying a formal procedure – often, the provisions of electoral law only require that the electoral commission be notified. Second, unlike in proxy voting, the voter retains direct control over the actions of the person providing assistance.

III. Legal Framework of the Institution of Proxy Voting in Poland

As indicated earlier, the institution of proxy voting is recognised in Polish electoral law, although its introduction came relatively recently. Initial proposals for introducing such a mechanism into Polish law emerged as early as 1992,[26] largely through initiatives by the National Electoral Commission, Poland's central electoral authority. However, proxy voting was not formally included in the country's regulations until 2009.

In the interim, the need to implement such a measure into Polish electoral law was repeatedly emphasised by the Commissioner for Human Rights and various social organisations, led by the Institute of Public Affairs.[27] The possibility of voting by proxy was introduced by the Law of 12 February 2009, amending the Law on the Election of the President of the Republic of Poland, the Law on the National Referendum, and the Law – Electoral Ordinance to the European Parliament,[28] and was initially intended to apply only to the upcoming European Parliament elections, which are typically characterised by lower voter turnout, as a sort of pilot project, allowing the new regulations to be tested on a smaller scale. However, because this law was submitted to the Constitutional Tribunal for preventive review of its constitutionality, the changes did not, in practice, take effect for those elections.

Another law which addressed proxy voting was the Law of 19 November 2009, amending the law on the Election of the President of the Republic of Poland, the Law - Electoral Ordinance for Commune Councils, *Powiat* Councils and *Voivodeship* Assemblies and the Law on the Direct Election of the Commune Head, Mayor and

[25] Ostrowski and Kwidziński, 2025, 554.

[26] Przywora, 2014, 191; Borski, 2016, 23.

[27] See: Zbieranek, 2006, 53-58.

[28] Law of amending the Law on the election of the President of the Republic of Poland, the Law on the national referendum and the Law - Electoral Ordinance to the European Parliament, 12 February 2009.

City President.[29] Under this act, this solution was to be applied in the elections of the President of the Republic of Poland and local government elections.

The above-mentioned acts provide that two groups of voters may grant a power of attorney for a proxy to vote on their behalf: a voter with a significant or moderate degree of disability, and a person who turns 75 on or before the day of the election. The scope of this institution was therefore relatively narrow. The regulations also stipulated that only a person registered in the voter register in the same district (commune) as the person granting the proxy could act as the proxy; also being a person holding a certificate of the right to vote.

To ensure the independence of the proxy's actions, the regulations stipulate that this role cannot be assumed by scrutineers[30] or election candidates, or by a person who is a member of the district electoral commission responsible for the district in which the person granting the proxy power is to vote.

Naturally, the procedure for preparing the power of attorney is official in nature, and the act of power of attorney is prepared at the request of the voter. It is also worth adding that this procedure is free of charge so as not to create unnecessary barriers to the use of this option by entitled individuals. Ultimately, the newly introduced solution was first used in the elections for the President of the Republic of Poland held in 2010. In the first round, 6,456 voters took advantage of this opportunity, while, in the second round, the number of proxies prepared increased to 11,613.[31] During these elections, no major violations of the new voting procedure were recorded.

The next step in expanding the application of proxy voting in Poland was the proposal to include it in the new Electoral Code. The work on this act had a special dimension, as it constituted the implementation of long-standing demands from numerous groups, among them the scholarly community, election administration, and various social organisations, regarding the need to organise and incorporate the provisions of Polish electoral law scattered throughout electoral ordinances into a single legal act

[29] Law of amending the law on the election of the President of the Republic of Poland, the Law - Electoral Ordinance for Commune Councils, *Powiat* Councils and *Voivodeship* Assemblies and the Law on the Direct Election of the Commune Head, Mayor and City President, 19 November 2009.

[30] Persons appointed by electoral committees participating in elections, whose task is to ensure the proper conduct of the voting process and determine the voting results at the polling station. Scrutineers exercise so-called social oversight of the electoral process.

[31] See the Announcement of the National Electoral Commission of 21 June 2010 on the results of the vote and the result of the election of the President of the Republic of Poland ordered for 20 June 2010, and the Announcement of the National Electoral Commission of 5 July 2010 on the results of the re-vote and the result of the election of the President of the Republic of Poland.

with the rank of a "code".[32] The Electoral Code was adopted on 5 January 2011, and one of the progressive solutions included therein was the possibility of using the institution of a proxy in elections – let us add, in every type of elections held in Poland.

However, the explanatory memorandum for this draft refers to this institution in a very narrow scope, indicating that "This solution would allow disabled people to actively participate in public life" and also that "In the opinion of the drafters, the social benefits resulting from this solution justify this: a deviation from the principle of personal voting by each voter."[33] It was therefore intended to be a measure primarily aimed at activating selected groups of voters, increasing turnout, and thus increasing the guarantee of the principle of universal and equal suffrage.

The comprehensive regulations governing proxy voting, as adopted in the Electoral Code, have proven to be relatively stable over time, especially when compared with the provisions on the second major alternative voting method in Polish electoral law, postal voting, which was introduced concurrently to the Electoral Code.[34] In fact, from the very beginning, the legislator was determined that this institution would be available, as per the laws of 12 February 2009 and 19 November 2009, only to voters with a significant or moderate degree of disability, and older voters. In the latter case, in 2020, however, the legislator decided that the lower age limit for appointing a proxy should be modified, lowering it from the originally set age of 75, to 60.[35] This solution was formally intended to increase accessibility to proxy voting, especially considering the specific conditions caused by the COVID-19 pandemic and the danger that could be posed to older people through traditional voting at a polling station. In reality, however, it cannot be ignored that this change was also dictated by specific political determinants related to the desire to mobilise a specific group of voters to participate in the upcoming presidential elections. Under the Electoral Code, proxy voting does not extend to voters casting their ballots in special voting districts, so-called separate districts, such as those established in hospitals, social welfare homes, prisons, or stu-

[32] It is usually assumed that an act with the rank of a "code" ensures greater stability of the branch of law it regulates, and its preparation itself forces the legislator to revise a specific area of regulation and to comprehensively consider measures applied.

[33] Explanatory memorandum to the parliamentary bill – Electoral Code, 6th term of office of the Sejm, Sejm paper no. 1568. 24 June 2008.

[34] Balicki, 2021, 191-207.

[35] The amendments were made pursuant to the Law of 31 March 2020 amending the Law on special measures related to the prevention, counteracting and combating of COVID-19, other infectious diseases and crisis situations caused by them, and certain other acts.

dent dormitories. It also does not apply to voting districts located abroad, or to those established on Polish seagoing vessels.

In accordance with the generally accepted standard, the Polish legislator established in the Electoral Code that the right to accept a proxy to vote may only be entrusted to a person who holds the right to vote. Initially, it was also required – similar to the 2009 acts – that such a person be entered in the voter register in the same commune as the voter. However, in 2023, with the launch of the so-called Central Voter Register in Poland,[36] this requirement was abandoned, opening the possibility of appointing other voters as proxies. Under current regulations, one person is authorised to accept one proxy. However, the Electoral Code provides for one exception to this rule: one person may accept two proxy votes, provided that at least one of the voters-principals is their ascendant, descendant, spouse, brother, sister, adoptee, charge, or ward.[37] The power of attorney procedure in Poland is typically formal. This means that voters interested in this option must submit a request to the commune's executive body.[38] In this respect, the legislator met the expectations of voters by allowing not only the submission of such a request in a traditional manner (on paper or orally) but also using electronic means of communication (so-called e-services).[39] However, the voter must comply with the deadline provided for by the regulations by submitting the request no later than nine days before election day. Importantly, Polish electoral law requires that the voter indicate in the request which elections the power of attorney applies to.[40] This means that the Polish legislator has prevented the possibility of establishing a general power of attorney regarding voting rights.

The power of attorney to vote is granted before the commune head or another employee of the commune office authorised to prepare power of attorney letters. The provisions of the Electoral Code provide that the power of attorney document may be prepared at the voter's place of residence, which is also intended to facilitate the procedure, particularly for persons with disabilities.[41]

[36] The Central Voter Register replaced the decentralised, separate voter registers maintained by individual communes. It is maintained in a single IT system.

[37] Electoral Code of Poland, 5 January 2011, Art. 55(3) EC.

[38] In Poland it is the commune head, mayor or the president of the city; Article 56 EC.

[39] Electoral Code of Poland, 5 January 2011, Art. 56(2b) EC.

[40] Ibid., Art. 56(2) EC.

[41] If the voter so requests, the power of attorney letter may be drawn up elsewhere, including at the premises of the commune office. Electoral Code of Poland, 5 January 2011, Art. 56(5) and (6).

It is also important to note that, since the power of attorney letter is based on the voter's declaration of intent, the legislature also allows for its revocation. The legislator provides several avenues for such revocation. First, the voter–principal may submit a declaration to the head of the commune in which the proxy authorisation was issued, no later than two days before election day, withdrawing the power of attorney. A similar legal effect is achieved if the declaration is delivered to the relevant district electoral commission on election day.

Finally, a voter may also appear at the polling station on election day, before the proxy has cast their vote, and decide to vote in person. In such a case, the power of attorney automatically expires and the proxy loses the right to vote on the voter's behalf. The electoral commission should inform the proxy of this fact if they attempt to cast a vote on behalf of the principal.[42]

Under Polish electoral law, since the institution of proxy voting first came into force, no fees have been charged for preparing a relevant power of attorney letter. This is intended to guarantee equality and universality in the exercise of electoral rights.[43] A proxy may not charge the person granting the power of attorney to vote any fees for voting on their behalf, just as it is prohibited to grant a power of attorney to vote in exchange for any financial or personal benefit. Such cases are subject to penalties specified in the penal provisions of the Electoral Code.[44]

IV. Doubts Concerning Proxy Voting

As indicated earlier, the institution of proxy voting, despite generally being regarded as a mechanism that supports universal suffrage without imposing significant financial burdens on the state, is typically approached with considerable caution. Often, despite its potential to increase voter turnout, numerous arguments are presented against its use. In particular, foreign literature argues that this mechanism raises doubts as to its compliance with the principle of fairness,[45] equality of elections, or secrecy of voting.[46] Concerns have been raised that the possibility of voting by proxy may lead to abuses involving forcing voters (e.g. elderly people) to appoint a proxy,

[42] Electoral Code of Poland, 5 January 2011, Art. 58 EC.

[43] Ibid., Art. 60 EC.

[44] See Electoral Code of Poland, 5 January 2011, Art. 511 and 512 EC.

[45] Barrat et al., 2023, 186.

[46] Rabitsch, Moledob and Lidaue, 2023, 524.

or offering financial benefits to proxy voters for using this procedure. It is sometimes argued that this solution runs contrary to the principle of secrecy of voting: since the voter, by indicating their desired voting method, reveals his or her voting preferences to the proxy, the content of his or her voting decision is not protected. As regards the principle of equality, it is often emphasised that the possibility of transferring the right to vote to another person by its very nature means that the proxy will not have the number of votes required by law, but will always have at least one vote more. Finally, and perhaps most often, the key objection to proxy voting is that a voter using this procedure has no way of verifying the content of a vote cast by the person who is acting as their proxy.[47] This, in the opinion of opponents, fundamentally undermines the sense of using this voting method.

The institution of proxy voting was met with similar doubts in Poland. Following the adoption of the Electoral Code, which provides for the possibility of using this institution in all types of elections, a group of Sejm members submitted a motion to the Constitutional Tribunal requesting a review of the conformity with the Constitution of the Republic of Poland of, among others, provisions establishing and regulating the institution of proxy voting. The applicants challenged these provisions in light of the constitutional principles of direct elections, equality of voting rights, and the protection of citizens' trust in the state and the laws (i.e., the rule of law).

With regard to the first objection, they argued that the principle of direct elections requires voters to cast their votes in person, thereby excluding the possibility of proxy voting, which is not, in essence, a personal act. As regards the principle of equality, the applicants contended that a proxy – unlike a voter – has two votes, i.e. his own vote and the vote of his principal. They further pointed out that the voter has no real control over the actions or omissions of the proxy, effectively transferring their voting power, which raises concerns as to whether the proxy will ultimately act in accordance with the voter's will.

Finally, in relation to the alleged violation of the principle of trust in the state and the law, the applicants argued that the procedure creates a risk of undue influence on vulnerable individuals, such as the elderly or persons with disabilities. In extreme cases, they suggested, this could even lead to the "purchase" of voting rights from those entitled to vote by proxy.[48]

[47] Rachwał, 2023, 107.

[48] Application to the Constitutional Tribunal of 7 March 2011, case registered under reference number K 9/11.

However, the Constitutional Tribunal found that the provisions specifying the rules for proxy voting did not violate the Constitution of the Republic of Poland in any of the above-mentioned aspects. As regards the principle of direct elections, the Constitutional Tribunal relied on the specific understanding of this principle in Polish electoral law. It held that the principle of direct elections does not entail a requirement of voting in person. Rather, this principle should be understood as the single-stage nature of the electoral process, whereby voters cast their votes directly for candidates (to representative bodies or single-person offices), and not for intermediaries who will then make the final choice. The Tribunal further noted that the absence of a requirement of personal voting within the concept of directness is confirmed by long-standing solutions present in Polish electoral law. This case concerns the possibility of providing technical assistance to a disabled voter at his or her request at the polling station. In such a situation, the Constitutional Tribunal noted, the voter does not vote independently, and what is more, in some cases, he or she is unable to verify which option on the ballot paper was marked by the person providing assistance (e.g. when the voter is visually impaired). However, this solution has not been questioned thus far from the point of view of the principle of direct elections.[49]

The Polish constitutional court did not find any violations of the principle of equality. The applicants' doubts in this case concerned respect for the principle of equality in its formal aspect, which requires that each voter be awarded the same number of votes in a given election. The MPs-applicants pointed out that a proxy acting under the voter's authorisation actually has two votes: his own and the voter's. The Tribunal concluded that the case should be addressed by determining the nature of the vote cast by a proxy on behalf of the principal. The person designated as a proxy casts a vote solely on behalf of the principal – in no way does it constitute their vote. At the same time, it should be noted that granting a proxy the authority to vote on behalf of the principal does not result in the legal deprivation of that voter's electoral rights; the individual remains on the electoral register. Furthermore, should the voter change their mind, they may withdraw the power of attorney or vote in person before the proxy does. The Tribunal concluded that a vote cast by a proxy on behalf of a voter is not equivalent to a vote cast by that proxy in their own name. Consequently, the argument that such a person effectively exercises two votes was deemed entirely unfounded.[50]

[49] Judgement of the Constitutional Tribunal of 9 July 2011, K 9/11, LEX 936468.

[50] Ibid.

As regards the third challenge, the Constitutional Tribunal found that it had not been duly substantiated by the applicant, and that no evidence had been cited to support it. Therefore, the proceedings were discontinued. The Tribunal merely noted that the Polish regulations on proxy voting were constructed in such a way (e.g., by formalising the procedure for granting a power of attorney and involving an official) that they minimised the risk of irregularities in the preparation of proxy voting documents and allowed voters to make an independent and informed decision as to whether to use this institution.[51]

V. The Practice of Application of the Institution of Proxy Voting in Poland

It is worth briefly referring to the practice of using the proxy voting procedure in Poland. Despite much criticism of this measure, no serious violations have been recorded so far that could prompt the legislator to abandon this mechanism. Neither the electoral administration nor international missions observing the elections in Poland have made such demands.

It is also worth noting that this solution is not widely used, although – generally speaking – there has been a gradual increase in its use in successive election processes.[52] For example, an analysis of the popularity of proxy voting in parliamentary elections in Poland (to the Sejm and Senate) since its introduction shows that in none of these electoral processes has the level of interest in this method exceeded 0.14%. In the 2011 elections to the Sejm and Senate, 12,427 and 12,394 voters, respectively, cast votes by proxy (out of 30,762,931 eligible voters).[53] In 2015, the figure was 9,731 and 9,729 voters (out of 30,629,150 eligible voters).[54] In 2019, slightly more people voted

[51] Ibid.

[52] Kowalska rightly notes that "It is therefore obvious to perceive this procedure [proxy voting – note by A.P.] more as an instrument serving to expand the real possibility of exercising their rights to elect and thus more fully implement the principle of universal suffrage by the state, rather than as an instrument intended to significantly increase voter turnout." Kowalska, 2020, 44.

[53] Announcement of the National Electoral Commission of 11 October 2011 on the results of the elections to the Sejm of the Republic of Poland ordered for 9 October 2011 and Announcement of the National Electoral Commission of 11 October 2011 on the results of the elections to the Senate of the Republic of Poland ordered for 9 October 2011.

[54] Announcement of the National Electoral Commission of 27 October 2015 on the results of the elections to the Sejm of the Republic of Poland held on 25 October 2015 and Announcement of the National Electoral Commission of 27 October 2015 on the results of the elections to the Senate of the Republic of Poland held on 25 October 2015.

this way: 21,666 and 21,682, respectively, (out of 30,253,556 eligible voters),[55] while in the last parliamentary elections held in 2023, the figures were 39,983 and 39,767, respectively (out of 29,532,595 eligible voters).[56]

This relatively small percentage of voters may result, firstly, from the structure of the provisions included in the Polish Electoral Code. It is worth noting that it defines in a rather narrow way the group of people entitled to use this mechanism. This may also be related to the fact that, *de facto*, the same people who are entitled to vote by proxy in Poland can also use the postal voting procedure, which gives them the opportunity to fill out the ballot paper themselves. It cannot be ignored that some voters – even though they meet the requirements for proxy voting – act out of a sense of attachment to tradition, and simply prefer to cast their vote in person. The relatively low interest in the proxy voting procedure may also stem from the fact that some voters, particularly seniors, still lack sufficient awareness of both the availability of this option and the procedure for using it. This is despite the efforts of the National Electoral Commission, which conducts information campaigns during each election to promote and explain this alternative method of voting.

VI. Conclusions

The institution of proxy voting, although long established in many foreign legal systems, has a relatively short tradition of use in Poland. The Polish legislator introduced it gradually, beginning in 2009, with full implementation across all types of elections in 2011.

The adopted framework is notably detailed, and aligns with the standards set by the Venice Commission in the Code of Good Practice in Electoral Matters. Comprehensive regulations, including provisions specifying the official procedure for granting power of attorney and penal provisions, are intended to ensure that the use of proxy voting guarantees respect for the principle of universal suffrage and does not expose the electoral process to violations of the principle of fairness and equality of elections.

[55] Announcement of the National Electoral Commission of 14 October 2019 on the results of the elections to the Sejm of the Republic of Poland held on 13 October 2019 and Announcement of the National Electoral Commission of 14 October 2019 on the results of the elections to the Senate of the Republic of Poland held on 13 October 2019.

[56] Announcement of the National Electoral Commission of 17 October 2023 on the results of the elections to the Sejm of the Republic of Poland held on 15 October 2023 and Announcement of the National Electoral Commission of 17 October 2023 on the results of the elections to the Senate of the Republic of Poland held on 15 October 2023.

Although the introduction of proxy voting – as in other countries – initially gave rise to significant doubts and concerns, its application in Poland does not suggest that it poses a serious threat to the aforementioned principles. At the same time, it should be emphasised that the analysed voting method is not widely used in practice. This is primarily due to the assumptions guiding the legislator and the desire to ensure that this mechanism is used only in strictly defined cases.

In my view, the group of entitled persons does not need to be expanded beyond the *de lega lata* entities indicated in the Electoral Code. This position stems primarily from the fact that, today, proxy voting is designed as an instrument to assist individuals who genuinely have difficulty reaching the polling station. Extending this option to include other groups of voters could undermine the tradition of personal voting and, moreover, could increase the risk of misuse, particularly as broader access may create greater opportunities to exert undue influence on election outcomes.

At the same time, the Polish legislator should consistently strive to expand the use of the alternative voting method of postal voting. This form of voting raises fewer concerns and could serve as a particularly valuable solution for Polish voters residing abroad, who are often required to travel hundreds of kilometres to cast their vote at a polling station in a foreign district, which can significantly hinder the effective exercise of their electoral rights.[57]

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Artificial Intelligence and the Legal Superposition Concept

ABSTRACT

The article analyzes two main approaches to determining the legal status of artificial intelligence. The first treats artificial intelligence as an object of law, while the second relies on the legal fiction of recognizing it as a partial legal subject. The analysis demonstrates that both approaches are inadequate: the objective model fails to address the challenges posed by artificial intelligence's autonomous actions, whereas the subjective model risks violating the fundamental principles of the legal system.

The research is based on comparative legal and functionalist methods, and includes an analysis of both international and Georgian legal practice. The paper proposes a superpositional legal concept, according to which the status of artificial intelligence should be determined dynamically, in the context of a specific legal relationship. This approach combines the elements of the object of law and the functionally limited subject, creating a hybrid model that ensures the flexibility and consistency of the legal system. In addition, it is emphasized

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that the effective integration of artificial intelligence requires not only formal subjectivity, but also the development of mechanisms for materially ensuring accountability.

The research concludes that the legal regulation of artificial intelligence should be based on a functional and context-dependent approach that preserves the anthropocentric foundations of law, and at the same time responds to the challenges of modern technological development. The presented model can be used as both a theoretical and practical tool for determining the legal status of artificial intelligence, particularly in jurisdictions where the regulatory framework is still in the process of formation, including that of Georgia.

Keywords: Artificial intelligence, superposition, functional legal fiction, electronic person, technological innovation, intellectual autonomy, EU AI Act, AI Liability Directives.

I. Introduction

In quantum mechanics, superposition refers to a state where a system is simultaneously in several possible states before an observation is made.[1] Translating this idea into a legal analogy allows us to describe the normative uncertainty that characterizes the legal status of artificial intelligence. In modern legal reality, artificial intelligence is not subject to traditional categorical classification, since it simultaneously exhibits both the properties characteristic of an object of law, and the functional features that are usually associated with a subject of law.[2]

In the classical dogmatics of law, a clear differentiation between the subject and the object is the basis of systemic stability. The subject is perceived as the bearer of normative action, possessing rights and obligations, while the object is the reality in relation to which these rights are exercised.[3] In the case of artificial intelligence, this separation becomes problematic, because it is not only used as an object of law, but also participates in processes that determine the emergence of normative consequences. For example, an intellectual product or automated decision generated by artificial intelligence creates legal consequences that cannot always be attributed solely to human action.[4]

[1] Griffiths and Schroeder, 2018, 102.

[2] Russell and Norvig (ed.), 2021, 19.

[3] კერესელიძე, 2009, 185 [k'ereselidze, 2009, 185].

[4] Pagallo, 2013, 147

In this situation, legal doctrine tries to find a balance between preserving existing categories and adapting to technological reality. One common approach considers artificial intelligence as a technical tool, which means that it is subject to the traditional regime of ownership and control.[5] This model is functionally effective as long as the artificial intelligence operates under the direct control of a human. However, with the development of autonomous algorithms, where the system independently chooses alternatives for action, this approach cannot ensure an adequate sharing of responsibility.[6]

A second direction is based on the use of legal fiction and attempts to grant artificial intelligence the status of a so-called "electronic person".[7] This concept is based to some extent on the historical development of the corporate person, with the legal system having created a functional subject without natural personality.[8] Despite the strength of this analogy, the model of the electronic person does not take into account the essential difference that exists between a corporation and artificial intelligence. The decisions of a corporation are ultimately based on human will, while the decisions made by artificial intelligence may arise as a result of algorithmic processes that are not subject to direct human control at a particular moment.[9]

Thus, the existing approaches fail to fully define the legal nature of artificial intelligence. The status of an object cannot cover cases of autonomous action, and granting it the status of a subject creates the risk of violating the fundamental principles of the legal system.[10] To overcome this contradiction, it is necessary to develop a theoretical model that can reflect the dynamic relationship between these two categories.[11]

The superpositional approach is based on the idea that the legal status of artificial intelligence is not static, and must be determined in the context of a specific legal relationship. Within this model, artificial intelligence is perceived as an object of law in certain cases, while in other cases it can be given elements of functional subjectivity.[12] This approach does not imply the recognition of artificial intelligence as an equal

5 გაბისონია, 2022, 443 [gabisonia, 2022, 443].

6 Cerka, Grigiene and Sirbikyte, 2015, 376.

7 European Parliament, Resolution with Recommendations to the Commission on Civil Law Rules on Robotics, par. 59 (f), 16 February, 2017.

8 ალადაშვილი, 2020, 62 [aladashvili, 2020, 62].

9 Solum, 1992, 1257.

10 Koops, Hildebrandt and Jaquet-Chiffelle, 2010, 5.

11 Pagallo, 2013, 150.

12 Raso et al., 2018, 14.

subject to humans, but aims for the flexible use of legal categories, which is consistent with the logic of modern technological development.

The central question of this study is whether it is possible to define the legal status of artificial intelligence within a single category, or whether its nature requires a more hybrid conceptualization. This issue is of particular importance given the widespread application of artificial intelligence across various sectors, with its decisions already having tangible legal implications. Consequently, the lack or insufficient definition of legal regulation poses a risk of normative uncertainty and an absence of accountability.[13]

It is also important to note specific cases, where the use of artificial intelligence as a technological tool is nonetheless sectorally permitted. This is referenced only in the context of software in one of the government decrees.[14] while its potential is discussed in the Energy Policy Document of the Parliament of Georgia.[15] In this regard, it is also important to mention the approach of the National Bank,[16] which points to the risks and opportunities of the technological use of artificial intelligence in the commercial banking sector.

The research employs both comparative legal and functionalist methods. The comparative analysis allows for an examination of approaches in different legal systems, while the functionalist perspective focuses on the ability of law to create new normative instruments, including legal fiction, as a mechanism of adaptation.[17] This methodological framework enables a comprehensive and nuanced analysis of the problem.

II. Conceptual Framework: Subject, Object, and Legal Fiction

One of the fundamental foundations of the dogmatic system of law is the clear separation between the subject and the object, which defines the structure of normative relations.[18] The subject is perceived as the bearer of rights and obligations,

[13] ერისთავი და დავითური, 2021, 7-8 [eristavi da davituri, 2021, 7-8].

[14] Resolution of the Government of Georgia No. 92 "On Approval of the Strategy and Action Plan for Integrated Management of the State Border of Georgia for 2023-2027", par. 4.3, 9 March 2023.

[15] Resolution of the Parliament of Georgia No. 4349-XIVმს-Xმპ " On the Approval of the 'State Energy Policy of Georgia", 27 June 2024.

[16] Order No. 151/04 of the President of the National Bank of Georgia "On Approval of the Regulation on Risk Management of Data-Based Statistical, Artificial Intelligence and Machine Learning Models", 17 August 2020.

[17] Koops, Hildebrandt, and Jaquet-Chiffelle, 2010, 7.

[18] Civil Code of Georgia, 27 June 1997, Art. 7, 8.

and the object represents the reality to which these rights apply.[19] However, with the rapid advancement of modern technology, this classical model no longer adequately addresses cases where a technical system, in particular artificial intelligence, itself becomes a source of legally significant actions.[20] Therefore, dogmatic analysis should not be limited to the description of abstract categories, and should be integrated with real-world, practical cases.

An important example in this regard is the so-called TAY case, when an artificial intelligence chatbot created by Microsoft independently published hateful content on a social network.[21] Initial interpretations presented this fact as the result of the independent action of artificial intelligence; however, according to Microsoft's official explanation, the system became the object of an attack by coordinated users who exploited algorithmic weaknesses and manipulated its behavior.[22] This explanation makes it clear that the "autonomy" of artificial intelligence is often not absolute, and depends on both the design of the algorithm and external social interaction. Nevertheless, the legal issue remains: who should be held responsible for the consequences arising from the system's actions?[23]

Such issues are not limited to individual cases, but are also found in broader social and political contexts. For example, the use of artificial intelligence to spread disinformation in electoral processes raises questions about the allocation of responsibility.[24] At the same time, international organizations, including the United Nations, the Council of Europe and the European Union, point to the risks posed by artificial intelligence systems, especially in the context of human rights protection. These circumstances strengthen the argument that a clear definition of the legal status of artificial intelligence is necessary.[25]

Throughout the historical development of legal systems, a similar issue has arisen, with its resolution being facilitated through legal fiction. One such example is the institution of the legal entity, which recognized a set of objective elements as subjects

[19] კერესელიძე, 2009, 185 [k'ereselidze, 2009, 185].

[20] Pagallo, 2013, 147.

[21] Opinosis Analytics, What went wrong with Tay, the Twitter bot that turned racist?, <https://www.opinosis-analytics.com/blog/tay-twitter-bot/> [02.11.2025].

[22] Microsoft, Learning from Tay's Introduction,<https://blogs.microsoft.com/blog/2016/03/25/learning-tays-introduction/> [02.11.2025].

[23] Cerka, Grigiene, and Sirbikyte, 2015, 376.

[24] United Nations, Can artificial intelligence (AI) influence elections?, <https://unric.org/en/can-artificial-intelligence-ai-influence-elections/> [02.11.2025].

[25] Council of Europe, 2018, 10.

of law.[26] This model allows us to identify functional need and normative regulation. However, in the case of artificial intelligence, the situation is more complex, since its decisions are not always related to the will of specific people, and can arise as a result of algorithmic processes.[27]

The definition of artificial intelligence plays a crucial role in determining its legal status. One dominant approach views artificial intelligence as a complex cybernetic system capable of processing information and making decisions.[28] Broader definitions characterize it as a partially autonomous system that can self-regulate, adapt, and engage in self-learning.[29] These definitions indicate that artificial intelligence functionally transcends the boundaries of the classical object, but at the same time does not achieve full subjectivity.

Within this context, two main approaches have emerged in legal scholarship. The first treats artificial intelligence as a technical tool, meaning it remains subject to the traditional framework of ownership and control.[30] The second approach is based on the concept of an "electronic person", and attempts to grant it limited subjectivity through legal fiction.[31] However, neither approach provides a comprehensive solution to the problem, since the first cannot take into account autonomous actions, while the second creates the risk of over-expansion of subjectivity.

At the EU level, the concept of an electronic person was first systematically addressed in a European Parliament resolution on the civil law regulation of robotics.[32] The document suggested the possibility of creating a special legal status for highly autonomous systems, which would ensure liability in certain circumstances. However, it is important to note that this initiative remained at the level of a recommendation and did not evolve into a binding legal framework, signalling that the concept of an electronic person is not yet fully established in legal practice.[33]

The issue of the autonomy of artificial intelligence is of particular importance, as it determines the scope of its legal status. Autonomy can be legally interpreted as

[26] Civil Code of Georgia, 26 June 1997, Art. 24-25.

[27] Solum, 1992, 1257.

[28] Ponkin and Redkina, 2018, 94.

[29] გაბისონია, 2022, 131 [gabisonia, 2022, 131].

[30] Ibid., 443.

[31] European Parliament Resolution, 2017.

[32] European Parliament, Resolution with Recommendations to the Commission on Civil Law Rules on Robotics, par. 59 (f), 16 February, 2017.

[33] Pagallo, 2013, 150.

the ability to make decisions independently, and to implement them without external interference.[34] Modern technological developments demonstrate that artificial intelligence currently exhibits forms of partial autonomy, which allows it to independently perform certain functions;[35] however, this autonomy is incomplete, representing an important legal boundary.

These factors exclude the recognition of artificial intelligence as a full-fledged legal subject. While it can perform certain autonomous actions, it does not possess free will or the ability to assume responsibility in the way that a person does.[36] Therefore, its legal status cannot be defined solely within the category of a subject.

In order to resolve this contradiction, the concept of functional legal fiction is considered the most realistic approach. This model implies that artificial intelligence can be granted limited, context-dependent subjectivity in specific legal relationships. For example, it could be considered a responsible entity in the creation of a contract or as an author of an intellectual product, however, this does not equate to recognizing it as a full-fledged subject.[37]

Thus, the functional legal fiction serves as an intermediate mechanism that provides a balance between the classical principles of law and the requirements of technological development. It differs from the concept of an "electronic person" in that it does not seek to recognize artificial intelligence as a full-fledged subject, but rather creates a flexible and targeted regulatory model that better responds to modern legal challenges.[38]

III. The Concept of Superposition and the Need for a Broader Understanding of Legal Status

One of the central challenges in determining the legal status of artificial intelligence is the issue of liability, which is directly linked to the nature of legal subjectivity. In the dogmatics of law, subjectivity implies not only the existence of rights and obligations, but also the possibility of imposing liability in the event of their violation.[39] In this context, in the case of artificial intelligence, the question arises: is it possible to

[34] Solum, 1992, 1257.

[35] Cerka, Grigiene, and Sirbikyte, 2015, 380.

[36] Robertson, 2014, 593.

[37] Koops, Hildebrandt and Jaquet-Chiffelle, 2010, 10-13.

[38] Pagallo, 2013, 148.

[39] კერესელიძე, 2009, 185 [k'ereselidze, 2009, 185].

impose liability on a system that does not possess material resources and is not legally recognized as a subject in the traditional sense?[40]

In current legal systems, liability is usually attributed to a person or a legal entity. For example, approaches in EU law, including the draft AI Liability Directive, are focused on attributing damage to the system's creator, operator or supplier.[41] However, this model is problematic in cases where artificial intelligence exhibits elements of autonomous action, when a specific outcome cannot be directly attributed to a human decision.[42] Thus, classic liability models fail to adequately reflect the reality that has emerged as a result of technological progress.

To address this issue, various mechanisms have been proposed in the legal literature, including mandatory insurance and the creation of special compensation funds. This approach implies that the creators of artificial intelligence systems should provide insurance for potential damage, simplifying the process for victims to receive compensation.[43] From an economic perspective, the model enhances the efficiency of the legal system, and reduces the complexity of risk allocation.[44] Nevertheless, this mechanism still hinges on the principle of human responsibility, and does not take into account the participation of artificial intelligence itself in the process of accountability.

In this context, a more complex model could be developed that integrates artificial intelligence functionally into the liability system. In particular, it is possible to consider a model according to which part of the economic value generated by artificial intelligence would be directed to a special guarantee fund, which would be used to compensate for damage. This approach is based on the idea that artificial intelligence, as a participant in economic activity, should be included in the financial mechanisms of liability.[45]

This proposal highlights that a functionalist legal fiction that only formally grants subjectivity to artificial intelligence may not be sufficient for its real-world integration. Simply attributing subjectivity without material support is ultimately ineffective, since the exercise of responsibility requires an economic basis.[46] This is where the importance of the superposition concept arises, which combines the elements of the object and subject of law in one hybrid model.

[40] ჭანტურია (რედ.), 2017, 40 [ch'ant'uria (ed.), 2017, 40].

[41] European Union, Artificial Intelligence Liability Directive, 2022.

[42] Galasso and Luo, 2018, 5.

[43] Koops, Hildebrandt and Jaquet-Chiffelle, 2010, 32-34.

[44] Galasso and Luo, 2018, 7.

[45] Koops, Hildebrandt and Jaquet-Chiffelle, 2010, 8.

[46] Solum, 1992, 1257.

According to the superpositional approach, the legal status of artificial intelligence is not static and must be determined in the context of a specific legal relationship. Within this model, artificial intelligence is considered an object in some cases, for example, in the field of ownership and control, while in other cases it can be attributed with elements of functional subjectivity, such as responsibility or authorship.[47] This approach ensures the flexibility of the legal system and reduces dogmatic contradictions.

International legal instruments also point to a shift towards functional regulation. The 2024 Council of Europe Convention, for example, does not define artificial intelligence as a legal subject, but instead uses the term "artificial intelligence system", referring to a machine-based system whose level of autonomy and adaptability may vary.[48] Similarly, the EU AI Act does not grant legal subjectivity to artificial intelligence, but classifies it according to risk, and establishes different levels of regulation.[49] These approaches confirm that modern legal practice is oriented towards a functional rather than a static model.

The issue of regulating artificial intelligence in the Georgian legal space is still at the development stage. Although research and academic discussions exist, a unified legislative framework has yet to be established.[50] Nonetheless, artificial intelligence is already being used in various sectors, including in state policy documents and financial regulations.[51] This highlights the growing need for regulation.

International practice also confirms that artificial intelligence is increasingly involved in legally relevant processes. For example, the decision of the German Federal Court (DABUS case) noted that artificial intelligence can be considered as a technical tool, although its role in the creation of an intellectual product must be recognized.[52] Similarly, Italian legislation provides for the participation of artificial intelligence in the field of copyright law, which once again indicates its legal importance.[53]

The above examples demonstrate that artificial intelligence is already subject to legal regulation, even though its status remains heterogeneous. That is why it is necessary to develop a conceptual model that ensures uniform and consistent regulation. The superposition approach in this regard is one of the most promising theoretical

47 Pagallo, 2013, 148.

48 Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law, Art. 2, 17 May 2024.

49 Regulation (EU) 2024/1689 "On Artificial Intelligence", 2 August 2026, Art. 5, 6.

50 გაბისონია, 2022, 525 [gabisonia, 2022, 525].

51 დავითური და ერისთავი, 2021, 29-30. [Davituri da Eristavi, 2021, 29-30].

52 Federal Court of Justice of Germany, DABUS Case (X ZB 5/22), 11 June 2024.

53 Law of Italy "On Employment and Intellectual Professions", 17 September 2025, Art. 1.

frameworks, as it combines the stability of the legal system and the requirements of technological progress.[54]

In conclusion, defining the legal status of artificial intelligence should not rely solely on traditional legal categories, but should also consider their functional transformation. The superposition concept offers a way for the legal system to adequately respond to contemporary technological challenges, preserving the central role of humans, while ensuring an effective distribution of responsibility.[55]

IV. Georgia's Legal Reality and the Feasibility of Innovation

Currently, Georgian civil law maintains a strict distinction between subject and object, recognizing legal subjects only as natural persons and legal entities. There is no regulatory framework for artificial intelligence, nor is its legal status defined, meaning that its status remains unaddressed by law.[56]

The main challenges for Georgia in adapting to technological advancements and regulating artificial intelligence are evident on several fronts. First, within the framework of the EU Association process, Georgia will need to align with the EU AI Act[57] and the AI Liability Directive (proposal).[58] These directives establish standards for AI's legal responsibility and potential subjectivity, underscoring the need for legislative harmonization in Georgia.[59]

While this article proposes an alternative conceptual approach, Georgia could address these challenges by integrating functional AI legal subjectivity into its Civil Code. Under this approach, artificial intelligence would be recognized as a functional legal subject only for specific legal purposes, without conferring it human rights or obligations. This definition aligns with the EU directives, reflecting the recognition of artificial intelligence within the EU framework. At the same time, the innovative concept proposed here does not conflict with EU requirements, as it expands the scope of AI's legal status without violating the directives.

[54] Pagallo, 2013, 150

[55] Koops, Hildebrandt and Jaquet-Chiffelle, 2010, 9.

[56] დავითური და ერისთავი, 2021, 37-38 [Davituri da Eristavi, 2021, 37-38].

[57] Regulation (EU) 2024/1689 "On Artificial Intelligence", 2 August 2026, Art. 5, 6.

[58] See: Proposal for a Directive of the European Parliament and of the Council on Adapting Non-Contractual Civil Liability Rules to Artificial Intelligence (AI Liability Directive) COM/2022/496, 28 September 2022.

[59] Mgeladze and Gorgoshadze, 2019, 72.

V. Conclusion

This study confirms that superposition represents one of the most effective concepts for defining the legal status of artificial intelligence. By positioning artificial intelligence as a hybrid of both legal subject and object, this approach enables legal systems to respond effectively to the challenges posed by modern technologies. This hybrid status ensures that artificial intelligence can be integrated into legal processes within a framework that balances recognition and responsibility, while safeguarding human dignity and adapting the legal system to contemporary innovation needs.

Thus, hybrid legal subjectivity is not merely a theoretical construct, but a practical tool that strengthens the resilience of Georgia's legal system, accelerates innovation, and promotes international harmonization. The research demonstrates that the superposition concept is a necessary evolutionary step in modern law, combining technological progress, human rights priorities, and legal system stability.

However, while the superposition concept is proposed as an ideal model, implementing functional legal subjectivity for artificial intelligence is currently the only practical and feasible solution within Georgia's legal context, particularly in terms of harmonization with the EU. As technology evolves, the legal system will inevitably need to reassess the status of artificial intelligence, at which point the recognition of the superposition concept will become increasingly essential.

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Standard for Assessing Lawyers' Professional Obligations by the PDPS in Requests for Information Containing Personal Data

ABSTRACT

Lawyers bear the professional obligation to ensure the legality of data processing in the course of their practice. The rules established by the Law of Georgia on Personal Data Protection, and consequently the supervisory powers of the Personal Data Protection Service (PDPS), extend to the processing of data, including legal practice. According to the PDPS's practice, when a supervisory authority examines the lawfulness of data processing, the applicable legislation obliges the lawyer to provide the PDPS with the requested information. Non-compliance, including failing to submit information or documentation to the PDPS, is considered a breach of law and the duty to inform the PDPS. Such breaches are classified as administrative offences and lead to administrative liability for the lawyer.

Since lawyers represent a self-regulated profession bearing professional responsibility, this article examines the conflict between the lawyer's obligation to uphold professional standards and to fulfill requests from the PDPS. The conflict is examined against the background of the practice of personal data protection and the Ethics Commission of the Georgian Bar Association. Particular attention is given to assessing the arguments on which the Personal Data Protection Service bases its view that being fully informed does not violate the professional obligations of lawyers. The study focuses on three aspects in particular: the extent of the PDPS's assessment of client protection by lawful means; the relationship between the PDPS's request for information and the

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protection of lawyers' professional secrecy, and; limits of the general powers of the supervisory authority.

This analysis will evaluate the standard used by the PDPS for assessing lawyers' professional obligations regarding personal data requests. It develops recommendations to assist the PDPS in studying lawyers' conduct. The focus is on ensuring compliance with lawyers' professional standards.

Keywords: Lawyer, Personal Data Protection, PDPS, Legal Ethics, Professional Secrecy.

I. Introduction

In the course of their professional activities, lawyers handle information from clients and other sources which may include the personal data of other parties involved in proceedings, the legality of whose processing could be subject to dispute. Both domestic and international personal data protection regulations are applicable across all sectors.[1] According to the legal framework of the European Union and the Council of Europe, independent and effective supervisory authorities are regarded as one of the essential elements of the right to the protection of personal data.[2] The rules established by the Law of Georgia on Personal Data Protection, and consequently the supervisory powers of the Personal Data Protection Service (hereafter PDPS),[3] extend to the processing of data by a natural person in connection with his or her entrepreneurial or professional activities, including legal practice.[4] PDPS focuses on examining applications related to data protection.[5] In 2025, the Parliament of Georgia adopted a legislative package that **abolished the Personal Data Protection Service (PDPS)** as an independent institution and **transferred its functions to the State Audit Office**, effective **March 2, 2026**.[6] All responsibilities previously exercised by the PDPS are now performed by the State Audit Office.[7] This merger is part of a broader **government administrative reform** aimed at *optimizing public administration,*

1 Goshadze, 2020, 43.

2 IDFI, 2021, 19.

3 Bakhsoliani, 2022, 15.

4 Law of Georgia "On Personal Data Protection", 14 June 2023, Art. 2.

5 Ibid., Art. 22 (1).

6 Law of Georgia "On Amendments to the Law of Georgia "On Personal Data Protection", 17 December 2025.

7 Law of Georgia "On Personal Data Protection", 14 June 2023, Art. 22(1).

simplifying institutional responsibilities, and *clarifying the distribution of oversight functions*.[8] The **State Audit Office** is the authority in Georgia responsible for carrying out other supervisory functions previously exercised by the PDPS.[9] At this stage, the legislative regulation and practice discussed in the article are not affected by the amendments to the law, as they relate solely to replacing the supervisory authority, and the issues remain valid for lawyers at present.

According to the PDPS's practice, when a supervisory authority examines the lawfulness of data processing, the applicable legislation obliges the lawyer to provide the PDPS with the requested information.[10] Non-compliance, including failing to submit information or documentation to the PDPS, is considered a breach of law and the duty to inform the PDPS. Such breaches are classified as administrative offences and lead to administrative liability for the lawyer.[11]

The practice developed by the PDPS in the course of examining complaints lodged by third parties poses a challenge for the legal profession, insofar as the requested information may fall within the scope of professional secrecy. Since a lawyer is a person bearing professional responsibility,[12] his or her activity is protected by such professional principles as legality,[13] independence,[14] professional secrecy,[15] competence,[16] and trust.[17] Therefore, lawyers represent a self-regulated profession with specific professional obligations. When the state compels lawyers to comply with the requests of the PDPS, a conflict arises. This conflict falls between the lawyer's obligation to uphold professional standards and the request from the state.

The Ethics Commission of the Georgian Bar Association has confirmed the conflict by advising lawyers against sharing information obtained during their professional activities with the PDPS. They claim that cooperating with the PDPS would violate standards of professional conduct.[18] Notably, the Georgian Bar Association,

[8] Public Statement of the Georgian Parliament, 17 December 2025.

[9] Ibid.

[10] Law of Georgia "On Personal Data Protection", 14 June 2023, Art. 51 (4); Decision Nგ-1/575/2018 of the State Inspector PDPS, 17 October 2018.

[11] Decision Nგ-1/414/2019 of the State Inspector PDPS, 17 December 2019.

[12] Law of Georgia "On Lawyers", 20 June 2001, Art. 1, 5, 6, 7; Code of Professional Ethics of Advocates of Georgia, 15 April 2006, Art. 2-5.

[13] Khubuluri, 2016, 87.

[14] Myers, 1999, 858.

[15] Zacharias, 1989, 358.

[16] Goldstein Bolocan (ed.), 2002, 25.

[17] McChrystal, 1992, 370.

[18] Recommendation N007/18 of the Ethics Commission of the Georgian Bar Association, 17 July 2018.

which defends lawyers' rights in Georgia,[19] has publicly expressed concern that the practice established by the PDPS limits a lawyer's ability to use information obtained for legitimate purposes of client protection, and creates a real risk of interference with legal practice.[20]

Against the backdrop of these two opposing positions, the significance of studying the issue is further underscored by existing court practice statistics. Information obtained from the courts[21] and the PDPS[22] indicates that, to date, the courts have not yet substantively ruled on the matter.[23] Moreover, at this stage, apart from the decisions in which the PDPS has identified violations concerning a lawyer's duty to inform the PDPS, the PDPS has not undertaken any other activities regarding lawyer compliance with personal data protection rules.[24] At the same time, however, the PDPS supports strengthening enforcement mechanisms and increasing sanctions.[25]

This research examines the standard used by the PDPS for assessing lawyers' professional obligations regarding personal data requests. In particular, the study analyzes inconsistencies between the decisions of the Personal Data Protection Service and the professional obligations imposed on lawyers. The approaches of the PDPS and the Ethics Commission of the Georgian Bar Association are examined and compared. Through systematic and logical analysis of these approaches, together with a review of the case law of the European Court of Human Rights, the research identifies key trends emerging in practice. The recommendations of the Council of Bars and Law Societies of Europe are also analyzed, and, based on their experience, relevant best practices are outlined. Finally, through the use of inductive and deductive methods, conclusions and relevant recommendations are presented to assist the State Audit Office in assessing lawyers' conduct and promoting appropriate professional practice. The focus is on ensuring compliance with ethical standards.

[19] Khandashvili and Turazashvili, 2018, 15.

[20] Public Statement of the Georgian Bar Association - "Appeal of the Bar Association to the State Inspectorate Service", 25 December 2019.

[21] Letter No. 3-0154/7028830 of the Tbilisi City Court, 24 March 2023; Decision N4/8707-18 of the Administrative Panel of the Tbilisi City Court, 26 October 2018.

[22] Letter NPDPS 8 23 00001885 of the PDPS, 20 March 2023.

[23] In two cases where lawyers challenged the decision of the PDPS to name them violators, on the grounds of a conflict with professional obligations, only one has received a decision to date. In that case, the court did not rule on the merits of the case: it annulled the PDPS's decision, declaring the lawyer a violator due to the expiration of the period for imposing an administrative penalty. On appeal, the lawyers' complaints have yet to be reviewed.

[24] Report of the Personal Data Protection Inspector, 2022, 108-109, 154-155.

[25] IDFI, 2021, 19.

In order to achieve the objectives, set out in this paper, the research mainly relies on **comparative legal methodology,** doctrinal analysis, and case-law interpretation. The Personal Data Protection Service decisions and ethical opinions were selected, in which the approach of the PDPS to the professional obligations of lawyers and the corresponding response of the Ethics Commission can be observed.

The paper is structured into four main sections. The first provides the introduction; the second addresses the assessment by the PDPS of the standard of protecting a client through lawful means; the third section examines the relationship between the PDPS's request for the provision of information and the protection of professional secrecy, and; finally, based on the analysis of the above-mentioned issues, conclusions are formulated regarding the standard applied by the Personal Data Protection Service when assessing the professional obligations of lawyers in the process of requesting information containing personal data.

II. Assessment by the PDPS of the Standard for Defending a Client Using Lawful Means

1. Obligation to Defend a Client Using Lawful Means and Its Application to the Processing of Personal Information

Lawyers bear the professional obligation to ensure the legality of data processing in the course of their practice.[26] In the realm of personal data, the principles established by legislation provide a high standard of protection for the rights of data subjects.[27] Among these, the principle of legality is accorded the highest priority in professional regulations, above all other fundamental principles governing legal practice.[28]

When providing legal assistance, a lawyer is professionally required to employ only lawful means;[29] the use of lawful strategies and actions is also in the client's best interests.[30] The lawyer needs to identify the client's interests and subsequently eva-

[26] Besemer, 2020, 127.

[27] Gugava, 2017, 74.

[28] Decision N082/18 of the Ethics Commission of the Georgian Bar Association, 20 February 2019.

[29] Law of Georgia "On Lawyers", 20 June 2001, Art. 1(2), 6 (1).

[30] Decision N010/10 of the Ethics Commission of the Georgian Bar Association, 22 June 2010; Decision N106/12 of the Ethics Commission of the Georgian Bar Association, 31 March 2010; Decision N025/13 of the Ethics Commission of the Georgian Bar Association, 16 April 2014; Decision N048/15 of the Ethics Commission of the Georgian Bar Association, 18 April 2018; Decision N157/13 of the Ethics Commission of the Georgian Bar Association, 20 February 2013.

luate them in terms of legality, purposefulness, and reasonableness.[31] Moreover, the lawyer plays a key role in administering justice and has a responsibility not just to their client, but also to society and everyone involved in legal proceedings, including the opposing parties.[32] The European Court of Human Rights has established that the right to defense requires lawyers to act according to professional ethical standards and within the law.[33]

Accordingly, any lawyer processing data in the course of their professional activity must ensure that such processing complies with applicable legislation, including the Law of Georgia on Personal Data Protection. Personal data should be processed only on legally recognized grounds, and in accordance with the relevant principles. The principles and grounds codified in the law, due to their enduring nature, establish general rules for data processing and define the legality of the actions undertaken by data controllers.[34]

2. Extent of the PDPS's Assessment of Client Protection by Lawful Means

The PDPS has raised concerns about the legality of processing personal data in legal practice, viewing it as an ethical issue.[35] This was illustrated in a case where a lawyer disclosed the opposing party's income and conducted surveillance, including video recordings with a personal phone, during litigation. Regarding the disclosure of income, the PDPS noted that the lawyer referred orally in court to the opposing party's income, which coincided with data held by the Revenue PDPS, but could not specify how the information had been obtained. The PDPS focused on two issues: (1) whether the Law of Georgia on Personal Data Protection applies to data processing for judicial proceedings, and (2) whether it applies to the disclosure and obtaining of information.[36]

[31] Khandashvili and Turazashvili, 2018, 45.

[32] Decision N164/13 of the Ethics Commission of the Georgian Bar Association, 16 July 2014, Decision N118/18 of the Ethics Commission of the Georgian Bar Association, 24 July 2019, Decision Ნსს-32-19 of the Supreme Court of Georgia, Disciplinary Chamber, 15 January 2020.

[33] Brandstetter v Austria [ECtHR], App. No. 11170/84, 12876/87 and 13468/87, 28 August 1991; X v Switzerland [ECtHR], App.9/27/80, 23 September 1992, X v The United Kingdom [ECtHR], App. No. 7215/75, 5 November 1981.

[34] Report of the Personal Data Protection Inspector, 2013-2014, 2014, 6.

[35] Decision Nგ-1/575/2018 of the State Inspector PDPS, 17 October 2018.

[36] Ibid.

On the first issue, the PDPS concluded that, under Article 2(2)(d) of the Law of Georgia on Personal Data Protection, its provisions do not apply to data processing for judicial proceedings, since this could undermine the trial before a final judgment is rendered. On the second issue, however, the PDPS explained that the law does cover disclosure and obtaining of information used in court. Because the lawyer's obtaining of information was directly connected to professional activity, the PDPS proceeded to assess whether the processing had a lawful purpose and met the test of proportionality. The lawyer refused to disclose details, arguing that the information was protected by professional secrecy. Consequently, the PDPS did not evaluate the lawfulness of the processing in substance, but classified the lawyer's conduct as an administrative violation under Article 52(4) of the Law, citing failure to provide sufficient information.

A similar approach was adopted in another case involving the disclosure of sensitive personal data by a lawyer during a television broadcast.[37] To assess the legality of the act, the PDPS requested details about when the lawyer's relationship with the client began, how and why the information was obtained, and the grounds for its disclosure. The lawyer refused to provide this information, stating that the information had been obtained in the course of legal representation, and that disclosure served the client's defense strategy. The lawyer argued that ethical standards prohibited the provision of any further details to the PDPS.[38] The PDPS ultimately found that the lawyer had unlawfully disclosed sensitive data, namely, information about the data subject's recognition as a victim in a separate criminal case, and qualified this as an administrative violation.[39]

It has been established that the lawful processing of special categories of personal data must comply with statutory principles aimed at ensuring fairness and legality, thereby reinforcing the principle of a fair state.[40] Undoubtedly, lawyers fall within the scope of personal data protection regulations; however, the key issue is defining the proper limits of the PDPS's assessment of a lawyer's professional conduct when he/she is acting in defense of a client's lawful interests.[41]

The PDPS's practice shows that its competence extends to the lawfulness of data processing carried out by lawyers in their professional roles. Processing carried out

[37] Decision Nა-1/137/2020 of the State Inspector PDPS, 21 April 2020.

[38] Ibid.

[39] Ibid.

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

[41] Decision Nა-1/137/2020 of the State Inspector PDPS, 21 April 2020.

solely for personal purposes falls outside the scope of the Law of Georgia on Personal Data Protection. Where a lawyer acts in a professional capacity, however, they are considered a data controller, and the use of personal data must be assessed accordingly. The PDPS makes a clear distinction between personal and professional data processing, with only the latter being subject to its regulations. When data is disclosed in court proceedings, the PDPS does not examine the processing itself, but it may still review whether the disclosure and obtaining of that information by the lawyer comply with the law.[42]

The PDPS has correctly emphasized that lawyers are obliged to protect their clients' interests through lawful means according to the ethical principle of legality, which in turn requires lawful processing of personal data. However, recent practice shows a problematic trend: if a lawyer invokes professional secrecy and refuses to provide information, the PDPS does not substantively assess lawfulness, but instead sanctions the lawyer for insufficient disclosure. This approach risks undermining not only legal standards of lawfulness, but also core professional obligations, such as the duty of professional secrecy. When assessing legality, the PDPS should focus on whether the lawyer acted within the scope of professional representation. Only where the lawyer exceeds the limits of client representation can the finding of a violation be properly justified.

III. The Relationship between the PDPS's Request for Information and the Protection of Lawyers' Professional Secrecy

1. The Ethical Dimension of Informing the PDPS

1.1. The Right to Defense Guaranteed by Professional Secrecy

The right to defense, protected by the principle of professional secrecy, has been central to the debate between the Ethics Commission of the Georgian Bar Association and the PDPS. The Ethics Commission, in response to a lawyer's inquiry, examined whether a lawyer would violate ethical duties by providing the PDPS with information, including case-related documents about a client. In its public recommendation, the Commission clarified that laws regulating the legal profession do not allow lawyers to disclose information obtained during their professional work to the PDPS

[42] Ibid.

upon request.[43] Any departure from this stance would violate the obligation to maintain professional secrecy.[44]

In contrast, the PDPS has adopted a markedly different approach. It argues that access to information protected by professional secrecy is essential for fulfilling its supervisory mandate under law. On this basis, the PDPS contends that lawyers are obliged to provide the requested information fully and promptly, regardless of the professional secrecy standard.[45]

This divergence in interpretation has had practical consequences. In cases examined by the PDPS, lawyers refused to disclose information, citing the principle of professional secrecy. These refusals formed the grounds for administrative violation findings against them.[46] Such outcomes highlight the tension between oversight mechanisms and the core professional duties of lawyers.

The position advanced by the Ethics Commission is particularly compelling. Protecting professional secrecy serves as a guarantee of the right to defense, arising directly from the lawyer's professional role. Its primary purpose is to foster client trust,[47] encouraging open communication between lawyer and client.[48] Without such assurance, meaningful communication would be compromised.[49] Thus, the principle ensures the reliability of client protection[50] while also upholding the independence and integrity of the legal profession.[51]

It should be noted that the concept of professional secrecy requires a clearer analytical distinction, as the article refers to the following terms: *professional secrecy*, *confidentiality*, and *professional privilege*. Under Georgian Legal Ethics' regulations, the terms professional secrecy and confidentiality are treated as synonymous.[52] The obligation to maintain professional secrecy is almost absolute[53] and, as a general rule, requires a lawyer to act only with the client's consent, save for a limited number of

[43] Recommendation N007/18 of the Ethics Commission of the Georgian Bar Association, 17 July 2018.

[44] Ibid.

[45] Decision Nგ-1/414/2019 of the State Inspector PDPS, 17 December 2019.

[46] Decision Nგ-1/575/2018 of the State Inspector PDPS, 17 October 2018.

[47] Richmond, 2022, 303.

[48] Fischel, 1998, 1-3.

[49] Northrop, 2009, 1494.

[50] Recommendation N007/18 of the Ethics Commission of the Georgian Bar Association, 17 July 2018.

[51] Fischel, 1998, 1-3.

[52] Gasitashvili et al., 2013, 23-24.

[53] Crystal, 1982, 219.

exceptions established by law.[54] Lawyer–client privilege is not interpreted as broadly as the ethical duty of confidentiality. The ethical duty encompasses virtually all information relating to the client, whereas, in the context of privilege, the focus is on communication between the lawyer and the client. Information that becomes known to a lawyer directly from the client, through communication with the client in the course of representation, is considered inviolable. Accordingly, information obtained from other sources does not fall within the scope of privilege. Georgian legislation does not provide an explicit definition of privileged information. However, in its decision, the Ethics Commission interpreted this term and stated that "only information that becomes known to a lawyer directly from the client and/or from a person seeking legal advice who has approached the lawyer for the purpose of ensuring the protection of their rights shall be considered inviolable (privileged information)."[55]

The receipt of confidential information is inherently linked to the "very essence of the lawyer's function,"[56] and confidentiality is regarded as both a "fundamental right and duty of the lawyer,"[57] given that lawyers obtain information in their professional capacity which their clients would not disclose to any other person.[58] Exceptions to this principle are permissible only when consistent with the principles of the rule of law.[59]

Professional secrecy is not, strictly speaking, a fundamental right in itself, but it is protected as a specific manifestation of the right to respect for private life.[60] The European Court of Human Rights has repeatedly associated legal professional privilege and professional secrecy with the protections afforded under Articles 6 and 8 of the European Convention on Human Rights.[61]

A further basis for endorsing the reasoning set out in the Ethics Commission's recommendation derives from the significance of the client's will as an element of the right to defense. The principle of confidentiality enables clients to disclose infor-

[54] Law of Georgia "On Lawyers", 20 June 2001, Art. 7; Code of Professional Ethics of Advocates of Georgia, 15 April 2006, Art. 4.

[55] Gasitashvili et al., 2021, 237.

[56] Goldstein Bolocan (ed.), 2002, 30.

[57] CCBE, 2021, Model Article on Confidentiality (2).

[58] Ibid.

[59] Recommendation No. R(2000)21 of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer, principle I, (6), (Principle III, paragraph 2).

[60] Giacompulos, Butarelli and O'Flaherty, 2018, 53.

[61] ECtHR, Factsheet – Legal professional privilege, 01 November, 1, < https://www.echr.coe.int/Documents/FS_Legal_professional_privilege_ENG.pdf> [23.09.2025];

mation to their lawyers without fear that it will be shared with others without their explicit consent, and this assurance is essential to the administration of justice.[62] Confidentiality thus creates a protected environment in which the lawyer is understood to serve solely as a conduit of the client's interests, free from considerations of public order that could otherwise alter the client's conduct.[63]

Once a lawyer agrees to provide information to the PDPS, fiduciary duties immediately arise.[64] The duty of professional secrecy protects both the information given directly by the client, and any details obtained from other sources about the client's case.[65] Lawyers cannot freely use such material at their own discretion.[66] Confidentiality gives clients a safe space to decide which issues are important to them and when, and how much of their personal information may be shared,[67] both during the lawyer–client relationship and after its termination.[68] The state, represented by the PDPS, should not be permitted to intrude upon this protected sphere, which exists to safeguard the client's autonomy in self-determination.[69] A lawyer's obligation not to disclose information without the client's consent thus preserves the client's autonomy, an obligation that becomes particularly significant where the state seeks to intervene.[70]

When assessing the Ethics Commission's reasoning, it is important to note that professional regulations clearly establish the rules and exceptions for handling client-related information within the scope of professional secrecy. Aside from exceptions explicitly provided by law,[71] a lawyer is obliged not to disclose client information to third persons, and this obligation is not limited in time.[72] Breaching this duty entails professional liability. Therefore, the PDPS should recognize that lawyers operate under strict professional obligations, and requested information may fall within the scope of professional secrecy. Compelling disclosure could conflict with the right to defense, and may expose lawyers to professional liability.

62 Gordon, 1993, 572.

63 Martyn, 2003, 1328.

64 Pizzimenti, 1990, 446.

65 Law of Georgia "On Lawyers", 20 June 2001, Art. 7; Code of Professional Ethics of Advocates of Georgia, 15 April 2006, Art. 4.

66 Gasitashvili et al., 2013, 24.

67 Martyn, 2003, 1329.

68 Recommendation N017/13 of the Ethics Commission of the Georgian Bar Association, 27 September 2013.

69 Ibid.

70 Ibid.

71 Law of Georgia "On Lawyers", 20 June 2001, Art. 7 (3); Kvachadze et al., 2011, 12.

72 Ibid., Art. 7 (1)(a).

Professional secrecy is an essential element of modern society. It ensures confidential communication between individuals and professionals, such as doctors, lawyers, or accountants, who receive sensitive information.[73] While confidentiality and data protection are closely tied to the right of informational self-determination, professional secrecy goes further, safeguarding the public interest in maintaining trust in professionals who are bound to preserve confidentiality in their work.[74] Data protection rules and mechanisms are designed to support this safeguard; for example, obligations on data controllers and processors to apply security measures exist to prevent breaches of the confidentiality of personal data protected by professional secrecy.[75]

For this reason, the PDPS should consider the specific professional duties of those it supervises. Since the law exhaustively defines the grounds for disclosing professional secrets, a lawyer cannot unilaterally change these standards. As the PDPS qualifies as a "third person" in the lawyer-client relationship, any information requested from lawyers must be handled by the lawyers strictly within the limits set by law, including the principles of professional secrecy.

1.2 The Primacy of Protecting Professional Privilege over Confidentiality

All European countries have regulations ensuring a lawyer's right and duty to maintain the confidentiality of client matters.[76] In some legal systems, the principle of confidentiality protects lawyer–client communications under the concept of professional privilege, while in others it falls under the broader protection of professional secrecy. Both approaches, however, aim to achieve the same goal: to safeguard information shared for legal advice, representation, or both.[77]

Professional ethics defines "trust" as information protected under the lawyer–client privilege.[78] Although the regulatory acts governing professional ethics in Georgia do not explicitly use the term "professional privilege", there is a distinction between professional privilege and confidentiality. Professional privilege benefits from a higher standard of protection. Specifically, privilege protects communications between a

[73] Commentary on Article 90 - Obligations of secrecy, <https://gdprhub.eu/Article_90_GDPR> [23.09.2025].

[74] Ibid.

[75] Giacompulos, Butarelli and O'Flaherty, 2018, 71.

[76] CCBE (a), 2016, 9.

[77] Ibid.

[78] Gordon, 1993, 567.

lawyer and a client, which a lawyer may use only with the client's consent, whereas confidentiality safeguards other information obtained during case handling, subject to defined exceptions, including situations where client consent may not be required. Both professional privilege and confidentiality serve as mechanisms to ensure access to justice and the upholding of the rule of law.[79]

Privilege protects both current and prospective clients.[80] It covers the communication itself, not the facts conveyed by the client. The content of the communication, rather than the facts provided, falls under confidentiality protection.[81] Due to the principle of confidentiality, a client may waive privilege by voluntarily disclosing the communication.[82] It is also important to note that privilege does not protect communications outside the scope of the lawyer–client relationship.[83]

Thus, it can be concluded that professional privilege (information exchanged between lawyer and client) must not be interfered with, and the use of such information is determined by the client. By contrast, the principle of confidentiality establishes specific, limited exceptions within which a lawyer may act.

1.3 Exceptions to Interference with Confidentiality

1.3.1 Self-Defense by the Lawyer

If the protection of confidentiality contributes to the effective functioning of the legal system, exceptions to this principle may be permitted to restore or support the system's operation.[84] Similarly, if confidentiality is essential to foster trust or privacy, an exception may be justified when retaining client information would undermine trust or allow the relationship to be misused to violate legal norms.[85]

One of the main arguments advanced by the PDPS when requesting information from lawyers is that such requests do not violate the principle of confidentiality because an exception exists: a lawyer may disclose confidential information for self-defense without the client's consent.[86] This exception allows a lawyer to reveal

[79] Union Internationale des Avocats, International report on professional secrecy and legal privilege, 2019.

[80] Northrop, 2009, 1487.

[81] Mueller, 2013, 6.

[82] Rice, 1998, 866.

[83] CCBE, 2019; Batts, 2020, 9.

[84] Martyn, 2003, 1329.

[85] Ibid.

[86] Decision Nგ-1/414/2019 of the State Inspector PDPS, 17 December 2019; Decision Nგ-1/121/2021 of the State Inspector PDPS, 26 April 2021.

otherwise protected information to safeguard their own interests.[87] Exceptions to confidentiality are allowed when a lawyer needs to defend themselves or when the legal system needs to function properly. A lawyer may disclose confidential information without the client's consent if there is a claim or allegation against them, and the information is essential for their self-defense. The exception must meet several conditions: there must be a claim or allegation against the lawyer, and the disclosure of information must be necessary for self-defense. This exception may extend to administrative proceedings before the PDPS, as the term "claim" is interpreted broadly to include various proceedings brought against a lawyer arising from their professional activities.[88]

The necessity of disclosure for self-defense includes both subjective and objective elements. Subjectively, the lawyer must act in good faith and consider the client's interests when using the information. The lawyer should reasonably believe that the information is relevant to defending against the claim, and assess its connection to the issues in dispute. Objectively, the information disclosed must be relevant to the resolution of the case. Since lawyers may use this exception for self-defense, its scope is limited to what is necessary for that purpose.[89]

When relying on this exception, a lawyer must carefully evaluate which information is necessary for self-defense and must avoid providing excessive details to the adjudicating authority.[90] Privileged information may not be disclosed, however, a lawyer may reveal information protected by confidentiality to the extent necessary to refute a claim, provided it is done in good faith and with due regard for the client's interests.[91]

Exceptions to confidentiality may be categorized into two types: (1) those arising from disputes between a lawyer and their client, and (2) those arising from interactions between a lawyer and third parties, including the state. The Professional Ethics Code does not specify which type of claim triggers a lawyer's right to self-defense, although this distinction carries significant practical implications. Depending on

87 Levine, 1977, 783.

88 Law of Georgia "On Lawyers", 20 June 2011, Art. 7(3)(G); Code of Professional Ethics of Advocates of Georgia, 15 April 2006, Art. 4 (4)(G).

89 In the following cases before the Ethics Commission of the Georgian Bar Association, lawyers were found to have breached confidentiality standards due to the improper handling of information submitted in their defense during disciplinary proceedings: Decision N029/11 of 17 March 2011, Decision N001/12 of 17 March 2012, and Decision N060/14 of 1 March 2015.

90 Decision N029/11 of the Ethics Commission of the Georgian Bar Association, 17 March 2011.

91 Decision N001/12 of the Ethics Commission of the Georgian Bar Association, 17 March 2012.

whether the claim originates from the client or a third party, a lawyer's professional conduct may be regulated differently.

In cases examined by the PDPS,[92] where the standards for evaluating a lawyer's professional obligations were applied during requests for personal data, the claimant was typically the client's opposing party. The PDPS adopts a literal interpretation of the confidentiality exception, considering that a lawyer may use information obtained in the course of professional activity to defend against a claim. A systemic interpretation of confidentiality, however, emphasizes the protection of the client's interests and the need for the lawyer to act with the client's consent, given the lawyer's professional duty to restrict third-party access to information.

International practice illustrates varying approaches. Under the Model Code of Conduct for European Lawyers, the complainant may be a party other than the client.[93] The ABA Model Rules of Professional Conduct impose a higher standard for the use of confidential information in self-defense when a third party initiates proceedings against a lawyer.[94] Information disclosed for self-defense must not include privileged lawyer–client communications, although lawyers may use information concerning their own work, as the results of legal work relate to the lawyer and do not constitute a breach of confidentiality.[95]

Practice demonstrates that statutory exceptions serve to protect the client's right to representation, while the lawyer's right to self-defense remains discretionary rather than mandatory. This allows the lawyer to disclose client information only to the extent reasonably necessary to achieve a legitimate purpose under the exception.[96] Treating self-defense as a right, rather than an obligation, ensures that the overarching purpose of client confidentiality is preserved.[97] Lawyers must assess whether a particular case falls within the exception, consider the client's interests, and ensure that any disclosure is proportionate.

Accordingly, within the scope of this exception, the PDPS cannot require a lawyer to provide all requested information unconditionally. Professional standards interpretation is within the legal profession's jurisdiction, and any unilateral redefinition by the PDPS risks undermining professional self-regulation.

[92] Decision Nგ-1/414/2019 of the State Inspector PDPS, 17 December 2019; Decision Nგ-1/121/2021 of the State Inspector PDPS, 26 April 2021.

[93] CCBE, 2021, Model Article on Confidentiality (2.8).

[94] ABA, Model Rules of Professional Conduct, Rule 1.6 (5).

[95] Grimm et al., 2008, 442.

[96] Martyn, 2003, 1330.

[97] Ibid.

1.3.2 Does the Obligation to Report Suspicious Transactions under Anti-Money Laundering and Counter-Terrorism Laws Interfere with Legal Professional Privilege?

The Personal Data Protection Service justifies interference with a lawyer's professional secrecy by relying on the European Court of Human Rights (ECtHR) case *Michaud v. France.* In *Michaud*, the Court examined whether French lawyers' obligation to report suspicious transactions to the authorities under anti-money laundering (AML) and counter-terrorism legislation constituted a disproportionate interference with legal professional privilege.[98]

The Personal Data Protection Service failed to make a factual comparison or detailed analysis, leading to the unjustified conclusion that, as obligations under AML laws can require lawyers to provide the state with client information in all types of service, the same approach could be used with the PDPS. In its decision, the PDPS, without conducting a comparative assessment or analysis of the factual circumstances relevant to the matter under consideration, directly cited a judgment of the European Court of Human Rights: "The Court found that the aforementioned obligation constituted an interference with the lawyer's right to respect for private life, which also encompasses professional and business activities. However, with regard to the legitimate aim pursued and the particular importance of the disclosure of information in a democratic society, the obligation to disclose such information did not constitute an interference with legal professional privilege." The Service subsequently concluded that the application of the same approach is permissible for the state when the Personal Data Protection Service requests information from a lawyer, but did not consider ECtHR's proportionality reasoning.

The European Court of Human Rights found that the interference was proportionate, relying on two principal considerations:

First, as the Conseil d'État observed when examining the applicant's complaint in administrative proceedings, lawyers are subject to the obligation to report suspicious transactions only in limited circumstances: when they represent a client in financial or real estate-related business activities, or act as trustees, and when they assist clients in certain specifically defined transactions. The reporting obligation is therefore linked to the purpose of the lawyer's involvement in such activities. In this respect, the obligations imposed on lawyers are comparable to those applicable to other professionals participating in financial or commercial transactions, and do not

[98] Michaud v. France [ECtHR], App. No. 12323/11, 06 March 2013.

relate to the role performed by lawyers in defending their clients. Moreover, French legislation provides for an exception whereby lawyers are exempt from the reporting obligation where their activities concern the provision of legal advice or representation in judicial proceedings, irrespective of whether the relevant information was obtained before, during, or after the proceedings. This exception also covers legal advice provided to a client regarding the institution or avoidance of judicial proceedings. The exemption does not apply, however, where the advice is given for money laundering or terrorist financing, or where the lawyer knows that the client intends to use the advice for such purposes. On this basis, the Court concluded that the obligation to report suspicions does not affect the most fundamental aspect of the lawyer's defense role, which constitutes the core justification for legal professional privilege.

Secondly, the Court took into account the existence of a filtering mechanism designed to safeguard legally privileged information. Lawyers are not required to transmit information directly to Tracfin; rather, such information is first communicated to the President of the Bar Council of the Conseil d'État and the Court of Cassation, or to the president of the Bar Association to which the lawyer belongs. In this process, a fellow lawyer elected by members of the profession, whose receipt of such information cannot be regarded as a breach of professional secrecy, is best placed to determine whether the information is protected by legal professional privilege. Where the information is not protected and the statutory conditions are satisfied, it is subsequently transmitted to Tracfin.

The Court also emphasized the particular role played by the presidents of bar associations in safeguarding professional secrecy, and referred to several of its earlier judgments in which this issue had been addressed. Accordingly, *Michaud v. France* cannot be applied to lawyers compelled to disclose client information during legal representation for the above-mentioned two primary reasons:

1. The ECtHR did not find a violation of Article 8 of the Convention regarding confidentiality, as the reporting obligation did not concern the lawyer's role as a defender. Professional privilege remained protected. The obligation applied only to tasks undertaken by lawyers that were similar to those of other professionals subject to AML requirements, not to activities performed in the course of defending their clients.
2. The French legislation included protective confidentiality measures: lawyers reported not directly to the authorities but to the president of the Bar Associ-

> ation. The Bar Association reviewed the information, assessed any suspicion within the scope of attorney-client privilege, and transmitted it to the state only when both criteria were met. This intermediary role ensured the protection of professional secrecy and maintained trust in the legal profession.[99]

Accordingly, *Michaud v. France* reinforces the protection of the lawyer-client privilege and emphasizes that disclosure by a lawyer must comply with established legal procedures. The regulatory framework governing suspicious transaction reporting aligns with confidentiality principles[100] and differs fundamentally from situations where a lawyer is compelled to provide information to the PDPS. In the latter cases, where the PDPS alleged that lawyers failed to provide the information, the lawyers were representing clients in administrative and civil matters unrelated to money laundering. Since classical legal representation does not entail interference with professional privilege, the PDPS's reliance on *Michaud* as a justification for exceptions to professional secrecy in these cases is inappropriate and, therefore, the PDPS has incorrectly applied the *Michaud* ruling in its cases to justify the exception.

2. Limitation of the General Powers of the Supervisory Authority

A key characteristic of the legal profession is self-regulation.[101] Accordingly, lawyers, as a professional group, oversee the conduct of their members independently, without interference from the state.[102] Self-regulation functions as a form of social contract: a public privilege exercised in the interest of protecting public values.[103] Part of safeguarding public interests includes establishing mandatory professional standards for lawyers, which are enforced internally by the profession itself.

Within this framework of professional self-regulation, supervisory authorities may request the disclosure of confidential information from a lawyer during investigative proceedings, in accordance with Article 58(1) of the GDPR.[104] To address potential conflicts between GDPR compliance and professional confidentiality obligations, Article 90 of the GDPR was introduced. This provision allows member states to

[99] Ibid.

[100] Tsereteli, Khubuluri and Shalamberidze, 2015, 32.

[101] Green, 2013, 602.

[102] Moliterno and Harris, 2007, 34.

[103] Gordon, 1988, 6.

[104] General Data Protection Regulation (GDPR), Article 90 – Obligations of Secrecy.

establish rules enabling lawyers to simultaneously protect professional secrecy and personal data.[105] For lawyers, professional associations may adopt specific rules to safeguard confidentiality, thereby limiting the investigatory powers of supervisory authorities over personal data protection, while ensuring that both legal ethics and data protection standards are respected.[106]

According to these recommendations, professional associations should request that their national authorities limit supervisory bodies' powers to access data held by lawyers, including during searches of offices, and adopt specific rules regulating supervisory authorities' powers over lawyers, as provided under Article 58 of the GDPR.

The Council of Bars and Law Societies of Europe (CCBE)[107] has adopted recommendations for lawyers which national bar associations are expected to implement to protect professional secrecy when regulating personal data protection.[108] According to these recommendations, professional associations should request that their national authorities limit supervisory bodies' powers to access data held by lawyers, including searches of offices, and adopt specific rules regulating supervisory authorities' powers over lawyers, as provided under Article 58 of the GDPR. The role of the bar association in interactions with supervisory authorities should also be clearly defined. Supervisory authorities should obtain the association's consent before requesting information protected by professional secrecy, and before conducting searches of offices or technical equipment. To obtain such consent, the supervisory authority must provide the reasons for the request, and present measures that will be carried out to protect the confidentiality of any personal data obtained.[109]

It should be noted that, to date, the Georgian Bar Association has not implemented measures under Article 90 of the GDPR. The current draft amendments to the Law of Georgia on Lawyers do not provide for limitations on supervisory authorities' powers, nor for the regulation of ethical obligations when requesting personal data from lawyers. It is therefore advisable that the Georgian Bar Association take measures to protect lawyers' rights in dealings with supervisory authorities. Any re-

[105] Commentary on Article 90 – Obligations of Secrecy <https://gdprhub.eu/Article_90_GDPR> [25.05.2023].

[106] Ibid.

[107] Represents the bar associations and law societies of 32 member countries, as well as 13 additional associated and observer countries (including the Georgian Bar Association).

[108] CCBE (b), 2016.

[109] Ibid.

quests for personal data must not lead to deviations from professional standards, even when the supervisory authority acts to enforce the law.

IV. Conclusion

The interest in protecting personal data may, at times, conflict with higher public interests, including the right to defense, the presumption of innocence, and the right to a fair trial. In this context, the Law of Georgia on Personal Data Protection should be interpreted in a manner that does not restrict a lawyer in the exercise of their professional activities, while simultaneously safeguarding these fundamental principles of justice. The state has an obligation to ensure the protection of personal data; however, a lawyer's professional secrecy constitutes a fundamental element of the rule of law.

The approach adopted by the PDPS, which evaluates a lawyer's conduct as a data processor and requests information without considering professional ethical standards or assessing the lawyer's obligations, creates legal challenges, and constitutes interference in professional legal practice. Nevertheless, this potential conflict is not irreconcilable, as both the protection of professional secrecy and the provision of personal data to supervisory authorities can coexist as essential components of a democratic society governed by the rule of law.

It is therefore important that the Law of Georgia on Personal Data Protection clearly regulates oversight of personal data in a way that does not undermine the client's right to access a fair trial. Information shared with a lawyer should remain confidential, and the client, the owner of the information, should retain control over how and to what extent the lawyer may use it. It is advisable to consider the mechanisms provided under Article 90 of the GDPR, and for professional associations to adopt rules that clearly define the supervisory authority of the PDPS over lawyers, thereby enabling lawyers to maintain professional secrecy while ensuring the protection of personal data. To achieve these objectives, the following recommendations are proposed:

Develop a Standard for Evaluating Professional Obligations: A standard should be established for assessing a lawyer's professional obligations when handling requests for information containing personal data. This standard should regulate the processing, protection, and disclosure of such information in light of both the principle of legality and the principle of professional secrecy. Information protected by professional privilege or confidentiality should be distinguished from other informa-

tion, and any determination of a violation should be limited to information outside the scope of professional activity;

Amend the Law on Lawyers: Legislative amendments should be introduced to the Law on Lawyers, specifically, by adding a provision to Article 7, with the following wording: "*12. A lawyer shall provide information obtained in the course of professional activity to the PDPS during ongoing proceedings only if such disclosure does not contravene the legislatively defined principle of professional secrecy*";

Develop Internal Rules for Lawyers: The Georgian Bar Association should prepare clear rules for the processing and protection of personal data by lawyers, thereby facilitating compliance with professional standards while adhering to the law;

Enhance Continuing Legal Education: Lawyers should receive ongoing training on the scope of supervision by the PDPS, the processing of personal data, and the standards for assessing professional obligations. This will ensure transparency regarding the boundaries of a lawyer's actions and the legal consequences when responding to requests for information containing personal data.

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Security and Mediation in Prisons: A Case Study of Poland in the Context of Selected European Solutions

ABSTRACT

Security is one of the most fundamental needs of individuals, societies and states. To be secure means to be free and secure from potential or actual threats. There are many ways to achieve and maintain an acceptable level of security, and these vary depending on available resources and the specific security environment. One such environment is prison. The realities of incarceration require a particular approach to the protection of life and health, the maintenance of order, and the development of appropriate relationships between staff and prisoners, while simultaneously ensuring the security of society as a whole.

The aim of the article is to present the issue of mediation in prison settings, with particular emphasis on Poland as a developed case study, and to outline selected solutions implemented in other European countries: Belgium and Latvia. In pursuing this objective, several research methods were employed, including the dogmatic-legal method, content analysis, and the analysis of legal acts and relevant documents.

Keywords: mediation, restorative justice, prison, security

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I. Introduction

Security may be understood as the condition that enables the dignified existence and development of a human being as an autonomous subject.[1] When referring to the specific context of prisons, the most important dimension of security is its human aspect, which encompasses both prisoners and staff.

The aim of the article is to present the issue of mediation in prison conditions, with particular emphasis on Poland as a developed case study, and to outline selected solutions functioning in other European countries: Belgium and Latvia. In pursuing this aim, several research methods were used: the dogmatic-legal method, content analysis, and the analysis of legal acts and relevant documents.

Belgium and Latvia were chosen as comparative examples because they represent two distinct yet complementary approaches to implementing mediation and restorative justice within the European penitentiary context.

Belgium is an example of a well-established, systemic model of restorative justice. It has successfully integrated mediation and restorative practices into its prison system, employing dedicated staff to promote communication between inmates, victims, and society. It demonstrates how restorative justice can become a structural and cultural element of prison policy and management. Belgium thus provides a mature, institutionalized reference point for how mediation can effectively function as part of a broader security and rehabilitation strategy.

Latvia, on the other hand, illustrates a transformative and developmental model. Emerging from the legacy of the Soviet penitentiary system, it has been gradually introducing restorative justice and mediation through targeted reforms, international cooperation (e.g. the Norwegian Grants), and investments in infrastructure and rehabilitation programs. Latvia shows how mediation and restorative justice can serve as tools for modernization and humanization of the prison system, even in countries undergoing systemic transformation.

In summary, Belgium was chosen for its advanced, institutionalized restorative model, while Latvia was selected for its reform-oriented and evolving approach – together offering a comprehensive comparative background for analyzing Poland's position and potential in developing mediation within prison settings.

[1] Drabik, 2011, 51.

II. The role of mediation in building a safe environment in prisons

Bearing in mind that mediation is a voluntary process aimed at concluding an agreement beneficial to all parties to the conflict, in which the parties to the conflict and an impartial mediator participate,[2] the choice of mediation is a safe and rational solution. In the mediation process, the parties seek to identify and shape a comfort zone in pursuit of common interests. However, mediation involves various forms of feedback and interaction between parties representing distinct and specific interests; these dynamics constitute natural elements of the process. As a result, mediation can often prove more effective than arbitrary court proceedings, as it increases the chances of the parties reaching a compromise. Awareness of the real costs of the trial and the duration of the court proceedings, lack of knowledge and certainty as to the outcome of the court judgment, the necessity of engaging one's own resources in the form of money, time and energy, all speak in favor of mediation as a solution. It is simply faster and cheaper, and, most importantly, it is aimed at agreement.[3]

Voluntary mediation is an element of mediation. This principle means that each party, after the first meeting, may decide to withdraw from further mediation proceedings. As P. Waszkiewicz points out, voluntary mediation is understood as the absence of coercion from the outside that might compel the parties either to enter the mediation process, or to conclude a specific agreement.[4]

Mediation is a method of peaceful resolution of internal conflicts, one based on dialogue and respect, which allows the people involved to take responsibility for their behaviour. Mediation opens up the possibility to create a genuine space for resolving conflicts in a more democratic and lawful manner.

When discussing mediation, it is impossible to ignore the concept of restorative justice. Restorative justice[5] is a process that allows those harmed by crime and those responsible for the harm, provided they voluntarily consent, to actively participate, with the assistance of a trained and impartial third party, in addressing the matter arising as a consequence of the offense. Restorative justice often takes the form of a dialogue (direct and indirect) between the victim and the perpetrator

[2] Godlewski and Śliwa, 2015, 86.

[3] Jakubiak and Rybacka, 2023, 200.

[4] Waszkiewicz, 2018, 187.

[5] Recommendation CM/Rec (2018)8 of the Committee of Ministers to Member States concerning restorative justice in criminal matters, 3 October 2018.

of the crime, which may involve, if appropriate, other persons directly or indirectly affected by the crime. These may be persons supporting victims and perpetrators of the crime, competent services, or members or representatives of communities affected by the crime.

Restorative justice[6] is most often presented as a viable alternative to imprisonment for many criminals. From this perspective, restorative justice interventions can serve many of the functions typically expected of incarceration, such as deterring crime and preventing reoffending. Further, teaching prisoners conflict resolution skills helps them transition more successfully back into society.

As John Braithwaite emphasized in his work *Crime, Shame and Reintegration*,[7] restorative justice has been found to have the potential to prevent crime more effectively than traditional retributive justice. He argued that tolerance of criminal behaviour increases the likelihood of further offenses, while stigmatizing and socially excluding offenders – treating them with disrespect or social outcasting – also serves to exacerbate criminal conduct. In contrast, "reintegrative shaming," which involves expressing disapproval of the criminal act while maintaining respect for the individual, and which culminates in acts or rituals of forgiveness, helps reintegrate offenders into society and reduces the risk of reoffending. This approach highlights the moral and social dimensions of restorative justice, focusing on accountability, empathy, and community healing rather than punishment alone.

There are three pillars of security in prisons: physical, procedural and psychological security.[8] Physical security includes walls, bars and direct coercive measures. Procedural security is any number of practices (originating from legal regulations and internal documents of the penitentiary unit), the use of which supports the maintenance of order and security, i.e. the procedure for issuing keys, the procedure for counting inmates, the procedure for visits with prisoners. Psychological safety is the youngest pillar - its origins can be traced to the broader evolution in approaches to penitentiary practice[9] and the development of resocialization concepts. It is based on the principle that "prevention is better than cure" (stop trouble before it starts).[10] Psy-

6 Venice Declaration of the Ministers of Justice of the Council of Europe Member States on the role of restorative justice in criminal matters, 14 December 2021.

7 Braithwaite, 1989, 54-68.

8 Recommendation Rec (2006)2-rev of the Committee of Ministers to Member States on the European Prison Rules, rule 51.2, 11 January 2006 [Revised and amended by the Committee of Ministers on 1 July 2020 - see Rec(2006)2-rev].

9 Dawidziuk, 2013, 22.

10 Staśkiewicz and Gmurowska, 2022, 106-107.

chological security, meanwhile, is the implementation of the principles of dynamic security[11] and the concept of restorative justice, including the use of mediation.

According to the modern approach to ensuring security, a correctional facility requires not only the skills of careful observation and rapid response, which help prevent problematic situations and allow early intervention (even before a prisoner's aggressive behaviour manifests), but also the skills of mediation and amicable conflict resolution – both between the prisoners themselves and between the prisoners and visitors (e.g. families). Unfortunately, the lack of sufficient knowledge about the concept of mediation, mediation techniques or, indeed, restorative justice, is the main barrier to their use, despite their great potential.[12]

Abraham Maslow, after identifying the basic physiological needs and those related to safety, defined the need for positive social interactions as the third fundamental human need.[13] However, it should be highlighted that prisons are environments where individuals with a wide range of backgrounds and challenges converge, including people struggling with addiction, those with intellectual disabilities or mental health disorders, as well as individuals who have committed offenses such as theft, fraud, or corruption, including from positions of authority. It is a place where the entire cross-section of society comes into sharp focus. In such an environment, it is very easy to experience conflicts; where even a small spark can trigger a long chain of collective aggression that is difficult to contain.

Prison[14] is a closed environment in which inmates are subject to an institutional framework of prescribed disciplinary and interpersonal relationships which can give rise to internal conflicts. The prison context influences the emergence and development of such conflicts in multiple ways. It is necessary to consider structural factors, including the number of inmates, their accommodation, their loss of autonomy, and the experience of deprivation, as well as the institutional balance between rehabilitation and security. Conflicts in everyday prison life therefore emerge within a complex interplay of these conditions.

[11] Recommendation Rec (2003)23 of the Committee of Ministers to Member States on the management by prison administrations of life sentences and other long-term prisoners, 9 October 2003.

[12] Staśkiewicz and Gmurowska, 2022, 109.

[13] Maslow, 2013, 41-52.

[14] The national regulations that regulate the activities of the Polish prison system are: The Code of Criminal Procedure of 6 June 1997 and the law "On the Prison Service" of 9 April 2010. Other provisions are the regulations of the Minister of Justice, while legal acts of an internal nature play a role in the functioning of the prison system.

If conflicts within the system can also be understood as a signal of poor integration of the system with the environment, then conflicts in the penal system refer to the quality of links between the "prison system" and society. Occupancy rates, the number of available staff in the prison, and the resources accessible for the practical implementation of the prison's objectives, become conditions determining the situation in the prison, and thus the likelihood, nature and potential development of conflicts.[15]

Conflicts can escalate significantly, in part because a prisoner has no influence over external circumstances (e.g. an isolated prisoner may want to reconcile with their family, but the family does not want to have contact) and is subject to procedures they may be unwilling to follow.

Mediation offers a positive interaction experience at different levels. Being a flexible process that adapts to difficult conditions, it can help the parties involved resolve conflicts, and can reconcile estranged family members. Its purpose is to teach prisoners communication and conflict resolution skills, improve the quality of life within prisons, and facilitate transition back to the community for the offender. The mediation process allows the parties to express their feelings and points of view, identify needs, and explore, resolve and negotiate an agreement that is satisfactory to both parties.

Improving the prisoners' problem-solving abilities is essential for their success in social rehabilitation and reintegration into society. Such skills affect their ability to think rationally, control impulses, and solve any issues they may face. Mediation serves as a model for developing emotional maturity in conflict resolution, and holds significant potential for application within the prison setting.

By gaining valuable experience in problem-solving and conflict resolution in a prison environment, prisoners can transfer their mediation skills back to family communities after release, providing them with a useful strategy for reintegration into society. In this respect, the mediation process ensures the effective rehabilitation of prisoners.

In applying this understanding of security to the field of penology/criminology, it can be observed that the mediation process forms an integral part of the safety pillars within the penitentiary unit.

[15] Bałandynowicz, 2019, 27.

III. Mediation in Polish prisons

In Poland, the concept of mediation within prisons has not yet become widespread enough to be considered popular,[16] however, as A. Lewicka-Zelent points out, constructive methods of conflict resolution are increasingly being adopted in Poland. Mediation, as one such method, no longer concerns only juvenile cases (from which it originated in Poland): due to its values, it is now conducted in various spheres of Polish life, among them politics, religion, and education.[17]

The institution of mediation was introduced into the Polish criminal law system more than 25 years ago. Intended to reflect a new perspective on the role of the victim of a crime, it sought to strengthen the position of the injured party in criminal proceedings, and simultaneously to serve as an alternative method of conflict resolution. Moreover, the institution of mediation, in addition to jurisdiction and preparatory proceedings, also appeared in enforcement proceedings, being introduced to the Code of Criminal Procedure of 1997[18] in Article 23a, added by the amendment of 10 January 2003, which entered into force on 1 July 2003.[19]

In accordance with Article 162 of the Act of 6 June 1997 Code of Criminal Procedure,[20] the penitentiary court hears the representative of the prison administration, as well as the professional court probation officer, if they have submitted a request for conditional release, and takes into account the settlement concluded as a result of mediation. In the case of a convicted person connection with disorders of sexual preferences, as specified in articles 197-203 of the Penal Code,[21] conditional release cannot be granted without consulting experts. Seeking the opinion of experts in such cases is mandatory.

The current legal solutions related to settlement concluded as a result of mediation were incorporated into the Code of Criminal Procedure as a result of an amendment made by the Act of 24 July 2003. However, these solutions have raised reservations since their inception. The necessity of mediation in enforcement proceedings

[16] In June 2022, the research project "Pilotage of a program implementing the idea of restorative justice in the District Inspectorate of the Prison Service in Lublin" was completed. The implementation of the project is to contribute to increasing the number of experts in criminal mediation, including in public administration. More about the project: <https://mediacjaisprawiedliwoscnaprawcza.pl> [13.07.2025].

[17] Lewicka-Zelent, 2020, 13.

[18] Code of Criminal Procedure of Poland, 6 June 1997.

[19] Law on amendment to the Code of Criminal Procedure of Poland, 10 January 2003.

[20] Code of Criminal Procedure of Poland, 6 June 1997.

[21] Penal Code of Poland, 6 June 1997.

was highlighted by experts during the drafting of amendments to the Code of Criminal Procedure. The aim was to define the mediation procedure in detail, particularly during the imprisonment phase. However, when the Code of Criminal Procedure was amended, no extensive modifications were made to adapt mediation to the specific characteristics of enforcement proceedings. The draft law does not even clearly indicate the purpose of introducing this institution.[22]

In the Code of Criminal Procedure,[23] the institution of mediation is explicitly specified in Article 23a § 1, which currently provides that the court or court clerk, and in the preparatory proceedings the prosecutor or other authority conducting these proceedings, may, on the initiative or with the consent of the accused and the victim, refer the case to an institution or person authorized to conduct mediation proceedings between the victim and the accused. The parties are informed about this, including the purposes and principles of mediation proceedings, as well as the content of Article 178a of the Code of Criminal Procedure (which concerns the examination of a mediator as a witness – this article prohibits questioning the mediator as a witness regarding facts learned from the accused or the victim in the process of conducting mediation proceedings, with the exception of information about offenses referred to in Article 240 § 1 of the Penal Code, which relates to the punishable failure to report a prohibited act).

However, the situation is different in the Code of Criminal Procedure. Here, the issue of mediation is only briefly mentioned in a single article, which states that the penitentiary court will take into account an agreement reached through mediation. The assumptions behind the project of introducing mediation to the Code of Criminal Procedure aimed to clarify the concept of mediation in enforcement proceedings. The intention was to specify in detail the procedure for conducting mediation at the stage after the verdict had already been issued.[24]

While, to date, none of these assumptions has come into force, mediation in the Code of Criminal Procedure could play an important role in influencing convicts, resulting in, among other things, efforts to change their behaviour.[25] The issue of mediation in the Code of Criminal Procedure has, since its introduction, generated a number of critical positions in the doctrine of executive criminal law.[26] These posi-

[22] Dąbkiewicz, 2013, 67-68.

[23] Code of Criminal Procedure, 6 June 1997.

[24] Szymanowski, 2004, 39.

[25] Dąbkiewicz, 2013, 14.

[26] Sowiński, 2022, 77-89.

tions referred to the manner in which the institution was introduced into the Code of Criminal Procedure and to the objectives of this mediation. Apart from a brief mention of mediation, the Code of Criminal Procedure does not provide for this institution in its regulations. Therefore, it would be necessary to refer to the regulations on mediation contained in the Code of Criminal Procedure, and yet mediation regulated in the Code of Criminal Procedure serves completely different purposes than mediation in enforcement proceedings. For example, the directives in Article 53 § 3 of the Penal Code, stating that when imposing a sentence, the court will also take into account the positive results of mediation conducted between the victim and the perpetrator, or an agreement reached between them in proceedings before the court or the prosecutor, do not apply in enforcement proceedings. As such, there is no unified position in the doctrine to this day as to whether mediation in the Code of Criminal Procedure is an autonomous institution for this procedure, or whether mediation can take place at all. Most of the doctrine holds that the obligation to consider a settlement concluded as a result of mediation refers only to an agreement concluded at an earlier stage, i.e. at the stage of preparatory or jurisdictional proceedings.[27]

There is also the view that mediation is a competent institution for enforcement proceedings, because the fact of concluding a settlement in these proceedings is the basis for granting conditional release from the remaining sentence of imprisonment. However, in this respect, too, it is necessary to refer to the content of Article 1 § 2 of the Code of Criminal Procedure, which stipulates that, in enforcement proceedings, in matters not regulated by the Code, the provisions of the Code of Criminal Procedure apply accordingly. Therefore, some authors currently point to the appropriate use of mediation in enforcement proceedings under the provisions of the Code of Criminal Procedure regarding the consensual method of resolving a conflict. Hence, it is accepted to apply mediation not only to persons serving a custodial sentence, but also to convicts in another way, that is, regardless of the type of sentence imposed. It is also noted in the doctrine that it is unjustified to link the admissibility of mediation proceedings only to conditional early release from serving the remainder of the sentence of imprisonment.[28]

As evidenced by the high recidivism rates among released prisoners, the current rehabilitation system within Polish criminal justice system is failing. No amount of educational or vocational training will improve the problem posed by the return of prisoners to social life without the ability to make reasonable decisions and resolve

[27] Lachowski, 2021, 598.

[28] Rękas, 2011, 8-9.

conflicts in a peaceful and lawful manner. The institution of mediation in prison will enable prisoners to make better decisions and improve their problem-solving skills. Although the research conducted by Agnieszka Lewicka-Zelent shows that persons serving a prison sentence are characterized by a low level of readiness to compensate the victims of the crimes committed, this does not mean that they lack the desire to undertake restorative actions.[29]

IV. Mediation in other European countries

Mediation within prison walls is possible. Belgium is an example of a country where the idea of restorative justice (including mediation) has been included in systemic solutions. Each prison employs a person whose task is to introduce a model of restorative justice not only to the penitentiary unit itself, but also to its environment. The programme has three objectives[30]:

Preparing communication structures between internal and external services;

Raising prisoner awareness of cases, needs, positions, issues of victims and restorative justice;

Raising awareness among victims and society about the realities of imprisonment and restorative justice.

Other countries are also beginning to apply the idea of restorative justice, including mediation.

Latvia, like other Baltic states, is struggling to fully free itself from the remnants of the Soviet system. As indicated in a 2013 report, the Latvian penitentiary system still has many problems that Latvia has been trying to face since the beginning of its independence. These include: poor living conditions in prisons, old buildings (some over 100 years old), too large cells (up to 30 prisoners), overcrowding, strong internal hierarchies among prisoners, and non-compliance with human rights.[31]

Aware of the problem, Latvia intensified efforts to improve its penitentiary system. In 2013, the Latvian government decided to allocate LVL 55,000,000 (about EUR 78,000,000) over five years for the construction of a modern prison, and issued Regulation of the Council of Ministers No. 191 on the procedure for the implementation of rehabilitation of convicts.[32] Since then, the documents of each prisoner contain a

[29] Lewicka-Zelent, 2016, 56.

[30] Jakubiak, 2022, 48.

[31] Kamenska and Ilvija, 2013, 15-30.

[32] Regulation of the Council of Ministers of Latvia No. 191 of 9 April 2013 "On the Procedure for the Implementation of Rehabilitation of Convicts".

section on rehabilitation, and their rehabilitation plan is developed together with the prisoner - including the possibility of education, employment, consultation with a social worker, psychologist, chaplain, etc.

In 2014, Latvia launched a project implemented under the Norwegian Grants mechanism (EEA and Norway Grants for 2014-2021), which aimed to familiarize the Latvian Prison Service with solutions, such as electronic surveillance and the concept of restorative justice and mediation. The aim was also to promote practices that facilitate the prevention of lawbreaking – especially among juvenile offenders – which is crucial for improving the effectiveness of the penitentiary system and social reintegration.[33]

Latvia's actions are having a positive effect. Prisons are no longer overcrowded, the prison population has decreased significantly, and modern solutions, which were implemented with some concern, are proving successful.[34]

V. Conclusion

Mediation in prison settings represents an essential element of the modern penitentiary system, combining the goals of security, rehabilitation, and social reintegration. The Polish case demonstrates that, although the legal framework provides for the possibility of mediation, its practical application remains limited. The incorporation of mediation into the Code of Criminal Procedure and the Penal Enforcement Code reflects an awareness of its potential to humanize criminal justice and improve safety within prisons, yet the lack of detailed procedural regulations, and the persistence of traditional punitive approaches, continue to hinder its full implementation.

The comparative analysis of Belgium and Latvia highlights two complementary perspectives on how mediation and restorative justice can function in correctional environments. Belgium serves as an example of a systemic and institutionalized approach, where restorative justice is deeply embedded in prison management and culture. Latvia, in turn, illustrates a transformative path of gradual reform, in which mediation supports the modernization and humanization of penitentiary institutions. Both models show that mediation can enhance not only the effectiveness of rehabilitation, but also the overall sense of safety within prisons, by reducing conflicts and promoting constructive communication.

[33] <https://eeagrants.org/news/introducing-alternatives-imprisonment> [13.07.2025].

[34] U. Staśkiewicz, *Profound change or just a facade? Legal transformation of the Estonian and Latvian penitentiary systems*; The Legal Commission Proceedings of the Polish Academy of Sciences, Lublin Branch, vol. XVIII, 2025, No. 1, 431-447.

In the Polish context, mediation should be perceived as a tool for building a culture of dialogue and responsibility among inmates, as well as between prisoners and staff. It fosters personal development, emotional maturity, and social competence – key factors for successful reintegration after release. Expanding the use of mediation in penitentiary practice requires not only legislative refinement, but also educational efforts aimed at increasing awareness among prison staff, inmates, and society about the benefits of restorative approaches.

Ultimately, mediation in prisons is not merely an alternative to disciplinary or punitive mechanisms: it is a comprehensive process that strengthens security through understanding and cooperation, turning conflict into an opportunity for transformation. By promoting dialogue, empathy, and mutual respect, mediation contributes to the creation of safer penitentiary environments, and supports the broader goal of restorative justice: rebuilding social harmony disrupted by crime.

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International Law on Missing Persons: Normative Foundations and Contemporary Significance**

ABSTRACT

The article examines the emergence of a new field of international law: *missing persons law*, comprising a body of binding and non-binding norms, and a sophisticated governance architecture involving diverse actors and institutions. It argues that, while the problem of missing persons remains acutely relevant in today's turbulent world, contemporary developments in international law support identifying missing persons law as a distinct field at the global level. The article further makes the case for consolidating an *international law of missing persons* as a separate branch of international law, and contends that future norm development should be informed by critical approaches, including Third World Approaches to International Law (TWAIL), and feminist legal theory.

Keywords: missing persons, armed conflict, right to know, enforced disappearance, new area of law

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I. Introduction

The 2025 Oscars Awards spotlighted numerous films from Central and South America, a region historically marked by the tragic legacy of enforced disappearances. Among them, two standout films directly engage with the issue of missing persons and the enduring anguish faced by their loved ones. In both, characters draw powerful parallels between disappearance and a form of existential punishment. In *Emilia Peréz*,[1] the main heroine declares, "Losing a loved one is a tragedy; losing their remains is a condemnation." Similarly, in *I'm Still Here*,[2] Eunice (a character based on the real-life figure Eunice Paiva) tells journalists, "Enforced disappearance kills one person, but condemns all the others to eternal psychological torture."

Against this backdrop, the present article analyzes the international legal framework concerning missing persons. It explores the protections currently provided under international law to prevent persons going missing, and, when this occurs, to ensure efforts to trace, recover, identify, and return the remains to their families, while guaranteeing that families are meaningfully included throughout the process.

After establishing that the issue of missing persons remains a pressing concern for the international community, largely due to its global nature, the article first examines the relevant legal and institutional frameworks on missing persons, alongside the jurisprudence of international courts and tribunals. It then argues that the law on missing persons is emerging as a distinct branch of international law, shaped through transnational legal processes in which states, as well as a range of other actors, play a formative role. The article also offers an analysis of how this field has developed, drawing on critical theories of international law.

1. The Issue

Both the international community and national authorities remain committed to addressing the issue of missing persons, which has become an increasingly salient concern in contemporary contexts.[3] Families are often left without information about the fate of their relatives and must navigate profound uncertainty. The primary con-

[1] "*Emilia Peréz*" in Internet Movie Database <https://www.imdb.com/title/tt20221436/> [30.01.2026].

[2] *"I'm Still Here"* (Original title: "*Ainda Estou Aqui*") in Internet Movie Database <https://www.imdb.com/title/tt14961016/> [30.01.2026].

[3] According to the latest estimate of the International Committee of the Red Cross (ICRC), the number of people registered as missing by the International Red Cross and Red Crescent Movement worldwide has increased by nearly 70 per cent over the past five years to about 284,000, driven by growing numbers of conflicts, mass migration, and fading respect for the rules of war. See <https://www.icrc.org/en/news-release/missing-people-registered-increased-70-percent-five-years> [30.01.2026].

cern is whether missing persons are alive or deceased, followed by the legal, social, and psychological consequences associated with prolonged absence or confirmed death, as well as the enduring question of the circumstances and causes of disappearance.

Individuals may be reported missing for a variety of reasons, including enforced or involuntary disappearance (such as abduction), natural disasters, and migratory movements.[4] In situations of armed conflict or internal violence, heightened insecurity and social disruption frequently lead to separation and disappearance among both civilians and members of the armed forces.[5]

From the outset, it should be emphasized that the issue of missing persons is fundamentally humanitarian in nature. Accordingly, measures aimed at preventing disappearances, clarifying fate and whereabouts, and supporting affected families, should be implemented without discrimination,[6] as families experience comparable harm regardless of nationality or affiliation with parties to a conflict.

2. Key Definitions

In international law, there is no single, unified definition of a "missing person."[7] The International Commission on Missing Persons (ICMP) offers a broad understanding, suggesting that, at a minimum, a missing person is anyone who needs to be located for reasons beyond that person's control.[8] People may go missing in a wide range of contexts. The ICMP notes that the causes may include, *inter alia*, armed conflict, human rights violations, natural and man-made disasters, transnational crimes (such as drug trafficking or trafficking in human beings), as well as migration.[9]

By contrast, the International Committee of the Red Cross (ICRC) argues in favor of a more specific definition, and provides the following formulation: a missing person is someone whose whereabouts are unknown to his or her relatives and/or who, on the basis of reliable information, has been reported missing in accordance with national legislation, in connection with an international or non-international armed conflict, a situation of internal violence or disturbances, natural catastro-

4 World Population Review, *Possible Reasons an Individual May Go Missing*. See <https://worldpopulationreview.com/country-rankings/missing-persons-statistics-by-country> [30.01.2026].

5 Hamadeh et al., 2022, 29-34, 59-63, 95-99.

6 In the context of armed conflict, "discrimination" is referred to as "adverse distinction". For more details on similarities between these two notions, see: Dvaladze, 2022, 411-434.

7 La Vaccara, 2019, 21-25.

8 ICMP, Who Are the Missing? <https://icmp.int/the-missing/who-are-the-missing/> [30.01.2026].

9 Ibid.

phes, or any other situation that may require the intervention of a competent state authority.[10]

On the basis of the ICRC definition, several elements must be satisfied for a person to qualify as a "missing person" in legal terms. First, the person's whereabouts must be unknown to their relatives; alternatively, there must be reliable information indicating that the person has gone missing and has been reported missing in accordance with national legislation. Second, the disappearance must be linked to armed conflict (international or non-international), internal violence or disturbances, natural disasters, or another situation requiring the intervention of competent state authorities. In this sense, the ICRC definition is both narrow and broad: it is narrow because it sets identifiable criteria that must be met, yet broad because it contains a residual clause and therefore does not exhaustively list all situations in which a person may go missing.

The ICRC also addresses the meaning of "relative" of a missing person. It suggests that the general definition should be sufficiently wide to cover persons affected by the unknown whereabouts of the missing person, while acknowledging that particular provisions conferring specific rights may require a more restricted definition.[11] Subject to general rules on family relationships in existing law, and for the purposes of protection and assistance to the "relative(s)" of missing persons, the term should be understood to include: children born in and out of wedlock, adopted children and step-children, a lawfully wedded spouse or an unwedded partner, parents (including step-mother, step-father, and adoptive parents), and full, half, or adopted sisters and brothers.[12]

The definition of "relative" may also be broadened to reflect particular cultural contexts in which the notion of "family" extends beyond formal kinship ties, and which may include, for example, close friends.[13] The rationale for broadening the scope of "relative(s)" is to avoid limiting participation in tracing processes to the immediate family alone. Where a person's emotional and social ties to the missing individual indicate a relationship akin to family, that person should be able to engage with tracing and search efforts and to receive information, subject to any necessary legal safeguards.

For the purposes of this article, the author adopts the ICRC approach. Accordingly, references to "missing persons" and "relatives" should be understood in the sense articulated by the ICRC.

[10] ICRC Advisory Service on International Humanitarian Law, Guiding Principles / Model Law, Art. 2, p. 7.

[11] Ibid.

[12] Ibid., commentary to Art. 2, p.8.

[13] Ibid.

Confusion at times arises between the concepts of missing persons and enforced disappearance. It should be noted that enforced disappearance refers to a specific form of conduct that may result in a person going missing. Its scope, however, is limited to the facts and circumstances defined in the relevant international instruments governing enforced disappearance.[14] By contrast, the category of missing persons is considerably broader, and encompasses situations extending beyond enforced disappearance, including a wide range of other reasons for which a person may go missing. In essence, enforced disappearance may constitute one ground on which a person goes missing, but not every case of a missing person amounts to an enforced disappearance.

3. Legal Scholarship

To the best of the author's knowledge, no publication to date has addressed the issue of missing persons through a genuinely holistic approach, meaning one that covers the full range of legal questions arising across the field.

Nevertheless, international legal scholarship has produced several important works that illuminate particular dimensions of the issue. Among the earliest is Alessandra La Vaccara's *When the Conflict Ends, While Uncertainty Continues: Accounting for Missing Persons between War and Peace in International Law*,[15] which examines the obligations of parties to an armed conflict to search for and trace missing persons, and to provide information to their relatives. Another seminal contribution on the same matter is Grażyna Baranowska's *The Rights of the Families of Missing Persons: Going Beyond International Humanitarian Law*,[16] published in the Israeli Law Review. In addition, the International Review of the Red Cross has devoted two thematic volumes to related questions - *The Missing*[17] and the more recent *Protection of the Dead*.[18] These volumes examine specific issues concerning missing persons and the dead in the context of armed conflict. None of the above works, however, considers the issue of missing persons through a comprehensive analysis that aims to integrate all relevant legal aspects within a single framework.

[14] See: International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006 (International Convention on Enforced Disappearance), Art. 2; Rome Statute of the International Criminal Court, 17 July 1998, (Rome Statute), Art. 7(1-i).

[15] La Vaccara, 2019.

[16] Baranowska, 25-49.

[17] International Review of the Red Cross, 2017.

[18] International Review of the Red Cross, 2025.

Given the absence of scholarship that addresses missing persons from all relevant perspectives of international law, the author of this article proposes to initiate a broader book project that would analyze the issue across multiple branches of international law and articulate a new concept: an *international law on missing persons*.[19] This concept would encompass the international legal framework governing prevention, search and tracing, identification and the transfer of remains, as well as the corresponding obligations that arise under different branches of international law. To this end, the author seeks to identify and develop an emerging area – a missing persons law - whose central objective is to consolidate the applicable international legal norms relating to missing persons and, where appropriate, to advance the development of those norms.

This article aims to help fill the gap in legal scholarship on missing persons. It seeks to lay the groundwork for the argument that a distinct field - missing persons law - has begun to emerge and is continuing to develop. The author intends to build on this premise through further publications. This article is the first in a planned series addressing the contours and content of international law on missing persons.

II. The Legal and Institutional Framework

1. Legal Framework

1.1. Treaty and Customary Law

International law provides both hard- and soft-law instruments aimed at preventing persons from going missing, and protecting the rights and interests of missing persons, as well as those of their families. International Humanitarian Law (IHL), particularly the 1949 Geneva Conventions (GC I - IV),[20] the 1977 Additional Protocols (AP I and AP II),[21] and customary IHL and International Human Rights

[19] The author presented this book project at two international academic events: at the lunch seminar of the Ghent Rolin-Jaequemyns International Law Institute on 23 November 2023, held in Ghent, Belgium, and at the conference "Enhancing Good Practices" organized under the EU-supported GRM Project implemented by the DAAD on 21-22 February 2024, held in Tbilisi, Georgia.

[20] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, (GC I), Art. 16-17; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (GC II) Art. 19-20; Geneva Convention (III) Relative to the Treatment of Prisoners of War of 12 August 1949 (GC III), Art. 122-124; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (GC IV) Art. 136-141.

[21] Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection

Law (IHRL) seek to ensure that individuals do not go missing. These bodies of law give rise to two overarching obligations for states and parties to an armed conflict: (i) to clarify the fate and whereabouts of missing persons, and (ii) to prevent persons from going missing.[22] The first obligation also entails respect for a family's right to know the fate and whereabouts of their relatives.[23] In addition, IHL sets out extensive duties regarding the dead, requiring that all possible measures be taken to search for, recover, and identify deceased persons.[24] States must also adopt domestic legislation and other measures to respond to the needs of families of missing persons.

Rule 117 of the ICRC Customary International Humanitarian Law Study reflects state practice, establishing a norm applicable in both international and non-international armed conflicts: each party to the conflict must take all feasible measures to account for persons reported missing, and must provide family members with any information it has on their fate.[25] Rules 112 and 116 further emphasize each party's obligation to take all possible measures to search for, collect, and evacuate the dead without adverse distinction;[26] to record all available information prior to disposal; and to mark the location of graves.[27]

The 2006 *International Convention for the Protection of All Persons from Enforced Disappearance* is the first universally binding treaty to address the phenomenon of enforced disappearance. It defines enforced disappearance as the arrest, detention, abduction, or other deprivation of liberty by state agents (or by persons acting with state authorization, support, or acquiescence), followed by a refusal to acknowledge the deprivation of liberty or to disclose the fate or whereabouts of the disappeared person.[28] Enforced disappearance constitutes a violation of human rights and is prohibited.[29] Where committed as part of a widespread or systematic attack directed

of Victims of International Armed Conflicts, 8 June 1977 (AP I), Arts 32 and 33; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non--International Armed Conflicts, 8 June 1977 (AP II), art 8.

22 Petrig, 2015, 260-272.

23 For the "right to know" see Baranowska, 2022.

24 Art. 15-17 of the GC I; Art. 18-20 of the GC II; Art. 120-121 of the GC III; Art. 16 of the GC IV; Art. 33-34 of the AP I; Art. 8 of the AP II.

25 Henckaerts, 2005, Rule 117, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home> [30.01.2026].

26 Ibid., Rules 112.

27 Ibid., Rules 116.

28 International Convention on Enforced Disappearance, Art. 2.

29 Diakonia International Humanitarian Law Centre, 2024, 25-27.

against a civilian population, it may amount to a crime against humanity under the Rome Statute of the International Criminal Court.[30]

1.2. Soft Law Instruments

Aside from binding international legal instruments, the issue of missing persons is also addressed extensively in a range of soft-law documents adopted by international organizations. Among these, the most significant is the United Nations Security Council (SC) resolution concerning persons missing as a consequence of armed conflict.[31] In this resolution, the SC calls upon parties to armed conflict to take appropriate measures to prevent persons from going missing as a result of armed conflict, through the facilitation of the reunion of families dispersed as a result of armed conflict, and to allow for the exchange of family news, consistent with their international obligations.[32] At the same time, it emphasizes the dramatic increase in persons reported missing as a result of armed conflict, which entails consequences for the missing persons themselves and for their families - especially women, children, and communities in the immediate and long-term - and reaffirms in this regard the importance of allowing families to know the fate and whereabouts of their missing relatives, consistent with applicable international humanitarian law, which is of crucial humanitarian importance.[33]

The Parliamentary Assembly of the Council of Europe (PACE), in its relevant resolution, underscores the importance of resolving the issue of missing persons in Europe - particularly in Cyprus, the Balkans, and the South Caucasus - and reiterates states' obligation to conduct effective investigations to clarify the fate and whereabouts of missing persons.[34] To that end, PACE identifies five priority areas: (i) placing affected families at the center of all action on missing persons; (ii) developing and promoting national legislation to address missing-person cases; (iii) supporting national and regional mechanisms established to prevent and resolve disappearances; (iv) ensuring access to information on missing persons; and (v) taking all feasible measures to identify human remains, establish identity, and record relevant data.[35]

[30] Rome Statute, Art. 7(1-i).

[31] United Nations Security Council, Resolution 2474, 11 June 2019.

[32] Ibid., para. 3.

[33] Ibid., preamble.

[34] Council of Europe Parliamentary Assembly, Missing Persons from Europe's Conflicts: The Long Road to Finding Humanitarian Answers, Res. 1956, 3 October 2013.

[35] Ibid., para. 7.

1.3. Case Law of the International Courts

The issue of missing persons, and corresponding state obligations, has also been addressed and further developed in the jurisprudence of regional bodies, namely the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR).

In its landmark judgment in the case of *Cyprus v Turkey*,[36] the ECtHR held that the failure of the Turkish authorities to conduct an effective investigation into the whereabouts and fate of missing persons who disappeared in life-threatening circumstances constituted a violation of the right to life.[37] The Court further found that the failure to investigate cases in which there was an arguable claim that individuals had been in custody at the time of their disappearance amounted to a violation of the right to liberty and security.[38] Finally, it held that the authorities' silence in the face of the relatives' legitimate concerns attained a level of severity which could only be categorized as inhuman treatment, in breach of the prohibition of such treatment.[39]

Likewise, the IACtHR, in its pilot judgment *Velasquez Rodriguez v. Honduras*, found that a systematic pattern of disappearances had been carried out in Honduras between 1981 and 1984 by military personnel, police, or persons acting under their orders.[40] Such disappearances violated basic rights guaranteed in the American Convention, including the rights to personal liberty, to be free from arbitrary arrest or imprisonment, and not to be arbitrarily deprived of life.[41] According to the Court, state parties are generally required to respect and guarantee the rights of the Convention. This includes the duty to prevent, investigate and punish any violation of the rights recognized by the Convention, and, as appropriate, the duty to restore rights that were violated and provide appropriate compensation for damages resulting from any such violation.[42]

The Court held that Honduras must therefore compensate the family of the victim, and that any agreement on the form and amount of compensation must be approved by the Court.[43] This judgment paved the way to multiple similar

[36] Cyprus v. Turkey [ECtHR], app. No. 25781/94, 10 May 2001.

[37] European Court of Human Rights, Factsheet – Armed Conflicts, January 2023, 2.

[38] Ibid.

[39] Ibid.

[40] Case of Velásquez-Rodríguez v. Honduras [IACtHR], Judgment of July 29, 1988 (Merits), para. 81.

[41] Ibid., paras. 117, 119, 155, 157, 194.

[42] Ibid., paras. 174-177.

[43] Ibid., para. 194.

claims[44] by the families and relatives of victims of enforced disappearances in various parts of the Americas, and, consequently, many cases of enforced disappearances reached the IACtHR seeking effective remedy in the form of compensation for the massive human rights violations caused by the large-scale practice of enforced disappearances.

1.4. Non-Binding Guidelines

Reflecting these general obligations across hard- and soft-law instruments, the ICRC Advisory Service has developed a practical tool - *Guiding Principles/Model Law on the Missing* - to assist states and competent national authorities in adopting legislation aimed at addressing, preventing, and resolving cases of missing persons.[45]

The non-binding *Manual on the Effective Prevention and Investigation of Potentially Unlawful Death* (the "Minnesota Protocol"), adopted under the auspices of the United Nations, constitutes another important tool for effectively addressing the issue of missing persons.[46]

The Minnesota Protocol aims to protect the right to life and advance justice, accountability, and the right to a remedy, by promoting the effective investigation of potentially unlawful death or suspected enforced disappearance.[47] The Protocol sets a common standard of performance in investigating potentially unlawful death or suspected enforced disappearance, and offers a shared set of principles and guidelines for states, as well as for institutions and individuals who play a role in the investigation.[48]

[44] See: *inter alia,* Case of Durand and Ugarte v. Peru [IACtHR], Judgment of August 16, 2000 (Merits); Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala [IACtHR], Judgment of May 26, 2001 (Reparations and Costs); Case of Rodríguez Vera Et Al. (The Disappeared from The Palace of Justice) V. Colombia [IACtHR], Judgment of November 14, 2014 (Preliminary objections, merits, reparations and costs); Case of De La Cruz-Flores v. Peru [IACtHR], Judgment of November 18, 2004 (Merits, Reparations and Costs); Case of Yvon Neptune v. Haiti [IACtHR], Judgment of May 6, 2008 (Merits, Reparations and Costs); Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador [IACtHR], Judgment of November 21, 2007 (Preliminary Objections, Merits, Reparations, and Costs); Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago [IACtHR], Judgment of June 21, 2002 (Merits, Reparations and Costs).

[45] ICRC Model Law.

[46] United Nations Office of the High Commissioner on Human Rights, The Minnesota Protocol on The Investigation of Potentially Unlawful Death (2016) The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (The Minnesota Protocol), New York, Geneva, 2017.

[47] Ibid., para. 1.

[48] Ibid., paras. 1-2.

1.5. Domestic Law

Several states have adopted special legislation on missing persons.[49] Such laws typically address, *inter alia*: the legal status of missing persons; the mandate and responsibilities of national authorities for tracing; procedures for the search, recovery, transfer, identification, and burial of human remains; the rights and benefits of families; rules on personal data processing; and criminal or administrative liability for violations related to the handling of missing person cases.

Given that the issue of missing persons intersects[50] with multiple areas of international law, violations of rules governing the search for and tracing of missing persons, and of relatives' right to know the fate and whereabouts of their loved ones, may also trigger the application of numerous other international legal instruments,[51] even where those instruments do not specifically address missing persons.

2. Institutional Framework

2.1. International Committee of the Red Cross

From its inception, the issue of missing persons has been one of the International Committee of the Red Cross's central concerns. Its operation of the Central Tracing

[49] Ukraine, Sri-Lanka, Bosnia and Herzegovina, Croatia.

[50] Aside from international humanitarian law and international human rights law, which address missing persons directly, this issue may also arise under other branches of international law. These include: (1) international environmental law, insofar as effective environmental governance can help prevent circumstances leading to disappearances; (2) the international law on internal displacement, insofar as preventing internal displacement may also reduce the risk of persons going missing; (3) international refugee law, insofar as rules governing asylum procedures and the protections attached to refugee status may affect efforts to search for and trace missing persons; (4) international law relating to disaster relief operations, insofar as persons may go missing as a result of natural or human-made disasters; (5) the international law of the sea, insofar as persons may go missing at sea; (6) international air and space law, insofar as persons may go missing in aircraft or spacecraft, or otherwise in air and outer space; (7) international diplomatic and consular law, insofar as persons may go missing on the premises of diplomatic or consular missions; and (8) data protection law, which can be crucial to identification as well as to search-and-trace processes. Relevant non-legal fields may also be implicated, including forensic science, which is essential for exhumation, autopsy, and the identification of mortal remains.

[51] Aside from the cited international instruments, number of international treaties and other instruments of a universal or regional character contain provisions relevant to missing and deceased persons, including (but not limited to): United Nations International Covenant on Civil and Political Rights (1966); United Nations Convention on the Rights of the Child (1989); European Convention for the Protection of Human Rights and Fundamental Freedoms (1950); United Nations Declaration on the Protection of All Persons from Enforced Disappearance (1992); United Nations Guiding Principles for the Search for Disappeared Persons (2019); United Nations Guidelines for the Regulation of Computerized Personal Data Files (1990); Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (1981), as amended by Protocol CETS No. 223 (2018); OECD Updated Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data (2013).

Agency[52] for more than 150 years reflects a sustained commitment to accounting for missing persons, promoting family reunification, and alleviating the suffering of relatives by providing information on the fate and whereabouts of their loved ones. Where death is confirmed, this commitment also extends to searching for, recovering, identifying, and returning human remains. More than a century and a half later, the ICRC remains a leading international institution in this field, with the prevention of family separation, locating missing persons, restoring contact between family members, and supporting families throughout the search process remaining at the core of its humanitarian mandate to relieve suffering caused by armed conflict.[53]

2.2. International Commission on Missing Persons

The International Commission on Missing Persons is an intergovernmental organization tasked exclusively to work on the issue of missing persons.[54]

ICMP works with governments, civil society organizations, justice institutions, international organizations and families throughout the world to address the issue of missing persons.[55] It is actively engaged in fostering social and political advocacy, and developing and providing technical expertise to locate and identify missing persons.[56]

ICMP endeavors to secure the co-operation of governments and other authorities in locating persons missing as a result of armed conflicts, human rights abuses, natural and man-made disasters, and other involuntary reasons, and to assist them in doing so.[57]

ICMP also supports the work of other organizations in their efforts, encourages public involvement in its activities, and contributes to the development of appropriate expressions of commemoration and tribute to the missing.[58]

2.3. National Institutions

In addition to long-standing international bodies such as the ICRC and the ICMP - specialized actors in the field - other international organizations also extend

[52] ICRC Missing Persons Platform, Central Tracing Agency, <https://missingpersons.icrc.org/directory/icrc-central-tracing-agency> [30.01.2026].

[53] ICRC, Reconnecting Families: Preventing Separation, Searching for the Missing, Reuniting Loved Ones, <https://www.icrc.org/en/what-we-do/reconnecting-families> [30.01.2026].

[54] ICMP, About ICMP, <https://icmp.int/about-icmp/> [30.01.2026].

[55] Ibid.

[56] Ibid.

[57] Ibid.

[58] Ibid.

their mandates to issues relating to missing persons and enforced disappearances.[59] Beyond the international level, national authorities play a crucial role in implementing the relevant international legal obligations domestically.

The National Information Bureau, which states are required to establish in peacetime,[60] constitutes key institutions for preventing persons from going missing and for accounting for those who are missing. In addition, national commissions on missing persons[61] and national bodies responsible for the implementation of international humanitarian law[62] often play a significant role in efforts to search for and trace missing persons, and to provide information to their relatives.

Taken together, these international and domestic mechanisms form a comprehensive network of agencies, indicating that an institutional framework for addressing missing persons exists at both the national and international levels.

III. The Emergence of a New Branch of International Law "Law on Missing Persons"

1. Formation of Law through a Transnational Legal Process

International law formation is an inclusive process. It requires engagement by a range of actors to determine whether the international community is committed, or at least not opposed, to incorporating a particular legal framework into the global legal system. This part of the paper examines whether the emergence of an *international law on missing persons* through a transnational legal process satisfies the degree of consensus that international law presupposes, such that it may plausibly claim a distinct place within the international legal order.

[59] For example, United Nations, Organization on Security and Cooperation in Europe, Council of Europe, European Union etc.

[60] A "National Information Bureau" is an institution operating on the national level to collect information regarding the fate of protected persons, which registers this information, undertakes searches, and transmits all this information through the protecting power, the ICRC, or the national Red Cross or Red Crescent societies of the state concerned. See GC III, Arts. 122-124; GC IV, Arts. 136-141.

[61] For example, Georgia has a special Inter-Agency Commission on the Search and Transfer of Missing Persons in Armed Conflicts, established by the Government of Georgia. See: Ordinance No. 505 of the Government of Georgia "On Approving the Composition and the Statute of the Interagency Commission for the Search for Missing Persons and the Repatriation of the Remains of Persons Missing as a Result of Armed Conflicts", 24 October 2019.

[62] See: Table of National Committees and other national bodies on international humanitarian law, <https://www.icrc.org/sites/default/files/2026-01/Final-version-NCIHLs-table_en-2026.pdf> [30.01.2026].

D.P. Verma observes that international law is a dynamic, continuously evolving process: it discards or refines old rules, and recognizes new ones, in order to clarify, supplement, or replace existing precedent.[63] The very idea of "approval" presupposes some measure of agreement among relevant actors in the international community regarding the content and status of new norms, as to whether those norms are added to the existing body of rules or substitute for them. Such agreement provides international law with legitimacy and, even if not in a strictly formal sense, contributes to its perceived binding force. R.F. Hansen similarly treats legitimacy as central to international law's capacity to advance the public policy of the international community.[64]

Some commentators contend that states alone legitimize international law, either because they are the exclusive creators of legal obligations,[65] or because the international legal order remains primarily a state-to-state system.[66] Others emphasize the diminishing law-making role of the nation-state, pointing to norm generation by non-state actors and through mechanisms other than intra- or inter-state legislative procedures.[67] From this perspective, the state, understood as a primarily territorial law-making entity, may increasingly be supplemented, or even displaced, by other norm-generating entities that are not necessarily territorially defined.[68] Even authors who place states "at the heart of the international legal system"[69] acknowledge that a focus on state action alone can produce a misleading account of how international law is made.[70]

This diversification of law-making actors accompanies the globalization of international law. As G. Silva argues, globalization entails a legal system that is not merely Eurocentric, but one that also incorporates valuable contributions from other legal traditions.[71] The transnational (or global) legal process has features distinct from classical international law-making: it entails non-traditional forms of norm formation that engage actors who are not exclusively, and sometimes not primarily, states, including a wide range of non-state participants. The process is also dynamic. As

63 Verma, 1989, 44.

64 Hansen, 2013, 262-263.

65 D'Amato, 1982, 99.

66 Hansen, 2013, 262-263.

67 Osterdahl, 2014, 123.

68 Ibid.

69 Higgins, 1993, 39.

70 Ibid., 41.

71 Nascimento e Silva, 1996, 238.

H.H. Koh notes, transnational law "transforms, mutates, and percolates" across levels and domains - public and private, domestic and international - moving in multiple directions rather than along a single hierarchical pathway.[72] In this context, the homogeneous international society from which classical international law emerged is no longer the relevant baseline: contemporary international law operates in a more complex environment, one in which norm formation is increasingly pluralized and, as a consequence, often more cumbersome.[73]

The formation of an international law on missing persons clearly illustrates the transnational legal process described above for several reasons. First, it draws on a diverse set of sources. As discussed in the previous chapter, the relevant international instruments range from binding treaty obligations to non-binding "soft law" standards adopted by international organizations and, in some instances, developed by non-governmental organizations. Additional obligations and interpretive guidance also emerge from the jurisprudence of international courts and human rights bodies.

The field is characterized by a plurality of actors engaged in norm development, implementation, and enforcement. Most importantly, the international law on missing persons is structured around individuals rather than states: persons who have gone missing and their relatives occupy the normative center of this corpus. Moreover, the law is not created or operationalized exclusively by states. International organizations, human rights groups, and independent experts, particularly in forensic disciplines, play a substantial role in shaping standards and practices.

Finally, the addressees of relevant obligations are not limited to states. Where persons go missing in connection with armed conflict, duties may also bind non-state armed groups. This feature is well established in international humanitarian law, which vests obligations in all parties to a conflict;[74] in non-international armed conflicts, those parties include organized non-state actors, notwithstanding their non-state character.[75]

2. International Consensus

The article now turns to whether a general agreement exists within the international community to develop an international law on missing persons as a distinct

[72] Koh, H.H., 2017, 240.

[73] Verma, 1989, 39.

[74] GCs, common Art. 3, para. 1; AP II, Art 1(1).

[75] GCs, common Art. 3, para. 7.

branch of international law. To that end, it adopts the line of reasoning advanced by Judge Antônio Augusto Cançado Trindade in *International Law for Humankind: Towards a New Jus Gentium*.[76] Addressing the formation of contemporary international law, Trindade departs from a strict "formal sources" account and argues that the evolution of new norms should be assessed through the lens of international consensus.[77] In earlier conceptions, state consent was treated as the exclusive indicator of the binding character of international obligations.[78] By contrast, Trindade maintains that, in contemporary international law, "individual consent could never constitute the ultimate "source" of legal obligation," and that a discernible tendency toward consensus in the formation of international legal norms has emerged.[79] Other authors advance a similar position, likewise rejecting the view that norm formation requires unanimous consent.[80]

Trindade does not set out a detailed methodology for tracing "international consensus". Instead, he anchors the inquiry in *opinio juris*, which he argues has acquired a significantly broader meaning than its traditional role as the "subjective" element of customary international law.[81] For Trindade, *opinio juris* is central not only to the emergence and identification of norms of general international law, but also to the formation of international law more broadly.[82] On this understanding, *opinio juris* may be treated as a principal manifestation of "international consensus" concerning the development of new norms.

Crucially, Trindade further contends that agreement on norms of general international law should not be sought solely among states: it should also be identified across a broader range of actors, including international organizations, peoples, "organized civil society", and groups of individuals operating at the international level.[83] This approach aligns with a global-law perspective in which norm formation is no longer the exclusive prerogative of sovereign states, but rather a task shared among the actors participating in global governance.[84]

[76] Trindade, 2010.

[77] Ibid., 132.

[78] Ibid.

[79] Ibid.

[80] See: Geoffrey, 2017.

[81] Trindade, 2010, 137.

[82] Ibid., 137-138.

[83] Ibid., 135.

[84] Notably, Trindade's approach in this respect is not reflected, for example, in the recent work of the International Law Commission (ILC). In its latest Draft Conclusions on the Identification of Custo-

Opinio juris, so conceived, gives expression to a "juridical conscience" not only of nations and peoples, but of the international community as a whole.[85] Notably, Trindade has himself invoked this broader understanding of *opinio juris communis*, including in his separate opinion in the *Whaling in the Antarctic* case.[86]

Pursuant to the reasoning set out above, the paper now examines whether an international consensus has already emerged regarding the formation of an international law on missing persons. This field is among the clearest illustrations of broad-based engagement in norm development. The relevant processes involve not only states, but also international organizations, civil society movements, non-governmental organizations, and, in certain contexts, armed groups.

Despite the absence of a dedicated universal instrument regulating missing persons at the global level, indicators of international consensus can be identified across a range of normative materials and institutional practices. Treaties, customary rules, policy documents, statements, decisions, and operational conduct by international actors collectively point to the existence of an *opinio juris* in favor of recognizing missing persons law as part of international law. The ICRC Study on Customary International Humanitarian Law, which articulates several customary rules relevant to missing persons,[87] is particularly outstanding in this regard, as it reflects and systematizes the practice and legal conviction underpinning the international character of these rules.

Taken together, the developments discussed above confirm that missing persons have become a significant concern of the international community. This, in turn, supports the view that a measure of consensus exists that the issue warrants distinct regulation at the global level. At the same time, the degree of attention devoted to missing persons remains insufficient to generate comprehensive, sustained discussions on how to consolidate this body of law into a fully articulated global framework.

mary International Law, the ILC maintains that *opinio juris* is confined to those acts of states that demonstrate their acceptance of a rule as law. At the same time, the ILC acknowledges that, in certain cases, the practice of international organizations may contribute to the formation or expression of rules of customary international law, and that the conduct of other actors may also be relevant in assessing state practice. See: Draft conclusions on identification of customary international law (2018). Adopted by the International Law Commission at its seventieth session, in 2018, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/73/10, para. 65). Yearbook of the International Law Commission 2018, 2022, Arts. 4(2-3), 9-10.

85 Trindade, 2010, 135.

86 Whaling in the Antarctic (Australia v. Japan, New Zealand intervening), Judgment, 2014 I.C.J. Reports 226.

87 CIHL, rules 98, 112-117.

Responses have also been uneven across contexts and institutions, leaving room for interpretive divergence and, potentially, future fragmentation.[88]

By analogy, this trajectory resembles the formation of other specialized protective regimes in international law, such as international refugee law,[89] the international law relating to internally displaced persons,[90] and the international law on trafficking in human beings,[91] which likewise focus on particular groups and seek to elevate their protection through more specific and, in some respects, more stringent normative standards.

IV. Critical Appraisal of the International Law on Missing Persons

1. TWAIL and SWAIL Critique

Third World Approaches to International Law (TWAIL) is a broad, interdisciplinary movement of scholars and practitioners who critique how modern international law was shaped by the European powers and continues to reproduce global hierarchies that disadvantage the "Third World" (a political term for historically colonized and economically marginalized states and peoples).[92] TWAIL is not only a critique: it seeks to recover suppressed histories and voices, expose the racial and colonial foundations of key legal institutions, and reimagine international law as a tool for material justice and self-determination, including more equitable global economic governance and genuine accountability for powerful states and corporations.[93]

[88] For example, the forcible disappearance of persons by non-state armed groups may be treated as "missing persons" under international humanitarian law (IHL), and as enforced disappearance under international criminal law. However, it would not constitute a violation of the *International Convention for the Protection of All Persons from Enforced Disappearance*, because that treaty applies only to enforced disappearances attributable to the state. This produces a fragmented understanding of "enforced disappearance", insofar as the same conduct may be categorized differently across distinct bodies of international law.

[89] Convention Relating to the Status of Refugees, 28 July 1951.

[90] The Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2), United Nations Economic and Social Council, Commission on Human Rights, 11 February 1998.

[91] Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted on 15 November 2000 (Palermo Protocol).

[92] For details about the TWAIL movement see: Gonzalez Hauck et al., 2024, 79-83.

[93] On this matter see: Anghie, 2023, 7-112,

While the project of decolonizing international law has, from the perspective of former Western colonies, gained increasing scholarly attention,[94] far less consideration has been given to the experiences of states that were historically subjected to domination by the Russian Empire and its successor, the Soviet Union.

Recent scholarship has begun to address this gap. In particular, emerging efforts to articulate "Second World Approaches to International Law" (SWAIL)[95] seek to foreground the legal experiences of societies shaped by socialist rule and post-socialist transition. Unlike TWAIL, which benefits from a longer and more consolidated intellectual tradition, SWAIL remains at an early stage of conceptual development. Some scholars have proposed the notion of the "Global East",[96] in contrast to the "Global South", to capture the shared historical and geopolitical experiences of countries formerly embedded in the socialist bloc.

Because the issue of missing persons disproportionately affects countries in the Global South and parts of the Global East - most visibly in contexts of armed conflict and pervasive violence shaped by histories of colonialism, imperialism, and their contemporary afterlives in neo-colonial and neo-imperial practices - it is crucial to examine the development of an international law on missing persons through the SWAIL and TWAIL perspectives. As this emerging field of international law will largely govern, and be applied within, these contexts, it is essential that affected states and communities are meaningfully involved in shaping its norms, institutions, and implementation pathways. Accordingly, ongoing legal developments should be scrutinized through SWAIL and TWAIL to ensure that the resulting framework is workable and responsive to the needs of those most impacted, rather than being designed by external actors and subsequently imposed on communities that had little or no role in its creation.

[94] See for example: Cardoso Squeff and Damasceno, 2024, 63-96.

[95] International workshop In Search of Second World Approaches to International Law was held at the Central European University in Vienna, Austria on 21-22 February 2025. Program and details are available here: <https://events.ceu.edu/2025-02-21/search-second-world-approaches-international-law> [30.01.2026].

[96] Labuda, 2024, 273-275.

2. The Gender Perspective

Statistically, the majority of missing persons are male, meaning that women and children comprise the bulk of those left behind.[97] This means that the impact of disappearances is gendered.[98] Men are most frequently the victims of human rights violations that result in persons going missing, such as arbitrary detentions, torture, executions, and enforced disappearances, while women disproportionately suffer the human rights violations of not knowing the fate and whereabouts of their loved ones, whilst also being required to bear the legal and economic responsibilities for their families and cope with the emotional, social, psychological, and cultural impact of living without their male partner or relative.[99]

In some contexts, the wives of missing persons face significant barriers in accessing bank accounts, inheritance, proprietary rights, and identity documents for children, owing to discriminatory laws.[100]

Women relatives of missing persons can also face considerable emotional and social challenges. Beyond the emotional distress already associated with a family member going missing, women may face exacerbated levels of stress, concern, and anxiety in their newly imposed role of breadwinner and provider.[101] Their shift in role can be the subject of criticism by the community as a neglect of their responsibilities and traditional requirements.[102]

The negative impact of missing persons on women and children is particularly acute in the context of patriarchal culture, where, in practice, social norms and customary practices dominate over the positive law, and can limit women's ability to exercise their rights.[103]

As demonstrated above, the issue of missing persons is profoundly gendered and, in many contexts, disproportionately affects women. Accordingly, and consis-

[97] According to the United Nations Working Group on Enforced or Involuntary Disappearances (WGEID) "[M]en comprise between 70 to 94 percent of those who have been disappeared globally." United Nations Working Group on Enforced or Involuntary Disappearances, General Comment on Women Affected by Enforced Disappearance, UN Doc A/HRC/WGEID/98/2, 14 February 2013.

[98] For understanding the gender dimension of the issue of missing persons, see: Diakonia International Humanitarian Law Centre, 2023, Chapter 2.

[99] Ibid., 18.

[100] Ibid.

[101] Ibid., 18-19.

[102] Ibid.

[103] Ibid.

tent with SWAIL and TWAIL critiques, emerging developments in the international law on missing persons should also be examined through a gender lens. Any claim to "gender sensitivity" in this field must be grounded in inclusive, meaningful participation by people of all genders, especially those from affected communities, to ensure equal representation and that diverse experiences inform decision-making. Such participatory approaches are essential where the resulting norms and policies will primarily regulate and shape the lives of those who bear the greatest burdens of disappearance and its aftermath.

V. Conclusion

In conclusion, the issue of missing persons intersects with multiple areas of international law. Although initially developed primarily in the context of armed conflict, it has growing relevance across other fields, most notably international human rights law. This article has argued that the rules concerning missing persons found in international humanitarian law and related legal regimes already constitute a coherent corpus that may be conceptualized as a distinct branch of international law: The International Law on Missing Persons. This claim is supported by the diversity of sources and the multiplicity of actors contributing to its elaboration, which together reflect the emergence of a new field through transnational legal processes, in which not only states, but also international organizations, courts, expert bodies, and civil society participate in the creation and application of norms.

At the same time, many contemporary legal provisions relating to missing persons, particularly those rooted in international humanitarian law, remain shaped by colonial legacies and by histories of norm-production in predominantly male-dominated settings. For this reason, future developments in this field should be guided by decolonial and feminist approaches so as to ensure that the law is shaped through the meaningful participation of affected communities and other actors who have historically been marginalized in international lawmaking.

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