

ROLF KNIEPER 85
რომის კენიკერი

LIBER AMICORUM



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იურიდიული ფაკულტეტი

Faculty of Law of Ivane Javakhishvili Tbilisi State University

ROLF KNIEPER

როლფ კნიპერი

85

Liber Amicorum





სამეცნიერო რედაქტორები

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თომას მაიერი

გერმანიის საერთაშორისო თანამშრომლობის საზოგადოების პროექტის ხელმძღვანელი

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ივანე ჯავახიშვილის სახელობის თბილისის სახელმწიფო უნივერსიტეტის იურიდიული ფაკულტეტის სამეცნიერო კვლევებისა და ინტერნაციონალიზაციის სამსახურის ექსპერტი, მონვეული ლექტორი

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The articles in this collection preserve the original style of the authors.

ISBN

Vorwort der Herausgeber

Dieses Buch ist Professor Dr. Dr. h.c. mult. Rolf Knieper gewidmet, der im Jahr 2026 seinen 85. Geburtstag feiert. Das Wirken von Professor Rolf Knieper geht weit über seine Beteiligung in den Rechtsreformen in den Staaten, die sich aus dem Zusammenbruch der Sowjetunion gebildet haben hinaus, zumal Professor Knieper als Akademiker und Schiedsrichter auch in Theorie und Praxis tätig ist.

Startpunkt seines Engagements in den Transformationsstaaten war das Jahr 1992, in dem Professor Rolf Knieper seine Tätigkeit im Bereich der Rechtsreformen in Georgien begann. Nachdem Eduard Shevardnadze in diesem Jahr die Präsidentschaft übernahm, identifizierten die damals Verantwortlichen in enger Abstimmung mit der deutschen Bundesregierung den Bereich des Zivilrechts als Kernthema der Rechtsreformen, da dieses Rechtsgebiet zwar noch aus den Anfangsjahren der Sowjetunion eng mit der kontinental-europäischen, insbesondere deutschem Rechtstradition verbunden war, im Rahmen einer sozialistischen Planwirtschaft zentrale Institutionen aber de facto nicht angewendet wurden.

Die neuen unabhängigen Staaten standen daher vor der Mammutaufgabe, für dieses Rechtsgebiet neue gesetzliche Grundlagen zu schaffen und in der Rechtsgemeinschaft der Länder zu verankern. Dabei wurden sie im Rahmen der internationalen Zusammenarbeit von mehreren Seiten unterstützt. Die von Professor Rolf Knieper geleiteten Reformvorhaben folgten dabei der Doktrin, dass es einerseits international anerkannte Institutionen gibt, die verankert werden müssen, andererseits nationale Kontexte, die es unbedingt zu berücksichtigen galt. Ein Ansatz, der in seiner Darstellung „Juristische Zusammenarbeit: Universalität und Kontext“ umfassend dargestellt wurde.

Dieser Ansatz bedingt, dass nicht die internationalen Experten die Richtung der Reformen bestimmen, sondern dass die lokalen juristischen Gemeinschaften die Ausarbeitung und den nötigen Kapazitätsaufbau selbst betrieben, unterstützt durch die internationale Expertise und sonstige Unterstützungen. Dies entspricht auch der Bedeutung insbesondere der Zivilgesetzbücher für die Bildung der neuen Staaten und des Selbstbewusstseins der lokalen Experten. Ein Ansatz, der leider nicht von allen Organisationen der internationalen Entwicklungszusammenarbeit verfolgt wurde.

Diese partnerschaftliche Herangehensweise bringt es mit sich, dass dieses Buch nicht ausschließlich aus Fachbeiträgen besteht, sondern oftmals auch die besonderen persönlichen Beziehungen von Professor Rolf Knieper reflektieren, die in nunmehr mehr als 30 Jahren eine Reihe von Freundschaften gestiftet haben. Diese Beiträge bieten einen umfassenden Überblick über die Geschichte der Rechtsreformen und die beeindruckenden Leistungen von Professor Rolf Knieper, sein Engagement, seine Kommunikationsfähigkeiten und seine persönlichen Qualitäten.

Professor Rolf Knieper leistet in seiner fortwährenden Arbeit weiter seine Beiträge und wird bei der Analyse von aufkommenden oder durch ihn identifizierten Fragestellungen als Experte herangezogen. In einer Vielzahl von Publikationen unterlegt er die Reformen zudem mit einem akademischen Unterbau, der in den Ländern hohe Beachtung findet.

Angesichts seiner unglaublichen Vitalität ist zu erwarten, dass Rolf Knieper noch lange Zeit seine freundschaftlichen Beziehungen, seine unmittelbare Beratung und die akademische Einordnung weiter betreiben und im Bereich der Rechtsreform der Transformationsstaaten weiterwirken wird.

Lado Chanturia

Thomas Meyer

Lia Shatberashvili

რედაქტორების წინასიტყვა

ეს წიგნი ეძღვნება პროფესორ როლფ კნიპერს, რომელიც 2026 წელს 85-ე დაბადების დღეს აღნიშნავს. პროფესორ როლფ კნიპერის საქმიანობა მრავალმხრივია და სცდება იმ სამართლებრივ რეფორმებში მონაწილეობას, რომლებიც საბჭოთა კავშირის დაშლის შემდეგ წარმოქმნილ სახელმწიფოებში განხორციელდა. პროფესორი კნიპერი, როგორც მეცნიერი და საერთაშორისო არბიტრი, აქტიურად მოღვაწეობს როგორც თეორიაში, ისე პრაქტიკაში.

გარდამავალ ქვეყნებში მისი ჩართულობის საწყის წერტილად შეიძლება ჩაითვალოს 1992 წელი, როდესაც პროფესორმა როლფ კნიპერმა საქართველოში დაიწყო საქმიანობა სამართლებრივი რეფორმების სფეროში. მას შემდეგ, რაც იმავე წელს ედუარდ შევარდნაძემ პრეზიდენტის თანამდებობა დაიკავა, იმდროინდელმა პასუხისმგებელმა პირებმა გერმანიის ფედერალურ მთავრობასთან მჭიდრო თანამშრომლობით სამართლებრივი რეფორმების ძირითად სფეროდ სამოქალაქო სამართალი განსაზღვრეს. ეს სფერო, მიუხედავად იმისა, რომ საბჭოთა კავშირის ადრეული პერიოდიდან კონტინენტურ-ევროპულ, განსაკუთრებით კი გერმანულ სამართლებრივ ტრადიციასთან მჭიდროდ იყო დაკავშირებული, სოციალისტური გეგმური ეკონომიკის პირობებში მისი ძირითადი ინსტიტუტები პრაქტიკულად არ გამოიყენებოდა.

ამგვარად, ახალი დამოუკიდებელი სახელმწიფოები აღმოჩნდნენ უზარმაზარი ამოცანის წინაშე — ამ სამართლის სფეროსთვის ახალი საკანონმდებლო საფუძვლების შექმნა და მათი საერთაშორისო სამართლებრივ საზოგადოებაში დამკვიდრება. ამ პროცესში ისინი საერთაშორისო თანამშრომლობის ფარგლებში სხვადასხვა მხრიდან იღებდნენ მხარდაჭერას. პროფესორ როლფ კნიპერის ხელმძღვანელობით განხორციელებული რეფორმები ეფუძნებოდა დოქტრინას, რომლის მიხედვითაც, ერთი მხრივ, არსებობს საერთაშორისო დონეზე აღიარებული სამართლებრივი ინსტიტუტები, რომლებიც უნდა დამკვიდრდეს, ხოლო მეორე მხრივ — აუცილებელია ეროვნული კონტექსტის გათვალისწინება. ეს მიდგომა ფართოდ არის წარმოდგენილი მის ნაშრომში „იურიდიული თანამშრომლობა: უნივერსალურობა და კონტექსტი“.

ამ მიდგომის მიხედვით, რეფორმების მიმართულებას არ განსაზღვრავენ საერთაშორისო ექსპერტები; პირიქით, ადგილობრივი იურიდიული საზოგადოებები თავად ახორციელებენ რეფორმების შემუშავებას და საჭირო ინსტიტუციური შესაძლებლობების განვითარებას, საერთაშორისო ექსპერტების ცოდნისა და მხარდაჭერის დახმარებით. ეს მიდგომა ასევე შეესაბამება სამოქალაქო კოდექსების განსაკუთრებულ მნიშვნელობას ახალი სახელმწიფოების ჩამოყალიბებისა და ადგილობრივი ექსპერტების პროფესიული თვითშე-

გნების განვითარებაში. სამწუხაროდ, საერთაშორისო განვითარების თანამშრომლობის ყველა ორგანიზაცია არ მიჰყვებოდა ასეთ მიდგომას.

სწორედ ამ პარტნიორული და მეგობრული თანამშრომლობის შედეგია, რომ წინამდებარე წიგნი მხოლოდ იურიდიულ სტატიებს არ მოიცავს. მრავალი მათგანი ასევე ასახავს პროფესორ როლფ კნიპერის განსაკუთრებულ პირად ურთიერთობებს, მის პირად თვისებებს, რომლებმაც მას 30 წელზე მეტი ხნის განმავლობაში მრავალი მეგობარი შეუძინა. ეს ნაშრომები გვთავაზობს სამართლებრივი რეფორმების ისტორიისა და პროფესორ როლფ კნიპერის შთაბეჭდავი საქმიანობის ფართო მიმოხილვას, მისი პროფესიონალიზმის, კომუნიკაციის უნარისა და მიღწეული წარმატებების აღწერას.

პროფესორი როლფ კნიპერი დღემდე აგრძელებს აქტიურ საქმიანობას და კვლავ მონაწილეობს ექსპერტის სახით ახალი ან მის მიერ გამოკვეთილი პრობლემური საკითხების დამუშავებაში. მრავალრიცხოვან პუბლიკაციებში მან ჩამოაყალიბა განხორციელებული რეფორმების მეცნიერული საფუძველი, რაც მრავალ ქვეყანაში დიდ ყურადღებას იმსახურებს.

მისი გასაოცარი სიცოცხლისუნარიანობის გათვალისწინებით, შეიძლება ვივარაუდოთ, რომ როლფ კნიპერი კიდევ მრავალი წლის განმავლობაში გააგრძელებს მეგობრულ ურთიერთობებს თავის კოლეგებთან, აკადემიურ და მეცნიერულ საქმიანობას და კვლავ მნიშვნელოვან როლს შეასრულებს გარდამავალი ქვეყნების სამართლებრივი რეფორმების სფეროში.

*ლადო ჭანტურია
თომას მაიერი
ლია შატერაშვილი*

INHALTSVERZEICHNIS / TABLE OF CONTENTS

Vorwort der Herausgeber	V

რედაქტორების წინასიტყვაობა	VII

Lado Chanturia

Im Zeitalter der Rechtstransformation. Rolf Knieper und die Entstehung neuer Privatrechtsordnungen

(ლადო ჭანტურია , სამართლებრივი გარდაქმნების ეპოქა. როლფ კნიპერი და ახალი კერძო სამართლის წარმოშობა)	15

Besarion Zoidze

The Indelibility of the Contract's Founding Interest in the Process of Transformation of the Obligatory Relationship (A Critical Assessment of a Court Judgment)

(ბესარიონ ზოიძე , ხელშეკრულების სადამფუძნებლო ინტერესის მოუშლელობა ვალდებულებითი ურთიერთობის ტრანსფორმაციის პროცესში (ერთი სასამართლოს გადაწყვეტილების კრიტიკული შეფასება))	35

Tedo Ninidze

A Word on Professor Rolf Knieper

(თედო ნინიძე , სიტყვა პროფესორ კნიპერზე)	52

John Khetsuriani

Constitutional Reform in Georgia (2017) and the Constitutional Court

(ჯონი ხეცურიანი , 2017 წლის საკონსტიტუციო რეფორმა საქართველოში და საკონსტიტუციო სასამართლო)	61

Norbert Bernsdorff

Georgia: Legal Uncertainties in the Further Accession Process

(ნორბერტ ბერნსდორფი , საქართველო: სამართლებრივი გაურკვევლობები გაწევრიანების პროცესში)	81

Maidan K. Suleymenov

Rolf Knieper: Anfänge der Entwicklung des Wissenschaftlers und Menschen

(მაიდან სულეიმენოვი, როლფ კნიპერი: მეცნიერისა და ადამიანის განვითარების საწყისები)..... 105

Alexander Trunk

Schadensrecht in Osteuropa – Versuch eines Überblicks

(ალექსანდერ ტრუნკი, ზიანის ანაზღაურების სამართალი აღმოსავლეთ ევროპაში – მიმოხილვის მცდელობა) 118

Tariel Kululashvili

Following the Footsteps of Georgian Lawmaking in the 1990s

(ტარიელ კულულაშვილი, საქართველოს 90-ანი წლების სამართალშემოქმედების კვალდაკვალ) 152

Thomas Meyer

Regulierung der Prozessfinanzierung

(თომას მაიერი, სასამართლო პროცესის დაფინანსების სამართლებრივი რეგულირება) 156

Shirin Akhmedova

Rolf Knieper's Contribution in the Development of the Legal System of Turkmenistan

(შირინ ახმედოვა, როლფ კნიპერის მონაწილეობა თურქმენეთის სამართლებრივი სისტემის განვითარებაში)..... 167

Iris Muth

Pink Floyd und die Rechtsberatung

(ირის მუთ, პინკ ფლოიდი და სამართლებრივი რეფორმები) 174

Shamil Asyanov

Rolf Knieper – Teacher and Friend

(შამილ ასიანოვი, როლფ კნიპერი - მასწავლებელი და მეგობარი) 192

Aydin Suleymanli

Bridging Law and Humanity: In Honour of Professor Rolf Knieper

(აიდინ სულეიმანლი, სამართლისა და ჰუმანურობის ერთიანობა: პროფესორ როლფ კნიპერის პატივსაცემად) 201

Valeri Khrustali

Voraussetzungen der Zulässigkeit einer Berufung in Zivilverfahren

(ვალერი ხრუსტალი, სამოქალაქო პროცესში სააპელაციო საჩივრის დასაშვებობის წინაპირობები) 224

Vardan Pogosyan

Shift from Presidentialism to Parliamentarism: Armenian Perspective and Trends in Eastern Europe

(ვარდან პოგოსიანი, საპრეზიდენტო სისტემიდან საპარლამენტო სისტემაზე გადასვლა: სომხეთის გამოცდილება და აღმოსავლეთ ევროპის ტენდენციები) 238

Farkhad Karagussov

About a Concept of Ordre Public in Law of Kazakhstan

(ფარხად კარაგუსოვი, ყაზახეთის სამართალში საჯარო წესრიგის (Ordre Public) კონცეფციის შესახებ) 256

Hans-Joachim Schramm

Entwicklungen des Europäischen Vertragsrechts vor dem Hintergrund des georgischen Zivilrechts

(ჰანს იოახიმ შრამი, ევროპული სახელმწიფოებო სამართლის განვითარება საქართველოს სამოქალაქო სამართლის ფონზე) 267

Irakli Burduli

Recollecting the Institution of Commercial Broker: A Legal Figure Absent from Legislation and the Rationale for Its Regulatory Reinstatement

(ირაკლი ბურდული, კომერციული ბროკერის ინსტიტუტის გახსენება: კანონმდებლობაში არარსებული სამართლებრივი ფიგურა და მისი რეგულირების ალდგენის დასაბუთება) 285

Khanlar Hajiyev**Judicial Argumentation and Sustainable Legal Development**

(ხანლარ ჰაჯიევი, სასამართლო არგუმენტაცია და სამართლის მდგრადი

განვითარება) 306

Jens Deppe**Comments on the Future of International Development Cooperation**

(იენს დეპე, მოსაზრებები საერთაშორისო განვითარების თანამშრომლობის

მომავალზე) 322

Ikram Karimov**Die Verkörperung der deutsch-aserbaidshianischen Freundschaft**

(იკრამ კარიმოვი, გერმანულ-აზერბაიჯანული მეგობრობის განსახიერება) 349

Tamar Zarandia, Nana Mchedlidze**Possession and Legitimate Expectation: Aspects of the Right to Property in Georgian Law and the ECHR**

(თამარ ზარანდია, ნანა მჭედლიძე, მფლობელობა და ლეგიტიმური მოლოდინი:

საკუთრების უფლების ასპექტები ქართულ სამართალსა და ადამიანის უფლებათა

ევროპული სასამართლოს პრაქტიკაში) 354

Max Gutbrod**Aporias of Law-Making: A Tour d’Horizon**

(მაქს გუტბროდი, სამართალშემოქმედების პარადოქსები – მოკლე მიმოხილვა) 386

Zhu Yan**An Interpretation of the Chinese Civil Code from the Perspective of Political, Economic and Social Foundations**

(ჯუ იანი, ჩინეთის სამოქალაქო კოდექსის ინტერპრეტაცია პოლიტიკური, ეკონომიკური

და სოციალური საფუძვლების ქრილში) 430

Sandro Jorbenadze, Sergi Jorbenadze

The Place of Creation by Artificial Intelligence in Intellectual Property Law

(სანდრო ჯორბენაძე/სერგი ჯორბენაძე, ხელოვნური ინტელექტის ქმნილების ადგილი ინტელექტუალური საკუთრების სამართალში)..... 456

Natia Chitashvili

Legal Grounds for Limiting the Freight Forwarder's Liability Through Special Drawing Rights (SDR)

(ნათია ჩიტაშვილი, სპეციალური სასესხო უფლებით (სსუ - SDR) ექსპედიტორის პასუხისმგებლობის შეზღუდვის სამართლებრივი საფუძვლები)..... 471

Lia Shatberashvili

Zwischen Zwang und Vernunft – Zur Dialektik des Freiheitsbegriffs bei Rolf Knieper

(ლია შატბერაშვილი, იძულებასა და გონიერებას შორის – თავისუფლების ცნების დიალექტიკის შესახებ როლფ კნიპერის შემოქმედებაში) 489

Roin Migriauli

Die Entwicklung des georgischen Insolvenzrechts: von der Nichtvermögenheit zur Zahlungsunfähigkeit

(როინ მიგრიული, ვალაუვალობის ქართული სამართლის განვითარება არამემძლეობიდან გადახდისუნარობამდე) 510

Ellen Best

Was braucht es für eine kompetente Rechtsberatung? Nicht nur Rechtskenntnisse. Ein unwissenschaftlicher Erlebnisbericht

(ელენ ბესტი, რა არის საჭირო კომპეტენტური სამართლებრივი კონსულტირებისთვის? არა მხოლოდ სამართლის ცოდნა. გამოცდილების არამეცნიერული მონაცემი)..... 531

Sulkhan Gamkrelidze

Die gegenwärtige Krise der Entwicklungszusammenarbeit

(სულხან გამყრელიძე, განვითარების თანამშრომლობის თანამედროვე კრიზისი) ... 537

Ekaterine Gasitashvili

On the Right of the Innocent Owner

(ეკატერინე გასიტაშვილი, უდანაშაულო მესაკუთრის უფლების შესახებ) 546

Zangar Nogaibay

Die Expertenempfehlungen von Professor Knieper sind weiterhin relevant für Kasachstan

(ზანგარ ნოდაიბაი, პროფესორ კნიპერის ექსპერტული რეკომენდაციები კვლავაც აქტუალურია ყაზახეთისთვის) 565

Anna KobylenkovaA Few Words in Honour of Professor Rolf Knieper on His 85th Birthday

(ანა კობილენკოვა, პროფესორ როლფ კნიპერის 85-ე იუბილესადმი მიძღვნილი რამდენიმე სიტყვა) 569

Nino Khoperia

Blockchain Technology and Artificial Intelligence in Law

(ნინო ხოფერია, ბლოკჩეინის ტექნოლოგია და ხელოვნური ინტელექტი სამართალში) 571

Mariam Tsiskadze

Rechtliche Aspekte der Regelung gemeinschaftlicher Beziehungen

(მარიამ ცისკაძე, საზიარო ურთიერთობების მოწესრიგების სამართლებრივი ასპექტები) 584

Im Zeitalter der Rechtstransformation Rolf Knieper und die Entstehung neuer Privatrechtsordnungen

Einführung

Mit dem Zerfall der Sowjetunion Anfang der neunziger Jahre des vergangenen Jahrhunderts wurde nicht nur der Kommunismus zu Grabe getragen, sondern es entstand über Nacht ein reformbedürftiger Rechtsraum in den ehemals sowjetischen Republiken und nun unabhängigen Staaten. Wie Professor *Rolf Knieper* zutreffend beschrieb, brachte die politische Unabhängigkeit ein institutionelles Vakuum mit sich: *„der Zusammenbruch der kommunistischen Ökonomie lähmt die Produktion des gesellschaftlichen Reichtums, der Zusammenbruch der an die Ökonomie geknüpften sozialen Strukturen schafft Verhaltensunsicherheiten und regellose Konkurrenz aller gegen alle auf der Suche nach einem neuen Platz in der Gesellschaft, und dort natürlich möglichst auf ihrer Sonnenseite“*.¹ Es begann die Stunde der Rechtsreformen sowie der internationalen rechtlichen Zusammenarbeit. Das galt in gleichem Maße sowohl für das große Russland, welches sich erstaunlicherweise über seine Unabhängigkeit von der Sowjetunion freute,² als auch für das kleine Georgien.³

* Prof. Dr. Dr. h.c. Lado Chanturia ist Professor an der Ivane Javakhishvili Staatsuniversität von Tbilisi und Präsident der vierten Sektion am Europäischen Gerichtshof für Menschenrechte in Straßburg.

1 *Rolf Knieper*, Konzepte und Methoden der Kodifikation in Übergangsgesellschaften am Beispiel Georgiens, in Rechtsreform in Georgien, Beiträge zu einer Tagung vom 23. bis 25. Mai 1994 in Tbilisi, (Hrsg.) *Sergo Dshorbenadze, Rolf Knieper, Lado Chanturia*, Verlag der Universität Tbilisi, 1994, 161.

2 *Rolf Knieper*, Juristische Zusammenarbeit: Universalität und Kontext, GTZ, Universum Verlag, Wiesbaden, 2004, 11.

3 *Sergo Dshorbenadze*, Grundprobleme des zukünftigen Zivilgesetzbuches von Georgien, in Rechtsreform in Georgien, 155.

Kein anderer Rechtswissenschaftler hat zur Entstehung der neuen Privatrechtsordnungen im postsowjetischen Raum so viel beigetragen wie *Rolf Knieper*. Kein anderer westlicher Jurist hat die Rechtsentwicklung so nachhaltig beeinflusst wie er. In zahlreichen Monografien, Aufsätzen und Diskussionsbeiträgen erörterte er meisterhaft die Welt des neuen Rechts. *Rolf Knieper* hat einen beispiellosen Prozess der Rechtsreformen initiiert und ihn drei Jahrzehnte lang begleitet. Dank ihm sind neue, nie zuvor dagewesene, Rechtsgebiete entstanden, ohne welche die Existenz einer modernen Rechtsordnung und der Rechtsstaatlichkeit undenkbar wären.⁴ Keine andere Person hat mein Leben so tief, so grundlegend und nachhaltig geprägt wie *Rolf*. Noch mit niemandem war ich in allen Fragen so einig wie mit ihm, ohne dass wir uns im Voraus abgestimmt hätten. Wir sind uns auch in der Einschätzung der gegenwärtigen prekären und zum Teil tragischen politischen Prozesse einig.⁵

In der „*Erklärung von Bremen*“, die auf einer internationalen Konferenz zur „Rechtsreform in der Gemeinschaft Unabhängiger Staaten (GUS)“ am 5. März 1997 von Teilnehmern aus 13 Transformationsstaaten und 12 bilateralen, regionalen und multilateralen Organisationen verabschiedet wurde, hieß es unter anderem: „*Die Teilnehmer sind sich darüber einig, dass ein in der praktischen Anwendung staatlich garantiertes Rechtssystem fundamentale und unabdingbare Voraussetzung für Demokratie und eine freie Marktwirtschaft ist; dass auch das Privatrecht bei allen nationalen Eigenheiten auf allgemein anerkannten, universal gültigen Prinzipien beruht, die zur nationalen Souveränität und kulturellen Vielfalt nicht im Widerspruch stehen*“.⁶ Mit diesen Worten, die auf *Rolf Knieper* zurückgehen, wurden Aufgaben und Ziele der Rechtsberatung und Rechtsreform definiert, die bis heute nicht an Aktualität verloren haben.

4 Das Gesellschaftsrecht, Insolvenzrecht, Scheck- und Wechselgesetze, Schiedsgerichtbarkeit sind klare Beweise seiner Reformtätigkeit.

5 Mit seiner Einschätzung unserer persönlichen Beziehungen und Freundschaft, die er beeindruckend in seinem Beitrag zu meinem 60. Geburtstag formuliert hatte, stimme ich voll zu: „Zu Beginn waren Lado und ich selbst überrascht, wie zwei Menschen unterschiedlichen Alters, sozialisiert in ganz unterschiedlichen politischen, ökonomischen und kulturellen Gesellschaften und mit ganz unterschiedlichen Lebenserfahrungen so viel Einigkeit produzieren konnten, ohne mühsam nach Kompromissen suchen zu müssen...“: *Rolf Knieper*, Der Weg ist das Ziel. Praktische Wissenschaft als wissenschaftliche Praxis im Leben von Lado Chanturia, *In Lieber Amicorum*, Lado Chanturia, Tbilisi, 2023, 43.

6 *Boguslawski-Knieper* (Hrsg), Wege zu neuem Recht, Materialien internationaler Konferenzen in St. Petersburg und Bremen, Nomos, 1998.

Rolf Knieper als Rechtskulturträger und Aufklärer genießt eine beispiellose Anerkennung in all den Ländern, in denen er die Entstehung neuer Rechtsordnungen mitgestaltete. Aus allgemein bekannten historischen Gründen waren sowjetische Juristen von den westlichen Rechtsordnungen isoliert und weit entfernt; die erklärten und politisch erwünschten Rechtsreformen scheiterten somit nicht zuletzt hauptsächlich aufgrund mangelnder Rechtsexpertise. *Rolf Knieper* war unermüdlich tätig und brachte die notwendige Expertise und das *Know How* mit. Darüber hinaus trug er wesentlich zur Aus- und Fortbildung einer neuen Generation von Juristen bei.

Rolf Knieper als Brückenbauer zwischen verschiedenen Kulturen und Generationen hat seine ganze Tätigkeit dem harmonischen, konstruktiven und nachhaltigen Zusammenwirken von Vertretern der verschiedenen Generationen gewidmet. Dies drückt sich vor allem in der Tatsache aus, dass in seinem umfangreichen Netzwerk nationaler Juristen Vertreter der Lehrer-Schüler Generationen angehörten und harmonisch zusammenarbeiteten.⁷ Die Freundschaften und Kooperationen, die dank ihm zustande kamen, setzen sich fort und stellen eine weitreichende Inspiration für die Nachwuchsgenerationen dar.

Ich hatte das Privileg, meinen großartigen Freund über drei Jahrzehnte bei seiner außerordentlich umfangreichen Tätigkeit in den verschiedenen Staaten der ehemaligen Sowjetunion zu begleiten und mit eigenen Augen zu sehen, mit welchem Engagement und welcher Begeisterung er sich dem historisch einmaligen Prozess der Rechtstransformation widmete. Wie er später schrieb, „*wir ahnten, dass wir einen enorm schwierigen Auftrag übernommen hatten, allerdings ohne Bewusstsein darüber, dass er uns fast unser ganzes weiteres Leben begleiten sollte, nicht immer, aber oft gemeinsam*“.⁸ Nun versuche ich nur einen Bruchteil dessen, was *Rolf* schuf, dem Leser in Erinnerung zu bringen.

1. Georgien, wo es alles begann

In Georgien nahm *Rolfs* vielfältige und bis heute andauernde Tätigkeit als Rechtsreformer und Rechtsaufklärer ihren Anfang. Der vom Enthusiasmus der georgischen Juristen begeisterte Rechtswissenschaftler widmete sein

7 Am 29. Oktober 2025 haben die usbekischen Juristen den 100. Geburtstag von Professor *Rakhmankulov* (damaliger Vorsitzender der usbekischen Kommission zur Ausarbeitung des usbekischen ZGB) gefeiert, wo *Rolf Knieper* als Ehrengast eingeladen war.

8 *Knieper*, Der Weg ist das Ziel, 39.

Berufsleben der Rechtsentwicklung in Ländern mit ganz unterschiedlichen kulturellen, historischen und rechtlichen Hintergründen und Erfahrungen. Er bezeichnete es als das georgische Paradox, *„dass in dieser Zeit der Krise und des Pessimismus eine Gruppe von Wissenschaftlern, Praktikern und Politikern des Rechts sich in mit Optimismus gespeistem Elan daranmacht, eine gründliche Reform des Zivil- und Wirtschaftsrechts sowie der Gerichtsorganisation und des Zivilprozesses zu planen, zu entwerfen und in die Tat umzusetzen“*.⁹

a. Das Zivilgesetzbuch

Seit Anfang 1993 arbeiteten unter Leitung von Professoren *Sergo Dschorbenadze* und *Rolf Knieper* georgische und deutsche Juristen an der Privatrechtsreform. Als Ergebnis des ständigen Ideenaustausches und der häufigen wechselseitigen Besuche entstand in Georgien eine neue Privatrechtsordnung, deren Krönung das erste Zivilgesetzbuch Georgiens (1997) darstellte. Ungeachtet *„der Kritik an der Zusammensetzung der mit der Reform betrauten Juristen und der daraus folgenden scheinbar einseitigen Orientierung auf die Rezeption deutschen Rechts“*, wie *Rolf* dies betonte,¹⁰ ist es in Georgien gelungen, nachhaltige und bis heute geltende grundlegende Gesetze des Privatrechts zu verabschieden.

Die Kodifikation des Zivilrechts gehört zu Recht zu den wichtigsten Ereignissen der modernen georgischen Staatlichkeit und sie ist untrennbar mit dem Namen *Rolf Kniepers* verbunden. Auf ihn gehen nicht nur die Ausarbeitung des Zivilgesetzbuches, sondern auch dessen Umsetzung, inklusive der ersten Veröffentlichung des Gesetzes, dessen Kommentare sowie die Aus- und Weiterbildung der georgischen Juristen zurück. Im Prozess der deutsch-georgischen juristischen Zusammenarbeit ist ein außerordentlich umfangreiches Netzwerk von Universitätsprofessoren, Richtern, Rechtsanwälten und Notaren entstanden, welche maßgeblich in die Umsetzung der neuen Gesetze involviert waren.¹¹

Die Reformarbeit war kontinuierlich mit den Fragen der Modellkonkurrenz, Orientierung und Gegenbewegungen konfrontiert. Die Tatsache, dass die

9 *Knieper*, Konzepte und Methoden der Kodifikation in Übergangsgesellschaften am Beispiel Georgiens, 162, auch in *Rolf Knieper*, Rechtsreformen entlang der Seidenstraße, BWV, 2006, 47.

10 *Knieper*, Konzepte und Methoden der Kodifikation in Übergangsgesellschaften am Beispiel Georgiens, 163, *Knieper*, Rechtsreformen entlang der Seidenstraße, BWV, 2006, 48.

11 *Hein Bölling, Lado Chanturia*, Die Arbeitsmethode des Richters im Zivilprozess. An Hand von Fällen, Lösungen und Entscheidungen zum georgischen Recht, GTZ. Tbilisi, 2003.

Entscheidung zugunsten der kontinentaleuropäischen Lösungen getroffen wurde, ist maßgeblich Rolf zu verdanken: *„Ich habe dies getan, da ich die klare Begrifflichkeit und die Positivierungen von Rechten und Pflichten in der Tradition der kontinental-europäischen Kodifikationen für Vorteile in der Fragilität der Übergangsgesellschaften halte“* – schrieb er als überzeugter Verfechter der Kodifikation und perfekter Kenner der Kodifikationsgeschichte.¹² Die mangelnde Erfahrung und die mangelnde Rechtstradition sprachen ebenso dafür, dass Georgien grundsätzlich das kodifizierte Recht, also genau und präzise ausformulierte Gesetzestexte, zum Grundstein seiner Rechtsordnung machte.¹³ Diese grundlegende Entscheidung prägte die Zukunft der Rechtsentwicklung in Georgien.¹⁴ Die Versuche, das Zivilgesetzbuch zugunsten einer sogenannten Selbstregulierung auszuhöhlen, scheiterten.¹⁵

Die primäre Aufgabe zu Beginn der Kodifizierungsarbeit ist es zu prüfen, *„welche Materien überhaupt in einem modernen Zivilgesetzbuch behandelt werden sollten“*.¹⁶ Mit Blick auf die sowjetische Vergangenheit, in der die Zivilgesetzbücher mit öffentlich-rechtlichen Vorschriften und Instituten belastet waren, stellte diese Aufgabe eine große Herausforderung dar. Hierbei handelte es sich um eine der zentralen Fragen, die sich nicht nur in Georgien, sondern in allen post-sowjetischen Staaten stellten, die diskutiert und unterschiedlich beantwortet worden sind.¹⁷ Dank Rolfs konstruktiven und überzeugenden Argumenten, konnte in Georgien ohne Komplikationen Einigkeit über folgende Fragen erzielt werden.

Erstens, das Zivilgesetzbuch sollte auf die Regelung privatrechtlicher Beziehungen fokussiert werden. Die privaten Beziehungen sollten im Zivilgesetzbuch geregelt werden und die öffentlich-rechtlichen Verhältnisse in besonderen Gesetzen des öffentlichen Wirtschaftsrechts. „Ein fairer und angemessener

12 Knieper, Rechtsreformen entlang der Seidenstraße, BWV, 2006, S. 56. In seinem Buch „Gesetz und Geschichte“ hat Rolf Knieper die politischen, historischen und philosophischen Hintergründe der Kodifikation des BGB untersucht.

13 Lado Chanturia, Rückblick auf Georgiens rechtliche Transformation im Privatrecht, in: Mattias Kötter u.a. (Hrsg.), Rechtsstaatsförderung – Handbuch für Forschung und Praxis, 2022, 139 ff.

14 Bessarion Zoidze, Rezeption des europäischen Rechts in Georgien, Tbilisi, 2005 (in georgischer Sprache).

15 Chanturia, Rückblick auf Georgiens rechtliche Transformation im Privatrecht, 140.

16 Knieper, Der Weg ist das Ziel, 44.

17 Stellvertretend Rolf Knieper, Lado Chanturia, Hans-Joachim Schramm, Das Privatrecht im Kaukasus und in Zentralasien, BWV, 2010.

Interessenausgleich zwischen privaten, individuellen Parteien im Rechtsverkehr“ gehört zu den zentralen Aufgaben des Zivilrechts.¹⁸ Zweitens, schnell wurde auch die Notwendigkeit erkannt, materielles und prozessuales Recht als getrennte Materien zu behandeln. Eine Ausnahme wurde nur für das Internationale Privatrecht konzipiert. Das im Jahr 1998 verabschiedete Gesetz zur Regelung des Internationalen Privatrechts umfasste sowohl das materielle als auch das prozessuale Recht.¹⁹ Drittens, aus der Notwendigkeit der Rechtssicherheit heraus wurde entschieden, dass bestimmte Rechtsmaterien, wie etwa das Eigentum oder Formen der juristischen Personen sowie bestimmte Vertragstypen, vollständig einheitlich entweder im Zivilgesetzbuch oder in einzelnen Gesetzen, wie etwa im Gesetz über gewerbliche Unternehmen, zu kodifizieren.

Insgesamt gesehen orientiert sich das ZGB Georgiens am deutschen BGB, berücksichtigt aber zugleich bereits moderne Entwicklungen des Privatrechts, einschließlich des europäischen Rechts.²⁰ Im Gegensatz zur sowjetischen Rechtstradition, integrierte Georgien als erstes postsowjetisches Land das Familienrecht ins ZGB und schloss sich damit an die kontinentaleuropäische Tradition der Kodifizierung des Zivilrechts an. Rolf leistete einen enormen Beitrag zu dieser Entscheidung.

b. Das Gesellschaftsrecht

Das Kodifikationswerk von Rolf Knieper stellt die erste Kodifizierung des Gesellschaftsrechts mit einem Allgemeinen Teil dar, in dem die für alle Unternehmer geltenden Vorschriften von der Gründung bis zur Liquidation zusammengefasst wurden, und einem *numerus clausus* von juristischen Personen im Jahre 1994. Es hat maßgeblich zur nachhaltigen Entwicklung des Gesellschaftsrechts in Georgien beigetragen. Aus diesem Grund wurde auch die Gesetzeskonzeption im neuen Gesetz über die gewerblichen Unternehmer, das am 1. Januar 2022 in Kraft trat, beibehalten. Auch an der gründlichen Überarbeitung des Gesetzes im Lichte der Annäherung Georgiens an die Europäische Union hatte Rolf einen enormen Anteil: ein Vorbild der drei Jahrzehnte andauernden Rechtsberatung.

18 Rolf Knieper, Massenschäden und Risikogesellschaft. Grenzüberschreitungen und Brückenbau, in Festschrift für Prof. Dr. Alexander Trunk zum 65. Geburtstag, Aliyev/Breig/Wedde (Hrsg.), BWV, 2022, 231.

19 Georgi Vashakidze, Das Internationale Privatrecht von Georgien, 2014, 7 ff.

20 Lado Chanturia, Recht und Transformation. Rechtliche Zusammenarbeit aus der Sicht eines rezipierenden Landes, RabelsZ, 72 (2008), 123.

Wie *Rolf* es richtig beschrieb, hatte das Gesetz für seine Gesamtkonzeption keine Vorbilder und wegen der selbst für Gesetzesautoren ungewöhnlich hohen Originalität wurde es Gegenstand zahlreicher Diskussionen, sowohl auf nationaler als auch auf internationaler Ebene. Ungeachtet dessen wurde einhellig empfohlen, das Gesetz beizubehalten und es allerdings um einige Novellierungen zur Verbesserung des Minderheitenschutzes sowie des Rechts der verbundenen Unternehmen zu ergänzen.²¹

Auch die Gesetzesimplementierung verlief mit breiter internationaler Unterstützung, in die sowohl Rechtswissenschaftler als auch Rechtspraktiker aus verschiedenen Ländern involviert waren. Die internationalen Symposien in den Jahren 2000 und 2003 mit Beteiligung der führenden deutschen Gesellschaftsrechtler trug zur Popularisierung des neuen georgischen Gesellschaftsrechts bei.²² Ohne Übertreibung lässt sich zusammenfassen: *Rolf Knieper* spielte nicht nur die führende Rolle, ohne ihn wäre dieser Prozess nicht denkbar gewesen.

c. Der Staat als Marktteilnehmer

Ausschlaggebend und richtungsweisend waren *Rolfs* Vorschläge und Konzepte für die Rolle und Stellung des Staates als Marktteilnehmer, zusammengefasst in einer Vorschrift des ZGB: „*Der Staat beteiligt sich an bürgerlich-rechtlichen Verhältnissen wie eine juristische Person des Privatrechts*“. Zugleich war damit der Grundstein für die Anerkennung des Staates als juristische Person des öffentlichen Rechts gelegt. Wie er es später lakonisch zum Ausdruck brachte, wurde damit klargestellt, dass der Staat nicht auf die Ausübung hoheitlicher Tätigkeit beschränkt ist und tatsächlich als Partei im Geschäftsverkehr auftreten kann, ohne gegenüber anderen Personen weder benachteiligt noch privilegiert zu sein.²³ Damit verschwand die „*sowjetisch inspirierte Rechtsform der teilautonomen Staatsunternehmen*“ aus dem neuen georgischen Privatrecht. Darüber hinaus wurde die Monopolstellung des Begriffs der juristischen Personen im

21 *Knieper*, Juristische Zusammenarbeit: Universalität und Kontext, 47.

22 Die Ergebnisse der Symposien wurden in zwei Tagungsbände veröffentlicht: Aktuelle Probleme der Entwicklung des Gesellschaftsrechts in Georgien. Deutsch-georgisches Symposium in Tbilisi 7-8. März 2000 (Hrsg.) *Lado Chanturia, Rolf Knieper, Johannes Semler*; Sorgfaltspflicht und Verantwortlichkeit in der Aktiengesellschaft nach georgischem und deutschem Recht. Tagungsband des II. deutsch-georgischen Symposiums zum Gesellschaftsrecht. (Hrsg.) *Lado Chanturia, Rolf Knieper, Johannes Semler*, GTZ. Tbilisi, 2003.

23 *Knieper*, Der Weg ist das Ziel, 42-43.

Zivilrecht, die im sowjetischen und postsowjetischen Recht vorherrschend war, aufgehoben.²⁴ Das Privatrecht beschränkt sich auf die Rechtsformen der juristischen Personen, die nur den Privaten zur Verfügung stehen. Der Staat darf juristische Personen des öffentlichen Rechts gründen. Dieses Konzept war neu für die postsowjetische Rechtsordnung.²⁵

Damit verzichtete Georgien als erstes Land unter den post-sowjetischen Staaten auf die Berücksichtigung der sowjetischen Zivilrechtsdogmatik, wie etwa die besondere Subjektfähigkeit des Staates im Zivilrecht.²⁶

2. Rechtsreformen entlang der Seidenstraße – Renaissance der Kodifikationsidee

Als *Renaissance der Kodifikations-Idee* bezeichnete *Rolf Knieper* in seinem Buch *Gesetz und Geschichte* die enormen Anstrengungen der ehemals kommunistischen Staaten – von Albanien über die kaukasischen Staaten, Russland, die zentralasiatischen Staaten bis zur Mongolei – bei der Erarbeitung und Verabschiedung neuer Zivilgesetzbücher.²⁷ Seine vielfältige Tätigkeit in diesem riesigen und geopolitisch signifikanten Raum war durch die Überzeugung geprägt, „dass Recht ein wesentlicher Bestandteil der allgemeinen Entwicklungsagenda ist, dass es gleichberechtigt und interdependent zu wirtschaftlichen, politischen und sozialen Sphären steht und dass es dabei durchaus sein eigenes Gewicht hat“.²⁸

Mit diesem Engagement lud *Rolf Knieper* die besten Rechtsvertreter von Armenien bis Tadschikistan zur umfassenden Privatrechtsreform ein, bildete Netzwerke, diskutierte mit Kolleginnen und Kollegen die zentralen Fragen der neuen Rechtsordnung und schlug ihnen die optimalen Lösungen und Konzepte vor. Auffällig war dabei, dass in allen Ländern identische Probleme mit identischen

24 *Knieper, Chanturia, Schramm*, Das Privatrecht im Kaukasus und in Zentralasien, 86 ff.

25 Siehe *Suleimenov Maidan*, Lado Chanturia – Citizen of the World, in *Liber Amicorum*, Lado Chanturia, Tbilisi, 2023, 130 ff.

26 *Jorbenadze*, Die wesentlichen Probleme des künftigen Zivilgesetzbuches von Georgien, 156; *Chanturia*, Rückblick auf Georgiens rechtliche Transformation im Privatrecht, 141.

27 *Rolf Knieper*, Gesetz und Geschichte. Ein Beitrag zu Bestand und Veränderung des Bürgerlichen Gesetzbuches, Nomos, Baden-Baden, 1996, 24.

28 *Knieper*, Universalität und Kontext, 17.

Argumentationsmustern diskutiert wurden. Das erleichterte selbstverständlich die juristische Zusammenarbeit mit den Juristen aus all diesen Staaten.²⁹

Bei der Kodifizierung des Privatrechts, insbesondere des Zivil- und Gesellschaftsrechts, haben sich in den Staaten der Region hauptsächlich zwei Modelle entwickelt, wobei die Mehrheit der Länder dem Modell-ZGB für die Gemeinschaft der Unabhängigen Staaten (GUS) folgte. Einige wenige, wie Georgien und Turkmenistan, nahmen das deutsche BGB zum Vorbild.³⁰ Ungeachtet dessen waren die neuen Zivilgesetzbücher kontinuierlich Gegenstand der Erneuerungen, wie etwa das Güterrecht im ZGB von Aserbaidshan.³¹ Dies erforderte permanente Bereitschaft, die Länder zu bereisen und die relevanten Reformfragen zu beraten. Unvergesslich und beeindruckend sind seine Einsätze und zahlreichen Stellungnahmen zu verschiedenen Fragen des Privatrechts oder der Gerichtsverfassung.³² Sie betreffen Fragen des Eigentums, der juristischen Personen, des Gesellschaftsrechts, des Internationalen Privatrechts, der Gerichtsverfassung, der Organisation der juristischen Berufe, der Juristenausbildung usw.³³

Die nachhaltige Rechtsentwicklung und Fortschritte im Rechtswesen konnten nur durch den regelmäßigen Dialog und den internationalen Erfahrungsaustausch erreicht werden. Überzeugt von der Notwendigkeit der wissenschaftlichen Zusammenarbeit unterstützte *Rolf Knieper* seit 1998 seinen kasachischen Freund Professor *Maidan Suleimenov* bei der Einführung und Durchführung der jährlichen zivilrechtlichen Konferenzen in Almaty. Aus dieser Initiative heraus entstand ein herausragendes Forum für Zivilrechtswissenschaftler aus allen Staaten der Region. Die jährlich herausgegebenen Tagungsbände dokumentieren den Erfolg der internationalen wissenschaftlichen Kooperation. *Rolf* beteiligte sich an allen dieser Konferenzen und lieferte wertvolle Beiträge zu aktuellen Problemen des modernen Zivilrechts.³⁴

29 Ebenda, 22.

30 *Chanturia Lado*, Codification of Private Law in Post-Soviet States of the CIS and Georgia, in *Wen-Yeu Wang* (ed), Codification in International Perspective, Selected Papers from the 2nd IACL Thematic Conference, Springer, 2014, 93 ff.

31 *Knieper, Chanturia, Schramm*, Das Privatrecht im Kaukasus und in Zentralasien, 238 ff.

32 In seinem Buch *Universalität und Kontext* (24) berichtet Rolf, dass er in den Jahren von 1993 bis 2004 165 Dienstreisen unternommen und 120 Reiseberichte dokumentiert habe. Eine Arbeit, deren Umfang und Ausmaß kaum vorstellbar sind.

33 *Knieper*, Rechtsreformen entlang der Seidenstraße.

34 Stellvertretend das letzte Tagungsband von 2024: *Нормы гражданского права, Алматы, 2024.*

Rolf Knieper spielte eine Schlüsselrolle bei der Verabschiedung des turkmenischen Zivilgesetzbuches, das sich ebenfalls am deutschen BGB orientierte. Auch in Turkmenistan bildete er, ungeachtet der dortigen schwierigen innenpolitischen Umstände, ein Team von Juristen, die anschließend an der Kommentierung des ZGB und dessen Umsetzung arbeiteten.³⁵ Ich hatte das Vergnügen, zwei Jahre lang seine Tätigkeit in Turkmenistan zu begleiten und die überhaupt ersten Veröffentlichungen juristischer Literatur für das unabhängige Turkmenistan mit ihm zusammen zu organisieren.

Allerdings konnte sich das georgische Konzept eines einheitlichen Gesetzes über gewerbliche Unternehmer in anderen Ländern der Region nicht durchsetzen. Ungeachtet dessen hat sich *Rolf Knieper* auf vielfältige Weise an der Formulierung des Gesellschafts- und des Kapitalmarktrechts aktiv beteiligt, wie etwa am usbekischen Recht der juristischen Personen, am Aktienrecht usw.³⁶ Mit Bedauern fasste *Rolf* dabei zwei Erkenntnisse zusammen: *erstens*, die endgültige Form eines konsistenten Gesellschaftsrechts wurde noch nicht erreicht, und *zweitens*, die Modellgesetze, die für die GUS Staaten ausgearbeitet wurden, brachten keinen durchschlagenden Erfolg.³⁷

Die zahlreichen Beiträge und Veröffentlichungen dokumentieren, welche umfassenden, vielfältigen und tiefgreifenden Änderungen des Rechts in den ehemals kommunistischen Ländern dank *Rolfs* gigantische Tätigkeit vollzogen wurden, die anschließend zu grundlegenden Umwandlungen des Rechts, der Rechtswissenschaft, der Juristenausbildung und der Rechtsanwendung führten. In diesem historischen Prozess vertrat *Rolf* die Auffassung, dass die Rezeption der fremden Rechtsordnungen unter Berücksichtigung des Kontexts des jeweiligen Landes erfolgen müsse.³⁸

3. Rechtstransformation und rechtspolitischer Diskurs

Rolf Knieper lieferte grundlegende Stellungnahmen und Konzepte zu zentralen Fragen der neuen Rechtsordnung, die zum größten Teil nicht an Aktualität

35 Право. Экономика. Благосостояние. Актуальные вопросы правовой реформы в Туркменистане, Ягмыр Нурыев, Ладо Чантурия (изд.), Ашгабат, 2010; Ладо Чантурия, Предисловие к научно-практическим комментариям к Гражданскому кодексу Туркменистана, Том первый, Ашхабад, Туркменская государственная издательская служба, 2013, 9–12 (на русском и туркменском языках).

36 *Knieper*, Universalität und Kontext, 48.

37 Ebenda, 49.

38 *Knieper*, Rechtsreformen entlang der Seidenstraße, 28-38.

verloren haben. Seine Ideen unterschieden sich von den allgemein verbreiteten und anerkannten Konzepten und Ideen. Als Beispiele können hier seine Skepsis gegenüber den durchgeführten Vaucher-Privatisierungen oder seine Kritik an den sogenannten Übergangsgesetzen genannt werden. Aus der Vielzahl der Themen, zu welchen *Rolf* seine klaren Auffassungen abgegeben hatte, habe ich nur einige gewählt.

a. Rechtsstaat und Marktwirtschaft

Als schwierigen Einstieg in Rechtsstaat und Marktwirtschaft bezeichnete *Rolf Knieper* in der Einführung zum Buch *Das Privatrecht im Kaukasus und in Zentralasien* die zentralen Fragestellungen bezüglich des Verhältnisses von Rechtsstaat und Marktwirtschaft für die postsowjetischen Staaten.³⁹ Die Schwierigkeit bestand darin, „dass ein gewaltiges soziales, ökonomisches und kulturelles Experiment zu Ende gegangen ist, das mehr als die Hälfte der Weltbevölkerung und der Erde erfasst hatte und das auch den Rest der Welt in Atem gehalten hat“ und sich infolgedessen „ein gewaltiger einheitlicher Wirtschaftsraum sich auflöste und die großen, durch zentrale industriepolitische Entscheidungen gegründeten Staatsunternehmen über Nacht sowohl ihre Lieferanten als auch ihre Kunden verloren.“⁴⁰ Das Verschwinden der zentralen Planungs- und Durchführungsbürokratien schaffte Raum für Experimente und Initiativen. Gerade aus diesem Grunde stellte *Rolf Knieper* die These auf, dass generell Rechtsstaatlichkeit und Marktwirtschaft und deren Verhältnis zueinander in den Nachfolgestaaten der Sowjetunion neu erfunden werden müssten, da diese Staaten als Teil der sowjetischen Staatswirtschaft und Einheitsstaates keine eigenen Erfahrungen mit der Ausgestaltung der Marktwirtschaft und des Rechtsstaats hatten. Ungeachtet der gemeinsamen Ausgangslage dieser Staaten, gestaltete sich der Reformprozess unterschiedlich und es kristallisierten sich dementsprechend verschiedene Streitpunkte heraus.

In der Frage nach dem grundsätzlichen Verhältnis zwischen Rechtsstaat und Marktwirtschaft wurde der Transformationsprozess durch zwei Reformkonzepte geprägt. Die Vertreter der *neoklassischen Marktorientierung* sprachen sich für einen möglichst freien Markt mit minimalem staatlichen Einfluss aus. Diese Theorie gründet auf einem individualistischen und egoistischen

39 *Knieper, Chanturia, Schramm*, Das Privatrecht im Kaukasus und in Zentralasien, 1 ff.

40 Ebenda, 2-3.

Menschenbild, wonach individuelle Bedürfnisbefriedigung und Wohlstandsmehrung im Zentrum stehen, während die gesellschaftliche Wohlstandsmehrung außen vorgelassen wird. Ziel sei demnach eine möglichst effiziente Güterverteilung zur Bedürfnisbefriedigung. Am geeignetsten sei demzufolge der freie, souveräne und unregulierte Markt. Durch die entgegenstehenden Interessen der Marktteilnehmer entsteht ein sensibles und flexibles System, koordiniert durch das Zusammenspiel von Angebot und Nachfrage. Jegliche staatliche Intervention würde diesen Mechanismus aus dem Gleichgewicht bringen und müsse sich daher gegenüber einem Laissez-faire-Zustand rechtfertigen.⁴¹

Nach *Rolfs* Auffassung wird in dieser Theorie der neoklassischen Marktorientierung außer Acht gelassen, dass ein abstraktes Modell nicht eins zu eins die Realität widerspiegelt. Eine vorbehaltlose Ummünzung von idealtypischen Konstruktionen wird insbesondere dann problematisch, wenn sie über staatsinterventionistische Regulierungen des Marktes hinaus auf jegliche rechtliche Aspekte von Markbeziehungen angewandt wird.⁴²

Zum anderen spricht gegen die Theorie der neoklassischen Marktorientierung mit minimalem Staatseinfluss die *Komplementarität von Marktwirtschaft und Rechtsstaat*. Während zwar eine Neubestimmung eines stabilen und verlässlichen Rechtssystems erforderlich ist, sollte der Staat nicht auf ein Minimum reduziert werden. *Rolf Knieper* ist davon überzeugt, dass der Staat notwendig ist, um als unabhängige Instanz die Interaktionen und divergierenden Interessen der Marktteilnehmer auszugleichen und gleichzeitig für die allgemeinen gesellschaftlichen Interessen einzustehen und diese zu schützen. Der Rechtsstaat bildet dabei den Rahmen, in welchem individuelle Interessen und Wohlstand verfolgt werden können. Der Staat sollte weder «stark» noch «schwach» sein, sondern als unabhängige und durch Gewaltenteilung gebändigte Instanz interagieren, um durch Gesetz und Recht die Voraussetzungen für einen funktionierenden Markt zu schaffen.

Vor diesem Hintergrund wurden in den Nachfolgestaaten neue Privatrechtsordnungen aufgebaut. Obwohl alle Staaten der Region zwischen privatem und öffentlichem Recht unterschieden und eine systematische Kodifikation mit dem ZGB im Zentrum entwickelt haben, gab es Differenzen bezüglich der Technik der

41 Ebenda, 7 ff.

42 Ebenda, 10 ff.

Kodifikation, dem Verhältnis der Gesetze des Privatrechts zueinander und dem Umfang und Inhalt des jeweiligen ZGBs.

Einige Staaten tendierten dazu, dem ZGB einen Vorrang gegenüber anderen privatrechtlichen Gesetzen einzuräumen. *Rolf Knieper* zufolge führe dies zu verfassungsrechtlichen Bedenken, da neben der Verfassung eine weitere Hierarchisierung der Gesetze eingeführt wird. Darüber hinaus behielten manche Staaten es bei, im ZGB allgemeine Grundsätze einer Materie zu regeln und weitere speziellere Regelungen diesbezüglich einem entsprechenden Sondergesetz zu überlassen. Dies führte zu Doppelungen und Widersprüchen, welche wiederum die Klarheit der Gesetze untergruben.

Es stellte sich die Frage, ob solche Unterschiede in der Privatrechtsentwicklung nationalen Besonderheiten zugeschrieben werden können, d.h. ob das Recht der *«exklusive Ausdruck einer spezifischen nationalen Kultur»* sei. Diese These wird jedoch verworfen. Stattdessen seien das Privatrecht und die Wirtschaftsgesetze an die Herausforderungen der neuen Marktwirtschaft anzupassen. Diese neuen marktwirtschaftlichen Gegebenheiten ziehen neue Bedürfnisse nach sich, welche eine solche kodifikatorische Anpassung sogar erzwingen würden. Obwohl der gesellschaftliche Kontext zwar entscheidend sei für die Wirkung des Rechts im lokalen Kontext, seien nicht die nationalen identitären Spezifika, sondern der wirtschaftsstrukturelle Kontext entscheidend.

Die Existenz von Rechtsnormen bedingt auch eine effektive Umsetzung dieser in die Praxis. Durch Auslegung der Gesetze können zum einen Unzulänglichkeiten oder Widersprüche der Gesetze, wie sie zum Beispiel bei der Aufteilung in allgemeine Grundsätze und Sondergesetze entstehen können, bewältigt werden. Zum anderen ergibt sich daraus auch eine kontinuierliche Rechtsfortbildung. Die Notwendigkeit der Auslegung und Interpretation der Gesetzestexte ergibt sich auch aus der inhärenten Uneindeutigkeit von menschlich hergestellten Texten, welche niemals ganz aus dem Weg geschaffen werden kann.⁴³

b. Rechtsimperialismus

Angesichts der Breite und Bedeutung der Rechtsberatungstätigkeit im Kontext der internationalen Zusammenarbeit verdient ein Problem Aufmerksamkeit, welches in den 90-er Jahren des vergangenen Jahrhunderts unter dem

43 Ebenda, 12 ff.

Stichwort des „*Rechtsimperialismus*“ auf die Tagesordnung gebracht wurde; den Vereinigten Staaten und Deutschland wurde ein Kampf um Einfluss auf Osteuropa durch den Export eigener Rechtssysteme vorgeworfen. Rolf Knieper ging auf die Problematik des sogenannten Rechtsimperialismus ein und schilderte anschaulich die Voraussetzungen einer nachhaltigen Zusammenarbeit im Bereich der Rechtsreform, die eine stabile Basis für die Entwicklung der Transformationsländer im Gegensatz zu den Ideen des Imperialismus schaffen sollten.⁴⁴

Die Notwendigkeit der internationalen juristischen Zusammenarbeit erklärte sich vor allem dadurch, dass „*vielen der an der Erstellung der sogenannten normativen Akte beteiligten Akteure besonders in den neu unabhängig gewordenen Staaten weder das Verfahren und die Technik der Gesetzgebung noch die Bedeutung der Hierarchie juristischen Texte vollständig vertraut war.*“ Die große Anzahl internationaler Experten aus verschiedenen Ländern und Organisationen verstärkte die Bedürfnisse nach angemessener Rechtsberatung. Nach Rolfs Auffassung war es wenig erstaunlich, dass Staaten nach tiefgreifenden Systemveränderungen und Jahrzehnten der Isolation an die europäischen Kodifikationsstrategien wieder anknüpfen wollten.⁴⁵

Rolf Knieper sprach sich vielmehr für die harmonische Modernisierung und Globalisierung des Rechts aus. Zu Recht betonte er, dass sich im Zivil-, Handels- und Wirtschaftsrecht die rechtsvergleichende und auch rechtspolitische Diskussion längst globalisiert haben, vor allem in Form von Konvergenzen zwischen Kodifikationsrecht und *case law*. Aus diesem Grund kann „von Systembruch oder gar imperialisierender Überformung keine Rede sein“. Allerdings schließt dies nicht die Existenz verschiedener Alternativen aus. „*Professionell unsauber oder hinterlistig oder „imperialistisch“ wäre es, in der Beratung Informationen über existierende Alternativen und ihre Konsequenzen zurückzuhalten.*“⁴⁶

Rolf schlug verschiedene Alternativen und daraus resultierende offene Empfehlungen für alle Länder der Region vor. Er war davon überzeugt, dass die Zeiten, in denen imperialistische Landnahmen eventuell noch einen Sinn ergeben hätten, schon lange endgültig vorbei waren.⁴⁷ An dieser Auffassung hat sich in der letzten Zeit einiges geändert, insbesondere seit Beginn des Angriffskrieges

44 Knieper, Rechtsreformen entlang der Seidenstraße, 57-65.

45 Ebenda, 64.

46 Ebenda, 62-63.

47 Rolf Knieper, Nationale Souveränität – Versuch über Ende und Anfang einer Weltordnung, 1992.

gegen die Ukraine im Jahr 2022. Rechtsimperialismus verlor seine Aktualität, denn er wurde durch den blutigen Imperialismus in verschiedenen Formen ersetzt.

c. Privatisierung

*Rolf Knieper fällt ein hartes Urteil über die Art und Weise, wie die Privatisierungen im postsowjetischen Raum durchgeführt wurden: „„Privatisierungen“ fanden zum Schein statt und führten zu Zerstörung von Vermögen und insbesondere von sozialen Infrastrukturen, Hoffnungen wurden enttäuscht und buchstäblich Tausende starben, weil sie vergeblich, aber nach ihrer Lebenserfahrung zunächst zu Recht auf ein vom Staat und gesellschaftlichen Organisationen geknüpft soziales Netz gehofft hatten“.*⁴⁸

Er bezeichnete es als groben Fehler, die theoretischen Überlegungen der traditionellen marktwirtschaftlich organisierten Gesellschaften und praktischen Rechtspolitiken als universelle Normalität auf die Transformationsgesellschaften zu übertragen, wie es mit den Privatisierungstherapien geschehen ist.⁴⁹

Anders als in den traditionellen Marktwirtschaften, unterlagen Staatsunternehmen nicht dem Zwang der Profitabilität und dem Druck des Marktwettbewerbs, was wiederum die Möglichkeit eröffnete, die Errichtung und Finanzierung von sozialen und sogar physischen Infrastrukturen zu übernehmen. Kindergärten, Krankenhäuser, Schulen usw. konnten Aufgabe des Staates, aber auch Aufgabe von Staatsunternehmen sein. Die durchgeführten Privatisierungen durch „bloßes“ Auswechseln der Eigentümer und Geschäftsführer, führten unausweichlich zu einer Zerstörung dieses Netzwerks, welches die soziale Existenz von Hunderttausenden zwar möglicherweise mehr schlecht als recht, aber immerhin gesichert hatte. Dies wiederum führte zu einer enormen Vermögensvernichtung und großem Leid bei weiten Bevölkerungskreisen.⁵⁰

Auch nach dreißig Jahren der Privatisierungsmaßnahmen sind diese Worte und Einschätzungen immer noch zutreffend. Der durch die Privatisierung entstandene neue Privatsektor ist weit davon entfernt, die oben angesprochenen sozialen Funktionen zu übernehmen.

⁴⁸ Knieper, Universalität und Kontext, 13.

⁴⁹ Gemeint ist die sogenannte als Schocktherapie bezeichnete Privatisierung: Knieper, Universalität und Kontext, 20-21.

⁵⁰ Ebenda, 21.

d. Kodifikatorische Behandlung des „Wirtschaftskodex“

Rolf Knieper wies oft darauf hin, dass die kodifikatorische Behandlung des Wirtschaftsrechts bis heute zu den umstrittensten Fragen der Rechtsreformen in der postsowjetischen Welt gehört.⁵¹ Zum Beispiel gilt in der Ukraine seit dem 16. Januar 2003 nicht nur ein Zivilgesetzbuch, sondern auch ein Wirtschaftskodex. Solche Herangehensweisen zur Kodifikation des Wirtschaftsrechts wurden Gegenstand ausführlicher wissenschaftlicher Kritik, wozu Rolf grundlegende Überlegungen lieferte.⁵² Ähnliche Versuche der Kodifizierung des Wirtschaftsrechts hat es auch in Kasachstan gegeben, was als Versuch der Zerstörung der Rechtsordnung Kasachstans bezeichnet wurde.⁵³

Laut Rolf hat *„Die Koexistenz von zwei Gesetzbüchern in der Ukraine eine unübersichtliche, der Rechtssicherheit und damit einer positiven wirtschaftlichen Entwicklung abträgliche Situation geschaffen, da sich beide Gesetze in weiten Teilen mit ähnlichen Rechtsmaterien beschäftigen, insbesondere dem Obligationen-, dem Eigentums- und Unternehmensrecht. Ihre Inhalte weichen allerdings teilweise voneinander ab und überschneiden sich“*.⁵⁴

Es ist allgemein bekannt, dass diese Theorie ihre Wurzeln in der sowjetischen Schule des Wirtschaftsrechts hat, die wiederum auf die terminologische Ähnlichkeit des deutschen Handelsgesetzbuches und des französischen *Codes de Commerce* mit dem Wirtschaftskodex des postsowjetischen Typs verweist⁵⁵. Rolf Knieper wies diese irreführende Begründung überzeugend zurück: *„Bei den westeuropäischen Gesetzen handelt es sich aber um reines Unternehmensprivatrecht, während der ukrainische Wirtschaftskodex bewusst Privatrecht und Wirtschaftsverwaltungsrecht mischt“*.⁵⁶

Darüber hinaus belegen die modernen Kodifikationen wie in den Niederlanden und Quebec, dass derartiges Sonderprivatrecht nicht strukturnotwendig ist

51 Rolf Knieper, Sonderprivatrecht für Diese und Jenen?, in: Umweltrecht und Umweltwissenschaft, Festschrift Eckard Reh binder, 2007, 45 ff.

52 Правовое регулирование предпринимательской деятельности в постсоветский период. Под. Общ. Ред. Н.С.Кузнецовой и М.К. Сулейменова. – Харьков: Право, 2018.

53 Предпринимательский кодекс как орудие развала правовой системы Казахстана. Под редакцией проф. М.К. Сулейменова. Каспийский Общественный университет, Алматы, 2011.

54 Knieper, Der Weg ist das Ziel, 47.

55 W.K. Mamutov, Die Konzeption eines Wirtschaftsgesetzbuches der Ukraine, in WGO-MfOR 1994, 373 ff.

56 Knieper, Der Weg ist das Ziel, 48.

und dass die Handelsgesetzbücher Frankreichs und Deutschlands nur spezifische historische Konstellationen darstellen.⁵⁷

e. Institutionen

In den Überlegungen und Beiträgen von *Rolf Knieper* spielen Institutionen eine zentrale Rolle. Für das Funktionieren eines Rechtsstaates muss es Gerichte, Staatsanwälte, Anwälte sowie Notare geben.⁵⁸ Der Reform all dieser Institutionen hat *Rolf* während seiner Tätigkeit besondere Bedeutung beigemessen.

Die Institutionen sollen demnach die Voraussetzung für stabile und nachhaltige Markverhältnisse schaffen. Sie sollen die rechtlichen Rahmenbedingungen für die wirtschaftlich unabdingbaren Rechtsinstitute, wie zum Beispiel Vertragsabschluss, Rechtstitel, gutgläubiger Erwerb oder Gesellschaftsrecht, schaffen, aber auch deren Durchsetzung vor einer unabhängigen Justiz ermöglichen.⁵⁹

Im Kontext der Institutionen hat die Bedeutung der Schiedsgerichtsbarkeit für die postsowjetischen Länder erheblich zugenommen. Die vielfältige Tätigkeit von *Rolf Knieper* auf diesem Gebiet, sowohl in seiner Beraterfunktion als auch in seiner Funktion als weltweit prominenter und geschätzter Schiedsrichter, kann als bedeutende Möglichkeit zur Umsetzung der international geltenden Standards in die nationalen Rechtsordnungen angesehen werden. Von besonderer Bedeutung sind die vergleichenden Darstellungen der Schiedsgerichtsbarkeit einerseits und der staatlichen Gerichtsbarkeit andererseits. Das Zusammenwirken der beiden wird als eine unabdingbare Voraussetzung für das Funktionieren der Rechtsordnung betrachtet. Die Beiträge von *Rolf Knieper* zur Problematik der Schiedsgerichtsbarkeit sind unvermindert aktuell.⁶⁰

In seiner Untersuchung „*Eine ökonomische Analyse des Notariats*“ zeigt *Rolf Knieper* anschaulich, welche gesellschaftspolitische Aufgabe dem Notarwesen zugesprochen wird. Der Notar hält die Richtigkeitsgewähr von öffentlichen Registern, die neutrale und sachkundige notarielle Beratung, Belehrung und Beurkundung für staatliche, hoheitliche Aufgaben. Diese Ausgestaltung ergibt sich aus einer alten kontinental-europäischen Tradition: der Beweissicherung von Tatsachen, Erklärungen und Verhandlungsergebnissen in einer mit öffentlichem

57 *Knieper*, Sonderprivatrecht für Diese und Jenen? 45 ff.

58 *Rolf Knieper*, *Ökonomische Analyse des Notariats*, C.H. Beck, 2010.

59 *Knieper*, *Chanturia*, *Schramm*, *Das Privatrecht im Kaukasus und in Zentralasien*, Einführung.

60 Statt vielen: *Knieper*, *Rechtsreformen entlang der Seidenstraße*, 267-303.

Glauben ausgestatteten Urkunde, die von einer mit besonderen Befugnissen ausgestatteten Amtsperson aufgesetzt worden ist.⁶¹ Die Bedeutung und Wichtigkeit des Notariats kann nicht besser beschrieben werden.

4. Aus- und Fortbildung von Juristen

Rolf Knieper vermittelte die klare Botschaft, dass die Reformen des Rechts- und Justizsystems in der postsowjetischen Welt ohne gut ausgebildete Juristen trotz bester Gesetzestexte kaum erfolgreich sein können.⁶² Neben der hohen Qualität der Gesetzgebung, die das moderne Recht braucht, lebt es von der Anwendung durch die Praxis. Richter, ebenso wie Rechtsanwälte und Notare müssen das Gesetz interpretieren, ihm Sinn in einer konkreten gesellschaftlichen Situation geben und es fortbilden. Professionelle Fertigkeiten und Kenntnisse, die man dafür braucht, können nur in einem fachlichen Studium erworben werden.⁶³ Rechtskultur ist, laut *Rolf*, ein Produkt der Rechtsanwendung, „die von hohem professionellem und ethischem Niveau getragen ist“.⁶⁴ Damit hat *Rolf* das Grundprinzip der Juristenaus- und fortbildung festgelegt.

In meinem reichen Berufsleben, nicht zuletzt am Europäischen Gerichtshof für Menschenrechte in Straßburg, habe ich mich von der besonderen Bedeutung hoch qualifizierter Juristen überzeugen können. Es gibt keine entwickelte Rechtsordnung ohne gut ausgebildete Rechtspraktiker.

In diesem Zusammenhang stehen Legislative, Judikative und Rechtswissenschaft in einem Verhältnis zueinander, welches bewirkt, dass der abstrakte Gesetzestext effektiv auf einen spezifischen realen Sachverhalt angewendet werden kann. Eine qualitativ angemessene Juristenausbildung spielt dabei eine wichtige Rolle. Die angehenden Juristen, Richter und Rechtsanwälte müssen die Interpretation und Auslegung der Gesetze und deren Anwendung in der Praxis effektiv vornehmen können. *Rolf Knieper* befürwortet die Wichtigkeit der obligatorischen Weiterbildung für Richter und eine stärkere Praxisorientierung der Juristenausbildung im Allgemeinen.⁶⁵

61 *Knieper*, Ökonomische Analyse des Notariats, 9-10.

62 *Rolf Knieper*, Aus- und Fortbildung von Juristen als Teil der Rechtsreform in Zentralasien, in: *Knieper, Chanturia, Schramm*, Das Privatrecht im Kaukasus und in Zentralasien, 587.

63 *Rolf Knieper*, Interpretation, Analogie und Rechtsfortbildung: Delikate Abgrenzung zwischen Judikative und Legislative, *WiRO*, 2003, Nr. 3, 65-69.

64 *Knieper, Chanturia, Schramm*, Das Privatrecht im Kaukasus und in Zentralasien, 587.

65 Ebenda, 587 ff.

Überzeugt von dieser Notwendigkeit widmete sich *Rolf Knieper* der Juristen- ausbildung als einem der herausragenden Elemente der Rechtstransformation. Er förderte durch die Einführung des praxisorientierten Studiums mit Falllösungstechnik und schriftlichen Klausuren, die enge Verbindung zwischen Rechtswissenschaft und Rechtspraxis. Die Einbindung von europäischen, vor allem der deutschen Professoren in den Lernprozess, aber auch von praktizierenden Juristen (Richter, Rechtsanwälte, Staatsanwälte, Notare) ermöglichte die Umsetzung der interaktiven, fallbezogenen und praxisorientierten Unterrichtsform im Jura- studium in Georgien.⁶⁶ Dagegen kritisierte *Rolf* die *Curricula* in vielen Transformationsstaaten, die theoretisch geprägt waren, sowohl was die Themen als auch die Lernmethoden anging. Eine Orientierung auf die spätere Berufspraxis, die konkrete Arbeit mit den Gesetzestexten mit dem Ziel einer Konfliktlösung sowie auf die kritische Analyse der Gerichtsurteile und die Gestaltung von Verträgen stand für ihn noch in den Anfängen.⁶⁷ Das Thema der praxisorientierten Ausbildung von Juristen ist nach wie vor von herausragender Bedeutung.

Rolf Knieper betreute persönlich Hunderte von Juristen aus allen postsowjetischen Staaten, die zum Studium an der Universität Bremen nach Deutschland kamen. Für diejenigen, die ihre Promotion abschlossen, war er ein vorbildlicher Doktorvater. Viele haben unter seiner Betreuung den LL.M. Studiengang absolviert. Dank *Rolf* wurde die Universität Bremen zum Zentrum der internationalen juristischen Ausbildung und des internationalen Wissenschaftsaustauschs. Bremen wurde Austragungsstandort zahlreicher internationaler Seminare, Konferenzen oder „Runden Tische“.⁶⁸ So entstand ein kontinuierlicher Dialog zwischen den verschiedenen Experten, Institutionen und Ländern, die an der Entstehung des neuen Rechts und der neuen Rechtskultur beteiligt waren.⁶⁹ Mit *Rolfs* Emeritierung hat die Universität Bremen diese historisch einmalige Funktion aufgegeben.

66 Chanturia, Rückblick auf Georgiens rechtliche Transformation im Privatrecht, 144.

67 Knieper, Aus- und Fortbildung von Juristen als Teil der Rechtsreform in Zentralasien, 588.

68 Statt vielen: Probleme des Vertragsrechts und der Vertragssicherung in den Staaten des Kaukasus und Zentralasiens. Materialien einer internationalen Konferenz an der Universität Bremen vom 10. und 11. April 2008. BWV. Berlin. 2009. *Rolf Knieper, Lado Chanturia, Hans-Joachim Schramm* (Hrsg.); Grundlagen der Zivilrechtsordnung in den Staaten des Kaukasus und Zentralasiens in Theorie und Praxis. Materialien einer Konferenz an der Universität Bremen vom 29. und 30. März 2007. BWV. Berlin. 2008. 242 S. (In deutscher und russischer Sprache), *Rolf Knieper, Lado Chanturia, Hans-Joachim Schramm* (Hrsg.).

69 Knieper, Universalität und Kontext, 23.

Schlusswort

Im Vorfeld der Vorbereitung dieses Aufsatzes habe ich noch einmal sämtliche Beiträge von *Rolf* gelesen. Ich habe versucht, die in den letzten dreiunddreißig Jahren mit ihm zusammen verbrachten Momente zu rekonstruieren. Es scheint eine fast unmögliche Aufgabe zu sein, seine umfangreiche und beeindruckende Tätigkeit als internationaler Rechtsreformer und Rechtsaufklärer angemessen zu würdigen. Ich kann seine Leistung mit der von *Alexander von Humboldt* durchgeführten vergleichen; denn noch kein anderer westlicher Rechtswissenschaftler hat das Recht und die Rechtsentwicklung in den postsowjetischen Staaten so geprägt wie er.

Dreiunddreißig Jahre enger Freundschaft verbinden *Rolf Knieper* und mich. Ich habe unvergessliche Momente mit ihm zusammen erleben dürfen. Das Schlüsselgeheimnis seines Erfolgs über all diese Jahre hinweg ist, dass er immer fortschrittlich, modern, offen für neue Ideen, ehrlich, freundlich, prinzipientreu ist. Er hat nie sein Wort gebrochen, nie seine Versprechungen vergessen - hierbei handelte es sich manchmal auf kleinen Zettelchen notierte Bitten der Partner. Das begeisterte seine Kollegen und Freunde in den Partnerländern. *Rolf* führt Menschen zusammen und vereinigt sie für die Verwirklichung der historischen Ziele.

Rolf ist stets für eine Überraschung gut. Als der Staatspräsident von Georgien *Eduard Shevardnadze* ihm die Ehrenbürgerurkunde Georgiens überreichte, schenkte *Rolf* ihm eine Dissertation von *Mikheil Shevardnadze* geschrieben in deutscher Sprache und herausgegeben in München im Jahr 1915 über die Todesstrafe in Europa. *Eduard Shevardnadze* war begeistert, dass sein Namensträger während des Ersten Weltkrieges den Mut hatte, eine Doktorarbeit gegen die Todesstrafe in Europa zu schreiben.

Mein bester Freund, *Rolf Knieper*, hat sich mit seiner Tätigkeit ein Denkmal errichtet, das die Welt der Juristen noch lange begeistern wird.

*I dedicate this article to Professor Rolf Knieper,
a great friend of the Georgian people and the first Honorary Doctor of Law of
Tbilisi State University, whose considerable contribution since the 1990s
to the reform of Georgian law has been guided by European values
in shaping modern Georgian private law.*

The Indelibility of the Contract's Founding Interest in the Process of Transformation of the Obligatory Relationship (A Critical Assessment of a Court Judgment)

I. The Essence of the Problem

The issue under consideration may be illustrated by the decision of the Tbilisi Court of Appeal of 27 November 2014 (Case No. 3/915–13).¹ In general, the content of the case is as follows: several citizens sold their residential apartments, including the plot of land, to a certain person called Efraim Gur. According to the contract, the latter took upon the obligation to build a multi-storey building on the said plot of land and to transfer flats of a certain size to the sellers. The citizens signed the contract with Efraim Gur under this condition, which was also registered in the Public Registry. The person who acquired the plaintiffs' apartments took out a loan from the Bank of Georgia and encumbered the acquired land plot with a mortgage. After he failed to repay the debt to the bank, this plot was sold at an auction and was purchased by the Bank of Georgia, and it was

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1 Decision of the Tbilisi Court of Appeal of 27 November 2014, case #3/915–13.

registered in its name in the Public Registry. The former owners of the land demanded the fulfilment of the obligation from the Bank of Georgia. The bank refused to satisfy their demand. The plaintiffs' claim was not satisfied by the Administrative Affairs Collegium of the Tbilisi City Court by its decision of 1 November 2013. They were also refused satisfaction of the claim by the Administrative Chamber of the Tbilisi Court of Appeal.

The main question in this decision concerns whether the Bank of Georgia, which acquired the real estate from Efraim Gur by means of an auction, could become the subject of the obligation that stemmed from the contract concluded between Efraim Gur and the plaintiffs. The entire decision concerns the clarification and justification of this issue. Specifically, explaining that the contractual relationship is an obligatory relationship and its fulfilment could not be imposed on the final acquirer of the real estate, namely, the Bank of Georgia. Let us see how this reasoning is substantiated. Let us start with the analysis of the evidence cited in the decision.

II. The Place of Rights and Obligations in a Legal Relationship

A legal relationship is a moving bridge of rights and obligations between subjects with independent interests, a kind of means for realising a civil transaction. In this sense, it is also a technical and legal means for connecting persons with different interests. In short, it is a way of exercising a right. Legal interest in private law can only be satisfied in this way. This is how the interest is legitimised. From this, it is clear that a legal relationship is established where there are opposing subjects with autonomous interests. Only in the context of the relationship with these subjects, the legal relationship is a means for them to achieve their intended interests. As such, both are values with purpose, which does not mean that they will exist independently of each other. The rights and obligations that create the fabric (content) of the legal relationship are always attributed to its participants and, in this sense, the contractual relationship is of a personal nature. It is interesting what happens during the transformation of a legal relationship, specifically, when its subjects change. We must think that this does not cause its content to be depleted or disappear. No matter what development the nature of the legal relationship takes, it cannot erase the interest that was the founding interest when the relationship was established. We think that the succession of subjects in a legal relationship cannot dismantle its content, as long

as the interest of one party remains intact. Just as in a carriage contract, the consignee must receive the cargo, no matter how many carriers' hands it passes through, so too must the founding interest of the legal relationship be preserved in all cases, as long as it exists. Otherwise, establishing the legal relationship would lose its meaning. In this sense, the legal relationship appears before our eyes as an independent and autonomous value, which by this quality manages to protect the interests of its participants. In this sense, the legal relationship is a cover and guarantee for the protection of rights and obligations. Since the concept of the Court of Appeal is based on the current norms and practice, it is better to discuss it in the context of the real (*in rem*) and obligatory (*in personam*) relationship and examine if the same approach can be applied to the obligatory relationship as we have towards the real one. First, let us present this issue in general terms.

The issue here is not the influence of a fundamental right. The main issue is to maintain the purpose of the relationship when the bearer of this purpose remains in the relationship, and it defines the form and substance of the relationship.

III. Delimitation of Real and Obligatory Rights

To put it very simply, real rights (rights *in rem*) are rights tied to property, while obligatory rights (rights *in personam*) are rights related to a person.² Therefore, wherever the object goes, the real right follows it; in fact, it becomes its essential component. Whosoever's hands the object passes into, they will become the possessor of the object encumbered by the real right. Civil law scholars call this the principle of the right following the object (*droit de suite*). As for the obligatory right, it is a quality of the person. As long as the person is within the obligatory relationship, the person appears in this context as the bearer of rights and obligations. If someone else takes their place, the obligations that the subject who "left the game" was the bearer of do not automatically transfer to this other person. Only their free will can become the bearer of the said burden. Obligatory rights are not characterised by the quality of following, which would

2 On this issue, see in detail: *Besarion Zoidze*, Geltungsbereich (Grenzen) des Sachenrechts. In: Rechtsvergleichung und Privatrecht im deutsch-georgischen Diskurs. Akten des 3. Und 4. Deutsch-Georgischen Kolloquiums, Band 18, 117–137, Saarbrücken, 2022. Herausg: Tiziana J Chiusi/Irakli Burduli.

automatically obligate the new subject. What, then, must determine such different features of different rights? Such must be the nature of these rights. A real right is an absolute right and, because of this, it negatively obligates everyone. Everyone is obliged to respect it in the sense that they do not allow themselves to violate it. Absoluteness connects it to all third parties, who can be considered potential violators by their objective status. It also automatically obligates its new acquirer to be the bearer of the said burden.

The example of the right of ownership shows that the owner is opposed by the whole world and, if there is no restraint from them, the exercise of the right of ownership cannot be safe; moreover, it will be called into question. The situation is different in an obligatory relationship. It is a closed and relative relationship between specific persons, where rights and obligations are distributed among them; a party opposes the other party, and a party obligates the other party. Only they are authorised and obligated towards each other. There is no external threat as there is in real law (property law). It doesn't exist also because there is no interest, be it negative or positive. The obligatory relationship, due to its personal nature, is devoid of the succession-following of burdens. This is also because every right and obligation embedded in the content of the obligatory relationship is weighed against such interests and abilities of the parties, which may not even exist in the case of a new subject. An obligation that I undertook may not be undertaken by the party that replaces me. Therefore, why should they become the bearers of an obligatory burden that they cannot bear? If we were to force the new party to bear this burden, it would be the forced imposition of someone else's interests. The court relies on this concept when it argues that the Bank of Georgia is not obliged to fulfil the obligation that its predecessor undertook. For clarity on the issue, let us look at the trends in the relationship between real and obligatory rights.

IV. The Trend of Convergence of Real and Obligatory Rights

We do not intend to talk at length about this issue here. We have focused on them in other studies.³ This time, stemming from the goals of our research, it is

3 The historical context of the formation of real and obligatory law on the example of Germany is described in detail in the renowned book by Rolf Knieper: *Рольф Книпер, Закон и История. О состоянии и изменениях Германского Гражданского Уложения*, Перевод с немецкого Ногайбай З.М. Издательское объединение «Номос», Алматы 2005, 117-253.

interesting how the obligatory right approaches the real one in a technical-formal dimension. In short, obligatory rights fall under the principles established for real rights, which are conditioned by the influence of fundamental rights on private law, namely, on contract law.⁴ A model example of this is the influence of the protection of the fundamental right to property on tenancy law. By the precedent of the Federal Constitutional Court of Germany, the protection of the tenant's right is positively equated with the protection of the fundamental right to property.⁵ Accordingly, it falls under the purview of Article 14 of the Basic Law. Unfortunately, the Constitutional Court of Georgia did not take this into account in the so-called *Purtskhvanidze* case. Quite obviously, the influence of the Constitution is also reflected in the law of obligations. It is impossible for private rights to be affected only in their relationship with the Constitution; they also change their character inter se and become co-participants in a common constitutional regime. Under the current Civil Code, tenancy and lease rights over immovable property have the characteristic of “following the property”, that is, they run with the land. Every new acquirer of the real estate automatically steps into the position of lessor or lessee. The mere fact that we are dealing with an obligational relationship is not a sufficient ground for the new acquirer to be released from these legal burdens. The new owner cannot claim that only the previous owner was a party to the contract with the tenant and that he or she cannot automatically become a party. In this context, the obligational relationship, which is in principle personal, no longer appears purely personal at all but assumes a quasi-proprietary character, in that it runs with the land and binds successors in title. The question is, what do these rights follow in this case? Clarifying this is important, as it is necessary to see properly the value that has such a gravitational force. Thus, the obligatory relationship, which according to the general rule should have been terminated, is not terminated. Therefore, the

4 See this issue in detail: *Salome Kerashvili*, *The Influence of Fundamental Rights on Contract Law: The Importance of European Experience for Georgian Law*, TSU Publishing, 2018 (in Georgian). Also: *Besarion Zoidze*, *The Impact of Fundamental Rights on Private Autonomy: Expansion or Restriction of Private Autonomy* (Review of the Practice of the Constitutional Court of Georgia), in: *Private Autonomy as a Fundamental Principle of Private Law*, TSU Publishing House 2018, 93-111 (in Georgian).

5 See *Salome Kerashvili*, *Constitutional Protection of Ownership and Its Impact on Private Law: Primarily Based on the Precedents of the German Constitutional Court*, in: Konstantine Korkeilia (ed.), *Protection of Human Rights and Legal Reforms in Georgia*, Tbilisi 2014, 179-190 (in Georgian).

new owner automatically becomes a participant in this relationship. What category of burden is this anyway? The relationship looks like a burden. The burdensomeness of the relationship itself is determined by the interest of the lessee and tenant in the real estate, which was initially formed as a right. The interest consisted of the use of the real estate. The means of its satisfaction became the lease and tenancy relationship. In the end, an obligatory right of the lessee and tenant arose on the property that became the subject of the interest. Since it is clear from the nature of these relationships that this interest is long-term and not a one-time event, it deserves respect and protection. Also, the fact must be taken into account that this interest, similar to the interest of ownership, is protected by the constitution due to its nature, as noted. Naturally, we will ask: what happened? What happened is that, on the basis of the obligatory relationship, the real estate was encumbered with a right, the obligation to exercise which acquired an objective character. The obligation, as they say, must be fulfilled. This means that the technical, constructive and formal nature of the contract should not become the basis for its collapse and, in this sense, the risks of termination must be so reasonable that it does not become the basis for its termination soon after its conclusion. If we approach it this way, we will see that the obligation and, accordingly, the right of the opposing party become such an organic characteristic of the relationship and, hence, of the real estate, that their existence no longer depends on the change of ownership in the relationship. Thus, the objective characteristic of the obligation fulfils the founding role of the personal relationship. Similar approaches are characteristic of private relationships. We recall the now-repealed norm of the Civil Code, which, upon the alienation of a residential apartment encumbered by a mortgage, gave the previous owner of this property the right to become the tenant by law in the apartment sold at auction. In this case, we are talking about the primary establishment of an obligatory relationship.

The conclusion that can be drawn from our discussion is that it depends on the nature of the relationship and, hence, on the character of the interest, whether the obligations in the contractual relationship will be preserved upon the change of persons.

Now, let us examine the approach of the Public Registry towards real and obligatory rights in the context of registration.

V. The Court on the Nature of Obligation and Real Right

The main proof for not satisfying the claims by both the first instance and the second instance courts is that obligations are connected to a specific person and exist as long as this person is present in the contractual relationship. It is clear from the decisions that the courts express this unified idea in different ways. In order not to burden this work with citations, we will convey the main points that run as a red thread through the decision. For example, we often read that an obligation is not a real right. This is very non-academic reasoning, and it seems there is nothing strange in the literal context. It is already known that an obligation is not a right, but something else is implied here. The court wants to tell us that the obligation is the obligation of a specific person, and it does not transfer to a new subject who will take possession of the property with which the fulfilment of this obligation is connected. To put it simply, the obligation disappears at this point. The obligation that Efraim Gur undertook before the plaintiffs cannot be transferred to the Bank of Georgia, which is the new owner of the real estate. It turns out that, by this logic, Efraim Gur must fulfil the obligation. But the question arises: how will he fulfil this obligation when he is no longer the owner of the plot of land on which the multi-story building was to be built to satisfy the plaintiffs' claim? The plaintiffs' founding interest in entering the contractual relationship was precisely that. They connect the satisfaction of their rights precisely to the real estate transferred to Efraim Gur. In this mirror, their rights look like rights tied to the given property. They would not have entered into the contractual relationship if they did not have this interest, this hope. The party, Efraim Gur himself, in this context, looks like a tool to achieve this goal, who, as a party to the contract, also had his own interest. Since the satisfaction of the plaintiffs' rights is impossible outside (beyond) the property they relinquished, due to this circumstance, the interests related to this property come to the fore and, accordingly, the rights are considered tied to the property by their objective status. The founding condition for the fulfilment of the obligation was precisely this. We have a kind of double bond of the right; one to the property and the second to the person. Clearly, the bond to the property is essential, since the fulfilment of the obligation, in the form the contract was concluded, is linked to the use of the transferred plot of land to build a multi-story building. The contract turned this property into a property with a specific purpose, which obligates any of its possessors to use it for this purpose. This is a

purpose based on an obligation. That is why tying the obligation to the person is secondary, while its tie to the object is so strong and essential that the property, in the hands of any of its acquirers, becomes a factor causing the obligation related to it. It is as if the obligation became a quality and an essential component of the object, i.e., the obligation acquired a real (*in rem*) character. An obligatory burden on an object would be complete nonsense if every new acquirer of this object did not fall under it. That is why the acquirer of the property does not only acquire a right (the right of ownership is meant), but also falls under the mantle of obligation.

VI. The Confrontation of Obligation and Right

In various parts of the decision, there are frequent references to the fact that an obligation is not a real right. What is meant here is that it is the relation between obligatory and real rights. This is indeed true, but for some reason, in the court's decision, the obligatory right is overshadowed by this and is presented as an obligation proper. Let us see what an obligation is. According to the Civil Code, an obligation covers (implies) the necessity of performing something or refraining from its performance. This type of obligation necessarily implies the right of the other party to demand the performance of a certain action. In short, in an obligatory relationship, obligatory rights are visible in the demand for the fulfilment of the obligation. In our case, the plaintiffs' right is expressed in the fulfilment of the claim that the plaintiffs had (before the breach of contract) against Efraim Gur. It is true that private law distinguishes between the right of claim and a right. However, within an obligatory relationship, the right of claim is expressed in the fulfilment of the obligation, which in this case is a right proper, specifically, an obligatory right. In short, the right of claim, as an element of the content of the obligatory relationship, is at the same time a right.

If the court had discussed the obligatory right, it would have necessarily had to ascertain its nature. Instead, it shifted the focus not to the plaintiffs' attitude towards the performance, but to the defendant's attitude towards the obligation. What is an obligation for the defendant is a right for the plaintiffs. The court should have discussed the interrelation of rights (real and obligatory) and not the interrelation of an obligation and a real right. Here are the obligatory rights, which are elements of the content of the obligatory relationship, along with the obligations proper. In short, an obligatory right is a right derived from an

obligation. Let us clarify what the content of the plaintiffs' obligatory rights consists of. To put it simply, it concerns the fulfilment of the obligation undertaken, i.e., it concerns the construction of a multi-story building on the promised site for the plaintiffs and also the transfer of the promised real estate. Therefore, Efraim Gur undertook the obligation to transfer real estate into the ownership of the contract parties in the future. Here we are talking about future property, which is sufficiently defined in the existing contract, i.e., we are talking about a real right, the content of which is defined by the obligation undertaken by Efraim Gur. If there is no obligation, there will be no said real right. The future real right is a value that is protected by the Constitution and the First Additional Protocol of the European Convention on Human Rights, i.e., future property exists in the form of an obligation. Since future property is protected, it means that its source - the obligation - is also protected. When a high-ranking right is protected, the basis that causes the emergence of this right is also protected at the same time. Due to these circumstances, such a causal link is established here that whoever replaced Efraim Gur would also become the bearer of the same said obligation. In short, we can outline it thus: one person's obligation is linked to the other party's right to the fulfilment of this obligation. That fulfilment is linked to the emergence of ownership, which, before its real appearance, exists in the form of the right to future property. In short, in this sense, the property that the Bank of Georgia acquired is encumbered by the plaintiffs' right to future property, which was embedded in the content of the obligation from the very beginning.

VII. The Issue of Registering a Right in the Registry in Relation to Obligatory Rights

In the court's decision, the registration of real and obligatory rights in the Public Registry is considered in a leading position. First, let us look at this issue in general. Historically, in our reality, the Public Registry was considered an institution for the registration of real rights. As a rule, real rights are rights subject to registration (registrable). There are small exceptions to this. The purpose of registration is the publicity of the real right and the notification of its existence to all interested third parties in the context of legal purity. It also has the importance of ensuring security. For example, when someone claims that a particular property, in which you have an interest, is theirs and is flawless *in rem*, I must be able to read this from the Public Registry. Trust in the registry and the

infallibility of the data are linked precisely to this.⁶ In short, the publicity of real rights is an echo of the absoluteness of real rights. The existence of a negative obligation of third parties towards a property that is hidden or closed and, consequently, unknowable to them is impossible. After all, any person can annex real rights. We have a different situation regarding obligatory rights. Here, as was said above, we have an existential, relative space, within which these rights circulate, and in this sense, it, as a closed space, obligates only the participants of the relationship, since the interests of the participants are also their own interests. An external threat from third parties, in the context of both positive and negative interests, almost does not exist, since by their action, whether legal or illegal, the piercing-appropriation of the rights and obligations existing in this relationship cannot happen, except for cases when there is a change of persons in the obligation according to the rules established by private law. This has determined the inability and inexpediency of registering obligatory rights in the Public Registry. However, step by step, the registry's interest in bringing a number of obligatory rights into its space is growing, although less on the basis that real rights are registered in the Public Registry. Let us look at this issue in the Law on Public Registry. We will try to do this in connection with the norms on which the court's decision relies.

In the Law on Public Registry, Chapter 2 is set apart under the title Registry of Rights to Immovable Property, Article 12 of which lists those rights and obligations that are subject to registration. Besides the classic real rights, obligatory legal institutions are also mentioned alongside them, namely: f) tenancy, sub-tenancy; g) lease, sub-lease; h) loan for use; and i) leasing. At first glance, we might get the impression that they are registered because they are deviated towards real rights. Some of them do indeed have such a nature; however, they are founded even without registration. In our view, the legislature in this case is guided primarily by fiscal (tax) interests rather than by an intention to correct the legal form of these institutions. However, whatever our assessment of this may be, it is indisputable (and this is also clear from the legislation) that tenancy and lease exhibit features characteristic of real rights. This is clearly indicated by

6 See on the mentioned characteristic of the registry: Der öffentliche Glaube des Grundbuchs und der gutgläubige Erwerb von unbeweglichen Sachen. In: dem georgischen Recht IN: Rechtsvergleichung und Privatrecht im deutsch–georgischen Diskurs. Akten des 3. Und 4. Deutsch–Georgischen Kolloquiums, Band 18, 13–29, Saarbrücken, 2022. Herausg: Tiziana J Chiusi/Irakli Burduli.

equating the rights of the tenant and lessee with the right to property in the context of constitutional protection. More interesting for us is the entry in subparagraph "l" of the same Article 12, which concerns the registration of obligations related to the right of ownership of an immovable property. It is precisely this issue that the court focuses on. It should be said here that, according to paragraph 4 of the same article, the obligations provided for by subparagraph "l" do not transfer to the new owner of the real estate, while in the case of subparagraphs "b" - "k," the registered data is transferred unchanged to the new owner. Obligatory institutions also fall here, i.e., they also acquire the nature of following the object, and this is a transformation of their private and legal nature. We said above that the legislature is motivated by fiscal interests. However, the legislature itself believes that the said rights do not arise without registration, just as we have observed in the case of real rights. This is what the lawmaker writes in paragraph 5: "For the emergence of the rights provided for in subparagraphs 'a' - 'e' of the first paragraph of this article, and in the case of transactions concluded for a term of more than 1 year with the participation of a legal entity of private law (including transactions whose total term exceeds 1 year) - also the rights provided for in subparagraphs 'f' - 'i' and 'l' of the first paragraph of this article, their registration in the Public Registry is necessary." As we see, a number of obligatory rights became subject to the registration requirement. It is true that the state's interest is the starting point here. However, it also serves the interests of third parties in the context of the security of civil transactions.

As is clear from the court's decision, the plaintiffs registered the obligation that Efraim Gur undertook in the Public Registry, and this was also reflected in the necessary documents regarding the auctioning of the real estate. Even after its acquisition, the obligation was kept registered in the Public Registry until it was removed from the registry at the request of the Bank of Georgia. First, let us see what significance the court attaches to the registration of such an obligation in the Public Registry.

VIII. The Court's Position Regarding the Registration of Obligations Related to the Right of Ownership in the Public Registry

The court diminishes and devalues the nature of obligations related to real estate. The court believes that the registration has an informational character

and does not result in the new owner being obligated. In short, we have information about the legal status of the property. The court also notes that "what was registered in the registering body was an obligation regarding the transaction and not a right related to the specific immovable property." We have already discussed above that what is an obligation for one is considered a right for the other. Indeed, the above-named sub-paragraph "I" speaks of an obligation related to an immovable property, which qualifies as the plaintiffs' right. It can be said that the right is expressed in it in a negative form. While also noting that the emphasis on the obligation is informational in nature, the court adds that this does not have legal weight. It is incomprehensible for an obligation related to real estate to be registered in the registry, and then to claim that this has no legal weight. On the contrary, the obligation undertaken by the defendant Efraim Gur is a determinant of the nature (essence) of the contract concluded with the plaintiffs and is so organic to it that no matter how the party obligated by the contract changed, the obligation would still remain in force. In addition, sub-paragraph "I" of the first paragraph of Article 11 of the Law on Public Registry speaks of a category of obligation whose validity depends on the fact of registration. It is registered not only to inform someone of its existence, but because it becomes a determining component of the contractual organism and, according to this quality, an essential component of the real estate. It does indeed have an informational function. That is why every acquirer of property must know the burdens they are about to be the bearers of. It is a very frivolous approach to self-confidently believe that the new acquirer of the property becomes the bearer of only the benefits stemming from this property. Whoever relies on the explanation of the content of sub-paragraph "I" of paragraph 4 of Article 11 will say that our reasoning contradicts its provision, which does not provide for the transfer of the obligation to the new acquirer of the property. The text of the law is indeed imperative, and if we do not evaluate the nature of the obligation envisaged in sub-paragraph "I," we will remain captive to this understanding. We think that we should look at obligations existentially and distinguish them from the obligations that obligate someone with the transfer of future property. This category of obligation will clearly have the quality of following since future property will be implied in it. We could have gone this way and not paid attention to the text of the law. If the obligation related to real estate did not obligate me, then what sense would it make to specifically emphasise it in the Public Registry? Furthermore, sub-paragraph "I" could be interpreted together

with sub-paragraph "a" of the first paragraph of Article 11. On this view, since we are dealing with future property, that property is protected as "property" under sub-paragraph "a" albeit in the specific legal configuration envisaged by sub-paragraph "l." In this way, the argument that the obligation is transferred to the new acquirer becomes even more convincing. In addition, we could have explained sub-paragraph "l" together with sub-paragraph "a" of the first paragraph of Article 11 and said that, since we are dealing with future property, it, as property, is protected by this sub-paragraph, but in the state provided for by sub-paragraph "l." This way, the argument for its transfer to the new acquirer will be more convincing. The European Court protects the acquisition of property that exists in the form of an obligation.⁷ Here, too, we are dealing with just such a phenomenon. Efraim Gur promised the plaintiffs by contract the future transfer of real estate. This is a right to future property, and it is currently given in the form of an obligation. Since it is about property, this type of property is protected by sub-paragraph "a"; protection here implies the fulfilment of the obligation by all persons who, by acquiring the real estate, become the bearers of this burden.

IX. Guarantee of the Existence of the Legal Relationship, Institutions, Subjects and Rights

When we say that the obligation must be fulfilled, the fundamental order should not be dismantled by the change in the form of the legal relationship and its participating subjects, obviously, with some exceptions. The relationship does not manage the interests; rather, it obeys the will of the interest. It would be a great injustice if, as a result of the development or reconstruction of the relationship, the interest that this relationship was established to evoke (create) were to collapse and disappear. The founding interest of the relationship should be considered the general interest by which all other interests that may arise in the process of development of this relationship will be bound, obviously, if the interest of the party that conditioned the establishment of the relationship exists. The main point is that the interest that caused the emergence of the relationship should be objectively recognisable to every new subject. In those legal systems

7 Norbert Bernsdorff, *Protection of Possessions According to ECHR Between Effect Utile on the One Hand and Margin of Appreciation or Judicial Self-Restraint on the Other Hand*, In: *South Caucasus Law Journal*, #01/2010, 120-129.

where real and obligatory laws are strictly separated from each other, it is precisely there that this problem often arises. This situation appeared clearly from the decision we reviewed. The emergence of the problem is facilitated by the separation of the said spheres of private law at the level of principles. Our research has shown that these branches are approaching each other and are also becoming whole in terms of purpose.

In this case, the issue of the interrelation of the legal relationship and institutions, their subjects and their rights will necessarily arise. We have already talked about the first. We will add again that no matter how the legal relationship changes its form, it must still be considered the main basis for the emergence of the founding interest, around which other new interests must revolve. Just as the acquirer of property must show the attentiveness and diligence accepted in a civil contract, here too, when a new interest of a new subject appears, it must also be in this type of framework.

It is important that the institution fulfils its function and that the process of development of the legal relationship does not dismantle it. Obviously, institutions also change, but objective conditions are necessary for this. The institutional guarantee must be maintained even when the relationship experiences the mutual influence of different institutions. At this time, it must be clarified which institution is foundational in the emergence and establishment of the relationship. In our case, obligatory and real institutions are influencing each other. The relationship between the parties arose based on the obligatory institution, and it established the rights and obligations of the parties. Institutional coexistence should not distort the interest intended by the founding institution. This principle may be violated in the event that the interest of the founding party of the contract demands it, and it is at the same time not in conflict with the interests of the other party (possibly a new party). Here, we want to clarify one feature of the contractual relationship. It is true that the contract is a consensus of opposing interests and is based on the equality of the parties, respecting the interests of both sides. But as mentioned above, the founding interest will be the one on which the entire legal relationship will subsequently be built. That is why the obligation, which was imposed on one of the parties, is a provocation and reflection of the founding interest, and it is fully existent as long as the desire (right) to fulfil it exists from the other party. When we assert this, we also take into account the existentiality of the relationship and interests, which can change many things. And this makes me say that the obligation has a real effect (nature),

and this is the burden of the obligatory relationship as an institutional value, which is a constant companion as long as the right stemming from and related to this obligation is present.

There are no obligatory relationships without the balanced and counterweighed rights and obligations of the subjects of this relationship towards each other. Since we say that the contract is a product of agreed will, we must assume that this will establishes the agreed interests as a single organism or, more precisely, two elements of one interest, in which the contract itself is implied, which differ from each other and at the same time determine each other. We believe that different interests bound together as one interest are the subject of special respect and protection. The subject of the relationship is the bearer of the interest, i.e., the right. It is enough to strip the subject of this right and, as a result, the specific relationship, i.e., the existential subject, will also collapse. To prevent this from happening, we argue that the rights and obligations of the parties must be considered as objects of special protection; the change in form of the contract must not dismantle them. The elements of this relationship should not be sacrificed to the relativity of the relationship. This means that obligations may turn out to be indelible for a relationship that, at first glance, has the quality of being delible. In short, stemming from the nature of the right, it can have the character of a real right even within a relative relationship. The nature and interest of every right determine the character of its existence. We tried to substantiate the noted position above. We also want to note here that the moments of similarity between real and obligatory rights are not their new qualities, but the recognition of what already exists.

It is even more unacceptable when the regulation of the relationship happens at the expense of infringing upon a fundamental right. Any fundamental right is a value in itself and the reason for its own existence. It cannot become a guarantee and means for another fundamental right. We will cite in this regard the right to property and the freedom of entrepreneurship. One is guaranteed by Article 19 of the Constitution of Georgia, and the other by Article 26, paragraph 2. Each of them, as a fundamental right, is a category with a purpose, and we can only talk about the priority of one of them in case of a conflict with each other. This discussion of ours was conditioned by one very academic claim filed with the Constitutional Court of Georgia, the admissibility of which has not yet

been decided.⁸ It concerns the fate of the right of construction (superficies) upon the auction sale of the plot of land encumbered with this right. According to the principle of the right following the object or property (*droit de suite*) operating in real law, this right continues to exist even in the hands of the new owner of the plot of land, and its cancellation contradicts the substantial nature of the real right. The filing of the claim was conditioned by Article 38, paragraph 19 of the Law on Insolvency Proceedings, which provides for the cancellation of the right of construction (superficies) in the event of the property's transfer to a new acquirer. Many issues are raised in the claim; however, in this case, its connection with the freedom of entrepreneurship is interesting. The negative and destructive influence of this phenomenon on the freedom of entrepreneurship, specifically, on the functioning of an already existing and operating entrepreneurship (enterprise), is argued quite deftly. The grounds for preserving entrepreneurship should be sought not outside, specifically in the said quality of the right of construction, but, as mentioned above, in its self-foundation, which implies the right of the entrepreneurial subject to exist independently of others. Even if the right of construction were not a real right and the plot of land were used for the said purpose on the basis of an obligatory right, the entrepreneur's entrepreneurial activity should still have been preserved. The existence of an entrepreneurial subject does not depend on what category (quality) of legal fabric it is created from. The main point is that it exists and functions substantially and constitutionally. Its durability is determined by the right to life, and not by the right through which the plot of land was transferred. At one time, the Constitutional Court of Georgia recognised the right to life of small entrepreneurs, specifically the right of electricity distribution companies.⁹

This circumstance also indicates that any institution that creates the unified organism of law is conditioned by objective necessity for the law to fulfil its function. The dignity of any institution is protected. In this process of protection, the main value is the right and its dignity. Formal constructions of law cannot be allowed to cause its collapse. Since a right is a value with a purpose, it cannot

8 See: Constitutional Complaint filed with the Constitutional Court of Georgia: *LLC Omega Motor Group v. the Parliament of Georgia* (#1733, 23.06.2022).

9 See: Decision of the Constitutional Court of Georgia of 19 December 2008 on case #1/2/411: *LLC Rusenergосervice, LLC Patara Kakhi, JSC Gorgota and Others v. the Parliament of Georgia and the Ministry of Energy of Georgia*.

become a means and a tool for another right. A right, once established, cannot be changed or cancelled by bypassing the will of the subject bearing it.

A Word on Professor Rolf Knieper

When speaking about Professor Rolf Knieper, particularly about his connection to Georgia, I invariably recall Arthur Leist – the German writer, researcher and publicist – who first visited Tbilisi at the invitation of prominent Georgian writers and public figures such as Ilia Chavchavadze, Ivane Machabeli and others. The invitation was prompted by Leist's publications in the European press concerning Georgia at that time. Shortly thereafter, Leist settled permanently in Georgia, founded a German-language newspaper and published essays on Georgian themes. During his lifetime, and again nearly half a century after his death, his book *The Heart of Georgia* was published, a work that became beloved throughout the country. Today, dissertations are written about Arthur Leist in Georgia, and he is mentioned alongside the distinguished Georgian public figures of the late nineteenth and early twentieth centuries.

Professor Rolf Knieper's practical engagement with Georgia dates to the early 1990s, a difficult period in the country's history. Difficult periods have never been rare in the life of our people; however, these particular years stand out because of their profound contradictions. On the one hand, political independence had been achieved – a longstanding historical aspiration of the Georgian people. On the other hand, the long-awaited atmosphere of freedom was overshadowed by the ongoing civil war, the wounds of separatism and severe economic hardship. Against this backdrop, enduring tasks, such as replacing a totalitarian system with Western-style democracy and establishing a free-

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market economy on the ruins of a dirigiste system, remained. To accomplish these goals, a new legal system was indispensable; one that would become part of the European legal order.

Within the institutional framework of the German Agency for Technical Cooperation, Professor Rolf Knieper served as a consultant to an already existing commission tasked with preparing a Civil Code. Soon, this commission became the nucleus of the formation of Georgian private law, involving a broad circle of Georgian civil law scholars, both theorists and practitioners. The commission operated under the Ministry of Justice and was chaired by Professor Sergo Jorbenadze, Head of the Department of Civil Law and Civil Procedure at Tbilisi State University. It was in cooperation with this commission that Professor Rolf Knieper's lawmaking activity in Georgia began. Before addressing specific details, I consider it appropriate to dwell on the methodological aspects, namely, Professor Knieper's views on the essence of lawmaking. I had the opportunity to become acquainted with these views in a structured manner through a work specifically devoted to this issue, entitled *Creation and Lawmaking*, which Professor Knieper personally handed to me almost a quarter of a century ago.

At the outset, it should be noted that during that period, legal doctrine – not only in socialist countries – was dominated by the proposition that the State does not create law but merely formalises and registers it in legislative acts. Professor Knieper regards this proposition as excessively outdated, inadequate and devoid of practical relevance. In the formation of a legal act, it is important not only to reflect socio-economic reality adequately, but equally essential to analyse its future state, i.e., to examine the full range of likely future developments. All of this requires creative activity, which is, in essence, a form of scholarly activity and creativity.

According to Professor Rolf Knieper's methodology, the creation of a legal act begins with the stage of understanding the given social relations and concludes with the stage of interpreting the adopted legal act. At the first stage, it is necessary to answer the questions, namely, to what extent the regulation of a given social relation is necessary, and whether a legal form of regulation is required at all. To answer these seemingly simple questions, a number of further issues must be examined, namely, how these phenomena were regulated previously; why is legal regulation necessary in this particular form; how effective it will be; and in what direction will the object of regulation develop. Once these questions are addressed, further questions arise, such as which type of

normative act is optimal for the given relations; what should be the normative level of regulation; which existing normative acts will be affected by the introduction of this new regulation; and what practical results will follow from their corresponding amendment.

It is evident that all of the above-mentioned issues require profound analysis. The work of the legislator (the State) may be compared to human creative activity in the fields of science and art. From a methodological perspective, such a comparison must be grounded in a fundamental, purpose-oriented category common to all forms of creativity, a category denoted by the word 'good'.

In this context, I would particularly emphasise two theses advanced by the Professor. First, the creation of law requires not merely – and not even primarily – political will, but rather scholarship and, at the same time, creative activity on the part of professionals. Second, professionals (and not only professionals) are well aware that, despite the widespread and lofty phrases such as “law is created by the people” or “laws reflect the will of the people,” concrete laws are in fact created (or at least should be created) by individual persons, i.e., by professionals. Ultimately, it depends on individuals how competently, professionally and effectively (which also means elegantly) this task will be carried out.

The first legal act, in the drafting of which Professor Rolf Knieper played a decisive role, was the draft Law “On Entrepreneurs”. A predecessor to this project existed in Georgia in the form of a local analogue of the *Perestroika*-era legislation, which was not free from the remnants of socialist doctrine. The draft Law “On Entrepreneurs” clearly delineated six principal organisational forms of entrepreneurship, within which the subjects of the country’s economy were subsequently structured. Alongside forms well known in Western law, such as limited partnership, limited liability company and joint-stock company, the draft included cooperatives and individual entrepreneurs as special sections. As for the general partnership, unlike its German analogue, it was constituted as a legal entity under Georgian law.

Before its discussion in Georgia, the draft was examined in Bremen at the Chamber of Commerce, at a large gathering of lawyers including non-German jurists. I still vividly recall the presentation of an Austrian professor, who offered qualified and thoughtful comments. Naturally, for a non-specialist, the most striking aspect of this law is its socio-economic content. However, it must be said that the aforementioned corporate forms are well-established legal institutions and widely tested throughout the Western economies. In particular, the limited

liability company is of purely German origin and has been metaphorically described in specialised literature as the engine of capitalism. The Georgian law represented a genuine legal innovation from the standpoint of legal technique. In the legal systems of developed countries, each legal form of organisation is typically regulated by a separate legislative act. In the Georgian law, however, the norms defining these forms were consolidated within a single legislative act. Moreover, the act was structured in accordance with the Pandectist system of codification, comprising general and special parts, which facilitated both the understanding of general norms common to all organisational forms and the specific provisions governing each individual form. It should also be noted that the registration of these entities, taking into account the capacities of the legal profession in Georgia at that time, was entrusted to specially designated judges.

Following the Law “On Entrepreneurs”, a comprehensive body of private-law draft legislation was developed with the direct participation and organisational support of Professor Rolf Knieper. Among these were draft laws on bankruptcy, competition, private international law, legal entities under public law, and the Civil Code and the Code of Civil Procedure (the latter drafted by Professor Heinrichs and Professor Tengiz Liluashvili).

A particularly significant subject is the draft Civil Code of Georgia, which was submitted by the Ministry of Justice to the Head of State and subsequently to the Parliament of Georgia. It should be noted that the same procedural path was followed by all legislative acts, whether of private-law or public-law character. Prior to parliamentary deliberation, each of them was discussed at government sessions, which were usually chaired by the Head of State. During these discussions, the remarks and proposals of government members were heard and considered.

Turning now to the Civil Code of Georgia, in whose creation Professor Knieper played a most decisive role, I would like to recall a brief episode. The Code had already entered into force when, as a member of a governmental delegation (led by the President of Georgia, Eduard Shevardnadze), I had the opportunity to meet the then Minister of Justice of the Russian Federation. He was a specialist in criminal law.

When he learned that my professional interests lay in civil law and that I had completed my academic training in Moscow under Professor Nikolai Malein, he confidently asked whether we had taken their Civil Code into account. My answer was sincere: “Of course, we considered it alongside other codes.” I noticed

that he had not expected such a reply. He remarked, “I believe we included all the institutions.” The conversation about the Code ended there, and we moved on to another subject. The resonance of the Georgian Civil Code, however, did not end with that encounter. Those who follow post-Soviet legal periodicals will frequently encounter references to the Georgian Civil Code. Moreover, in Russian scholarly literature, it must objectively be acknowledged that such references have appeared exclusively in a positive context.

This brings us to the somewhat worn question, i.e., is this Code Georgian? Any informed professional knows that worldwide, there are essentially two types of civil codes, namely, reformatory codes and received codes. Of the reformatory type, there are primarily two codes, namely, the French and the German Civil Codes. These two codes differ significantly in terms of legal technique. Both are European, and both models have spread worldwide. As for the common law system, the Anglo-American legal tradition, to use the words of Canadian Professor Christopher Osakwe, these systems display a certain allergy to continental-European codification and to codes understood in the continental sense. Indeed, contemporary legal literature does not present an entirely clear picture regarding the prospects of codes as forms of systematising legal norms.

With regard to received codes, one of the most recent examples from a historical perspective, and one which I personally regard in many respects as one of the finest, is the Civil Code of Québec. This Code was not only influenced by the French Civil Code but, as noted by the distinguished theorist Rémy Cabrillac, also incorporates elements drawn from the German, Italian, Ethiopian, Polish, Mexican and other codes. Québec doctrine has not ignored the potential negative consequences of such extensive borrowing. As Cabrillac writes, the doctrine observes that if foreign law enters Québec law through its sources, it must be Québec-ised, that is, it must cease to exist as foreign law and, figuratively speaking, become something like a transplanted heart, which, once transplanted, is no longer the donor’s heart but belongs entirely to the recipient. Québec jurists emphasise that judges play a decisive role in preventing the opposite outcome. To that end, borrowed norms must be interpreted in harmony with other norms and the entire civil law of Québec.

Throughout history, across the world, writes Cabrillac, the temptation to voluntarily adopt foreign codes has arisen frequently and continues to do so. A variety of factors, among which time and limited deadlines are the first and foremost, explain this phenomenon. It was precisely such time constraints that

shaped the choices of the codifiers in Central and Eastern Europe who, after the collapse of communist regimes, turned to established models of codification in order to ensure an immediate transition to a market economy.

What determines the selection of norms to be received? First and foremost, the quality of the norms to be adopted and the authority of the underlying doctrine. German and French legal doctrine enjoyed particular authority in Russia. It was on this foundation that the Civil Code was developed in pre-revolutionary Russia and formally adopted after the revolution. What is meant here are the fundamental concepts of the Code, its presumptions and other essential elements of legal technique. The authority of German legal scholarship in Georgia dates back to the nineteenth century. Georgian youth, among whom Luarsab Andronikashvili was one of the pioneers of legal education in Georgia, pursued advanced legal and philosophical studies primarily in Germany. I cannot refrain from recalling an episode when Professor Knieper, at one meeting, presented the President of Georgia with a document showing that one of the President's ancestors had defended a doctoral dissertation in jurisprudence at a German university at the end of the nineteenth century. It was a striking surprise, for none of those present knew the identity of that young scholar, and I suspect that even the President himself had not been aware of it.

Among other factors influencing the adaptation, the political authority of the legal system from which norms are borrowed is no less significant.

Today, it may be concluded that the Civil Code of Georgia is fundamentally based on the model of the German Civil Code. At the same time, the Georgian Code contains certain provisions not found in the German Civil Code but introduced during that same period into the Dutch and other codes. Moreover, it must be emphasised that the Civil Code of Georgia incorporates conceptual provisions that, among post-Soviet countries, were reflected for the first time in Georgia.

Among such provisions, I would highlight the institution of the State as a legal entity under public law and the State as an owner. It is self-evident that the introduction of these fundamental institutions into Georgian legal reality is closely associated with the name of Professor Rolf Knieper.

There exist different legal constructions of the State as a subject of private law. In the civil law of socialist countries, the State was conceived as a special subject of civil law, whereas it is regarded as a legal entity under public law in continental European legal systems.

The Civil Code of Georgia adopts the latter construction. Under the Georgian Civil Code, the State is a special type of legal person, not because it enjoys any privileged position in private legal relations, but because, within this sphere, it must be endowed not only with private-law capacity but also with public-law powers. According to the Civil Code of Georgia, when participating in private-law relations, the State is not authorised to impose requisition or confiscation on its contractual counterparty. In Professor Rolf Knieper's view, the preservation and development of a society built upon the principles of a market economy inevitably entails tasks that cannot be organised through contractual, remunerated, and purely private-law relations.

Professor Rolf Knieper's views on the State as a subject of civil law are systematically set forth in a scholarly article published in the legal journal *Gosudarstvo i Pravo* (2009, No. 9). In that article, the author observes that the reasoning of certain extremely liberal scholars, who argue that the State should refrain from involvement in economic relations, is far removed from reality. The State's functions in the economic sphere must be realised in the public, common interest.

In a society built upon the principles of a market economy, there inevitably exist tasks that cannot be organised through contractual, remunerated, and private-law relations. Such tasks must be realised directly in the public interest by the State, which, unlike private actors, has access to revenue through the imposition of taxes and cannot generate income under the conditions of competition in the free market and within private-law relationships. Whereas a private legal entity, when faced with insufficient profitability and the threat of bankruptcy, is compelled to relinquish its assets, the State must fulfil indispensable tasks as required by the public interest, and it cannot be declared bankrupt. In Professor Rolf Knieper's view, in real life, the State not only participates in entrepreneurial activities but also carries out its public functions predominantly through the use of private law. For this reason, legislation ensuring transparency in public procurement is of particular importance; legislation that would regulate competitive procedures, the selection of contractual partners and specific contractual arrangements in situations where public and private law intersect.

A second particularity of the State's legal subjectivity in private-law relations under the Civil Code of Georgia concerns the State's position as owner. The Code embraces the principle of the unity of ownership. In Professor Rolf Knieper's opinion, the concept of a special form of State ownership is incompatible with the

general legal capacity of a legal person. The State is an owner in the same manner as any other subject and uses its property within civil-law relations. If a particular object belonging to the State is transferred to direct public use, such designation must be established by a specific public-law act.

A third distinctive feature of the State's participation in private-law relations under the Civil Code of Georgia relates to the specific technique of representation, which fundamentally distinguishes it from the approaches prevailing in socialist and post-socialist countries. Georgia, similar to Germany, recognises the State as a legal entity under public law endowed with private-law legal capacity. However, such status does not extend to the Government of Georgia or its constituent parts (ministries and other agencies). Like any legal person, the State may act through its organs. These organs represent the State on the basis of their competences. As in all representative relationships, the rights and obligations arising from such actions bind not the organs themselves but the State directly and exclusively.

Tortious acts are likewise attributed to the State. The legislative, executive and judicial branches are organs of the State; their actions must therefore be regarded as actions of the State itself.

According to Professor Rolf Knieper, from the standpoint of constitutional law, and with regard to the unity of the State, it is erroneous and highly questionable to regard governments and individual ministries in certain post-Soviet countries as separate legal persons capable of independently concluding contracts and asserting proprietary claims over assets that, in reality, belong to the State.

Today in Georgia, the institution of the legal entity under public law is widely applied, not only *de facto*, as was always the case, but also *de jure*. This is confirmed by Article 1509 of the Civil Code, according to which legal entities under public law include the following: the State; a self-governing unit; legal persons established by the State on the basis of legislation or an administrative act that are not formed in one of the legal forms of organisation defined by the Civil Code or the Law on Entrepreneurs; state institutions and state funds not created in accordance with the Civil Code or the Law on Entrepreneurs; non-governmental organisations established on the basis of legislation for the achievement of public purposes (political parties and others); and legal entities under public law recognised by the Constitutional Agreement of Georgia, namely, the Georgian

Apostolic Autocephalous Orthodox Church, the Armenian Gregorian Church and the Azerbaijani Muftiate.

It is recognised that legal entities under public law, despite their diversity, share the following common characteristics: (1) they are created to accomplish tasks of particular importance for the State and society; (2) their status must be reinforced in legislative and other normative acts appropriate for the realisation of those objectives; (3) they combine public-law and private-law functions in their activities; (4) the general norms of civil legislation apply to them to a limited extent; (5) property connected with legal entities under public law has a designated purpose; (6) guarantees must be established for the independent exercise of their functions; and (7) a specific procedure for their reorganisation must be determined. Time has confirmed the necessity of the institution of the legal entity under public law in our legal reality.

Such an institution is indispensable for addressing the tasks of anti-crisis governance. In virtually all countries, new models of anti-crisis management are being constructed, and a core element of these models is precisely the legal entity under public law. A brief check confirms that, within the post-Soviet space, Georgian civil legislation was likely among the first to recognise *de jure* the institution of the legal entity under public law, although in other post-Soviet republics it had always existed *de facto*. Only thereafter did qualified monographs on legal entities under public law appear in post-Soviet theoretical literature, and so-called round-table discussions were held on the necessity of introducing this institution. Moreover, even in Georgia, a special so-called framework law “On Legal Entities under Public Law” was adopted, the draft of which was prepared directly by Professor Rolf Knieper.

P.S. I shall conclude as I began. The essence of lawmaking, like that of any form of creation, is “the good.” This good is created by specific individuals. At the same time, laws have no authors for the formal reason that they are not objects of copyright. The objects of copyright are draft laws. Here lies another paradox – the authors of draft laws are known only to specially interested professionals. I would like to believe that the name of Professor Rolf Knieper will be transmitted to future generations of professionals in Georgia.

Constitutional Reform in Georgia (2017) and the Constitutional Court

Abstract

Constitutional reform undertaken in 2017, which ended the transformation of the country into the parliamentary republic, also affected the Constitutional Court. The norms providing the constitutional basis for the Court were amended. The article discusses the content of amendments, their appropriateness and relevance; it demonstrates the experience of relevant regulations from other countries. The constitutional amendments regarding the formation of the Constitutional Court and appointment of judges, as well as specifying the scope of authorities the Court holds are assessed positively in this paper. However, considering the substantial reduction of competences of the Court, specifically, removal of four competences altogether, including the formal control of the provisions, further limitation of the competence of overseeing the constitutionality of elections, etc., the constitutional reform in these regards cannot be declared as a step forward.

Introduction

Georgia underwent yet another constitutional reform in 2017. Although the Constitution has been amended on numerous occasions since 1999, comprehensive constitutional revisions took place only twice prior to 2017 — in 2004 and 2010.

All three reforms (2004, 2010 and 2017) aimed at establishing a new system of governance or substantially modifying the existing one. The political elite appeared to regard the choice of the model of government as a primary reason

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for institutional failure. In reality, however, the establishment of a democratic state governed by the rule of law is not intrinsically linked to any particular form of government. Constitutional monarchies, presidential systems, semi-presidential systems and parliamentary republics alike may successfully embody democratic and rule-of-law principles. Numerous contemporary examples confirm this. What is essential is the effective separation of powers, combined with functioning checks and balances and robust protection of fundamental rights and freedoms.

In 1995, Georgia adopted a presidential system. Following the constitutional reform of 2004, this system was formally transformed into a semi-presidential one. A new executive body — the Government — was introduced. However, the mechanisms of checks and balances were structured in a manner that, in practice, resulted in what was widely described as a “super-presidential” model¹. The negative socio-political and socio-economic consequences of this concentration of power have had long-lasting effects.

The constitutional reform of 2010 was likewise driven by political considerations. The shift towards a parliamentary republic appeared advantageous for the ruling party, as electoral success in parliamentary elections would allow it to maintain control over the executive branch. More precisely, the reform introduced a model of rationalised parliamentarism, aimed primarily at ensuring governmental stability². Yet the key instrument of this model — the constructive vote of no confidence, designed to balance the relationship between Parliament and Government — was drafted in such a complex manner that it was practically unusable. Moreover, the constitutional status and competences of the President remained ambiguous. This became evident shortly after the amendments entered into force and gave rise to institutional conflict between constitutional bodies.

Given the perceived deficiencies of the existing parliamentary model, the principal objective of the 2017 constitutional reform was to ensure that the Constitution conformed more fully to the fundamental principles characteristic of

1 *I. Arakelian*, *The Process of Constitutional-Political Reform in Georgia: Political Elite and the Voices of the People* (IDEA, CIPDD 2005), 21.

2 On rationalised parliamentarism see *E. Tanchiev*, 'Rationalised Parliamentarism in O. Melkadeze (ed), *Republic: Parliamentary or Presidential*, Upleba 1996, 38-44.

parliamentary systems.³ The extent to which this objective was achieved is reflected in the final opinion of the Venice Commission on the 2017 reform. The Commission concluded that “the constitutional reform process completes the evolution of Georgia’s political system towards a parliamentary system and constitutes a positive step towards the consolidation and improvement of the country’s constitutional order, based on the principles of democracy, the rule of law and the protection of fundamental rights.”⁴

At the same time, the Venice Commission provided a number of specific comments and recommendations, including with regard to the competences of the Constitutional Court, particularly in electoral matters. Although the amendments had already been adopted on second reading — limiting the possibility of substantial modifications — the Parliament of Georgia decided to implement the Commission’s recommendations. This necessitated the initiation of an additional set of constitutional amendments, thereby extending the reform process into 2018.

This was not the first occasion on which constitutional reform affected the Constitutional Court. The system of constitutional review established by the 1995 Constitution has undergone several substantial revisions, both through constitutional amendments and legislative reforms. In 2002, for example, the organic law governing the Constitutional Court was significantly amended.⁵ The Court’s competences were expanded; both abstract and concrete review were strengthened; standing to initiate proceedings was broadened; and procedural mechanisms were made more flexible and efficient.

However, in 2004, the government that came to power following the revolutionary events initially sought to abolish the Constitutional Court by merging it

3 "It is necessary to transform current inaccurate parliamentary system of governance into meticulous parliamentary governance system. This was [...] fundamental task set before the Commission and the State Constitutional Commission worked according to this very [...] fundamental task" <<http://www.parliament.ge/ge/parlamentarebi/chairman/chairmannews/irakli-kobaxidze-sakonstitucio-cvilebebis-mizania-demokratiuli-ganvitarebis-konstituciuri-garantiebis-sheqmna>>.page accessed 1 June 2018.

4 European Commission for Democracy through Law (Venice Commission), 'Opinion on the Draft revised Constitution as adopted by the Parliament of Georgia at the second reading on 23 June 2017, CDL - AD (2017)023, 51.

5 Article 14, 12 February 2001, 668 4, Organic Law of Georgia on Constitutional Court of Georgia; See also J. Khetsuriani, *Novelties in the Legislation of the Constitutional Court of Georgia*, Human and Constitution, 2002, 9-18.

with the Supreme Court. Subsequently, on 17 December 2004, a draft constitutional law initiated by the President was submitted for public discussion. The draft envisaged removing the Constitutional Court from the judicial branch, terminating prematurely the mandates of all justices of both the Constitutional Court and the Supreme Court (with the exception of the newly elected President of the Supreme Court), introducing impeachment procedures for the removal of Constitutional Court justices, lowering the minimum age requirement for appointment, amending the rules for the formation of the Court so that all members would be elected by Parliament upon nomination by the President, excluding electoral review from the Court's jurisdiction, and narrowing the range of normative acts subject to constitutional complaint by individuals.⁶

These proposed amendments met with strong domestic and international criticism, and the government ultimately refrained from adopting the draft. Nevertheless, certain restrictive measures — including limitations on the Court's competences and the reduction of the age requirement for appointment — were subsequently enacted through other legislative changes.⁷

Attempts to limit the Constitutional Court's powers were also made in 2016. However, following the President's veto, a significant portion of the most controversial amendments to the legislation governing the Court was not adopted.⁸

The constitutional reform of 2017 introduced several significant amendments to the constitutional provisions regulating the Constitutional Court. This article analyses the content of these amendments, evaluates their appropriateness, and assesses their compatibility with general principles of constitutional law.

6 9 December 2004, 8 148, Ordinance of the Parliament of Georgia on Publishing Draft Constitutional Law "On Amendments to the Constitution of Georgia and Creation of Organizing Commission of its General Public Discussions".

7 *J. Khetsuriani*, *From Independence to Rule of Law State*, Cezanne 2006, 67-69.

8 On this topic see *J. Khetsuriani*, *The Authority of the Constitutional Court of Georgia*, *Favorite Style* 2016, 278-282.

The place of the constitutional court within the system of separation of powers

As a result of the 2017 constitutional reform, the position of the Constitutional Court within the system of separation of powers formally remained unchanged. The Constitution continues to recognise the Court as part of the judicial branch. Chapter Six of the revised Constitution of Georgia, entitled “Judicial Authority and the Prosecutor’s Office,” provides that judicial authority shall be exercised by the Constitutional Court of Georgia and the courts of general jurisdiction (Article 59(1)).

The inclusion of the Prosecutor’s Office within the same constitutional chapter requires closer examination. In some legal systems (e.g., Belgium, Spain, Romania, Latvia and Croatia)⁹, the prosecution service is institutionally linked to the judiciary. In the Georgian context, however, the integration of the Prosecutor’s Office into the chapter on judicial authority appears largely formal. While the constitutional legislator may have taken into account the prosecutor’s significant role in the administration of justice, this logic would equally justify including the Bar within the same chapter.¹⁰

Although the Prosecutor’s Office is recognised as a constitutional body, the Constitution does not define its competences. This omission constitutes a structural weakness, as it leaves broad discretion to the ordinary legislator in determining its powers. Considering the rules governing its formation and its accountability to Parliament (Article 65 of the revised Constitution), the Prosecutor’s Office appears institutionally closer to the legislative branch than to the judiciary. Notably, under the original 1995 Constitution — and again following the 2004 reform — it was more closely associated with the executive branch.¹¹

9 O. Melkadze, B. Dvali, *Judiciary in the Foreign States*, Merani, Tbilisi, N. 3 2000, 209-225.

10 The indication to the advocacy in the new version of the Constitution of Georgia is given in the chapter on Human Rights (article 31, paragraph 3). In this regard it is noteworthy, that advocacy together with the Prosecutor’s Office is included in the chapter on Judiciary in the Constitution of Bulgaria, while the Constitutional Court is separated from the Judiciary and has its own dedicated chapter (see V. Gonashvili (ed) *Constitutions of Foreign States Part IV* (2007). 222, 224).

11 In the original 1995 version of the Constitution of Georgia the Prosecutor’s Office was considered an institution of the Judiciary and its powers were envisaged within the same chapter (article 91, while as a result of constitutional reform of 2004 the indication on the Prosecutor’s

A further noteworthy amendment concerns the constitutional definition of judicial authority. The previous Constitution explicitly stated that judicial authority was exercised through “constitutional review, adjudication, and other forms determined by law” (former Article 82(1)). The reference to “other forms determined by law” has been removed in the revised Constitution.

This amendment is problematic. The concepts of judicial authority and adjudication are not identical. Judicial authority is a broader notion encompassing adjudication, constitutional review, and certain institutional functions that cannot strictly be classified as either. For example, when the Constitutional Court decides on the early termination of a judge’s mandate, it does not exercise constitutional review in the classical sense. Similarly, the High Council of Justice — an institution constitutionally situated within the judiciary — performs governance functions that do not amount to adjudication. Nevertheless, such activities represent constitutionally recognised exercises of judicial authority. The removal of the broader formulation unnecessarily narrows the conceptual framework of judicial power.

Adjudication and constitutional review constitute the core functions of the courts of general jurisdiction and the Constitutional Court, respectively. These functions define their institutional specificity and distinguish them from other state bodies. No other institution may exercise judicial power in this sense. Although courts also perform auxiliary functions, these serve only to ensure the effective performance of their primary adjudicative role. As legal scholarship has observed, adjudication is the defining function of the judiciary and determines its place within the constitutional system.¹²

Some scholars have characterised constitutional courts as both judicial bodies exercising political influence and political bodies exercising judicial powers — describing constitutional adjudication as a “mixed” or quasi-political function.¹³ Based on this reasoning, constitutional courts are sometimes regarded as independent supreme state institutions, separate from the judiciary, which

Office was completely removed from the Basic Law and it became an institution of the Executive Branch).

12 O. Melkadze, B. Dvali, *Judiciary in the Foreign States*, Merani, Tbilisi, N. 9, 16.

13 D. Gegenava, *The Nature of the Constitutional Court and its Place in the Concept of Separation of Powers* in G. Kverenchkhiladze, D. Gegenava (eds), *Modern Constitutional Law Book I*, 99.

explains why certain constitutions (e.g., Austria, Spain, Bulgaria) provide for them in separate chapters.¹⁴

In our view, however, the Constitutional Court cannot properly be characterised as a political institution. Political bodies act on the basis of discretion and policy considerations. By contrast, the Constitutional Court acts only upon application and decides exclusively on legal questions — namely, whether a law or other normative act conforms to the Constitution.¹⁵ While its decisions may have significant political consequences, this does not transform the Court into a political actor. The political relevance of judicial decisions must not be confused with political decision-making.

The Constitutional Court is one of the highest constitutional institutions of the state and exercises judicial authority through constitutional adjudication and related functions provided by law. Its placement within the judicial branch is therefore constitutionally appropriate.

The composition and formation of the constitutional court

The principal aspects of the composition and formation of the Constitutional Court have been regulated at the constitutional level both before and after the 2017 reform. These include the size of the Court, the method and procedure for appointing judges, eligibility requirements, and the state bodies involved in the appointment process.

Prior to the 2017 reform, the Constitution used two terms interchangeably with respect to the personal composition of the Court: “judge of the Constitutional Court” and “member of the Constitutional Court” (former Article 88(2)). The revised Constitution employs only the term “judge of the Constitutional Court,” which more accurately reflects the judicial nature of the office.

The number of judges on constitutional courts varies across jurisdictions and is typically determined by the scope of the Court’s competences, expected caseload, and other institutional considerations.¹⁶ The Constitutional Court of Georgia consists of nine judges — a number that has remained unchanged since

14 *H. B. Вумрук*, Конституционное правосудие. Судебно-конституционное право и процесс, Юрист М., 2005, 161.

15 *G. Khubua, J. Ch. Traut*, Constitutional Justice in Germany 2001, 18.

16 The fewest number of judges is in the Constitutional Court of Andorra (four judges), while the largest number is in the Constitutional Court of Russia (19 judges).

the adoption of the 1995 Constitution. Proposals were made to increase the number of judges, particularly in the event that the Court would be granted broader forms of constitutional review, which would likely have increased its caseload significantly. As these proposals were not adopted, the Court's size has remained constant.¹⁷

The eligibility requirements for appointment have, however, undergone modification. Under the original Constitution, candidates were required to be Georgian citizens, at least 35 years of age, and to possess a higher legal education (former Article 88(4)). In 2005, the minimum age requirement was lowered from 35 to 30.¹⁸ In our view, this reduction was unjustified. Even prior to this amendment, Georgia had established comparatively low age requirements. The further reduction risked undermining the professional maturity of the Court, particularly since the Constitution did not require prior professional legal experience.

In many jurisdictions, professional competence is ensured through higher minimum age thresholds or mandatory professional experience. For example, the minimum age for appointment to the constitutional court is 40 in Germany and Slovakia, and 45 in Hungary. In Austria, a minimum of ten years' professional experience is required; in Spain, fifteen years. Even in countries where no formal age requirement is prescribed (e.g., Lithuania, Latvia¹⁹), substantial professional experience is required, which in practice means that candidates are generally well above the age of 35 at the time of appointment.²⁰

In legal scholarship, the relatively modest criteria previously established for appointment to the Constitutional Court have been justifiably criticised as inconsistent with the high constitutional status of its judges.²¹

As a result of the 2017 constitutional reform, the eligibility requirements for candidates were significantly strengthened. Article 60(2) now provides that a

17 *J. Khetsuriani*, The Authority of the Constitutional Court of Georgia (n.8), 148-154.

18 Article 2 of the Constitutional Law no. 2496 - bb I, no.1, 27 December 2005.

19 It is noteworthy that unlike the candidates of the Constitutional Court, the Basic Law set the same criterion for the candidate of judgeship of the general court. Namely, the candidate of judgeship in the general courts was required among others, to have at least 5 years of work experience within the specialty (article 86, paragraph 1).

20 *В. В. Маклаков* (Ред), Конституционный контроль в зарубежных странах (Норма, М., 2007). 42-43; *Н В Витрук*, Конституционное правосудие. Судебно-конституционное право и процесс, Юрист, М., 2005, 180-181.

21 See *G. Kakhiani*, Constitutional Control in Georgia. Theory and Legal Analysis, Meridiani 2011, 149-150.

candidate must be a citizen of Georgia who has attained the age of 35, possesses a higher legal education, has no fewer than ten years of professional legal experience, and demonstrates distinguished professional qualifications.

The minimum age requirement has thus been restored to its original level. More importantly, additional substantive criteria have been introduced, notably the requirement of at least ten years of professional experience and distinguished professional competence. Taken together, these requirements substantially enhance the professional threshold for appointment and, in our view, contribute to ensuring that the Constitutional Court is composed of experienced and highly qualified jurists.

The rules governing the selection and appointment of judges are equally significant. Comparative practice demonstrates that there is no single uniform model. Nevertheless, across constitutional systems, the overarching objective of the lawmaker is to design appointment procedures that safeguard the independence of the Constitutional Court from political or partisan influence.

This objective is often pursued through mechanisms ensuring the balanced participation of different branches of government in the formation process (e.g. Bulgaria, Spain, Italy, Ukraine).²² The original 1995 Constitution of Georgia followed precisely this model. Article 88(2) provided that three members were appointed by the President of Georgia, three were elected by Parliament, and three were appointed by the Supreme Court — thereby formally involving all three branches of power.

Legal scholarship has observed, however, that although this tripartite structure formally remained intact following the 2004 constitutional reform, the institutional status of one of the appointing authorities — the President — was significantly altered. As the President was no longer regarded as the head of the executive branch, some scholars argued that the executive branch had effectively been excluded from participation in the formation of the Court. In response, proposals were made to ensure full institutional parity by enabling the Government to nominate candidates for appointment by the President.²³ In our

22 Article 147, Constitution of Bulgaria. 12 July 1991, Държавен Вестник, No.56, 13.07.1991; Article 159, Constitution of Spain. 13 October 1978, Boletín Oficial del Estado 29.12.1978; Article 135, Constitution of Italy. 22 December 1947, Gazzetta Ufficiale No. 298, 27.12.1947; Article 148, Constitution of Ukraine, 28 June 1996, Відомості Верховної Ради України (ВВР), 1996, № 30.

23 See G. Kakhiani, *Constitutional Control in Georgia* (n.21), 135-136.

view, such an approach would indeed be appropriate. However, the necessity for this adjustment did not arise immediately after the 2004 reform, but rather following the 2010 reform, when the Government became the highest executive authority and the President's executive powers were substantially curtailed.

Between 2004 and 2013, although the President was no longer formally the head of the executive branch, executive powers remained shared. The Government was accountable both to Parliament and to the President; the President retained authority to dismiss the Government, remove individual ministers, and suspend or annul acts of executive bodies. In that constitutional configuration, presidential appointment of Constitutional Court judges could still plausibly be regarded as participation of the executive branch.

Following the 2017 reform, however, the President was almost entirely detached from the executive branch and retained only the largely ceremonial status characteristic of parliamentary systems. Nevertheless, the President continues to appoint one third of the Constitutional Court judges independently.

If the legislator remains committed to the principle of balanced participation of the three branches of government in the formation of the Court, it is difficult to identify how the executive branch now meaningfully participates in the process. In the current constitutional framework, the President no longer clearly represents any of the classical branches of power. Accordingly, this issue should be addressed in the future either by introducing a formal role for the Government in the nomination process or by requiring countersignature by the Prime Minister for presidential appointments to the Constitutional Court.²⁴

The 2017 reform also amended the procedure for electing Constitutional Court judges by Parliament. Under the previous constitutional framework, three members were elected by a majority of the full composition of Parliament. The revised Constitution now requires a majority of no fewer than three fifths of the total number of Members of Parliament (Article 60(2)). It is noteworthy that the original 1995 Constitution likewise required a three-fifths majority of the full membership of Parliament. The new formulation replaces "majority" with a qualified three-fifths majority and substitutes "full composition" with "total number

24 For instance, the President of Italy appoints one third (five judges) of the Constitutional Court without the Government proposing the candidates to the President, however, the Decree of the President on appointing a judge needs countersigning from the Chairman of the Government (see *B. B. Маклаков (Ред), Конституционный контроль в зарубежных странах*, Норма М., 2007, 315-316).

of members,” thereby clarifying the quorum requirement. The introduction of a higher qualified majority is, in our view, a positive development. It promotes cross-party consensus, strengthens the involvement of the parliamentary minority, and reduces the risk of appointments being dominated solely by the governing majority.

With regard to the term of office, constitutional design generally favours either life tenure or a single fixed term without the possibility of reappointment. The Georgian Constitution originally established a ten-year non-renewable term for judges of the Constitutional Court. This model has remained unchanged through subsequent reforms and continues to apply under the revised Constitution. The retention of a long, non-renewable term represents a sound legislative choice, as it enhances judicial independence by removing incentives related to reappointment.

The election of the President of the Constitutional Court should be considered in a similar institutional context. The President of the Court exercises representative, organisational, and certain procedural powers that distinguish this position from that of other judges. Comparative constitutional practice reveals two primary models: in some countries (e.g. Belgium, Italy, Latvia), the President of the Constitutional Court is elected by the judges themselves; in others (e.g. Germany, Austria, Spain), the President is appointed by an external state institution.²⁵

Legal scholarship generally regards internal election by the members of the Court as the more appropriate model, as it significantly reduces the risk of

25 Article 32, Organic Law of Belgium Special Act of January 6, 1989 On Constitutional Court, Official English translation available here: <http://www.const-court.be/en/basic_text/Organic_legislation_SACC.pdf> accessed 1 June 2018; Article 135, Constitution of Italy 22 December 1947, Gazzetta Ufficiale No. 298, 27.12.1947; Article 12, Law of Latvia on Constitutional Court 14 June 1996, official English translation available here: <<http://www.satv.tiesa.gov.lv/en/2016/02/04/constitutional-court-law/>> accessed 1 June 2018; Article 9, Law of Germany on Federal Constitutional Court 12 March 1951, official English translation available here: <http://www.bundesverfassungsgericht.de/Shared-Docs/Downloads/EN/Gesetze/BVerfGG.pdf?_blob-publicationFile&v=10> accessed 1 June 2018; Article 147, Constitution of Austria 1 October 1920 (Federal Law Gazette No. 1/1930 (StF: BGBl. Nr. 1/1930 (WV))); Article 160, Constitution of Spain 31 October 1978, Boletín Oficial del Estado 29.12.1978.

politicisation and strengthens both judicial equality and institutional independence.²⁶

In the original version of the Constitution of Georgia, the President of the Constitutional Court was elected by and from among the judges of the Court for a term of five years. The same individual could not be elected twice (former Article 88(2)). This model of internal election survived all subsequent constitutional reforms; however, the prohibition of re-election was amended. Beginning in 2010, re-election of the same person became permissible, and this occurred in practice in 2011.²⁷ The 2017 reform restored the original rule. Under the revised Constitution, re-election of the same person to the office of President of the Constitutional Court is again prohibited (Article 60(3)).

Although not directly regulated at the constitutional level, it is also relevant to note an important development concerning the nomination of candidates for the Presidency of the Constitutional Court under the Organic Law. Prior to 2016, a candidate for President of the Court was nominated upon the joint proposal of the President of Georgia, the Speaker of Parliament, and the President of the Supreme Court (Article 10(3) of the Organic Law). Following amendments to the Organic Law on the Constitutional Court, candidates may now be nominated exclusively by three judges of the Constitutional Court.²⁸ Consequently, the nomination and election of the President of the Court are now entirely internal processes. In our view, this reform further strengthens the institutional autonomy and internal independence of the Constitutional Court.

The authority of the constitutional court and the subjects entitled to petition the constitutional court

The 2017 constitutional reform introduced significant changes to the foundational constitutional provisions governing the powers of the Constitutional Court of Georgia.

Under the previous constitutional framework, the competences of the Constitutional Court were defined both by the Constitution and by the Organic Law. Following the reform, however, the Constitution itself became the exclusive

26 *H. B. Вумрук*, Конституционное правосудие. Судебно-конституционное право и процесс, Юрист, М., 2005, 195.

27 Article 379 Constitutional Law of Georgia 15 October 2010 no.3710-08 1, no.62, 05.11.2010.

28 Organic Law of Georgia 3 June 2016 (webpage 04.06.2016).

source of the Court's powers. Article 60(4)(j) of the revised Constitution provides that the Constitutional Court "shall exercise other powers as provided by the Constitution," thereby clearly indicating that the enumeration of competences is exhaustive at the constitutional level. It is therefore no longer permissible to expand the Court's jurisdiction through ordinary legislation, including the Organic Law.

The revised Constitution enumerates nine principal competences of the Constitutional Court: protection of human rights (constitutional complaint), abstract review of normative acts, concrete review of normative acts, adjudication of disputes concerning competences between constitutional bodies, constitutional review of international treaties, review of the constitutionality of political parties, review of the constitutionality of elections and referenda, protection of local self-government, and other powers expressly provided by the Constitution.

This list does not include the authority of exercising impeachment procedure. It is indicated in the article 48 of the new version of the Constitution, which is already named "Impeachment". By contrast, under the Constitution currently in force and the Organic Law on the Constitutional Court, the Court exercises fourteen competences. The reform therefore reduced the number of powers by four. Specifically, the following competences were removed: formal constitutional review (procedural review of normative acts), adjudication of disputes concerning violations of the status of the Autonomous Republic, review of normative acts adopted by the Autonomous Republic, and protection of the constitutional foundations of the judiciary. From a purely quantitative perspective, the scope of the Court's jurisdiction has thus been significantly narrowed. The following analysis will examine in greater detail the competences that have been abolished or substantially modified.

One of the most consequential changes concerns the abolition of formal constitutional review. Under this competence, the Constitutional Court examined whether legal acts of Georgia and parliamentary regulations complied with constitutional requirements regarding their adoption, promulgation, signature, publication, and entry into force. In other words, the object of review was not the substantive content of the normative act but its formal conformity with constitutionally prescribed procedures. Formal constitutional review applied exclusively to parliamentary normative acts and served to safeguard the integrity of the legislative process established by the Constitution. The importance of this competence was considerable. Although it constituted an independent head of

jurisdiction, the Organic Law further provided that the Court could raise issues of formal constitutionality *ex officio* (Article 26(2)) and was obliged to examine formal compliance when exercising other forms of normative review. This *ex officio* dimension was exceptional within the Georgian system of constitutional justice. The legislator's approach reflected a fundamental principle of constitutional validity: a normative act lacks legal force not only when its substance contradicts the Constitution, but also when constitutionally prescribed procedures for its adoption or entry into force have been violated. With the entry into force of the revised Constitution, a problematic situation may arise. A law adopted by Parliament may be substantively compatible with the Constitution, yet its adoption may have involved serious procedural violations of constitutional requirements. Under the new constitutional framework, the Constitutional Court will no longer possess an explicit mechanism to review such violations. The removal of formal constitutional review therefore weakens constitutional safeguards against procedural breaches in the legislative process. In our view, the abolition of this competence cannot be regarded as appropriate.

The next two competences of the Constitutional Court concerned the Autonomous Republic of Ajara and were designed to resolve constitutional disputes between central state authorities and regional institutions. Under the previous constitutional framework, the Constitutional Court was empowered to adjudicate claims concerning violations of the Constitutional Law "On the Status of the Autonomous Republic of Ajara," as well as to review the conformity of normative acts adopted by the Supreme Council of the Autonomous Republic of Ajara with the normative acts of Georgia. Following the abolition of this special competence, constitutional review of normative acts adopted by the Supreme Council of Ajara must now be conducted under other heads of jurisdiction of the Constitutional Court (e.g., abstract norm control or constitutional complaint). However, review within those general competences does not provide the same level of procedural protection as the former specialised mechanism.

The distinction is significant. Under the abolished regime, submission of a constitutional referral by the Parliament of Georgia automatically suspended the operation of the contested normative act of the Supreme Council of Ajara until the Constitutional Court rendered its final judgment. Moreover, the disputed act could be examined not only for its constitutionality but also for its legality

in a broader sense.²⁹ These procedural guarantees and enhanced review mechanisms no longer exist under the revised constitutional framework.

With regard to the second competence related to Ajara, violations of the Constitutional Law “On the Status of the Autonomous Republic of Ajara” could previously be committed by either central or regional authorities. Accordingly, the right to initiate constitutional proceedings in this regard was granted to institutions at both levels of government: the President of Georgia, the Government of Georgia, no fewer than one fifth of the Members of Parliament, and the Supreme Council of the Autonomous Republic of Ajara.³⁰ Under the revised Constitution (Article 60(4)(d)), the highest representative or executive body of the Autonomous Republic of Ajara is entitled to petition the Constitutional Court only where it considers that its constitutionally guaranteed competences have been violated. This formulation significantly narrows the scope of potential disputes, as it confines review strictly to issues of constitutional competences rather than the broader matters regulated by the Constitutional Law on the Status of Ajara.

Another competence removed from the Constitutional Court concerned the protection of the constitutional foundations of the judiciary. In our view, this competence may be functionally replaced by the Court’s jurisdiction to adjudicate disputes concerning competences between state bodies. The Constitution entrusts the High Council of Justice with ensuring the independence and effective functioning of the general courts (Article 64(1)). Consequently, a normative act contradicting constitutional guarantees relating to the judiciary would directly affect the competences of the High Council of Justice. It is therefore reasonable to assume that this body should be entitled — ideally through explicit provision in the Organic Law — to initiate constitutional review in such cases.

The competence of abstract norm control has also been amended. Prior to the reform, abstract review had a limited scope: both the Constitution (former Article 89(1)(a)) and the Organic Law on the Constitutional Court precisely enumerated the types of normative acts subject to review under this head of jurisdiction. Following the 2017 reform, abstract norm control acquired a universal character. In principle, any normative act may now be subjected to constitutional review under this competence. This expansion should be assessed positively,

29 See J. Khetsuriani, *The Authority of the Constitutional Court of Georgia* (n.8), 253-263.

30 Article 41' Organic Law of Georgia on Constitutional Court of Georgia, Parliamentary Papers, N. 45, 21.11.1997, 54.

provided that it does not result in excessive caseload and institutional overload. Abstract review constitutes one of the most significant instruments of checks and balances within a constitutional system. At the same time, in our view, it would be more appropriate for this competence to focus primarily on normative acts adopted by supreme state authorities, thereby preserving the Constitutional Court's role as guardian of the constitutional order rather than as a general supervisory body over all subordinate normative acts.

The constitutional definition of the Court's jurisdiction over disputes concerning competences between state bodies has also been amended. The revised Constitution expands the range of entities entitled to participate in such disputes, including the Council of the National Bank, the Auditor General, the Prosecutor General, and executive bodies of the Autonomous Republic of Ajara (Article 60(4)(d)). At the same time, courts have been removed from the list of entities entitled to petition the Constitutional Court in competence disputes. It may be assumed that, in cases where the competences of the judiciary are affected, the High Council of Justice will be granted standing to initiate proceedings by virtue of the Organic Law — as suggested above. More generally, the Organic Law on the Constitutional Court should clarify not only this issue but also the standing of key constitutional bodies (such as the President of Georgia, the Parliament of Georgia, and the High Council of Justice) to initiate proceedings concerning alleged violations of their competences or those of other state institutions.³¹ In its current wording, the constitutional provision authorising the Court to “consider disputes on the authority of an appropriate body” lacks sufficient precision. The scope of standing and referral mechanisms requires further legislative specification in order to ensure legal certainty and effective constitutional adjudication.

In the revised Constitution of Georgia, the competence of the Constitutional Court regarding constitutional control over political parties has been reformulated. Prior to the 2017 reform, the Court was empowered to review both the constitutionality of the formation and the activities of political associations of citizens. Following the reform, however, the Court's jurisdiction is limited to

31 Pursuant to the Organic Law of Georgia on Constitutional Court of Georgia (საქართველოს საკონსტიტუციო სასამართლოს შესახებ) article 34, paragraph 1, the President of Georgia and the Parliament of Georgia are entitled to refer to the Constitutional Court not only when they consider their own competence violated, but also when the scope of competences of other state institutions are violated as well.

reviewing the constitutionality of the activities of political parties. The constitutionality of their formation no longer falls within the Court's competence. This limitation raises serious concerns. The Constitution itself establishes prohibitions relating both to the formation and to the activities of political parties. For example, the revised Constitution explicitly provides that "the formation of a political party according to territorial affiliation shall be impermissible" (Article 23(3)). Consider a situation in which a political party is established on the basis of territorial affiliation but subsequently conducts its activities in conformity with all other constitutional requirements. Under the current constitutional framework, the Constitutional Court would lack jurisdiction to prohibit such a party on grounds relating to its formation. At the same time, no other state body is authorised to prohibit political parties, as the Constitution explicitly provides that political parties may be prohibited exclusively by the Constitutional Court (Article 23(4)).

An additional amendment expanded the Court's powers in relation to the prohibition of political parties. When declaring a political party unconstitutional, the Constitutional Court is now authorised to terminate the mandates of members of representative bodies elected through that party. This development should be assessed positively. Georgian legal scholarship had previously advanced well-reasoned arguments in favour of such a mechanism, and comparable solutions exist in other jurisdictions. The reform therefore aligns domestic constitutional practice with established comparative standards.³²

Significant changes were also introduced regarding the Court's authority over electoral matters. A new constitutional provision stipulates that regulations governing elections may not be declared unconstitutional during the respective election year unless such regulations were adopted within fifteen months prior to the month of the election (Article 60(6)). At the same time, the general constitutional formulation of the Court's electoral jurisdiction remains unchanged: the Constitutional Court continues to adjudicate both disputes concerning the constitutionality of electoral (or referendum) legislation and disputes concerning the constitutionality of elections (or referenda) themselves.³³ In our view, however, this legislative framework contains a serious shortcoming. If the constitutionality of the electoral legislation itself is not contested, but elections are

32 J. Khetsuriani, *The Authority of the Constitutional Court of Georgia* (n.8), 94-97.

33 J. Khetsuriani, *The Authority of the Constitutional Court of Georgia* (n.8), 102-103.

conducted in violation of that legislation and of constitutional principles, such violations may fall outside the Court's effective jurisdiction. The newly introduced fifteen-month rule further restricts the Court's role. If no amendments to electoral legislation are adopted within the fifteen months preceding an election, the Constitutional Court is barred from reviewing the constitutionality of electoral regulations during that election year. In practical terms, this may significantly weaken the Court's capacity to address constitutional deficiencies in the electoral framework at precisely the moment when judicial oversight is most needed. In effect, one of the most crucial competences of the Constitutional Court risks being substantially constrained. From the perspective of constitutional democracy, the judiciary's role in safeguarding the legitimacy of state authority through electoral review should be strengthened rather than curtailed. Unfortunately, constitutional developments since 2005, including the 2017 reform, indicate a movement in the opposite direction.

As noted earlier, the constitutional reform also affected the circle of subjects entitled to petition the Constitutional Court. Prior to the reform, eleven entities possessed standing. Following the amendments, this number increased to sixteen. In addition, newly designated entities are now entitled to initiate proceedings concerning disputes of competences.

The constitutional provision governing the legal effects of the Court's judgments has likewise been amended. Under the previous Constitution, a normative act declared unconstitutional ceased to have legal effect immediately upon publication of the Court's judgment (former Article 89(2)). The revised Constitution retains this general rule but adds an important qualification: the Court may determine a different, later date for invalidation (Article 60(5)). Notably, the Organic Law on the Constitutional Court had already provided for such flexibility (Article 25(2)). However, this provision was not applied in practice because it conflicted with the constitutional rule mandating immediate invalidation and did not permit judicial discretion regarding the temporal effects of judgments. The introduction of constitutional-level authority to postpone the invalidation of unconstitutional acts addresses a genuine practical need. In particular, such flexibility is essential when reviewing international agreements or other normative

acts whose immediate annulment could generate legal uncertainty or institutional disruption.³⁴

The issue has now been resolved. As a result of the constitutional reform, the previously existing provision of the Organic Law has been elevated to constitutional rank. In our view, the practical application of this provision by the Constitutional Court will help prevent potential conflicts between national and international legal principles and will serve as an important instrument for safeguarding legal certainty.

Conclusion

The constitutional reform carried out in Georgia in 2017 completed the transformation of the country's political system into a parliamentary model and addressed several deficiencies that had emerged following the 2010 reform. Although the reform process partially continued in 2018, the amendments concerning the Constitutional Court did not alter its institutional position within the system of separation of powers. Under the revised Constitution, the Constitutional Court remains part of the judicial branch and continues to function as the body entrusted with constitutional adjudication.

The reform introduced several positive developments. The eligibility requirements for appointment as a judge of the Constitutional Court were significantly strengthened; the parliamentary quorum required for election was increased; the possibility of re-election of the President of the Court was abolished; the circle of entities entitled to petition the Court was expanded; the scope of abstract review and party-related constitutional review was broadened; and the Court was granted discretion to determine the temporal effects of its judgments declaring normative acts unconstitutional.

At the same time, the reform substantially reduced the Court's overall competences. Four distinct heads of jurisdiction, including formal constitutional review, were abolished. The Court's authority in electoral matters was further restricted. Moreover, any future expansion or clarification of the Court's powers is now possible only through constitutional amendment — a procedurally demanding and politically burdensome process. If one accepts that the institutional relevance of a constitutional court is largely determined by the breadth and

34 On this issue see *J. Khetsuriani*, *The Authority of the Constitutional Court of Georgia* (n.8), 186-188.

effectiveness of its competences, then the significant reduction of jurisdiction introduced by the 2017 reform cannot be regarded as a progressive development in this respect.

Accordingly, while the reform strengthened certain structural and procedural aspects of the Constitutional Court, it simultaneously narrowed its substantive authority. From the perspective of constitutional adjudication and the role of the Court within the system of checks and balances, the 2017 constitutional reform cannot be unambiguously characterised as a step forward.

Georgia: Legal Uncertainties in the Further Accession Process

Abstract

After Georgia was granted candidate status in December 2023, the accession process, which had only just begun, came to a standstill just a few months later. A statement by the European Union (EU) in June 2024 to "put this process on hold" for the time being was countered by the Georgian government in November 2024 with the announcement that it would not hold any more accession talks until the end of 2028. The decisions of both sides appear unnecessarily hasty, as they were made in Brussels and Tbilisi in the heat of highly emotional debates. For Georgia, they have unfortunately introduced legal uncertainties into the accession process in many respects. The EU could use legal arguments to justify its "retreat." The consequences of prolonging the process are likely to be particularly painful. In this situation, it makes sense for Georgia to seek membership of the European Economic Area (EEA) as a transitional measure. As a "half EU membership," membership in the EEA—which is likely to be achieved more quickly—represents a preliminary stage or a transitional stage on the path to the ultimate goal of full integration into the EU. Such a step could also help to defuse the heated domestic political situation because it has the character of a compromise.

I am happy to participate in a tribute to *Rolf Knieper*, even though I only met him once in the past. Together with him and the co-editor of this volume, *Lado Chanturia*, I took part in a bilateral conference in Bishkek, Kyrgyzstan, in May 2002, financed by the German Society for Technical Cooperation, on issues relating to the professional, personal, and organisational independence of judges. At the time, I was head of department at the Ministry of Justice of the German Federal State of Lower Saxony, which had close

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ties with the Central Asian country of Kyrgyzstan and maintained a cooperative relationship with it.

Through his many years of advisory work on the development of civil, constitutional, and administrative structures in Georgia, *Rolf Knieper* has made an invaluable contribution to the Caucasus republic. Early on, in the first decade of the 2000s, he also considered Georgia's prospects for joining the European Union (EU), while at the same time exploring alternatives in the form of a privileged position within the European Neighborhood Policy¹. *"The internationally renowned professor of civil and commercial law is highly respected in numerous countries of the former Soviet Union, especially in Georgia"* – this is how *Rolf Knieper* was introduced in an interview with him in 2023. *Rolf Knieper's* particular sympathy for Georgia was also evident when he had to comment on the discontinuation of bilateral development cooperation with Georgia in 2020, which had been financially supported by the German Society for Technical Cooperation - now the German Society for International Cooperation - since the 1990s. His repeatedly expressed empathy for the small country in the South Caucasus connects me to him.

1. Introduction – The Starting Point

Georgia's application to conclude an accession agreement with the EU was submitted more than three years ago, in March 2022. In the same month, the Council of the European Union asked the European Commission (EU Commission) to give its opinion on the application for accession. Unlike Ukraine and the Republic of Moldova—two countries from the same accession round that are also seeking membership—the EU did not grant Georgia candidate status in June 2022. In an opinion, the EU Commission merely opened up a "European perspective" for Georgia and made further steps towards EU membership contingent on the implementation of a catalog of twelve priorities². As is well known, the EU Commission then adopted its 2023 Enlargement Package in November 2023³.

1 See his contribution to the conference proceedings edited by *Ann Gäbler*, „Alternativen zum EU-Beitritt: Die Nachbarschaftspolitik der Europäischen Union am Beispiel von Georgien, Moldova und der Ukraine" from 2007 <<https://www.jstor.org/stable/24223550>> (accessed on 1.9.2025).

2 See Communication from the Commission to the European Parliament, the European Council and the Council – Commission Opinion on Georgia's application for membership of the European Union, Brussels, June 17, 2024, COM(2022) 405 final.

3 European Commission, Georgia 2023 Report, Brussels, November 8, 2023, SWD(2023) 697 final. Press release of the European Commission of November 8, 2023 <https://ec.europa.eu/commission/presscorner/detail/%20en/ip_23_5633> (accessed on 1.9.2025). This article takes into account political and legal developments up to September 2025.

In it, it recommended that the Council of the European Union grants Georgia candidate country status at its summit in December 2023. At the same time, it pointed out that Georgia had only completed three of the twelve priorities by that date: enhancing gender equality, taking into account European Court of Human Rights judgments, and nominating a new public defender. Following the Georgian government's public promise that the remaining nine priorities would be fulfilled in the foreseeable future, the Council of the European Union unanimously decided at its summit in December 2023, meaning with the approval of all 27 member states, to grant Georgia candidate country status. Accession negotiations were not initially taken up, as was also the case in Ukraine and the Republic of Moldova.⁴

Because it considered the Georgian legislature's regulation of foreign influence to be contrary to the rule of law, the EU "put the accession process on hold" in June 2024. In 2023, the Georgian parliament had submitted two bills in parallel, one on Transparency of Foreign Influence⁵ and another on the Registration of Foreign Agents⁶. After both bills were suspended following mass protests, the Georgian government reactivated the first bill⁷ in April 2024 and brought it into force. Following the parliamentary elections in October 2024, the Georgian government announced in November 2024 that it would postpone Georgia's accession talks with the EU for the time being. The Georgian Prime Minister stated that the Georgian government would "suspend" such talks until 2028⁸ and would not negotiate accession with the EU until the end of 2028⁹. The Georgian government saw the EU's ongoing criticism as interference in internal affairs and a threat to Georgia's sovereignty. At the same time, however, the Georgian Prime Minister assured that his country's accession to the EU

4 These were only launched in June 2024, even though both countries had already been declared candidates for accession in June 2022.

5 Law on Transparency of Foreign Influence.

6 Law on Registration of Foreign Agents.

7 Specifically, Law of May 18, 2024 on Transparency of Foreign Influence, unofficial translation by the European Commission for Democracy through Law (Venice Commission).

8 Year of the next parliamentary elections.

9 *"We have decided today to put the start of negotiations with the EU back on the agenda until the end of 2028."*

remained a "top priority" for him and that he remained confident that Georgia would become a member of the EU by 2030 as planned¹⁰.

Those interested in Georgia may welcome or lament this development, which is being voiced loudly depending on one's political views. On the one hand, the development is seen as the result of "blackmail" by the EU or an "attack on Georgia's dignity"; on the other hand, it is described as an "anti-European turn" or an "alarming backsliding to pro-Russian times." Regardless of this, it certainly represents the current dilemma facing Georgia in the accession process.

In terms of content, the following contribution is intended to initiate a more objective discussion of a heated political and legal debate. My remarks are those of a neutral observer from a legal and political science perspective, who has been much involved with such issues in his professional career. These remarks are intended to make a contribution to providing "unvarnished" information about the possibly expected legal and political developments. However, they can in no way be "instrumentalised" or exploited for certain purposes.

2. "Low-Key" Responses from the European Union – Setting up a Threat Scenario?

The EU's reactions to the Georgian government's suspension of accession talks have so far been "low-key" and do not contain any commitment on the part of the EU to the further accession process. However, they should be seen as a preliminary step towards a "tougher stance" by the EU and are creating a threatening backdrop¹¹. In response to a request in July 2025, the EU Commission stated that it remained committed to deepening its partnership with Georgia in line with the aspirations of a large majority of the Georgian population; however, it did not currently see itself in a position to recommend that the Council of the European Union opens accession negotiations.

Measures taken at EU level to date include freezing bilateral budget support and assistance under the European Peace Facility. Individual EU member states have imposed entry bans on Georgian politicians and cut development

10 Georgia halts EU accession talks until 2028, Caucasus Watch, November 28, 2024, <<https://www.caucasuswatch.de/de/news/georgia-halts-eu-accession-talks-until-2028.html>> (accessed on 5.9.2025).

11 This is already evident in the EU Commission's „Georgia 2024 Report“ dated October 30, 2024, SWD(2024) 697 final.

cooperation funds. Germany alone has suspended support projects worth more than 200 million euros. Restrictions on visa-free travel for Georgian officials are also being discussed¹². In January 2025, the Council of the European Union decided to suspend parts of the Agreement between the EU and Georgia on the Facilitation of the Issuance of Visas¹³; this had entered into force in March 2011. In mid-July 2025, the EU Commission sent a letter to the Georgian Government with eight demands regarding respect for fundamental rights, the fight against corruption, the independence of judiciary and compliance with EU rules on border protection. If these demands are not met by the end of August 2025, Georgia risks losing visa-free travel to the EU for all Georgian citizens.

Various actors, including the Baltic states of Estonia, Latvia, and Lithuania, as well as the Czech Republic and EU Foreign Affairs Representative *Kaja Kallas*, have called for sanctions—so-called restrictive measures—against Georgian officials. Such measures do not have a punitive effect, but are intended to induce those against whom they are directed and who are held responsible for certain behavior to change their policies or actions. However, under Article 22 of the Treaty on European Union (TEU), EU sanctions under the Common Foreign and Security Policy must be decided unanimously by all EU member states. Because this is not the case, an "alliance of the willing" is now to impose individual sanctions.

At this point in time, the EU Commission is still uncertain as to what consequences it should draw at the level of Georgia's accession process. The European Parliament is also taking a wait-and-see approach, as can be seen from its Joint Motion for a Resolution on the further deterioration of the political situation in Georgia of February 12, 2025¹⁴. In point 22 of the resolution, it merely calls for the EU's strategy towards Georgia to be "immediately and comprehensively reviewed" and for the EU-Georgia Association Agreement to be revised. Some also

12 See *Franziska Smolnik/Giorgi Tadumadze*, Georgia at a Crossroads, SWP-Aktuell 2025/A 26 of June 3, 2025 < <https://www.swp-berlin.org/publikation/georgia-at-a-crossroads.pdf> > (accessed on 1.9.2025).

13 Council suspends visa-free travel for diplomats and officials, Press release of the Council of the European Union of January 27, 2025 < <https://www.consilium.europa.eu/de/press/press-release/2025/01/27.pdf> > (accessed on 5.9.2025).

14 See European Parliament, Joint Motion for a resolution, RC-B10-0106/2025 (adopted text P10_TA(2025)0019) < https://www.europarl.europa.eu/doceo/document/RC-10-2025-0106_EN.html > (accessed on 1.9.2025).

argue that further EU measures in the accession process should be made dependent on the outcome of the Georgian local elections in October 2025.

3. Risk: Abandonment of the Accession Process – Reset "to Zero"?

The fact that the accession process, with all the progress achieved so far – unanimous granting of candidate status, waiver by the EU of all twelve priorities – is being reset „to zero“ poses a risk for Georgia that should not be underestimated. The EU is currently taking a wait-and-see approach and has not yet taken any measures in this direction. However, some EU member states are already making such demands. The legal problem in this context is that the Georgian government felt compelled to counter the EU's decision not to continue the accession procedure with Georgia for the time being with its own announcement to "suspend" the procedure until 2028.

3.1. The Call for Consensus-Based Negotiations "on an Equal Footing"

As far as the – primarily verbal – dealings with Georgian officials on issues relating to EU accession are concerned, the accusations made by Georgia against European and national politicians from EU member states are certainly justified. However, a lack of mutual respect on the part of the EU towards countries wishing to join the EU has always been lamented; the absence of a positive atmosphere in such proceedings is therefore nothing new.

One example of this is an incident from the accession round in 2004: Poland was the largest and most populous of the ten candidate countries that joined the EU in 2004. The Polish government wanted Poland to become an EU member as quickly as possible. It requested that the accession date be brought forward, even though Poland had "fallen behind" in meeting the so-called Copenhagen criteria in 2002 and 2003. The EU Commission's Implementation Reports showed in particular that the Polish judicial system had not been brought into line with EU standards. Poland also wanted to „opt out“ of the free movement of capital, but at the same time refused to accept other EU member states' „opt-outs“, which were intended to prevent an influx of cheap labour force from Poland into those countries. The EU Commissioner for Enlargement, *Günther Verheugen*, increased the pressure on Poland with some harsh words. At a press conference in October 2002, he said: *"I would advise the Polish delegation to*

drink only one (!) glass of champagne or vodka and then get back to work immediately."¹⁵ .

In the highly emotional and ideological debate, the EU is accused of "unfair treatment" of Georgia in the accession process and of acting as a "blackmailer." Georgia finds it unacceptable to view relations between the EU and Georgia as "one-sided." In this context, the Georgian side emphasises that integration into the EU is a "mutual act" and "not a generous gift from Brussels." Criticism is also directed at the EU's centralised decision-making process on accession issues and the fact that "consensus-based negotiations" with countries wishing to join are being replaced by a "majority-driven approach."¹⁶ .

Taken together, these statements reveal an inaccurate understanding of the legal meaning of the term "enlargement":

3.2. Misunderstanding of the Term "Enlargement"

When talking about enlargement of the EU through the accession of new member states, the following must be taken into account: The term "enlargement" of the EU used in this context is misleading. It suggests that this is a territorial expansion of the EU that originates from and is initiated by the EU, meaning that it is, in a sense, inherent in the logic of the EU itself. In fact, however, it is an opening of the EU desired by states wishing to join. The term "opening up" would therefore be more accurate. There is a widespread prejudice here: The EU does not recruit new member states with the aim of gaining more and more economic power and influence in the world. It is "opening up" itself to these states because they want it in that way. The countries that want to join the EU under Article 49 TEU expect that they will be able to develop more quickly and

15 See *Barbara Anna Woyno/Frank Hilbert*, EU-Beitritt von Polen <<https://www.polish-online.com/polen/wirtschaft/eu-beitritt.php>> (accessed on 5.9.2025).

16 For comprehensive details: Georgien setzt Verhandlungen mit Brüssel aus, Tagesschau news report from November 28, 2024 <<https://www.tagesschau.de/multimedia/audio/audio-204308.html>> (accessed on 1.9.2025); Georgia halts EU Accession Talks until 2028, Caucasus Watch of November 28, 2024< <https://www.caucasuswatch.de/de/news/georgia-halts-eu-accession-talks-until-2028.html>> (accessed on 1.9.2025); Georgian Parliament Speaker participates in EU-Parliamentary Conference, engages in High-Level Bilateral Talks, Caucasus Watch, May 14, 2025 <<https://www.caucasuswatch.de/de/news/georgian-parliament-speaker-participates-in-eu-parliamentary-conference-engages-in-high-level-bilateral-talks.html>> (accessed on 5.9.2025).

increase their prosperity with the help of the EU; they hope that their economies will benefit from the European single market. This is the basic principle, even if it has not been consistently upheld by the EU itself for some time. In this respect, the EU's enlargement doctrine has been conservative to date¹⁷. Consequently, there should be no "discounts" on the so-called Copenhagen criteria or "short-cuts" on the path to accession for countries wishing to join the EU.

3.3. The Accession Process as a Process of Subordination Law

The repeated calls for consensus-based negotiations "on an equal footing" give rise to the need to classify the process by which countries wishing to join the EU can be admitted under European law. It is always difficult to precisely classify procedures in the EU, which is also referred to as a "negotiated negotiation system," in terms of legal doctrine. However, some clarifying procedural maxims can be identified.

3.3.1. The Accession Procedure as an Application Procedure at the Discretion of the European Union

The accession procedure laid down in Article 49 TEU is a multi-stage process that begins with an application for membership and leads to EU membership if the "conditions for accession" are met¹⁸. Because the EU does not decide on an application for accession in the accession procedure exclusively in the interests of the state wishing to join, but must also, as a matter of principle and as a matter of priority, safeguard the interests of the EU, it decides through its Council of the European Union on the "if," "when," and "how" of the opening of accession negotiations at its discretion¹⁹. As a result, the EU has the final say in this matter.

17 See *Barbara Lippert*, EU Enlargement: Geopolitics meets Integration Policy, SWP-Aktuell 2023/A 63 of December 12, 2023 <<https://www.swp-berlin.org/publikation/eu-enlargement-geopolitics-meets-integration-policy.pdf>> (accessed on 5.9.2025). Changes to this enlargement doctrine have not been successful in the past: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions – Enhancing the accession process – A credible EU perspective for the Western Balkans, Brussels, February 5, 2020, Com(2020) 57 final.

18 See Article 49, sentence 5 TEU.

19 The so-called principle of opportunity applies. On discretion in the context of the accession decision, see *Philipp B. Donath*, Die Voraussetzungen für die Aufnahme neuer Mitgliedstaaten

Although the state wishing to join is free to decide whether or not to submit an application for membership and is therefore free to do as it wishes in this respect, there is no legal right against the EU to initiate accession proceedings after a membership application has been submitted. Against this background, the application for admission is therefore a prerequisite for the admissibility of accession proceedings, without which the EU may not initiate such proceedings on its own initiative²⁰. However, the state wishing to accede cannot force the opening of proceedings by means of its application.

3.3.2. Accession Agreement – Subordinate Treaty, Relationship of Superiority and Subordination

After successful accession negotiations and fulfillment of all "conditions for admission"²¹, an accession agreement is concluded between the EU member states and the applicant country²². At first glance, it appears that at the time of conclusion of the accession agreement, the applicant country and the EU member states are „on an equal footing“, meaning that - as in private law - they are "on equal terms" and can freely determine their legal relationships. Nevertheless, even at this stage of the accession process, the legal relationship is characterised by a relationship of superiority and subordination. The accession agreement is a treaty governed by the law of subordination, not the law of coordination. Thus, the Council of the European Union unilaterally determines whether and when the "conditions for admission" have been fulfilled. Furthermore, the EU member states retain freedom of conclusion with regard to the accession agreement until its conclusion; limits to the discretion to conclude may be set at most by a contractual self-commitment or the principle of proportionality.

3.4. Withdrawal of the Application for Accession under General Rules – The Example of the Republic of Iceland

The withdrawal of an application for membership in the application-based accession procedure is possible under general rules until the accession

in die Europäische Union unter besonderer Berücksichtigung des Merkmals „Europäischer Staat“, in: Studentische Zeitschrift für Rechtswissenschaft (StudZR), 2008, 242 et seq.

20 In this respect, there is a blocking effect.

21 This refers to the so-called Copenhagen criteria.

22 See Article 49, sentences 5 and 6 TEU.

agreement is concluded. The withdrawal of the application is to be regarded as the *actus contrarius* to the submission of the application. The withdrawal of an application for admission may be made in writing or by conclusive conduct. Because an accession procedure may only be carried out at the request of the applicant country, this procedure ends with the withdrawal of the application for membership. Any (interim) decisions already taken by the EU become "irrelevant" and are therefore ineffective. The accession process is not divisible in the sense that parts of this process—such as the progress of the applicant country certified by the EU in the Enlargement Reports, the candidate status, or negotiation chapters already completed in the accession negotiations—can continue to exist.

The example of the Republic of Iceland shows that the withdrawal of an application for accession follows the general rules for the withdrawal of applications in procedures based on applications.²³ The country had applied for EU membership in July 2009. Since June 2010, the Republic of Iceland had been an official candidate for accession, and the EU had already started accession negotiations with the country in July 2010. After the parliamentary elections in April 2013 resulted in political majorities rejecting Iceland's accession to the EU, the new Icelandic government declared to the EU in March 2015 that it no longer wished „to be considered a candidate country“²⁴. The Council of the European Union interpreted this statement by the Icelandic government as a withdrawal of the Republic of Iceland's application for membership and considered the accession process to be terminated. Prior to its decision, the Icelandic government had neither consulted the Icelandic parliament nor held a promised national

23 See *Carsten Schymik*, *Island auf EU-Kurs – Beitritt als Rettungsanker*, SWP-Aktuell 2009/A 24 of May 5, 2009 <https://www.swp-berlin.org/fileadmin/contents/products/aktuell/2009A24_shy_ks.pdf> (accessed on 1.9.2025). Norway and Switzerland also withdrew their applications for accession after negative referendums on accession, in some cases even twice. In the case of Norway, conclusive behavior was interpreted as a withdrawal of the applications for membership; in detail: European Parliament, *Die rechtlichen Fragen der Erweiterung der EU – Das Recht auf Beitritt* < https://www.europarl.europa.eu/enlargement/briefings/23a2_de.html> (accessed on 5.9.2025).

24 In detail: *Island zieht Beitrittsantrag zurück*, *Süddeutsche Zeitung* online, March 12, 2015 < <https://www.sueddeutsche.de/politik/europaeische-union-island-zieht-beitrittsantrag-zurueck-1.2391592.html>> (accessed on 1.9.2025); *Mitte-Rechts-Regierung beendet Verhandlungen. Island zieht EU-Beitrittsantrag zurück*, *Tagesschau* news report dated March 12, 2015 < <https://www.tagesschau.de/ausland/island-103.html>> (accessed on 5.9.2025).

referendum on the continuation of accession negotiations with the EU²⁵ ; at the time of the withdrawal of the application for accession, one third of all negotiation chapters had already been completed. The Icelandic government's actions were accompanied by violent mass protests²⁶ .

3.5. The Decision to „Suspend“ Accession Talks as a Withdrawal of the Application for Membership?

The Georgian government's decision to counter the EU's decision not to continue the accession procedure with Georgia for the time being with its own announcement to "suspend" the procedure opens up scope for interpretation of this statement. There are growing calls in some EU member states for consultations on whether the accession process with Georgia should also be "formally" terminated in view of the Georgian Prime Minister's announcement. According to diplomats in Brussels, at least six EU member states are arguing that the accession process should not only be "suspended" in light of the Georgian Prime Minister's statement, but "formally terminated." These include not only the Baltic states, but also France and Germany. Former German Foreign Minister *Annalena Baerbock* has called for Georgia's suspension of accession talks to be followed by an official termination of the accession process²⁷ . In July 2025, EU Foreign Affairs Representative *Kaja Kallas* called on the Georgian government to comment on this by the end of August 2025²⁸ .

25 See *Benedikt Johannesson*, Thousands Protest Government's EU Application Withdrawal, Iceland Review, March 15, 2015 <<https://www.icelandreview.com/news/2015/03/15/thousands-protest-governments-eu-application-withdrawal.html>> (accessed on 5.9.2025).

26 Iceland government move to reject EU talks sparks protest, Reuters, March 15, 2015 <<https://reuters.com/article/iceland-eu-idUSL2NOVVH06T20150315.html>> (accessed on 1.9.2025). In December 2024, the current Icelandic government decided to hold a referendum on accession negotiations with the EU before 2027.

27 *Annalena Baerbock* will Georgiens Beitrittsprozess aussetzen, Die Zeit, December 26, 2024 <<https://www.zeit.de/politik/ausland/2024-12/georgien-annalena-baerbock-will-georgiens-eu-beitrittsprozess-aussetzen.html>> (accessed on 1.9.2025).

28 EU threatens accession candidate Georgia with sanctions, european newsroom, July 16, 2025 <<https://www.europeannewsroom.com/de/eu-threatens-accession-candidate-georgia-with-sanctions.html>> (accessed on 5.9.2025).

The EU's reaction to Iceland's withdrawal of its application for membership shows just how explosive the Georgian government's statement is. In March 2014, EU Commission diplomats advised the Icelandic government not to withdraw its application for membership with all the consequences that would entail, arguing that such a withdrawal would be irreversible and that the accession process would have to be restarted at a later date if necessary²⁹: *"Iceland should better put its EU membership bid on hold instead of retracting or dropping the membership application."*

However, even if the accession talks are merely "suspended," the EU may consider an application for membership to have been withdrawn by conclusive behavior, namely if the suspension is not limited in time. Referring to the precedent of Malta, which joined the EU in 2004 after putting its bid on hold while an EU-sceptic government was in office, the then EU Commissioner for Enlargement, *Olli Rehn*, stated³⁰:

"So in a way putting the bid on hold is possible, but of course not for an unlimited period of time... There is no option to keep these things up in the air."

In view of the above, there is a risk for Georgia that the accession process, with all the progress achieved so far, will be reset „to zero“ by the EU.

4. Questioning Aspects Previously Considered Unproblematic

It is not possible to predict with certainty whether the EU – after resuming the current accession process, which has only been interrupted, or after starting a new accession process as a result of a reset of the current accession procedure „to zero“ – would examine obstacles that have not yet been addressed for the first time³¹. When the EU Commission set out a list of requirements in its "Opinion on Georgia's application for membership of the EU" in June 2022 and demanded twelve priorities to be fulfilled, it left questions that logically needed to

29 For further details: Iceland can wait and see on EU membership, webarchive of March 6, 2014 <<https://www.webarchive.org/web/20140310000626/https://news.ninemsn.com.au/world/2014/03/06/08/06/iceland-can-wait-and-see-on-eu-membership.html>> (accessed on 5.9.2025).

30 Iceland can wait and see on EU membership, webarchive of March 6, 2014 <<https://www.webarchive.org/web/20140310000626/https://news.ninemsn.com.au/world/2014/03/06/08/06/iceland-can-wait-and-see-on-eu-membership.html>> (accessed on 5.9.2025).

31 No venire contra factum proprium.

be answered first unaddressed. These include aspects that relate to Article 49 TEU itself or – in the interpretation of Article 49 TEU – touch upon principles of EU enlargement policy. The EU Commission may have left such preliminary legal questions open because it assumed that there were no obstacles to Georgia's accession to the EU in this respect. The existence of obstacles to accession at this level, i.e., the validity of its previous unexamined assumptions, could now be called into question by the EU for the first time.

4.1. Georgia: Not an "Outermost Region" or an "Overseas Country"

The objection raised by some Member States³² that Georgia is "remote" from the EU territory and geographically "isolated" because it does not share borders with other EU Member States has not yet been followed up by the EU Commission. In fact, the EU borders closest to Georgia are those of Bulgaria and Romania across the Black Sea. This argument put forward in favour of refusing Georgia's accession is based on the fact that, according to Article 49 TEU, only "European states" can join the EU³³ and that the EU's ability to act also requires geographical "connection" to the EU territory. Admittedly, the term "European state" in Article 49 TEU is not an arbitrary term of inclusion or exclusion³⁴. Nevertheless, the EU has always taken great care in defining its territory. In Articles 349 and 355 of the Treaty on the Functioning of the European Union (TFEU), it has meticulously regulated whether land areas, territories, and states on the "outer periphery" of the EU should have access to it. In the absence of any connection under international law with any of the current EU member states, Georgia

32 Denmark: Georgia's insularity stands in the way of its accession to the EU, Politiken of March 11, 2023 <https://www.politiken.dk/promo_name_id.digitaladgang/georgias-insularity-stands-in-the-way-of-its-accession-to-the-eu.html> (accessed on 1.9.2025); Poland: Wyspiarski charakter Gruzji stoi na przeszkodzie jej przystąpieniu do UE, Wirtualna Polska of January 24, 2023 <<https://www.wp.pl/presscorner.detail/gruzji.insularity.html>> (accessed on 1.9.2025); Portugal: A insularidade da Georgia impede sua adesão a UE, Diário de Notícias, September 7, 2022 <<https://www.portugal.eu/document/a-insularidade-da-georgia-impede-sua-adesao-a-ue.html>> (accessed on 1.9.2025).

33 For general information on this topic, see *Philipp B. Donath*, Die Voraussetzungen für die Aufnahme neuer Mitgliedstaaten in die Europäische Union unter besonderer Berücksichtigung des Merkmals „Europäischer Staat“, in: *Studentische Zeitschrift für Rechtswissenschaft (Stu-dZR)*, 2008, 244 ff.

34 See *Herfried Münkler*, Die politische Idee Europa, in: *Mariano Delgado/Matthias Lutz-Bachmann*, Herausforderung Europa, 1995, 10.

cannot be classified as an "outermost region" under Article 355, paragraph 1 TFEU or as an "overseas country" under Article 355, paragraph 2 TFEU, in which case individual EU regulations may apply. Due to its geographical "insularity," the member states mentioned above argue that a separate status under European law must be created for Georgia. Such concerns could become louder in the future.

4.2. No Accession Prospects for De Facto Divided States as a Dogma

The complete territorial sovereignty of a state over its national territory is one of the most important prerequisites for EU accession. In principle, a de facto divided state, i.e., a state that exists as a single entity under international law but includes territories controlled by another state, does not have access to the EU. The recognition of a divided state as a sovereign member of the EU is incompatible with the fundamental principles of the EU. Internal border conflicts and external interference could jeopardize the stability of the EU itself. Following Cyprus' accession in 2004, the Council of the European Union took a clear position on this issue and made the rejection of such states a dogma of its enlargement policy³⁵.

To this day, Cyprus is effectively divided into a Greek Cypriot southern half, the Republic of Cyprus, and a Turkish Cypriot northern half, the Turkish Republic of Northern Cyprus. The latter is not recognized under international law. The EU accession applied for by the Republic of Cyprus on behalf of the entire island was intended to benefit the whole island. However, because the Cyprus conflict could not be resolved in time, the EU member states agreed to separate the accession negotiations from the reunification issue. The latter should not stand in the way of accession. In 2004, Cyprus joined the EU as a de facto divided island. The territory of the EU is its entire territory. The territory known as the Turkish Republic of Northern Cyprus, over which the Republic of Cyprus does not exercise effective control beyond the demarcation line known as the Green Line, is considered a "special EU territory" where EU law cannot currently be enforced. With Cyprus's planned accession to the Schengen area in the second half

35 Representatively *Stig Johansson*, De facto divided states and accession to the European Union – Cyprus as a case study, *europaesk rätt*, 2017, 62, 67.

of 2025, the sovereignty issue will become particularly visible because the so-called Green Line will then become the external border of the EU³⁶.

Admittedly, for geopolitical reasons, the EU member states agreed in 2022 and 2023 to deviate from the aforementioned dogma under restrictive legal conditions. In any case, the Council of the European Union has not yet seen any obstacle to accession in the fact that the candidate countries in the last accession round do not have complete control over their national territory — Ukraine with Crimea and the Donbass, Moldova with Transnistria and Gagauzia, and Georgia with Abkhazia and South Ossetia. Because the sovereignty issues in Cyprus have not yet been resolved, there are growing calls to "reactivate" the EU's previous enlargement policy of strictly rejecting de facto divided candidate countries.

5. Assumption for an Uncompromising Monitoring of the So-Called Copenhagen Criteria from 2028 Onwards

In December 2023, the Council of the European Union granted Georgia the status of candidate country, even though the EU Commission had only considered three of the twelve priorities to be completed at that time³⁷. At the time, the EU Commission stated³⁸: *"In the case of Georgia...the Commission recommends that the Council grants Georgia the status of a candidate country on the understanding that a number of steps are taken."* The granting of candidate status by the EU thus represented a "bill of exchange on the future".

Against this backdrop, it is unlikely that the accession process will resume at the end of 2028 with the immediate opening of accession negotiations. Such a scenario would only be conceivable if the Georgian government were to use the time until 2028 to focus on and complete the remaining nine priorities.

36 See *Andreas Demetriades*, Cyprus to join the Schengen Zone, Advocate & Legal Consultants < <https://www.demetriades-law.com/when-will-cyprus-join-the-schengen-zone.html> > (accessed on 1.9.2025).

37 See footnote 3.

38 European Commission, European Neighbourhood Policy and Enlargement Negotiations (DG NEAR), factsheet of November 8, 2023 < <https://www.neighbourhood-enlargement.ec.europa.eu/news/commission-adopts-2023-enlargement-package.html> > (accessed on 5.9.2025).

5.1. Sovereignty-Preserving "Opt-Out" Clauses only with Unanimity in the European Union

Admission of a country wishing to join the EU does not necessarily mean membership "with all the consequences that entails." In theory, a candidate country also has the option of "fighting for" certain concessions that preserve its sovereignty during the accession process.

If a candidate country does not wish to participate in cooperation in a particular policy area of the EU, it can insist on being granted exemptions – "opt-out" clauses. Such reservations then allow it to "opt out" of certain EU projects, including obligations towards the EU. Such "opt-out" clauses can exist at the level of treaties, meaning primary law, but also at the level of secondary law. At the level of treaties—and thus also of an accession agreement—such reservations require the acceptance of all existing EU member states. To the extent of the reservation, the treaty obligations of the prospective member state requesting the exception are then limited³⁹.

It is impossible to predict whether and to what extent candidate countries will be granted sovereignty-preserving "opt-out" clauses in the accession negotiations. The success of such efforts will certainly depend on how trouble-free and without disruption the accession process has proceeded so far. However, the political desirability of the accession of the country concerned from the EU's point of view (at present) also plays a role that should not be underestimated⁴⁰. If "opt-out" clauses are demanded too emphatically, the EU member states can threaten to veto them under the current "unanimity rule," thereby causing the accession negotiations to "break down."

39 In the past, the United Kingdom was proverbially the "land of opt-outs." However, Ireland, Denmark, and Poland have also always tried to preserve as much of their national sovereignty as possible through „opt-out“ clauses.

40 On the refusal of „opt-out“ clauses for some candidate countries in the Western Balkans, see Communication from the Commission to the European Parliament, the European Council, and the Council on pre-enlargement reforms and policy reviews, Brussels, March 20, 2024, COM(2024) 146 final.

5.2. The Predestination of the Law on Transparency of Foreign Influence in the Accession Negotiations

In preparation for an accession agreement, the EU Commission conducts a screening of each of the 35 negotiation chapters to examine in detail the extent to which the national law of an applicant country deviates from the EU's „acquis communautaire“ and needs to be adapted accordingly. Since the introduction of a "new methodology" for conducting accession negotiations in February 2020, the so-called Interim Benchmark Assessment Report on the rule of law has been an important part of the accession process. Due to negative experiences with countries seeking accession in previous rounds of enlargement⁴¹ and those in the Western Balkans⁴², compliance with the requirements of negotiation chapter 23, "Judiciary and Fundamental Rights," is being monitored particularly closely. Negotiation chapter 23 is the first to be "opened" in the accession negotiations and the last to be "closed." No other negotiation chapter may be "closed" until a positive Interim Benchmark Assessment Report has been issued for negotiation chapter 23. The EU Commission regularly draws on the recommendations of the European Commission for Democracy through Law (Venice Commission) for its assessment⁴³.

With regard to the need for an Interim Benchmark Assessment Report on the rule of law, it can reasonably be assumed that the EU Commission will demand that the Law on Transparency of Foreign Influence⁴⁴ be repealed in its current form. In May 2024, the Venice Commission stated that the restrictions imposed by the Law on the rights to freedom of expression, freedom of association, and privacy are incompatible with the strict test set out in Article 8, paragraph 2, Article 10, paragraph 2, and Article 11, paragraph 2, of the European Convention on Human Rights... *“as they do not meet the requirements of legality, legitimacy, necessity...and proportionality...”*⁴⁵ However, this opinion should be interpreted

41 Poland, Romania, and Hungary.

42 Albania, North Macedonia, and Serbia.

43 For more details, see *Mahir Muharemovic/Pavel Usvatov*, IBAR: Der Zwischenbericht zur Rechtsstaatlichkeit im Beitrittsprozess, KAS country report dated July 25, 2024 < <https://www.kas.de/de/laenderberichte/detail/ibar-der-zwischenbericht-zur-rechtsstaatlichkeit-im-beitrittsprozess> > (accessed on 5.9.2025).

44 Law of May 18, 2024.

45 See Urgent Opinion of the Venice Commission on the Law on Transparency of Foreign Influence, No. 1190/2024 of May 21, 2024, 23.

rather restrictively⁴⁶: The European decision-making bodies also assume that a state's desire to increase the transparency of the financing of domestic associations when they receive money from abroad can certainly constitute a legitimate reason for regulation. On this basis, the legality of transparency laws is therefore merely a question of their design.⁴⁷ Obligations to obtain, communicate, register, and update information, administrative and criminal sanctions, and the entire enabling environment must be measured against the principle of proportionality. Judgments and opinions of European decision-making bodies now provide sufficient standards in this regard. These must be observed.

6. Duration and Dilatory Treatment in the Accession Process after 2028

In November 2024, the Georgian government reaffirmed its commitment to making Georgia *"the most prepared candidate for EU membership"* by 2030⁴⁸; this should be secured by 2030⁴⁹. However, against the backdrop of previous accession procedures, such a goal seems illusory. The "suspension" of accession talks until the end of 2028 merely delays the already lengthy accession process by another four years. It could also provoke the displeasure of other EU member states on this issue and, in the long run, cause the EU's remaining geopolitical interest in Georgia's accession to wane or at least to "slacken," for example due to a change in the global political situation. At this point, it should be remembered that an accession process requires unanimity within the EU at all stages.

Once a candidate country has achieved candidate status, it often takes several more years before accession negotiations can begin. Only then does the actual marathon of negotiations begin, which in turn often lasts for many years. Whereas the period between the application for accession and admission used to be less than ten years in some cases – the United Kingdom needed three years, Greece and Austria six years, and Spain nine years – the countries that

46 See Norbert Bernsdorff, *Foreign Agents Gesetze in der Analyse – Offenlegungsgebote und Verhältnismäßigkeitsprinzip*, in: Festschrift für Steffen Detterbeck zum 70. Geburtstag, *Recht als Prozess zwischen Handwerk und Wissenschaft*, 2026, 569.

47 See Norbert Bernsdorff, *Foreign-Agents Gesetze in der Analyse – Offenlegungsgebote und Verhältnismäßigkeitsprinzip*, in: Festschrift für Steffen Detterbeck zum 70. Geburtstag, *Recht als Prozess zwischen Handwerk und Wissenschaft*, 2026, 569.

48 See above under footnote 10.

49 Official announcement: *"This is our promise to the Georgian people, and we will fulfill it."*

joined in 2004 already took an average of ten years, and Bulgaria and Romania, which joined in 2007, took twelve years.

Since the enlargements in 2004 and 2007, the accession processes have taken longer and longer. The EU Commission justifies this with bad experiences: Hungary, for example, has not met the EU's requirements for the rule of law since its accession in 2004. The economic and political standards of Bulgaria and Romania, which joined in 2007, are now below the EU standard again. According to the EU Commission, no significant progress has been made in the accession states of the Western Balkans despite the time that has elapsed. The accession date originally set for 2025 has now been completely abandoned; the date of accession to the EU is now a long way off. The accession process has taken the longest for Turkey⁵⁰: After Turkey applied for membership in 1987, it was granted candidate status in December 1999; accession negotiations began in 2005. Due to setbacks in the areas of "democracy," "the rule of law," and "human rights," the EU "put" the accession process „on hold" in June 2018. Full membership of the EU currently seems highly unlikely⁵¹.

That, despite the delay, the accession process for Georgia will accelerate after 2028 because the EU, contrary to its conservative enlargement doctrine to date, is refraining from a close-meshed review of the so-called Copenhagen criteria in the case of rapid so-called emergency enlargements, is not to be expected. Although, in the past, the EU Commission has developed ideas on how to make the accession process more efficient in such cases, with a view to the enlargement to include Western Balkan states. According to a communication from February 2020⁵², it has changed the accession process so that some of the 35 negotiation chapters are now grouped into thematic clusters, meaning that accession negotiations are now conducted on the basis of the respective clusters

50 See European Parliament, Türkiye EU accession process must remain frozen, press release of May 7, 2025 <<https://www.europarl.europa.eu/news/en/press-room/20250502/PR28215/turkiye-s-eu-accession-process-must-remain-frozen.html>> (accessed on 5.9.2025).

51 Regarding the following: Council of the European Union, Enlargement: Türkiye, Explainers of December 1, 2024 <<https://www.consilium.europa.eu/en/policies/turkey-enlargement.html>> (accessed on 5.9.2025).

52 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions – Enhancing the accession process – A credible EU perspective for the Western Balkans, Brussels, February 5, 2020, COM(2020) 57 final.

as a whole rather than on the basis of individual chapters⁵³. However, this step will not contribute to streamlining the accession process if the required reforms – such as the remaining nine priorities in the case of Georgia – are located in the same, i.e., one (single) cluster⁵⁴.

7. Reform Processes in the European Union – The "Achilles' Heel" of Enlargements

Former EU Commission President *Jean-Claude Juncker* continues to warn against new accessions by Ukraine, Moldova, and Georgia without prior reforms of the EU "from top to bottom." When he took office in 2014, he announced his intention to "take a break" from enlargement and prioritise organisational reforms of the EU⁵⁵. "Deepening" before "enlargement" instead of "enlargement" before "deepening"! This demand stems from an old debate in the EU that continues to this day. Is it imperative that enlargement and thus the expansion of the EU to include new member states⁵⁶ be preceded by institutional reforms of the EU? The background to these considerations is that, according to the so-called Copenhagen criteria, the EU must have the capacity to accept new member states. The accommodation capacity is currently exhausted. This is the consensus in Brussels; in connection with the accession processes of Ukraine, Moldova, and Georgia, this position was reaffirmed by the Council of the European Union in its Granada Declaration of October 2023⁵⁷.

For the "last round" of accession countries, the "linkage" between EU enlargement and reforms poses a serious risk. This is particularly true if a candidate country is not yet so far advanced in the accession process, for example if accession negotiations have not even begun due to delays for which the country itself is responsible. In this case, the EU might want to stick to suspending the accession process because it considers a candidate country's "entitlement" to EU

53 See above under footnotes 17 and 52.

54 Cluster 1 of negotiation chapters: "Fundamentals of EU accession process".

55 Political Guidelines 2014 <<https://www.euractiv.de/section/europa-wahlen/news/anhoe-rung-von-erweiterungskommissar-hahn-wir-werden-keine-daeumchen-drehen.html>> (accessed on 1.9.2025).

56 This refers to the six countries of the Western Balkans as well as Ukraine, the Republic of Moldova, and Georgia.

57 Granada Declaration of October 6, 2023 <<https://www.consilium.europa.eu/en/press/press-releases/2023/10/06/granada-declaration.html>> (accessed on 5.9.2025).

membership to be still "weak" in such a situation. Accession countries would then have to wait for the end of the regular lengthy⁵⁸ reform process that has begun in the EU.

The length of time by which an accession process would be prolonged by reform efforts in the EU would, of course, depend primarily on their "temporal conditionality." The large continental European countries France, Germany, Italy, and Spain fear that the EU will be unable to act if it is not institutionally prepared for enlargement before the next round of accessions. They therefore advocate reforming the EU and the next round of accession negotiations one after the other, i.e., successively. Another group of EU member states, including the current EU Commissioner for Enlargement, *Marta Kos*, is willing to compromise and wants to do both at the same time as part of a so-called package solution. Irrespective of this, the duration of any interruption in the accession process would also depend on whether EU reforms were carried out at the level of treaty revisions requiring ratification⁵⁹ or below this level, through adjustments to the subsequent accession agreements or by making use of the so-called *passerelle* or bridge clauses in the existing Treaty on European Union⁶⁰.

As a result, reform processes in the EU could constitute a further reason for the accession process for Georgia to be significantly prolonged. This is particularly important if the EU not only suspends the current accession process but also resets it „to zero“⁶¹.

8. Conclusion and Outlook: Membership of the European Economic Area as an Intermediate Step, "Half membership" of the European Union

Georgia is at a crossroads. With the developments in 2024, Georgia's prospects for timely accession to the EU have deteriorated from many legal perspectives. An accession has become impossible to predict. Should such an accession

58 For the potential duration, see the EU's efforts to reform the institutions through the „European Constitution“, which ultimately failed. The ambitious goal of former EU Council President *Charles Michel* to complete EU reforms by 2030 was not supported by the EU member states.

59 Rollback or abolition of the so-called unanimity principle, reduction of the EU Commission, expansion of the powers of the European Parliament, etc.

60 See *Thomas Gutschker*, Warum sich die EU mit einer Erweiterung schwer tut, Das Parlament, May 24, 2024< <https://www.das-parlament.de/aussen/europa/warum-sich-die-eu-mit-einer-erweiterung-schwer-tut.html>> (accessed on 1.9.2025).

61 See above under 3.5.

still be pursued after 2028, the accession process is likely to be delayed indefinitely.

Georgia has long been the EU's closest partner in the South Caucasus. The country has been the location for regionally focused European initiatives and a regional advocate for "connectivity" with the EU. The relationship between Brussels and Tbilisi had an impact beyond the bilateral level on the role of the EU and its future engagement in the South Caucasus. Against this backdrop, it should be in the interests of both the EU and Georgia not to let the next few years pass unused, but to enable Georgia to at least achieve "gradual integration" into the EU via an interim solution.

For a long time, the so-called neighbourhood status of countries with no current prospects of accession was considered a genuine alternative to full membership of the EU⁶². It was a product of the EU enlargements in 2004, 2007, and 2013, is based on Article 8 TEU, Articles 212, 217, and 218 TFEU, and enables the deepening of cooperation with the EU in a privileged form within the framework of bilateral partnership agreements. Due to the "consolidation" that has already taken place in this regard, it therefore makes sense for Georgia to strive for "more" in partnership for a transitional period. Although countries associated with the EU under the European Neighbourhood Policy enjoy a privileged relationship with the EU, this only leads to a kind of partial integration that does not grant the advantages of full integration. However, if the focus is to be placed on such a "plus," this presupposes that Georgia will continue to adhere to its strategic goal of becoming a full member of the EU and, after the events of 2024, will not again seek merely an alternative to this, as it did in the past with its so-called neighbourhood status. In the former case, the goal would then be to achieve a legal preliminary stage or a legal transitional stage on the path to EU membership for an intermediate phase. Due to its compromise nature, such a temporarily accepted "half membership" in the EU could also help to defuse the domestic political situation in Georgia.

62 See the conference proceedings edited by *Ann Gäbler*, "Alternativen zum EU-Beitritt: Die Nachbarschaftspolitik der Europäischen Union am Beispiel von Georgien, Moldova und der Ukraine", from 2007, <<https://www.jstor.org/stable/24223550>> (accessed on 1.9.2025).

It is not expected that the EU will offer Georgia new legal cooperation models as an intermediate step during this transition period⁶³. For decades, it has stuck to its concept of full membership⁶⁴, and above all does not tolerate cherry-picking or à la carte options when it comes to adopting the EU's common body of law. The status to be sought for a transitional period can therefore only be one from among the established cooperation models, such as a membership of the European Economic Area (EEA). The EEA, which consists of two pillars, the EU pillar and the European Free Trade Association (EFTA) pillar, has proven to be functional in the past⁶⁵ and has already served as a „springboard“ to EU membership for other countries.

A country does not become a member of the EEA by joining independently, but by becoming a member of EFTA and subsequently signing the EEA Agreement. Joining the EEA is therefore not done directly with the EEA organisation, but as an EFTA member via an EEA Agreement with the other EFTA countries and the EU. Membership of EFTA must be negotiated with its existing members Iceland, Liechtenstein, and Norway; this agreement⁶⁶ then forms the legal framework for economic cooperation and free trade between the EFTA states. After joining EFTA, membership of the EEA also requires the signing of the aforementioned EEA Agreement, which came into force in 1994.

Membership of the EEA offers the member state economic integration into the EU internal market⁶⁷. Nevertheless, the EEA Agreement goes beyond a mere free trade agreement in the traditional sense. The four fundamental freedoms of the EU internal market already apply in the EEA in accordance with Articles 28 et seq. TFEU: the free movement of goods, persons, services, and capital. Without already being a formal member of the EU with all the obligations that this entails, the EEA Agreement therefore grants, even before accession to the EU, the freedom of movement of persons, which is highly attractive to candidate countries, as well as the possibility of being integrated into other policy areas or

63 For example, a status of "partial membership," "junior membership," or some kind of "light" EU membership. For more details: *Barbara Lippert*, Die EU und ihre Nachbarschaftsbeziehungen: etablierte Assoziierungsmodelle und neue Grundformen, in: *integration 2/2019*, 93 ff.

64 Candidate countries must meet the so-called Copenhagen accession criteria in full.

65 See *Barbara Lippert*, Die EU und ihre Nachbarschaftsbeziehungen: etablierte Assoziierungsmodelle und neue Grundformen, in: *integration 2/2019*, 83, 91.

66 Accession to the so-called Stockholm Convention.

67 No political and institutional integration into the EU, i.e., no representation in EU institutions and no participation in European legislation.

policy spaces of the EU⁶⁸. Because of its close ties to the EU, membership in the EEA can build a "bridge" for countries that want to pave the way for later EU membership by integrating into the European internal market⁶⁹.

However, it should be noted that admission to the EEA is not always successful. This also applies to former EU member states such as the United Kingdom. For example, after Brexit, the EU would have liked to see the United Kingdom continue in its role as an EEA member. However, both its accession to EFTA and its continued membership of the EEA through the creation of a special status within the EEA – discussed as a "Norway plus" model – failed due to resistance from the current EFTA states Iceland, Liechtenstein, and Norway⁷⁰. Within the EEA, these states now constitute a more or less "exclusive club"⁷¹.

The Republic of Austria serves as a model example for Georgia⁷². Its application for membership, submitted in the 1980s, was met with little enthusiasm in Brussels for several reasons. After lengthy negotiations, Austria agreed in 1994 to join the EEA for an intermediate phase as a legal preliminary stage or a legal transitional stage on the path to EU membership, which it achieved in 1995. The Republic of Austria thus used this legal interim solution as a „springboard“ for its ultimate goal of joining the EU⁷³.

68 See *Barbara Lippert*, Die EU und ihre Nachbarschaftsbeziehungen: etablierte Assoziierungsmodelle und neue Grundformen, in: *integration* 2/2019, 91.

69 Example: Republic of Austria.

70 Instructive here *Patrick Wintour*, Norwegian politicians reject UK's Norway-plus Brexit plan, in: *The Guardian* of December 7, 2018.

71 *Barbara Lippert*, Die EU und ihre Nachbarschaftsbeziehungen: etablierte Assoziierungsmodelle und neue Grundformen, in: *integration* 2/2019, 83.

72 However, Georgia already has a separate free trade agreement with the EFTA organisation, which came into force in May 2018 and regulates trade between Georgia and the EFTA states.

73 See *Michael Gehler*, 1992: Österreichs EWR-Beitritt – Vorstufe zur EU-Mitgliedschaft, *hdgö Digital Museum* < https://www.hdgö.at/ewr_beitritt.html > (accessed on 5.9.2025). In order to explore the possibilities of Georgia's membership in the EEA, it might be useful to establish contact with Norway.

Rolf Knieper: Anfänge der Entwicklung des Wissenschaftlers und Menschen

Ich kenne Professor Rolf Knieper seit mehr als 30 Jahren und bin glücklich, mich als seinen Freund bezeichnen zu können. Natürlich hat Rolf viele Freunde in verschiedenen Teilen der Welt. Sein bester Freund im postsowjetischen Raum ist zweifellos Professor Lado Chanturia, ein hervorragender georgischer Professor und Staatsmann, der heute Richter am Europäischen Gerichtshof für Menschenrechte ist. Aber ich bin froh, dass Rolf Knieper auch in Kasachstan ein Stück seines Herzens hinterlassen hat. Wir sind glücklich, ihn als wissenschaftlichen Leiter des Programms der Deutschen Gesellschaft für Internationale Zusammenarbeit (GIZ) zur Unterstützung der Länder Zentralasiens und des Kaukasus zu nennen. Im vergangenen Jahr haben wir unsere 25. wissenschaftliche Jahreskonferenz abgehalten und bei fast jeder Konferenz hat Rolf einen Hauptvortrag gehalten, um den herum sich wissenschaftliche Diskussionen entwickelten.

Um nicht unsubstantiiert zu sein und jeden von der Vielseitigkeit des wissenschaftlichen Interesses von Professor Knieper und seiner Fähigkeit, die komplexesten Themen der Zivilrechtstheorie in einer zugänglichen und verständlichen Art und Weise darzulegen, überzeugen zu wollen, werde ich einfach die Titel der Berichte vom Rolf Knieper bei unseren jährlichen zivilistischen Lesungen zitieren:

Grundlagen des Vertragsrechts; Rechtssubjekte im Netz des internationalen Wirtschaftsrechts; Entwicklungsrichtungen des Zivilrechts; Objekte des

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Zivilrechts: von den Sachen zu den entmaterialisierten Wirtschaftsgütern; Subjektive Rechte und ihr Schutz: rechtsphilosophische Überlegungen; Probleme der inneren Differenzierung des Privatrechts; Der Staat im Zivilrecht; Kodifizierung und Rechtssicherheit im Zivilrecht; Zivilrecht im Lichte der wirtschaftlichen Theorien; Warum, wie und was ist Zivilrecht; Besitz und Eigentum: Beitrag kommerzieller und nichtkommerzieller Geschäftsbeziehungen zur Entwicklung des Privatrechts; Die Person als Schnittstelle zwischen Unternehmensbeziehungen im Zivilrecht: Die Rede für Transparenz und Rechtssicherheit, Schutz von Treu und Glauben und gegenseitigem Vertrauen als moderner Grundsatz des Zivilrechts; Einige Aspekte der Unwirksamkeit von Rechtsgeschäften; Abgrenzung zwischen außervertraglichen Beziehungen und vertraglichen Schuldverhältnissen; Kodifizierung als Wettbewerb? Anmerkungen zum Verhältnis zwischen kontinentalem Recht und allgemeinem Recht; Zur Frage der finanziellen Entschädigung für immaterielle und materielle Schäden; Klassifizierung und Abgrenzung: zum 80. Geburtstag von Maidan Kuntoarovich Suleymenov; Normen des Zivilrechts: Kontinuität und Anpassungen und andere.

Rolf und ich sind Altersgenossen (auf Kasachisch - Kurdas), er ist ein halbes Jahr älter als ich. Aber man merkt ihm sein Alter nicht an. Letztes Jahr hat er beim Bankett nach der Konferenz wild getanzt, so wie er es immer tut und wie immer haben wir auf dem Bankett einen weiteren "Deal on the fly" gemacht und das Thema der nächsten Konferenz bekannt gegeben.

Rolf ist sehr einfühlsam und kümmert sich um seine Freunde. Ich möchte Ihnen nur ein Beispiel nennen: vor etwa 15 Jahren brach ich mir die Wirbelsäule und hatte eine sehr komplizierte Operation in Deutschland. Nach der Operation habe ich mich in der wunderschönen Stadt Seligenstadt erholen können. Rolf Knieper und seine Schüler, Professor Lado Chanturia und Professor Hans-Joachim Schramm, kamen mit dem Auto zu mir, 500 Kilometer entfernt. Sie kamen nur, um mich zu besuchen und zu unterstützen. Rolf war dafür extra aus Frankreich, wo er damals und heute noch wohnt, nachgefliegen. Natürlich war ich gerührt und überwältigt von dieser Tat meiner Freunde!

Es ist kaum zu glauben, dass Rolf Knieper bereits seinen 85 jährigen Geburtstag feiert.. Nicht umsonst sagt man, dass das Alter nicht durch die Anzahl der Jahre, sondern durch den Geisteszustand bestimmt wird. Rolf ist jung im Geiste. Rolf ist jung in seinem Körper. Er liebt Menschen, er liebt Kommunikation, er mag Bier, er mag das Tanzen. Er hat genug Energie, um eine Menge Dinge gleichzeitig zu tun.

Ich wünsche Rolf Knieper, dass er noch viele Jahre so weitermacht. Zu seiner Freude und zur Freude von uns allen, die wir ihn lieben.

Ich werde nicht mehr über die bemerkenswerten Qualitäten des bemerkenswerten Mannes und Wissenschaftlers Professor Rolf Knieper sagen. Stattdessen möchte ich hier aus dem Vorwort zu seinem Buch „Gesetz und Geschichte“ zitieren, das ich für die Veröffentlichung dieses Buches in Kasachstan im Jahr 2005 vorbereitet habe. Das Vorwort selbst ist nicht von großem Interesse, da ich natürlich nicht tief genug in die Feinheiten der Analyse des deutschen Bürgerlichen Gesetzbuchs eindringen konnte, das zudem nicht von einem Fachübersetzer übersetzt wurde. Ich möchte lediglich die Ursprünge von Rolf Kniepers Entwicklung zu einem großen Wissenschaftler mit einem tiefen Verständnis für die Feinheiten des Zivilrechts aufzeigen.

"Rolf Knieper. Gesetz und Geschichte. Zum Stand und zu den Veränderungen des deutschen Bürgerlichen Gesetzbuches / Vorwort von Suleymenov M. K., Verlagsgesellschaft "Nomos" (Stadt Baden-Baden), Almaty 2005, 278 Seiten

Vorwort zur russischen Ausgabe

Ich habe Professor Rolf Knieper von der Universität Bremen vor 10 Jahren in Leiden kennengelernt, als ich an dem Modell-Zivilgesetzbuch der GUS-Staaten arbeitete, an dessen Vorbereitung auch die Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) beteiligt war. Damals war ich beeindruckt von Prof. Kniepers präzisen und klaren Kenntnissen einer Vielzahl von zivilrechtlichen Fragen.

Dann begannen wir, uns häufiger zu treffen, vor allem auf wissenschaftlichen und praktischen Konferenzen in Sankt-Petersburg, Bremen und Almaty sowie bei der Ausarbeitung von Mustergesetzen der GUS-Länder (über Aktiengesellschaften, über Gesellschaften mit beschränkter Haftung, Hypotheken, Konkurs, Wertpapiere und andere).

Einen besonders engen Austausch gab es aber bei der Vorbereitung der jährlichen zivilrechtlichen Lesungen, die vom wissenschaftlichen Forschungsinstitut für Privatrecht der Kasachischen geisteswissenschaftlichen und juristischen Universität in Zusammenarbeit mit der GTZ organisiert wurden. Herr Rolf Knieper war der Leiter des GTZ-Projekts "Förderung der Privatrechtsreform in Transformationsstaaten". Wir hielten Konferenzen zu einer Vielzahl zivilrechtlicher Themen ab: dingliche Rechte, zivilrechtliche Verträge, Subjekte des Zivilrechts, aktuelle Probleme des modernen Zivilrechts usw. Und bei jeder Konferenz hielt

Professor R. Knieper einen Vortrag zu einem Thema aus dem deutschen Zivilrecht. Er tat dies stets leicht und locker, und gleichzeitig zeichneten sich seine Vorträge durch Klarheit und wissenschaftliche Tiefe aus.

Ich war über Rolf Kniepers fundiertes Wissen über buchstäblich jedes zivilrechtliche Problem erstaunt. Ich dachte, es sei unmöglich, alle Probleme gleichermaßen gut zu kennen, aber Professor Knieper hat meine Zweifel widerlegt.

Erst nach dem Lesen des Buches, das wir dem russischsprachigen Leser vorlegten, wurde mir klar, woher Professor Knieper dieses grundlegende Wissen hat. Die Monografie zeichnet sich durch eine solche Breite der darin aufgeworfenen Fragen und die Tiefe ihrer Darstellung aus, dass der Autor nach dem Verfassen der Monografie nicht anders kann, als fast die gesamte Bandbreite des Wissens auf dem Gebiet des Zivilrechts zu besitzen.

Kurz gesagt, geht es in dem Buch um das deutsche Bürgerliche Gesetzbuch (BGB). Doch nicht umsonst heißt es so kurz und bündig "Gesetz und Geschichte". Das BGB wird hier nicht als eine eingefrorene Sammlung von Rechtsnormen analysiert, sondern als ein lebendiger Organismus, mit einer detaillierten Untersuchung aller Stadien und Phasen der Entstehung, der Entwicklung, des Wandels, des Aussterbens von Theorien und Standpunkten, die als Begründung für die Aufnahme oder den Ausschluss einzelner Artikel, Paragraphen, Kapitel und Abschnitte in das BGB dienten.

Jeder Jurist, der dem kontinentalen Rechtssystem angehört, kennt natürlich BGB und die Bedeutung, die sie bei der Herausbildung des Zivilrechts in Russland, der Sowjetunion und den modernen GUS-Staaten hatte.

Das am 14. Juni 1896 verabschiedete deutsche Bürgerliche Gesetzbuch (BGB) trat am 1. Januar 1900 in Kraft. Es spielte eine wichtige Rolle bei der Beseitigung der uneinheitlichen Gesetzgebung der deutschen Staaten, bei der Schaffung der rechtlichen Voraussetzungen für die Entwicklung der Marktbeziehungen und bei der Befreiung der Warenproduktion von den traditionellen Fesseln.

Daher stieß BGB auf den heftigen Widerstand einiger prominenter Juristen, insbesondere des Leiters der historischen Rechtsschule, des berühmten deutschen Juristen Savigny, der in seinem Werk "Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft" die Idee der Schaffung einer einheitlichen deutschen Kodifikation scharf kritisierte.

BGB bildet zusammen mit dem französischen Zivilgesetzbuch (Code Napoleon) vom 21. März 1804 die Grundlage des kontinentalen Rechtssystems. Im Gegensatz zum französischen Zivilgesetzbuch, das auf dem institutionellen

System (Personen, Sachen, Verpflichtungen) beruht, basiert das Zivilgesetzbuch auf dem Pandektensystem, dessen Hauptmerkmal die Zusammenfassung von Rechtsnormen aus allen Bereichen der rechtlichen Regelung der zivilrechtlichen Beziehungen in einem allgemeinen Teil ist.

Das BGB besteht aus fünf Büchern mit insgesamt 2.385 Artikeln. Das erste Buch (§ 1-240) besteht aus dem allgemeinen Teil, der Vorschriften über Personen, Sachen, Rechtsgeschäfte, Verjährung, Rechtsdurchsetzung und Sicherheit enthält. Das zweite Buch (§ 241-853) enthält Vorschriften zum Schuldrecht, das dritte Buch (§ 854-1296) enthält Vorschriften zum Sachenrecht, das vierte Buch (§ 1297-1921) zum Familienrecht und das fünfte Buch (§ 1922-2385) zum Erbrecht. Dem Bürgerlichen Gesetzbuch ist das "Einführungsgesetz" vorangestellt, das Hinweise auf das Verhältnis des Gesetzbuchs zu anderen Rechtsnormen, auf seine zeitliche Geltung sowie einige Regeln des internationalen Privatrechts enthält.

Das BGB ist ein kontroverseres Dokument als das französische Zivilgesetzbuch. Einerseits geht es von denselben Grundprinzipien des Zivilrechts aus - formale Gleichheit vor dem Gesetz, Freiheit und Unverletzlichkeit, Vertragsfreiheit. Andererseits enthält es erhebliche Abweichungen vom Grundsatz der Unverletzlichkeit des Privateigentums und bewahrt die feudalen Verhältnisse.

Das BGB ist auch insofern umstritten, als sie die Ursprünge des römischen (erste beiden Bücher) und des germanischen (drittes, viertes und fünftes Buch) Rechts miteinander verschränkt. Darin spiegeln sich die heftigen theoretischen Diskussionen wider, die während des gesamten 19. Jahrhunderts zwischen Vertretern der romanistischen Schule (Thibaut und andere) und der historischen Schule, deren Begründer Savigny war, geführt wurden. Das BGB enthält zahlreiche Normen abstrakten Inhalts, die in einer komplexen Sprache verfasst sind, weshalb sie oft als Kodex der Wissenschaftler bezeichnet wird¹.

Ich habe diesen kurzen historischen Hintergrund gegeben, um dem Leser die Schwierigkeit der Aufgabe und gleichzeitig die Brillanz der Lösung von Professor Knieper zu verdeutlichen. Das Buch bietet eine detaillierte, gründliche und sehr sorgfältige Analyse aller Feinheiten, Nuancen und Peripetien, die die Annahme von BGB begleiteten, eine Analyse aller Konzepte, Theorien, Ideen, Standpunkte, die die Grundlage für die Schaffung des wissenschaftlichen Konzepts

1 Siehe z.B. Zivil- und Handelsrecht der kapitalistischen Staaten, Red. V.P. Mozolin and M.I. Kulagin, Moskau, Hochschulverlag 1980, 30-32; Zivil- und Handelsrecht der kapitalistischen Staaten, K.K. Yaichkov (Hrsg.), Moskau, 1966, 31-35.

BGBs bildeten, eine Analyse aller Bedingungen und Umstände, die Änderungen an BGB erforderlich machten, sowie eine Analyse dieser Änderungen selbst.

Das Buch ist in fünf Teile gegliedert.

Die ersten beiden Teile sind den allgemeinen Fragen der Schaffung und Überarbeitung des BGBs gewidmet, die folgenden drei Teile sind der Analyse der wichtigsten Abschnitte des Zivilrechts gewidmet (Teil 3 befasst sich hauptsächlich mit dem Personen-, Familien- und Erbrecht, Teil 4 hauptsächlich mit dem Schuldrecht, Teil 5 hauptsächlich mit dem Sachenrecht).

Der Hauptinhalt des Buches erschließt sich aus dem Untertitel: "Zum Stand und zu den Veränderungen des deutschen Bürgerlichen Gesetzbuches". Das Buch stellt einen bedeutenden Beitrag zur Erforschung des Staates einerseits und der Veränderungen im BGB andererseits dar.

Professor Knieper gilt als konsequenter Verfechter des kodifizierten Rechts und als überzeugter Vertreter der normativen Rechtstheorie. Rechtstexte "müssen mit einem normativen Sicherungszweck in der sozialen Wirklichkeit verankert sein". "Alle Kodifikationen des Privatrechts - auch die letzte, das erst 1992 in Kraft getretene niederländische „Vermögensrecht“, sowie die außerhalb Europas existierenden - schöpfen aus denselben Wurzeln. Auch dort, wo - wie in der angelsächsischen Rechtsfamilie - ein anderer Weg als die Kodifikation gewählt wurde, sind identische Wurzeln ebenso erkennbar wie inhaltliche Ähnlichkeiten in der Behandlung spezifischer Probleme" (Abschnitt 1.1.).

Rolf Knieper widerlegt überzeugend die Verfechter des nationalen Rechts, eines Rechts, das "aus dem inneren Wesen der Nation" (Savigny) abgeleitet ist. "Der niederländische Gesetzgeber betont, dass es zwar eine Besonderheit des Niederländischen gibt, aber dennoch ein 'kontinentaleuropäisches Gewohnheitsrecht' (Hartkampf)".

Auch Professor Knieper befürwortet den staatlichen Zentralismus, und bei der Wahl zwischen dem Gesetz und den Entscheidungen der Gerichte als Rechtsquellen gibt er dem Gesetz den Vorzug.

Teil II der Monografie ist der Geschichte der Gründung von BGB gewidmet. Das Buch analysiert diesen gesamten Prozess im Detail und zeigt den brodelnden Kessel von Meinungen, Konzepten, Argumenten "für" und "gegen" die Gründung des BGB.

Neben Savigny und seiner historischen Rechtsschule gab es viele andere Kritiker der Schaffung des Gesetzbuches (Gierke, Menger und andere), wobei die Kritik aus einer nationalistischen Perspektive kam. Das Fehlen von deutsch-

nationalen Merkmalen und sozialer Absicherung wurde als großer Mangel des Entwurfs von BGB herausgestellt.

Dies ist ein vertrautes Bild für uns. Während der Vorbereitung und Verabschiedung des Entwurfs des Zivilgesetzbuches der Republik Kasachstan haben wir oft ungefähr die gleichen Argumente gehört.

Dennoch wurde das BGB am 1. Juli 1896 "in der 118. Sitzung der laufenden Reichstagssession bei 288 anwesenden Reichstagsmitgliedern mit 222 gegen 48 Stimmen angenommen; 18 Abgeordnete enthielten sich der Abstimmung."

Nach einer vergleichenden Analyse aller Kodifikationen des kontinentaleuropäischen Rechts, vor allem des französischen Code Civil, kommt der Autor zu dem Schluss, dass es trotz erheblicher Unterschiede (für die Beispiele angeführt werden) mehr Gemeinsamkeiten in den Gesetzbüchern der verschiedenen Länder gibt. "Das römische Recht im Bild des Pandektenrechts, das durch die Philosophie der Vernunftrechts initiiert wurde, sind diese gemeinsamen fachlichen Wurzeln, die sich durch den engen persönlichen Kontakt zwischen den Gelehrten entwickelt haben und die alle Gesetzestexte in Struktur und Inhalt so vergleichbar und ähnlich machen" (Abschnitt ii. 3. b.).

Zur Beantwortung der Frage, ob bei einem Vertragsabschluss die Bindungswirkung durch die Willensäußerung erst nach deren Annahme oder bereits im Zeitpunkt der Willensäußerung eintritt, kann aus dem Buch nur ein Beispiel für eine vergleichende Analyse angeführt werden. Der französische Code Civil entfaltet seine Wirkung erst, wenn die Willenserklärungen übereinstimmen und erklärt daher ein vorläufiges Angebot für jederzeit widerrufbar; § 862 des österreichischen Bürgerlichen Gesetzbuchs besagt, dass ein Angebot nicht widerrufen werden kann, "bevor die Zeit der Annahme abgelaufen ist"; § 145 des deutschen Bürgerlichen Gesetzbuchs erklärt den Anbieter grundsätzlich als "durch das Angebot gebunden"; der italienische Codice Civile erlaubt den Widerruf eines Angebots, bevor die Annahme ausgesprochen wird und der Ausdruck dem Anbieter zugeht (Art. 1326, 1328, 1335), während das niederländische Wetboek ebenfalls eine Widerrufbarkeit vorsieht, diese aber bereits vor dem Zeitpunkt der Absendung der Annahme ausschließt (Art. 219-6.5. 2.2.).

Und genau diese Art von Analyse nimmt Professor Knieper für alle Abschnitte der Monografie und für alle von ihm aufgeworfenen und behandelten Probleme vor.

Teil III, der den Subjekten des Zivilrechts gewidmet ist, nimmt einen sehr wichtigen Platz in dem Buch ein. Anhand der Analyse der traditionellen

zivilrechtlichen Kategorien - Rechtsfähigkeit, juristische Person, Vertretung - zeigt der Autor den komplexen Entwicklungsweg der Zivilrechtstheorie und der Entstehung des Zivilrechts auf. Sowohl hier als auch in anderen Abschnitten des Buches ist Professor Knieper ein glühender Verfechter des positiven Rechts. Er würdigt zwar die Naturrechtstheorie (insbesondere die Arbeiten von Savigny), die einen wesentlichen Beitrag zur Schaffung von Rechtskategorien und -begriffen geleistet hat, übt aber dennoch eine gründliche Kritik an dieser Theorie vom Standpunkt des positiven Rechts aus.

Die Monografie zeigt insbesondere den langen und schwierigen Weg, den die Menschheit von der Trennung der Menschen nach Klassen und anderen Merkmalen bis zu der klaren Erkenntnis zurückgelegt hat, dass die Rechtsfähigkeit jedem Menschen innewohnt, ohne Unterschied des Standes, der Religion, des Geschlechts usw. (Abschnitt III. 1. a).

Vieles wird der Analyse der Überwindung der in der Rechtstheorie etablierten Doktrin gewidmet, die die dem Rechtssubjekt innewohnende moralische Freiheit und den Willen zu einer Eigenschaft erklärt. Der Beweis für die Unanwendbarkeit des Konzepts des Rechtssubjekts als Person, die mit Willensbewusstsein handelt, wird durch die Analyse solcher Institutionen erbracht, bei denen dieses Konzept nicht funktioniert: die juristische Person (Abschnitt III. 1. c) und die Vertretung (Abschnitt III. 1. d).

Bei der Definition der juristischen Person haben sich zwei Hauptrichtungen gegenübergestellt. Die erste ist die Theorie der Fiktion, nach der die Rechtsfähigkeit mit dem Begriff der Person zusammenfällt. Das heißt, die juristische Person existiert nur, als ob sie eine Person wäre, als künstliches Subjekt, als Fiktion. Die zweite Theorie ist die Theorie der Biologisierung der juristischen Person (organische Theorie), nach der die juristische Person dem Menschen gleichgestellt wird. Jeder Mensch muss nicht mehr als Person qualifiziert werden, sondern im Gegenteil, jede Person wird als Mensch qualifiziert. Die juristische Person wird wie ein menschlicher Organismus mit seinen Organen behandelt.

Mit ähnlichen Konzepten wurde versucht, das Phänomen der Repräsentation zu erklären.

Professor Knieper übt eine begründete Kritik an diesen Konstruktionen und bietet seine höchst originelle Erklärung des Begriffs des Rechtssubjekts. Er stellt eine einfache Frage: Welche Eigenschaften muss eine Person besitzen, um eine vollständige Person und ein Rechtssubjekt sein zu können? Die Antwort sucht er wiederum im positiven Recht von BGB. Bei der Wahl des positiven Rechts haben

die sozialen Bedürfnisse Vorrang vor den Schlussfolgerungen aus der Hypothese der menschlichen Handlungsfreiheit (Abschnitt III. 2).

Die Freiheit ist nicht das Verlangen, die Spontaneität, die Überraschung - das heißt, alles, was durch den Menschen geschieht, aber dem Gesetz der Ordnung widersteht. Nur der Mensch, dessen Wille von allen Partikularismen, Neigungen, Impulsen und Bestrebungen gereinigt ist, der vernünftig und moralisch ist, ist frei.

In den klassischen Zivilgesetzbüchern ist die Normalität der Freiheit als Nützlichkeit verankert, und das bedeutet zweckorientierte Vernunft.

Die Qualität der Rechtspersönlichkeit ist unter dem Gesichtspunkt des Kriteriums der Vernunft problematisch: Alle Menschen sind Personen, auch unfähige Personen. Das Gesetz hat dieses Problem gelöst, indem es die Rechtsfähigkeit von der Geschäftsfähigkeit und der Rechtsfähigkeit, der *capacite juridique*, trennt.

Dies ist ein juristischer Kompromiss: Alle Menschen gelten als Personen und sind rechtsfähig. Nur wer das Kriterium der nützlichen Freiheit auf der Grundlage zweckorientierter Vernunft erfüllt, ist "Voll-Person", d.h. geschäfts- und handlungsfähig. Dies ist bei juristischen Personen der Fall, deren Ziele von vornherein auf die Erhaltung des Vermögens, die sinnvolle Nutzung des Vermögens und dessen Vermehrung ausgerichtet sind, und bei jenen Menschen, die die materielle Qualität des Personseins besitzen, also dem Realitätsprinzip folgen. Ausgeschlossen sind diejenigen, deren Geist nicht realitätsadäquat funktioniert.

Lässt man den rechtlich farblosen personalen Begriff der Rechtsfähigkeit, den das Gesetz allen natürlichen und juristischen Personen zubilligt, beiseite und definiert die Rechtsfähigkeit als Ergebnis der von Trieben befreiten Vernunft, so entspricht die juristische Person - zumindest in den Teilen des Zivilrechts, die nicht den familienrechtlichen Beziehungen gewidmet sind - besser als die individuelle Person dem Vollsubjekt mit seinen eigentumsorientierten, sinnlich unausgewogenen Zielen.

Im Begriff der *personne morale* (moralische Person), wie die juristische Person auch heute noch in der gesamten romanischen Rechtsgesellschaft genannt wird, findet dieser Gedanke seinen Ausdruck.

Die juristische Person ist abstrakt vernünftig (intelligible); sie ist der Prototyp des sinnentleerten Rechtssubjekts des Zivilrechts. Nicht er muss durch Fiktion mit dem Menschen gleichgesetzt oder gar mit menschlichem Leben erfüllt und zu einer höheren, organischen Lebenseinheit stilisiert werden, sondern der

empirische Mensch muss sich bemühen, seine Sinnlichkeit und Emotionen zu zügeln und zu verdrängen, um eine *personne morale*, d.h. eine juristische Person zu werden, nicht nur, weil die Rechtsordnung ihn so qualifiziert, sondern auch, weil er sich ihr gegenüber sublimiert (Abschnitt II. 2. b).

Wie dieser Prozess in den Familienbeziehungen ablief und immer noch abläuft, wie der Übergang von der patriarchalisch-familiären Welt zur Welt der Eigentumsverhältnisse erfolgt, hat Professor Knieper glänzend dargestellt (Abschnitt III. 4).

Aus dieser Konstruktion ergibt sich auch eine Erklärung für die Schematisierung des Zivilrechts. Die Praxis des Zivilrechts zeigt, dass weder der Staat als Garant der Moral noch die moralische Freiheit den vernünftigen Willen des Menschen bestimmen können. Es genügt die gesetzgeberische Schematisierung und Objektivierung, Materialisierung, gesetzgeberische Klarstellung und Normierung der Normalität (Durchschnitt) des wirtschaftlichen Umsatzes.

Der Schlüssel zu einer konsistenten Erklärung der zivilrechtlichen Modernisierung liegt nach Professor Knieper in der Herstellung eines objektiv gewichteten Mittelwertes. Die Objektivierung der sinnlich-ethischen Rationalität des Rechts erleichtert die Berechenbarkeit der Rechtsordnung. Sie geht damit auf den "rationalen Zweckverband des Unternehmens", juristisch gesprochen die juristische Person, zu. Ihr Bild wird nicht durch Instinkte und Neigungen getrübt. Fällt hingegen die Maske von der physischen Person ab und kann sie auch durch eine Therapie nicht mehr aufrechterhalten werden, droht die Person in das "alte Laster" der Instinkthaftigkeit zurückzufallen, so schützt der Staat unabhängig von der Moral eindeutig ihr Wesen durch die Grenzen der wirtschaftlichen Notwendigkeit.

Dies ist also der wesentliche und notwendigste Grund für Veränderungen im Zivilrecht seit den Kodifikationen und der Geheimhaltung ihrer Akzeptanz durch gesellschaftspolitische Gegner: Die Normalisierung des Durchschnitts (Maßstabs), der sich an der zielorientierten Vernunft und den Rentabilitätsmotiven der juristischen Person misst, wird verstärkt. Solange das Individuum die von außen gesetzte Normalität des Durchschnitts als Grenze respektiert, kann es sich auch als Individuum wohl fühlen (Abschnitt III. 5. d).

Teil IV des Buches analysiert das Schuldrecht. Es wird untersucht, wie ein Vertrag zustande kommt und welche Fragen sich dabei stellen, insbesondere die Bindung durch staatliches Recht. Es wird argumentiert, dass der Vertrag keine Rechtsquelle sein kann, denn es hat nie mehr als eine Rechtsquelle gegeben -

das positive Recht (Abschnitt IV. 1. c). Es wird die unvermeidliche Unvollständigkeit des Rechts aufgezeigt und die Stellung der Gerichte kritisiert, die in die normative Regelung eingreifen und Fälle offener Nichtdurchsetzung des Rechts zulassen (BGB), der Prozess der widersprüchlichen Konvergenz von Familienrecht und Schuldrecht wird untersucht (es gibt keine Alternative zum Schuldrecht).

Die Notwendigkeit der Verpflichtung durch Staat und Recht wird aufgezeigt, die Unzumutbarkeit der Qualifizierung zivilrechtlicher Beziehungen als Selbstbestimmung.

Teil V schließlich befasst sich hauptsächlich mit dem Sachenrecht

Im Gegensatz zum Code Civil und anderen Gesetzbüchern (einschließlich des Zivilgesetzbuches von Kasachstan) steht im BGB ein Abschnitt über das Eigentumsrecht nach dem Abschnitt über das Schuldrecht. Professor Knieper begründet die Richtigkeit dieser Gliederung. Er führt eine tiefe Analyse der dinglichen Rechte, des Begriffs und der Formen des Eigentums, der Eigentumsgegenstände, der Rechte des Eigentümers und anderer Fragen durch. Auf dieser Grundlage zeigt er die tiefgreifende Wechselwirkung zwischen dinglichen Rechten und Schuldrechten auf und verdeutlicht die Rolle und Bedeutung jeder dieser Institutionen im Wirtschaftsleben der Gesellschaft.

Das BGB beruht auf der Anerkennung der dinglichen Herrschaft der Rechte, doch mit der Entwicklung der Ware-Geld-Beziehungen geht das statische System der isolierten Herrschaftsverhältnisse über die Dinge zunehmend verloren. Das unumstößliche Prinzip der Verfügungsfreiheit hat alle Dinge in Waren verwandelt, und diese Verwandlung hat entgegen allen Klagen und gesetzlichen Schranken auch den Boden erfasst (Abschnitt V. 2, a).

Das Konstrukt der Dinglichkeit ist nicht auf BGB oder auf privatrechtliche Beziehungen beschränkt. Viele der öffentlich-rechtlichen Pflichten und Beschränkungen sind auf Sachen aufgebaut. Insbesondere große Teile des Umweltrechts, insbesondere das Recht der Belästigung, haben sich aus dem Privatrecht entwickelt, das den Status des Nachbarn - des Grundstückseigentümers - regelt, und diese Grundlage ist deutlich sichtbar. Die öffentlich-rechtliche Bindung an Sachen entspricht in ihrer historischen Umsetzung der Absicht und den Handlungen der Normierung von Schuldverhältnissen in allgemeinen Geschäftsbedingungen und im zwingenden Recht. Sie verwandelt Dinge weiter in Waren und sichert nicht nur die gesellschaftstheoretische, sondern auch die gesellschaftlich-praktische Statik der Herrschaft von Rechtsverhältnissen über Dinge. Das

Sachenrecht wird mehr und mehr zum Anhängsel des Schuldrechts, Eigentum wird als zeitlich verschobene Tauschbeziehung definiert (Abschnitt V. 2. b).

Die herrschende Rechtsdogmatik unternimmt nach Ansicht von Professor Knieper den unzutreffenden Versuch, den Begriff der Eigentumsrechte auf die Vermögensrechte auszudehnen. Die Ausweitung erstreckt sich auf den Mindestlohn, die Sicherung des Lebensunterhalts, das Wohnungsrecht, also auf die berechtigten und schützenswerten Erwartungen des "Durchschnittsmenschen". Insbesondere hat das Bundesverfassungsgericht in einem Urteil aus dem Jahr 1993 die ausschließliche Inhaberschaft eines Eigentumsrechts zur privaten Nutzung und Verfügung als wichtiges (wesentliches) Merkmal des Eigentumsrechts bezeichnet. Auf dieser Grundlage hat es auch das Besitzrecht des Mieters an der Wohnung als Eigentum qualifiziert, da die Wohnung den Mittelpunkt der privaten Existenz bildet und ausschließlich vom Mieter genutzt wird.

In Wahrheit geht es aber, wie Professor Knieper meint, um das unmittelbare zwischenmenschliche Verhältnis zwischen Mieter und Vermieter, um das Recht des Mietvertrages, und nicht um die absolute Stellung des Mieters gegenüber allen anderen Subjekten. Es ist diese Beziehung und nicht der Konflikt zwischen den beiden Dingen, der geregelt werden soll (Abschnitt V. 2. b).

Die Entwicklung des Zivilrechts beweist nicht die abnehmende Bedeutung des Zivilrechts für die Eigentumsproblematik in der Zivilgesellschaft, sondern vielmehr - entsprechend der Sozialstruktur - eine Umschichtung zu Lasten des Sachen- und Eigentumsrechts zugunsten des Eigentums- und Vermögensrechts (Abschnitt V. 2. g).

Im Mittelpunkt dieses Prozesses steht die Umwandlung des Geldes von materiellen Dingen und Eigentum in Geld, das von allen Gegenständen befreit und zu reiner Liquidität wird.

Generell lässt sich ein Bedeutungsverlust des Sachenrechts feststellen, jedoch nicht des gesamten Zivilrechts: Das Schuldrecht hat den Bedeutungsverlust des Sachenrechts kompensiert und steht im Zentrum der privatrechtlichen Beziehungen - tendenziell sogar im Verhältnis zum Familienrecht. Das Geld akzentuiert diese Bewegung (Abschnitt V. 2. e).

Dies ist eine kühne und eher unerwartete Schlussfolgerung von Professor Knieper. Meines Erachtens gibt es Stoff für weitere Überlegungen, für die Entwicklung der Theorie des Verhältnisses zwischen dinglichen und schuldrechtlichen Rechten.

Der letzte Teil des Buches trägt den Titel "Epilog im Osten" und charakterisiert die Bedeutung, die Werke dieser Art - nämlich theoretische Studien des Rechts und der Geschichte - für die Entwicklung des Rechts in den Ländern der ehemaligen Sowjetunion haben können. Wir sind praktisch dabei, eine neue Zivilgesetzgebung marktwirtschaftlicher Art zu schaffen, die von den ideologischen Schichten des kommunistischen Systems gereinigt ist, und die Untersuchung der Entstehung und Formierung des kodifizierten Zivilrechts in Deutschland, die Analyse von Erfolgen und Misserfolgen, Entdeckungen und Fehlern, die bei der Schaffung von BGB gemacht wurden, kann sicherlich eine wichtige Rolle bei der Wahl der richtigen Richtung der Entwicklung des Zivilrechts und insbesondere bei der Entwicklung der Grundsätze der Kodifizierung des Privatrechts spielen.

Die Unzulänglichkeiten des Buches sind eine Fortsetzung seiner Vorzüge. Die detaillierte und gründliche Analyse der subtilsten Nuancen der Theorie und Praxis des Zivilrechts, die Verweise auf zahlreiche Werke deutscher Wissenschaftler, von denen ein Großteil unseren Juristen unbekannt ist, die recht komplexe wissenschaftliche Sprache - all dies schafft gewisse Schwierigkeiten bei der Wahrnehmung des Textes des Buches. Man darf nicht vergessen, dass die Monografie von einem deutschen Wissenschaftler für deutsche Juristen geschrieben wurde und nicht für russischsprachige Leser angepasst ist.

Die Lektüre dieser Monografie ist kein leichtes Vergnügen, sondern eine große Arbeit, aber wenn Sie genügend Fleiß, Geduld und Aufmerksamkeit aufbringen, wird sich Ihnen die innere Logik und Einheit dieser wissenschaftlichen Grundlagenforschung erschließen.

Ich empfehle den Lesern, sich diese Arbeit zu machen und aus der Monografie von Professor Knieper den größtmöglichen Nutzen für die eigene Praxis zu ziehen.“

Zum jetzigen Zeitpunkt fällt es mir schwer, den vor 20 Jahren vorgenommenen Analysen der wissenschaftlichen Arbeit von Rolf Knieper etwas hinzuzufügen. Ich kann nur noch einmal meine Bewunderung für sein Talent und meine Freude darüber zum Ausdruck bringen, dass ich das Glück hatte, mit diesem herausragenden Wissenschaftler und wunderbaren Menschen über so viele Jahre in engem Kontakt zu stehen.

Es erfüllt mich mit Freude, dass ich Rolf meinen Freund nennen darf!

Ich wünsche Rolf schöpferische Langlebigkeit! Möge er uns noch viele Male mit seinen tiefgründigen und funkelnden wissenschaftlichen Arbeiten erfreuen!

Schadensrecht in Osteuropa – Versuch eines Überblicks

A. Einleitung

Nach wohl allen heutigen Rechtsordnungen ist der Verursacher eines Schadens unter bestimmten Voraussetzungen verpflichtet, dem Geschädigten hierfür Ersatz zu leisten¹. Viele Rechtsordnungen unterscheiden insoweit zwischen der grundsätzlichen Verpflichtung zum Schadensersatz (Haftungs begründung) und der Art und dem Umfang des zu leistenden Schadensersatzes (Haftungsausfüllung), auch wenn beide Komponenten miteinander verknüpft sind².

Gegenstand dieses Beitrages ist das Schadens(ersatz)recht im Sinne von Recht der Haftungsausfüllung im weitgefassten Raum „Osteuropa“, d.h. in den ehemals „sozialistischen“ Staaten Mitteleuropas, Südosteuropas, Osteuropas im engeren Sinn, der Kaukasus-Region und Zentralasiens³. Obwohl versucht wird, einen möglichst weiten Kreis von Staaten in diese Betrachtung einzubeziehen,

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1 S. hierzu etwa *Wolfgang Wurmnest*, <https://hwb-eup2009.mpipriv.de/index.php/Schadensersatz> (abgefragt am 8.11.2025).

2 Zur begrifflichen Unterscheidung von Haftungs begründung und Haftungsausfüllung s. z.B. *Christian Grüneberg*, in: ders., BGB, 84. Aufl. (2025), Vorb. v. § 249 Rdz.1 und 2.

3 Zu dieser im Bereich der Rechtsvergleichung für den Untersuchungsgegenstand des „Ostrechts“ oder „Osteuropäischen Rechts“ eingebürgerten Bestimmung des betrachteten geografischen Raums s. etwa *Herbert Küpper*, Einführung in die Rechtsgeschichte Osteuropas (2005), S.15 (der für seine eigene Darstellung aber die Rechtsordnungen der Staaten der Kaukasus-Region und Zentralasiens ausklammert); speziell zu den Gemeinsamkeiten der Staaten des postsowjetischen Raums s. Andrej Shirvindt, Former Soviet States of Eastern Europe, Caucasus and Central Asia, in: Mathias Siems/Po Jen Yap (ed.), Cambridge Handbook of Comparative Law (2024), S.275-301.

ist eine Berücksichtigung aller Staaten dieses Raums hier nicht zu leisten, und aus Raum- und Zeitgründen muss sich die Betrachtung im wesentlichen auf einen Vorschriftenvergleich beschränken. Gerade das Schadensrecht ist in vielen Ländern stark durch Rechtsprechung und Fachliteratur geprägt, die für eine vertiefte Betrachtung natürlich unbedingt einbezogen werden müssten.

B. Rechtsgrundlagen

Das Schadensrecht ist in allen Staaten Osteuropa im Kern in Zivilgesetzbüchern oder besonderen Obligationenrechtsgesetzen geregelt. Hinzu treten schadensrechtliche Sondervorschriften in Spezialgesetzen, teilweise auch in Handels- oder Unternehmensgesetzbüchern⁴. Einige Staaten, insbesondere solche des postsowjetischen Raums, regeln den Kern des Schadensrechts im Allgemeinen Teil des Zivilrechts⁵, andere behandeln – wie das deutsche Recht (§§ 249 – 255 BGB) – das Schadensrecht übergreifend im Allgemeinen Teil des Schuldrechts (z.B. Kap.7 §§ 7-140 des estnischen Obligationenrechtsgesetzes/OblRG, Buch 3 Titel 4 §§ 408-415 des georgischen Zivilgesetzbuchs/ZGB). Überwiegend wird das Schadensrecht getrennt geregelt für die Haftung in bestehenden Sonderbeziehungen, häufig im Vertragsrecht, und im Deliktsrecht (z.B. Teil 3 Kap.20, Art.349-358, kas. ZGB Allg. Teil – (Teil 3) Kap.47 Art.917-952 kas. ZGB Bes. Teil, Teil 2 Titel VIII Kap.I Sect.5 Art.346-349 kroat. ObligationenG - Teil IX Sect.7 Art.1085-1106 kroat. ObligationenG)⁶. Zum Teil wird vom einen auf den anderen Regelungskomplex verwiesen, z.B. in Art.349 kroat. ObligationenG⁷.

Die älteste Regelung des Schadensrechts in Osteuropa findet sich im lettischen Zivilgesetzbuch von 1937, einer auf historischer und rechtsvergleichender Grundlage entwickelten und in vielfacher Hinsicht originellen Kodifikation, die

4 S. z.B. Teil 3 Abschnitt X Sektion 3 Art.373-386 slowak. (ehemals tschechoslowak.) HGB, Teil 3 bulgar. HandelsG.

5 Z.B. Art.15 russ. ZGB Teil I, Art.9 Pkt.4 und 5 kas. ZGB Allg. Teil, Art.19 mold. ZGB, Art.22 ukr. ZGB.

6 Weitere Beispiele: Art.45-54 (Deliktshaftung) - Art.79-94 (Vertragshaftung) bulgar. Obligationen- und VertragsG (vom italienischen Code civile inspiriert); Kap.25 Art.393-406.1 russ. ZGB Teil 1 (Haftung in schuldrechtlichen Sonderbeziehungen) – Kap.59 Art.1064-1101 russ. ZGB Teil 2 (ergänzend zu der allgemeinen Vorschrift des Schadensrechts in Art.15 russ. ZGB).

7 Im Rahmen der vertraglichen Haftung Subsidiärverweisung auf die außervertragliche Haftung. Eine ähnliche Verweisungsvorschrift enthält Art.99 III des schweizerischen Obligationenrechts (bei Vertragshaftung subsidiäre Verweisung auf die schadensrechtlichen Vorschriften des Deliktsrechts).

vom lettischen Gesetzgeber im Jahr 1992 wieder in Kraft gesetzt wurde⁸. In einigen Staaten gelten noch die – wenn auch überarbeiteten – Zivilrechtskodifikationen der sozialistischen Epoche (Polen, Slowakei, teilweise auch im postjugoslawischen Raum⁹). Im postsowjetischen Raum spielte beim Erlass der neuen Zivilrechtskodifikationen um das Jahr 2000 das einheitliche Modell-ZGB der Gemeinschaft Unabhängiger Staaten (1995-2002)¹⁰ eine wesentliche Rolle, mit der Ausnahme von Georgien, das sich besonders am deutschen Recht orientierte (partiell in diese Richtung auch Aserbaidschan und Turkmenistan). Als besonders moderne, auch aktuelle rechtspolitische Entwicklungen auf europäischer Ebene aufnehmende Kodifikation des Obligationenrechts unter Einschluss des Schadensrechts fällt das estnische Obligationenrechtsgesetz (2001) ins Auge. Die derzeit neuesten Kodifikationen des Schadensrechts sind in den Zivilgesetzbüchern von Rumänien (2009), Tschechien (2012), Ungarn (2013) und, ganz frisch, Tadschikistan (2022) enthalten. In mehreren Staaten laufen derzeit Arbeiten zum Erlass neuer Zivilgesetzbücher (z.B. in Nord-Mazedonien, Serbien und in Kosovo¹¹).

Hinter jeder Regelung steht eine landesspezifische Entstehungsgeschichte, aus der sich z.B. Begrifflichkeiten für die Bezeichnung von Schadenskategorien ergeben¹². Bei einigen Regelungen ist erkennbar, dass sie von einem

8 S. hierzu *Kaspars Balodis*, Wiederinkrafttreten und Reformen des lettischen Zivilgesetzbuches, in: *Helmut Heiss* (Hrsg.), *Zivilrechtsreform im Baltikum* (2006), S.59 (60-62); ferner *Philipp Schwartz*, *Das Lettländische Zivilgesetzbuch vom 28. Januar 1937 und seine Entstehungsgeschichte* (2008).

9 Unmittelbar in Serbien sowie Bosnien und Herzegowina, der Sache nach (trotz Erlass neuer Obligationengesetze) auch in Kosovo, Montenegro und Nord-Mazedonien. Auch die Obligationengesetze von Kroatien und Slowenien sind weiter von dieser Tradition geprägt; vgl. dazu auch *Christa Jessel-Holst/Rainer Kulms/Alexander Trunk* (Hrsg.) *Private Law in Eastern Europe: Autonomous Developments or Legal Transplants* (2010), passim.

10 Text verfügbar auf der Webseite der Interparlamentarischen Versammlung der GUS, https://i-acis.ru/baza_dokumentov/modelnie_zakondatelnie_akti_i_rekomendacii_mpa_sng (abgefragt am 8.11.2025)

11 Entwürfe für ein neues ZGB des Kosovo sind bei <https://md.rks-gov.net/en/legislation/civil-code/> zugänglich (abgefragt am 25.10.2025).

12 So z.B. die Begriffe „ubytki“, „vred“ und „ushcherb“ im russischen Recht, s. Art.15 und Art.1064 russ. ZGB, die z.B. bereits im ZGB der RSFSR von 1964 (Art.219 [Haftung in Sonderbeziehungen] und Überschrift Kap.40 [Deliktsrecht] dieses Gesetzes und in Art.106 und 117 des ZGB der RSFSR von 1922 unterschieden wurden und auf vorrevolutionären Sprachgebrauch zurückgehen. S. hierzu auch *Hans-Joachim Schramm*, *Rechtsgeschäftslehre und Schuldrecht*, in: *Rolf*

ausländischen Vorbild geprägt wurden, wobei auch die ausländische Rechtsprechung und Fachdiskussion einbezogen und teilweise kodifiziert, aber auch modifiziert wurden¹³. Einige Vorschriften lassen auch Einflüsse internationaler Regelwerke erkennen¹⁴, diese sind aber bislang auf einzelne Vorschriften oder Komponenten davon begrenzt geblieben. Eine neue Entwicklung ist die Unterstützung der Vorbereitung neuer Zivilgesetzbücher durch die EU in Beitrittskandidatenländern der Balkanregion, die vor allem die Übernahme des EU-Acquis sichern soll¹⁵.

C. Grundstruktur ausgewählter Regelungen

Zur Illustration des Inhalts und der Regulationsstruktur des Schadensrechts in Osteuropa sollen zunächst die schadensrechtlichen Vorschriften einiger ausgewählter Staaten, in alphabetischer Ordnung, kurz vorgestellt werden. In die Auswahl einbezogen wurden Staaten, deren schadensrechtliche Vorschriften entweder als typisch auch für andere Staaten oder als besondere Merkmale aufweisend erschienen: das Recht *Estlands* als besonders systematische, moderne Regelung; das Recht *Georgiens* als stark am deutschen Recht orientierte, aber weiter entwickelte Regelung; das Recht *Kroatiens* als einer Rechtsordnung in der Nachfolge Jugoslawiens; das Recht *Lettlands* als einer sehr autochtonen, aber zugleich auf rechtsvergleichender Grundlage beruhenden Rechtsordnung; das Recht *Polens* als einer Rechtsordnung, die trotz wesentlicher Neuerungen auch heute noch auf Traditionen des sozialistischen Zivilrechts beruht; das Recht *Russlands* als einer auf dem Modell-ZGB der GUS beruhenden postsowjetischen

Knieper/Lado Chanturia/Hans-Joachim Schramm, Das Privatrecht im Kaukasus und in Zentralasien (2010), S.490 f.

- 13 Dies gilt z.B. für das grundsätzlich vom deutschen Recht geprägte, aber konkretisierend weiterentwickelte estnische Schadensrecht (s. insbes. §§ 127, 128 estn. OblRG). Auch Georgien (Art.408-415 georg. ZGB) lässt sich hier einordnen. Historische Beispiele waren z.B. die Orientierung Serbiens bei seinem Bürgerlichen Gesetzbuch von 1844 am österreichischen ABGB und die defacto-Übernahme des ABGB in Bosnien-Herzegovina, s. dazu *Meliha Povlakič*, Codification of Civil Law in Bosnia and Herzegovina (2024), https://doi.org/10.54171/2024.ev.ccl_12 (abgefragt am 8.11.2025).
- 14 S. z.B. § 127 Abs.3 und § 135 estn. OblRG – Ähnlichkeit mit Art.74 und 75 f. CISG. Für viele postsowjetische Staaten ist das Modell-ZGB der GUS als Regionalform internationaler Rechtsvereinheitlichung prägend.
- 15 Vgl. hierzu aus schadensrechtlicher Perspektive *Daniel Martin*, Grundprinzipien des europäischen Schadensrechts, GPR 2022, 178-187.

Rechtsordnung; das Recht der *Slowakei* als einer ebenfalls noch vom sozialistischen Zivilrecht geprägten Rechtsordnung, die zugleich auch die Unterschiede zwischen den fast zeitgleich entstandenen Zivilgesetzbüchern Polens, der Tschechoslowakei und Ungarns verdeutlicht; das Recht Tschechiens, dessen neues Zivilgesetzbuch ebenfalls noch die Tradition der früheren Regelungen erkennen lässt; das Recht der *Ukraine* als ebenfalls vom Modell-ZGB der GUS geprägter Rechtsordnung, die aber viele Eigenmerkmale aufweist, sowie das Recht *Ungarns*, dessen neues Zivilgesetzbuch das Schadensrecht anders strukturiert als viele andere Staaten der Region und sich besonders um Klarheit der Regelungen bemüht. Es versteht sich, dass diese Rechtsordnungen nicht den gesamten Rechtsraum der Region Osteuropa-Zentralasien abbilden, sondern dass auch die hier nicht vertieft angesprochenen Rechtsordnungen im Bereich des Schadensrechts charakteristische, interessante Merkmale aufweisen. Nach Möglichkeit werden im Rahmen des an die Länderberichte anschließenden Vergleichs auch andere Rechtsordnungen angesprochen.

I. Estland

Das estnische Obligationenrechtsgesetz enthält einen besonderen Abschnitt zum Schadensrecht (Kap.7 §§ 128-140), der grundsätzlich für alle Schadenersatzansprüche gilt, aber auch einzelne Sondervorschriften für vertragliche Schadenersatzansprüche enthält. An der Spitze steht eine allgemeine Regel über das Ziel des Schadensersatzes: so weit wie möglich Herstellung des Zustandes, der ohne den schadensverursachenden Vorgang bestehen würde (§ 127 Abs.1 estn ObIRG). An zweiter Stelle folgt die generelle Aussage, ein Schaden sei insoweit nicht zu ersetzen als die verletzte Norm oder Verpflichtung nicht auf die Gewähr von Schadensersatz abziele (§ 127 Abs.2). § 127 Abs.3 enthält eine, auf vertragliche weitere Regel zur Begrenzung des Schadensersatzes, die nach ihrem Wortlaut auf vertragliche Schadensersatzansprüche beschränkt ist: die Ersatzpflicht beschränke sich auf Schäden, die der Verursacher vorhersah oder hätte vorhersehen können¹⁶. § 127 Abs.4 verankert das Kausalitätserfordernis als generelle Haftungsvoraussetzung und erwähnt in diesem Zusammenhang besonders auch die haftungsausfüllende Kausalität¹⁷. § 127 Abs.5 kodifiziert den Grundsatz der

16 Ähnlichkeit mit Art.74 CISG.

17 Zur Unterscheidung von haftungsbegründender und haftungsausfüllender Kausalität s.a. z.B. Hermann Lange/Gottfried Schiemann, Schadensersatz, 3. Aufl. (2003), S.77-78.

Vorteilsausgleichung. § 127 Abs.6 S.1 schließlich räumt dem Gericht erforderlichenfalls eine Schätzungsbefugnis zur Bemessung des Schadensersatzes ein.

§ 128 estn. ObIRG beschreibt bzw. bestimmt verschiedene Kategorien ersatzfähiger Schäden: Vermögens- und Nichtvermögensschaden (§ 128 Abs.1), wobei im Hinblick auf Vermögensschäden, „insbesondere“ zwischen direktem Schaden und entgangenem Gewinn unterschieden wird (§ 128 Abs.2). In § 128 Abs.3 – 5 werden die entsprechenden Schadenskategorien genauer beschrieben. Die §§ 130 - 134 estn. ObIRG enthalten Sonderregeln zum Schadensersatz bei Körper- und Gesundheitsschäden (§ 130), bei Verletzung von Persönlichkeitsgütern (§ 131), bei Sachschäden (§ 132) sowie Umweltschäden (§ 133). § 134 befasst sich mit Besonderheiten des Ersatzes immaterieller Schäden. § 135 enthält wohl vom CISG inspirierte Sonderregel über die Bestimmung des Schadensersatzes bei vertraglicher Haftung (Ersatzgeschäfte etc.¹⁸).

§ 136 regelt die Art der Leistung des Schadensersatzes: grundsätzlich durch Geldleistung (mit verschiedenen Varianten, § 136 Abs.1-4), ausnahmsweise auch auf andere Weise (§ 136 Abs.5). § 137 und § 138 regeln den Schadensersatz bei Haftung mehrerer Personen. § 139 regelt die Reduzierung des Schadensersatzes bei Mitverschulden des Geschädigten, und die abschließende Vorschrift des § 140 behandelt zwei weitere Fallgruppen von Begrenzungen des Schadensersatzes: kraft gerichtlicher Entscheidung aus Billigkeitsgründen (§ 140 Abs.1) oder kraft besonderer gesetzlicher Regelung (§ 140 Abs.2).

Außerhalb von Kap.7 estn. ObIRG finden sich Vorschriften über Art und Umfang des Schadensersatzes auch an einigen weiteren, aber eher wenigen Stellen des Gesetzes, z.B. (partiell) in § 106 ObIRG (Zulässigkeit haftungsausschließender oder haftungsbeschränkender Vereinbarungen) und im Rahmen des Deliktsrechts¹⁹, z.B. § 1061 Abs.3 estn. ObIRG (im Rahmen der Produzentenhaftung kein Ersatz von Schäden am Produkt selbst und § 1065 ObIRG (besondere Beweislastregelung in der Produzentenhaftung)²⁰.

18 Ähnlichkeit mit Art.75 und 76 CISG.

19 Kap.53 estn. ObIRG §§ 1043-1067.

20 Diese Vorschriften beruhen auf der EG-Produkthaftungsrichtlinie von 1985, eine Anpassung an die neue Richtlinie von 2024 ist noch nicht erfolgt.

II. Georgien

Das georgische Zivilgesetzbuch enthält, ähnlich wie das BGB und das estnische Recht, im Rahmen des Allgemeinen Schuldrechts einen besonderen Abschnitt zum Schadensrecht (Buch 3 Obligationenrecht Titel 4, Art.408-415).

An der Spitze steht, ähnlich wie bei § 249 Abs.1 dt. BGB und wie bei der „Zielbestimmung“ in § 127 Abs.1 estn. OblRG, die Verpflichtung zur Herstellung des Zustandes, der ohne das Schädigungsgeschehen bestehen würde (Art.408 Abs.1 georg. ZGB). Darauf folgen einige technische Vorschriften zur Art der Leistung des Schadensersatzes bei Körper- und Gesundheitsschäden (Art.408 Abs.2 – 4 georg ZGB)

Art.409 georg. ZGB befasst sich, in Anlehnung an § 251 dt. BGB, mit dem Verhältnis von Naturalrestitution und Geldersatz. Wie das deutsche Recht geht die Vorschrift implizit vom Vorrang der Naturalrestitution aus. Geldersatz ist nach Art.409 georg. ZGB nur bei Unmöglichkeit oder Unangemessenheit der Naturalrestitution vorgesehen. Einer Vorschrift außerhalb von Titel 4 (Art. 394 Abs.1 georg. ZGB), im Kontext der Haftung in schuldrechtlichen Sonderbeziehungen, ist wohl zu entnehmen, dass insoweit grundsätzlich nur Geldentschädigung zu leisten ist.

Art.410 ZGB verbietet grundsätzlich vorgängige Vereinbarungen über einen Ausschluss der Haftung für Verpflichtungen. Art.395 Abs.2 georg. ZGB, wiederum im Abschnitt über die Verletzung schuldrechtlicher Pflichten, beschränkt dieses Verbot aber auf vorsätzliche Pflichtverletzungen.

Art.411 georg. ZGB stellt, ähnlich wie § 252 BGB, klar, dass der Anspruch auf Schadensersatz auch entgangenen Gewinn umfasst, scheint sich nach seinem Wortlaut aber auf den Schadensersatz wegen Pflichtverletzung in Sonderbeziehungen zu beschränken.

Art.412 georg. ZGB beschränkt den Schadensersatz auf Schäden, die für den Schädiger vorhersehbar waren, und die als „direkte“ Schäden zu qualifizieren sind.

Art.413 georg. ZGB behandelt, angelehnt an § 253 dt BGB, den Ersatz immaterieller Schäden. Geldersatz für immaterielle Schäden kann danach grundsätzlich nur bei besonderer gesetzlicher Anordnung gewährt werden (Art.413 Abs.1). Eine solche besteht bei Verletzung von Körper oder Gesundheit (Art.413 Abs.2), darüber hinaus beispielsweise bei Persönlichkeitsverletzungen (Art.18

Pkt.6 georg ZGB). Eine Unterscheidung nach Haftung in schuldrechtlichen Sonderbeziehungen und im Deliktsrecht wird insoweit nicht getroffen.

Art.414 georg. ZGB enthält eine weitere Regelung zur Berechnung des Schadensersatzes: Bei der Verletzung von Pflichten in Sonderbeziehungen ist insoweit auch das Erfüllungsinteresse „zu berücksichtigen“ sein (Art.414 S.1 georg. ZGB). Die letzte Vorschrift des Abschnitts (Art.415 georg. ZGB) regelt die Herabsetzung des Schadensersatzes bei Mitverschulden des Geschädigten.

Insgesamt ist der schadensrechtliche Abschnitt des georgischen ZGB ausführlicher gestaltet als die §§ 249 ff dt. BGB, aber weniger systematisch strukturiert als die estnische Regelung. Viele Regelungen des Schadensrechts werden im georgischen ZGB zudem an anderer Stelle geregelt, z.B. vor allem in anderweitigen Systemzusammenhängen des allgemeinen Schuldrechts, im Vertragsrecht und im Deliktsrecht.

III. Kroatien

Kroatien verfügt, wie derzeit auch noch alle anderen Nachfolgestaaten Jugoslawiens²¹, nicht über eine Gesamtkodifikation des Zivilrechts, sondern über zivilrechtliche Einzelgesetze, die aber insgesamt alle großen Materien des Zivilrechts abdecken. Das Schadensrecht ist in Kroatien im Obligationengesetz von 2005 geregelt, das seinerseits weitgehend auf das gesamtjugoslawische, damals moderne und auf rechtsvergleichender Grundlage entwickelte Obligationengesetz von 1978 zurückgeht²².

Das Obligationengesetz von 2005 enthält keine übergreifende Regelung zum Schadensrecht²³, wohl aber ausführliche Vorschriften zum Schadensrecht in Sonderbeziehungen, insbesondere zum Schadensersatz bei vertraglicher Haftung (Art.342-349 kroat. ObIG), sowie im Deliktsrecht (Art.1045 ff, insbes.

21 In mehreren Staaten sind aber Arbeiten an einer Gesamtkodifikation des Zivilrechts in einem ZGB im Gange (Serbien, Montenegro, Nord-Mazedonien, Kosovo), s.o. bei Fn.11.

22 S. *Ivan Tot*, The Yugoslav Law on Obligations of 1978 and the Legacy of Professor Mihailo Konstantinović (1897–1982): The Influence of the Interwar Period on Post-WWII Legal Transfers, <https://british-association-comparative-law.org/2024/03/08/the-yugoslav-law-on-obligations-of-1978-and-the-legacy-of-professor-mihailo-konstantinovic-1897-1982-the-influence-of-the-interwar-period-on-postwar-legal-transfers-by-ivan-tot/> (sub Part V) (abgefragt am 29.10.2025).

23 In den Allgemeinen Vorschriften des Gesetzes findet sich nur eine Vorschrift, nach der jedermann verpflichtet ist, Schädigungen anderer zu vermeiden (Art.8 kroat. ObIG).

Art.1085-1106 kroat. OblG). Bemerkenswert ist die Querverweisung zwischen diesen Regelungen: Art.349 kroat. OblG verweist im Hinblick auf den Schadensersatz in Verträgen subsidiär auf die Regeln über den Schadensersatz im Deliktsrecht, und Art.346 Abs.6 kroat. OblG enthält eine ähnliche Verweisung vom Schadensersatz in Verträgen auf Schadensersatz in sonstigen Schuldrechtsbeziehungen.

Nach kurzen Ausführungen zur Haftungsbegründung in Verträgen (Art.342-345 kroat. OblG)²⁴ setzen die eigentlichen – ebenfalls recht kurz gefassten – Vorschriften über den Schadensersatz (Art.346-349 kroat. OblG) mit der generellen Regel ein, dass der Gläubiger bei Pflichtverletzungen seitens des Vertragspartners Anspruch auf Ersatz des durch die Pflichtverletzung verursachten „gewöhnlichen Schadens“ (obične štete), Verlust von entgangenem Gewinn sowie auf eine „angemessene Entschädigung für Nichtvermögensschaden“ (pravičnu naknadu neimovinske štete) habe (Art.346 Abs.1 kroat. OblG). Der Anspruch wird dabei auf für den Schädiger vorhersehbare Schäden begrenzt. Diese Beschränkung entfällt bei fraudulöser oder vorsätzlicher oder grob fahrlässiger Pflichtverletzung (Art.346 Abs.2 kroat. OblG). Art.346 Abs.3 kroat. OblG verankert den Grundsatz der Vorteilsausgleichung, allerdings in etwas gemilderter Form (u razumnoj mjer – in vernünftigem Maße). Art.346 Abs.4 und Art.347 kroat. OblG behandeln die Herabsetzung des Schadensersatzes wegen Mitverschuldens des Gläubigers.

Die Vorschriften zum Schadensersatz innerhalb des Deliktsrechts unterscheiden im Grundansatz zwischen Vermögensschäden und Nichtvermögensschäden. Obwohl das kroatische Haftungsrecht von der deliktischen Generalklausel ausgeht, wird in einigen schadensrechtlichen Vorschriften auch nach bestimmten Rechtsgütern unterschieden: Verletzung von Leben, Körper, Gesundheit, anderen Persönlichkeitsgütern, reine Vermögensschäden; auch Sachschäden werden angesprochen.

Die einleitende Vorschrift innerhalb des Deliktsrechts zum Ersatz von Vermögensschäden (Art.1085 Abs.1 kroat. OblG) statuiert die Verpflichtung zur Naturalrestitution. Geldersatz wird nur geschuldet, wenn oder soweit die Naturalrestitution nicht genügend oder nicht möglich ist oder aus besonderen Gründen nicht angemessen erscheint (Art.1085 Abs.2 bis 4 kroat. OblG). Gemäß Art.1088

24 Teilweise werden dort auch bereits Aspekte des Schadensrechts angesprochen, z.B. Vereinbarungen über eine Haftungserweiterung oder eine Haftungsbeschränkung, Art.344, 345 kroat. OblG.

kroat. ObLG ist bei Körper- und Gesundheitsschäden Ersatz grundsätzlich in Form einer Rentenzahlung zu leisten.

Bei Vermögensschäden sind nach Art.1089 kroat. ObLG sowohl der „gewöhnliche Schaden“ (obične štete) und entgangener Gewinn zu ersetzen. Auch im Deliktsrecht ist der „volle Schaden“ zu ersetzen; dieser wird in Art.1090 kroat. ObLG durch einen Vergleich mit der Vermögenslage des Geschädigten „ohne die Schädigungshandlung“ bestimmt. Gemäß Art.1091 kroat. ObLG kann das Gericht auch deliktischen Schadensersatz aus sozialen Gründen herabsetzen, und Art.1092 kroat. ObLG sieht auch bei deliktischem Schadensersatz eine Herabsetzung bei Mitverschulden des Geschädigten vor.

Der Abschnitt zum Schadensersatz innerhalb des Deliktsrechts schließt mit einigen z.T. recht detailreichen Vorschriften über den Ersatz immateriellen Schadens. Vorangestellt ist zunächst, im Fall von Persönlichkeitsverletzungen, ein Anspruch auf Veröffentlichung von Gerichtsentscheidungen, Widerruf u.ä. (Art.1099 kroat. ObLG). Der Anspruch auf Ersatz immateriellen Schadens richtet sich auf eine angemessene Entschädigung und ist insbesondere bei Verletzung von Persönlichkeitsrechten, aber auch in qualifizierten Fällen von Verletzungen anderer Persönlichkeitsgüter (Tötung, schwere Körperverletzung, Sexualdelikte u.a.) vorgesehen. Dieser Anspruch ist unabhängig von einem etwaigen Anspruch auf Ersatz von Vermögensschäden in solchen Fällen (Art.1100-1106 kroat. ObLG).

IV. Lettland

Das lettische Zivilgesetzbuch (civillikums) enthält allgemeine Vorschriften zum Schadensrecht in Kapitel 8 (Art.1770-1792) von Buch 4 (Obligationenrecht). Das allgemeine deliktsrechtliche Kapitel des ZGB (Buch 4 Kap.3: Art.1635-1668) ist dagegen von schadensrechtlichen Vorschriften freigehalten. Jedoch finden sich an späterer Stelle in einem separaten Unterkapitel über bestimmte Deliktssituationen (Art.2347-2368 ZGB: Körper- und Gesundheitsschädigungen, Verletzung von Persönlichkeitsgütern, Sachschädigungen, Schäden durch von Gebäuden etc. herabfallende Gegenstände, Schädigungen durch Tiere), das unter die Kapitelüberschrift „Andere Ansprüche“ eingeordnet ist, neben haftungsbegründenden Regeln auch einige Sonderegeln zu Art und Umfang des Schadensersatzes. Art.1770 lett. ZGB definiert den Begriff Schaden („zaudējumu“, wörtl. Verlust), vermögensrechtlich als „finanziell messbare Einbuße“. Im Kontext des Deliktsrechts wird für Schäden zum Teil auch ein anderer

Schadensbegriff verwendet (bojājumi, Verletzung, Schädigung), die Begrifflichkeit erscheint aber mehr vom allgemeinen Sprachgebrauch geprägt zu sein als von dogmatischen Überlegungen.

Der lettische Gesetzgeber gliedert das Kapitel 8 in drei Unterkapitel: „Arten von Schäden“ (Art.1770-1775 lett. ZGB), „Recht auf Schadensersatz“ (Art.1776-1778 lett. ZGB), „Verpflichtung zum Schadensersatz“ (Art.1779-1785 lett. ZGB) sowie „Bewertung des Schadens“ (Art.1786-1792 lett. ZGB). Unterschieden werden bereits entstandene und künftige Schäden (Art.1771 lett. ZGB), Vermögensminderung und entgangener Gewinn (Art.1772 lett. ZGB), „direkte“, „indirekte“ und „zufällige“ Schäden (Art.1773 lett. ZGB). Unter „direkten“ Schäden werden Einbußen verstanden, die das „natürliche und unvermeidliche“ Ergebnis einer Handlung (oder Unterlassung) sind, während „indirekte“ Schäden das Ergebnis „besonderer Umstände oder Beziehungen“ sind. Der Begriff des „zufälligen“ Schadens wird im wesentlichen zu dem Zweck definiert, eine Ersatzfähigkeit (grundsätzlich) auszuschließen (Art.1774 und Art.1775 lett. ZGB). Im Unterabschnitt über das Recht auf Schadensersatz wird im wesentlichen der Haftungsausschluss bei Mitverschulden angesprochen (Art.1176 lett. ZGB).

Aus dem Unterabschnitt über die Verpflichtung zum Schadensersatz ergibt sich (implizit) die Verpflichtung zum Ersatz des gesamten Schadens (Art.1779, besonders deutlich Art.1774 für Schadenszufügung außerhalb vertraglicher Beziehungen). Für den Umfang des Schadensersatzes im Rahmen vertraglicher Beziehungen verweist Art.1780 lett. ZGB auf das Vertragsrecht.

Der Unterabschnitt über die Bewertung des Schadens enthält eine Reihe spezieller Aussagen, z.B. dass die Pflicht zum Ersatz von Vermögensschäden sich auf den entgangenen Gewinn erstreckt (Art.1786 f. lett. ZGB) und dass es bei der Bewertung der Schädigung von Vermögensgegenständen nicht nur auf einen „normalen“ Wert des Gegenstandes ankomme, sondern auf den Wert speziell für den Geschädigten, aber ohne Berücksichtigung eines besonderen Affektionsinteresses (Art.1788 lett. ZGB).

Der Grundsatz der Naturalrestitution wird in diesem Kapitel nicht ausdrücklich angesprochen, implizit liegt allen Vorschriften der Gedanke des Geldersatzes zugrunde. Auch Besonderheiten der haftungsausfüllenden Kausalität werden nicht thematisiert.

Die deliktsrechtlichen Sondervorschriften von Buch 4 Kap.19 (Art.2347-2368 ZGB) enthalten verschiedene Konkretisierungen des zu ersetzenden Schadens, z.B. zur Ersatzfähigkeit der Kosten medizinischer Behandlung (Art.2347 Abs.1 S.1

ZGB). Auch die Ersatzfähigkeit entgangenen Gewinns bzw. entgangener Einnahmen wird hier besonders angesprochen, z.T. verbunden mit gerichtlichem Ermessen (s. Art.2347 Abs.1 S.2 ZGB, weitergehend Art.2348 lett. ZGB). In diesem Zusammenhang wird (allerdings in sehr engem Rahmen: körperliche Entstellungen, z.T. mit unter Gleichbehandlungsgesichtspunkten problematischer Sonderbehandlung von Frauen²⁵) auch die Ersatzfähigkeit von Nichtvermögensschäden angesprochen, wobei die Entscheidung in der Regel in das Ermessen des Gerichts gelegt wird (s. Art.2349 Abs.1 lett. ZGB; etwas weitergehend Art.2352a lett. ZGB bei Persönlichkeitsrechtsverletzungen).

Bei Freiheitsberaubungen sieht Art.2352 lett. ZGB an erster Stelle Naturalherstellung durch Freilassung des Opfers vor, daneben Geldersatz für immateriellen Schaden. Bei anderen Persönlichkeitsverletzungen regelt Art.2352a lett. ZGB verschiedene Ansprüche der Betroffenen, z.B. auf Widerruf, aber auch auf Ersatz immateriellen Schadens. Insgesamt wirken diese Regelungen, die häufig auf Gesetzesänderungen nach der Wiedererlangung der staatlichen Unabhängigkeit Lettlands beruhen, sehr pointillistisch und tendenziell restriktiv.

V. Polen

Kernregelung des polnischen Zivilrechts ist auch heute noch das in der sozialistischen Epoche entstandene, aber inzwischen vielfach überarbeitete Zivilgesetzbuch (*kodeks cywilny*) aus dem Jahr 1964²⁶. Das polnische ZGB enthält im Allgemeinen Teil des Obligationenrechts (Buch 3 Titel 1 Art.353-365/1 poln. ZGB) drei knappe, aber inhaltsreiche Vorschriften zum Schadensrecht: Art.363-365 poln. ZGB). Sie setzen das Bestehen einer sich aus anderen Vorschriften (z.B. Vertrags- oder Deliktsrecht) ergebenden Verpflichtung zum Schadensersatz voraus. Die an der Spitze stehende Vorschrift des Art.363 § 1 ZGB begrenzt den Umfang des zu leistenden Schadensersatzes auf „normale Folgen“ der schädigenden Handlung (oder Unterlassung). Sie verwendet den allgemein im polnischen Recht verwendeten Begriff des Schadens (*szkod*). Zugleich wird in der Vorschrift das Kriterium der haftungsausfüllenden Kausalität gesetzlich verankert. Gemäß Art.363 § 2 poln. ZGB ist grundsätzlich der gesamte verursachte Schaden zu ersetzen (Totalreparation): das Gesetz spricht insoweit von entstandenen

25 S.a. Art.2353 lett. ZGB.

26 S. dazu im Überblick *Wolfgang Ernst*, https://hwb-eup2009.mpipriv.de/index.php/Polnisches_Zivilgesetzbuch#%C3%9Cbersetzungen_von_Rechtstexten (abgefragt am 3.11.2025).

Verlusten (*straty*) als auch von entgangenen Vorteilen (*korzyści*). Die Möglichkeit von gesetzlichen oder vertraglichen Ausnahmen wird aber ausdrücklich angesprochen. Art.364 poln. ZGB regelt die Herabsetzung des Schadensersatzes entsprechend einem etwaigen Mitverschulden des Geschädigten an der Schädigung selbst oder der Schadenshöhe. Die Herabsetzung soll „den (Gesamt-)Umständen entsprechend“ erfolgen, wobei dem Verschulden beider Seiten besonderes Gewicht zukommen soll.

Art.363 poln. ZGB schließlich regelt die Art der Leistung des Schadensersatzes: Grundsätzlich hat der Geschädigte das Wahlrecht zwischen Naturalrestitution oder Geldersatz (Art.363 § 1 S.1 poln. ZGB). Gemäß Art.363 § 1 S.2 poln. ZGB kann jedoch nur Geldersatz verlangt werden, wenn Naturalrestitution entweder unmöglich ist oder für die verpflichtete Partei mit übermäßigen Schwierigkeiten oder Kosten verbunden wäre. Art.363 § 2 poln. ZGB behandelt einen Spezialaspekt des Geldersatzes (Berechnung der Kosten grundsätzlich nach dem Zeitpunkt der Leistung des Schadensersatzes).

Ergänzende Regelungen zum Schadensersatz finden sich im Vertragsrecht, aber insbesondere im Deliktsrecht (ZGB Buch 3 Titel VI Art.415-449, dazu für die Produzentenhaftung Art.449/1 – 449/10 poln. ZGB). So sieht z.B. Art.439 poln. ZGB („Schadensprävention“) im Rahmen des Deliktsrechts einen Abwehranspruch gegen drohende Schädigungen vor. Art.440 poln. ZGB erlaubt dem Gericht im Verhältnis zwischen natürlichen Personen als Deliktsbeteiligten eine angemessene Schadensherabsetzung entsprechend der finanziellen Lage beider Seiten. Art.445 poln. ZGB erlaubt bei Personenschädigungen, unter Einschluss von Freiheitsberaubung und Handlungen gegen die sexuelle Selbstbestimmung die Zuerkennung von Ersatz für immateriellen Schaden (Schmerzensgeld). Ergänzt wird dies durch Sonderregelungen zum Schutz von Persönlichkeitsgütern bzw. Persönlichkeitsrechten im Allgemeinen Teil des Zivilgesetzbuchs (Art.23 f. poln. ZGB)²⁷.

VI. Russland

Das russische Zivilgesetzbuch steht – auch für den Bereich des Schadensrechts - als Beispiel für die Mehrzahl der Staaten des postsowjetischen Raums, die ihr Zivilrecht auf der Grundlage des Modell-Zivilgesetzbuchs der GUS

27 S. dazu *Katarzyna Mol*, Haftung für Pressepublikationen: eine vergleichende Untersuchung des polnischen und deutschen Zivilrechts (2000), passim.

gestaltet haben. Aufgrund der traditionell sehr umfangreichen russischen Fachliteratur und Diskussion, aber auch aufgrund des politischen Gewichts Russlands in der Region, kommt dem russischen Recht auch heute noch im postsowjetischen Raum eine Art Modellfunktion zu. Sonderentwicklungen in den verschiedenen Staaten und länderspezifische Rechtsprechung sind aber stets vorrangig zu beachten.

Anders als die bisher erörterten Rechtsordnungen enthält das russische ZGB keinen zusammenfassenden Abschnitt zum Schadenersatzrecht im Allgemeinen Teil des Schuldrechts, sondern eine sehr kurz gefasste allgemeine Vorschrift zum Schadensrecht im Allgemeinen Teil des Zivilgesetzbuchs (Art.15 ZGB²⁸). Ergänzende Vorschriften zum Schadensrecht finden sich in verschiedenen anderen Abschnitten des ZGB, insbesondere in bezug auf Schadenersatz in bestehenden Schuldrechtsbeziehungen (Art.393-406 russ. ZGB) und im Deliktsrecht (Art.1064-1101 russ. ZGB, z.B. Art.1082-1084, 1089-1091, 1099-1101 russ. ZGB; für Persönlichkeitsverletzungen s.a. Art.151 russ. ZGB).

Art.15 Pkt.1 russ. ZGB verankert den Grundsatz der Totalreparation, verweist aber auf mögliche Ausnahmen. Art.15 Pkt.1 russ. ZGB verknüpft die Verpflichtung zur Leistung von Schadenersatz mit der „Verletzung eines Rechts“ des Geschädigten und erwähnt das Erfordernis der Kausalität zwischen Rechtsverletzung und dem entstandenen Schaden, d.h. die haftungsausfüllende Kausalität. Zur Bezeichnung des Schadens verwendet Art.15 ZGB grundsätzlich den Begriff „ubytki“ (wörtlich nahekommend: Verluste). Art.15 Pkt.2 ZGB verwendet daneben auch den Begriff „ushcherb“. Im Kontext des Deliktsrechts wird demgegenüber Schaden grundsätzlich mit dem Begriff „vred“ bezeichnet. Die drei Begriffe werden im ZGB nicht klar unterschieden und wohl synonym verwendet²⁹. Besonderheiten der Auslegung im Rahmen einzelner Vorschriften sind dadurch nicht ausgeschlossen. In Art.15 Pkt.2 S.1 ZGB werden sodann verschiedene Untergruppen ersatzfähigen Schadens definiert: Kosten zur Wiederherstellung des Zustands ohne die Schädigung, Verlust oder Schädigung von „Vermögen“ (imushchestvo) – dies begrifflich definiert als „realer Schaden“ – und entgangener Gewinn. Als Besonderheit statuiert Art.15 Pkt.2 Satz 2 ZGB zudem, dass der

28 Im Modell-ZGB der GUS entspricht dem ebenfalls die Vorschrift des Art.15. Art.15 russ. ZGB weicht von Art.15 des Modell-ZGB leicht ab: Art.15 Pkt.1 ZGB sieht auch gesetzliche Sonderregelungen vor, die höheren Schadenersatz als eine Totalreparation gewähren. Das Modell-ZGB erwähnt nur niedrigeren Ersatz.

29 S. dazu auch *Hans-Joachim Schramm* (Fn.12).

Schadensersatzanspruch auch die Herausgabe einer Bereicherung umfasst, die der Schädiger infolge der Schädigung erlangt hat (Verletzererwerb).

Art.15 ZGB differenziert nicht ausdrücklich zwischen Vermögensschäden und Nichtvermögensschäden, geht aber wohl implizit von Vermögensschäden aus. Für Nichtvermögensschäden (nur ausnahmsweise Geldersatz, insbesondere bei Verletzung von Persönlichkeitsgütern), bestehen Sondervorschriften in Art.151 russ. ZGB und Art.1099-1101 russ. ZGB). Die Sondervorschriften verweisen häufig auf Art.15 ZGB; eine ausdrückliche Querverweisung zwischen den Vorschriften über den Schadensersatz in Sonderbeziehungen und im Deliktsrecht fehlt jedoch.

Innerhalb der Vorschriften über den Schadensersatz in schuldrechtlichen Sonderbeziehungen (Art.393-406 ZGB) sind Bestimmungen über die Haftungsbegründung eng verknüpft mit Bestimmungen über Bemessung und den Ersatz des Schadens.

So statuiert die einleitende Vorschrift des Art.393 Pkt.1 S.1 russ. ZGB zunächst die haftungsbegründende Grundregel, dass die Verletzung einer (Primär-)Verpflichtung zur Sekundärverpflichtung auf Leistung von Schadensersatz führt. Art.393 Pkt.1 S.2 russ. ZGB ergänzt dies mit der für vertragliche Schadensersatzansprüche typischen Aussage, dass die Leistung von Schadensersatz grundsätzlich nicht von Pflicht zur Erfüllung der Primärverbindlichkeit befreit.

Art.393 Pkt.2 russ. ZGB verweist für den Schadensersatz zunächst auf die Grundregel des Art.15 russ. ZGB und fährt sodann fort, dass in Sonderbeziehungen der Schadensersatzanspruch grundsätzlich auf Ersatz des positiven Interesse gerichtet ist. Art.393 Pkt.3-6 russ. ZGB enthalten weitere Konkretisierungen zur Bestimmung bzw. Feststellung des zu ersetzenden Schadens, u.a. auch zu einer Schadensschätzung durch das Gericht (Art.393 Pkt.5 russ. ZGB). Die im Rahmen einer größeren Überarbeitung des ZGB im Jahr 2015 eingeführte Vorschrift des Art.393.1 russ. ZGB regelt – angelehnt an Art.75, 76 CISG – die Bestimmung des Schadensersatzes bei Vornahme von Ersatzgeschäften. Art.394 russ. ZGB behandelt das Verhältnis zwischen einer Vertragsstrafe (neustojka) und dem Anspruch auf Schadensersatz. Art.395 russ. ZGB sieht bei Verletzung von Geldzahlungspflichten eine Verzinsungspflicht als Mindestschaden vor. Art.396-398 befassen sich mit weiteren Einzelaspekten des Schadensersatzes, Art.400 spricht Sonderregeln und Vereinbarungen über eine Haftungsbeschränkung an, und die diesen Abschnitt abschließende, ebenfalls im Jahr 2015 eingeführte Vorschrift des Art.406.1 russ. ZGB sieht die Möglichkeit vor, dass die Parteien in

unternehmerischen Beziehungen vertraglich auch eine von einer Pflichtverletzung unabhängige Schadensersatzpflicht vereinbaren.

Auch im russischen Deliktsrecht (ZGB Teil 2, Kap.59, Art.1064-1101) sind die Vorschriften über Haftungsbegründung und über die Ausgestaltung des zu leistenden Schadensersatzes (Haftungsausfüllung) eng verknüpft.

Bereits die Eingangsvorschrift (Art.1064 Pkt.1 S.1 ZGB) verbindet die haftungsbegründende Grundregel – jede³⁰ Schädigung der Persönlichkeit oder des Vermögens einer Person führt zu einem Schadensersatzanspruch – mit der Aussage der Totalreparation. Art.1064 Pkt.1 S.2 ZGB ergänzt für die Haftungs begründung, dass durch Gesetz die Haftpflicht auch einem Dritten (z.B. einer Versicherung) auferlegt werden könne. Art.1064 Pkt.1 S.3 ZGB trifft eine wesentliche Aussage über den Umfang des Schadensersatzes: Durch Gesetz oder Vertrag könne eine Ausgleichszahlung (Kompensation) in einem die Schadenshöhe übersteigenden Umfang festgelegt werden.

Gemäß Art.1064 Pkt.3 S.2 ZGB kann das Gericht die Gewährung von Schadensersatz versagen, wenn der Geschädigte die Schädigung verlangt hat oder mit ihr einverstanden war³¹. Dies soll aber nur gelten, wenn dieses Verlangen oder Einverständnis nicht den guten Sitten widerspricht.

Sogleich nach der grundlegenden Haftungsvorschrift des Art.1064 ZGB regelt Art.1065 ZGB den Anspruch auf Unterlassung drohender Schädigungen und betont damit den Zusammenhang der Ausgleichsfunktion des Schadensersatzes mit Präventiv Gesichtspunkten.

Art.1080 f. russ. ZGB regeln die Haftung mehrerer Schädiger einschließlich etwaiger Regressansprüche. Gemäß Art.1082 ZGB ist der Schaden nach Entscheidung des Gerichts entweder in Natur oder durch Geldleistung zu ersetzen. Art.1082 ZGB bringt für das Deliktsrecht keine Priorität einer der beiden Ersatzweisen zum Ausdruck. Art.1083 russ. ZGB sieht in einer sehr ausdifferenzierten Vorschrift bei Mitverschulden des Schädigers die Herabsetzung des Schadensersatzes vor. Nach Art.1083 Pkt.3 ZGB kann das Gericht bei Schädigungen durch eine natürliche Person den Schadensersatz unter Berücksichtigung der finanziellen Lage des Schädigers herabsetzen (Sozialschutzgedanke zugunsten von Schädigern), nimmt hiervon aber vorsätzliche Schädigungen aus. Weitere Sondervorschriften über die Höhe und Leistung von Schadensersatz sieht das

30 Grds. Rechtswidrigkeits- und Verschuldenserfordernis, Art.1064 Pkt.2 und 3 russ. ZGB.

31 Zur Berücksichtigung von Mitverschulden des Geschädigten Art.1083 russ. ZGB.

russische ZGB in besonderen Abschnitten über Körper- und Gesundheitsschädigung (Kap.59 § 2, Art.1084-1094)³² sowie über Schäden aus Produkt- und Dienstleistungshaftung (Kap.59 § 3, Art.1095-1098) vor. Ein besonderer Abschnitt ist schließlich dem Ersatz immateriellen Schadens im Rahmen des Deliktsrechts gewidmet (Kap.59 § 4, Art.1099-1101). Das Gesetz spricht insoweit nicht von Schadensersatz, sondern von Ausgleichszahlung (Kompensation) und verweist ergänzend auf Art.151 russ. ZGB.

Sonderregeln über die Leistung von Schadensersatz finden sich auch in zahlreichen spezialgesetzlichen Vorschriften, z.B. in Bezug auf Umweltschäden in Art.77 des Gesetzes über den Schutz der Umwelt vom 10.01.2002³³. Das Gesetz enthält auch Sondervorschriften über das Zusammenwirken von Vorschriften über die Umwelthaftung mit anderen Regelungen über den Umweltschutz.

VII. Slowakei

Das Schadensersatzrecht der Slowakei weist die Besonderheit auf, dass dort – ähnlich wie in Polen – weiterhin das aus der sozialistischen Epoche stammende, wenn auch überarbeitete tschechoslowakische Zivilgesetzbuch von 1964 gilt. Zugleich gilt in der Slowakei noch das nach dem Systemwechsel von 1989 erarbeitete (gesamt-)tschechoslowakische Handelsgesetzbuch von 1991. Anders als Tschechien hat die Slowakei bisher auf den Erlass eines neuen Zivilgesetzbuchs verzichtet.

Das (jetzt slowakische) Zivilgesetzbuch von 1964 enthält einen umfangreichen Teil VI (Art.415-450), der übergreifend Deliktsrecht, Schadensrecht und das Recht der ungerechtfertigten Bereicherung regelt. Anders als etwa im polnischen Zivilgesetzbuch ist damit das Schadensrecht nicht „vor die Klammer gezogen“, sondern insbesondere mit dem Deliktsrecht eng verknüpft. Viele schadensrechtliche Vorschriften sind aber nicht auf den deliktischen Kontext beschränkt, sondern gelten auch für die Haftung in Sonderbeziehungen. Für die Vertragshaftung im kaufmännischen Bereich enthält jedoch das

32 Z.B. regelt Art.1084 russ. ZGB das Konkurrenzverhältnis von Delikts- und Vertragshaftung in solchen Fällen (Vorrang des höheren Schadensersatzes), die weiteren Vorschriften betreffen insbesondere die Bestimmung des Schadensersatzes in derartigen Fällen, z.B. die Zahlung von Geldrenten und die Indexierung der Schadensersatzsumme.

33 Text s. https://www.consultant.ru/document/cons_doc_LAW_34823/43558415faf76e7f86fa8225219fa411f60c6563/ (abgefragt am 29.10.2025).

Handelsgesetzbuch von 1991 ausführliche Vorschriften (§§ 373-386 slow. HGB 1991). Sondervorschriften bestehen auch für den Schadensersatz bei der Verletzung von Persönlichkeitsgütern (§§ 11-16 slowak. ZGB).

Das slowakische ZGB stellt an die Spitze von Teil VI Regelungen zur Prävention von Schäden (Kap.1: §§ 415-419). § 415 slowak. ZGB statuiert eine allgemeine Schadensverhütungspflicht, die neben der Vermeidung von Schädigung an Gesundheit oder Eigentum ausdrücklich auch den Schutz der Umwelt anspricht. Damit verbunden sind Vorschriften zur Haftungsbefreiung, wenn bei Tätigkeiten zur Vermeidung von Schäden selbst Schäden entstehen (§ 418 (2) slowak. ZGB), sowie zum Ersatz von Aufwendungen oder Schäden gegenüber Personen, in deren Interesse gehandelt wurde (§ 419 slowak. ZGB). Die betreffenden Regelungen liegen in einem Überschneidungsfeld von Schadensrecht, Deliktsrecht und Geschäftsführung ohne Auftrag.

Kapitel 2 dieses Teils fasst unter der Überschrift „Haftung für Schäden“ Vorschriften zur Haftungsbegründung (deliktische und sonstige Haftung) und zur Haftungsausfüllung zusammen. Nach der Generalklausel des § 420 (1) slowak. ZGB führt jede Verletzung „einer Pflicht“ zu einem Anspruch auf Ersatz des kausal herbeigeführten Schadens³⁴. Verschulden wird grundsätzlich weder für die Haftungsbegründung noch für die Haftungsausfüllung verlangt, nach Art.420a (3) slowak. ZGB entlastet grundsätzlich nur höhere Gewalt. Nach dem Wortlaut der Vorschriften besteht damit im slowakischen Recht theoretisch ein äußerst weitgehendes Haftpflichtregime, das allerdings in einigen nachfolgenden Vorschriften³⁵ und auch im Bereich der Vertragshaftung nach dem HGB³⁶ etwas gemildert wird.

Vorschriften zur Haftungsausfüllung finden sich in einer allerdings etwas zufällig anmutenden Abfolge in Abschnitt 3 von Kapitel 2: Danach sind grundsätzlich sowohl der „tatsächliche Schaden“ (skutečná škoda) als auch entgangener Gewinn zu ersetzen (Art.442 (1) slowak. ZGB). Grundsätzlich ist Geldersatz geschuldet (Art.442 (2) 1. HS. slowak. ZGB); der Geschädigte kann aber Naturalrestitution verlangen, wenn diese „möglich und sinnvoll“ ist (Art.442 (2) 2. HS. slowak. ZGB). Ein erweiterter Schadensersatz ist vorgesehen bei Schädigungen im Rahmen einer vorsätzlichen Straftat (Art.442 (3) slowak. ZGB). Bei

34 Zur Beweislast für die Kausalität s. § 420 (3) slowak. ZGB (der in Anspruch Genommene muss sich entlasten).

35 S. z.B. §§ 424, 440 slowak. ZGB.

36 Vgl. §§ 373-377 slowak. HGB.

Gesundheitsschädigungen ist auch die Zuerkennung von Schmerzensgeld vorgesehen (Art.444 slowak. ZGB). Weitere Vorschriften befassen sich mit Einzelheiten des Schadensersatzes bei Gesundheitsschädigungen u.ä. (§§ 445-449 slowak. ZGB). Bei besonderen Gründen, insbesondere aufgrund sozialer Gesichtspunkte, wird der Schadensersatz durch gerichtliche Entscheidung reduziert (§ 450 slowak. ZGB).

VIII. Tschechien

Im Unterschied zur Slowakei hat Tschechien im Jahr 2012 ein neues Zivilgesetzbuch (*občanský zákoník*) erlassen und zugleich das Handelsgesetzbuch von 1991 aufgehoben. Auch das neue ZGB enthält keine allgemeine Regelung zum Schadensersatzrecht im Allgemeinen Teil des Obligationenrechts (Buch 4 Titel 1 §§ 1721-2054). Eine kurze Vorschrift, nach der die Bestimmungen über Verpflichtungen aus Verträgen sinngemäß auch für andere Verpflichtungen gelten (§ 1723 (2) tschech. ZGB), erfasst zwar auch Verpflichtungen auf Leistung von Schadensersatz, hat aber mangels einer systematischen Regelung zum Schadensersatz in Verträgen insoweit wohl keine wesentliche Bedeutung. Ähnlich wie im ZGB 1964 findet sich auch im ZGB 2012 ein Sonderkapitel zur deliktischen Haftung, das sowohl Regelungen zur Haftungsbegründung als auch zur Haftungsausfüllung (Schadensersatzrecht) enthält (Buch 4 Titel III, Art.2894-2990). Trotz der Kapitelüberschrift „Ansprüche aus Delikt“ finden sich in diesem Zusammenhang auch einige Vorschriften, die sich ausdrücklich mit vertraglicher Haftung befassen (z.B. § 2913 ZGB³⁷). Es scheint, dass dieses Kapitel trotz der im Vergleich zum ZGB 1964 enger gefassten Kapitelüberschrift weiterhin sowohl die deliktische als auch vertragliche Haftung (bzw. Haftung in schuldrechtlichen Sonderbeziehungen) regelt. Innerhalb dieses Kapitels besteht, wie auch im ZGB 1964, ein Sonderabschnitt über Art und Umfang des Schadensersatzes (Titel III Abschnitt 3 §§ 2951-2971 tschech. ZGB). Dieser Abschnitt ist wiederum untergliedert in Allgemeine Bestimmungen (§§ 2951-2955), Sondervorschriften über den Ersatz von Personenschäden (§§ 2956-2968) und sonstige Vorschriften, die Besonderheiten von Sachschäden, Verletzung von Tieren und die Leistung von Schmerzensgeld behandeln (§§ 2969-2971).

Innerhalb der Allgemeinen Bestimmungen zum Schadensersatz steht an der Spitze der Grundsatz der Naturalrestitution (§ 2951 (1) S.1 tschech. ZGB).

37 Überschrift: „Verpflichtung zum Schadensersatz bei Verletzung vertraglicher Pflichten“.

Geldersatz ist zu leisten, wenn Naturalrestitution entweder „nicht gut möglich“ ist oder der Geschädigte Geldersatz verlangt (§ 2951 (1) S.2 tschech. ZGB). Damit kehrt das neue ZGB im Vergleich zur früheren Rechtslage das Regel-Ausnahme-Verhältnis von Naturalrestitution und Geldersatz um und gewährt dem Geschädigten zudem ein generelles Wahlrecht für Geldersatz. § 2951 (2) tschech. ZGB regelt den Umfang der Ersatzpflicht bei Immaterialschäden³⁸. Hier ist nicht Ersatz eines rechnerisch definierten Schadens zu leisten, sondern eine „angemessene Entschädigung“. Diese ist in Geld zu erbringen, falls kein anderweitiger Ausgleich möglich und ausreichend ist.

§ 2952 S.1 tschech. ZGB benennt, wie Art.442 (1) des ZGB 1964, ersatzfähige Schadenspositionen. Zu ersetzen ist zum einen der „tatsächliche Schaden“ (skutečná škod), zum anderen „Verluste“, die durch den Klammerzusatz „entgangener Gewinn“ (ušlý zisk) ergänzt werden. Besteht der Schaden in der Belastung mit einer Schuld, kann der Geschädigte nach seiner Wahl Befreiung von der Schuld oder Geldersatz verlangen (§ 2952 S.2 tschech. ZGB).

§ 2953 (1) tschech. ZGB sieht, wie Art.450 ZGB 1964, bei „besonderen Gründen“ (insbesondere sozialer Art) eine angemessene Herabsetzung des Schadensersatzes durch gerichtliche Entscheidung vor. § 2955 tschech. ZGB räumt dem Gericht die Befugnis zur Schadensschätzung „auf der Grundlage einer fairen Beurteilung der individuellen Umstände des Falles“ ein.

Ergänzende Regelungen zu Sonderkonstellationen des Schadensersatzes finden sich in den folgenden beiden Unterabschnitten von Titel III Abschnitt 3 (§§ 2955-2971 tschech. ZGB). Die Vorschriften sind eng an das ZGB 1964 angelehnt.

IX. Ukraine

Wichtigste Quelle des Schadensrechts der Ukraine ist das Zivilgesetzbuch (Цивільний кодекс) von 2003, insbesondere dessen Art.22 und 23 und die spezielleren Vorschriften der Art.623, 1167 f., 1188 und 1192 f., 1197 f. ukr. ZGB. Auch das vor kurzem aufgehobene Wirtschaftsgesetzbuch der Ukraine von 2003 enthielt einige Vorschriften über Haftung und Schadensersatz (Kap.25 WGB,

38 Solche sind nur bei ausdrücklicher gesetzlicher Anordnung zu ersetzen, § 2849 (2) tschech. ZGB. Ergänzend s. § 2971 tschech. ZGB.

Art.224-229)³⁹. Hinzu kommen schadensrechtliche Vorschriften in Spezialgesetzen, z.B. im Umweltschutzgesetz und im Atomgesetz.

Das ukrainische Zivilgesetzbuch folgt, wie die Zivilgesetzbücher der meisten postsowjetischen Staaten, in seiner Grundstruktur und vielen Einzelvorschriften dem Modell-ZGB der Gemeinschaft Unabhängiger Staaten, weist zugleich aber zahlreiche Sonderelemente auf. Wie das Modell-ZGB enthält es u.a. einen Allgemeinen Teil (Buch 1), und umfangreiche Regelungen zum Obligationenrecht (Buch 5).

Wie das Modell-ZGB enthält auch das ukrainische Recht in seinem Allgemeinen Teil die Grundregel des Schadensersatzrechts (Art.22 ukr. ZGB). Art.22 ukr. ZGB ist aber anders gegliedert und auch inhaltlich etwas anders gestaltet als die entsprechende Vorschrift des Art.15 GUS-Modell-ZGB. Beide Regelungen knüpfen an die Verletzung eines Rechts⁴⁰ einer Person durch einen Schädiger die Verpflichtung zum Ersatz der durch die Verletzung verursachten „Verluste“⁴¹ (Art.22 Pkt.1 ukr. ZGB). Art.22 Pkt.2 ukr. ZGB enthält sodann – wie Art.15 Pkt.2 Modell-ZGB – eine Aufstellung verschiedener erstattungsfähiger Schadensarten: „realen Schaden“ (definiert als Zerstörung oder Schädigung einer Sache und Aufwendung zur Wiederherstellung des verletzten Rechts) und den nach üblichen Umständen zu erwartende entgangene Vorteile.

Art.22 Pkt.3 S.1 ukr. ZGB statuiert ausdrücklich – anders als das Modell-ZGB – den Grundsatz der Totalreparation. Wie im Modell-ZGB wird auch im ukrainischen ZGB der Verletzergewinn als Mindestmaß entgangenen Gewinns definiert (Art.22 Pkt.3 S.2 ukr. ZGB).

Ebenfalls über das Modell-ZGB hinausgehend, regelt Art.22 Pkt.4 ukr. ZGB auch die Art des Schadensersatzes: grundsätzlich ist (implizit) Geldersatz geschuldet, aber der Geschädigte hat das Recht, „nach Maßgabe der Umstände“ eine andere Form des Schadensersatzes zu verlangen, beispielsweise Naturalrestitution.

39 Diese Regeln betrafen sowohl die vertragliche als auch die außervertragliche Haftung. Ein Element des Schadensrechts, das in vielen postsowjetischen Staaten anzutreffen ist und z.B. in Art.225 Pkt.6 WGB ausdrücklich niedergelegt war, ist die Ermittlung des entstandenen Schadens nach von der Regierung festgelegten „Methodiken“, die von einer freien Ermittlung des Schadens signifikant abweichen können. Dies ist z.B. auch ein Element des geltenden ukrainischen Umwelthaftungsrechts.

40 In Art.22 ukr. ZGB ist speziell von der Verletzung eines „zivilen“ (bürgerlichen) Rechts die Rede; offener insoweit Art.15 Modell-ZGB.

41 Ukr. збитків (zbytkiv). Dies entspricht dem im Modell-ZGB gebrauchten Begriff „ubytki“.

Ähnlich wie im GUS-Modell-ZGB besteht auch im ukrainischen Recht eine Sondervorschrift über den Ersatz immateriellen Schadens (Art.23 ukr. ZGB). Art.23 ukr. ZGB geht insoweit aber wesentlich weiter als das „Vorbild“ des Art.17 GUS-Modell-ZGB. Während das GUS-Modell Ersatz immateriellen Schadens grundsätzlich nur bei der Verletzung von Persönlichkeitsgütern natürlicher Personen vorsieht und im übrigen eine ausdrückliche gesetzliche Regelung über die Erstattungsfähigkeit solcher Schäden verlangt, statuiert Art.23 Pkt.1 ukr. ZGB generell – auch bei juristischen Personen und auch bei der vertraglichen Haftung – die Erstattungsfähigkeit immaterieller Schäden. Art.23 Pkt.2 ukr. ZGB zählt in einer Liste die Fälle erstattungsfähigen immateriellen Schadens auf: Erleiden von Schmerzen bei Körper- und Gesundheitsverletzungen, seelisches Leiden z.B. bei Beeinträchtigung in persönlichen Beziehungen oder bei der Beschädigung von Sachen, Beeinträchtigungen von Ehre und Ansehen, auch bei juristischen Personen. Die Form des Ersatzes immateriellen Schadens ist in Art.23 Pkt.3 ukr. ZGB ganz ähnlich, aber ausführlicher geregelt als in Art.17 Modell-ZGB: der Ersatz kann in Geld, aber auch in anderer Form gewährt werden, und das Gericht hat alle Umstände des Einzelfalls abzuwägen.

Die schadensrechtlichen Grundbestimmungen der Art.22 und 23 ukr. ZGB werden in anderen Büchern des ZGB, insbesondere im Allgemeinen Schuldrecht und im Deliktsrecht, durch weitere Vorschriften konkretisiert bzw. zum Teil modifiziert. So enthält Art.623 ukr. ZGB u.a. eine Sonderregel über die Bemessung des Schadenersatzes bei vertraglicher Haftung (s. Art.623 Pkt.3 ukr. ZGB). Eine größere Zahl schadensrechtlicher Sondervorschriften findet sich ferner im Deliktsrecht (s. Art.1167 f.: Sondervorschriften zum Ersatz immaterieller Schäden; Art. 1189: Verweisung auf gesetzliche Sonderregeln zur Nuklearhaftung; Art.1193: Mitverschulden des Geschädigten; Art.1197 f.: Bemessung des Schadenersatzes in Gestalt von Einkommensverlusten bei Körperverletzungen u.ä.).

Die wahrscheinlich signifikanteste Besonderheit des ukrainischen Schadensrechts ist die sehr weitgehende Ersatzfähigkeit immaterieller Schäden.

X. Ungarn

Ungarn hat im Jahr 2013, kurz nach Tschechien, ein neues Zivilgesetzbuch erlassen⁴², das an die Stelle des aus der sozialistischen Epoche stammenden

42 Englische Übersetzung z.B. bei <https://jogkodex.hu/doc/8089567> (abgefragt am 6.11.2025).

Zivilgesetzbuchs von 1959⁴³ getreten ist.

Auch das ungarische Zivilgesetzbuch 2013 ist kein vollständig neu konzipiertes Gesetz, sondern baut auf dem ZGB 1959 auf, entwickelt es aber wesentlich weiter. Es ist in Einführungsbestimmungen (Buch I), Bücher zur Rechtsstellung natürlicher Personen (Buch II), über juristische Personen (Buch III), zum Familienrecht (Buch IV; neu), Sachenrecht (Buch V), Obligationenrecht (Buch VI) und Erbrecht (Buch VII) gegliedert.

Vorschriften zum Schadensrecht finden sich überwiegend zum einen im Kontext des allgemeinen Vertragsrechts (Buch VI, Teil 2, Titel X: Vertragsverletzung Kap. XXII: Allgemeine Regeln über die Vertragsverletzung, Art.6:137-6:152), zum anderen im Deliktsrecht (Teil 4, Titel XXVI, Art.6:518-6:546). Darüber hinaus bestehen schadensrechtliche und verwandte Vorschriften an einigen anderen Stellen, z.B. zur Verletzung von Persönlichkeitsrechten in Buch II und III des ZGB (Art.2:51-2.53 und Art.3:1 (3) ung. ZGB).

Im ungarischen ZGB sind die Bestimmungen über den Schadensersatz im Deliktsrecht als Grundregeln konzipiert, die subsidiär auch in anderen Regelungszusammenhängen Anwendung finden (s. die Verweisungsvorschrift des Art.6:144 ung. ZGB). Sie sollen daher hier zuerst behandelt werden.

Das Kapitel zum Deliktsrecht verknüpft Vorschriften zur Haftungs begründung und Haftungsausfüllung. Die Grundnorm der deliktischen Haftung (Art.6:519 ung. ZGB: Rechtswidrige Verursachung eines Schadens führt zur Ersatzpflicht) betrifft sowohl die haftungsbegründende als auch die haftungsausfüllende Kausalität. Art. 6:521 ung. ZGB begrenzt die Haftung grundsätzlich auf für den Verursacher vorhersehbare Schäden. Speziell dem Schadensrecht gewidmet ist Art.6:522 ung. ZGB. Gem. Art.6:522 (1) ung. ZGB ist grundsätzlich der gesamte verursachte Schaden zu ersetzen (Totalreparation). Art.6:522 (2) ung. ZGB definiert den Umfang des gesamten Schadens als Wertminderung des Vermögens, entgangenen Gewinn sowie für den Ausgleich der Verluste notwendige Kosten. Art.6:522 (3) ungar. ZGB verankert den Grundsatz der Vorteilsausgleichung, unter Beifügung einer wertungsbezogenen Komponente. Art.6.522 (4) ung. ZGB schließlich regelt eine allgemeine Ausnahme vom Grundsatz der Totalreparation: dem Gericht wird bei Vorliegen „besonderer Umstände“ die Befugnis zur Herabsetzung des Schadensersatzes eingeräumt.

43 Englische Übersetzung z.B. bei <https://www.refworld.org/legal/legislation/natlegbod/1960/en/74370> (abgefragt am 6.11.2025).

Ebenfalls im Kontext des Deliktsrechts regelt Art.6:523 ung. ZGB Abwehransprüche schadensbedrohter Parteien gegen den Gefährder (Präventionsgedanke).

Art.6:525 ung. ZGB behandelt die Haftungsminde rung bei Mitverschulden des Geschädigten, und Art. 6:626 ung. ZGB statuiert die Unwirksamkeit bestimmter Haftungsausschluss- oder -begrenzungsvereinbarungen⁴⁴. Gemäß Art. 6:527 (1) ung. ZGB ist Schadensersatz grundsätzlich in Geld zu leisten, sofern nicht (als Ausnahme) eine Naturalrestitution gerechtfertigt erscheint. Mehrere Vorschriften befassen sich mit schadensersatzrechtlich begründeten Rentenleistungen (Art. 6:528-6:530 ung. ZGB). Art.6:531 ung. ZGB regelt in materiellrechtlicher Formulierung die Festlegung des Schadensersatzes, wenn der genaue Schadensumfang nicht ermittelbar ist. In diesem Fall soll ein für den Ersatz des erlittenen Schadens „angemessener“ Betrag bestimmt werden. Weitere Vorschriften befassen sich mit der Fälligkeit und Verjährung von Schadensersatzansprüchen sowie mit der Anpassung der Schadensersatzsumme an Inflation und ähnliche Kostensteigerungen (Art.6:532-6.534 ung. ZGB).

Im Rahmen der Vorschriften über die Haftung wegen Verletzung vertraglicher Pflichten (Art.6:137-6:152 ung. ZGB) finden sich einige Sonderbestimmungen zum Schadensersatz, die zum Teil von den schadensrechtlichen Regelungen des Deliktsrechts abweichen. Nach Art.6:143 (1) ung. ZGB sind nach den Regeln der Vertragshaftung grundsätzlich alle im Rahmen der Vertragserfüllung verursachten Schäden zu ersetzen. Art.6:143 (2) ung. ZGB ergänzt, dass dies auch für „weiteren Schaden an Vermögensgegenständen des Gläubigers“ und für infolge der Vertragsverletzung entgangenen Gewinn gilt, fügt aber an dieser Stelle (anders als bei Art.6:143 (1) ung. ZGB) hinzu, dass die betreffenden Schäden „zum Zeitpunkt des Vertragsschlusses vorhersehbar“ sein mussten. Bei bestimmten Schäden wird somit der Umfang des Ersatzes durch ein zeitlich determiniertes Vorhersehbarkeitselement begrenzt. Bei vorsätzlichen Vertragsverletzungen soll nach Art.6:143 (3) ung. ZGB „jeder“ Schaden ersetzt werden, offenbar ohne Vorhersehbarkeitskontrolle. Ergänzend zu Art.6:143 ung ZGB statuiert Art.6:146 ung. ZGB, dass die Haftung nach Vertragsregeln auch für Schäden gilt, die „während“ der Vertragserfüllung an Vermögensgegenständen des Gläubigers verursacht wurden.

44 Im Vertragsrecht ergänzend Art.6:152 ung. ZGB.

Ein interessanter Sonderaspekt der Haftung wird in Art.6:564 ung. ZGB angesprochen. Danach finden die schadensrechtlichen Vorschriften des Deliktsrechts subsidiär auch auf die im ungarischen Recht an einigen Stellen vorgesehenen Fälle der Haftung für rechtmäßiges Handeln Anwendung.

Stark ausgebaut wurde durch das neue Zivilgesetzbuch der (auch haftungsrechtliche) Schutz von Persönlichkeitsgütern bzw. Persönlichkeitsrechten (Art.2:42-2.54 ung. ZGB). Art.3:1 (3) ung. ZGB erklärt diese Vorschriften für grundsätzlich auch auf juristische Personen anwendbar.

Art.2:51 ung. ZGB stellt eine Liste von Ansprüchen der beeinträchtigten Personen (Anspruch auf Unterlassung, Widerruf, Entschuldigung u.a.), die ausdrücklich nicht von einem Verschulden des Schädigers abhängig sind. Art.2:52 ung. ZGB gewährt bei der Verletzung von Persönlichkeitsgütern und Persönlichkeitsrechten auf Anspruch auf Ersatz immateriellen Schadens. Für die Anspruchsvoraussetzungen wird auf die allgemeinen Haftungsvorschriften verwiesen, mit der Besonderheit, dass insoweit ein Schadensnachweis nicht zu erbringen ist. Für den Umfang des zuzuerkennenden Immaterialschadensersatzes führt Art.2:52 (3) ung. ZGB eine Reihe von nicht abschließenden Abwägungskriterien auf. Art.2:53 ung. ZGB stellt klar, dass Vermögensschäden, die durch eine Verletzung von Persönlichkeitsgütern bzw. Persönlichkeitsrechten verursacht wurden, nach den allgemeinen Regeln zu ersetzen sind.

Insgesamt macht das ungarische Schadensrecht einen sehr durchdachten, auch auf systematische Konsistenz ausgerichteten Eindruck. Merkmale des ungarischen Rechts sind, dass es auf eine systematische Separierung von Haftungsbegründung und Haftungsausfüllung verzichtet und das Schadensrecht im Deliktskontext als Grundmodell behandelt, das im Rahmen der Vertragshaftung modifiziert wird.

D. Elemente eines Vergleichs

Jeder Vergleich setzt bestimmte Kriterien voraus, an denen sich die zu vergleichenden Gegenstände messen lassen. Für den nachfolgenden gedrängten Vergleich sollten folgende Kriterien herangezogen werden: die systematische Stellung des Schadensrechts in den betrachteten Rechtsordnungen; Feststellungen zu den Zielen des Schadensrechts in den verschiedenen Rechtsordnungen; der Gebrauch von Grundbegriffen des Schadensrechts; sowie schließlich ein

Überblick über die in den Rechtsordnungen zum Ausdruck gebrachten Grundprinzipien des Schadensrechts.

I. Systematische Stellung des Schadensrechts

Alle Staaten der postsowjetischen Region außer Georgien verankern im Allgemeinen Teil der Zivilgesetzbücher eine Grundnorm des Schadensrechts, die im wesentlichen den Grundsatz der Totalreparation kausal herbeigeführter Schäden und den grundsätzlichen Vorrang des Geldersatzes festlegt⁴⁵. Für diesen Regelungsstandort spricht, dass Verpflichtungen zur Leistung von Schadensersatz in allen Teilbereichen des Zivilrechts vorgesehen sein können. Daneben bestehen aber in diesen Ländern zahlreiche Sonderregeln zum Schadensersatz insbesondere im Vertragsrecht und im Deliktsrecht.

Eine Reihe von Staaten Osteuropas sehen, möglicherweise geprägt durch das Modell des deutschen Rechts, im Allgemeinen Teil des Schuldrechts einige – mehr oder weniger ausführliche – übergreifende Vorschriften des Schadensrechts vor, die durch Vorschriften in anderen Teilen der Zivilgesetzbücher oder in Sondergesetzen ergänzt und/oder modifiziert werden. Beispielhaft genannt werden können die Rechte Estlands, Georgiens, Lettlands und Polens, wobei das Recht Estlands besonders detailreich und zugleich systematisch strukturiert erscheint. Im litauischen Zivilgesetzbuch von 2000 und im rumänischen Zivilgesetzbuch von 2009 werden die vertragliche und deliktische Haftung grundsätzlich in einem übergreifenden Kapitel zur „zivilrechtlichen Haftung“ geregelt, das Schadensrecht wird dort im Gesamtkontext mit Vorschriften zur Haftungsbegründung behandelt, nicht übergreifend herausgestellt⁴⁶.

Das Zivilgesetzbuch der Slowakei (von 1964) regelt das Schadensrecht weitgehend im Rahmen des Rechts gesetzlicher Schuldverhältnisse, sieht dort aber einen besonderen Abschnitt zum Schadensrecht vor, der teilweise auch Schadensersatz in Verträgen betrifft⁴⁷. Das tschechische Recht ordnet das

45 Art.17 arm. ZGB, Art.21 azerb. ZGB, Art.14 bel. ZGB, Art.9 Pkt.4 und 5 kaz. ZGB, Art.14 kyrg. ZGB, Art.19 mold. ZGB, Art.15 russ. ZGB, Art.14 tadsch. ZGB, Art.14 turkmen. ZGB, Art.22 ukr. ZGB, Art.14 uzbek. ZGB, Anders dagegen das georgische ZGB. Auch das mongolische ZGB enthält in seinem Allgemeinen Teil keine Generalklausel zum Schadensrecht.

46 S. Buch 6 (Obligationenrecht) Kap.XIII Art.6:245–6:304 lit. ZGB; Buch V (Obligationenrecht) Kap.IV Art.1349-1395 rumän. ZGB.

47 Slowak. ZGB (1964) Teil 6, Titel 3, §§ 438-450.

Schadensrecht noch spezifischer in das Deliktsrecht ein⁴⁸, enthält aber in diesem Rahmen ebenfalls einige Vorschriften zur Vertragshaftung.

Aus systematischer Perspektive gewissermaßen das Gegenteil zu den „übergreifenden“ Ansätzen des Schadensrechts ist das Recht Ungarns, dessen Zivilgesetzbuch auf einen Allgemeinen Teil verzichtet und das Schadensrecht im Schwerpunkt im Deliktsrecht verankert⁴⁹, zugleich aber im Rahmen des vertraglichen Schadensrechts subsidiär auf das Deliktsschadensrecht verweist, sofern im Vertragsrecht keine Sonderregeln bestehen⁵⁰. Einem ähnlichen Ansatz folgt auch Kroatien, das über kein umfassendes Zivilgesetzbuch mit einem Allgemeinen Teil verfügt und im Rahmen des Obligationenrechtsgesetzes das Schadensrecht im wesentlichen in Abschnitten zum Schuldrecht in Sonderbeziehungen und zum Deliktsrecht regelt⁵¹.

II. Ziele des Schadensrechts

Das klassische Hauptziel des Schadensrechts ist der Ausgleich des bei dem Geschädigten entstandenen Schadens im Sinne einer möglichst weitgehenden Herstellung des Zustandes, der ohne die Schädigungshandlung bestehen würde (Ausgleichsfunktion). Dieses Ziel wird in § 127 Abs.1 estn ObIRG ausdrücklich formuliert und an die Spitze der Vorschriften zum Schadensrecht gestellt⁵². Alle anderen Schadensrechte der Region gehen implizit ebenfalls von dieser Funktion des Schadensrechts aus. Neben die Ausgleichsfunktion können aber auch weitere Ziele des Schadensrechts treten, z.B. eine (vom Schadensersatz im Ausgleichssinne zu unterscheidende) Genugtuungsfunktion oder eine Präventions- oder Abschreckungsfunktion.

Eine Genugtuungsfunktion des Schadensrechts ist in, soweit ersichtlich, allen Staaten Osteuropas für den Themenbereich des Ersatzes immaterieller Schäden vorgesehen, unabhängig davon, ob in diesem Zusammenhang ebenfalls der

48 Tschech. ZGB (2012) Buch 4, Titel III, insbes. Abschnitt III, §§ 2951-2971.

49 Ung. ZGB Buch VI, Teil 4 Titel 26.

50 Art.6:144 ung. ZGB.

51 Teil 2 Abschnitt VIII Kap.1 Unterabschnitt 5 I.4. (insbes. Art.346-349) sowie Abschnitt IX.7 (insbes. Art.1085-1110) kroat. ObIG.

52 Der Sache nach ebenso Art.408 (1) georg. ZGB. Art19 Pkt.5 mold. ZGB nimmt diesen Grundsatz in die Generalklausel des Schadensrechts auf, stellt ihn aber nicht an die Spitze; an der Spitze steht die (implizite) Verpflichtung auf Totalreparation durch Geldersatz.

Ausdruck „Schadensersatz“⁵³ oder ein davon abweichender Begriff, z.B. *compensation*, *Schmerzensgeld* o.ä.⁵⁴, gebraucht wird. Typischerweise wird die Bemessung der Genugtuung von einer Abwägung aller Umstände abhängig gemacht, die sich von der eher mathematischen Berechnung anderer Schäden unterscheidet.

Präventionsgedanken erscheinen im Schadensrecht der Staaten Osteuropas vor allem unter dem Gesichtspunkt, dass Gesetze in schadensrechtlichem Zusammenhang auf die Notwendigkeit einer Vermeidung von Schäden hinweisen (s. z.B. Art.415 slowak. ZGB) und Unterlassungsansprüche verankern (z.B. Art.417 (2) slowak. ZGB⁵⁵, Art.1065 russ. ZGB, Art.6:523 ung. ZGB). Erhöhungen des Schadensersatzes aus Straf- oder Präventionsgründen nach Art von *punitive damages* sind in den Schadensrechten der osteuropäischen Staaten grundsätzlich nicht vorgesehen, können aber in sondergesetzlichen Regelungen vorkommen (s. Art.1064 Pkt.1 Satz 3 russ. ZGB).

Ein weiterer Gesichtspunkt, der in vielen osteuropäischen Staaten auch im Schadensrecht Ausdruck findet, ist die Möglichkeit von Herabsetzungen des zu leistenden Schadensersatzes aus (insbesondere) sozialen Gründen⁵⁶, z.B. § 140 estn. OblRG, Art.1093 kroat. OblG, Art.440 poln. ZGB, Art.450 slowak. ZGB, Art.2953 tschech. ZGB, Art.6:522 ung. ZGB.

III. Grundbegriffe des Schadensrechts

1. Schaden

Grundsätzlich verwenden die meisten Rechtsordnungen Osteuropas einen einheitlichen Begriff des „Schadens“ (*damage*), der dann in weiteren Vorschriften nach verschiedenen Schadenskategorien untergliedert wird (z.B.

53 So z.B. Art.134 estn. OblRG, Art.413 georg. ZGB, Art.23 ukrain. ZGB, Art.2:52 ung. ZGB.

54 So z.B. § 13 (2) slowak. ZGB, Art.151 russ. ZGB, Art.2951 (2) tschech. ZGB.

55 Damit verbunden sind dann z.T. Folgeregelungen, z.B. über Haftungs-milderung bei Maßnahmen der Schadensprävention, Art.418 slowk. ZGB, oder eine Kostentragungspflicht für Abwehrmaßnahmen, Art.419 slowak. ZGB.

56 Häufig wird von einer Herabsetzung „aus besonderen Gründen“ gesprochen (z.B. in den zitierten Vorschriften des slowakischen und tschechischen Rechts); aber soziale Gründe gehen hier i.d.R. vorrangig ein.

„tatsächlicher“ oder „realer“ Schaden, Vermögensschaden/Nichtvermögensschaden⁵⁷, „direkter“ Schaden, „entgangener Gewinn“ oder „entgangener Vorteil“, Schaden an bestimmten Rechtsgütern oder reiner Vermögensschaden, etc.)⁵⁸. Im postsowjetischen Raum ist es demgegenüber verbreitet, insbesondere im Deliktsrecht grundsätzlich einen anderen Schadensbegriff zu verwenden (z.B. russ. „vred“) als bei Schäden im Rahmen von Sonderbeziehungen (z.B. russ. „ubytki“/Verluste). Der Begriff „vred“ bezieht sich eher auf Beeinträchtigungen bestimmter Rechtsgüter, der Begriff „ubytki“ eher auf reine Vermögensschäden. Die Bedeutung beider Begriffe ist aber nicht klar abgegrenzt, so dass ihre Tragweite in jeder Vorschrift eigenständig zu bestimmen ist.

2. Kausalität

Eine weitere Grundkategorie des Schadensrechts (wie auch des Haftungsgrundungsrechts) ist das Kausalitätserfordernis. Der Begriff der Kausalität wird in den meisten Rechtsordnungen Osteuropas nicht definiert. Eine Legaldefinition findet sich aber z.B. in § 127 (4) estn. OblRG, der Kausalität mit Ursächlichkeit bestimmter Umstände für eine Folge beschreibt. Eine etwas abweichende Begriffsbestimmung trifft Art.6.247 des litauischen ZGB, der Kausalität als „Beziehung“ zwischen Handlungen oder Unterlassungen und einem Schaden bezeichnet, nach der der Schaden dem Schädiger „zuzurechnen“ ist. Damit wird der wertungsbezogene Begriff der Zurechnung in den Kausalitätsbegriff einbezogen.

Die meisten osteuropäischen Rechtsordnungen grenzen die Kausalität (bzw. die Zurechenbarkeit) durch den Gesichtspunkt der Vorhersehbarkeit (für den Schadensverursacher oder in objektiver Betrachtung) ein⁵⁹ und differenzieren insoweit z.T. nach verschiedenen Haftungskonstellationen, z.B. fahrlässigem oder vorsätzlichem Handeln des Schadensverursachers⁶⁰. Das estnische und das ungarische Recht regeln ausdrücklich auch die Beachtlichkeit der Vorteilsausgleichung (Teilkomponente der Kausalität) als haftungsbegrenzenden

57 Die Legaldefinition des Schadens in Art.170 lett. ZGB beschränkt sich auf Vermögensschäden. Immaterialschäden werden als getrennte Kategorie einer Ersatzpflicht betrachtet, s. z.B. Art.2352, 2353 lett. ZGB.

58 S. z.B. § 128 estn. OblRG, Art.411 georg. ZGB, Art.1773 f. lett. ZGB.

59 S. z.B. § 127 (2) estn. OblRG, Art.412 georg. ZGB.

60 S. z.B. Art.6:143 ung. ZGB.

Umstand⁶¹. Einige Rechtsordnungen sehen Sonderregeln zur Kausalität bei mehreren Schädigern oder bei Unklarheit über die Person der Schädiger bzw. der Kausalität vor⁶².

3. Schädiger – Geschädigter

Es ist nicht überraschend, dass alle Schadensrechte in Osteuropa die beiden Parteien des schadensrechtlichen Ausgleichs – Schädiger und Geschädigter – benennen⁶³. Sie enthalten aber darüber hinaus meist auch Regeln zu Mehrheiten von Schädigern oder Geschädigten⁶⁴, z.T. auch zu Drittbeteiligten⁶⁵, oder zu Personenwechseln in diesem Zusammenhang⁶⁶.

IV. Prinzipien des Schadensrechts

An der Spitze der schadensrechtlichen Vorschriften steht manchmal die Aussage, dass der Geschädigte durch den Schadensersatz in eine Lage zu versetzen ist, die der Lage ohne die Schädigung möglichst nahekommen soll (besonders klar § 127 (1) estn. OblRG)⁶⁷

Diesem Grundsatz können zwei Aussagen entnommen werden:

- eine grundsätzliche Aussage zur Totalreparation des Schadens,
- und eine grundsätzliche Aussage zur Naturalrestitution.

61 § 127 (5) estn. OblRG, Art.6:522 (3) ung. ZGB. S. andererseits das tschech. R, das möglicherweise insoweit nur unter bestimmten Voraussetzungen einen Bereicherungsanspruch vorsieht, s. Art.2954 tschech. ZGB.

62 S. z.B. § 138 estn. OblRG, Art.2915 (2) und 2925 (2) tschech. ZGB, Art.6:542 (4) ung. ZGB.

63 Die Bezeichnungen variieren hier leicht, vgl. etwa Art.15 russ. ZGB („Person, deren Recht verletzt wurde“ = Geschädigter; „Person, die das Recht einer anderen verletzt hat“ = Schädiger) mit § 127 (1) estn. OblRG („Geschädigter“) und Ar.6:519 ungar. ZGB („Verursacher des Schadens“ = Schädiger).

64 S. z.B. §§ 137, 138 estn. OblRG.

65 S. etwa Art.1064 Pkt.1 S.4 russ. ZGB: Durch Gesetz kann bestimmt werden, dass auch eine Person, die den Schaden nicht verursacht hat, zum Ersatz des Schadens verpflichtet ist; ähnlich Art.6:246 lit. ZGB. Ferner z.B. Art.2966 tschech. ZGB (Ansprüche gegen den Schädiger von Personen, die gegenüber dem Geschädigten unterhaltsberechtigt sind).

66 S. z.B. Art.82 (2) tschech. ZGB (im Fall der Verletzung von Persönlichkeitsrechten können nach dem Tod des Verletzten Personen, die diesem nahestanden, dessen Rechte geltend machen), Art.1097 kroat. ObIG (grds. Nichtübertragbarkeit bestimmter Schadensersatzansprüche).

67 Ähnlich z.B., ebenfalls an der Spitze des Schadensrechts, Art.408 georg. ZGB.

1. Totalreparation oder Teilersatz

Alle Schadensrechte Osteuropas gehen vom Grundsatz der Totalreparation der zurechenbar verursachten Schäden aus. Der Grundsatz der Totalreparation wird zum Teil ausdrücklich formuliert⁶⁸, kann sich aber auch implizit aus der Aussage ergeben, dass „der“ (gesamte) Schaden zu ersetzen sei. Bekräftigt wird dies durch Sonderregeln, nach denen ausnahmsweise nicht der gesamte Schaden zu ersetzen ist⁶⁹. Der Grundsatz der Totalreparation wird allerdings in einigen Staaten, insbesondere im postsowjetischen Raum, dadurch relativiert, dass für bestimmte Schäden (z.B. Umweltschäden) staatlich erlassene Berechnungsstandards oder Methodiken bestehen, die die Schadenshöhe weit unter den tatsächlichen Restitutionskosten festlegen⁷⁰. Zum Grundsatz der Totalreparation bestehen verbreitet Ausnahmen nach unten, selten Ausnahmen nach oben⁷¹. Ausnahmen nach unten können sich insbesondere aus dem Schutzzweck einer verletzten Norm ergeben⁷², aber auch aus „besonderen“ Umständen, z.B. aufgrund der sozialen Lage der Beteiligten oder von Besonderheiten der Schädigungshandlung⁷³.

2. Naturalrestitution oder Geldersatz

Zur Dichotomie von Naturalrestitution oder Geldersatz bestehen in Osteuropa zwei unterschiedliche Grundansätze: Einige Staaten, häufig solche, die mit dem deutschen Recht eng verbunden sind, stellen den Grundsatz der Naturalrestitution an die Spitze und sehen Geldersatz theoretisch nur als Ausnahme vor. Hierzu zählen beispielsweise Estland, Georgien, Kroatien und Tschechien⁷⁴. Die Mehrzahl der Staaten geht dagegen vom Grundsatz des Geldersatzes aus und gewährt einen Anspruch auf Naturalrestitution nur in Ausnahmefällen⁷⁵. Das

68 Z.B. in Art.15 Pkt.1 russ. ZGB, Art.1090 kroat. ObLG, Art.6.251 (1) lit. ZGB(oder Art.6:522 (1) ungar. ZGB §... B.

69 S. z.B. Art.1091 kroat. ObLG.

70 S. hier z.B. zum russischen Recht *Kristoffer Svendsen*, Liability and Compensation for Offshore Oil Pollution in the Arctic – Comparing Norwegian and Russian Law (2024), S.384-420.

71 Z.B. unter dem Gesichtspunkt von „punitive damages“, s.o. bei II.

72 Die Schutzzwecklehre ist z.B. in § 127 (2) estn. ObIRG verankert.

73 S. beispielsweise Art.1091 kroat. ObLG. In diesen Fällen wird dem Gericht meist eine Ermessensbefugnis eingeräumt.

74 § 127 (1) estn. ObIRG, Art.408 georg. ZGB, Art.1085 kroat. ObLG, Art.2951 tschech. ZGB.

75 S. z.B. Art.22 Pkt.1 und 4 ukr. ZGB, Art.15 russ. ZGB, Art.6:245 lit. ZGB, Art.6:527 (1) ung. ZGB

polnische Recht gibt dem Geschädigten die Wahl zwischen Geldersatz und Naturalerfüllung (Art.363 § 1 poln. ZGB).

3. Alles-oder-Nichts-Prinzip oder Haftungsstaffelung

Auf der Ebene der Haftungsbegründung kennen alle Staaten Osteuropas sowohl die Verschuldenshaftung (als Grundregel jedenfalls im Deliktsrecht) als auch verschiedene Varianten von Gefährdungshaftung. Auf der Ebene der Haftungsausfüllung gilt grundsätzlich das Alles-oder-Nichts-Prinzip in dem Sinne, dass auch bei leichtester Fahrlässigkeit oder dem Fehlen von Haftungsauschlussgründen voller Schadensersatz zu leisten ist. Dies gilt jedoch nicht uneingeschränkt. Mitverschulden des Geschädigten führt durchweg zu einer Haftungsreduzierung und in vielen Staaten kann „aus besonderen Gründen“ der Schadensersatz herabgesetzt werden. Bei einer Mehrzahl von Schädigern sehen einige Staaten unter bestimmten Voraussetzungen eine Aufteilung der Haftpflicht vor, so dass der Geschädigte dann u.U. keinen vollen Schadensersatz erhält.

4. Sonderregeln für immaterielle Schäden

Fast alle Rechtsordnungen Osteuropas enthalten Sonderregeln über den Ersatz immateriellen Schadens, insbesondere im Bereich der Verletzung von Persönlichkeitsgütern (z.B. Leben oder Gesundheit) oder von Persönlichkeitsrechten⁷⁶. Zum Teil werden solche Beeinträchtigungen im Kontext des Personenrechts der Zivilgesetzbücher geregelt, die ergänzend auf die allgemeinen Haftungsvorschriften verweisen⁷⁷. Typischerweise steht hier die Gewährung von Schadensersatz (oder Entschädigung) in Geld neben anderen Formen des Ausgleichs, z.B. neben Ansprüchen auf Unterlassung, Widerruf oder Entschuldigung. Häufig finden sich auch in den allgemeinen Haftungsvorschriften Sonderbestimmungen zum Ersatz immaterieller Schäden. Fast überall gilt der Grundsatz, dass

76 Die Vorschriften gelten durchweg jedenfalls für natürliche Personen, z.T. werden sie aber ausdrücklich oder durch Rechtsprechung auf juristische Personen (und gleichgestellte Subjekte) erstreckt, s. z.B. Art.3:1 (3) ung. ZGB, § 135 tschech. ZGB; zur Rechtslage in Russland zu dieser Frage s. Josephine Doll, Persönlichkeitsschutz juristischer Personen im russischen Zivilrecht (2022), passim.

77 Die allgemeinen Haftungsvorschriften gelten auch für Vermögensschäden bei solchen Beeinträchtigungen/Verletzungen, s. z.B. Art.2:53 ung. ZGB.

Ersatz für immaterielle Schäden nur bei Vorliegen einer ausdrücklichen gesetzlichen Grundlage gewährt wird. Am weitesten geht insoweit, soweit ersichtlich, das ukrainische Recht, das bei Rechtsverletzungen generell auch immaterielle Schäden für erstattungsfähig erklärt⁷⁸. Einige Rechtsordnungen definieren den Begriff immaterieller Schäden mit Angabe von Fallgruppen⁷⁹. In der Regel wird die Entscheidung über die Zuerkennung und den Umfang des Ersatzes in diesen Fällen in gerichtliches Ermessen gestellt, wobei in die Abwägung einzubeziehende Umstände häufig in den Vorschriften konkretisiert werden. Die praktische Anwendung dieser Vorschriften ist in hohem Maße anwendungsbezogen, wobei auch der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte und ggf. des Gerichtshofs der Europäischen Union erhebliche Bedeutung zukommt.

J. Zusammenfassung

Die vorausgehende tour d’horizon durch das Schadensrecht in den Staaten Osteuropas und Zentralasiens hat gezeigt, dass ungeachtet vieler Sonderregelungen in den jeweiligen Rechtsordnungen doch auch wesentliche gemeinsame Linien bestehen: weitgehende Übereinstimmung in der Verwendung des Schadensbegriffs, die Anwendung von Kausalitätsregeln auch auf die Dimension der Haftungsausfüllung, der Grundsatz der Totalreparation als Ausgangspunkt und die stark entwickelten Regeln über den Ersatz immaterieller Schäden, insbesondere bei Personen- und Persönlichkeitsverletzungen. Gespalten sind die Ansätze in bezug auf den Vorrang von Naturalrestitution oder Geldersatz. Will man in diesem Kontext Untergruppen von Rechtsordnungen bilden, so weisen untereinander insbesondere die (meisten) Rechtsordnungen des postsowjetischen Raums und die Nachfolgestaaten Jugoslawiens besondere Gemeinsamkeiten auf. Eine interessante aktuelle Entwicklung in der Balkanregion sind die aktuellen Vorhaben einer Kodifizierung des Zivilrechts in mehreren Staaten, die auch dem Schadensrecht neue Impulse zu geben versprechen. Innerhalb der Staaten Mittelosteuropas sind insbesondere die fast zeitgleich entstandenen neuen Zivilgesetzbücher Tschechiens und Ungarns von Interesse, die ungeachtet vieler Neuerungen auch Traditionen der Zivilgesetzbücher der sozialistischen Epoche fortführen. Interessant ist, dass Ungarn weiterhin auf ein „allgemeines“

78 Art.23 ukr. ZGB.

79 S. z.B. Art.23 Pkt.2 ukr. ZGB, Art.6:250 lit. ZGB.

Schadensrecht verzichtet, aber die Vorschriften des Schadensrechts im Deliktsrecht so gestaltet, dass sie grundsätzlich auch auf die Haftung in Sonderbeziehungen passen. Polen und die Slowakei nehmen insoweit eine Sonderstellung ein, als dort die – allerdings überarbeiteten – Zivilgesetzbücher von 1964 noch fortgelten, die das Schadensrecht nur sehr knapp regeln. Estland und Georgien haben insofern eine Sonderstellung als sich ihre modernen Schadensrechte besonders deutlich am deutschen Recht ausrichten. Vor allem das estnische Recht hat dabei einen eigenen, sehr systematisch geprägten und für Rechtsanwender gut lesbaren Ansatz entwickelt. Das lettische Recht nimmt insofern eine Sonderstellung ein als das Schadensrecht des lettischen Zivilgesetzbuchs von 1937 zwar einerseits rechtsvergleichend begründet ist, aber in seiner Struktur von den übrigen osteuropäischen Rechtsordnungen deutlich abweicht. Das lettische Recht trägt damit in Osteuropa eine eigene, besondere Handschrift.

Das Schadensrecht in den Rechtsordnungen Osteuropas und Zentralasiens weist keine grundlegenden Abweichungen von den gesamteuropäischen Entwicklungen des „Civil Law“ ab, aber es enthält eine Vielzahl anregender, im Detail unterschiedlicher und diskussionswürdiger Lösungen, z.B. zur Frage der sinnvollen Systematisierung des Schadensrechts, zur Frage des Vorrangs von Naturalrestitution oder Geldersatz und zur Bestimmung des ersatzfähigen Schadens, besonders auch bei Immaterialschäden.

Following the Footsteps of Georgian Lawmaking in the 1990s

While reflecting on the lawmaking processes in Georgia during the 1990s, I recall those years of hardship with a sense of pride. On the one hand, it was a period of newly discovered freedom and democracy; on the other, it was marked by the immense challenges inherent in rebuilding a state from the ground up. It soon became evident that dismantling an existing state and its legal system – and reconstructing them – involved extraordinarily complex problems. Even destruction had to be framed within law, and construction required strict adherence to legal procedures.

At that time, appropriate legislation was largely absent, implementation mechanisms were weak or non-existent, and enforcement capacity was fragile. Left unchecked, the process might have led to grave consequences. Public life had already begun to resemble an arena of chaotic interactions and clashes among narrow and clan-based interests.

In the short term, the most realistic path out of this impasse appeared to be the establishment of a new system of law and justice. At the initial stage, there was no intention of rapidly replacing an entire body of legislation, particularly one embedded with punitive norms. Soviet law, as is well known, was strongly characterised by its repressive functions. Paradoxically, those punitive instruments were still capable of maintaining a certain degree of public order, and the country's instability at the time made their use unavoidable.

The task before us was to awaken a different role for law; one that no longer serves as an obstacle to economic development, but becomes the foundation for new economic relations and a vehicle for progressive social transformation.

* Dr. Tariel Kululashvili was the First Deputy Minister of Justice of Georgia in 1990–2000.

Yet the obstacles were formidable. Properly trained personnel were scarce, relevant literature was inaccessible, language barriers limited access to Western legal scholarship, and computers and the internet were still beyond reach. Representatives from European countries began visiting us, offering assistance. But many of these visits remained symbolic. The promised assistance rarely materialised. Gradually, enthusiasm faded; in some cases, we politely thanked our visitors and saw them off with their unfulfilled assurances.

It was in this atmosphere that, one day, without prior notice, a tall, well-built man entered my office. He wore a greenish coat and a light brown scarf, had curly hair, and carried a friendly yet determined expression. Later, when German experts would arrive, they would jokingly say, “Kululashvili has sent us again.” His demeanour was positive and businesslike, which immediately aroused my interest. Still, true to my Kakhetian directness – Kakheti being a historic region in eastern Georgia known for its cultural heritage and ancient winemaking traditions – I said bluntly, “We are tired of such visits. You come, make grand promises, and then disappear.”

He did not hesitate. “I will return in one week,” he replied calmly, “and then we shall see.”

He kept his word. That man was Rolf Knieper.

He returned, not merely with promises, but with books, ideas and intellectual commitment.

The legislative achievements realised with Rolf’s involvement are widely known; hence, I will not dwell on them. Instead, I would like to illuminate the less visible dimension of that work. From the very beginning, we were joined by the distinguished lawyer and notary Hartmut Fromm, whose practical experience proved invaluable.

Our work was intense and disciplined. The setting was modest; the old Ministry of Justice building, formerly the Trade Unions House on Rustaveli Avenue. It was winter. There was no electricity and no heating. We worked late into the night, warming our hands over candles. Yet this was not an exception; it was the general condition of the country.

In such circumstances, the Georgian *supra* – the traditional feast – became a rare source of warmth and communal comfort. One day, Rolf said to me, “We have become friends, and please do not be offended, but I am amazed at the abundance of feasts under such scarcity. We have much work to do. Perhaps we should limit them.”

We took his words seriously. On working days, the elaborate feasts and extended toasts were significantly reduced.

Over time, Rolf himself mastered the art of the *Tamada* – the toastmaster who leads a *supra* according to strict traditional rules. He embraced the role with remarkable ease. His education, cultural sensitivity and warmth made him a natural. Such qualities are indispensable in law, perhaps even more than in other fields. At the formative stage of our nation's lawmaking, we were fortunate to have someone of such intellectual and human distinction by our side.

Our first tangible legislative product was the draft Law on Entrepreneurship. It was adopted swiftly and implemented with surprising speed. The public response was immediate and positive. That success encouraged us all and confirmed that well-crafted legal norms could gain broad societal acceptance.

On non-working days, we travelled across the country, introducing our German colleagues to Georgia's historical and cultural heritage. Many impressions from those journeys were subtly reflected in later civil-law concepts.

One memory stands out. On a hot Sunday, we travelled to Kakheti. We lunched beneath Mount Kudigori, near the ancient Nekresi complex. Cold mountain streams flowed nearby; centuries-old chestnut trees surrounded us. The feast unfolded traditionally, led by the head of the Gurjaani Folk Ensemble.

As we prepared to leave, the polyphonic song *Mravalzhamieri* began. One song followed another. Just when we thought we could depart, the grove's watchman approached, playing the *Chonguri* and singing beautifully. Rolf hesitated, visibly torn between schedule and emotion.

Then the local police chief arrived in full uniform. As tradition required, he was invited to share a toast. More singing followed. Rolf, who valued punctuality deeply, found himself torn between time constraints and admiration.

Meanwhile, in Tbilisi, the legendary film director Rezo Chkheidze was waiting for Knieper and Fromm at the Metekhi Hotel. For the first time in their lives, and perhaps the only time, the Germans were late.

Looking back, the role of law during the dismantling of the socialist system and the building of a new order was immense. We believed that stable legal norms would anchor freedom and democracy. And indeed, the first signs soon appeared. Alongside the creation of a normative framework for the economy, law began to assume its role as a guarantor of liberty.

Yet history unfolded differently than we had expected. After the initial decisive break with socialist law, we never imagined that legislation and the rule of

law would face renewed systemic challenges. Nevertheless, during the 1990s and the 2010s, law and justice were subjected to further substantial pressures.

Law is not merely a collection of regulatory norms nor the immediate effects of their application. Legislative change carries long-term structural consequences. Sustainable law, both in word and in action, shapes legal culture and public legal consciousness.

When legal norms are repeatedly and systematically altered over decades, legal certainty suffers. A low level of familiarity with legislation and limited practical experience hinder consistent interpretation and weaken law's establishment in public life.

Regulierung der Prozessfinanzierung

Einleitung

Einen Beitrag zu einer Festschrift zu leisten ist im Allgemeinen schon ein Ehre. Dies für die Festschrift zum 85. Geburtstag für Prof. Dr. Drs. h.c. Rolf Knieper zu tun geht darüber hinaus. Prof. Knieper hat mich nicht nur geprägt, sondern meinen beruflichen Werdegang ermöglicht, auch wenn der wenig juristisch auf die Zielgerade geht.

Ich hatte das Glück, Prof. Knieper in den späten achtziger Jahren noch als Student kennen zu lernen. Aus Afrika zurückgekehrt übernahm er die zivilrechtlichen Vorlesungen und nahm den „großen Schein“ im Zivilrecht ab. Von großzügigen Noten geprägt hatte ich einen heilsamen Schock, als Prof. Knieper meine Hausarbeit für den großen Schein nur mit gerade so befriedigend bewertete und damit meinen Ehrgeiz weckte. Als wissenschaftlicher Mitarbeiter des Fachbereichs Rechtswissenschaften an der Universität Bremen war ich mit Prof. Knieper im ständigen Kontakt. Dadurch ergab sich für mich die Möglichkeit aus einer Randposition heraus zunächst Recherchearbeiten zu erledigen um dann im März 1996, als die Doktorarbeit bereits bewältigt war, auf eine erste Mission in die Mongolei zur Richterausbildung nach Baruun Urt geschickt zu werden. Gefolgt von Einsätzen in Georgien und Turkmenistan trat ich im Jahre 1998 in dem von

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der GTZ¹ finanzierte Stelle im Projektbüro „Rechtsreform in den Transformationsstaaten“ an um ab 2002 vollständig in der entwicklungspolitischen Zusammenarbeit tätig zu werden und bis heute zu sein.

Das Wirken von Rolf Knieper im Rahmen der deutschen entwicklungspolitischen Zusammenarbeit kann für die Entwicklung der Rechtssysteme in den Staaten der ehemaligen Sowjetunion gar nicht hoch genug eingeschätzt werden. Beginnend mit der Kooperation mit Georgien, bei dem neben der Unterstützung der Entwicklung des Zivilgesetzbuches das Gesellschafts- und Zivilprozessrecht zunächst im Vordergrund stand, erstreckte sich die Zusammenarbeit auf alle Staaten des Südkaukasus, Zentralasiens, Moldau und der Mongolei². Durch den wissenschaftlichen Austausch mit Rechtswissenschaftlern und Praktikern aus der Russischen Föderation, der Ukraine, aber auch mit China kann davon gesprochen werden, dass Bremen, in dem eine bundesweit einmalige Kooperation mit dem Bremer Senat, der Universität und der Handelskammer etabliert wurde, ein Knotenpunkt der Bemühungen, die in der kontinental europäischen Tradition stehenden neuen Staaten auf die Anforderungen einer sich marktwirtschaftlich orientierenden Wirtschaft gerecht zu werden³.

Auch wenn Vorhaben zu Rechts- und Justizreformen von der deutschen entwicklungspolitischen Zusammenarbeit kaum noch betrieben werden, beteiligt sich Prof. Knieper weiter an dem fachlichen Austausch mit Rechtswissenschaftlern aus dem Kaukasus und Zentralasien. Ein weiteres Tätigkeitsfeld liegt in seiner Tätigkeit als internationaler Schiedsrichter, auch im Bereich von Investitionsstreitigkeiten mit staatlicher Beteiligung in ICSID⁴ Verfahren.

1 Seit 2011 firmiert die Deutsche Gesellschaft für technische Zusammenarbeit als Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH.

2 Vgl. *Rolf Knieper / Mark Boguslawski* (Hrsg.), *Wege zum neuen Recht: Materialien internationaler Konferenzen in Sankt Petersburg und Bremen*, Berlin: Berliner Wissenschafts-Verlag (BWV), 1998; *Rolf Knieper: Rechtsreformen entlang der Seidenstrasse*, Berliner Wissenschafts-Verlag, 2010.

3 *Rolf Knieper*, *Integration of Turkic States into Global Arbitration*, *Transatlantic Law Journal*, 4/2025, 160.

4 International Centre for Settlement of Investment Disputes.

Regulierungswelle in der Prozessfinanzierung

Dies stellt eine, hoffentlich nicht zu wackelige Brücke zum Thema meines Beitrages dar: der immer weiter um sich greifenden Regulierung der Prozessfinanzierung⁵.

Wie im deutschen Recht stellt auch im Rahmen der Anwendbarkeit des ICSID Abkommens die Zahlung anfallender Kosten eine Voraussetzung für die Betreuung des Verfahrens dar. Zahlt eine Partei nicht die Kosten, die sich aus Regulation 14 ICSID Administrative and Financial Regulations ergeben und gem. Regulation 15 angeforderten Kosten, wird das Verfahren gem. Regulation 16, Abs. 2, Ziff. b. ausgesetzt oder, sollte die Zahlung weiter nicht erfolgen, gem. Ziff c. eingestellt.

Auch in ICSID Regelungen wird dabei die Finanzierung durch Dritte genannt. Erhält die Partei so etwa in Regel 14 der Schiedsgerichts Regeln finanzielle Unterstützung und ist diese unentgeltlich oder gegen eine Beteiligung an den durch den Schiedsgerichtsspruch gewährten Ansprüchen vergolten, ist dies dem General-Sekretär anzuzeigen.

Der Beitrag befasst sich mit einem Instrument im Rahmen von zuallererst zivilrechtlichen Streitigkeiten, dass sich bereits seit den 90er des letzten Jahrhunderts vor allem im angelsächsischen Rechtskreis gibt⁶ und das nunmehr immer weitergehende Bedeutung auch im kontinental-europäischen Raum hat: Die Finanzierung von Prozesskosten. Dies wird dokumentiert durch die Europäische Rechtsentwicklung, durch die Behandlung im Rahmen des VIS Moot Court im Jahre 2022 und, nicht zuletzt durch ein Projekt des Europäischen Rechtsinstituts, das Prinzipien der Prozessfinanzierung entwickelt, die vor kurzem als Entwurf

5 Siehe aber bereits *Fabian Frechen / Martin Kochheim*, Fremdfinanzierung von Prozessen gegen Erfolgsbeteiligung, NJW 2004, 1213.

6 <https://clp.law.harvard.edu/knowledge-hub/magazine/issues/litigation-finance/a-brief-history-of-litigation-finance/> (18.12.2025).

veröffentlicht wurden⁷. Die Gesetzgebungsinitiative des Europäischen Parlaments⁸ wurde allerdings nicht weiterverfolgt⁹.

Definition, rechtliche Einordnung und Erscheinungsformen

Unter Prozessfinanzierung firmieren dabei Konstellationen, in denen Dienstleistungsunternehmen die Prozesskosten eines Rechtsstreits (meistens der Klägersseite) übernehmen und dafür im Gegenzug, an den durch ein Urteil oder einen Vergleich gewährten Ansprüchen beteiligt werden¹⁰. Verliert die finanzierende Seite den Prozess, hat dieser Dienstleister keine Ansprüche und kann die zur Verfügung gestellten Mittel nicht zurückverlangen.

Dabei handelt es sich bei der Prozessfinanzierung nicht um einen Darlehensvertrag, da die vom Prozessfinanzierer zu tragenden Kosten ja gerade nicht zurückzahlen sind¹¹. Auch ein Versicherungsvertrag liegt nicht vor, da der Eintritt des Schadensfalles, also der Kostenübernahme für den Fall des Unterliegens absehbar sind und in diesem Falle kein Entgelt zu zahlen ist¹². Auch eine rechtliche Dienstleistung soll nicht bestehen¹³, obschon die Dienstleister vor Abschluss eines Vertrages die Erfolgseinsichten, zumindest im Rahmen einer summarischen Prüfung, abschätzen, also einer rechtlichen Prüfung unterziehen. Diese Prüfung stellt aber keine Leistung gegenüber der ursprünglichen Partei dar, sondern eine Risikoeinschätzung für den Prozessfinanzierer. Nachdem es in Deutschland zunächst überwiegende Auffassung war, dass es sich um eine Art Gesellschaft handelt, deren Zweck es ist, den zugrunde liegenden Anspruch zu verfolgen¹⁴, wird

7 https://europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_Governing_the_Third_Party_Funding_of_Litigation.pdf (18.12.2025).

8 P9_TA(2022)0308; Entschließung des Europäischen Parlaments vom 13. September 2022 mit Empfehlungen an die Kommission zur verantwortungsbewussten privaten Finanzierung von Rechtsstreitigkeiten (2020/2130(INL)).

9 *Tanja Domej*, Effektive Zivilrechtsdurchsetzung: Zugang zur Justiz, Prozessfinanzierung, Legal Tech – welcher rechtliche Rahmen empfiehlt sich?; NJW – Beilage zum Deutschen Juristentag, 2024, 39.

10 *Rachael Mulheron* 'The Modern Doctrines of Champerty and Maintenance' (OUP, 2023) 30.

11 Fn 5.

12 Vgl. Fn 11, 1214.

13 Vgl. *Tanja Domej*, Effektive Zivilrechtsdurchsetzung: Zugang zur Justiz, Prozessfinanzierung, Legal Tech – welcher rechtliche Rahmen empfiehlt sich?; NJW – Beilage zum Deutschen Juristentag, 2024, 37 ff.

14 Fn 11, 1215.

in neuerer Zeit die Qualifizierung des Vertrags über Prozessfinanzierung vernachlässigt und davon gesprochen, dass es sich um eine, im deutschen Recht nicht geregelte Finanzdienstleistung handelt¹⁵.

Neben der klassischen Prozessfinanzierung, in der der Inhaber einer Forderung einen oben skizzierten Prozessfinanzierungsvertrag schließt, haben sich andere Geschäftsmodelle entwickelt. Gerade im Bereich des Verbraucherschutzes lassen sich Legal Tech Unternehmen die Forderungen zu deren Durchsetzung treuhänderisch abtreten (sogenannte Inkassozeession) und erhalten im Gegenzug einen Teil des durch den Prozess erzielten Erlöses¹⁶.

Insgesamt ist zwischen Prozessfinanzierung von individuellen Verfahren und Verfahren zur kollektiven Rechtsdurchsetzung zu unterscheiden. Während die Prozessfinanzierung in größeren Wirtschaftsverfahren eine Rolle spielt wird sie im Bereich des Kollektiven Rechtsschutzes insbesondere im Verbraucherbereich diskutiert.

In neuerer Zeit finden sich zudem in den USA Entwicklungen, die nicht den Kläger vor Prozesskosten schützen, sondern ein Finanzierungsinstrument für die Anwaltskanzleien darstellen. Bei der sogenannten Portfoliofinanzierung wird nicht der Einzelfall, sondern für eine ganze Reihe von, nicht im Zusammenhang mit den Einzelfällen stehenden Fällen, und damit die anwaltliche Tätigkeit insgesamt finanziert¹⁷. Damit werden, wie in der Hypothekenkrise, „gute Fälle“ mit „schlechten Fällen“ gebündelt, also Risiken weiter diversifiziert.

Verhältnis zu Grundsätzen des deutschen Rechts „Geld muss man haben“

Als Student der Rechtswissenschaften in Deutschland lernt man, die Personenverhältnisse, in einem zur Begutachtung gegebenen Sachverhalt in Zwei-Personenverhältnisse aufzuteilen. Im Ergebnis wird damit die Komplexität des Sachverhalts auf Ansprüche zwischen einzelnen Personen reduziert. Die Hinzuziehung eines Dienstleisters, der die nach § 91 ff. Zivilprozessordnung entstehenden Prozesskosten trägt, führt allerdings nicht immer dazu¹⁸, dass dieser Partei

15 Vgl. Fn 9, 37.

16 *Thomas Riehm*, Effektive Rechtsdurchsetzung durch finanzierte Abtretungsmodelle, NJW 2024, 2713 ff.

17 *Anthony Sebok*, ‘The Rules of Professional Responsibility and Legal Finance: A Status Update’ (2022) 57. Wake Forest Law Review 777, 791.

18 Anders bei den, insbesondere im Verbraucherbereich und Legal Tech verbreiteten Abtretungslösungen.

wird. Insoweit ändert die Einschaltung von Prozessfinanzierern also nichts an der Anspruchskonstellation.

Ein Grundsatz des deutschen Zivilrechts besagt, dass im zivilrechtlichen Verkehr der Grundsatz „Geld muss man haben“ herrscht¹⁹. Der für Vorsatz und Fahrlässigkeit gem. § 276 BGB haftende Schuldner kann sich nicht darauf berufen, unverschuldet in eine Notlage zu geraten. Wie er oder sie sich diese Mittel beschafft, ist Sache des Schuldners²⁰.

Allerdings kennt das deutsche Recht Institute, die in dem Falle, indem jemand die für die Rechtsverfolgung notwendige Kosten nicht aufbringen oder aber vermeiden kann. Dafür ist zunächst das Institut der Prozesskostenhilfe zu nennen²¹. Danach haben Personen, die die Kosten für einen Rechtsstreit nicht aufbringen können, die Möglichkeit einen Antrag auf Prozesskostenhilfe beim Gericht stellen. Dabei muss allerdings die hinreichende Aussicht auf Erfolg bestehen und die wirtschaftliche Lage offengelegt werden, was im Rahmen eines aufwändigen summarischen Vorverfahrens erfolgt. Hier erfolgt eine, vom Gericht vorzunehmende, Risikoeinschätzung also, neben der Offenlegung der Vermögenverhältnisse der beantragenden Partei, gem. § 114 ZPO, um zu prüfen, ob das Verfahren eine hinreichende Erfolgsaussicht hat.

Zudem ist in Deutschland der Abschluss einer Rechtsschutzversicherung weit verbreitet. Insgesamt haben 46,3% aller Haushalte eine solche Versicherung abgeschlossen²².

Insgesamt entspricht die Prozessfinanzierung daher dem Grundsatz, dass es Aufgabe des Schuldners ist, sich die für die Durchführung eines gerichtlichen Verfahrens erforderlichen Mittel zu beschaffen. Ob er das aus eigenen Mitteln macht, dafür ein Darlehensvertrag eingeht oder, wie in unserem Fall, jemanden findet, der die Kosten übernimmt, bleibt der prozessführenden Partei überlassen.

19 Hans Brox/Wolf-Dietrich Walker, SchuldR AT, 43. Aufl. 2019, § 9 Rn. 9; Medicus, AcP 188 (1988), 489 ff.

20 Im Gegenteil. Wer ein Rechtsverhältnis eingeht, aber im voraus weiß, dass er oder sie die sich daraus ergebenden Zahlungsansprüche nicht erfüllen kann, begeht einen Betrug nach § 263 des deutschen Strafgesetzbuches.

21 Vgl. §§114 ff. Zivilprozessordnung.

22 <https://www.gdv.de/gdv/themen/gesellschaft/versicherungsschutz-versicherungsdichte-ueberversicherung-49418> (18.12.2025).

Verbot des Erfolgshonorars

§ 1 der Bundesrechtsanwaltsordnung definiert den Rechtsanwalt als unabhängiges Organ der Rechtspflege. Ursprünglich wurde damit auf die Unabhängigkeit der Rechtsanwalt vom Staat gezielt. Diese waren noch bis zum Inkrafttreten der Rechtsanwaltsordnung vom Staat bestellt, wurden dann aber als nach allen Seiten unabhängig anerkannt²³. Da es der Unabhängigkeit gegenüber dem Mandanten zuwiderlaufen würde, wenn der Anwalt am Ausgang des Verfahrens ein wirtschaftliches Interesse hätte, war das Verbot des Erfolgshonorars einer der Grundpfeiler der rechtlichen Regelung des Anwaltsberufes²⁴. Bereits mit seiner Entscheidung vom 12.12.2006²⁵ hatte allerdings das BVerfG das ausnahmslose Verbot für verfassungswidrig erklärt. Das BVerfG bestätigt die dem Verbot zugrundeliegenden Zwecke, lässt das Verbot aber daran scheitern, dass es keine Ausnahmeregelungen kenne.

Da es sich bei den Finanzdienstleistern, die Prozessfinanzierung anbieten, nicht um Anwälte handelt, ist das Verbot der Erfolgsvereinbarung nicht anwendbar. In aller Regel sind nicht einmal die Unternehmen, die Legal Tech Lösungen insbesondere für Verbraucher anbieten, Anwaltskanzleien²⁶, sondern die Lösungen werden anlassbezogen oft durch Zweckgesellschaften angeboten, zum Beispiel um standardisierte Fälle abzuarbeiten²⁷.

Mit der LexFox I Entscheidung des Bundesgerichtshofes wurde klargestellt, dass das Angebot von Legal Tech Anbieters, die eine Lizenz als Inkassodienstleister haben, keine rechtliche Dienstleistung darstellt. Obwohl eine rechtliche Prüfung für die Übernahme von Prozessfinanzierungen erforderlich ist, soll dies „noch“ keine rechtliche Dienstleistung darstellen²⁸. In der Folge gab es

23 Zunächst gab es die Prokuratoren, die staatlich bestellt und berechtigt waren, vor den Gerichten aufzutreten und den Advokaten, die von den Parteien als Experten herangezogen wurden. Nachdem zunächst die Advokaten durch staatlich angestellte Assistenzräte abgelöst wurden. Erst mit der Rechtsanwaltsordnung aus dem Jahre 1879 wurde die Unabhängigkeit der Anwaltschaft gesetzlich eingeführt, wobei diese Unabhängigkeit nicht nur gegenüber dem Staat sondern auch gegenüber dem Auftraggeber und Dritten gilt (vgl. *Volker Römermann*, Beck Online Kommentar, 24. Edition, § 1 BRAO, RdNr. 1 und 2).

24 *Günther*, Beck Online Kommentar, § 49b BRAO, RdNr. 9.

25 BVerfG NJW 2007, 979 ff..

26 Vgl. *Thomas Meyer*, Legal Tech in Germany – from vision to reality, Contribution to the annual conference of the Koppenhagen School for Natural Law, 2020.

27 Vgl. Fluggastentschädigung oder Mietpreisentschädigungen.

28 BGH vom 27.11.2019, - VIII ZR 185/18, BGHZ 224, 89.

erheblichen Druck seitens der Anwaltschaft das Verbot des Erfolgshonorars aufzuheben oder einzuschränken, damit diese nicht im Wettbewerb benachteiligt werden. Mit dem Gesetz zur Förderung verbrauchergerechter Angebote im Rechtsdienstleistungsmarkt²⁹ wurde das Verbot aufgeweicht. Gem. § 4a des Rechtsanwaltsvergütungsgesetzes ist ein Erfolgshonorar im Einzelfall zulässig, wenn

- die streitige Forderung nicht über 2.000 EURO liegt, oder
- eine Inkassodienstleistung erbracht wird, oder
- der Auftraggeber ohne die Vereinbarung eines Erfolgshonorars von der Rechtsverfolgung abgehalten würde.

Das zeigt, dass die aktuellen Entwicklungen im Bereich der nichtanwaltlichen Verfolgung der Durchsetzung von Ansprüchen zu einer Aufweichung des Verbots des Erfolgshonorars geführt hat. Der von deutschen Gerichten verfolgte Ansatz, neue Instrumente dieser Durchsetzung gewähren zu lassen, hat auch bislang nicht dazu geführt, dass Grundprinzipien des deutschen Rechts in Frage gestellt werden.

Verbraucherschutz und Prinzipien

Das Gesetz zur gebündelten Durchsetzung von Verbrauchergesetzen (VDuG)³⁰ setzt die Richtlinie über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher³¹ um. Hinsichtlich der Prozessfinanzierung wird in § 4 geregelt, dass eine Prozessfinanzierung nicht erfolgen darf, wenn der Prozessfinanzierer Wettbewerber der beklagten Seite oder von dieser abhängig ist. Der Anteil an der erhaltenen Leistung darf zudem 10% nicht übersteigen.

Zudem enthält das Gesetz Regelungen, die auch in den verschiedenen Veröffentlichungen und Regelungen im Rahmen der internationalen Schiedsgerichtsbarkeit³² aber auch dem Entwurf der Prinzipien für die Prozessfinanzierung des Europäischen Rechtsinstituts³³ entspricht. Dies betrifft die Bereiche:

29 Sogenanntes Legal Tech Gesetz, vom 10. August 2021, Bundesgesetzblatt I, 3415.

30 BGBl. 2023 I Nr. 272, S. 2 in der Fassung vom 16.7.2024, BGBl. 2024 I Nr. 240.

31 ABl. L 409 vom 4.12.2020, 1–27.

32 Vgl. etwa <https://d20qsj1r5k97qe.cloudfront.net/news-attachments/The-Investment-Treaty-Arbitration-Review-97.pdf> (18.12.2025).

33 Vgl. Fn 7.

- Transparenz, also dass alle Parteien darum wissen, ob Abmachungen über Prozessfinanzierung bestehen und dass die in Anspruch nehmende Partei weiß, worauf sie sich einlässt;
- Interessenkonflikte, also zu vermeiden, dass der Finanzierer wirtschaftliche Interessen hat, die denen der finanzierten Partei widersprechen
- Solvenz des Finanzierers, damit keine Parteien einen Nachteil durch die Prozessfinanzierung hat.
- Klarheit über die Höhe der Finanzierungskosten, also welchen Anteil der Finanzierer erhält, was bei Verbraucherefällen durch die EU Richtlinie auf 10% gedeckelt ist.
- Vermeidung der Einflussnahme auf den Prozessverlauf. Obwohl in aktuellen Prozessfinanzierungen der Abschluss von Vergleichen oder zum Beispiel ein Anwaltswechsel von der Zustimmung des Finanzierers abhängig ist, soll vermieden werden, dass der Finanzierer aus Interessen, die nicht in dem Fall begründet sind, in den Verfahrensverlauf eingreift.
- Verhinderung der Kündigung zur Unzeit.

Dispositionsmaxime und Regulierung von Prozessfinanzierung

Während mit der Einschränkung der Prozessfinanzierung bei Verbraucherbeeteiligung deren Interessen geschützt werden sollen³⁴, könnte man sich fragen ob die Kriterien des Verbotes der Einflussnahme auf den Prozess, die Solvenzdarlegung des Finanzierers und der Vermeidung von Interessenkonflikten aber auch der Transparenz, nicht dem Grundsatz der Parteiherrschaft und insbesondere der Dispositionsmaxime entgegen stehen.

Wie erwähnt, ist die Beibringung ausreichender Mittel Sache der klagenden Partei. Ergibt sich während oder vor eines Verfahrens, dass die klagende Partei nicht über die erforderlichen Mittel wird das Verfahren, nicht weiter betreiben. Nur im Falle der Beantragung von Prozesskostenhilfe muss die antragstellende Partei ihre Vermögensverhältnisse offenbaren. Hat die Partei dafür einen Kredit aufgenommen, trägt sie allein das Solvenzrisiko des Kreditgebers und der beklagten Partei. Von daher stellt es einen Wertungswiderspruch dar, wenn im Falle der Prozessfinanzierung die finanzierende Stelle ihre Solvenz darlegen

³⁴ Vgl. dazu *Gerhard Ring*, Erfolgshonorar und Prozessfinanzierung – Reform des RVG und des RDG infolge des Legal Tech Gesetzes, *Neue Justiz (NJ)* 2021, 525; Vgl. auch *ELI Principles*, Fn 7, 34.

muss. Das Risiko der Vermögenslosigkeit der finanzierenden Stelle trägt die klagende Partei, die im schlechtesten Fall keine wirksamen Prozesshandlungen vornehmen kann, weil ihre Finanzquelle versiegt ist³⁵. Dieser besondere Schutz scheint in Verbrauchersachen noch legitim, da die klagenden Verbraucher vor dieser Vermögenslosigkeit geschützt werden³⁶. Sind keine Verbraucher betroffen ist nicht klar, warum dann eine Offenlegung erfolgen sollte. Dies gilt auch allgemein für den Grundsatz der Transparenz. Nimmt ein Kläger Dienstleistungen eines Prozessfinanzierers in Anspruch ist unklar, warum dies offengelegt werden muss. Solange keine Mittel aus illegalen Quellen ergibt sich kein öffentliches oder Parteiinteresse Interesse die Herkunft der Mittel zu deklarieren.

Auch bei dem Verbot der Einflussnahme auf den Prozess durch den Prozessfinanzierer könnte gefragt werden, ab dadurch die Parteiherrschaft der klagenden Partei eingeschränkt wird. Gem. der Dispositionsmaxime ist es Sache der Partei warum ein Verfahren in bestimmter Art geführt wird. Allerdings ergibt sich bereits aus dem Verhältnis zwischen Prozeßfinanzierer und der Partei, dass ersterer auf einen bestehenden Interessenkonflikt hinweisen muss. Dies erfolgt aber im Verhältnis zwischen Finanzierer und Finanziertem und nicht im Verhältnis zur anderen Partei. Dass diese ohnehin sich aus Treu und Glauben ergebende Pflicht nunmehr in den aufkommenden Regulierungen der Prozessfinanzierung noch einmal verdeutlicht wird, steht also der Dispositionsmaxime nicht entgegen. Das dies dem Gericht und der anderen Seite offengelegt werden soll, widerspricht aber bereits den Interessen der klagenden Partei, ihre Angelegenheiten nicht öffentlich zu machen. Da die Risiken durchweg im Verhältnis zwischen Prozessfinanzierer und -finanzierten liegen scheint fraglich, warum die Offenlegung im jeweiligen Verfahren erfolgen soll. Kommt es im schlimmsten Fall zu einer Unzulässigkeit der Klage, dient diese nicht dem Interesse der finanzierten Partei sondern der Gegenseite.³⁷

Schlussbemerkungen

Die Prozessfinanzierung ist auf dem Vormarsch. Wie in anderen gesellschaftlichen Bereichen auch drängen Finanzdienstleister in den Markt und werden

35 Vgl. Fn 16, 2716.

36 Fn 7, 34.

37 Vgl. Caroline Meller-Hannich, und Beate Gsell, „Die Regulierung privater Prozessfinanzierung in der EU, AnwBl Online 2023, Seiten 160 ff., 163.

diesen verändern. Dies birgt die Gefahr, dass die Durchsetzung zivilrechtlicher Ansprüche zu einem gängigen Wirtschaftsgut werden, wie das zum Beispiel Forderungen aus Hypothekenkrediten der Fall war. Selbst wenn diese in Finanzprodukten verwendet werden, hat der wachsende, aber nicht systemrelevante Markt (noch) nicht das Potential zu einer Gefahr für die Wirtschaft zu werden.

Die kritische Sicht auf diese Entwicklung wird dabei vorbehaltlos geteilt ist aber Ausdruck weiterer, elementarer Prinzipien. Es ist den Parteien überlassen, wie sie die entstehenden Kosten finanzieren. So wie sie über den Prozessgegenstand selbst verfügen können und in jeder Phase des Verfahrens eine Klage zurücknehmen zu können, sind sie frei in ihrer Wahl der Finanzierung oder in der Verfolgung der Durchsetzung überhaupt.

Obwohl der Richtlinienentwurf der Europäischen Kommission nicht weiter verfolgt wurde, bestehen eine Reihe von Gesetzgebungsinitiativen. Während beim Aufkommen der Prozessfinanzierung, vielleicht etwas unbedarft, noch kein gesteigerter Bedarf an Regulierungen gesehen wurde³⁸, setzen aktuelle Entwicklungen auf umfassende Inhaltskontrollen, Transparenz- und Offenbarungspflichten³⁹ bei denen sich der Regelungsbedarf nicht immer erkennen lässt.

Es bleibt abzuwarten, ob durch die Prozessfinanzierung den Effekt hat, dass die Ergebnisse anwaltlicher Beratung finanzmarktfähig gemacht werden. Anders, als die Befürworter einer Deregulierung anführen, mit der Prozessfinanzierung würde der klagenden Partei erst der Zugang zum Recht ermöglicht⁴⁰, zeigt der durch Marktdurchdringung charakterisierte amerikanische Markt, dass eine solche Durchdringung keineswegs zu einer Reduzierung der Kosten für die Inanspruchnahme von anwaltlicher Vertretung in zivilrechtlichen Streitigkeiten führen. Es besteht Einigkeit, dass die Kosten anwaltlicher Vertretung in den USA ungleich höher sind, als etwa in Kontinentaleuropa⁴¹. Das wird sich durch die Verbreitung der Prozessfinanzierung sicherlich nicht ändern.

38 Vgl. Fn 5, 1217.

39 Vgl. etwa ELI, FN 7.

40 Vgl. Fn 16, 2714.

41 <https://bridge-alliance.law/vergleich-kostenrecht-usa-deutschland/> (18.12.2025).

Rolf Knieper's Contribution in the Development of the Legal System of Turkmenistan

1. From the initial years of Turkmenistan's independence, the need to reform the entire national legal system of the country became apparent. It is appropriate to note that the Mejlis (Parliament) of Turkmenistan, within a comparatively short period, developed and adopted the first Constitution of the new sovereign state, as well as a number of laws regulating relations in various spheres of public life.

In the mid-1990s, the country was visited by international legal experts, offering cooperation and assistance in the formation of the legislative framework of the country. Among them, special attention of national partners was paid to the experts who visited Turkmenistan within the framework of the TACIS Programme of the European Union. The team of lawyers was headed by Professor Rolf Knieper of the University of Bremen (Germany).

The task facing the European experts was far from straightforward: it was necessary to propose a roadmap for the creation of a new body of civil legislation. Numerous meetings were held with the heads and representatives of the state bodies of Turkmenistan, including the Parliament, the Supreme Court, the Ministry of Justice (currently the Ministry of Adalat), the Prosecutor General's Office, the Turkmen National Institute of Democracy and Human Rights under

* Former Coordinator of the GIZ Legal Reform Project in Turkmenistan, former Director of the Turkmen National Institute of Democracy and Human Rights under the President of Turkmenistan.

the President of Turkmenistan (currently the Institute of State, Law and Democracy of Turkmenistan) among others.

A special place was given to dialogue with the representatives of the diplomatic missions of foreign states and international organisations accredited in Turkmenistan. The purpose of these meetings was to avoid duplication of assistance efforts, specifically on the issues of developing private law in the young state.

It should be noted that the team of German lawyers and, of course, Rolf Knieper himself, step by step, tactfully, professionally and very convincingly were able to establish a partnership in such an important matter as the development and adoption of the new Civil Code of Turkmenistan.

At that time, Parliamentarians of Turkmenistan had at their disposal several versions (mainly in the form of drafts) of the Civil Code of the former Soviet republics, including the Model Civil Code adopted by the Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States (CIS) on 29 October 1994.

In the post-Soviet space, it was widely believed that the CIS model codes – most notably the Model Civil Code, Model Criminal Code, Model Code of Criminal Procedure, Model Penal Code, Model Customs Code and Model Tax Code – had exerted the most far-reaching influence on the national legislative systems of the overwhelming majority of CIS states.

2. The Mejlis of Turkmenistan created a working group to develop a draft Civil Code of Turkmenistan, which included international experts for the first time in the country's legislative practice. In addition to legislators, the members of the working group included the representatives of various government agencies, the judiciary and the academic community of Turkmenistan.

A long process of understanding by the developers of the main normative legal act of the civil legislation of the state that had embarked on the path of independence from the principles of a planned economy had thus begun. Professor Knieper's high professionalism, tact, communication skills, and ability to persuade – combined with his personal charisma – were crucial in supporting this work. The work on the draft Civil Code of Turkmenistan lasted about three years. Numerous meetings, round-table conferences, and explanatory seminars for law enforcement officers and parliamentarians were held. It should be noted

that the meetings were held not only in the capital, but also in all *velayats* (regions) of the country.

The prepared draft of the Civil Code of Turkmenistan was published in the printed media. The nationwide discussion of the draft allowed for the consideration of the opinions, proposals, comments, and additions by both specialists and all interested persons.

On 17 July 1998, in the city of Dashoguz, the Civil Code of Turkmenistan¹ was adopted at the next meeting of the *Khalk Maslakhaty* (People's Council). The Civil Code came into effect on 1 March 1999. The country's leadership called the Code the economic Constitution of Turkmenistan, and there were many grounds for this.

For the first time in legislative practice, it was determined that civil legislation is based on the recognition of the equality of participants in the relations it regulates, the inviolability of property, freedom of contract, the inadmissibility of arbitrary interference by anyone in private affairs, the need for unimpeded exercise of civil rights, ensuring the restoration of violated rights, and their judicial protection. Individuals and legal entities are free to establish their rights and obligations on the basis of a contract and to determine any contractual terms if they do not contradict the law (Article 1 of the Civil Code).

The norms on the participation of the state in civil legal relations deserve special attention. In particular, the state participates in civil legal relations as a legal entity. The powers of the state are exercised through its bodies. Legal entities formed by the state participate in civil legal relations on a general basis (Article 48 of the Civil Code).

After the adoption of the Civil Code of Turkmenistan, until its entry into force, a team of German lawyers, together with the deputies of the Mejlis of Turkmenistan and national specialists, conducted a number of explanatory events on the application of the norms of the basic law of private law.

Rolf Knieper's work on developing the new legal system of the young independent state and strengthening international legal cooperation was highly appreciated by the Government of Turkmenistan. In 1999, by a decree of the President of Turkmenistan, Professor Rolf Knieper of the University of Bremen was awarded the *Gairat* medal.

1 <https://minjust.gov.tm/ru/hukuk/merkezi/hukuk/701>.

3. Legislative systems evolve in response to social and economic change. National legislation, in turn, reacts flexibly to certain changes. The Parliamentarians of Turkmenistan came to the conclusion that it was necessary to reform civil legislation. The following points served as justifications for this: recommendations of the World Intellectual Property Organisation (WIPO) to exclude copyright provisions from the Civil Code and to allocate them to a special law; development of civil legal relations with a foreign element, and the need to bring the Turkmen and Russian language versions of the texts of the Civil Code of Turkmenistan into conformity.

Rolf Knieper also took an active part in this work, especially in integrating the provisions on international private law into the draft of the new Civil Code. On 28 June 2025, the Mejlis of Turkmenistan adopted the new Civil Code², which entered into force on 1 January 2026.

The new Civil Code has not changed the provisions that civil legislation is based on the recognition of the equality of participants in the relations it regulates, the inviolability of property, freedom of contract, the inadmissibility of arbitrary interference by anyone in private affairs, the need for the unhindered exercise of civil rights, ensuring the restoration of violated rights, and their judicial protection. Individuals and legal entities are free to establish their rights and obligations on the basis of a contract and to determine any contractual terms if they do not contradict the law (Article 1 of the Civil Code).

The state participates in civil legal relations as a legal entity. The powers of the state are exercised by its bodies. Legal entities formed by the state participate in civil legal relations on a general basis (Article 48).

Part VI "International Private Law", which includes Articles 1303-1343, is a complete innovation. The law applicable in civil law relations involving foreign persons, or civil law relations with another foreign element, is determined on the basis of the Constitution of Turkmenistan, international treaties of Turkmenistan, this Code, other legislative acts and business customs. If, in accordance with Part One of this Article, it is impossible to determine the applicable law, the law of the country with which the civil law relationship of the foreign element is most closely connected is applied (Article 1303).

2 <https://minjust.gov.tm/ru/hukuk/merkezi/hukuk/698>.

Foreign law shall be applied in Turkmenistan in cases where the application of foreign law in accordance with the principle of reciprocity is provided for by the legislation of Turkmenistan. Any reference to foreign law in accordance with the provisions of this section of the Code shall be considered as a reference to the substantive law, and not to the conflict of laws law of the relevant country, with the exception of those provided for in part three of this article. A reverse reference to foreign law may be accepted in cases of reference to the laws of Turkmenistan determining the legal status of an individual (Article 1306 of the Civil Code).

4. As for further cooperation of Rolf Knieper with Turkmenistan, the adoption of the Civil Code required continued joint activities with this unrivalled professional. The issue of developing Commentaries to the Civil Code was put on the agenda. A Working Group was created at the Institute of State, Law and Democracy of Turkmenistan, consisting of representatives of the national parliament, the judiciary, bar associations, law enforcement agencies and legal scholars. German lawyers, headed by Professor Knieper, took the most active part in preparing the Commentaries. By now, the work has been fully completed, the Commentaries to the Civil Code of Turkmenistan have been prepared and published in the state and Russian languages.

5. Along with multi-format activities to assist post-Soviet states in developing legal systems, Rolf Knieper, with the support of the German Society for Technical Cooperation - GTZ (now the German Society for International Cooperation - GIZ), initiated a multilateral project for the development of private law in countries with transition economies. The project was highly significant for the countries of the former USSR that have embarked on the path of sovereignty and have chosen an economy built on the principles of market relations as a model for their development.

Among the countries participating in the project were all Central Asian states, as well as Armenia, Azerbaijan, Georgia, Moldova and Mongolia. The project was carried out with the help of the LEXINFOSYS, and aided law enforcement officers and legal scholars in carrying out a broad exchange of legal information and academic research. In an annual format, meetings of national coordinators from each country were held with the participation of invited specialists from different countries, at which a wide range of issues on the development of private

law in the newly independent states were discussed. Professor Rolf Knieper was an excellent leader of this unique effort, both in its scope and in its effectiveness.

6. Another stage of Rolf Knieper's tireless work on the formation of the modern legal system of Turkmenistan was assistance in the development of the Civil Procedure Code of Turkmenistan. Joint productive work continued for several years. On 18 August 2015, the Mejlis of Turkmenistan adopted the new Civil Procedure Code of Turkmenistan.³

The Civil Procedure Code determined that justice in civil cases is administered on the basis of equality before the law and the court. In the course of civil proceedings, no preference may be given to any of the citizens and none of them may be subject to discrimination on the grounds of their nationality, race, gender, origin, property and official status, place of residence, language, attitude to religion, political beliefs, and party affiliation or lack of affiliation with any party; legal entities may not be given preference and none of them may be subject to discrimination on the grounds of their location, organisational and legal form, subordination, form of ownership and other circumstances (Article 11).

According to the Code, civil proceedings are carried out on the basis of adversarial proceedings and equality of the parties. The parties enjoy equal procedural rights and bear equal procedural obligations.

The parties choose their position, methods and means of defending it independently of the court, other bodies and persons during civil proceedings. The court is completely exempt from collecting evidence on its own initiative in order to establish the factual circumstances of the case, but, upon a reasoned request of the parties, assists them in obtaining the necessary materials in the manner prescribed by the Civil Procedure Code (Article 15).

Numerous consultations held with Professor Knieper supported the drafters in taking account international standards, including legislatively minimising the participation of the prosecutor in civil proceedings. The prosecutor has the right to apply to the court with a claim (application) in order to fulfil the duties imposed on him to protect the rights of citizens (incapacitated, partially capable or capable, but due to their physical condition such as old age, illness, etc., unable to independently exercise their rights and fulfil their duties), public and state interests (Article 9 of the Civil Procedure Code).

3 <https://minjust.gov.tm/ru/hukuk/merkezi/hukuk/682>.

7. Some of the most important subjects of cooperation in the legal sphere with Professor Rolf Knieper were the consultations held in the Mejlis of Turkmenistan during the development of a new version of the Constitution of Turkmenistan⁴ (adopted on 14 September 2016), which was supplemented by a new Section VII "Economy and Financial and Credit System". The new section, among others, included a norm that the economy of Turkmenistan is based on the principles of market relations. The state encourages and supports entrepreneurship, promotes the development of small and medium-sized enterprises (Article 134 of the Constitution of Turkmenistan).

Professor Knieper has held numerous events on international arbitration during years of cooperation, within the framework of which consultations with the Government of Turkmenistan, as well as a number of meetings with representatives of state bodies, were actively held to provide information about the status of international arbitrations and the main international legal documents in this area.

Particular attention was paid to consulting on the ratification of international conventions by Turkmenistan on the recognition and enforcement of foreign arbitral awards and on contracts for the international sale of goods, and their role in increasing the attractiveness of investment in the country for foreign investors. On 17 April 2022, both of these UN conventions were ratified by the laws of Turkmenistan.⁵

It is impossible to fully describe in a single article the colossal contribution that Rolf Knieper made to the formation of the modern legal system of Turkmenistan.

Dear Rolf, congratulations on another anniversary, although 85 is not a number for you! I wish you health, longevity, success and all the best.

4 <https://minjust.gov.tm/ru/hukuk/merkezi/hukuk/1>.

5 <https://minjust.gov.tm/ru/hukuk/merkezi/hukuk/451>. <https://minjust.gov.tm/ru/hukuk/merkezi/hukuk/452>.

Pink Floyd und die Rechtsberatung

A. Vorwort

Denke ich an Rolf Knieper, höre ich Pink Floyd's „*Another brick in the wall...*“ und sehe Mohnblumen, schneebedeckte Gipfel in Georgien und irgendwo am Horizont den Sevan-See strahlen.

Ich erinnere intensiv meine ersten georgischen Tafeln, in denen entweder Rolf Knieper oder Lado Chanturia *Tamada* waren. Den beiden ist es sogar gelungen, einander als *Tamada* wunderbar zu ergänzen. Doch nicht nur das: Nie werde ich den Moment vergessen, als ich in St. Petersburg im Sommer 2001 den prachtvollen Saal der Weltbanktagung betrat und Rolf Knieper und Lado Chanturia von der Bühne den Saal zum Leuchten brachten.¹ Stärker als es die wohl tausend Lichter der Kornleuchter im Saal je vermocht hätten. Rolf Knieper und Lado Chanturia verströmten eine solch unglaubliche Kraft, einen Schaffensdrang und einen Optimismus, verbunden mit der festen Überzeugung für das Obsiegen des Rechts, das für mich bis heute nachwirkt.

Gerade in den krisenbeladenen Jahren der 2020er, in denen der rechtsstaatliche Kompass weltweit und besonders auch in einigen der postsowjetischen Staaten keine klare Richtung mehr vorgibt, denke ich an diesen Moment in St. Petersburg gerne, manchmal etwas wehmütig, zurück.

Das waren die Zeiten, in denen ein Weltbankpräsident sprach: „*There can be no good and clean government without respect for the rule of law, nor*

* Dr. Iris Muth ist Referatsleiterin im Bundesfamilienministerium (BMBFSFJ).

1 Second Global Conference on Law and Justice, World Bank, 09.07-11.07.2001, St. Petersburg.

transparent and well-functioning financial markets, nor equitable and sustainable development“² und hierfür ausschließlich zustimmendes Nicken und Applaus bekam.

So klangvoll und ergreifend wie Pink Floyd es spielt, verkörpert Rolf Knieper vor allem dieses:

No thought control und *no dark sarcasm*. Sich mit aller Kraft und Intelligenz für eine Welt der freien, unkontrollierten Gedanken, des faktenbasierten Wissens und des Rechts einzusetzen, das strahlt Rolf Knieper für mich aus wie keine andere Person. Das hat mich geprägt, während meiner Dissertation bei Rolf Knieper bis heute. Es hat mich gelehrt, über den Tellerrand zu gucken, unkonventionelle Gedanken durchzuspielen und immer wieder Konventionelles und vermeintlich allgemeingültige Behauptungen kritisch zu hinterfragen.

Rolf Knieper hat sich gleichzeitig erfolgreich dem Sarkasmus gestellt, der von Firmen, Staaten und sog. „Rechtsberatern“ ausging, die mit viel Geld und wenig Wissen über die Länder, über die Menschen und über ihre Rechtstraditionen versuchten, ihre unpassenden Regelungen den Zielländern aufzuoktroyieren. So als wären die postsowjetischen Länder eine *tabula rasa*, die sich beliebig mit völlig systemfremden Kredit- und Bankengesetzen befüllen ließen. Dass die Zielländer und ihre Menschen diese sinnlosen und meistens völlig kontraproduktiven „Beratungen“ auch noch selbst zahlen mussten, war an Sarkasmus kaum zu überbieten. Eine teure Gefahr für das Rechtsvertrauen und den Rechtsstaat in den Ländern, die in der schwierigen Umbruchzeit nichts mehr brauchten als genau das: Vertrauen in das wirkende Recht und in den Staat.

Rolf Knieper hat sich diesem sarkastischen Irrsinn in Russland, Zentralasien ebenso wie im Kaukasus mit einer fundierten Fachlichkeit, breiter Erfahrung, einem außerordentlichen Gespür für die Menschen und die Kultur und einem ausgeprägten Verhandlungsgeschick sehr oft erfolgreich entgegengestellt. Kein Wunder, dass sie ihn mit Ehrenwürden und -titeln belohnten, bei denen ich irgendwann aufgegeben habe, mitzuzählen.

2 James Wolfensohn, Vortrag am 09.07.2001 zur Eröffnung der Second Global Conference on Law and Justice.

B. Erfolgreiche Gesetzgebungsberatung und Gewohnheitsrecht

Doch was ist erforderlich, - abgesehen von den individuellen Fähigkeiten und der Akzeptanz einer Beraterin oder eines Beraters - damit ausländische Beratung bei der Gesetzgebung erfolgreich ist?

„Erfolgreich“ ist nach meinem Verständnis eine Beratung, die in den Gesetzgebungsprozess sinnvoll einfließt und dazu beiträgt, dass die Gesetze in der Realität angewendet werden und ihre Ziele erreicht werden. Erfolgreich kann eine Beratung auch sein, wenn ein überflüssiges oder kontraproduktives Gesetz aufgrund der Beratung nicht verabschiedet wird.

Die Frage, was es braucht für eine in diesem Sinne erfolgreiche Gesetzgebungsberatung, beschäftigt mich nun seit über einem Vierteljahrhundert. Anhand der Beratung des georgischen Arbeitsrechts in der Praxis (2000-2002) durfte ich mit meiner „teilnehmenden Beobachtung“ hierzu forschen. Die Ergebnisse habe ich in meiner Dissertation 2003 festgehalten.

Im Folgenden möchte ich die damaligen Ergebnisse aus heutiger Perspektive, über 20 Jahre später, reflektieren. „Über 20 Jahre später“ heißt: mit veränderten globalen Rahmenbedingungen und geprägt durch weitere Erfahrungen, die ich in verschiedenen Gesetzgebungsprozessen auf nationaler, supranationaler und auf internationaler Ebene sammeln konnte. Dazu gehört meine Arbeit als Menschenrechtsbeauftragte der Organisation für Sicherheit und Zusammenarbeit in Europa (OSZE) in Georgien (2002-2006), die Arbeit mit der Arbeitsgesetzgebung in Armenien (2003-2004) und die Erfahrungen aus europäischer (EU – Richtlinien) und deutscher Gesetzgebung in den Jahren 2007 bis heute.

Schließlich möchte ich meine Rechercheergebnisse zur Rolle des Gewohnheitsrechts in Svanetien aus dem Jahre 2006 ergänzend hinzufügen.

I. Erkenntnisse aus der georgischen Arbeitsgesetzberatung, 2000-2002

Klar ist, dass die Reform des georgischen Arbeitsrechts nicht allein in der Verabschiedung gesetzlicher Normen bestehen kann, sondern ihre Wirksamkeit wesentlich von der praktischen Umsetzung abhängt. Damit das gelingt, bedarf es insbesondere auch einer Akzeptanz des geänderten Rechts bei denjenigen, die es anwenden und durchsetzen sollen wie auch in der Bevölkerung. Es bedarf zudem einer institutionellen Stärkung, Transparenz und Information und Aufklärung über die neuen Regelungen.

Die Analyse der georgischen Arbeitsgesetzgebung aus 2000-2002 hat verdeutlicht, dass für die erfolgreiche ausländische Beratung folgende organisatorische und fachlich-inhaltliche Kriterien erfüllt sein sollten:

1. Organisatorischer Rahmen

Eine glaubwürdige und professionelle ausländische Gesetzgebungsberatung erfordert neben fachlich-inhaltlichen Aspekten einen organisatorischen Rahmen, der freie und unabhängige, durch fachliche Kriterien geleitete Beratungsmaßnahmen ermöglicht.³ Dies wurde und wird in der Realität nicht selten dadurch beeinträchtigt, dass die Beratungsorganisationen eigene politische Ziele und damit verbunden - häufig sachfremde - Interessen verfolgen, die längst nicht immer mit den Reformzielen des beratenden Landes übereinstimmen. Ferner braucht es Flexibilität und eine damit gekoppelte Fähigkeit, zeitnah auf die An- und Nachfragen der Partner zu reagieren. Strikte bürokratische Projektplanungsvorgaben der Beratungsorganisationen, die zu längeren zeitlichen Vorausplanungen ohne adäquate Anpassungsmöglichkeiten führen, werden den Bedarfen der Partnerländer nicht gerecht.

2. Sensibilität für die Rechtskultur

Beratung sollte nicht einfach fremdes Recht, ohne Rücksicht auf die vorhandene Rechtskultur, importieren.⁴ Dies ist bereits von den Kritikern des „Rechtsimperialismus“ aufgeworfen worden.⁵ „Rechtsimperialismus“ bezeichnet die Praxis, dass mächtige Staaten oder internationale Organisationen ihre Rechtsvorstellungen auf andere Länder übertragen, häufig unter dem Vorwand universeller Gültigkeit, aber zumeist mit eigenen geopolitischen oder ökonomischen Machtinteressen.⁶ Die Kritiker des „Rechtsimperialismus“ implizieren, dass ausländische Rechtsberatung zur Rezeption fremden Rechts führt.

3 Iris Muth, Neues Recht zwischen Tradition und Systemwechsel, 286.

4 Iris Muth, Neues Recht zwischen Tradition und Systemwechsel, 276.

5 vgl. u.a. Chimni, B.S. (1993), *International Law and World Order: A critique of contemporary approaches*, 2. Aufl., Cambridge University Press; Anghie, Antony (2004): *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press.

6 Vgl hierzu die Primärreferenz bei Rolf Knieper, „Rechtsimperialismus?“ *Zeitschrift für Rechtspolitik* 29 (1996), S. 64-67.

Die Untersuchung der Beratung des georgischen Arbeitsrechts hat gezeigt, dass in diesem Fall, weder die Übernahme fremden Rechts das Ziel der Beratung war noch, dass eine solche Übernahme erfolgt ist. Alle Beratungsmaßnahmen haben das Ziel verfolgt, einen guten Mittelweg zwischen der Fortentwicklung der gewachsenen rechtlichen Strukturen einerseits und der Anpassung an die Anforderungen des Weltmarktes andererseits zu finden.

Allgemein lässt sich festhalten, dass Gesetzgebungsberatung kulturelle, wirtschaftliche und institutionelle Rahmenbedingungen des Partnerlandes berücksichtigen muss. Hier gilt es für Rechtsberater zudem - falls erforderlich - internationale Rechtsstandards an die rechtskulturellen Rahmenbedingungen vor Ort kompatibel anzupassen.

3. Rolle lokaler Akteure

Eine akzeptierte und an den Bedarfen des Partnerlandes orientierte Gesetzgebung erfordert, dass wesentliche Akteure im Partnerland die Gesetzgebung leiten und alle relevanten Akteure vor Ort in den Prozess mit einbezogen werden. Hierzu zählen im Falle der Arbeitsgesetzgebung, die Arbeitgeberverbände, die Gewerkschaften, ebenso wie die Verwaltung, Justiz, Rechtsanwälte und Arbeitsinspektoren.

Die Arbeitsgesetzgebung in Georgien wurde geleitet durch eine georgische Gesetzgebungskommission, die ausschließlich aus georgischen Akteuren bestand. Die deutsche Rechtsberatung durfte hierbei beobachtend teilnehmen und beratend ergänzen.

Wie auch die Gesetzgebung der letzten Jahrzehnte in Deutschland und auf EU - Ebene zeigen: eine frühzeitige und transparente Beteiligung von denjenigen, die vom Gesetz betroffen sein werden ist elementar für seine Akzeptanz und Implementierung. Hierfür bedarf es einer klaren und vorausschauenden Verfahrensplanung, die Informationen zur richtigen Zeit an die richtigen Adressaten richtet und diese in einem ausgewogenen und durchdachten Prozess klug mit einbezieht. Beteiligungen erfolgen in der Regel über (öffentliche) Anhörungen und Stellungnahmen von entsprechenden Verbänden und ggf. weiteren Interessenvertretungen.

Bei der Arbeitsgesetzgebung in Georgien fanden regelmäßige Treffen statt mit Gewerkschaften, Arbeitgebervertretungen, betrieblichen Personalvertretungen und Rechtsanwälten. Bei teilweise emotionalen und sehr kontroversen

Diskussionen konnten die deutschen Beratenden zumindest teilweise dazu beitragen, dass Debatten versachlicht wurden, rechtsvergleichende Aspekte eingebracht und Kompromisse entwickelt wurden. Die Kompromisse waren nicht immer inhaltlicher Art; in schwer lösbaren Konflikten bestanden sie auch darin, dass sich die zerstrittenen Akteure auf ein weiteres gemeinsames Verfahren einigten.

4. Bedarfsorientierung

Rechtsberatung sollte immer an den konkreten Bedarfen und Herausforderungen des Partnerlandes ansetzen und zu umsetzbaren Lösungen durch die lokalen Akteure beitragen. Dabei ist die Beteiligung der Praxis und die gute Analyse der Ausgangslage und der Herausforderungen wichtig, um akzeptierte und umsetzbare Regelungen zu erarbeiten.

Nach der Erfahrung in Georgien verläuft dies besonders erfolgreich, wenn neben der guten Analyse und dem Wissen über die Rechtslage zwischen den Personen in der Gesetzgebungskommission und den ausländischen Beratenden, zudem ein festes Vertrauensverhältnis, Bereitschaft für den Perspektivwechsel, gegenseitiges Verständnis und der Austausch auf Augenhöhe vorhanden ist und gelebt wird.

5. Gute Gesetzgebungstechnik

Allgemein anerkannte Gesetzgebungsprinzipien, wie die interne Stimmigkeit, Klarheit und Bestimmtheit der Regelungen sind elementar für eine gute Anwendung eines jeden Gesetzes weltweit. Die Beratung in Georgien hat gezeigt, dass Rechtsberater häufig sinnvoll zur Schaffung eines technisch guten, klaren und bestimmten Gesetzes beitragen konnten. Praxis und Erfahrungen mit einer Rechtssetzungstechnik, die rechtstaatlichen Standards entspricht, war bei georgischen Gesetzgebenden Anfang der 2000er Jahre nicht immer stark ausgeprägt.

Dabei ist beim Arbeitsrecht angesichts der sowjetischen Rechtstradition besonders wichtig, klare und möglichst lückenfreie Regelungen zu schaffen. Aus der sowjetischen Rechtsanwendung resultiert ein allgemeiner Mangel an Rechtsauslegungskenntnis. Es hat sich gezeigt, dass in allen postsowjetischen Staaten auf Gesetzeslücken selten durch richterliche Rechtsfortbildung, sondern häufig durch Gesetzesänderungen und weitere Gesetzesnovellen reagiert

wurde. Dies gilt zumindest für die Zeit der 1990er und 2000er Jahre.⁷ Der Hang zu Gesetzesnovellen und der fehlenden Erfahrung richterlicher Rechtsfortbildung erhöhten grundsätzlich die Schwierigkeiten bei der Umsetzung von aus dem angloamerikanischen *common law* stammenden Regelungen.

6. Institutionenaufbau und Umsetzungskompetenz

Das beste Gesetz ist nichts wert, wenn es keine geeigneten Strukturen und Menschen gibt, die dieses umsetzen. Daher muss Beratung auch immer die Strukturen für Umsetzung, Kontrolle und Streitbeilegung mit im Blick haben und ggf. stärken. Dies kann selbstverständlich ein komplexer, langwieriger Prozess sein, der über die Dauer der eigentlichen Gesetzgebungsberatung hinausgeht.

Vor diesem Hintergrund war es klug und richtig, dass das überregionale GTZ-Rechtsberatungsbüro für Zentralasien und dem Kaukasus mit Sitz an der Universität Bremen unter Leitung von Rolf Knieper immer neben Gesetzgebungsberatung auch die Stärkung der relevanten Institutionen wie der Justiz, der Anwaltschaft, der staatlichen Universitäten und der Verwaltung vorgesehen hat. Dies erfolgte z. B. durch Aus- und Fortbildungen, Erstellung von Unterrichtsmaterialien (*curricula*), Studienreisen nach Deutschland und Hospitationen in der deutschen Justiz und Verwaltung sowie diversen Studienaufenthalten und Praktika.

Dabei war das Ziel von Anfang an, lokale Fachleute so auszubilden und Institutionen so zu stärken, dass sie unabhängig von externer ausländischer Expertise wurden. Nur so können dauerhafte Kapazitäten im Sinne der entwicklungspolitischen Nachhaltigkeit und für wirksame Umsetzungen der Gesetze geschaffen werden.

Für eine professionelle Weiterentwicklung des Rechts waren die gemeinsam durch georgische und deutsche Rechtswissenschaftlerinnen und Rechtswissenschaftler erstellte Literatur, Fachartikel und die Schaffung der häufig ersten Gesetzeskommentare wichtig.

7. Rechtsbewusstsein und Transparenz

Die weiteren Akteure wie auch die Bevölkerung müssen die neuen Regeln kennen und akzeptieren. Mit diesem Ziel waren die vom

7 Rolf Knieper, WiRO 2003, 257 ff.; Iris Muth, Neues Recht zwischen Tradition und Systemwechsel, 284.

GTZ - Rechtsberatungsbüro konzipierten und durchgeführten Maßnahmen zur Öffentlichkeitsarbeit, zum Zugang zu Beratungsangeboten und zur Justiz sowie adressatengerechte und bedarfsorientierte Aus- und Fortbildungen entscheidend. So sollten über das Arbeitsgesetz und seine Anwendung nicht nur Richter und Rechtsanwälte, sondern auch weitere Adressaten des Gesetzes wie Gewerkschaften und Arbeitgeberverbände geschult werden.

Für alle verabschiedeten Gesetze gilt, dass sie veröffentlicht und zugänglich gemacht werden mussten und müssen. Neben und parallel zu der Veröffentlichung der Gesetze in dem amtlichen georgischen Gesetzgebungsblatt „*Sakartvelos Sakanonmdeblo Matsne*“⁸ fanden zu den Gesetzgebungen, die eine breitere Öffentlichkeit betrafen, auch Informationsveranstaltungen in Präsenz, sowie über Presse, Fern- und Rundfunk, statt.

8. Internationale und europäische Standards als Orientierung?

Bei der georgischen Arbeitsgesetzgebung stand die Gesetzgebungsberatung vor dem Dilemma, dass es einerseits keine ausreichend rechtskulturell gewachsenen Strukturen in diesem Bereich in Georgien gab und andererseits internationale Regelungen zu unspezifisch waren und sich kein anderes nationales Arbeitsrecht als Modell gut eignete.

Orientierungsrahmen für die Gesetzgebung war daher das Ziel der Gesetzgebung, Regelungen zu schaffen, die innerhalb der georgischen Rechtsordnung und der Verfassung wie auch gegenüber internationalen Verpflichtungen konsistent und widerspruchsfrei sind. Hierfür wurden westeuropäische und internationale Bestimmungen des Arbeitsrechts vergleichend herangezogen und auf allgemeingültige Grundsätze sowie deren Übertragbarkeit in das georgische Recht hin überprüft.⁹ Es wurden also westeuropäische Regelungen, ihre Ausgangs- und Rahmenbedingungen und ihre Anwendung miteinander verglichen, um auf Basis dieser Erkenntnisse Regelungen zu entwickeln, die auf die georgischen Verhältnisse angepasst wurden. Für diesen Prozess war ausländische Rechtsberatung hilfreich, da zu der Zeit unter georgischen Juristen Kenntnisse über die westeuropäischen Arbeitsrechtssysteme, die internationalen

8 Offizielle Website des georgischen Justizministeriums für die Veröffentlichung der Verfassungsänderungen, Gesetze, Regierungsverordnungen, präsidentiale Dekrete und andere normative Akte in konsolidierter und verbindlicher Form: Matsne.gov.ge

9 Iris Muth, Neues Recht zwischen Tradition und Systemwechsel, 281.

Regelungen und vor allem Erfahrungen mit ihrer Anwendung nicht ausreichend vorhanden waren.

Zwar konnte sich die ausländische Gesetzgebungsberatung auf kein einheitliches Arbeitsgesetzmodell stützen, doch konnte sie sich an den Gemeinsamkeiten der westlichen Arbeitsrechtsordnungen orientieren, die sich vor allem aus den Grundsätzen der Koalitionsfreiheit in Abgrenzung zu den sowjetischen Arbeitsrechtsbestimmungen ergeben. Diese Abgrenzung verdeutlichte die Bruchstellen zwischen dem Arbeitsrecht in der planwirtschaftlich geprägten Sowjetunion und dem durch die Marktwirtschaft geprägten Arbeitsrecht westlicher Staaten. Auf dieser Basis hat die georgische Gesetzgebungskommission zusammen mit den ausländischen Beratenden Regelungen erarbeitet, die der sozialistischen Rechtstradition ebenso wie den sozio-ökonomischen Umständen Georgiens hin zu einer freien Marktwirtschaft Rechnung trugen oder dies zumindest versuchten.

Dieser Bereich stellte die ausländische Beratung bei der georgischen Arbeitsgesetzgebung vor die größten Herausforderungen, da diesbezügliche Informationen nur schwer ermittelbar waren und Erfahrungswissen fehlte.

Aus der Bedeutung zur Beachtung rechtskultureller Rahmenbedingungen ergibt sich, dass westliche Beratung ggf. auf die Gefahren einer unkritischen Übernahme nationaler, supranationaler und internationaler Regelungen hinweisen sollte.

Die Untersuchung des georgischen Arbeitsrechts hat verdeutlicht, dass diese Gefahr damals angesichts der Sogwirkung der Europäischen Gemeinschaft, die auch zur kritiklosen Übernahme von europäischen Regelungen führte, groß war. Der Wunsch durch die Übernahme europäischer Regelungen schneller als Mitglied in der Europäischen Union aufgenommen zu werden, setzte sich auch in den Folgejahren fort. Eine unkritische Übernahme der Regelungen kann jedoch zu erheblichen Störungen bei der Akzeptanz und Umsetzbarkeit des Rechts führen. Daher können der Stand der wirtschaftlichen Entwicklung und die besonderen Rahmenbedingungen Georgiens bzw. des Partnerlandes erfordern, dass von internationalen Regelungen abgewichen wird, sofern sich das Partnerland zu deren Umsetzung nicht völkerrechtlich verpflichtet hat.¹⁰

10 Rolf Knieper, *Zwang, Vernunft, Freiheit*, 1981, 101 ff., wo Knieper vertritt, dass die Begriffe der „politischen Souveränität“ und der „nationalen Identität“ temporär genutzt werden können, um zB „Ungleichzeitigkeiten“ der wirtschaftlichen Entwicklung auszugleichen und dadurch bsw. erst den Aufbau einer international konkurrenzfähigen Industrie zu ermöglichen.

Aus dem anfangs bereits Dargelegten sind für Entscheidungen zu Abweichungen von europäischen Regelungen Kenntnisse der georgischen Strukturen einerseits und der einschlägigen europäischen und internationalen Regelungen, ihrer Auslegung sowie ihrer rechtsvergleichenden Anwendungspraxis erforderlich. Eine enge Zusammenarbeit zwischen georgischen und ausländischen Fachleuten war an dieser Stelle für die Beratung daher besonders wichtig.

9. Politischer Durchsetzungswille und -möglichkeit

Die beste Gesetzgebungsberatung und Beratungsmethodik kann keine Garantie für eine erfolgreiche Implementierung eines Gesetzes bieten.¹¹ Es braucht immer den politischen Durchsetzungswillen und die Durchsetzungsmöglichkeiten der Anwendenden. Dies sind beim kollektiven Arbeitsrecht neben den staatlichen Stellen vor allem auch die Kollektivparteien und eine unabhängige, starke Justiz.

Und es braucht eine Bevölkerung und einzelne Personen, die bereit sind, sich im Streitfalle an die staatlichen Organe, allen voran der Justiz zu wenden. Dies setzt, wie bereits erwähnt, ein Vertrauen in die Funktionsfähigkeit dieser Organe voraus, es setzt aber auch ein Grundverständnis von allgemeingültigen Regelungen und ihrer staatlichen Durchsetzbarkeit wie auch das Fehlen von vermeintlich oder wahrhaft besseren Alternativen für die Streitbeilegung voraus.

An diesen Voraussetzungen scheint es m.E. zumindest in den 2000er Jahren in abgeschiedenen Gebirgsregionen wie der Region Obersvanetien im Hohen Kaukasus gefehlt zu haben.

II. Gewohnheitsrecht in Obersvanetien (2006)

Die These, dass staatliches Recht, so gut es auch sein mag und so erfolgreich es von ausländischen Fachleuten beraten wurde, nur begrenzt in Obersvanetien umgesetzt wird, möchte ich in diesem Kapitel darlegen. Meine These leitet sich ab aus einer Feldstudie, die wir im August 2006 in Obersvanetien durchführen konnten.

11 *Iris Muth*, Neues Recht zwischen Tradition und Systemwechsel, 283.

1. Obersvanetien

Obersvanetien ist eine Hochgebirgsregion im Nordwesten von Georgien, an der Grenze zu Russland (Kabardino-Balkarien und Nordossetien). Die Region ist geprägt von 3000-5000 Meter hohen Bergen (u.a. Schkara, Ushba). Es ist das höchste besiedelte Gebiet in Europa und Heimat der Svanen, einer alten ethnischen Gruppe mit eigener Sprache und eigener Kultur. Svanisch gehört zu der kartvelischen (georgischen) Sprachfamilie. Die svanische Sprache ist in erster Linie eine gesprochene Sprache, die kein eigenes historisches Schriftsystem entwickelt hat. Wenn es schriftlich verwendet wird, geschieht dies üblicherweise durch Transkription mit georgischen Buchstaben.

Die Svanen gelten als besonders traditionsbewusst; viele alte Bräuche, zu denen auch ihr Gewohnheitsrecht gehört, haben sich dort auch während der Sowjetzeit erhalten. Dies mag auch daran gelegen haben, dass Svanetien lange Zeit schwer zugänglich war und so leichter unabhängig von äußeren Einflüssen bleiben konnte.

2. Methodik und Rahmenbedingungen der Studie

Für die Feldstudie haben meine Kollegin Barbara Minderjahn und ich 70 Interviews mit Vertretungen von offiziellen staatlichen Strukturen wie der Justiz (Richter und Staatsanwaltschaft), Polizei und Gamgebelis (kommunaler Verwaltungsleiter, vergleichbar mit einem Bürgermeister), Regierungschef für die Region Samegrelo/Obersvanetien, Abgeordnete aus dem Parlament in Tbilisi sowie mit lokalen Mediatoren (alle männlich), Priestern, hochanerkannten Persönlichkeiten wie Bergsteigern, Ärzten, Lehrern sowie NGOs geführt.

Die Interviewpartner in Obersvanetien kamen aus verschiedenen Familien, Clanstrukturen, Dörfern und Dorfgemeinschaften in der Provinzhauptstadt Meschia und den vier weiteren Orten in Svanetien: Ushguli, Kala, Ipari und Haishi.

Die Interviews wurden einzeln und in Gruppen geführt.

Für das Führen vertrauensvoller Interviews war es wichtig, dass uns anerkannte svanische Familien als Gäste aufgenommen haben. Hiermit trugen sie auch die Verantwortung für unser Wohlergehen während des Aufenthaltes bei ihnen. Dies entspricht nach wie vor praktizierter svanischer Tradition, nach der gilt, dass der Gast von Gott geschickt worden sei. Deshalb schuldet man ihm Respekt, Schutz und Versorgung. Ein Gast stand und steht unter dem Schutz des

Hausherrn. Sogar Blutrache musste ruhen, solange ein Gast im Haus war. Aus demselben Grund durfte er weder verraten noch belogen werden.

Die erhaltenen mündlichen Informationen haben wir, soweit es möglich war, mit schriftlichen Materialien abgeglichen bzw. verifiziert. Zu den wenigen erhältlichen Materialien gehören unveröffentlichte Texte von Zeugen aus dem Jahre 1994, einige wenige Texte von Wissenschaftlern aus Tbilisi und Mediationsgegenstände, wie ausgewählte Kirchen, Ikone und Streitschlichtungsstöcke.¹² Diese Stöcke waren in der Regel im Besitz des Ältesten, der Streitfälle zu entscheiden hatte. Für jeden erfolgreich gelösten Fall wurde ein weiterer Strich auf den Holzstock geritzt.

3. Grundlagen des svanischen Gewohnheitsrechts

Grundsätzlich spielen alle denkbaren Streitfälle im svanischen Gewohnheitsrecht eine Rolle. Besonders häufig kommen Streitigkeiten um Landbesitz, Eigentumsfragen, „Frauenraub“, Diebstahl und zunehmend Streitigkeiten im Kontext kleinerer Unternehmen vor.

Entscheidungen der interviewten Streitschlichter¹³ umfassten insbesondere die Aufforderung an die eine Partei, die andere um Vergebung zu bitten, Geldstrafen und Landübergabe. Die höchste Strafe war es, aus der Gemeinschaft verbannt zu werden und das Haus und Land an die Gegnerfamilie zu übergeben.

Es gibt im svanischen Recht keine Ingewahrsamnahme und damit auch keine Gefängnisse. Die svanischen Familien hatten jedoch Wehrtürme am Haus bzw. auf dem Hof, in denen sich der potentielle Täter in der Regel für ein Jahr einsperrte, um nicht Opfer einer Blutrache zu werden. Er wurde von seiner Familie in dieser Zeit mit dem Nötigsten versorgt.

Nach der Philosophie des svanischen Rechts ging es um Schlichtung anstelle von Strafe, Teilnahme der Familie bzw. Gemeinschaft anstelle von Entscheidungen, die von oben herab gefällt werden. Es sind Einzelfalllösungen ohne kodifiziertes Recht.

Bei den Streitschlichtungen standen die potentiellen Auswirkungen der „Entscheidungen“ auf die Gemeinschaft gegenüber den Interessen und Rechten des Einzelnen im Vordergrund. Wesentliche Werte nach denen das svanische

12 Für diese Streitschlichtungsstöcke scheint kein eigener Begriff zu existieren.

13 Streitschlichter in Svanetien waren ausschließlich Männer, so dass hier nur die männliche Form verwendet wird.

Gewohnheitsrecht geprägt ist, sind die Ehre und damit das Vermeiden eines jeglichen Gesichtsverlustes, gegenseitiger Respekt, Gleichheit der männlichen Parteien und die Wahrheit vor und der Glaube an Gott.

Rache, um die Ehre wiederzuerlangen, war grundsätzlich sozial anerkannt.

4. Akteure des svanischen Gewohnheitsrechts

Wichtige Akteure des svanischen Gewohnheitsrechts sind die **Ältestenräte** (*Khutsebi*), welche die höchste moralische und rechtliche Autorität besaßen. Der Khutsebi entscheidet über schwerwiegende Konflikte und interpretiert das Gewohnheitsrecht (Adat) mit bindender Kraft. Der Ältestenrat besteht aus einer Gruppe von anerkannten Männern (in der Regel Morevis) die häufig ad hoc für einen konkreten Fall etabliert wurden. Die Anzahl der Personen beträgt in der Regel 12 oder 24, je nach Schwere und Komplexität des Falles.

Operative Richter heißen **Makhshvi** und **Neskhamesi**. Die Makhshvi sind meistens der Kopf einer Familie, Sippe, einer Gemeinschaft (svanetisch „*temi*“) oder eines Dorfes. Sie werden aus der Gemeinschaft gewählt oder von den Ältesten bestimmt und entscheiden über Alltagskonflikte (z.B. Eigentumsfragen oder kleinere Streitigkeiten).

Die Neskhamesi sind ein Richtergremium oder Einzelrichter für bedeutendere Streitfälle. Sie treten zusammen, wenn wichtige Streitigkeiten z.B. um Land, Blutgeld oder Ehebruch nicht allein durch Makhshvi, also Familienoberhäupter oder Älteste, beigelegt werden können. Sie sind eine Art Zwischenstufe zwischen den einzelnen Familien bzw. Sippen und dem Ältestenrat (Khutsebi). Die Entscheidungen der Neskhamesi haben bindende Wirkung, sie werden aber in schweren Fällen von einer Gemeindeversammlung oder dem Ältestenrat bestätigt.

Die **Morevi** sorgen für die Umsetzung der Entscheidungen. Morevi sind anerkannte Persönlichkeiten, die von beiden Streitparteien akzeptiert werden. Sie agieren als Bürgen bzw. Garanten und werden von den Parteien, zu denen auch Verwandte oder Außenstehende zählten, gewählt. Morevi haben die Aufgabe, zu verhandeln, zuzuhören und, wenn nötig, einen Schwur vor einem Ikonenbild einzusetzen. Dabei haben Morevi eine wichtige soziale Sicherungsfunktion.

Die **Sabcho** ist die Gemeindeversammlung aller Männer des Dorfes. Sie legitimiert die Entscheidungen der Richter bzw. des Ältestenrates. Sie kann neue

Normen und Auslegungen bestätigen und wesentliche Streitfälle prüfen. Sie sichert die gesellschaftliche Legitimation.

Zu den wichtigen Akteuren eines Streitfalles gehören schließlich auch die Familienmitglieder der Streitparteien.

5. Verfahren des svanischen Gewohnheitsrechts

Das Verfahren im svanischen Gewohnheitsrecht sieht folgende Schritte vor:¹⁴

Zunächst erfolgt die Auswahl der Makhshvi bzw. Neskhamesi durch die Streitparteien. Diese wiederum wählen die, in der Regel 12 oder 24, anerkannten Persönlichkeiten (Morevis). Alle an der Streitschlichtung Beteiligten müssen einen religiösen Eid schwören. Danach beginnt die Untersuchung des Falles mit Hilfe von Zeugen. Die Zeugen werden, anders als im westlichen Justizsystem, grundsätzlich gemeinsam, und nicht einzeln, befragt. Ebenfalls werden der Beschuldigte und das „Opfer“ angehört.

Darauf aufbauend wird eine Entscheidung immer im Konsens und immer hinter verschlossenen Türen getroffen. Opfer und Beschuldigter müssen vor Verkündung der Entscheidung nochmals einen Eid schwören, dass sie die Entscheidung akzeptieren werden.

Im Anschluss wird die Entscheidung den Streitparteien und der Gemeinschaft verkündet.

Sieben Tage nach der Verkündung gibt es in der Regel ein Versöhnungsfest in Form einer svanischen Tafel im Hause des ursprünglich Beschuldigten. Bei einem solchen Fest werden nicht nur Versöhnungsgesten, wie Umarmungen und Küsse, zwischen den ursprünglichen Streitparteien ausgetauscht, es ergeht häufig auch das gegenseitige Angebot, Pate für eines der eigenen Kinder zu werden.

Zu guter Letzt wird auf dem Fest ein weiterer Eid der ehemaligen Streitpersonen vor der versammelten Gemeinschaft geschworen, dass sie niemals eine solche Verletzung bzw. einen solchen Streit wiederholen werden.

III. Erkenntnisse aus der Studie in Svanetien für die Gesetzgebungsberatung

Aus der Studie lassen sich einige Erkenntnisse ableiten, die für die Wirkung staatlicher Gesetze und damit letztlich auch für die ausländische Gesetzgebungsberatung relevant sein können.

¹⁴ Vgl. hierzu auch *Egnate Gabliani*, Georgian Traditional Justice.

- 1.) Staatliche Gesetze haben nur einen begrenzten Einfluss in Svanetien und
- 2.) Die Svanen vertrauen weiterhin ihrem Gewohnheitsrecht

Alle 45 befragten Svaninnen und Svanen, junge wie ältere, gaben an, dass sie im „Streitfalle“ wie auch im Falle einer Straftat zunächst die respektierten Mitglieder der Gemeinschaft mit ihren Streitschlichtungssystemen um Unterstützung bitten und sich - zumindest nicht sofort - an die staatlichen Instanzen wenden würden. Diese Haltung spiegelt sich in den staatlichen Justizstatistiken wider, wonach in 2003 lediglich drei Fälle in dem einzigen staatlichen Gericht in Svanetien mit Sitz in Mestia verhandelt wurden.¹⁵ Dazu passt auch, dass die einzige Station für polizeilichen Gewahrsam in Mestia fast immer leer war.¹⁶ In ganz Obersvanetien gab und gibt es kein staatliches Gefängnis.

Nahezu alle Interviewpartner äußerten, dass sie staatlichen Strukturen, wie der Polizei und den Gerichten, skeptisch gegenüberständen und sie diese Institutionen nicht so respektierten wie die traditionellen svanischen Streitschlichtungsorgane. So würden sie gegenüber einer Ikone im Rahmen eines traditionellen Streitschlichtungsverfahrens niemals lügen, denn damit würden sie ja Gott belügen. Vor einem staatlichen Gericht hingegen würden sie durchaus lügen, wenn sie dies für erforderlich erachteten.

Diese Haltung zeigte sich u.a. auch in dem sog. „Marshrutka“-Fall, in dem Zeuginnen vor einem staatlichen Richter aussagten. Fünf Tage nach der Aussage verkündeten sie in ihrer Gemeinschaft, dass sie den Richter belogen hätten. Allen war klar, dass sie dies nie vor einer Ikone machen würden. Auch dem Richter war dies klar, so dass er die anerkannten Streitschlichter aus der Gemeinschaft um Unterstützung beim Beilegen des Konfliktes bat. Die Zeuginnen wurden daher schließlich durch svanische Streitschlichter aufgefordert, vor einer Ikone auszusagen, was sie taten. Mit diesem Umweg konnte der Fall am Ende erfolgreich gelöst werden.

- 3.) Das Gewohnheitsrecht basiert im Wesentlichen auf religiösem Glauben

15 Interview mit Richter, Amtsgericht Mestia, 16.08.2006. Leider konnten keine aktuelleren Daten zu den Fällen am Magistratsgericht Mestia herausgefunden werden. Die offizielle georgische Justizstatistik weist keine Daten für das Gericht in Mestia aus. Sie weist lediglich Zahlen für das Bezirksgericht Zugdidi inklusive der Magistratsgerichte von Mestia, Tsalendjika (Samegrelo) und Chkhorotsku (Samegrelo) aus. Für 2023 waren dies insgesamt 20.311 eingegangene und erfasste Fälle an allen Gerichten.

Das Schwören des Eides geschieht grundsätzlich vor einer Ikone oder einer Kirche.¹⁷ Der tief verankerte religiöse Glaube und die allseits verbreitete Furcht vor Gott trägt erheblich zur Versöhnung der Streitparteien bei. Hierzu zählt auch, dass es für Svanen selbstverständlich ist, dass in der Nähe oder in der Kirche niemals etwas Schlechtes über einen anderen Menschen gesagt wird; auch wird nicht geschimpft oder gestritten.

Jeder entscheidende Schritt bei einem svanischen Streitschlichtungsverfahren wird mit einem religiösen Eid, in der Regel vor einer Ikone, verbunden. Dieser religiöse Eid ist aufgrund der tief verankerten Gottesfurcht aus Sicht der Svanen eine Garantie, die Wahrheit zu erlangen. Eine solche Pflicht zur Wahrheit besteht aus svanischer Sicht gerade nicht vor staatlichen Organen.

Das gesamte svanische Gewohnheitsrecht basiert und hängt ab von dem strengen Glauben und der Gottesfurcht eines jeden einzelnen Svanen in der Gemeinschaft.

In der Konsequenz ist das System auch nur anwendbar auf und für Mitglieder aus dieser Gemeinschaft.¹⁸

4.) Staatliche und svanische Rechtssysteme ergänzen und verdrängen sich

Polizei, Staatsanwälte, Richter und Verwaltungsbeamte (Gamgebelis) haben alle mitgeteilt, dass sie schonmal gut anerkannte „Streitschlichter“ aus den svanischen Gemeinschaften um Unterstützung bei ihren staatlichen Aufgaben gebeten hatten. Dies wurde bereits anhand des sog. Marskhrutka - Falles aufgezeigt. Streitschlichter wurden hinzugezogen bei Strafrechts- wie auch Zivilrechtsfällen, aber auch bei politischen Entscheidungen. Letzteres war z.B. der Fall im Jahre 1993, als Streitschlichter dafür Sorge getragen hatten, dass sich Svanen nicht an dem Bürgerkrieg um Abkhazien beteiligten.

Die interviewten Personen aus Svanetien haben ihr System als für sie höherwertiger beschrieben als das staatliche Rechtssystem. Dies läge daran, dass es gerecht, wahr und versöhnend sei und beide Parteien befriedige. Die Entscheidungen seien akzeptiert und würden befolgt.

Hingegen würden Gerichtsentscheidungen häufig den Konflikt zwischen den Parteien, Familien und Gemeinschaften nicht beenden. So habe es immer

17 *Besarion Nizharadze*, Historical – Ethnographical letters, Distribution of Christianity in Svaneti, S. 1.

18 Laut Interviewpartner im August 2006 soll es vereinzelte Ausnahmen geben, in denen die Regeln des svanischen Rechts in vergleichbaren Gemeinschaften in in Kvemo Kartli und Abkhazien angewendet worden seien.

wieder Fälle von Blutrache gegeben, selbst nachdem der Täter vor staatlichen Gerichten verurteilt und seine Strafe in der staatlichen Haft abgesessen habe. Solche Fälle seien sowohl während der Sowjetunion geschehen als auch noch danach. So sei der letzte diesbezüglich bekannte Fall im Jahre 2004 geschehen.

Aus Sicht der Svanen solle das svanische Streitschlichtungssystem stärker in das staatliche System integriert werden. In Svanetien solle dieses System parallel neben dem staatlichen System weiter gelten.

Die staatlichen Vertreter äußerten sich zu dieser Frage – wenig überraschend – verhaltener: So anerkannten einige Interviewpartner¹⁹, dass das svanische System leistungsstark für Svanetien sei, um Konflikte zu lösen und sie vorzubeugen. Doch sei es nicht realistisch, dieses System in das staatliche System zu integrieren. Vielmehr sahen einzelne Vertreter auch in dem svanischen System ein Hindernis auf dem Weg zu einem vollständigen Rechtsstaat im westlichen Sinne in Georgien zu etablieren.²⁰

Weitere befragte Personen äußerten, dass das svanische System ignoriert werden solle, räumten jedoch ein, dass es ohnehin bestehen bleibe und sich von keinem staatlichen System verdrängen ließe.

D. Schlussfolgerungen

Das unter A.) beschriebene Vorgehen einiger ausländischer Berater, Georgien als *tabula rasa* zu betrachten, die sich beliebig mit ausgeklügelten, systemfremden Kredit- und Bankengesetzen befüllen ließe, mag angesichts der Betrachtungen des svanischen Systems noch absurder klingen.

Doch bleibt die Erkenntnis, dass Georgien wie auch alle anderen postsowjetischen Staaten gerade in der Umbruchzeit bis heute nichts mehr brauchen als genau das: „Vertrauen in das wirkende Recht und in den Staat“.

Diese Erkenntnis gerät auch angesichts der Betrachtungen des svanischen Streitschlichtungssystems nicht ins Wanken. Das svanische System war, und ist es noch immer, wichtig für das friedvolle Zusammenleben in den svanischen Gemeinschaften. Es hat aber bereits angesichts zunehmender Einflüsse von außen, die vor allem unter dem Präsidenten Saakashvili ab dem Jahre 2007 vorangetrieben wurden, an Bedeutung verloren. Und es wird wohl mit zunehmenden äußeren Einflüssen weiter an Bedeutung verlieren.

19 Richter aus Zugdidi, 17.08.2006

20 Verwaltungschef Samegrelo - Obersvanetien (governors office), 16.08.2006

Für den Großteil des georgischen Staates hatte das svanische System schon damals keine Auswirkungen und hat es heute erst recht nicht. Für die Zukunft Georgiens war, ist und bleibt entscheidend, dass der Wohlstand und die Sicherheit der georgischen Bevölkerung im Westen liegen. Dazu zählen vor allem die Kernbestandteile eines Rechtsstaats, wie die Rechtsbindung der Staatsgewalt, das Gewaltmonopol des Staates, die Rechtsgleichheit und die Durchsetzung wesentlicher Freiheits- und Grundrechte.

Dazu gehört auch, dass staatliches Handeln weder auf Falschbehauptungen basieren darf, noch diese durch staatliche Akteure weiterverbreitet werden. Faktenbasiertes Handeln, Verschwörungstheorien und Angstverbreitung entschieden und konsequent entgegenzutreten, tradierte universal geltende Werte und Prinzipien zu erhalten, ist heute die größte Herausforderung für den Aufbau und den Erhalt resilienter rechtsstaatlicher Systeme. Mehr denn je.

Hierfür braucht es Persönlichkeiten wie Rolf Knieper -, die mit Kraft, Schaffensdrang, Optimismus und der festen Überzeugung für das Obsiegen des Rechts und des faktenbasierten Wissens gegen diejenigen eintreten, die Demokratien und universelle Werte weltweit zerstören wollen. Dafür braucht es fundierte Fachlichkeit, breite Erfahrung, ein außerordentliches Gespür für die Menschen und ein ausgeprägtes Verhandlungsgeschick. Und es braucht den Mut, vermeintlich einfachen Lösungen und der zerstörerischen Wut von Autokratien früh, entschieden, konsequent und transnational entgegenzutreten.

Heute mehr denn je.

Rolf Knieper – Teacher and Friend

Following the collapse of the Soviet Union, the newly independent countries encountered many immediate challenges. In Uzbekistan, as in other CIS states, the transition from a state-planned economy to a market economy depended critically on legal reforms, above all, in civil legislation and its foundational structure, and the Civil Code.

In May 1992, at a meeting convened by the Minister of Justice with leading Uzbek jurists, the concept and structure of legal reform for an independent Uzbekistan were under discussion, especially in the field of civil law. Proposals ranged from adopting Islamic law to pursuing Anglo-Saxon legal models. Nonetheless, the majority favoured maintaining the continental legal system, deemed essential for preserving stability in regulatory governance. The minister backed this position, noting it was aligned with the political leadership of the republic.

It was decided to form a working group to draft a new version of the Civil Code and to engage international consultants. Firstly, this decision was motivated by the absence of domestic experts experienced in tackling complex codification projects such as a Civil Code. During the Soviet era, such work was conducted at all-Union centres and committees, largely by Russian legal scholars. Secondly, Uzbek legal consciousness remained Soviet in orientation and struggled to assimilate new private-law institutions such as property rights, contractual innovations and market-oriented civil constructs.

Thus, in July 1992, a working group was established in Uzbekistan to draft a new version of the Civil Code of Uzbekistan, and, in March 1993, it was joined

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by a consultant from Germany – the well-known European civil law scholar Rolf Knieper.

At first, Rolf – young-looking (he always looks a decade younger for his age), tall, slender, with tousled hair – did not impress us immediately. Yet at our first meeting, his critical and profound analysis of Uzbek civil legislation, accompanied by concrete proposals for reform, left us astounded.

Collaborating with Rolf Knieper proved challenging for both sides. We were deeply steeped in socialist legal consciousness and the outdated Soviet Civil Code. We engaged in frequent debates on private property rights, *in rem* rights, obligations law and many other topics. Nevertheless, Rolf's patience and clarity gradually prevailed. His ideas became a part of the draft articles and paragraphs of the new Civil Code. Below are several examples of discussions within the working group based on Rolf's contributions to the improvement of Uzbekistan's civil legislation, which were subsequently adopted and incorporated into the Civil Code of Uzbekistan.

Rolf Knieper explained that modern commercial transactions require flexibility and simplicity, and therefore, the question of what form the parties should give to their contracts ought to be left to their discretion. Only in cases where interests of significant importance are affected – for example, in contracts involving real estate – should a mandatory qualified form be prescribed. The protection of state interests, such as those of tax authorities, should not be embedded in the Civil Code. This principle is enshrined in the United Nations Convention on Contracts for the International Sale of Goods, which, in Article 11, provides for freedom of form in contracts.¹ Rolf noted, however, that unfortunately Article 108 of the Civil Code of Uzbekistan requires a written form for all contracts involving at least one legal entity, or where the transaction amount exceeds a prescribed limit, which contradicts the principle of freedom of form of contracts as set forth in the above-mentioned UN Convention.²

A particularly telling episode occurred in Geneva, in September 2021, where I served as the Uzbek law expert during an international commercial arbitration between LUKOIL (Uzbekistan) and an Indonesian firm. The arbitrators

1 United Nations Convention on Contracts for the International Sale of Goods, Article 11: https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods_cisg Accessed 19 August 2025.

2 Civil Code of the Republic of Uzbekistan, adopted 1996, Article 108: <http://www.lex.uz> Accessed 19 August 2025.

questioned the stringent formal requirements for contract formation in Uzbekistan's Civil Code. I explained that this issue was controversial and that Rolf Knieper had repeatedly critiqued these provisions during our work. On hearing Rolf's name, the German and Swiss arbitrators exclaimed, "Oh, you know Rolf Knieper?!" I said, "Yes, I do!" and added that we had a longstanding collaboration. The arbitrators' mood shifted, and they began to listen to me with greater attention and respect.

Rolf argued that Articles 125 and 126 of the Uzbek Civil Code do not sufficiently protect business relations and do not adequately reflect the realities of a functioning market economy.³ He emphasised that it is fundamentally unfair for the burden of non-compliance with statutory objectives, or of exceeding the authority granted to a representative, to fall on a good-faith contracting party. In practice, violations of internal rules or corporate charters should have internal consequences within the organisation and should not undermine the enforceability of agreements in the external market. This approach ensures that business operations remain predictable and that the principle of private autonomy is respected. Currently, under Articles 113 and following, contracts can only be declared invalid through court decisions, which creates legal uncertainty and contradicts the principle that parties should be able to rely on their freely expressed intentions.⁴

Regarding the rules on representation (Articles 129 and following), Rolf acknowledged that, in general, they are compatible with the needs of a market economy.⁵ However, some aspects require modernisation to align with international standards. For instance, there is no compelling economic reason that a power of attorney must always be in writing (Articles 135 and following) or why it must have a fixed expiration date (Article 139). While Article 132 correctly states that acts performed without authority require approval to become valid, the law does not address the consequences if approval is refused. This omission leaves the good-faith third party vulnerable. At a minimum, the law should

3 Civil Code of the Republic of Uzbekistan, adopted 1996, Articles 125–126: <http://www.lex.uz> Accessed 19 August 2025.

4 Civil Code of the Republic of Uzbekistan, adopted 1996, Article 113: <http://www.lex.uz> Accessed 19 August 2025.

5 Civil Code of the Republic of Uzbekistan, adopted 1996, Articles 129–139: <http://www.lex.uz> Accessed 19 August 2025.

explicitly establish liability for false representations, providing clear protection and remedies.

Rolf also examined the subject of public contracts, regulated by Article 358.⁶ He argued that this article excessively restricts the autonomy of private businesses. By compelling all companies to enter into certain contracts and forbidding them from negotiating terms, the law effectively removes contractual freedom, requiring uniform conditions for all clients. According to Rolf, this goes far beyond the necessary protection of weaker parties in a contract and undermines the principle of private autonomy enshrined in Article 354.⁷ He suggested reforming the provision along the lines of Georgia, Moldova and Turkmenistan. In these jurisdictions, companies are required to enter into contracts only if they hold a dominant position in the market and can dictate terms unilaterally, or if one party's existence depends entirely on the goods or services provided by the company. This approach strikes a more reasonable balance between protecting weaker parties and respecting the freedom of stronger market players (see Article 333 of the Civil Code of Turkmenistan⁸ and Article 319 of the Civil Code of Georgia⁹).

A related issue concerns standard terms and adhesion contracts, covered in Articles 359 and 360. The Uzbek Civil Code recognises the problem of unequal bargaining power but addresses it only superficially. Article 359 provides a basic definition of standard terms, while Article 360 states that terms contrary to fairness are invalid. However, these articles do not clarify what constitutes unfairness, leaving considerable ambiguity. Rolf suggested adopting a European-style approach, which includes detailed lists of unfair terms, as has been successfully implemented in all EU countries and in the civil codes of Georgia, Turkmenistan and Mongolia (see Sections 305–310 of the German Civil Code and Articles 342–

6 Civil Code of the Republic of Uzbekistan, adopted 1996, Article 358-360: <http://www.lex.uz> Accessed 19 August 2025.

7 Civil Code of the Republic of Uzbekistan, adopted 1996, Article 354: <http://www.lex.uz> Accessed 19 August 2025.

8 Civil Code of Turkmenistan, Article 333: <https://www.turkmenlegislation.gov.tm> Accessed 19 August 2025.

9 Georgian Civil Code, Article 319: <https://matsne.gov.ge/en/document/view/22727> Accessed 19 August 2025.

348 of the Georgian Civil Code¹⁰). Such an approach enhances transparency, protects weaker parties, and provides clear guidance for courts and businesses alike.

Another major focus of Rolf's analysis was the enforcement of obligations and the consequences of late, improper or non-performance. He noted that the Uzbek Civil Code shares much in common with the German Civil Code in emphasising that contracts must be fulfilled and that obligations cannot be entirely nullified even when performance becomes difficult or impossible.¹¹ Rather than cancelling obligations, both codes allow adjustments that reflect the changed circumstances while ensuring that the interests of the affected party are considered.¹² This approach encourages fairness, continuity of business relations and economic stability.

For example, Article 399 of the Uzbek Civil Code allows a buyer of defective goods to demand repair, replacement, price reduction, reimbursement for repair costs or termination of the contract.¹³ Similar remedies exist for incomplete deliveries (Article 413), defective leases (Article 542), and contracts for work or services (Article 650).¹⁴ These rules partially correspond to German law (Sections 437, 536, 634 BGB).¹⁵ However, Rolf pointed out several important differences. In Germany, the seller has the first right to repair or replace defective goods (Sections 439, 281 BGB),¹⁶ whereas in Uzbekistan this right applies only to contracts for work. He argued that extending this rule to other contracts would improve fairness and efficiency. Additionally, in Germany, obligations to remedy defects exist independently of fault whereas in Uzbekistan the law sometimes

10 BGB – Bürgerliches Gesetzbuch (German Civil Code), Sections 305–310: <https://www.gesetze-im-internet.de/bgb/>; Georgian Civil Code, Articles 342–348: <https://matsne.gov.ge/en/document/view/22727> Accessed 19 August 2025.

11 BGB – Bürgerliches Gesetzbuch (German Civil Code), Section 275: <https://www.gesetze-im-internet.de/bgb> Accessed 19 August 2025.

12 BGB – Bürgerliches Gesetzbuch (German Civil Code), Section 313: <https://www.gesetze-im-internet.de/bgb> Accessed 19 August 2025.

13 Civil Code of the Republic of Uzbekistan, adopted 1996, Article 399: <http://www.lex.uz> Accessed 19 August 2025.

14 Civil Code of the Republic of Uzbekistan, adopted 1996, Articles 413, 542, 650: <http://www.lex.uz> Accessed 19 August 2025.

15 BGB – Bürgerliches Gesetzbuch (German Civil Code), Sections 437, 536, 634: <https://www.gesetze-im-internet.de/bgb> Accessed 19 August 2025.

16 BGB – Bürgerliches Gesetzbuch (German Civil Code), Sections 439, 281: <https://www.gesetze-im-internet.de/bgb> Accessed 19 August 2025.

implies that liability depends on fault. Article 409(2) further limits liability in cases of force majeure, even when a guarantee is provided, which Rolf considered unfair because it allows the guarantor to escape responsibility prematurely.¹⁷

Beyond these specific provisions, Rolf addressed broader structural questions in contract law. In Germany and France, many commercial contracts are regulated in a separate Commercial Code, often considered a marker of an advanced legal system. In Uzbekistan, there has been occasional discussion about whether a separate commercial code is necessary. Rolf argued that it is not. Modern codifications, such as those in the Netherlands and Quebec, demonstrate that civil and commercial law can be integrated effectively. The existence of separate French and German Commercial Codes is largely a historical artefact rather than a reflection of current economic or legal necessity.¹⁸

From this perspective, Rolf praised Uzbekistan for integrating various types of contracts into the Civil Code rather than creating a separate commercial code. Examples include contracts on carriage (Articles 709 and following), bank deposits (Articles 759 and following), insurance (Articles 914 and following), and contemporary contracts such as financial leasing (Articles 587 and following), factoring (Articles 749 and following), and franchising (Articles 862 and following).¹⁹ This approach provides coherence, reduces duplication and simplifies legal practice. However, he criticised the tendency to regulate these contracts again through special laws, such as those governing financial leasing, which sometimes conflict with the Civil Code and create legal uncertainty. He emphasised that such duplication should be avoided, and existing special laws should be fully integrated into the Civil Code to ensure consistency, predictability, and clarity for businesses and courts alike.²⁰

Rolf Knieper's contributions extended beyond Uzbekistan. He played an active role in drafting Civil Code projects across the CIS, and particularly took pride in his highly regarded work on the Civil Codes of Georgia and Turkmenistan,

17 Civil Code of the Republic of Uzbekistan, adopted 1996, Article 409: <http://www.lex.uz> Accessed 19 August 2025.

18 *Rolf Knieper*, *Lectures on Civil Law Reform in the CIS*, Bremen, 1998.

19 Civil Code of the Republic of Uzbekistan, adopted 1996, Articles 709, 759, 914, 587, 749, 862: <http://www.lex.uz> Accessed 19 August 2025.

20 *Rolf Knieper*, *Lectures on Civil Law Reform in the CIS*, Bremen, 1998.

efforts that earned him honorary titles and state awards in those countries as well as in Kazakhstan, Albania, China, Armenia, Azerbaijan and Tajikistan.

In April–May 1994, a CIS working group was formed to draft a model Civil Code for member states. Distinguished civil law scholars – including Academician K. Rakhmankulov and myself from Uzbekistan – participated alongside eminent experts from the Netherlands, Austria, the USA, Italy, and Germany (among them R. Knieper and I. Schramm). Rolf’s presentations, given his theoretical depth and practical legislative experience, aroused considerable interest in our work. Moreover, he had by then already acquired vast experience drafting Civil Codes in the CIS.

In the heated debates over the content of various legal provisions, representatives of the Soviet civil-law school (such as A. Makovsky, E. Sukhanov, Kh. Rakhmankulov, M. Suleimanov, Yu. Basin, S. Khokhlov, and others) opposed the radical reforms to the system and substance of civil legislation proposed by foreign experts. They justified their position by emphasising the need to consider certain features of the transitional period toward a market economy, as well as the importance of ensuring continuity in established civil legal relations. Aiming to bridge the positions of the opposing sides, Rolf Knieper presented compelling and well-reasoned arguments on the necessity of implementing European private-law standards for real progress. At the same time, he stressed the importance of maintaining legal continuity and undertaking a gradual restructuring of the Soviet civil law system to align it with modern European, specifically continental, legal traditions. Rolf’s recommendations were typically accepted without objection. He was frequently consulted on emerging legal issues.

To defuse tensions, Rolf often invoked the lengthy development of the German Civil Code at the turn of the 20th century – a process spanning nearly fifteen years – to illustrate how legal culture, elite understanding and governance readiness evolve slowly. “By comparison,” he would say, “our work on the model Civil Code is swift and promising – but much remains to be done.”

On Rolf Knieper’s recommendation, from 1996 to 2004, I participated in the German Society for Technical Cooperation (GTZ) project based at the University of Bremen – then Rolf was the head of the law faculty – to advance private-law legislation in transition economies. Experts (ministry, parliamentary and judicial officials) from eight CIS countries and Mongolia met in Bremen, Frankfurt, and other cities, analysed national legislation, drafted proposals, and discussed European integration strategies. These sessions were excellent training for

national experts in legislative drafting, with Rolf leading discussions and offering guidance on legislative implantation and doctrinal alignment.

We admire Rolf's boundless energy, remarkable work ethic and social ease. He travels extensively – lecturing, consulting, advising emerging states in the CIS, Africa, and Southeast Asia, and serving as arbitrator in international tribunals across continents.

At the same time, Rolf Knieper is the author of over 200 scholarly articles and monographs – each a serious contribution to the evolution of European civil law. In particular, his book *Law and History* (2005, Almaty)²¹ is a foundational study: a profound professional analysis of Germany's Civil Code development at the 19th–20th century transition and its subsequent evolution. I recommend it as essential reading for every legal scholar – a source for understanding the challenges lawmakers confront when drafting new civil-law codes and refining existing ones.

Rolf Knieper is also known for his principled stance and perseverance. Between 2011 and 2013, he opposed, alongside other civilists, Kazakhstan's draft Entrepreneur Code – a legislative initiative that many scholars believed would undermine regulatory clarity by blending private and administrative economic law. Rolf's efforts included organising conferences, symposiums and publishing a collected volume (Almaty, 2011).²² Ultimately, bureaucracy prevailed, and the Code was adopted in 2015.²³

A similar proposal emerged in Uzbekistan, but it faced significant opposition. Rolf Knieper delivered clear and legally sound presentations and arguments at various events in Uzbekistan, explaining why adopting an Entrepreneurial Code, which mixes private law with economic administrative law, would be unwise. He warned that this approach would lead to overlapping legal norms and worsen the regulation of economic and entrepreneurial activities. His arguments prompted vigorous debate among lawyers and entrepreneurs. Thanks to Rolf's strong and consistent stance, the proposal to create an Entrepreneurial Code for Uzbekistan was ultimately rejected. However, ten years later, in 2025, the proposal resurfaced – passed by Uzbekistan's Ministry of Justice and Parliament

21 *Rolf Knieper, Law and History*, 2005.

22 *Rolf Knieper (ed.), Collected Volume on Civil Law Reform*, Almaty, 2011.

23 Entrepreneurial Code of the Republic of Kazakhstan, adopted 2015, Law No. 375-V: <https://adilet.zan.kz/eng/docs/K1500000375> Accessed 19 August 2025.

– and, today, all the issues Rolf Knieper warned of are causing serious difficulties for entrepreneurs and legal practitioners in Uzbekistan.

Not only is Rolf Knieper a distinguished scholar with encyclopaedic knowledge of European and CIS legal systems, an expert in lawmaking and the application of civil and private international law, but he is also known for his warm personality and excellent communication skills. Rolf has made many friends across the CIS and beyond. When he visits Uzbekistan, the legal community welcomes him with genuine joy. Conversations with him are always engaging.

Rolf's knowledge is truly impressive, and his sense of humour and natural ease in communication (he learned Russian surprisingly easily), along with his friendliness and modesty, naturally draw people to him and make every interaction both pleasant and engaging. Working with Rolf is easy and efficient, but time spent outside of work is just as enjoyable, whether it involves a trip to the mountains, a visit to a museum, sampling local cuisine or attending a theatre performance.

And most importantly, Rolf Knieper knows how to be a true friend. He is always ready to help, whether it is editing a paper, planning a research project, helping with a dissertation summary, or solving issues with finding a job in Germany.

I still remember how, back in 2006 in Bremen, Rolf invited the three of us from Uzbekistan to his apartment. He treated us to an amazing fish dinner, which he cooked himself. He even went to the fish market at 4 a.m. to buy the freshest fish! That is just the kind of person Rolf is.

Rolf Knieper devoted 25 years to the development of civil law in the CIS. Many modern civil codes in these countries reflect his important contributions. Rolf can be regarded as a key figure in the reform and progress of civil legislation in the post-Soviet space.

Soon, our dear friend and teacher Rolf Knieper will turn 85. He remains full of energy and sharp intellect, just as he was 30 years ago. On behalf of myself and the legal community of Uzbekistan, I sincerely wish Rolf long life, good health, and continued success in his work!

**Bridging Law and Humanity:
In Honour of Professor Rolf Knieper**

Hominum causa omne ius constitutum est
(Every law was created for the sake of individuals.)
Gaius, Roman jurist.

This maxim of the Roman jurist Gaius captures with remarkable precision the philosophy of Professor Rolf Knieper. His scholarly and personal stance is imbued with the belief that the law exists for human beings – for the protection of dignity, freedom and justice. Professor Knieper would tirelessly repeat that the true purpose of law is not the preponderance of a norm over the person, but service to human beings, to their development and to the environment in which we live.

Professor Knieper belongs to that rare generation of humanist jurists for whom the law is not a mere system of rules, but a living element of society, interwoven with culture, history and ethics. His approach to any question has always combined the depth of scholarly analysis with humanity – the ability to see an individual and a human life behind an article of a statute.

I am fortunate to know Professor Knieper personally and to have worked with him for several years. To me, he is an embodiment of wisdom, refinement and inner strength. Throughout that time, every conversation with him has not only been a lesson in professional matters but also a lesson in humanity, respect and kindness.

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Historical and Political Context of Azerbaijan in the Late 1990s and the GIZ Project Assistance to Judicial and Legal Reforms in Azerbaijan, Supported by Germany

The late 1990s in Azerbaijan marked a transition from the post-Soviet turbulence to the formation of stable state institutions. After regaining its independence in 1991, the country underwent a difficult period of restoring political stability, rebuilding its economic system and strengthening the rule of law. Against the backdrop of the consequences of the First Karabakh War, more than a million refugees and a change of political elites, serious structural deficits persisted in relation to personnel, institutions and the normative framework.

The return of Heydar Aliyev to the leadership of the country in 1993 gave fresh impetus to the process of state-building. Under his leadership, systematic work began to strengthen state institutions, stabilise the political system and establish a modern legal framework. In 1995, the new Constitution of the Republic of Azerbaijan was adopted, laying the foundation for the state governed by the rule of law, proclaiming the separation of powers and enshrining the supremacy of law as the fundamental value. That was also a time when large-scale judicial and legislative reforms to modernise the country's legal system were initiated.

The legal system of Azerbaijan in the late 1990s retained features of the Soviet period. The new state institutions – judicial, legislative and executive – did not yet possess sufficient institutional resilience. They required much improvement and strengthening. Therefore, there was a need for systematic codification of legislation and its alignment with international standards. The development of the legal framework became a priority of state policy and judicial reforms were regarded as a strategic instrument for consolidating statehood and public trust in state institutions.

A key stage on this path was the conclusion of the *Intergovernmental Agreement on Technical Cooperation between the Republic of Azerbaijan and the Federal Republic of Germany* in 1996. Among other matters, the Agreement provided for technical assistance to Azerbaijan for the implementation of judicial and legal reforms. The Federal Ministry for Economic Cooperation and Development (BMZ) assigned the implementation of the project *Assistance to Judicial and Legal Reforms in Azerbaijan* to the German Agency for Technical Cooperation (*Deutsche Gesellschaft für Technische Zusammenarbeit* [GTZ], now *Deutsche*

Gesellschaft für Internationale Zusammenarbeit [GIZ]). Professor Knieper was the Project Leader representing GIZ and was responsible for the overall scholarly and methodological guidance. His mandate covered not only Azerbaijan but also other countries of the South Caucasus and Central Asia, which ensured a regional approach and the exchange of experience among the former post-Soviet states.

The choice of Germany as the strategic partner for legal reforms was an obvious one. Both countries represent the continental legal tradition, based on codified sources of law and a highly developed culture of legal drafting. The German legal tradition, distinguished by system, scholarly depth and respect for the principle of legal certainty, proved particularly relevant to Azerbaijan's legal development needs. This ensured methodological compatibility for reforms and made it possible to adapt European legal standards effectively to national practice.

My first contact with the project dates back to 1997, when I was a very young lawyer. By 1998, I was already actively involved in the work. I was designated as the National Coordinator of the project in Azerbaijan. That role entailed interaction with state bodies, the Parliament (*Milli Majlis*) and the judiciary, as well as coordination of the project's day-to-day activities. It was both a great vote of confidence and a tremendous school. It was in my position as the National Coordinator that I came to realise how essential it was to unite people and to create an environment built on cooperation and trust.

Methodological and Conceptual Foundations of the Judicial-Legal Reforms: Approach of Professor Rolf Knieper

The methodology proposed by Professor Knieper combined the scholarly system of the German legal school with respect for the local particularities of the recipient country. His approach to reform was based on partnership rather than patronage; international assistance should stimulate domestic capacities rather than supplant them.

A key principle for Professor Knieper was adaptation, not merely copying. He proceeded from the view that a legal model could become successful only when it was organically embedded in the country's context and reflected its history, culture and administrative traditions.

The work on reforms was conducted systematically. Professor Knieper regarded the legislative process not as a set of isolated acts but as a coherent architecture in which each norm was logically interconnected with the others.

Alongside scholarly rigour, he attached great importance to the practical applicability of law. For these reasons, the project involved not only drafting statutes but also training judges, civil servants, lawyers and advocates, as well as media representatives, with a view to providing sound legal education to the public.

Principles of Implementation: From Theory to Practice

The methodological principles proposed by Professor Knieper found their embodiment in the very first steps of the project's implementation. In 1998, the first joint seminar for members of the *Milli Majlis* (Parliament) of the Republic of Azerbaijan was held on the Parliament's premises. The seminar was dedicated to the technique of legislative codification and shaped up the future strategy of reforms. Members of the Parliament, high-ranking representatives of various state authorities and members of the judiciary and law-enforcement agencies participated in the seminar. The event became a symbol of the transition from concepts to practical interaction between German experts on the one hand and the Azerbaijani lawmakers on the other hand.

Systemic Codification and the Logic of Legislation

Codification became the central focus of the judicial reforms carried out under the scholarly-methodological leadership of Professor Knieper. The approach of colleagues from Germany stemmed from the fact that a state governed by the rule of law could be stable only when the legislative system possessed internal coherence, uniform terminology and predictability in the application of norms.

Professor Knieper stressed that the chaotic accumulation of isolated statutes without a unifying concept would inevitably lead to contradictions and would diminish the quality of the application of law. One of the project's tasks, therefore, was to form a single structure of legislation built on a hierarchy of norms where codified acts comprised the systemic core of the legal order.

The work on codification became a school of systemic legal thinking and craftsmanship for an entire generation of Azerbaijani lawyers. A modern structure of legislation was created, harmonised with European principles and made consistent with the logic of the continental legal system. This foundation ensured the further development of both civil legislation and future administrative, judicial and human-rights reforms.

Reform of Civil Legislation

One of the key focuses of the legal transformation in the Republic of Azerbaijan in the late 1990s and early 2000s was the far-reaching reform of civil legislation. The formation of modern private law in the post-Soviet context required not merely the adaptation of earlier norms but also a thorough reconsideration of the relationship between the state, the individual and property. In that process, particular significance was given to the drafting of the Civil Code of the Republic of Azerbaijan, which became the foundational document for the entire subsequent legal system.

Under the guidance and with the active participation of Professor Knieper, complex and multilayered work was carried out to design the structure and content of the future Code. Judges, civil-law scholars and representatives of research institutes from Germany were engaged to provide expert assessments of individual parts concerning companies, property relations, the law of obligations and contract law. The Azerbaijani side was represented by lawyers, judges and scholars with extensive practical knowledge and experience in the field of civil law.

Professor Knieper did not limit his work to a purely consultative role. He acted as a coordinator of interaction between German and Azerbaijani experts, organising meetings at universities, seminars and discussions involving practising judges and legislators. His approach was marked by an aspiration to combine national legal traditions with the principles of the continental European doctrine. The German side did not impose ready-made models but rather proposed solutions based on systematic analysis and respect for local legal realities. As a result, a normative foundation was established, enabling the transition from fragmentary legislation to a coherent and internally consistent system of civil law.

Development of Civil Procedure Legislation

The logical continuation of the reforms in the area of substantive civil law was the development of procedural legislation, viz., the drafting of the new Code of Civil Procedure. That stage was no less important for improving the rule of law and ensuring the practical realisation of those legal principles that had been embedded in the Civil Code itself.

Work on procedural legislation was likewise carried out with the active participation of German experts and in close cooperation with Azerbaijani judges, lawyers and scholars. Special attention was paid to judicial protection of the rights of individuals and legal entities, the balance between procedural efficiency and the guarantees of a fair hearing, as well as the introduction of the principles of adversarial proceedings and equality of arms.

Representatives of the German judiciary, including judges of the federal supreme courts, as well as experts from the Council of Europe, took part in this work. Professor Knieper coordinated the German specialists' activities, ensuring that their proposals were consistent with the national features of the Azerbaijani judiciary. Numerous joint seminars and workshops were held in Azerbaijan, Germany and France. These events contributed to the formation of a professional community of judges and lawyers who shared the idea of independent and rationally organised civil proceedings oriented towards the protection of individual rights.

Thus, the reform of civil procedural legislation became not merely a technical stage in the development of the judiciary but a significant step towards the institutional consolidation of the principles of a state governed by the rule of law.

Constitutional Court and Institutional Reforms

Particular attention within the GIZ project was given to the establishment and institutional strengthening of the Constitutional Court of the Republic of Azerbaijan, which was founded in 1998. The creation of the Constitutional Court was a major step towards building the system of separation of powers and ensuring the supremacy of the Constitution as the state's fundamental act of legislation. At the early stages of its activity, the Constitutional Court required not only normative consolidation but also the formation of an institutional culture, organisational structure and practice of constitutional adjudication that were in harmony with European standards.

Throughout that period, Professor Knieper and the team of German experts played a key role in implementing the programme to strengthen the Constitutional Court institutionally. Together with German experts and with the support of the Federal Constitutional Court of Germany, drafts of internal regulations were developed, along with recommendations on the organisation of the Chancery, document flow and the structure of administrative units. Special attention

was paid to judicial independence, procedural transparency and the effective distribution of competences among the Court's departments.

An important avenue of cooperation was the organisation of specialised training programmes and exchanges. Within the project, in July 2000, an official visit of the delegation of the Constitutional Court of Azerbaijan to Germany was arranged, led by the Court's President, Doctor of Law, Mr Khanlar Hajiyev. After discussions with the President of the Federal Constitutional Court of Germany, Prof Dr Jutta Limbach and other judges, the participants became acquainted with the activities of the Federal Constitutional Court, the constitutional proceedings, the process of delivering judgments and the role of the Court in safeguarding fundamental rights and freedoms.

In the following years, this cooperation was further strengthened. In May 2003, at the invitation of the President of the Constitutional Court of Azerbaijan, Mr Khanlar Hajiyev and with the support of the GIZ project, the then President of the Federal Constitutional Court of Germany, Prof Dr Hans-Jürgen Papier, paid an official visit to Baku. This was the first visit of a German Federal Constitutional Court delegation to Azerbaijan – a significant event that marked a new stage in bilateral cooperation and contributed to building strong professional and institutional bridges between the two courts.

These visits made it possible not only to learn from the experience of German colleagues but also to adopt the best European practices in Azerbaijan.

At that time, the GIZ Project Office was located on the premises of the Constitutional Court, which facilitated daily professional interaction, the exchange of views and the joint planning of activities. International conferences, workshops and training sessions were held for judges, assistants and Chancery staff on constitutional review, judicial ethics and the application of international legal standards.

This comprehensive work, carried out in close cooperation between German and Azerbaijani professionals, laid a solid foundation for the Constitutional Court's development as an independent and authoritative institution of the national legal system. The experience of the Federal Constitutional Court of Germany significantly influenced the formation of the Court's internal practice, the strengthening of the status of judges and the development of the doctrine of constitutional justice in Azerbaijan. As a result, the Constitutional Court became one of the key elements in the mechanism protecting citizens' constitutional rights and ensuring the supremacy of the Constitution, reflecting the successful

implementation of the principles of the rule of law and independent judicial review.

Development of the Legal Profession and the Law *on Advocacy*

One of the key aspects of the reforms was the strengthening of the legal profession and the preparation of the Law *on Advocacy*. Professor Knieper proceeded from the premise that a stable judicial system was impossible without a strong and independent domestic Bar. Within the project, seminars and study visits to Germany were held, involving leading German advocates and legal scholars. The topics included professional ethics, disciplinary liability, the organisation of self-governance and relations with the judiciary. The outcome of that work was the adoption of the law that created the institutional foundations of the modern legal profession in Azerbaijan and reinforced guarantees for the protection of citizens' rights.

Formation of Administrative and Administrative-Procedural Legislation

The next major area of reforms was drafting substantive and procedural administrative legislation, both being new concepts for Azerbaijan. While the purpose of the civil legislation was to provide the legal basis for economic and private-law relations, administrative regulation had to define the framework for interaction between individuals and the state.

Professor Knieper attached particular importance to this area, viewing administrative law as a necessary condition for balancing the efficiency of state power with the protection of individual rights. He repeatedly stressed that the discretionary powers of administrative bodies must be limited by law and that administrative action must be subject to judicial review.

Work on the draft Code of Administrative Procedure required not only legal design but also institutional reconfiguration. With the participation of German specialists, including judges and experts of federal courts, a number of modern procedural institutions were implemented, including the principles of proportionality, adversarial proceedings, impartiality of the court and enhanced protection of individuals' rights when challenging acts of the public administration. Joint seminars, exchanges of delegations, professional training sessions and study visits were held in Germany and other European countries, enabling

Azerbaijani judges and lawyers to become acquainted with the practice of administrative justice in Europe.

It was precisely in that period that administrative courts, a new institution for the national legal system, were established on the basis of European principles of legality and judicial oversight of the executive. Professor Knieper's role in that process was not only consultative but also methodological. He helped in shaping the concept of administrative justice as an independent branch of the judiciary, serving to protect individuals from potential abuses by the state.

International Commercial Arbitration

An important direction of Professor Knieper's activity was the development of international commercial arbitration, which he saw as one of the key instruments for consolidating the rule of law and for forming a fair business environment. Thanks to his initiative and the active work within the GIZ project, a solid foundation was laid in Azerbaijan for the establishment of a modern system of arbitration law.

Under Professor Knieper's leadership, numerous seminars, courses and practical training sessions were delivered to judges, advocates and law faculty professors to disseminate knowledge about the principles and procedures of arbitral proceedings. Leading experts from Germany and other European countries, representatives of arbitral institutions and practising arbitrators took part in those events.

It is worth mentioning separately the first international seminar on arbitration law, organised in April 1998 at the initiative of Professor Knieper. The seminar was attended by renowned arbitrators and specialists, including Professor Jan Paulsson, one of the world's leading theorists and practitioners of international arbitration and later the President of the International Court of Arbitration at the International Chamber of Commerce (ICC). His participation lent the event a high professional standing and international recognition. The seminar became one of the first practical steps towards forming an arbitration culture in Azerbaijan and testified to Professor Knieper's early understanding of the need to establish national institutions for arbitral dispute resolution.

The recent opening of the Centre for International Arbitration in Baku may be viewed as the realisation of ideas that Professor Knieper advanced and supported as early as the late 1990s. His conceptual vision and persistent

recommendations concerning the importance of such institutions found expression in the contemporary development of the country's legal infrastructure.

In October 2025, on the occasion of the Centre's official opening, a special invitation was extended to Professor Knieper, to which he responded by delivering a special video message to the participants. His remarks to a large audience of lawyers, arbitrators and experts in international arbitration became a significant event. This address not only underscored the continuity of ideas laid down in the late 1990s but also symbolically linked the first steps in developing arbitration in Azerbaijan with the contemporary stage of its institutional formation.

Professor Knieper personally participated in numerous international arbitral proceedings, including inter-state and commercial disputes. His experience and professional authority secured international recognition for the GIZ project and the respect of the professional community.

Legal Education and Dissemination of the Law Through Mass Media

One of the key strands of the GIZ project was the development of legal education through mass media. The aim was to raise the level of legal knowledge among journalists covering legislation, judicial reform and human rights and to spread the culture of responsible and accurate representation of legal processes among the public.

Professor Knieper attached particular importance to the role of media representatives as intermediaries between the legal system and civil society. He emphasised that reforms could not be sustainable without informed public perception and that competent media coverage of legal change helped to build trust in state and judicial institutions. For these reasons, the project established a professional development programme for journalists designed to improve their knowledge of law and to enhance the quality of legal knowledge in the public sphere.

A specialised training centre was established to host seminars, training sessions and round tables with the participation of judges, advocates, law-faculty scholars and international experts. Those meetings enabled participants to discuss standards of terminological accuracy, the specifics of reporting on court proceedings and legal reforms, as well as the ethical dimensions of the media's

interaction with institutions of justice. Competitions for the best articles on various legal topics were also held.

Gradually, an active community of journalists specialising in legal topics formed around the project, who would later become regular participants in conferences, parliamentary hearings and public discussions organised with GIZ's support. Among many other things, their activity promoted transparency in legal reforms and helped build a culture of public dialogue about law and justice.

Conclusions and Significance

The reforms of substantive and procedural civil and administrative legislation and, in general, of the judicial and legal system carried out under the guidance of Professor Knieper with the participation of German experts secured the foundation for the modern legal order in Azerbaijan. The reforms became an example of successful international cooperation based on dialogue, respect for national practice and commitment to building a state governed by the rule of law. All those processes not only strengthened the normative and institutional foundations of Azerbaijani justice but also created the preconditions for the further evolution of law in the spirit of European legal values, namely justice, legality and the protection of human dignity.

The most active period of the project coincided with Azerbaijan's accession process to the Council of Europe. This lent additional dynamism to the reforms and made it necessary to adapt legislation to European standards. The experience of codification and institutional reforms with the participation of Professor Knieper became an example of effective interaction between national and international experts. The project evolved into a platform for international cooperation that fostered contacts with experts from the Council of Europe, European commissions and neighbouring South Caucasus countries. This, in turn, furthered the integration of Azerbaijan's legal system into the European legal space.

Implementation of Reforms and the Role of the International Expert Community engaging Leading German Specialists

One of Professor Knieper's notable achievements was the formation of a broad network of international experts united by the common aim of supporting judicial and legal reforms in Azerbaijan. Experienced German lawyers, judges, advocates, representatives of the German Federal Ministry of Justice and scholars from the academic community were involved in the project. Their participation reflected the principle of combining scholarly knowledge with practical experience, thanks to which a new legal culture took shape in Azerbaijan – one oriented toward the rule of law, procedural fairness and professional responsibility.

Active Participation of Azerbaijani Lawyers and Parliamentarians

Professor Knieper possesses a rare gift of uniting people of different professions and values. He succeeded in earning the sincere respect and goodwill of leading Azerbaijani lawyers and representatives of the judiciary and legislature. Owing to the atmosphere of mutual respect and openness he facilitated, the project received sustained support at all levels – from the Parliament to the executive branch of the state power.

Among the representatives of Azerbaijan, special appreciation is owed to Doctor of Law, Mr Khanlar Hajiyev, the first President of the Constitutional Court of Azerbaijan. From the outset, he provided comprehensive support to the project, ranging from administrative support, by offering office space to GIZ on the premises of the Constitutional Court, to his invaluable reviews and opinions. After Mr Hajiyev's election as a Judge of the European Court of Human Rights in respect of Azerbaijan, support for the project was continued by Mr Farhad Abdullayev, the current President of the Constitutional Court.

Among the project's active participants and friends were Mr Ikram Karimov, then the Chairman of the Baku City Court; Ms Anna Kobylenkova, Deputy Chairwoman of the Baku City Court, who took an active part in drafting the Code of Civil Procedure; and the late judge Mr Ilham Hasanov, who was also my university teacher in constitutional law and to whom I am enormously grateful for all his guidance.

A special role was played by the late Mr Safa Mirzoyev, Head of the Office of the Milli Majlis, whose support ensured coordination with Parliament, including on drafting new civil legislation.

In the field of administrative law and public administration, important contributions were made by Mr Nizami Safarov, at the time the head of the Parliament's Administrative Legislation Department and his deputy, Mr Sayad Karimov, who was involved in drafting administrative legislation and organising study visits to Germany.

The implementation of judicial reforms took place with the active support of the Ministry of Justice and the Presidential Administration. A significant contribution, particularly to cooperation and to the organisation of various seminars for judges, was made by the former Minister of Justice, Mr Fikrat Mammadov. Within the Presidential Administration, a special role was played by Mr Shahin Aliyev, Head of the Legal Support Department, his deputy Mr Niyazi Safarov and Ms Gulnar Rasulova, whose contribution was instrumental and highly effective in coordinating the project's interactions with the Administration.

All of the above-mentioned Azerbaijani lawyers and statesmen, as well as many others, played an exceptional role in advancing judicial reforms and in implementing the project. Many of them became not only colleagues but also close friends of Professor Knieper. Sincere human relations founded on mutual respect and trust arose among the participants and in many respects determined the success of the entire endeavour. The GIZ project became not merely a technical assistance programme but a genuine partnership of cultures and professional schools, strengthening ties between Azerbaijan and Germany and enhancing the country's international standing.

Institutional Dialogue and High-Level Exchanges

Building upon the atmosphere of mutual respect and institutional engagement established within Azerbaijan, the project gradually evolved into a broader framework of international cooperation, marked from 1998 onwards by a series of high-level reciprocal visits and exchanges between Azerbaijan and Germany. It is worth noting, in particular, one of these visits, which played an important role in developing institutional cooperation between the two countries.

In 2001, on the initiative of Professor Rolf Knieper and within the framework of the GIZ project, an official visit of the Minister of Justice of Azerbaijan, Mr

Fikrat Mammadov, was organised to the Federal Republic of Germany – to the Free Hanseatic City and Federal Land of Bremen, as well as to Berlin, where meetings were held at the Federal Ministry of Justice of Germany. This visit represented a significant step in establishing enduring professional and institutional links between the justice authorities of the two countries.

While in Bremen, Professor Knieper introduced Minister Mammadov to Dr Henning Scherf, a distinguished German lawyer and politician from the Social Democratic Party of Germany (SPD), who at that time served as the Mayor (*Bürgermeister*) and President of the Senate of the Free Hanseatic City of Bremen, having previously held the position of Senator for Justice. Dr Scherf was widely known as an advocate of judicial and social reform and as a statesperson deeply committed to the principles of justice, self-government and civic responsibility. During his stay, Minister Mammadov also familiarised himself with the organisation of the judicial system and public administration of the Federal Land of Bremen, whose government combines both regional and municipal competences.

The acquaintance between Minister Mammadov and Dr Scherf laid the groundwork for fruitful professional cooperation between the Ministry of Justice of Azerbaijan and the legal institutions of Bremen. At the invitation of the Azerbaijani side and with the organisational support of GIZ, an official return visit of Dr Henning Scherf to Azerbaijan took place in July 2003, arranged in close coordination with the Ministry of Justice.

The visit had both symbolic and practical significance. Its programme included meetings at the Ministry of Justice, the Constitutional Court, the Supreme Court, the *Milli Majlis* (Parliament), the Baku City Hall and the Ministry of Culture of Azerbaijan. Dr Scherf also delivered a public lecture on the role of justice and local self-government in democratic transformation, which attracted wide attention among representatives of the legal community and academia.

A particularly warm and symbolic moment of the visit concerned a gesture of cultural goodwill. Dr Scherf expressed his sincere gratitude to the Government of Azerbaijan and the Ministry of Culture and conveyed his deep appreciation to the President of the Republic of Azerbaijan, Heydar Aliyev, for his personal initiative and the decision to return the artworks belonging to the city of Bremen. These paintings had come to Azerbaijan in the aftermath of the Second World War and were preserved for decades in the National Museum of Art of Soviet Azerbaijan. Following the restoration of independence and on the initiative of

President Heydar Aliyev, the Republic of Azerbaijan, guided by principles of cultural responsibility and international goodwill, decided voluntarily to return these artworks to Germany.

This act of restitution was received in Germany with deep appreciation and became a powerful symbol of mutual trust, respect, and shared European values. It also added a humanistic and moral dimension to the broader framework of legal and institutional cooperation between the two countries.

The 2003 visit of Dr Henning Scherf further strengthened the legal and cultural ties between Azerbaijan and Germany, expanded institutional cooperation and vividly illustrated the integrative vision of Professor Rolf Knieper, for whom legal reform was inseparable from cultural understanding, mutual respect and the shared European values that underpin the idea of a common legal space.

Law as an Instrument of Dialogue: Legal Contacts Between Lawyers of Azerbaijan and Armenia

A further aspect of the GIZ project's activities in general and of Professor Knieper in particular deserves a special mention and, in retrospect, assumes particular significance. During the late 1990s and early 2000s, when there were no official diplomatic relations between Azerbaijan and Armenia, the legal programmes implemented by GIZ created the first professional contacts between the representatives of the legal communities of the two countries. These meetings took place in Germany, Georgia and several other places and were purely professional in nature, being focused on legal reforms and administrative and civil legislation. Despite political tensions, such discussions became a rare example of professional dialogue in which legal arguments and academic ethics prevailed over political differences. Professor Knieper played a special and, in many ways, diplomatic role. Thanks to his personality, balanced judgement and respectful approach to both sides, it was possible to maintain an atmosphere of trust and mutual respect. This experience of legal engagement, born under the most difficult political conditions, became a unique example of how law can be applied as an instrument of dialogue and mutual understanding even between societies in conflict. Today, when we witness the normalisation of relations between Azerbaijan and Armenia, when a peace treaty is under discussion and contacts are taking place both at the state level and within civil society, that experience of professional interaction, which arose within the GIZ framework,

acquires fresh symbolic significance as an early manifestation of the aspiration to a legal and civilised settlement of disputes. It may well be that experts and lawyers who met back then in a spirit of professional openness will very shortly resume communication and cooperation, fostering mutual understanding between the legal communities of the two states.

Episodes and Recollections of Cooperation

The GIZ project was not only an extensive programme of legal reforms but also a space for human encounters, joint decisions and professional exchange. Over the years of joint work, many memorable moments occurred. Each such episode is more than a story; it is a reflection of the spirit of the time, the enthusiasm and the dedication to a common cause.

Of the many recollections, I would like to dwell on just two episodes that left the deepest impression on me and that perhaps best reveal the essence and atmosphere of our joint work.

Story No. 1: Save Gobustan! (1999)

In 1999, a major seminar was held in Baku within the framework of the GIZ project on the role of the mass media in disseminating legal knowledge among the public. It was attended by journalists and media representatives, civil servants, foreign experts from Germany and representatives of international organisations supporting judicial reforms in Azerbaijan.

The seminar sought to strengthen the link between legal reform and public education to foster legal culture not only among specialists but also in society as a whole.

While the preparations were underway, I suggested to Professor Knieper that we make a short trip to Gobustan, the historical and archaeological reserve located near Baku. Professor Knieper readily agreed and we travelled to Gobustan.

Gobustan is famous for its ancient rock carvings and inscriptions, including those left by Roman legionaries. The place is a unique monument of human civilisation, reflecting millennia of human presence in the Caucasus. Yet in the late 1990s, its condition gave cause for regret; the territory was neglected, security was virtually absent and among the ancient stones one could see traces of picnics and litter left by groups of students.

Professor Knieper was deeply impressed by Gobustan's historical significance but equally disappointed by what he saw. The next day, opening the seminar, he unexpectedly addressed the participants with an improvised appeal. His words were simple, yet powerful:

"Save Gobustan!"

Professor Knieper spoke of how the preservation of cultural heritage is as important for the development of society as the construction of a state governed by the rule of law. The Professor stressed that Gobustan is not only a treasure of Azerbaijan but part of the common history of humanity and that careful treatment of cultural heritage is an expression of respect for one's own history and spiritual roots.

His address met with a wide response. Many Azerbaijani newspapers wrote about "the German professor who appealed to Azerbaijani society to save Gobustan." These words resonated widely and the appeal was discussed not only by journalists but also by the representatives of state authorities. Particular attention was paid to the issue by the Ministry of Culture of the Republic of Azerbaijan and soon the preservation of Gobustan received formal priority.

At that time, Azerbaijan was going through a difficult period of economic hardship. Inflows into the state budget were small, the economy was in the process of recovery and social challenges associated with refugees and displaced persons were acute. Therefore, issues of culture, restoration of monuments and preservation of historical heritage often receded into the background.

About ten years later, during one of his later visits, Professor Knieper expressed a wish to revisit Gobustan. When we arrived, he was astonished by the changes; the territory was improved, a nice museum was built, security was ensured and the ancient petroglyphs were carefully preserved and catalogued. It is also important to note that, in 2007, Gobustan was officially included in the UNESCO World Heritage List, confirming its unique historical and cultural value.

Before leaving Gobustan, the Professor asked me to buy him a small souvenir, a stone bearing an image of an ancient petroglyph. Smiling, he said, "Let this stone remind us of Gobustan, of our work and of how so much in life and in law begins with human care." He selected a different stone and bought it for me as well. That small stone from Gobustan sits at a prominent place in my home as a remembrance of that story and of the Professor's deep humanism and the remarkable connection he forged between people, culture and law.

Story No. 2: Practical Implementation and Legal Technique

Every piece of legislation must not only be enacted but also be successfully implemented in practice. Within the project, inter-agency working groups were created with the participation of representatives of the Parliament, the Ministry of Justice, the judiciary and the Presidential Administration. A hallmark of the work was the combination of academic rigour and operational speed. The episode concerning the *Law on Public Legal Entities* became emblematic in this regard.

In 2000, at one of Professor Knieper's meetings with the Head of the Legal Support Department of the Presidential Administration of the Republic of Azerbaijan, Mr Shahin Aliyev, he discussed the need to prepare a *Law on Public Legal Entities* for Azerbaijan. Professor Knieper noted that a similar draft law had already been developed under the GIZ project for Kazakhstan. In reply, Mr Aliyev asked Professor Knieper to share a copy of the draft law on his next visit to Baku for Mr Aliyev's review.

Professor Knieper promised to do so. Yet barely had we left the building of the Presidential Administration when he took out his mobile phone and immediately called the project assistant, Ms Lia Shatberashvili, from the GIZ Bremen Project Office at the University of Bremen, from where all project coordination was carried out. Ms Shatberashvili provided highly professional support to Professor Knieper on numerous organisational tasks and coordinated the project's activities in the South Caucasus, Central Asia and the broader post-Soviet space.

The Professor briefly explained the situation and asked her to send, as a matter of urgency, an electronic copy of the Kazakh draft law to my e-mail. The building of the Presidential Administration was close to the Project Office and we decided to take a 15-minute walk.

When we reached the office, the Professor said, "Aydin, check the mail, has the document arrived?" The letter had already been delivered. He immediately had the draft printed and sent to Mr Shahin Aliyev. After a short while, his assistant called to say that Mr Aliyev was very pleased and thanked the Professor for such prompt support. Hearing this, the Professor said, "Pass me the phone. I will speak with Shahin myself."

The assistant handed over the phone and Professor Knieper, with his characteristic warmth and sense of humour, said, "Shahin, had you waited three months for me to bring this draft with me, we would have lost precious time. Now it

is on your desk and you are receiving homework from the Professor. Do not waste time; begin your review and preparation of the draft. By the time I arrive, we shall already be discussing all the details.”

After the call, the Professor said to me, “You see, Aydin, had I simply brought this draft in my bag three months from now, we would have lost not only those three months, perhaps more. Now it is on their desks and, most importantly, the work can begin. This is a vivid example of why reform should not be postponed. Wherever it is possible to act swiftly, act at once.”

This case became a striking illustration of his attitude to the task at hand. Professor Knieper would always say that in legal reform, one must not postpone until tomorrow something that can be done today. He did not merely teach this. He demonstrated it by his personal example. His decisiveness, discipline and respect for time were manifestations of true professionalism and a high culture of management.

Professor Rolf Knieper as a Unifying Force and a School of Professionalism

Over the years of working together, uniquely warm and trust-based relationships took shape within our team. Despite the complexity of the tasks and the high level of responsibility, the Project’s atmosphere remained profoundly human and sincere.

Within the GIZ Project Office, we would often call Professor Knieper *Dayı* – *the word for a maternal uncle – in Azerbaijani*. The nickname arose in conversations between me and my colleagues, Elchin Usub, Rashad Huseynli and Shakir Safarbekov. The address is not familiar; on the contrary, it expresses respect, trust and the special warmth that Rolf generates around himself. The project he led united us not only professionally but also on a purely human level, where we became close friends and maintain that bond to this day.

Each visit of Professor Knieper to Azerbaijan was a true event for us, a source of inspiration, joy and new ideas. This was felt not only by those of us who worked with him every day, but also by our colleagues, partners and everyone else who had the good fortune to collaborate with the Professor. For everyone, he remained a person to whom one wanted to listen and with whom one wished to be friends. The Professor’s visits went far beyond the bounds of working meetings and official events; they were always accompanied by a special humane, open and unifying atmosphere.

For many of our partners – representatives of the judiciary, the Parliament, the Ministry of Justice and other state bodies – meetings with the Professor were not merely working sessions. They were, in fact, rare occasions when individuals with busy schedules engaged in different branches of power got together not only to discuss legal reforms but to exchange views, share experience and be inspired by common aims. Colleagues would sometimes smile and say, “Let Professor Knieper visit more often and then we shall have more reasons to gather everyone together.” These meetings truly played a special role. They strengthened mutual trust and fostered a culture of professional dialogue that had been so lacking in the transitional period of the late 1990s and early 2000s.

Informal conversations and dinners after official events proved especially meaningful. It was in these conversations that genuine understanding and respect among participants in the reforms were born.

Over time, a circle of people formed around Professor Knieper, bound not only by professional interests but also by warm personal relations. It is impossible to list everyone who contributed to this process, but one thing is clear. The project led by Professor Knieper became not merely a working platform but a space of trust, mutual respect and cooperation.

I often noticed that even in the most unexpected places, people would recognise the Professor, whether staff of institutions, security personnel, or police officers and would greet him with a sincere smile.

He possesses the rare quality of building relationships with people with the most diverse personalities and worldviews. Even those officials who were deemed to be difficult to communicate with and opposed reforms, people with whom it seemed almost impossible to find any common ground treated the Professor with respect. His diplomacy, tact and innate refinement created around him a special aura of trust and professional dignity.

No less important were the numerous trips and regional seminars. Our joint working visits took place not only in Azerbaijan but also in other countries of the region.

Regional meetings and seminars were often held in Tbilisi, where representatives of all three South Caucasus states, Azerbaijan, Armenia and Georgia, would get together. Beyond this, the project also extended to the states of Central Asia, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan, where work on legal reform and exchanges of experience were also conducted.

Professor Knieper's activity in Azerbaijan and the region covered not only law-making and expert work but also reached far deeper, for example by strengthening legal culture, the institutional foundations of the state and the human connections among professionals from different countries. The mission of bringing people together occupied a special place in his work. He succeeded in bringing together the lawyers of Azerbaijan and Germany and in creating an atmosphere of respect and professional trust among specialists from the South Caucasus and Central Asia.

Thanks to Professor Rolf Knieper, there emerged a unique community of like-minded people in which cooperation continued even after the completion of official programmes. The GIZ project, in essence, became an international bridge beyond politics, grounded in shared values, mutual interest and friendship.

It is no exaggeration to say that Professor Rolf Knieper is a friend of the people of these countries and a true citizen of the world, who devoted his life to the ideals of law and justice, mutual understanding and respect for the human being.

Professor Knieper and My Personal School

For me, working with Professor Knieper became a great experience not only professionally but also on a personal level. It was a school of life, diplomacy, patience and tolerance.

I always felt that I was dealing not merely with an outstanding scholar and expert but with a person capable of inspiring others and communicating his vision. I was lucky to get the rare opportunity to work by his side, to learn from him and to coordinate the project from the Azerbaijani side. This experience has forever remained in my memory as one of the brightest and most significant periods of my professional life.

Thanks to Professor Knieper, I was able to establish a wide network of professional and human connections, both in Azerbaijan and far beyond. Whenever I recall those years, I think of the Professor not only as an eminent scholar and organiser but, above all, as a person who brought hearts and cultures together.

Professor Knieper is not only an outstanding jurist and legal scholar but also a man of many interests, a subtle connoisseur of culture and art. He came to love Azerbaijan deeply; its traditions and, especially, Azerbaijani *mugham*, in

which, as he says, the nation's spirit can be heard. This love is mutual; in Azerbaijan, he is respected not only as a scholar but also as a person of great heart, kindness and nobility.

More than twenty-eight years of friendship and cooperation with Professor Knieper allow me to say that in him humanity, love of life, optimism, high professionalism, vast energy and rare refinement are wonderfully combined. He remains and will continue to be for all of us an example of how knowledge and kindness can change the world.

For me personally, Professor Knieper remains not only a colleague and mentor but also a friend whose support has been omnipresent throughout my career, in tough personal circumstances and in many everyday situations. He knows how to inspire and has helped me see the essential issues, such as meaning in work, respect for people and confidence in one's own strengths. Everything I have achieved as a lawyer and as a human being is, in many ways, linked to this cooperation, which became a true school of life for me.

Acknowledgements

In conclusion, I wish to express profound gratitude to Professor Rolf Knieper – as not only an outstanding scholar and expert but as a person whose impeccable character, intellectual generosity and sincere desire for dialogue became a crucial source of inspiration for all participants in the reforms in Azerbaijan. His scholarly leadership, deep understanding of the essence of legal transformation and ability to unite specialists from different countries and legal cultures around him had a decisive impact on the successful implementation of many strands of the GIZ project.

My special thanks go to the entire team of German experts and specialists who participated in the work in Azerbaijan. Their professionalism, openness and willingness to share experience made an enormous contribution to the modernisation of the legal system. No less significant was the role of my Azerbaijani colleagues – representatives of the judiciary, the legislature and the executive, academia, the Ministry of Justice, practising lawyers and journalists who, under the challenging conditions of consolidating state independence, supported the project, took an active part in various events and, through their knowledge and efforts, helped advance the idea of the rule of law.

These years of work were testing both professionally and personally. I had the honour, from 1997 to 2003, of serving as the national coordinator of the GIZ project in Azerbaijan and this experience remains one of the most significant stages of my professional biography. Even after the completion of the project, I continued to maintain warm and friendly relations with many of its participants – both on the German and Azerbaijani sides – including Professor Knieper, with whom I enjoy a long-standing relationship of friendship, sincerity and mutual respect.

This project has become not only a testament to scholarly collaboration but also a manifestation of human solidarity, professional respect and faith in the power of law as an instrument of mutual understanding and cooperation among nations.

I would also like to express particular gratitude to the working group that organised the preparation of this volume, in particular, to Mr Lado Chanturia, Mr Thomas Mayer and Ms Lia Shatberashvili. Their enthusiasm, attention to detail and coordination made it possible to bring together the results of many years of cooperation into a single work. Special words of appreciation are addressed to Ms Lia Shatberashvili for her continuous support and tireless work in coordinating the project from Bremen in those years and now in coordinating the publication of this book, as well as for providing the opportunity to include my article in this volume.

In the spirit of the legal tradition and values that guide so much of Professor Knieper's work, I refer to the definition of justice by Ulpian, "*Iustitia est constans et perpetua voluntas ius suum cuique tribuendi*" – justice is the constant and perpetual will to render to each his due.

Voraussetzungen der Zulässigkeit einer Berufung in Zivilverfahren

Der Ehrenbürger Georgiens, Ehrendoktor der Ivane-Javakhishvili-Staatlichen Universität Tbilisi, emeritierter Professor der Universität Bremen und herausragender Mensch, Herr Rolf Knieper, hat unschätzbare Beiträge zum georgischen Recht und zur Rechtswissenschaft geleistet.

Ich gratuliere meinem lieben Freund zu seinem 85. Geburtstag, wünsche ihm Gesundheit, Güte und unendliche Freude im Kreise seiner geliebten Familie und widme ihm dieses Werk.

Einleitung

Das Berufungsgericht ist eine neue Institution des georgischen Zivilprozessrechts. Es wurde mit der am 14. November 1997 verabschiedeten Zivilprozessordnung Georgiens eingeführt (die am 15. Mai 1999 in Kraft trat). Das Berufungsgericht überprüft im Rahmen der Berufung die Entscheidungen der Gerichte erster Instanz (Stadt- und Bezirksgerichte) sowie jene des Magistratsrichters sowohl in tatsächlicher als auch in rechtlicher Hinsicht. Dieser Beitrag erörtert und analysiert die theoretischen und praktischen Fragen der Zulässigkeit einer Berufung.

1. Einlegung einer Berufung durch eine berechtigte Person

Gemäß Artikel 364 der georgischen Zivilprozessordnung haben die Parteien, d. h. der Kläger, der Beklagte und Dritte, das Recht, mit einer selbständiger Klageforderung Berufung einzulegen. Die Subjekte einer Berufung sind auch die

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Mitbeteiligten, also Mitkläger und Mitbeklagte. Nach Artikel 87 Absatz 1 der georgischen Zivilprozessordnung genießen Mitbeklagte alle den Parteien nach diesem Gesetzbuch zustehenden Verfahrensrechte.

Ist die Grundlage der Mitbeteiligung, d.h. der Gegenstand der Klage, ein gemeinsames Recht (Artikel 86 Absatz 1 Buchstabe „a“ der georgischen Zivilprozessordnung) so kann einer der Kläger gegen die Entscheidung in vollem Umfang Rechtsmittel einlegen. Dasselbe gilt für einen der Beklagten (Mitbeklagten), wenn die Haftung gesamtschuldnerisch ist. Sind jedoch verschiedene Ansprüche verschiedener Kläger gegen verschiedene oder denselben Beklagten in einer Klage zusammengefasst, so kann einer der Kläger (Mitbeklagten) gegen die Entscheidung nur gegen jenen Teil Rechtsmittel einlegen, der seinen Anspruch betrifft. Dieselbe Regelung gilt für Mitbeklagte, wenn nicht ein einziger, sondern verschiedene (getrennte) Ansprüche gegen sie erhoben werden.

Wenn das Verfahren vor Gericht einem der Beteiligten (Artikel 87 Absatz 2 der georgischen Zivilprozessordnung) mit Berufungsrecht übertragen wird, kann dieser die Entscheidung ganz oder teilweise anfechten.

Für den Fall, dass durch erstinstanzliche Entscheidung die Rechte und Pflichten einer Person festgelegt werden, die weder als Partei noch als Dritter mit selbständiger Klageforderung, noch als Mitbeteiligter, noch als Rechtsnachfolger im Verfahren auftritt und daher weder in das Verfahren einbezogen noch geladen wurde, soll dieser Person das Recht eingeräumt werden, die Entscheidung im Berufungsverfahren anzufechten. Dies ergibt sich aus der Verletzung des fundamentalen Rechts dieser Person, an der gerichtlichen Verhandlung in der Sache, die ihre Rechte betrifft, teilzunehmen. Eine solche Entscheidung ist durch das Berufungsgericht aufzuheben, da sie unter grober Verletzung der prozessualen Vorschriften ergangen ist (Artikel 385 Absatz „a“ und Artikel 394 Absatz „b“ der georgischen Zivilprozessordnung).¹

2. Gegenstand der Berufung

Alles, was die Parteien vor dem Berufungsgericht anfechten können, bildet den Gegenstand der Berufung. Daher ist die Frage des Berufungsgegenstands von großer Bedeutung, was die hohe Aufmerksamkeit erklärt, die die Gesetzgeber des Zivilprozessrechts verschiedener Länder der Regelung dieser Frage

1 Tengiz Liluashvili, Valeri Khrustali, Kommentar zur georgischen Zivilprozessordnung, Zweite Auflage, Verlag „Samaratali“, 2007, 620-622.

widmen. Darüber hinaus ist anzumerken, dass die Frage des Berufungsgegenstands, d. h. was im Berufungsverfahren angefochten werden kann, in der Gesetzgebung der verschiedenen Länder nicht einheitlich geregelt ist.

In Deutschland können gemäß § 511 der deutschen Zivilprozessordnung (GER-ZPO) die endgültigen Entscheidungen des Gerichts erster Instanz Gegenstand der Berufung sein, jedoch unter einer wesentlichen Voraussetzung: dass das Gericht erster Instanz die Zulassung einer solchen Berufung erteilt hat. Darüber hinaus legt die genannte Vorschrift fest, in welchen Fällen eine Berufung gegen Entscheidungen des Gerichts erster Instanz zulässig sein sollte.²

Demnach sind gemäß § 511 GER-ZPO gegen endgültige Entscheidungen von Gerichten erster Instanz Rechtsmittel zulässig, wenn der Streitwert entweder 600 EUR übersteigt oder, wenn das Gericht erster Instanz die Rechtsmittel wegen der grundlegenden Bedeutung der Streitfrage, der Rechtsentwicklung oder der Aufrechterhaltung einer einheitlichen Rechtsprechung zugelassen hat.³

Nach georgischer Zivilprozessordnung können auch Entscheidungen der erstinstanzlichen Gerichte (Bezirksgerichte, Stadtgerichte) sowie Entscheidungen eines Magistratsrichters Gegenstand einer Berufung sein. Es ist dabei zu beachten, dass der Hauptgegenstand einer Berufung die Entscheidung des erstinstanzlichen Gerichts ist und die eigenständige Berufung gegen gerichtliche Entscheidungen eine Ausnahme darstellt. Diese Ausnahme ist in Artikel 240 Absatz 3 der georgischen Zivilprozessordnung vorgesehen. Gemäß Artikel 414 der georgischen Zivilprozessordnung kann gegen Gerichtsentscheidungen nur dann durch Erhebung einer Privatklage ein Rechtsmittel eingelegt werden, wenn dies in der Zivilprozessordnung vorgesehen ist. Aus der Analyse der Verfahrensnormen ergibt sich, dass die Erhebung einer Privatklage gegen eine Entscheidung zulässig ist, wenn die Gerichtsentscheidung den weiteren Verfahrensablauf behindert. Gegen andere Entscheidungen der Gerichte erster Instanz (Landgerichte, Stadtgerichte) sowie von Magistratsrichtern kann keine Privatklage erhoben werden; gegen diese Entscheidungen ist demnach keine eigenständige Berufung möglich.

2 Гражданское процессуальное Уложение Германии, перевод с немецкого, издательство "Wolters Kluwer", 2006.

3 Ulrich Hagenlocher/ Besarion Alavidze/ Nino Bakakuri/ Diana Berekashvili/ Ekaterine Gasitashvili/ Mzia Todua/ Ketevan Meskhishvili/ Paata Katamadze/ Zurab Dzlierishvili, Kommentar zur Zivilprozessordnung. Ausgewählte Artikel, 1015, GIZ – Deutsche Gesellschaft für Internationale Zusammenarbeit. 2020, elektronische Version der Veröffentlichung finden Sie auf der Website -lawlibrary.info/ge .

Die genannten Entscheidungen können jedoch strittig sein, weshalbentsprechend die Rechtswidrigkeit und Aufhebung der Entscheidung in der Berufung oder Gegenberufung geltend gemacht werden kann.⁴ Gemäß Artikel 377 Absatz 3 der georgischen Zivilprozessordnung können auch gerichtliche Entscheidungen, die im Zusammenhang mit der Prüfung des Falles in erster Instanz ergangen sind und der Erlassung einer gerichtlichen Entscheidung vorausgehen, Gegenstand der Überprüfung durch das Berufungsgericht sein, unabhängig davon, ob gegen sie eine Privatklage zulässig ist.

Die georgische Zivilprozessordnung sieht verschiedene Arten von Entscheidungen vor, darunter Teil-, Vor-, Ergänzungs- und Abwesenheitsentscheidungen (Artikel 229–230, Artikel 245–246, Artikel 261 der georgischen Zivilprozessordnung).

Kann gegen solche Entscheidungen Berufung eingelegt werden? Um diese Frage zu beantworten, erscheint es angebracht, kurz auf den Inhalt der hier genannten Entscheidungen einzugehen.

Gemäß Artikel 182 Absatz 1 der georgischen Zivilprozessordnung kann ein Kläger mehrere vom selben Gericht gegen denselben Beklagten verhandelte Ansprüche in einer einzigen Klage zusammenfassen, unabhängig davon, ob diese Ansprüche auf demselben Rechtsgrund beruhen. Eine solche Zusammenfassung wird als objektive oder subjektive Klageverbindung bezeichnet. Die Absätze 3 und 4 desselben Artikels sehen auch die Einreichung von Klagen durch mehrere Kläger oder gegen mehrere Beklagte vor. Zudem kann das Gericht auch von mehreren Klägern bei diesem Gericht eingereichte Klagen in einem Verfahren zusammenfassen. Eine solche Klageverbindung wird als subjektive Klageverbindung bezeichnet. Bei der Prüfung solcher Klageverbindungen kann sich herausstellen, dass einer der zusammengefassten Ansprüche (im Rahmen der objektiven Anspruchszusammenlegung) gesichert ist, während die übrigen noch nicht vollständig gesichert sind. In diesem Fall kann das Gericht auf Antrag der Parteien über denjenigen Anspruch entscheiden, über den alle Rechtslagen gesichert und entscheidungsreif sind.

Eine solche Entscheidung wird als Teilentscheidung bezeichnet, weil das Gericht nicht über alle Ansprüche zusammen entscheidet, sondern nur über einen Teil davon.

4 *Shalva Kurdadze, Nino Khunashvili*, Zivilprozessrecht Georgiens, Zweite Auflage, Verlag „Meridian“, 2015. 656-657.

Gleiches gilt für Fälle, in denen Ansprüche von mehreren Klägern oder gegen mehrere Beklagte zusammengefasst werden (subjektive Zusammenfassung). In einem solchen Fall kann das Gericht, wenn sich im Laufe des Verfahrens alles nur für einen oder mehrere Kläger oder Beklagte geklärt hat, eine Entscheidung nur über denjenigen Kläger oder Beklagten treffen, für den bzw. die alles geklärt ist. Eine solche Entscheidung wird ebenfalls als Teilentscheidung bezeichnet, da das Gericht anstatt einer Entscheidung für alle Parteien nur eine Entscheidung für einen Teil trifft.

Gemäß Artikel 188 der georgischen Zivilprozessordnung kann der Beklagte eine Widerklage gegen den Kläger erheben, die zusammen mit der Hauptklage verhandelt wird. Als Ergebnis einer solchen Verhandlung fällt das Gericht eine gemeinsame Entscheidung. Es kann jedoch vorkommen, dass sich bei der gemeinsamen Verhandlung herausstellt, dass hinsichtlich einer der Klagen oder Gegenklagen alles geklärt ist und die Entscheidung über diesen Teil bereits getroffen werden kann, während dies für den anderen Teil noch nicht möglich ist. Auch in einem solchen Fall kann das Gericht auf Antrag der beteiligten Partei eine Entscheidung treffen, die als Teilentscheidung bezeichnet wird, da sie nicht über beide Klagen (oder Gegenklagen), sondern nur über eine von ihnen ergeht.

Eine Teilentscheidung, sofern sie sich auf einen bestimmten Anspruch oder einen bestimmten Kläger oder Beklagten bezieht, ist somit hinsichtlich dieses Anspruchs bzw. dieser Partei endgültig.

Bereits entschiedene Ansprüche im Zusammenhang mit anderen verbundenen Ansprüchen oder Parteien werden bei der erneuten Prüfung des Falles nicht berücksichtigt. Dies bestätigt erneut die Auffassung, dass es sich um eine endgültige Entscheidung handelt, gegen die Berufung eingelegt werden kann.

Bezüglich der Vor- und Zwischenentscheidung gilt: Eine solche Entscheidung ist im zu verhandelnden konkreten Fall keine abgeschlossene, also endgültige Entscheidung. Sie stellt vielmehr eine teilweise Entscheidung dar, da sie nur eine Antwort auf ein Element der Klage enthält, und zwar auf deren Grundlage, also auf die tatsächliche Grundlage der Klageforderung, nicht jedoch auf den Gegenstand der Klage bzw. auf die Klageforderung selbst.

Gemäß Artikel 246 Absatz 2 der georgischen Zivilprozessordnung ist gegen eine solche vorläufige Entscheidung ein Rechtsmittel zulässig. Sie hat nach Rechtskraft eine präjudizielle Kraft für eine zweite gerichtliche Entscheidung über die Höhe des Anspruchs.

Gemäß § 304 GER-ZPO, kann das Gericht eine Zwischenentscheidung zum Sachverhalt erlassen, wenn sowohl der Sachverhalt als auch die Höhe des Anspruchs streitig sind. Diese Entscheidung ist als Endentscheidung anfechtbar.⁵

Artikel 261 der georgischen Zivilprozessordnung sieht die Möglichkeit des Erlasses einer Nebenentscheidung vor. Eine Nebenentscheidung tritt in gleicher Weise und innerhalb derselben Fristen in Kraft wie die Hauptentscheidung (Artikel 264 der Strafprozessordnung) und kann in auch gleicher Weise angefochten werden.⁶

Was das Versäumnisurteil betrifft, so ist gemäß den Bestimmungen des zweiten Teils von Artikel 366 der georgischen Zivilprozessordnung eine Berufung nur gegen ein Versäumnisurteil zulässig, das nach wiederholter Versäumnis ergangen ist, weshalb gegen dieses Urteil keine Berufung mehr bei dem Gericht eingelegt werden kann, das dieses Urteil erlassen hat. Gegen ein solches Urteil kann sodann nur mit der Begründung Berufung eingelegt werden, dass es an einer geeigneten Rechtsgrundlage mangelte. Darüber hinaus ist gemäß Artikel 240 Teil 3 der georgischen Zivilprozessordnung Gegenstand einer Berufung auch die Entscheidung des erstinstanzlichen Gerichts über die Weigerung, der Berufung stattzugeben, und über die Aufrechterhaltung des Versäumnisurteils sowie dieses Versäumnisurteil.

In der Rechtsprechung kommt es vor, dass eine Partei gegen den beschreibenden Teil einer Entscheidung Berufung einlegt und die festgestellten Tatsachen bestreitet, ohne jedoch die Änderung oder Aufhebung des für sie günstigen Tenors der Entscheidung zu fordern. In Georgien gilt diesbezüglich eine einheitliche Rechtsprechung, wonach die Berufung gegen den beschreibenden Teil einer Entscheidung unzulässig ist.

So hob die Zivilkammer des Obersten Gerichtshofs von Georgien das Urteil der Zivilkammer des Berufungsgerichts Tbilisi auf und wies die Berufung wegen Unzulässigkeit zurück.

Die Kammer des Obersten Gerichtshofs stellte in ihrem Urteil zutreffend fest, dass die Berufung nicht gegen das durch die Entscheidung des erstinstanzlichen Gerichts erzielte Rechtsergebnis, sondern gegen die festgestellte Tatsache gerichtet war und sich die Berufung auf die Begründung und nicht auf den Tenor

5 Гражданское процессуальное Уложение Германии, перевод с немецкого, издательство "Wolters Kluwer", 2006.

6 *Tengiz Liluashvili, Valeri Khrustali*, Kommentar zur georgischen Zivilprozessordnung, Zweite Auflage, Verlag „Samaratali“, 2007, 457–458.

der Entscheidung stützte. Dies ist sowohl aus verfahrensrechtlicher und rechtlicher Sicht als auch gemäß der etablierten einheitlichen Rechtsprechung unzulässig. Insofern stehen die Einschätzungen und Schlussfolgerungen des Berufungsgerichts im Widerspruch zur Auslegung der durch die ständige Rechtsprechung des Obersten Gerichtshofs von Georgien etablierten Norm. Insbesondere hat der Kassationsgerichtshof in einer Reihe von Fällen festgestellt, dass die alleinige Anfechtung der beschreibenden und begründenden Teile der Entscheidung unzulässig ist, da die geltende Zivilprozessordnung nur die Möglichkeit vorsieht, dass eine Partei den Tenor oder einzelne Punkte der Entscheidung des erstinstanzlichen Gerichts anfechten kann.

Obwohl Artikel 364 der georgischen Zivilprozessordnung das Recht auf Berufung gegen die Entscheidung des Gerichts erster Instanz festlegt und der Gesetzgeber keinen Teil der Entscheidung abtrennt, lässt die Tatsache, dass das Gesetz keine ausdrückliche Einschränkung vorsieht, keine gegenteilige Schlussfolgerung zu. Durch die Vereinbarkeit der Grundsätze des Zivilprozessrechts mit den Normen der Zivilprozessordnung wird deutlich, dass sich die Rechtskraft der Entscheidung auch auf ihren Tenor erstreckt. Der Tenor der Entscheidung stellt seinem Wesen nach eine direkte und präzise Antwort auf die Klage dar. Der Tenor der Entscheidung muss die Entscheidung des Gerichts über die Stattgabe oder die vollständige oder teilweise Zurückweisung der Klage enthalten (Artikel 249 Absatz 5 der georgischen Zivilprozessordnung). Demnach schützt eine Person durch die Erhebung der Klage ihre Rechte und beeinträchtigten Interessen. Die Erfüllung der Klageforderung führt zugleich zur Erledigung ihres Anspruchs, da das streitige Recht zugunsten der Gegenpartei gewahrt wird und damit auch das rechtliche Interesse der Partei erfüllt ist.

Bei der Erörterung des Anwendungsbereichs und der Rechtskraft der Entscheidung ist die Bestimmung des Artikels 106 Absatz „b“ der Zivilprozessordnung zu beachten. Gemäß dieser Bestimmung sind die Parteien von der Beweispflicht für Tatsachen befreit, auf die sich ihre Ansprüche oder Einwände stützen, die aber keiner Beweispflicht bedürfen. Dies sind die Tatsachen, die in einem Zivilverfahren durch eine rechtskräftige Entscheidung des Gerichts festgestellt wurden, wenn dieselben Parteien auch an der Verhandlung anderer Zivilsachen beteiligt sind. Auf den ersten Blick könnte das Verbot, die Begründung einer Entscheidung anzufechten, die Rechte einer Partei in einem späteren Verfahren beeinträchtigen, da die im Urteil festgestellte Tatsache gegen sie wirken und ihr aufgrund der Präjudizwirkung die Möglichkeit genommen werden könnte,

Tatsachen zu beweisen. Dies ist jedoch nicht der Fall. Der Kassationsgerichtshof stellt klar, dass die präjudiziellen Tatsachen solche rechtlich relevanten tatsächlichen Umstände umfassen, durch welche die Rechte und Pflichten der Parteien im materiell-rechtlichen Verhältnis bestimmt werden, die der Entscheidung zugrunde lagen. Bei der Prüfung der präjudiziellen Bedeutung wird sowohl den verfahrensrechtlichen Kriterien, welche die formalen Anforderungen einer rechtskräftig gewordenen Entscheidung bestimmen, Bedeutung beigemessen, , als auch dem Inhalt der durch diese Entscheidung festgestellten Tatsachen.

Bei der Zuerkennung präjudizieller Bedeutung für die durch eine rechtskräftige gerichtliche Entscheidung festgestellten Tatsachen ist die der Klageforderung zugrunde liegende Norm innerhalb dieser Entscheidung zu prüfen. Der beschreibende Teil der Entscheidung enthält abstrakte Elemente, die das durch die Norm bestimmte Ergebnis festlegen. Entsprechend dieser Elemente hängt der Erfolg der Klage davon ab, ob die Voraussetzungen der Norm festgestellt sind. Geht das Gericht mit einer rechtskräftigen Entscheidung über den Inhalt der Norm hinaus und stellt es einen Sachverhalt fest, der für das Rechtsergebnis irrelevant ist, so wird diesem Sachverhalt selbstverständlich weder in diesem noch in einem anderen Verfahren Rechtskraft beigemessen. Im Falle einer neuen Streitigkeit ist er jedoch als Beweisgrund zu berücksichtigen.⁷

Es besteht kein Zweifel daran, dass gemäß den Artikeln 106 und 266 der georgischen Zivilprozessordnung nicht nur der Tenor, sondern auch der beschreibende Teil, in dem die Schlussfolgerungen des Gerichts über das Vorliegen oder Nichtvorliegen der Tatsachen (des Rechtsverhältnisses) dargelegt werden, die Grundlage dieser Entscheidung bildeten – genauer gesagt, der Tenor selbst.

Darüber hinaus ist folgender wichtiger Punkt anzumerken: Es ist nicht ungewöhnlich, dass der beschreibende Teil einer Gerichtsentscheidung Ausführungen über das Vorliegen oder Nichtvorliegen von Tatsachen enthält, die für die tatsächliche Begründung des im Klageantrag und im Tenor dargelegten Anspruchs des Klägers irrelevant sind. Mit anderen Worten gesagt: Einige der im beschreibenden Teil der Entscheidung als erwiesen geltende Tatsachen sind für

7 *Award/decision adopted by the Supreme Court of Georgia* 2019. #9. S. 132–141, Urteil des Obersten Gerichtshofs von Georgien vom 1. März 2019, Aktenzeichen AS-1293-2018. Siehe hierzu auch das Urteil des Obersten Gerichtshofs von Georgien vom 4. Juni 2012 im Fall AS-797-750-2012; das Urteil vom 24. Mai 2010 im Fall AS-334-311-2010; das Urteil vom 7. September 2009 im Fall AS-710-1011-09 – /Archiv des Obersten Gerichtshofs von Georgien <http://www.supremecourt.ge/>.

die korrekte Entscheidung des Falles unerheblich, da sie weder den Anspruch des Klägers noch die Widerklage des Beklagten begründen können. Ein Anspruch besteht nicht ohne ein Rechtsverhältnis. Daher muss das Gericht lediglich die Tatsachen feststellen, die das Gesetz mit dem Entstehen, der Änderung oder der Beendigung dieses Rechtsverhältnisses in Verbindung bringt. Beruht der Anspruch auf einem vertraglichen Rechtsverhältnis, so müssen diejenigen Tatsachen bewiesen werden, die das Gesetz mit dem Entstehen dieses Verhältnisses in Verbindung bringt. Beispielsweise kann der Anspruch des Klägers auf Zahlung einer Vergütung an den Beklagten für im Rahmen eines Werkvertrags geleistete Arbeit durch Tatsachen wie das Bestehen eines Werkvertrags, die Art der vertraglich vereinbarten Arbeit, die tatsächliche Ausführung dieser Arbeit und die im Werkvertrag vorgesehene Vergütung für die Ausführung der Arbeit begründet werden. Je nach Widerklage des Beklagten können den oben genannten Sachverhalten weitere Tatsachen hinzugefügt werden. Wie bereits erwähnt, muss das Gericht lediglich jene Sachverhalte (Rechtsverhältnisse) feststellen, die nach dem Gesetz mit der Bewilligung oder Abweisung des Anspruchs in Zusammenhang stehen.

Artikel 260 der georgischen Zivilprozessordnung sieht das Recht des Gerichts vor, auf Antrag der Parteien oder aus eigener Initiative Ungenauigkeiten oder offensichtliche Rechenfehler in einer Entscheidung zu berichtigen. Eine ähnliche Regelung findet sich in der deutschen Zivilprozessordnung. Insbesondere gemäß § 319 GER-ZPO können Unrichtigkeiten, Rechenfehler und ähnliche offensichtliche Ungenauigkeiten in einer Gerichtsentscheidung auf Antrag der Parteien oder von Amtes wegen berichtigt werden. Gemäß § 320 GER-ZPO kann innerhalb von drei Monaten nach der Gerichtsentscheidung ein Antrag auf Berichtigung gestellt werden, wenn der beschreibende Teil einer Gerichtsentscheidung Unrichtigkeiten enthält, auf die die Bestimmungen des § 319 ZPO keine Anwendung finden, oder wenn Mängel, Unklarheiten oder Widersprüche vorliegen. Auf Antrag einer Partei wird der Antrag mündlich verhandelt. Über den Antrag entscheidet das Gericht ohne Beweisaufnahme durch Beschluss. An der Entscheidungsfindung sind nur die Richter beteiligt, die den Sachverhalt in der Sache entschieden und die Entscheidung gefällt haben. Änderungen des beschreibenden Teils der Entscheidung haben keine Auswirkungen auf den Tenor.⁸

8 Гражданское процессуальное Уложение Германии, перевод с немецкого, издательство "Wolters Kluwer", 2006.

Somit sind nur diejenigen im beschreibenden Teil der Gerichtsentscheidung dargelegten Tatsachen rechtlich gültig, welche nach dem Gesetz den Urteilstenor begründen oder rechtfertigen. Sollte das Gericht zudem der Ansicht sein, dass im beschreibenden Teil der Entscheidung Tatsachen dargelegt wurden, die für die korrekte Entscheidung des Falles nicht wesentlich sind, weil sie die Klage des Klägers oder die Widerklage des Beklagten nicht behaupten können, so sollte der betroffenen Partei zur Vermeidung möglicher Komplikationen oder Missverständnisse das Recht eingeräumt werden, lediglich den beschreibenden Teil der Entscheidung anzufechten (insbesondere die Streichung dieser Tatsachen zu beantragen), ohne dabei den für ihn günstigen Urteilstenor anzutasten oder dessen Abänderung bzw. Aufhebung zu verlangen. Dies bedarf einer gesetzlichen Regelung. Wünschenswert wäre die Einführung einer Norm analog zu § 320 GER-ZPO, wonach eine Partei beim zuständigen Gericht einen begründeten Antrag stellen und die Streichung derjenigen festgestellten Tatsachen, die nicht mit dem Tenor zusammenhängen, aus dem beschreibenden Teil der Entscheidung beantragen kann.⁹

Auf Grundlage des Vorstehenden lässt sich eine abschließende Schlussfolgerung zum Gegenstand der Berufung ziehen.

Folgende Entscheidungen können im Wege der Berufung angefochten werden:

1. Entscheidungen des erstinstanzlichen Gerichts (Amts-, Stadtgericht) und des Magistratsrichters;
2. Wiederholte Abwesenheitsentscheidung des erstinstanzlichen Gerichts;
3. Die Entscheidung des Gerichts erster Instanz über die Zurückweisung der Klage und die Aufrechterhaltung des Versäumnisurteils – einschließlich dieses Versäumnisurteils;
4. Teil-, Vor- und Nebenentscheidungen;
5. Entscheidungen des Gerichts erster Instanz (Amts-, Stadtgericht) und der Magistratsrichter, die der endgültigen Entscheidung des Gerichts vorausgehen, unabhängig davon, ob gegen diese eine Privatklage zulässig ist.¹⁰

9 Valeri Khrustali, Die Rechtskraft des beschreibenden Teils einer Gerichtsentscheidung (theoretische und praktische Aspekte). Zeitschrift „Themida“, 2020, Nr. 12, 3–9.

10 Valeri Khrustali, Gegenstand der Berufung, theoretische und praktische Aspekte. Wissenschaftlich-praktische Zeitschrift „Lawyer“, 2024, Nr. 12, 47–55.

3. Kosten und Frist für die Einlegung einer Berufung

Gemäß Artikel 365 der georgischen Zivilprozessordnung ist eine Berufung in einer vermögensrechtlichen Streitigkeiten nur zulässig, wenn der Streitwert 2.000 GEL übersteigt. Dieser Wert richtet sich nach dem Umfang der angefochtenen Entscheidung. Dies gilt ausschließlich für vermögensrechtlichen Streitigkeiten. In nichtvermögensrechtlichen Streitigkeiten kann gegen jede Entscheidung Berufung eingelegt werden, unabhängig davon, welcher Wert dem Gegenstand der nichtvermögensrechtlichen Streitigkeit beigemessen wurde. Dasselbe gilt für Entscheidungen der verhandelten Fällen in Verfahren über unbestrittene Ansprüche.

Der erste Teil des Artikels 369 der georgischen Zivilprozessordnung regelt die Frist für die Einlegung der Berufung. Diese Frist beträgt 14 Tage und eine Verlängerung oder Wiederherstellung ist nicht zulässig. Die Frist beginnt mit der Zustellung der begründeten Entscheidung an die Partei. Als Zustellung der begründeten Entscheidung gilt die Zustellung einer Ausfertigung der begründeten Entscheidung an die Partei gemäß den Artikeln 70 bis 78 oder Artikel 259-1 der georgischen Zivilprozessordnung sowie der Ablauf der in Artikel 259-1 Absatz 1 festgelegten Frist. Ist eine zur Einlegung einer Berufung berechtigte Person bei der Verkündung der begründeten Entscheidung anwesend, so beginnt die Berufungsfrist mit der Verkündung.

4. Die Übereinstimmung der Berufung mit den gesetzlichen Anforderungen

Die Berufung ist schriftlich, in der Regel in gedruckter Form, abzufassen. Die Berufung muss den Anforderungen des Artikels 368 der georgischen Zivilprozessordnung und dem vom Obersten Justizrat Georgiens genehmigten Musterformular entsprechen sowie unter Beachtung der in diesem Musterformular angegebenen Vorschriften verfasst werden.

Artikel 368 der georgischen Zivilprozessordnung regelt die obligatorischen Voraussetzungen für eine Berufung, deren Gesamtheit den Inhalt der Berufung bildet.

Adressat der Berufung ist das Berufungsgericht. Daher muss die Berufung, obwohl sie bei dem Gericht eingelegt wird, das die angefochtene Entscheidung erlassen hat, den Namen des Berufungsgerichts enthalten, das über die Berufung zu entscheiden hat. Die Berufung kann direkt vom Beschwerdeführer oder

durch seinen Vertreter eingelegt werden. Die Berufung muss den genauen Namen der angefochtenen Entscheidung und das Gericht, das diese Entscheidung erlassen hat, enthalten. Da das Berufungsgericht auf den Umfang der Berufung beschränkt ist (Artikel 377 der georgischen Strafprozessordnung), muss die Berufung klar und unmissverständlich darlegen, welcher Teil der Entscheidung angefochten wird. Das Berufungsgericht kann im Rahmen der Berufung sowohl die tatsächlichen als auch die rechtlichen Aspekte der Entscheidung überprüfen. Daher ist es von besonderer Bedeutung, im Berufungsantrag klar darzulegen, worin genau die Unrichtigkeit der Entscheidung besteht und welche Abhilfe der Berufungsführer begehrt. Es ist offensichtlich, dass ein bloßer Hinweis auf einen Sach- oder Rechtsfehler (Unbegründetheit) der Entscheidung nicht ausreicht. Im Berufungsantrag kann auf Beweismittel hingewiesen werden, die im Verfahren vorhanden waren, aber vom anfechtenden Gericht nicht oder fehlerhaft bewertet oder ohne Begründung für die Ablehnung außer Acht gelassen wurden. Darüber hinaus kann der Berufungsführer neue Beweismittel vorlegen, über deren Zulassung das Berufungsgericht unter Berücksichtigung der gesetzlich festgelegten Voraussetzungen entscheidet (Art. 380 und 382 der georgischen Zivilprozessordnung).

Der Berufungsantrag kann auch Hinweise darauf enthalten, dass die angefochtene Entscheidung im Widerspruch zu den Bestimmungen der Europäischen Menschenrechtskonvention und ihrer Zusatzprotokolle sowie zu ähnlichen rechtlichen Fragen im Hinblick auf die Präzedenzfälle des Europäischen Gerichtshofs für Menschenrechte steht.

Entspricht die Berufung nicht den oben genannten Anforderungen oder wurde die staatliche Gebühr nicht entrichtet, so ordnet das Gericht dem Berufungsführer die Behebung des Mangels an und setzt hierfür eine Frist. Wird der Mangel nicht innerhalb dieser Frist behoben, so ist die Berufung unzulässig.¹¹

5. Fehlende schriftliche Verzichtserklärung der Partei auf die Berufungsanrufung

Die Ablehnung der Berufung, ist ein Recht der Partei. Die Ausübung dieses Rechts hat eine bestimmte Rechtsfolge: Die Partei, die auf eine Berufung verzichtet, verliert das Recht, gegen die Entscheidung im Rechtsmittelverfahren

11 *Tengiz Liluashvili/ Gia Liluashvili/ Valeri Khrustali/ Zurab Dzlierishvili*, Zivilprozessrecht, Teil Zwei, Verlag „Meridiani“ 2003, 511-528.

Berufung einzulegen. Die Ablehnung der Berufung ist sowohl nach Verkündung des Tenors als auch nach dem Erlass der begründeten Entscheidung zulässig.

Die Rücknahme der Berufung ist nur in schriftlicher Form zulässig. Wurde eine solche Rücknahme jedoch mündlich unmittelbar nach Verkündung der Entscheidung erklärt, ist sie in das Sitzungsprotokoll aufzunehmen und vom erklärenden Beteiligten zu unterzeichnen. Gleichzeitig ist dem Beteiligten zu erläutern, dass er damit sein Recht auf Einlegung der Berufung verliert. Wird die Berufung trotz dieser Erklärung dennoch eingereicht, bleibt sie wegen Unzulässigkeit unberücksichtigt (Art. 374 und 378 der georgischen Zivilprozessordnung).¹²

Es ist ferner darauf hinzuweisen, dass die Partei, die auf die Einlegung der Berufung verzichtet hat, dieses Recht durch Einlegung einer Erweriderungsberufung wiedererlangt, sofern die Gegenpartei, die auf die Berufung nicht verzichtet hat, die Berufung einlegt (Art. 379 der georgischen Zivilprozessordnung).

Schlussfolgerung

Folgendes sind somit die Voraussetzungen der Zulässigkeit einer Berufung nach der georgischen Zivilprozessordnung.

Nach Art. 364 der georgischen Zivilprozessordnung haben die Parteien und Dritte mit selbständiger Klageanspruch das Recht, Berufung einzulegen. Für den Fall, dass durch gerichtliche Entscheidung die Rechte und Pflichten einer Person festgelegt werden, die weder als Partei, noch als Dritter mit selbständiger Klageforderung, noch als Mitbeteiligter, noch als Rechtsnachfolger im Verfahren auftritt und daher weder in das Verfahren einbezogen noch geladen wurde, soll dieser Person das Recht eingeräumt werden, die Entscheidung im Berufungsverfahren anzufechten. Dies ergibt sich aus der Verletzung des fundamentalen Rechts dieser Person an der gerichtlichen Verhandlung in der Sache, die ihre Rechte betrifft, teilzunehmen.

Darüber hinaus, wie oben bereits erwähnt, sind nur diejenigen im beschreibenden Teil der Gerichtsentscheidung dargelegten Tatsachen rechtlich gültig, welche nach dem Gesetz den Urteilstenor begründen oder rechtfertigen. Sollte das Gericht zudem der Ansicht sein, dass im beschreibenden Teil der Entscheidung Tatsachen dargelegt wurden, die für die korrekte Entscheidung des Falles nicht wesentlich sind, weil sie die Klage des Klägers oder die Widerklage des

12 *Tengiz Liluashvili/Valeri Khrustali*, Kommentar zur georgischen Zivilprozessordnung, Verlag „Samaratali“, 2007, 634-635.

Beklagten nicht behaupten können, so sollte der betroffenen Partei zur Vermeidung möglicher Komplikationen oder Missverständnisse das Recht eingeräumt werden, lediglich den beschreibenden Teil der Entscheidung anzufechten (insbesondere die Streichung dieser Tatsachen zu beantragen), ohne dabei den für ihn günstigen Urteilstenor anzutasten oder dessen Abänderung bzw. Aufhebung zu verlangen.

Die genannte Frage bedarf einer gesetzlichen Regelung. Wünschenswert wäre die Einführung einer Norm analog zu § 320 GER-ZPO, wonach eine Partei beim zuständigen Gericht einen begründeten Antrag stellen und die Streichung derjenigen festgestellten Tatsachen, die nicht mit dem Tenor zusammenhängen, aus dem beschreibenden Teil der Entscheidung beantragen kann.

Shift from Presidentialism to Parliamentarism: Armenian Perspective and Trends in Eastern Europe**

I. The Form of Government as a Legal Concept

The form of government, as a purely legal concept, describes how political power is organised between, and attributed to, the legislature and the executive in both substantive and institutional terms. It relates to the origin and survival of the relationship between the parliament, the president and the government from the perspective of the principle of separation of powers. Based on two major criteria, election of the president by the people and political responsibility of the government before the parliament, contemporary constitutional law and political science distinguish three major forms of democratic government, namely, parliamentary, presidential and semi-presidential. While the distinction between parliamentary and presidential forms of government is well established, the concept of a semi-presidential form of government, elaborated by M. Duverger,¹ is still disputable.

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** This constitutional detour is dedicated to the honouree, whose remarkable contributions have enriched the civil law of Armenia – with the hope that he will forgive the disciplinary divergence.

1 *Maurice Duverger*, *Institutions politiques et droit constitutionnel*, 11e éd., Paris, 1970, 7, 198-201, 277-282. *Duverger* first presented the main features of his concept in *Le Monde* newspaper (*Le Monde*, 26 novembre 1969, *Un régime semi-présidentiel*). It is commonly stated, also by *Duverger*, that the term *régime semi-présidentiel* has been used for the first time by Le

The semi-presidential form of government is usually characterised by the following criteria:

- The president of the country is elected by the people;
- The president shares the executive power with the government;² and
- The government is responsible to the parliament.

The semi-presidential form of government, in its turn, may be divided into two sub-types:

- 1) premier-presidential (i.e., the prime minister is responsible only to the parliament); and
- 2) presidential-parliamentary (i.e., the prime minister is responsible to both the parliament and the president).³

It is important to stress that the semi-presidential form of government or semi-presidential model is a constitutional-legal category. It only defines the rules for the exercise of power, without describing the application of these rules in practice. The political system lays down the rules of the game, to which the players must adhere, but does not determine how the legal rules shall operate in practice. The way of exercising power is also conditioned by other factors, such as political culture, party and electoral systems. According to M. Duverger,

Monde's editor, Hubert Beuve-Méry (Le Monde, 8 janvier 1959) with a reference to the Ve République. But it was actually *Duverger* himself who, in 1958, stated that the new form of government in France may develop in the direction of a semi-presidential model (Le Monde, 24 décembre 1958). Austrian constitutional lawyer R. Marcic applied the term to the Austrian system in 1957 (R. Marcic, *Mehr als ein Amt. Eine Macht*, Forum 1957, Heft 40, 127). It is also noteworthy that in the 1930s Michel Dendias qualified some regimes like Weimar and Spain as "quasi-presidential system" (M. Dendias, *Le renforcement des pouvoirs du chef de l'État dans la démocratie parlementaire*, Paris, 1932, 52, 112-113). The characterisation given by M. Dendias 1937 in his *Le chef de l'État républicain et le rajustement de l'exécutif. Au seuil de la dictature* (Paris, 1937, 44) has remarkable similarities with the future definition of M. Duverger: "Il s'agit d'une forme de gouvernement qui, par certains côtés, nous rappelle le système présidentiel américain; mais il en diffère par certains autres côtés par lesquels il s'approche du régime parlementaire. C'est un curieux mélange, fait du système présidentiel proprement dit, et du système parlementaire, mais avec prédominance très marquée de ce dernier."

- 2 Both in the 1970 edition of his manual and in his seminal article in the European Journal of Political Research (1980, 165-187), *Duverger's* criterion is that the president possesses "quite considerable powers." This criterion has been widely criticised in literature for its vagueness.
- 3 *Matthew Soberg Shugart and John Michael Carey*, *Presidents and Assemblies: Constitutional Design and Electoral Dynamics*, Cambridge, 1992, 24.

“the semi-presidential regime is indivisible from the three sub-systems surrounding it: political culture, party and electoral systems. The four together form the political system. In this way, it becomes clear why the same regime, defined by its legal institutions, can operate within the framework of different political systems.”⁴

II. Evolution of Forms of Government in Armenia from 1990 to 2015

Since its independence in 1991, the Republic of Armenia has experienced all three major forms of democratic government. While the presidential form of government existed between 1991 and 1995, Armenia adopted a semi-presidential form of government through its Constitution of 1995 (with a presidential-parliamentary model and a premier-presidential model in 2005-2015). In 2015, the country made a radical transition to a purely parliamentary form of government.

a) Presidential System 1991-1995

On 23 August 1990, the Parliament of Soviet Armenia, the Supreme Council, which, for the first time ever in the Soviet space, was elected through a competitive and democratic process and adopted the Declaration on Armenia’s Independence.⁵ This historical declaration laid down the basic principles of the newly independent state and was designed to provide a basis for elaborating the Constitution of the Republic of Armenia, as well as amending the existing Soviet Constitution, the functions of state bodies and drafting new Armenian legislation. In 1990, the Supreme Council passed the constitutional law on legislative acts, adopted in accordance with the Declaration on the Independence of Armenia, under which provisions of the 1978 Constitution contradicting the Declaration of Independence of the Republic of Armenia were suspended.⁶ As Armenia was still a constituent of the USSR, the main task for the country’s new authorities was to affirm Armenia’s independence without major shocks or openly

4 Maurice Duverger, “Le régime semi-présidentiel”, in : Yves Mény and Olivier Duhamel (eds.), *Dictionnaire constitutionnel* (Paris: PUF, 1992), 903 (translation by the author).

5 <https://cis-legislation.com/document.fwx?rgn=2902> (visited on 18.06.2019). Elizabeth F. De-feis, “Constitution Building in Armenia: A Nation Once Again,” *Parker School Journal of East European Law* 2, 1995, 160-162.

6 Henrik M. Khachatryan, *The First Constitution of the Republic of Armenia*, Yerevan 1998, 14.

confronting Moscow. Despite these efforts, since the late 1990s, Moscow's pressure on the Armenian authorities had intensified. Under these conditions, the leadership of the Pan-Armenian National Movement, which had the majority in the parliament, decided in the spring of 1991 to create a post of the President of the Republic by adopting a respective law. On 25 June 1991, the post of the President of the Republic of Armenia was established. In accordance with this decision of the Supreme Council, the Constitutional Commission drafted a corresponding Law on the President of the Republic of Armenia (adopted on 1 August 1991). On 19 November 1991, the Parliament adopted the Law on the Supreme Council.⁷ Before the adoption of the Constitution in 1995, the laws on the President and the Supreme Council provided the basis for the political system of the Republic of Armenia.

The presidential form of government of Armenia was quite different from the classical presidential form in that there was, in addition to the President of the Republic, who was the head of executive power, also a prime minister who led the cabinet of ministers. The cabinet was institutionally and organisationally separate from the president. The prime minister was appointed and removed from office by the president, and members of the cabinet were appointed and dismissed by the president upon the recommendation of the prime minister. The parliament had the right to pass a vote of no confidence in the cabinet (not in the president) by 2/3 majority of the parliament, which the president was not bound to accept.

b) The Adoption of the Semi-Presidential Model in the 1995 Constitution

The adoption of the semi-presidential model through the 1995 Constitution of Armenia⁸ had its own rationale. While the ruling majority was only focused on choosing a model that would reinforce the president's strong position, the opposition, which could not have a decisive influence on the process of constitution-making, was mostly a proponent of the parliamentary form of government. The ruling majority made its constitutional perceptions evident in the draft approved by the Constitutional Commission of 20 April 1994, which contemplated an absolutely dominant position for the president. The president

7 *Dezeis*, *ibid.*, 162-164.

8 *Constitutions of Europe: Texts Collected by the Council of Europe Venice Commission*, Vol. 1, Leiden/Boston 2004, 75-101.

would have the power to appoint and dismiss the prime minister without any involvement of the parliament (Paragraph 6 of Article 74), dissolve the parliament (Paragraph 5 of Article 74), and impose a veto that could only be overcome by a two-thirds majority (Paragraph 3 of Article 74). The only compromise in the draft for the parliament was that the latter was granted the right to pass a motion of no confidence in the government by a majority vote of the total number of parliament members, rather than by a two-thirds majority.

The draft of the Constitutional Commission was submitted to the Supreme Council in June 1994, along with 4 other drafts. The main alternative to the official draft was the draft constitution of 6 opposition parties, which provided for a parliamentary form of government. Since neither the draft of the Constitutional Commission nor the alternative projects received the required 2/3 majority of votes, the Supreme Council decided to enlarge the Constitutional Commission, including the representation of the opposition. In the final version of the Constitution, the ruling majority dropped the 2/3 veto right of the president.

The ruling majority chose this model, as it allowed resolving any crisis in favour of the president by dissolving the parliament - a power that the president did not have under the 1 August 1991 law, and a power that President L. Ter-Petrosyan badly needed since 1992. Another argument in favour of the semi-presidential model was that the president was no longer the direct head of the executive power, but, rather, should have played the role of a supra-partisan arbiter.

Despite the fact that at the constitutional referendum the draft Constitution had been presented to the public as a *French model*, having benefited from considerable engagement of French constitutional lawyers,⁹ the 1995 constitution model of Armenia was quite different from the French, as it was driven by an unconcealed desire to maximise the president's power. The first and foremost motive of the drafters was that the president should have a dominant position in the political system, not only over the executive power, but also vis-à-vis the parliament and the judiciary.

The most significant difference with the French system was the power of the president to dismiss the prime minister at will. The procedure of government formation was formally the same as in France, but the situation was changing

9 W. Pogosjan, Die verfassungspolitische Entwicklung in der Republik Armenien (1990-1995), Master's Thesis, Bonn, 1995, 63-68.

drastically in view of the president's unilateral power to dismiss the prime minister. Considering that the prime minister's tenure depended not only on the will of the parliamentary majority but also, and much more so, on the president's will, the parliament was forced to reckon with the president's preferences when forming the government, especially in light of the president's nearly unrestricted power to dissolve the parliament.

A combination of these two powers created an institutionally dominant position of the president over the government. Article 85.3 of the Constitution gave the president the power to define the government structure and the procedure for its operation. He was also entitled to ratify all decisions of the government (Article 86.2) and hence also to veto them.

As to the material powers of the president, the Armenian Constitution prescribed the president's dominant position in foreign relations, defence and security.

The president's power to issue decrees, prescribed by Article 56 of the Armenian Constitution, was subject to only one limitation, according to which presidential decrees could not contradict the Constitution and laws. This was inadequate, because the article gave the president primary law-making power on the one hand, and defined the supremacy of any presidential decree over the decisions and other normative legal acts of the government, on the other. Unlike France, the Armenian Constitution completely lacked the institution of countersignature.

In France, any presidential appointment to civil and military positions is subject to countersignature (Article 13 in conjunction with Article 19), and the appointment to some offices (ambassadors, generals, heads of central departments and prefects) is made only in the council of ministers (Paragraph 3 of Article 13). In Armenia, the president, without any proposal, nomination or countersignature, appointed the supreme commander of the armed forces (Paragraph 12 of Article 55) and made appointments to civil positions in cases provided by law (Paragraph 5 of Article 55). By the proposal of the prime minister, he appointed and dismissed the prosecutor general and the mayor of Yerevan (Paragraph 9 of Article 55 and Paragraph 2 of Article 108). Considering that the president of Armenia, unlike the French president, had the discretionary right to dismiss the prime minister, it was clear that his influence over the appointment of the prosecutor general and the mayor of Yerevan was very strong.

This brief comparison of the powers of the Armenian and French presidents clearly demonstrates the mendacity of the claim that Armenia was replicating the French model. From a legal standpoint, the position of the Armenian president was far stronger than that of the French counterpart. To this end, Armenia's Constitution resembled only the constitutions of a number of African countries (such as Angola, Burkina Faso, the Central African Republic, Gabon, Madagascar, Mauritania and Niger), where the president unilaterally appoints and dismisses the prime minister, and has the discretion to dissolve the parliament. In terms of constitutional law, the Armenian president had much greater power than the French president. The difference was even greater in political practice.

c) The Transition to a Parliamentary-Presidential Model of the Semi-Presidential Form of Government

The super-presidentialism created under the cover of a semi-presidential constitution became a subject of harsh criticism. After the forced resignation of the first president, L. Ter-Petrosyan, in the 1998 presidential election campaign, all candidates, including R. Kocharyan, who was to become the president, called for constitutional amendments to curtail the sweeping powers of the President of the Republic. However, after the election, the president tried to postpone the reforms, but after a long political tug of war went through a constitutional referendum in 2005. The revised constitution¹⁰ was largely in line with the requirements for the member states of the Council of Europe.

After the 2005 constitutional reform, the form of government in Armenia mostly corresponded to the parliamentary-presidential model. As a result of the reform, the President of the Republic lost his discretionary power to dissolve the parliament. The new Article 74.1 of the Constitution listed the cases for dissolution, which were exclusively restricted to the lasting inability of the parliament to fulfil its functions. The president also lost his decisive role in the formation of the government. Under Article 55.4 of the Constitution, the president was obliged to nominate as the Prime Minister a person who enjoyed the support of the majority of members of the parliament. With this transition from the initial 1995 model of a president with super-strong powers to a *premier-presidential* model,

10 Constitution of the Republic of Armenia. Published by GIZ, Yerevan 2014, 121-172.

Armenia broadly walked in the footsteps of the Eastern European countries that have a semi-presidential form of government.

Nonetheless, the reformed form of government remained imperfect and contained numerous potential threats. It did not address the danger inherent in the semi-presidential form of government, which exists in the case of a conflict between the president and the parliament. The reform of 2005 did not provide an institutional solution for situations in which a newly elected president opposed the parliamentary majority or when the newly elected parliament opposed the incumbent president. In the former scenario, the newly elected president had no constitutional leverage to exercise his fresh popular mandate. He could not form a new government without reckoning with the will of the parliamentary majority. The president also did not have the power to dissolve the parliament, because the National Assembly could easily avoid the emergence of preconditions for its dissolution under Article 74.1 of the Constitution.

III. Transition to the Parliamentary System in 2015

The 2005 constitutional amendments did not have any tangible effect on the functioning of the system of government. After the 2007 and 2012 parliamentary elections, having a comfortable parliamentary majority, the President of the Republic maintained his domination both over the government and the parliament. After the creation of the Constitutional Commission in the autumn of 2013, there were intense discussions on the merits of the semi-presidential model and its long-term perspectives for a democratic system of government.

1. The Perils of the Semi-Presidential Model

The semi-presidential system can operate in practice in three basic ways:

- a) The President of the Republic is the leader of the parliamentary majority;
- b) The President of the Republic and the parliamentary majority are opposed to each other; and
- c) There is no stable majority in the parliament.

Each of these three different forms of semi-presidential government has its own problems.

a) Excessive Concentration of Power in the Hands of the President

When the president is the majority leader, there is an excessive concentration of power in his hands; he shapes the entire policy of the country, thus undermining the constitutional role of the government. In many cases, the presidential administration replicates the functions of the government. Let us take the example of the Fifth Republic of France as a reference country of positive semi-presidential experience. Except for the periods of cohabitation, the political power in France was normally concentrated in the president's hands more than in any other democratic country. The president, who enjoys the support of the parliamentary majority, is in a very different situation from a prime minister in a parliamentary country, who always depends on the confidence of the parliamentary majority. According to eminent French constitutional lawyer, G. Vedel, the President of France would, in case of being the leader of the majority party, concentrate in his hands both the powers and authority of the US president and of the British prime minister, causing the system to become *ultra-presidential*.¹¹

The feeling of having greater legitimacy than the parliament increases the temptation for the president to concentrate power in his hands. The interpretation of the French Constitution by Charles de Gaulle is very characteristic as regards the role of the president: "that the indivisible authority of the State is entrusted completely to the president by the people who elected him, that there existed no other authority, either ministerial, civil, military or judiciary, which has not been conferred and was not being maintained by him, and finally that it was his duty to adapt the supreme domain, which is his alone, to fit in with those, the control of which he delegates to others."¹²

Excessive concentration of power in the president's hands is especially dangerous for countries lacking democratic traditions when the president is also the majority leader. Even in France, excessive concentration of power in the president's hands causes much concern. Many eminent French constitutionalists (G. Vedel, O. Duhamel, J. Gicquel, and others) characterise the French government system (i.e., the one in practice) as *ultra-presidential*, *super-presidential*, or *presidentialist*. In 2008, O. Duhamel sharply characterised the French political

11 Georges Vedel, "Cinquième République", in: Yves Mény and Olivier Duhamel (eds.), *Dictionnaire constitutionnel* (Paris: PUF, 1992), 138-139.

12 Cited by M. Duverger, 1980, 171.

system in the following way: “French presidentialism, even exacerbated by the sixth president, does not mean that the head of state has monopolised all the powers. Rather, it corresponds to a pyramidal conception and practice of power, with the president at the top, and the prime minister, government, and majority party directly underneath. These three organise and manage the subordination of the parliament. The powers are not balanced, but hierarchical.”¹³ Clarifying that he is not referring to the African or Latin-American-type presidentialism, which has a vividly authoritarian nature, and that French presidentialism is democratic, Duhamel nonetheless highlights that it is less democratic than the political systems of Great Britain or Germany.

b) Cohabitation

According to G. Sartori, flexibility is the main advantage of the semi-presidential system. Sartori praises this system for having two engines, viz., the president and the parliament-based prime minister. If the president enjoys the support of the parliamentary majority, he ensures the strong leadership of the government. If the government is led by a prime minister who enjoys the parliament’s support, then the president is the safeguard against excessive concentration of power.¹⁴ However, we have already seen that the reality is too far from such an idyllic scenario in the case of the first engine.

The experience of France has shown that cohabitation does not necessarily result in the breakdown of the semi-presidential system. But as the experience of the former Soviet Union and Eastern European countries (like Romania, Moldova, Ukraine, Poland, Lithuania or Georgia) has shown, in the case of *cohabitation*, the president commonly becomes, rather than a guarantor of democratic *rules of the game*, a troublemaker and an opposition leader. *Cohabitation* has been a serious test for these countries with limited experience of democracy. Much depends on the country’s political culture and the willingness of the actors to respect the constitution and the democratic *rules of the game*. Thus, the semi-presidential system does not adequately solve the problem of the conflict

13 Olivier Duhamel, “A Special Democracy”, IX, https://www.cairn-int.info/article-E_POUV_126_0017--a-special-democracy.htm (visited on 18.06.2019, the English version of “Une démocratie à part”, Pouvoirs 2008/3 (n° 126), 17-26).

14 Giovanni Sartori, Audizione nel Comitato Forma di Governo della Commissione bicamerale per le riforme costituzionali, seduta del 18 marzo 1997, in: Nomos. Le attualità nel diritto, 1997, n. 1, 120.

between different majorities created through dual democratic legitimacy. As ironically described by G. Vedel, “cohabitation is a crutch that may be necessary in the event of an accident, but this does not mean that accidents are beneficial and that they must be provoked.”¹⁵

c) A President Without a Majority in Parliament

Proponents of the semi-presidential form of government claim that the stability of the executive power is primarily not due to the stability of the government, but to stability resulting from the president’s fixed term and his ability to act in the absence of a majority in the parliament. However, as M. Duverger points out, the president in those situations may play the role of either the regulator (Finland) or the troublemaker (Portugal, Weimar).¹⁶ In any event, the president’s influence cannot be such as to compensate for the absence of a parliamentary majority.

d) Absence of Political Responsibility of the President

Proponents of the semi-presidential form of government view the president’s direct election as an opportunity for the people to directly determine the head of the executive power. However, direct election does not automatically turn the president into the leader of either the executive or the parliamentary majority. The semi-presidential form is a system in which both parliamentary and presidential elections separately influence the formation of the government. Through the presidential election, a person with an important role in the executive power is directly elected, but, unlike the presidential form of government, he is not the chief executive; hence, the political orientation of the parliamentary majority has to be reckoned with. Under *cohabitation*, not only is the executive power not elected directly, but also the public opinion is marred with doubt and uncertainty as to the specific roles of the two separate heads of the executive power. However, even when the majorities overlap, the prime minister and his team are not clearly identified because of their frequent changes.

In terms of political responsibility, semi-presidentialism has a fundamental deficiency, namely, despite his considerable political powers, the president

15 Georges Vedel, “Voter oui et comprendre”, *Le Monde*, 16 septembre 2000.

16 Maurice Duverger, *Le système politique français, Droit et science politique*, Paris, 1996, 585-587.

usually does not bear any political responsibility due to his fixed term in office. There is no possibility to express no confidence in the president for political reasons since his term in office is fixed. The prime minister plays the role of the *scapegoat*. The dilemma of the semi-presidential form of government is that it works well only when there is a majority in the parliament. However, when the parliament is able to create a stable parliamentary majority, there may often be no need for a directly elected president. When there is no stable parliamentary majority, which is often the case in countries aspiring to become democratic, then the directly elected president does not solve the problem of a power vacuum. The government does not enjoy stable support from the parliament, and the parliament only has a strong ability to block. A president who does not enjoy the government's support is not strong enough to act in lieu of the government. Under such circumstances, the rivalry between the president and the prime minister in the field of executive power has negative effects, too.

e) The Perils of Two Political Elections

In the semi-presidential form of government, people make two political choices - both the parliament and the president are elected directly and enjoy the same popular legitimacy. The election of the president in a semi-presidential system does not mean that the country has elected the chief of executive power, as in the presidential form of government. Although the president is endowed with real executive powers, especially in security, defence and foreign policy areas, he legally shares the executive power with the government. Such a system remains prone to conflicts, as it does not answer the question of which choice of the people determines the formation of the government, the election of the president or the parliament?

f) The Problem of Political Outsiders

Like in the presidential system, the semi-presidential form also faces the problem of political outsiders. Presidents with weak political affiliations to a political party are inclined to populist policies.

2. The Main Characteristics of the Parliamentary Government in Armenia After the Constitutional Reforms of 2015

Based on the analysis of the drawbacks of the semi-presidential government and the impossibility of finding satisfactory solutions to its inherent problems, the Constitutional Commission in 2014 proposed to switch from a semi-presidential form of government to a parliamentary government. The constitutional amendments were adopted by a referendum on 6 December 2015.¹⁷

The amended Constitution provides for a modern, rationalised parliamentary system, which implements a clear functional division of powers between the National Assembly and the government. The National Assembly, as the only directly democratically legitimate institution, plays the key role in shaping the political will of the people. The government, at the same time, enjoys necessary autonomy to develop and implement domestic and foreign policy. The Constitution provides for mechanisms of cooperation between the legislative and executive authorities aimed at avoiding institutional conflicts. With the adoption of the parliamentary form of government, the Constitution eliminates the dualism of executive power, making the government solely responsible for its determination and execution. The government, as the supreme body of executive power, is generated by legislative majorities and depends on such majorities for its survival. The government is responsible only to the parliament. The prime minister has a rather strong position, but he, unlike the president in a semi-presidential system, is always under parliamentary control and completely dependent upon parliamentary confidence.

The design of the presidency in the amended Constitution may at first glance seem quite unusual and restrictive. The underlying idea of the Constitution is to ensure that the president is an actual *neutral arbiter* with no material executive powers. His first and foremost task is to observe the compliance with the Constitution and thus to promote the realisation and development of constitutional values in public life.

Compared to the classical parliamentary form of government, the Armenian system displays some peculiarities aiming to avoid governmental instability and long parliamentary crises. The most striking features of the Armenian system are: 1. the rationalisation of the procedures of formation and removal of the

17 Constitution of the Republic of Armenia (version of 2015), published by GIZ, Yerevan, 2018, 149-215.

government; 2&3. the mechanisms of the no confidence and confidence votes; and 4. the dissolution of the parliament.

1) Stable Majority Clause and Formation of the Government

The most important aspect of the government's stability concerns the election of the National Assembly. The Constitution enshrines a proportional electoral system (Article 89.3 [1]) and at the same time stipulates that the electoral system of the National Assembly must guarantee a stable parliamentary majority (Article 89.3 [2]). The electoral system, further detailed in the Electoral Code,¹⁸ pursues two main objectives, namely, to form the representative body of the people without significant discrepancy between the votes and seats and, at the same time, to guarantee the formation of the parliamentary majority. The main idea here is to enable voters to directly influence the formation of the future government. If the voters do not have such an opportunity, i.e., merely choose their representatives in the parliament, then the right to form a government belongs exclusively to MPs who are free to choose and change government coalitions. If the parliamentary election does not result in an absolute majority for one party or a political coalition, the Constitution provides for the opportunity to hold a second round of the parliamentary elections between two parties (or alliances) that received the most votes in the first round. Thanks to this system, the government is actually determined by the voters and not by the parties, after the parliamentary election.

For the second round of the election of the National Assembly, the Constitution provides for the possibility of forming new alliances (Article 89.3 [4]). This provision aims to preclude the possibility that a party, which gained a relatively small percentage of votes in the first round, obtains an absolute majority in the parliament only due to the results of the second round. The principal advantage of the option of allowing alliances in the second round is that it prevents the formation of artificial alliances with the sole aim of gaining seats in the parliament, thus compelling the parties or alliances to reveal their options to the public right during the elections.

Due to the *stable majority clause*, the Constitution encourages the formation of a bipolar party system. The two-round system of the National Assembly's election system significantly facilitates the process of forming the government

18 <https://www.legislationline.org/documents/id/19915> (visited on 18.06.2019).

in the parliament, and also creates greater guarantees for the stability of the government because the government receives de facto direct democratic legitimacy.

The Constitution requires that the candidacy of the prime minister be clear and indisputable after the parliamentary elections. The electoral system in the Electoral Code provides for mechanisms according to which either a party or a coalition will gain an absolute majority (at least 54% of seats) in the parliament (Article 96).

The Constitution provides for detailed timeframes and procedures for the formation of the government both after the elections and during the legislative period in order to ensure that the position of the PM does not remain vacant for a long time.

The appointment and dismissal of the ministers is de jure carried out by the President of the Republic upon the recommendation of the Prime Minister (Articles 131 and 150). The President has no political discretion and may refuse the candidacy of a minister solely on the grounds of constitutionality. Here also, the Constitution provides for precise and tight deadlines for further procedures, including constitutionality checks.

2) Constructive Vote of No Confidence

Apart from the formation of the government by a stable parliamentary majority, the Constitution also consistently sets up mechanisms for the preservation of its stability during its functioning. The Constitution provides for the dismissal of the government for political reasons only by means of a constructive vote of no confidence (Article 115). According to the Constitution, at least one third of the members of the National Assembly may submit a motion on expressing a vote of no confidence in the prime minister only by indicating a new prime ministerial candidate (Article 115.1). Government change is possible only when there is a candidate for prime minister, who enjoys the support of the absolute majority of MPs. Thus, the Constitution also precludes the possibility of a minority government.

Both in the case of a constructive no confidence vote on the prime minister and his election during the legislative period, the Constitution provides for open voting to ensure transparency and accountability before the voters (Article 115.2 and Article 149.4).

A no confidence vote against the prime minister may be initiated no earlier than a year after his or her appointment. In case the motion is rejected by the National Assembly, a new motion may be submitted no earlier than six months later. The Armenian constitution makers may have exaggerated the necessity of stability safeguards, as such a regulation limits a cornerstone principle of the parliamentary form of government, i.e., the government's responsibility to the parliament.

3) Vote of Confidence

Another instrument to stabilise the government is the possibility for the government to ask the National Assembly for a vote of confidence in connection with the adoption of a law (Article 157 of the Constitution). In such a situation, the parliament faces a dilemma - either the parliamentary majority clearly expresses its support to the government, or, if the vote of confidence is denied, the parliament must be able to elect a new prime minister and form a new government. Otherwise, the parliament dissolves by virtue of law.

4) Dissolution of the National Assembly

The regulation of the Armenian Constitution on the dissolution of the National Assembly is based on the principle that the National Assembly shall operate as long as it is capable of fulfilling its core functions, including forming and supporting the government. While ensuring the normal functioning of the parliament, these regulations also contain important safeguards for the stability of the government.

The amended Constitution provides for precise cases for the dissolution of the National Assembly by virtue of law: 1. when the parliament is unable to elect the prime minister (Article 149, Part 3), or 2. after electing the prime minister, it does not approve the government's program (Article 151, Parts 3 and 4) and, 3. as a result of a vote of confidence (as described above in point 3).

Dissolution by virtue of law is a novelty in the international constitutional practice, where the authority to dissolve the parliament, as a rule, is vested in the head of state, who may or may not have discretion in this issue. Still, in case of disputes, the matter can be referred to the Constitutional Court through a procedure of competence disputes between constitutional bodies (Article 168.4).

IV. The Main Trends in Eastern Europe

The evolution of the form of government in Armenia is in full harmony with major trends in Eastern Europe. Except in Azerbaijan¹⁹ and, with some reservations, Belarus and Russia,²⁰ in all other countries the government is the supreme body of the executive power and is responsible to the parliament.

Some of them are fully parliamentary, in the sense that the president is elected by the parliament and not by the people (Estonia, Latvia, Georgia, Hungary, Albania and Kosovo). Despite having relatively strong presidents, Poland, Moldova, the Czech Republic, Slovakia, Slovenia, Bulgaria and Macedonia can be considered as parliamentary governments. Serbia and Montenegro²¹ are, beyond doubt, also parliamentary systems with weak presidents. The only uncontested example of a semi-presidential system seems to be Ukraine, while Lithuania,²² Croatia and Romania are on the borderline between semi-presidential and parliamentary systems.

Comparing the constitutions of Eastern European countries after the collapse of the communist system, we can clearly trace a shift towards parliamentarism:

- Croatia,²³ Ukraine²⁴ (from presidential-parliamentary to a premier-presidential model);

19 CDL-AD(2016)029.

20 Although in Belarus (Article 106.1 of the Constitution) and Russia (Article 110.1 of the Constitution) the executive power is exercised by the government, in both countries the presidents are in charge of the implementation of the main guidelines of domestic and foreign policy (Article 79.2 of the Constitution of Belarus and Article 80.3 of the Constitution of Russia). The governments are subordinated to the presidents, who can dismiss the prime minister at will (Article 106.10 of the Constitution of Belarus and Article 83(c) of the Constitution of Russia). Despite the fact that in both countries the parliaments can express a vote of no confidence in the government, it is for the presidents to decide whether to accept the resignation of the government or to dissolve the parliament. In Belarus, the president can even ignore the decision of the parliament without any follow-up.

21 CDL-AD(2007)047.

22 *Zenonas Norkus*, "Parliamentarism Versus Semi-Presidentialism in the Baltic States: The Causes and Consequences of Differences in the Constitutional Frameworks," *Baltic Journal of Law & Politics* 6:2 (2013), 8-28.

23 CDL-INF (2001)15.

24 *Sujit Choudhry, Thomas Sedelius and Julia Kyrychenko*, "Semi-Presidentialism and Inclusive Governance in Ukraine: Reflections for Constitutional Reform," *International IDEA*, April 2018 (<https://www.idea.int/sites/default/files/publications/semi-presidentialism-and-inclusive-governance-in-ukraine.pdf>, visited on 18.06.2019)

- Romania (within a semi-presidential form of government);²⁵
- Poland,²⁶ Moldova,²⁷ Serbia²⁸ (from semi-presidential to parliamentary system); and
- Georgia (from presidential to semi-presidential and now to a parliamentary form of government).²⁹

The shift from parliamentary election of the president to direct election in Slovakia and the Czech Republic has not resulted in a transformation into a semi-presidential system.³⁰

In conclusion, it is only fair to underline that the analysis of the drawbacks of semi-presidentialism does not mean that the semi-presidential model cannot contribute to the consolidation of democracy or function reasonably well, or that parliamentary systems are always a better guarantee for the consolidation of democracy. In my opinion, the basic structural and legal characteristics of semi-presidentialism make it more likely that such systems will encounter serious difficulties. One should also keep in mind that, besides constitutional characteristics, there also exist other very important variables, which greatly influence the actual functioning of the political system.

25 Elena Simina Tanasescu, "The President of Romania or: The Slippery Slope of a Political System", 4 *European Constitutional Law Review* 64 (2008). Sergiu Gherghina and Michael Hein, "Romania", in: A. Fruhstorfer and M. Hein (eds.), *Constitutional Politics in Central and Eastern Europe, From Post-Socialist Transition to the Reform of Political Systems*, Wiesbaden, 2016, 173-197.

26 For more details on the system of government under the Constitution of 1997 see Małgorzata Masternak-Kubiak, Janusz Trzcinski, "The System of Government in the Constitution of the Republic of Poland of April 2, 1997-an Analysis of the Competence of the Sejm," *Przegląd Sejmowy*, A Special Issue/October 1999, 39-50; Paweł Sarnecki, Andrzej Szmyt, Zbigniew Witkowski (eds.), *The Principles of Basic Institutions of the System of Government in Poland*, Warsaw, 1999, 26, 44, 64-65, 151, 177. The majority of the Polish constitutional doctrine denied the semi-presidential character even under the *Small Constitution* of 1992, which granted considerable powers to the President of the Republic.

27 CDL-AD(2017)014.

28 CDL-AD(2007)004.

29 CDL(2018)009.

30 Vit Hlousek, "Is the Czech Republic on its Way to Semi-Presidentialism?" *Baltic Journal of Law & Politics* 7:2 (2014), 95-118. Jan Wintr, Antoš Marek, Jan Kysela, "Direct Election of the President and its Constitutional and Political Consequences," *Acta Politologica*, 2016, Vol. 8, no. 2, 145-163.

About a Concept of Ordre Public in Law of Kazakhstan

1. Since 1999, when the Special Part of the Civil Code of the Republic of Kazakhstan (and Section VII “Private International Law” is among its other structural components) was adopted, the notion of *ordre public* has gained its legislative framework.¹

In 2004 the term “public order” got its legislative definition for first time. Particularly, in subparagraph 1) of Article 2 of the Old Law on International Arbitration (which is no longer in force since adoption of the acting Arbitration Law in 2016)² the term “public order of the Republic of Kazakhstan” was defined as “foundations of the state [governmental] and social structures enshrined in legislative acts of the Republic of Kazakhstan”.³ In 2013 the same definition was included in the Old Law on Domestic Arbitrages (which was adopted at the same

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1 The Civil Code of the Republic of Kazakhstan (Special Part) dated 1 July 1999 No. 409-І, as amended. Version in English (unofficial translation) at: https://adilet.zan.kz/eng/docs/K990000409_ [17 March 2025].

2 The Law of the Republic of Kazakhstan “On Arbitration” [“On Arbitrage”] dated 8 April 2016 No. 488-V, as amended. Version in English (unofficial translation) at: <https://adilet.zan.kz/eng/docs/Z1600000488> [17 March 2025].

3 The Law of the Republic of Kazakhstan “On International Arbitration” dated 28 December 2004 No. 23-ІІІ (ceased to be in force). Version in Russian at: https://online.zakon.kz/Document/?doc_id=1052495&pos=4&pos=4;-103#pos=4;-103 [17 March 2025].

time as the Old Law on International Arbitration and which was also terminated in 2016).⁴

Since 2016, according to subparagraph 1) of Article 2 of the Arbitration Law, the term “public order of the Republic of Kazakhstan” has been defined as “foundations of law and order [legal order] enshrined in legislative acts of the Republic of Kazakhstan”.

2. An analysis shows that currently Kazakhstan’s legislation quite clearly regulates the following situations:

(i) when an arbitral award of a domestic arbitrage, *i.e.* the one which functions on the territory of the Republic of Kazakhstan, contradicts to the public order existing in Kazakhstan (in such a case the arbitral award must be annulled by local court based on paragraph 2 of Article 52 of the Arbitration Law);

(ii) when the court finds that enforcement of an arbitral award rendered by a domestic arbitrage would contradict to the public order existing in Kazakhstan, even if the award itself is not contrary to the *ordre public* (in such a case the court in accordance with paragraph 1 of Article 255 of the Code on Civil Procedure shall reject to issue a writ of execution for the enforcement of such arbitral award);

(iii) when, regardless of a country in which it was rendered (in essence, this applies to decisions of foreign arbitration tribunals): (a) an arbitral award itself contradicts to public order of the Republic of Kazakhstan, or (b) its enforcement on the territory of the Republic of Kazakhstan would be contrary to the public order of Kazakhstan even if the content of the award does not contradict the public order of the Republic of Kazakhstan (in such cases a Kazakhstani court shall, based on Article 57 of the Arbitration Law, refuse in recognition or, as the case may be, in recognition and enforcement of the arbitral award on the territory of the Republic of Kazakhstan; moreover, in accordance with Articles 503, 504 and sub-paragraph 2) of paragraph 1 of Article 255 of the Code on Civil Procedure a Kazakhstani the court shall reject to issue a writ of execution for the enforcement of not only arbitral awards rendered by foreign tribunals, but also foreign judicial decisions, if the court finds that enforcement of an award or a foreign court decision would contradict to Kazakhstan’s *ordre public*);

4 The Law of the Republic of Kazakhstan “On [Domestic] Arbitrages” dated 28 December 2004 No. 22-III (ceased to be in force). Version in Russian at: https://online.zakon.kz/Document/?doc_id=1052490&pos=3;-51#pos=3;-51 [17 March 2025].

(iv) when in cases regulated by legislative acts and/or international treaties of the Republic of Kazakhstan local courts and arbitration tribunals should resolve disputes in accordance with a foreign law as an applicable one, the courts and tribunals shall comply with Article 1090 of the Civil Code which: (a) constitutes a legislative restriction to apply foreign law if it would cause contradiction to *ordre public* (“foundations of legal order”) of the Republic of Kazakhstan and (b) also requires that legislation of Kazakhstan shall be applied if an applicable foreign law contradicts to Kazakhstani public order.

Based on the above, it is clear that in Kazakhstan (as it is also common in foreign legal systems and international practice of application of conflict of law / private international law concepts) legislative provisions concerning *ordre public* shall be only used by courts when the courts decide on recognition and/or enforcement in Kazakhstan of arbitral awards and foreign court judgements, as well as when local courts and arbitrages apply foreign law to resolve disputes.

3. In 2024, however, the Constitutional Court of the Republic of Kazakhstan adopted its Normative Resolution where it expressed its recommendation to the Government of Kazakhstan “to consider an issue of further improvement of the legislation of the Republic of Kazakhstan on arbitration taking into account legal views of the Constitutional Court of the Republic of Kazakhstan set out in this normative resolution». ⁵

An analysis of this Normative Resolution of the Constitutional Court shows that it considers the legislative definition of the term “public order of [in] the Republic of Kazakhstan” uncertain and therefore it “should be based on clear criteria which would allowing to distinguish lawful behavior from unlawful conduct with complete certainty and exclude any possibility of arbitrary interpretation of provisions of law”. In that regard, the Constitutional Court proposed “to adjust respective terminology to ensure its certainty and clarity”. In addition, for some reason it was also stipulated that for this purpose one should take into account principles of arbitration proceedings (such as party autonomy,

5 “Төрелік туралы 2016 жылғы 8 сәуірдегі Қазақстан Республикасы Заңының 52-бабы 3-тармағының Қазақстан Республикасының Конституциясына сәйкестігін қарау туралы” Қазақстан Республикасы Конституциялық Сотының 2024 жылғы 13 қыркүйектегі No. 51-НҚ нормативтік қаулысы / Normativnoe postanovlenie Konstitucionnogo Suda Respubliki Kazaxstan ot 13 sentyabrya 2024 goda № 51-НП “О рассмотрении на соответствие Конституции Республики Казахстан пункта 3 статьи 52 Закона Республики Казахстан от 8 апреля 2016 года “Об арбитраже”. Versions in Kazakh and Russian can be downloaded from: <https://adilet.zan.kz/rus/docs/S2400000051/info> [17 March 2025].

independence, fairness, etc.) which, as it seems however, have no bearing on application of the aforementioned public order provisions by courts.

4. It is mentioned in the aforementioned Normative Resolution of the Constitutional Court that for the purpose of resolving the case concerning verification of compliance of paragraph 3 of Article 52 of the Arbitration Law to the Constitution of the Republic of Kazakhstan, an expert opinion of Prof. M.K. Suleimenov and Dr. A.E. Duisenova was heard by judges of the Constitutional Court. That expert opinion has been published on Internet resource and remains freely accessible.⁶

While I generally share the results of the analytical review and points of view contained in that expert opinion, in relation to the issue under consideration I consider it necessary to emphasize and unconditionally support the following conclusions of the aforementioned experts:

(i) “the concept of public order (*ordre public*, public policy) is rather vague, its application has been left entirely to judicial discretion” [the sources explain that although both these terms, the first used in continental legal systems, the second - in common law systems, are sometimes regarded as having the same meaning, they are not equivalent;⁷ but consideration of this aspects is not the subject of this article];

(ii) determining whether an arbitral award or its enforcement is contrary to the public order of the Republic of Kazakhstan rests within the competence of the court and “when annulling an arbitral award on this basis, the court must justify which fundamental norms forming the basis of the legal order were violated, as well as how the arbitral award and its further execution will be contrary to public order”; and

(iii) “taking into account adoption by the Supreme Court of the Republic of Kazakhstan of the Generalization of judicial practice on the recognition, enforcement and annulment of arbitral awards established during 2016, 2017 and the 1st quarter of 2018, the Generalization of judicial practice on the recognition,

6 Сuleйменов М.К., Дуйсенова А.Е., Заключение экспертов по вопросу о соответствии Конституции Республики Казахстан пункта 3 статьи 52 Закона Республики Казахстан от 8 апреля 2016 года «Об арбитраже». Version in Russian at: https://online.zakon.kz/Document/?doc_id=35300658&pos=3;-91#pos=3;-91 [17 March 2025].

7 Thoma I, Public policy (*ordre public*) in: Encyclopedia of Private International Law. Eds.: J. Basedow, G. Rühl, F. Ferrari and P. de Miguel Asensio. Edward Elgar Publishing, 2017, Vol. 2, 1454 – 1455.

enforcement and annulment of arbitral awards established during the period from 2019 to 2022, the Normative Resolution of the Supreme Court of the Republic of Kazakhstan dated November 2, 2023 No. 3 “On certain issues concerning application of legislation on arbitration by courts”, the definition of public order of the Republic of Kazakhstan provided for in subparagraph 1) of Article 2 of the Arbitration Law and [which] corresponds to Article 1090 of the Civil Code, can be considered sufficient”.

5. It is well known that the term “*ordre public*” is a general and abstract concept and it should be determined only by judges / courts in each specific case of applying foreign law or deciding to enforce in their country a foreign judgment or an arbitral award made on the basis of foreign or national law. In a broad sense, a public order includes generally accepted moral standards (“local morality”) and the prevailing social order in a given society which, in particular, serve as kind of limits in implementing the declared obligation of a national jurisdiction to apply foreign law in resolving legal situations, where applicable, and to recognize and enforce foreign judgments and arbitral award.⁸

In authoritative publications it’s been particularly emphasized that “public order” is a general and abstract concept that is specified by the judge in each specific case.

In common law countries, public order is referred to as public policy, and its scope, degree and methods of application are determined through the evolution of case law (judicial practice).

In the most national civil law systems legislation contains a general public order (*ordre public*) clause and defines conditions for the application of the public order ground. For example, German law provides that foreign law may not be applied if, in a particular case, such application would be clearly incompatible with the fundamental principles of the German legal order, or if it would entail a violation of fundamental rights or human rights. In French law, this concept includes the principles of universal justice, which is widely recognized in the public sphere as having an absolute value, the fundamental principles of the national legal system, as well as provisions relating to the political, social and economic structure of the country; in addition, it is specifically regulated that any private (for example, contractual, but not only) arrangements cannot deviate from public policy and morality. And, as in common law systems, the concept of

8 Thoma I. Ibidem, 1453.

public order has been formed and developed within the framework of judicial practice (in some countries, such as France, taking into account legal doctrine).⁹

One should bear in mind that public order is a relative concept. Its content changes over time and territories, it is constantly evolving and reflects the current state of social values and morality in each given society.

The relative nature of this concept is further demonstrated by the fact that in all developed legal systems the court must consider all specific circumstances of the case before refusing to apply foreign law on a ground relating to public order. The logic in recognizing such relative nature of the concept of public order and in applying this concept in practice is as follows: despite the fact that abstract norms of foreign law may contradict the laws of a given legal system, in the specific circumstances of a particular case their application may be comparable with the provisions of the respective jurisdiction without contradicting its public policy. And conversely, the abstract rules of a foreign legal system may be fully consistent with fundamental values of the jurisdiction, but under certain circumstances an application of that foreign law may result in a significant breach of national law and/or a material conflict with public policy in that country.¹⁰

Having considered the competence of courts in respect of recognition and enforcement of arbitral awards (which, actually, also relates to enforcement of foreign court judgements), one should note that by bringing into effect provisions on public order the court does not express its attitude to the content of foreign law, but the court simply does not allow negative [for the respective national legal order] consequences of application of foreign law or recognition and enforcement of foreign court decisions or arbitral awards to manifest themselves in its country (within the framework of its jurisdiction, its national legal order). There is a very simple rationale for this: in any given case, a foreign law, judgment or arbitral award is considered to be harmful or offensive to the legal order of that court, while the values and principles protected by the laws of that country are too fundamental to be ignored or disregarded.¹¹

Following the above consideration, it appears that, in accordance with the approaches widely accepted in foreign legal systems and recognized in international private law, the concept of public order cannot objectively be defined in

9 *Thoma I. Ibidem*, 1453 – 1454.

10 *Thoma I. Ibidem*, 1457.

11 *Thoma I. Ibidem*, 1453.

law as an unambiguous definition with any clearer (“understandable”) criteria, other than a reference to the widely accepted values and morality as well as social order existing in a given country.

6. The way how provisions relating to public order have been set out in acting legislation of Kazakhstan, how this term has been defined in the Arbitration Law, and the fact that it is left to the exclusive discretion of the court to decide (in each specific case of application of foreign law or recognition and enforcement of arbitral awards and judgements of foreign courts) whether public order is observed, it all corresponds to the notions of public policy and *ordre public* (which are also very general) recognized in foreign legal systems and at the international level.

This notion is intended to define, and it sufficiently defines, a framework for both a private discretion / behavior of the market participants or other persons and respective decisions of the Kazakhstani courts, to ensure a wide basis for generally accepted morality and social order existing in the country, as well as to observe fundamental rights and/or human rights.

It remains my belief that current wording of Kazakhstani laws is adequate and sufficient when it establishes that foreign law cannot be applied in the Republic of Kazakhstan as well as foreign court judgements and arbitral awards cannot be recognized and/or enforced if that leads to violation of or contradiction to the foundations of legal order (public order / *ordre public* / public policy) of the Republic of Kazakhstan.

Particularly, the norms of paragraph 1 of Article 1090 of the Civil Code (Special Part) of the Republic of Kazakhstan and subparagraph 1) of Article 2 of the Arbitration Law seem also adequate and being in full compliance with the generally recognized and widely perceived concepts globally. Even taking into account that in the legal doctrine the concept of *ordre public* is significantly fragmented and divided into different categories,¹² this is not a matter of the content of the law or legislative technique, but it is an issue of legal theory and methodology of application of legislative provisions related to public order (but consideration of this aspects is not the task for this article).

The foundations of the existing public order in Kazakhstan are enshrined primarily in declarations and provisions of the Constitution of the Republic of Kazakhstan. In addition, these foundations are further developed in relevant norms

12 Thoma I. Ibidem, 1456 – 1457.

of the laws corresponding to the Constitution. They also receive further expanded or detailed legal regulation depending on the substance of the legal relationship, including either of: (i) for the purposes of application of national law in relations between private entities, (ii) for application of foreign law or (iii) enforcement of arbitration and foreign court decisions, as well as (iv) recognition of documents issued by official bodies of foreign states in cases provided for by national law

7. Since the internationally recognized concept of the *ordre public*, as in Kazakhstan, includes respect for human rights and freedoms, courts will inevitably have to resolve if the public order is or would be violated (and the court would face various dilemmas) when there is a conflict revealed between different elements included in the scope of the concept of “public order” or “fundamentals of the rule of law” according to a national doctrine or case law.

As indicated in relevant publications, the European Convention on Human Rights contains several different types of rights, or at least rights with “different weights”. For example, such rights as the right not to be subjected to violence, the right not to be a slave and the right to life, *i.e.* the rights with substantial weight, have been distinguished. In particular, as an example, the right not to be subjected to violence can be called absolute, since there are no justifications important enough for them to prevail over this right. Those rights can also be called fundamental rights. In turn, other rights, such as the right to privacy, the right to freedom of expression and the right to freedom of assembly, are structured in such a way that other circumstances may be taken into account to determine whether they have been violated, thus qualifying them as non-absolute but still human rights. This means that, when the question arises whether there is a threat to public order, it is the courts (judges) who are vested with the power to interpret, balance, prioritize the protected foundations of public order, apply the so-called proportionality test when there is a conflict between protected rights, and so on.¹³

This aspect is important in the context that any modern legal order presupposes (at least declaratively) a respect for fundamental rights and many various human rights. But when assessing compliance of an arbitral award, a foreign court judgement or when applying a foreign law, a court is often made to take

13 McCrudden Ch., Dignity and Religion. Islam and English Law: Rights, Responsibilities and the Place of Shari’*s*, Griffin-Jones R., Ed. Cambridge University Press, 2013, 95.

into account a conflict of rights of different social groups, to find a solution (and even to leave the case unresolved) in order to prevent a more serious violation of / contradiction to public policy than if a case would be resolved to protect rights of one social group but detrimental to rights of other persons /social groups.

And this, incidentally, highlights such a characteristic of public order that it includes generally accepted values and moral standards that are in force in a given society (within a given jurisdiction). As noted below, the court may leave the issue without a resolution on merits, not based on the current norms of law (in fact, leaving them unheeded) but guided by interests of preserving social tranquility and maintaining confidence in the State that, although it does not allow punishment for violations of law and rights provided for in the law, but it would not allow the violation to continue.

In his very interesting publication, a former South African judge, Albir Sachs, described how a difficult case with a clear conflict between freedom of speech, on the one hand, and offensive and provocative statements causing immeasurable moral distress to a certain group of the country's citizens, on the other hand, was resolved by the court. Both aspects relevant to relations regulated by law and both posed threats to the rule of law. The author of the said publication showed quite convincingly both that only a court can resolve such dilemmas, and how a court can resolve them. Moreover, the author actually substantiated that there can be insoluble dilemmas, because a resolution in favor of one or other party would put public order to an even greater problem than leaving the issue without a definite solution. He proposed that, in addition to provisions of law that should be perfectly clear, precise, and unforgiving, it is also reasonable to say that there are areas of law where categorical content of the law is harmful. For such cases it is appropriate to allow for context-specific deliberations during the hearings, for courts to apply the principle of proportionality in cases involving a tumultuous confluence of affected constitutional values, to encourage judges to maximize involvement of all parties affected by the case, to allow certain issues to be left open (also with a concern for the state of public order). In these cases, a certain vagueness of the law could be a good thing or better solution.¹⁴

14 *Sachs A.* In praise of 'fuzzy law', *Islam and English Law: Rights, Responsibilities and the Place of Shari's*, Griffin-Jones R., Ed. Cambridge University Press, 2013, 225 – 235.

It seems that this analysis also shows the inexpediency of a more detailed definition of the terms “public order” and “fundamentals / foundations of legal order” in the legislation of Kazakhstan compared to the current version of the definition of “public order of the Republic of Kazakhstan” as it set forth in the Arbitration Law

8. In view of the above, I would once again refer to the authoritative sources that analyze the practice of the developed jurisdictions, which shows that an attempt to “more clearly define” in law the term “public order / public policy” is not only inappropriate, but can be dangerous for a national legal system.

Particularly, it can be harmful for Kazakhstan's legal system, as it would create an unreasonable legislative framework for judges, limiting them only to what exactly this definition indicates as pertaining to the fundamentals of the legal order and what does not pertain to it, and leaving judges without a freedom and tools for resolving cases taking into account emerging legal dilemmas and conflicts between different fundamental principles that form the public order in Kazakhstan. This may also lead to violation of international treaties and other international obligations of the Republic of Kazakhstan, violation of human and civil rights, infringement of legitimate interests of citizens and organizations, impossibility to implement their legitimate interests, etc.

At the same time, it would be important to amend existing legislative definition of “public order of the Republic of Kazakhstan” contained in subparagraph 1) of Article 2 of the Arbitration Law with a direct reference (in addition to the reference to legislative acts) to the Constitution of the Republic of Kazakhstan as the main source of establishing foundations of the Kazakhstani legal order. This would be an additional reminder that norms of the Constitution have direct effect and their content pre-determines content of all other legislation of the Republic of Kazakhstan which cannot contradict the Constitution.

In addition, it seems that instead of unnecessary introduction of a proposed new definition of foundations of legal order of the Republic of Kazakhstan to existing laws, a much more promising and effective way to develop Kazakhstani law and improve our legal culture would be to solve the problem of insufficient quality training of legal professional and the judiciary, on the one hand, and to create effective mechanisms of interaction between the judiciary and the scientific community in the joint development of the legal doctrine and legal practice, on the other hand. It is judges and legal scholars who have a special responsibility to cooperate in the developing this concept by judicial practice, and to

prevent any “more detailed legal definition” to cause undesirable for our country and our state arbitrariness of unreasonable or unjust law.

Entwicklungen des Europäischen Vertragsrechts vor dem Hintergrund des georgischen Zivilrechts

I. Einführung

Der Jubilar hat sich in herausragender Weise nicht nur, aber vor allem um das am 29.6.1997 verabschiedete und am 25.11.1997 in Kraft getretene Georgische Zivilgesetzbuch¹ verdient gemacht, an dessen Ausarbeitung er seit 1992 als Leiter eines Projektes der Gesellschaft für technische Zusammenarbeit (GTZ), nunmehr internationale Zusammenarbeit (GIZ), an der Universität Bremen beteiligt war.² Seine Arbeit wurde dabei nicht nur in den Ländern durch mehrere Ehrendoktorwürden gewürdigt, sondern auch in der Bundesrepublik in Gestalt der Verleihung des Bundesverdienstkreuzes 1.Klasse im Jahr 2006.³

Ziel seiner Arbeit war, neben Anleihen am deutschen Recht die internationalen und gemeineuropäischen Standards, so wie sie sich zu diesem Zeitpunkt herausgebildet hatten, den georgischen Partnern vorzustellen und zur Aufnahme in das georgische Recht vorzuschlagen. Was ihm gerade in Georgien als „Master

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1 Text in englischer Sprache: <https://matsne.gov.ge/en/document/view/31702?publication=133>.

2 Rolf Knieper (Hrsg.), *Wege zu neuem Recht* (1998), ders. *Juristische Zusammenarbeit: Universalität und Kontext* (2004).

3 https://www.uni-bremen.de/universitaet/hochschulkommunikation-und-marketing/personalia/detailansicht/prof-dr-dres-hc-rolf-knieper-fachbereich-rechtswissenschaft?utm_source=chatgpt.com.

Mind‘ des Zivilgesetzbuches in großem Umfang gelungen ist.⁴ Wie fruchtbar seine Arbeit in dieser Hinsicht gewesen ist, lässt sich vielleicht auch daran er-messen, dass es seit 2019 eine eigene ‚Deutsch Georgische Zeitschrift für Rechts-vergleichung‘ gibt.⁵

Zur Zeit der Ausarbeitung in der ersten Hälfte der neunziger Jahre des letzten Jahrhunderts konnten die Autoren bei der Ermittlung internationaler Standards auf verschiedene internationale und europäische Rechtsakte zurückgreifen. Dazu gehörten vor allem die Wiener Kaufrechtskonvention von 1980⁶, die EU-Produkthaftungsrichtlinie⁷ und die Haustürwiderrufsrichtlinie⁸ aus Jahr 1985 so-wie die Verbraucherkreditrichtlinie aus dem Jahr 1987⁹. In den Zeitraum der Er-arbeitung des Entwurfs des Georgischen Zivilgesetzbuches fielen die Veröffent-lichung der Richtlinie über missbräuchliche Klauseln in Verbraucherverträgen 1993¹⁰ und die erste Fassung der UNIDROIT-Principles of International Commer-cial Contracts (UPICC) 1994¹¹. Alle dieser Normen wurden von den Autoren des Georgischen Zivilgesetzbuches berücksichtigt und ganz oder teilweise übernom-men. Beispielhaft genannt seien hier die Regelungen über die Allgemeinen Ge-schäftsbedingungen in Art. 342 Geo ZGB ff, zu den verbundenen Geschäften in Art. 370 Geo ZGB und zur Gewährleistung im Kaufrecht in den Art. 488 Geo ZGB ff.

Bemerkenswerter Weise wurden darüber hinaus im Georgischen Zivilgesetz-buch aber auch Konzepte niedergelegt, die in Deutschland und Europa erst zu einem späteren Zeitpunkt verabschiedet wurden, so etwa zentrale Elemente der Warenkaufrichtlinie von 1999¹² und der Schuldrechtsreform in Deutschland, die

4 *Giorgi Rusiashvili*, Place of Georgian civil Law in European Legal Family, Journal of Law - TSU Faculty of Law , 2015 Nr.1, 95 – 106.

5 <https://lawjournal.ge/de/>

6 UN- Übereinkommen über den internationalen Warenkauf von 11.4.1980.

7 Produkthaftungsrichtlinie 85/347 vom 25.7.1985.

8 Richtlinie 85/577betreffend den Verbraucherschutz im Fall von außerhalb von Geschäftsräu-men geschlossen Verträgen vom 2012.1985.

9 Verbraucherkreditrichtlinie 87/102 vom 22.12.1986.

10 Klauselrichtlinie 93/13 vom 5.4.1993.

11 UNIDROIT-Principles of International Commercial Contracts <https://www.unidroit.org/english/principles/contracts/principles1994/1994fulltext-english.pdf>, dazu zuletzt *Brödermann*, UNIDROIT Principles of international commercial contracts, IWRZ 2024, 107, der ihre Bedeu-tung in internationalen Schiedsverfahren hervorhebt.

12 Kaufgewährleistungsrichtlinie 1999/44 vom 25.5.1999.

dort erst 2002 in Kraft trat¹³. Dies betrifft z.B. die Vorschriften zur Culpa in Contrahendo in Art. 315, 316 Geo ZGB, zur Vertragsauflösung in Art. 352, 405 Geo ZGB, zur allgemeinen Haftung für Pflichtverletzungen nach Art. 394 Geo ZGB, die § 280 BGB vergleichbar ist, den Wegfall der Geschäftsgrundlage in § 398 Geo ZGB und die Bestimmungen zur kaufrechtlichen Gewährleistung. Anders als im UN-Kaufrecht haben die Autoren des Georgischen ZGB hier nicht auf das Konzept der 'wesentlichen Vertragsverletzung' als Grundlage für einen Nachlieferungsanspruch bzw. die Vertragsauflösung zurückgegriffen, sondern den Vorrang des Nacherfüllungsanspruchs mittels Nachfristsetzung kodifiziert.

Bemerkenswert ist daneben die weitere Grundentscheidung des georgischen Gesetzgebers in Bezug auf die Integration Verbraucherschützender Vorschriften in das Zivilgesetzbuch. Die vertragsrechtlichen Regelungen des Europarechts finden ihre Rechtsgrundlage weit überwiegend in der Kompetenz der Europäischen Union zur Angleichung der Rechtsvorschriften des Binnenmarkts.¹⁴ Dies hat wiederum zur Folge, dass der Anwendungsbereich der europäischen Normen regelmäßig auf Verträge zwischen Unternehmern und Verbrauchern beschränkt ist. Im Georgischen ZGB wurden der Anwendungsbereich der Normen, die ihre Quelle im Europarecht haben, teilweise darüber hinaus ausgedehnt, wie etwa der Vorschriften zu den Allgemeinen Geschäftsbedingungen in den Art. 342 Geo ZGB ff. und den Rechten des Käufers bei Lieferung einer mangelhaften Sache in Art. 490, 491 Geo ZGB. Darüber hinaus wurden einige wenige Vorschriften zum speziellen Verbraucherkreditrecht übernommen, so in Art. 370 GeoZGB und Art. 871 Abs. 2 GeoZGB. Insgesamt aber haben sich die Autoren des ZGB dafür entschieden, die Vorschriften zum speziellen Schutz der Verbraucher, die zu jener Zeit zumindest in Entwürfen vorlagen¹⁵, nicht in das ZGB zu integrieren, sondern einem eigenständigen Gesetz über den Schutz der Verbraucher vorzubehalten.

13 Gesetz zur Modernisierung des Schuldrechts vom 26.11.2001 (BGBl 2001, S. 3138), in Kraft getreten zum 1.1.2002.

14 Art. 114 AEUV, *Schulze/Zoll*, Europäisches Vertragsrecht, 3.Aufl. (2021), § 1 Rn. 29 ff., *Herresthal*, in Langenbucher (Hrsg.), Europäisches Privat- und Wirtschaftsrecht, 5.Aufl (2022), § 2 – Vertragsrecht, S. 79 (96 f).

15 KOM (92) 11 – Vorschlag einer Richtlinie des Rates über den Verbraucherschutz bei Vertragsabschlüssen im Fernabsatz, KOM 95 (520) - Vorschlag für eine Richtlinie des Parlaments und des Rates über den Verbrauchsgüterkauf und – garantien.

Die einschlägigen Vorschriften des Verbraucherschutzes finden sich heute im Georgischen Gesetz über den Schutz der Verbraucherrechte vom 29.3.2022.¹⁶

Ziel des vorliegenden Artikels soll es sein, die wesentlichen Entwicklungen des europäischen Vertragsrechts seit der Verabschiedung des Georgischen Zivilgesetzbuches nachzuzeichnen und der Frage nachzugehen, ob sich hier allgemeine Prinzipien herausarbeiten lassen, die für die Weiterentwicklung des georgischen Vertragsrechts von Interesse sein könnten.

II. Europäisches Vertragsrecht

Soweit hier von einem europäischen Vertragsrecht die Rede ist, muss gleich zu Beginn die einschränkende Bemerkung vorweggeschickt werden, dass es ein solches in kohärenter Form, also etwa in Gestalt eines europäischen Zivilgesetzbuches, nicht gibt. Erste Ansätze für eine Vereinheitlichung des europäischen Privatrechts lassen sich zwar auf der Grundlage einer privaten Initiative von Wissenschaftlern bis in die 1980 Jahre zurückverfolgen (Lando Commission). Diese Initiative führte, parallel zu den global ausgerichteten Arbeiten von UNIDROIT, zur Veröffentlichung der Principles of European Contract law in mehreren Teilen zwischen 1995 und 2002.¹⁷ Hierbei handelt es sich aber um akademische Arbeiten, die ohne einen konkreten gesetzgeberischen Auftrag unternommen wurden. Auf der politischen Ebene gab es ausgehend von Entschlüssen des Europäischen Parlaments im Jahr 1989 und 1994 in der Phase nach dem Zusammenbruch der Sowjetunion und dem absehbaren Beitritt der osteuropäischen Staaten zur Europäischen Union Diskussionen über die Möglichkeiten und Wege zu einer Vereinheitlichung der nationalen Vertragsrechte.¹⁸ Die Arbeiten an einem einheitlichen Europäischen Zivilgesetzbuch sind jedoch über erste Vorarbeiten nicht hinausgekommen. Zunächst kam es zur Vorstellung eines Aktionsplanes im Jahr 2003, der das Ziel vorgab, die Kohärenz des europäischen Vertragsrechts durch Definitionen, Regeln und Prinzipien zu verbessern.¹⁹ Auf dieser Grundlage erfolgte eine Zusammenstellung der zu dieser Zeit existierenden

16 Text in englischer Sprache: <https://matsne.gov.ge/en/document/view/5420598?publication=0>.

17 *Lando/Clive et al. (ed.), Principles of European Contract law Part I (1995), Part I and II (2000), Part III (2003).*

18 *Herresthal* in Langenbucher (Hrsg.) *Europäisches Privat- und Wirtschaftsrecht*, 5. Aufl. (2022), § 2 – Vertragsrecht, S. 79 (83).

19 Mitteilung der Kommission Ein kohärentes europäisches Vertragsrecht, KOM 2003(68).

Prinzipien des europäischen Vertragsrechts, die unter der Bezeichnung *Acquis Group, Contract I. Pre-contractual Obligations, Conclusion of Contract, Unfair Terms* 2007 veröffentlicht wurden.²⁰ Diese flossen wiederum gemeinsam mit Arbeiten der Lando Kommission ein in den *Draft Common Frame of Reference*, der 2009 veröffentlicht wurde und den Staaten als Referenzrahmen dienen sollte.²¹

Angesichts des wachsenden Widerstandes gegen ein so umfassendes Projekt unternahm die Kommission zunächst den Versuch einer Vereinheitlichung lediglich des Kaufrechts in Gestalt eines Vorschlags für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht im Jahr 2011.²² Aber nicht einmal diesem Unterfangen war ein Erfolg beschieden. Diese Vorarbeiten führten aber zur Erarbeitung von Vorschlägen für zwei Richtlinien: der Richtlinie über bestimmte vertragsrechtliche Aspekte des Online-Warenhandels und anderer Formen des Fernabsatzes von Waren und der Richtlinie über bestimmte vertragsrechtliche Aspekte der Bereitstellung digitaler Inhalte.²³ Diese Entwürfe mündeten 2019 in die Verabschiedung der Richtlinie über bestimmte vertragsrechtliche Aspekte des Warenkaufs²⁴ und die Richtlinie über bestimmte vertragsrechtliche Aspekte der Bereitstellung digitaler Inhalte und digitaler Dienstleistungen.²⁵

Insgesamt verlegte sich die Kommission ab 2014 jedoch darauf, die Rechtsentwicklung in einzelnen Sektoren voranzutreiben. Dieser Wechsel fand in der im Mai 2015 veröffentlichten Strategie für den digitalen Binnenmarkt seinen Ausdruck.²⁶ Hier wurde das Ziel formuliert, die rechtlichen Grundlagen für einen digitalen Binnenmarkt zu schaffen, unabhängig von der Zuordnung zu einem Rechtsgebiet. Diese Grundlagen umfassen neben anderen Vorschriften für den grenzüberschreitenden online-Handel und den freien Datenfluss. Aus

20 Bertolini, *European Commercial Contract law*, p. 27, [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/753420/IPOL_STU\(2023\)753420_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/753420/IPOL_STU(2023)753420_EN.pdf).

21 Von Bar/Clive (Hrsg.), *Draft Common Frame of Reference, Principles, Definitions and Model Rules for European Private Law* (2009), Text verfügbar unter https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/EUROPEAN_PRIVATE_LAW/EN_EPL_20100107_Principles_definitions_and_model_rules_of_European_private_law_-_Draft_Common_Frame_of_Reference_DCFR_.pdf.

22 KOM 2011(635).

23 COM(2015) 635, COM(2015) 634, Schulze/Zoll *Europäisches Vertragsrecht*, 3.Aufl. (2021), § 1 Rn. 52 ff.

24 *Warenkauf-Richtlinie* 2019/771 vom 20.5.2019.

25 *Digitale-Inhalte-Richtlinie* 2019/770 vom 20.5.2019.

26 KOM 2015(192), Schulze/Zoll *Europäisches Vertragsrecht*, 3.Aufl. (2021), § 1 Rn. 61 ff.

kodifikatorischer Sicht besteht die Aufgabe darin, diese Regelungen in verschiedenen Sektoren auf ihre gemeinsamen Prinzipien hin zu untersuchen und die Frage zu untersuchen, ob darunter Regeln allgemeiner Art sind, die für eine Aufnahme in ein Zivilgesetzbuch in Betracht kommen bzw. dort schon in allgemeiner Form enthalten sind.

Parallel dazu wurden die UNIDROIT Principles in den Jahren 2004, 2010 und 2016 überarbeitet und kommentiert, so dass auch hier ein Blick lohnt auf der Suche nach neuen Entwicklungen im Vertragsrecht.²⁷ Dabei darf jedoch der unterschiedliche Ansatz der Europäischen Union einerseits und UNIDROIT andererseits nicht aus dem Blick geraten. Während das EU-Recht primär den Schutz der Verbraucher zum Ziel hat und regional auf die Mitgliedstaaten der EU beschränkt sind, sind die UNIDROIT-Principles auf den internationalen Handel weltweit ausgerichtet.

III. Regelungsgebiete

Nachfolgend sollen die bedeutsamsten europarechtlichen Vorschriften mit besonderer Relevanz für das allgemeine Vertragsrecht vorgestellt werden, die nach der Verabschiedung des georgischen Zivilgesetzbuches in Kraft getreten sind. Außer Betracht bleiben daher an dieser Stelle Richtlinien zu besonderen Vertragstypen²⁸ und zur deliktischen Haftung für fehlerhafte Produkte.²⁹

1. Vertragsschluss im Internet

Hinsichtlich der mit einem Vertragsschluss im Internet verbundenen Fragen sind von europäischer Seite die Signatur-Richtlinie³⁰ und die e-commerce Richtlinie³¹ von Bedeutung, die ergänzt werden durch eine einschlägige Konvention

27 International Institute for the Unification of Private Law UNIDROIT Principles 2016.

<https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf>.

28 Verbraucherkreditrichtlinie 2008/48, ersetzt durch Richtlinie 2023/2225; Handelsvertreterrichtlinie 86/65, Pauschalreiserichtlinie 90/314, neu gefasst durch Richtlinie über Pauschalreisen und verbundene Dienstleistungen 2015/2302, Wohnimmobilienkreditrichtlinie 2014/17, Überweisungsrichtlinie 97/5, ersetzt durch die Zahlungsdiensterichtlinie 2007/64.

29 Richtlinie über die Haftung für fehlerhafte Produkte 85/374, ersetzt durch die Richtlinie 2024/2853 vom 23.10.2024.

30 Signatur-Richtlinie 199/93, ersetzt durch VO 910/2014 über elektronische Identifizierung.

31 E-Commerce Richtlinie 2000/31 vom 8.6.2000.

der Vereinten Nationen.³² Die zentralen hier geregelten Fragen betreffen den Zugang von Erklärungen über das Internet, die Wirksamkeit von Verträgen, Formvorschriften und allgemeine Informationspflichten. Soweit erkennbar sind diese Fragen nicht im georgischen ZGB, insbesondere nicht in den Art. 68, 69 Geo ZGB bzw. Art. 327 GeoZGB ff geregelt, sondern als spezielles Verbraucherschutzrecht im Georgischen Gesetz über den Schutz der Rechte der Verbraucher.

2. Vertragsschluss im Fernabsatz und außerhalb der Geschäftsräume

Der europäische Gesetzgeber hält besondere Vorschriften bereit für den Fall, dass ein Unternehmer mit einem Verbraucher Verträge abschließt außerhalb der Geschäftsräume oder im Wege des Fernabsatzes. Seit 2011 sind beide Fälle in der Verbraucherrechterichtlinie gemeinsam geregelt.³³ Die wesentlichen Instrumente zum Schutz der Verbraucher sind hier wiederum Informationspflichten zu Lasten des Unternehmers, Transparenzpflichten im Rahmen des Bestellvorgangs und das Widerrufsrecht des Verbrauchers. Die Umsetzung dieser Vorschriften erfolgte in Georgien in den Art. 10 bis Art. 15 des Gesetzes über den Schutz der Rechte der Verbraucher vom 29.3.2022.

3. Allgemeine Geschäftsbedingungen

Zu den zentralen Vorschriften, die den Gedanken einer gerichtlichen Kontrolle gestörter Parität der Vertragsparteien umsetzen, gehört auf europäischer Ebene die Richtlinie über missbräuchliche Klauseln in Verbraucherverträgen.³⁴ Dieser Regelung ging das deutsche Gesetz über allgemeine Geschäftsbedingungen voraus, das im Unterschied zur europäischen Richtlinie auch für Verträge zwischen Unternehmern galt. Diesen Ansatz hat der europäische Gesetzgeber nicht übernommen. Im Georgischen Recht finden sich zu dieser Frage an zwei Stellen Regelungen: zum einen in den bereits erwähnten Art. 342 bis Art. 348 GeoZGB, zum anderen in den Art. 21 bis Art. 23 des Gesetzes über den Schutz

32 United Nations Convention on the use of electronic communication in international contracts (2007), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-57452_ebook.pdf.

33 Verbraucherrechterichtlinie 2011/83 vom 25.10.2011.

34 Klauselrichtlinie 93/13 vom 5.4.1993, dazu *Schulze/Zoll*, Europäisches Vertragsrecht, 3.Aufl. (2021), § 4.

der Rechte der Verbraucher. Dabei sind ihrem Wortlaut nach die Art. 347, 348 GeoZGB als verbraucherschützende Normen ausgestaltet, so dass es hier zu Überschneidungen kommt.

4. Zahlungsverzug

In Abweichung von den zumeist am Schutz der Verbraucher orientierten Richtlinien regelt die Zahlungsverzugsrichtlinie den Anspruch auf Verzugszinsen wegen verspäteter Erfüllung einer Zahlungsverpflichtung im unternehmerischen Rechtsverkehr.³⁵ Regelungsziel ist hier, den Beginn der Verzinsungspflicht unabhängig von einer Mahnung eintreten zu lassen. Die Richtlinie sieht vor, dass die Verzinsungspflicht unabhängig von einer Mahnung entweder ab dem vertraglich festgelegten Zahlungstermin oder, wenn ein solcher nicht festgelegt ist, spätestens 30 Tage automatisch nach Eingang der Rechnung zu zahlen ist. Darüber hinaus wird die Höhe der zu zahlenden Verzugszinsen in Anlehnung an einen Bezugszinssatz, der hier in Anlehnung an den Zinssatz der Europäischen Zentralbank festgelegt wird, zuzüglich mindestens 8 Prozentpunkten.

Das georgische Zivilgesetzbuch enthält in den Art. 383 Geo ZGB ff spezielle Bestimmungen zur Erfüllung einer Zahlungsverpflichtung und den Art. 394 Geo ZGB Vorschriften zum Schadensersatz wegen der Verletzung von Pflichten allgemein. Die Frage des Verzugs ist dort in Art. 394 (2) Geo ZGB geregelt. Nach dieser Vorschrift kann der Gläubiger dem Schuldner einer angemessenen Frist setzen. Ein Schadensersatzanspruch entsteht nach dieser erst nach Ablauf der Frist. Nach Absatz 3 ist das Fristsetzungserfordernis nur dann entbehrlich, wenn außerordentliche Umstände dies im Interesse beider Parteien rechtfertigen.

5. Warenkauf

Durch die Verbrauchsgüterkaufrichtlinie wurde das Recht der Gewährleistung für die Lieferung mangelhafter Waren aufgrund eines Kaufvertrages zwischen einem Unternehmer und einem Verbraucher in der Europäischen Union weitgehend an das UN-Kaufrecht angepasst.³⁶ Übernommen wurde das System der Rechtsbehelfe des UN-Kaufrechts, der Begriff des Sachmangels und die

35 Richtlinie zur Bekämpfung des Zahlungsverzugs im Geschäftsverkehr 2000/35, neugefasst durch Richtlinie 2011/7 vom 16.2.2011.

36 Richtlinie über bestimmte Aspekte des Verbrauchsgüterkaufs und Garantien für Verbrauchsgüter 1999/44, ersetzt durch Richtlinie 2019/771 vom 22.5.2019.

zweijährige Verjährungsfrist, nicht aber das Konzept der wesentlichen Vertragsverletzung. Dieses wurde ersetzt durch die Notwendigkeit einer Fristsetzung. Als spezielle verbraucherschützende Bestimmung hat man zudem eine Beweislastumkehr vorgesehen und die verbraucherschützenden Vorschriften für zwingend erklärt. Aus diesem Grund wurden zudem Vorschriften über den Regress des Verkäufers gegen den Hersteller aufgenommen. In der Neufassung der Richtlinie 2019 wurde vor allem der Begriff des Sachmangels überarbeitet und die Verpflichtung des Verkäufers einer mangelhaften Sache, auch die Kosten des Aus- und Einbaus zu ersetzen. Durch die bis Mitte 2026 umzusetzende Reparaturrichtlinie hat der europäische Gesetzgeber zudem für bestimmte Produkte eine Verpflichtung der Hersteller vorgesehen, Verbrauchern die Möglichkeit zu verschaffen, dies Produkte reparieren zu lassen.³⁷

Im georgischen Recht finden sich in den Art. 488 Geo ZGB ff Vorschriften, die dem europäischen Recht in der ursprünglichen Fassung im Kern entsprechen. Ergänzende Bestimmungen zum Verbraucherschutz sind zudem in dem Georgischen Gesetz über den Schutz der Verbraucherrechte niedergelegt. Dort finden sich die spezielle Gewährleistungsrechte in Art. 17 und die Beweislastumkehr in Art. 19. Soweit ersichtlich gibt es allerdings keine speziellen Vorschriften zum Regress des Zwischenhändlers gegenüber dem Hersteller. Bemerkenswert ist zudem die Regelung zur Rüge- und Untersuchungspflicht des Käufers. Hier hat der europäische Gesetzgeber erstmals in der Neufassung 2019 den Mitgliedstaaten die Befugnis eingeräumt, eine solche Pflicht auch zu Lasten der Verbraucher vorzusehen. In Art. 495 Georgisches ZGB hat der georgische Gesetzgeber eine Rügepflicht beschränkt auf Rechtsgeschäfte zwischen Unternehmen vorgesehen.

6. Digitale Inhalte

Zu den wichtigsten Neuerungen der jüngeren Zeit auf der Ebene des europäischen Privatrechts gehört die Umsetzung des Ziels der Schaffung eines digitalen Binnenmarktes³⁸ in Gestalt der Digitale Inhalte Richtlinie.³⁹ Ausgangspunkt ist

37 Richtlinie 2024/1799 über gemeinsame Vorschriften zur Förderung der Reparatur von Waren vom 13.6.2024.

38 COM 2015 (192).

39 Richtlinie 2019/770 über bestimmte vertragsrechtliche Aspekte der Bereitstellung digitaler Inhalte und digitaler Dienstleistungen vom 20.05.2019.

die Annahme, dass in Zukunft der Handel mit digitalen Inhalten eine zentrale Bedeutung erlangen wird. Dabei steht aufgrund der Eigenart von Daten weniger die physische Übertragung im Vordergrund, als vielmehr die Möglichkeit zur Nutzung. Aus diesem Grund wird auch die Unterscheidung zwischen Kauf und Dienstleistung aufgegeben. Ausgangspunkt ist vielmehr die Bereitstellung digitaler Inhalte oder Dienstleistungen. Davon werden, wie in Erwägungsgrund 19 erläutert wird, verschiedenste digitale Produkte erfasst wie etwa Computerprogramme, Video- und Audiodateien, digitale Spiele und Bücher, aber auch digitale Dienstleistungen in Cloud Umgebungen und soziale Medien. Anliegen der Richtlinie ist es, Regeln zu schaffen über die Vertragsmäßigkeit digitaler Inhalte und die Abhilfen bei Vertragswidrigkeit oder nicht erfolgter Bereitstellung. Dabei orientieren sich die Gewährleistungsrechte im Ausgangspunkt an der Verbrauchergüterkaufrichtlinie. Diese werden jedoch an die Besonderheiten des Datenverkehrs angepasst. An die Stelle der Lieferung der Ware tritt die Bereitstellung der digitalen Inhalte und an die Stelle des Rücktritts die Vertragsbeendigung. Eine wesentliche Neuerung liegt in der Verpflichtung des Unternehmers, dem Verbraucher Aktualisierungen, die für den Erhalt der Vertragsmäßigkeit der digitalen Inhalte und Dienstleistungen erforderlich sind, während der Vertragslaufzeit bereit zu stellen.

Soweit ersichtlich, haben diese Gedanken noch keinen Eingang in das georgische Recht gefunden. Erwähnenswert ist aber, dass die Datenschutzgrundverordnung⁴⁰ im Georgien durch das Gesetz über den Schutz der persönlichen Daten⁴¹ umgesetzt wurde und damit auch das Recht des Bürgers, nicht von Entscheidungen betroffen zu sein, die ausschließlich im Wege der automatisierten Datenverarbeitung getroffen werden.⁴²

7. Weitere europäische Regelungen mit privatrechtlichem Inhalt

Neben den genannten gibt es zahlreiche weitere europäische Normativakte mit privatrechtlichen Inhalten, allerdings mit eher speziellem Inhalt. Diese Akte enthalten weniger Vorschriften, denen sich allgemeine Prinzipien entnehmen

40 Datenschutzgrundverordnung 2016/679.

41 Gesetz über den Schutz der persönlichen Daten vom 14.6.2023.

42 Art. 21 DSGVO, Art. 19 Georgisches Gesetz.

lassen. Hierzu gehören, neben den Anti-Diskriminierungsrichtlinien⁴³, und den Verordnungen über die Fahrgastrechte⁴⁴ insbesondere die Richtlinien über unbestellte Waren⁴⁵, über Teilzeitnutzungsverträge über Immobilien⁴⁶, über Pauschalreisen⁴⁷, über Zahlungsdienste⁴⁸. Sie sollen hier außer Betracht bleiben ebenso wie die zweifellos wichtigen Verordnungen zum digitalen Binnenmarkt, insbesondere die Verordnung über Fairness und Transparenz von online Vermittlungsdiensten⁴⁹, die Verordnung über digitale Märkte⁵⁰, die Verordnung über digitale Dienste⁵¹ sowie die sog. Modernisierungsrichtlinie⁵². Im Kern handelt es sich bei diesen Vorschriften um spezielle Transparenz-⁵³ und Informationspflichten⁵⁴ sowie Verpflichtungen bzw. Verbote⁵⁵ für online-Dienstleister und Plattformen, damit aber nicht um neue Regelungstechniken.

IV. Weiterentwicklung internationaler Modellregeln

1. UNCITRAL

Unter der Ägide der UN-Kommission für internationalen Handel (UNCITRAL) wurden verschiedene Modellgesetze erlassen sowie die UN-Konvention über

43 Art. 19, 157 AEUV, Richtlinie 2000/43 über die Anwendung des Gleichbehandlungsgrundsatzes, Richtlinie 2006/54 zur Gleichbehandlung von Männern und Frauen im Beruf.

44 Fluggastrechte-VO 261/2004, VO 1371/2007 über die Rechte der Fahrgäste im Eisenbahnverkehr.

45 Richtlinie 2005/29 über unlautere Geschäftspraktiken im binnenmarktinternen Geschäftsverkehr zwischen Unternehmen und Verbrauchern vom 11.5.2005.

46 Richtlinie 2008/122 über den Schutz der Verbraucher im Hinblick auf bestimmte Aspekte von Teilzeitnutzungsverträgen vom 14.1.2009.

47 Richtlinie 90/314 über Pauschalreisen, ersetzt durch Richtlinie 2015/2302.

48 Richtlinie 2007/64 über Zahlungsdienste, ersetzt durch Richtlinie 2015/2366.

49 Verordnung 2019/1150 für Fairness und Transparenz für online Vermittlungsdienste vom 20.6.2019 (TransparenzVO).

50 Verordnung 2022/1925 über bestreitbare und faire Märkte im digitalen Sektor (DSA) vom 14.9.2022.

51 Verordnung 2022/2065 über digitale Dienste (DMA) vom 19.10.2022.

52 Richtlinie 2019/2161 zur besseren Durchsetzung der Verbraucherrechte vom 27.11.2019 (DVR-RL).

53 Art. 26, 27 DSA, Art. 3 -10 TransparenzVO.

54 Art. 14, 30, 32, 34, 35 DSA, Art. 4 Nr. 5 DVR-RL.

55 Art. 5, 6, 7 DMA, Art. 25, 28 DAS.

elektronische Kommunikation im internationalen Handel vom 23.11.2005.⁵⁶ Die Modellgesetze betreffen neben dem Modellgesetz über elektronischen Handel von 1996⁵⁷ unter anderem elektronische Unterschriften⁵⁸ und das Modellgesetz über automatisierte Vertragsabschlüsse⁵⁹.

2. UNIDROIT

Die UNIDROIT Principles über internationale Wirtschaftsverträge wurden seit 1994 drei Mal überarbeitet – 2004, 2010 und 2016.⁶⁰ Darüber hinaus wurden im Rahmen von UNIDROIT Dokumente zum internationalen Leasing (1988),⁶¹ Factoring (2002)⁶² und zum Franchise (2002)⁶³ veröffentlicht.

Die Weiterentwicklung der UNIDROIT-Principles nach 1996 lässt sich dahingehend zusammenfassen, dass die geregelten Materien stückweise erweitert wurden. So kamen 2004 Bestimmungen zur Aufrechnung, Abtretung, Schuld und Vertragsübernahme, der Stellvertretung und der Vertrag zugunsten Dritter hinzu.⁶⁴ 2010 wurden die Bestimmungen um Abschnitte zu Verstößen gegen zwingende Vorschriften, Bedingungen, Gesamtgläubiger und Gesamtschuldner und die Rückabwicklung fehlgeschlagener Verträge ergänzt.⁶⁵ Mit der Änderung 2016 wurden in erster Linie die Kommentierungen erweitert und die Unterscheidung zwischen Langzeitverträgen und solchen mit einer einfachen

56 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-57452_ebook.pdf.

57 Model law on electronic commerce (1996), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-04970_ebook.pdf.

58 Model law on electronic signatures (2001), <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ml-elecsig-e.pdf>.

59 Model law on automated contracting (2024), <https://uncitral.un.org/sites/uncitral.un.org/files/2424674e-mlautomatedcontracting-rev1-ebook.pdf>.

60 UNIDROIT Principles on international commercial contracts (2016), S. xxxvii, <https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-i.pdf>.

61 Model Law on leasing (2008), <https://www.unidroit.org/instruments/leasing/model-law/>

62 UNIDROIT Convention on international factoring (1988), <https://www.unidroit.org/instruments/factoring/convention/>

63 Model Franchise disclosure law (2002), <https://www.unidroit.org/instruments/franchising/model-law/>

64 Zimmermann, Die Unidroit Grundregeln der internationalen Handelsverträge 2004 in vergleichender Perspektive ZEuP 2005, 264.

65 Vogenauer, Die UNIDROIT Grundregeln der internationalen Handelsverträge 2010, ZEuP 2013, 7.

Leistungspflicht ausgebaut.⁶⁶ Inhaltlich lässt sich die Entwicklung derart beschreiben, dass die allgemeinen Prinzipien von Treu und Glauben, des Schutzes des Vertrauens des Vertragspartners und des Verbots des Missbrauchs formaler Befugnisse weiter gestärkt wurden. In diesem Sinne lassen sich die neu eingefügten Art. 1.8 (Verbot des widersprüchlichen Verhaltens), Art. 2.2.5 (Konzept der Anscheinsvollmacht), Art. 2.2.7 (Interessenkonflikt bei der Stellvertretung), stillschweigende Bedingungen (implied obligations), Art. 5.1.2 und die Verpflichtung zur Kooperation (Art. 5.1.3.) deuten. Das Konzept des Schutzes des Vertrauens auf den Inhalt eines bestätigten Vertragsabschlusses, das in Deutschland mit dem Begriff des ‚kaufmännischen Bestätigungsschreibens‘ erfasst wird (Art. 2.1.11, 2.1.12), und die Haftung für unlauter geführte Vertragsverhandlungen (Art. 2.1.15) waren zuvor bereits Teil der Prinzipien.

V. Auswirkungen auf das allgemeine Vertragsrecht

Abschließend soll der Versuch unternommen werden, aus den vorliegend genannten Vorschriften allgemeine Tendenzen herauszuarbeiten, und der Frage nachzugehen, ob sich Regeln allgemeiner Art herauskristallisieren lassen, die ihren Weg in das allgemeine Schuldrecht finden werden.

1. Abgrenzung allgemeines Vertragsrecht und Verbraucherschutzrecht

Zu den zentralen Fragen des Schuldrechts wird wohl die nach der Zuordnung des Verbraucherschutzrechts gehören. Da sich die Europäische Union auf den Schutz der Verbraucher konzentriert, stellt sich die Frage, ob es sich hierbei um eine eigenständige Materie handelt oder sie in das jeweilige Zivilgesetzbuch zu integrieren ist. Ein maßgebendes Kriterium dürfte in der Beantwortung der Frage liegen, ob das Gewährleistungsrecht einheitlich ausgestaltet werden soll, wofür einiges spricht, oder mit je eigenen Regeln für Verbraucherverträge und Verträge zwischen Unternehmen bzw. Privatpersonen.

Eine Ausdehnung der weiteren speziellen verbraucherschützenden Vorschriften in Gestalt von Widerrufsrechten in besonderen Situationen oder einer Beweislastumkehr hinsichtlich des Vorhandenseins von Mängeln zum Zeitpunkt

66 Unidroit Principles of international commercial contracts – overview, https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/overview/?utm_source=chatgpt.com.

des Gefahrübergangs auf Verträge zwischen Unternehmern wird soweit erkennbar, nicht vertreten.

2. Schutz des redlichen Vertragspartners

Ein voranschreitender Schutz des redlichen Vertragspartners scheint hingegen als eine allgemeine Tendenz wahrnehmbar zu sein, wenn man die Entwicklung der UNIDROIT-Principles für internationale Wirtschaftsverträge zugrunde legt. Hier haben im Laufe der Jahre die Vorschriften an Bedeutung gewonnen, die die Parteien zu redlichem Verhalten verpflichten und unredliches Verhalten mittels Haftungsvorschriften sanktionieren. Als Beispiele seien genannt die Haftung für den arglistigen Abbruch von Vertragsverhandlungen (Art. 2.1.15 UNPICC) und für das Wissen um die Gründe für eine Unwirksamkeit des Vertrages (Art. 3.2.16 UNPICC).

Hierzu gehören ebenso Vorschriften, die das zurechenbar hervorgerufene Vertrauen in Sachverhalte schützen, wie das Vorliegen einer Vertretungsmacht (Art. 2.2.5 UNPICC), die Ergänzung des Vertrages entsprechend den gemeinsamen Absichten der Parteien (Art. 4.8 Art. 5.1.2 UNPICC) und die Pflicht zur Kooperation (Art. 5.1.3 UNPICC).

3. Vorvertragliche Informationspflichten, Schutz der legitimen Erwartungen

Die Existenz und der Umfang vorvertraglicher Informationspflichten gehört in rechtsvergleichender Perspektive zu den Themen, bei denen materielle Unterschiede zwischen kontinentalem Recht und dem anglo-amerikanischen Recht herausgearbeitet werden, auch wenn sie bei näherer Betrachtung geringer sind, als zunächst behauptet.⁶⁷ Das europäische Recht begegnet dem bei Verträgen zwischen Unternehmern und Verbrauchern zum einen durch umfangreiche, von manchen als überbordend kritisierte Informationspflichten.⁶⁸ Zum anderen lässt sich aber insgesamt eine Objektivierung des Sachmangelbegriffs feststellen, der im Ergebnis dazu führt, dass ein Verkäufer verpflichtet ist, auf die ihm bekannten Umstände hinzuweisen, widrigenfalls er Gefahr läuft, sich dem Vorwurf der Lieferung einer mangelhaften Sache auszusetzen. So wird in den neuern Formulierungen des Mangelbegriffs darauf abgestellt, dass eine Ware dem entsprechen

67 Kötz, Europäisches Vertragsrecht, 2. Aufl., § 10 II.

68 Schulze/ Zoll, Europäisches Vertragsrecht, 2. Aufl., § 3.

muss, was ein ‚Verbraucher vernünftiger Weise erwarten kann‘.⁶⁹ Dies entspricht inhaltlich einer Verpflichtung des Verkäufers, alle Umstände zu offenbaren, die für den Vertragspartner von Relevanz sind. Aber auch die UNPICC gehen davon aus, dass eine Täuschung auch in einer Nicht-Offenbarung von Tatsachen liegen kann, soweit, *according to reasonable commercial standards of fair dealing, the latter party should have disclosed* (Art. 3.2.5 UNPICC).

4. Vertragsschluss im Internet

Während sich die tragenden Elemente des Vertragsschlusses in Gestalt von Angebot und Annahme auf den Vertragsschluss im Internet übertragen lassen, hat der europäische Gesetzgeber zum Schutz der Verbraucher verschiedene Vorschriften zu deren Schutz erlassen. Hierzu gehören in erster Linie Informationspflichten des Vertragspartners, aber auch Anforderungen zur Ausgestaltung des Bestellvorgangs, die den Verbrauchern vor Irrtümern bewahren sollen.⁷⁰ Auch ein Vertragsschluss durch automatisierte Systeme kann im Grundsatz mit den herkömmlichen Instrumenten der Zurechnung von Willenserklärungen rechtlich erfasst werden.⁷¹ Allerdings sind hier die Grenzen der Zurechnung von Fehlleistungen des Systems noch nicht geklärt. Ob sich hier Art. 8 UNCITRAL Modellgesetzes über automatisierte Vertragsschlüsse durchsetzen wird, bleibt abzuwarten.⁷²

5. Digitale Inhalte und Dienstleistungen

Die EU hat mit der Richtlinie 2019/770 über digitale Inhalte und Dienstleistungen in einer Weise Neuland betreten, die richtungsweisend sein könnte.

69 Art. 7 (1) d Warenkauf RL 1019/770, Art. 8 (1) b Digitale Inhalte RL.

70 Art. 10 e commerce-RL dazu *Schulze/Zoll* Europäisches Vertragsrecht, 3.Aufl., § 3 Rz. 103 ff., Art. 8 Verbraucherrechte-Richtlinie.

71 *Pfeiffer*, Der Vertragsschluss unter Einsatz von KI im Rechtsvergleich – Die dogmatische Begründung im deutschen und amerikanischen Recht, KIR 2024, 151.

72 Article 8. Unexpected actions carried out by automated systems

1. Unless otherwise agreed by the parties, where an action carried out by an automated system is attributed to a party to a contract, the other party to the contract is not entitled to rely on that action if, in the light of all the circumstances:

(a) The party to which the action is attributed could not reasonably have expected the action; and

(b) The other party knew or could reasonably be expected to have known that the party to which the action is attributed did not expect the action.

Immerhin weisen digitale Inhalte Besonderheiten auf, die einer Regelung bedürfen. Dies betrifft unter anderem die Fragen, ob die Bereitstellung personenbezogener Daten auf Seiten des Nutzers eine Gegenleistung im Sinne des Vertragsrechts darstellt,⁷³ die Ersetzung der ‚Lieferung‘ durch die ‚Bereitstellung‘ der digitalen Inhalte,⁷⁴ wie die Vertragsmäßigkeit digitaler Inhalte zu bestimmen ist,⁷⁵ die Verpflichtung zur Aktualisierung⁷⁶ und die Differenzierung zwischen einmaliger und fortlaufender Bereitstellung.⁷⁷

6. Transparenzpflichten

Während sich Informationspflichten auf konkrete Inhalte bezieht, beschreibt die Transparenzpflicht eher das Ziel der Verständlichkeit und Klarheit.⁷⁸ Auch dieses Gebot findet in den einschlägigen Bestimmungen der EU zunehmend Verbreitung, zuletzt in Art. 14 DSA.⁷⁹

7. Allgemeine Geschäftsbedingungen

Im Ausgangspunkt hat man die Regelung zu den Allgemeinen Geschäftsbedingungen in der Klausel-Richtlinie von 1993 als Verbrauchrecht ausgestaltet.⁸⁰ Nunmehr finden sich einschlägige Regeln auch in Art. 2.1.19 UNPICC und damit in einer Regelung für Rechtsgeschäfte zwischen Unternehmern. Ein Unterschied besteht jedoch insoweit als es in den UNPICC keine speziellen Klauselverbote gibt, sondern Art. 2.1.20 UNPICC sich auf das Verbot überraschender Klauseln beschränkt. Dieser Überraschungseffekt kann sich nach Absatz (2) sowohl aus dem Inhalt als auch der Sprache und der Präsentation ergeben. Die Vermutung liegt allerdings nahe, dass sich die Gerichte bei der Auslegung dieser Norm an den speziellen Klauselverbote etwa der Richtlinie orientieren werden.

73 Art. 3 (1) Abs.2 RL 2019/770.

74 Art. 5 RL 2019/770.

75 Art. 8 RL 2019/770.

76 Art. 8 (2), (3) RL 2019/770.

77 Art. 11 RL 2019/770.

78 *Schulze/Zoll*, Europäisches Vertragsrecht, 3.Aufl., § 2 Rz. 28 ff.

79 Art. 14 (1) 3 DAS ‚Die Allgemeinen Geschäftsbedingungen werden in klarer, einfacher, verständlicher, benutzerfreundlichen und eindeutigen Sprache abgefasst und in leicht zugänglicher und maschinenlesbarer Form öffentlich zur Verfügung gestellt.‘

80 Klauselrichtlinie 93/13.

8. Vorrang der Nacherfüllung vs. wesentliche Vertragsverletzung

Während sich im europäischen Verbraucherschutzrecht der Vorrang der Nacherfüllung mittels des Erfordernisses der Fristsetzung durchgesetzt hat,⁸¹ haben sich die Autoren des UNPICC in Anlehnung an die Regelung des UN-Kaufrechts für das System der Auflösung nur im Fall einer wesentlichen Vertragsverletzung entschieden.⁸² Lediglich bei einer verzögerten Lieferung kommt hier das System einer Nachfristsetzung zum Einsatz, Art 7.3.1 (3) UNPICC.

9. Vereinheitlichung der Mechanismen der Rückabwicklung gescheiterter Vertragsbeziehungen

Als einstweilen offen muss die Frage nach einer Vereinheitlichung der Rückabwicklung gescheiterter Vertragsbeziehungen behandelt werden. Traditionell stehen sich hier in den kontinentaleuropäischen Rechtsordnungen die Rückabwicklung nach Bereicherungsrecht und das Konzept eines speziellen Rückabwicklungsschuldverhältnisses nach Rücktritt gegenüber.⁸³ Hinzu treten aufgrund des europäischen Rechts weitere spezialisierte Rückabwicklungsmechanismen.⁸⁴ Bemerkenswert ist hierbei die Differenzierung zwischen der Rückwicklung eines auf eine einmalige und die eines auf eine dauerhafte Bereitstellung gerichteten Vertrages in Art. 16 Digitale Inhalte Richtlinie. Eine vergleichbare Differenzierung findet sich in den Art. 7.3.6. UNPICC und Art. 7.3.7. (UNPICC).

Neben dieser Gemeinsamkeit sticht aber als beachtlicher Unterschied zwischen den Unidroit Principles und den kontinentaleuropäischen Regelungen hervor, dass es in den Unidroit Principles lediglich den einheitlichen Rückabwicklungsmechanismus der Restitution gibt, der sowohl in Anfechtungsfällen zum Einsatz kommt,⁸⁵ als auch bei der Beendigung von Verträgen.⁸⁶ Ob hierin der Weg in die Zukunft liegt, bleibt abzuwarten.

81 *Schulze/Zoll*, Europäisches Vertragsrecht, 3.Aufl., § 6 Rz. 82 ff..

82 Art. 7.1.5 UNPICC, Art. 7.3.1 UNPICC.

83 *Kötz*, Europäisches Vertragsrecht, 2.Aufl., § 13 V.

84 Art. 13, 14 Verbraucherrechte Richtlinie, Art. 16, 17 Digitale Inhalte Richtlinie, Art. 16 Warenkaufrichtlinie, dazu *Schulze/Zoll*, Europäisches Vertragsrecht, 3.Aufl., § 6 Rz. 125 ff.

85 Art. 3.2.15 UNPICC.

86 Art. 7.3.5 UNPICC ff.

10. Nachhaltigkeit

Schließlich gewinnt das Thema der Nachhaltigkeit zunehmend an Bedeutung, wie an dem Recht auf Reparatur augenfällig wird.⁸⁷ Hierhier gehört auch der Hinweis darauf, dass die ‚Haltbarkeit‘ eines Produkts zu den Merkmalen gehört, deren Fehlen einen Sachmangel begründen können, ebenso wie öffentliche Erklärungen des Verkäufers oder anderer Glieder der Vertragskette.⁸⁸ Letzteres erlaubt z.B. die Einbeziehung der Einhaltung von Umweltstandards, mit denen ein Produkt beworben wird, in die für Mängel relevanten Umstände.

⁸⁷ Richtlinie 2024/1799 vom 10.7.2024.

⁸⁸ Art. 7 (1) d Warenkaufrichtlinie.

**Recollecting the Institution of Commercial Broker:
A Legal Figure Absent from Legislation and the Rationale for Its
Regulatory Reinstatement**

I. Introduction

Following the restoration of Georgia's independence in the early 1990s, a process of legislative transition toward capitalist legal relations began. This process was accompanied by the adoption of various normative acts in the field of private law. At the time, the primary objective of the lawmakers was to grant participants in private legal relations full contractual freedom, including the autonomy to determine rights and obligations. The intention was to ensure the formation of legal relations on the basis of private autonomy and the free expression of will, thereby enabling the regulation of matters between parties to civil transactions in accordance with their preferences. However, contractual and statutory autonomy did not imply that the state could forgo establishing the minimum legal framework necessary to define the substance of specific legal relations. It remained essential to determine the legal status of the involved parties, to define the content and nature of their rights and obligations, and - most importantly - to regulate the allocation of liability characteristic of such relations.

In this context, particular emphasis was placed on the development of entrepreneurial law and the legislative regulation of its characteristic institutions as a foundation for a functioning capitalist economy and market order. One of the

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key figures supporting this legal transformation alongside Georgian legal scholars was Professor *Rolf Knieper* of the University of Bremen, a long-standing friend of the Faculty of Law and of Georgia as a whole. Through his active engagement and considerable contribution, Georgia's integrated system of private law was developed, which was divided into two main branches, namely, general private law and special private law. Special private law included, above all, commercial and entrepreneurial law. Rather than adopting a separate commercial code, as is common in many continental European jurisdictions (e.g., Germany, Austria and France), Georgia pursued an innovative legislative model that integrated these norms into a unified legal act, The Law on Entrepreneurs. Enacted in 1995 after several years of preparatory work, this law became the principal source of Georgian commercial and corporate law. It represented a legislative synthesis built predominantly on the logical and conceptual framework of German commercial and corporate law. A modest but significant place within the general part of the Law on Entrepreneurs was originally allocated to the institution of the commercial broker (*Handelsmakler*) – a legal figure regulated at the legislative level in nearly all jurisdictions within the continental European legal tradition. Georgia was no exception in this regard. However, the current legislative framework contains no reference to this institution, effectively rendering it legally unregulated despite its continuing relevance and application in commercial practice. Given its functional significance in the Georgian economy, it is important to examine the reasons behind the disappearance of this legal figure from legislation (if such reasons exist) and to evaluate whether its reintroduction into the legal system is warranted. During a legal conference in Tbilisi, Prof *Knieper* aptly expressed his concern regarding the disappearance of this institution from the legislative field and emphasised the need for its proper regulatory reinstatement. In recognition of this valid concern, the present research seeks to revisit the topic and provide a concise academic discourse, particularly in light of the complete absence of contemporary Georgian legal scholarship on commercial brokerage. Aside from an outdated commentary on the pre-2022 Law on Entrepreneurs, no substantial academic literature exists on this topic.

The present paper serves as a form of *remembrance* of the legal institution of the **commercial broker** (*Handelsmakler*), drawing the reader's attention to the normative vacuum resulting from its removal from Georgian legislation and emphasising the necessity of its legal reinstatement. The article is structured into four parts: 1. **Introduction** – providing context and outlining the relevance

of the topic; 2. **Historical and Legislative Development** – offering a comparative overview of the evolution of brokerage regulation, with a focus on the cases of **Georgia and Germany**; 3. **Defining Characteristics of the Commercial Broker** – analysing the essential legal features and distinguishing elements of this legal figure; and 4. **Conclusion** – summarising the core findings and underscoring the importance of systematic legislative reconsideration for the commercial broker's reintegration into Georgian commercial law.

II. Historical Excursus

1. The Concept of Commercial Broker in the Law of 1995

The legal regulation of relations involving the commercial broker was historically anchored in the *Law on Entrepreneurs* of Georgia. This law included several provisions governing specific legal institutions; more precisely, various types of contracts. From the perspective of the legislative framework in force at the time, it offered a form of linked or integrative regulatory model. Article 10 addressed the general commercial power of attorney, providing a relatively detailed regulation of matters related to the procuration (*Prokura*), including the scope of authority to perform legal acts. This provision was particularly significant in the context of the limited partnership (*Kommanditgesellschaft*), especially with regard to the exercise of managerial and representative powers by the limited partner (*Kommanditist*). The subsequent provision – Article 11 – dealt with closely related contractual institutions and regulated the legal status of the commercial agent (*Handelsvertreter*) and the independent trader (*selbständiger Gewerbetreibender*). The same article also included legal norms on another key market participant, namely, the commission agent (*Kommissionär*). Although the law at that time did not provide an extensive regulation of these institutions, the existing norms were deemed sufficient and functional in the context of the then-developing Georgian market economy. Within this broader legislative framework, the regulatory system concluded with the commercial broker (*Handelsmakler*). Article 12 was dedicated to this institution, offering a minimum legislative framework for the legal regulation of brokerage activities. This provision remained unchanged in the law until its repeal in 2008. Thus, the commercial broker was not treated in isolation but was embedded within a broader commercial legal structure that reflected a coherent, albeit limited, approach to

regulating intermediary commercial actors in the Georgian legal system of the time.

2. On the Controversy Regarding the Adoption of German and Austrian Commercial Law

That Georgian corporate and entrepreneurial law is the result of the **adoption of German and, consequently, Austrian commercial and company law** is beyond dispute. This position has been widely acknowledged and discussed in legal literature.¹ Under the dualist model of Western European private law, the aforementioned institutions, characteristic of classical commercial relations, are typically regulated in considerable detail within commercial codes. While such regulation is generally based on the concept of dispositive (non-mandatory) legal norms, certain limitations on contractual autonomy are justified by the need to safeguard the fundamental principles inherent to these legal institutions.

The regulation of **commercial brokerage** in Europe has a longstanding tradition, predating many modern codifications. In particular, the **Commercial Code** that served as the **basis** for adoption into Georgian commercial legislation in the mid-1990s contains a detailed framework governing the legal relationships involving **commercial brokers**. This codification, however, does not stem from the **German Commercial Code (*Handelsgesetzbuch*, HGB) of 1900**, but rather finds its origins in earlier legislative acts, most notably the ***Allgemeines Deutsches Handelsgesetzbuch* (ADHGB)** of 1861 and its subsequent influence on Central

1 Zoidze, B., Rezeption des Europäischen Privatrechts in Georgien, 2005, 185 ff; Chanturia, L., The Basic Inclinations of “Entrepreneur” Law Reform, in collection: Feradze (Hrsg.), Essays of Law and Political Thinking, Book III, 2015, 650-666; Chanturia, L., Die europäisierung des georgischen Rechts – Blosser Wunsch oder grosse Herausforderung?, *RabelsZ* 74 (2010), 154-179; Burduli, I./Makharoblishvili, G./Egnatashvili, D./Giguashvili, G., Development of Modern Georgian Commercial Law (key aspects of reforms), *Iuristebis Samkaro*, 2016; ; Burduli, I., Das georgische Gesellschaftsrecht: Quo Vadis?! Eine kurze Darstellung der Reformen und des Refrombedarfs im georgischen Unternehmensrecht, in: Chiusi/Burduli (Hrsg.), Rechtsvergleichung und Privatrecht im deutsch-georgischen Diskurs. Band 14, *Jurisprudencia Saraviensis*, 2019, 1-25; Burduli, I., Nekrorezeption in Transformationsgesellschaften (Am Beispiel des postsowjetischen georgischen Unternehmensrechts) in: *Festschrift für Hanns Prütting zum 70. Geburtstag – Dogmatik im Dienste von Gerechtigkeit, Rechtssicherheit und Rechtsentwicklung*, Carl Heymanns 2018, 3-15. In the International Context: *Kurzynsky-Singer*, Wirkungsweise der legal transplants bei den Reformen des Zivilrechts in: *Transformation durch Rezeption?*, Kurzynsky-Singer (Hrsg.), 2014, 4 ff.

and Eastern European legal systems. The ADHGB provided one of the earliest comprehensive regulatory frameworks for commercial intermediaries, including commercial brokers (*Handelsmakler*), and its legal structure significantly influenced the formation of commercial law in several jurisdictions, including Georgia, through the process of **legal transplantation** and **doctrinal adoption** following the dissolution of the Soviet Union.

In turn, the provisions on commercial brokerage found in the German Commercial Code (HGB) can be traced back to the General German Commercial Code of 1864 (ADHGB), which itself was derived from an earlier regulation found in the *Allgemeines Landrecht für die Preußischen Staaten* (ALR) of 1794. Specifically, the ALR addressed this institution in Part II, Section 11. These norms, therefore, have a long-standing historical pedigree and, despite undergoing various amendments over time, the institution of the commercial broker has retained its doctrinal identity and core conceptual principles. Sections 93 to 104 of the German Commercial Code regulate the legal framework applicable to commercial brokers (*Handelsmakler*), and these provisions are placed in the first book of the Code. This part of the HGB governs foundational aspects of commercial law, including the legal definition of a merchant (*Kaufmann*), the commercial register, business firms (*Firmenrecht*), commercial books, procuration (Prokura), commercial representation and auxiliary commercial persons. Within this systematic context, the commercial broker is situated alongside these key legal actors, forming the concluding part of the Code's first book. A close examination of the 1994 edition of the Georgian Law on Entrepreneurs reveals a strikingly similar structure, strongly indicative of a direct legal transplant from German commercial law into Georgian entrepreneurial legislation. The Austrian Commercial Code, as in force until 2008, followed a comparable regulatory model. Paragraphs 317 to 323 provided the legal framework governing commercial brokerage in Austria. Notably, the major reform of Austrian commercial law did not initially abolish these provisions. It was only with legislative amendments introduced in 2025 that these norms were formally removed from the Code. However, they were not repealed in the sense of being declared legally void; rather, their exclusion reflected a shift in legal policy rather than a regulatory gap. As such, the removal did not result in a regulatory vacuum or impairment of legal certainty and applicability. Austria's current legislative framework in this area remains coherent and operationally sound. A detailed analysis of this development will follow below.

3. The Compelling Grounds for Termination?

The abolition of the institutional regulation of the commercial broker in Georgia is a direct consequence of the sweeping amendments² made to the Law on Entrepreneurs, reflecting the liberal approaches that have been established in the Georgian economy and legislation since 2004. Starting from this period, the concept of full contractual and statutory autonomy in the fields of corporate and entrepreneurial law began to take hold. This was expressed simply by the repeal of various legislative norms regulating specific relationships. These often unsystematic changes in entrepreneurial legislation ultimately resulted in a complete anachronism, which created numerous deadlock situations among participants in various legal relationships against the background of deregulation. Resolving these deadlocks, which should represent at least a minimal task for the legislators, became a significantly difficult challenge. Consequently, this situation gave rise to numerous unresolved disputes, deepening the antagonism between the parties. Such conditions undoubtedly undermined the civil peace necessary for commercial transactions and the functioning of the market economy. Added to this was the absence of an established system of alternative dispute resolution mechanisms in the country, which, in the absence of legal norms, could have socially mitigated these problems and allowed parties a way out of deadlock through settlement. In short, the 14 March 2008 amendments to the Law on Entrepreneurs, characterised by the total repeal of legislative norms, represent the result of the liberal economic approach entrenched at the time. It was during this period that key institutions, still relevant and characteristic of commercial practice and tradition - such as the commercial representative, independent merchant, commission agent and commercial broker - were removed from the law. The concept of general commercial procuration was reintroduced in the 2022 revision of the Law on Entrepreneurs as Article 48, which raises certain ambiguities, notably why similar legal institutions, such as procuration itself, are not regulated in the same law, or at least why there is no provision for its use by way of subsidiary analogy. Naturally, if we follow the model of the

2 Irony of Amendments and, Therefore Theses of Necroreception by: *Burduli, I.*, Post-Soviet Corporate Law in the Face of Permanent Reform: The Futile Process and Georgia (in Georgian). Collection of Articles: Essays in the History of Law and Political Thought, Book IV, Tinatin Tsereteli Institute of State and Law Institute, "Meridiani", 2019, 146–175.

base legislation, that is, the German legal system, the regulatory norms governing these institutions should be presented within this very part of the law.

The explanatory memorandum for the 14 March 2008 amendments, which should have contained the governmental justification, offers almost no detailed explanation and is characterised only by general narratives. In other words, it does not address the abolition of the institution of the commercial broker at all. The memorandum does not discuss the economic aspects of the amendment either, which raises serious doubts that the removal of the commercial broker from the Georgian legislative framework was not substantively justified. The mere statement that such relationships should be solely dependent on the parties' agreement is unconvincing and lacks proper legal reasoning. This is because the institution of the commercial broker involves many issues that require a minimal legislative framework governing the rights and obligations of the parties, the rules for remuneration and liability. Therefore, despite the fact that these matters are generally addressed by the overarching civil law principles found in general civil legislation, the commercial broker institution demands special regulation due to its specific nature. In summary, complete deregulation cannot be considered a necessary precondition for the development of the institution of the commercial broker.

In this context, attention is drawn to Austrian law. As noted above, Austrian commercial and corporate law bears a strong resemblance to the German legal system. In many cases, Austrian legislation has directly transposed provisions from the German Commercial Code and other corporate law statutes, along with their associated institutions. For example, the 1892 German Limited Liability Companies Act served as a model. Even after the major reform of 2008, the Austrian Commercial Code continued to regulate institutions such as commercial agents, independent merchants, authorisation to perform legal acts and general commercial powers of attorney, as well as the so-called commercial assistants and apprentices (*Handlungsgehilfe* and *Handlungslehrlinge*).³ However, in the subsequent period, the current Austrian Entrepreneurs' Code regulates only the procuration - general commercial power of attorney and the authority to perform legal acts - in Book One, Part Five. Provisions regarding the commission

3 About the reform see: Burduli, I./Makharoblishvili, G./Egnatashvili, D./Ebanoidze, T., Capital Market Functionality: Current Realities and the Imperative for the Reform, Iuristebis Samkaro, 2017, 4 ff.

agent are found in the following part of the Code.⁴ Although the regulation of the institutions of commercial agent⁵ and commercial broker no longer appear in this act, it does not mean that their operation has been abolished. In fact, since 2022, the specific provisions regulating commercial brokers have been transferred from the Entrepreneurs' Code to a separate Brokers' Act.⁶ The latter law specifically addresses the relationship between civil and commercial brokers, serving as a specialised statute governing these institutions, and thus constitutes special provisions in this field. It can be said that the Austrians allocated the institution of commercial broker to a different legislative act; its regulatory effect has been preserved, and this relocation was a matter of legal policy rather than a legal abolition. Consequently, Austrian law maintains a well-established system regulating the institution of brokerage while simultaneously facilitating the law enforcement process for judges through clearly defined legal norms. This creates a doctrinal framework and judicial practice that enhance transparency and predictability in this area, thereby contributing to the stability of commercial transactions.

III. Key Characteristics Defining a Commercial Broker

1. Legal Definition and Juridical Nature of Commercial Broker

"The commercial broker is an indispensable participant in the modern market economy. Through their mediation and active involvement, tens of thousands of transactions are concluded between entrepreneurs."⁷ This is exactly how the commentary on the provisions of the Law on Entrepreneurs relating to the commercial broker begins. Indeed, the commercial broker plays a significant role in today's civilised, stable and developed economic markets. Traditionally regarded as merchants or entrepreneurs, their activities are classified as

4 See *Burduli, I./Chitashvili, N./Kharashvili, A.*, Foundation of Georgian Law of Freight Forwarder, "Meridiani", 2025, 46 et seq.

5 Regulated by the Law of Commercial Representatives (*Handelsvertretergesetz*). <https://www.ris.bka.gv.at/NormDokument> [2.07.2025]. The multi-page collection on this subject confirms how important established institutions can be. Ex. see.: *Nocker, M.*, *Handelsvertretergesetz. Mit ausführlichen Berechnungsbeispielen zum Ausgleichsanspruch*, 2. Aufl. 2015.

6 Law About Brokerage Relationships: BGBl. Nr. 262/1996. <https://www.ris.bka.gv.at/Gelten-deFassung> [2.07.2025]

7 *Chanturia, L./Ninidze, T.*, Commentary to the Law of Entrepreneurs, (2002), 159.

entrepreneurial conduct. The commercial broker is directly connected to key segments of economic circulation, such as the sale of goods or securities, insurance, cargo transportation, ship chartering, etc. The considerable importance of these sectors to both the global and domestic economies underpins the broker's substantial role in market relations.

According to the legal definition provided in paragraph 93 of the German Commercial Code, as well as Article 12.1 of the Law on Entrepreneurs in its pre-2008 version, a commercial broker is an entrepreneurial actor who undertakes to conduct various types of transactions on behalf of other parties. The broker is not contractually bound on a permanent basis by these parties, which fundamentally distinguishes them from a commercial agent.⁸

The primary subject matter of a commercial brokerage intermediary includes the purchase and sale of goods and merchandise, as well as securities, insurance, ship chartering, or any other area⁹ related to entrepreneurial activities that may be involved in economic transactions and facilitate the formation, management and interaction of economic entities and parties. A commercial broker differs from a commercial agent in that the broker does not conclude transactions in the name of the parties. Consequently, the broker acts as a neutral intermediary¹⁰ and must not operate in favour of any particular party's interests. In other words, the commercial broker should be a neutral party free from conflicts of interest. If partiality or favouritism towards one party is demonstrated, the broker may be held liable for violating the principle of impartial mediation.¹¹ Although a broker may be engaged by only one party to perform mediation services, this does not imply that the broker must represent or advocate for that party's interests, nor act as a partisan agent. Even in cases where the broker is engaged by only one party, the scope of the broker's actions and corresponding duties remains defined by objective and impartial conduct.¹² A commercial broker facilitates the connection between potential parties to a transaction in exchange for remuneration, usually a commission. However, the broker enjoys contractual autonomy and may decide not to perform the brokerage services if

8 Ebenroth/Baujong/Semler, HGB Komm., (2024), §84 Rn. 163.

9 Ebenroth/Baujong/Semler, HGB Komm., (2024), §84 Rn. 163.

10 Roth/Kindler in Roth/Kindler/Düren, HGB, (2023), §84 Rn. 5.

11 Roth/Kindler in Roth/Kindler/Düren, HGB, (2023), §84 Rn. 5.

12 Lehmann in Häublein/Hoffmann-Theinert/Poll (Hrsg.), BeckOnline HGB Komm., (2024), §93 Rn. 6.

no agreement on compensation is reached. The commercial broker is neither a party to the contract being concluded nor acts in their own name within the relationship; rather, they engage in intermediary activities aimed at bringing the parties together for the purpose of concluding a transaction.¹³ It can be said that the commercial broker functions similarly to a promoter,¹⁴ a person who brings about the parties' intended agreement without being a direct party to the transaction nor acting on behalf of any party within such a legal relationship.

Article 12.1 of the Georgian Law on Entrepreneurs, as it stood before the 2008 amendments, corresponded directly to Paragraph 93 of the German Commercial Code (*Handelsgesetzbuch*, HGB). Therefore, when identifying the characteristic features of the commercial broker, one may rely even on the literal wording of the German legislation to interpret the concept. The first paragraph of Paragraph 93 of the Commercial Code, together with the addition of the second paragraph, clearly defines these features as follows: 1. The commercial broker is a person acting within the scope of entrepreneurial activity and necessarily acts on behalf of other persons.¹⁵ That is, their activity is directly related to connecting different parties and establishing legal relationships between them through the conclusion of contracts. Importantly, the conclusion of a contract is not an indispensable condition for the broker's activity; the broker's main function and objective lie in the connection of the parties, not necessarily in securing a contract between them. Therefore, the broker's activity is result-independent. Accordingly, the broker's obligations encompass the proper and good-faith conduct¹⁶ of the process rather than the outcome of that process. Hence, the outcome does not fall within the broker's primary obligations, and for this reason, the broker's contract is not considered a bilateral contract under §320 of the German Civil Code (BGB), but rather a unilateral obligation contract;¹⁷ 2. The broker's mandate is to mediate the conclusion of a contract on behalf of

13 Münch.Komm.HGB/*Ströbl*, (2025), vor §84 Rn. 6.

14 about the Institute for exs.: *Robert W. Hamilton, R., W.*, The Law of Corporations, St. Paul (2000), 94 mn.

15 Münch.Komm.HGB/*Ströbl*, (2025), §93 Rn. 3.

16 This thesis is also supported by paragraph 99 of the Commercial Code, according to which a commercial broker is entitled to receive remuneration/commission even if no agreement is reached between the parties and the transaction is not concluded as a result of the brokerage. see.: *Lehmann* in Häublein/Hoffmann-Theinert/Poll (Hrsg.), BeckOnline HGB Komm., (2024), §93 Rn. 6.

17 *Roth* in Hopt (Hrsg.), HGB Komm., (2025), §93 Rn. 23.

other parties; 3. This brokerage activity cannot be contractually assigned on a permanent basis; 4. The subject matter of the contract, i.e., the contracts to be mediated, must relate to the specific types of activities listed in § 93 of the Commercial Code or to other objects within the commercial and entrepreneurial turnover.¹⁸

2. Its Economic Significance and Distinction from the Civil Broker and Other Similar Institutions

2.1. Economic Function

The significance of the commercial broker's activity is determined by the diversification of the modern commercial market and the specific nature of the goods and services circulating therein. It would not be incorrect to categorise the commercial broker's activity into three generalised directions, viz., commodity brokerage, brokerage of financial products and services, and maritime brokerage. Naturally, within these three principal categories, further sub-segments can be distinguished, with insurance brokerage occupying a particularly prominent place.¹⁹ The chartering of vessels and the associated transactional intermediation activities are primarily governed by maritime commercial law and established trade customs. However, the specific legal nuance lies in the fact that the object of such transactions is not classified as immovable property.²⁰ Particular attention should be given to intermediary activities involving financial products conducted through brokerage, wherein the broker of corporate securities assumes a distinct economic function. This is especially relevant in the contemporary era, marked by the decline of traditional so-called *floor trading* (*Parketthandel*) and the increasing reliance on advanced technological platforms in securities markets.²¹ Their activities are mostly regulated by capital market legislation and fall under the supervision of financial regulatory authorities. In short, all this indicates that the figure of the commercial broker and its utilisation in establishing traditional commercial relations remains significant. Especially in the era of diversified markets, where daily transactions require the connection and rapprochement of multiple parties, trust in the institution of the broker, and the

18 Münch.Komm.HGB/Ströbl, (2025), §93 Rn. 3. Definition of the characteristics also, see.: *Thomale* in Heidel/Schall (Hrsg.), *Handelsgesetzbuch*, (2024), §93 Rn. 2-6.

19 *Bergmann* in Oetker (Hrsg.), *HGB Komm.*, (2024), §93 Rn. 3.

20 *Bergmann* in Oetker (Hrsg.), *HGB Komm.*, (2024), §93 Rn. 3.

21 *Bergmann* in Oetker (Hrsg.), *HGB Komm.*, (2024), §93 Rn. 3.

application of their skills and knowledge remain invaluable for business success. The global economic market of the 21st century is unimaginable without the connection of its participants. For this purpose, it becomes necessary to involve entrepreneurial individuals possessing specialised knowledge and skills. Market participants themselves - buyers of goods, products and services - often turn to commercial brokers for intermediary assistance. Therefore, the transnational market segment is inconceivable without such a figure. Its significance should naturally give rise to the necessity of legislative regulation of this institution. This is the case in almost all developed economies belonging to the Continental European legal system. According to recent data published by the National Statistics Office of Georgia, the country is experiencing a normal pace of economic growth. Naturally, modern economic growth is unthinkable without intensive interaction between domestic and foreign market participants. Equally unthinkable is that parties would always reconcile their interests and find each other without intermediaries. The activity of the commercial broker in Georgia has not disappeared. Many everyday transactions are concluded through the use of such intermediary activities. However, its legal regulatory framework has been relegated solely to contractual autonomy, which is unjustified.²²

In Georgia, the role of the civil broker in real estate transactions is significant, a fact substantiated by the case law of the Supreme Court.²³ However, the doctrinal necessity to distinguish it from the commercial broker must be acknowledged. This requirement pertains not only to the differentiation of the commercial broker from the civil broker but also extends to distinguishing it from the commercial representative, independent merchant and commission agent.

22 This is also confirmed by the case law of the Supreme Court of Georgia, notwithstanding the fact that it predominantly concerns civil brokerage. However, an analysis of the court decisions and the factual background of the disputes leads to the conclusion that many such relationships, by virtue of their substantive content, are more accurately characterised as commercial or entrepreneurial in nature rather than purely civil. The Supreme Court does not expressly deliberate on this distinction in its decisions, as it adjudicates cases strictly within the scope of the cassation claims submitted. Evidently, no specific request regarding the necessity of such a legal qualification or distinction was raised by the parties during the proceedings. See for exs.: #AS-989-2018; #AS-1090-2021; #AS-1105-2023.

23 see for Exs. A Few Interesting Decisions of the Supreme Court: #AS-1090-2021; #AS-824-824-2018; #AS-898-848-2015.

2.2. Difference from the Civil Broker

The distinction between the commercial broker and the civil broker, beyond the practical content of the legal relationship, constitutes a matter of legal policy and normative application in the majority of European countries. In turn, differentiating between civil and commercial brokers often poses challenges due to the similarity in the nature of their activities. For this reason, the fundamental basis for their differentiation lies in the didactic and clarifying function of the law (legislation). Accordingly, the politico-legal aspect of this difference underpins their phenomenology, bringing greater clarity to their mutual differentiation. In this regard, the specialised regulation provided in the German Commercial Code or the Austrian law on brokers clearly highlights this distinction. The specific entrepreneurial nature of the activity enumerated in §93 of the Commercial Code serves as a significant basis for qualifying a person as a commercial broker.²⁴ In addition to §93 of the Commercial Code, it is possible to apply the provisions of the German Civil Code that regulate the civil broker, specifically §§652 and the following. A mirror approach - treating commercial and civil brokers identically - is considered unjustified and impermissible. This means that the civil-law norms governing the civil broker are autonomous and indispensable, and the subsidiary application of commercial law norms is not allowed.²⁵ Whereas a civil broker's role may be limited solely to facilitating the possibility of concluding a contract, a commercial broker's direct obligation includes actively conducting intermediary activities between the parties with the aim of bringing them to the actual conclusion of the transaction.²⁶ This underscores a fundamental distinction between the two types of brokers, despite their apparent practical similarity in everyday contexts.

The term intermediation, as used in Section 93 of the Commercial Code, does **not** encompass every form of intermediation. Specifically, it excludes intermediation carried out in one's own name and/or through commission-based transactions. Intermediation is understood solely as an activity whereby the intermediary does **not** become a party to the contract, does **not** assume the risk of contract performance without becoming a party, and does **not** execute the transaction on behalf of a specific third party as its representative. This

24 *Wichert* in Dauner-Lieb/Langen (Hrsg.), BGB Schuldrecht, (2021), §652 Rn. 9 f.

25 *Münch.Komm.BGB/Althammer*, (2023), §652 Rn. 18.

26 *Bergmann* in Oetker (Hrsg.), HGB Komm., (2024), §93 Rn. 4.

definition derives both from the concept of the broker itself and from the legislative framework. Of particular importance is the definition of a commercial representative (*Handelsvertreter*, § 84, paragraph 1) and the distinction from a commission agent (*Kommissionär*). In the case of internet platforms, various legal models may arise, where the activity of the platform operator cannot always be classified as intermediation in the legal sense described above.²⁷

2.3. Difference from the Commercial Representative

The fundamental distinction between a commercial representative and a commercial broker lies in the fact that the commercial representative is **contractually and continuously authorised**²⁸ by a principal to act as their agent. In other words, the commercial representative is **perpetually obligated** under contract to mediate transactions. Accordingly, the duties of the commercial representative include taking all necessary measures to facilitate the conclusion of an indefinite number of transactions and to perform mediation activities in relation to them.²⁹ The next significant distinction between these two institutions is that the commercial representative is a **mandated agent** of the enterprise they represent and, consequently, acts as the **bearer and promoter of that enterprise's interests**.³⁰ The duty to maintain neutrality, which was characterised above under the notion of an impartial bearer of objective interests, is generally foreign to the commercial representative. It suffices as an argument that the customer base attracted within the scope of the permanently mandated intermediary relationship belongs to the enterprise, and the commercial representative cannot simultaneously engage in brokerage activities with this customer base. The commercial broker is not restricted by such obligations; rather, any limitation concerning the identified customer base depends on the agreement established between the broker and the party (or parties). Within the scope of their permanent representative mandate, the commercial representative acquires the right to remuneration only after the enterprise or a third party concludes a

27 Based on several sources cit.: *Reiner* in Joost/Strohn/Poelzig/Sander (Hrsg.), *Handelsgesetzbuch*, (2024), §93 Rn. 12.

28 Münch.Komm.HGB/*Ströbl*, (2025), §93 Rn. 29.

29 Münch.Komm.HGB/*Ströbl*, (2025), §93 Rn. 29.

30 *Keim*, Maklerprovision bei arglistbedingter Wandelung des Hauptvertrages, NJW 2001, 3168-3169.

transaction,³¹ whereas, as noted above, the commercial broker's activity is based not on the result but on conducting the process.³² Accordingly, the commercial broker's right to receive commission (provision) does not arise only upon the conclusion of the transaction, but may arise from the initiation or during the course of the intermediary activity. The scope of contractual freedom in this regard is fairly broad. However, as noted in the relevant commentary literature, *"the right to claim commission arises upon the conclusion of the principal contract, although it may also arise earlier - e.g., at the stage of a preliminary agreement - if such a provision is stipulated by the parties."*³³ In summary, the timing of the broker's remuneration depends on the agreement between the parties. However, where this is regulated by a brokerage contract, payment may, in principle, occur at any point, prior to, during, or after the intermediary activity. In the case of a commercial agency, by contrast, the underlying contract is one of providing continuous service, characterised by a long-term obligation between the parties.³⁴

2.4. Difference from the Commission

As for the commission agent, the distinction between a commission agent and a commercial broker is primarily reduced to two key aspects, namely, a commission agent is not limited solely to intermediary activity, but rather undertakes the purchase or sale of goods or securities at the expense of another person, the principal, while acting in their own name.³⁵ Accordingly, legal literature recognises that a commission contract is, as a rule, a contract for services, the subject of which is the performance of a remunerated assignment, and is presumably also classified as a *mandate contract* (contract of agency).³⁶

31 *Thomale* in Heidel/Schall (Hrsg.), *Handelsgesetzbuch*, (2024), §99 Rn. 2 ff.

32 *Bergmann* in Oetker (Hrsg.), *HGB Komm.*, (2024), §93 Rn. 17.

33 *Roth* in Hopt (Hrsg.), *HGB Komm.*, (2025), §93 Rn. 56.

34 *Canaris, C. W.*, *Handelsrecht*, (2000), §17, Rn. 15.

35 *Lehmann* in Häublein/Hoffmann-Theinert/Poll (Hrsg.), *BeckOnline HGB Komm.*, (2024), §93 Rn. 24, 25; *Münch.Komm.HGB/Ströbl*, (2025), §93 Rn. 34.

36 *Münch.Komm.HGB/Ströbl*, (2025), §93 Rn. 34.

2.5. Difference from the General Commercial Power of Attorney

The distinction between a commercial broker (*Handelsmakler*) and the holder of a general commercial power of attorney (*Prokurist*) is relatively straightforward: **Procuration (*Prokura*)** is a formalised form of commercial representation, registered in the commercial register (*Handelsregister*), whereby an individual - the *procurator* (*Prokurist*) - is appointed through a legal authorisation (mandate) to represent the business entity and act in the interest of the enterprise. This legal institute is fundamentally different from commercial brokerage, which is characterised by **independence, neutrality and a non-representative intermediary role**. While the *procurator* binds the enterprise legally and acts on its behalf in external transactions, the **commercial broker** merely facilitates contractual relationships between third parties without becoming a representative or a party to the contracts.³⁷ He is bound by a fiduciary duty toward the enterprise, and in cases of exceeding authority or improper exercise of powers, the *procurator* incurs liability toward the business entity. This fiduciary obligation entails acting in good faith, with due care and exclusively in the interest of the enterprise. Unlike a commercial broker, whose primary obligation is to remain neutral and facilitate transactions without aligning with a particular party's interest, the *procurator* is structurally integrated into the internal corporate framework and is legally accountable for the consequences of his actions that may affect the enterprise.³⁸ The functioning of the general commercial power of attorney (*Prokura*) requires the existence of both intra-corporate and extra-corporate acts. The intra-corporate act typically consists of the issuance of the general commercial mandate (*Prokura*) by the company's supreme governing body - usually the shareholder meeting - as well as the formal appointment of the *procurator* to the position by the company's director or managing body. This dual requirement ensures that the *procurator's* authority is not only legally valid externally (towards third parties), but also properly authorised internally, in accordance with the company's organisational structure and internal governance mechanisms.³⁹ The extra-corporate act refers to the registration of the *procurator* in the commercial register (entrepreneurial register), which is a

37 Roth in Koller/Roth/Mork (Hrsg.), HGB Komm., (2011), vor §48 Rn. 10 ff.

38 Jung, Handelsrecht, (2023), Kapitel 7, §25, Rn. 2 ff.

39 Brox, Prokura und Handlungsvollmacht nach AktG, NJW 67, 801 f.

mandatory requirement for its legal effect *erga omnes*, i.e., vis-à-vis third parties.⁴⁰ This registration ensures publicity and legal certainty in commercial transactions, allowing third parties to rely in good faith on the existence and scope of the *procurator's* authority. Without such registration, the *procurator* does not acquire full legal force in external relations, regardless of its internal validity within the company. This dual structure - internal issuance and external registration - is essential for the lawful and effective functioning of the *procurator* as a key representation mechanism in corporate and commercial law. Indeed, the existence of a *procurator* is predicated upon the **convergence of two essential legal acts**.⁴¹

3. Key Characteristics of the Legal Relationship of the Commercial Broker

3.1. The Commercial Broker Agreement

The brokerage agreement concluded by a commercial broker is established in accordance with the essential elements characteristic of civil law contracts and is fundamentally governed by the provisions of the Civil Code regarding contract formation, termination, rescission, breach and liability, taking into account the specific features set forth in the Commercial Code. The contract does not require any special form and may be concluded either in writing, including in a formal written form, or orally. The Federal Court of Justice of Germany also recognises the possibility of concluding a brokerage contract by conduct (*conkludent* acts), emphasising the obligation of the interested party to exercise particular diligence in such cases.⁴²

For understanding the legal nature of the commercial broker's contract, the following should be considered: as noted above, the contract constitutes a contract for the provision of services in its broad sense, since the broker is not obligated to the result but rather to the intermediary activity itself, that is, the broker is authorised and responsible for taking all necessary measures to bring the parties closer together. Accordingly, the commercial broker's contract is not

40 Hofmann/Fladung/van Ghemen, Der Prokurist, (2007), 97 f.

41 On this issue, the Supreme Court of Georgia has developed an interesting and correct practice. Although it concerns the legislation in force prior to 2022, the transfer and direct application of this practice to the current legislation presents no problem whatsoever. See: #AS-310-2011; #As-1375-1212-2010.

42 BGH 95, 395; BGH = NJW 2005, 3779.

a contract of sale or a contract of mandate, as far as the broker is not directly responsible for a specific result, namely, the conclusion of an agreement between the parties. More precisely, achieving such a result does not fall within the broker's obligations.⁴³ Finally, if the special provisions stipulated by the German Commercial Code are not to be applied, the broker's contract shall be regarded as a contract for the performance of a mandate pursuant to § 675 of the German Civil Code (BGB).⁴⁴

3.2. The Duties of a Commercial Broker

As noted above, due to the institutional and functional nature of the commercial broker, they are neither obligated nor responsible for the outcome of the mediation. This concept is critically important in the context of the broker's duties, since their primary obligation does not include the conclusion of contracts between the parties nor the execution of any actions based on the broker agreement. The fact that the broker is not directly bound to perform mediation services for the parties grants them greater freedom and independence in the economic market, along with increased flexibility and competitiveness.⁴⁵ However, it should also be noted that mediation constitutes merely a prerequisite for claiming a commission and, naturally, if the broker does not perform any intermediary activities, they cannot demand remuneration from the parties.

The commercial broker's contract constitutes a unilateral obligation contract that produces an intermediary result solely for the principal. The relevant commentary literature also notes that the parties may define the broker's duties by agreement if necessary. This issue relates to the so-called exclusive broker contract, whereby the principal undertakes the obligation not to engage another broker in the legal relationship. Such a firmly defined offer is not accompanied by a right to revoke the mandate. However, under an exclusive commercial broker contract, the broker is obliged to perform the intermediary activities. It should also be noted that in such a constellation, there is no bilateral contract since the obligations between the parties are not in a synallagmatic (mutually dependent) relationship. The principal retains full freedom to conclude

43 See among other things, in the context of distinguishing it from other types of contracts: *Sprau* in Palandt (Hrsg.), BGB Komm., (2020), §652 Rn. 1 ff.

44 *Fehrenbacher* in Prütting/Wegen/Weinrich (Hrsg.), BGB Komm., (2025), §675 Rn. 2 ff.

45 Münch.Komm.HGB/*Ströbl*, (2025), §93 Rn. 56.

contracts, especially given that the principal has the right to enter into agreements even without the broker's mediation.⁴⁶ Alongside the special exclusive contract, legal literature also points to other cases, specifically the use of so-called brokerage service contracts or "brokerage commission contracts"⁴⁷ instead of the traditional pure brokerage agreement.

It should be reiterated that the contractual law governing commercial brokers is founded on a broad scope of freedom. This very fact allows the parties to agree upon various types of combinations, shaped by practical and real-life necessities. Accordingly, a commercial brokerage agreement may be construed either as a contract for the provision of services or as a commission contract, and civil law norms applicable to these types of contracts may be applied accordingly. The adjudicator must thoroughly ascertain the content and scope of the legal relationship and rights and obligations agreed upon with the principal, and must pay close attention to its interpretation. The absence of such careful consideration appears to be the most significant problem currently existing in Georgia. The practice of the Supreme Court of Georgia, that is, the adjudication process, generally fails to recognise any distinction between the aforementioned legal institutions and the specific nature of the legal relationships characterising them. This issue is not only a problem of judicial practice⁴⁸ but rather a significant legislative gap. In brief, it is not excluded that a commercial broker may assume an obligation regarding the result of the intermediary activity. In such cases, the contract will be governed by the Civil Code provisions on mandate (agency) and commission contracts. If the broker undertakes the obligation to perform the activity (i.e., concluding the deal) without guaranteeing the result, then the contract will be considered a service contract, and the relevant Civil Code provisions regulating service agreements will apply accordingly.⁴⁹

3.3. Right to Remuneration

The right of the commercial broker to receive remuneration, namely commission, constitutes one of the broker's fundamental rights and simultaneously

46 Cit. of several sources: Münch.Komm.HGB/*Ströbl*, (2025), §93 Rn. 56, 22.

47 Münch.Komm.HGB/*Ströbl*, (2025), §93 Rn. 56.

48 Since the court, especially the Court of Cassation, cannot go beyond the scope of the claim's request.

49 Münch.Komm.HGB/*Ströbl*, (2025), §93 Rn. 36.

represents a primary obligation of the principal (the party giving the mandate). Generally, the broker acquires the right to the commission upon becoming authorised to perform the intermediary activity based on the brokerage contract and upon providing evidentiary proof or confirmation of the brokerage services rendered. In most cases, the conclusion of the brokerage contract precedes the provision of such evidence or confirmation. However, as clarified by judicial practice, this sequence is not strictly mandatory.⁵⁰ In cases where the broker's activity is limited solely to providing confirmation, the right to receive intermediary commission is forfeited. However, German judicial practice tends to favour the broker's position and, under certain circumstances, grants the broker the right to receive a commission, albeit sometimes only a partial one.⁵¹ In short, a commercial broker must carry out intermediary activities based on the content of the contract concluded with them or provide proof of such activities (*Nachweis*) or perform intermediary actions (*Vermittlung*).⁵² The right to claim remuneration exists vis-à-vis the principal.⁵³ However, an exception to this rule may be made for the so-called insurance broker, due to their historical role and established trade customs.⁵⁴

IV. Conclusion

In Georgia, still characterised as a transitional economy, the reform, and more precisely, the evolution of economic law, has been proceeding with certain systemic deficiencies. Frequently, unconsidered legislative actions hinder the development of the legal framework. Legislative gaps and flaws lead to the delegitimisation of judicial enforcement and foster public distrust toward the courts, especially in the absence of well-developed alternative dispute resolution mechanisms. This situation impedes the sustainable development of business, as the law (legislation) fails to fulfil its functions of clarity, predictability and the security of commercial transactions. Under such circumstances, participants of the economic market refrain from making additional investments and

50 See with reference to judicial practice: *Roth* in Hopt (Hrsg.), HGB Komm., (2025), §93 Rn. 40.

51 *Roth* in Hopt (Hrsg.), HGB Komm., (2025), §93 Rn. 40.

52 *Roth/Kindler* in Koller/Kindler/Drüen (Hrsg.), HGB Komm., (2023), §93 Rn. 16; *Thomale* in Heidel/Schall (Hrsg.), Handelsgesetzbuch, (2024), §93 Rn. 18 ff.

53 *Roth/Kindler* in Koller/Kindler/Drüen (Hrsg.), HGB Komm., (2023), §93 Rn. 32.

54 *Roth/Kindler* in Koller/Kindler/Drüen (Hrsg.), HGB Komm., (2023), §93 Rn. 32, 21; *Reiner* in Joost/Strohn/Poelzig/Sander (Hrsg.), HGB Komm., (2024), §93 Rn. 29.

reallocating material resources within the economy. The present study raises the issue of the advisability of reviving legal figures extracted from Georgian legislation and presents the development of a normative framework for their reintegration based on a historical, doctrinal and comparative legal methodology. Resolving the issue solely on the basis of a mandate contract⁵⁵ is unjustifiable. Given that post-communist Georgian private law has been shaped through the adoption of German law, it is advisable to undertake a thorough reconsideration and analysis of similar legal institutions and the corresponding legislation within German law. This process should encompass both the examination of individual legislative provisions and the system of norms as a whole, adapting them to the specific realities of the Georgian legal environment. As a result, a comprehensive legislative framework governing the institution of the commercial agent should be established, including a clear definition of the substantive content underlying these norms as reflected in German law. This should be followed by an analysis of German legal doctrines, case law, as well as a review of the most recent doctrinal developments and academic literature in the field, with the aim of proposing these standards for application within the Georgian system of law enforcement. One of the principal issues currently facing Georgia is the unreflective treatment of the dichotomy between the civil and commercial law relationships involved in intermediary activities. As has been demonstrated, this is confirmed by the practice of the Supreme Court of Georgia in its rulings. A review of these decisions reveals a lack of a clear and sound understanding by adjudicators of the doctrinal foundations of this institution, which presents a significant problem. The primary source of this confusion and ambiguity lies in the inadequate legislative regulation of these institutions, a deficiency which urgently requires rectification.

55 *Fehrenbacher* in Prütting/Wegen/Weinrich (Hrsg.), BGB Komm., (2025), §675 Rn. 2 ff.

Judicial Argumentation and Sustainable Legal Development

Among the many meanings of law, the following interpretation is notable: it defines law as a form of culture embodying the wisdom, knowledge and experience of people who have achieved significant success along humanity's thorny path. Legal culture is the crystallisation of human wisdom and spiritual wealth, permeated with legal theory and judicial practice. In its modern sense, the art of litigation encompasses traditional, especially European, legal culture. In this respect, it may be said that cooperation with GTZ (*Gesellschaft für Technische Zusammenarbeit*) at a very decisive stage in the history of the state became a most important milestone in acquainting the national legal system with a highly developed legal culture, and should be regarded as an interesting turning point in the destinies of those striving to build a state that is committed to the rule of law, democratic principles and human rights. The individual who plays a key role in such cooperation – ensuring effective interaction with state institutions and contributing to the development of national legislation and law enforcement practice – is of enormous significance. By a fortunate coincidence, such a role was played by one of the brightest representatives of German legal culture, Professor Rolf Knieper. His contribution to the establishment and development of the Constitutional Court of the Republic of Azerbaijan is truly immense, and as its first Chairman (1998–2003), I recall this with particular pleasure. Much could be said about his fundamental scholarly works, the vast knowledge he has generously shared for decades and his exceptionally important role in drafting new national legislation. All of this matters greatly, yet it would still amount to only a small part of what we appreciate. It seems that the main key to his success lies

* Dr. Khanlar Hajiyev is Judge of the European Court of Human Rights (2003–2017).

in his personal qualities, which leave an indelible impression on anyone who meets him. Here, one may recall a thought expressed by Antoine de Saint-Exupéry in one of his remarkable books, which can be summarised as follows: if you want to build a ship, don't drum up people together to collect wood and don't assign them tasks and work, but rather teach them to long for the endless immensity of the sea. This article is dedicated to Professor Rolf Knieper.

Law owes much of its effective functioning and development to legal argumentation and interpretation. These two defining elements of law continue to make a significant contribution to shaping its content, structure and limits of application. The meanings of a legal norm are established through these key judicial functions – argumentation and interpretation – which confirms the well-known maxim: the life of the law is connected not only to logic but also to a great extent to experience accumulated throughout the history of legal systems. The meanings derived as a result of argumentative activity and the creative role of judges influence the formation and transformation of legal orders and their semantic content. It is this experience that has allowed for certain conclusions to be drawn, one of which is that law cannot govern society without its argumentative dimension, and it is incapable of satisfying fundamental social interests without a system of contemporary meanings. Through these meanings, law not only functions but also evolves, both in times of stability and during periods of change. Since understanding the precise nature of society's needs is, in general, dependent on sociological knowledge and the analysis of social phenomena, it is important for judges continually to expand their knowledge and deepen their legal thinking. This must include an understanding of the actual impact of legal norms and legal practices on society. The study of law should be regarded as a social science, existing in a union with philosophy, economics, history, sociology, logic and political science. The relevance of their synthesis grows within the process of judicial argumentation.

Argumentation is a central element of legal practice. Legal disputes necessitate their resolution through law by means of argumentation in every judicial decision. As a result, a collection of disputes and responses to them forms judicial practice, in which argumentation reflects the understanding of legislation, the current level of law enforcement and the general state of legal thinking. In essence, judicial practice represents a body of judicial arguments, where a special place is given to interpretation. Like a mirror, it reflects the actual state of legal science, legal understanding and law enforcement. Argumentation and

interpretation may be seen as the essential medium in which law is not only formed and developed – a process to which the law-making role of judges also contributes – but in which its ongoing and sustainable development is ensured. Sometimes, to be heard, one needs not just arguments but something more – something that expands and pushes the boundaries of comprehension. In 1660, the Irish scientist Robert Boyle published a series of scientific experiments he had conducted. Among them, one important report concerned the observation of an interaction between a mechanical pump, a receiver and a clock. In this experiment, by gradually pumping air out of the receiver, Boyle observed a significant diminishment in the sound generated by the clock. The ticking grew fainter and fainter until it ceased altogether when all the air had been pumped out. This milestone in physics helped in understanding the wave nature of sound and its inability to propagate in a vacuum. The researcher’s experiment demonstrated that a mechanical wave, like sound, requires a medium – in this case, air – to propagate. The density of the medium is related to the sound’s intensity, and a lack of the former determines the absence of the latter. Thus, vibrations cannot propagate without a medium.¹ This relationship between a medium and waves helps us to understand the connection between judicial argumentation and the guarantees of sustainable legal development. The latter is possible, for example, in constitutional proceedings, which allow the determination of the constitutionality of a norm and its interpretation, thereby deriving new meanings that shape the legal order. Let us also note that expanding the temporal boundaries of a legally significant provision, especially in cases requiring a special environment, such as those concerning the legal protection of future generations, is becoming a common issue for the judicial system.

It is noteworthy that today many constitutions around the world contain provisions on sustainable development, and, in most cases, this is connected to the concern for future generations, including the protection of the environment. At the same time, many provisions of this concept remain general, creating the need for their legislative and judicial implementation. There is also no precise definition of the very concept of sustainable development, which complicates the search for a fair balance in determining a development path that can meet the needs of society. Nevertheless, whenever courts refer to a specific legal

1 *Drigo, A*, Future Generations in Climate Litigation: Early Whispers of an Intergenerational Law? *German Law Journal* (2024), 1120.

concept, broad opportunities arise for them, giving them a chance to bring out the achievements of doctrine and practice through the lens of an argumentative approach. These opportunities are reflected in the judge's efforts to enhance the persuasiveness of their reasoning. Arguments serve to deepen the guarantees of sustainable development, ensuring a balance between the right to development and the imperative of sustainable development. The right to promote development aims to ensure that it remains sustainable from economic, social and environmental perspectives, and that it aligns the rights of present and future generations. A significant step forward is the recognition of the right to pursue sustainable development on a continuous basis, which corresponds to a strategy of progress and a more stable state where, at times, it is important that the situation, if not visibly improving, at least does not deteriorate. The moral instinct and common sense of many people suggest that sustainability should be a goal of any society since human safety and well-being depend upon it. In this regard, sustainability requires nothing but following the long-term interests of society.

It is rightly considered that, from a general perspective, when we believe that higher human values should be constitutionally protected, the force of legislation as a source of rationality and legal order is indirectly diminished. It is obvious that Kelsen's hierarchy of norms is important for the legal order, but general legislation and judicial practice deserve special attention. Any law that emerges as a product of political will should be assessed both as part of a historical legacy and as an instrument with adaptable content.

The primary legitimising purpose of the state is to ensure certainty. In the modern state, rights and freedoms, as well as the realisation of moral values, receive strong protection through certainty. Sustainable development requires stability in approaches to judicial reasoning. It seems appropriate to recall C. K. Allen's work *Law in the Making*, which was taken as an embodiment of the deductive principle of judicial reasoning, now widely accepted, especially in Europe.² The experience of previous decisions is of great importance for legal thought, and this case-specific experience is utilised in legal reasoning. At the same time, according to Allen, lawyers regard a legislative model of development that accords a significant place to doctrine as an appeal to a necessary body of specialised knowledge. They regard it as the most creative element in

2 Allen, C. K. *Law in the Making*, Oxford, 1927, 117.

jurisprudence, which must constantly be adapted to changing social needs. A rule, once formulated in its original form, soon becomes entirely detached from the will and intentions of its creator and acquires a new life and character in the hands of the interpreter.³ Courts thus become increasingly important institutions that frequently resort to the method of developing law through judicial law-making – especially constitutional courts, which, as practice in many jurisdictions shows, consciously create law in which legal doctrine plays an entirely new role. This inevitably affects the methods of judicial reasoning, where efforts are directed, on the one hand, to examining the constitutionality of a norm, and, if it is found unconstitutional, to advancing new arguments in favour of modern regulation, while maintaining the general orientation toward sustainable development.

Many countries are moving toward sustainable development despite socio-economic and environmental challenges. Success in this process depends not only on constitutional priorities but also to a considerable extent on the implementation of constitutional provisions in actual practice. As judicial practice shows, courts often resort to legal doctrines and principles as tools for solving complex problems. Principles play an indispensable role in weighing arguments and in the argumentation process itself, especially in constitutional adjudication. The need to maintain balance in judicial reasoning requires the sufficiency of arguments. Judicial discretion is the foundation of interpretative activity, but its exercise implies the freedom to choose principles. One of the key principles in addressing the tasks of ensuring sustainable development is the principle of legal certainty. A lack of clarity and unpredictability in the law may be regarded as a violation of this principle. It should be added that such uncertainty directly affects legal reasoning. However, it must be particularly emphasised that in the decision in question the Court, respecting the principle of certainty and stability, relied on its own precedent. There is also an interesting, well-established division of roles: the Supreme Court ensures uniformity in the interpretation of norms by courts of general jurisdiction, while the Constitutional Court is obliged to ensure that this interpretation conforms to the constitution. Consequently, both judicial bodies, each in its own capacity, contribute both to the stability of judicial enforcement and to the development of legislation. The role of the Constitutional Court in the formation of law is a special one, and legal reasoning lies

3 Ibid, 118.

at the heart of this function. The growing importance of this function is directly linked to the increasing attention paid to judicial law. The judicial-interpretative model of legal development has become a necessity. Considering the role that legal principles play in judicial reasoning, it seems appropriate to continue their examination, particularly the principles of proportionality and reasonableness, which interact in the resolution of specific cases.

The reasonable can be perceived as a form of practical and value-oriented rationality. One of the most interesting theories of reasonableness comes from R. Alexy, who views it as an all-encompassing principle of legal argumentation, applicable when justification is difficult, and there is a simultaneous need to avoid subjectivity. According to him, it performs a function of coherence, works towards the critique of interests, generalisation and impartiality, as well as the correct balancing of reasons. The same author points out that reason requires law to become real, and law requires reason to be legitimate. This fusion of the real and the ideal is the essence of the idea of the reasonableness of law. The interdependence of law and reason is manifested in two dimensions of law, namely, procedural and substantive.⁴ Legal argumentation is the essence of the idea of reasonableness in Ch. Perelman's rhetorical approach. He considers legal argumentation as having its own logic, which appears reasonable. Logic and reasonableness make an argument persuasive for a universal audience sharing common opinions and beliefs. For Perelman, reasonableness has an objective, not a subjective, dimension because he sees in it a close connection with common sense.⁵ According to A. Aarnio, what makes an action or decision reasonable, and not just rational or even irrational, is a subject of debate. For some, the reasonable lies in human nature and intuition; for others, it implies conformity with common sense; for yet others, it depends on argumentation and corresponds to a result that convinces the parties because they accept it.⁶ Consequently, it can be said that reasonableness is the core of legal argumentation for pragmatic reasons, since the application of law represents a public, normative, evaluative and conflictual arena, the existence of which is correlated

4 Alexy, R. The Reasonableness of Law, in: Bongiovanni, G., Sartor, G., Valentini, C. (eds.), *Reasonableness and Law*, Law and Philosophy Library, vol 86, Springer, Dordrecht, 2009, 3-15.

5 Perelman, C. *The Rational and the Reasonable in the New Rhetoric and the Humanities: Essays on Rhetoric and Its Applications*, Dordrecht: Reidel Publishing Company, 1979, 117-123.

6 Aarnio, A. *The Rational as Reasonable, A Treatise on Legal Justification*, D. Reidel Publishing Company, 1987, 295.

with general consensus. Proportionality and reasonableness are closely linked as the former often serves as a tool for affirming the latter. Historically, proportionality became a characteristic feature of German public law and is believed to have been first established in police law by the Supreme Administrative Court of Prussia in June 1882.⁷ It is widely applied by constitutional courts, especially in the process of judicial argumentation aimed at ensuring sustainable development. Its use implies the fulfilment of the following conditions: suitability – meaning that the restrictive measure corresponds to the goal pursued; necessity – meaning that the measure must not exceed what is required to achieve the goal and that no less restrictive alternative exists; and, finally, proportionality *stricto sensu* – meaning that the disadvantages associated with the measure must not outweigh the benefits that justify it.⁸ The Federal Constitutional Court of Germany holds that “an interference must be suitable and necessary for achieving the pursued goal. It must not impose an excessive burden on the individual concerned and must therefore be reasonable in its impact on them.”⁹ Thus, the principle of proportionality had to travel a long way before becoming a constitutional principle. It has always played and continues to play a leading role in the philosophical search for justice. Simultaneously, it plays a decisive role in moral discourse when the latter concerns resolving conflicts between individuals, their freedoms, and their interests. In proportionality analysis, great importance is attached to whom the burden of proof is attributed – the citizen or the state authority, given that one of them carries out an interference expressed in the restriction of rights and freedoms. The burden of proof correlates with the volume of arguments put forward, despite the formal equality of the parties.

In one of its decisions, the Federal Constitutional Court of Germany (*Southwest Case*, BVerfGE 1, 14 (1951)), declared that every constitutional principle must always be interpreted in such a way as to make it compatible with the fundamental principles of the Constitution as a whole. The well-known principle of “practical concordance” (*praktische Konkordanz*) requires a holistic understanding of the Constitution, in which the fundamental commitments of the document must be harmonised so that none is applied at the expense of others. As D. Kommers has noted, this principle derives from the conception of the Basic

7 Decision 9, 14 June 1882, PROVG 353.

8 *Emilion, N.* The Principle of Proportionality in European Law: A Comparative Study, Kluwer Law International, 1996, 27.

9 BVerfGE 63 at 144.

Law as a structural unity. What is particularly significant is the existence of a broad consensus regarding the “objective order of values,” which must guide the process of reasoning. Taken as a whole, the constitution reflects certain overarching principles and foundational decisions to which individual provisions are subordinated.¹⁰ Our detailed attention to legal principles is not accidental, for they not only play a vital role in constitutional adjudication but are also balanced through argumentative operations within it. The methods of interpretation employed by the court must correspond not only to the facts of the case, the provisions of the constitution and laws, and judicial practice, but also to the fundamental principles it upholds. There must exist obligatory structural connections between the principles invoked by the Court, the facts, the legal norm and its interpretation. Judicial reasoning requires respect for the criterion of coherence with regard to logical connections. The Court favours interpretations that best align with the legal principles at issue. In deploying arguments, a judge must demonstrate that the decision is consistent with the legal values embodied in legal principles. MacCormick distinguishes between two types of arguments, viz., arguments based on legal principles and arguments by analogy. Arguments grounded in principles show that a decision is justified by its consistency with widely accepted legal principles. Analogical arguments justify a decision by demonstrating that the facts are similar as are the rules expressed in the earlier decision, and that both are based on the same legal principle.¹¹ It is important to emphasise that coherence has a certain value as a canon of legal argumentation, and its role lies in identifying legal principles, distinguishing them from moral and political ones, and specifying their application in cases of plurality. Within legal reasoning, the principle functions as a key criterion, compliance with which serves not only to ensure particular economic, political and social conditions for sustainable development but also to meet the demands of justice.

The idea of sustainable development correlates with the ecological concept of sustainable growth. Essentially, the problems associated with climate change are seen as serious challenges that require solutions through appropriate reasoning. Sustainable development requires mediation between the interests of the present generations and those of future generations. In this regard, the decision of the Federal Constitutional Court of Germany of 24 March 2021 is of

10 *Kommers, D.* Germany: Balancing Rights and Duties, Oxford, 2007, 203.

11 *MacCormick, N.* Legal Reasoning and Legal Theory, Oxford, 1978, 192.

particular interest. In that ruling, the Court provided a new interpretation of Article 20 of the Constitution, construing it as both a guideline for future legislative action and a platform for intergenerational justice, for which proportionality is the primary mechanism. According to the Court, the burden of climate change should not be disproportionately imposed on future generations. The Constitutional Court holds the state responsible not for actions, but for the likely consequences of inaction. To this end, the Court's reasoning is based on scenario assumptions as tools of constitutional adjudication in a 'forward-looking' manner. For the first time in its jurisprudence, it established the obligation to achieve climate neutrality so as not to infringe upon the rights of future generations.¹² The analysis of the situation takes the form of a strategic risk assessment, which facilitates rational choice under conditions of uncertainty about future scenarios. Consequently, the development of scenarios became the Court's main argument for annulling provisions of the Federal Climate Change Act of 2019. The exceptional social value of this ruling lies in the fact that the Court, for the first time, established the duty to achieve climate neutrality in order to protect future generations. Thus, the Court assesses the constitutionality of the law on the basis of scenario analysis, which, as we have indicated, is central to its reasoning. In principle, scenario analysis appears to be the most complex form of strategic forecasting under conditions of uncertainty and risk. In such a situation, it becomes necessary to consider models of possible future events that may unfold. The main purpose of studying scenarios is to stimulate new ideas about the future that are highly likely to occur. This is a kind of probabilistic approach, somewhat reminiscent of the balance of probabilities in the standard of proof in common law. It is noteworthy that scenario analysis is not aimed at predicting the future with certainty, since this method instead explores various possibilities and their implications for decision-making under uncertainty. It should also be emphasised that positive constitutional obligations extend to all branches of government, meaning that scenario analysis is a responsibility of the legislative and executive authorities as well. A high degree of uncertainty is usually invoked as an argument when regulation is replaced by a broad scope of judicial discretion.

The concept of sustainable development imposes on judges the duty to find a balance between the past, the present and the future. It is important to seek

12 BVerfG, 1 BvR 2656/18, 24 March 2021, paras. 1-270.

harmony between preserving tradition and the necessity of modernisation. A. Barak once wisely remarked that the past influences the present but does not determine it. The past guides the present but does not enslave it.¹³ In the same way, we may speak of the future: the present is meant for its careful study and for concentrating ideas and reflections on the future, which will be reflected in progressive reasoning and evolutionary interpretation. Constitutional law helps to build bridges between the present and the future, and judicial arguments play a particularly important role in ensuring this reliability. Sustainable development entails an evolutionary approach not only to legislation but also to the method of interpreting norms. Financial crises periodically strike the global economy, negatively affecting people's social well-being, demanding protection from destructive social consequences, and requiring new ways of supporting people so they can continue to live with dignity, although such care must also take into account the sovereignty of the future.

For sustainable constitutional development, the prestige of argumentation is of particular importance – its success in persuasion requires that arguments be modern and respond to a systematically changing background of law enforcement. The relevance of this function and its activation are driven by the demands of the new millennium as reflected in many international legal documents. These efforts were reflected in the landmark resolution of the UN General Assembly in July 2022, which recognised that a clean, healthy and sustainable environment is a human right. In essence, this position amounted to the formation of a separate human right. The European Court of Human Rights, for the first time considering a case brought by an environmental NGO, recognised measures to mitigate and adapt to climate change as a positive obligation of the state under Articles 2 and 8 of the European Convention on Human Rights. The Court decided to adhere to the traditional line of rights development, asserting that Article 8 of the Convention must be regarded as encompassing a right to effective protection for individuals by the state from the serious adverse effects of climate change on their lives, health, well-being, livelihood and quality of life.¹⁴ It is also important that the Court drew attention to the need for courts to possess scientific knowledge, relying on expertise and the use of international

13 Barak A. *On Judging: Judges as Guardians of Constitutionalism and Human Rights*, Edward Elgar Publishing, 2016, 37.

14 Dedov, D.I. Gadjiyev, K.I. *Climate Rights and Their Judicial Protection: Commentary on the Legal Positions of the Grand Chamber of the European Court of Human Rights*, 2024, no. 5, 61-74.

approaches. The integration of knowledge is an essential requirement for judges, who embody in judicial reasoning their own understanding and vision of a way out of critical situations. Court decisions must be distinguished by persuasive arguments, clear language and style of presentation. Furthermore, judicial reasoning serves as an important element of judicial independence. Internal independence should lead to decision-making in a manner free from the judge's personal views and prejudices on a specific issue relevant to the case. Impartiality towards the parties to the proceedings is closely linked to the principles of independence. The principle of the free evaluation of evidence, within which lie the arguments the court will use for effective judicial reasoning, is a guarantee of judicial independence in establishing fact and law in a specific case. This is a very important manifestation of freedom, namely, the choice of arguments and their application in justifying an interpretation.

As we have already noted, in constitutional adjudication, precedents are often used as arguments, which is evident from the majority of constitutional court decisions that rely on them quite successfully to justify their own rulings. The value of such arguments lies not merely in paying respect to legal certainty and the equality of citizens before the law, but also in maintaining stability in constitutional reasoning. This orientation highlights the potential to improve the understanding of adjudication as an argumentative activity. The effect of this model, in revealing the potential of justice – including the exercise of control over constitutional judicial practice – also contributes to the rationality of legal argumentation. Perelman emphasised that judges, in resolving legal disputes, have certain so-called argumentative techniques at their disposal. Their use does not guarantee the correctness of the decision but rather determines the strength (or weakness) of the reasoning as a whole.¹⁵ At the core of judicial activity lies the aspiration to substantiate one's own decisions. All national jurisdictions, regardless of the legal school to which they belong, were created and continue to function on the basis of legal reasoning. This reasoning is shaped by methods of drafting judicial decisions, which must correspond to the context of the time. The concept of a living instrument applies not only to the interpreted text of the Constitution but also to the decisions of the Constitutional Court. Sustainable development is the fruit of systematic argumentation and the

15 *Perelman, C.* The Rational and the Reasonable in the New Rhetoric and the Humanities. Essays on Rhetoric and Its Applications, Dordrecht: Reidel Publishing Company, 1979, 117-123.

generation of new meanings, which requires a dynamic quality in judicial decisions – decisions that the Court will later invoke as arguments. Antonio La Pergola, a former President of the Constitutional Court of Italy, compared the court to a substation that transforms the high-voltage charge of philosophers into a lower voltage suitable for application.¹⁶ According to J. Wroblewski, “a metadecision of sources of law concerns the choice of arguments justifying law-applying decisions. <...> [which] determines what rules the court treats as valid, and, because of that, what is a ‘source of law in the decisional meaning’.”¹⁷

One of the progressive features of judicial reasoning is the use of foreign law. This modern approach can be qualified in various ways, namely, as a product of the globalisation of current constitutional practice or as a result of the ongoing dialogue among constitutional courts through mutual citation and increasingly direct interaction. This growing phenomenon, also referred to as constitutional cross-fertilisation, may prove to be not only a tool for better judicial decisions with examples of an innovative approach to legal reasoning and interpretation, but also a means for solving many tasks in state-building. The modern political and economic system in many countries is well-established, and their development is largely linked to the level of integration of artificial intelligence, algorithms and big data. Modernising the legal system and maintaining it is important not only for the convergence of legal systems but also for their competitiveness. Judicial reasoning allows for the use of foreign law in the context of interpreting provisions of national law. The national law enforcer consciously determines the degree of influence of foreign law depending on the circumstances of the case at hand and how the cited rule or its practice of application can impact sustainable legal development. There are various types of use of comparative material. In some cases, they are characterised as legal transplants and in others as constitutional borrowing. The migration of constitutional ideas – as these phenomena are sometimes called – is not always associated with a mandatory indication of the source and serves to strengthen judicial reasoning. This is not about unifying decisions; they must differ, and a constitutional court must protect constitutional identity. At the same time, we have the insightful words of Jacob Burckhardt that, in the realm of thought, it is supremely just and right that all boundaries should be swept away. There is too little of high spiritual

16 Periodico: *Giurisprudenza costituzionale*, Anno: 2003. Volume 48 – Fascicolo: 4 – Pagina Iniziale: 2419 – Pagina Finale: 2441.

17 Wroblewski, J. *The Judicial Application of Law*, Springer, 1992, 85.

value scattered over the earth for any epoch to be able to say, “we are completely self-sufficient, or even: we prefer our own.”¹⁸

Human dignity appears in modern human rights law as a source of rights. In this case, the function of dignity is boundless in terms of its substantive meaning since it serves as a source of all individual rights. Human dignity, as a source of human rights, occupies the pinnacle of the human rights system. It is difficult to compare it with any particular value or right or to limit it by them; it carries a powerful argumentative force. This position is reflected in the decisions of the Federal Constitutional Court of Germany, which interprets human dignity as “the highest constitutional value” (*oberster Verfassungswert*),¹⁹ attesting to its elevated status under the country’s constitutional law. At the same time, according to some authors, the use of this concept in judicial proceedings requires significant limitation (i.e., weak applicability). It should serve as an interpretative basis for legal argumentation rather than as the argumentation itself.²⁰ The European Court of Human Rights regards respect for human dignity as part of the very essence of the European Convention on Human Rights, stressing that the object and purpose of the Convention as an instrument for the protection of individuals require its provisions to be interpreted and applied in a way that makes its guarantees practical and effective.²¹ The Constitutional Court of Italy has defined human dignity as the supreme inviolable value permeating the legal system as a whole.²² In practice, this has given rise to two opposing interpretations, viz., one in favour of the right to die with dignity and the other against it. The case concerned a man whose daughter had been in a vegetative state for seventeen years due to a car accident, and who, as her legal guardian, requested permission to discontinue artificial nutrition. This request led to conflicting positions regarding the concept of human dignity. The Court of Appeal upheld the absolute or objective idea of dignity as an attribute of the right to life, affirming it as incompatible with the destruction of life. By contrast, the Supreme Court argued for a subjective conception of dignity as an individual perception, concluding that a dehumanised life amounts to nothing more than a purely biological process, which can no longer be regarded as a dignified life. Therefore, it may be

18 Burckhardt, J. *Force and Freedom: An Interpretation of History* (Meridian books), 1955, 346.

19 BVerfG 3 March 2004.

20 Dreier, H. *Human Dignity in German Law*, Cambridge, 5 March 2015, 375-377.

21 *Svinarenko and Slyadnev v. Russia*, 17.07.2014, no. 32541/08, paras. 118, 138.

22 Corte Costituzionale, 17 July 2000, no. 293, *Giurisprudenza Italiana*, 668 (2001).

ended in the name of human dignity simply by refusing the medical assistance necessary to sustain life.

As can be seen, judicial reasoning based on human dignity has encompassed the entire spectrum of alternatives, ranging from arguments in defence of the right to life to arguments supporting the right to end it.²³

Sustainable development in European Union law is regarded as a mandatory objective that the EU has been required to pursue since the adoption of the 1997 Amsterdam Treaty, which amended the founding treaties of the European Communities. The concept of sustainable development is mentioned in Articles 2 and 6 of that Treaty. It should be emphasised that there is a slight time gap between the recognition of sustainable development at the international level and its definition in the EU's political discourse. Shortly thereafter, the concept was incorporated into the treaties together with provisions on the environment, reflecting a commitment to the rational use of natural resources in order to balance ecological and economic interests of both present and future generations. In legal doctrine, sustainable development is sometimes defined not as a concept but as a principle. At the same time, the lack of a unified approach is largely due to its being treated primarily as an inspiring ethical concept rather than as a strict legal principle.

At the same time, it should be noted that, as the practice of international courts shows, they have managed to integrate the principle of sustainable development into their decisions. Sustainable development is not a fixed state of harmony but rather a process of change in which the exploitation of resources, orientation toward technological progress, protection of the climate and social rights, as well as institutional transformations, correspond to present and future needs, relying on political will in the case of legislative changes and on judicial will in the context of judicial reasoning. The term sustainable development is also used in the Preamble and in Article 37 of the Charter of Fundamental Rights of the European Union, which establishes that, first, the Union seeks to promote balanced and sustainable development, and second, that a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development. This provision does not confer an actual fundamental right on individuals but rather places a general obligation on the

23 Corte di Cassazione, 16 October 2007, no. 21748, *Foro Italiano*, I, 125(2008).

EU and its Member States to take the need for environmental protection into account in their policies. Meanwhile, there are also economic and social foundations of development, which come together within the framework of the single concept of sustainable development. The human being is at the centre of such development, and it is no coincidence that Principle 1 of the 1992 Rio de Janeiro Declaration states, “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.” It is likely that without a decent environment and economic improvement, human needs and aspirations cannot be satisfied.²⁴ The concept of sustainable development is also not defined in the Declaration on the Guiding Principles for Sustainable Development adopted by the European Council in July 2005, but that document structures a comprehensive understanding of the concept, which may be regarded as a long-term vision of sustainability. It states that sustainable development is a key objective for all European Community policies and is aimed at the continuous improvement of the quality of life on Earth, both for present and future generations. As can be seen, the focus is on maintaining the Earth’s capacity to sustain life in all its diversity. It is based on respect for fundamental rights, including freedom and equal opportunities for all.

The decisions of international courts on issues of sustainable development have great theoretical and practical value, although one must not forget the fundamental systemic principle, which states: for a system of control to be effective, it must be at least as complex as the object subject to control. Consequently, an interdisciplinary problem requires an equally interdisciplinary approach. In its important decision on an environmental case, the International Court of Justice largely relied on the objective of sustainable development. In the *Pulp Mills* case concerning the dispute between Argentina and Uruguay, decided in 2010, the Court had to interpret the meaning of Article 27 of the 1975 Statute of the River Uruguay. The International Court of Justice referred to its earlier decision in the same case, in which it stated that the use of the river “should allow for sustainable development which takes account of the need to safeguard the continued conservation of the river environment and the rights of economic development of the riparian states.” In this regard, the Court followed

24 Tadi, D. Towards a Nuanced Conceptualization of Sustainable Developments in International Law: An Analysis of Key Enviro-Economic Instruments. 2007, 81.

its 1997 decision in the *Danube Dam* case, where it declared that there is a need to reconcile economic development with environmental protection – a need aptly expressed in the concept of sustainable development. According to the Court, Article 27 embodies this interrelation between the equitable and reasonable use of a shared resource and the balance between economic development and environmental protection, which lies at the very heart of sustainable development.²⁵

It appears that the continued effective use of the concept of sustainable development will be linked to the growth of its influence and the development of judicial reasoning and general legal regulation. Thus, the burden necessarily falls on the courts, which are faced with an enormous variety of issues related to sustainable development. Most of these phenomena will unfold within the realm of judicial reasoning, since sustainable development – based on economic growth, social progress and environmental protection – requires of the judicial process a distinct philosophy of judicial craftsmanship, innovation and creativity

25 *Pulp Mills Case* (paras. 55, 75, 103, 177); *Danube Dam Case* (paras. 140-1).

Comments on the Future of International Development Cooperation

1. Introduction: IDC in crisis

What will international development cooperation (IDC) look like amid tighter state budgets and geopolitical fragmentation? If somebody had asked me this question some years ago, the answer would have been easier. But times have changed. The IDC faces a number of new challenges. One of these is that the definition of IDC does not appear to be clear anymore. Contemporary debates reveal significant disagreement about its meaning, purpose and scope, especially in the face of new or increasing global risks. Various notes of contestation have been published, dealing with the narrative, the institutional setting¹ or issues of reform implementation that reflect the need for a multi-stakeholder framework so as to arrive at broader cooperative efforts on global issues and emphasizing international partnerships instead of the ancient donor and caretaker model.² For the purpose of this contribution, and out of habit, I continue to name it IDC although it would perhaps be better to just call it ‘international cooperation’. However it is useful for this discussion here to stick with the old designation, as I cite many IDC sources.

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1 Over the last decades, the IDC framework has been dominated by OECD’s *Development Assistance Committee* and various development organizations of the United Nations.

2 See, for example, *Masood Ahmed*, *The End of Development Cooperation?*, Center for Global Development CGD, Opening Address at 2025 ABCDE July, 22. <https://www.cgdev.org/publication/end-development-cooperation> – Note: All internet links have been accessed on 4th of February 2026.

Thus, increasing doubts point towards a deeper crisis of IDC – a crisis of meaning, of financing, and ultimately of international solidarity. And isn't it, by the way, also a crisis of rule of law and human rights as well? For some decades, the system of IDC or development aid (German: '*Entwicklungshilfe*') appeared to be rather strong, with multilateral institutions giving the impression of a global legitimacy. They had an enormous outreach, often combined with local presence, and a rather high convening power. The *Sustainable Development Goals* (SDG) of the United Nations conveyed the idea of common progress. Aid agencies disposed of a proven sets of crisis measures and large data assets. The international community of IDC organisations had the endearing habit of coming up with new buzzwords all the time, suggesting that everything had been thought of.³ After all, many IDC terms and their underlying concepts stood for promising ways not only to guarantee progress, but to counter natural disasters and, to some extent, to deal with political crisis as well.

Suddenly, this multilaterally promoted cooperation for development and progress, if not for social and economic welfare, happens to be sidelined. Is it going to be reduced to a minimum for an increase in military spending? Would this be an inevitable consequence of the new military threat that Europe faces, according to statements by some of its leading politicians? At the same time, sweeping changes in the USA have led to the abolition of USAID and many other institutions responsible for IDC and international relations. Is a '*New Washington Dissensus*'⁴ becoming the default norm? Or is it, as Donald Trump in his capacity as American president solemnly declared, a widespread consensus of wealthy countries that 'unbridled immigration' is the number one political issue of our time, which the IDC has allegedly promoted instead of stopping it? In the

3 For example, energy transition and resilient infrastructure; just transition jobs; resilience and economic inclusion; digital public infrastructure; blended finance; debt-for-climate and nature swaps, South–South or even triangular cooperation etc.

4 *Andy Summers/Stephan Klingebiel*, The new Washington dissensus: Trump's five principles for global development policy, *Center for Global Development* CGD: <https://www.idos-research.de/externe-publikationen/article/the-new-washington-dissensus-trumps-five-principles-for-global-development-policy/>

United States, ‘*anti-wokeism*’,⁵ ‘*neo-isolationism*’⁶ and anti-democratic movements have joined forces to ask the same question about IDC: Why do we need this? Why are we financing it? – ‘*Look*’, they claim with a pious look up to the sky, ‘*we are not responsible for the whole of the world!*’ – This attitude suggests that IDC is somewhat superfluous, and when coupled with criticism of its allegedly wasteful working methods, it creates an atmosphere of outright hostility toward international projects of all kinds of development cooperation.

2. Well-known weaknesses of IDC

Of course, IDC has always had a number of weaknesses. For years, insiders complain about high transaction costs, slow procurement, risk aversion, siloed or duplicative programs, limited adaptive programming, underinvestment in monitoring and evaluation (M&E) as well as in learning and local partnerships and institutions. Although IDC professionals seem to offer an inexhaustible supply of good solutions for everyone, they are not the only ones. Today, there are many alternatives to IDC. An international cooperation that is granted under certain conditions, subject to numerous restrictions, and yet still uncertain regarding its implementation is in many cases no longer the first choice. A comparison with Chinese assistance reveals that Western aid is on the retreat. Chinese finance and contractors often move faster and accept different terms than Western donors, who attach governance and conditionality requirements.⁷ The Chinese policy of non-interference and the ‘development first’ messaging resonates with many governments. Visible infrastructure delivery, such as roads, ports and power, is something that citizens and governments can easily point to and is often perceived as ‘getting things done’.⁸

5 *Stephen Dark*, American paranoia: right-wing conservatism from McCarthyism to wokeism and the death of democracy, in: *TheFifthEstate*, 24.07.24, <https://thefifthestate.com.au/business/american-paranoia-right-wing-conservatism-from-mccarthyism-to-wokeism-and-the-death-of-democracy/>

6 *Brian Katulis/Steven Cook*, The Case Against Neo-Isolationism, in: *The Liberal Patriot*, 06.02.24, <https://www.liberalpatriot.com/p/the-case-against-neo-isolationism>

7 *Deborah Bräutigam* (for NORFUND), China in Africa, What can Western donors learn?, <https://www.norfund.no/wp-content/uploads/2020/02/Norfund-China-in-Africa-PDF.pdf>

8 *Afrobarometer*, 15.11.21, Africans welcome China’s influence but maintain democratic aspirations,

In addition to this, international NGO complain about the astonishing lack of public transparency of state-sponsored institutions. This, in turn, leads to recurring accusations of a lack of accountability,⁹ and, if I may say so, to a considerable ignorance of the true effect of IDC. In addition to the lack of transparency, there is also a certain fragmentation. Despite the improved cooperation and harmonization among donor countries, a lot of foreign aid is not well coordinated, which reduces its effectiveness.¹⁰ Foreign aid tied to donor visibility and vested interests adds to this fragmentation, especially in the case of bilateral cooperation.¹¹

At the same time, there is the eternal issue of ‘ownership’, which cannot be discussed often enough. In short, this is the identification of institutions and beneficiaries of partner countries with an international project – that at first glance often appears to be a foreign intervention. Obviously, the meaning and purpose of an international project is not always clearly communicated. In addition, there are now so many different types of IDC projects that this diversity of forms alone has a confusing effect. This is compounded by a bewildering landscape of different development aid organisations, financing models and forms of cooperation. As regards the allocation of funds to an international development organization,

<https://www.afrobarometer.org/publication/ad489-africans-welcome-chinas-influence-maintain-democratic-aspirations/>

- 9 See, just as one example, the recent report ‘*KFW: Irresponsible Banking*’ by the *Coalition for Human Rights and Development* that finds a lack of transparency and accountability in German financial development cooperation, <https://rightsindevelopment.org/kfw-irresponsible-banking/>
- 10 The basic publication here is OECD, *The Architecture of Development Assistance*, 2012, https://www.oecd.org/content/dam/oecd/en/publications/reports/2012/12/the-architecture-of-development-assistance_g1g1e978/9789264178885-en.pdf - For more aspects, read for example *Shannon P. Garcelli*, *The Institutional Foundations of Foreign Aid Fragmentation*, 21.01.2019, https://wp.peio.me/wp-content/uploads/2019/01/PEIO12_Paper_58.pdf
- 11 Aid provided by multilateral organisations such as the UN and World Bank tends to be less affected by the political priorities of donor countries. It is often better coordinated and advocated by the OECD and other agencies as a means of increasing effectiveness and reducing administrative costs. Multilateral institutions also play a key role in sector-wide transformations, such as the Green Revolution and disease eradication campaigns. They demonstrate a greater collective impact in certain areas.

recent evidence suggests that earmarked foreign aid¹² may undermine ownership,¹³ which in turn leads to a reduced impact of IDC.

But let's focus on a more important question: was IDC successful? From a bird's eye view, IDC has improved over the years.¹⁴ The timeline of success rates of IDC shows a gradual improvement in the effectiveness of aid, particularly since the adoption of the *Paris Declaration on Aid Effectiveness* and the increased efforts of the OECD and the UN to harmonise and coordinate donor activities from the mid-2000s onwards. Systematic evaluation, improved coordination mechanisms (such as country-level UN coordination) and greater alignment with the strategies of recipient countries have helped to improve the quality and results of aid over time. However, on closer inspection, too many projects still suffer from failures. It is true to say that the necessary 'upscaling' of so-called 'pilot projects' is often being neglected. One might think that it would be enough to show 'how it's done' with the help of a limited pilot project. But this approach is unfair, because the government institutions of a beneficiary often lack the financial and human resources of a well-equipped pilot project to implement the innovation on a larger scale. In addition, the predominance of short, volatile project cycles mixed with excessive bureaucracy (not to forget the clueless repetition of highly useful training sessions) have inevitably led to a certain kind of 'donor fatigue' experienced by some of the partner countries of IDC.

To summarize, while measurable improvements in aid effectiveness, particularly regarding coordination, harmonisation, and evaluation, have been documented over the past decades, the picture remains complex with ongoing challenges caused by fragmented systems, external crises, and shrinking aid

12 For explanation, donors may allocate aid towards an IDO but decide to 'ear-mark' that aid towards a specific country, theme or project.

13 A newer publication of 2025 by *Bernhard Reinsberg/Jack Taggart* asks 'How Does Earmarked Foreign Aid Affect Recipient-Country Ownership?', <https://onlinelibrary.wiley.com/doi/epdf/10.1002/jid.3985>. Compare also an older World Bank report by *Stephen Knack/Lodewijk Smets* about the further consequences of aid tying and donor fragmentation, <https://documents1.worldbank.org/curated/en/489781468331245571/pdf/WPS5934.pdf>.

14 See, for example, the OECD Development Co-operation Report 2023, *Debating The Aid System*, https://www.oecd.org/content/dam/oecd/en/publications/reports/2023/02/development-co-operation-report-2023_be7899d0/f6edc3c2-en.pdf. Please also check *Maximilian Brucker/Madhinee Valeyathepillay*, *Development Aid – Between Illusion and Reality*, https://www.ifo.de/DocDL/dice-report-2017-4-brucker_valeyathepillay-december.pdf

budgets. Recent economic shocks and crises (COVID-19, war in Ukraine) have temporarily reversed some gains, and overall aid volumes have declined in 2024 and 2025 after several years of growth. At the same time, threats and risks are playing out (and threaten to do so even more in the future): climate shocks; food insecurity; shrinking civic space; the misuse of digitalization, including artificial intelligence and, above all, a new kind of populism armed with systemic mis- and disinformation – people who regret that money was ever spent on international development aid.

3. Growing hostility towards IDC

What is the source of this growing resentment towards IDC? In fact, triggered by a lot of mis- and dis-information, we are encountering increasing political and societal unwillingness to continue spending money on IDC. Obviously, IDC has been discredited in many respects. Now more than ever, doubts are welcome to reduce, downsize and save money. Politically speaking, we are living in miserable times. The international solidarity has been severely affected. One need only listen to the speeches by UN Secretary-General *António Guterres* in 2025 to realize that something is wrong:

*'I cannot explain the level of indifference and inaction we see by too many in the international community. The lack of compassion. The lack of truth. The lack of humanity. This is not just a humanitarian crisis. It is a moral crisis that challenges the global conscience.'*¹⁵

How can we understand this striking statement made by one of the leaders of IDC? The shortcomings of IDC mentioned above may be one factor, however, in my view, this is insufficient to explain the reawakened or unprecedented unwillingness. Let's take a closer look at the public opinion and how people's attitudes towards IDC have changed.

To start with the so-called 'post-colonial' debate: In recent years (if not decades), a critical international discussion about Western post-colonial behaviour has gained traction. It has called into question many well-known features of IDC.

15 *Vibbu Mishra* (UN News): In hard-hitting human rights address, *Guterres* calls for urgent action on Gaza, authoritarianism and climate justice, <https://news.un.org/en/story/2025/07/1165497>

Many African leaders and intellectuals have argued that aid imposes donor-driven agendas, eroding sovereignty and democratic legitimacy, thus perpetuating *Neo-Colonialism*.¹⁶ Critics say aid discourages domestic resource mobilization, fosters rent-seeking elites and delays structural reforms. Conditionalities tied to governance, economic models, and foreign policy weaken African agency. Many do believe that the World Bank and the IMF promote external priorities. In addition to this, some see Western aid as a vehicle for cultural dominance. Local traditions and priorities have often been sidelined in favour of Western narratives. For the future, many call for a new South–South cooperation, domestic industrialization, and fair trade instead of perpetual grant and debt dependency (*'Africa Needs Trade, Not Aid'*).¹⁷

In my view, much of this criticism is justified. On the other hand, for the sake of completeness, I would like to mention *Rachel Glennerster's* rejection of the criticism that IDC is a legacy of colonialism which promotes dependency. In an interview she said:

*'This accusation still sees developing countries as schoolboys who can be pushed around. But they have much more expertise than they used to, know what they want, and see themselves as partners.'*¹⁸

This remark coincides with my own experience in that it would be overly simplistic to portray recipient countries as mere objects of IDC or even victims. While the accusation of postcolonial behaviour appears to be justified in many respects, it is in my view not decisive for the increasing downgrading of IDC.

What seems to be much more relevant, however, is that opinion has changed on a broad front in some wealthy countries (so-called donor countries). A

16 This term was coined by *Kwame Nkrumah* with his book first published 1965: *'Neo-Colonialism, the Last Stage of imperialism'*, <https://www.marxists.org/ebooks/nkrumah/nkrumah-neocolonialism.pdf>

17 See for comparison *Célestin Monga* in an interview with *LeMonde*, 14.02.25: *'Whining about aid is not a development strategy for Africa'*, https://www.lemonde.fr/en/le-monde-africa/article/2025/02/14/whining-about-aid-is-not-a-development-strategy-for-africa_6738172_124.html. – From the point of view of behavioural analysis, compare *Nicole Smilak/Robert Putnam*, *A Critique of Colonialism and Modern Aid in Africa: What Would Skinner Say?*, in: *Behav Soc Issues* 2022 May 4;31(1):252–271 <https://pmc.ncbi.nlm.nih.gov/articles/PMC9067341/>

18 *Süddeutsche Zeitung* 29.09.25, *Wie sich die Entwicklungshilfe ändern muss (How development assistance should change)*, interview by *Nils Althaus* with *Rachel Glennerster*.

worrying combination of budget constraints and new (or revived) ideological perspectives has emerged. Not only has it spread in the United States, as might have been expected, but it has also found fertile grounds in Europe. Xenophobic sentiments have become popular in European countries. The refugee crisis has given rise to radical political forces. As a consequence, the *Official Development Assistance* (ODA), the public funding available for international projects to achieve the SDGs, is now in fact declining substantially on both sides of the Atlantic. This is happening at a time when IDC is most needed due to the undiminished climate change, the ongoing threat of pandemics, the unabated number of fragile states, many ongoing conflicts and returning poverty. Can we afford to save money by reducing IDC in this particular situation? Shouldn't we know better? In the long term, can we get along without IDC? Or what kind of cooperation would be needed?

4. IDC as a controversial political issue (apple of discord)

First, let's be clear about it: the SDGs are far from being achieved.¹⁹ The number of people facing the risk of famine worldwide has doubled in a year.²⁰ Moreover, the growing threat to vital global goods raises the question of whether the scope of IDC has been too narrow to date. In retrospect, the SDGs, which were formulated in 2015, seem to me to be an urgent call to abandon the narrow framework of development aid in favour of more – and more genuine – international cooperation. Thus, in the context of post-pandemic poverty, the reasons given for the closure of USAID are even more astonishing, especially from a human development perspective. Money was not the only factor.

In 2023, foreign U.S. aid (or official development assistance) accounted for around 1.2% of state spending.²¹ According to some estimates, the military

19 See <https://unstats.un.org/sdgs/report/2025/> and various dashboards such as <https://www.sdgdashboard.org> ; <https://dashboards.sdgindex.org> ; <https://sdgtransformationcenter.org/sdgindex>

20 LeMonde, *Mathilde Gérard*, 17.05.2025: In 2024, nearly 300 million people in 53 countries analyzed were facing a food crisis, warned the latest edition of the 'Global Report on Food Crises': https://www.lemonde.fr/en/health/article/2025/05/17/the-number-of-people-facing-the-risk-of-famine-worldwide-has-doubled-in-a-year_6741362_14.html

21 *Pew Research Center*, What the data says about U.S. foreign aid, 06.02.25, <https://www.pewresearch.org/short-reads/2025/02/06/what-the-data-says-about-us->

budget is between sixteen and twenty times larger.²² Nonetheless, USAID has been labelled as a convenient target for austerity measures. Furthermore, the shutdown was achieved through executive action, enabling the government to bypass any public debate before making the decision. Attack is the best form of defence, especially if you don't want to spend too much time discussing things.

For justification, the U.S. government framed the agency as misaligned with national interests and values. The agency was accused of sponsoring programs that allegedly promoted unfavourable ideologies abroad rather than advancing American priorities.²³ Critics claimed USAID focused on 'left-wing,' 'woke,' or 'radical' agendas — like gender equity, family planning, and climate activism — which they saw as misusing taxpayer money for ideology. In my view, this is astonishing, because there have never been sufficient funds for gender equality, social protection, or health as a right of the poor population in disadvantaged countries. The accusation that development projects were ideologically driven is unfounded, because the proportion of what might be called 'ideological projects' was in fact negligible. The impression is that the baby should be thrown out with the bathtub water.

Some outlets with critical perspectives portrayed USAID as a tool of regime change, government overreach, or covert manipulation.²⁴ In the same way,

foreign-aid/: 'The \$71.9 billion in foreign aid that the government spent in fiscal 2023 works out to 1.2% of that year's total federal outlays, which were more than \$6.1 trillion.' It is interesting to note that '\$8.2 billion of the \$71.9 billion in disbursements in fiscal 2023 (11.4%) was designated as military aid.' — See slightly different figures at: *Sean Seddon* (BBC), What is USAID and why is Trump poised to close it down?, 07.02.25, <https://www.bbc.com/news/articles/clyezjwnx5ko> : 'According to government data, the US spent \$68bn on international aid in 2023. That total is spread across several departments and agencies, but USAID's budget constitutes more than half of it at around \$40bn - that's about 0.6% of total US annual government spending of \$6.75tn.'

22 See for example *SIPRI* fact sheet 2025, Trends in the World Military Expenditure 2024, https://www.sipri.org/sites/default/files/2025-04/2504_fs_milex_2024.pdf

23 *The White House*, At USAID, Waste and Abuse Runs Deep, 03.02.25, <https://www.whitehouse.gov/articles/2025/02/at-usaid-waste-and-abuse-runs-deep/>; see also: *Saranac Hale Spencer*, Sorting out the facts on waste and abuse at USAID, in: FactCheck.org, 08.02.25, <https://www.factcheck.org/2025/02/sorting-out-the-facts-on-waste-and-abuse-at-usaid/>

24 Compare Press Release about the Hearing Wrap Up: America-First Foreign Aid Protects U.S. Interests at Home and Abroad, 27.02.25, <https://oversight.house.gov/release/hearing-wrap-up-america-first-foreign-aid-protects-u-s-interests-at-home-and-abroad/>; see also *Aida*

through the *Department of Government Efficiency* (DOGE), *Elon Musk* has led the agency downsizing. He echoed populist critiques, aggressively framed USAID as ‘beyond repair’ and even labelled it ‘a criminal organization’ and ‘time for it to die’.²⁵ DOGE oversaw the furloughing of thousands of staff, together with the quick removal of independent inspectors general at a series of agencies. – A more neutral stance was to argue that USAID overlapped with the State Department's roles. It was suggested that USAID should be folded under the State Department's structure. This would make it more efficient. Aid should be channelled more strategically and in a more disciplined manner, in line with foreign policy goals rather than broad development agendas.

As a matter of fact, this argument was favoured by the UK some years ago (creation of FCDO by FCO/DFID merger in 2020).²⁶ Somewhat later it was repeated by a number of German politicians, including the political party of the CDU (compare the last coalition negotiations), who have spoken in favour of abolishing the *Federal Ministry for Economic Cooperation and Development*, the BMZ, and subsequently introduced considerable cuts in German ODA (arg. ‘*painful, but necessary*’).²⁷

Unlike in the U.S. scenario where the administration has decided to eliminate the USAID entirely (with no replacement plan), German and European critics mostly push for reforms or redirection in favour of economic cooperation, that is, by replacing large parts of the traditional technical and financial cooperation programs with conditional investment partnerships. There seems to be a growing trend to allege that IDC drains domestic funds for tax fairness, inflation control and welfare priorities at home. In addition, populist and nationalist parties across Europe (e.g., in Hungary, Italy, France, Germany) have pushed back against EU aid frameworks, arguing that they override national sovereignty and

Chavez, USAID Is Not Worth Blindly Defending, in: *The Nation*, 17.02.25, <https://www.thenation.com/article/politics/usaids-trump-musk-history-controversies/>

25 Reuters, <https://www.reuters.com/world/us/musk-give-update-reform-effort-amid-questions-about-his-power-2025-02-03/>

26 The Foreign, Commonwealth and Development Office (FCDO) is the ministry of foreign affairs and a ministerial department of the government of the United Kingdom. The office was created on 2 September 2020 through the merger of the Foreign and Commonwealth Office (FCO) and the Department for International Development (DFID).

27 See an overview of opinions at *Deutscher Bundestag*, Kürzungen im Etat für wirtschaftliche Zusammenarbeit und Entwicklung, 09.07.25, <https://www.bundestag.de/dokumente/textarchiv/2025/kw28-de-entwicklung-1094250>.

impose unwelcome normative agendas — like immigration quotas, LGBTQ+ rights, or climate policies. They often portray aid as part of 'Brussels' political engineering' and cite it as the evidence of 'Brussels overreach'.

The BMZ has responded to the 'changed world order' and the ongoing budget cuts with a new reform plan titled *Shaping The Future Together Globally* that promises to use resources in a more targeted manner, i.e., to save money.²⁸ Actually, it's not a strategy, but rather a strategic reduction. With goals 2 (Peace and Stability) and 3 (Economic Cooperation), it serves German foreign and economic policy, while goal 4 (Strategic Alliances for Global Solutions) emphasizes the strengthening of multilateral systems. Goal 1 (Poverty Reduction) looks like a scaled-down bilateral IDC in favor of the least developed countries (LDC), mainly in Africa. Accordingly, the new BMZ action plan *Strong Partnerships for a successful economy worldwide*²⁹ provides for more dialogue between business and development policy and early involvement of commercial enterprises, removal of structural barriers to facilitate contracts being awarded to German and European companies (e.g. by involving companies in the project development of relevant investments) and the targeted promotion and support for German companies.

The model of Mutual Interest Development Cooperation (MIDC), presented by the Kiel Institute of World Economy, is an illustration of this new kind of setting priorities: with a few exceptions, the criterion of mutual interest can be used to filter out projects that do not appear to promise economic benefit to all parties involved.³⁰ However, apart from the difficulty of defining mutual benefits, this model could be misunderstood as development aid being given as a reward to model pupils who can already demonstrate such promising good governance that the success of a development project is guaranteed. — One could therefore conclude that IDC in its current form will be downsized and dismantled. As *Rachel Glennerster* has put it:

28 See BMZ *Shaping the future together globally*, <https://www.bmz.de/de/ministerium/grundsaetze-ziele/zukunft-zusammen-global-gestalten-282480>

29 See BMZ *Strong Partnerships for a successful economy worldwide*: <https://www.bmz.de/resource/blob/269838/aktionsplan-wirtschaft-entwicklung-20251002-ansicht.pdf>

30 Tobias Heidland, Moritz Schularick, Rainer Thiele, 'Mutual Interest Development Cooperation: Aligning Incentives in a Fragmenting World', Kiel Institute of World Economy, Report January 2026. Download https://www.kielinstitut.de/fileadmin/Dateiverwaltung/IfW-Publications/fis-import/f2f2aacd-478f-4751-9930-41d97af6c4ca-Kiel_Report_5_MIDC_EN.pdf

*'The US has triggered a free rider effect. It has normalized cuts, thereby giving other countries moral permission to do the same.'*³¹

Of course, most European countries would rather distance themselves from the kind of authoritarianism³² that has emerged in the USA. However, the question remains whether it is wise to trade increased European defence readiness for a greatly reduced IDC. Don't we need both? The money saved will not nearly be enough to finance the planned military upgrade. And what would be the political costs of such an approach? Have we as a matter of fact started an irreversible process of getting rid of IDC altogether? Let us have a closer look at the facts and figures of ODA cuts.

5. Substantial ODA-cuts in facts and figures³³

Substantial ODA-cuts have become a common phenomenon all over Europe. In 2024, ODA from DAC member countries declined for the first time in six years, falling by 7.1% in real terms compared to 2023. The total amount of ODA was USD 212.1 billion, which represented 0.33% of the combined gross national income (GNI) of the OECD member countries.³⁴ For comparison, according to data of 2019, Global Foreign Direct Investment (FDI) was roughly nine times higher than the total ODA. However, ODA often triggers additional inflow of capital, for example, but not exclusively, by international financial development

31 Rachel Glennerster *ibidem* (same interview as cited above).

32 Compare Jonathan Freedland, Step back and take it in: the US is entering full authoritarian mode, in: The Guardian, 29.08.25, <https://www.theguardian.com/commentis-free/2025/aug/29/us-authoritarian-donald-trump-national-guard>; Adam Gabbatt, Donald Trump says he is not a dictator. Isn't he? in: Guardian, 01.09.25, <https://www.theguardian.com/us-news/ng-interactive/2025/sep/01/trump-dictator-authoritarianism-politics>

33 Although the following figures have been taken from published documents, it is difficult to obtain clear figures because everything is in motion and there seem to be different ways of counting depending on which budget items are included in ODA or as official defence spending. This is why sometimes different figures are given in the footnotes. The main intention is here to show the orders of magnitude, without any claim to completeness or greater accuracy.

34 OECD on official development assistance, <https://www.oecd.org/en/topics/official-development-assistance-oda.html> (as of August 2025)

cooperation, administered by the multilateral development banks (guarantees, syndicated loans, credit lines etc.).³⁵

In 2024, most countries stayed way below the 0.7% target of ODA as a percentage of national wealth, including USA (0,22%), France (0,48%) and Germany (0,67%).³⁶ As a consequence, the health sector and sub-Saharan Africa bear the biggest cuts from major donors. This has prompted *Bill Gates* to warn that the cuts in fact risk ‘millions of deaths’ by undermining global health programs.³⁷ In addition to this, it is worth mentioning that 13.1% of total ODA has been diverted by the DAC member countries to in-donor refugee costs, effectively re-branding domestic spending as ODA.

In absolute figures for Germany: In 2024, Germany's ODA totalled €30 billion. The BMZ budget shows a continuous decline from around €12.2 billion (2023) to around €10.3 billion (2025), with €9,94 billion envisioned for 2026.³⁸ In 2024 the BMZ was permitted to spend 36% of Germany's ODA funds. The Federal Foreign Office spent 13%. At the same time, 14% went to the EU and 20% was spent on services for refugees in Germany.³⁹

For all DAC member states, the OECD projected a further 9 to 17% drop in ODA in 2025, which would be on top of a 9% drop in 2024.⁴⁰ In fact, these concerns were surpassed by the actual figures, which were reported in April 2026 regarding the reductions made in 2025: it has turned out to be a 23 % decrease over 2024.⁴¹

35 See *OECD* (2023), Private finance mobilised by official development finance interventions, https://www.oecd.org/content/dam/oecd/en/publications/reports/2023/01/private-finance-mobilised-by-official-development-finance-interventions_b2e9927e/c5fb4a6c-en.pdf

36 GNI proportions vs. government spending proportions. ODA:GNI is the standard international metric (0.7% UN target). But when voters think about the “share of the budget” they often mean ODA as a share of government expenditure, which is typically much smaller than the ODA:GNI number – that is why the domestic “taxpayer” narrative can be misleading unless you show both metrics.

37 CNN 9.5.25, <https://edition.cnn.com/2025/05/09/tech/bill-gates-elon-musk-usaid-cuts-criticism>

38 *Deutscher Bundestag*, Weniger Geld für wirtschaftliche Zusammenarbeit und Entwicklung, <https://www.bundestag.de/dokumente/textarchiv/2025/kw39-de-entwicklung-1104112>

39 See BMZ-website: <https://www.bmz.de/de/ministerium/zahlen-fakten/oda-zahlen>

40 *OECD* Policy Brief 26th of June 2025: Cuts in ODA: OECD projections for 2025 and the near term.

41 *OECD* preliminary 2025 ODA data: <https://www.oecd.org/en/data/insights/data-explainers/2026/04/a-historic-decline-in-foreign-aid-preliminary-2025-oda-data.html>

Least developed countries (LDC) were expected to see a 13-25% fall in net bilateral ODA from DAC providers. Anticipated cuts to multilateral organisations triggered a second wave of funding decreases for the poorest countries and vital services. The eleven providers that have announced cuts account for between 62% (WHO/health) and 87% (WFP/food) of funding. The German ‘*Welthungerhilfe*’ summarizes:

‘The massive cuts in ODA have disproportionately affected vulnerable and marginalized groups, which are already most impacted by hunger. ODA funds for food security, balanced nutrition and rural development contribute significantly to reducing hunger and malnutrition.’⁴²

Compared to ODA, how much will be spent for defence? At the 2025 NATO Summit in The Hague, Allies made a commitment to investing 5% of Gross Domestic Product (GDP)⁴³ annually on core defence requirements and defence- and security-related spending by 2035. Every member state will allocate at least 3.5% of GDP annually based on the agreed definition of NATO defence expenditure by 2035 to resource core defence requirements.⁴⁴ Again, in absolute figures and for Germany:⁴⁵

Year	Defense budget (total)	ODA expenditure (development assistance)	Defense as a percentage of GNI	ODA as a percentage of GNI	Ratio of defense to ODA (%)
2023	ca. €58,5 billion	€35,05 billion	approx. 1,13%	0,82%	138%

42 Frauke Bohner, “Kompass 2025”: German Development Policy at a Turning Point, <https://www.welthungerhilfe.org/global-food-journal/rubrics/development-policy-agenda-2030/compass-2025-disruption-as-a-chance-for-reform>

43 GDP is concerned with the value of all goods and services produced within a country. GNI is the total income earned by citizens and residents and includes money received from sources outside a country.

44 https://www.nato.int/cps/en/natohq/topics_49198.htm

45 This table has been created with the help of *Perplexity*. For comparison with France, see *Focus 2030*: France reneges on its official ODA commitments, 30.4/23.07.25, <https://focus2030.org/France-reneges-on-its-Official-Development-Assistance-commitments>: A new ODA cut, ten times more than other budget lines on average.

Year	Defense budget (total)	ODA expenditure (development assistance)	Defense as a percentage of GNI	ODA as a percentage of GNI	Ratio of defense to ODA (%)
2024	ca. €71,0 billion ⁴⁶	€30,0 billion	approx. 1,4%	0,67%	210%
2025	ca. €86,5 billion (prognosis) ⁴⁷	ca. €25–30 billion (prognosis)	approx. 1,7%	approx. 0,65%	>250%

These figures demonstrate a paradigm shift in military deterrence, or rather 'defence readiness', to which many other objectives are currently being sacrificed for the foreseeable future. Taking into account that the Russia-Ukraine war is not over and the war-torn Ukraine will require further and potentially increased international assistance, both civilian and military, it is likely that the ratio of defence to ODA will increase again in 2026.⁴⁸ NATO Secretary General Mark Rutte has justified this unprecedented effort by stating, among other things, '*We live in a more dangerous world.*'⁴⁹

Nevertheless, one might ask: how much more dangerous would this world be without the IDC or equivalent forms of international cooperation, given its increasingly important role in preventing conflicts and mitigating the consequences of disasters? To illustrate the scale of the issue and inform the taxpayer argument, even a substantial cut to the ODA of 25% yields relatively small absolute fiscal savings compared to major budget aggregates:

46 According to NATO reporting, Germany reached €90,06 billion (~2.12% of GDP) including the special fund.

47 According to the Bundestag (Presse/Kurzmeldungen) the defence budget 2026 shall be €108 billion.

48 In 2023, Ukraine received \$37 billion in ODA, equating to 14 per cent of all ODA disbursed in that year. In addition to ODA, military aid allocations to date have totalled \$128 billion. See IEP March 2025, <https://www.visionofhumanity.org/wp-content/uploads/2025/03/Official-Development-Assistance.pdf>

49 See Mark Rutte, NATO press conference 5.6.25 in Brussels: '*And look at the Russian threat. The Chinese built up. We live in a different world. We live in a more dangerous world. It was the German Chief of Defence saying a couple of days ago that by 2029 the Russians might be able to mount a successful attack at NATO. So we are safe today, but if we don't do this, we are not safe in the foreseeable future, and that's why we have to do this.*'

- In the US, a 25% ODA cut of 2019 expenditures saves USD 8.65bn or about 0,195% of total federal outlays (France: 0,2 % of estimated government expenditures, Germany: 0,3 %).
- Thus, in the US, a 25% ODA cut would equal about 1,28% of US defence outlays (on the basis of 2019 figures).

As an interim result, it can be noted that

- ODA is small in absolute terms vs. private external finance or direct foreign investment (DFI) and vs. public spending for defence,
- ODA is a small line in national budgets and an easy political target.

However, ‘small’ does not mean ‘insignificant’. The scheduled ODA cuts will be striking and felt immediately by a significant number of low- and least-income countries. Besides, the weakening of the IDC in the current phase will further undermine the tarnished credibility of the EU.

6. Estimated consequences of substantial ODA cuts

The long-term effects of increasing military budgets while reducing IDC can only be guessed at. However, some direct effects are already clear. These include discussions about what to give up, changing priorities, better ways of working, and new opportunities and partnerships. How does IDC cope with this situation, what do experts say?

First of all, looking at the ‘low income countries’, cuts to ODA can translate directly into significant losses as a proportion of a country’s total economy (GNI).⁵⁰ To cite the *Center for Global Development* (CGD):

‘If USAID’s freeze went on for a year it would leave twenty-three economies facing at least a 1 percent economic shock (sixteen LICs and seven LMICs). Eight of these would face at least a 3 percent blow: South Sudan (9 percent), Somalia (9 percent), Afghanistan (7 percent), Liberia (4 percent), Syria (5 percent), the Central African Republic (4 percent), Yemen (4 percent), and Micronesia (3 percent).’⁵¹

50 Sam Huckstep/Laura Granito/Sara Casadevall Belles/Lee Crawford (CGD), Charting the Fallout of Aid Cuts: Which Countries Will be Hit Hardest, as Multiple Donors Cut Budgets?, 12.06.25, <https://www.cgdev.org/blog/charting-fallout-aid-cuts>

51 CGD: <https://www.cgdev.org/blog/which-countries-are-most-exposed-us-aid-cuts-and-what-other-providers-can-do>.

The *Institute for Economics and Peace* (IEP) adds to this in a newer ODA report:

*'Given the current climate, this report presents economic projections under various scenarios, indicating that ODA could decline by 20 to 40 per cent in the coming years. This would result in reductions of between \$50 and \$115 billion less aid relative to 2023 levels. In such scenarios, sub-Saharan Africa, MENA and Latin America could see cuts of 30-40 per cent in their ODA inflows, exacerbating risks of economic downturns, political instability, and humanitarian crises.'*⁵²

Secondly, as mentioned, ODA leverages much larger finance through guarantees, co-financing with multilateral development banks (MDBs) and possibly also some blended finance. At the same time, ODA-supported IDC is often targeted at public goods such as vaccination, climate adaptation, and stabilisation of least developed and/or fragile states, which are undersupplied by markets. It is precisely this leveraging role that leads many development professionals to argue that even modest cuts would have a disproportionately negative impact, affecting many countries seriously.

Thirdly, although it appears to be difficult to estimate the future costs of current omissions, it is reasonable to assume that savings are now being made in the wrong place. Although budgetary constraints are genuine, many IDC experts agree that cuts to ODA are *'false economies'*.⁵³ While they may offer short-term budget relief, they increase future instability and humanitarian need and erode hard-won development gains. We know that there are multiple dimensions of a reduced IDC:

52 See *Institute for Economics and Peace* (IEP) on Official Development Assistance: IEP March 2025.

53 In summary, while the World Bank Group, EIB, EBRD, and IMF have not adopted the "false economy" label, their analyses echo the same underlying logic: ODA reductions endanger the economic, health, and social progress achieved in many vulnerable regions, and may prove counterproductive both economically and geopolitically in the long run. Their official statements tend to frame the issues in terms of risks to development, growth, and stability rather than explicitly using the terminology of *'false economies.'* Their focus is on the severe impact cuts will have on essential sectors in the poorest and most vulnerable countries, highlighting risks that obviously confirm the concerns expressed by NGOs and charities.

- Humanitarian fallout: ODA cuts threaten critical sectors (health, education, energy access) and risk reversing development gains, particularly among LDCs.
- Conflict scenarios: Cuts are projected to hit conflict-affected and fragile states hardest, raising risks of instability, migration pressures, and global security issues. By destabilizing already fragile regions, ODA reductions can provoke crises that will ultimately cost more to address (in terms of humanitarian aid and conflict resolution).
- Economic consequences: Economists have stressed that ODA-funded research has helped target ‘high-impact, cost-effective interventions’ such as cash transfers, asset grants, and health goods distribution. Cutting aid would erode this progress.
- Environmental damage and climate change: Short-term savings reduce resilience, increasing future emergency response costs — not to mention the loss of biodiversity.

Finally, it is true in many respects to say that ODA is not simply a charity or ‘*philanthropic gift*’.⁵⁴ ODA has always been a modest, often politically motivated, investment in global stability, security, and shared prosperity. Experts state that ODA has been insufficient and will need to be increased and supplemented. The scale of the current ODA cuts calls into question the states’ further commitment to achieving the SDG, and the functioning of IDC as it is now.

7. First reactions and attempts to cope with the situation

Nowadays, the same question will be asked time and again in all kinds of variations: ‘*How can IDC deliver impact with substantially fewer resources?*’ Many try to think positively. For example, as the think tank IDDRI⁵⁵ has suggested:

54 It is interesting to come back to the recommendations of a 2017 report (see footnote 14, ‘Development Aid – Between Illusion and Reality’, saying: ‘*What becomes clear is that foreign aid is not only a philanthropic gift to countries and people in need. There are political considerations involved when money is distributed. ODA may be an instrument for connecting and building relationships with foreign governments, rather than serving its actual purpose. Without further analysis of the share of politically-motivated disbursements, it is unlikely that this spending will be redirected or scaled back. The focus should be on direct humanitarian and development aid to people needing it most.*’

55 IDDRI = L’Institut du développement durable et des relations internationales.

*'The narrative of 'doing more with less' would imply prioritizing areas of high potential, such as those that contribute to strengthening domestic resource mobilization (DRM) and promoting domestic and foreign private investment (for example, through improving the business environment) in African LDCs. Priority should also be given to programmes to support administrative reforms that help strengthen the capacity of governments to guarantee and provide basic public services. This capacity is essential to reduce the vulnerability of LDCs to the unpredictability of external resources.'*⁵⁶

Other IDC organizations have issued publications like, for example, *'Demystifying Africa's dependence on foreign aid'* (Mo Ibrahim Foundation),⁵⁷ or *'Surviving the aid cuts: working politically to deliver value at lower cost'* (ODI).⁵⁸

The Mo Ibrahim Foundation takes a sober look at the figures:

'As development aid from historical donor countries is recently declining, the moment to re-examine the weight of Official Development Assistance (ODA) to Africa has never been more urgent. While the extent of USAID cuts and waning traditional donor commitments seem unexpected, they are signalling a broader trend long in the making. (...) Between 2020 and 2023, due to the Russia-Ukraine conflict, Europe was the only world region to benefit from a substantial ODA increase. (...) Globally, of the 20 countries with the highest net ODA received as share of GNI, eight are African, together comprising 8.6% of the continent's total population. Of these eight, many are countries in acute or with a history of prolonged conflict: Burundi, Central African Republic, Liberia, Mozambique, Niger and Somalia. Unsurprisingly, these states' ODA/GNI ratios are in line with other conflict countries such as Syria and Ukraine, showing that a 'dependence' on ODA is not an African challenge, but often a consequence of civil war and humanitarian support.'

56 IDDRI Ben Katoka/Ahmadou Ali Mbaye, Reduction in official development assistance: what impact and what alternatives for African countries? 22.05.25, <https://www.iddri.org/en/publications-and-events/blog-post/reduction-official-development-assistance-what-impact-and-what>

57 Mo Ibrahim Foundation (07.08.25), <https://mo.ibrahim.foundation/news/2025/demystifying-africas-dependence-foreign-aid>

58 ODI (18.08.25), <https://odi.org/en/insights/surviving-the-aid-cuts-working-politically-to-deliver-value-at-lower-cost/>

And ODI writes in the manner of an expert organisation that has always known better:

'One answer may lie in the more systematic application of 'Thinking and Working Politically' (TWP). For over a decade, advocates for TWP have argued for more politically smart, adaptive and issue-based approaches to development programming. Their argument starts by recognising that most so-called 'development problems' – like the lack of sustainable livelihoods and poor-quality public services – are in fact inherently political. I.e. 'development' implies change to the status quo, which creates winners and losers. To be successful, aid funded-projects need to be savvy about navigating these politics - and be flexible enough to do so. - But here's what's under-emphasised: politically smart approaches are often cheaper compared to traditional interventions. The case for politically smart aid is thus especially worth making in a time of shrinking budgets.'

In my view, all of this is somewhat true. But it does not answer the main question *'How to achieve a meaningful future impact'* in view of the SDG? At least in case that we understand the word *'meaningful'* in view of sustainable interventions, namely the long-term commitment to the common goal of saving lives and working towards a future we can live in, it becomes clear that without coordinated and serious efforts, little progress will be made. A renewed commitment to the SDG will be necessary.

8. Thinking out of the box: is there room for a new international cooperation?

The current situation seems to be complicated, to say the least. Would it be a good idea to think outside the box and go beyond the actual boundaries of the IDC setting? In view of major challenges such as the consequences of the climate crisis, disaster and conflict prevention, it will most likely be necessary to add more financial resources to the existing ODA framework. Besides, it has often been noted that the traditional IDC is not flexible enough, that there should be more locally initiated and controlled projects and more bottom-up approaches.

However, this would require continued and flexible funding, as well as better working methods.⁵⁹

The recurring demand to '*address the root causes of migration*' should lead to better localisation of efforts, with at least 25–30% of funding going to local actors in the form of multi-year grants to strengthen locally led governance and rights. More and better finance for small and medium enterprises, digital and green skills, and social protection that can respond to shocks would prioritise people in people-centred international cooperation. Flawed climate and energy programmes that favour mitigation and bankable deals, as well as ongoing supply-chain reshoring, should be replaced by more sustainable approaches. To halt and reverse biodiversity loss and ecosystem degradation, it seems to be promising to engage in country adaptation and nature investment plans based on local solutions and community control. Evidence shows that local actors deliver better resilience outcomes per dollar (e.g. early warning systems and watershed protection). Scaling this up would combat top-down inefficiency and empower local leadership.

At the same time, the IDC discussion demonstrates the increased importance of global public goods. The OECD addresses this issue in its 2023 report, '*The Role of Development Cooperation in the Provision of Global Public Goods*':

*'Bilateral aid spending on what could be considered as the provision of global public goods by members of the OECD Development Assistance Committee (DAC) has grown from an estimated 37% of average bilateral official development assistance (ODA) in 2007-11 to around 60% in 2017-21, due in large part to growing expenditure related to climate challenges, costs for refugees in donor countries, food security, and infectious diseases. Over the same period, the share of aid financing to meet country-level development priorities – defined by the OECD as country programmable aid (CPA) – has declined to the extent that it now accounts for less than half of total ODA.'*⁶⁰

59 Such as, for example, problem-driven iterative adaptation (PDIA).

60 Elgar, K., Ahmad, Y., Bejraoui, A., Carey, E., Choudhury, M., De Paepe, G. (2023), The role of development co-operation in the provision of global public goods, OECD Development Co-operation Working Papers, No. 111, page 9, https://www.oecd.org/content/dam/oecd/en/publications/reports/2023/05/development-co-operation-and-the-provision-of-global-public-goods_e28bebd8/aff8cba9-en.pdf

Therefore, shouldn't we reconsider the role of IDC and propose new ways of working that explicitly cover the entire scope of the SDGs⁶¹ including the provision and protection of global public goods?⁶² As it has already been suggested, would today's multilateralism become more effective and resilient by focusing on key areas such as rebuilding trust, modernising institutions, creating new impact pathways and engaging the private sector as co-creators?⁶³ Besides, should the BRICS states not be included in a more systematic way than has been done so far in order to achieve the SDGs?⁶⁴ Given that the BRICS states agreed to the SDGs of the UN Agenda 2030 in September 2015, should these states not become co-architects and co-drivers of IDC, taking on equal responsibility for achieving the SDGs?

As stated above, these questions are based on the premise that, while ODA-nurtured IDC is necessary, it is not sufficient for effectively targeting the SDG, because ODA volumes are shrinking. The OECD has stated it already that the current IDC institutions alone cannot guarantee or safeguard all the public goods

61 Compare the Opening remarks by *Amina Mohammed*, United Nations Deputy Secretary-General, at the 2022 Effective Development Co-operation Summit, Geneva. – See also the documents of this summit at: <https://effectivecooperation.org/Summitoutcomedomument>

62 See for example: *NORAD*, Development Cooperation and Global Investments (2021), <https://www.norad.no/contentassets/8b464ebc5e5a418c8579c579b4653c0f/development-cooperation-and-global-investments---whatss-next-for-development-cooperation/> ; *FERDI*, Public Funding for Development and Global Public Goods: How can they be measured (2024), <https://ferdi.fr/dl/df-iKsEA3s7WuF88HuW8Cn2HfuP/ferdi-report-2024-public-funding-for-development-and-global-public-goods-how.pdf> ; *UN Economic and Social Council*, Trends and progress in international development cooperation (03.01.25), <https://docs.un.org/en/E/2025/8> ; *G7G20* (2025), <https://g7g20-documents.org/database/document/2025-g20-south-africa-sherpa-track-development-ministers-ministers-language-chairpersons-statement-emerging-principles-on-fostering-international-cooperation>

63 *Boston Consulting Group*, The Future of International Cooperation in a Fragmented World, <https://web-assets.bcg.com/pdf-src/prod-live/future-international-cooperation-in-fragmented-world.pdf>, page 5.

64 *University of Toronto*: BRICS Information Center, <http://www.brics.utoronto.ca/docs/250706-declaration.html> - BRICS member states themselves, along with some political scientists and international relations experts, advocate for their more systematic inclusion in IDC. This advocacy stems from a desire for a fairer global system and recognition of the developing world's aspirations to play a larger role in shaping international affairs, as highlighted in many BRICS declarations and speeches.

at risk.⁶⁵ The need to invest in the protection of global public goods and resilience mechanisms, such as global health, disaster response, conflict prevention and climate change adaptation and mitigation systems, has been highlighted by the recent COVID-19 pandemic. Future pandemics will most likely even be exacerbated by conflict or climate change.

9. Broader international cooperation for the SDG

Therefore, a new or substantially enhanced international cooperation would commit more UN member states more intensively. It would engage multiple stakeholders, including academia, the health sector, education, trade, and governance. A more comprehensive international cooperation would focus on prevention, resilience and shared benefits. It would be able to produce much more impact beyond the rather narrow donor–recipient transactions. Furthermore, new definitions would explicitly link global public goods, such as health, climate, peace, education, trade, and environmental protection, to government engagement. (By the way, even the international trade is a global public good, as we can currently see from the customs and tariffs disputes unfolding and endangering entire economies). This would motivate states to contribute more than just their ODA quotas. National institutions would play a more important role, operating on equal terms with multilateral institutions. Thus, a definition of this broader international cooperation for the SDG could be:

‘International cooperation involves governments, intergovernmental organisations, private entities, academic institutions and civil society intentionally coordinating resources, knowledge and policy measures. The aim is to promote the SDGs and provide and preserve public goods that are essential for human security, environmental sustainability and equitable economic opportunities. Although ODA remains a core instrument, success requires a unified approach with shared strategic priorities, integrating education, science, health, trade and governance systems. Global problems require global solutions, and local problems may still require more international support so that they will not become international problems.’

65 OECD (2020), Development Co-operation Report 2020: Learning from Crises, Building Resilience, OECD Publishing, Paris, <https://doi.org/10.1787/f6d42aa5-en>, see page 33/34.

Rather than diluting the SDG, the ambition would be to double the efforts to achieve them and counteract the emerging devaluation of international cooperation.⁶⁶ Such an effort would go further than the self-critical review of UN organisations that was announced in March 2025.⁶⁷ In addition to reviewing the implementation of UN mandates and realigning the UN organisations, and beyond increasing efficiency, harmonising funding and introducing a new 'humanitarian compact', UN donor states are increasingly calling for a focus on prevention, resilience and global public goods. This, in turn, requires resident coordinators to be strengthened and empowered to achieve local results. And for that, more core and flexible funding of NGO would have to be provided.

The concept of IDC or 'development aid' would be broadened and redefined as international cooperation involving joint efforts to solve national, international and global issues on a larger scale. This would transcend borders and serve the public interest of the global community – if the term 'global community' is still applicable, it is because this community is, after all, bound by fate.⁶⁸ From a holistic perspective, ODA would be just one, however significant, of many financial sources within a larger ecosystem that would have to build on synergies between a multitude of actors. In case that broader international cooperations replace the narrow, traditional IDC,⁶⁹ it would meet with more goodwill, perhaps even among the most fundamental critics of IDC. People would understand that this is happening in our own interest and as a sustainable investment in our future.

66 See also about future options: *Stephan Klingebiel/Andy Summer*, Four Futures for a Global Development Cooperation System in Flux, IDOS Policy Brief 11/2025 <https://www.idos-research.de/policy-brief/article/four-futures-for-a-global-development-cooperation-system-in-flux/> The first option would be '*Global Solidarity 2.0*'.

67 The Secretary-General's system-wide reform launched in 2025 called *UN80* aims to make the UN more agile, coherent, efficient and responsive. It has three main workstreams: efficiencies & improvements; mandate implementation review; and structural changes & programme realignments, <https://www.un.org/un80-initiative/en> and <https://news.un.org/en/story/2025/06/1164836>.

68 Compare *Jill Campbell-Miller*, Shocked, but not Surprised: The End of USAID in Historical Perspective, 26.02.25, in: Active History, <https://activehistory.ca/blog/2025/02/26/the-end-of-usaid-in-historical-perspective/> - 'The destruction of USAID is representative of much more than the aid itself. It is the clear rejection of a global norm that, however imperfectly, acknowledges the humanity of all.'

69 In fact, in recent years IDC has taken over so many new jobs that this development seems to me to be more logic than saving money by cutting back ODA and IDC altogether.

10. The question of new standards for international cooperation

As a consequence, international projects would have to answer to a number of new criteria. The *OECD DAC evaluation criteria for efficient and sustainable development cooperation*⁷⁰ would have to be amended. Additional control questions could relate to the prevention of conflict and disasters, the achievement of the SDG, and the provision and protection of global public goods. For example:

‘Does the intervention address the needs and priorities of affected people, institutions and global public goods — including early prevention of crises, risk reduction and transboundary harms — and is it aligned with national and regional prevention strategies and global frameworks?’ (relevance)

‘Does the intervention produce durable, system-level change — strengthening institutions, local capacities, social cohesion, ecological resilience, or cross-border governance — and reduce the probability and severity of future shocks?’ (impact)

‘Are benefits likely to endure without continued external support, including the long-term stewardship of global public goods (ecosystems, climate stability, digital commons, cross-border disease control) and the maintenance of institutions that uphold peace, justice and public order?’ (sustainability)

In my view, these questions indicate that good governance would be key in broadening the international cooperation, protecting public goods and achieving the SDG. Good governance would treat international cooperation as a necessary part of government affairs. It would rely on explicit risk and prevention analysis, rigorous evidence in favour of global public goods and a broader multi-stakeholder engagement.

With the help of a new framework and better international harmonisation — hopefully including the BRICS states as co-architects — it would be easier to honour today’s ODA commitments to the LDC and fragile states. This new kind of international cooperation would be able to create better country platforms or ‘compacts’ with unified results frameworks, achieve more pooled financing,

70 OECD website ‘*Evaluation Criteria*’, <https://www.oecd.org/en/topics/sub-issues/development-co-operation-evaluation-and-effectiveness/evaluation-criteria.html>

reach fairer debt solutions and agree on anticipatory financing for disasters such as droughts, cyclones and epidemics. As frequently stated, the existing fragmentation of IDC is one important factor hindering progress, and the risk rules of today's IDC organisations often appear to crowd out fragile contexts. What is more, IDC alone seems to be unable to cope with the complexities of today's regional and global challenges, including digital transformation. In this field, many development aid organisations lack the necessary expertise and financial resources to deliver fully-fledged development assistance. A much broader coalition of forces would be needed for the complex reform agendas of our time.

11. Outlook

The budgetary constraints, exacerbated by the long-term economic consequences of the pandemic and military conflicts in Europe and the Middle East, are occurring at a time when the traditional IDC finds itself in deep crisis. This raises major questions about its future direction, mandate and legitimacy. The assertion that IDC brings little benefit is on a par with climate change denial; it is in the interest of populists, isolationism and arms buildup at any cost.

In view of a better future, the necessary protection of global public goods shows that the abandonment of international solidarity is not an option. The further fragmentation of the institutions engaged in international cooperation would be disastrous. Therefore, multilateralism should be reformed and strengthened.

For the time being, I don't believe that it would be helpful to broadly discuss a normative or ideological crisis, or to suggest that norms and values have generally changed to the worse. I believe that it would be better to focus on changing tasks and new alliances for the SDG. The historic process of drafting, watering down and agreeing the current wording of the SDG has already demonstrated the existence of different perspectives on legal and social values and government responsibilities. A lot of compromise by abandoning dogmas and focusing on the tasks themselves continues to be necessary.

Finally, given the anticipated economic and social consequences of the ongoing ODA reduction — a small but vital part of public spending — particularly in some of the world's most vulnerable countries, it would not be wise to abandon the existing commitments without reforming IDC. While more and more Western politicians are suggesting that it would be possible to get along without

international cooperation or that it would be convenient to reduce it to a minimum, experts and NGOs argue that it would be immoral to provide aid for many years and then withdraw it without a phasing-out or transition period. While a new kind of international cooperation is indeed needed, this should not come at the cost of financial gaps on short notice that will cost human lives.

Even in case that one wants to save money and reduce ODA contributions, it will be crucial to shift the focus from reactive, post-crisis interventions to prevention metrics. This involves prioritising early-warning systems, conflict mediation efforts and fiscal buffers for fragile states. From this perspective, a new, more effective international cooperation involves allocating a maximum of resources to conflict prevention and social welfare to the most vulnerable states. This implies moving away from reactive development aid, which is often insufficient and arrives too late. In my view, a new, preventive international cooperation would lead to a revaluation of good governance. Maybe there will even be a ‘renaissance’ of the law and rule of law ideas, as we are hoping for concerted efforts and sustainable solutions. Accountability and transparency should be understood as empowering factors, not troublesome burdens, by all political systems of the United Nations.

Die Verkörperung der deutsch-aserbaidshanischen Freundschaft

Nach meinem Abschluss an der juristischen Fakultät der Staatlichen Universität Aserbaidschans wurde ich als Ermittler zur Staatsanwaltschaft des Bezirks Gusar versetzt. Gusar liegt im Norden Aserbaidschans, in jenem Teil des Großen Kaukasus, der dem Kaspischen Meer nahe ist. Die Bevölkerung besteht überwiegend aus Lesginen. In einigen Siedlungen leben außerdem Aserbaidshaner sowie in geringer Zahl Bergjuden. Einer der hohen Gipfel des Kaukasus, der Schahdag (4243 m), liegt auf dem Gebiet dieses Bezirks. Das Gebiet grenzt an Russland. Der Samur-Fluss, der als viertgrößter in das Kaspische Meer mündet, trennt diese beiden Länder voneinander.

Kurz vor meiner Versetzung in den Bezirk Gusar teilte mir Süleyman Süleymanov, bei dem ich in der Staatsanwaltschaft mein Praktikum absolviert hatte, mit, dass dort ein enger Freund von ihm lebe, der zugleich Studienkollege des Bezirksstaatsanwalts gewesen sei. Er fügte hinzu, dass er mich persönlich dort hin bringen und dem Kollegium vorstellen werde. So kamen wir nach Gusar. Dort waren wir zu Gast bei Yunis Gurbanov, einer der angesehenen Persönlichkeiten des Bezirks.

Yunis Gurbanov war Veteran des Zweiten Weltkriegs. Nach Kriegsende hatte er eine Frau deutscher Herkunft geheiratet, war mit ihr nach Aserbaidshan gekommen und hatte sich in seinem Heimatbezirk niedergelassen. Er leitete ein großes landwirtschaftliches Unternehmen, das sich mit Viehzucht, Obstbau und Ackerbau befasste. Aus dieser Ehe gingen mehrere Kinder hervor. In Erinnerung geblieben ist mir vor allem sein ältester Sohn Rafig. Bis meine Unterkunft feststand, war ich Gast dieser Familie. Dass die deutsche Hausfrau sowohl Lesginisch als auch Aserbaidshanisch fließend sprach, ihre Gastfreundschaft, ihre

* Dr. Ikram Karimov ist Verdienter Jurist von Aserbaidshan, war Richter und Gerichtspräsident verschiedener Gerichte Aserbaidjans.

Vertrautheit mit unseren Traditionen und ihre Aneignung unserer nationalen Küche hinterließen bei mir einen tiefen Eindruck.

Auch der Bezirksstaatsanwalt Isabala Asgarov war Kriegsteilnehmer. Während des Krieges verlor er infolge einer Minenexplosion den Teil seines rechten Beins unterhalb des Knöchels.

Die Zeit, in der ich als Vorsitzender des Stadtgerichts von Baku tätig war (1987–2000), fiel mit dem Zerfall der Sowjetunion und dem Beginn der Unabhängigkeit zusammen. Diese Periode war zugleich von der Durchführung der Rechts- und Justizreformen geprägt. Im Rahmen von Veranstaltungen, die im Zusammenhang mit Projekten der Deutschen Gesellschaft für Technische Zusammenarbeit (GTZ) zur Vorbereitung und Begleitung der Rechts- und Justizreformen in Aserbaidschan stattfanden, lernte ich Professor Rolf Knieper kennen. Er war Berater des GTZ-Projekts für Privatrecht in den GUS-Staaten und Professor an der Universität Bremen.

Meiner Ansicht nach war Aydın Süleymanlı, der Leiter des GTZ-Projekts zur Rechts- und Justizreform in Aserbaidschan, der engste und loyalste Freund von Professor Rolf Knieper in unserem Land. Später erfuhr ich, dass Aydın der Neffe von Süleyman Süleymanov war, bei dem ich in der Staatsanwaltschaft mein Praktikum absolviert hatte.

Da die Ausarbeitung der Zivilprozessordnung dem Stadtgericht Baku übertragen worden war, setzte sich die Arbeitsgruppe aus Richtern dieses Gerichts zusammen. Die Arbeit an der Kodifikation erstreckte sich über die Jahre 1998 bis 2000. In dieser Zeit arbeitete die Gruppe unter der Leitung von Professor Rolf Knieper gemeinsam mit weiteren aus Deutschland angereisten Rechtswissenschaftlern sehr erfolgreich. Von besonderer Bedeutung waren das Seminar in der Bakuer Siedlung Zuğulba sowie unsere fachlichen Kontakte und der Gedankenaustausch mit Gerichten und Richtern in Bremen. Schließlich wurde unser Entwurf von Experten des Europarats positiv bewertet und im Jahr 2000 von der Nationalen Versammlung (Milli Məclis) der Republik Aserbaidschan als erster Kodex dieser Art verabschiedet.

In dieser Zeit entstand zwischen Professor Rolf Knieper und mir eine enge Freundschaft, die mit der Zeit auch auf unsere Familien übergriff. Der Besuch unserer Arbeitsgruppe im Haus des Professors in Frankfurt am Main und das Kennenlernen seiner Familienangehörigen hinterließen tiefe Spuren in unserem Leben. Er stellte mich und meinen Sohn Kerim dem Bürgermeister von Bremen, Herrn Henning Scherf, vor. Herr Henning Scherf hatte während des Zweiten

Weltkriegs seine Schulbildung im Gefängnis erhalten, da seine Eltern von der SS verhaftet worden waren und er als Kind gemeinsam mit ihnen das Gefängnisleben durchleben musste. Er ist außerdem ein hervorragender Komponist. Während seines Aufenthalts in Aserbaidtschan war er in meinem Haus im wunderschönen Bergdorf Basgal zu Gast, einer wahrhaft malerischen Ecke unseres Landes. Dabei schenkte er mir eine CD mit seinen Kompositionen.

Der Besuch von Herrn Henning Scherf in Aserbaidtschan stand im Zusammenhang mit einem bemerkenswerten Ereignis. Als eine der bitteren Folgen des Zweiten Weltkriegs waren einige Werke Bremer Maler nach Aserbaidtschan gelangt. Diese Gemälde wurden im Kunstmuseum von Baku aufbewahrt. Unser damaliges Staatsoberhaupt Heydar Aliyev überreichte diese Bilder 1999 auf dem Istanbuler Gipfel dem deutschen Bundeskanzler Gerhard Schröder als Geschenk. Am Ende kehrten diese Werke in ihre Heimat – nach Bremen – zurück. Als Bürgermeister der Stadt organisierte Herr Henning Scherf ihre Ausstellung in Bremen und machte der Bevölkerung diesen Schritt Aserbaidtschans bekannt. Er selbst reiste ebenfalls nach Aserbaidtschan, um dem Staatsoberhaupt seinen Dank auszusprechen.

Professor Rolf Knieper ist mir als ein sehr bescheidener, gesprächiger, humorvoller und aufrichtiger Mensch in Erinnerung geblieben. Er ist ein verlässlicher Freund und vergisst seine Weggefährten in Aserbaidtschan nicht. Die Zeit seines Aufenthalts in Aserbaidtschan fiel mit einer Phase zusammen, in der ein Teil unseres Landes unter Okkupation war und in der es Zeltstädte gab, in denen nahezu eine Million Flüchtlinge und Binnenvertriebene untergebracht waren. Gerade durch deutsche Hilfe wurden in 15 Ortschaften Aserbaidtschans mehr als 2900 Zeltlager für 22.000 obdachlos gewordene Menschen geschaffen. Professor Knieper kennt dieses bittere Schicksal unseres Volkes gut. Er wusste auch, welche schwere Spuren die erneute Deportation während des Zweiten Weltkriegs nach Kasachstan, jener Deutschen, die einst aus Baden-Württemberg nach Aserbaidtschan verbannt worden waren, im Schicksal der Deutschen hinterlassen hatte. Ihm war bekannt, wie sorgfältig die zahllosen deutschen Friedhöfe auf aserbaidtschanischem Boden bewahrt werden. Noch heute begegnet man in diesen Regionen Deutschen, die kommen, um dort begrabene Verwandte aufzufinden und ihrer zu gedenken.

Im Sommer 1988 waren der weltbekannte Fußballschiedsrichter Tofiq Bəhramov und der in der damaligen UdSSR anerkannte Fußballschiedsrichter Viktor Abgolz meine Gäste. Im Gespräch erklärte Abgolz, er sei deutscher

Abstammung; seine Familie habe im heutigen Göygöl (Yelenendorf; deutsch: Helenendorf) gelebt. Er wünsche sich, das Grab seines Vaters zu besuchen. Als die Familie nach Kasachstan deportiert wurde, war sein älterer Bruder noch ein Kind. Er selbst wurde bereits in der Verbannung geboren. Wo das Grab seines Vaters lag, wusste er nicht ... Er wollte es nur anhand einiger Merkmale finden, die ihm seine Mutter genannt hatte. Zugleich betonte er, nach den Erzählungen seiner Mutter habe den Deutschen das Leben in Aserbajdschan gefallen; ihre zweite Deportation habe in ihrem Leben schwere Spuren hinterlassen. Seine Mutter habe ihm gute Erinnerungen an die Aserbajdschaner mitgegeben.

Mit Hilfe unserer Freunde, die im Bezirk Göygöl arbeiteten, organisierten wir Abqolts' Reise dorthin. Bei der Suche nach dem Grab seines Vaters und bei seiner Instandsetzung wurde ihm geholfen. Abqolz verließ Aserbajdschan mit schönen Eindrücken.

Ich besitze unzählige Fotos mit Professor Rolf Knieper. Ein Teil davon ist in meinen biografischen Memoiren veröffentlicht worden. Besonders schöne Momente verbinden sich für mich mit jenen Bildern, auf denen die Flaggen Aserbajdschans und Deutschlands nebeneinanderstehen. Am bewegendsten ist für mich, dass ein solches Foto in der Zeitschrift „Stern“ (42/99) veröffentlicht wurde. Auf den Fotos ist deutlich zu erkennen, wie heiter, freundlich und warmherzig der Professor ist.

In manchen Familien Aserbajdschans leben Nachkommen deutscher Herkunft. Sie stammen überwiegend von den Deutschen ab, die im 19. Jahrhundert nach Aserbajdschan deportiert wurden, sowie von jenen, die nach dem Zweiten Weltkrieg Familien mit aserbajdschanischen Soldaten gründeten. Eine solche Familie gehört zur Verwandtschaft meiner Ehefrau. In der Siedlung Mardakan gibt es ein Kino, das den Namen Nizami trägt. Dieser Ort liegt in der Nähe meines Hauses. Die Ehefrau des inzwischen verstorbenen Kamal, der Direktor dieses Kinos gewesen war, war ebenfalls Deutsche. Sein Enkel Elmar erzählt mir bis heute mit Freude schöne Erinnerungen an seine deutsche Großmutter. Ich richte die Aufmerksamkeit deshalb auf jene, die mit deutschen Frauen eine Familie gründeten, weil ich in diesen Familien die Liebe und die Treue der deutschen Frau zu ihrem Ehemann gespürt habe. Die Beständigkeit solcher Ehen ist – unabhängig von der Nationalität – für alle beispielhaft.

Zu Beginn des 19. Jahrhunderts wurde Gedabey, das unter russische Besatzung geraten war, bald zu einem Industriezentrum, in das die Siemens-Brüder investierten und das den Grundstein für den aserbajdschanischen Bergbau und

die Nichteisenmetallurgie im industriellen Maßstab legte. In der zweiten Hälfte des 19. Jahrhunderts wurde Gedabey zu jener Region, in der die erste Eisenbahn Aserbaidshans und gegen Ende des Jahrhunderts das erste Wasserkraftwerk im Südkaukasus in Betrieb genommen wurden ...

Zu allen Zeiten und auch heute stehen die deutsch-aserbaidshanschen Freundschaftsbeziehungen auf einem hohen Entwicklungsniveau und gründen auf gegenseitigem Vertrauen. Diese Beziehungen ließen sich endlos aufzählen. Zweifellos wird auch die heranwachsende Generation ihren Beitrag dazu leisten, diese Freundschaft noch weiter zu vertiefen.

Ich gratuliere meinem Freund Rolf Knieper herzlich zu seinem Jubiläum. Ich wünsche ihm Gesundheit und dass er seiner Familie und dem Kreis seiner Freunde noch lange erhalten bleibt. Rolf Knieper, der einst einer jungen aserbaidshanschen Frau großzügig half, in Italien künstlerische Erfahrungen zu sammeln, und ihr seine Güte nicht versagte, lade ich heute nach Aserbaidshan ein: zu einem Konzert eben jener Frau, die inzwischen den Titel „Volkskünstlerin“ trägt und als berühmte Sängerin weit über die Grenzen des Landes hinaus bekannt ist – Fidan Hacıyeva. Ich lade ihn ein, dort die Arie der Liebe aus Bizets „Carmen“ zu hören, die er so gern hört und verehrt. Zugleich wünsche ich, dass er persönlich sieht und erlebt, wie unsere Landsleute, die einst in Zelten lebten, in den von der Besatzung befreiten Gebieten nun endlich in Frieden leben, aufbauen und gestalten.

Tamar Zarandia*
Nana Mchedlidze**

Possession and Legitimate Expectation: Aspects of the Right to Property in Georgian Law and the ECHR

The right to property occupies a central place in both Georgian civil law and the European Convention on Human Rights (ECHR). In each system, however, the protection of property is mediated through specific doctrinal constructions which determine when a factual situation or a legal position is sufficiently consolidated to warrant legal protection. This article examines two such constructions that are foundational to the contemporary understanding of property, namely, possession under Georgian civil law and “possessions” – including legitimate expectations – under Article 1 of Protocol No. 1 to the Convention. The first part analyses the concept, functions and doctrinal controversies surrounding possession in Georgian law and its role as a bridge between factual control and formal title. The second part traces the evolution of the Strasbourg Court’s notion of possessions, with particular emphasis on legitimate expectation and legal certainty, and assesses how these standards are received, and sometimes misapplied, in Georgian judicial practice. Taken together, the two parts aim to illuminate the points of convergence and tension between domestic

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doctrine and Convention standards, and to indicate the implications for courts applying both frameworks in parallel.

I. The Concept and Significance of Possession in Domestic Law

1. Introduction

Possession is often described as the heart of property law.¹ When fact is paramount, the law bows before it. Possession, in essence, as the factual control over an object, is worthy of legal protection for various reasons. The legal consequences of possession are equally diverse. The first temporary consequence is the presumption of ownership.² The next, a more radical consequence, is that if possession continues for the period prescribed by law and satisfies the statutory requirements, the possessor becomes the owner.³ Thus, the fact of possession, together with the passage of time, becomes a co-generator of the right. The third, even more intriguing consequence, is the right of a bona fide possessor to retain the fruits and benefits of the object even when they were not the owner and must return the object.⁴

The legal consequences of possession always depend on the object of possession, the degree and duration of possession, and the possessor's own attitude towards the fact of possession. It is worth considering why, at first sight, such a simple factual circumstance as physical control results in such serious legal consequences. What determines the protection of possession? Possession is protected in itself, even without examining its legal basis or establishing its relation to the right of ownership.

1.1. Etymology

In Sulkhan-Saba Orbeliani's dictionary, a possessor is defined as "one who exercises will"... "possession is the exercise of one's own will".⁵ Ivane Javakishvili noted that not everything which constituted the object of human possession was of the same nature, and that depending on the rights of a person over such an object, the law recognised several categories, each assigned a term

1 *Malaurie, P., Aynès, L.*, Les Biens, 123.

2 Civil Code of Georgia, Article 158.I.

3 Acquisitive Prescription, Civil Code of Georgia, Articles 165-167.

4 Civil Code of Georgia, Article 163 I(2).

5 *Sulkhan-Saba Orbeliani*, Works, Tbilisi, 1965, 537.

appropriate to its nature.⁶ According to him, in Georgian law of the 9th-12th centuries, the term expressing possession was *koneba* (property).⁷ From the late feudal period, the terms “hold” and “occupy” appear to express possession as factual control over an object.⁸ In French scholarship, three etymologies of possession are proposed. The first is the most classical: *potis* – capable, vested with authority, powerful + *sedere* – seated, settled; indicating a factual relationship. The second is also of interest: *pes* – foot + *sedere* – to settle, meaning held under one’s foot. The third, a relatively recent view, emphasises the importance of intention: *proprius* – one’s own + *sedere* – to take, to consider as one’s own, to adopt as one’s own.⁹

1.2. Discussions During the Drafting of the Georgian Civil Code

The institution of possession, like the entirety of property law, is predominantly influenced by German law in modern Georgian legislation.¹⁰ While during the Soviet period possession was considered merely as one of the elements comprising the content of ownership, the Civil Code established it as a separate legal institution.¹¹ However, pursuant to Article 170 of the Civil Code, the owner may freely possess and use the property. In this definition, possession is referred to as one of the elements of ownership, which indicates a certain lack of consistency on the part of the lawmakers.¹²

2. Possession as Factual Control Over an Object

Unlike the right of ownership, which grants an authorised person a legal entitlement over an object,¹³ possession establishes factual control over it. Factual

6 *Javakhishvili, I.* History of Georgian Law, Volume II, Part II, Tbilisi, 1984, 280.

7 *Ibid.*, 294-295.

8 *Zoidze, B.*, Georgian Property Law, Tbilisi, 2003, 55 et seq; *Zoidze, B.*, Ownership in Ancient Georgian Law, Individual and Constitution, 2004, No. 1, 96-115.

9 *Malaurie, P., Aynès L.*, Les Biens, 123.

10 *Zoidze, B.*, Reception of European Private Law in Georgia, Tbilisi, 2005.

11 *Chanturia, L.*, Fundamental Principles of Property Law in the Future Civil Code of Georgia, Legal Reform in Georgia, Tbilisi, 1994, 241.

12 *Zoidze, B.*, Reception of European Private Law in Georgia, Tbilisi, 2005, 248.

13 *Zarandia, T., Mchedlidze N.*, Protection of the Right to Property Under Georgian Legislation and the European Convention on Human Rights, TalTech Journal of European Studies, Talinn University of Technology, Vol. 14, Issue no. 1, pp. 53-70.

control, which means the acquisition of objects, has existed since the origin of humankind; it was through this means that individuals expressed their will to have an object for themselves.¹⁴ Under Article 155 of the Civil Code, possession of an object arises through the intentional acquisition of factual control over it. Possession may exist over any object. Ownership and possession often coincide, namely when the owner has their object in their own (direct) possession or under their control or authority. The separation of ownership and possession becomes evident, for instance, when the owner leases the object to a third party. In such a case, the latter becomes the possessor of the object for the duration of the lease. Thus, possession is factual control over an object. At the same time, the subjective element must be clearly identifiable, specifically, the intention to possess. It is irrelevant whether the possessor has the right to possess.¹⁵

Possession is exercised when the possibility of exerting influence over the object is realised. It should also be taken into account that a merely temporary interruption in the exercise of factual control over the object does not result in the termination of possession. Possession continues even when direct control cannot be exercised temporarily; for example, when a person is on holiday and not present in their home.¹⁶

3. Possession of Rights and Claims

Possession of a right¹⁷ is the ability to exercise that right. At first glance, possession primarily concerns factual control, dominion and, in this sense, relates only to possession of material objects. This understanding is supported by the legal definition of possession, according to which it arises through the intentional acquisition of factual control over an object.¹⁸ The Civil Code of Georgia also recognises the possibility of possessing a claim or a right. According to the Civil Code of Georgia, “an intangible property benefit consists of those claims and rights that may be transferred to other persons, or which are

14 *Kochashvili, K.*, Attempt to Generalise the Relationship Between Possession and Ownership, Law, Nos. 10-12, 2000, 53.

15 *Wolff, M., Wellenhofer, M.* Sachenrecht, §4, Rn.1.

16 *Idem.*

17 Regarding the concept of a right, see *Ninidze, T.*, Köning's “Legal Archaeology”, Law, 2011, No. 1, 231 *et seq.*

18 Civil Code of Georgia, Article 155.

intended to provide material benefit to their possessor...”¹⁹ Such claims include, for example, the right of subrogation.²⁰

When it comes to the possession of intangible assets, not everything may appear clear. While the intellectual component of possession – animus (intention) – does not encounter any difficulty due to the immaterial nature of rights and claims, the element of corpus (physical control) is controversial. In principle, the traditional definition of corpus presupposes the existence of a body or material object. However, if we return to the essence of the corpus, it lies in the fact of control.²¹ It may be said that, since claims and rights lack corpus, which is one of the elements of possession, possession in such cases is reduced to the outward manifestation of the authorised person. It should also be noted that the Code’s own definition evokes the idea of possession of a material object.²² The modern concept of possession, however, appears to be the result of its gradual expansion.²³

Due to objective circumstances, it is very important to adapt the concept of possession of objects, particularly its corpus element, to the artificial nature of intangible assets and to apply it accordingly. This means that possession is applied on the basis of the economic purpose of such assets. This adaptation implies that the legal acts representing the corpus may be expressed not only through factual control of material objects, but may also be interpreted as factual authority,²⁴ which may exist over intangible goods. This general definition should be applicable to various types of intangible assets.

19 Civil Code of Georgia, Article 152, Also: a claim or a right, which may be assigned or pledged, may be transferred as property by its possessor to another person. Claims and rights are transferred to the new holder in the same condition as they were in the hands of the former possessor (Civil Code of Georgia, Article 198.1.)

20 On the issue of subrogation, see *Motsonelidze, N.*, Subrogation as a Means of Fulfilling the Insurer’s Claim, Doctoral Dissertation, Tbilisi, 2015, http://press.tsu.ge/data/image_db_innova/disertaciebi_samartali/natalia_mowonelidze.pdf (10.11.2025).

21 *Parance, B.* La possession des biens incorporels, L.G.D.J, 2008, 415.

22 Possession arises through the intentional acquisition of factual control over an object (Civil Code of Georgia, Article 155.1).

23 *Beaulieu, M. L.*, Les Cahiers de droit, Analyse de la possession, vol. 4, n° 3, 1961, érudit, 5. <http://www.erudit.org/revue/cd/1961/v4/n3/1004137ar.pdf> (as of 17.01.2013).

24 *Parance, B.* La possession des biens incorporels, L.G.D.J, 2008, 415.

4. Possessor and Owner

In everyday language, the terms owner and possessor are often conflated. “How many cars do you own?” “He owns a remarkable house...” The reason is likely that the shadow of the owner always appears behind the possessor.²⁵ Although everyday speech frequently equates the possessor with the owner, the law very clearly distinguishes between these two categories. Ownership is a legal category, whereas possession is more factual than legal. A possessor is a person who exercises factual control and, accordingly, in some cases may be presumed to be the owner. Furthermore, the person exercising possession is often the owner, though not always. A thief who exercises factual control over a stolen object is also considered a possessor.

Possession, as a factual state of dominion over an object, may exist in the context of an obligation-based legal relationship. For example, a lease is an obligation-based legal relationship, yet it carries certain proprietary effects, because the lessee, who factually possesses the premises on the basis of a lease agreement, is at the same time a lawful possessor and enjoys possessory protection. In this way, their obligation-based lease right acquires a proprietary character.²⁶

5. The Legal Consequences of Possession

The legal consequences of possession depend on the nature, degree and duration of possession itself. Possession entails the exercise of material control over an object, which may be expressed both through its use and through the opportunity to derive economic benefit from it. At the same time, possession is more than mere physical holding; it requires the possessor’s psychological attitude. Under French law, the possessor must have the intention to act as though they were the owner of the object. According to the prevailing view in Georgian law, it is sufficient that possession is exercised for oneself, for one’s own benefit.²⁷ However, for the purpose of acquisitive prescription, the law expressly requires that the person must possess the object “as their own”,²⁸ which seemingly implies the

25 Zoidze, B., *Georgian Property Law*, Tbilisi, 2003, 58.

26 Lakerbaia, T., *The Influence of Property Law on the Law of Obligations*, Seminar Paper, Tbilisi, 2012, 22.

27 Kochashvili, K., *Possession as the Basis for the Presumption of Ownership (A Comparative Legal Study)*, Doctoral Dissertation, Tbilisi, 2012, 81.

28 Civil Code of Georgia, Article 165 I.

necessity of possession under the title of an owner. Thus, possession is not unequivocally a case of mere physical holding.

The law indeed attaches significant legal consequences to possession. Firstly, possession is protected by possessory claims, also referred to as possessory actions. Under Georgian law, a bona fide possessor is entitled both to claim the return of the object from unlawful possession and to request the cessation of unlawful interference (Civil Code, Articles 160–161). If possession continues for a certain period, the possessor becomes the owner, even if they were not the owner at the time they entered into possession (Civil Code, Articles 165–167, acquisitive prescription). A lawful possessor retains the fruits obtained during the period of lawful possession (Civil Code, Article 162). Moreover, even an unauthorised bona fide possessor retains the fruits as their property when they must return the object (Civil Code, Article 163 [1]).

Possession is also important in relation to the *rei vindicatio* claim. Under Article 172(1) of the Civil Code, the owner's claim for the return of the object is directed against the possessor as the addressee of the claim, that is, the defendant. Furthermore, such a claim is legitimate only against the actual possessor, since it is only from them that the object may be physically recovered.

Possession is also significant in the context of the transfer of ownership over movable property, which is carried out under Article 186. The first sentence of Article 186 requires the transfer of the object to the acquirer on the basis of a valid legal title. Transfer of the object means the transfer of possession. Ownership is transferred only when the transferor completely relinquishes possession, and the acquirer acquires it factually.

Other cases of acquiring ownership are also based on possession, specifically possession in the form of indirect possession. In relation to movable property, possession serves both evidentiary and acquisitive functions.

6. Functions of Possession

In everyday language, the concepts of owner and possessor are frequently confused.²⁹ The reason for this is that ownership is presumed behind possession.³⁰ The presumption of ownership in possession provides stronger protection, as by

29 In the notion of the possessor, everyday language often implies the owner: “How many cars do you own?” “He is the possessor of a remarkable house!”

30 Zoidze, B., *Georgian Property Law*, Tbilisi, 2003, 58.

virtue of the presumption, possession is protected regardless of whether it is based on a legal title.³¹ Nevertheless, property law clearly distinguishes between the categories of ownership and possession; ownership is an absolute property right, whereas possession is factual control over an object.

The fact of possession, alongside other legal prerequisites, is a co-generator in the creation of ownership.³² The acquisitive function of possession is evident here. If possession continues for the period prescribed by law and meets the statutory requirements, the possessor becomes the owner. The evidentiary function of possession is reflected in the presumption of ownership set out in Article 158 of the Civil Code.³³ In order to prove their ownership, the owner may refer to their possession.³⁴ In a dispute where the possessor opposes someone who denies the existence of any right behind the possession, the possessor prevails by proving possession alone, without needing to demonstrate any other element. If neither party can prove their right, the dispute is resolved in favour of the possessor.³⁵ It is possible to distinguish many other functions of possession based on their nature and effect.³⁶

Possession also has a protective function. Certain provisions on possession serve to protect it or, in some cases, to restore lost possession. Possession grants the possessor the rights of defence and/or self-help. If a bona fide possessor is deprived of possession against their will, they have a possessory (fact-based) claim to recover possession within three years,³⁷ as it is important that the possessor has the opportunity to use the object.³⁸

A lawful possessor is also afforded protection under tort law. In cases of possession acquired without a legal basis, the object may be reclaimed. There is also

31 Zoidze, B., Commentary on the Civil Code of Georgia. Chanturia, L., Akhvlediani Z., Jorbenadze, S., (eds.), Book II, 1999, Articles 158, 54 *et seq.*

32 Civil Code of Georgia, Articles 165-167. Regarding the acquisition of ownership of immovable property through prescription, see Palavandishvili K., Acquisition of Ownership of Immovable Property by Prescription, Besarion Zoizde 60, 277 *et seq.*

33 Capitant, H., Terré, F., Lequette, Y., Les Grands arrêts de la jurisprudence civile, 2000, 394-395.

34 Chechelashvili, Z., Property Law, 2010, 72 *et seq.*

35 Malaurie, P., Aynès L., Les Biens, 141.

36 Wolf, M., Wellenhofer, M. Sachenrecht, §4, Rn.5.

37 Civil Code of Georgia, Article 160.

38 Weiling, H. J., Sachenrecht, Springer-Verlag, 1994, 59.

protection of possession during enforcement proceedings (in accordance with procedural legal rules).³⁹

Possession has a publicity function. Factual control over an object is visible and noticeable even to an external observer. Accordingly, in the case of movable items, possession also serves a function of publicity; that is, for movable objects, the law uses possession in order to draw attention to the existence of rights. This publicity is expressed in different ways.⁴⁰ Upon the transfer of ownership and the establishment of limited real rights, the law requires the transfer of the object (transfer of possession). Through the transfer of possession, the change in legal status should become clear to other participants in the transaction. A second outcome of the publicity function of possession derives from Article 158 of the Civil Code. Given that possession routinely documents rights over an object, the law draws a conclusion in favour of the possessor, presuming that they are the owner. Thus, the possessor need not prove anything in this process; possession itself constitutes evidence in their favour. The owner may rely on the presumption established in Article 158. The burden of proof rests on the party disputing the possessor's ownership. In the case of bona fide acquisition of ownership from an unauthorised person,⁴¹ possession is the main indicator of the transferee's good faith. In commercial dealings involving movable objects, in circumstances of doubt, possession is also indicative in favour of the transferor. It should be noted that the publicity function attributed to possession in the case of movables is performed, in relation to rights over immovable property, by the public register.

In some cases, possession may also have a security function; for example, in instalment sales. A fiduciary relationship based on retention of legal title is a clear example of the existence of possession for security purposes (*fiducia cum creditore*). In this sense, ownership is understood more as an instrument rather than an objective.⁴²

Trust in the continued existence of possession, in its enduring nature, is also protected (the continuity function of possession). For example, in the case of a change of owner, the possessor is protected to such an extent that they may

39 *Wolf, M., Wellenhofer, M.*, Sachenrecht, §4, Rn.5.

40 *Ibid.*, §4, Rn.6.

41 Civil Code of Georgia, Article 187.

42 *Apers, A., Gruyaert, D.* Retention of title v. immovable incorporation, Property law perspectives IV, Dorothy Gruyaert, Eviline Remaekers and Luka Rostill (eds.), Metro, 2016. 1-18.

assert their entitlements arising from previous possessory relationships (for instance, on the basis of a loan agreement) against the new owner. This is particularly relevant in the lease of residential premises, where the interests of the possessor (i.e., the tenant) are strongly protected in the event of a change of ownership (Civil Code, Article 209). A sale does not terminate the lease. In Georgian law, this is referred to as the tendency of obligation law to move towards property law.⁴³

When a movable object leaves the possession of its owner against their will (loss, theft, or a similar event), as a rule, this makes it impossible for third parties to acquire ownership in good faith. Possession as one's own for a period of 5 to 15 years⁴⁴ may give rise to the acquisition of ownership.

7. Possession and Ownership

In the majority of cases, possession, as the fact of holding an object, and ownership, as the right to full dominion over it, coincide; the owner of the object is simultaneously its possessor. However, there are also instances where the object is not in the hands of the owner and may even be alienated by a non-owner. Any discrepancy between possession and ownership is, as a rule, not long-lasting. This may be described as *pente fatale*, when a given fact persists for a certain period, it tends to evolve into a right.⁴⁵ Several scenarios are possible here. The owner may claim the object and thereby restore it to their possession, or the object may remain with the possessor and, after the expiry of a certain period, possession is transformed into ownership; the fact becomes a right, as the entire legal mechanism is intertwined with time. Time sometimes converts fact into right, sometimes gives rise to a right, and sometimes extinguishes it. Time grants a right to one and takes it away from another.⁴⁶ In many cases, it is a fact that shapes reality and, thanks to time, that fact becomes legal reality.

43 Zoidze, B., *Georgian Property Law*, Tbilisi, 2003, 21.

44 Civil Code of Georgia, Articles 165-167.

45 Malaurie, P., Aynès, L., *Les Biens*, 124.

46 Zarandia, T., *Place and Time Limits for the Performance of Contractual Obligations*, Tbilisi, 2005, 31 et seq.

8. Conclusion

Possession, despite its seemingly simple factual nature, is a concept of profound legal significance. While ownership represents a full legal title and denotes an absolute right over an object, possession occupies a unique and multifaceted position in law. As factual control, it is independent of legal entitlement and may exist even in the absence of a lawful basis. Yet, due to long-standing legal traditions and practical necessity, possession enjoys protection and produces legal consequences that, in certain circumstances, rival those of ownership.

Modern Georgian civil law, heavily influenced by German legal doctrine, recognises possession as a separate legal institution alongside ownership. This marks a departure from the Soviet approach, where possession was considered merely an element of ownership. Georgian law not only defines possession as factual dominion but also attributes to it various functions such as acquisitive, evidentiary, protective, publicity, security and continuity functions. Of particular importance are the presumption of ownership arising from possession and the role of possession in the acquisition of ownership through prescription. Time plays a decisive role; factual circumstances, when sustained over a legally defined period, may evolve into rights.

Possession may exist independently from ownership and often precedes or anticipates it. Its relevance extends beyond tangible objects to encompass certain intangible assets, provided that the concept of corpus is adapted to reflect the artificial and economic nature of such rights and claims. The subjective element – the intention to possess – remains indispensable. Ultimately, possession is neither a purely factual occurrence nor strictly a legal construct. Rather, it constitutes an interface between actuality and normativity.

The law protects possession not only to safeguard factual stability but also to ensure legal certainty and promote economic circulation. The possessor, whether lawful or bona fide, benefits from legal security, including the right to defensive and self-help actions, the ability to retain fruits, and, under certain conditions, the acquisition of ownership. In the context of movable property, possession serves as a functional substitute for documentation, while in the case of immovable property, this role is fulfilled by the public register.

Thus, possession bridges the gap between fact and right. It allows legal systems to respond flexibly to social and economic realities, while maintaining

structural coherence in property law. By elevating factual control to a legally relevant status, the institution of possession ensures that law reflects lived reality. Fact, when supported by time, may become legal truth, demonstrating once again that law, though normative, remains grounded in the concrete realities of human interaction.

II. The Principle of Legitimate Expectation in the Case-Law of the European Court of Human Rights

1. Introduction

Legitimate expectation is a key principle in the European Court of Human Rights' case-law on the protection of property. It operates as a safeguard for individuals and legal entities who rely on assurances, legal frameworks, or established practices that suggest their property rights or related transactions will be respected. The doctrine protects parties from arbitrary or unfair interference that would frustrate their reasonable expectations concerning property interests.

At the same time, the principle also enables individuals and entities to regulate their conduct in accordance with domestic legal requirements so as to create or maintain a legitimate expectation capable of attracting protection under Article 1 of Protocol No. 1. As the Court's case-law consistently demonstrates, a legitimate expectation arises only where domestic law provides a sufficiently established basis for an enforceable claim. This means that individuals must act in conformity with national legal rules, such as completing the required procedural steps, meeting deadlines, providing necessary evidence, or fulfilling registration obligations, in order to bring their claim within the protective scope of Article 1 of Protocol No. 1. Where these domestic conditions are not met, no legitimate expectation can come into existence.

In this way, the doctrine not only shields private parties from arbitrary interference but also guides them in structuring their behaviour with a clear understanding of the conditions under which their expectations will qualify as "possessions". This interplay between reliance and domestic legality gives the doctrine an important systemic function, namely, it provides predictability and enables individuals and entities to organise their affairs in a stable legal environment.

Seen from this perspective, legitimate expectation is closely connected to the broader principle of legal certainty. Strasbourg jurisprudence reinforces legal

certainty by ensuring that domestic law is applied consistently, that applicants may rely on authoritative national rulings, and that the Convention framework does not undermine the stability of the domestic legal system. Legal certainty, therefore, forms the structural backbone of the doctrine; it is what allows expectations to be regarded as legitimate in the first place.

2. Legitimate Expectation and Its Development

In *Marckx v. Belgium*, the Court explained that “by recognising that everyone has the right to the peaceful enjoyment of his possessions, Article 1 (P1-1) is in substance guaranteeing the right of property.”⁴⁷ The English version of the Convention uses the term “possessions” for the protected interest. However, it should not be understood in the limited “technical-juridical” sense.⁴⁸ The parallel French term *biens* makes clear that this notion is not to be construed narrowly and was meant to cover a broad range of proprietary interests.⁴⁹

The defining feature of a possession is that the individual interest has acquired economic value.⁵⁰ For instance, in *De la Cierva y Osorio de Moscoso and Others v. Spain* (dec.), relying on Article 1 of Protocol No. 1, the applicants submitted that the deprivation of the peerages in question violated their right to the peaceful enjoyment of their possessions, in the absence of any reasonable justification and without compensation. They contended that these titles were not purely honorific but also had economic value, reflected, for example, in social advantages and enhanced status. In addition, assets from the family estate, particularly immovable property, would often, by custom, revert to the holder of the peerage.⁵¹ The Court, however, held that Article 1 of Protocol No. 1 applied only to existing possessions and a noble title did not amount to a possession within the meaning of the aforementioned provision. The mere possibility of exploiting such a title commercially, for instance as a brand or trade name,

47 *Marckx v. Belgium*, application no. 6833/74, judgment of the Plenary Court of 13 June 1979, para. 18.

48 *Van Dijk P., Van Hoof F., Van Rijn A., Zwaak L.*, Theory and Practice of the European Convention on Human Rights, 4th ed. Antwerpen, Oxford: Intersentia, 2006, 865.

49 *Harris D.J., O’Boyle M., Bates E.P., Buckley C.M.*, Law of the European Convention on Human Rights, 4th ed., Oxford: Oxford University Press, 2018, 850.

50 *Idem*.

51 *De la Cierva y Osorio de Moscoso and Others v. Spain* (dec.), applications nos. 45726/99, 41127/98, 41503/98 et al., decision of 28 October 1999.

was insufficient to bring it within the scope of Article 1 of Protocol No. 1; the complaint was therefore inadmissible *ratione materiae*.⁵²

In *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, which concerned the seizure and sale of a machine to which a foreign vendor claimed title, for the recovery of tax debt owed by the purchaser, the Court explained that the term “possessions” in Article 1 of Protocol No. 1 has an autonomous meaning and is not confined to ownership of tangible property; other rights and interests that qualify as assets may also be treated as “property rights” and thus as “possessions” for the purposes of this provision.⁵³ In this context, it is therefore irrelevant whether Gasus’s interest in the concrete mixer is classified as ownership or as a security right in rem. In any event, the seizure and sale of the concrete mixer amounted to an interference with the applicant company’s right to the peaceful enjoyment of a possession within the meaning of Article 1 of Protocol No. 1.⁵⁴

The concept thus extends to both immovable and movable property and to tangible and intangible interests, such as shares, bank deposits and intellectual property. It also encompasses contractual rights, including leases, and sums owed under court judgments (often described by the Court as judgment debts). Pension rights fall within this notion of possessions, as do other forms of welfare benefits.⁵⁵

The Court has recognised that, in certain cases, the prospect of obtaining an asset may give rise to a legitimate expectation capable of engaging the safeguards of Article 1 of Protocol No. 1.⁵⁶ For an expectation to qualify as legitimate, it must go beyond a simple hope and rest on a concrete legal basis, such as a

52 *Idem*. See also *Harris D.J., O’Boyle M., Bates E.P., Buckley C.M.*, *Law of the European Convention on Human Rights*, 4th ed., Oxford: Oxford University Press, 2018, 850.

53 *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, application no. 15375/89, judgment of 23 February 1995, para. 53.

54 *Idem*, see also *Van Dijk P., Van Hoof F., Van Rijn A., Zwaak L.*, *Theory and Practice of the European Convention on Human Rights*, 4th ed. Antwerpen, Oxford: Intersentia, 2006, 865-866.

55 *Harris D.J., O’Boyle M., Bates E.P., Buckley C.M.*, *Law of the European Convention on Human Rights*, 4th ed., Oxford: Oxford University Press, 2018, 850.

56 *Pressos Compania Naviera S.A. and Others v. Belgium*, application no. 17849/91, judgment of 20 November 1995, para. 31.

statutory provision or a judicial decision relating to the property interest at issue.⁵⁷

The Court's doctrine of legitimate expectation under Article 1 of Protocol No. 1 did not emerge fully formed. Its development can be traced through a series of cases where the Court first recognised economic interests as possessions before gradually extending protection to situations involving reliance on domestic decisions.

The starting point is *Tre Traktörer AB v. Sweden* (1989), where the Court accepted that the economic interests associated with operating a business – in that case, a restaurant licence essential for the continuation of operations – constituted possessions within the meaning of Article 1 of Protocol No. 1. The withdrawal of the licence directly affected the goodwill and value of the business, and thus interfered with the peaceful enjoyment of the company's possessions.⁵⁸ At this early stage, the Court's focus was essentially on material economic interests connected to an already existing asset.

The logic was reaffirmed in *Fredin v. Sweden* (no. 1) (1991), where the revocation of a gravel extraction permit was treated as an interference with the applicants' possessions, specifically the economic value of exploiting the gravel pit.⁵⁹ The Court again emphasised the economic consequences of losing a previously granted right. These early cases thus anchored Article 1 of Protocol No. 1 firmly in tangible economic expectations linked to vested rights.

A more significant shift occurred in 1991 with *Pine Valley Developments Ltd v. Ireland*, where the Court moved beyond economic value alone and recognised, for the first time, that a legitimate expectation based on a lawful administrative act could itself constitute a possession. The applicants had relied on a planning permission recorded in a public register, which they were entitled to assume was valid. Even though the Supreme Court later ruled that the permission was void *ab initio*, the Strasbourg Court held that, until that ruling, the applicants enjoyed a legitimate expectation of being able to carry out their development.⁶⁰ This expectation, grounded in reliance on an official and apparently

57 *Kopecký v. Slovakia* [GC], application no. 44912/98, judgment of the Grand Chamber of 28 September 2004, paras. 49-50.

58 *Tre Traktörer AB v. Sweden*, application no. 10873/84, judgment of 7 July 1989, para. 53.

59 *Fredin v. Sweden* (no. 1), application no. 12033/86, judgment of 18 February 1991, para. 40.

60 *Pine Valley Developments Ltd v. Ireland*, application no. 12742/87, judgment of 29 November 1991, para. 51.

valid administrative decision, was considered “a component part of the property in question”.⁶¹

In reaching this conclusion, the Court placed particular emphasis on the domestic legal context and the manner in which the relevant provisions had been interpreted by the national authorities. The judgment illustrates the Court’s early articulation of what would later become a central element of the legitimate expectation doctrine, namely, the existence and scope of such an expectation must be assessed primarily by reference to domestic law, as construed by the competent national courts. The Court carefully examined the Irish legislative framework, specifically section 6 of the 1982 Act, and gave decisive weight to the views expressed by members of the Supreme Court in the domestic proceedings, as well as to the position taken by the planning authorities and the State itself.⁶² While the judgment does not explicitly refer to the principle of legal certainty, the Court’s reliance on a permission duly recorded in a public register and on authoritative pronouncements of the highest national court reflects a concern for stability, predictability and the protection of reliance interests. The Court relies on certainty, predictability and stability of legal acts, which are foundational elements of legal certainty. This approach foreshadows the later Grand Chamber case-law, in which legitimate expectation is recognised only where the applicant’s claim has a clear and legally grounded basis in domestic law and where the individual’s reliance on that legal framework is objectively justified.

Thus, in *Pine Valley Developments Ltd v. Ireland*, the Court expanded the notion of possessions from existing economic rights (*Tre Traktörer, Fredin*) to legitimate expectations of acquiring or realising such rights, provided these expectations were sufficiently established in domestic law. This marked the beginning of a doctrinal trajectory that later culminated in the refined test articulated in *Kopecký, Gratzinger, Béláné Nagy*, and subsequent case-law.

A second and distinct aspect of the doctrine of legitimate expectation was articulated in *Pressos Compania Naviera S.A. and Others v. Belgium*, where the central question was whether the applicants’ tort claims could qualify as possessions under Article 1 of Protocol No. 1.⁶³ The Government argued that the claims were not possessions because none had yet been recognised by a final judicial

61 *Idem*.

62 *Ibid.*, para. 52 *et seq.*

63 *Pressos Compania Naviera S.A. and Others v. Belgium*, application no. 17849/91, judgment of 20 November 1995.

decision, which, in their view, was necessary to render them certain, enforceable and capable of protection. They further contended that, given the unexpected and controversial position later taken by the Court of Cassation, the applicants could not rely on any legitimate expectation of receiving compensation, warning against confusing a right to property with a right of property. The Commission essentially endorsed this position. The applicants, however, pointed out that under ordinary Belgian tort law, a claim came into existence at the moment damage occurred; courts merely confirmed its existence and fixed the amount. The Court agreed, noting that it could rely on domestic law as far as it was compatible with the object and purpose of Article 1 of Protocol No. 1. Under Belgian tort rules, such claims arose automatically upon the occurrence of damage and therefore constituted assets amounting to possessions. On that basis, and in light of consistent case-law of the Belgian Court of Cassation, the Court held that the applicants could legitimately expect their claims to be determined under the ordinary law of tort. *Pressos* thus developed a second dimension of legitimate expectation; one that protects not the expectation of acquiring new property, but the expectation that an existing claim – already qualifying as a possession – will be adjudicated under the legal framework in force at the time it arose. This reliance-based expectation concerns the stability of the applicable legal regime and safeguards individuals against retroactive measures that fundamentally alter the treatment of vested claims.⁶⁴

In later cases, the Court built on *Pressos* by consistently treating legitimate expectation in this second sense as relating to the legal regime governing an already existing asset, rather than as a free-standing property right. In *Draon v. France*⁶⁵ and *Maurice v. France*,⁶⁶ the applicants had acquired, under the then-applicable domestic legislation, vested claims to full compensation in respect of wrongful prenatal diagnosis. Subsequent retrospective legislative amendments fundamentally redefined the scope and quantum of those claims. The Grand Chamber accepted that, once the damage had occurred and the statutory conditions were met, the applicants possessed assets in the form of compensation claims and a legitimate expectation that those claims would be determined

64 *Idem*.

65 *Draon v. France*, [GC], application no. 1513/03, judgment of the Grand Chamber of 21 June 2006, para. 70.

66 [GC], application no. 11810/03, judgment of the Grand Chamber of 6 October 2005, paras. 67-69.

under the legal framework in force at the material time, rather than being retroactively curtailed. Similarly, in *N.M. and Others v. France*,⁶⁷ the Court examined legislative changes affecting compensation for contaminated blood and again proceeded on the basis that legitimate expectation concerned the continuity and foreseeability of the domestic rules applicable to an established claim. In all these cases, the expectation itself did not constitute the possession. It is attached to the manner in which a pre-existing asset, a vested compensation claim, would be treated under domestic law, and it served to reinforce the Court's scrutiny of retroactive or abrupt legislative interventions under Article 1 of Protocol No. 1.

Similarly, in *Uzan and Others v. Turkey*, the Court held that the minor applicants enjoyed a legitimate expectation which fell within the notion of possessions, since the domestic courts had expressly recognised their legal capacity to acquire specific rights by way of inheritance and donation.⁶⁸ In other words, their position was not that of mere potential heirs with a factual hope of receiving assets at some future point, but of persons whose entitlement was already sufficiently anchored in domestic law and confirmed by judicial decisions. The legitimate expectation in *Uzan* thus stemmed from a combination of their legally recognised status and the concrete rights attributed to them under national inheritance rules, so that any subsequent measure affecting those rights engaged Article 1 of Protocol No. 1.

The same logic was applied, in a more structured statutory setting, in *Jarre v. France*.⁶⁹ That case concerned the immediate impact of a Constitutional Council decision repealing a provision which had created a specific compensatory mechanism, namely, persons who were heirs under French law, but who were excluded from succession under the foreign law governing the estate, could nevertheless claim a share of the French assets. The Court found that, at the time of their father's death and when they lodged their claim, the applicants satisfied all four conditions laid down in that provision. Their situation, therefore, went beyond a mere hope of benefiting from a favourable legal change; they already held a concrete and legally defined claim under a still-operative statute. On that

67 *N.M. and Others v. France*, application no. 66328/14, judgment of 3 February 2022, paras. 49-50.

68 *Uzan and Others v. Turkey*, applications nos. 19620/05, 41487/05, 17613/08 and 19316/08, judgment of 5 March 2019, para. 193.

69 *Jarre v. France*, application no. 14157/18, judgment of 15 February 2024.

basis, the Court considered that they had a legitimate expectation which rose to the level of possessions for the purposes of Article 1 of Protocol No. 1.⁷⁰

Both *Uzan* and *Jarre* thus illustrate the same development of the doctrine as in *Pressos*, namely, where domestic law and judicial practice confer a sufficiently established inheritance or compensatory claim, the expectation that this claim will be honoured under the existing legal framework is itself protected as part of the applicant's proprietary interest.

3. Legitimate Expectation in the Context of Social Security Entitlements

The Convention, as drafted in 1950, was premised on a distinction between civil and political rights on the one hand and economic, social and cultural rights on the other. The rights guaranteed by the Convention and by Protocol No. 1, adopted in 1952, were clearly confined to civil and political guarantees, while the 1961 European Social Charter introduced a catalogue of economic and social rights. The *travaux préparatoires* of the Social Charter further show that it was conceived as a counterpart to the Convention in the social domain.⁷¹ Nevertheless, the Court has recognised that, although the Convention primarily guarantees civil and political rights, many of these rights carry social or economic implications, and its interpretation may legitimately extend into that domain, as there is no watertight division between the two spheres. Building on this understanding, the Court has developed its approach under Article 1 of Protocol No. 1, especially in the field of social security, taking into account the practical organisation of welfare systems across Council of Europe Member States, informed in particular by the principles of the European Social Charter.⁷²

The subject matter of the possessions must be capable of being clearly identified in relation to the claims that rest on them. In the context of pension and social-security schemes, the Commission has therefore drawn a distinction between, on the one hand, systems in which the payment of contributions builds up an individual share in a fund – a share whose value can be calculated at any given time – and, on the other hand, schemes where the link between contributions and subsequent benefits is much looser, so that the object of the

⁷⁰ *Ibid.*, paras. 48–49.

⁷¹ *Beeler v. Switzerland* [GC], application no. 78630/12, judgment of the Grand Chamber of 11 October 2022, para. 50.

⁷² *Ibid.*, para. 51.

possessions is less clearly defined. The former type of scheme is property-generating, and entitlements to benefits under it are treated as possessions within the meaning of Article 1. By contrast, the latter type is based on the principle of solidarity, expressing the responsibility of the community as a whole, and it does not give the individual any claim to a specific portion of the fund. It creates only an expectation, the amount of which depends on the conditions obtaining when the pension is actually paid. These pensions rest on collective security and are not financed by contributions that can be individually attributed. Even so, such systems may confer a right to certain benefits for as long as they remain in force and the person concerned satisfies the relevant conditions.⁷³

Under the case-law, in matters of broad economic or social regulation, States typically enjoy an extensive margin of appreciation under the Convention.⁷⁴ Owing to their direct insight into national circumstances and priorities, domestic authorities are presumed to be better equipped than the Strasbourg Court to assess the public interest in such domains. As a result, the Court will ordinarily refrain from interfering with legislative policy unless it is “manifestly without reasonable foundation.”⁷⁵ This means that measures adopted on economic or social grounds must still be applied without discrimination and must satisfy the requirement of proportionality.⁷⁶ This general principle extends to pension matters. In that field, the Court has typically confined its deference to legislative policy choices that are not “manifestly without reasonable foundation” to situations in which the complained-of difference in treatment stems from a transitional measure introduced as part of a broader scheme aimed at remedying an existing inequality.⁷⁷ In all events, regardless of the breadth of the State’s margin

73 *Van Dijk P., Van Hoof F., Van Rijn A., Zwaak L.*, Theory and Practice of the European Convention on Human Rights, 4th ed. Antwerpen, Oxford: Intersentia, 2006, 867.

74 *P.C. v. Ireland*, no. 26922/19, application no. 26922/19, judgment of 1 September 2022, para. 72.

75 *UAB Profarma and UAB Bona Diagnosis v. Lithuania*, application nos. 46264/22 and 50184/22, judgment of the Grand Chamber of 7 January 2025, para. 227.

76 *Fábián v. Hungary* [GC], application no. 78117/13, judgment of the Grand Chamber of 5 September 2017, para. 115.

77 See, inter alia, *Stec and Others v. the United Kingdom* [GC], applications nos. 65731/01 and 65900/01, judgment of the Grand Chamber of 12 April 2006, paras. 61-66 and *British Gurkha Welfare Society and Others*, application no. 44818/11, judgment of 15 September 2016, para. 81.

of appreciation, the ultimate determination of whether the Convention has been respected lies with the Court.⁷⁸

In the great majority of cases concerning alleged discrimination in access to social welfare benefits, the Court has centred its examination on Article 1 of Protocol No. 1 rather than on Article 8.⁷⁹ It has held, in particular, that the payment of contributions into a pension fund or social-security scheme may, in certain circumstances, generate property rights within the meaning of Article 1 of Protocol No. 1.⁸⁰ For instance, the payment of contributions into a pension fund may, in certain circumstances, generate a property right, and that right may be affected by the manner in which the fund is allocated.⁸¹ The Court has also held that rights deriving from contributions to social-insurance systems constitute pecuniary interests within the meaning of Article 1 of Protocol No. 1.⁸² However, even if that provision protects the entitlements of insured persons who have paid into a social-insurance scheme, it cannot be read as guaranteeing a pension of a fixed or specific amount.⁸³ A key consideration under Article 1 of Protocol No. 1 is whether the applicant's entitlement to benefits under the relevant social-insurance scheme has been interfered with in a manner that impairs the very essence of their pension rights.⁸⁴

78 *Jurčić v. Croatia*, application no. 54711/15, judgment of 4 February 2021, para. 64.

79 Only a limited number of cases concerning social-welfare benefits – that is, payments drawn from public funds, including social-insurance schemes – have been examined by the Court under Article 8 taken alone (see, for example, *La Parola and Others v. Italy* (dec.), application no. 39712/98 decision of 30 November 2000; *McDonald v. the United Kingdom*, application no. 4241/12, judgment of 20 May 2014; *Belli and Arquier Martinez v. Switzerland*, application no. 65550/13, judgment of 11 December 2018). The Court has not taken these cases to suggest that Article 8, read on its own, imposes positive obligations on States in the field of social security (*Beeler v. Switzerland* [GC], application no. 78630/12, judgment of the Grand Chamber of 11 October 2022, para. 60).

80 In *Şerife Yiğit v. Turkey* [GC], the Court examined the State's refusal to recognise the applicant's religious marriage, and its impact on her inheritance rights, under Article 8 of the Convention, while the financial aspect of her complaint, namely, the refusal to grant a survivor's pension and social-security benefits, was assessed under Article 14 taken together with Article 1 of Protocol No. 1 (application no. 3976/05, judgment of the Grand Chamber of 2 November 2010).

81 *Bellet, Huertas and Vialatte v. France* (dec.), applications nos. 40832/98, 40833/98 and 40906/98, decision of 27 April 1999

82 *Gaygusuz v. Austria*, application no. 17371/90, judgment of 16 September 1996, paras. 39-41.

83 *Skorkiewicz v. Poland* (dec.), application no. 39860/98, decision of 1 June 1999.

84 *Domalewski v. Poland* (dec.), application no. 34610/97, decision of 15 June 1999.

As regards the context of Article 14 taken together with Article 1 of Protocol No. 1, the Court has underlined that its primary task is to examine whether the impugned features of the scheme comply with Article 14, rather than to assess the individual circumstances of the applicants or of others who may be affected by the legislation. Its function is to determine the overarching question of principle, namely, whether the legislation in issue unlawfully distinguishes between individuals who are in comparable situations.⁸⁵

In its decision in *Stec and Others*, the Court found that, for the purposes of determining the applicability of Article 1 of Protocol No. 1, there was no longer any justification for distinguishing between contributory and non-contributory benefits.⁸⁶ It also stressed that the principles generally governing Article 1 of Protocol No. 1 apply equally in the field of welfare benefits. The Article does not limit a Contracting State's discretion to decide whether to establish a social-security system, or to determine the form or level of benefits provided under such a scheme. However, once domestic legislation grants an enforceable entitlement to a welfare benefit or pension, that entitlement constitutes a proprietary interest within the meaning of Article 1 of Protocol No. 1 for those who meet the statutory conditions, and such legislation must comply with Article 14.⁸⁷

Judge Borrego Borrego agreed, but for different reasons, with the Grand Chamber's conclusion of no violation in *Stec and Others*, which concerned differences in the entitlement for men and women to certain industrial injuries social security benefits.⁸⁸ In his view, the applicants did not possess possessions within the meaning of Article 1 of Protocol No. 1, which is a prerequisite for examining any interference with property rights. Referring to the Court's case-law, he noted that possessions may include existing property or claims giving rise to a legitimate expectation of acquiring property. Traditionally, however, the Convention bodies had distinguished between contributory and non-contributory benefits, the latter falling outside the scope of Article 1 of Protocol No. 1.

85 *Carson and Others v. the United Kingdom* [GC], application no. 42184/05 16/03/2010 judgment of the Grand Chamber of 16 March 2010, para. 62 and *British Gurkha Welfare Society and Others*, application no. 44818/11, judgment of 15 September 2016, para. 63.

86 *Stec and Others v. the United Kingdom* [GC] (dec.), applications nos. 65731/01 and 65900/01, decision of the Grand Chamber of 6 July 2005, paras. 52-53.

87 *Ibid.*, paras. 53-54.

88 *Stec and Others v. the United Kingdom* [GC], applications nos. 65731/01 and 65900/01, judgment of the Grand Chamber of 12 April 2006, concurring opinion of Judge Borrego Borrego.

Judge Borrego Borrego expressed concern that the Court's admissibility decision in the case widened the notion of possessions by treating all enforceable welfare benefits, whether based on contributions or not, as proprietary interests. This, he argued, effectively transformed all individuals, including those dependent solely on social welfare, into property holders protected under Article 1 of Protocol No. 1, thereby stretching the classical concept of property far beyond its original contours.

Judge Borrego Borrego's concurring opinion in *Stec* expressed a significant concern about the Court's expanding interpretation of possessions, particularly the shift from a traditional and property-centred understanding toward the inclusion of all enforceable welfare entitlements. He argued that, by treating both contributory and non-contributory benefits as proprietary interests, the Court had effectively transformed every recipient of social welfare, regardless of contribution history, into a property holder protected under Article 1 of Protocol No. 1, thereby stretching the classical concept of property far beyond its original contours. In his view, this expansion stemmed from the strong emphasis placed on non-discrimination under Article 14, which, when read together with Article 1 of Protocol No. 1, risked overshadowing the property dimension and importing, through judicial interpretation, a form of general non-discrimination protection akin to that contained in Protocol No. 12, notwithstanding the respondent State's decision not to ratify that instrument. By contrast, Borrego highlighted *Kopecký v. Slovakia* as an example of a much more traditional and legally disciplined approach, where the absence of a demonstrable factual prerequisite (the location of confiscated items) was sufficient to exclude a claim from the scope of Article 1 of Protocol No. 1. His critique underscored the doctrinal uncertainty generated by *Stec*, especially the blurring of the threshold for identifying a protected proprietary interest.⁸⁹

4. Legitimate Expectation and Legal Certainty

It was precisely this doctrinal indeterminacy that the Grand Chamber sought to resolve in *Béláné Nagy v. Hungary* [GC].⁹⁰ The Grand Chamber systematically clarified the contours of legitimate expectation, rejecting the idea that a mere

⁸⁹ *Idem*.

⁹⁰ *Béláné Nagy v. Hungary* [GC], application no. 53080/13, judgment of the Grand Chamber of 13 December 2016.

arguable claim or a disputed interpretation of domestic law could suffice. Instead, it reaffirmed that a legitimate expectation arises only where the applicant holds an *assertable right* grounded in domestic law that amounts to a sufficiently established, substantive proprietary interest, thereby returning to the principle articulated in *Kopecký*. The Court distilled its heterogeneous formulations into a clear requirement as follows. An expectation is protected only where reliance is reasonably justified by a legal act or consistent judicial practice, and not where entitlement depends on unsettled or contested interpretations of domestic law.⁹¹

Thus, where an applicant does not meet, or no longer meets, the statutory conditions for entitlement to a particular benefit or pension, and those conditions were amended before the applicant became eligible, no issue arises under Article 1 of Protocol No. 1. By contrast, where the suspension or reduction of a pension stems not from any change in the applicant's personal situation but from amendments to the law or its application, this may amount to an interference with the rights protected by Article 1 of Protocol No. 1. Accordingly, when legislative conditions governing entitlement are altered and the person concerned consequently ceases to satisfy them in full, the individual circumstances – including the nature of the changes introduced – must be examined with care in order to assess whether the applicant nonetheless retained a sufficiently established substantive proprietary interest under domestic law.⁹²

This refinement was subsequently confirmed in *Beeler v. Switzerland [GC]*, where the Grand Chamber emphasised that the case-law had reached a level of stability enabling it to articulate a precise threshold for applicability, namely, Article 1 of Protocol No. 1 protects only existing possessions and, in limited circumstances, legitimate expectations that meet the standard of a sufficiently established proprietary interest under national law. In this way, the Court addressed the uncertainty highlighted in *Stec*, re-anchoring legitimate expectation in principles of legal certainty and the rule of law.⁹³

At the same time, the Court has acknowledged that legal certainty may be put at risk where domestic courts change their practice, and has therefore

91 Ibid., paras. 75-79.

92 *Bélné Nagy v. Hungary [GC]*, application no. 53080/13, judgment of the Grand Chamber of 13 December 2016, paras. 86-89.

93 *Beeler v. Switzerland [GC]*, application no. 78630/12, judgment of the Grand Chamber of 11 October 2022, paras. 57-58.

examined whether, despite such developments, an applicant could still rely on a sufficiently clear and consistent line of authority. In *Aliyeva and Others v. Azerbaijan*, the Court accepted that, notwithstanding the Supreme Court's later departure from its earlier approach in comparable expropriation cases, the applicants' claim to statutory additional compensation rested on a sufficiently clear and consistent line of Supreme Court case-law.⁹⁴ Their entitlement was therefore sufficiently established in domestic law to amount to a legitimate expectation and thus a possession for the purposes of Article 1 of Protocol No. 1.⁹⁵ However, no legitimate expectation arises "where there is a dispute as to the correct interpretation and application of domestic law", and the applicant's arguments are ultimately rejected by the national courts.⁹⁶

In situations where a restitution claim is conditional from the outset, its satisfaction depends on the outcome of judicial proceedings, its compliance with the statutory requirements is genuinely in doubt, and later resolved against the applicant by the domestic courts, the claim cannot be regarded as having been sufficiently established to qualify as an asset for the purposes of Article 1 of Protocol No. 1. Put differently, where a conditional claim lacks a clear and settled basis in the statutory framework or domestic case-law in the applicant's favour, the Court will not treat it as a sufficiently established asset capable of generating a legitimate expectation under Article 1 of Protocol No. 1.⁹⁷

In *Anheuser-Busch Inc. v. Portugal*, the applicant company sought the registration of the Budweiser trademark but ultimately lost before the Supreme Court, which held that a prior appellation of origin protected under a bilateral treaty prevailed and invalidated the registration. The Grand Chamber accepted that a trademark application may, in principle, qualify as a possession, as it generates proprietary interests and a right to have the application examined under the applicable legislation. However, the case essentially concerned the interpretation of complex domestic and international norms in a genuine legal dispute between two private parties. The Court reiterated that it will not substitute its own reading of domestic law for that of the national courts in the absence of

94 *Aliyeva and Others v. Azerbaijan*, applications nos. 66249/16, 66271/16 *et al.* judgment of 21 September 2021.

95 *Ibid.*, paras. 109–111.

96 *Kopecký v. Slovakia* [GC], application no. 44912/98, judgment of the Grand Chamber of 28 September 2004, para. 50.

97 *Ibid.*, para. 58; *Milasinović v. Croatia* (dec.), application no. 26659/08, decision of 1 July 2010.

arbitrariness or manifest unreasonableness. As there was no retroactive legislative interference and no indication of arbitrariness in the Supreme Court's reliance on the bilateral agreement, the applicant could not claim a Convention-protected legitimate expectation that its trademark would be registered or maintained, and no interference with its possessions was found.⁹⁸

A similar emphasis on the objective legal basis and foreseeability of the applicant's position can be seen in *The J. Paul Getty Trust and Others v. Italy*, where the Court accepted that the Trust's long-standing possession of the bronze statue gave rise to a proprietary interest amounting to a possession, but nonetheless held that, in view of the inalienable status of cultural objects under Italian heritage law, the absence of any limitation period for measures aimed at recovering unlawfully exported cultural property, the continuous efforts of the Italian authorities to reclaim the statue, and the Trust's negligent failure to investigate its provenance, the Trust could not be said to have developed a legitimate expectation either that it would be able to retain the statue or that it would receive compensation.

Subsequent legislative amendments of the relevant provision do not, in themselves, demonstrate that the previous legal framework was defective or that applicants previously enjoyed a Convention-protected expectation. In *Galakvoščius v. Lithuania*, the Court held that later changes to the election deposit rules did not retroactively create a legitimate expectation to a refund in favour of an applicant whose deposit had been forfeited in accordance with the law in force at the material time.⁹⁹

The Court also rejects attempts to ground a legitimate expectation solely in favourable political declarations by members of the executive,¹⁰⁰ in a programmatic legislative statement referring to future legislation that was never enacted,¹⁰¹ or in a domestic scheme that made the grant of financial assistance expressly conditional on the availability of limited emergency funds without laying

98 *Anheuser-Busch Inc. v. Portugal* [GC], application no. 73049/01, judgment of the Grand Chamber of 11 January 2007, para. 65.

99 *Galakvoščius v. Lithuania* (dec.), application no. 11398/18, decision of 7 July 2020, paras. 42, 59-60. Registry of the European Court of Human Rights, Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights, Protection of Property, Updated on 31 August 2025, 10.

100 *Bata v. Czech Republic* (dec.), application no. 43775/05, decision of 24 June 2008, para. 77.

101 *Zamoyski-Brisson v. Poland* (dec.), applications nos. 19875/13, 19906/13 et al. decision of 12 September 2017, para. 78.

down any clear criteria on the amount or distribution of such aid.¹⁰² No legitimate expectation was found either in relation to State aid which had itself been distributed unlawfully through a building society,¹⁰³ or in respect of a claimed right to deduct input VAT where the applicant company knew that its suppliers had failed to comply with their VAT obligations and was in a position to secure their compliance, irrespective of its own compliance with VAT duties.¹⁰⁴

In cases concerning claims other than those linked to existing possessions, the Court has expressed the requirement of a domestic legal basis for a substantive interest in varying formulations. It has examined, for example, whether the applicants had “a claim which was sufficiently established to be enforceable”;¹⁰⁵ whether they could show “an assertable right under domestic law to a welfare benefit”;¹⁰⁶ or whether they satisfied “the legal conditions laid down in domestic law for the grant of any particular form of benefits.”¹⁰⁷

At the same time, the Court has made it clear that the existence of a genuine dispute or an arguable claim is not the test for identifying a legitimate expectation under Article 1 of Protocol No. 1. Those concepts belong to the separate question of the applicability of Article 6 § 1 under its civil limb.¹⁰⁸ There is therefore no necessary overlap between the existence of a possession within the meaning of Article 1 of Protocol No. 1 and the applicability of Article 6 § 1 to the proceedings at issue. In *Kopecký*, the absence of a legitimate expectation to

102 *Traina Berto and Alfonsetti v. Italy* (dec.), application no. 75505/12 2022, paras. 45-46.

103 *BCR Banca pentru locuințe S.A. v. Romania* (dec.), application no. 4558/20, decision of 5 December 2024, paras. 127-139.

104 *Immoresks Makedonija Doo Skopje v. North Macedonia* (dec.), application no. 25311/17, decision of 24 September 2024, paras. 32-35, 41. Registry of the European Court of Human Rights, Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights, Protection of Property, Updated on 31 August 2025, 10-11.

105 *Gratzinger and Gratzingerova v. the Czech Republic* (dec.) [GC], application no. 39794/98 decision of the Grand Chamber of 10 July 2002, para. 74.

106 *Stec and Others v. the United Kingdom* [GC], applications nos. 65731/01 and 65900/01, judgment of the Grand Chamber of 12 April 2006, para. 51.

107 *Richardson v. the United Kingdom* (dec.), application no. 26252/08, decision of 10 April 2012, para. 17; *Bélané Nagy v. Hungary* [GC], application no. 53080/13, judgment of the Grand Chamber of 13 December 2016, para. 76. Registry of the European Court of Human Rights, Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights, Protection of Property, Updated on 31 August 2025, 11.

108 *Kopecký v. Slovakia* [GC], application no. 44912/98, judgment of the Grand Chamber of 28 September 2004, paras. 50, 52; *Draon v. France*, [GC], application no. 1513/03, judgment of the Grand Chamber of 21 June 2006, para. 68)

restitution under the substantive domestic provisions was sufficient to exclude the application of Article 1 of Protocol No. 1, but it did not prevent Article 6 § 1 from applying once a genuine and serious dispute over property rights had arisen.¹⁰⁹

To sum up, the Court's case-law has reached a stage of sufficient clarity and consistency to permit a precise definition of the threshold for the applicability of Article 1 of Protocol No. 1, including in the area of social-welfare benefits. It should be recalled that the provision does not guarantee a right to acquire property or to receive a pension of a particular amount. Its protection extends only to existing possessions and, in certain circumstances, to a legitimate expectation of obtaining an asset. For such an expectation to qualify as a possession, the applicant must demonstrate an assertable right amounting to a sufficiently established substantive proprietary interest under domestic law.

5. Domestic Judicial Practice

As shown above, in the case-law of the European Court of Human Rights, the concept of legitimate expectation is a thoroughly developed subject. Nevertheless, the reasoning of the ordinary courts in Georgia often remains inadequate.

For example, the Ambrolauri District Court stated that "according to the case-law of the European Court, long-term use of immovable property gives rise to a legitimate expectation of acquiring ownership" ("*Öneryıldız v. Turkey*", § 123; "*Kopecký v. Slovakia*", no. 44912/98, 28 September 2004, § 52; "*Saghinadze v. Georgia*", § 103).¹¹⁰

This interpretation by the District Court is incorrect. None of the judgments referenced contains the proposition attributed to the European Court. In the paragraph cited from *Öneryıldız*, the European Court does not present its own reasoning at all; the passage contains only the applicant's arguments.¹¹¹ In *Kopecký*, the European Court clarified that a disputed claim cannot be relied upon as a basis for establishing a legitimate expectation. Where a property interest takes the form of a claim, it may be regarded as an "asset" only if that claim has

109 *Kopecký v. Slovakia* [GC], application no. 44912/98, judgment of the Grand Chamber of 28 September 2004, para. 52.

110 Judgment of the Ambrolauri District Court of 12 February 2020 in case no. N090310019003209435, p. 19.

111 *Öneryıldız v. Turkey* [GC], no. 48939/99, ECtHR, 30.11.2004, para. 123.

a sufficient legal basis in national law or in settled domestic case-law.¹¹² The same line of reasoning appears in the paragraph referenced from the judgment in *Saghinadze v. Georgia*.¹¹³

Not only is the District Court's reading unsupported by the cases it cites, but no such principle exists anywhere in the case-law of the European Court. As shown above, the European Court consistently explains that Article 1 of Protocol No. 1 protects existing possessions and does not guarantee a right to acquire property.¹¹⁴ Under the concept of legitimate expectation, the question is whether a given claim may qualify as a possession.¹¹⁵ A legitimate expectation cannot be equated with a person's mere hope of obtaining property; it requires a reasonably justified expectation grounded in a legal norm or established judicial practice.¹¹⁶

In the case examined by the District Court – concerning a claim to annul an administrative act issued by the Standing Commission on the Recognition of Ownership Rights over plots of land held by natural persons and private legal entities—the European Court has addressed precisely this question in a case against Georgia involving an unlawfully occupied plot of land and a structure built on it by the applicant.¹¹⁷ The purpose of the present analysis is not to replace the District Court's reasoning or to apply the European Court's standards directly to the facts of the domestic case. It should simply be noted that, for the European Court, long-term use of immovable property does not generate a legitimate expectation of acquiring ownership. In that case, despite the applicant's use and possession of the plot of land and the structure on it since the 1980s, Mr Meladze did not have a sufficiently established property interest under domestic law capable of giving rise to a legitimate expectation. Accordingly, his application was declared inadmissible.¹¹⁸

112 *Kopecký v. Slovakia* [GC], no. 44912/98, ECtHR, 28.9.2004, para. 52.

113 *Saghinadze v. Georgia*, no. 18768/05, ECtHR, 27.5.2010, para. 103.

114 See also *Grbac v. Croatia*, no. 64795/19, ECtHR, 16.12.2021, para. 86.

115 *Zarandia, T., Mchedlidze, N.*, Protection of the Right to Property under Georgian Legislation and the European Convention on Human Rights, in: Jubilee Volume in Honour of Professor Lado Chanturia on His 60th Birthday, edited by T. Zarandia and B. Zoidze, Tbilisi, 2023, 202.

116 *Valverde Digon v. Spain*, no. 22386/19, ECtHR, 26.1.2023, para. 49.

117 *Meladze v. Georgia* (dec.), no. 30635/09, ECtHR, 2.10.2018.

118 *Zarandia, T., Mchedlidze, N.*, Protection of the Right to Property under Georgian Legislation and the European Convention on Human Rights, in: Jubilee Volume in Honour of Professor

6. Conclusion

The foregoing analysis shows that legitimate expectation under Article 1 of Protocol No. 1 is a demanding and tightly structured concept. It does not operate as a free-standing equity clause capable of overriding domestic law, but as a rule-of-law filter. Expectations are protected only where they are objectively grounded in a sufficiently established proprietary interest recognised under national law, whether through clear statutory provisions, settled case-law or a duly recorded and legally valid administrative act. At the same time, the doctrine has developed along two distinct but interconnected lines, namely, expectations of acquiring or realising property and expectations concerning the stable legal regime governing existing claims, both of which are anchored in legal certainty and the protection of reliance.

The Grand Chamber's case-law, in particular *Kopecký*, *Béláné Nagy* and *Bee-ler*, has now consolidated these strands into a single threshold test. Only those expectations which rest on an assertable right amounting to a sufficiently established, substantive proprietary interest in domestic law qualify as possessions. By contrast, conditional or contested claims, hopes of future legislative reform, political assurances, or benefits dependent on discretionary schemes or unlawful arrangements fall outside the protection of Article 1 of Protocol No. 1. This clarification not only responds to the uncertainty highlighted in *Stec* but also re-centres the doctrine on legal certainty, foreseeability and the prevention of arbitrary state action.

For national courts, including those in Georgia, this has two implications. First, legitimate expectation cannot be invoked to circumvent clear statutory requirements or to convert long-term de facto situations into property rights in the absence of a legal basis. Secondly, careful engagement with Strasbourg case-law is essential. Selective quotations or misattributed principles – such as the Ambrolauri District Court's assertion that long-term use of immovable property generates a legitimate expectation of ownership – risk undermining both domestic legal certainty and the coherence of Convention standards. Properly understood, the doctrine of legitimate expectation reinforces, rather than weakens,

Lado Chanturia on His 60th Birthday, edited by T. Zarandia and B. Zoidze, Tbilisi, 2023, 203-205. See also *Mchedlidze, N.*, Standards of Reasoning under the European Convention on Human Rights, Dissertation submitted for the award of the academic degree of Doctor of Law, Tbilisi, TSU Publications, 2025.

the primacy of domestic law. It protects individuals who have ordered their affairs in good faith on the basis of a clear legal framework, while preserving the Convention's role as a safeguard against retroactive, inconsistent or arbitrary interference with property rights.

The analyses offered in the two parts of this chapter show that neither Georgian property law nor the Convention regime protects abstract claims to wealth or purely factual advantage. In domestic law, possession is protected because, and as far as, it is anchored in a legally recognised relationship to an object, mediating between bare factual control and formal ownership. In Strasbourg case-law, possessions, including legitimate expectations, attract protection only where they rest on a sufficiently established and substantive proprietary interest in national law, whether through clear statutory provisions, settled case-law or a valid administrative act.

Both systems thus rely on the criteria of stability, foreseeability and good-faith reliance to determine when factual or legal positions merit protection. For Georgian courts, this convergence has concrete consequences. Concepts such as possession and legitimate expectation cannot be used to bypass explicit statutory conditions or to transform long-standing *de facto* situations into property rights without a legal basis. Properly understood, the interaction between Georgian doctrine and Article 1 of Protocol No. 1 strengthens legal certainty and coherence, ensuring that the protection of property remains firmly grounded in the rule of law rather than in judicial discretion or policy-driven equity.

It is an honour for me to congratulate Professor Rolf Knieper – an outstanding legal scholar, a cherished friend of our University and our country, an Honorary Citizen of Georgia, and an Honorary Doctor of Tbilisi State University – on the occasion of his 85th birthday. Professor Knieper's contribution to the Georgian state is beyond measure. He stood at the origins of the processes that led to the creation of the modern Civil Code of Georgia and to the shaping of Georgia's system of private law.

I will never forget our first meeting in Bremen in 2007, at an international academic conference. His encyclopaedic knowledge, professionalism, warmth, and humane manner were profoundly impressive – qualities he extends to everyone. Professor Knieper is not only a great scholar, but also a remarkable human

being; a torch-bearer for others, always ready to teach, to advise and to help. It is precisely these attributes that define his uniqueness.

I am happy that, through my modest contribution to this volume, I can express my gratitude and pay tribute to Professor Knieper and his lifelong work, which have been exemplary for me both academically and professionally. Through his life's endeavours, he embodies the ideals that scholarship knows no borders; that values are far stronger than linguistic, cultural, or legal differences, and that cooperation and mutual respect are the foundations of academic life. I congratulate him on his jubilee and wish him many more years of active life, good health, and an abundance of that inner strength which so distinctly sets him apart – both as a scholar and as a person – and before which age remains nothing more than numbers.

Tamar Zarandia

Aporias of Setting Law A Tour d'Horizon

The below is to give a broad overview of the direction the making of law that has the aim to further freedom has taken, to reflect on whether such law making can be characterized as a straight-line process or rather as one on which typical mistakes are made, and to suggest improvements.

Despite this or that recent development, many of us may believe that we are on the path which ultimately leads to general increases in freedom, and that only this or that unfortunate historic coincidence stands in the way for what will emerge as finally convincing body of law to grant optimal degrees of freedom¹. As a maybe minor observation, believing in such a progress is intellectually satisfying as it goes in line with an increase in one's own knowledge, with the ability to continuously add options to further freedom and their characteristics to what may seem an already rich selection being a potential source of pride. In this article, I will to the contrary argue that progress is disappointing, in particular if benchmarking the progress against what could have been achieved

For doing so, I have assembled a large number of examples. Obviously, given their range, this article contains very subjective assessments. Beyond addressing

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1 As an example for the notion of optimal law *Nadezda Grishanova* (Надежда Гришанова), Усовершенствование правового регулирования деятельности обществ с одним участником, (my translation: The perfection of the regulation of the activity of a company with one participant, available https://jurliga.ligazakon.net/ru/news/234594_usovershenstvovanie-pravovogo-regulirovaniya-deyatelnosti-obshchestv-s-odnim-uchastnikom-proekt-rekomenduyut-k-prinyatiyu-za-osnovu, visited the 25.11.2025.

many areas of law and factual developments I am not a specialist in, I have taken the liberty to make assumptions regarding the reasons for development, have based my conclusions on perceptions that I acknowledge are difficult to verify, and dealt with issues there may be substantial literature about which I have no knowledge of, and there is not much in literature that supports my theories.

I have ventured into this also encouraged by what I understand is the scientific and professional path of Rolf Knieper, and what I admire about this path: The constant and meticulous search for where the best solution could be, the conviction that such solution exists, will ultimately prevail even if not talked about repetitively, and despite so many hurdles and setbacks is worth the tireless, joyful and open effort in furthering it, not avoiding conflicts when conflicts seemed unavoidable, but certainly not seeking any for personal benefit or profit.

1. Protection of Personality

Law will frequently proceed from the assumption that, as long as rights are generally set out in law, such rights will indeed be protected. At the same time, the effect of key rules and theories does raise doubts:

1.1. Personality

Recognition of the individual as a subject of rights like it is set out, for instance, in §§ 1ss of the German Civil Code², can be traced down to the groundbreaking recognition of the individual during the Renaissance³. The effect of

2 In the following referred to as the “BGB”. As a side note, *Farkhad Karagussov*, О развитии вещного права в гражданском законодательстве Казахстана, 389, in Нормы гражданского права, материалы юбилейного, 25-ой Международной научной практической конференции (в рамках ежегодных цивилистических чтений), (my translation: On the development of property law in the Kazakh legislation, civil law norms, materials of the scientific-practical commemorating seminar (in the framework of the civil law lectures), 389, argues with a similar provision against the concept of state ownership which *Rolf Knieper* for instance in *Approaches to Arbitration in Turkic States*, 5 has tirelessly critized.

3 A trivial recognition of such traces in <https://en.wikipedia.org/wiki/Renaissance>, visited the 1.8.2025, a more scientific in *Larry Siedentop*, *Inventing the Individual: The Origins of Western Liberalism*, a literary when *Thomas Mann* associates the “birth of freedom”, the “emancipation of the individual with the Renaissance in *Doktor Faustus*, Taschenbuchausgabe, Das erzählerische Werk, 1974, Band 9, 353.

such recognition however may have been the contrary of what the rules seem to suggest:

1.1.1. Personality in History

Indeed, paradoxically, it seems that, at the very same time at which the individual was seen as being recognized, slavery peaked, and, inter alia through the then emerging ability to transport people, coercion exacerbating inequality spread through the world⁴. Whilst generally known⁵, this situation appears to have led to surprisingly few reactions. For instance, despite various abolitionist movements⁶, the violence against slaves, jews, the so-called witches or other groups believed to be different appears to have reached new highs, and the differences between social spheres⁷ as well as among different nations⁸ to have increased at least insofar as the negative impact of such differences, wars and cruelties are concerned. Few seem to have stressed the contradiction between the general theory and this reality from a lawyerly angle⁹, and their views appear

4 Here, I am proceeding from the maybe naïve notion that inequality among groups becomes more difficult to bear when groups are in contact. As to the more narrow development of slavery, general coverages such as *Isnard Paulin* and *Michael Zeuske*, *Benedetta Russi*, *Cécile Vidal*, *Claude Chevaleyre*, *Welten der Sklaverei, Eine vergleichende Geschichte* appear to be increasingly emerging but lacking general summaries and assessments.

5 Whilst *Heinrich Heines* poem “Sklavenschiff”, is easily available for instance at <https://www.deutschunddeutlich.de/contentLD/GD/GT61psSklavenschiff.pdf>, accessed the 1.10.2025, the focus in it appears to be sidelined for being characterized as extreme.

6 See for instance *Andreas Eckert*, *Über den Abolitionismus: Abraham Lincoln war spät dran*, in <https://www.faz.net/aktuell/feuilleton/buecher/ueber-die-rolle-ehemaliger-sklaven-fuer-die-abschaffung-der-unfreiheit-19894942.html>, visited on 26.11.2025.

7 *Joachim Gernhuber*, *Die Landfriedensbewegung in Deutschland bis zum Mainzer Reichslandfrieden von 1235*, *Bonner rechtswissenschaftliche Abhandlungen*. H. 44, 1952, 60 links the emergence of modern penal law and related difficulties to increases in difference between knights and peasants in early Middle Ages due to technical inventions such as armors

8 The waves of export to Europe (timber, meat, sugar, coffee) and falling back into subsistence economy as identified for Brazil by *Celso Furtado*, *Formação Econômica do Brasil*, 1959 since its colonialization could also be described as consequence of contact with economies like the European ones.

9 *Thiago Reis*, in *Teixeira de Freitas*, *leitor de Savigny*, (my translation: *Teixeira de Freitas as a reader of Savigny*) available under <https://repositorio.fgv.br/server/api/core/bitstreams/9f17cb83-36de-4957-842f-89671971b68e/content>, page 27, visited the 13.10.2025, concludes that the notable Brazilian legal scholar *Teixeira de Freitas*, in his opposition to

to not have gained significance as compared to the intricate set of rules¹⁰, interests¹¹ and blurred developments¹² slavery lead to, which continue to have bigger¹³ and smaller repercussions to our days¹⁴.

In this context, according to the assessment of some, at least the promulgated attachment to religion strengthened in parallel with violations and with the intention to cover them¹⁵. In contrast, a witness of the cruelties and religious man, the Dominican *Bartolomé de Las Casas*, emerged as champion for the protection of Indians rights. He seemed to first have to take part in the debate of what, in the 16th century, emerged as a central question, namely whether Indians were humans and how much coercion was appropriate for them to become what was considered as an important related element, namely Christians¹⁶.

slavery, was inspired by the rigor of Savigny's analysis. I owe the knowledge of *Reis'* works to Rolf Knieper.

- 10 As just one example see different voting rights in the US already in the 18th century, Christian End, Ein Back-Up in der Realität, <https://www.zeit.de/2025/37/datenloeschung-usa-archivierung-wissenschaft-datenrettung>, visited the 1.1.2026
- 11 See *Theodor Heuss*, Schattenbeschwörung, Der livländische Mirabeau, 1821-1856, 166ff about Hamilkar Fölkersam in Lithuania navigating for abolition among Russian, German and the influence of local potentates, *Vicente Costa Santos Tapajós*, História do Brasil, 15. ed., 401, about how development programs like that of Jose Bonifacio were sidelined because of them being abolitionists, 404 about the importance of illegal slave traffic, *Raimundo Faoro*, Os donos do poder, formação do patronato brasileiro, 6ª edição 1957, 505 on former slave owners being relieved by abolition as former slaves had to care for themselves, *Sven Beckert*, Kapitalismus, 2025, 221 for the importance of slavery for organization of the working process and the division of labor, 221, *Faoro*, 354 for resentment about Brazilian monarchical rules (in particular the famous Lei do Ventre Livre, the freedom of those born to slaves) being a scapegoat for failing to adapt farming to changed conditions.
- 12 *Faoro* (fn. 11), 354 on how, arguably worse than the liberals in the Germany of the 19th (see Riccarda Huch, fn. 60, passim), because of abolition discussions and contrary to common view of historians losing track of economic and political developments.
- 13 *Beckert* (fn. 11) 614 traces current discrimination back to slavery.
- 14 *Selma Fatogun*, Mohrenstraße umbenannt: Neuer Namensträger gehörte ausgerechnet afrikanischer Sklavenhalter-Elite an, <https://apollo-news.net/mohrenstrasse-umbenannt-jetzt-kommt-raus-neuer-namenstraeger-gehorte-afrikanischer-sklavenhalter-elite-an/>, visited 1.11.2025, an article apparently with many readers.
- 15 *Reinhold Schneider*, a catholic author having been linked to resistance against national socialism, but certainly far from being revolutionary, puts this theory forward in *Das Leiden des Camões oder Untergang und Vollendung der portugiesischen Macht*. Hamburg, 1959.
- 16 *Lars Kirkhusmo Pharo*, The Council of Valladolid (1550-1551): A European disputation about

Whilst Las Casas has left a very substantial written legacy that includes theoretical works¹⁷, its stringency appears to have been impacted by Las Casas trying to, through engagement with the public and benchmarking the one ruler against the other, convince those in power to treat Indians adequately¹⁸. Indeed, probably in response to activity such as the one of Las Casas, both the government¹⁹ and the church²⁰ adopted legal acts for the protection of Indians. However, none of those legal acts appear to have had effect, and the government legal acts appear soon have been formally reversed. Indeed, organizationally, there seem to have been few attempts to decrease the dependency of the church from the state²¹, and the possible development of the religious into some sort of

the human dignity of indigenous peoples of the Americas, in: *The Cambridge Handbook of Human Dignity*, 2014, 95 ss. The debate appears to have been protracted, it, in addition to written submissions, required two months hearings, see https://fr.wikipedia.org/wiki/Controverse_de_Valladolid, accessed on 1.10.2025. Accordingly, my assumption, that Las Casas position was that Indians in themselves were no humans, but that they had the potential to become humans if converted to the right belief, is difficult to evidence.

17 *Faoro*, fn. 11, 116.

18 *Lewis Hanke*, Bartholome de las Casas, in particular 10ss with particularly positive references to different Isabella the Catholic, less so to Charles I of Spain (Charles V as Roman Emperor).

19 *Paolo G. Carozza*, From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights, *Human Rights Quarterly*, 2003, Bd. 25, Nr. 2, S. 281, 290; *Gschwend, Lukas/Good, Christoph*, ZRG Bd. 95, 2009, S. 218, 225. See the prohibition to take slaves in https://es.wikipedia.org/wiki/Leyes_Nuevas.

20 See https://en.wikipedia.org/wiki/Sublimis_Deus, visited the 1.11.2025. In the text of this and the immediately following footnotes, rules, rulemaking and their effect are dealt with in some detail on the basis of a voluminous history of the Popes because of its focus on the very rules as opposed to their effect: Pope Paul III is said to have contributed to culture in general and to defence of the rights of aborigines in America (see 5th Vol., 719ss), reminding the worldly rulers that they had been granted rights in order to lead the aborigines to Christianity by appropriate education (see, inter alia, 522 and 532 for Pius V, for Paul III 719 of Volume. 5). The cruelty of the typical treatment of the aborigines was noted as an obstacle to religious education (521, 8. Volume) and so prevention against cruelty not being successful excused with the difficulty in doing so (532 5. Volume), all in *Ludwig von Pastor*, *Geschichte der Päpste im Zeitalter der katholischen Reformation und Restauration*, Papst Pius V 1566-1572, 8th Volume, Freiburg im Breisgau 1920, *Geschichte der Päpste seit dem Ausgang des Mittelalters*, Papst Paul III, 1534 bis 1549, 5th. Vol., Freiburg im Breisgau 1925, 8th and 9th Ed.

21 *Ludwig von Pastor*, 8th Vol., previous fn., 524, cites „somebody knowledgeable“ concluding that it was „almost impossible“ „to conceive less comprehensive control than the one that the Kings of Spain, either directly or through the Council of the Indies, the Vice King or the Governor had in matters of the church“ (my translation). No thought seems to have been given to

international law seems have been overshadowed by the church, after little time, committing its resources to what also has been referred to as “propaganda”²². Whilst the recollection of Las Casas continues to be cherished²³, one cannot help but suspect that the effects of this memory are purposefully sidelined²⁴, which gives room to radical and potentially even more nonconsequential views being associated with Las Casas²⁵. In turn, missionaries’ utopian plans collapsing when the Portuguese state, in the 18th century, reacted with moving towards a prohibition to the missionaries’ much less effectful than Las Casas activities²⁶, in an influential assessment not so long ago reminded of the challenges of revolutions in the 20th century²⁷.

dual reporting, and therefore even the perception of the cruelties depended on the nomination of bishops with respective inclinations see about the nomination of Las Casas and a bishop in Goa 719, 5th Vol.

- 22 The chapter about Pope Gregory’s XV short (1621-1623), but meaningful pontificate in *Ludwig von Pastor, Geschichte der Päpste im Zeitalter der katholischen Restauration und des dreissigjährigen Krieges, Gregor V und Urban VII (1621 – 1644)*, Volume 13, Freiburg im Breisgau, 1928, 8th and 9th Ed., 102 is entitled “Elevation of the Religious Sentiment”, the summary, in 223, reads “The really major achievement was the founding of the Propaganda. This step resulted in ... an important and far-reaching sign, which was significant for the direction in which the Church’s activity would move in an extremely beneficial manner for centuries to come. The foresight, wisdom, and prudence of Rome, which were evident not only in the missions but also in the high importance the institute had for linguistics and ethnology, are also evident in the instructions to the nuncios of Gregory XV. (my translations)”.
- 23 See for Las Casas beatification https://web.archive.org/web/20200707081658/https://www.la-croix.com/Archives/2002-10-03/Ouverture-de-la-cause-de-beatification-de-Bartolome-de-La-Casas_-_NP_-2002-10-03-16695, viewed on 1.10.2025, also, the number of biographies in Pasrtior, fn. 3, 719, 5th Vol., prior fn., of the “Fiery Dominican bishop and champion of the human rights of Indians against brutal politics of violence” (my translation).
- 24 The Beatification mentioned in fn. 23 is still ongoing.
- 25 For instance *Hans Magnus Enzensberger’s* Nachwort to Bartolomé de Las Casas, *Kurzgefaßter Bericht von der Verwüstung der Westindischen Länder, aus dem Spanischen von Ulrich Kunzmann*. Herausgegeben von *Michael Sievernich*. 211ss
- 26 Resistance at the border between Brazil and Uruguay is given as the reason for the suppression of the Jesuits by Pombal by *Jonathan Wrigth*, *Die Jesuiten – Mythos, Macht, Mission*, 182.
- 27 See *Darcy Ribeiro*, *O povo brasileiro, a formação e o sentido do Brasil*, 56s: also in <https://archive.org/details/o-povo-brasileiro/O%20povo%20brasileiro%20%5BArquivável%5D/>, visited the 1.10.2025 “The utopias of the missionaries were so starkly opposed to the colonial project that war between settlers and priests broke out soon. Colonists wanting to enrich themselves by having the Indians do bodily work were aided by mundane priests ready to bless earthly

No further consideration seems to have been given to the relation between the type of violation of rights and the traditionally recognized right to kill a tyrant²⁸. Similarly, to my knowledge, there is no body of thought around the type of violation required for a right to resistance to exist, and whether the rulers, people surrounding them or actions by them could be their objects of the right to resistance.

Given the importance of the issues at stake in the mentioned historic context, it does not surprise that similar discussions seem to have been even less structured. Among such similar discussions, the fragmentation of religion that intensified in the very same Renaissance comes to mind, with, famously, *Luther*, in a sense underlining the difference between religious and ethical rules (or rules of law), siding with the potentates of a fragmented German Reich, *Calvin*, to the opposite, recognizing a right to resistance²⁹. To the reverse, American independence, which can easily be traced back to disappointment about rules of the English Empire not having been complied with, soon seems to have concentrated on whether and how to lay down the rules that should now govern³⁰.

In parallel, in public debate, a right to resistance seems to have been used as a justification with a relatively loose link to what this resistance could possibly achieve: Whilst, for instance *V. Zazulich* was one of those to risk adverse consequences for what appears to have been her Marxist revolutionary dream, her,

places, giving God what was God's and to the king what he claimed. ... For decades, they" – the missionaries" – "had no word of pity for the thousands of dead Indians, for the burned villages, for the children, women, and men enslaved ... no historical disaster, no previous utopian project had reached such heights, because no hope until then had been so encouraging or could be carried so far and demonstrate the feasibility of intentionally rebuilding society according to a plan. The Jesuit utopia crumbled, and they were expelled from the Americas, handing over, defenceless and devirilized, their catechumens to sacrifice and slavery at the hands of the possessed colonists. The same happened to the miraculous dream of the Franciscans, reduced to a vision of the foolishness of the colonial world, uncivil, impious, and brutal."

28 see *Harold L. Berman*, *Recht und Revolution, Die Bildung der westlichen Rechtstradition*, Frankfurt am Main, 2. Auflage 1991, 452ss about John of Salisbury acknowledging the right of resistance and to murder without, presumably for safety concerns, clarifying whom to murdered.

29 For the contrast between *Calvin* and *Luther* *Jürgen Moltmann*, *Covenant oder Leviathan? Zur Politischen Theologie der Neuzeit*, *Zeitschrift für Theologie und Kirche*, August 1993, Vol. 90, No. 3 (August 1993), 299 (301).

30 *Eric Foner*, *The Story of American Freedom*, 1998, S. 3 ff.

in the first instance, not being condemned for severely wounding somebody who had for sure not attacked her, found broad support in the then Petersburg society presumably because of the brutality of the then rule for which at least partially the one wounded was responsible³¹. Those events, in turn, nowadays are mostly remembered because of the inadequacy of those trying her³². Finally whilst Hutten's initial aim may be satisfaction for the forced death of his brother that was otherwise not available, he, in National Socialist times, was paid tribute to as a fulfilling a revolutionary mission³³.

1.1.2. Data Protection and Pandemia as Modern Challenges

On a much lesser level insofar as the quantum of violations is concerned, challenges to defining the scope of personality rights seem to be as ubiquitous as dependent on time and relevant development of technology. What may be most relevant about each of such challenges is not so much their impact, but more that they lead to incongruous responses, with the danger obviously being that this process continues and escalates. I will use a few examples of the day to stand in for other existing and potential challenges:

In the course of the last decades, technology has increasingly allowed to do business including enhancing personal safety by collecting and using a multitude of data. In that context, it does not surprise that also various countries require access to private data in exchange to allowing to cross borders³⁴. Such requirements, on the one hand, remind us that we may, on a personal level, be used to

31 *Günther Stöckl*, *Russische Geschichte*, 3. Auflage, S. 578.

32 her having been inadequately tried under the new rules implemented by Alexander II (see https://en.wikipedia.org/wiki/Judicial_reform_of_Alexander_II, visited 1.12.2025) appears to have been inspiration for *Fedor Dostoyevskis* Brother Karamasov. On prerequisites for selection of judges see below no. 2.1.

33 according to *Herbert Grabert*, *Der protestantische Auftrag des deutschen Volkes*, Stuttgart, 1936, 61, peasants had "placed their hopes" on Hutten in their "three centuries long liberation struggle," were "driven to despair and exploited," "fought for freedom and justice." They were not only "abandoned" but "morally betrayed" by Luther through his treatise "On the Freedom of a Christian", (my translations) on the Grabert continuing his extremism see https://de.wikipedia.org/wiki/Herbert_Grabert, visited the 30.11.2025, hat.

34 Even the related fact pattern seems to be ill established, see for Russia for instance https://www.reddit.com/r/AskARussian/comments/1musfc8/question_about_russian_border_control_phones/, visited the 30.11.2025, for the USA <https://www.theguardian.com/technology/2025/mar/26/phone-search-privacy-us-border-immigration>.

receive visas and be able to frequently cross borders, but that many countries, in what they understand as being dangers of global migration, take action that does not have basis on rules. On a much more general level, when it comes to developing rules, reaction fail to short of expand into the detail at hand as opposed to repeating that factual and potential violations need to be balanced against the advantages in using the data³⁵.

Also, limitations of freedom originated in the recent pandemia seemed to have led to substantial dissatisfaction among the population³⁶. The guarantees of fundamental rights in constitutions and elsewhere could have contributed to such dissatisfaction being mitigated as well as the standards for reasoning and thoroughness of those acting in being revisited and potentially strengthened, which could have also provided guidance for further extraordinary situations. To the opposite, enforcement against those that most likely caused harm, the at the time so called super spreaders³⁷ that violated the many rules existing was rarely heard of, and seems to have been out of proportion with the harm they have caused. Also, even the most clearly absurd rules such as forbidding, in fresh air, to sit on one bank or people living together to meet seem to rarely have been reviewed by courts, and much of court review seems to have been limited to those injunctions that were prompted in the context of public meetings³⁸. Technically, courts appear to frequently have relied on normally useful

35 It is characteristic how highly rated comparatively trivial answers like, in my translation: "We need to think more about this new world to prevent abuse. Therefore, it would make sense to allow certain data to be stored only for a limited period of time. That would be feasible and fits with our principle that at least for the vast majority of offenses, there is a right to a fresh start." by Nobel laureate *Jean Tirole* in „Bürger können sich dieser Überwachung nur sehr schwer entziehen“, by *Johannes Pennekamp*, *Frankfurter Allgemeine Zeitung*, 28, also in <https://www.faz.net/aktuell/wirtschaft/mehr-wirtschaft/ueberwachung-durch-palantir-be-ginnt-gerade-die-digitale-schreckensherrschaft-herr-tirole-accg-110658744.html>, visited the 1.12.2025, are.

36 At least in the assessment of politicians like Wolfgang Kubicki and Dieter Ramelow in <https://www.youtube.com/watch?v=cMueCZNhQW4>, visited the 1.12.2025.

37 For instance <https://de.wikipedia.org/wiki/Superverbreitungseignis>.

38 with little importance given to the authorities independent assessment of the adequacy of measures, see https://de.wikipedia.org/wiki/Juristische_Beurteilung_der_Maßnahmen_gegen_die_COVID-19-Pandemie_in_Deutschland, an exception <https://www.verwaltungsgericht-goettingen.niedersachsen.de/aktuelles/presseinformationen/abspernung-eines-gebauedes-als-coronamassnahme-war-rechtswidrig-227674.html>, both visited 1.11.2025.

limitations to raise claims³⁹, with, when a rule was reversed, the reversal of the actions based on this rule being problematic⁴⁰.

All of this reminds us of a relatively minor event having lead to substantial dissent which in turn leads to backlash⁴¹.

1.2. Property Rights

As Hegel famously underlined, freedom becomes real through property⁴², and guarantees for property rights such as Art. 14 German Fundamental Law, those contained in the bilateral investment agreements and Art. 10 of the Energy Charter Treaty (further on “EC”) can be simple. At the same time, such texts not being sufficient for protection to be efficient is confirmed by similar guarantees in Art. 34 - 36 Russian Constitution not having much effect⁴³. Whilst

39 Characteristically, in VGH München, Beschluss v. 23.07.2025 – 20 N 20.1014 the claim was successful only because it was raised by an entrepreneur against limitations to visit hotel, and the court accepted that an entrepreneur, to continue his seminars, needed to use hotels.

40 92.278 Strafen aufgehoben, see <https://apollo-news.net/92-278-strafen-aufgehoben-spanisches-verfassungsgericht-erklrt-coronamanahmen-fr-verfassungswidrig/> visited the 25.12.2005.

41 *Wilfred Reilly*, How George Floyd dragged America to the right, <https://www.spiked-online.com/2025/05/25/how-george-floyd-dragged-america-to-the-right/>, visited the 20.12.2025.

42 This is my understanding of the § 41ss of *Georg Friedrich Wilhelm Hegels Philosophie des Rechts*, herausgegeben von *Helmut Reichelt*, 1972, 54ss.

43 The Russian Constitutional Court not taking positions on property issues is for instance highlighted in No. 77 of the decision of 20 September 2011 of the European Court of Human Rights in the Case of OAO Neftenaya Kompanya Yukos v. Russia (further on the “ECHR-Yukos Decision”, see <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-106308%22%5D%7D>}, accessed 1.1.2025. When participating in writing and having translated *Steffen Hindelang*, *Max Gutbrod*, Protection against Indirect Expropriation under National and International Legal Systems, inter alia *Göttingen Journal of International Law* 1 (2009) 2, 291ss, I intended to also highlight to the then bigger audience open to Russia’s specific problems how difficult it would be for Russia to avoid results like those in PCA Case No. AA 227, Yukos against the Russian Federation, Final Award, 18.7.2014, further on referred to as “Yukos EC Arbitration Award”, available at <https://pcacases.com/web/sendAttach/420>, accessed 30.12.2025. Furthermore, with the less well received *Steffen Hindelang*, *Max Gutbrod*, The Missing Bits – To Be Substituted by BITs? The Inadequacy of Russian Law as an Example for Indirect Expropriation, *Stockholm International Arbitration Review*, pp. 97-116, 2007, I intended to draw attention to the fact that the better a state protects against discrimination through its internal rules, the less

other parts of the Russian constitution also have comparatively little effect, the brevity of the common rules protecting property may also divert from planning for their development for instance in what concerns the protection of receivables⁴⁴. Also, courts could, before awarding damage claims, require that an attempt be made to unwind the measures leading to them⁴⁵. Importantly, to assess whether property has been expropriated indirectly⁴⁶, specific policy

likely it is that its acts be recognized as indirect expropriation on an international level. As evident from *Maxim Timofeev, Money Makes the Court Go Round: The Russian Constitutional Court's Yukos Judgment*, *VerfBlog*, 2017/1/26, <https://verfassungsblog.de/money-makes-the-court-go-round-the-russian-constitutional-courts-yukos-judgment/>, visited the 23.12.2025 and the Yukos EC Arbitral Award, there currently seems to be little related interest from the Russian side.

44 Rules for protection of receivables are delineated in BVerfG (German Constitutional Court), 21. 11.2023, 1 BvL 6/21. From my experience, Russian scholars tend to accept the designation of the private element in the Russian pension system in simple legislation as owned by the funds which managed it, which in turn seems to have facilitated the confiscation of pensions funds by the Russian state after 2014, see <https://www.interfax.ru/business/382558>, visited the 24.12.2025.

45 As evidenced by <https://de.wikipedia.org/wiki/Nassauskiesungsbeschluss>, it is widely believed that the intention of BVerfG (German Constitutional Court), Beschluss (Decision) dated 15. Juli 1981 – 1 BvL 77/78 was to contain damages awards. This is what also *Rolf Knieper*, *Rethinking Investment Arbitration*, *SchiedsVZ* 2015, 25, 31 proposes. Obviously, unwinding a complex a tax assessment that is a part of a general change of the implementation of tax legislation in similar conditions and a bankruptcy procedure (the fact pattern of the Yukos EC Arbitral Award) through international arbitration would be problematic. In a similarly multifaceted context, for which however much more practice than for the fact pattern of the Yukos EC Arbitral Award, namely the unwinding of partnerships on an invalid basis under national law, it is recognized that new types of rules that differ from those in place for the invalidity of reciprocal contracts are required, see *Joachim Gernhuber*, *Bürgerliches Recht*, 3. Ed, 70, § 60 I 1, which in turn confirms the importance of discretion in judicial decisions.

46 For instance, when asserting an indirect expropriation because tax claims have been used as a pretext to bankrupt Yukos (Yukos ECT Arbitral Award, 174, no.516), the Yukos ECT Arbitral Award appears to not have considered a general increase in taxation of oil companies (*Reuters*, *Russia. TNK-BPs Back Tax Claims May Grow Further*, <https://www.reuters.com/article/tnkbp-taxes/russia-tnk-bps-back-tax-claims-may-grow-further-idINL2058388720080520/>). Also, when the Yukos EC Arbitral Award, 217, no. 644 assesses a tax ruling as “nonsensical”, criticizes the reasoning of tax authorities (no. 647), notes a ruthless campaign (no. 811) and due process violations (no. 628), it seems to not give importance to whether this type of rulings was typical. Comparisons similarly lack when Yukos EC Arbitral Award, 365, no. 1141, considers the initiation of a bankruptcy as unreasonable. Finally, I believe the generally accepted political rule that investments of the size dealt with in the Yukos EC Arbitral Award that no single dominant

objectives⁴⁷, the states in question attempt to return to legality including in what

player in an industry potentially hostile to the government and with potential major foreign participation (about the later for instance Yukos-Sibneft Coy About Exxon Deal, <https://www.aljazeera.com/news/2003/10/3/yukos-sibneft-coy-about-exxon-deal>) be tolerated, with another major deal (the 2005 deal mentioned in Siemens offers to buy stake in Russian Power Machines, <https://www.renewableenergyworld.com/hydro-power/technology-equipment/siemens-offers-to-buy-stake-in-russias-power-machines/>) having been declined although no clear rules on foreign ownership were in place at the relevant time like typical not only for Russia (see *Steffen Hindelang: Investor-state dispute settlement – Pulling the chain tighter*, *VerfBlog*, 2014/4/17, <https://verfassungsblog.de/investor-state-dispute-settlement-pulling-the-chain-tighter-2/>), all accessed 30.12.2025.

- 47 There is plenty of literature on alleged shortfalls and strong assessments are frequently used, see f. i. *Scott Sinclair, Stuart Trew*, Canada and the EU should divest from CETA's dangerous investment court system at <https://www.policyalternatives.ca/news-research/canada-and-the-eu-should-divest-from-cetas-dangerous-investment-court-system/>, *Alessa Hartmann, Ludwig Essig*, CETA: Greenwashing auf Kosten von Demokratie und Umwelt, https://powershift.de/wp-content/uploads/2023/09/Powershift_CETA-Greenwashing_Analyse.pdf, *Lukas Schaugg*, Why Coordinated Withdrawal From the Energy Charter Treaty Remains Essential for Effective Climate Action, <https://www.iisd.org/articles/insight/coordinated-energy-charter-treaty-withdrawal-essential>, not giving guidance on the rules such court is to apply, Frequently, with strong words like in *Dave Keating*, A Little-Known EU Investor Dispute Treaty Could Kill The Paris Climate Agreement, <https://www.forbes.com/sites/davekeating/2019/09/05/a-little-known-eu-investor-dispute-treaty-could-kill-the-paris-climate-agreement/>, visited 1.11.2025. To my knowledge, little more detailed research about the interlink between the Paris Agreement and biodiversity as well as strengthening internal rules on the one and investment protection as well as investment desired for the so-called climate transition. Instead, evaluations like investment agreements being “progressive, and the decision to withdraw from the EC being a “landmark decision when it comes to net zero” like in *Isabelle Wenger, Ellen Dixon*, A Step in the Right Direction and Where Do We Go from Here? <https://dailjus.com/world/2025/03/a-reflection-on-the-withdrawal-from-the-energy-charter-treaty>, all visited 1.11.2025, are easy to find.

relates to the behavior of the investor⁴⁸ and the expectations of the investors⁴⁹ deserve special protection require a similarly comprehensive analysis of the legal order concerned⁵⁰, and related decisions are likely to heavily depend on judgement calls that may differ even among ideal judges. Not least, the quantum of damages is far from being as simple as civil law rules⁵¹ suggest⁵². Whilst for

48 To my mind, f. i. Yukos EC Arbitral Award, no. 1357ss and *Eleonora Castro*, Clarifying the clean hands doctrine under general international law <https://academic.oup.com/jids/article/16/3/ida030/8203024>, are critical towards the “clean hands theory” because the link between illegal action and consequences for the investor is difficult to objectively assess: a CEO committing a violation of traffic rules is unlikely to influence the legality of the business of the company, but the assessment may be different if the CEO is in charge of organizing transport. In turn, the Yukos EC Arbitral Award no. 1355, concluding that the state is to correct eventual illegal action, fails to take into account that the investor may have hindered this very correction. For instance, further to influencing the legislator (see *Francesca Mereu*, Business Will Have Big Voice In Duma, <https://www.themoscowtimes.com/archive/business-will-have-big-voice-in-duma>), undue payments to government officials of many levels, including those in charge of the sale of some sizeable parts of what became known as Yukos by the state, and including persons holding high positions in Russia until 2025 seems plausible, and such a level of corruption specific to the case and exacerbated by corruption in the industry (see *Li-Chen Sim* The Rise and Fall of Privatization in the Russian Oil Industry <https://scispace.com/pdf/the-rise-and-fall-of-privatization-in-the-russian-oil-18ycynd575.pdf>, all accessed 24.12.2025) poses challenges for “correction”.

49 Mamidoil/Albania, ICSID Case No. ARB/11/24 of 30.03.2015, <https://www.italaw.com/sites/default/files/case-documents/italaw4228.pdf>, visited the 1.12.2025, No. 625 refers to shortfalls of the earlier regime in the country sued, foreign military intervention in it and related knowledge of claimant. A paradoxical side element of this type of scenario is that the profit that the likes of Yukos demand largely derives from the low prices of the acquisition of the relevant assets due to the shortfalls in state rule.

50 The far from exhaustive in this respect (see fn. 49) Yukos EC Arbitral Award No. 1312 refers to hundreds of pages of submissions

51 I am referring to provision such as the §§ 252 German Civil Code, the brevity of which seems to divert from deeper substantive issues, see below no. 1.4.1.

52 Whilst I, *de lege lata*, disagree with *Rolf Kniepers*, Rethinking Investment Arbitration, SchiedsVZ 2015, 25, 31 arguments against interest, *de lege ferenda*, I in particular find the accumulation of interest whilst foreclosure of awards is unclear problematic with a view to increase the chances for countries to accept foreclosure. I also fail to follow why compensations are fixed in so called hard currencies (dollars or Euros in the Yukos case, Yukos ECT Arbitration Award, no. 1798 see ECHR-Yukos Decision, Section 1, respectively) as if participation of the country sued in international capital markets were self-understood and although, until exiting, the investor would bear the risk linked to the local currency for dividend distribution for instance. Awarding local currency would lead to reasonable results even if one assumes

individual issues such as the return to legality, the consideration of specific interests⁵³, evidence and publicity⁵⁴ the development of new rules is not difficult to conceptualize, related attempts seem to not be progressing well⁵⁵. Instead of working further to adapt rules, Russia ended up not joined the EC, presumably because of concerns about compensation claims⁵⁶ also giving up Russia's protection and what generally previously had seemed a natural ambition of Russia's to

that the very measure that turns out to be illegal leads to devaluation of the currency in question (for instance, because an important very profitable business is prohibited), as the dispute initiated by the one investor should not lead to generally allowing such a business.

- 53 Potentially, the difficulty in agreeing on an appropriate wording is due to general dissent on the future strategy relating to environmental policy, I have summarized my concerns in *Klimaschutz, Global Governance und Russland*, https://www.ostinstitut.de/documents/Gutbrod_Klimaschutz_Global_Governance_und_Russland_OL_1_2021.pdf, visited 1.1.2026, concerns about the direction of environmental policy also in *Maria Ivanova*, At 50, the UN Environment Programme must lead again, <https://www.nature.com/articles/d41586-021-00393-5>, visited the 1.10.2025, general drafting issues are raised *Steffen Hindelang: Investor-state dispute settlement – Pulling the chain tighter*, *VerfBlog*, 2014/4/17, <https://verfassungsblog.de/investor-state-dispute-settlement-pulling-the-chain-tighter-2>.
- 54 Whilst to my mind, generally public debate such as for instance demanded by *Natalie Bernasconi* Background paper on Vattenfall vs. Germany Arbitration, see https://www.iisd.org/system/files/publications/background_vattenfall_vs_germany.pdf, accessed the 1.12.2025, in particular situations such as those referred to in fn. 53 above for obvious reasons are difficult for states to publicly discuss and maybe even to raise, so there are arguments in favor of adapting relevant procedural rules.
- 55 Doubts on whether the wording proposed for general issues regarding CETA indeed resolves issues in *Steffen Hindelang*, Noch einen Nachschlag gefällig?: Der Vorschlag der Bundesregierung zu einer Interpretationserklärung zum CETA- Abkommen und deren Auswirkungen auf die Handelspolitik, *Völkerrechtsblog*, 30.11.2022. <https://voelkerrechtsblog.org/noch-einen-nachschlag-gefällig/>, visited the 1.1.2026. Reverse approaches, setting out provisions in constitutions in detail, seems to have been tested in Brazil, see *Wolf Paul*, Die Brasilianische Verfassung von 1988, Ihre Bedeutung für Rechtsordnung und Gerichtsverfassung Brasiliens without big success. *Otto Luchterhand*, DRRZ Band 10, Heft 2, Von Jelzins defekter Rechtsstaatsverfassung zu Putins Verfassung eines autokratischen „Doppelstaats“ - und wieder zurück?, 126, 145 has doubts the benefit of the Russian Constitution after Putin being more extensive.
- 56 *Alexey Knelz*, Russland ist kein Freund der europäischen Energie Charter, <https://www.dw.com/de/russland-ist-kein-freund-der-europäischen-energiecharta/a-2094980>, accessed the 1.1.2026. In my reading, in contrast, *Yulia Selivanova*, The Energy Charter and the International Energy Governance, can be read as summary of arguments and many years of *Yulia Selivanovas* work to try and convince Russia to join the Energy Charter.

obtain a position in international gas and maybe oil trade⁵⁷, Europe has with some – to my mind ill founded – feeling of need - withdrawn from the EC citing a vague expectation for it to be replaced by something more “progressive and flexible”⁵⁸.

1.3. An Aberration? Alienation: Diagnosis and Remedies

In addition to personality and property rights, there has been a concern with ensuring what can, in very general terms, be referred to as the ease with which a personality is itself, is unalienated⁵⁹. In the context of the industrial revolution, this ability has been said to have been unduly limited⁶⁰. The identification of those responsible for such limitations as being capitalists or imperialists seems to owe part of its attraction to having encouraged research detailing the role of groups of similar actors. Interestingly, the delineation of such types of classes or power centers suggest they at least partially hinder progress⁶¹. At the same time, the remedies put forward by this school of thought seems never have been adequately related to the shortfalls identified. As if to compensate this shortfall,

57 *Elena Petrova, Tatiana Sviridova*, «Газпром» отказался от туркменского газа и ставит на «Силу Сибири-2». Кто милее Китаю?, (my translation:Gazprom desisted from Turkmen gas and sets on the “Power of Siberia”, <https://newizv.ru/news/2024-10-28/gazprom-otkazalsya-ot-turkmenskogo-gaza-i-stavit-na-silu-sibiri-2-kto-milee-kitayu-434031>, accessed 20.1.2026.

58 *Lukas Schaugg*, Why Coordinated Withdrawal From the Energy Charter Treaty Remains Essential for Effective Climate Action, <https://www.iisd.org/articles/insight/coordinated-energy-charter-treaty-withdrawal-essential-> The hope a new treaty would emerge without giving details of this treaty in *Stephan Wilske* and others, Energy Charter Treaty Modernisation Adopted, <https://www.gleisslutz.com/en/news-events/know-how/energy-charter-treaty-modernisation-adopted>, accessed 1.10.2026.

59 Whilst *Marx* is famous for him arguing with this term, it is not easy to find related evidence, and he seems to have resorted to a romantic, backward-looking ideal by stressing the free choice of profession as opposed to the one requiring mastery or specialization, see *Karl Marx*, *Die Frühschriften*, *Deutsche Ideologie*: Feuerbach, 561, or Christianity, *Zur Judenfrage*, 187.

60 An admittedly very brief summary following *Ricarda Huch*, *Alte und neue Götter*, 1848, 308. *Huch*, who herself had a keen but much less romantic historical interest, assumed that *Marx* and *Engels* intended a return to medium ages.

61 *Faoro*, fn. 11, describes different forms of favoritism which migrated from medieval Portugal into the Brazil up until the 1930, to conclude that they are the cause for a specific form of stagnation (*estamento*) and blurred debate, also see fn. 11 and 12. I will take up some of the related thought process below in no. 2.4.

this school of thought ab initio was linked to radical remedies⁶², which seem directly linked to the astounding cruelty linked to communist revolutions and regimes, which maybe continued for comparatively long because the stringent limitation of private ownership and revenue indeed decreased differences among people. Furthermore, this paradigm hindered the formation of prices, which may well also have put in question the accuracy of write offs, which in turn are an important element of the formation of international markets⁶³.

1.4. Ability to Act

Narrowing down alienation to specific action, focusing on how people can improve their ability to transact, the less specific (monarchic, aristocratic or authoritarian) influences prevail, the smaller the ability will be to, by taking coercive decisions, give preference to the interest of the few. Accordingly, some have indeed defined the ability to act as a fundamental element of freedom⁶⁴. Therefore, once more on a high level, I will address how far this type of freedom can be guaranteed by law:

1.4.1. Perceptions about the Extent of Constitutional Guarantees

Regularly, in the political debate it is suggested that social disbalance can be decreased by increased taxation of those with higher income or property, and, whilst many countries have been living with progressive taxation for long periods of time, others, in particular when tax administration has been weak as

62 Ricarda Huch, *Alte und neue Götter*, 1848, 489 attributes the “promotion of a final fight” even by the young Engels to his bitterness about what he understood as being entrepreneurs without heart exploiting the industrial revolution.

63 Interestingly, from what I know, *Wolfgang Fikentscher*, *Modes of Thought, A Study in the Anthropology of Law and Religion* 2., überarbeitete Auflage, 107, is unique to refer to the difficulty communist regimes had in forming prices. At the same time, the relevance of this difficulty is mentioned below in no. 1.4.1.1. when it comes to the usefulness of international valuation rules, and, with a very veiled reference to the reasons why North Stream was built, in no. 1.4.2.1.

64 See *Max Gutbrod*, *Review Essay About the Relevance of German Civil Law Science*, 7, no 2.1.4, 7, also available in https://www.academia.edu/35357187/Review_Essay_About_the_Relevance_of_German_Civil_Law_Science_of_the_20th_Century_for_the_CEE_and_CIS_A_review_of_Stefan_Grundmann_Karl_Riesenhuber_Deutschsprachige_Zivilrechtslehrer_des_20_Jahrhunderts_in_Berichten_ihrer_Schüler, visited the 1.10.2025, tied to the receipt of salaries, *Pedro Dutra*, *San Tiago Dantas. A Razão Vencida*, I, 499.

compared to the influence of those affluent, have simplified the progressive element of taxation or only introduced it after the time required to strengthen tax administration⁶⁵. Also, there has been a theoretical debate on whether a planned economy is permissible under a constitution like the German one which guarantees property⁶⁶. At the same time, the complex of measures including price regulation on residential leases which deeply interferes into the Berlin housing market and, according to some, is to be furthered by expropriation⁶⁷, has been limited, but not been made impossible by courts⁶⁸. To the reverse, there is a string of decisions on the maximum amount of taxes that the state allowed to levy based on the notion that a property guarantee like in the German Constitution does not allow excessive interference⁶⁹.

1.4.1. Transactional Level or Civil Law

Arguably, in a free economy, no standards for the interaction among parties need to be set, rather, such standards can be left to parties. Historically, however, there hardly is any jurisdiction in which rules for contracts, in particular rules related to consumers have not existed for a shorter or longer period of time. As a maybe extreme example for rules being useful, the private examination of criminal records, which would be necessary if there were no rules of criminal or civil law, even if such examinations were conducted by investigators and insurance companies, are likely to be much more complicated than the rules

65 To my mind, one of the bigger successful tax reforms throughout the post-Soviet countries was the decrease of income taxation by flat tax which is being reversed in Russia lately.

66 For instance see *Lucas Ihle*, Warum das Grundgesetz die Soziale Marktwirtschaft verlangt, <https://www.faz.net/einspruch/ist-das-grundgesetz-wirtschaftspolitisch-neutral-19794974.html>, visited the 1.11.2025.

67 As the Berlin parties are not prepared to admit that expropriation is not viable, they are doing as if they were expropriating, see *Timm Kühn und Erik Peter*, Vergesellschaftungsgesetz vorgelegt, <https://taz.de/Vergesellschaftungsgesetz-vorgelegt/!6139206/>, visited the 1.12.2025.

68 BVerwG (Highest German Arbitration Court), 9.11.2021, Az. 4 C 1.20 invalidating a communal pre-emptive right and BVerfG (German Constitutional Court) 25.03.2021 2 BvF 1/24, 2 BvL 4/20, 2 BvF 5/20 invalidating a limitation of the level of leases that can be demanded.

69 This debate is cited by BVerfG (German Constitutional Court) 26.03.2025- 2 BvR 1505/20. The repetitiveness of the debate is confirmed by a bestseller like *Phillip Banse and Ulf Buermeyer*, Baustellen der Nation, 187ss again evaluating wealth distribution in Germany as a problem and proposing taxation of inheritances as a solution without considering problems of valuation of businesses and formation of property.

that exist⁷⁰. Whilst continental jurisdictions are known for the comparatively high abstraction of their rules, there neither appears to be a standard for such rules⁷¹ nor their development⁷². In my view, the downside of this lack of principles and unclear focus becomes the clearer, the more rules are benchmarked against issues of relevance in our changing reality. Some, admittedly anecdotal, examples:

1.4.1.1. A key function of civil law should be to, by supporting quality assurances, facilitate the access of small and medium sized businesses to local markets. At the same time, such local markets, in my perception, having a comparatively little role seems to not only be due to lack of capital and access to justice, but also of the trust required to attract customers to their products⁷³.

1.4.1.2. Rules for contracts seem to focus on elements of comparatively little importance⁷⁴. In doing so, whilst the abstractions used in the past seem to have an attraction of their own⁷⁵, the context that would be required to determine appropriate balances seems to lack focus⁷⁶. As one of the consequences, with to my

70 One of the few related analyses I am aware of is, namely the one by *Rolf Knieper*, The Economic Relevance of Notarial Authentic Instruments, see https://www.bnotk.de/fileadmin/user_upload_bnotk/Bnotk_Internationales/KnieperUINLStudy.pdf, visited the 26.12.2025, for understandable reasons, comparatively narrow in scope.

71 *Joachim Gernhuber*, Das Schuldverhältnis, 2. Ed., § 7 IV 3, S. 153: “Sets of rules for contracts tend to not be conceptualized theoretically. Rather, they are typically developed based on a thorough examination of the realities of life which they are intended to regulate.” (my translation).

72 *Joachim Gernhuber*, Das BGB und die Legislative, in 40 Jahre Bundesrepublik Deutschland, 40 Jahre Rechtsentwicklung, S. 115, 141, when providing a to my mind uniquely thorough evaluation of the then 40 years development of the German Civil Code after WWII, notes that he considers his own evaluation as neither being exhaustive and nor comprehensive (“Zu vieles ist fragmentarisch geblieben, und holzschnittartig dazu”).

73 I cannot but link this with the example *Rolf Knieper* orally used in answer to a question by a minister about whether the codes in the newly independent state were over-sophisticated.

74 An example for the focus on detail *Enneccerus/Lehmann*, Schuldrecht, 14th ed 1952, 447, § 114, arguing that the in the interim abolished rules on the sale of animals deserve further specification at the same time as the foreword (V) stresses the need of the law to go with time. The breath of the development can be inferred from works like *Attila Menyhárd*, *Dr. Emőd Veress* New Civil Codes in Hungary and Romania and appears to encompass reforms of the civil codes of Russia and Brazil.

75 As just one example, see the importance given to name contracts as Fixgeschäft if the date of fulfilling them is certain, see *Enneccerus/Lehmann*, fn. 75, § 24 I 2 4, 102.

76 See fn. 198.

mind surprising ease solutions are sought in state supervision, with product certification, banking and capital markets related contracts (in particular repos, the transfer of funds (§ 675a ss BGB) and parallels in the proposed European Civil Code⁷⁷, custody for securities (see below no. 1.5.1.), travel contracts⁷⁸ and prevention of unfair competition⁷⁹ being examples that can be made plausible relatively easily. Characteristically, not even the ever-growing importance of repos⁸⁰ has led their risk analysis to be aligned with civil law⁸¹, and the many regulatory changes⁸² have not impacted the predominance of contractual and in particular English law contracts⁸³.

1.4.1.3. The ease with which agreements are reached appears to be an important function of law, and German rules on general conditions of sale seem to give a specifically successful related example⁸⁴. Similarly, rules for non-written adjacent obligations in contracts and in the pre-contractual phase have been developed in close interplay between courts and science with legislation being the

77 In the foreword of a well-respected commentary to the banking agreements of the BGB, namely the *Münchener Kommentar zum Bankrecht*, 4. Auflage 2024, *Herausgeber, Bandredakteur und Verlag* note the increasing role of supervision, without questioning it („die Einwirkungen der aufsichtsrechtlichen Dimension in die früher v. a. privatrechtlich geprägten Rechtsverhältnisse nehmen kontinuierlich zu“).

78 This argument admittedly is a bit of a hobby of mine where the fundament is that quality contractual regulation can contribute to the decrease of the need to insure.

79 See on the possibility to enforce competition rules as latest German Higher Court 27. März 2025, Az. I ZR 222/19 and I ZR 223/19.

80 For the significance of repos in capital markets see for instance <https://kase.kz/ru/markets/repo>, visited the 1.12.2025.

81 See the risk analysis in page 14ss of https://www.esma.europa.eu/sites/default/files/2024-04/ESMA50-524821-3147_EU_Securities_Financing_Transactions_markets_2024.pdf, visited the 1.12.2025, also country reports in *Jürgen Ellenberger, Hermann-Josef Bunte*, *Bankrechtshandbuch*, 6. Ed. lacking alignments for instance with the fiduciary property in the understanding under German law.

82 See Art. 500-1 of the Kazakh Civil Code, Art. 51.3 Russian Law on the Securities Market.

83 For comparison of English law with “German DRV and France’s FBF” agreements, see *Michael Huertas*, Taking stock of ESMA’s first review of EU securities financing transactions markets, <https://legal.pwc.de/en/news/articles/taking-stock-of-esmas-first-review-of-eu-securities-financing-transactions-markets>.

84 *Joachim Gernhuber*, *Bürgerliches Recht*, 3. Ed., 69. § 8 I 8 notes “standard terms and conditions are associated with rationalization effects through the simplification of business operations”. Kseniia Tatarkina, *Massengeschäfte im russischen und im deutschen Recht*, 29ss in turn links what she refers to as mass transactions with changes in techniques production over time.

consequence⁸⁵. However, when the same principles of good faith are applied in a more general manner to for instance determine the balance of agreements, the results typically are not convincing and in some instances even counterintuitive⁸⁶.

1.4.1.4. Whilst generally rules on invalidity of agreements have been aligned with the rationale for the invalidity⁸⁷, there seems to be a focus on special legislation to deal with the effects of changes in regimes⁸⁸,

1.4.1.5. Legal theory seems to focus on the difference between property and non-property damage as opposed to setting rules for the quantum of damages that are adequate to changing habits⁸⁹, which seems to prevent newcomers and

85 Reference is made to *Jürgen Schmidt-Räntsch*, Karlsruhe/Berlin, Zehn Jahre Schuldrechtsreform, ZJS 2012, 301ff, see https://www.zjs-online.com/dat/artikel/2012_3_565.pdf.

86 In *Max Gutbrod*, Zur Rolle der Billigkeit im neuen russischen Zivilrecht, https://www.ostinstitut.de/documents/Gutbrod_Zur_Rolle_der_Billigkeit_im_neuen_russischen_Zivilrecht_OL_1_2017.pdf, I have discussed a similar phenomenon, see also *Jens Peter Schmidt*, Zehn Jahre Art. 422 Código Civil – Licht und Schatten bei der Anwendung des Grundsatzes von Treu und Glauben in der brasilianischen Gerichtspraxis (Ten Years Article 422 Código Civil – Highlights and Lowlights in the Application of the Principle of Good Faith in Brazilian Court Practice), Mitteilungen der Deutsch-Brasilianischen Juristenvereinigung, Vol. 32, No. 2, pp. 34-47, 2014, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2569133 with specifically interesting remarks about the ongoing interchange among court and potentially critical science being a precondition for good faith decisions to be balance.

87 See Joachim Gernhuber, Bürgerliches Recht, 48, § 6 I 1 „Einem schwach entwickelten Rechtsdenken mag die Gleichung mangelbehaftetes Rechtsgeschäft = unwirksames Rechtsgeschäft unwiderleglich scheinen. Entwickeltere Rechtsordnungen sind sich der Notwendigkeit differenzierenderer Betrachtung bewusst.

88 Only Hans Carl Nipperdey Treuhänderschaft und Gesetz Nr. 8 AHK 307 in Festschrift für Nickisch, 307 discuss how trust management agreements concluded to avoid confiscation by Nazi rule where to be interpreted after Nazi rule, BGH (German High Court) of 16.03.2012 - V ZR 279/10 rather interprets requirements for the transfer of property in a very specific manner to avoid the effects of a confiscation, does not discuss the issue at all although in the Foreword, I the importance of circumstances at the time of publication is noted.

89 Relating the determination of the quantum of damages *Joachim Gernhuber*, Bürgerliches Recht, 3. Auflage,, § 43, I 5, 363f notes that of court practice fails to convince by “attempting to justify its new results with old norms — thus engaging in pseudo-positivism—and theory, by being overly fixated on the alternative of pecuniary loss versus non-pecuniary loss, even though numerous attempts have long confirmed the futility of an approach as limited as this. Accordingly, a transition to a broader and more differentiated system in which the traditional alternatives only represent the endpoint of a scale that also includes intermediate stages is in place” (my translation). For such a system, to my mind, a prerequisite is that tables of common cases such as the ones used for the non-pecuniary damages regulated by § 253 German Civil

more differentiated practices⁹⁰.

1.4.2. Worldwide Level or International Law

Whereas states can be expected to care for their citizens, they tend to turn against foreigners and in particular trade from abroad⁹¹. Furthermore, states will not of and by themselves be interested in establishing level playing fields and not be respectful of the standards applied elsewhere.

1.4.2.1. Trade

The above dynamics underlines how significant a development it was that after a decades long development which included even countries of the then Soviet Block and in which the USA played a key role⁹², the WTO, an international agreement with a dispute resolution mechanism through a judicial body⁹³,

Code (see for disturbed holidays, hobbies or marriages, *Habersack in Grüneberg*, BGB, 83. Ed., § 253, 15) are viable. Whilst the difference in hypothetical purchase price is a well-established method of determining damages, see for instance already in *Joachim Gernhuber*, Bürgerliches Recht, § 43 III 1. a aa, 413 it has taken dissenting decisions among the German Highest Court and the European Court of Justice among as showcased in *DPA*, Typengenehmigung begründet keinen unvermeidbaren Verbotsirrtum, <https://www.lto.de/recht/nachrichten/n/eugh-c66623-haftung-trotz-eg-typengenehmigung-dieselskandal>, accessed 1.2.2026, VW-Abgasskandal: EuGH bestätigt Schadensersatz-Ansprüche, see <https://www.ndr.de/nachrichten/niedersachsen/vw-abgasskandal-eugh-bestaetigt-schadensersatz-ansprueche,dieselskandal-102.html>xxx, another case of dissent between the EuGH dated 16.6.2011, cases Rs. C-65/09 und C-87/09 (Weber und Putz), generally also on the Highest Courts back and forth on damages *Beate Gsell, Augsburg, Comment on BGH, Urt. v. 10.6.2008 – VI ZR 248/07, ZJS 2008, 486*, https://www.zjs-online.com/dat/artikel/2008_4_86.pdf, all accessed the 1.2.2026.

90 As a little personal example, whilst one, as a passenger with a wheelchair is relatively frequently rejected in the likes of Uber, technical progress seems to not have given much guidance on how to get to a more reliable use.

91 see *Sven Beckert*, Kapitalismus, 2025, 592 about the factual significance of protectionism.

92 See the official history of WTO at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm, visited 1.12.2025.

93 Arbitration courts underlined by *Stephen N. Neff*, Justice Among Nations, Harward University Press, 478, the history of dispute settlement mechanisms is being reviewed by Krzysztof Pelc, Counterfactuals and Contingency in WTO Dispute Settlement History, in <https://www.cambridge.org/core/journals/world-trade-review/article/counterfactuals-and-contingency-in-wto-dispute-settlement-history/BC76CDE2EB13CC9BCADC44F33A28B947>, accessed 12.12.2025.

emerged. Importantly, accession to the WTO requires consent of all existing members, so that adding requirements and extending the accessing process is possible. Indeed, at least partially because of such additional requirements, accession of Russia and Uzbekistan took particularly long⁹⁴. As such an additional requirement internal and external pricing of gas for internal and external markets that had previously only had been relevant for anti-dumping procedures was raised in the context of the WTO accession of Russia⁹⁵. In this context, focus could have been put on the options to address price differences among countries for commodities such as gas⁹⁶. This could also have triggered discussions of how pricing is influenced by the relevant good being transported through an infrastructure which at that time could have been deemed depreciated and may well have damaged the environment disproportionately. New rules that however failed to emerge could also have been developed to deal with financial services⁹⁷, protection in the investment phase⁹⁸, the telecoms and electricity industries as well as localization and unbundling⁹⁹ requirements for various industries.

94 For Uzbekistan, which may have suspended negotiations for decades because of their difficulty, and comparison with other countries in Central Asia, see *Niginakhon Said*/Oybek Saidkhodjaev, Will Uzbekistan's 31-Year Effort to Join the WTO Finally Pay Off? <https://the-diplomat.com/2025/03/will-uzbekistans-31-year-effort-to-join-the-wto-finally-pay-off/>, visited the 1.12.2025, President *Putin* mentioned the duration and a perception of one sidedness of the WTO-accession of Russia in his famous Munich speech <https://www.youtube.com/watch?v=hQ58Yv6kP44>, min. 25ss, visited the 1.12.2025. One of my major involvements was trying to assure Russians that WTO plus (see https://www.bruegel.org/system/files/wp_attachments/bp_trade_jan09.pdf) did not automatically mean extra requirements.

95 See, for instance, *Alan Yanovitch*, WTO rules and the energy sector in: Regulation of Energy in International Trade Law – WTO, NAFTA and Energy Charter. Edited by Yulia Selivanova, 1, 21.

96 *Alexander Bratersky*, WTO Opens World to Russia. Though U.S. Trade Remains Hobbled by Jackson-Vanik, <https://oilandgaseurasia.com/articles/p/154/article/1729/>, visited the 1.12.2025.

97 Some attribute the problems highlighted in "China discriminates against foreign card companies", <https://www.bbc.com/news/business-18866467>, visited the 1.12.2025, to delays in complying with WTO decisions.

98 see *Yulia Selivanova*, The Energy Charter and the International Energy Governance, 373, 392ss.

99 Whilst such requirements are stated as a given for the EU in https://energy.ec.europa.eu/topics/markets-and-consumers/governance-internal-energy-market_en, visited the 1.12.2025, Russia seems to have tried vertical integration

Interestingly, Russia maintains membership in the WTO¹⁰⁰ as one of the few remaining links to the international legal order¹⁰¹ despite the limitation of trade due to actions like the ones involved with the Russian attack on Ukraine potentially coming up in the context of the legality of sanctions¹⁰².

To the reverse, discussions such as those between the US and the EU in the context of what had been proposed as *Transatlantic Trade and Investment Partnership (TTIP)* seemed to have been so detailed and intricate that they became very difficult to evaluate, most likely because of them including technical standards, and claims of the US to have been disadvantaged on standards¹⁰³ maybe due to lack of sophistication of specialized resources. In any instance, whilst trade has been in the headlines for some time¹⁰⁴, related legal mechanisms seem to not play a crucial role¹⁰⁵.

100 Despite earlier movements to the contrary, see Russia Plans to Exit World Trade Organization and Other Global Bodies, <https://www.iisd.org/articles/news/russia-plans-exit-world-trade-organization>. Russia has even initiated the procedure against the European Carbon Boarder Adjustment Mechanism (CBAM) that had been expected from countries like China, see https://www.wto.org/english/news_e/news25_e/ds639rfc_19may25_e.htm, both visited the 24.12.2025.

101 My perception during 1990 – 2020 had been that Russia almost uncritically joined international agreements. After 2022, it rather left most of them, with a full account not being easily available.

102 see *Wolfgang Weiss*, Interpreting Essential Security Exceptions in WTO Law and in View of Economic Security Interests, <https://dopus.uni-speyer.de/frontdoor/deliver/index/docId/4895/file/WeissInterpretingEssentialSecurityExceptions.pdf>, accessed the 01.10.2025, *Fujio Kawashima* Trade Sanctions against Russia and their WTO Consistency: Focusing on Justification under National Security Exceptions, *International Community Review*, https://brill.com/view/journals/iclr/26/1-2/article-p121_6.xml?srsId=Afm-BOOpZBX2dbVUD99RIOhpz8xtWiklZl2vuJ5k-MH7iwyB0ltOBR_U2, visited 1.12.2022.

103 <https://web.archive.org/web/20121119123318/http://www.agbioforum.org/v13n4/v13n4a01-vandemoortele.htm>

104 As just one example, Neue Eskalation im Handelsstreit, Trump verkündet Zölle von 25 Prozent auf Autoimporte, <https://www.n-tv.de/wirtschaft/Trump-verkuendet-Zoelle-von-25-Prozent-auf-Autoimporte-article25659298.html>, accessed the 1.12.2025.

105 Some increase of interest in trade agreements seems to be the consequence, see *Francesca Burwell* and others, The EU and Mercosure are creating one of the worlds largest trade areas. What's next?, <https://www.atlanticcouncil.org/dispatches/eu-and-mercosur-are-creating-one-of-the-worlds-largest-free-trade-areas/>, visited the 1.1.2025.

1.4.2.2. Valuation

One of the key issues in any economy is how to present value, and the general new understanding of the personality (see no. 1.1.1. above) emerged at the same time as bookkeeping in the modern form¹⁰⁶. In the context of globalization, as if to limit discussion¹⁰⁷ and despite concerns about legitimacy¹⁰⁸, the desire to unify accounting internationally led to a committee being entrusted with setting rules. As a result, valuations tied to current market values have become a standard¹⁰⁹, with additional issues emerging if capital is to be reserved¹¹⁰ currently being worked through. Similarly, when accounting rules were introduced, no consideration seems to have been given to the sophistication of relevant

106 *Jane Gleeson-White*, Double entry, How the merchants of Venice Created Modern Finance, 2011 dwells on this juxtaposition.

107 I have for instance failed to find the rebuttal by *Philippe Danjou* as reported in https://en.wikipedia.org/wiki/International_Financial_Reporting_Standards, visited the 1.10.2025, there fn. 42. The relatively comprehensive Jahresabschluss und Jahresabschlussprüfung / Probleme, Perspektiven, internationale Einflüsse. Festschrift für *Bäthge. Hans Havermann*, Tendenzen zur Internationalisierung der deutschen Konzernrechnungslegung, 519 reflects the introduction of IFRS as follows: 533: “for participants in a world market of capitals, one single language is needed”, 534: this „language“ is Anglo-Saxon not because of substance and market regulation, but because of the factual importance of its use, 544: it is necessary to be dynamic, international “without emotions” (my translations) *Jacques Richard/Wilfried Bechtel*, Jahresabschlussinformationen für globale Märkte und die aktuelle Krise des französischen Rechnungswesens 601, 628 argue the Anglo-Saxon model should be accepted so it can be influenced (by the French), balanced only by a random stressing of the need to harmonize rules for audit in *Herbert Biener* Wäre die Übernahme der Prüfungsgrundsätze der FAC oder anderer Berufsorganisationen geeignet, die Qualität der Abschlussprüfung in Deutschland zu verbessern? 639, 660.

108 *Ulf Luthardt, Jochen Zimmermann*, A European view on the legitimacy of accounting procedures: Towards a deliberative-accountability framework for analysis, <https://www.sciencedirect.com/science/article/abs/pii/S1052045709000320>.

109 Skepticism about the mark-to-market valuations in *Wulf Döser*, in *Astapovich et al.*, Corporate Reform and Harmonization of Russian and EU Corporate Laws, Moscow, 2006, 52, *Charles Lee*: Why Fair-Value Accounting Isn’t Fair, <https://www.gsb.stanford.edu/insights/charles-lee-why-fair-value-accounting-isnt-fair>, *H. David Sherman, S. David Young*, Where Financial Reporting still falls short, <https://hbr.org/2016/07/where-financial-reporting-still-falls-short>, both visited 30.11.2025.

110 See, in the context of the introduction of Basel IV, the views of *Johannes Borgen*, a knowledgeable analyst, in see <https://x.com/jeuasommennulle/status/1940403035903291776>, visited the 5.12.2025.

markets, not even for countries without market tradition¹¹¹, although, obviously, the reliability of the determination of prices varies. I believe this all to contribute to volatility particularly in markets dominated by long term assets¹¹², delay climate finance¹¹³ and pose challenges for less sophisticated markets. Rules on ESG reporting, in turn, seem to have followed the perception of whatever parameter that is available should become public regardless of what the impact is¹¹⁴.

1.4.3. Personal Level or Regularizing Influence and Supporting Choices

Ethnical or religious determinants in private life on the one hand seem to be weakening, on the other hand the number of forms of partnerships including in terms of duration, parenthood, care for illnesses, deficiencies and age as well as influence and willingness of relatives to share burdens including through migration appears to be increasing. Accordingly, frictions acute enough to benefit from legal regulations are also likely to increase and demand agility¹¹⁵. In contrast, in what is traditionally referred to as family law, adoption of rules or law appears to be particularly erratic¹¹⁶ and fraught with emotions, and rules for

111 See articles about the mechanical introduction of IFRS in Russia and India: *Natalia V. Generalova, Mikhail L. Pyatov, Boris I. Sokolov* The History of IFRS in Russia in 1991–2021, <https://publications.aaahq.org/jiar/article-abstract/23/3/51/12617/The-History-of-IFRS-in-Russia-in-1991-2021?redirectedFrom=fulltext>, and *P.C. Roopa, Shri Shankar, Anand Sing*, An Empirical Study on International Financial Standards, ss <https://www.ijrar.org/papers/IJRAR19D2350.pdf>, both visited the 1.12.2025.

112 In particular the erratic increases and loss in value in real estate markets and the behavior of major players in the German real estate market.

113 In the case of biodiesel-company Verbio, the valuation of biodiesel-related assets as well as the status as trader in derivatives or not recognized, see https://www.academia.edu/152393157/Verbio_HV_2025 and https://www.academia.edu/126177414/Verbio_Hauptversammlung_24_25_Zur_Methodik_der_Bewertung_die_THG_Quoten, both accessed 1.2.2026.

114 Given the manyfold related effects, I am unsure on how to evidence related effects, and have attempted to put together some related thoughts and perceptions in my shareholders parameters project as evidenced in https://www.academia.edu/122287631/Parameters_for_Activity_within_the_Shareholder_Activism_Project, visited the 1.1.2026.

115 See the resentment in the report of a right-wing news outlet by *Anna Diouf*, Werbung für illegal Praktiken, Ein Baby kaufen? Kein Problem: Leihmutterschaftsmesse <https://www.tichyseinblick.de/meinungen/ein-baby-kaufen-leihmutterschaftsmesse-in-köln/>, visited the 1.12.2025, as an example dealing with paternity of homosexuals.

116 *Joachim Gernhuber*, Neues Familienrecht, 140, characterizes the post war German

otherwise outdated social models may persist¹¹⁷. For religious rules, establishing their exact content and adherence to them may be a challenge. As a result, international rules on issues like disability or domestic violence have been contributing to even states generally ambitious states benchmarking their dealing with those issues¹¹⁸, with international influence being used to improve and unify the standards for difficult situations¹¹⁹. At the same time, when the very issues are considered, legal remedies or questions such as the ability to ensure housing, custody of children for instance if parents reside in different jurisdictions, the right to keep living in a country despite having been a partner to a resident there only for a limited time or religious rules may play a role¹²⁰, lead to distortions and specifics in the need to heal related psychical wounds¹²¹.

legislation until 1977 as “of gray everyday life... neither able to preserve the old social model, nor to develop a new one” (my translation).

- 117 whilst, in Germany, marital law has frequently been criticized as being arcane, an assessment of a generally conservative scientist like *Joachim Gernhuber*, *Neues Familienrecht*, 7, “The conviction with which the bourgeoisie principles (patriarchy, housewife marriage, fault principle in divorce) were incorporated into the German Civil Code (BGB) lead to a family law that could avoid detail and finesse to a far greater extent than would have been possible in a codification even two decades younger.” (my translation) is rare. Currently, there appears to be a focus on extending the ability to marry, without much consideration of the benefit this could bring in by increasing preparedness to care for aging and disabilities.
- 118 *Jonas Wahmkow*, *Die Deutsche Bahn hat massiven Nachholbedarf*, Interview with *Jürgen Dusel*, <https://taz.de/Behindertenbeauftragter-Die-Deutsche-Bahn-hat-massiven-Nachholbedarf/!6097796/>.
- 119 see about monitoring of the situation with reference to international convention BKA: Zahl der Opfer häuslicher Gewalt erreicht neuen Höchststand, <https://regionalheute.de/bka-zahl-der-opfer-haeuslicher-gewalt-erreicht-neuen-hoechststand-1754110862/>, including the assessment that higher figures may confirm better reporting Sozialministerin: Gewalt gegen Frauen wird Sichtbarer, <https://www.sueddeutsche.de/politik/gewaltpraevention-sozialministerin-gewalt-gegen-frauen-wird-sichtbarer-dpa.urn-newsml-dpa-com-20090101-250826-930-957866>, both accessed 1.1.2025.
- 120 I have put together some questions about one of the domestic violence oriented initiatives is in https://www.academia.edu/144624055/Thoughts_on_International_Cooperation_in_Family_Matters_in_Particular_in_Acting_Against_Domestic_Violence, visited the 1.12.2025.
- 121 See about specific migration related traumata *Anna Carthaus*, Interview with Meryam Scholer-Ocak, *Darüber wird erst gesprochen, wenn andere verletzt werden*, <https://www.zeit.de/2025/48/meryam-schouler-ocak-gefluechtete-psychische-erkrankungen-psiater-gxe>, accessed the 20.12.2025.

1.4.4. Access To Development

To my mind and not least due to the developments mentioned in this article, the importance of access to qualification systems and their updating according to technological progress¹²² is rising, and it is particularly disappointing that a country like Germany seems to not be doing well in terms of social mobility¹²³ and access to affordable living¹²⁴. As an aside, and despite the political vulnerability of systems like El Sistema¹²⁵, I note that through art and sports social mobility on the basis of abilities can become possible as opposed to what I believe is a likely rising importance of inheritances, and human divisions can be mitigated by programs such as student exchanges¹²⁶, with the challenge always being to find a convincing balance between effort and return.

1.5. Systemic Infringements

In parallel with the importance technical tools and organizational models increasing, frequency, importance and speed of the violation of rights seems to also have increased. As typical for segregated actions, many tended to be involved to different degrees, and may have been purposefully involved with a view to increase the number of potential culprits. Law seems to have struggled to keep pace with those developments:

1.1.1. Personality

Radbruch, when devising the to become famous theory that justified imposing sanctions for violation of personality rights in spite of such actions could

122 As a little anecdotal example of related challenges, I have heard that in Australia fees for schooling are way higher than those for university.

123 See *Julia Baarck, Moritz Bode, Andreas Peichl*, Rising Inequality, Declining Mobility: The Evolution of Intergenerational Mobility in Germany, available under https://www.ifo.de/DocDL/cesifo1_wp12058.pdf, visited 05.12.2025.

124 doubts on social mobility in Germany for instance in <https://www.handelsblatt.com/finanzen/vorsorge/karriere-gestresste-generation-das-aufstiegsversprechen-gilt-nicht-mehr/100170215.html>, visited the 1.1.2026.

125 See https://de.wikipedia.org/wiki/El_Sistema, visited 05.12.2025.

126 Ferdinand Knapp, EU plans to expand Erasmus program to southern Mediterranean countries, <https://www.politico.eu/article/eu-expand-erasmus-program-southern-mediterranean-africa-middle-east/>, visited the 1.12.2025

having been deemed legal under rules established by those sympathetic with the perpetrators¹²⁷, may have reacted to the beginning of prosecution of violations committed under Hitler and the then little differentiated demands¹²⁸, and, had he had the time (Radbruch passed away in 1949), could have adapted his theory to developments. Similarly, procedural flaws and the limitation of the extent of the adjudications by the Nürnberg Tribunal¹²⁹ could have triggered further rules. Instead, some took such flaws as a basis for the review of their earlier positive opinion relating to adjudication¹³⁰, others kept silent about actions, events and consequences¹³¹ as if rule-setting was beyond their intellectual reach. Indeed, trials such as the one on *Eichmann* also appear to, in a grotesque manner, reflect the effort of the culprits to share guilt with as many as possible in being less focused on the action of the individual as opposed to the perception relating to the nation as a whole¹³². Whilst the topic continues to raise emotions, the many signs to the effect that the longer time passed since the deeds had been committed, the smaller a contribution was deemed

127 *Gesetzliches Unrecht und übergesetzliches Recht*, Süddeutsche Juristenzeitung. 1946, 105.

128 A relatively measured observer like *Thomas Mann* Essays IV, 1945-1950, (Große Frankfurter Ausgabe, Frankfurt a. M., 2009, 64ss, in related Kommentare, 52ss the intellectuals considered and *Mann* withdrawing the article from publication) had considered the death penalty for all those responsible without court procedure and the extension of some similar approach to intellectuals.

129 When following the evaluation of related benefit, on the one hand, *Hannah Arendt*, in *Einige Fragen der Ethik, Über das Böse*, 2007, München 21, concludes that court procedures are important in drawing the attention to the individual even in mass societies, on the other, in *Eichmann in Jerusalem, Ein Bericht von der Banalität des Bösen*, München, 7. Ed. 2013, 400 talks about the shortfalls of the *Eichmann* proceeding and in 404 depicts an “ideal judge” with a relatively general verdict.

130 *Karl Jaspers*, *Die Schuldfrage*, New Edition München 1987, in the Nachwort 1962, 84 changed his view because of non-inclusion of crimes of allies *Scheinprozess* 88.

131 A prominent case being the one of German President *Weizsäcker*, the speech of whom on National Socialism was particularly well received, but who kept about his fathers and his own role in the Nürnberg Tribunal, https://de.wikipedia.org/wiki/Richard_von_Weizsäcker, visited the 1.12.2025. At the same time, many involved hesitated to confirm their role in spite of them themselves own stressing moral values like Günter Grass or leaving the lime-light such as civil law scholar Fritz Baur, about the latter see Max Gutbrod, fn. 64, 15 no. 2.5.2.

132 See *Willi Winkler*, *Eichmann-Prozess, Einflussnahme*, <https://www.sueddeutsche.de/kultur/eichmann-prozess-jerusalem-einflussnahme-1.5568791>, accessed 1.1.2025.

sufficient for legal or moral adjudication, with the debate on prescription¹³³ seemingly additionally diverting from the substance, namely the degree and evenness of prosecution¹³⁴. The pure fact that there had been a debate may however have contributed to the relatively little hesitance to convict those involved similar deeds after 1945¹³⁵. In sum, although issues like the disproportions in convictions have been continuously raised¹³⁶ science appears to turn away from such major to minor issues.

In addition, rather than focusing on how the various fact scenarios being tried might have helped *Radbruch* to develop his theories, the focus of current debate appears to be on how the part of his theory that has been described fits into *Radbruchs* prior work¹³⁷. Current general scientific and public debate in turn seems to concentrate on terms, their history and the benefit in amending them¹³⁸, with the use of the relevant term in public debate or to make decisions on recognition of statehood or aid to organizations linked to those incriminated being given a higher value than the likelihood of prosecution or tracing events in detail¹³⁹.

This all may be seen as unsatisfactory but looks impressive compared to the degree to which the reverse, namely holding populations hostage for their

133 See <https://www.bpb.de/kurz-knapp/hintergrund-aktuell/293285/das-ende-der-verjaeh-rungsdebatte-warum-mord-nicht-verjaehrt/>, accessed the 20.10.2025, is characteristic for many.

134 In *Claus Roxins Täterschaft und Tatherrschaft*, 1963, the title suggests the participation in very question, it however up until has a focus on substantive law, not on procedures.

135 See for the killings of the GDR BGH (German Highest Court) 20.03.1995 – 5 StR 111/94.

136 See for instance *Gudula Hörr*, *Das Massaker von Babi Jar - "Wir mussten die Drecksarbeit machen"*, <https://www.n-tv.de/politik/Wir-mussten-die-Drecksarbeit-machen-arte-cle18735846.html>, visited the 1.12.2025, in my translation: The Babi Jar Massacre – “we had to do the dirty work” with the argument of a person doing hands on work that people in the higher ranks only faced little prosecution.

137 At least in https://de.wikipedia.org/wiki/Radbruchsche_Formel, the consistency in *Radbruchs* thinking is raised.

138 See https://www.nytimes.com/2025/08/13/opinion/ezra-klein-podcast-philippe-sands.html?smid=fb-share&fbclid=IwY2xjawMKRU9leHRuA2FibQlxMQABHI2XPWHKgIM-fmNtsaphOGb1JQvGjjWw83w58TBwtZHIzI7Dq350rJs8Ru7RE_aem_3pU-vqBO72m_vFct8e5ooRge.

139 Astoundingly, and only after legal action to obtain documents, *David Harding*, *Die Einstein-Vendetta*, made the organization of a murder of a cousin of Albert Einstein public. The further text above is obviously inspired by recent events surrounding Israel and Palestine.

governments like in World War II¹⁴⁰ or in the context of the crimes committed on and after 7.10. 2023 are being dealt with: Some discussions have been held about primary¹⁴¹, less so about ultimate responsibility¹⁴², the initiative to end atomic bombs¹⁴³ looks like the denial of the existence of a problem, with the emergence of new phenomena¹⁴⁴ underlining the need for regulation.

As if the comedy that used to follow the tragedy ended up in another tragedy, events surrounding the conflict that could be identified as the first in a series that could become typical for the 21st century and in my personal perception stood at the beginning of the current distance Russia has to the West, namely the war in Serbia¹⁴⁵, has not lead to higher intensity of discussions of international law being extended or amended. It rather repeat many of the features that have become problematic over the 20th century, namely the effect of violation of laws in bringing somebody to justice¹⁴⁶, whether a court specially set up for the purpose of adjudicating a case is competent, whether the means utilized by this court are appropriate, whether the ultimate punishment is an adequate reaction to the actions in total, with the potential for resentment also because of the bombings in Serbia being substantial.

1.5.1. Property Rights and Technology Risks

Division of work plays a major role in all types of property relations, and roles in holding property are frequently structured with a view to perform discreet functions relating to such holding. For instance, an attempt to reform and unify

140 Mark Selden, *The United States and Japan in Twentieth-Century Asian Wars*, In Mark Selden, Alvin Y. So (eds.), *War and State Terrorism: The United States, Japan, and the Asia-Pacific in the Long Twentieth Century*, 19ss.

141 for instance, in https://en.wikipedia.org/wiki/Arthur_Harris#Post-war_era, accessed the 1.12.2025.

142 I am for instance referring to the governments of the warring countries.

143 I for one remember campaigns like <https://www.greenpeace.de/frieden/erinnerung-atom-bombenabwurf-hiroshima>, visited the 1.12.2025, since my childhood.

144 See Frank Sauer, *Wie autonome Waffen das Schlachtfeld verändern*, <https://www.derpragmaticus.com/r/autonome-waffen?twclid=2-2askaql6y9o24umzl5zp2xgyx>, visited the 2.12.2025, about rules relating to autonomous weapons being needed.

145 On the question being of relevance and open see https://en.wikipedia.org/wiki/Legitimacy_of_the_NATO_bombing_of_Yugoslavia, visited the 1.11.2025.

146 Needless to say, the forthcoming trial of Mr. Maduro will again trigger this question.

security holdership¹⁴⁷ throughout the world seems to have stalled because of being too focused on safety of acquisition of the security as opposed to loss of the security through such acquisition and processing of tax obligations relating to securities considerably lags practices on their transfer¹⁴⁸. Whilst systems of control structures are broadly recognized in the corporate world and to counter financial risks, their acceptance as an important element of containing the risks of technology¹⁴⁹ and private participation in them¹⁵⁰ seems to take time.

2. Implementation Mechanisms and Their Dynamics

We understand rules as being objective, but as lawyers, in particular from our practice appreciate the detail of how implementation works. At the same time, implementation seems to be understood as a given and not being focused upon with the same attention as substantive rules.

2.1. Judicial Bodies

Whilst AI seems to again support the hope that the mechanical implementation of law become possible also to compensate staffing needs caused by negative demography, to my mind the ultimate resolution of conflicts will continue

147 I am referring to the Unidroit Convention on Substantive Rules for Intermediated Securities, see <https://www.unidroit.org/instruments/capital-markets/geneva-convention/>, visited on 22.2.2026.

148 A proposal for a structural solution to the substantial issues linked with taxation at the source and referred to as cum-ex and cum-cum in *Nils Heck, Meike Schreiber*, „Komplexe Aktiengeschäfte machen die Menschen nicht wirklich wütend. Sollten sie aber.“, interview with *Christoph Spengel*, <https://www.sueddeutsche.de/projekte/artikel/wirtschaft/cum-cum-sparkassen-interview-e381447/>, some of the intricacies of the equivalent to pleading guilty in *Volker Votsmeir, Geron Thönissen*, „Ich habe mich kaufen lassen“ – Klare Geständnisse zum Prozessstart, <https://www.handelsblatt.com/finanzen/banken-versicherungen/cum-ex/cum-ex-habe-mich-kaufen-lassen-klare-gestaendnisse-zum-prozessstart/100167001.html>, both visited on 2.1.2016.

149 *Nicolas Killian*, Er wäre gern einer der Guten, <https://www.zeit.de/2026/03/dario-amodei-anthropic-openai-kuenstliche-intelligenz-claude>, accessed 22.1.2026.

150 To https://www.academia.edu/129374962/Deutsche_Börse_Capital_Markets_Parameters_Shareholders_Meeting_25, accessed 1.1.2026, where I had made a related suggestion, there was not much reaction. Interestingly, the only plausible proposal for the control of AI I am aware of is one involving review by internal review bodies, see *Nicolas Kilian, Dario Amodei*: Er wäre gerne einer der Guten, <https://www.zeit.de/2026/03/dario-amodei-anthropic-openai-kuenstliche-intelligenz-claude>, accessed 27.1.2026.

to be in the responsibility of persons, if only the one that confirms the result AI leads to or, or the one devising the AI.

2.1.1. National Law

There is a general notion that courts constitute a power independent from the executive and legislative powers, with this third power to ensure stability of law. At the same time, independence of such a power is necessarily limited in that laws and the composition of courts can be changed, and that courts have limited power to implement more far-reaching decisions. For instance, at a time at which a state defaults on bond holders, it is unlikely this state will pay on a court order a teacher obtains for his salary¹⁵¹. Also, when court decisions contradict what is important to the legislator, the legislator can change the law. From a more formal side, partiality at the promotion of judges may weaken the “third power”, be it by appointments into the very judicial apparatus¹⁵², be it when judges are promoted or elected in a more political process, in particular when arguments or issues relating to the respective candidate are taken out of the context adequate for choosing judges¹⁵³. Needless to say, without valid decisions of a court system, neither such vital elements of democracies like the division of power among the different branches of government¹⁵⁴ nor succession of power is likely to proceed in an orderly fashion¹⁵⁵. Judges in turn can be unduly

151 *Faoro* (fn. 12) 471 even refers to conscious delays in payment of salaries to keep the army loyal to the then Empire.

152 Detail of the deviation in nomination processes of judges in Russia is discussed in *Veronika Horrer*, *Richterliche Unabhängigkeit in der Russischen Föderation*, 2011.

153 *Susanne Beck* and numerous others, *Stellungnahme zur Causa Frauke Brosius-Gersdorf*, <https://verfassungsblog.de/stellungnahme-zur-causa-frauke-brosius-gersdorf/?unapproved=980957&moderation-hash=4c9cb7d5d9a3afadf04dc8239faac2f6#comment-980957>, visited the 15.10.2025.

154 About how the traditional division of power is being dismantled see *Peter Burghardt*, *Dank des Obersten Gerichtshofs kann Trump nun fast durchregieren*, <https://www.sueddeutsche.de/meinung/usa-trump-supreme-court-kommentar-li.3276049>, accessed 15.10.2025.

155 Interestingly, at least before the pardons issued for those acting on 6.1.2025 (see https://en.wikipedia.org/wiki/Pardon_of_January_6_United_States_Capitol_attack_defendants), this natural function of courts seemed to not have been focused upon, see *Nicole Schreier*, *Trump's Supreme Court Nominierung im Zeichen der Checks and Balances*, in <https://verfassungsblog.de/trumps-supreme-court-nominierung-im-zeichen-der-checks->

influenced from many sides, including by distorted discussions of their actions including over social media¹⁵⁶, issues of personal safety¹⁵⁷, interference in the premises they use privately or for work¹⁵⁸, with there being ample evidence of adverse influence transcending borders¹⁵⁹, for instance when it comes to supplies to the court¹⁶⁰, individual judges¹⁶¹ and relatives¹⁶². The danger to the court system is exacerbated by the little importance that, in public debate, is typically given to the ongoing technical working capacity of the judicial system, also given that it is difficult to measure its adequacy.

and-balances/?unapproved=980958&moderation-hash=f5c0aab4ec5ab4ebbc09ad650dd6dee6# visited the 28.10.2025.

- 156 Discussion about impartiality for instance in *Juliette McIntyre: From One ICJ to Another: Impartiality, Independence and the World Court*, *VerfBlog*, 2025/9/01, <https://verfassungsblog.de/from-one-icj-to-another/>, <https://verfassungsblog.de/from-one-icj-to-another/>.
- 157 *Reymer Klüwer*, Blitzkrieg gegen die Richter, <https://www.sueddeutsche.de/politik/usa-elena-kagan-us-justiz-trump-einschuechterung-li.3288491>, visited the 28.10.2025.
- 158 an example publicly discussed is the building of the Federal Reserve, see for the Fed <https://www.sueddeutsche.de/projekte/artikel/politik/trump-fed-powell-dollar-e122764/>, accessed 1.11.2025.
- 159 *Jean Galbraith*, U.S. Sanctions on the International Criminal Court, The Details and The Pattern, See <https://verfassungsblog.de/u-s-sanctions-on-the-international-criminal-court/>, for policy makers see <https://www.reuters.com/world/us/trump-administration-weighs-sanctions-officials-implementing-eu-tech-law-sources-2025-08-26/>, accessed 1.11.2025.
- 160 *Christof Kerkmann*, Bruch mit Symbolkraft: Aus Angst vor Sanktionen ersetzt der Internationale Strafgerichtshof US-Technologie mit einem Paket aus Deutschland – und könnte damit am Beginn eines Trends stehen, visited the 1.12.2025, calls for action in *Kai Ambos, The Sanctioning of Law: On the US Government's Sanctions Policy Against the International Criminal Court*, *VerfBlog*, 2025/12/18, <https://verfassungsblog.de/sanctions-us-icc-united-states/>, and *Cyril Laucci*, US Sanctions Against the ICC: From Stupor to Action, <https://opiniojuris.org/2025/12/19/us-sanctions-against-the-icc-from-stupor-to-action/> <https://opiniojuris.org/2025/12/19/us-sanctions-against-the-icc-from-stupor-to-action/> accessed 1.11.2025.
- 161 *Achim Sowall*, Amazon und Paypal blockieren Richter in Europa, <https://www.golem.de/news/internationaler-straengerichtshof-amazon-und-paypal-blockieren-richter-in-europa-2511-202479.html>, visited the 23.11.2025.
- 162 *Tim Hume and AP*, ICC judges stoic in face of US sanctions over Israeli war crimes cases reference to family members not any more being able to travel to the USA, see <https://www.aljazeera.com/news/2025/12/12/icc-judges-stoic-in-face-of-us-sanctions-over-israeli-war-crimes-cases>, visited 1.12.2026.

2.1.2. International Law

Characteristically, the standards for behavior for judges at international level seem to very broadly differ from those at national level, with specifically standards for the quality¹⁶³ and fees¹⁶⁴ of arbiters on an international level being under discussion, and composition of tribunals neither being reflective of the participation of the countries that are parties to treaties nor diverse. From anecdotal evidence, it does seem that even for countries with broad experience the choice of qualified counsel does not come easy¹⁶⁵. Also, discussions on changes in law seems to not be as substantive as desirable as taking position may have negative repercussions when it comes to the choice as an arbiter¹⁶⁶, and the blockade of the WTO dispute settlement mechanism which could only be dealt with by a workaround of willing countries a natural but dysfunctional consequence of substantive discussions not proceeding¹⁶⁷. At the same time, the typically lengthy proposals for improvements related to the choice of arbiters¹⁶⁸ seem to not take the minimum standards for what is required to form a committed body of internationally qualified judges into account.

163 See, for instance, *Martin Dietrich Brauch*, Toward a Code of Conduct for Investment Adjudicators – Can Ethical Standards Salvage ISDS, also at <https://www.iisd.org/itn/2019/09/19/toward-a-code-of-conduct-for-investment-adjudicators-can-ethical-standards-salvage-isds-martin-dietrich-brauch/>, visited the 1.11.2025, *Rolf Knieper*, Rethinking Investment Arbitration, *SchiedsVZ* 2015, 25, 29.

164 This criticism has also been made for the WTO see *Stephanie Nebehay*, U.S. takes aim at judges pay in new attack on WTO system, <https://www.reuters.com/article/us-wto-trade-usa/us-takes-aim-at-judges-pay-in-new-attack-on-wto-system-idUSKBN1XW1ZO>. By the way, when evaluating earnings, the effort to be recognized as judge should be included.

165 At least I have heard allegations to this effect about Germany in the Vattenfall-cases.

166 A relatively small and specific example where substantive issues are linked to a court in *Wolf Reuter*, Ein Bumerang für Karim Khan, <https://www.juedische-allgemeine.de/politik/ein-bumerang-fuer-karim-khan/?twclid=2-vjeuqa8gm79eqfg3xbdkji3z>, accessed 10.10.2026.

167 For the shortfalls of substantive discussions see above no. 1.4.2.1., for the workaround https://wtoplurilaterals.info/plural_initiative/the-mpia/, visited the 9.1.2026.

168 See, for instance, *Issam Halak*, Multilateral investment court: Framework options [https://www.europarl.europa.eu/Reg-DATA/etudes/BRIE/2021/690642/EPRS_BRI\(2021\)690642_EN.pdf](https://www.europarl.europa.eu/Reg-DATA/etudes/BRIE/2021/690642/EPRS_BRI(2021)690642_EN.pdf), Steffen Hindelang, Investor-State Dispute Settlement ('ISDS') and alternatives of dispute resolution in international investment law *Berliner Online-Beiträge zum Europarecht*, Nr. 99, 1ss., https://www.jura.fu-berlin.de/forschung/europarecht/bob/berliner_online_beitraege/Paper99-Hindelang/Paper99---Steffen-Hindelang---Investor-State-Dispute-Settlement-and-alternatives-of-dispute-resolution-in-international-investment-law.pdf, both accessed the 10.1.2026.

2.1.3. Procedural rules

We tend to give little attention to comparing the effect of various procedural rules. For instance, it being possible to call whoever participated in dealings to court as typical for Germany¹⁶⁹ may increase honesty much beyond court procedures. Also, the degree to which false statements are prosecuted, and evidence is used for the purpose of imposing sanctions differs¹⁷⁰. Furthermore, whilst for instance, German and Russian civil procedural rules are similar¹⁷¹, in practice, in Germany¹⁷² more importance is given to the discretion of the parties, whereas Russian courts influence into the procedure is bigger. As a consequence, in Germany statements of claim can be much shorter if the claimant assumes that the respondent will not object in substance, and rules on reimbursement of procedural costs like in Germany will have a major effect on consumer claims for instance¹⁷³. This so-called material effect of procedural rules does seem to have specifics in international law. For instance, a party to arbitral proceedings from a country that does not or to a lesser degree sanction untrue statements at disclosure of material may face disadvantages as compared to a party from a country in which wrongful disclosure is strictly sanctioned.

2.1.4. Return to Legality

On the one hand, only decisions that are objective, that therefore are preferably handed down by courts that are as independent as possible, should be recognized as binding. On the other hand, the likelihood that a despicable executive power increases when partisans of this power are encouraged to switch

169 See the official clarification for instance in https://oberlandesgericht-braunschweig.niedersachsen.de/startseite/z_ablage_alte_knotenpunkte/hinweise_fur_zeugen/rechte-und-pflichten-des-zeugen-vor-gericht-148276.html, accessed 13.1.2026.

170 I have had related practical experience comparing insolvency, marital and succession cases in Russia and Germany.

171 An equivalent of §§. 137s Civil Procedural Code has been introduced in Russia but is only reluctantly being applied.

172 summarized in the so called “Dispositionsgrundsatz” (the “principle of disposition”, my translation).

173 whilst I have not reviewed related assessments, I have heard the view that in Great Britain lawyers cost makes consumer claims almost impossible, in Germany they are viable and in Russia it is difficult for consumers to enlist quality legal Advice.

sides¹⁷⁴. Furthermore, lost objectivity will typically be difficult to restore without the very influence of the state on the court system which normally is highly undesirable. Whilst there seems to be plenty of material on related country specific challenges¹⁷⁵, there does not seem to be any consolidated related body of knowledge.

2.2. Structure of Sanctions against Persons

The manner in which individuals are sanctioned for undesirable activity will have a long and varied tradition in various countries¹⁷⁶. Accordingly, it seems that it is more on the basis of such a tradition and not so much on a rational basis that people at large will tend to assume that what has been tradition, for instance lifelong sentences for certain crimes, limitations of freedoms like imprisoning and handcuffs, are reactions not to be questioned although given current technical means limitations of freedom could be enforced much more easily¹⁷⁷, and enthusiasm for reform will in particular be little as in any reform discussion the typically very low rates of re-socialization will become an issue. Accordingly, reforms of sanctions systems tend to be ad hoc as opposed to systemic, reflecting issues of the day like revolutions, crimes and the ability of some of the perpetrators to avoid what would be seen a deserved sanctions regime. At the same

174 Well known structures of withdrawal in provisions such as Art. 24 German Criminal Code would benefit from allowing more discretion. The benefit of discretion becomes plausible considering that longtime Belarus president Lukashenko was seen as mishandling COVID by an overwhelming part of the population including the elite, but the many involved with rule infringements under the existing regime united to defend it, see about the “controlled corruption” already in *Tino Künzel*, *Als Deutscher unter slawischen Preussen*, Interview mit *Daniel Krutzinna*, <https://mdz-moskau.eu/belarus-daniel-krutzinna-als-deutscher-unter-slawischen-preussen/>, accessed the 10.1.2026.

175 *Gerrit Kurtz*, *Rethinking Transitional Justice in Sudan: Drawing Lessons From the Transition Process and Finding an End to the War*, *VerfBlog*, 2025/6/26, <https://verfassungsblog.de/transitional-justice-sudan/up>, *Jakub Jaraczewski*, *Poland’s ongoing rule-of-law crisis explained*, <https://notesfrompoland.com/2025/03/17/polands-ongoing-rule-of-law-crisis-explained/>, I have similar anecdotal evidence about Georgia currently and after Shevardnadze left power Shevardnadze left power.

176 Whilst reforms are likely to be speedier and power less fragmented than in the German empire of the medium ages which are the object of *Joachim Gernhuber*, fn. 8, the article instills a feeling for the time spans required.

177 As a purely anecdotal example, I was recently told that in German prisons the number of comparatively heavy keys the use of which has to be learned is very substantial.

time, ever more important deviations from what had been assumed to be the case seem to occur, with, on the one hand, prisoners appearing on videos¹⁷⁸, suggestions of corruption being discussed orally only¹⁷⁹, on the other the devices which allow to limit movements becoming more sophisticated. To the reverse, criminal procedures which limit the ability to participate in political processes appear to also gain relevance¹⁸⁰.

Conversely, it appears to be more difficult than previously to predict criminality with suicide of the criminal becoming frequent, ultimate goals being ideological and as a result states being slow in reacting to likely or even announced crimes¹⁸¹.

178 Alexey Navalny jokes in January video from penal colony, <https://www.bbc.com/news/av/world-europe-67941119>, accessed 2.2.2026.

179 With the much debated right of prisoners to vote <https://www.bbc.com/news/av/world-europe-67941119> only providing for little relief, not to harm others Kolesnikova "...declined to discuss further details of the prison conditions. She was thinking of her many friends who were still incarcerated. "There's a lot one can say about the conditions in Belarusian prisons," she said. Her goal, however, was to stop aggression and hatred – and that would never be achieved if she repeated everything" (my translation from *Vasili Golod*, interview with *Maria Kolesnikava* <https://www.tagesschau.de/ausland/kolesnikowa-interview-100.html>, visited the 15.12.2025

180 At least to the outside, phenomena such as the exclusion from election mayor of Istanbul, https://de.wikipedia.org/wiki/Festnahme_von_Ekrem_İmamoğlu, *Alexey Navalny*, see *Ina Ruck*, Vom Flughafen ins Straflager <https://www.tagesschau.de/ausland/europa/nawalny-jahrestag-haft-101.html>, the candidate for a mayoral position in Ludwigshafen, AfD Politiker Joachim Paul klagt erneut vor Verwaltungsgericht Neustadt, <https://www.swr.de/swr-aktuell/rheinland-pfalz/ludwigshafen/ob-wahl-ludwigshafen-afd-politiker-joachim-paul-klagt-vor-verwaltungsgericht-neustadt-gegen-ausschluss-100.html>, the Brazilian presidential candidate Bolsonaro in *Jan Heidtmann*, Interview with *Petra Costa*, Brasilien ist gerade gelungen, woran die USA gescheitert sind, <https://www.sueddeutsche.de/kultur/brasilien-demokratie-petra-costa-interview-li.3352305> and *Mr. Le Pen*, see <https://www.lesechos.fr/politique-societe/politique/ineligibilite-de-marine-le-pen-la-cour-dappel-annonce-une-decision-des-lete-2026-2157508>, visited the 1.11.2025 Questionable decisions *Csongor Kuti* On Means and Ends, The Annulment of the Romanian Presidential Elections, <https://verfassungsblog.de/on-means-and-ends/>, all visited the 1.11.2025, have a certain similarity.

181 An Australian friend of mine who has left the Soviet Union because of antisemitism was disappointed by the lack of prosecution of antisemitism before the 14.12.2025-attack in Sydney.

2.3. States Functions and People

We tend to assume that the state is and will continue to be a well-established organization at least performing certain minimum functions. To the contrary, the reality of the states we have experience with includes states being dangerously weak. Maybe less in our attention are the following challenges to state functions:

Assembling those that resent changes relating to life choices (also see above no. 1.4.3.) seems to be likely to further clannism taking religious or ideological beliefs as a pretext¹⁸². At the same time, people's link with states seems to be weakening¹⁸³, migration of the less affluent seems to increase leading to competition of social security systems, with social security systems having to cope with technical progress, climate change and social volatility likely to decrease the percentage of the population able to earn minimum salaries. Social security being more easily available however increases the likelihood that political asylum is sought without strong political dissent being in place. On the other hand, given the developed techniques to assert authoritarian power, the commitment of many having sought political asylum is bound to have increased importance¹⁸⁴. To the reverse, states seem to currently feel at ease intervening into the day to day of other states¹⁸⁵. In yet another perspective on states, as a tool to decrease the risk of totalitarianism, in post war Germany, with US backing,

182 A in a sense classic example of religious beliefs being used as a pretext is Chechnya, where highly doubtful local rulers maintain power for decades following bloody wars with even within the Russian elite at least at times doubts about the sustainability being raised, see, for instance, interview with Anatoly Chubais on 26.11.2018, see. <https://www.youtube.com/watch?v=I1E2oeCIPnc&t=1517s>, accessed the 20.1.2026. As further explained above in no. 1.1.1., the dynamics of religious beliefs does not seem to be new.

183 *Craig Berry, Richard Berry*, Scots living overseas or elsewhere in the UK should have given the right to vote in the independence referendum, see also <https://eprints.lse.ac.uk/63345/1/democraticaudit.com-Scots%20living%20overseas%20or%20else-where%20in%20the%20UK%20should%20have%20been%20given%20the%20right%20to%20vote%20in%20the%20independ.pdf> as an example, plans on Volksverhetzung <https://taz.de/Ahndung-bei-Volksverhetzung/!6141806/>.

184 I am basing my judgment on participation in recent protests against Iran.

185 *Nina Barth*, Warum Vance, Musk und Rubio die AfD unterstützen, <https://www.tagesschau.de/ausland/amerika/us-regierung-afd-100.html>, accessed 30.1.2026.

corporate conglomerates were broken up¹⁸⁶, but, currently, the new normal appears to be the opposite¹⁸⁷. As only one example of how formidable the challenge is to rebuild the state functions that have been endangered by the likes of the above-mentioned phenomena, state defaults regularly also lead to issues with statistics bureaus¹⁸⁸, with frequently many angles of any particular body having to be considered¹⁸⁹.

Dealing with challenges like those mentioned presupposes attention to many seemingly technical processes that seem to not have bigger importance such as judicial, court or general safeguards including their willful dismantling to avoid that opposition comes to power. As just one example, sanctions for partisan delaying a deemed opposition from taking functions seems difficult to devise¹⁹⁰,

186 Whilst the very term decartelization seems to be in the public domain, see <https://en.wikipedia.org/wiki/Decartelization>, accessed 30.1.2026, its application for instance in Post Soviet States appears to be inconsistent.

187 To only take the US example for so many see *Valentin Dornis*, Trump nutzt den Kapitalismus als Kampfmittel, <https://www.sueddeutsche.de/wirtschaft/wirtschaftspolitik-trump-nutzt-den-kapitalismus-als-kampfmittel-li.3299844>, *Max Muth, Ann-Kathrin Nesik*, Die Geschäfte der Familie Trump, <https://www.sueddeutsche.de/projekte/artikel/wirtschaft/melania-trump-donald-trump-familienimperium-praesidentschaftsgeld-verdienen-e521047/>.

188 see official criticism of the Greek statistics body at 10 of https://ec.europa.eu/eurostat/documents/4187653/6404656/COM_2010_report_greek/c8523cfa-d3c1-4954-8ea1-64bb11e59b3a, its new positioning in https://en.wikipedia.org/wiki/Hellenic_Statistical_Authority#cite_note-3, for Argentina *Raquel Garcia*, IMF Deems Argentina's Statistics Credible Again, <https://web.archive.org/web/20170224053911/https://panampost.com/raquel-garcia/2016/11/10/imf-deems-argentinas-statistics-credible-again/>, the similarity to events such as *Parker Purifoy*, Census Bureau Hit With Layoffs as 100 Get Notices in Shutdown, <https://news.bloomberglaw.com/daily-labor-report/census-bureau-hit-with-layoffs-as-100-get-notice-in-shutdown>, all visited on 1.11.2025, is striking.

189 As an example, the decrease of the salary of the head of the US-auditing body, including the thorough discussion in Dan Goelzer, PCAOB Board Member Pay Cuts and What they May Mean for Audit Oversight, <https://medium.com/the-audit-blog/pcaob-board-member-pay-cuts-and-what-they-may-mean-for-audit-oversight-b5454840b3f8>, visited 30.1.2026, should be complemented by a discussion of the ambition for reform of the body in question, the influence of the chairperson relating to such reform, the selection process and the further career expectations for the leadership.

190 See for simple issues like the swearing in of a representative https://en.wikipedia.org/wiki/Adelita_Grijalva, visited the 23.11.2025.

so that the number of problematic situations very generally increases without much public attention¹⁹¹.

2.4. Dynamics of the International Economy

In addition to the dynamics of migration and trade mentioned earlier, states and perspectives, as compared to other states and perspectives, can be stronger or weaker, can have more or less influence. Maybe the relevant elites perceptions of the ambitions and shortfalls of the lesser affluent parts of the population, frequently also referred to as the proletariat or the salary takers, tend to be one sided, with slave trade maybe being only an extreme variation of how the more affluent part of a population not caring for the detail of the effects of what is happening to the group affected, and such lack of care, in the one or other manner, being more frequent than we tend to acknowledge¹⁹²: Relevant elites tend to take side against more organic development options, at times in bona fide believing that they, with a view to increase the speed should temporarily side with the one or other more powerful but potentially distant ones. Additional difficulties to conceptualize and digest differences in wealth distribution might arise in the context of the accumulation of capital that is typical for capital markets¹⁹³, with, on the one hand, capital markets seeming desirable, on the other the differentials in income, wealth and currency valuation being difficult to reconcile. The structured thinking about how to adapt global and local government models to such challenges seems to be in its beginning with a tendency to identify the problems with the typically vilified will of a group of people, and the use of abrupt means to deal with problems as suggested by to Marxism¹⁹⁴ As, to

191 An example of the day is summarized in *Brad R. Roth.: The Seizure of Maduro as a Repudiation of Legal Constraint, VerfBlog, 2026/1/05*, <https://verfassungsblog.de/the-seizure-of-maduro-international-law-venezuela/>.

192 A distant recollection of similar events in Europe is the popularity of *Schubarts* century old song about slavery, to be found in <https://www.musik-von-unten.de/Kaplied.htm>.

193 Most notable, to my mind, are the USA, London and the Venice of the Renaissance.

194 Without noting the issues on Marxism referred to above in no. 1.3. To only cite two types of examples of lines of thought: *Dieter Senghaas, Samir Amin (* 1931) Akkumulation auf Weltebene - Autozentrierte Entwicklung*, at <https://web.archive.org/web/20080907162647/http://www.inwent.org/E+Z/1997-2002/ez601-7.htm>, and *Raul Prebisch, Dialogo acerca de Hayek e Friedman*, *Revista de la CEPAL*, 1981, 182 see <https://repositorio.cepal.org/server/api/core/bitstreams/92402d3a-9a3b-4bb6-8967-3ccac2b816da/content>. Furtado, see fn. 9, was inspired by Prebisch.

my mind, the current US development showcases, non transparent financial center policies can be disguised so that a large part of the population is convinced the policies serve an industrial past, and ongoing review of terms is vital, minding how easy it is to abuse them¹⁹⁵.

3. Dynamics of Development

Rules are not self-understood; they need to be set¹⁹⁶. The challenge in setting rules becomes plausible considering the range of possible rules. When conceptualizing rules, typically, humans focus on what comes to their attention as being unsatisfactory¹⁹⁷ and neither on the bigger context nor on how likely the rules are to indeed improve the situation. As alluded to in this article, there are many areas which deserve regulation to improve the ability to act. At the same time, the general assertion that people are alienated leading to a similarly general conviction that all rules should be overthrown and authoritarian governments installed (see no. 1.3) may well gain attraction, but fails to convince in the context legal professionals can excel in, namely in assessing the adequacy of a means for a purpose. Also, legal professionals should be able to expand the detail into the general and to explain contexts to those focused on minor issues, but interested in rules at large. At the same time, at least if one agrees with the line of argument in this article, this very lawyerly ability has been poorly used as scholars have not focused on the interlinks between everybody's realities and the rules ensuring personality rights in bigger and smaller contexts. As further examples, the understanding of property protection has not taken up the problems that emerged and failed to consider the interrelation among abilities of states and investors, and a focus on terms seems to have diverted attention

195 As a casual example see *Anastasia Kashevarova*, (Анастасия Кашеварова RU), telegram message dated 14.06.1960, as a reaction to the US attack on Iran, claims (in my translation), accessed the 20.20.2025 i. a. reads: "The international community endorses the murder of scientists. Terrorism has become the official rule of the West. Officially. And nobody objects."

196 Whilst it is in a sense trivial that norms are required to determine responsibility, I find it helpful that this need relating to technical liability is stressed by *Joachim Gernhuber*, *Bürgerliches Recht*, 3rd ed., § 41, I 7, S. 343 I.

197 „Our assessment of law does not only react to absolute but also to relative injustice, potentially specifically strongly to the latter“, my translation of *Joachim Gernhuber*, *Drittwirkungen im Schuldverhältnis kraft Leistungsnähe*, *Festschrift für Arthur Nikisch*, 1958, S. 249, 251.

from the effect sanctions are likely to have. All of this is the more disappointing as lawyerly thinking tends to measure itself by the precision with which the abstract terms also required for rule making are used and how such abstract terms are linked to more concrete ones¹⁹⁸, and as the demand for rules is obviously increasing not least due to technological progress involving data processing, pandemics, international exchange of people and goods, specialization and discrepancies among states.

Court practice has contributed to the formation of some rules, and the reliance on courts being able to contribute to even further the rules that have been formed based on court practice¹⁹⁹ is a tribute to the courts quality. At the same time, necessarily, court practice is slow, focused on individual cases as opposed

198 To my mind, when *Joachim Gernhuber*, *Die Billigkeit und ihr Preis*, in *Summum ius, summa iniuria*, *Festschrift für Kern*, 205, 210 concluded "The jurisprudence of concepts (*Begriffsjurisprudenz*), *ad nauseam* described as leading in a wrong direction, ...although only a differentiated consideration of legal terms can adequately identify the benefit of using terms, although many results being convincing in a multitude of cases is accepted by the voiceful critics of the jurisprudence of concepts, a level of knowledge has been reached which requires that, in comparing methodologies, the self-confidence of the novel be reduced, not to return to the old, but to enrich the new with lasting elements of the old." (my translation of „der ... als Irrweg juristischen Denkens bis zum Überdruß dargestellten Begriffsjurisprudenz, ..., obwohl nur eine differenzierende Betrachtung der rechtlichen Begriffe Wert und Unwert der Begriffsbildung gerecht zu erfassen vermag, obwohl selbst der vielgeschmähten Methode der Begriffsjurisprudenz Richtigkeit ihrer Ergebnisse in einer Vielzahl von Fällen zugestanden werden muss, kurzum ein Erkenntnisstand erreicht ist, der es gebietet, im Umschlag der Methodenlehren die Überheblichkeit des Neuen zu stützen, nicht um zum Alten zurückzukehren, sondern um das Neue durch bleibende Elemente des Alten zu bereichern.“) he intended to make this type of precision and the experience useful. To the contrary when for instance *Farkhad Karagussov*, in *О нормативной основе корпоративных отношений и корпоративного управления* (my translation: *On the normative bases of shareholder relations and corporate governance*), in *Нормы гражданского права, материалы юбилейного, 25-ой Международной научной практической конференции* (в рамках ежегодных цивилистических чтении, 404, through legal forms of corporations seems to want to improve control of corporate activity at the same time which, to my mind, such implementation requires empowering creditors, potential creditors and minority shareholders, if any.

199 See for the *Schuldrechtsreform* in particular no. 1.4.1. above.

to the bigger context²⁰⁰ and even continuous pro-freedom stances by courts, at times, are reversed²⁰¹.

The increase in differentiation of the world seems to also lead to those that normally would be agents for change not serving this very function: Those in charge of protection of legal rules²⁰² or people in need²⁰³ may give preference to their own interests, organizations more generally in charge of legal matters are subject to attacks²⁰⁴, and countermeasures such as the recently established international system of lawyers appear to be weak²⁰⁵. Not least, at times, what

200 A general but still abstract description of how courts proceed is in *Joachim Gernhuber*, Austausch und Kredit im rechtsgeschäftlichen Verbund, Zur Lehre von den Vertragsverbindungen, Festschr für Larenz, 459, 460.

201 In my reading of *Steffen Hindelangs* The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law, it is most relevant how the earlier pro-EU and protection courts now limit freedoms, for information freedom a similar assessment *Friedrich Schoch*, 20 Jahre IFG im Spiegel der Rechtssprechung, NVWZ 2026, 1.

202 notaries seem be the cause for, see *Henneke Brink*, The Singapore Convention – Where is Europe? In <https://mediate.com/the-singapore-convention-on-mediation-where-is-europe>, the European Union not joining the Singapore Convention, on reasons for joining *Cathy Smith, Andrew McKeown, Niamh Tubridy*, Convention on Mediation – Another Way for International Commercial Disputes?, <https://www.lawlibrary.ie/viewpoints/singapore-convention-on-mediation/>, both accessed 20.12.2025, as an interesting point of comparison, *Gernhuber*, fn. 8, also noted the lack of agents for the modern form of penal law.

203 The related notion is purely anecdotal based on my involvement in local Berlin politics.

204 See for universities *Carlotta Wald*, Ein Deal zu viel, Einige amerikanische Universitäten wollen sich Trumps Erpressungen nicht länger beugen. Gut so!, <https://www.zeit.de/2025/45/us-universitaeten-donald-trump-deal-gxe>. I have randomly been involved in assessing whether between reform attempts or political influence is more relevant in the issues raised by DGO (Deutsche Gesellschaft für Osteuropakunde), Offener Brief: Aufruf gegen den Umbau der Hochschulen in Georgien, 13.01.2026, <https://dgo-online.org/informieren/aktuelles/offener-brief-umbau-hochschulen-georgien-dgo/>. As only one example relating to law firms see *Devan Cole*, Federal judge overturns Trump's executive order targeting Chicago law firm Jenner & Block, <https://abc7chicago.com/post/federal-judge-overturns-president-donald-trumps-executive-order-targeting-chicago-law-firm-jenner-block/16523186/>, for NGOs see *Heike Bucher*, Jahr eins der Vergeltung, Donald Trump und ein Pipeline-Milliardär versuchen, die amerikanische Umweltbewegung zu zerstören. Das erste Opfer, dem die Pleite droht: Greenpeace USA, <https://www.zeit.de/2025/50/greenpeace-usa-donald-trump-pipelines-klage-energy-transfer> both visited the 20.12.2025.

205 *Salim Amin*, The New European Convention for the Protection of the Profession of Lawyer: A Milestone or a Missed Opportunity? *Völkerrechtsblog*, 13.05.2025,

could be helpful seems to lack the importance required, as illustrated by the difficulties in determining competency for a number of mundane civil procedure questions²⁰⁶. At the same time, illegality not only, like a virus, gives rise to further illegality²⁰⁷, but also appears to increasingly prompt unmeasured responses²⁰⁸.

Recalibrating legal science in the manner alluded to above²⁰⁹, I am looking forward to many more opportunities to discuss the issues mentioned and similar ones with Rolf Knieper, and learn from his perspectives and rich experience.

<https://www.coe.int/en/web/portal/-/council-of-europe-adopts-international-convention-on-protecting-lawyers#>, about the importance of lawyers for *Andrei Yakovlev, Anton Kazun, Daniil Sitkevich*, The Role of Lawyers in Social Changes in Developing Countries: Evidence from Russia, https://www.researchgate.net/publication/317995866_The_Role_of_Lawyers_in_Social_Changes_in_Developing_Countries_Evidence_from_Russia, both visited the 1.1.2026.

- 206 For a series of attempts to improve German-Brazilian day-to-day exchange see *Thomas Klippstein*, Perspektiven für eine oöptmale Kooperation im Deutsch-brasilianischen Rechtshilfeverkehr, *Ana Hadnes Bruder*, Citacoes na cooperacao judiciaria Alemanha-Brasil, *Mirreilungen der Deutsch-Brasilianischen Juristenvereinigung*, https://www.dbjv.de/site/assets/files/3238/dbjv_mitteilungen_1_2019.pdf.
- 207 I am afraid that the account of *Kerstin Kohlenberg, Emilia Smechowski*, Es klopft: Jeffrey Epstein sei nun bereit für seine Massage <https://www.zeit.de/2025/54/jeffrey-epstein-missbrauch-frauen-maedchen-donald-trump-bill-clinton>, accessed the 20.01.2026 of a minor being abused because she was not in the US legally.
- 208 It seems telling that only in interviews like *Felix Hotlermann, Thomas Jahn*, „Niemand spricht mehr über Deutschland“, Interview mit *Alex Karp*, <https://www.handelsblatt.com/technik/it-internet/palantir-chef-alex-karp-niemand-spricht-mehr-ueber-deutschland-09/100180137>, accessed the 1.1.2025, something like an attempt to rationalize the fervor and neglect for legal rules with which migration is being dealt with currently in the USA, namely that illegals make 5% of the US-population, can be found.
- 209 The recalibration I am thinking of here is, at least in my view, also demanded for when *Joaachim Gernhuber*, Die Billigkeit und ihr Preis, in *Summum ius, summa iniuria*, Festschrift für Kern, 205, 217, argues for a more active role of science in law making. In that context, a similarly broad discussion like the one prompted by *Thomas S. Kuhns*, The structure of scientific revolution (on the related discussion see *Wolfgang Stegmüller*, Hauptströmungen der Gegenwartsphilosophie, 6. Ed. 748, would be helpful. Interestingly, very much in line with his works on musicology and general views on music *Elmar Budde*, Kunst und Wissenschaft, The unanswered question, *Hermann Glaser, Margarethe Grolmann, Norbert Steinmetz*, Zukunft Kulturpolitik, Festschrift für Olaf Schwencke, 21ss argues for a new orientation of science.

An Interpretation of the Chinese Civil Code from the Perspective of Political, Economic and Social Foundations

The Chinese Civil Code (CCC) was promulgated on 28 May 2020 by the National People's Congress (NPC), which indicated the completion of the political and legislative task and the academic dream of the past decades. It is important to understand the CCC not only based on the interpretation of the detailed provisions, but also based on a deep insight into the political, economic and social foundations hidden behind the text of the CCC.

In fact, the act of legislating has never been the sole province of jurists. On the contrary, it is an act of immense political significance that simultaneously feeds back on and refracts economic shifts, family life and even nationalist sentiment. Although the CCC has already been passed, its drafting reveals intensely Chinese characteristics. Digging into such background information carries critical significance, both theoretical and practical, for our understanding of the text of the CCC and transcending the text of the CCC to grasp changes in legislation or even Chinese society.

This paper will analyse the political, economic and social foundations as well as the national character of the CCC. As a matter of principle, we are not concerned with an exhaustive analysis of the CCC's specific provisions, but rather with drawing lessons from the background to the drafting thereof. Through such efforts, it is hoped that the CCC, as the most important codification work, can be read comprehensively and critically through a historical lens.

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1. The Political Foundations of the CCC

(1) Political Factors

Composing historiography and making laws (修史定律 *Xiushi Dinglue*) are the two most important tasks which every new regime in China must handle. The People's Republic of China (PRC) also followed this path. Unfortunately, due to many political movements, the drafting of the CCC failed four times from the 1950s to the beginning of the 20th century. Following the amendments to the Chinese Constitution (CC) in 2018, the phrase "leadership of the Communist Party of China is the most fundamental trait of socialism with Chinese characteristics" was appended to Article 1(2), hitherto "the socialist system is the most basic system of the People's Republic of China." The act of legislating under the Party's guidance is accordingly a fundamental requirement of constitutionality. In regulating civil relations between equal subjects, the legislation of CCC must equally uphold the Party's leadership, maintain scientific and open legislation, and fully reflect the socialist characteristics of China's civil law.

From the founding of the PRC in 1949 to the completion of the Constitution in 1954, civil legislative work has been put on the agenda. Under the extreme policy of "striking out on one's own" and "learning from the former Soviet Union", the approach of abolishing the six fundamental laws, such as the Constitution, Civil Code, Criminal Code and Procedure Acts, etc., was adopted. The former Soviet Union's legislative models and principles were imported *en masse*, resulting in the "everything for the public power" strand of legislative thinking. In accordance with the thinking that "private law is the law of the capitalist class,"¹ both the political atmosphere and economic foundation in the age of the far left politics worked decisively against drafting the CCC, which was ultimately abandoned.

The reform and opening up policy ushered in historic opportunities for Chinese civil legislative work. Passed by the second session of the Fifth NPC in 1979, the Sino-Foreign Equity Joint Venture Law was effectively the first piece of civil and commercial law. It certainly carried a noticeable foreign element, expressed the legal demands of opening up the economy and directly reflected the trait of

1 See *Vladimir Lenin*, *Lenin's Manuscripts (Chinese Version 列宁文选)*, Band 4, People's Publishing House, 1961, 222-223.

‘responsiveness to the new transformation’ in Chinese civil legislation. Encouraged by the open and inclusive policies at the time, the legislation also embodied the spirit and outlook of ‘based in China but with an eye to the world.’ In the three decades from 1979 to 2009, especially following the constitutional recognition of the socialist market economy in 1993,² and accession to the World Trade Organization (WTO) in 2000, civil legislation in the form of individual laws matured, and all the stand-alone laws became fully capable of regulating their respective fields. Yet, as the supreme representative of a country’s civil legislation and research, calls for the codification of a new comprehensive civil code persisted from legislators, the judiciary and academics.

In October 2014, the Fourth Plenum of the 18th Chinese Communist Party (CCP) Central Committee passed the Decision on Some Major Issues Concerning Comprehensively Promoting Governance According to Law, explicitly stating that the compilation of the CCC was needed. This political decision provided the basis and condition precedent for the legislation of the CCC. Compilation of the CCC is a twofold process, whereby other pieces of existing stand-alone civil laws are integrated after the CCC’s General Book has been completed. The CCC was finally passed by the Third Session of the 13th National People’s Congress in May 2020.

Looking at the developmental history following the founding of the PRC, the work on drafting the CCC could not possibly be completed without setting the political tone for it. This is not to say that letting politics set the tone for drafting the CCC is free from controversy. As early as 2003, scholars had expressed a certain rejection of politics in the draft CCC. However, the academic circle had recognised that “under China’s current system, the attitude of top leadership towards the CCC directly determines its future”³ during the drafting of the

2 The 1993 amendment to the Constitution of the PRC, adopted on 29 March 1993, formally incorporated the concept of a "socialist market economy" in Art. 15 para. 1. (The state shall practice a socialist market economy.)

3 See *Ji Hailong*, "The Distance Between Ideal and Reality: A Cold Observation on the Codification of China's Civil Code", *Journal of East China University of Political Science and Law*, Vol. 6, 2016, 19. Previously, a well-known scholar, Professor Liang Huixing, was worried that political factors would excessively affect the drafting of the "Civil Code", and wrote in the "Preface to the Proposed Draft Civil Code of China": "All comrades in the research group are well aware that the power of national legislation lies with the legislature, and the current legislative

current CCC. That politics determines legislation is a universal rule, explicit in Napoleon's active participation in the French Code Civil and the determination of the German BGB's fate by the economic expansion of Bismarck's Second Reich.⁴

In internal academic debates surrounding the compilation of the CCC, supporters and opponents alike widely draw on the phrase "compilation of the CCC" during the Fourth Plenum of the 18th CPC Central Committee as proof of the project's political necessity. Supporters elevated the controversy to a political level by analysing political processes and drawing comparisons with foreign political precedents. Opponents sought legitimacy for the expression "protect the people's property rights and personality rights" in the report of the 19th NPC. Although some scholars lamented that the CCC was slipping further and further away in 2012, and didn't believe the legislation of CCC would be put in the legislation agenda shortly, the promulgation and entering into effect of the General Provisions of Civil Law of 2017 (which was incorporated into the future CCC as the first book) finalised the debate as the CCC was getting ever closer. The successful compilation of the CCC was ensured by the political mission conferred in the Party's supreme literature.

What is the relationship between politics under Party rule and the legislation of the CCC? Even if we were to confine ourselves to theory, this issue still requires clarification. A deeper question might be why, under the CCP leadership, has the CCC known such a different history from the other legislation? What fundamentally caused the CCC to pass with the support of the country's supreme leadership? From its birth, can we read a lean towards the market economy and increased protection for private property rights in current politics?

From political history, we can find the answer. The status of civil law in Chinese law has encountered two watershed moments. The first was during the

system has not yet met the requirements of scientific and democratic legislation. However, all the comrades in the research group devoted themselves to completing the Civil Code Draft in the spirit of pursuing science, democracy, and the rule of law, and being responsible for the people, nation, country, and academia." See China Civil Code Legislative Research Group, *The Draft Proposal of the Chinese Civil Code and Explanations: General Provisions*, Law Press, 2004, 2-3.

4 See *Rolf Knieper, Gesetz und Geschichte: Ein Beitrag zu Bestand und Veränderung des Bürgerlichen Gesetzbuches*, Nomos 1996, 23-34.

aftermath of the Cultural Revolution (1966-1976), when the policy of opening up and reform was in its infancy. Concerning the question of which law would become the fundamental legislation between equal parties under a planned commodity economy, economic and civil law scholars engaged in a debate with the fate of their respective disciplines at stake. Civil law scholars won the day, with Article 2 of the General Principles of Civil Law (GPCL) of 1986 successfully putting paid to the horizontally unified economic law, originally proposed by Vladimir Laptev⁵ from the ex-USSR, which only meets the requirements of an authoritarian planned economy. The second time coincided with the collapse of the Soviet Union and Eastern Europe in 1989, which generated enormous international political pressure. China adopted an extremely cautious attitude towards this dramatic international change in the socialist bloc. The Leader *Deng Xiaoping* launched the socialist market economy with his Southern Tour in 1992 speech. This, together with a series of constitutional amendments, cemented the fundamental status of civil law in the market economy. Through shifts in the status of civil law, we can see the general direction of China's political reform.

What cannot be overlooked is the fact that decisions at the political level do not necessarily mean that political creeds will be written into the CCC at the legislative level. On the contrary, directly incorporating political demands into the CCC may have detrimental effects legislatively. It is not unreasonable to see the bureaucratisation of legislation with Chinese characteristics and the system of institutional participation as exerting a deleterious effect on the compilation of the CCC, since political effects flowing from the legislature's act of simply and mechanically producing the CCC will inevitably result in "an objective predisposition towards speed and stability, if the legislature wishes to increase legislative efficacy and ensure political correctness."⁶

5 See *Vladimir Viktorovich Laptev*, *Economic Law*, Progress Publishers, 1987.

6 See *Wei Leijie*, "The Politics of the Codification of China's Civil Code", *China Law Review*, Vol. 6, 2017, 118. *Ji Hailong*, "The Distance Between Ideals and Reality: A Cold Observation on the Codification of China's Civil Code", *Journal of East China University of Political Science and Law*, Vol. 6, 2016

(2) The Relationship Between Civil Law and Constitutional Law

An analysis of the political foundation behind the drafting of the CCC cannot sidestep the relationship between civil law and the Constitution. Constitutionality has always been the political bottom line for drafting the CCC.

a. Why the CCC Directly Copies the Text of the Constitution

There is a direct copying of constitutional provisions in the current civil law legislation, including the CCC. The most vivid example is the provisions in the Law of Real Rights (LRR) of 2007 on state ownership. This legislative model, which consists of unabashedly copied provisions of the Chinese Constitution (CC), certainly lends itself to charges of “formal constitutionalisation”. Such formal constitutionalisation rests on its legislative background. Drafters of the LRR before 2007, faced with the issue of whether to go down the socialist path or the capitalist path, opted to borrow constitutional provisions in order to invoke the talismanic phrase “this law is formulated in accordance with the Constitution”. Regarding sensitive issues such as the system of ownership, particularly the position of private ownership, ensuring absolute correspondence between the legal text and the Constitution obviates any political risk in civil legislation.

By way of illustration, Article 3(1) of the LRR of 2007 (now Art. 206 (1) CCC) is a direct copy of the first half of Article 6(2) of the CC; Article 3(2) (now Art. 206 (2) CCC), through a simple re-arrangement of word order, is a continuation of the second phrase in Article 7 and the first half of the second phrase in Article 11(2) CC. Legal equality, the LRR’s most important principle, finds expression in Article 3(3): “the state implements a socialist market economy, whereby the equality of legal status and the right to develop of all market entities are guaranteed” (now Art. 206 [3] CCC). A mix of provisions from the CC and the LRR, Article 3 reflects the pressure of constitutionality, which the legislature faced while also upholding the fundamental principle of equality of private law. However, this has the effect of demoting constitutional provisions and encroaching upon the textual resources of the LRR. Crucially, by directly copying articles or expressions found in the CC, the CCC has, in effect, legalised the Constitution. This is in itself a risk of direct application of the CC in provisions, which is definitely not welcomed by Chinese high-ranking politicians.

b. The Hierarchy of Constitutional and Civil Law

In contrast to the aforementioned relationship between the texts of the CC and CCC, debates over the hierarchy of the constitution and civil law touch upon the status of the constitution as fundamental law and the definition of civil law. In today's China, the Constitution and constitutionalism are extremely touchy topics, further impelling an elucidation of the relationship between civil and constitutional law.

The four-decade developmental history of China's civil law legislation shows that it has always been ahead of the CC amendments. For example, the GPCL of 1986 had already defined personality rights in Chapter 6, Section 4. It took the CC until 2004 to recognise that the state respects and guarantees human rights by way of a constitutional amendment. More strikingly, China still operated a planned economy in 1986, which permitted the commodity economy to a limited extent, at most like a bird in a cage. Yet Article 2 of the GPCL was especially precious, in that it established the fundamental position of civil law in the quite early stage of market economy (still under the planned economy) by clearly bringing proprietary relationships between equal subjects under the adjudication of civil law in a planned economy at that time, ironically in an unconstitutional manner.

It was precisely such an approach of crossing the river by stepping stones (*摸着石头过河* *Mozhe Shitou Guohe*) that resulted in the anti-constitutionality of the legislation, meaning that civil law scholars in a dramatically transformational society engaged in legislating did not see in constitutionality a principle of the rule of law to some degree. On the contrary, some even thought that the CCC could play a functional role as a constitution.

Discussions surrounding the relationship between constitutional and civil law received exhaustive treatment in the reply of the Supreme People's Court (SPC) *Qi Yuling's* Case concerning whether civil liability arises if the fundamental and constitutionally guaranteed right to education of citizens is violated by infringing upon name rights.⁷ Possibly influenced by charges of anti-constitutionality

⁷ See Judicial Interpretation of SPC No. 25 of [2001]. The *Qi Yuling* case was a landmark 2001 SPC ruling that affirmed the constitutional rights of a citizen to a name, identity, reputation, and education. The case came about after a female high schooler from Shandong Province, Qi

surrounding the making of the LRR in 2005, civil law scholars began paying attention to the relationship between civil and constitutional law. Some scholars have pointed out that the main function of constitutional law is to limit state power, while private law is primarily concerned with developing and protecting fundamental civil rights.⁸ Both constitutional and civil law have a transcendental basis for being a higher law, with the civil law inheriting the former's functions when they are inadequately carried out. Although both the general provisions of Civil Law, passed in 2017, and Art. 1 of the CCC kept the statement "this law is formulated in accordance with the Constitution," this seems more like a continuation of political (or legislative) logic once controversy surrounding the LRR had died down (private law, preceding the draft of LRR, contained no such expressions of 'in accordance with the Constitution', apart from the Inheritance Law of 1985) rather than an adoption of the fruits of academic discussion.

Not to forget that constitutional law in China is not allowed to be applied directly in adjudication, the CCC remains the core of judicial application. Its status has also earned widespread attention, being a core part of legislative work.

(3) Personality Rights as an Example

The subject of human rights has always been a touchy one in China. What crucially distinguishes Chinese studies on human rights from Western human rights discourse is the fact that "not only are collective human rights the basis to and condition precedent for realising individual human rights, but they also furnish the means and guarantees by which this is done."⁹ During the constitutional amendment in 2004, the CC had already laid the foundation for writing personality rights into the CCC with the explicit statement "the State protects human rights". Although whether personality rights should constitute an entirely

Yuling, after many years, discovered that her college admission offer identity had been stolen by another female high schooler who went to a local college based on her name and got a decent work position after graduation. Ironically, she had been denied her right to education and had lost the career opportunity. The case is sometimes called "China's Marbury" because of its role in an individual civil case recognising and affirming constitutional rights within the judicial system.

8 See Xie Hongfei, "The Constitutional Function of China's Civil Code: Beyond the Constitutional Implementation Law and Civil Law Imperialism", *Journal of the National Procuratorate College*, No. 6, 2016, 40-41.

9 See Xu Xianming and Qu Xiangfei, "The Demarcation Theory of Human Rights Subjects", *China Legal Science*, Vol. 2, 2001, 58.

separate book was the most hotly debated issue during the process of compiling the CCC, one must appreciate that such arguments are limited in scope to legislative technique.

Does the fact that personality rights constitute a separate book in the CCC, thereby breaking with the traditional German *Pandecten* systematic structure, mean an entirely new stage in China's legislating or even a new era of protection of human rights in the world?

Thus far, no civil law scholar has sought to deny the significance of personality law. On the contrary, civil law scholars have not devoted appreciable energy to the relationship between personality rights and human rights. Instead, they have engaged in protracted theoretical disputes over the technical arrangements for protecting personality rights, namely, whether protection of such rights would be better served by tort law or a separate book dedicated to personality rights.

Scholars opposed to the separate book of personality rights in the CCC based on the political agenda of the two-step plan followed by legislative organs. They accuse the separation of personality rights into a stand-alone book of being inconsistent with this, since it would be a three-step plan. Moreover, these scholars contend, such an approach may lead to a repetition of the political turmoil overseas, such as the Jasmine Revolution in the Middle East, thus hinting at the consequences of a separate book on personality rights.¹⁰ Alternatively, they note that tort law is already competent to protect personality rights, going so far as to fight a last-ditch battle around the right of self-defence when the draft of the CCC was about to be submitted to the NPC for review.

Scholars in support of a separate book on personality rights find support in political correctness, drawing on the text of the Report to the 19th CPC National Congress and arguing that the law of personality is a specific manifestation of the spirit of the report. Other advantages of a separate book on personality rights include the important role such an act would play in realising the aspiration of the popular masses for a better life and differentiating the tort law's negative protection from the specific recognition offered by the law of personality rights. Particular recognition of personality rights in the civil rights chapter of the

10 See *Liang Huixing*, "Chinese Civil Code Shall Not Set a Book of Law of Personality Rights", in *Zhongzhou Xuekan*, 2016 Vol.2, 52.

future CCC and a legislative model separating personality rights from the subject would be an important innovation and development of the civil law system.¹¹

The law of personality rights is not a unique topic of Chinese legislation and judicial practice, but rather the collective reflection of the disaster of Nazi atrocities and European anti-Semitism. Tracing its roots, however, the law of personality rights is not a stand-alone reflection of civil law's intrinsic values, but rather a collective manifestation of Western human rights thinking in civil law, beginning 800 years ago with the *Magna Carta* movement in Britain, and traversing the Enlightenment, the French Revolution, and the American War of Independence. Western society has thought deeply about the value of the human being as the subject and gradually displayed disenchantment with medieval theocracy. Particularly noteworthy during the founding of the USA are the Constitutional Convention and the Bill of Rights, important achievements for the rule-of-law aspirations of Protestants since their arrival in North America in the 1620s. The most striking characteristic of US human rights is the provision on liberty, life and property in the Constitution, which is not bogged down in dogmatics or legislative theory. The archetypal example is the Second Amendment,¹² which directly confers upon each person the human right to take up arms in self-defence and to prevent the fall of the government. The Second Amendment is directly related to the spirit of Protestantism and the resistance towards European hegemony, and supplies a rock-solid social foundation.

With help from the US, the Bonn *Grundgesetz* (i.e., the German Constitution) of 1949 was forthrightly explicit, making the respect of human dignity and the development of the personality of the human being the Constitution's fundamental objective. Thereafter, academic discussion on the effectiveness (*Drittwirkung*) of the Constitution had sprung up around the application of fundamental rights and judicial practice to civil cases. This gave birth to the framework rights of *Allgemeines Persönlichkeitsrecht*, which in turn engendered many

11 See Wang Liming, "Highlights and Improvement Ideas of the Civil Law Personality Rights (Draft of NPC legislative Work Commission)", *Journal of China University of Political Science and Law*, No. 4, 2018, 118-119; Wang Liming, "Making Personality Rights Independent in the Civil Code", *Contemporary Law*, No. 3, 2018, 3. Wang Liming, "Strengthening Personality Rights Legislation to Ensure a Better Life for the People", *Journal of Sichuan University (Philosophy and Social Sciences Edition)*, No. 3, 2018, 5-6.

12 "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

specific personality rights. Some Chinese scholars have charged the *German* BGB with caring too much for material property rights and not enough for human personality rights, and being a legal code for the 19th century, insufficiently attentive to the personality issues of the 21st century.¹³ Although not without merit, they ignore that the *German* BGB has its philosophical foundations in Kant's philosophy of rights and freedoms. Compared with its French counterpart, the *German* BGB may appear conservative on the political and philosophical fronts. However, it is nevertheless guided by the values of freedom and private property, and continues the mainstream Western thinking on constitutionalism and human rights. Judicial practice in post-World War II Germany has greatly advanced the development of personality rights. China's issue with personality rights also stems from reflection over anti-human rights actions during the Cultural Revolution, a fact often referenced by scholars in support of a separate book on personality rights in the CCC. They buttress their argument for the strict protection of personal dignity by looking to the trampling of human rights during the two World Wars. Compared with Germany, however, the arguments of Chinese civil law scholars on personality rights did not flow from arguments over fundamental rights in the constitution, being limited to debates internal to the civil law. They even shy away from sensitive human rights topics in the constitution due to political circumstances.

From this text's point of view, and without considering debates between different academic factions, the most striking value of consecrating personal rights as a separate book is to make a political declaration. That is, draw on the tradition of a separate chapter on civil rights in the GPCL of 1986 and strive to earn political recognition for the compilation of the CCC. Yet if we were to make the CCC a carrier of historical value, its specific provisions would be imbued with an extreme ideological function and severely impact the application of later laws. Paradoxically, civil law scholars scarcely discuss the relationship between Article 109 of the General Provisions of Civil Law (the personal freedom and dignity of natural persons enjoy the protection of the law) and Articles 37 and 38 of the CC. As is well known, without the Constitution's protection of fundamental rights, personality rights in the CCC would be a dried-up well and cast adrift from its moorings. If, on the other hand, we truly desire to implement personality

13 See XU Guodong, "The Research of the origin of Theories of Civil Law of the Commodity Economy", in *Jurisprudence*, 2001, Vol. 10, 60.

rights following the success of the CCC, it must be more than a private legal code. Instead, the CCC will implement the Constitution's fundamental rights, directly or indirectly, and give play to the guiding and regulatory functions of public law on society. Should this be the case, we will touch on the question of fundamental rights in the Constitution. Civil law scholars lacked the confidence to tackle constitutional issues during the drafting of the CCC.

From a political standpoint, codification of personal rights cannot make enormous strides since this would produce drastic overall consequences. The ordinary lawyer thinks in the pattern of the natural logic of personal rights, human rights, and the Constitution, which definitely would not be welcomed by the CCP politicians. To make the legislation of personality rights a historical marker of China's progress in the rule of law would be to exaggerate the function of legislating personality rights and its significance for social progress. This divorces the construction of human rights and focuses on personal rights in civil law, potentially stripping personality rights of the basis for their existence.

(4) Self-Autonomy and Regulation

Attributable to modern Western concepts of limited government and representative democracy, civil law has the important function of differentiating between civil society and the political state. The jurisdiction of the former is much larger than and limits the latter. Yet with modern states becoming ever more complex, state regulation increasingly permeated every aspect of society, and the bureaucracy grew. The USA is a prime example, where President F. Roosevelt's New Deal left behind the legacy of an unwieldy federal apparatus. In China, an even bigger bureaucracy strictly controls every aspect of social life. In an autonomy-focused civil law system, the issue of how to handle regulatory laws is important.

(5) The Function of Environmental Protection of the CCC as a Typical politicisation of Civil Law

It is a strikingly Chinese characteristic of the CCC to directly provide the Green Principle of environmental protection as the main goal and function.¹⁴ This begs

14 Art. 9 "When conducting a civil activity, a civil subject shall act in a manner that facilitates conservation of resources and protection of the ecological environment." Some specific provision can be found in Book 2 for Real Rights. (Art. 294, 346) and Book 3 for Contracts (Art. 509 sub. 3).

the question of whether, given the existence of voluminous laws and regulations on environmental protection, the Green Principle in the CCC is a political statement or a new and innovative legislative model.

Compared with traditional European continental civil codes, the addition of the Green Principle in China's CCC is not only the result of serious environmental issues in its dramatically industrialised society, but also the civil law confirmation of central political directions. Even before the drafting of the CCC, environmental legislation had been exhaustive. Although the addition of a Green Principle in the CCC bears the hallmarks of a new era, the CCC cannot become an important functional legislation for environmental protection. It is more concerned about declaring functions and value orientation. Apart from the above-mentioned political directions, China's current resource constraints are tight and environmental problems are acute. Natural resources are state-owned but controlled by local governments, leading some regions to illegally issue approvals or tolerate resource destruction in the pursuit of GDP. The exploitation, use and protection of various natural resources are difficult to integrate due to departmental divisions, and environmental issues are often caused by competing administrative authorities. Providing for the Green Principle in the CCC, at least at the legislative level, balances the relationship between development and protection. If a deep philosophical problem must be found, the concept of the unity of nature and man (天人合一 *Tianren Heyi*) in traditional Chinese culture can be pointed to. After all, this differs from the economic model, based on the plunder of natural resources, established by the Western Industrial Revolution. Such a model is also the reflective focus for Western post-modernism.

(6) International Private Law: From Biding Our Time and Concealing Our Strengths (韬光养晦 *Taoguang Yanghui*) to Accomplishing Great Things and Making a Difference (大有所为 *Dayou Zuowei*)

International private law can be regarded as an example of China's ambition to test its political and economic influence. The basic principles, such as Territorial Jurisdiction or Long Arm Jurisdiction, were heavily discussed in the drafting of the CCC.

Article 12 of the General Provisions of the CCC¹⁵ essentially continues with Article 8 of the GPCL of 1986 in applying the traditional principle of territoriality. On the one hand, this is a conservative expression of the bureaucratic legislation mentioned in the preceding paragraph. On the other hand, it can be read as abiding by the rule of biding your time and concealing your strengths, which held sway in China's diplomatic relationships for over three decades. Drawing on the increase in China's comprehensive strength, as well as the slight preference for accomplishing great things and making a difference in contemporary foreign policy, scholars have criticised Article 12 of the CCC. For them, transcending territoriality is a trend in Western international private law. Chinese civil law's emphasis on territoriality, born in the initial exploratory phases of opening up and reform, bucks the trend of the transformation of modern international society. Moreover, it fails to meet the requirements of the One Belt and One Road Initiative and the requirements for participating in global legal competition. For these reasons, scholars advocate that the territoriality principle should be jettisoned, and the issue handed over to unified international civil law. The latest Foreign Investment Law of 2019 is a key example of the influence external, international politics has over domestic civil and commercial legislation. As international private law is beyond this author's academic capabilities, no further analysis or discussion will be made here.

2. Transformation of Economic Foundations and the Development of Chinese Civil Law

Although China's economic structure has undergone dramatic transformations in the four decades of reform and opening up, the basic economic system must uphold the centrality of state ownership and a variety of different ownership models. The core issue in China's academic life is to expand and strengthen state ownership and actively develop the private economy. As the most important piece of legislation regulating private relationships among equal subjects, the development of the civil law cannot be divorced from four decades of reform and opening up. At the same time, it must provide sufficient legal support and guarantees for China's future economic development. Being a legal reflection of the market economy, Chinese civil law is built on the basis of property

15 "The laws of the People's Republic of China shall apply to the civil activities taking place within the territory of the People's Republic of China, except as otherwise provided by law."

rights (private in the West, and tripartite in China), free transaction (contract law), and the protection of rights and interests (tort law). Chinese civil law owes a debt of gratitude to the socialist market economy for its rebirth in reform and opening up.

(1) Economic Foundations from a Legal Framework

As early as the 1980s, scholars had realised that the early market economy, from Roman times, must be the garden-bed for developing civil law.¹⁶ The commodity economy is undeniably the economic incubator for civil law. More precisely, it is the law for citizens possessed of private property and personal freedom. In the European continent, civil law truly became society's basic law, thanks to the sprouting of the Enlightenment and industrialisation. In China, although the policy of reform and opening up was centred around economic construction, enormous political strides made since the last century may be a deeper reason for the commodity economy putting down roots in disaster-hit China.

With the civil law being the basis for the market economy, every step of economic development was accompanied and influenced by improvements in Chinese civil and commercial legislation. In fact, what sets China's achievements in economic development apart from the Western model is its trajectory of experimenting first, legislating later, rather than economic development driven by the rule-of-law. Under such a model, subsequent civil legislation assumes increased functionality and may even appear forced. Nowhere is this more evident than in the LRR of 2007, the legislation of which was driven by principles of the protection of lawful private property, and those with a piece of land shall have peace of mind (有恒产者有恒心 *Youhengchanzhe Youhengxin* - Mencius). It was hoped that, by so pacifying the rich, they would be able to lead others to wealth. Changes in civil legislation, from the GPCL of 1996 to the Tort Law of 2009, indeed display the result of moving from a planned economy to a market

16 Professor *Tong Rou* (佟柔) from Renmin Law School, an authoritative Chinese civil law scholar of the 1980s, also uncovered an intrinsic link between the commodity economy and civil law in capitalist theory, ironically, by studying *Das Kapital* by Karl Marx. See *Tong Rou*, Textbook of Civil Law, 7, Law Press 1986. He tries to find the fundamental economic basis for the survival of Chinese civil law after 30 years of political and economic disaster from 1949 to 1979.

economy. The compilation of the CCC is a wholesale jungle-clearing exercise for this period of civil legislation, which intends to reflect and stabilise primarily the new economic relationships, including the new call for the protection of personality rights, both of which had already been formed in China's socialist market economy.

It is noteworthy that, in discourses on the relationship between civil law and its economic foundation, including analytical proof and discussions on the adverse effects of civil law regulation on economic foundations, almost all the literature is satisfied with macro-discussions of the relationship between economic foundations and civil law. The relationship between China's economic foundation and its civil law has not received detailed attention, especially with regard to the dynamic relationship between China's civil law legislation and its economic foundation from the trajectory of historical development. Economically-based explanations of civil law's developments and setbacks since reform and opening up are singularly lacking to this day.

(2) Civil Law as a Tool to Solve Transformational Economic Issues

From the legislative work of contract law and law of real rights, Chinese legislators, in many cases, took a functional and policy-oriented legislating approach and treated civil law as a tool for managing and solving transformational economic issues. For example, when legislating the Contract Law of 1999, an important objective was to solve tripartite debt among enterprises. When legislating the LRR of 2007, an important objective was to prevent the loss of state-owned assets and protect private property, even by going as far as to limit the autonomy of private law with the reasoning of China's special national conditions. Examples include the monopolistic liquidation and distribution of urban land by local governments and strictly limiting the free liquidation of rural construction land (not agricultural land) to guarantee that the local governments profit the most from the land transactions, which led to the current property market crisis.

(3) Commercial Law Against the Backdrop of Codification of the CCC

As previously mentioned, the question of commercial law is unavoidable when discussing the legislation of the CCC. Due to twists and turns in the confirmation of the socialist market economy in China, commercial law has always

lacked proper recognition. It is precisely this reason which has contributed to calls for the independence of commercial law. In traditional Chinese society, merchants are at the bottom of the social hierarchy of scholar-farmer-labourer-merchant (士农工商 *ShiNongGongShang*). Traditional Chinese agricultural society has followed a basic economic policy of pro-agriculture and anti-commerce (重农抑商 *Zhongnong Yishang*), closely linked to social control and state monopoly in an autocratic society. Even today, legislating directly in the commercial sphere is not a small feat.

The relationship between civil and commercial law and society's commercialisation can be a footnote in the economic foundation of the CCC's formation. More enlightening is the issue of the independence of substantive commercial law. This evinces that, besides a market for trading in ordinary goods, there exists a market for non-daily trade with considerable barriers to entry by ordinary citizens. Such barriers may be related to an economic foundation, which divorces civil and commercial law. Legislation such as the laws of companies, insurance and negotiable instruments is both formally and substantively independent. They have given rise to typical subjects and behaviours that are separate from traditional civil law to the exclusion of ordinary civil norms sourced in daily custom. As for the rules of commercial behaviour, which have yet to achieve independence, they are only formally mixed in with civil law. For example, commercial law makes special provision for whether property offered as collateral may be disposed of in the event of default and the conditions for establishing a lien in property law; securities buy-backs in financial law are not applied in ordinary civil activities. Moreover, a unified civil and commercial style of legislating causes numerous problems, both theoretical and practical. For example, Judicial Interpretation No. 2 on the Contract Law, issued by the SPC, provides a clause which stipulates that, if liquidated damages exceed the actual loss by 30%, the term may be considered excessively high and is subject to reduction by a court or arbitration tribunal. The courts can adjust the damages based on the actual loss and other factors, such as the degree of fault of the parties and the principles of fairness. A party must request the adjustment and bear the burden of proving that the amount is excessively high. Yet the ratio of such damages is manifestly different between civil and commercial contracts. This is because the subject matter in commercial dealings, especially risk-oriented investment contracts, is itself a risk. It is difficult to judge whether the liquidated damages

of 30% of the whole loss due to the breach of such contracts are excessively high or low. To depart from commercial transactions and rely directly on norms is to invite chaos in practice.

Without a doubt, Chinese commercial law saw full-fledged development under the reform and opening up policy, with commercial activities influencing social change in China to an unprecedented degree. However, this has not seen the build-up of an independent merchant class, much less political demands on par with the capitalist revolution in Europe. The precise reasons for this deserve deep reflection.

3. Social Foundations of the CCC

The relationship between family changes and civil law, with an emphasis on the impact of changes on China's families and population, reaches far beyond the legal realm and has profound implications for China's future social development.

(1) Changes in Population and Family

Family was and remains the key part of the social foundation of civil law. In the four decades of reform and opening up, fundamental, or even dramatic changes, in the Chinese family system have mainly expressed themselves as follows.¹⁷ First, a reduction in size and complexity, with extended families fracturing into nuclear families. Second, ageing and a decrease in the number of children result in a reduction in inter-generational support within the family. This may further aggravate elderly care. Third, there is a surge in the number of non-traditional families. Particularly noteworthy is the dissolution of the household contract responsibility system for rural families and the urban institutional system. Individuals have reverted to being part of the family rather than part of the institution. Security and welfare functions, which had hitherto been assumed by the state and the collective, now fall upon mutual help among family members. This transformation in the functions of state and family has seen a return of the latter to the front-line of life and death. Collective expressions can

17 See Peng Xizhe and Hu Zhan, "The Transformation of Contemporary Chinese Families and Restructure of Family Policies", in *Chinese Social Science*, 2015 Vol. 12, 117-122.

be seen in the retreat from a welfare state, difficulties in housing, education and healthcare. There is an interaction between social changes and the younger population's family values, namely, the structure of rights between parents, children and couples is constantly changing; inter-generational transmission of cultural and traditional values is weakening, and nuclear families are increasingly finding it difficult to perform functions such as raising offspring, supporting the elderly and working at home. The fast-paced Internet and modern technological revolutions are also impacting the family model in novel ways, enhancing cohesion but also leaving the family incredibly vulnerable. For example, online emotional opportunities for Chinese people are exponentially increasing, meaning that marriage is no longer where the heart belongs.

If we extend the time period for surveying changes in the Chinese family system, three waves of assaults can be observed over the course of a century. These are, respectively, criticism of the family system at the beginning of the 20th century, political activities directed against family sentiment during 1949-1976, and the rational economic intrusion upon family responsibility over the past three decades. The first wave was anti-traditionalist, designed to cut off the bonds of flesh and blood between the traditional patriarchal system and feudal society. It opened up the family system to secularisation and marginalisation. The second wave is linked to progress in China's modernisation, with the institution providing an alternative family function that reduced the importance of the family and marginalised it from a national perspective. The over-politicisation of social life eroded the fundamental values of the family, politicised marriage and made a symbol out of family politics. This culminated in the extreme politicisation of the Cultural Revolution, which pushed the family's ontological values to the extreme. The third wave reflects the destruction of the social mechanism by the market mechanism. Self-centred individualism and economic rationalism invaded the family, bringing an increase in urban divorce rates and family disputes over elder-care and family property. In the countryside, this has sparked inter-generational tension, a decline in parental authority, moral regression and a loss of human ethics. This has led to a reduction in family size, decreased resilience to risk, lower birth rate, higher divorce rates and increased pressure.

Family law regulates more than just inter-familial, personal and proprietary relations. In fact, it bears how intensely the state's public authority infiltrates

the family, impacting on elder-care and birth. Therefore, family law is by no means pure private law. We can even view birth and population as a country's most important and basic matters.

Taking into account the preponderant role of ancient family law (the core of *li* (礼)-based law) in the field of traditional Chinese civil law, and the continuity between the understandings of family and people in contemporary China, the correspondence between *li*-family-people, constitutional law-family and law-civil law can be established. Given that the first piece of written law in the PRC is the Marriage Law of 1950,¹⁸ rather than the Constitution of 1954, the relationship between the meaning of home in civil law and national identity is strengthened. The reason why the marriage law, inherited from Soviet tradition, is still understood under the rubric of civil law is due to its purpose still being to set or shape freedom between subjects. No piece of civil law legislation can boast more remarkable achievements than the marriage law in China, the most thorough implementation of the autonomy of private law. It has certainly led to the disintegration of the traditional family, the evolution of the family person into a person in property law and the gradual retreat of ethical personalities in the face of financial relations. Key family functions in the traditional sense, such as caring for the elderly and tending to offspring, which in turn shape the basic personality of subjects participating in national political life, successively disintegrated in a spectacular change for reform and opening up over the past four decades. The atoms of Chinese social structure have changed, significantly impacting economic life. It is curious to note that in Chinese southeastern coastal areas, such as Wenzhou in Zhejiang Province and Quanzhou in Fujian Province, where traditional concepts of clan and family are relatively better preserved, the regional economy far outstrips the north. The clan and family can eclipse individualised social structures for economic development, because morality and

18 Very interestingly, the first two civil laws after the foundation of PRC in 1949 are Marriage Law and Basic Principles of Land Law. Both of them can be regarded as fulfilling the revolutionary promises by the CCP to mobilise the poor farmers to join the army. The first one is to emancipate the female as the half of the sky, and the second one is to allot agricultural land to farmers who fight hard in the civil war based on the political and economic agenda of the fight against the landlords and divide the land. However, only two years later the land was taken back to the collective people's commune, which actually entailed copying the collective movement of the former Soviet Union in China.

trustworthiness within the family can reduce the transaction costs and substantially secure the trust.

(2) Family Changes and the Legislation of the Marriage Law

The high degree of social cooperation based on the extreme division of labour in China has destroyed the gender division of labour in the Chinese transitional society, with the outward shift of family functions leading to their weakening and relocation. There are some key specific characteristics of family change. First, the patriarchal family structure is disintegrating, with public service and the welfare state supplanting aid offered by personal relationships in the aid system. The mutual support function of traditional family members is gradually marginalised, with the family's role in satisfying the spiritual and emotional needs of its members highlighted. Second, on the basis of parent-child equality, there has been an increase in the number of provisions restricting parental rights. Family size (the number of its members) has decreased, including single-parent and single-person families. Additional factors include the prevalence of contraception and a continued decline in fertility rates, the spread of increased school enrolment, a concept of fertility based on the responsibility of the economic welfare state, rural-urban migration, as well as the costs and pressure of buying houses, which force people to purchase smaller dwellings. Third, gender relations are increasingly equal, internal family structures are changing, and differences in family authority are eliminated. This corresponds to the developmental trend of democratic politics in public law. Fourth, illegitimate children have acquired the same legal status and rights as legitimate children; the traditional link between marriage and the legitimacy of children has been broken, and divorce is more easily obtained in real life. Additionally, literature on the value orientation of family law and social change sees a shift in marriage and family legal relationships from subordinate to equal. That is, with the emphasis on children's rights since the 20th-century, as well as the introduction and implementation of gender equality, China's traditional patriarchal family structure has collapsed and is replaced by equality between family members. Improvements in the status of women and children have led to increasingly equal gender relations. Legally, parents and children are in an absolutely equal relationship. Medical progress, the one-child policy (abandoned in 2016) and the social welfare security system have greatly influenced family changes.

Marriage law must keep in step with the fundamental family changes. The most typical example is the implantation of property law values in the traditional family by China's Marriage Law and Judicial Interpretations, leading to an ethical collapse in the face of the economy. The three Judicial Interpretations Concerning the Marriage Law, issued by the SPC since 2000, have tended to replace the family property system with the individual property system. They included the post-modern ideal of the contractual 'going Dutch' model of marriage and reduced the difficulty of dividing marital property. Once the spark is no longer there, the parties to a marriage can take their respective shares and leave. Realistically, this may lead to a sharp increase in divorce rates. The judicial interpretations mean that the primary consideration of young people in marriage is material (buying a house), making them turn to their families for help. This gives parents a greater say in their children's marriage, making correspondence in social status the most realistic choice and turning marriage feudal once more. Therefore, some scholars have called for judicial practice to display restraint instead of destroying moral authority or replacing ethical order.¹⁹

Controversy has always been attached to whether the Marriage Law should be included in the CCC due to its particularities. Jurists have long been concerned with the archetypal conflict between ethical and economic orientation in civil law, which leads to conflict. Chinese scholars have also been cognisant of this kind of essential conflict between property law and family law. Such a distinction does not suffice to lead to the separation of marriage law and civil law. After all, family law and property law are mutually infiltrating.²⁰ The strengthening of autonomy within the family stands in contrast to the demand of ethics in property law. Both find ownership under an abstract person, thus forming the internal division of civil law. In general, voices for or against writing the Marriage Law into the CCC as a book have been silenced following the legislature's decision. Integration of the Marriage Law into the CCC has always been the latter's fundamental systemic structure.

The internal systematic unity of civil law tells us that the value of marriage law also carries out basic values such as autonomy, equality and protection of the weak. This is reflected in the autonomous order of life within the family,

19 See Jiang Shigong, "Chinese Families from the Perspective of Judicial Function", in *Wenhua Zongheng*, 2011 Vol. 1, 30.

20 See Rolf Knieper, *Gesetz und Geschichte*, *ibid.*, 148-151.

equal values (accounting for equality between relatives), freedom (freedom of marriage under family cooperation) and fairness (preferential protection for the weak). Additionally, intrinsic values include the combination of attributes from private law with the functions of public law, equal emphasis on individual rights and family protection, the transformation from an individual standard to a family standard, emphasis on identity and the integration of family ethics.

4. Civil Law and National Character

(1) Domestic and Universal

Does civil law possess universal values or only local knowledge? National self-esteem is an important political slogan in present-day China. Controversy has always been attached to the issue of whether law is a set of life norms with universal value or only local knowledge.

In regulating social relations among individuals and families, civil law must perforce have a domestic character. However, domesticity is in and of itself a value judgment, with the type of domestic norms eligible for inclusion in the code reflective of the CCC's political and cultural demands. For the first time, Article 10 of the CCC stated that custom can be a source of civil law, opening the way for outstanding Chinese traditions to be written into the civil law. A nationwide survey of civil custom is indeed indispensable. Unfortunately, the legislature has not undertaken an in-depth investigation of nationwide civil customs, leaving the task to judges and potentially undermining the law's unity and predictability. Relevant provisions, based on national conditions and reflecting core socialist values, reflect domesticity, in this context being Article 184 (the Good Samaritan provision) and Article 185 (on the personality interests of heroes, martyrs and others). The land system is the most domesticated. There is no doubt that the systems for managing rural land contracts and the use of homesteads, as well as elder-care, are uniquely Chinese civil law characteristics.

A return to truly traditional Chinese life is impossible after several revolutions and dramatic political movements. The good wish is met with cold, hard reality. In regulating people's lives, ancient Chinese law would often adopt authorising and even arbitrary provisions that combine *li*, music, politics and punishment such as entering the dwelling of another without cause at night (夜无故入人家 *Ye Wugu Rurenjia*) in Tang Dynasty Law and the return of lost items (得阑遗物

Delan Yiwu) in Song Dynasty Law, which can only be the objects of studies in legal history and are long gone from real life.

The political, economic and social foundations of civil law reflect the potential relationships between social change or transformation and compilation of the CCC, which are fluid. Civil law and national character should be gleaned more from the invariable historical context. However, civil law is sourced in transaction law. Because the transactions are generally equivalent, societies will gradually converge due to their economic bases. The uniqueness of civilisation is often due to geographical isolation and poor communication in the agricultural era. These gradually disappeared in the face of the age of globalisation. The national character of civil law can only exist in coincidences between norms and history.

However, the law is also a nationalistic expression. For example, the French CCC upholds the political aspirations and linguistic orientation of the French bourgeois revolution. It is an easily understood yet eloquent and comprehensive collection of the Western bourgeois spirit of freedom and equality. The German BGB draws on the principles of classical German philosophy, especially Kantian philosophy. Its language is hard to understand and obscure, being utterly jurist speak. The Chinese CCC should have its own national character in order to embody Chinese cultural characteristics.

(2) The Fate of Domestic Law with Chinese Characteristics and Comparative Law

Domesticity with Chinese characteristics and foreign exchange have always been heavily coloured by political discourse. The fundamental tenet of the CCP is to blend Marxism with Chinese revolutionary practice. Politically, dogmatism has always been a heavily criticised version of appropriation. Because civil law was born from, and grew with, reform and opening up and the market economy, it was heavily coloured by external influences. At one time, comparative law supplied motivation for the development of China's civil law. The Contract Law of 1999 is the best proof of comparative law during this period,²¹ with many scholars viewing it as the pinnacle of civil legislation in China.

21 As an example, Prof Rolf Knieper, among other Western Scholars, was invited by the Legal Work Commission of NPC in 1998 to give expert opinions regarding the draft of Chinese Contract Law.

Yet beginning with the drafting of the LRR, Chinese authoritative civil law scholars began debating the importance of Chinese law's domesticity, seemingly due to a fear of anti-constitutionality and liberalisation of the capitalist class. They have elevated such domesticity to the value basis of "the importance of human beings lies in freedom, while the importance of nations lies in self-improvement."²² Indeed, political nationalism involves the legislation and academic study of civil law.

The development of the rule of law in East Asia shows that it is a general trend of localisation in all countries and regions, with Japanese law being representative. Authoritative Japanese civil law scholar *Zentaro Kitagawa* sees a three-step development of Japanese civil law, namely, from legislative transplantation to theoretical adoption, and finally buildup of domestic law which expresses the nation's civil law values.²³ After the Second World War, Japan had completed the construction of its domestic law.

However, it should be pointed out that this construction of domestic law is not inconsistent with the study of comparative law. Rather, it is the domesticated expression of private law's fundamental values in a particular country or area. Given the open-ended nature of domestic law, it cannot be confused with political correctness. As German scholars have put it, law is either a question of quality (*Qualitätsfrage*) or a question of force (*Machtfrage*).²⁴ The inheritance of Anglo-Saxon law is a classical representation of force through the vehicle of colonisation, while the inheritance of European continental law is more about quality. In maintaining each country's domesticity, civil law scholars commonly agree that civil law possesses common fundamental traits. For example, in the field of market trade in free economies, domesticity takes a backseat and allows the powerful uniformity of contract law in the era of globalisation. If we analyse seriously every piece of civil law legislation, we find a great variance in

22 See *Wang Liming*, "Enhance the Subjective Consciousness of Civil Law Theoretical Innovation", in *People's Daily*, 11 February 2019, 9.

23 The Japanese Civil Code was originally influenced by French civil law, and German law had a massive effect from the Meiji era to the Taisho era. Prof Kitagawa identified that Japanese civil law had been transformed into a German legal-style system. The significance of this realisation was obvious in explaining this theoretically as doctrinal reception (*Theorierezeption*) as opposed to black letter reception (*Kodifikationsrezeption*). See *Zentaro Kitagawa*, *Rezeption und Fortbildung des europäischen Zivilrechts in Japan*, Frankfurt am Main 1970.

24 See *Paul Koschaker*, *Europa und das römische Recht*, 1953 137f.

the degree of domesticity, namely, laws on marriage and inheritance are strongly domesticated, property laws are comparatively domesticated, while contract laws are increasingly internationalised. Civil law cannot be limited to a single issue of domestic law, requiring instead academic debates in comparative study and practical testing. Practical results show that, as mentioned before, the Contract Law of 1999 is the best piece of civil legislation. This is the best reflection of the importance of comparative law in Chinese civil law.

Conclusion

The completion of China's civil codification means the end of legislative work as a major political task, and the academic work has shifted from legislative theory to future interpretative skills of the provisions in the CCC to meet the needs of judicial daily work. In terms of codification, CCC lacks real system innovation and reflects more the requirements of political tasks.²⁵ In fact, it is not difficult to understand that China's tradition has always been to carry out various activities around political power, and it is now the basic requirement for the party to lead everything. But no doubt, after experiencing the ups and downs after the foundation of the PRC, the forty years since the reform and opening up have been the best period of peace and development of the Chinese nation, which allows the successful drafting of the CCC becoming a reality. Nonetheless, it is worth noting that China's politics, economy and society are still undergoing dramatic changes after the promulgation of the CCC, and the future fate of the CCC is worth continuing to pay attention to.

25 See *Su Yongqin*, "Evaluating and Looking at the Civil Code of Mainland China from the Perspective of Codification Theory", *Cross-Strait Law Review* Vol. 69, 2020/09, pp.5: "From the perspective of codification, the Civil Code passed in mainland China in 2020 will find that the lack of systematisation is its biggest problem, but systematisation is already the main value of today's Civil Code. Although the systematisation of the departmental orientation can also bring certain institutional benefits and is politically feasible, in the long run, its doctrinal teachings will bear particularly high costs. In addition, it is a pity that mainland China has not made good use of this century-old legal moment, and has missed the opportunity to make major innovations on the basis of *Pandekten* law and lead the trend of civil code in the 21st century."

The Place of Creation by Artificial Intelligence in Intellectual Property Law

1. Introduction

Artificial intelligence is actively used in modern life. This applies to both business and everyday matters. Against this background, many questions arise, which often represent issues that are difficult to resolve from a legislative point of view. It is precisely for this reason that legal frameworks are being gradually developed to regulate the scope of the legal use of artificial intelligence. A clear example of this is the regulation on artificial intelligence adopted by the European Parliament and the Council of the European Union, which covers several areas¹ and establishes the main directions for regulating artificial intelligence.²

The discussion below concerns the significance of creations by artificial intelligence within the context of intellectual property law, specifically in relation to copyright, as well as trademarks and patents. The discussion also touches upon

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1 For detailed information, see: <https://eur-lex.europa.eu/eli/reg/2024/1689/oj/eng> [17.07.2025].

2 Based on this, four main functions are defined: a) regulation of the internal market; b) increasing the demand for human- and trust-oriented artificial intelligence; c) protection of the level of health, safety, and fundamental rights; d) protection of innovations. For the full picture, see: *Voigt* in BeckOK KI-Recht, Schefzig/Kilian, 2. Edition, Stand: 01.05.2025, KI-VO Art. 1, Gegenstand, Rn. 10.

the rights that we are dealing with in each case and the legal status that can be assigned to them.

2. Exclusion of Artificial Intelligence as a Legal Subject

The terminological issue must be emphasised from the outset. The term "artificial intelligence" mentioned in this paper implies an artificial intelligence system that possesses the appropriate technological function or capability.

Artificial intelligence is not a legal subject. Consequently, it does not have legal capacity.³ Accordingly, it has no rights or obligations. An opinion has been expressed in relevant literature that, in future, the so-called dual perception of legal subjects will change, and artificial intelligence will play a significant role in this regard.⁴ This could be a kind of hybrid version, which will be based on the characteristics of classical subjects.⁵ However, until it is given the status of a legal subject, only within the framework of a *de lege ferenda*⁶ discussion, its actions cannot be equated with human actions.

3. Difference Between the Terms: "Creation" and "Work"

The term "creation" is intentionally coined in this paper. The result or output of artificial intelligence is inherently different from the result obtained through human (intellectual-creative) labour. Accordingly, it is important that there is no terminological confusion in this respect, which would also be problematic for legal qualification. For example, in relation to the term "work" and others.

A uniform terminology regarding the creation by artificial intelligence has not yet been established in Georgian legal literature. In the future (for example, after legislative changes), it is possible that a new term will be formed. In particular, depending on the specific activity, general terminology may be used. For example, a text, music, picture, etc., created by artificial intelligence.

3 Spuchkoff in Münchener Kommentar zum BGB, 10. Auflage 2025, §1, Rn. 14.

4 Gabisonia, The Essence of Artificial Intelligence and the Problem of Recognizing it as a Legal Subject, Journal "Justice", N1 2022, 138.

5 Burkadze, Towards the Status of Considering Artificial Intelligence as a Legal Subject, Journal "Justice", №2 [5] 2023, 42.

6 That is, from the perspective of future legal regulation.

4. Copyright of a Work and Its Relation to a Creation by Artificial Intelligence

According to sub-paragraph "a" of Article 1 of the Law of Georgia "On Copyright and Related Rights," the legislation divides a work into three categories, namely, in the fields of science, literature and art. The term "work" itself is not defined in the law. However, to determine its legal nature, it is important that intellectual-creative activity takes place during the creation of the work.

4.1 Intellectual-Creative Activity

In copyright law, the concept of the author is the most important, even more important than the action itself.⁷ Accordingly, intellectual-creative activity must originate directly from a human.⁸ It does not matter what condition the person is in;⁹ such an action is considered a real act.¹⁰ A creation by artificial intelligence cannot be characterised by such a criterion. Specifically, artificial intelligence cannot comprehend in the classical sense. It cannot study an issue that is related to perception and cognition. Consequently, it does not have the ability to memorise, analyse or draw conclusions.¹¹

4.2 Artificial Intelligence as an Auxiliary Tool

If we do not consider artificial intelligence as a legal subject, then how can it be qualified for the purposes of intellectual property law from today's legislative perspective? Given the current situation, it is closest to a computer program. Accordingly, it can be considered an auxiliary, facilitating tool for the creation of a work, on the basis of which it becomes easier for a natural person to carry out intellectual-creative activity.

7 This is expressed based on the protection of the same non-property rights.

8 *Grützmacher* in *Praxiskommentar zum Urheberrecht*, Wandtke/Bullinger, 6. Auflage 2022, UrhG §69a, Rn. 34.

9 For discussion, see the practice of the Swiss Supreme Court: Schweiz BGE, Urteil vom 14.06.1990, 116 II 351(354).

10 *Hoeren* in *Handbuch des Urheberrechts*, Loewenheim, 3. Auflage 2021, §10 Der Urheber, Rn. 4.

11 Technical means are not implied; rather, the paper focuses on characteristics that resemble human abilities.

4.2.1 An Example of a Creation by Artificial Intelligence

A natural person commissions an artificial intelligence program¹² to create a "novel." The program creates the novel, taking about one minute. In such a case, the "novel" is not considered a real novel and, accordingly, not a work, and the natural person, as the one who placed the order, does not hold copyright on the "novel," since their intellectual-creative activity is not evident in the creation of the artificial intelligence. The same may apply to a case where an artificial intelligence program creates a "picture."¹³ A copyright will not be extended to it in this case either.¹⁴

4.2.2 An Example of a Work Created with the Help of Artificial Intelligence

Unlike in the case of a creation made directly by employing artificial intelligence alone, the situation is different when artificial intelligence is used as an instrument.¹⁵ In this regard, it is significant to be able to confirm that the person only gave such prompts to artificial intelligence that would not be problematic for the final result to be considered a work.¹⁶ Specifically, the degree of human involvement in the creative process should be distinctly superior. In other words, it is important to properly determine the issue of rights, who is the creator, and who played the decisive role: the human or artificial intelligence?¹⁷

An example of the above reasoning is as follows: while drafting a novel, a natural person asks artificial intelligence to find information about certain historical facts. The artificial intelligence tool finds the material, which the author uses only for clarification to reflect in his novel. In such a case, artificial intelligence has an auxiliary role.

12 It does not matter which one. It could be, for example, "ChatGPT".

13 *Thaler v. Perlmutter*, No. 22-CV-384-1564-BAH.

14 See: *Kaesling*, „Autonomes“ Schaffen einer KI und Urheberrecht in der US-amerikanischen Rechtsprechung, Anmerkung zur Entscheidung des D. C. District Court in der Rs. *Thaler v. Perlmutter et al.*“, GRUR 2024, 260 et seq.

15 *Raue* in Urheberrechtsgesetz, Dreier/Schulze, 8. Auflage 2025, UrhG §2, Rn. 21.

16 See: *Kraetzig*, KI-Kunst als schöpferische Zerstörung, NJW 2024, 700.

17 *Hoeren/Wirtz*, Kunst und Recht, 2024, 74.

4.2.3 Human Responsibility Despite Assistance from Artificial Intelligence

The auxiliary role of artificial intelligence should not be understood in terms of fully trusting the information provided by artificial intelligence by the person who sought it. For example, an action without verification can establish a person's responsibility, because the information provided or processed by artificial intelligence may violate other rights.¹⁸ This does not only apply to cases in the field of intellectual property,¹⁹ but also, for example, the dissemination of information received from artificial intelligence without verification,²⁰ especially if the rights of a third party are violated.²¹ This is even more so when the standard terms of a contract for the use of artificial intelligence do not stipulate a warranty.²²

Following this line of reasoning, a second example can be given: a doctor decides to provide consultation to patients remotely over the Internet. He uses an artificial intelligence tool. Despite using artificial intelligence, the doctor is obliged to verify the answer provided by artificial intelligence thoroughly, in order to exclude errors as much as possible.²³

4.3 Absence of an Author in the Case of a Creation by Artificial Intelligence

A creation by artificial intelligence does not have an author. Specifically, it does not matter whether the creation of such a work was the desire of an individual or was prepared on the basis of a contractual relationship.²⁴ For greater

18 Schack, Urheberrecht, 4. Auflage, Rn. 324c.

19 See, for example, the case in the USA where a lawyer submitted non-existent precedents to the court without verification: *Mata v. Avianca, Inc.*, No. 1:2022cv01461 - Document 54 (S.D.N.Y. 2023).

20 See, for example, *Sylvia Noland v. Land of the Free L.P. et al.*, No. B331918 (Cal. Ct. App. filed [12.09.2025]) (Los Angeles County Super. Ct. No. BC716737).

21 See: LG Kiel, Urteil vom 29.2.2024 - 6 O 151/23.

22 See, for example, the case of "ChatGPT": <https://openai.com/policies/row-terms-of-use/> [17.07.2025].

23 From the perspective of the profession, an example can also be given from legal practice, where a consultation provided by a lawyer remotely (e.g., on social media) is associated with appropriate legal consequences. See, for example, Selected Recommendations for Lawyers of the Ethics Commission of the Georgian Bar Association, 2013-2021, prepared by *Khatia Chogovadze*, 2021, 109-110.

24 *Ulrici* in Urheber in Arbeits- oder Dienstverhältnissen, Däubler/Hjort/Schubert/Wolmerath, Arbeitsrecht, 5. Auflage 2022, UrhG §43, Rn. 2.

clarity, it should be explained that in this case, we are not talking about a work whose author chooses to be anonymous. Despite anonymity, a person has copyright upon their appearance or identification.²⁵ In the case of artificial intelligence, such a precondition is not present.

4.4 Scope of Disposal of a Creation by Artificial Intelligence

4.4.1 Entering into a Contract Involving a Creation by Artificial Intelligence

Entering into a contract involving a creation by artificial intelligence stems from the general principle of freedom of contract. This means that the parties (the one who ordered the preparation of the creation from artificial intelligence) and a third party enjoy an authority that is not prohibited by any legal norm.²⁶ For example, it is possible for a person to place a creation (image) by artificial intelligence on a tablecloth and then enter into a contract with another person for the wide distribution (sale) of such a tablecloth.

4.4.2 Mass Production of Creations by Artificial Intelligence

A case concerning the mass production of a creation by artificial intelligence is determined similarly to the example given above. For example, a store sells various items on which a creation (visual) by artificial intelligence is placed. In such a case, the disposal, sale or production of such a creation will not be prohibited by law, but a different situation will arise from the point of view of copyright law, because it does not give rise to such rights.

4.4.3 Legal Consequences

Based on the examples provided, it is possible to focus on two directions: a) in relation to the counterparty arising from the contractual relationship; and b) on the circumstances related to copyright. Let us consider both.

²⁵ Jorbenadze, *Copyrights in Life*, fourth revised edition, 2023, 102-103, 109.

²⁶ For discussion, see, for example, Jorbenadze, *Freedom of Contract in Civil Law*, 2017, 85.

4.4.3.1 Claim Against the Counterparty

A contractual claim will be based on the contract. Accordingly, the responsible subject will only be the counterparty to the contract. Let us say, if the contract provides for the payment of a penalty for its breach, the claim will arise precisely from the condition of the contract. For example, if by contract, a person is obliged to sell a tablecloth decorated with a creation by artificial intelligence to third parties and they violate this obligation, their responsibility will arise precisely from the contract, and so on.

4.4.3.2 Absence of a Claim Based on Copyright

Unlike the case of a contract, a person who (based on the example above) carries out the mass production of the tablecloth will not have a claim to assert copyright. For example, if it turns out that a third party²⁷ is producing tablecloths and has a similar creation produced using artificial intelligence on them, as shown in the example above, the action of the third party is not considered a violation of copyright.²⁸

The starting point of this explanation is precisely the nature and significance of the creation by artificial intelligence, which, in turn, is not considered a work. An exception may be a case where the artificial intelligence is of an auxiliary nature, and the person's intellectual-creative activity is protected.

4.5 Interim Conclusion

A creation by artificial intelligence does not constitute a work, as it does not satisfy the prerequisite of intellectual-creative activity.²⁹ Considering its nature, a creation by artificial intelligence is the closest to a work made for hire.³⁰ However, even in this case, since there is no intellectual-creative activity behind the action,³¹ the creation is not considered a work (including a work for hire).

27 This does not imply the counterparty with whom he may have a contract.

28 An exceptional case is found in the case of trademark registration, which is discussed in this same paper (5.4.2 and 5.4.3).

29 For discussion, see: *Linke*, „Künstliche Intelligenz“ und Urheberrecht – Quo vadis? 1. Auflage, Nomos Verlagsgesellschaft, Baden-Baden, 2021, 188.

30 Especially if there is a contract with direct conditions regarding the preparation of the respective creation.

31 Therefore, there are no specific natural persons behind this same legal entity.

5. Creation by Artificial Intelligence in Relation to Trademarks

5.1 Definition of a Trademark

According to paragraph 1 of Article 5 of the Law of Georgia "On Trademarks," "a trademark is any symbol or combination of symbols that is entered in the Register of Trademarks, is formulated clearly and distinctly, and has the ability to distinguish the goods and/or services of one enterprise from the goods and/or services of another enterprise." According to this law, a symbol created either verbally or in the form of a drawing, and others, can be presented as a trademark. For example, a person's first and last name.³²

5.2 Importance of Registration

Entering a trademark in the Register of Trademarks ultimately means its registration, which constitutes the granting of the corresponding exclusive right and a prerequisite for the protection of this right. Specifically, in this way, a person is granted the exclusive right to permit or prohibit others from using this mark or similar marks.

5.3 Connection to Copyright

A trademark must not violate the copyright of a third party. This case refers to a situation where, say, a drawing is registered as a trademark. It is emphasised that, in this case, we are talking about a work created by a natural person, on which they have copyright. Even if a drawing is registered as a trademark, after registration, it may face an obstacle. We can develop a similar discussion when a trademark violates a person's copyright. For example, in relation to the same drawing, it is registered as a trademark in such a way that the corresponding permission from the author has not been obtained.³³

5.4 Registration of a Creation by Artificial Intelligence as a Trademark

32 See, for example, *Fezer*, Markenrecht, 5. Auflage, Verlag C.H. Beck, München, 2023, MarkenG §3, Rn. 2a.

33 For comparison, see: BGH, Urteil vom 23.01.2003 – I ZR 171/00.

For greater clarity, the discussion can be based on an example: a person intends to start an entrepreneurial activity in the food industry. They give a task to an artificial intelligence tool to provide several options for a trademark. The artificial intelligence tool presents seven options, from which the person prefers one and decides to register it as a trademark. When the person submits the creation to *Sakpatenti* (National Intellectual Property Centre of Georgia), no absolute or relative grounds for refusal of registration are identified in relation to the creation. Accordingly, *Sakpatenti* registers the trademark. How lawful is this registration?

5.4.1 Content of the Application

Under Article 9 of the Law of Georgia "On Trademarks," it is not mandatory to indicate the author. In other words, for the registration of a trademark, copyright, or intellectual-creative activity is not of decisive importance, except in the case where its violation is subsequently revealed (this detail will be discussed below). Accordingly, it turns out that, unlike the origin of copyright, at the time of trademark registration, it is not mandatory that the creation (that is, what is registered as a trademark) be created by a natural person.

5.4.2 Admissibility of Registration

Following the above reasoning, it can be said that a creation by artificial intelligence is subject to registration as a trademark. The existence of an author and, consequently, intellectual-creativity does not play an essential role in this case. An exception is a case where the ground for refusal of registration falls under the general rule.³⁴

5.4.3 Cancellation and Invalidation of Trademark Registration

The cancellation and invalidation of a trademark registration differ from each other in their legal consequences. In the first case, we encounter a situation where the trademark was legally and correctly registered before cancellation, while in the case of invalidity, there is a presumption that its registration was in violation of the law from the very beginning. Along with these distinguishing

³⁴ For example, an identical or similar trademark has been created, etc.

features, the difference also lies in the grounds. Based on the discussion around artificial intelligence, this paper will only focus on the part that is important for discussing the issue.

5.4.3.1 Claim Regarding the Cancellation of the Registration of a Creation by Artificial Intelligence as a Registered Trademark

First, the grounds for the cancellation of a trademark registration should be considered. According to sub-paragraph "c" of paragraph 2 of Article 27 of the Law of Georgia "On Trademarks," a court cancels a trademark registration at the request of a third party if "the use of the trademark by the trademark owner or with their consent creates a false impression for the consumer about the type, properties, quality, value or geographical origin or other characteristics of the goods." The term "third party" includes any interested person who may have such a right. Let us consider an example: a person has a tableware store. The store sells tableware on which a specific creation (visual) is applied. The creation (visual) is made by artificial intelligence and, accordingly, it does not fall under the definition of a "work". The person does not have copyright on the creation (visual) applied to the tableware. Despite this, the general public is informed about the tableware and the creation (visual) on the tableware (it is easily associated with the person). One of the regular customers is fascinated by the creation (visual) and wants to produce an identical product themselves, to apply it (in an identical form) to tableware. When this customer learns that the creation (visual) was made by artificial intelligence, they decide to find a way to acquire rights to it and decide to register the creation (visual) as their own trademark. *Sakpatenti* carries out the corresponding registration. After this, the regular customer demands that the original manufacturer of the tableware no longer produce tableware with this creation (visual), because it is registered as their trademark.³⁵ In this case, the original tableware manufacturing company does not have grounds for cancelling the trademark registered by the regular customer, since the trademark does not create a false impression for consumers about any characteristic.³⁶

35 See the case of exclusive rights, defined by Article 45 of the Law of Georgia "On Trademarks".

36 Similarly, one can also speak about sub-paragraph 'e' of paragraph 1 of Article 4 of the Law of Georgia "On Trademarks". Also, the assessment of actions based on the principles of unfair

5.4.3.2 Claim Regarding the Invalidity of the Registration of a Creation by Artificial Intelligence as a Registered Trademark

According to sub-paragraph "b" of paragraph 1 of Article 28 of the Law of Georgia "On Trademarks," a ground for the invalidation of a trademark arises if its registration was carried out with bad faith intent. According to sub-paragraph "e" of the same paragraph, a ground for invalidity arises when, "the registration of the trademark and/or the use of the trademark violates the copyright of a third party, which arose before the priority date established for the trademark," while sub-paragraph "a" of the same paragraph defines conflict with recognised principles of public order or morality as a ground for invalidity. Let us consider each of them based on the same example that was given in the context of cancellation.

In the case of bad faith, only the earlier owner has the right to file a claim. Similarly, we encounter this in the case of copyright infringement, and in extreme cases, the right holder, who is not present in this case (considering the absence of a work). The issue of public order remains. The extent to which the registration of a creation by artificial intelligence as a trademark is inconsistent with public order is a matter of discussion. For this, attention should be focused on three aspects: a) to what extent the definition of the creator of a trademark is at the legislative level; b) to what extent the necessity of intellectual-creative activity is evident in the existence of a trademark; and c) what is the main essence of trademark registration. The answer to the first question is simple: the law (unlike the case of an author or inventor) does not have a direct definition of by whom a trademark should be created. The term applicant is secondary for this definition, as it can be any person (similar to, say, a deposit or a patent). Similarly, in this case, the instance of intellectual-creative activity is not evident; that is, we do not see the necessity of the participation of a natural person. As for the essence of trademark registration itself, it is related to the creation of a property right and focuses on the protection of the trademark. Thus, the ground for invalidity is also not evident.

competition is a separate subject of discussion, which is deliberately not discussed in this paper.

5.5 Interim Conclusion

After the registration of a creation by artificial intelligence as a trademark, a third party has the right to file a claim only in a case precisely defined by law, which will be related to general standards. The mere fact that the trademark was created by artificial intelligence does not constitute a legislative basis that could become a prerequisite for the cancellation or invalidation of the registration.

6. The Relation of Creations by Artificial Intelligence to Patents

A patent is a confirmation of a person's possession of exclusive rights (see sub-paragraph "f" of Article 2 of the "Patent Law of Georgia"). The owner of a patent can be either a natural or a legal person. In this regard, there is no prohibition in the law. In turn, a patent is granted for an invention. Patenting is permissible if the request meets the criteria of patentability, namely, novelty, inventive step and industrial applicability. Can a creation by artificial intelligence be considered an invention? To answer this question, it is important to consider several legal aspects.

6.1 Inventor

According to sub-paragraph "e¹" of Article 2 of the "Patent Law of Georgia," an inventor can only be a natural person, and their intellectual-creative activity must have taken place. Accordingly, artificial intelligence is not considered an inventor,³⁷ because it is not even a legal subject.

6.2 Invention and Creation by Artificial Intelligence

What an invention is, the legislation has left open, and there is no direct record in the law regarding this. For the purposes of this paper, the issue can be considered more broadly in this respect, namely, can an invention exist without an inventor? Although the purpose of a patent is more of a property interest, it would not be correct to ignore that an invention is the result of the action of a natural person.

37 See the practice of the Swiss court: BVGer, Urteil vom 26.06.2025, B-2532/2024.

If we proceed from today's legislative text, an invention cannot exist without an inventor. On the one hand, a parallel can be drawn with the concept of the author of a work, similar to which, an invention should be the result of intellectual-creative activity. On the other hand, it is also evident from the concept of a patent that a patent includes a description of the invention, claims, drawings and an abstract.

Thus, if we consider that a patent is granted for an invention, it is important to clarify who or what can be behind the invention. If we say that a natural person must be behind the invention (that is, an inventor), then a creation by artificial intelligence cannot be considered as such.

6.3 Invention with the Help of Artificial Intelligence

If there was assistance from artificial intelligence, then the existence of the invention should not be questioned unequivocally.³⁸ What can be considered assistance and/or what active share belongs to artificial intelligence, in this case, is a matter of discussion and should be determined individually for each case. The justification for this falls within the scope of the burden of proof of the respective (in this case, the claimant) party.

6.4 Connection to Public Order

Sub-paragraph "a" of Article 17³⁹ of the "Patent Law of Georgia" regulates the issue of the inadmissibility of granting a patent on the grounds of conflict with public order. In its essence, the definition of public order is quite broad and is subject to interpretation depending on individual circumstances.⁴⁰ If we consider a creation by artificial intelligence as an invention that contradicts public order, then the ground for its invalidity will arise,⁴¹ even if it is patented.

6.5 Case of Labour and Contractual Relations

38 See: BGH, Beschluss vom 11.06.2024, X ZB 5/22.

39 The objects for which a patent is not granted are indicated in Article 17 of the "Patent Law of Georgia," from which, for the purposes of this paper, attention is focused on the most relevant prerequisite.

40 See the Ruling of the Supreme Court of Georgia of 18 November 2008, №as-533-786-08.

41 On the basis of sub-paragraph 'd' of paragraph 1 of Article 57 of the "Patent Law of Georgia".

According to paragraph 5 of Article 19 of the "Patent Law of Georgia," the creation of an invention is possible on the basis of a contractual relationship. Specifically, this can happen both in a labour relationship and also through a service (work) contract. When discussing artificial intelligence, the first case should be excluded.⁴² Specifically, the artificial intelligence system (or its provider) cannot be considered an employee.⁴³ As for a service contract, in this case, it is possible that the provider of the artificial intelligence (and not the artificial intelligence system) is a counterparty.⁴⁴ If we expand on the above reasoning and consider the result of a natural person's intellectual-creative activity as a prerequisite for an invention, then, even if such a contract exists, the creation should not be considered an invention.

6.6 Interim Conclusion

Based on the above, it can be said that a creation by artificial intelligence cannot be considered an invention, because artificial intelligence (the respective system) cannot become an inventor. This conclusion stems from the current legislative situation. In this regard, it is desirable that the approach to patenting be based on a new reality.⁴⁵

7. Summary

Artificial intelligence (the respective system) is not a legal subject (person). The current legislative regulation in Georgia does not recognise a direct interpretation of this issue. Accordingly, its resolution must be based on considering the existing situation.

In relation to Copyright – Artificial intelligence cannot be an author. Artificial intelligence cannot create a work. This means that in relation to a creation by artificial intelligence, there can be no copyright (exclusive) rights.

42 The example does not include the case where an employee uses the help of artificial intelligence.

43 First of all, according to paragraph 3 of Article 3 of the Labor Code of Georgia.

44 There is no specification in the law that the recipient of the order (the performer) must necessarily be a natural person.

45 See, for example, *Gabisonia*, The Essence of Artificial Intelligence and the Need for its Legal Regulation, Georgian-German Journal of Comparative Law, 7/2021, 39.

It is desirable that the following addition be made to the Law of Georgia "On Copyright and Related Rights": to paragraph 3 of Article 5, where a list consisting of the types of copyrights that do not extend to the term "creation by artificial intelligence" should be added.

In relation to Trademarks – A creation by artificial intelligence can be registered as a trademark. Unlike copyright (or patent) law, in such a case, the issue of intellectual-creative activity does not play a decisive role.

In relation to Patents (Inventions) – Artificial intelligence cannot be an inventor. Also, its creation cannot be considered an invention⁴⁶ and, accordingly, it should not be patented. Similar to copyright, intellectual-creative activity plays a decisive role in this regard.

It is desirable that sub-paragraph "g¹" be added to paragraph 1 of Article 16 of the "Patent Law of Georgia," which concerns objects that are not considered inventions, where a reference will be made to the term "creation by artificial intelligence".

In summary, it can be said that the development of artificial intelligence is one example of technological development,⁴⁷ behind which legislation significantly lags. Accordingly, the resolution of each issue is based on reasoning stemming from the current situation.⁴⁸ In this regard, it is important that there exist more flexible and/or modern interpretations at the legislative level,⁴⁹ which will regulate the involvement of artificial intelligence in intellectual property law.

46 For a comparative-legal discussion, see: Schrön, *Künstliche Intelligenz im Patentrecht*, 1. Auflage, 2023, 144, 147.

47 Accordingly, there are issues that may not have even been discussed today; a classic manifestation of this is artificial intelligence defeating the world chess champion, which was considered difficult to imagine until that moment. On this issue, see: *Ziegenbalg*, *Algorithmik, Eine universelle Methode im Überblick*, 2025, 35-36.

48 For a comparative-legal discussion, see, for example, *Hoeren*, *ChatGPT und das Recht, Eine juristische Einschätzung zur Anwendung von KI-Textgeneratoren an den Hochschulen, Forschung und Lehre*, 11/2023, 847.

49 Especially at the stage of artificial intelligence capability at which humanity is today, which is called limited (weak) artificial intelligence. On this issue, see: *Rossipaul*, *Künstliche Intelligenz in Kommunikation und Kunst*, 2023, 26 et seq.

Legal Grounds for Limiting the Freight Forwarder's Liability Through Special Drawing Rights (SDR)

1. Introduction

Against the backdrop of globalisation and the dynamic development of international trade, freight forwarding has become an integral component of modern economic relations. The functioning of international logistics networks and the continuous movement of goods would be inconceivable without professional forwarding services, which encompass the organisation of cargo transportation, the management of documentation and the coordination of various modes of transport. The freight forwarder thus represents a pivotal link that connects the carrier, the consignor and the consignee within a unified logistical chain.

However, in the context of international economic relations, the freight forwarder's role is not merely technical or organisational in nature but also entails significant legal risks. The loss, damage or delay of cargo gives rise to claims for compensation, often involving objects of high material value. Consequently, the

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issue of the freight forwarder's civil liability acquires particular importance, both for the contracting parties and for the broader framework of economic security.

For this reason, both international and domestic legal systems have developed the institution of liability limitation, the primary purpose of which is, on the one hand, to prevent the financial insolvency of freight forwarders resulting from the high value of transported goods, and, on the other, to ensure a reasonable balance between the protection of consumer interests and the economic viability of forwarding operations.

In this context, a particularly significant role is played by the Special Drawing Right (SDR), established by the International Monetary Fund (IMF), which serves as a universal accounting unit used to determine liability limits across various modes of transport.

The introduction of the SDR mechanism has greatly contributed to the establishment of a unified and predictable framework of liability within the sphere of international transportation. Nevertheless, the liability limits applicable to freight forwarders have not yet been fully harmonised at the international level. Unlike the liability of carriers, which is comprehensively regulated by international conventions such as the Montreal Convention, the CMR (Convention on the Contract for the International Carriage of Goods by Road), and the Hague–Visby Rules, the extent of a freight forwarder's liability is most often defined by domestic legislation, the FIATA Model Rules for Freight Forwarding Services, or standard contractual terms adopted within the framework of contractual freedom.

This circumstance presents a significant challenge both for legal theory and for practical regulation. From the outset, it becomes necessary to identify the legal foundations upon which the limitation of the freight forwarder's liability is based, to evaluate the effectiveness of the SDR mechanism, and to delineate potential directions for international unification, grounded in a comparative analysis of different national models.

The present chapter is devoted precisely to the examination of this issue. Its objective is to reveal the legal grounds for limiting the freight forwarder's liability, to analyse the international practice of applying the Special Drawing Right (SDR), and to assess the effectiveness of this legal instrument at both the international and domestic levels.

2. The Economic and Legal Significance of Freight Forwarding

Freight forwarding plays a crucial role in international trade and the global economy,¹ adapting to the continuously growing demands of consumers and businesses. Traditionally, the core activities of freight forwarders were associated with assisting merchants in the preparation and organisation of cargo shipments, including booking and coordinating transportation.

A freight forwarder's services typically encompass arranging the export clearance of goods in the country of dispatch and import clearance in the country of destination. Moreover, freight forwarders often maintained networks of foreign partners capable of receiving instructions for handling goods upon arrival, including cargo reception, storage, and customs formalities at the destination point.²

Today, freight forwarding agents bear responsibility for the planning and organisation of cargo transportation,³ ensuring seamless communication and coordination among all participants within the transport and forwarding chain, and maintaining the integrity of the logistical network.⁴ Agent forwarders manage and supervise the entire process – from the point of dispatch to the final delivery.⁵ They also provide clients with a range of additional services, including storage, handling, packaging, and distribution of goods, as well as related auxiliary and advisory services, encompassing but not limited to customs and fiscal matters, declaration of goods for official purposes, procurement of cargo insurance, and the collection or processing of payments and shipment-related

1 *Parhammehr H.R., Zeajeldi I.*, The Role of FIATA Multimodal Transport Bill of Lading in Business Exchange in International Transport, *Social Sciences* 11(12), 3150.

2 *Ramberg J.*, Unification of the Law of International Freight Forwarding, 3 *Unif. L. Rev.* n.s. 5, 1998, 5.

3 *Tushevska B.*, Civil Law Versus Common Law Concept of Freight Forwarders, *Balkan Social Science Review*, Vol. 4, December 2014, 50.

4 For a detailed discussion on the expanded role and functions/duties of freight forwarders, see: *Balasubramaniyam P., Sasirekha K.*, A Study on the Role of Freight Forwarders in Logistics and Supply Chain Management, *International Journal of Scientific Research in Engineering and Management* 09(04), 2024, 1-9; *Skiba S., Karaś A.*, The Changing Role of a Freight Forwarder in Modern Supply Chains, *European Research Studies Journal* Volume XXV, Issue 1, 2022, 341-351; *Bokareva O.*, *Uniformity of Transport Law through International Regimes*, Edward Elgar Publishing, 2019, 34, 51-52.

5 *Ramberg J.*, Unification of the Law of International Freight Forwarding, 3 *Unif. L. Rev.* n.s. 5, 1998, 5.

documentation.⁶ The effective administration and management of documentation thus largely depend on the forwarder's expertise.

However, such network-based logistical operations are inherently exposed to various risks, including total or partial loss of cargo, destruction or damage of goods and delays in delivery. The realisation of these risks foregrounds the question of civil liability of freight forwarders, while their effective management requires the establishment of clear legal frameworks that delineate the scope of the forwarders' rights and responsibilities.

Freight forwarders employ a variety of strategies to ensure the effective management of risks. These strategies may include systematic risk assessment, utilisation of insurance mechanisms, rigorous contractual regulation and other appropriate measures. Particular importance is attached to the training of forwarding personnel and professional skills development programs, enabling them to implement the risk management process effectively and to minimise the exposure to potential risks. Relevant scholarly research indicates that the success of risk management strategies is directly dependent on their correct selection and the quality of their implementation. Accordingly, it is essential for freight forwarders to conduct thorough analyses and select strategies that are optimally aligned with their activities, operational environment, and the carrier-economic conditions. Such a systematic approach contributes to risk prevention, operational stability and the protection of the interests of all parties involved in transportation.⁷

In response to legal and economic risks and to prevent the insolvency of freight forwarders in cases involving high-value cargo, it has become imperative within both international and domestic legal systems to establish liability limitations for forwarding agents. On the other hand, defining a limited amount of liability also serves the interests of clients, as it provides them with predictability

6 *Bokareva O.*, Uniformity of Transport Law through International Regimes, Edward Elgar Publishing, 2019, 51-53; *Bugden P. M.*, *Lamont-Black S.*, *Goods in Transit*, 3rd edition, London: Sweet & Maxwell, 2013, 371-88.

7 For a detailed discussion on risk mitigation strategies in freight forwarding, see: *Yoon J.*, *Yildiz H.*, *Talluri S.*, Risk Management Strategies in Transportation Capacity Decisions: An Analytical Approach, *Journal of Business Logistics*, Volume 37, Issue 4, 2017, 364-381; *Jarašūnienė M.*, *Gelžinis M.*, Risk and Crisis Management Strategies in the Logistics Sector: Theoretical Approaches and Practical Models, *Future Transp.*, 5, 74, 2025, 1-26; *Selvaraj D.K.*, *Allrin R.R.*, A study of risk management practices in logistics operations, *International Journal of Literacy and Education* 4(2), 2024, 223-227.

regarding the potential compensation they may receive in the event of the forwarder's liability.⁸

Accordingly, one of the central issues in freight forwarding is the limitation of the freight forwarder's liability, which is implemented through the determination of a capped amount based on the International Monetary Fund's Special Drawing Rights (SDR) (hereinafter referred to as SDR).

3. Limitation of the Freight Forwarder's Liability: Conventional Regulation, Domestic Autonomy, and the Role of Unified Model Acts (FIATA)

The liability of the carrier, expressed as a capped amount in Special Drawing Rights (SDR), is determined at the conventional level, for instance, under the Montreal Convention of 28 May 1999 for the Unification of Certain Rules for International Carriage by Air,⁹ as well as under the Convention on the Contract for the International Carriage of Goods by Road (CMR).¹⁰

In contrast to carriers, the liability limits of agent freight forwarders are not regulated by international treaties. Consequently, the extent of freight forwarders' liability is either governed by domestic legislation¹¹ or determined within the framework of contractual freedom, and is often codified through standard contractual terms within the domestic legal space. These standard terms are

8 *Poliak M., Salamakhina E.*, Comparison of the Multimodal Transport Operator's and a Freight Forwarder's Liability Limit in International Transport. Case Study, Vol. 14 No. 1 2023, 67; See also: *Poliak M., Salamakhina E., Lakhmetkina N., Zhuravleva N.*, Comparison of freight forwarder liability in selected countries of the European Union and selected countries of the Commonwealth of Independent States (CIS), The 13th International conference on Automotive Safety, Automotive Safety 2022, 89.

9 Convention for the Unification of Certain Rules for International Carriage by Air, 28 May 1999. The convention was ratified by the President of Georgia under Decree No. 834 on 15 October 2010.

10 Convention on the Contract for the International Carriage of Goods by Road (CMR), adopted: 19/05/1956, entered into force for Georgia: 02/11/1999.

11 *Ramberg J.*, Unification of the Law of International Freight Forwarding. Uniform Law Review, 3(1), 1998, 5-13. For example, Section 461 of the German Commercial Code, with reference to Section 431, provides for the limitation of liability based on SDRs for both the carrier and the forwarder.

grounded in general normative principles establishing the limitation of civil liability.¹²

A significant effort within many transnational legal systems to define compensation limits for the benefit of the consumer has been made by national freight forwarders' associations¹³ through the establishment of standardised, uniform rules. These rules offer association members a consistent liability limit to ensure uniformity in domestic tariffs. Furthermore, individual forwarding companies may incorporate by contract the use of FIATA's model rules,¹⁴ which, in turn, establish a capped liability for all forwarding entities adhering to these rules. Consequently, even within the transnational space of a single country, the unification of liability limits at a normative level is not always ensured, and, in practice, the precise amount of liability may vary depending on the standard contractual terms of individual forwarding companies.

Unlike carriers, numerous attempts to unify the legal regimes governing the activities and liabilities of freight forwarders at a conventional level have proven unsuccessful.¹⁵ International efforts have thus shifted toward the formation of uniform soft law norms. In this regard, the International Federation of Freight Forwarders Associations (hereinafter FIATA), a non-governmental organisation uniting forwarding companies worldwide, has become the most authoritative and influential organisation. Within the framework of bringing freight forwarding companies from various countries together, FIATA has developed transport documents that are internationally recognised in the global market. Additionally, FIATA provides its members with the opportunity to incorporate FIATA's standard conditions into freight forwarding contracts.¹⁶

12 See in detail: *Poliak M., Salamakhina E.*, Ensuring Fair Compensation: Analyzing and Adjusting Freight Forwarder Liability Limits, 8 (2), 42, 2024, 1-16; *Tushevska B.*, Liability of The Freight Forwarders According to National And International Law, Goce Delcev University, 2015, 1-15, DOI:10.13140/RG.2.1.4786.6727.

13 Association of Logistics and Freight Forwarding of the Slovak Republic and The Association of Forwarding and Logistics of the Czech Republic.

14 FIATA Model Rules for Freight Forwarding Services, 1996.

15 For example, the UNIDROIT Draft Convention on Contract of Agency for Forwarding Agents relating to International Carriage of Goods. This draft convention was not adopted due to FIATA's resistance.

16 *Parhammehr H. R., Zeajeldi I.*, The role of FIATA multimodal transport bill of lading in business exchange in international transport. Social Sciences, 11 (12), 2016, 3150 – 3153, <<https://docsdrive.com/?pdf=medwelljournals/sscience/2016/3150-3153.pdf>> [03.09.2025].

However, ambiguity arises from the fact that the liability limits for forwarders established in the FIATA model rules are of a recommendatory nature. Their binding effect for any given company arises only upon adherence to the FIATA model rules. Consequently, the liability limits of forwarders are inconsistent not only across different countries but often even among companies registered within the same state. In most cases, such discrepancies create practical difficulties for consumers, who are compelled to examine the terms of each company individually¹⁷ in order to identify the most favourable shipping conditions.¹⁸

For this reason, if the limitation of a forwarder's liability under a statutory liability regime is not defined at the legislative level in a given country, it is advisable that a uniform liability amount be proposed for all organisations operating in the transnational market by the national associations of freight forwarders. While such a proposal is only recommendatory and not binding, international experience shows that companies generally adhere to the transnational rules of the forwarding association in their country, to FIATA norms, or to the liability limits established under the CMR Geneva Convention.

In countries where the national forwarding association has not recommended a capped liability amount under a statutory liability regime, individual companies may, within the framework of contractual autonomy, define the scope of the forwarder's liability either with a specific statutory limit or by adopting the maximum limit set by FIATA as a guideline.

In Germany, the limitation of liability for forwarders and carriers under a statutory liability regime is established by the German Commercial Code. Liability limits are also regulated in accordance with the Code in the standard contractual terms of German forwarding companies¹⁹ and are diversified depending on the role of the forwarder in the transaction.²⁰ Specifically, under § 461(1) of the

17 Poliak M., Salamakhina E., Comparison of the Multimodal Transport Operator's and a Freight Forwarder's Liability Limit in International Transport. Case Study, Vol. 14 No. 1 2023, 66.

18 Poliak M., Salamakhina E., Lakhmetkina N., Zhuravleva N., Comparison of freight forwarder liability in selected countries of the European Union and selected countries of the Commonwealth of Independent States (CIS), The 13th International conference on Automotive Safety, Automotive Safety 2022, 89.

19 General German Forwarding Conditions (ADSp), Art. 23-24, <<https://www.dbcargo.com/resource/blob/5635844/8403b6e33030af19b38b08a8e6285161/ADSp-complete-data.pdf>> [02.01.2025].

20 Poliak M., Salamakhina E., Comparison of the Multimodal Transport Operator's and a Freight Forwarder's Liability Limit in International Transport. Case Study, Vol. 14 No. 1 2023, 70.

Commercial Code, the forwarder is liable for the compensation of damages resulting from the loss or damage of goods under their control.

Accordingly, the following paragraphs of the German Commercial Code (*Handelsgesetzbuch*, HGB) are applied: §§ 426,²¹ 427,²² 429,²³ 430,²⁴ 431²⁵ (1), (2), and (4), as well as §§ 432 and 434-436. Thus, when establishing the capped liability amount for a forwarder under a statutory liability regime, the German Commercial Code refers by a blanket provision to the norms governing the limitation of the carrier's liability. In this context, particular attention should be paid to §§ 429, 430, and 431, which specify the amount of liability and the method of calculation.

§ 429 is especially noteworthy as it concerns the method for calculating compensation based on the value of the goods and provides that: (1) If the carrier is liable for compensation due to the total or partial loss of the goods, the compensation shall be calculated according to the place and time at which the goods

21 According to paragraph 426, the carrier is exonerated from liability if the loss, damage, or delay in delivery were caused by circumstances that the carrier could not have avoided, even if it had exercised the utmost care, and the consequences of which could not have been prevented by the carrier.

22 According to paragraph 427: (1) The carrier is exonerated from liability if the loss, damage, or delay in delivery was caused by the following risks: 1. The use of an open or uncovered means of transport or deck stowage, if such a transport method was agreed upon or generally accepted; 2. Insufficient packing by the sender; 3. Handling, loading, or unloading of the goods by the sender or recipient; 4. The nature of the goods, which makes them particularly susceptible to damage, especially by crumbling, rust, decay, drying out, leakage, or ordinary wear and tear; 5. Insufficient marking of packages by the sender; 6. Transport of live animals. (2) If the damage occurs under circumstances that could have been caused by any of the risks listed in subsection (1), it is presumed that the damage was indeed caused by that risk. This presumption does not apply to the circumstance listed in subsection (1) point 1 if an extraordinarily large loss occurs. (3) The carrier may rely on subsection (1) point 1 if the loss, damage, or delay in delivery was not caused by the carrier's failure to follow specific instructions issued by the sender regarding the transport of the goods. (4) If the carrier is obliged under the carriage contract to protect the goods against heat, cold, temperature changes, humidity, vibration, or similar effects, it may rely on subsection (1) point 4 only if it has taken all necessary measures, particularly regarding the selection, maintenance, and use of appropriate equipment, and if it has complied with any specific instructions given. (5) The carrier may rely on subsection (1) point 6 only if it has taken all measures required by the circumstances and has complied with all specific instructions provided to it.

23 Material damage to the cargo.

24 Costs necessary for the assessment of damages.

25 Maximum amount of liability.

were delivered for transportation. (2) If the goods are damaged, the amount of compensation is determined by the difference between the value of the goods that are unsuitable for transport and the estimated value of the damaged goods, taking into account the place and time at which the goods were delivered for transportation. Expenses necessary to reduce or remedy the damage are considered equivalent to the difference calculated in accordance with the first sentence. (3) The value of the goods is determined based on the prevailing market price, or, if no such price exists, based on the usual value of goods of the same type and quality. If the goods were sold prior to delivery for transport, the purchase price indicated on the seller's invoice, without transportation costs, shall be regarded as the prevailing market price.

According to § 430, in the event of loss or damage to the goods, the carrier is liable, in addition to the compensation payable under § 429, for the costs of assessing the damage. The carrier's statutory liability limit is determined by §431 of the Commercial Code, which, as noted, also applies to the forwarder due to the blanket reference. Specifically, pursuant to § 431(1), the compensation payable under §§ 429 and 430 for loss or damage to goods is limited to 8.33 SDR per kilogram of the total weight of the goods.

Under § 431(2), if the shipment consists of multiple packages and only certain packages are lost or damaged, the compensation specified in subsection is calculated as follows: (1) For the entire shipment, if the total value of the shipment is lost;²⁶ or (2) For the individual package(s) that lost value, if the total value of the shipment has not depreciated.

For forwarders, § 431(4) also establishes the method for calculating the liability in SDR, namely, the accounting unit referred to in subsections (1) and (2) is the International Monetary Fund's Special Drawing Rights (SDR). The amount is converted into euros based on the euro value of the SDR on the day the goods were received for transport or on a date agreed upon by the parties. The euro value in relation to the SDR is calculated on the accounting day according to the valuation method used by the International Monetary Fund for its operations and transactions.

The statutory liability limit for forwarders and carriers under the German Commercial Code (8.33 SDR) aligns with the modernised version of Article 23(3)

26 This occurs when there is an integral connection between the components of the cargo. See *Hopt/Merkt*, 44th edition 2025, HGB § 431 Rn. 1, with further reference to BeckOK HGB/G. Kirchhof § 431 Rn. 6. See also *Ebenroth/Boujong*, HGB § 431 Rn. 9.

²⁷ of the Convention on the Contract for the International Carriage of Goods by Road (CMR). ²⁸ Specifically, the Protocol of 5 July 1978,²⁹ which entered into force on 28 December 1980, amended Article 23(3) of the CMR Convention, replacing the French franc with a liability limit expressed in 8.33 Special Drawing Rights (SDR).³⁰

The substitution of the SDR for the franc was motivated by the fact that the SDR represents a more stable currency compared to the French franc previously used in the CMR Convention.³¹ Similarly, the Montreal Convention of 28 May 1999, on the unification of certain rules for international air carriage,³² addressed matters differently than the Warsaw Convention. One of the key innovations of the Montreal Convention was the adoption of the SDR, replacing the French franc previously used in the Warsaw Convention. In addition, the Montreal Convention significantly increased the scope of airline liability.³³ It should also be noted that the Montreal Convention established different grounds for the exclusion of liability depending on the type of damage suffered by the passenger or consumer.³⁴

27 *Schelin J.*, CMR Liability in a Law & Economics Perspective, Stockholm Institute for Scandinavian Law 1957-2010, 185-190.

28 Adopted: 19/05/1956, entered into force for Georgia: 02/11/1999, Convention on the Contract for the International Carriage of Goods by Road (CMR).

29 Protocol to the Convention on the Contract for the International Carriage of Goods by Road, Geneva, Date enacted: 1978-07-05, In force: 1980-12-28, <<https://www.jus.uio.no/english/services/library/treaties/07/7-02/contract-carriage-road.html>> [04.01.2025].

30 For further discussion on this issue, see: Radionov, N., Limitation of liability right in road freight carriage in Croatia: an extinct institute, *Uniform Law Review*, 21 (4), 2016, 457-468.

31 Convention on the Contract for the International Carriage of Goods by Road (CMR).

32 Convention for the Unification of Certain Rules for International Carriage by Air, 28 May, 1999. The convention was ratified by the President of Georgia under Decree No. 834 on 15 October 2010.

33 The international carriage of passengers or goods is characterised by certain specificities compared to land and maritime transport. For example, in air transport, loss of baggage may give rise to claims for both material and non-material damages (see *Walz v Clickair SA* (C-63/09), 2010), whereas claims for non-material damages are not admissible under other types of international carriage. See Daujotas R., *Justification of Liability Limitation in International Carriage of Goods*, 2011, 14.

34 *Geferidze D., Janiashvili G.*, Analysis of Regulatory Norms on Airline Liability under the 1929 Warsaw and 1999 Montreal Conventions, *Journal Diplomacy and Law*, No. 1-2(10), 2023, 19 (in Georgian).

Under Article 22(3) of the Montreal Convention, in the carriage of goods, the carrier's liability for destruction, loss, damage, or delay is limited to 17 SDR per kilogram. The SDR amount set in 1999 (17 SDR) was subsequently updated on 30 December 2009 to 19 SDR, and as of 28 December 2019, it currently stands at 22 SDR.³⁵

When limiting the carrier's liability under a statutory liability regime, it is possible to categorise the applicable international instruments and SDR-based liability limits according to the type of transport. In parallel with the carrier liability limits established by international instruments for international air carriage (as discussed above), carrier liability is also limited for other modes of transport. International maritime carriage of goods, which constitutes the primary form of international transport, is governed by four main international conventions.³⁶ Importantly, limitations on carrier liability are included in all four conventions.

It should be emphasised that, under the above-mentioned conventions (excluding the Hague Rules), the carrier's liability is not limited in cases where *"the loss or damage resulted from the carrier's act or omission committed with intent"*³⁷ to cause damage or recklessly and with knowledge that damage would

35 2019 Revised Limits of Liability Under the Montreal Convention of 1999, <https://www.icao.int/secretariat/legal/Pages/2019_Revised_Limits_of_Liability_Under_the_Montreal_Convention_1999.aspx> [04.10.2025].

36 1. The 1924 Hague Rules – International Convention for the Unification of Certain Rules relating to the Bill of Lading 1924, which entered into force in 1931. 2. The 1968 Hague-Visby Rules – The Hague Rules as Amended by the Brussels Protocol 1968, representing an updated version of the Hague Rules, with amendments adopted in 1979. 3. The 1978 Hamburg Rules – United Nations Convention on the Carriage of Goods by Sea. 4. The 2008 Rotterdam Rules – United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. This convention is based on, and simultaneously serves as a modern alternative to, the Hague Rules, Hague-Visby Rules, and Hamburg Rules. The Rotterdam Rules provide a regulatory framework that reflects multiple technological and commercial developments that have occurred since the adoption of the preceding conventions, including the growth of containerisation, door-to-door carriage under a single contract, and the development of electronic transport documentation. See: https://uncitral.un.org/en/texts/transportgoods/conventions/rotterdam_rules [accessed 08.02.2025]. It is important to note that the Rotterdam Rules have not yet entered into force. They will become effective one year after ratification by the 20th UN member state. See: https://uncitral.un.org/en/texts/transportgoods/conventions/rotterdam_rules/status [accessed 08.10.2025].

37 The qualification of conduct is essential when assessing claims for compensation arising from loss or damage in any type of transportation. The so-called wilful conduct rule is interpreted

probably result” (Hague-Visby Rules, Article IV(5)(e); Hamburg Rules, Article 8; Rotterdam Rules, Article 61). However, if the party seeking compensation for loss or damage to goods cannot prove that the carrier acted intentionally or recklessly, the regime limiting carrier liability will apply.³⁸

Under the Hague Rules, the carrier’s liability should not exceed 100 pounds per package or unit. However, in practice, using the package/unit measure for the purpose of limiting carrier liability proved to be ambiguous and problematic.³⁹ Consequently, under the Hague-Visby Rules, the Hamburg Rules, and the Rotterdam Rules, a weight-based measure in kilograms was introduced alongside the package/unit measure for limiting carrier liability.

primarily according to the legislation applied by the court or arbitral tribunal considering the case. In this regard, the case of *TNT Global SpA v Denfleet International Ltd* [2007] EWCA Civ 405; [2007] 1 C.L.C. 710 is instructive, as it concerned loss caused by a truck driver falling asleep. The trial court held that the driver could have foreseen the possibility of falling asleep and, under such circumstances, continuing to drive amounted to negligence and was treated as wilful conduct. However, the Court of Appeal reached the opposite conclusion, ruling that the mere fact that the driver admitted falling asleep was insufficient to prove that he knew his ability to drive was seriously impaired. According to the appellate court, continuing to drive could constitute negligence, but it could not be classified as wilful misconduct. This case illustrates the difficulty in determining the nature of conduct during the carriage of goods and the possibility of divergent interpretations by different courts. Ultimately, the correct qualification of conduct is critical, as a carrier’s limitation of liability may be set aside if it is proven that the act was intentional. See *Daujotas R.*, Justification of Liability Limitation in International Carriage of Goods, 2011, 12-13.

38 *Daujotas R.*, Justification of Liability Limitation in International Carriage of Goods, 2011, 6.

39 See *Monica Textile Corporation v. S.S. Tana* (1991) 952 F.2d 636 – In this case, Monica Textile Corporation (the shipper) entered into a carriage contract with the respondent carrier for the transportation of a single 20-foot container from Africa to the port of Savannah, Georgia. The bill of lading stated that the container, packed and sealed by Monica, contained 76 bales of cotton fabric. During transit, the cargo was damaged, prompting Monica to file a claim for damages in a New York court. The carrier sought to limit its liability to USD 500 under the Carriage of Goods by Sea Act (COGSA) §1304.5, which provides that neither the carrier nor the ship shall be liable for any loss or damage to cargo exceeding USD 500 per package or unit. The carrier argued that the entire container constituted a single package/unit, as indicated in the “Number of Packages/Units” field of the bill of lading. The court ultimately held that each of the 76 bales in the container constituted a separate package, and the USD 500 limitation applied to each individual package, not the container as a whole. For further details, see the case: <https://casetext.com/case/monica-textile-corp-v-ss-tana> [accessed 08.02.2025]. For discussion on the definition of a package/unit and relevant jurisprudence, see Sharp N.A., What is a COGSA “Package”? *Pace International Law Review*, Vol. 5, Issue 1, 1993.

According to the Hague-Visby Rules, the maximum liability is set at 2 SDR per kilogram or 666.67 SDR per package, while under the Hamburg Rules, it is 2.5 SDR per kilogram or 835 SDR per package. The Rotterdam Rules establish comparatively higher limits, viz., 3 SDR per kilogram or 875 SDR per package.

It is evident that the regulatory conventions governing maritime transport firmly maintain the concept of limiting carrier liability, although there is a noticeable trend of increasing limits, which may be driven by economic changes and fluctuating levels of inflation. While each of the aforementioned conventions establishes different liability limits, the Hague-Visby Rules are the most widely applied in international maritime carriage of goods. This predominance is, on the one hand, due to the fact that standard forms of contracts and bills of lading often refer specifically to the Hague-Visby Rules, and, on the other hand, to the well-established body of legal precedent associated with these rules. The resulting consistency and predictability are of particular importance for commercial trade.⁴⁰

In the case of land transport, the most widely used international liability limit is that provided under the Geneva Convention on the Contract for the International Carriage of Goods by Road (CMR),⁴¹ set at 8.33 SDR per kilogram of total cargo weight.⁴² It is noteworthy that the carrier liability limit established under the Convention concerning International Carriage by Rail (COTIF)⁴³, which is 17 SDR per kilogram of cargo⁴⁴, is further reinforced by the uniform rules supplementing the international rail transport contract.⁴⁵ It is evident that, compared

40 *Daujotas R.*, Justification of Liability Limitation in International Carriage of Goods, 2011, 5, 8.

41 Convention on the Contract for the International Carriage of Goods by Road, CMR).

42 *Poliak M., Salamakhina E., Lakhmetkina N., Zhuravleva N.*, Comparison of freight forwarder liability in selected countries of the European Union and selected countries of the Commonwealth of Independent States (CIS), The 13th International conference on Automotive Safety, Automotive Safety 2022, 90.

43 The Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Protocol of 3 June 1999 (Vilnius Protocol), is commonly referred to as COTIF 1999.

44 *Radionov N.*, *Ograničenje odgovornosti željezničkog prijevoznika za štete na robu* (Limitation of railway carrier's liability the carrier for goods damage). *Izvorni znanstveni članak*, 2011, 869-896, in: *Poliak M., Salamakhina E., Lakhmetkina N., Zhuravleva N.*, Comparison of freight forwarder liability in selected countries of the European Union and selected countries of the Commonwealth of Independent States (CIS), The 13th International conference on Automotive Safety, Automotive Safety 2022, 90.

45 Uniform Rules Concerning the Contract for International Carriage of Goods by Rail, CIM, 1999.

to maritime transport, carrier liability limits in land transport are substantially higher.⁴⁶

The liability limit established under the Geneva Convention on the Contract for the International Carriage of Goods by Road (CMR), set at 8.33 SDR per kilogram of total cargo weight, corresponds to the amount established under § 431 of the German Commercial Code. It is noteworthy that the application of this statutory liability limit is also reflected in Georgian judicial practice.⁴⁷ The German legislature adopted alignment with the CMR in order to achieve maximum legal harmonisation between international and national liability regimes in road transport. This harmonisation significantly reduced the scope of forwarder liability compared to the prior German regulatory framework.⁴⁸

However, the possibility of freely adjusting the liability limit through individual contracts, within a range of 2 to 40 SDR per kilogram (§ 449(2) of the German Commercial Code), provides the parties with broad discretion to ensure that the compensated amount meets their specific needs.⁴⁹ Another commonly applied benchmark is 2 SDR per kilogram of cargo, as established under the Hague-Visby Rules.⁵⁰ Accordingly, a Georgian agent or forwarding company⁵¹ may

46 This difference is explained by the following factors: Nature and value of cargo. In maritime transport, the carriage of relatively low-value goods is more common, such as raw materials or bulk commodities (e.g., grain or coal), whose value per kilogram is comparatively low. In contrast, road transport frequently involves higher-value cargo, such as televisions, computers, or other high-priced products. Volume differences: Maritime transport accommodates the movement of large quantities of cargo, which necessitates a more flexible liability system. Road transport, particularly in international markets, is more often focused on smaller, yet higher-value shipments. See Daujotas R., *Justification of Liability Limitation in International Carriage of Goods*, 2011, 12.

47 Supreme Court of Georgia, Decision of 18 November 2024, Case No. AS-1076-2024 – in this case, pursuant to the Convention on the Contract for the International Carriage of Goods of 19 May 1956, the maximum liability of the forwarder was set at 8.33 Special Drawing Rights (SDR) per kilogram of gross weight.

48 MükHGB/Herber/Harm, 5th ed. 2023, HGB § 431 Rn.2.

49 Ibid.

50 *Poliak M., Salamakhina E., Lakhmetkina N., Zhuravleva N.*, Comparison of freight forwarder liability in selected countries of the European Union and selected countries of the Commonwealth of Independent States (CIS), The 13th International conference on Automotive Safety, Automotive Safety 2022, 90.

51 That is, the forwarder does not assume the rights and obligations of the carrier. For a detailed discussion on the qualifying conditions for distinguishing between a carriage contract and a

choose, when incorporating liability limits into a contract, to adopt either the conventionally established limit⁵² or the limit prescribed by an authoritative organisation, such as the FIATA model rules, which also provide for a limit of 2 SDR per kilogram of total cargo weight.⁵³

It is important to note that, under § 435 of the German Commercial Code, the rules limiting liability under a statutory liability regime do not apply if the damage was caused by the intentional act or gross negligence of the carrier or one of the persons⁵⁴ mentioned in § 428, i.e., when such a person acted knowing that their conduct would probably result in damage. This prohibitive rule on limiting liability for damage caused intentionally or through gross negligence applies, by analogy, to the agent forwarder as well.

A similar approach is reflected in the Civil Code of Georgia regarding the limitation of a forwarder's liability. Specifically, under § 742 of the Civil Code of Georgia, (1) A forwarder may not rely on provisions that exclude or limit their

forwarding contract, see: *Chitashvili N., Burduli I.*, Unified Criteria for Differentiating Freight Forwarding and Transportation Contracts in the Context of Legal Liability, *Studia Iuridica Lublinensia* vol. 34, 2, 2025, 69-85; *Poliak M., Salamakhina E.*, Ensuring Fair Compensation: Analyzing and Adjusting Freight Forwarder Liability Limits, 8 (2), 42, 2024, 1-16; *Tushevska B.*, Liability Of The Freight Forwarders According To National And International Law, *Goce Delcev University*, 2015, 1-15, DOI:10.13140/RG.2.1.4786.6727.

52 It is noteworthy that, in many jurisdictions, the liability limit of the freight forwarder corresponds to the carrier's liability limit established under international conventions regulating specific modes of transport. This approach is both logical and rational, as the most convenient scheme is one in which the forwarder's obligation toward the client aligns with the carrier's liability toward the forwarder. See *Poliak M., Salamakhina E.*, Ensuring Fair Compensation: Analyzing and Adjusting Freight Forwarder Liability Limits, 8(2), 42, 2024. Moreover, in the case of multimodal transportation, the operator is liable for the cargo in accordance with the legal norms applicable to the segment of the transport route where the damage occurred, or, if the location of the damage cannot be determined, according to the norms applicable to the entire transport route. See *ibid.*

53 And not per individual item. Pursuant to Article 8.3.1 of the FIATA Model Rules (on loss or damage of goods), notwithstanding the provisions of Article 7.3, the forwarder shall not be liable for loss or damage to goods in an amount exceeding 2 SDRs per kilogram of the total weight of the lost or damaged cargo, unless a higher compensation is recoverable from the person whose acts or omissions the forwarder is responsible for.

54 This refers to the carrier's assistants, whose fault is attributable to the carrier. Under Article 428 of the German Commercial Code, carriers are liable for the actions or omissions of their employed personnel to the extent that such acts or omissions occur within the scope of their assigned duties. The same principle applies to the acts and omissions of other persons whose services the carrier engages for the purpose of transporting goods.

liability, or shift the burden of proof, if the damage was caused intentionally or through gross negligence. (2) The same rule applies to the non-contractual liability of an auxiliary person if, under the first paragraph,⁵⁵ fault is attributed to them.⁵⁶

The principle that liability cannot be limited for intentional or grossly negligent conduct is also embedded in the rules on invalidity of standard contractual terms. In particular, under § 348(v) of the Civil Code of Georgia, a standard term is null and void if it excludes or limits liability for damage caused by the obligor or their representative through gross negligence in the performance of the obligation (liability for negligence). Naturally, this also implies that any contractual clause seeking to limit liability for intentionally caused damage (a more severe form of fault) is illegitimate. This reasonable safeguard is further supported by § 395(2) of the Civil Code of Georgia, which prohibits parties from agreeing in advance to exempt the obligor from liability for damage caused intentionally.

Thus, in contracts concluded with consumers,⁵⁷ the permissibility of limiting liability is even more strictly constrained, excluding not only intentionally caused damage but also damage caused by gross negligence. In the case of freight forwarding, where the forwarder owes a special duty of care to the principal (§ 731 of the Civil Code of Georgia), the prohibition on limiting liability for both intentional and grossly negligent damage is reasonable and fair.

4. Conclusion

The study of the legal mechanisms for limiting the liability of freight forwarders and the ceiling amounts established in Special Drawing Rights (SDR) demonstrates that the development of this institution is rooted in the economic nature of international trade and transport relations. The evolution of international logistics systems has significantly improved the efficiency of goods movement, while simultaneously increasing the risks of liability and damage arising from loss, damage, or delay of cargo. These circumstances have created the need for a balanced legal approach, on one hand, ensuring the effectiveness of

55 Based on the reference to the first paragraph of Article 742, in this case it also encompasses fault arising from intentional or grossly negligent conduct of an assistant.

56 Cf. with Article 697 of the Civil Code of Georgia.

57 Article 348 of the Civil Code of Georgia is applied as a basis for the invalidity of standard contractual terms concluded with natural persons who are not engaged in entrepreneurial activities.

the compensation mechanism, and, on the other, safeguarding the forwarder's economic stability and continuity of operations.

Liability limitation functions as a legal instrument designed to achieve an optimal balance between these interests. It is based on the principle that the liability cap does not constitute a denial of damage or an avoidance of contractual performance, but rather establishes a predetermined maximum amount of compensation grounded in objective economic criteria. In this context, the role of the International Monetary Fund's Special Drawing Rights (SDR) is particularly significant, as it ensures uniformity in liability ceilings, currency neutrality, and international legal stability.

The practice of using SDR has been widely established across various international legal instruments, including the Montreal, Hague-Visby, Hamburg, Rotterdam, and CMR Conventions, as well as the COTIF rules. This system has facilitated the establishment of transparent and predictable liability standards, significantly reducing legal uncertainty and the likelihood of disputes. Nevertheless, the scope of forwarder liability limitation remains largely non-uniform. Its legal regulation often relies on national legal norms (e.g., the German Commercial Code – HGB, §§ 431 and 459), FIATA model rules, and terms agreed upon in individual contracts.

Comparative legal analysis indicates that the German model is considered one of the most balanced, as it combines harmonisation with international standards while retaining the specificity of domestic law. This approach sets a precedent for ensuring legal predictability and economic security. In the Georgian legal system, the limitation of forwarder liability is governed by the general provisions of the Civil Code and the principle of contractual freedom, which in practice creates the need for more detailed regulation, particularly regarding the standardised use of SDR units.

Accordingly, it can be concluded that limiting a forwarder's liability through SDR not only represents a practical manifestation of a private law dispositive institution but also serves as a mechanism for maintaining international economic balance. Its effective functioning relies on legal certainty, alignment with international norms, and the maintenance of fair proportionality between the parties. In the future, it is essential to develop a unified international framework for limiting forwarder liability that links international trade practices, SDR standards and the harmonisation objectives of national legislations.

Ultimately, this study demonstrates that the legal foundations for limiting forwarder liability and the process of SDR standardisation constitute a direction that integrates the dispositive nature of private law, the dynamics of international economic relations, and the necessity of ensuring legal security. Within this unified context, this institution acquires strategic significance in contemporary civil and commercial law.

Zwischen Zwang und Vernunft – Zur Dialektik des Freiheitsbegriffs bei Rolf Knieper

I. Einleitung

„Die Geschichte der Freiheit ist die Geschichte des Widerspruchs“, bemerkte einst der US-amerikanische Historiker und 28. Präsident der Vereinigten Staaten von Amerika, Woodrow Wilson (1856–1924).¹

Kaum ein Begriff des menschlichen Denkens ist so schillernd, so durchdrungen von philosophischer und politischer Bedeutung wie der der Freiheit. Die Geschichte der Menschheit ist geprägt vom beständigen Streben des Einzelnen wie ganzer Völker nach Unabhängigkeit und Selbstbestimmung – sie bildet den Schauplatz des oft selbstlosen Kampfes um die Freiheit.

Seit der Antike haben sich Philosophen, Theologen und Juristen und seit der Aufklärung zudem Psychologen, Soziologen und Politikwissenschaftler mit diesem Begriff auseinandergesetzt – stets auf der Suche nach seinem Wesen, seinem Ursprung und seiner Bedeutung. Doch trotz der scheinbaren Selbstverständlichkeit, mit der die moderne Gesellschaft „Freiheit“ reklamiert, bleibt ihr Wesen umstritten.

In seinem gesamten Werk – von den frühen Studien wie *Zwang, Vernunft, Freiheit* (1981) bis zu den späteren Arbeiten wie *Gesetz und Geschichte* (1996) und *Von der Vertragsfreiheit zum smart contract* (2019) – widmet sich Rolf

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1 „The history of liberty is the history of resistance...“, Woodrow Wilson, Address to the New York Press Club, September 9, 1912.

Knieper der Analyse des Freiheitsbegriffs in seinen verschiedenen Dimensionen. Freiheit versteht er dialektisch: Sie ist das Ergebnis der bewussten Aneignung und Gestaltung sozialer Zwänge. Sie entsteht innerhalb gesellschaftlicher Strukturen und Institutionen. Knieper wendet sich damit gegen die Vorstellung eines völlig autonomen, losgelösten Subjekts und betont stattdessen die Bedeutung der sozialen und materiellen Bedingungen für die reale Verwirklichung von Freiheit. Seine Theorie der Freiheit ist zugleich eine historisch-anthropologische Analyse und Kritik der modernen Rechtsordnung.

Ziel des folgenden Essays ist es, diese Entwicklung in ihrer inneren Logik nachzuzeichnen: von der historischen Entstehung der Vernunft aus der Gewalt über die rechtliche Formierung der Freiheit durch das Gesetz bis zur normativen Fiktion der Willensfreiheit im modernen Rechtssystem. Dabei wird deutlich, dass sich Kniepers Freiheitsbegriff nicht als linearer Fortschritt, sondern als sich vertiefende Dialektik versteht – als Bewegung, in der das Recht Freiheit immer wieder verspricht, indem es sie zugleich formiert und begrenzt.

II. Was ist Freiheit? Zur Etymologie des Begriffs

Will man sich mit der Bedeutung und Etymologie des Freiheitsbegriffs auseinandersetzen, so findet man in den Fachlexika folgende Aussagen:

- Duden:
Zustand, in dem jemand von bestimmten persönlichen oder gesellschaftlichen, als Zwang oder Last empfundenen Bindungen oder Verpflichtungen frei ist und sich in seinen Entscheidungen nicht eingeschränkt fühlt...
- Oxford English Dictionary:
The state of being able to act without hindrance or restraint; liberty of action.
- Cambridge Dictionary:
The condition or right of being able or allowed to do, say, think, etc. whatever you want to, without being controlled or limited.
- Dictionnaire Larousse:
Possibilité d'agir selon ses propres choix, sans avoir à en référer à une autorité quelconque.
- Historisches Lexikon der Schweiz HLS:
Freiheit . . . bedeutet ganz allgemein die Unabhängigkeit von äusseren und inneren Zwängen...

Diese Definitionen suggerieren eine scheinbar einfache Gleichung: Freiheit ist gleich ein Recht, das einem erlaubt, sich von nichts und niemanden beeinflussen zu lassen, und nach eigenem Willen über alles entscheiden, etwas tun oder unterlassen...

Doch diese moderne Alltagssicht weicht erheblich von dem ab, was die klassischen Philosophen und die Rechtswissenschaft – von der Antike über die Aufklärung bis in die Gegenwart – unter Freiheit verstanden haben.

III. Freiheitsverständnis von der Antike bis zur Gegenwart

Von den antiken Philosophen über die religiösen Lehren des Mittelalters und die philosophischen Lehren der Aufklärung bis hin zu modernen philosophischen Werken wurde Freiheit stets nicht nur als universelles Recht, sondern immer im Zusammenhang mit Selbstbestimmung, Vernunft und Selbstverpflichtung verstanden.

Bereits **Sokrates** sah die Freiheit nicht als ein abstraktes Recht, sondern als Herrschaft der Vernunft über die Begierden:² Der Mensch muss zwischen den Möglichkeiten seines Handelns so wählen, dass er nach Maßgabe seiner Vernunft das Beste wählt. Er sah die Freiheit des Menschen in der „Selbstheilung durch Vernunft“: Freiheit als Befreiung von irrationalen Leidenschaften.³

So wird auch bei **Platon** der Mensch, der im Gebrauch seiner Vernunft an dem Guten an sich selbst teilnimmt, seinerseits „selbstgenügsam und frei“. Freiheit entsteht, wo Vernunft (λόγος) die Begierde lenkt: „Die Freiheit der Seele liegt in der Zustimmung zur Ordnung des Guten“.⁴

Aristoteles verbindet Freiheit mit der *phronesis*, der praktischen Weisheit, die das sittlich Angemessene erkennt.⁵

2 *Pierre Hadot*, Philosophie als Lebensform, Berlin 1991.

3 *Martha C. Nussbaum*, The Therapy of Desire: Theory and Practice in Hellenistic Ethics, Princeton University Press, 1994, 13–24, 37–43.

4 *Hans-Georg Gadamer* – Platos dialektische Ethik. Phänomenologische Interpretationen zum Philebos, Tübingen: Mohr (Siebeck), 1968, 102.

5 *Martha C. Nussbaum* – The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy, Cambridge University Press, 1986, 335; s. auch: *Fred D. Miller, Jr.* – Nature, Justice, and Rights in Aristotle's Politics, Oxford University Press, 1995, 83–112.

Die europäische Freiheitsgeschichte, wie Charles Taylor herausarbeitet, wurzelt weithin in diesen antiken Vorstellungen der Selbstbestimmung durch Vernunft.⁶

Zu Beginn der Neuzeit beschreibt **Descartes** (1596-1650) die Freiheit als eine Variable, die mit der Zunahme der geistigen Klarheit über die Willensziele wächst.

Ähnlich erörtert **Spinoza** (1632-1677), dass frei einzig das ist, was allein aus der Notwendigkeit seines Wesens heraus existiert und allein durch sich selbst zum Handeln bestimmt ist. Der Mensch wird frei nur durch die Loslösung von der Bestimmung durch die Affekte.⁷

Mit **Rousseau und Kant** entsteht das moderne Konzept der Freiheit als Selbstgesetzgebung: Der Mensch ist frei, wenn er den moralischen Gesetzen folgt, die er sich vernünftigerweise selbst gibt. Laut **Kant** (1724-1804) liegt diese Freiheit in der Vernunft und in der Befolgung von Pflichten, die sich der Mensch selbst auferlegt. Für Kant ist Freiheit eng mit der moralischen Selbstbindung verbunden.⁸

Hegel (1770-1831) betont die konkrete Ausgestaltung der Freiheit durch soziale und institutionelle Rahmenbedingungen. Der Mensch findet seine wahre Freiheit nur in der Einordnung in den Staat. Sofern nun die Idee der Freiheit die Sittlichkeit ist, kann Hegel den Staat als die Wirklichkeit der sittlichen Idee bezeichnen.⁹

Und später formuliert **Friedrich Nietzsche** (1844–1900) ein Freiheitsverständnis, das die gängige Vorstellung ungebundener Autonomie radikal infrage stellt. Mit einer Überschrift „In Ketten tanzen“¹⁰ beschreibt Nietzsche eine paradoxe Form von Freiheit: Schöpferische Freiheit entsteht nicht durch die Abwesenheit von Zwängen, sondern durch die bewusste Aneignung von Formen, Regeln und Grenzen. Frei ist der Mensch nicht, wenn er „alles darf“, sondern wenn er seine

6 Charles Taylor, *Sources of the Self: The Making of the Modern Identity*, Cambridge, 1989, 126.

7 Baruch de Spinoza, *Ethik in geometrischer Ordnung dargestellt*, Felix Meiner Verlag Hamburg, 2015, Teil I, Teil III-IV.

8 Immanuel Kant, *Grundlegung zur Metaphysik der Sitten*, Felix Meiner Verlag Hamburg, 2016, Kapitel III.

9 Georg Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts*, Felix Meiner Verlag Hamburg, 2017, §§ 142–260.

10 Friedrich Nietzsche, *Menschliches, Allzumenschliches, Ein Buch für freie Geister*, Abschnitt „Der Wanderer und sein Schatten“, Aphorismus 140.

Zwänge so gestalten kann, dass sie ihm — ähnlich den „Ketten“ des Tänzers — Bewegung erst ermöglichen.¹¹

Liest man die Werke von **Sartre** (1905-1980), so verblasst die Vorstellung über das Phänomen der Freiheit wie man es in den Lexika (s. oben) vermittelt und wie es viele Menschen noch verstehen, gänzlich: nach Sartre ist ein Mensch gar ...“dazu verurteilt, frei zu sein...”¹² — also er ist nicht mal frei, selbst zu entscheiden, ob er frei sein will oder nicht...

IV. Begriff und Dimensionen der Freiheit bei Rolf Knieper

Rolf Knieper beschäftigt sich mit einer konzeptionellen Klärung des Freiheitsbegriffs in der historischen Perspektive. Freiheit sei mehr als die bloße Abwesenheit von Zwang: sie ist eingebettet in soziale und rechtliche Strukturen, die sie ermöglichen und zugleich begrenzen. Freiheit erscheint in der Moderne nicht als Naturgegebenheit oder metaphysische Konstante, sondern als gesellschaftlich und normativ entstandene Form. Der freie Wille ist nicht Ursprung, sondern Resultat von Geschichte, von Disziplin, von Recht.

1. Ursprung der Vernunft in der Gewalt – historische und anthropologische Dimension

In *Zwang, Vernunft, Freiheit* (1981) analysiert Knieper die Entstehung der modernen Vernunft als Zähmung des Triebs und als Ergebnis sozialer und geschlechtlicher Disziplinierung.

Freiheit erscheint dabei von Beginn an als Ergebnis eines Prozesses, in dem Gewalt, Zwang und Rationalisierung ineinandergreifen. Rolf Knieper beschreibt diesen Prozess als die „Trennung von Trieb und Vernunft“¹³, die der europäischen Neuzeit zugrunde liegt. Das, was sich die Aufklärung als Emanzipation des Geistes vorstellt, sei in Wahrheit ein Akt der Unterdrückung: die Vernunft erhebt sich, indem sie das Sinnliche, Körperliche, Affektive ausstößt und diszipliniert: „... Es

11 S. auch: *Klaus Günther*, Dialektik der Aufklärung in der Idee der Freiheit. Zur Kritik des Freiheitsbegriffs bei Adorno, in: *Zeitschrift für philosophische Forschung*, 1985, Bd. 39, H. 2, 229-260.

12 *Jean-Paul Sartre*, *Der Existentialismus ist ein Humanismus und andere philosophische Essays 1943-1948*, Rowohlt 2000.

13 *Rolf Knieper*, *Zwang, Vernunft, Freiheit. Studien zur juristischen Konstruktion der bürgerlichen Gesellschaft*, Frankfurt a. M. 1981, 27 ff.

*bestehen für mich wenige Zweifel daran, dass der aufklärerische und pandektistische Freiheitsbegriff nicht ohne seine Begrenzung und Konditionierung durch Vernunft und Sittlichkeit verstanden werden kann.*¹⁴

Die Vernunft wird damit nicht zum Ausdruck menschlicher Befreiung, sondern zum Instrument der Herrschaft. Sie organisiert die Selbstbeherrschung des Subjekts und ersetzt äußere Zwänge durch innere – das was Knieper als „**Internalisierung der Gewalt**“ bezeichnet: „...Von Beginn an war die Sphäre des Marktes und der Warenproduktion, der Vertragsfreiheit und Privatautonomie gekennzeichnet durch Selbstdisziplinierung und Internalisierung von Gewaltverhältnissen.“¹⁵

Der „Prozess der Zivilisation“¹⁶ sei nicht Resultat maschineller Produktion, sondern Produkt einer intentionalen Triebunterdrückung. Der Körper wird diszipliniert, Sexualität reglementiert und Arbeit zur sittlichen Pflicht erklärt. An die Stelle der mittelalterlichen Leiblichkeit tritt die bürgerliche Rationalität, die das Leben in nützliche, produktive Bahnen zwingt.

Besonders eindringlich zeigt Knieper dies am Beispiel der Hexen- und Hebammenverfolgungen der frühen Neuzeit. Sie sind für ihn kein Rückfall ins finstere Mittelalter, sondern der eigentliche **Geburtsakt der modernen Vernunft**. Hinter den „jahrhundertlang praktizierten, millionenfachen, von bestialischen Folterungen begleiteten Morden“ stehe ein „bevölkerungspolitisches Programm“¹⁷: die Auslöschung weiblichen Wissens über Empfängnisverhütung und Geburtenkontrolle, die Disziplinierung der Körper im Interesse von Reproduktion und Produktivität. In diesem Zusammenhang entfaltet Knieper seine Geschlechteranalyse: Die Zivilisierung des Mannes – seine Triebbeherrschung, Leistungsbereitschaft, Askese – steht im strukturellen Verhältnis zur Unterwerfung der Frau. Die Vernunft ist männlich; sie entsteht aus der Angst vor der „sexuellen und produktiven Überlegenheit der Frau“¹⁸. Die Unterdrückung der weiblichen Körper fungiert als Voraussetzung der männlichen Selbstdisziplin, aus der das bürgerliche Subjekt hervorgeht. Hier lässt sich theoretische Nähe zu Friedrich Nietzsche

14 Rolf Knieper, Die Freiheiten des Willens, der Person und des Eigentums in der Metaphysik des Zivilrechts, Kritische Justiz, Vol. 40, No. 2 (2007), 163.

15 Rolf Knieper, Zwang, Vernunft, Freiheit. Studien zur juristischen Konstruktion der bürgerlichen Gesellschaft, Frankfurt a. M. 1981, 43.

16 Ebenda, 30 f.

17 Ebenda, 34 f.

18 Rolf Knieper, Zwang, Vernunft, Freiheit. Studien zur juristischen Konstruktion der bürgerlichen Gesellschaft, Frankfurt a. M. 1981, 34.

feststellen, insbesondere zu dessen Genealogie der Moral.¹⁹ Nietzsche beschreibt Moral und Vernunft als Ergebnis von Prozessen der Internalisierung und Selbstdisziplinierung, die ursprünglich auf Gewaltverhältnissen beruhen. Die von Knieper vertretene Überlegung, dass die moderne Vernunft nicht durch Erkenntnisfortschritt, sondern durch gewaltsame Zurichtung entstanden ist, lässt sich als Weiterführung dieser genealogischen Perspektive verstehen. Die Vernunft der Neuzeit, so seine These, **verdankt** sich diesen Hexenverfolgungen und der gewaltsamen Disziplinierung zum sittlichen Menschen.

Dieses Denken wird in einer frühen Rezeption von Rolf Kniepers Werk im Spiegel („Heimweh nach den Hexen“ von Hans Halter) als radikale Kritik an der bürgerlichen Vernunft, die nach Knieper nicht Befreiung, sondern Selbstunterdrückung erzeugt, charakterisiert. Zugleich wird ihm hier unterstellt, die brutalen Disziplinierungspraktiken als notwendig anzusehen und Sehnsucht „nach den starken Naturen“²⁰ des Mittelalters zu haben.

Nach meinem Verständnis idealisiert Knieper jedoch diese gewaltsamen Praktiken nicht, er befürwortet sie nicht, sondern deutet sie genealogisch:²¹ er sieht die Hexenverfolgungen der frühen Neuzeit als Teil der Disziplinierung und Sexualreglementierung der frühbürgerlichen Gesellschaft und als den gewaltsamen Ursprung einer modernen Vernunft, die den Körper, die Triebe und schließlich den Willen selbst diszipliniert. In dieser Hinsicht bestehen deutliche Parallelen zur Theorie von Nietzsche (s. hier Fn. 19) sowie zur Machtanalyse von Michel Foucault²², bei dem die Disziplinierung des Menschen als historischer Prozess, der Körper und Verhalten formt und normiert, beschrieben wird.

Die Vernunftstheorie Kniepers wurde auch von Ulrich Preuss in der *Kritischen Justiz* (1984)²³ kritisiert: Preuß kritisiert, dass der systematische Zusammenhang zwischen Patriarchat, Staatsentstehung und kapitalistischer Ökonomie bei Knieper unzureichend ausgearbeitet und analysiert sei.²⁴ Preuß kritisiert ebenfalls,

19 Rolf Knieper, *Gesetz und Geschichte. Ein Beitrag zu Bestand und Veränderung des Bürgerlichen Gesetzbuchs*, Baden-Baden 1996, Fn. 140.

20 Heimweh nach den Hexen, *Der Spiegel* 14/1982, 60/89: <https://www.spiegel.de/politik/heimweh-nach-den-hexen-a-0eb8a078-0002-0001-0000-000014341960> (04.12.2025).

21 Rolf Knieper, *Selbst-Bestimmungen*, *Kritische Justiz*, Vol. 31, No. 3 (1998), 381-388.

22 Rolf Knieper, *Gesetz und Geschichte. Ein Beitrag zu Bestand und Veränderung des Bürgerlichen Gesetzbuchs*, Baden-Baden 1996, Fn. 121.

23 Ulrich K. Preuß, *Zwang, Vernunft, Freiheit. Studien zur juristischen Konstruktion der bürgerlichen Gesellschaft by Rolf Knieper*, *Kritische Justiz*, Vol. 17, No. 3 (1984), 347-349.

24 Ebenda, 348.

dass Knieper „*dem disziplinierten, abstrakten, bürgerlichen Subjekt*“ ein idealisiertes Bild eines „ganzheitlichen“ Subjekts – lust-, trieb- und genussfähig, das nicht durch Vernunftdisziplin oder Selbstkontrolle eingeschränkt ist, gegenüberstellt. Das von Knieper angedeutete Subjekt „jenseits der Triebökonomie“ sei **historisch und sozial unrealistisch**, weil: Menschen *immer* sozial geformt sind – im Sinne von Marx's These vom Menschen als „Ensemble der gesellschaftlichen Verhältnisse“.²⁵

Doch diese Kritik lässt sich in Kniepers Theorie einordnen: Das „Gegenbild“ fungiert weniger als empirische Alternative, sondern als abstrakte Darstellung, die zeigt, wie stark das bürgerliche, reale Subjekt durch Rationalisierung reduziert wurde.

Die Philosophen der Aufklärung – Locke, Voltaire, Beccaria, Kant – schrieben gegen die disziplinierende Gewalt, aber mit dem Argument, dass der Mensch **von Natur aus** vernünftig und sittlich sei. Somit vertraten sie die Idee, dass Freiheit nur durch Selbstkontrolle und Vernunft möglich ist. Mit anderen Worten: Die Aufklärer lösten zwar den äußeren Zwang der Kirche ab, internalisierten aber die Norm der Vernünftigkeit – das „freie Subjekt“ wurde nun durch Vernunft regiert statt durch Strafe. Die Folge ist eine neue Definition von Freiheit: Sie bedeutet nicht mehr ungebundene Selbstentfaltung, sondern **Einsicht in die Notwendigkeit**: „*Freiheit konnte nun als Einsicht in die Notwendigkeit definiert werden, ohne daß die Adressaten der Definition sie als lächerlich, absurd und lebensverachtend zurückgewiesen hätten.*“²⁶ Die äußere Gewalt der Inquisition und die religiösen Gebote der Kirche werden ersetzt durch die innere Stimme der Vernunft und des Gewissens. Das Subjekt überwacht sich selbst; der Zwang wird zur Selbstbindung. Somit ist die bürgerliche Vernunft nichts anderes, als die Form, in der die Gesellschaft ihre Kontrolle in die Individuen hinein verlagert.

Knieper beschreibt die rechtsphilosophische Tradition (Kant, Hegel, Jhering) in Verbindung mit der psychoanalytischen Theorie Freuds: Freiheit erscheint erst dort möglich, wo „*in mühsamer Kulturarbeit*“ Affekte gebändigt, Partikularitäten

25 Ulrich K. Preuß, Zwang, Vernunft, Freiheit. Studien zur juristischen Konstruktion der bürgerlichen Gesellschaft by Rolf Knieper, Kritische Justiz, Vol. 17, No. 3 (1984), 349.

26 Rolf Knieper, Zwang, Vernunft, Freiheit. Studien zur juristischen Konstruktion der bürgerlichen Gesellschaft, Frankfurt a. M. 1981, 35; auch: Rolf Knieper, Gesetz und Geschichte. Ein Beitrag zu Bestand und Veränderung des Bürgerlichen Gesetzbuchs, Baden-Baden 1996, 90.

unterdrückt und das Realitätsprinzip internalisiert wurden.²⁷ Knieper übernimmt diese Theorie, rekonstruiert sie aber kritisch als Voraussetzung einer normierenden Rechtsordnung, die Normalität, Nützlichkeit und Berechenbarkeit privilegiert und die Abweichungen pathologisiert: *„Der gute Hausvater war der Durchschnittstyp, der das im Verkehr Erforderliche (§ 276 BGB) tut. Wenn nicht, wurde er entmündigt. Der Despotismus der Sitte - so hatte J. St. Mill²⁸ geurteilt - stehe in unablässigem Gegensatz zur Neigung; wer ihm nicht gehorche, verliere sein Vermögen und lande im Irrenhaus“*.²⁹ In dieser Sicht ist die „vernünftige Freiheit“ kein Naturzustand, sondern das Produkt von Zwang, Disziplinierung und ökonomischer Zweckrationalität – eine ideologische Grundlage des klassischen Zivilrechts.

Damit ist der Grund gelegt für die spätere Transformation dieses Gedankens in die Sphäre des Rechts: Wenn Vernunft der Mechanismus ist, durch den Freiheit zur Norm wird, dann muss auch das Gesetz als eine Form solcher normativen Vernunft verstanden werden. Von hier aus führt der Weg zu Kniepers zentralem Motiv: **das Gesetz als Produzent der Freiheit**.

2. Die Formierung der Freiheit durch das Gesetz – rechtshistorische Transformation

In *Gesetz und Geschichte* (1996) analysiert Knieper die historische Herausbildung der modernen Rechtsordnung als Teil eines umfassenden kulturellen und gesellschaftlichen Prozesses.

Er zeigt, dass Begriffe wie Vernunft, Autonomie und Rechtssubjekt keine zeitlosen Kategorien sind, sondern im Kontext der Aufklärung und der bürgerlichen Nationalstaatlichkeit entstanden.

Ein zentrales Argument Kniepers ist, dass Zwang nicht nur als Einschränkung, sondern auch als Ermöglichungsbedingung von Freiheit verstanden werden muss. **Rechtszwang** schafft Verlässlichkeit, Vorhersehbarkeit und gleiche Ausgangsbedingungen. Knieper betont ausdrücklich, dass die freiwillige Selbstordnung individueller Willen nicht ausreicht, um stabile Rechtsverhältnisse zu

27 Rolf Knieper, *Gesetz und Geschichte*. Ein Beitrag zu Bestand und Veränderung des Bürgerlichen Gesetzbuchs, Baden-Baden 1996, 73.

28 John Stuart Mill (1806–1873), war ein englischer Philosoph, politischer Ökonom, einer der wichtigsten Vertreter der utilitaristischen Moralphilosophie.

29 Rolf Knieper, *Gesetz und Geschichte*, 96.

tragen, und dass die notwendige Grundlage von Bindung, Eigentumsschutz und sozialer Infrastruktur nur durch positives, zwangsbewährtes Recht gewährleistet werden kann.³⁰ Diese Position knüpft an Kants „Metaphysik der Sitten“ an, in der Kant das Recht definiert als *„Inbegriff der Bedingungen, unter denen die Willkür des einen mit der Willkür des anderen nach einem allgemeinen Gesetz der Freiheit zusammen vereinigt werden kann“*.³¹ Für Kant ist der Rechtsstaat eine notwendige Bedingung dafür, dass die Freiheit aller koexistieren kann. Knieper führt diesen Gedanken fort, indem er betont, dass ohne **effektiven Rechtszwang** die Freiheit des Einzelnen faktisch nicht existieren kann:

„Nur staatliche Gerichte und staatliche Zwangsvollstreckung vermögen den effektiven Ausgleich von Schäden zu garantieren, die sich Private in Verfolgung ihrer eigenen Interessen zufügen...“.³²

Der Schritt von der anthropologisch-geschichtlichen zur juristischen Ebene ist bei Knieper kein Bruch, sondern eine konsequente Weiterführung seiner Freiheitskritik. Wenn in *Zwang, Vernunft, Freiheit* die Vernunft als Herrschaftsform beschrieben wurde, so zeigt *Gesetz und Geschichte* (1996), wie diese Herrschaft im Recht selbst Gestalt gewinnt. Knieper untersucht hier, wie sich in der Rechtsdogmatik der Neuzeit ein Freiheitsbegriff etabliert, der das Ergebnis eben jener „Reinigung“ ist, die er zuvor als kulturelle Zähmung des Triebes beschrieben hatte: eine „vernünftige Freiheit“,³³ in der nur der gesetzmäßig handelnde Wille als frei gilt.

Im Abschnitt III.2.a) des Buches „Gesetz und Geschichte“ *„Die normative Reinigung der Freiheit vom Affekt, des Willens von der Willkür“*³⁴ wird dieser Prozeß ausführlich beschrieben. Die Freiheit des Willens wird dort ausdrücklich als Gegenbegriff zu Affekt, Leidenschaft und Willkür verstanden. Was in der Aufklärung als Vernunftsideal begann, verfestigt sich in der Rechtslehre zur Dogmatik. Knieper rekonstruiert die Entstehung dieses Begriffs historisch: In der Pandektistik, der klassischen deutschen Zivilrechtswissenschaft des 19. Jahrhunderts, wird der Wille als frei vorausgesetzt, aber zugleich durch das Gesetz normiert. Freiheit erscheint als eine Eigenschaft des „vernünftigen Subjekts“ – nicht weil dieses empirisch frei wäre, sondern weil das Gesetz es so will: *„Der empirische Mensch mit*

30 Rolf Knieper, *Gesetz und Geschichte*, 70.

31 *Ebenda*.

32 *Ebenda*, 135.

33 *Ebenda*, 72.

34 *Ebenda*, 69 ff.

*seiner Neigung, seinen Antrieben und allen subjektiven Ursachen, das konkrete Ich, das dieses oder jenes will, Bedürfnisse, Laune, Einfall hat, braucht den Imperativ des Verbots oder Gebots, die äußere, juristische Gesetzmäßigkeit, die Nötigung und ist **nicht frei**.*³⁵

Die aufklärerische Formel der Freiheit als „Einsicht in die Notwendigkeit“ erhält damit eine juristische Fassung. Das Gesetz definiert, was als vernünftiger Wille gelten darf, und „reinigt“ ihn von allem Zufälligen, Emotionalen, Affektiven.³⁶ *„Wenn die internalisierte Vernunft versagt, muß sie - wodurch sonst als durch positives Recht? - ersetzt werden, damit die fortbestehende innere Notwendigkeit (Savigny) zu Verbindlichkeit, Bindung und Rechtsverhältnissen organisiert bleibt...“*³⁷

Die Idee des „freien Willens“ ist für ihn daher eine juristische Fiktion, die das Recht benötigt, um Verantwortung, Vertrag und Eigentum zu begründen.

Aus dieser Perspektive beschäftigt sich Knieper mit der Konstruktion der juristischen Person. Er rekonstruiert die klassischen Positionen Savignys, Gierkes und Kelsens³⁸ zur juristischen Person, um zu zeigen, dass die Figur des Rechtssubjekts – ob natürliche oder juristische Person – keine gegebene ontologische Einheit, sondern eine rechtlich erzeugte Funktionsfigur ist, die auf den Bedingungen der kapitalistischen Warenproduktion aufbaut. Ausgehend von der historischen Ablösung der ständischen Ordnung beschreibt Knieper zunächst Savignys Position, nach der der „Begriff des Menschen“³⁹ mit dem „Rechtsträger“ zusammenfällt, sodass die juristische Person immer auf Aspekte der natürlichen Person zurückgeführt werden müsse („Vermögensfähigkeit“). Gierke (auch später v. Tuhr) wendet sich dagegen und behauptet, eine juristische Person sei „kein bloßer künstlicher Begriff“, sondern verfüge über eine „reale Verbands Persönlichkeit“: sie sei nicht Fiktion, sondern ein echter sozialer Organismus, der über die Einzelpersonen hinausreiche.⁴⁰

35 Rolf Knieper, *Gesetz und Geschichte*, 70.

36 *Ebenda*, 106.

37 *Ebenda*, 130 f.

38 Rolf Knieper, *Zwang, Vernunft, Freiheit. Studien zur juristischen Konstruktion der bürgerlichen Gesellschaft*, Frankfurt a. M. 1981, 23 f.; auch Rolf Knieper, *Gesetz und Geschichte. Ein Beitrag zu Bestand und Veränderung des Bürgerlichen Gesetzbuchs*, Baden-Baden 1996, 61 ff.

39 Rolf Knieper, *Zwang, Vernunft, Freiheit. Studien zur juristischen Konstruktion der bürgerlichen Gesellschaft*, Frankfurt a. M. 1981, 23.

40 Rolf Knieper, *Gesetz und Geschichte*, 64.

Bei Kelsen dagegen ist die juristische Person keine empirische Einheit, sondern eine „von der Rechtswissenschaft geschaffene Konstruktion“ und „Einheit von verpflichtenden Rechtsnormen“, also quasi eine bloße rechtstechnische Fiktion.⁴¹

Für Knieper bleibt jedoch auch Kelsen unvollständig, da er die gesellschaftliche Grundlage dieser Konstruktionen nicht erfasst: *„Das ist ihm nicht gelungen, weil er in der Analyse steckengeblieben ist“*.⁴² Kelsen erkenne zwar die Abstraktheit der Konstruktion an, ziehe jedoch nicht die Konsequenz, dass im bürgerlichen Recht überhaupt nicht „der Mensch“, sondern ausschließlich abstrakte Vermögensverhältnisse und ihre rechtliche Organisation die Rolle spielen: *„... Hier genügt es zu sagen, daß sowohl Kant als auch Kelsen die Konsequenzen ihrer eigenen Analysen für das einfache Recht nicht vollständig vollzogen haben. Das gilt bis heute unverändert für Ansichten, die juristische Privatautonomie für einen Bereich der Lebensgestaltung halten und auf diese Weise natürlichen Menschen reservieren: Die banale Realität und Praxis der marktmächtigen Kapitalgesellschaft kommt der akademischen Theorie nicht in den Blick“*.⁴³ Somit begründet Knieper eine eigene Position: Rechtssubjektivität – ob menschlich oder korporativ – ist nicht anthropologisch begründet, sie ist nicht Ausdruck individueller Autonomie, sondern Ausdruck der Abstraktionsprozesse kapitalistischer Waren- und Vermögensordnung. Die Person wird zur Person, weil und insofern sie in einer auf Warenproduktion gegründeten Gesellschaft Rechtsakte vollziehen muss – kaufen, verkaufen, Verträge schließen.

Somit wird die juristische Person zur zentralen Figur des modernen Zivilrechts, zum funktionalen Subjekt einer mechanisierten Ökonomie: *„Eine rechtswissenschaftliche Analyse kommt nicht umhin, die Entscheidung des BGB-Gesetzgebers für richtig zu halten, gegen den Rat von Gierke die Person zum **Referenzsubjekt** gemacht zu haben. Das ist vorzüglich die juristische Person.“*⁴⁴

Der Mensch kann ebenfalls Rechtsperson sein – aber nur um den Preis der Selbstdisziplinierung: *„Die juristische Person wird durch natürliche Lebenszyklen und Gefühle nicht gestört. Mangels Sinnlichkeit leidet sie an der Mechanisierung nicht. Voll-Person ist aber auch der Mensch, der seine Affekte zu beherrschen und*

41 Rolf Knieper, Gesetz und Geschichte, 63.

42 Ebenda.

43 Ebenda.

44 Ebenda, 80.

*die Vernunft des Eigentums zu leben in der Lage ist.*⁴⁵ Nicht die juristische Person wird also dem Menschen ähnlich gemacht, sondern der Mensch wird den Strukturen angepasst, die ursprünglich für die juristische Person ideal sind: *„Die juristische Person ist die „intelligible“; sie ist der Prototyp des entsinnlichten Rechtssubjekts des Zivilrechts. Nicht sie muß über Fiktionen dem Menschen gleichgestellt oder gar mit menschelemdem Leben erfüllt und zu einer höheren, organischen Lebenseinheit stilisiert werden, sondern der empirische Mensch hat danach zu trachten, seine Sinnlichkeit und Affekte zu bändigen und zu verdrängen, um zur personne morale zu werden - juristische Person also...“*⁴⁶

Der Mensch ist nur Rechtsperson, **weil** das Recht ihn abstrahiert – nicht weil er metaphysisch Freiheit besitzt (im Gegensatz zu Kant). Der vernünftige Wille steht der mechanisierten Welt nicht gegenüber, sondern ist ihr strukturell angepasst. In dieser *„Korrespondenz von vernünftiger Person und mechanisierten Welt“*⁴⁷ vollendet sich der Prozess, der in *Zwang, Vernunft, Freiheit* als Zivilisierung des Körpers begann: Die Vernunft wird zur inneren Maschine, die das Handeln des Subjekts planbar und vorhersehbar macht.

Somit zeichnet Knieper die Kodifikation als Resultat einer genealogischen Entwicklung der Vernunft vom Naturrecht zum kodifizierten Willenssubjekt.

In seiner umfangreichen Rezension in der *Kritischen Justiz* kritisierte **Rainer Schröder** unter anderem eben diese „einseitige“ Beschreibung der Kodifikationsgeschichte – insbesondere die Entstehung des BGB – und meinte, dass sie zu stark aus Ideen und zu wenig aus politischen Kompromissen ableite und vernachlässige dabei empirische und politische Ergebnisse der rechtsgeschichtlichen Forschungen jener Zeit. Insbesondere beanstandet er die mangelnde Berücksichtigung politischer und sozialer Kompromissprozesse bei der Entstehung des BGB.⁴⁸

Dieser Vorwurf beruht jedoch auf einem methodischen Maßstab, den Knieper selbst nicht teilt.

In *Selbst-Bestimmungen* nimmt Knieper die Kritik produktiv auf: Er stellt klar, dass sein Ansatz **kein klassisch rechtshistorischer** ist, sondern ein **gesellschaftsanalytischer**: *„Recht, Gesetze und die an ihnen entwickelten dogmatischen*

45 Rolf Knieper, *Gesetz und Geschichte*, 81.

46 Rolf Knieper, *Gesetz und Geschichte*, 77.

47 Ebenda, 78.

48 Rainer Schröder, *Gesetz und Geschichte*. Ein Beitrag zu Bestand und Veränderung des Bürgerlichen Gesetzbuchs by Rolf Knieper, *Kritische Justiz*, 1997, Vol. 30, No. 1, 108, 113.

*Konstruktionen [sind] Material für Gesellschaftsanalyse, und nur eine zureichende Gesellschaftsanalyse ermöglicht eine zutreffende Analyse des Materials Recht“.*⁴⁹ Ziel sei nicht die Rekonstruktion gesetzgeberischer Detailprozesse, sondern die Analyse jener Rationalitätsformen und Subjektkonstruktionen, die dem modernen Recht zugrunde liegen und seine Freiheitsversprechen formieren. Schröders Kritik ist daher weniger als Widerlegung, sondern eher als Ausdruck eines grundlegenden Methodenstreits zu verstehen.

Neben dieser methodischen Grundkritik erhebt Schröder weitere Einwände gegen Kniepers Ansatz. So beanstandet er einzelne Zuspitzungen, etwa in der Interpretation Gierkes oder Max Webers,⁵⁰ sowie die starke Gewichtung der Hexenverfolgungen als Bestandteil der Genealogie moderner Vernunft, die er historisch für nicht hinreichend abgesichert hält.⁵¹

In *Selbst-Bestimmungen* reagiert Knieper auf diese Einwände weniger durch Einzelerläuterungen, als durch eine Präzisierung seines theoretischen Anspruchs. Er distanziert sich von teleologischen Fortschrittserzählungen, versteht seine historischen Bezüge nicht als kausale Erklärungen, sondern als genealogische Feststellungen und betont den **diagnostischen** Charakter seiner Analyse.

3. Die normative Fiktion der Willensfreiheit

Im Vortrag *„Die Freiheit des Willens, der Person und des Eigentums in der Metaphysik des Zivilrechts“*, den Rolf Knieper 2007 an der Waseda Universität in Tokio gehalten hat, präziserte er die Verknüpfung von Vernunft und Mechanik als den Ausgangspunkt für die Feststellung, dass die Freiheit des Willens kein metaphysisches Naturphänomen und keine empirische Gegebenheit, sondern eine normative Fiktion ist:

*„Die Freiheit des Willens sind ebenso wie seine Verbindlichkeit normative Annahmen. Sie gelten gemäß dem Gesetz...“.*⁵² Sie entsteht allein durch das Gesetz, das sie voraussetzt und zugleich hervorbringt.

Knieper zeigt, dass der Rechtsverkehr – insbesondere das Zivilrecht – nur funktioniert, wenn er den Willen als frei unterstellt. Wer Verträge schließt, muss

49 Rolf Knieper, *Selbst-Bestimmungen*, Kritische Justiz, Vol. 31, No. 3 (1998), 382.

50 Rainer Schröder, *Gesetz und Geschichte. Ein Beitrag zu Bestand und Veränderung des Bürgerlichen Gesetzbuchs* by Rolf Knieper, Kritische Justiz, 1997, Vol. 30, No. 1, 108-109.

51 Ebenda, 111.

52 Rolf Knieper, *Die Freiheiten des Willens, der Person und des Eigentums in der Metaphysik des Zivilrechts*, Kritische Justiz, Vol. 40, No. 2 (2007), 160.

sich zurechnen lassen, was er erklärt; wer handelt, muss dafür verantwortlich sein.

Er veranschaulicht dies anhand des Beispiels eines Kunsthändlers, der ein Gemälde verkauft: Ein „*man of ripe years and of sound mind, acting freely and with his eyes open*“⁵³ entscheidet sich, ein Bild zu veräußern. Alles scheint Ausdruck seiner individuellen Autonomie – bis zu dem Moment, in dem er sein Angebot zurückziehen möchte. Ab dann zeigt sich, dass seine Freiheit rechtlich begrenzt ist: Das Gesetz bindet ihn an seine Erklärung, auch wenn sein Wille sich geändert hat. Die Rechtsordnung schützt nicht den wechselnden Willen, sondern die Verlässlichkeit seiner Form. Der Kunsthändler ist nicht frei im empirisch-psychologischen Sinne, muss aber rechtlich so behandelt werden, als wäre er es. Denn nur so kann das Zivilrecht funktionieren. Es bedarf der **Fiktion eines freien Willens**, um Verträge, Eigentum, Verpflichtung und Haftung zu ermöglichen. Der Kunsthändler ist frei, seinen Willen zu äußern – doch sobald er dies tut, wird dieser Wille rechtlich der Ordnung zugerechnet und der Disposition des Einzelnen entzogen.

Diese Diskrepanz zwischen normativer Zuschreibung und faktischer Freiheit bildet Kniepers Kritikpunkt: Er beschreibt die Rechtsfreiheit als notwendige, aber problematische Fiktion – nicht weil sie entbehrlich wäre, sondern weil sie eine Freiheit voraussetzt, die nicht empirisch gegeben, sondern nur rechtlich gesetzt ist.

Auch in diesem Vortrag zieht er den historischen Zusammenhang: Die kollektive Disziplinierung Europas begann nicht erst im Bürgertum, sondern früher – durch die Inquisition und ihre Jahrhunderte der Angst und Strafe: „*Aus dem Gesagten ergibt sich hoffentlich mit einiger Klarheit, dass die Konzeption der Freiheit des Willens und der Rechtspersönlichkeit nicht gelöst von den historischen Entstehungsbedingungen verstanden werden kann.*“⁵⁴

Diese äußere Gewalt wurde zu einer **inneren Kontrollinstanz**, in dem sie „*in das Gedächtnis der Menschen eingegraben*“ wurde.⁵⁵ Auch hier macht er sichtbar, dass selbst die moderne Freiheit auf einer langen Geschichte von Zurichtung, Triebbeherrschung und Disziplinierung beruht.

53 Rolf Knieper, Die Freiheiten des Willens, der Person und des Eigentums in der Metaphysik des Zivilrechts, Kritische Justiz, Vol. 40, No. 2 (2007), 156.

54 Rolf Knieper, Die Freiheiten des Willens, 162.

55 Ebenda, 163.

Knieper sieht die Begrenzung des Willens als unvermeidlich und strukturell notwendig für jedes Rechtssystem. Gleichzeitig kritisiert er die Selbsttäuschung, mit der moderne Gesellschaften sich selbst als „befreit“ darstellen, obwohl sie in Wahrheit **noch stärker normieren** als die alten bürgerlich-patriarchalen Systeme: *„Mir scheint auch – und ich betone die Subjektivität der Anschauung –, dass bei aller Betonung des Hedonistischen die externe soziale Kontrolle und **die Normierung menschlichen Verhaltens unaufhaltsam zunimmt**, und dies, je weniger die patriarchalische ›Menschenproduktion‹ gewährleistet ist“*.⁵⁶ Unter dem „Hedonistischen“ sind hier die modernen Aufforderungen einiger Wissenschaftler, *„die Vielfalt der Affekte, der ästhetischen, ökonomischen, emotionalitätsbezogenen etc. Interessen“* im Zivilrecht zu berücksichtigen, gemeint.⁵⁷ Die Ereignisse letzter Jahrzehnte (Drogenbekämpfung, Terroranschlag in New York etc.)⁵⁸ und darauffolgende Reaktionen zeigen, dass unter dem Vorwand von Schutz und Sicherheit immer neue Formen **sozialer Kontrolle** eingeführt werden. Das führt zu einer paradoxen Situation: Je mehr die Freiheit begrenzt wird, desto *„mehr in praktisch inhaltsloser Weise der hohe Wert der individuellen Freiheit gepredigt wird“*.⁵⁹

Auch die Eigentumsfreiheit – ebenso wie die Freiheit der Person – ist keine naturrechtliche oder vorstaatliche Befugnis, sondern ein normativ konstruiertes Konzept, das auf der Annahme vernünftigen, rationalen Handelns aufbaut. Der gesetzliche Eigentumsbegriff, der im Anschluss an Kant und Hegel die feudale Eigentumsaufspaltung überwindet,⁶⁰ ist nach Knieper nicht Ausdruck unbegrenzter Verfügungsmacht, sondern Teil eines größeren zivilrechtlichen Vernunftmodells: *„Der in die bürgerliche Freiheit entlassene Mensch ist ... im Eigentum als Vernunft“*.⁶¹ Die Freiheit des Eigentums ist normativ auf Vernunft, Nützlichkeit und produktiven Gebrauch orientiert. Sie ist nicht die Freiheit, zu zerstören, zu verschwenden oder zu missbrauchen: *„Freiheit des Eigentums . . . ist alles andere als Beliebigkeit und Spaß, sondern eingebettet und orientiert in normativ*

56 Rolf Knieper, Die Freiheiten des Willens, 163.

57 Ebenda, 163.

58 Ebenda.

59 Ebenda.

60 Ebenda, 162-163.

61 Ebenda, 166.

definierte Vernunft, die sich entweder selbst, im Rechtssubjekt bildet und äußert, oder als »Idee der Gesellschaft« durchgesetzt werden muss...“⁶²

Die Rechtsfreiheit ist damit weniger Ausdruck individueller Autonomie als Bedingung der Funktionsfähigkeit des Rechts – eine Spannung, die sich im weiteren Verlauf der Entwicklung nicht auflöst, sondern in veränderter Form fortsetzt.

4. Von der normativen Fiktion zur algorithmischen Vernunft – Die Transformation der Privatautonomie

Die in der Rechtsfreiheit angelegte Spannung – wie oben dargelegt – setzt sich in der spätmodernen Transformation der Privatautonomie fort und gewinnt dort eine neue, technisch vermittelte Gestalt. In Kniepers Spätwerk erscheint diese Entwicklung in einer neuen Dimension: Der Übergang von der **mechanischen** zur **algorithmischen Vernunft**.

Während in *Gesetz und Geschichte* noch die „Korrespondenz von vernünftiger Person und mechanisierter Welt“⁶³ die Struktur moderner Rationalität wieder-spiegelte, zeigt sich im Aufsatz „*Von der Vertragsfreiheit zum smart contract*“⁶⁴, den er zunächst am 1. November 2018 als Vortrag an der Konferenz zum Thema „Privatautonomie als grundlegendes Prinzip des Zivilrechts“ an der Staatlichen Universität Tbilisi gehalten hat,⁶⁵ die nächste Stufe: die Verlagerung der Freiheit in den Code, die Formung des Willens durch technische Vorlagen.

Hier führt Knieper wieder aus, dass die Voraussetzungen der klassischen Privatautonomie brüchig geworden sind. Mit dem Zerfall der patriarchalischen Familie und der Verlagerung existenzieller Sicherung in Lohnarbeit wird fraglich, ob der Wille weiterhin als Träger der Rationalität gelten kann, die das Privatrecht voraussetzt. Entsprechend gilt im Privatrecht nicht der Wille als solcher als bindend, sondern – wie Radbruch die pandektistische Lehre zusammenfasst – „*Nicht der Wille bindet, sondern auch soweit die Verbindlichkeit des Vertrages an*

62 Rolf Knieper, Die Freiheiten des Willens, 166.

63 Rolf Knieper, Gesetz und Geschichte, 78.

64 Rolf Knieper, Von der Vertragsfreiheit zum smart contract, Kritische Justiz, 2019, Vol. 52, No. 2, 193-202.

65 Privatautonomie als grundlegendes Prinzip des Zivilrechts. Gemeinsame Konferenz Der Staatlichen Ivane Javakhishvili Universität Tbilisi (TSU) und des Max Planck Instituts für ausländisches und internationales Privatrecht: https://tsu.ge/assets/media/files/8/Publications/Konf-Max-Planck_2018.pdf, 43

*den Willen gebunden ist, ist sie an ihn gebunden durch das Gesetz“.*⁶⁶ Vor diesem Hintergrund stellt Knieper fest, dass *„die „schöne Poesie“ der Privatautonomie und subjektiven Rechte sei fallenzulassen zugunsten der wissenschaftlichen Einsicht in die Pflichtenorientiertheit des Privatrechts“.*⁶⁷

Die soziale Infrastruktur, auf der die Selbstdisziplin des vernünftigen Willens beruhte, zerfällt; an ihre Stelle treten neue Formen der Steuerung, die nicht auf innere Gesetzgebung, sondern auf permanente Beobachtung, Datenerhebung und Lenkung setzen.

Die klassische Formel der *Selbstgesetzgebung* – das noch für Kant und Hegel als Bedingung moralischer Freiheit galt – weicht einer **Fremdgesetzgebung durch Code**.

Der Unterschied ist entscheidend – denn während die mechanische Vernunft noch auf Selbstdisziplinierung beruhte, stellt die algorithmische Vernunft eine automatische Steuerung dar.

Knieper bezieht sich auf seine früheren Aufführungen aus „Gesetz und Geschichte“ und meint, *„Bemühungen zu entdecken, „um Steuerung und Berechenbarkeit weiter zu verfeinern, ja den Menschen tendenziell vollständig aus dem Prozess der Güterbewegungen und Risikozurechnungen auszuschließen, in denen er ohnehin zunehmend als Störfaktor wahrgenommen wird.“*⁶⁸

Die traditionellen Voraussetzungen des Privatrechts – insbesondere der *homo oeconomicus* als vernünftiges, rational-entscheidendes Rechtssubjekt – werden aufgegeben.

Die neueren Erkenntnisse der **Behavioural Economics**, prominent vertreten durch Richard Thaler,⁶⁹ identifizieren das reale Marktsubjekt als „human“, also als systematisch irrational, emotional gesteuert und lenkbar. Der sogenannte **libertäre Paternalismus** („*nudging*“) ersetzt in diesem Modell die frühere moralische und psychologische Erziehung der Aufklärungsgesellschaft. Während im 18./19. Jahrhundert die Freiheit legitimiert war, weil der vernünftige Mensch seine Triebe selbst zu kontrollieren vermochte, wird diese Funktion heute durch digitale Infrastrukturen übernommen, die dafür sorgen – wie es Knieper

66 *Ebenda*, Von der Vertragsfreiheit zum smart contract, Kritische Justiz, 2019, Vol. 52, No. 2, 197.

67 *Ebenda*, 199.

68 *Rolf Knieper*, 112.

69 *Rolf Knieper*, 199. *Richard Thaler* ist ein US-amerikanischer Wirtschaftswissenschaftler (geb. 1945), bekam Alfred-Nobel-Gedächtnispreis für Wirtschaftswissenschaften (2017).

ausführlich beschreibt - durch „...sanften „nudges“, zu klugen Entscheidungen zu bringen, selbstverständlich zum eigenen und gesellschaftlichen Besten. Dazu gehören lohnende Investitionsentscheidungen, die Aufnahme von Krediten zu günstigen Bedingungen, gesunde Ernährung, die Schonung der Umwelt, ein Konsum, der das individuelle Budget nicht übersteigt und die Familie nicht ins Elend stürzt, gemäßigter Alkoholenuss, eine Zunahme der Organspenden und vieles mehr, gegen das niemand etwas haben kann.“⁷⁰

In diesem Zusammenhang verweist Knieper auf die „sozial genannten Netzwerke“, in denen sich „offensichtlich begeistert und freiwillig Milliarden von Menschen“ bewegen, während „einige wenige privat organisierte Unternehmen“⁷¹ die technischen Instrumente der externalisierten Kontrolle entwickeln und einsetzen. In diesen Netzwerken legen die Individuen ihre „Erlebnisse, Gefühle, Sehnsüchte und Bedürfnisse“ offen und hinterlassen – ebenso wie im elektronischen Zahlungsverkehr – unzählige Datenspuren, die zur Grundlage **neuer Formen externer Entscheidungslenkung** werden: algorithmische Profilbildung und *big data* bilden ein System permanenter Außenkontrolle: „*Big data autonomisiert sich zu big daddy, der orientiert, steuert, kontrolliert und mit der Gesichtserkennung dafür sorgt, dass niemand entrinnt*“.⁷² Die Selbstdarstellung der Individuen generiert Daten, aus denen Unternehmen präzise Profile herstellen, die wiederum durch personalisierte Empfehlungen und Werbung Verhalten beeinflussen. Im Ergebnis erzeugen diese digitalen Mechanismen eine **Angleichung** des Konsum-, Urlaubs-, Freizeit-Verhaltens und formieren ein Massengeschmack: Alle kaufen und verkaufen dasselbe, geleitet von sozialen Netzwerken, *Influencern und Coaches* in dauernder Außenkontrolle, aber sie tun es formal in Privatautonomie. Und **niemand** kann diesem - wie es Knieper selbst beschreibt – **entinnen** (s. Fn 69). Im Ergebnis entsteht paradoxerweise eine totale „*Gleichförmigkeit*“⁷³ - und dies in einer Zeit, die als Zeitalter eines immer stärkeren Individualismus vorgestellt wird.

Allerdings, wird die erste Speicherung und Codierung der Daten noch von menschlichen Marktteilnehmern initiiert. Die Tendenz zeigt aber, dass auch hier auf Menschen verzichtet werden könnte: „*Aber auch das mag eines Tages überflüssig werden. Die durch den Einsatz von Algorithmen möglich gewordene*

70 Rolf Knieper, Von der Vertragsfreiheit zum smart contract, 199.

71 Ebenda, 200.

72 Ebenda.

73 Rolf Knieper, Von der Vertragsfreiheit zum smart contract, 200.

Aufzeichnung und Definition jedes Menschen in einem Profil, das auch handlungs-orientierende Wirkung entfaltet, erlaubt es, den sanften ‚nudge‘ des neuen libertären Paternalismus korrekt anzusetzen.“⁷⁴

Knieper beschreibt, dass die Anhänger der *smart contracts* ein großes positives Potential des Modells prognostizieren: Die weitere Entwicklung der *smart contracts* und deren Nutzung durch signifikante Gruppe von Marktteilnehmern sowie die Verbindung der Datenquellen mit blockchain-Systemen und im Ergebnis die automatische Durchsetzung der Verträge kann eine radikale **Senkung von Transaktionskosten** sichern, was das eigentliche Ziel der *behavioural economics* laut den Ökonomen Ronald Coase, John Wallis und Douglass ist. Dies erfordert aber möglicherweise noch weitere Verschmelzung des realen „human“ mit dem bisher fiktiven *homo oeconomicus*.⁷⁵

Auf jeden Fall wird die traditionelle Vertragsfreiheit – im Sinne des bürgerlichen Rechts seit dem 19. Jh., mit dem Einsatz der neuen Technologien normativ ausgehöhlt: „... dass ...*sich ausbreitende Nutzung von smart contracts die Konzeption der Privatautonomie, wie sie den großen Kodifikationen des 19. Jahrhunderts ebenso wie dem common law of obligations and of property zugrunde liegt, weitgehend umkrempelt*“.⁷⁶

Damit kehrt sich die Bedeutung von Freiheit um: Nicht mehr der Mensch gestaltet die Vertragsverhältnisse, sondern die digitalen Strukturen gestalten den Menschen als Vertragspartner. Somit werden nicht nur Normen zur **individuellen** Vertragsgestaltung, deren Erfüllung, Folgen der Vertragsstörungen usw., sondern auch diejenigen, die sich mit der Entstehung dieser Normen beschäftigt haben – also auch u.a. die Väter des BGB – überflüssig.⁷⁷

V. Schlußwort: Rolf Kniepers Beitrag zur modernen Freiheitskritik

Rolf Kniepers Werk stellt über vier Jahrzehnte hinweg eine konsequente Dialektik der Freiheitsbegriffs vor – eine Analyse, die Freiheit nicht als natürliche Selbstbestimmung, sondern als historisch produzierte Form des Zwanges versteht. Freiheit ist für Knieper kein Zustand, sondern eine Praxis – eine Form, die nur in der Spannung von Autonomie und Unterwerfung existiert und sich

⁷⁴ Rolf Knieper, Von der Vertragsfreiheit zum smart contract, 202.

⁷⁵ Ebenda.

⁷⁶ Ebenda.

⁷⁷ Ebenda.

historisch verändert. Kniepers Freiheitskritik lässt sich damit als Analyse unterschiedlicher historischer Dimensionen von Freiheit verstehen – von der Disziplinierung des Körpers und der moralischen Tugend über die juristische Konstruktion des Rechts bis hin zur technischen Steuerungsform im digitalen Zeitalter. Seine zentrale These lautet:

Freiheit ist die Form des Zwanges, den eine Gesellschaft braucht, um funktionsfähig zu sein.

Kniepers Freiheitskritik ist nicht destruktiv, sondern **diagnostisch**. Er will nicht die Freiheit als eine Illusion darstellen, sondern sie von ihren Mythen befreien. Die Einsicht, dass Freiheit normativ erzeugt wird, ist keine Kritik an das Recht, sondern eine Voraussetzung seiner Reflexion. Wenn das Gesetz die Freiheit formt, dann kann sich auch die Rechtswissenschaft ihrer Verantwortung nicht entziehen: Sie hat zu bedenken, welche Freiheitsformen sie produziert, welche Subjektformen sie schafft, welche Zwänge sie als Vernunft verkleidet.

Seine Diagnose, dass Freiheit die Form des Zwanges ist, wird im digitalen Zeitalter zur **empirischen Erfahrung**. Wo früher das Gesetz die Rationalität des Handelns garantierte, übernehmen heute technische Systeme diese Rolle. Die Freiheit, die dabei noch verbleibt, ist wiederum eine normierte: die Freiheit, so zu handeln, wie es das Systems erlaubt.

Doch, trotz aller Skepsis, behält Knieper meines Erachtens einen Hauch von Optimismus: Wer begreift, dass Freiheit eine historisch und rechtlich erzeugte Form ist, kann sie auch verändern. Die Aufgabe besteht nicht darin, eine vermeintlich ursprüngliche Freiheit zurückzugewinnen, sondern die Bedingungen der gegenwärtigen zu reflektieren – und sie, wo möglich, zu **humanisieren**.

Damit bleibt Rolf Kniepers Werk bis heute ein Maßstab für die Rechtsphilosophie: Es zeigt, dass das Freiheitsproblem nicht gelöst, sondern **verlagert** wurde – vom Körper in die Norm, von der Norm in den Code. Die Frage ist nicht mehr, ob der Mensch frei ist oder nicht, sondern **wer (und wie) den Code schreibt**, der seine Freiheit erzeugt.

Die Entwicklung des georgischen Insolvenzrechts: von der Nichtvermögenheit zur Zahlungsunfähigkeit

1. Einleitung

In den 1920er Jahren des 20. Jahrhunderts wurde die Gestaltung der Sowjetunion abgeschlossen. Sie entstand durch den Zusammenschluss der von Russland eroberten Staaten. Mit der Gründung eines neuen Staates wurde auch der Grundstein für ein neues Rechtssystem gelegt.

Das Rechtssystem des in die Sowjetunion zwangsweise eingegliederten georgischen Staates entwickelte sich folglich in Anlehnung an das Recht des herrschenden Staates — der Russischen Föderation — und dieser Zustand setzte sich, mit nur geringfügigen Modifikationen, bis zum Zerfall der Sowjetunion fort.

Die Entwicklung des sowjetischen Rechts vollzog sich folgendermaßen: In den 1920er und 1930er Jahren erfolgte zunächst die unmittelbare Rezeption der Gesetze der Russischen Föderation in den Sowjetrepubliken, später gründete sich das Rechtssystem der Sowjetunion jedoch auf den besonderen Rechtsgrundsätzen des einheitlichen Staates (der Sowjetunion), die in den Sowjetrepubliken als Rechtsquellen galten.¹

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1 Beispielsweise ging der Verabschiedung des „Zivilgesetzbuches“ in der Georgischen SSR die Verabschiedung der „Grundlagen des Zivilgesetzbuches der UdSSR“, der „Zivilprozessordnung“ – der „Grundlagen der Zivilprozessordnung der UdSSR“ usw. voraus.

2. Das Recht der Nichtvermögenheit

Die „Zivilprozessordnung“ von Georgischen SSR vom 17. Mai 1931, die auf der entsprechenden Gesetzgebung Russlands (damals RSFSR) – der russischen „Zivilprozessordnung“ von 1929 – basierte, bildete in diesem Fall keine Ausnahme.² Im Rahmen des Zivilprozessrechts wurde der Grundstein für das georgische Insolvenzrecht gelegt, das damals als ein Institut des Zivilprozessrechts anzusehen war.

Die im Jahr 1931 verabschiedete georgische „Zivilprozessordnung“, welche auf der russischen „Zivilprozessordnung“ von 1929 beruhte, hatte den Anhang 2 mit der Überschrift „Regeln über die Nichtvermögenheit von natürlichen und juristischen Privatpersonen“, welche aus 46 Artikeln bestand. Die in diesem Anhang enthaltenen Regeln begründeten die Entwicklung eines neuen Rechtsgebiets in Georgien — „das Recht der Nichtvermögenheit“.³

Es ist bemerkenswert, dass der georgische Begriff „არაშემდგომობა“ - („Nichtvermögenheit“) keine völlig exakte Übersetzung des russischen Begriffs *несостоятельность* darstellte. Der russische Begriff hätte damals eher mit Begriffen wiedergegeben werden können, die die inhaltlich wirtschaftliche und finanzielle schwierige Lage des Schuldners beschrieben hätten, beispielsweise „Zahlungsunfähigkeit“ oder „Konkurs/Bankrott“.⁴ Was den modernen Begriff „კალაუვალობა“ (Insolvenz) betrifft, wäre es verfrüht gewesen, darüber Erwägungen anzustellen. Dieser Begriff „კალაუვალობა“ (Insolvenz) trat im georgischen Rechtsgebrauch erst Ende des 20. Jahrhunderts (in den 1990er Jahren) auf.⁵ Somit war es zu Beginn des 20. Jahrhunderts, als das vorhergehende Recht des Insolvenzrechts (das Recht der Nichtvermögenheit) noch in der Entstehungsphase war und sein Inhalt sowie seine Notwendigkeit noch nicht vollständig begriffen waren, natürlich zu früh, von einer Modernisierung der Begriffe, einschließlich des Begriffs „Nichtvermögenheit“, zu diskutieren.

2 Vgl. „Zivilprozessordnung von Georgischen SSR“ (Ausgabe 1931), mit Änderungen bis zum 1. Mai 1956, Verl. Sakhelgami, 1956.

3 Siehe R. Migriauli, Einführung in das Konkurs- und Zahlungsunfähigkeitsrecht (Lehrbuch), 3. überarbeitete Auflage, Tbilisi, 2017, 274-281 (in georgischer Sprache).

4 R. Migriauli, Einige Aspekte des Konkursrechts, in: „Fragen des georgischen Privatrechts“, 2. ergänzte Auflage, Tbilisi, 2016, 18-19 (in georgischer Sprache).

5 Die Notwendigkeit, den Begriff „Insolvenz“ einzuführen und dem Rechtsgebiet die Bezeichnung „Insolvenzrecht“ zu geben, wurde erstmals 1997 geäußert. Vgl. R. Migriauli, Schuldnerinsolvenz als Sanierungsmaßnahme, Zeitung „Msgepsi“, Nr. 19, 1997 (in georgischer Sprache).

Das Recht der Nichtvermögenheit als neues Rechtsgebiet befand sich noch in der Entstehungsphase und seine konkreten Institutionen mussten zunächst in der Praxis erprobt werden. Fakt ist jedoch, dass die im Anhang 2 der georgischen Zivilprozessordnung von 1931 enthaltenen „Regeln“ (über die Nichtvermögenheit von natürlichen und juristischen Privatpersonen) als Ansatzpunkt für das neue Rechtsgebiet (über das Recht der Nichtvermögenheit der natürlichen und juristischen Personen) erschienen, welches später wie ein Vorgänger die Last des Konkurs-, Zahlungsunfähigkeits- und Insolvenzrechts übernahm.

Das Recht der Nichtvermögenheit regelte die zwangsweise Liquidation des Vermögens „nichtvermögender Schuldner“ — natürlicher und juristischer Privatpersonen — sowie die rechtlichen Folgen einer solchen Abwicklung. Durch dieses Recht wurden die für dieses Rechtsgebiet typischen Institutionen geregelt, wie: Feststellung der Nichtvermögenheit einer Person,⁶ der nichtvermögende Schuldner,⁷ Befugnis zur Einleitung eines Verfahrens zur Feststellung der Nichtvermögenheit,⁸ das zu liquidierende Vermögen,⁹ Liquidatoren des Nichtvermögensverfahrens¹⁰, die Folgen der Nichtvermögenheit¹¹ usw. Heutzutage haben sich für diese Institutionen die folgenden modernen Begriffe etabliert: Feststellung der Zahlungsunfähigkeit (Insolvenz), insolventer Schuldner, Befugnis zur Einleitung eines Zahlungsunfähigkeitsverfahrens (Insolvenzverfahrens), Zahlungsunfähigkeits- (Konkurs- und Insolvenzmasse), Konkurs- bzw. Rehabilitationsverwalter usw.

Die Fälle der Nichtvermögenheit unterlagen den „Volksgerichten“ zur Behandlung.¹² Bemerkenswert ist, dass im Recht der Nichtvermögenheit von 1931 der Prioritätsgrundsatz zwischen Gerichten anerkannt war. Wurden also vor mehreren Gerichten die Verfahren zur Feststellung der Nichtvermögenheit derselben natürlichen Person eingeleitet, so hatte dasjenige Volksgericht Vorrang, das den Schuldner zuerst für nichtvermögend erklärte oder in dem ein Nichtvermögensverfahren zuerst eingeleitet worden war.¹³

6 „Zivilprozessordnung der Georgischen SSR“ (Ausgabe von 1931), Art. 2-8.

7 Ebenda, Art.1.

8 Ebenda, Art.3.

9 Ebenda, Art. 16-23.

10 Ebenda, Art. 10-15.

11 Ebenda, Art.9.

12 Ebenda, Art.1.

13 Ebenda, Anm. zu Art.1.

„Das Recht der Nichtvermögenheit“ konnte im sowjetischen Rechtsraum nicht lange bestehen. Die Repressionen des sowjetischen Regimes erfassten auch dieses Rechtsgebiet, und es wurde als bourgeoises Recht vollständig aus den Zivilprozessen entfernt. Die im Zivilprozessrecht Ende der 1950er Jahren angefangenen und bis Ende der 1960er Jahre in den verschiedenen Sowjetrepubliken fortgesetzten Reformen, wurden dadurch beendet, dass in den neuen Prozessordnungen aller Sowjetrepubliken — so auch in der georgischen Zivilprozessordnung von 1964 — keine Regelungen verblieben, die dem modernen Insolvenzrecht vergleichbar gewesen wären.

Somit bestand das georgische Recht der Nichtvermögenheit, dessen Grundlage 1931 gelegt worden war, lediglich 33 Jahre und endete 1964. Es bleibt jedoch Gegenstand weiterer Forschung zu klären, inwieweit während dieser 33 Jahre Nichtvermögensverfahren tatsächlich in der Gerichtspraxis aktiv angewendet wurden: wie viele Verfahren vor den sogenannten Volksgerichten geführt, wie viele Personen als nichtvermögend festgestellt und mit welchen Ergebnissen die Verfahren abgeschlossen wurden usw.

3. Die Periode der Ablehnung des Insolvenzrechts

Die Periode, in der das Insolvenzrecht gänzlich aus dem georgischen Rechtsraum verbannt war, dauerte 28 Jahre. Diese Periode begann mit dem Inkrafttreten der Zivilprozessordnung der Georgischen SSR von 1964 und endete 1992 mit der Verabschiedung des Dekrets „Über den Konkurs von Unternehmen“¹⁴ im bereits unabhängigen Georgien.

In der Periode der Ablehnung des Insolvenzrechts (etwa den 1960er bis 1980er Jahren) erklärte die Sowjetunion den „entwickelten Sozialismus“. Die Hegemonie sowjetischer (staatlicher) Betriebe war im Land etabliert, während alles Private — seien es Eigentum oder Unternehmen — abgelehnt oder eingeschränkt wurde.

Die sowjetische Ideologie war mit den Prinzipien einer Marktwirtschaft unvereinbar. Die sowjetische Wirtschaft basierte auf einem zentralisierten Planwirtschaftssystem, das die Produktion, die Verteilung von Ressourcen und die Preisbildung durch staatliche Organe streng kontrollierte. Dementsprechend entwickelten sich die Wirtschaftsbeziehungen zentral und nach den in den Kabinetten erarbeiteten Plänen. Daher nannte man die sowjetische Wirtschaft

14 Das Dekret wurde am 8. September 1992 vom Staatsrat Georgiens erlassen.

Planwirtschaft (russ.: плановая экономика). Die Umsetzung der Grundsätze der Planwirtschaft und deren praktische Anwendung oblag den sogenannten „Staatlichen Planungskomitees“ (russ.: Государственный плановый комитет, kurz Госплан), die auf zentraler Ebene in der Sowjetunion und auf lokaler Ebene in den Sowjetrepubliken eingerichtet wurden.¹⁵ Die Planungskomitees stellten die zentralen Institutionen der sowjetischen Wirtschaft dar, deren Hauptziel es war, langfristige und kurzfristige Wirtschaftsentwicklungspläne zu erstellen, diese zu koordinieren und ihre Umsetzung zu überwachen.¹⁶ In der Georgischen SSR oblag dem staatlichen Planungskomitee die Entwicklung lokaler Produktion (z. B. Wein, Tee, Mangan und Textilien) sowie die Nutzung von Energie- und Bergbauressourcen im Rahmen der sowjetischen Industriepolitik.

Die Planungskomitees planten zentral nicht nur die Errichtung, Entwicklung oder Erweiterung staatlicher Betriebe und deren Tätigkeitsbereiche, sondern auch deren Liquidation, Fusionen oder andere gleiche Maßnahmen.

Die Planungskomitees existierten bis etwa 1990 und erfüllten bis zum Zerfall der Sowjetunion ihre negative Rolle in der wirtschaftlichen Entwicklung des Landes. Im Gegensatz zu einer Marktwirtschaft sollte die Wirtschafts- und Sozialpolitik in der Sowjetunion und ihren einzelnen Republiken im Rahmen der Planwirtschaft ausschließlich auf einem konkreten, in den Kabinetten entwickelten Plan basieren. Die Planung wirtschaftlicher Maßnahmen umfassten alle Bereiche — von der Produktion von Konsumgütern bis hin zur Herstellung von Raketen, Militärgütern und anderen strategischen Gütern.

Unter den Bedingungen einer Planwirtschaft war die Existenz des Insolvenzrechts natürlich völlig nutzlos, da dieses Rechtsgebiet nur für private Geschäftssubjekte anwendbar ist, und selbst dann nur im Rahmen der Marktwirtschaft. Die sowjetische Planwirtschaft erwies sich gleichermaßen als ungeeignet für das Handelsrecht (Unternehmerrecht).¹⁷ Schließlich basiert doch das Recht von gewerblichen Unternehmern auf der Ideologie des Privateigentums und der Geschäftssubjekte. Aber in einem Umfeld, in dem allein staatliche Unternehmen

15 Die Planungskomitees wurden 1921 auf Anordnung von W. Lenin während der Zeit der Neuen Ökonomischen Politik (НЭП) geschaffen.

16 Vgl. E.A. Иванов, Госплан СССР: Попытка воплотить в жизнь великую мечту, in: Zeitschrift „Экономическая наука современной России“ („Wirtschaftswissenschaft des modernen Russlands“) abgekürzt ЭНП, Nr. 4 (51) 2010, 115-130 (in russischer Sprache).

17 R. Migriauli, Kurzes Lehrbuch zum Recht von gewerbliche Unternehmer, Tbilisi 2021, 27-28 (in georgischer Sprache).

gebildet wurden und ausschließlich diese den wirtschaftlichen Raum monopolisiert haben, fehlte die praktische Anwendung sowohl des Insolvenz- als auch des Unternehmerrechts und beide Rechtsgebiete erschienen im sowjetischen System wie Fremdkörper.

Auch die Reformen, die 1985 von Michail Gorbatschow, dem damaligen Generalsekretär der Kommunistischen Partei der Sowjetunion, im ganzen Land eingeleitet wurden, konnten der sowjetischen Wirtschaft nicht zur Erholung verhelfen. Die von ihm initiierte „Umgestaltung“ (russ.: *Перестройка*) zielte darauf ab, den Aufbau des realen Sozialismus zu verbessern und Raum für kritisches Denken in der Gesellschaft zu schaffen. Eine solche politische Entwicklung führte jedoch zum Zusammenbruch der Ideologie der kommunistischen Partei und zum Aufstieg nationaler Ideologie, wodurch die Kontrollfunktion der kommunistischen Partei allmählich verloren ging.¹⁸

Die Periode von „Perestroika“ setzte sich bis zum Zerfall der Sowjetunion (1991) fort und die in diesem Zeitraum durchgeführten Reformen wirkten sich auch auf die Wirtschaftsbeziehungen aus. Als Alternative zu staatlichen Unternehmen begann in der Sowjetunion die Schaffung privater Unternehmen. Die rechtliche Grundlage für ihre Gründung bildete das sowjetische Gesetz „Über kooperative Zusammenarbeit (*კოოპერაციის*) in der UdSSR“ von 1988.¹⁹ Ein gleichnamiges Gesetz wurde 1989 auch in Georgien erlassen. Somit sind in der Periode von „Perestroika“ die ersten privaten Unternehmen in Rechtsform von Genossenschaften (*კოოპერატივი*) entstanden, denen erlaubt war, als Produktions- und Konsumgenossenschaften „alle Arten von Tätigkeiten“ auszuüben, sofern diese nicht gesetzlich verboten waren.²⁰ Über Genossenschaften wurde privaten Initiativen im unternehmerischen Bereich Tür und Tor geöffnet. Die Entstehung und Tätigkeit privater Unternehmen erschütterten die Grundlage der Planwirtschaft nachhaltig.

Im Juni 1990 verabschiedete der Ministerrat der UdSSR die Verordnung „Über Aktiengesellschaften und Gesellschaften mit beschränkter Haftung“²¹, die

18 Vgl. *Ketevan Mumladze*, Brechung des Konzepts von Transformation und Öffentlichkeit in georgischen Printmedien, Doktorarbeit, GIPA – Georgisches Institut für öffentliche Angelegenheiten, 4–8 (in georgischer Sprache).

19 Gesetz der Union der Sozialistischen Sowjetrepubliken „Über Genossenschaften in der UdSSR“, Verlag „Sowjetgeorgien“, Tbilisi 1989 (in georgischer Sprache).

20 Gesetz „Über Genossenschaften in der UdSSR“, Art. 3, Absätze 1 und 2.

21 *Бюллетень текущего законодательства* (Bulletin der laufenden Gesetzgebung), Juni 1990 (Sonderausgabe), Moskau, 3-28 (in russischer Sprache).

als rechtliche Grundlage für die Gründung gemeinsamer Gesellschaften (Joint Ventures) durch juristische Personen und Bürger diente.²² Mit dieser Verordnung wurde auch die Existenz von gemeinsamen Unternehmen in der Sowjetunion zulässig, die unter Beteiligung ausländischer juristischer Personen (ausländischer Unternehmen) gegründet wurden. Damit erweiterte sich der Kreis der Geschäftssubjekte: Neben Genossenschaften beteiligten sich auch Aktiengesellschaften und Gesellschaften mit beschränkter Haftung am Geschäftsleben. Das Auftreten ausländischer Firmen auf dem sowjetischen Markt und der Zustrom ausländischer Investitionen untergruben die Planwirtschaft und legten die Keimzellen einer Marktwirtschaft frei.

Nachdem Georgien am 26. Mai 1991 seine Unabhängigkeit erklärt hatte, wurde in einem der ersten normativen Akte — dem Gesetz vom 14. Juni 1991 „Über die Grundlagen des Wirtschaftssystems der Republik Georgien“²³ — als Grundlage des Wirtschaftssystems das Prinzip marktlicher Beziehungen und die Freiheit unternehmerischer Tätigkeit erklärt.²⁴ Die Umsetzung des neuen Wirtschaftssystems wurde nun von der Existenz unternehmerischer Subjekten (Gesellschaften) abhängig, die auf privatrechtlichen Beziehungen beruhen. Am 25. Juli 1991 verabschiedete das unabhängige gesetzgebende Organ Georgiens — der Oberste Rat Georgiens — das Gesetz „Über die Grundlagen der unternehmerischen Tätigkeit“²⁵. Mit der Verabschiedung des vorgenannten Gesetzes endete die Hegemonie staatlicher Unternehmen und wurde die Grundlage für die Schaffung privater unternehmerischer Gesellschaften in verschiedenen Rechtsformen gelegt. Infolgedessen entstanden in Georgien neben Genossenschaften auch Aktiengesellschaften, Gesellschaften mit beschränkter Haftung, Einzelunternehmen und Ein-Personen-Unternehmen, lokale und öffentliche Organisationsunternehmen usw.²⁶ Die neu gegründeten Privatunternehmen, deren Zahl täglich zunahm, nahmen ihre Tätigkeit in verschiedenen Wirtschaftsbereichen auf.

22 Bulletin, Punkt 1.

23 Das Gesetz ist veröffentlicht in dem Buch: „Sammlung normativer Akte Georgiens“, Band 1, Verlag „Wirtschaft und Recht“, 1992, 3-11.

24 Gesetz „Über die Grundlagen des Wirtschaftssystems der Republik Georgien“, Art. 1.

25 Das Gesetz ist veröffentlicht in dem Buch: „Sammlung normativer Akte Georgiens“, Band 1, Verlag „Wirtschaft und Recht“, 1992, 12-39.

26 Gesetz „Über die Grundlagen unternehmerischer Tätigkeit“, Art. 11.

Die Vielzahl unternehmerischer Subjekte schuf ein gewisses Wettbewerbsumfeld, wodurch viele von ihnen zum wirtschaftlichen und finanziellen Zusammenbruch verurteilt waren. Hinzu kam oft fehlendes betriebswirtschaftliches Wissen und mangelnde Kompetenzen in der Unternehmensführung, was unweigerlich zum Zusammenbruch bzw. zur Auflösung und Liquidation der unternehmerischen Gesellschaften führte.

Für die konsequente und staatlich organisierte Liquidation von Geschäftssubjekten (Gesellschaften), die in den wirtschaftlichen Zusammenbruch geraten sind, stellte man die Notwendigkeit der Einführung eines normativen Aktes zur Regelung des Konkurses auf die Tagesordnung. Das Ergebnis ließ nicht lange auf sich warten und am 8. September 1992 verabschiedete der Staatsrat von Georgien ein Dekret „Über den Konkurs von Unternehmen“.²⁷

4. Das Dekret „Über den Konkurs von Unternehmen“ vom 8. September 1992

Von März bis Oktober 1992 stellte sich der Staatsrat Georgiens als oberstes Staatsorgan vor, das vorübergehend auch die Gesetzgebungsfunktion innehatte.²⁸ In diesem Zeitraum, der volle sieben Monate dauerte, wurde der vom Staatsrat Georgiens erlassene oberste normative Akt als „Dekret“ bezeichnet.

Erstaunlicherweise erließ der Staatliche Rat — obwohl er in der politischen Geschichte Georgiens als vorübergehende (nicht demokratisch legitimierte) Regierung betrachtet wird — bereits kurz vor dem Ende seiner Zuständigkeit, also noch etwa sechs Wochen vor Auslaufen seines Mandats, das Dekret „Über den Konkurs von Unternehmen“. Es sei angemerkt, dass dieses Dekret nicht das einzige Dekret war, das in jener Zeit Fragen im Zusammenhang mit der wirtschaftlichen Entwicklung des Landes regelte. In seiner Amtszeit hat der Staatliche Rat auch andere bedeutende Dekrete erlassen, etwa das „Zollgesetzbuch“,²⁹ das Dekret „Über die Beschränkung monopolistischer Tätigkeit und Entwicklung des

27 Der Erlass ist veröffentlicht in dem Buch: „Sammlung normativer Akte Georgiens“, Band 2, Verlag „Tsoetne“, 1995, 225-239.

28 Vgl. hierzu *Gia Khukhashvili*, „Das administrative Format des Staatsrates und der Prozess der Relegitimierung der Macht“, in der Zeitung: „Überblicke zur öffentlichen Politik“, Nr. 2, 2012 (in georgischer Sprache).

29 „Sammlung normativer Akte Georgiens“, Buch 2, 268-329.

Wettbewerbs in der Republik Georgien“,³⁰ das Dekret „Über Zollltarife“³¹ u.a. Warum gerade das vorübergehende Staatsorgan in dieser besonders kritischen Übergangsphase wirtschaftsrelevante Dekrete erließ und wie notwendig diese Dekrete waren, ist eine Frage, die die Forscher der Rechtsgeschichte zu klären haben.

In der Geschichte der Entwicklung des georgischen Insolvenzrechts war das Dekret „Über den Konkurs von Unternehmen“ ein wichtiger Wendepunkt: im georgischen Rechtsraum tauchte erstmals der Rechtsbegriff „konkurs/bankrott“ („გაყვრილობა“) auf. Im Dekret treten zahlreiche konkursbezogene Begriffe auf: „Konkursbegriff“, „konkursfähiges Subjekt“, „Konkursverfahren“, „Erklärung für Bankrott“, „Feststellung als bankrott“ u.a. Die Bedeutung des Dekrets wird dadurch nicht geschmälert, dass es sich um eine gescheiterte Umsetzung eines ähnlichen russischen Gesetzes handelte.

Es ist bemerkenswert, dass das Dekret „Über den Konkurs von Unternehmen“ bis zum 1. Januar 1997 galt. Während seines mehr als vierjährigen Bestehens fand dieses Dekret jedoch kaum praktische Anwendung, mit Ausnahme eines Einzelfalles, in dem auf der Grundlage dieses Dekrets ein Konkursantrag gegen das Weinunternehmen „Zegaani“ gestellt wurde. Aufgrund der rechtlichen Neuheit konnten weder das Gericht noch die Betroffenen die Einzigartigkeit des Konkursantrags und seinen Unterschied zum Klageantrag begreifen. Aus diesem Grund wurde der Konkursantrag nach den Regeln der Zivilprozessordnung bearbeitet und in Form einer Klageschrift behandelt. In der Folge konnte das Konkursverfahren gegen die Schuldnergesellschaft „Zegaani“ nicht stattfinden und andere Institutionen des Dekrets wurden nicht angewendet.

Das Dekret „Über den Konkurs von Unternehmen“ hat in der Rechtswissenschaft keine bedeutenden Spuren hinterlassen, da kein Rechtswissenschaftler es wissenschaftlich untersucht hat, weder als Gesetz noch als einzelne Institution.

Dennoch kann man sagen, dass das Dekret „Über den Konkurs von Unternehmen“ in gewissem Maße den Weg geebnet und die notwendigen Voraussetzungen im Insolvenzrecht für die spätere Verabschiedung des bereits europäisch geprägten Gesetzes „Über das Konkursverfahren“ geschaffen hat.

30 Ebenda, 240-255.

31 Ebenda, 256-266.

5. Das Gesetz „Über das Konkursverfahren“ vom 25. Juni 1996

Am 25. Juni 1996 erließ das georgische Parlament das Gesetz „Über das Konkursverfahren“ (im Folgenden: Konkursgesetz), das am 1. Januar 1997 in Kraft trat.³²

Das Konkursgesetz entstand im Rahmen einer Zusammenarbeit, die in den 1990er Jahren des vorigen Jahrhunderts zwischen dem georgischen Justizministerium und der deutschen Organisation „Die Deutsche Gesellschaft für Technische Zusammenarbeit“ (GTZ) begonnen hatte. Diese Zusammenarbeit umfasste nicht nur finanzielle Unterstützung durch die deutsche Regierung, sondern auch technische Hilfe (Einsatz deutscher Experten in Georgien, Organisation von Schulungen für georgische Wissenschaftler in Deutschland, Übersetzungsarbeiten, wissenschaftliche Publikationen etc.).³³ GTZ wurde von Professor Dr. Rolf Knieper geleitet, unter dessen aktiver Beteiligung die Reform des georgischen Privatrechts umgesetzt wurde.³⁴ Infolgedessen wurden in den Jahren 1992-1996 in Georgien wichtige Gesetze wie das „Zivilgesetzbuch“, das „Gesetz über gewerbliche Unternehmer“, das „Scheckgesetz“, das „Wechselgesetz“ und das „Gesetz über das Konkursverfahren“ verabschiedet. Damit gab Georgien die Rezeption russischen (sowjetischen) Rechts endgültig auf und passte sich vollständig dem europäischen, insbesondere dem deutschen Rechtsmodell, an.

An der Erstellung des „Gesetzes über das Konkursverfahren“ von 1996 war ursprünglich der Mitarbeiter des Max-Planck-Instituts in Hamburg, Herr Jürgen Thieme, beteiligt, der bereits 1992 einen gleichnamigen albanischen Gesetzesentwurf vorgelegt hatte. Allerdings basierten sowohl der albanische als auch der georgische Gesetzesentwurf auf dem damals in Deutschland geltenden Konkursrecht von 1877 (Konkursordnung). Dieses Konkursrecht wurde in Deutschland bald darauf (1994) durch ein neues, umfassenderes Gesetz ersetzt – die „Insolvenzordnung“.

Der georgische Entwurf des Konkursgesetzes wurde weitgehend nach den Grundsätzen des deutschen Rechts, einschließlich des neuen Gesetzes

32 Georgischer Gesetzesanzeiger, <https://matsne.gov.ge/document/view/652?publication=8>

33 Vgl. Roin Migriauli, „Georgisches Unternehmerrecht: Ursprung und Entwicklung“, Internationale wissenschaftliche Zeitschrift „Herald of Law“, Nr. 9, 07/2024, 99–110 (in georgischer Sprache).

34 Siehe Rolf Knieper, „Gedanken zur Rechtsreform zu Ehren von Professor Sergo Jorbenadze“, im Buch: „Sergo Jorbenadze - 70, Jubiläumsausgabe“, Tbilisi, 1996, 21-31.

aufgebaut.³⁵ Deshalb wird das Konkursgesetz von 1996 bis heute immer noch als „deutsches Gesetz“ bezeichnet.

Der Entwurf des Konkursgesetzes wurde anfänglich mit gewissen Mängeln übersetzt, da einige Rechtsinstitutionen (z.B. Konkursgründe, Überschuldung, Konkursgläubiger und seine Forderung, insolventer Schuldner, Aufrechnung im Konkursverfahren, anfechtbare Rechtsgeschäfte des Schuldners, Massegläubiger, Konkursvergleich u. a.) dem georgischen Privatrecht weitgehend fremd waren. Infolgedessen wurde der Inhalt des neuen Gesetzes und seiner wichtigsten Institutionen nicht richtig verstanden, weshalb sie auch falsch ins Georgische übersetzt wurden.³⁶ Leider verabschiedete das georgische Parlament 1996 das Gesetz mit diesen Mängeln. Durch die im Jahr 2001 im Konkursrecht eingeführte Neuerung³⁷ konnten die primären Übersetzungs- und Verständnisschwierigkeiten weitgehend behoben werden, sodass der Gesetzestext später für an Konkursverfahren beteiligte Personen (insbesondere Konkursgläubiger) und für andere Interessenten deutlich verständlicher wurde.

Das Konkursgesetz wurde in der Praxis auch aktiv umgesetzt: Vor den Bezirks- und Stadtgerichten wurden zahlreiche Konkursanträge eingereicht. Initiatoren waren nicht nur Gläubiger, sondern auch insolvente Schuldner selbst, für die das Konkursverfahren zu einer Art „Schutzschild“ gegenüber „lästigen Gläubigern“ darstellte. Bemerkenswert ist, dass während der Geltungszeit des Konkursgesetzes mehr als 1 000 Konkursverfahren eingeleitet wurden.

Die aktive Umsetzung des Konkursgesetzes in der Praxis wurde auch dadurch gefördert, dass mit der Finanzierung von der GTZ die intensive Schulung interessierter Personen und deren vertieftes Studium des Konkursrechts stattfanden. Die Schulung betraf auch jene Richter, die Konkursanträge annehmen und anschließend Konkursverfahren eröffnen oder deren Eröffnung ablehnen mussten. Wichtig ist auch, dass die Schulung auch Rechtsanwälte und Wirtschaftsprüfer betraf, aus deren Reihen anschließend ein geschultes Team von „Konkursverwaltern“ gebildet wurde. Die Konkursverwalter galten als die „zentralen

35 Vgl. *Jürgen Thieme*, „Reform und Transformation des Konkursrechts“, im Buch: *Sergo Jorbenadze* 70, Jubiläumsausgabe, 1996, 309–356.

36 Vgl. *R. Migriauli*, Vorwort zum Buch: „Das georgische Konkursrecht mit aktualisiertem Text und Beispielen von Konkursverfahrensdokumenten“, 1. Auflage, 2001, 8 (in georgischer Sprache).

37 *R. Migriauli*, „Einführung in das Konkurs- und Zahlungsunfähigkeitsrecht“, Ergänzendes Lehrbuch, 3. überarbeitete Auflage, Tbilisi, 2017, 26-27 (in georgischer Sprache)..

Figuren“ des Konkursverfahrens, wie sie in der juristischen Literatur genannt wurden.³⁸ Der Staat sorgte darüber hinaus für die Fortbildung von Mitarbeitern derjenigen Verwaltungsbehörden (vornehmlich der Steuerinspektionen), die als Großgläubiger in den Konkursverfahren auftraten.

Nach Einschätzung deutscher Experten war das Konkursgesetz von 1996 ursprünglich als Rahmengesetz gedacht, das in der Praxis verfeinert und perfektioniert werden musste. So war es auch geschehen: während der zehnjährigen Gültigkeitsdauer (1997-2007) wurde das Gesetz von ursprünglich 41 Artikeln auf 53 Artikel erweitert. Zudem wurde dem Gesetz ein separates Kapitel „Rehabilitation“ hinzugefügt, welches die Umstände und Verfahren zur Rettung eines insolventen Schuldners detailliert regelte. Der europäische Ansatz des sogenannten „deutschen Gesetzes“ von 1996 spiegelte sich auch darin wider, dass es die Möglichkeit des Konkurses von natürlichen Personen vorsah.³⁹

Ein ehemaliger Konkursrichter, der in Ostdeutschland tätig war, Herr Heinrich Schnittger, spielte eine wichtige Rolle bei der Popularisierung des georgischen Konkursrechts und bei dessen praktischer Umsetzung. Er war wesentlich an der theoretischen Ausbildung der Konkursrichter und Konkursverwalter in Georgien beteiligt.

Mit ihm als Co-Autor wurde 2011 in Georgien eine der wichtigsten Monographien zum Konkursrecht veröffentlicht.⁴⁰ Außerdem ist er der Verfasser zahlreicher wissenschaftlicher Publikationen im georgischen Recht.

Das Gesetz „Über das Konkursverfahren“ existierte über zehn Jahre; es trat am 1. Januar 1997 in Kraft und wurde am 15. August 2007 durch das am 28. März 2007 verabschiedete Gesetz „Über das Verfahren der Zahlungsunfähigkeit“ abgelöst. Das Konkursgesetz von 1996 leistete einen erheblichen Beitrag zur Entwicklung der Konkursrechtswissenschaft in Georgien.

38 R. Migriauli, „Der Rechtsstatus des Konkursverwalters auf der Grundlage einer vergleichenden Analyse des Konkursgesetzes von 1996 und des Zahlungsunfähigkeitsgesetzes von 2007“, in: Fragen des georgischen Privatrechts, 2. vollständige Auflage, 2016, 71.

39 Gesetz über das Konkursverfahren, Art. 2.

40 Siehe Heinrich Schnittger, Dr. Roin Migriauli, „Georgisches Zahlungsunfähigkeitsrecht, Charakterisierung und Vergleich mit dem georgischen Konkursrecht und internationalen Standards“, Tbilisi, 2011.

6. Das Gesetz „Über das Zahlungsunfähigkeitsverfahren“ vom 28. März 2007

Am 28. März 2007 verabschiedete das Parlament Georgiens das Gesetz „Über das Zahlungsunfähigkeitsverfahren“ (im Folgenden: Zahlungsunfähigkeitsgesetz),⁴¹ das am 15. August desselben Jahres in Kraft trat. Das Zahlungsunfähigkeitsgesetz war das dritte Gesetz innerhalb von 15 Jahren, das die insolvenzrechtlichen Fragen regelte.

Der Initiator des Zahlungsunfähigkeitsgesetzes von 2007 war der damalige Wirtschaftsminister Kakhaber Bendukidze, der während seiner Amtszeit mehrere umstrittene wirtschaftspolitische Reformen durchführte, darunter beschleunigte und oftmals kostengünstige Privatisierungen staatlicher und privater Vermögensgüter. Die Wirtschaftspolitik jener Zeit fand ihren Ausdruck in dem denkwürdigen Ausspruch des damaligen Wirtschaftsministers: „Es wird alles verkauft, außer das Gewissen.“ Das Zahlungsunfähigkeitsgesetz, das als „Bendukidzes Gesetz“ bezeichnet wurde,⁴² wurde gleichzeitig zum Gesetz, das die damaligen politischen Gegebenheiten umsetzte, weshalb es deutlich von den europäischen Standards des Insolvenzrechts abwich. Aufgrund dieser Umstände geriet das Gesetz unmittelbar nach seiner Verabschiedung in scharfe Kritik. Die Kritiker kamen nicht nur aus dem Kreis lokaler Organisationen, Experten⁴³ und Fachleute, sondern auch aus dem Kreis internationaler Experten⁴⁴ und Institutionen. Die Kritik an dem Gesetz von 2007 begann kurz nach dessen Verabschiedung.⁴⁵

Die Kritik richtete sich beispielsweise gegen die Fristen des Zahlungsunfähigkeitsverfahrens, die gesetzlich mit konkreten Zeiten bestimmt waren.

41 Georgischer Gesetzesanzeiger, <https://matsne.gov.ge/document/view/23572?publication=31>

42 Vgl. R. Migriauli, „An die Kritiker des Konkursrechts“, im Buch: Fragen des georgischen Privatrechts, 2. vollständige Auflage, 2016, 81 (in georgischer Sprache).

43 Siehe Interview mit R. Migriauli, „Zur Notwendigkeit der Aufhebung des Zahlungsunfähigkeitsgesetzes von 2007 und dessen Ersetzung durch ein neues Gesetz“, im Buch: Fragen des georgischen Privatrechts, 2. vollständige Auflage, 2016, 138-147 (in georgischer Sprache).

44 Siehe Hans Janus, Roin Migriauli, Georgiens schwieriger Weg zu einem modernen Insolvenzrecht, in der Zeitschrift: WiRO („Wirtschaft und Recht in Osteuropa“), #11, 2016.

45 Siehe R. Migriauli, „Lichter und Schatten des neuen Zahlungsunfähigkeitsgesetzes“, im Buch: Fragen des georgischen Privatrechts, 2. vollständige Auflage, 2016, 54-61 (in georgischer Sprache), sowie das Interview mit R. Migriauli aus dem Jahr 2009, „Das knechtende Gesetz und komplizierte Verfahren für Unternehmer“, im selben Buch, 133-137.

Insbesondere war für ein Konkursverfahren, das auf Antrag des Schuldners eingeleitet werden sollte, eine Höchstdauer von 207 Tagen festgelegt, für ein Verfahren auf Antrag des Gläubigers höchstens 225 Tage⁴⁶. Keine Insolvenzgesetze der zentraleuropäischen Staaten legen derart konkrete Fristen für die Verfahrensdauer fest. Angesichts der Vielzahl an zu klärenden rechtlichen Fragen in einem Insolvenzverfahren (Unternehmensführung, Vertragsverhältnisse, laufende Gerichtsprozesse etc.) sind derartige Fristen in der Praxis kaum einzuhalten. Die Steuerbehörde wurde ebenfalls kritisiert, da sie nur deshalb als gesetzlich gesicherter Gläubiger galt, weil sie gegen das Vermögen des Schuldners die Sicherungsmittel der vom Steuergesetzbuch festgelegten Verbindlichkeiten genutzt hatte (wie z.B. Steuerhypothek, Steuerpfändung, Steuerbeschlagnahme, Inkasso etc.). Der Schuldner muss definitiv Steuerschulden gegen das Staatsbudget gehabt haben. Ein gesicherter Gläubiger nimmt in einem Insolvenzverfahren eine privilegierte Stellung ein: Seine Forderung wird entweder außerhalb des Gläubigerverzeichnisses vor allen anderen Gläubigern befriedigt oder — falls er im Gläubigerverzeichnis aufgeführt ist — vor allen anderen Gläubigern als privilegierter Gläubiger.

Die schärfste Kritik richtete sich gegen das Nationale Vollstreckungsbüro, dem das Gesetz von 2007 kurz nach seiner Verabschiedung Vormundschaftsbefugnisse⁴⁷ verlieh. Das Nationale Vollstreckungsbüro trat als Vormund sowohl in Vormundschaftsverfahren als auch in Konkursverfahren auf, wenn sich die Gläubiger über einen bestimmten Konkursverwalter nicht einigen konnten. Das Nationale Vollstreckungsbüro war eine öffentlich-rechtliche Person, die gemäß der Vollstreckungsgesetzgebung mit völlig anderen Aufgaben betraut war. Die

46 R. Migriauli, „An die Kritiker des Konkursrechts“, im Buch: Fragen des georgischen Privatrechts, 2. vollständige Auflage, 2016, 82-87.

47 Ein Vormundschaftsverfahren ist kein Insolvenz- oder Sanierungsverfahren. Es wurde eingeleitet, sobald das Insolvenzgericht durch einen Beschluss eine Insolvenzerklärung zugelassen hatte (Artikel 19.3) und mit derselben Anordnung einen Vormund (Artikel 21) bestellte und eine Gläubigerversammlung (Artikel 21.1) einberufen wurde. Die Hauptfigur im Vormundverfahren war der Vormund, nämlich das Nationale Vollstreckungsamt (Artikel 26.1), der seinen Vollstrecker ernannte. Ohne die Zustimmung des Vormunds war es dem Schuldner untersagt, Geschäfte zu tätigen, bestehende Verträge zu kündigen oder sonstige Maßnahmen im Zusammenhang mit der Führung seines Unternehmens zu ergreifen (Artikel 21.2). Der Vormund war verpflichtet, die Vormundschaftsmasse zu erhalten und vor Beschädigung und Zerstörung zu schützen (Artikel 26.2). Das Vormundschaftsverfahren wurde sofort beendet, sobald der Schlichtungsrat eine Entscheidung über Konkurs oder Sanierung getroffen oder das Insolvenzverfahren eingestellt hätte (Artikel 33.3).

Führung eines Unternehmens ist ein komplexer Prozess, der in erster Linie mit rechtlichen und zweitens auch mit wirtschaftlichen und finanziellen Aspekten belastet ist. Daher wurde von den Standards eindeutig abgewichen, als dem Nationalen Vollstreckungsbüro (und seinen Vollstreckungsbeamten) die Aufgaben der Unternehmensführung übertragen wurden.⁴⁸ Die Insolvenzgesetzgebung in den mitteleuropäischen Ländern erlaubt es keiner öffentlichen Institution, die Verwaltung von Insolvenzverfahren (sei es Konkurs-, Rehabilitations- oder Reorganisationsverfahren) zu übernehmen. Diese Funktion ist ausschließlich, unabhängigen Privatpersonen und Fachleuten anvertraut.⁴⁹

Auch ein per Gesetz eingeführtes neues Gremium – der dreiköpfige Schlichtungsrat, der sogar einige Funktionen des Insolvenzgerichts übernahm – blieb nicht von Kritik verschont. Der Schlichtungsrat konnte als unflexibles Gremium nicht einmal die ihm gesetzlich zugewiesenen Aufgaben vollständig erfüllen.⁵⁰ Letztlich konnte das dritte Insolvenzgesetz, das eindeutig weit von europäischen Standards entfernt war, seine Rolle nicht angemessen erfüllen. Dies belegen die knapp 100 Zahlungsunfähigkeitsverfahren, die während der fast 13-jährigen Geltungsdauer des Gesetzes von den Gerichten eröffnet wurden, außerdem überwogen in diesen eröffneten Fällen Konkursverfahren. Denn durch Konkursverfahren wurden bedeutende Vermögenswerte privater juristischer Personen in beschleunigter und oft ungerechter Weise an gesicherte Gläubiger – Kommerzbanken und den Staat (Finanzamt) – verteilt. Infolgedessen ist Georgien im Doing-Business-Ranking der Weltbank deutlich abgerutscht.

Die Kritik am Gesetz „Über das Zahlungsunfähigkeitsverfahren“ hat Früchte getragen. Eine unter der Leitung des georgischen Justizministeriums eingerichtete Expertengruppe, in der auch die lokalen und internationalen Experten eingeschaltet waren, hat aktiv mit der Ausarbeitung eines neuen Gesetzes begonnen.

48 Interview mit *R. Migriauli*, „Zur Notwendigkeit der Aufhebung des Zahlungsunfähigkeitsgesetzes von 2007 und dessen Ersetzung durch ein neues Gesetz“, im Buch: Fragen des georgischen Privatrechts, 2. vollständige Auflage, 2016, 143–145.

49 *R. Migriauli*, „Der Rechtsstatus des Konkursverwalters auf der Grundlage einer vergleichenden Analyse des Konkursgesetzes von 1996 und des Zahlungsunfähigkeitsgesetzes von 2007“, im Buch: Fragen des georgischen Privatrechts, 2. vollständige Auflage, 2016, 72.

50 *K. Meskhishvili* in dem Buch: „Grundlagen des Zahlungsunfähigkeitsverfahrens“ nach dem georgischen Gesetz „Über die Rehabilitation und kollektive Befriedigung der Gläubiger“ (Autorenkollektiv), 2021, 12 (in georgischer Sprache).

Das neue Gesetz hätte alle kritischen Anmerkungen zum Zahlungsunfähigkeitsgesetz berücksichtigen und, basierend auf dem Assoziierungsabkommen vom 27. Juni 2014 und unter Berücksichtigung der europäischen Insolvenzregeln, an internationale, insbesondere europäische Standards angepasst werden müssen.⁵¹

Als Ergebnis jahrelanger Arbeit verabschiedete das Parlament Georgiens am 18. September 2020 das Gesetz „Über Rehabilitation und kollektive Befriedigung der Gläubiger“,⁵² das am 1. April 2021 in Kraft trat. Nach fast 25 Jahren der Entwicklung des Insolvenzrechts, von den 90er Jahren des 20. Jahrhunderts bis heute, trat somit das vierte georgische Insolvenzgesetz in Kraft.

7. Das Gesetz „Über Rehabilitation und kollektive Befriedigung der Gläubiger“ vom 18. September 2020

Vor der Verabschiedung des Gesetzes „Über die Rehabilitation und die kollektive Befriedigung der Gläubiger“ (im Folgenden kurz auch „Rehabilitationsgesetz“) wurden zur Ermittlung der Mängel des bestehenden Gesetzes von 2007 zahlreiche Forschungen sowohl unmittelbar durch das Justizministerium als auch – auf dessen Ersuchen – durch die Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) sowie durch die United States Agency for International Development (USAID) durchgeführt. Einschlägige Experten, Praktiker und Wissenschaftler, Regierungsbeamte aus verschiedenen Ministerien und Behörden sowie andere interessierte Parteien, die in der Arbeitsgruppe vereint waren, waren an der Forschungen beteiligt. Die Unterstützung internationaler Experten wurde während der gesamten Ausarbeitung des Gesetzentwurfs gewährleistet. Bei der Erstellung des Gesetzentwurfs wurden die Insolvenzregelungen aus Deutschland, Finnland, dem Vereinigten Königreich, Frankreich, den Vereinigten Staaten und anderer Länder sowie aktuelle Reformen berücksichtigt.⁵³

51 Erläuterungskarte zum Gesetz „Über die Rehabilitation und die kollektive Befriedigung der Gläubiger“, https://info.parliament.ge/file/1/BillReviewContent/254135?utm_source=chatgpt.com

52 Georgischer Gesetzesanzeiger, <https://matsne.gov.ge/document/view/4993950?publication=4>

53 Erläuterungskarte zum Gesetz „Über die Rehabilitation und die kollektive Befriedigung der Gläubiger“, https://info.parliament.ge/file/1/BillReviewContent/254135?utm_source=chatgpt.com

Infolge der von der Arbeitsgruppe durchgeführten Untersuchungen wurde festgestellt, dass eine grundlegende Reform des Insolvenzrechts notwendig sei, was die Erarbeitung eines völlig neuen Gesetzes erfordere, in dem es keine ineffektiven Institutionen mehr gäbe (wie etwa einen Schlichtungsrat oder einen Konkursverwalter mit eingeschränkten Befugnissen). Darüber hinaus hätte das neue reformierte Gesetz dem Insolvenzgericht seine Funktionen zurückgeben, ungesicherten Gläubigern einen angemessenen Platz im Gläubigerregister einräumen und ihren Einfluss auf bestimmte Prozeduren im Verfahren erhöhen sollen. Letztlich sollte das neue Insolvenzgesetz sowohl die rechtlichen als auch die wirtschaftlichen Probleme lösen, die in der Praxis aufgetreten waren. Daher stellte der von der Arbeitsgruppe ausgearbeitete Gesetzentwurf kein unmittelbares Analogon zu der Gesetzgebung eines bestimmten Landes dar. Er vereint Institutionen aus verschiedenen Systemen des Insolvenzrechts, die an die georgische Realität angepasst wurden. Das Ergebnis der Reform des Insolvenzrechts hätte ein Anstieg der Zahl der Anträge an das Insolvenzgericht sein sollen (während der Gültigkeitsdauer des Gesetzes von 2007, in den Jahren 2007-2020, betrug die Zahl der Anträge an das Gericht lediglich 93).

Mit der Verabschiedung des Rehabilitationsgesetzes im Jahr 2020 wurden im Insolvenzrecht umfassende gesetzgeberische Maßnahmen umgesetzt und im Gesetz detailliertere, an moderne Anforderungen angepasste Regelungen eingeführt. Diese Regelungen wurden soweit wie möglich an die internationalen Standards des Insolvenzrechts angenähert. Das Gesetz richtet sich im Wesentlichen nicht nur auf den Schutz der Interessen der Gläubiger, sondern fördert zugleich auch das Rehabilitationsverfahren. Zudem wurde die Rolle des Gerichts im Verlauf des Zahlungsunfähigkeitsverfahrens gestärkt sowie die Rechte und Pflichten der am Verfahren beteiligten Personen erweitert.

Die wichtigsten Neuerungen des neuen Gesetzes betrafen folgende Punkte:

1) Zieländerung. Im Gesetz wird eindeutig hervorgehoben, dass der Gesetzgeber sich um die Rettung des Schuldners und seiner Unternehmen bemüht. Die wesentlichen Schwerpunkte wurden gerade auf die Erhaltung der Unternehmen des Schuldners verlagert, was sich in der Rehabilitation des Schuldners widerspiegelt.⁵⁴ Die Rehabilitation ist als Rechtsinstitut derart in den Vordergrund gerückt, dass sie sich sogar im Titel des Gesetzes erscheint.

54 Rehabilitationsgesetz, Art. 1.

2) Einführung der Umstände der Zahlungsunfähigkeit (als die Verfahrensgründe). Während in den früheren Gesetzen die Kriterien der Zahlungsunfähigkeit nicht normativ festgelegt und deren Auslegung dem Insolvenzgericht überlassen waren, hat das neue Gesetz die Frage der Kriterien der Zahlungsunfähigkeit rechtlich geregelt und in Artikel 7 sechs verschiedene Umstände beschrieben, unter denen der Schuldner, sofern sie vorliegen, als zahlungsunfähig anzusehen ist.

3) Die Arten von Insolvenzanträgen. Gemäß den bisherigen Gesetzen gab es nur eine Art von Zahlungsunfähigkeitsantrag (Konkursantrag): zunächst ein reiner Konkursantrag, in weiteren Gesetzen aber den Zahlungsunfähigkeitsantrag. Das neue Gesetz hat zwei Arten von Anträgen eingeführt: den Zahlungsunfähigkeitsantrag auf Eröffnung des Rehabilitationsverfahrens und den Zahlungsunfähigkeitsantrag auf Eröffnung des Konkursverfahrens.⁵⁵ Dadurch ist dem Schuldner und dem Gläubiger die Möglichkeit gegeben, bereits im Anfangsstadium des Insolvenzverfahrens zu entscheiden, ob das Insolvenzverfahren auf das Überleben des Schuldners und seiner Unternehmen oder auf die Liquidation des Schuldners als insolvente Subjekt gerichtet sein sollte.

4) Regulierte Vereinbarung. Eine der Neuerungen ist die Einführung der regulierten Vereinbarung, die sogar im georgischen Insolvenzrecht eine gewisse Neuheit darstellt. Hierbei handelt es sich um einen Einigungsprozess zwischen einem Insolvenzschuldner und seinen Gläubigern ohne wesentliche gerichtliche Intervention. Dieser Einigungsprozess wird in der Literatur auch als „außergerichtliches Verfahren“ bezeichnet – er wird durch eine Vereinbarung abgeschlossen, bevor das Gericht ein Zahlungsunfähigkeitsverfahren eröffnet.

Der Ausschluss des Insolvenzgerichts im Insolvenzverfahren ist im georgischen Insolvenzrecht nichts Neues. Durch die früheren Gesetze war eine solche Institution bekannt, wie die außergerichtliche Rehabilitation.⁵⁶

Wird die regulierte Vereinbarung als neue Institution in der Insolvenzpraxis etabliert, wird dadurch der Umfang von gerichtlichen Eingriffen verringert und die „übermäßige Belastung“ durch die Insolvenz sowohl für den Schuldner als auch für die Gläubiger vermieden. Das oberste Ziel der regulierten Vereinbarung ist immer wieder die Rettung des Schuldners und seiner Unternehmen, was dessen Liquidation ausschließt.

⁵⁵ Rehabilitationsgesetz, Art. 44-45.

⁵⁶ Vgl. Gesetz „Über das Konkursverfahren“, Art. 10.

5) Moratorium. Das Moratorium kann auch als Neuheit des Gesetzes betrachtet werden. Allerdings hat die genannte Institution nur ihren Namen geändert und sich inhaltlich erweitert. Das Moratorium sieht eine Reihe von Maßnahmen vor, die vom Gericht angeordnet werden und auf das Aufrechterhalten der Insolvenzmasse und der Sicherung der Gläubigeransprüche gerichtet sind⁵⁷. Das Moratorium setzt nicht nur bestimmte gegen den insolventen Schuldner eingeleitete Verfahren aus (z. B. werden Zwangsvollstreckungsmaßnahmen gegen das Vermögen des Schuldners ausgesetzt, ebenso die Durchführung steuerlicher Sicherungsmaßnahmen sowie die Festsetzung von Steuerbußgeldern; zudem wird die Verzinsung und die Berechnung von Strafgebühren auf Verbindlichkeiten, die vor Eröffnung des Insolvenzverfahrens entstanden sind, ausgesetzt usw.), sondern verbietet auch bestimmte Handlungen seitens des Schuldners und der Gläubiger (z. B. ist die Befriedigung des Gläubigers aus dem Sicherungsgegenstand unzulässig, ebenso die Ausschüttung von Dividenden oder eine Reorganisation/Liquidation usw.).⁵⁸

6) Zahlungsunfähigkeitspraktiker. Eine Person mit diesem Status kann laut Gesetz zu folgenden vier Positionen ernannt werden: Rehabilitationsverwalter, Konkursverwalter, Rehabilitations-Supervisor und Supervisor für Regulierte Vereinbarung.⁵⁹

Für die Besetzung einer Position des Zahlungsunfähigkeitspraktikers sind durch das Gesetz eine Reihe von Voraussetzungen vorgesehen. In erster Linie muss der Zahlungsunfähigkeitspraktiker über die entsprechende Qualifikation und Erfahrung verfügen sowie einer bestimmten beruflichen Gemeinschaft angehören. Ferner unterliegt der Zahlungsunfähigkeitspraktiker der Autorisierung durch das Nationale Vollstreckungsbüro, wofür der Kandidat ein kostenpflichtiges Zertifizierungsprogramm absolvieren muss (Abschluss eines Ausbildungskurses und Bestehen einer Qualifikationsprüfung).

Nach Vergabe des Status „Zahlungsunfähigkeitspraktiker“ wird die Person in das Einheitliche Register der Zahlungsunfähigkeitspraktiker eingetragen und entweder durch ein elektronisches Auswahlsystem nach dem Prinzip der Zufallsverteilung oder in alphabetischer Reihenfolge der im Register gespeicherten Daten auf eine bestimmte Position berufen.

⁵⁷ Rehabilitationsgesetz, Art. 55-58.

⁵⁸ M. Ketiladze, Maßnahme des Moratoriums im Rahmen des Rehabilitationsverfahrens, Zeitschrift: Recht und die Welt, Nr. 26, 2023 (in georgischer Sprache).

⁵⁹ Rehabilitationsgesetz, Art. 11.

Eine weitere Neuerung des Gesetzes ist die Einführung eines Modells, das auf einer steigenden Vergütungsskala für die Arbeit von Zahlungsunfähigkeitspraktiker beruht.⁶⁰

7) Belassung des Schuldners in der Eigenverwaltung. Durch das neue Gesetz ist diese Institution in einer verfeinerten Form ausgestaltet, als sie im Gesetz von 2007 vorgesehen war. Das Gesetz von 2007 räumte dem Schuldner (Geschäftsführer des Unternehmens) im Rehabilitationsverfahren bestimmte Befugnisse ein, deren Umfang von der Gläubigerversammlung festgelegt wurde.⁶¹ Das Rehabilitationsgesetz hingegen räumt dem Schuldner im Rahmen des Rehabilitationsverfahrens die volle Befugnis ein und überträgt ihm die volle Leitung des Unternehmens, jedoch mit bestimmten Einschränkungen, was bedeutet, dass für bestimmte Maßnahmen die Zustimmung des Rehabilitations-Supervisors erforderlich ist.⁶²

Beschließt das Gericht die Belassung des Schuldners in der Eigenverwaltung im Rehabilitationsverfahren, wird kein Rehabilitationsverwalter bestellt und alle seine Befugnisse, mit Ausnahme von Sonderbefugnissen, gehen auf den Schuldner (Geschäftsführer des Unternehmens) über. Zudem muss die Belassung des Schuldners in der Eigenverwaltung vom Gericht als angemessen und begründet angesehen werden.

In einem solchen Fall muss das Gericht die Haltung des Schuldners vor Eröffnung des Insolvenzverfahrens berücksichtigen, nämlich ob er seine unternehmerischen Tätigkeiten in gutem Glauben ausgeübt hat, ob er das Vermögen des Schuldners ordnungsgemäß verwaltet hat usw.

Die Belassung des Schuldners in der Eigenverwaltung ist im Konkursverfahren nicht vorgesehen.⁶³

8) Erweiterung der Befugnisse des Konkursverwalters bei der Verwertung der Insolvenzmasse. Nach dem bisherigen Gesetz war der Konkursverwalter hinsichtlich der Verwertungsformen der Insolvenzmasse stark eingeschränkt. Er durfte die Vermögenswerte der Insolvenzmasse nicht einmal selbst veräußern – hierfür musste er sich an das Nationale Vollstreckungsbüro wenden, und auch

60 Rehabilitationsgesetz, Art. 119.

61 Gesetz „Über Zahlungsunfähigkeitsverfahren“, Artikel 44.4.

62 Rehabilitationsgesetz, Art. 64, 79 und 73.

63 M. Ketiladze, Die für die Geschäftsführung und Vertretung der Schuldnergesellschaft befugte Person im Rehabilitationsverfahren, Zeitschrift: Recht und die Welt, Nr. 24, 2022.

hier war nur eine Verwertungsform zulässig, nämlich die Verwertung durch Versteigerung.

Das neue Gesetz hat dem Konkursverwalter erweiterte Befugnisse eingeräumt, nämlich kann er die Verwertung der Insolvenzmasse mit sämtlichen gesetzlich zulässigen Verwertungsformen vornehmen.⁶⁴ Bei der Wahl der Verwertungsform ist der Konkursverwalter völlig frei und unabhängig.

Diese Verwertungsformen können beispielsweise Versteigerung, freier Verkauf an Dritte, bedingter Verkauf im Rahmen eines Tenders oder die freie Auswahl des Käufers sein. Der Konkursverwalter muss die Verwertungsform so wählen, dass sie schnell und effizient ist und beim Verkauf des Vermögens den höchstmöglichen Erlös erzielt, der letztlich dazu dient, die Forderungen der Gläubiger bestmöglich zu befriedigen. Verzögerungen im Veräußerungsverfahren dürfen nicht zu einer Wertminderung des zur Insolvenzmasse gehörenden Vermögens führen.

9) Rangfolge der Gläubigerbefriedigung. Nach dem neuen Gesetz ist die Rangfolge der Gläubiger gerechter geregelt. Soziale Forderungen rücken wieder an die erste Stelle.⁶⁵ Insbesondere ausstehende Gehälter und Urlaubsansprüche der letzten drei Monate vor Eröffnung des Insolvenzverfahrens sowie Entschädigungen für Arbeitsunfälle (sogenannte Preference Forderungen) wurde als ungesicherte Forderungen eingestuft und müssen vorrangig beglichen werden.

Die obige Liste stellt daher nur einen kleinen Ausschnitt der Neuerungen dar, die das Rehabilitationsgesetz von 2020 bietet. Fakt ist, dass das neue Gesetz die Philosophie des Zahlungsunfähigkeitsverfahrens verändert hat, indem es die Rettung und Rehabilitation des Schuldners und seines Unternehmens zur Priorität machte. Infolgedessen ist mit einem deutlichen Anstieg der Rehabilitationsfälle zu rechnen.

Darüber hinaus darf nicht außer Acht gelassen werden, dass das neue Gesetz im Vergleich zu allen vorherigen Gesetzen deutlich ausgefeilter und detaillierter ist. Sein Umfang hat sich mehr als verdoppelt, und jedes Kapitel (nun 14 statt 8) beschreibt die darin behandelten Institutionen eingehender.

⁶⁴ Rehabilitationsgesetz, Art. 101.

⁶⁵ Rehabilitationsgesetz, Art. 104.

Was braucht es für eine kompetente Rechtsberatung? Nicht nur Rechtskenntnisse

Ein unwissenschaftlicher Erlebnisbericht

Das Ende der Sowjetunion kam vielleicht nicht für alle, aber doch für die meisten überraschend schnell. Das Ende fiel in eine Zeit, als die Vision vorherrschte, dass Grenzen und Grenzregime an Bedeutung verlieren und einen Austausch von Gütern und Wissen im globalen Raum zu fördern. Auf diese Weise sollte Wohlstand und Demokratie in möglichst allen Teilen der Welt entstehen.

Damit einher ging die Idee, dass große Mächte ihre politische Feindschaft in wirtschaftliche Konkurrenz überführen und der Wettbewerb im Bereich Wissenschaft, Technologie und Wirtschaft stattfindet und nicht am Anteil des Wehretats am Bruttoinlandprodukt, wie der Politikwissenschaftler Herfried Münkler in der Einleitung seines Buches *Macht im Umbruch* schreibt. Es war eine wunderbare Idee.

In diesem Geist, im Geist des „Wandel durch Handel“, fand auch die Beratung aus dem „Team Knieper“ in den Ländern, den postsowjetischen oder Gus-Staaten, statt. Das Team, finanziert von der GTZ, bestand u.a. in Bremen aus Lia Shatberashvili, Thomas Meyer, Iris Muth sowie Kurzeitexperten - Professoren der Universität Bremen, Gerichts-präsidenten und Richter meist der Bremer Justiz; die männliche Form beschreibt die Realität.

Ziel war nicht die eigene Rechtsordnung zu exportieren, sondern zunächst die Wirtschaftsrechtsreformen, die für die notwendig gewordenen Wirtschaftsreformen anstanden, beratend zu begleiten. Dabei war von entscheidender

* Ellen Best ist Vizepräsidentin des Amtsgerichts Bremen a.D., Vorstandsmitglied der Europa Union, Landesverband Bremen.

Bedeutung die Grundhaltung, dass zum Verständnis von den dortigen Zivilgesetzbüchern den gesellschafts- und rechtshistorische Zusammenhang zu erkennen.

Was bedeutete das in der Praxis?

Als Rolf im Sommer 2000 auf unserer Terrasse saß, und uns von Georgien erzählte, hörten wir ihm fasziniert zu. Rolf war gerade wieder einmal von Tbilisi zurückgekehrt, er war dort seit Mitte der 90-iger Jahre beratend tätig, und schilderte ein Land mit spektakulärer Landschaft - Berge und Meer - mildem Klima, gute Küche und natürlich diese beeindruckenden Menschen. Die Begeisterung steckte uns alle an, wir wollten unbedingt dorthin fahren, und hätte Rolf uns an dem Abend ein Haus verkaufen wollen - wir hätten zugeschlagen. Doch Rolf war weder als Tourismusmanager unterwegs noch als Immobilienmakler, nein er war ja, wie uns klar war, Dr. Rolf Knieper, Professor der Rechtswissenschaft und in Georgien tätig, um den Aufbau eines Rechtsstaates zu unterstützen.

Er hatte bereits geholfen, ein bürgerliches Gesetzbuch für Georgien zu schreiben, aufgezeigt, welche Strukturen für einen Rechtsstaat erforderlich sind. Es hätte auch ein langweiliger Abend werden können. Stattdessen erfuhren wir von seinen ersten Aufenthalten in der vom Bürgerkrieg gezeichneten Hauptstadt Tbilisi. Von den Beratungen mit georgischen Zivilrechtlern, auch bei Stromausfällen, Kälte oder Hitze, um ein georgisches Zivilgesetzbuch zu schreiben. Die Begeisterung mit der Rolf von diesen Menschen sprach, die unter diesen Bedingungen mit vollem Einsatz, ein Gesetz schrieben, war ansteckend. Georgien war nicht nur nach mehreren Jahrhunderten ein eigenständiger Staat, sondern musste, und wollte natürlich auch, sich eine neue Ordnung geben. In jeder Hinsicht Neuland mit einem Präsidenten aus dem vergangenen Regime. Was Rolf beschrieb, waren nicht die gelegentlich blutleeren Ausführungen über zivilrechtliche Regelungen in einer gesetzelten Gesellschaft mit ausufernden, kleinstteiligen Vorschriften oder Rechtsprechung, sondern der Elan und der Mut, eine gesellschaftliche Ordnung mit neuen Spielregeln zu entwickeln, die Grundlage für eine freie und faire Gesellschaft. Dazu brauchte es eine Art von Leidenschaft, und die hatte Rolf.

Die ersten Georgier in meinem Leben waren Lia Shatberashvili, die Büroleiterin im „Team Knieper“ und Sulchan Gamkrelidze, der mich als Leiter des Rechtsprojekts vor Ort im Bremer Amtsgericht besuchte. Wir haben bis heute freundschaftlichen Kontakt. Mein erster Besuch in Georgien war im Dezember 2000 in Tbilisi gemeinsam mit Rolf und einem weiteren Kollegen. Ich war zu dem

Thema „Presse und Justiz“ mitgekommen, denn ich war damals schon länger Pressesprecherin des Amtsgerichts in Bremen. Die Stadt war grau, kaputte Straßen, wenig Verkehr, candle light dinner, weil es häufig keinen Strom gab, manchmal auch kein Wasser. An die Annehmlichkeiten eines Marriotts war nicht zu denken. Wir blieben eine Woche, damals gab es noch nicht so viele Flüge, und wohnten in einem einfachen Hotel in der Nähe des armenischen Markts. Wir besuchten Lado Chanturia, den damaligen Präsidenten des Obersten Gerichts und ich lernte meine Freundin Tamara kennen, die kurz darauf Richterin am Obersten Gericht wurde. Ich erfuhr, dass Rolf und Lado sich schon in den 90-iger Jahren in Deutschland kennengelernt hatten. Von den beiden ging eine bemerkenswerte Energie aus, die gemeinsam Überzeugung und die Leidenschaft Georgien auf seinem Weg in einen Rechtsstaat und in eine frei gewählte Völkergemeinschaft zu unterstützen.

Natürlich beeindruckte Rolf mit seiner Rechtskompetenz und der nicht immer verbreiteten Fähigkeit dieses Wissen praktisch anzuwenden, aber ich lernte bei diesem Besuch noch eine weitere Fähigkeit von Rolf kennen: ein guter Tamada zu sein, witzige Trinksprüche sagen, dem Alkohol zusprechen und am nächsten Morgen pünktlich mit gewohntem Scharfsinn über Rechtsreformen zu diskutieren. Wir waren fast jeden Abend zu einer Tafel eingeladen. Rolf kannte viele Menschen, machte Mut, war zugewandt und unterhaltsam und damit ein gern gesehener Gast.

Das war natürlich nicht nur in Georgien so. Dezember 2002 in Kirgistan, ein Land an der chinesischen Grenze, von dem ich kaum wusste, dass es existiert, das 1991 selbstständig geworden war. Auch hier ist Rolf gut bekannt und vernetzt und ist im Obersten Gericht ein gern gesehener Gast.

Die Präsidentin des Obersten Gerichts ist eine sympathische, interessierte und attraktive Frau. Nach einem vollen Tag Konferenz in Bishkek zum Thema Presse und Justiz, anschließend Abendessen mit Trinksprüchen, verkündet sie, dass sie gerne kegeln gehen würde. Sie liebe kegeln und wir könnten ihr keinen größeren Gefallen tun, als jetzt mitzukommen. Ein überraschendes Ansinnen nach Konferenz und Abendessen, aber warum nicht. Und tatsächlich wir brechen auf zum Kegelzentrum und wer ist mittendrin, kegelt alle neune und ist bester Stimmung? Natürlich Rolf. Wir kegeln bis nach Mitternacht, zum Abschluss des Abends noch ein Drink und am nächsten Morgen? Geht die Konferenz weiter.

Rolf begrüßt die Kegelschwestern und Brüder vom Vorabend, die nicht alle pünktlich sind, wie Teamkollegen und Kolleginnen.

Sommer 2003 in Jerewan. Eine Stadt mit damals unzähligen Cafés, Restaurants und Bars. Das Las Vegas für Menschen aus dem Iran. Und immer den Blick auf den Berg Ararat, der wichtigste Berg für Armenier, der Berg, der nicht in ihrem Land liegt.

Das Bürgerliche Gesetzbuch soll auch in Armenien reformiert werden, es soll ein modernes Gesetz werden, dass den veränderten Lebensverhältnissen Rechnung trägt. Ein Knackpunkt bei dem Arbeitstreffen mit den führenden Zivilrechtlern (es war keine Frau dabei): Verträge sollen auch mündlich zustande kommen, die zwingende Schriftform entfallen. Die Änderung hätte eine große Auswirkung im Alltag, bei Miet- und Arbeitsverträgen oder z.B. beim Autokauf. Ohne schriftliche Verträge standen Arbeitnehmer, Mieter, Käufer ohne Rechtsschutz da. Gerichte hatten Mühe bei arbeitsrechtlichen Auseinandersetzungen, Mietkonflikten oder Leistungsstörungen etwa bei Kaufverträgen ein Rechtsinstitut zu entwickeln, das ein Minimum an Rechten für die Vertragsparteien vorsah. Rolf erklärte anschaulich mit Ausflügen in das römische Recht das Abstraktionsprinzip, die Vorzüge der mündlich, auch inzidenter abgeschlossenen Verträge, wie gut das alles in Deutschland und anderen Ländern funktionierte. Es war nicht einfach. Natürlich folgten insbesondere jüngere Rechtswissenschaftler Rolf, aber es fielen auch harte Bemerkungen im Laufe der weitergehenden Beratungen, wie „Wie haben den Aghet (Armenozid) überlebt, wir überleben auch das.“

Der Abend nach dem Arbeitstreffen verlief harmonisch. Dieses Mal kein Wein, sondern armenischen Cognac. Cognac als Aperitif, Cognac als Begleitung zum Essen, Cognac als Digestiv. Natürlich Trinksprüche beim Essen, gegenseitig Wertschätzung, spät ein letztes Glas und am nächsten Morgen pünktlich geht es mit Rechtstheorien weiter.

Letztlich wurde das Gesetz modernisiert.

Es gäbe so viele Geschichten mit Rolf auch aus anderen Ländern von anderen Tafeln zu erzählen. Eine Tafel in Almaty, etwa im Jahr 2004, die Dankbarkeit des Juraprofessor Sulemeinov, den Rolf in der Mitte der 90iger in Almaty aufgesucht und unterstützt hatte, als es dort nach dem Zusammenbruch des Sowjetsystems nichts gab. Als, wie die ältere Dolmetscherin Lydia erzählte, manche Menschen fast verhungerten. Menschen, die gewohnt waren, dass der Staat sich kümmerte, den es aber nicht mehr gab.

Es gab die Treffen in Bremen und Berlin mit den Juristinnen und Juristen aus den neun Ländern, die an dem Projekt Rechtstransformation in den GUS Staaten der GTZ beteiligt waren. Ich lernte, die „Mutter“ des neuen Zivilgesetzbuches in der Mongolei kennen, der Grünkohl und Pinkel wegen des Fettgehalts bekannt waren. Fett wurde in der Mongolei geschätzt. Shirin aus Turkmenistan, erklärt, welche rechtlichen Probleme in Turkmenistan bei Scheidungen auftreten. Sie liebte übrigens Bremen wegen des Regens, in Turkmenistan schien immer die Sonne. Armenische Experten kamen ins Gespräch mit asserischen. Die Rechtberatung war in jedem Fall vielfältig.

Diese Anekdoten zeigen, die besonderen Fähigkeiten von Rolf. Was hatte Rolf, was andere Experten nicht hatten?

Es gab und gibt in Deutschland viele Professoren der Rechts-wissenschaft, Zivilrechtler, die vielleicht eine noch bessere wissenschaftliche Reputation hatten, mehr Artikel geschrieben oder gar Standardwerke veröffentlicht hatten. Aber das Talent von Rolf mit Menschen umzugehen, sich auf die Verhältnisse der Länder einzulassen, ihnen Orientierung in der Unsicherheit zu geben und die russische Sprache für das Projekt zu erlernen, war herausragend.

Im Krieg geboren, und in der Nachkriegszeit aufgewachsen hatte er als Kind eine Gesellschaft erlebt, die ganz unten war. Hatte die Fähigkeiten von Menschen sich selbst zu organisieren, um irgendwie zu überleben, gesehen. So traf er auf etwas, was ihm bekannt war. Seine Herangehensweise war nicht, festzulegen, unter welchen Bedingungen er bereit war, zu arbeiten, sondern die Bedingungen zu akzeptieren, die er vorfand und Unterstützung zu geben, am Welt-handel teilzunehmen. Es war seine unkonventionelle Art, und dabei gleichzeitig konventionell denken und handeln zu können. Herauszuheben, und sicher für den Erfolg des Projekts entscheidend, war und ist seine Fähigkeit, das Recht in historischen und gesellschaftlichen Entwicklung einzuordnen. Das Rechtssystem in Russland und in der Sowjetunion basierte auf Kontinentalrecht und war insofern wesensverwandt mit europäischem Recht mit Ausnahme von britischem Recht. Das kollidierte durchaus mit den Vorstellungen von US-amerikanischen Beratungen. Die USA, die in der historischen Situation der 90-iger und 00 Jahre, die einzige Weltmacht waren, waren von ihrem System des common law, den check und balances, die damals sicher noch funktionierten, aus ihrer Sicht verständlicherweise überzeugt.

Das Lobbying war aus amerikanischer Sicht nachvollziehbar, aber von wenig Verständnis über die historischen Entwicklungen getragen.

Ein Rechtssystem kann aber nicht wie ein neues Kleid ohne Anprobe übergestreift werden - es sitzt dann einfach nicht. Es ist auch nicht möglich wie in einem Supermarkt, das Beste aus einem Rechtssystem verschiedenster Länder zu nehmen und alles zusammen zu würfeln. Das passt für keine Gesellschaft. Menschen müssen ihre Rechtsordnung wenigstens halbwegs verstehen können und Vertrauen in diese Ordnung haben. Dazu gehört zwingend, dass die Anwendenden in Gerichten, Anwaltschaft, Universitäten usw. selbst das Gesetz verstehen, auslegen und nachvollziehbar erklären können. Das Rechtssystem muss daher wenigstens einigermaßen mit der gesellschaftlichen Realität übereinstimmen. Die Entwicklungen zu einem Rechtsstaat und auch in in einem Rechtsstaat können nicht einfach gekauft werden, auch nicht mit viel Geld. Rechtsstaatlichkeit ist ein mühsamer, stets anhaltender Prozess.

Für uns alle, die wir in dem „Team Knieper“ von der Universität Bremen aus starteten, waren die Erfahrungen und Begegnungen in den postsowjetischen Ländern eine wichtige Erfahrung. Es entstanden anhaltende Freundschaften, ein Verständnis für die Gesellschaften in den betreffenden Ländern und die Möglichkeit, Entwicklungen einschätzen zu können. Dafür bin dankbar, bin ich auch Rolf dankbar.

Heute schauen wir auf eine andere Welt. Wir mussten lernen, dass Wandel durch Handel, eine Zukunft in Frieden und Wohlstand kein Selbstläufer und Automatismus ist. Aber das bedeutet erst recht, nicht aufzugeben, sondern sich für Menschenrechte und Völkerrecht einzusetzen. Ich bewundere die Menschen, darunter viele junge Frauen, in vielen Ländern, die tagtäglich dafür kämpfen. Ich hoffe, es gibt viele „Teams Knieper“ dabei, wobei es nicht um das Geschlecht geht, sondern den spirit! Die Zeit würde mit solchen Projekten wieder eine andere werden.

Die gegenwärtige Krise der Entwicklungszusammenarbeit

1. Vorwort

Vor der Abfassung dieses Artikels befand ich mich in einer Phase tiefgehender Überlegungen, da er nicht die Form einer gewöhnlichen wissenschaftlichen Arbeit annehmen konnte. Die Thematik betrifft sowohl eine konkrete Epoche als auch eine Persönlichkeit, die bei der Gestaltung dieser Epoche eine bedeutende Rolle gespielt hat. Je größer der Erfolg, desto vielfältiger und widersprüchlicher sind häufig die Herangehensweisen an diesen Erfolg und an dessen Urheber. Das lässt sich wohl kaum vermeiden und gehört vermutlich zu den normalen Erscheinungen des öffentlichen Lebens.

Nicht selten beruhen Urteile über Menschen eher auf Gefühlen als auf rationaler Überlegung. Es gibt jedoch Ausnahmen, in denen bei der Bewertung einer Persönlichkeit eine Übereinstimmung von Verstand und Gefühl – diesen zwei unterschiedlichen Ausgangspunkten – stattfindet. In Georgien wurde die Persönlichkeit von Professor Rolf Knieper gerade durch diese beiden Prinzipien und ihre harmonische Verbindung beurteilt. Man schätzte ihn als Freund und achtete ihn zugleich als herausragenden Fachmann.

Und womit begann all dies? Es heißt, am Anfang sei das Wort gewesen. In der Zeit der von Michail Gorbatschow eingeleiteten *Perestroika* führte die Liberalisierung der Meinungs- und Ausdrucksfreiheit – neben anderen Umständen – zum Zerfall des Warschauer Paktes und der Sowjetunion.

In der Folge war Deutschland das erste Land, das die Unabhängigkeit Georgiens anerkannte. Seit 1992 begann auf der Grundlage dieser Anerkennung sowie

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der daraus erwachsenen Zusammenarbeit und partnerschaftlichen Beziehungen in Georgien – mit Unterstützung der deutschen Bundesregierung – ein Reformprozess im Bereich des Rechts- und des Justizsystems.

Warum gerade das Recht? Wahrscheinlich deshalb, weil Recht und Gerichtsbarkeit in enger Wechselbeziehung zur Wirtschaft stehen. Die Durchführung wirtschaftlicher Reformen war ohne eine Reform des Rechts – insbesondere ohne eine Reform des Privatrechts – kaum vorstellbar. Nach dem Fall der Berliner Mauer stellte sich in den Ländern Osteuropas, darunter auch in Georgien, als vorrangige Aufgabe der Übergang von der sowjetischen administrativ-befehlsbasierten Wirtschaftsordnung zu einer marktwirtschaftlichen Ordnung. Dieser Prozess war alles andere als einfach. Er erforderte, wie bereits zuvor angedeutet, eine entsprechende rechtliche Grundlage.

Von deutscher Seite war es Professor Rolf Knieper, der die Leitung dieser umfassenden Reform übernommen hat. Dieser Beitrag ist Rolf Knieper zum 85. Geburtstag gewidmet.

2. Das „Prinzip des Übergangs“ in der Lehre Hegels und die Krise der Entwicklungszusammenarbeit

Die Welt ist von Widersprüchen durchzogen. Gerade vor dem Hintergrund dieser Widersprüche hat Hegel eine Denkweise entwickelt, die Fortschritt und Entwicklung als Möglichkeit begreift. Es handelt sich um das Erreichen von Erfolg durch die Nutzung des Prozesses der Gegensätze. Hegel gliedert diesen Prozess in drei Stufen: die Negation, die Bewahrung und die Aufhebung unter Hervorbringung des Neuen. Die Negation bedeutet dabei nicht die vollständige Verneinung, sondern schließt das Unverändertlassen bestimmter Elemente ein – ihr Bewahren, Konservieren und Erinnern – um sie in eine nächste Entwicklungsstufe zu überführen.¹

Entgegengesetzte Kräfte treten auf dem Wege der dialektischen Bewegung in eine neue Dimension ein und bringen Neues hervor. Dieser Begriff bezeichnet somit nicht lediglich einen formalen Übergang von einem Zustand in einen anderen, sondern bildet die Grundlage für die weitere Entfaltung der Idee.

1 G.W.F. Hegel, *Wissenschaft der Logik I*, Suhrkamp Taschenbuch Wissenschaft, Frankfurt am Main, 2020, 82-115; 166 – 171.

Wenn wir einen Blick auf die Weltgeschichte werfen, erkennen wir, dass es sich hierbei um eine hegelsche Entwicklung handelt – den Übergang von einem qualitativen Zustand in einen anderen. In Bezug auf die Politik der Entwicklungszusammenarbeit zeigt sich diese gerade in diesem Übergangsprozess als Triebkraft der „*Transformation*“ von Gesellschaften und ihrer Versuche zur „*beiderseitigen Harmonisierung*“.

Versuchen wir, einen Blick in die Vergangenheit zu werfen, der uns die Licht- und Schattenseiten des heutigen Zusammenspiels von internationaler Politik und Entwicklungszusammenarbeit besser erkennen lässt.

Bereits in der Antike lassen sich Anzeichen von Entwicklungszusammenarbeit in den internationalen Beziehungen erkennen. Ihre Geschichte führt uns in die Welt der antiken Zivilisationen zurück. Seit der Antike bis in die Gegenwart hat Entwicklungszusammenarbeit eine bedeutende Rolle beim Fortschritt der globalen Zivilisationen gespielt. Gleichzeitig weist sie in allen Epochen eine bestimmte Charakteristik auf – sie war niemals rein altruistisch. Hinter der Entwicklungszusammenarbeit standen und stehen häufig die unmittelbaren und/oder perspektivischen Interessen mächtiger Staaten. Dies wurde besonders deutlich in der jüngeren Geschichte Georgiens.

Wenden wir uns erneut der antiken Welt zu: Historisch war Entwicklungszusammenarbeit stets mit mehreren sozialen Grundlagen verbunden. Sie stand in engem Zusammenhang mit der Verbreitung von Kultur, Wirtschaft, Politik und Rechtspolitik, durch die einerseits unterschiedliche Zivilisationen harmonisiert wurden, andererseits jedoch auch eine Art paralleler „*weicher Macht*“ wirksam war – teilweise zusätzlich zum Einsatz militärischer Mittel, in einzelnen Fällen aber auch ohne diese. Sie stellte und stellt somit ein wirksames Instrument hybrider Einflüsse und globaler Spannungen dar.

Der beschriebene Prozess wird besonders deutlich am Beispiel Ägyptens, Mesopotamiens und der angrenzenden Regionen (3.–1. Jahrtausend v. Chr.). Der Export von Zivilisation erfolgte vor allem durch Handel und diplomatische Beziehungen.

Ägypten betrieb Handel mit Phönizien und Kanaan. Darüber hinaus verbreitete es Wissen – insbesondere in den Bereichen Astronomie, Medizin und Kalenderwesen – nach Babylon und später in die griechische Welt. Gleichzeitig übte Ägypten Einfluss auf die Religion und Philosophie des antiken Griechenlands aus.

Phönizien (ca. 2500–539 v. Chr.) ist ein besonders anschauliches Beispiel dafür, wie auch kleine Staaten durch starke kulturelle Grundlagen und ihre geopolitische Lage großen Einfluss auf mächtigere Länder ausüben können. Das phönizische Alphabet bildete die Grundlage für das griechische und lateinische Alphabet. Phönizien verbreitete Techniken wie Glasverarbeitung, Textilfärbung und Schiffbau zunächst in Griechenland und später in Rom. Zudem unterhielt Phönizien Kolonien, darunter Karthago und weitere Mittelmeerstaaten, die gleichzeitig Träger phönizischer Kultur und Handelspartner waren.²

Ein klassisches Beispiel für globale Entwicklungszusammenarbeit in der Antike war die hellenistische Periode (323–30 v. Chr.), deren Grundlage die Eroberungen Alexanders des Großen bildeten. Bekannt ist, dass Aristoteles, der berühmte Philosoph und Erzieher Alexanders, mit der von ihm initiierten Idee des Exports der griechischen Zivilisation nicht einverstanden war. Alexander strebte danach, einen Weltstaat zu schaffen, der sich jedoch nicht allein durch militärische Macht halten lassen. Die griechische Zivilisation sollte dabei das Material sein, aus dem ein universelles Reich „*geschmiedet*“ würde.

Aristoteles hingegen ging nicht von globalen Entwicklungsperspektiven aus. Für ihn endete die Welt an den Mauern der polis-demokratischen Strukturen. Gleichzeitig teilte er die Welt in Griechen und Barbaren. Aristoteles war der Ansicht, dass die Barbaren von Natur aus nicht über die Eigenschaften verfügten, die sie mit der griechischen Welt hätten vereinen können. Jedes Volk habe seine spezifische Umwelt, und eine Veränderung dieser Umwelt würde nichts Gutes bringen. Darüber hinaus sah Aristoteles in dieser Idee auch die Gefahr einer Degeneration der griechischen Zivilisation.

Nichtsdestotrotz versuchte Alexander, den hellenistischen Raum zu erweitern. In den eroberten Ländern verbreiteten sich griechische medizinische und philosophische Lehren. Wissenschaftliche Zentren entstanden in Form der

2 *Herodot*, Historien, Band I, Verlag der Staatlichen Universität Tbilisi, Tbilisi 1975, 37 (in georgische Sprache); *L. Sanikidze*, Geschichte der antiken Länder. Die Epoche der Punischen Kriege, Verlag „Tsodna“, 14 (in georgischer Sprache); *E. Gombrich*, Eine kurze Weltgeschichte, Bakur-Sulakauri-Verlag, Tbilisi 2022, 36–38 (in georgischer Sprache); *R. Gordeziani*, Die griechische Zivilisation, Band I, Bakur-Sulakauri-Verlag, Tbilisi 2019, 165 (in georgischer Sprache).

„alexandrinischen Bibliotheken“, in denen Gelehrte aus vielen Ländern zusammenkamen.³

Ähnliche Bestrebungen gab es auch im Römischen Reich. *„Rom hat die Welt dreifach erobert: zuerst mit seinen Waffen, zweitens mit seiner Religion, und drittens mit dem Recht – und in allen drei Fällen hat es die Welt vereinigt: im ersten Fall als einheitlichen Staat, im zweiten Fall als einheitliche Religion und im dritten Fall durch ein einheitliches Recht“*⁴, schrieb Rudolf von Jhering in seinem Werk *Entwicklungsgeschichte des römischen Rechts*.

Darauf folgten das Mittelalter und die frühe Neuzeit. Die Jahrhunderte V–XV sind besonders durch die Kreuzzüge und die Intensivierung von Handelsbeziehungen geprägt. In Europa bildeten die Handelsstädte „Stadtstaaten“, die Handelsnetzwerke aufbauten, wie beispielsweise der Städtebund der Hanse. Erwähnenswert ist auch die deutsche Politik des *Drang nach Osten*, die später ihre kulturelle Fortsetzung fand. Diese kulturelle Fortsetzung entwickelte sich jedoch im 20. Jahrhundert politisch-militaristisch, unter den Bedingungen des Dritten Reiches.

Ebenso interessant ist die kulturelle Expansion Englands, Spaniens, Portugals, Frankreichs und der Niederlande nach Großbritannien, in den amerikanischen Kontinent und nach Afrika und Südostasien. Ein besonders wirksames Mittel der Einflussnahme war die Verbreitung des Glaubens, sichtbar durch die europäische Missionspolitik und die Islamisierung durch das Osmanische Reich.

Betrachtet man das Russische Reich kurz, so verfolgte es die sogenannte Politik der *„Peitsche und des Zuckerbrots“* (Политика кнута и пряника). Unter dem „Zuckerbrot“ waren kulturelle Einflüsse zu verstehen. Allgemein bekannt ist, dass die harte Politik des Russischen Reiches im Kaukasus – insbesondere auf dem Gebiet Georgiens – auf große Unzufriedenheit der lokalen Bevölkerung stieß. Aus diesem Grund ersetzte Russland die strengen Generalgouverneure im Jahr 1844 durch den Grafen Michail Woronzow (1782–1856) als Generalgouverneur von Tbilisi im Kaukasus. Woronzow gilt als das beste Beispiel für russische

3 L. Gigineischwili, Gespräche über die antike Philosophie, Verlag der Akademie des Denkens, 2022, 132 (in georgischer Sprache); R. Gordeziani, Die griechische Zivilisation, Band I, Bakur-Sulakauri-Verlag, Tbilisi 2019, 7–38 (in georgischer Sprache); M. Tschelidse, Die Philosophie des Hellenismus, Verlag der Staatlichen Universität Tbilisi, 1992, 3–32 (in georgischer Sprache).

4 Zit. in: Ю. С. Гамбаров, Курс Гражданского Права, Том I, Часть Общая, С.-Петербург, 1911, 110, 111.

„*weiche Macht*“ in der Geschichte der Beziehungen zwischen Russland und dem Kaukasus.

Wenn man die im Mittelalter begonnene und später fortgesetzte Entwicklung betrachtet, erkennt man, dass diese Perioden die Grundlage für die klassische Kolonialära legten, die weltweit vor allem im 19. Jahrhundert begann.

Wie bekannt ist, markiert das 20. Jahrhundert den Beginn der Dekolonialisierung. Mit dieser Epoche ist die erste Phase der Entwicklungszusammenarbeit verbunden, die auf Entwicklungs- bzw. Aufbauhilfe (*Development Assistance*) abzielte. Der Begriff der „*Hilfe*“, der bis 1945 dominierte und eng mit kolonialer „*Fürsorge*“ verknüpft war, endete mit Beginn des amerikanischen Wiederaufbauprojekts für Europa, insbesondere für Deutschland. Dieses Projekt ist allgemein als Marshallplan (1948) bekannt.

Die Umsetzung des Marshallplans stellte eine große Erfolgsgeschichte Westeuropas dar, die gleichzeitig den Beginn der erheblichen militärisch-politischen Einflussnahme der Vereinigten Staaten auf den europäischen Kontinent markierte. Darauf folgte die Dekolonialisierung in Afrika und Asien, die die Politik der Entwicklungszusammenarbeit auf eine neue Stufe hob. Die aus der Dekolonialisierung hervorgegangenen neuen Staaten benötigten dringend und unmittelbar Unterstützung. Ehemalige Hegemonialmächte – und nicht nur sie – traten als Geber dieser Hilfe auf.

Der Hilfeprozess hatte jedoch über die bloße Unterstützung hinaus weitere Effekte: Er stellte eine moderne Methode dar, politische und ökonomische Abhängigkeiten ehemaliger Kolonien von den ehemaligen Hegemonialmächten aufrechtzuerhalten. In dieser Zeit wurden auch die ersten Geberorganisationen gegründet.

Ab 1970 bis zum Ende der 1990er Jahre geriet die Entwicklungszusammenarbeit in der Gesellschaft zunehmend in die Kritik. Geberländer knüpften die internationale Hilfe im Rahmen struktureller Anpassungsprogramme an wirtschaftliche Reformen (Privatisierung, Marktöffnung). Diese Maßnahmen führten in den Entwicklungsländern zu sozialen Spannungen. Hinzu kam ein verstärkter Konflikt zwischen Industrie- und Entwicklungsländern, bekannt als Nord-Süd-Konflikt. Die Unzufriedenheit wuchs zudem weil ein erheblicher Teil der internationalen Hilfsprojekte als ineffektiv wahrgenommen wurde.

Seit etwa dem Jahr 2000 hat sich dieser Prozess verändert und erhielt einen neuen Namen: Die *Entwicklungshilfe* wurde zur *Entwicklungszusammenarbeit*. Damit änderte sich auch der Inhalt dieser internationalen Beziehungen.

Entwicklungsländer wurden als „*Staaten im Reformprozess*“ betrachtet. Geber und Empfänger der Hilfe wurden zu Partnern erklärt. Kurz gesagt: Es entstanden Bestrebungen, die Kluft zwischen entwickelten und sich entwickelnden Staaten zu überbrücken oder zumindest zu verringern.

Gleichzeitig traten auf internationaler und innerstaatlicher Ebene neue Akteure auf den Plan: Nichtregierungsorganisationen (NGOs), die sogenannte „*Zivilgesellschaft*“. Ihre Aufgabe war es, in den Staaten auf dem Entwicklungsweg die Prinzipien von sozialer Gerechtigkeit, Demokratie und Rechtsstaatlichkeit zu fördern. Zu diesem Zweck erhielten die NGOs umfangreiche finanzielle Mittel von den USA und der Europäischen Union, was ihrer Tätigkeit auch eine politische Dimension verlieh. Durch die Durchsetzung „*westlicher Werte*“ über NGOs erhöhte sich der Druck auf lokale Regierungen. In mehreren Ländern führte dieser Druck zu starken Konfrontationen.

Die radikale Moralisierung von Politik und Gesellschaft sowie andere Faktoren führten schließlich am 24. Februar 2022 zum Ausbruch des Krieges zwischen Russland und der Ukraine, der die weltpolitische Lage erheblich verschärfte. Auch die Entwicklungen in Georgien, die 2025 mit der Verabschiedung eines amerikanisch inspirierten FARA-Gesetzes vorerst abgeschlossen wurden, lösten erhebliche innerstaatliche und internationale Spannungen aus. Die Verabschiedung dieses Gesetzes wurde als antiwestlicher Schritt interpretiert und verschärfte die Beziehungen zwischen dem euro-atlantischen Raum und Georgien erheblich.

Die Ereignisse verdeutlichten, dass unter dem Deckmantel der Entwicklungszusammenarbeit starke politische Interessen wirken. Diese Ansätze, die Unveränderlichkeit veralteter Prinzipien aus der Zeit des Kalten Krieges, die Durchdringung mit doppelten Standards und die „*Tyrannie der Werte*“, führten die Welt an den Rand ernsthafter Konflikte zwischen Ost und West.⁵

Aus den beschriebenen Entwicklungen wird deutlich, dass selbst die Entwicklungszusammenarbeit einer ständigen Weiterentwicklung und Erneuerung bedarf. Die Welt befindet sich heute genau auf der hegelschen Übergangsstufe – sowohl aus Sicht der internationalen Politik als auch der Politik der Entwicklungszusammenarbeit.

Warum sprechen wir von Übergang? Weil dieser Prozess sowohl die Bewahrung des Alten als auch die Entfaltung neuer Perspektiven umfasst. Aber wie

5 C. Schmitt, *Tyrannie der Werte*, Verlag Duncker & Humbolt, Berlin, 2020, 35-55.

könnte eine hegelsche Synthese in der Dialektik zwischen internationaler Politik, Entwicklungszusammenarbeit und den Interessen einzelner Staaten aussehen? Eine präzise Antwort darauf zu geben, ist derzeit äußerst schwierig, insbesondere vor dem Hintergrund der bestehenden Konflikte zwischen einzelnen Ländern und des laufenden Krieges.

Trotz der Komplexität erscheint es möglich, erste Schritte zu unternehmen, die negative hybride Einflüsse verringern und politische Erschütterungen abmildern könnten.

3. Schlusswort

Warum Hegel? Weil Hegels Lehre, wie wir oben gesehen haben, eine evolutionäre Methode zur Umsetzung von Veränderungen darstellt.

Hegels Philosophie dreht sich um das Konzept der Freiheit. Entwicklungszusammenarbeit kann ein Weg zur Freiheit sein – vorausgesetzt, dass die Entwicklungen in die richtige Richtung verlaufen. Andernfalls kann derselbe Weg in eine neue Form der Abhängigkeit führen. Wenn wir von Abhängigkeit sprechen, dürfen wir diesen Begriff nicht mit der Kunst des notwendigen Kompromisses in den internationalen Beziehungen verwechseln. Ohne Kompromisse gibt es keine Unabhängigkeit; im Gegenteil, gerade Kompromisse schaffen Unabhängigkeit.

Wie wird internationale Zusammenarbeit und Entwicklungszusammenarbeit in der Zukunft aussehen? Veränderungen in diesem Bereich sind unvermeidlich. Aus hegelscher Perspektive sollte diese Zusammenarbeit auf historischen Gesetzmäßigkeiten und Entwicklungsstufen basieren. Die jüngsten Ereignisse haben den Konflikt zwischen globalen und lokalen Interessen deutlich gemacht. Um die bestehenden Schwierigkeiten zu überwinden, sind zumindest folgende Maßnahmen erforderlich:

- Entwicklungszusammenarbeit darf nicht zu einem Mittel politischer Einflussnahme und Druckausübung auf lokale Regierungen werden.
- Ausländische Staaten sowie ausländische und internationale Organisationen verschiedener Art dürfen nicht zu Akteuren in den innenpolitischen Angelegenheiten von Partnerstaaten werden.
- Die Regierungen sollten einen inhaltlich fundierten Plan ausarbeiten, der auf konstruktiver Zusammenarbeit basiert.

Was die zukünftigen Formen der Entwicklungszusammenarbeit betrifft, ist eine Überprüfung sehr wahrscheinlich. Die Kooperation über NGOs wird – zumindest teilweise – durch zwischenstaatliche Zusammenarbeit ersetzt werden.

Internationale Beziehungen, insbesondere spezifische Formen der Entwicklungszusammenarbeit, sind sehr sensibel und delikat. Sie können sowohl positive als auch negative Prozesse stimulieren. Damit zukünftige Formen der Entwicklungszusammenarbeit effektiver funktionieren als in der jüngsten Vergangenheit, sollte diese Zusammenarbeit, soweit möglich, von Politik entkoppelt werden. Diese Entkopplung ist entscheidend, damit Entwicklungszusammenarbeit nicht als politisches Instrument zur Beeinflussung einzelner Staaten missbraucht wird.

Schließlich sollte berücksichtigt werden, dass die größte Politik in apolitischen Formen umgesetzt wird. Eine falsche Gestaltung der Zusammenarbeit schadet nicht nur den zwischenstaatlichen Beziehungen, sondern auch den grundlegenden Prinzipien des Völkerrechts.

Die fehlerhaften Ansätze und Schwerpunktsetzungen in den internationalen Beziehungen der letzten zwanzig Jahre haben das übermäßig vorhandene post-sowjetische Vertrauen in westliche Gesellschaften in einzelnen Bevölkerungsschichten erschüttert. Ja, Sie haben richtig verstanden – dieses Vertrauen hatte fast den Charakter eines Glaubens angenommen. In einigen Teilen der Gesellschaft wurde es erschüttert, in anderen verstärkte es sich und entwickelte sich zu einem nahezu vollwertigen „fanatischen Ideal“. Solche radikalen Sichtweisen haben das reale System westlicher Werte beschädigt. Selbst die zu politischen Instrumenten gewordenen westlichen Werte wandelten sich und wurden zu Interessen. Heute stehen wir in Wirklichkeit eher der Konfrontation dieser Interessen gegenüber als einer Wertekrise.

Wir befinden uns derzeit an einem Punkt, an dem die alte internationale Ordnung nicht mehr existiert und eine neue noch nicht geschaffen wurde. Die Zukunft der Entwicklungszusammenarbeit wird maßgeblich von neuen Ansätzen in der internationalen Ordnung abhängen.

On the Right of the Innocent Owner

Introduction

“Justice must emerge from life. But it must not be cut off from it. The life it creates must be a perfection of what exists, not a separation from it.”¹

This publication discusses a decision² of the Supreme Court of Georgia, which, on the basis of the so-called *contra legem*³ interpretation, granted the claim of an innocent owner regarding the establishment of ownership rights over real estate that was used as the subject of a crime, or as a part of committing a crime, and confiscated it without compensation in favour of the state.

The task of law⁴ is to ensure legal certainty and the optimal protection of legitimate interests. This goal must be taken into account in the process of interpreting and developing the law. The function of law – to resolve disputes justly – is achieved not only through interpretation but also by evaluating the necessity of expanding the law’s reach.⁵ “Interpretation *contra legem* is carried out in the process of applying the law, concerns a specific case, and does not

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1 Bessarion Zoidze, Rezeption des Europäischen Privatrechts in Georgien, Tbilisi 2005, 129 (in Georgian).

2 Judgment of the Supreme Court of Georgia in case No. AS-1908-2019, 17.10.2023.

3 Giorgi Khubua, Interpretation *Contra Legem*, Journal "Methods of Law" N 2-2018, 14 (in Georgian).

4 Judgment of the Supreme Court of Georgia in case No. AS-1908-2019, 17.10.2023.

5 Judgment of the Supreme Court of Georgia in case No. AS-559-2019, 4.12.2019.

have the purpose of social regulation. Regulation of social relations is the exclusive authority of the legislature.”⁶ Interpretation *contra legem* gives priority to the law that stems from the constitutional legal order and ensures a correct and fair resolution of the dispute. Identifying this law and embodying it in concrete decisions is the function of justice. It is inadmissible to deny the administration of justice. Therefore, the judge is obliged to decide the issue even in cases where there is no specific norm regulating the relationship or the existing norm is ambiguous.⁷ In the decision-making process, the court is guided by the principle established in law, namely, *jura novit curia* (the court knows the law).⁸

Case Summary

Since 2008, a piece of real estate – a 7,329 sq. m plot of land including the buildings and structures situated upon it – had been registered in the National Agency of Public Registry as the property of an individual. Of this property, 1,000 sq. m, on which certain infrastructure was located, was leased by the owner to a legal entity in 2011 under a lease agreement.

In a criminal case in 2012, the court found a group of persons guilty. As an additional punishment under Article 52⁹ of the Criminal Code of Georgia, the 7,329 sq. m plot of land, which was actually under the control of the organised group and used by the organised group as the subject, or a part, of committing

6 Giorgi Khubua, Interpretation *Contra Legem*, Journal "Methods of Law" N 2-2018, 14 (translated from Georgian).

7 Civil Code of Georgia, Article 4.1,
<<https://www.matsne.gov.ge/ka/document/view/31702?publication=136>>, last accessed on 27 January 2026; Ruling of the Supreme Court of Georgia in Case No. AS-559-2019, 4.12.2019.

8 Judgment of the Grand Chamber of the Supreme Court of Georgia in case No. AS-664-635-2016, 2.03.2017.

9 “Confiscation of the object of a crime and/or a weapon or an object intended for committing a crime means the seizure of property owned by or in legal possession of a suspect, accused, or convicted person, used to commit an intentional crime or intended for this purpose, free of charge, in favour of the state. The object of a crime and/or a weapon or an object intended for committing a crime is confiscated by the court for all intentional crimes provided for by this Code, in the case when the object of a crime and/or a weapon or an object intended for committing a crime is present and their seizure is necessary due to state and public necessity or in the interests of protecting the rights and freedoms of individuals or in order to prevent a new crime” – the wording of the norm in force at the time of the passing of a guilty verdict in a criminal case (2012) (translated from Georgian).

the crime, and movable property located on it, were confiscated without compensation in favour of the state. It is undisputed that the lessor was not among the members of the criminal group, and he had no connection with this crime or the perpetrators. Furthermore, the owner of the confiscated real estate was never involved in the criminal proceedings in any procedural capacity.¹⁰

According to the verdict in the criminal case, the accused persons confirmed to the court that the real estate to be confiscated in favour of the state is “property obtained through criminal activity, in actual use and possession of the members of the organised group, and used by the organised group to commit a crime.”¹¹ By the court ruling, the real estate,¹² which was owned by an individual as a lessor, was registered as state property.

The legal consequences of a guilty verdict in a criminal case directly affect not only those individuals who used the real estate of an innocent tenant in the commission of a crime, but also the rights of the innocent owner, as his property registration record was cancelled.

In civil proceedings, an individual who was the lessor filed a lawsuit to protect his property rights, namely, to reclaim real estate from the state. The original owner¹³ of the real estate disputed that the confiscation of property, established by Article 52 of the Criminal Code, as an additional punishment, could not be applied against the owner who had no connection with the crime, did not directly use the property as the subject of the crime or as an object intended for the commission of the crime, but on the contrary, suffered as a result of this crime committed by others. The person whose property was confiscated, in response to an appeal to various state agencies to protect his rights, was informed that it was necessary to make certain changes to the legislation.¹⁴

The Supreme Court of Georgia, by partially granting the cassation appeal (respectively, the lawsuit), overturned the ruling of the Court of Appeal and

10 Judgment of the Supreme Court of Georgia in case No. AS-1908-2019, 17.10.2023, subsections 3.1-3.7.

11 Ibid.

12 According to the verdict in the criminal case, the entire real estate – 7,329 sq. m of land and the movable-immovable property situated thereon – was confiscated from the lessor.

13 The lessor is an individual.

14 Judgment of the Supreme Court of Georgia in case No. AS-1908-2018, 17.10.2023, subsection 5.17.

adopted a new judgment on the registration of the disputed real estate in the name of the innocent owner.¹⁵

The Chamber of Civil Cases of the Court of Cassation clarified that, while it lacked the jurisdiction to review a final, legally binding judgment rendered in a criminal case,¹⁶ it was nevertheless duty-bound, given the “complexities of this legal case,”¹⁷ to determine whether a protection mechanism existed for an innocent owner whose property was seized as the subject of a crime. “The constitutional right itself indicates its inviolability, the limits and scope of interference.”¹⁸ Furthermore, the fundamental rights enshrined in the Constitution are precisely the manifestation of the fact that “many cases that are regulated by criminal or civil law actually possess constitutional parameters, without the observance of which a legal resolution of a particular dispute is impossible.”¹⁹ The given case was not related to the so-called legitimate expectation of protection of property in actual possession, but to the right of a person registered as the owner in the public registry (the plaintiff in a civil dispute), because “the European Court of Human Rights in its recent judgments also confirms the approach

15 In the judgment of the Supreme Court of Georgia of 17 October 2023, No. AS-1908-2018, we read: “In such circumstances, based on the interest of protecting the rights of the innocent owner, taking into account the factual circumstances established in the case under consideration, the Court of Cassation believes that there are grounds for partially granting the claim, however, not by requesting the right of ownership of the disputed real estate from the legal owner – the state – by way of vindication, but by protecting the right to property protected by Article 19 of the Constitution of Georgia, as a fundamental human right. The Court of Cassation emphasises that ‘the interpretation *contra legem* is carried out in the process of applying the law, concerns a specific case and does not have the purpose of social regulation’” – Court decision, paragraph 17.

16 Judgment of the Supreme Court of Georgia N AS-1908-2018, 17.10.2023, Subsection 7.4, Section 8, Subsections 25.2, 25.7.

17 Judgment of the Supreme Court of Georgia in case No. AS-1908-2019, 17.10.2023, paragraph 13.

18 *Merab Turava*, Functions of Fundamental Rights and Their Importance in Substantive Criminal Law; Published in the anniversary collection dedicated to Lado Chanturia /Liber Amicorum Lado Chanturia/, TSU Publishing House, Tbilisi 2023, 135 (in Georgian).

19 *Giorgi Gogiashvili*, *Studia Iuridica*, Judge-Made Law; Second Edition, Tbilisi 2020, 85 (in Georgian).

that Article 1 of Protocol No. 1 applies to existing property and does not ensure the right of a person to receive property.”²⁰

The Court of Cassation noted that “the absence of a corresponding legislative provision or legal instrument of protection in national legislation cannot be used against persons and requires them to prove more than what is objectively possible in order to protect a right protected by the Constitution.”²¹

Legal Doctrine on the Right of the Innocent Owner and the Courts’ Decisions

The problem of confiscating the object and means of crime from an innocent owner has been discussed in Georgian legal literature.²² When discussing Article 52 of the Criminal Code,²³ the author notes that “in accordance with the grammatical interpretation of the norm, the offender may be deprived of ownership or legal possession of the instrument or object of crime without compensation. There is no mention of an innocent third-party owner here at all...”²⁴ The teleological definition of a norm is related to its purpose. “It is easy to determine the general purpose of a norm – it is the prevention of crime (protection of the interests of other persons, public interests, etc., are precisely the elements of determining the relevance of the preventive function), which is carried out by the preventive function of the punishment imposed by the norm. Punishment, in turn, can be imposed only on the offender and only on a person. Punishment cannot be imposed on an innocent person or only on an object.”²⁵

20 *Tamar Zarandia/Nana Mchedlidze*, Protection of Property Rights Under Georgian Legislation and the European Convention on Human Rights; published in the anniversary collection dedicated to Lado Chanturia /*Liber Amicorum Lado Chanturia*/, Tsu Publishing House, Tbilisi 2023, 202 (in Georgian).

21 Judgment of the Supreme Court of Georgia in case No. AS-1908-2019, 17.10.2023, paragraph 9.

22 *Vladimer Khasia*, The Problem of Confiscating the Object and Means of Crime from an Innocent Owner; Human Rights Protection, Achievements and Problems – Collection of Articles; Editor Konstantine Korkelia, Tbilisi 2012, 172 (in Georgian).

23 See footnote 8.

24 *Vladimer Khasia*, The Problem of Confiscating the Object and Means of Crime from an Innocent Owner; Human Rights Protection, Achievements and Problems – Collection of Articles; Editor Konstantine Korkelia, Tbilisi 2012, 173 (in Georgian).

25 *Ibid.*

In 2007, the Constitutional Court of Georgia ruled on the constitutionality of the words “or in lawful possession” in Part 2 of Article 52²⁶ of the Criminal Code of Georgia in relation to the then-current Article 21 of the Constitution of Georgia (currently Article 19 of the Constitution).²⁷ Under this judgment, “The owner’s culpability is not a prerequisite for justifying the confiscation of property. Both the European Court and the majority of nations (the USA, Germany, etc.) take into account the issues of the owner’s so-called negligence and good faith. For this reason, under the legislation of a number of countries, owners whose property, as an object or instrument of a crime, was seized in cases where the owner is innocent and acted in good faith, have the right to demand the return of the property, except in cases where there is a necessary public need or public interest for the seizure of this property. In addition, some countries provide for the possibility of compensation. In cases where a person is guilty of an act or acted negligently or in bad faith, his property is seized without compensation. Therefore, for the full and effective protection of the right to property, it is necessary to have adequate, complete and detailed procedures so that the owner can dispute over the legality of the seizure of property.”²⁸

It is noteworthy that the specialists in the field invited to the Constitutional Court in the aforementioned case,²⁹ based on their analysis of the current legislation of Georgia, emphasised the absence of adequate, complete and detailed regulated procedures.

In accordance with the operative part of this judgment of the Constitutional Court, the Parliament of Georgia was requested to ensure the improvement of the current legislation and Article 52, Part 2 of the Criminal Code of Georgia.³⁰ After that, the Parliament of Georgia amended Article 52, Part 2 of the Criminal Code, which deemed it inadmissible to seize from a suspect the object and/or instrument of a crime, or an item intended for the commission of a crime.³¹

26 See footnote 8.

27 Judgment of the Constitutional Court of Georgia of 2 July 2007 in case No. 1/2/384, Citizens – *Davit Jimshelishvili, Taniel Gvetadze and Neli Dalalishvili against the Parliament of Georgia*.

28 Judgment of the Constitutional Court of Georgia of 2 July 2007 in case No. 1/2/384; II- 24.

29 See footnote 24.

30 Judgment of the Constitutional Court of Georgia of 2 July 2007 in case No. 1/2/384; Resolution part.

31 Law of the Parliament of Georgia No. 3916-rs of 14 September 2010 "On Amendments and Additions to Certain Legislative Acts", entered into force on 29 September 2010, 51; Registration code 080020000.05.001.016004.

However, this change did not eliminate the fundamental problem that scholars and specialists in the field were discussing in the Constitutional Court back in 2007.

Georgian legal doctrine asserts that applying Article 52, Paragraph 2 of the Criminal Code to the rights of an innocent owner – one who neither knew nor could have known of the criminal use of their property – does not constitute the establishment of a rule of conduct. Instead, it creates an "autonomous condition" over which the owner has no influence.³² "According to the current wording, the extension of Article 52, Part 2, to an innocent owner has significant flaws in terms of both Article 21,³³ Part II and Part III of the Constitution."³⁴

According to the Constitutional Court, "in a social state, property, in parallel with satisfying the private interests of the owner, serves a social function. Law cannot be indifferent to the social burden of property because it is here that the task to be performed by property, its place, role and importance are revealed. Therefore, a social and legal state equally requires both the freedom of private property and the necessity of restricting it for public purposes."³⁵

It is noteworthy that, according to the existing judicial practice in criminal cases, interference and restriction in a person's property rights must serve public objectives. Furthermore, when public and private interests are in conflict and interference with private property becomes necessary, such action must be justified by an overriding public interest that renders this interference an exceptional and legitimate measure. In such cases, the subject and/or the instrument of the crime or the item intended for committing the crime must be identified, and its forfeiture must be deemed necessary based on state or public exigency,

32 *Vladimer Khasia*, The Problem of Confiscating the Object and Means of Crime from an Innocent Owner; Human Rights Protection, Achievements and Problems – Collection of Articles, Editor Konstantine Korkelia, Tbilisi 2012, 178 (in Georgian).

33 The norm in force at the time of the publication of Vladimer Khasia's article.

34 *Vladimer Khasia*, The Problem of Confiscating the Object and Means of Crime from an Innocent Owner; Human Rights Protection, Achievements and Problems – Collection of Articles, Editor Konstantine Korkelia, Tbilisi 2012, 179 (in Georgian).

35 Judgment of the Constitutional Court of Georgia of 2 July 2007 No. 1/2/384 in the case *Citizens of Georgia – Davit Jimshelishvili, Taniel Gvetadze and Neli Dalakishvili vs. Parliament of Georgia*, II.P.8

the protection of the rights and freedoms of others, or the prevention of further criminal activity.³⁶

Therefore, during the consideration of the civil dispute of the innocent owner, the Court of Cassation was faced with the question of how justice should be administered to protect the “fundamental legal good”³⁷ due to the absence of an effective legal mechanism in national legislation. “The normal functioning of private law depends not only on the extent to which different branches of law are harmonised with it, in other words, on the extent to which a common order of norms has been achieved throughout the entire legal system, but also on the practical legal order of norms. Regardless of the quality of a Civil Code, any imbalance or discord in this regard will impede civil commerce. Private law is inherently linked to various other legal fields; if criminal law fails to fulfil its role in protecting property, the consequences will severely impact the stability of civil commerce.”³⁸

The constitutional basis for restricting property rights and possible interference by the state is reinforced by the country's supreme law, and the legitimacy and proportionality of such interference are conditioned by a necessary public need, which establishes the obligation of the state to provide prior, full and fair compensation to the owner.³⁹ “Confiscation of property is defined as a complete and final removal. This is the case of nationalisation, expropriation or final confiscation. ...Confiscation of property, in the civil law sense, can only be based on

36 Judgments of the Supreme Court of Georgia on criminal cases: No 2k-662ap.-09, 23.12.2009; No 2k-359ap.-10, 28.07.2010; No 693ap.-17, 11.06.2018; No 2k-217ap.-18, 20.09.2018; No 2k-492ap.-18, 15.02.2019; No 2k-324ap.-22, 18.10.2021; No 2k-37ap.-23, 16.05.2023; No 2k-1343ap.-23, 3.06. 2024; No 2K-301Ap.-24, 10.09.2024; No 2K-150Ap.-25. 16.07.2025; No 2K-482Ap.-25, 30.09.2025; No 417Ap.-25, 21.10.2025.

37 *Irakli Kobakhidze*, Constitutional Law; First Edition; Tbilisi 2019, 50 (in Georgian).

38 *Bessarion Zoidze*, Rezeption des Europäischen Privatrechts in Georgien, Tbilisi 2005, 127-128 (in Georgian).

39 Judgments of the Supreme Court of Georgia: No AS-1133-2019, 30.07.2021; No AS-1152-2021, 31.01.2022; No AS-1349-2019, 20.04.2022; No AS-952-2019, 6.07.2022; No AS-688-2022, 20.09.2022; No AS-879-2021, 27.10.2022; No AS-599-2022, 31.03.2023; No AS-681-2023, 7.07.2023; No AS-1240-2024, 29.10.2024; No AS- 714-2024, 31.10.2024; No AS-1244-2024, 8.11.2024; No AS-1053-2023, 22.11. 2024; No AS-746-2024, 13.02.2025.

public interest and can never be the subject of a political decision. Confiscation is permissible only with adequate compensation.”⁴⁰

The seizure of property must also comply with the principle of the existence of a law in a comprehensible form (i.e., legality), which is clearly stated in the second sentence of Article 1 of Protocol No. 1, which requires that the seizure of property must be in accordance with the conditions laid down by law. Furthermore, the principle of legality is a whole and integral part of the European Convention and must apply to all three rules⁴¹ of Article 1. The requirement that law be intelligible necessitates the existence of properly accessible and sufficiently precise provisions within national legislation. These provisions must satisfy the essential requirements of the concept of law, which is to say, the formulation “in accordance with the conditions laid down by law” is not limited to domestic law. The Convention requires that domestic law itself align with the substantive requirements of the Rule of Law, which includes the guarantee of fair and due process.”⁴²

The Supreme Court of Georgia explained that the deprivation of the right of ownership of real estate to an innocent owner, which was used as a subject/instrument of a crime, did not comply with the requirements of Article 1 of Protocol No. 1 to the European Convention on Human Rights and could not ensure the maintenance of a fair balance between public interests and the interest worthy of protection of fundamental rights of the individual. In addition, the specific case “impedes the development of legitimate civil commerce and has a so-called ‘frozen’ effect, since the innocent owner, who legitimately disposes of the property, is not protected by the use of the appropriate legal procedure, to challenge the fundamental right to defend and achieve a legal result.”⁴³ In such

40 *Giorgi Amiranashvili*, Confiscation of the Subject of Crime in Legal Possession – Constitutional and International Standards; Human Rights Protection: Achievements and Challenges – Collection of Articles, Editor Konstantine Korkelia, Tbilisi 2021, 9 (in Georgian).

41 These three rules are: (I) the principle of peaceful enjoyment of possessions (first sentence of Part One); (II) confiscation of property (second sentence of Part One); (III) control of the use of property (second part); Issues of confiscation of property according to the case-law of the European Court of Human Rights, <https://www.supremecourt.ge/uploads/files/1/pdf/adamianis-uflebata-centri/sakutrebis-chamortmeva.pdf>, last accessed on 27 January 2026.

42 *Ibid.*, <https://www.supremecourt.ge/uploads/files/1/pdf/adamianis-uflebata-centri/sakutrebis-chamortmeva.pdf>, last accessed on 27 January 2026.

43 Judgment of the Supreme Court of Georgia in case No. AS-1908-2018, 17.10.2023, paragraph 13 and subsection 29.10.

a situation, one of the possible legal protection instruments is considered to be filing a relevant claim in court against the perpetrators of the crime (for example, compensation for the damage caused). “However, legal security and protection of the rights of each person should not be hypothetical, but rather a condition for a real legal outcome.”⁴⁴ In addition, as a specialist in the field explained in the Constitutional Court back in 2007: “The owner cannot demand property or compensation for damage from the state, especially not based on the norms regulating unjust enrichment... The injured, innocent owner has the right to demand not from the state, but only from the person who committed the crime.”⁴⁵ The Constitutional Court’s judgment also states: “Another issue is whether a civil claim for compensation for damage from a suspect, accused or convicted person is sufficient for the full protection of the right to property. In general, the full enjoyment of the right to property, like all other rights, and their effective protection, is inextricably linked to the right to a fair trial. Naturally, this circumstance obliges the legislature to provide the owner with all the necessary opportunities and adequate procedures for the protection of the right to property.”⁴⁶

Ownership of Real Estate

The Supreme Court judgment,⁴⁷ I am referring to, concerns the protection of the right of ownership of real estate used by third parties as the subject of a crime and confiscated by a court decision from an innocent owner. Both legal doctrine and judicial practice distinguish between ownership of real estate/property as a right, and actual use and possession of the property/property as a fact.⁴⁸

Ownership and possession are clearly separated by the current legislation, as is the legal regulation of ownership, possession and use of immovable and movable property, which is due to the fact that “...immovable property is of much higher value than movable property. The degree of value of goods depends on whether it serves only private interest or also social interest. The social value of immovable property is emphasised in the property laws of all countries. The

44 Ibid., paragraph 13.

45 Judgment of the Constitutional Court of Georgia of 2 July 2007 in case No. 1/2/384; I-8.

46 Ibid., II-24 (translated from Georgian).

47 Judgment of the Supreme Court of Georgia in case No. AS-1908-2018, 17.10.2023.

48 *Tamar Zarandia*, Property Law, Third Completed Edition, Tbilisi 2023, 52-53 (in Georgian).

social value of all property is measured by the extent to which it is burdened with public interest.”⁴⁹

The right of ownership of real estate is revealed and established by the entry in the public registry, therefore, the legislature's goal to protect the owner of such property by the presumption of completeness and accuracy of the data in the public registry⁵⁰ is unambiguous. Given this, an innocent owner remains even more vulnerable when his property, as the subject of a crime/used to commit a crime, is confiscated as an additional punishment, based on Article 52 of the Criminal Code. Georgian legal doctrine explains: “The state cannot deprive a criminal of more than what he has, just as no one can transfer to another more rights than he himself has. Therefore, a criminal can only be deprived of what is his, namely, their lawful possession. Legal ownership in itself is a significant property value, and its deprivation therefore has the character of punishment for the criminal (that is why we are talking only about legal ownership, not illegal ownership). Depriving the criminal of ownership, as an independent property, does not automatically mean depriving the owner of ownership, since direct ownership can be cancelled (or transferred to another person) in such a way that the indirect owner remains the owner. Thus, according to the literal interpretation of the norm, there is no legal norm for interfering with the rights of an innocent owner; consequently, no such interference should occur.”⁵¹

The judgment of the Constitutional Court of Georgia on 21 July 1997⁵² was considered to be of historical significance in legal literature. It declared the confiscation of property as an additional penalty to be unconstitutional, identifying it as a fundamental violation of property rights. This decision explained that, based on the Constitution of Georgia and the generally recognised principles and norms of international law, the right to property is an inalienable and supreme human value, a universally recognised fundamental right, the cornerstone of a

49 *Bessarion Zoidze*, *Rezeption des Europäischen Privatrechts in Georgien*, Tbilisi 2005, 245 - 248 (translated from Georgian).

50 Article 312 of the Civil Code of Georgia.

51 *Vladimer Khasia*, *The Problem of Confiscating the Object and Means of Crime from an Innocent Owner; Human Rights Protection, Achievements and Problems – Collection of Articles*, Editor Konstantine Korkelia, Tbilisi 2012, 172 (translated from Georgian).

52 Judgment of the Constitutional Court of Georgia of 21 July 1997 in case N 1/51; The author of the constitutional claim is the Chugureti District Court of Tbilisi; The full text of the judgment is available at <https://constcourt.ge/ka/judicial-acts?legal=55>, last accessed on 27 January 2026.

democratic society, and a social and legal state. Property is the essential basis of human existence. In the conditions of the development of free entrepreneurship in Georgia, it became possible to constitutionally strengthen the protection of property rights.

The Constitutional Court explained that the Constitution of Georgia assigns certain social functions to property. The exercise of the right to property should not violate the rights and freedoms of others, and the use of property should at the same time serve the common good. If these requirements are not met or other appropriate circumstances provided for by law exist, then the Constitution of Georgia does not exclude the restriction of the right to property; however, one of the necessary conditions in such cases is appropriate compensation. “At the same time, it should be taken into account that the confiscation of property, with its consequences, does not comply with the basic principle of the individuality of punishment, since it is usually directed not only against the offender, but also against his innocent family.”⁵³

Ten years after this important judgment, as I have already mentioned, the Constitutional Court, in its decision of 2 July 2007, explained the need to refine the current legislation⁵⁴ and Article 52, Part 2 of the Criminal Code.⁵⁵ Nevertheless, the problem could not be solved. Professor Otar Gamkrelidze accurately presented the key issue: “If the seizure of ‘personal property’ was unconstitutional, then, even more so, shouldn’t it be unconstitutional to seize ‘other people’s property’ from a criminal? Doesn’t this mean punishing someone who has not committed a crime?”⁵⁶ The use of *contra legem* in the Supreme Court of Georgia's decision on the issue of the right of an innocent owner is precisely a clear indication of the fact that, despite a number of important clarifications in the 2007 judgment of the Constitutional Court, the right of such a person to property, which may be used by other persons as the subject of/for committing a

53 Judgment of the Constitutional Court of Georgia of 21 July 1997 in case N 1/51; The author of the constitutional claim is the Chugureti District Court of Tbilisi; The full text of the Judgment is available at <https://constcourt.ge/ka/judicial-acts?legal=55>, last accessed on 27 January 2026.

54 See footnote 27.

55 See footnote 8.

56 *Giorgi Amiranashvili*, Confiscation of the Subject of Crime in Legal Possession – Constitutional and International Standards; Human Rights Protection: Achievements and Challenges – Collection of Articles, Editor Konstantine Korkelia, Tbilisi, 2021, 13-14 (translated from Georgian).

crime and, in favour of the state, be subject to confiscation, is unprotected. In such a case, there is no effective legal mechanism, a regulated procedure that ensures the protection of the owner in the event of restriction of his right.

As the Constitutional Court of Georgia explained: “Ignoring fundamental human rights and freedoms, especially the right to property, precludes the development of a free market economy, ensuring a dignified life for society as a whole and its individual members, as well as political, economic, and social stability. The economic strength of a democratic state governed by the rule of law rests fundamentally upon the respect for and protection of property rights.”⁵⁷

On a Judgment of the European Court of Human Rights

One of the recent judgments of the European Court of Human Rights (ECtHR), *Godlevskaya v. Russia*,⁵⁸ is noteworthy precisely insofar as a criminal defendant, who was sentenced to confiscation of real estate and its subsequent sale, was deprived of real estate belonging to his ex-wife, the applicant in the ECtHR, Lyudmila Godlevskaya. The spouses had agreed in their marriage agreement that, in the event of a divorce, the real estate would remain the personal property of the spouse with whose funds it was purchased. The real estate confiscated from the defendant was purchased with the funds of his ex-wife, Ms Godlevskaya.

The national court took into account the rules on the division of property agreed upon between the spouses in the marriage contract, but found that the value of Lyudmila Godlevskaya’s property exceeded the amount of the spouses’ joint income from the factory⁵⁹ of which the defendant was the director, and that the interested parties had refused to disclose the source of the funds to the investigator. The national court also took into account the amount of funds appropriated by the former director and the fact that the defendant himself did

57 Judgment of the Constitutional Court of Georgia No. 2/1-370,382,390,402,404 of 18 May 2007 in the case “*Citizens of Georgia Zaur Elashvili, Suliko Mashia, Rusudan Gogia and Others and the Public Defender of Georgia against the Parliament of Georgia*”

58 ECtHR, *Godlevskaya v. Russia* (N 58176/18), judgment adopted on 7.03.2021, became final on 7.03.2022, <https://hudoc.echr.coe.int/eng?i=001-213861>, last accessed on 27 January 2026 (Translated from French).

59 The factory filed a civil lawsuit requesting the seizure of the former director's property as a security measure, as the factory disputed the misappropriation of its material assets, which was blamed on the former director – the ex-wife of the applicant in the European Court of Human Rights, Ms. Godlevskaya.

not own any property. The national court based its decision on the assumption that there were sufficient grounds to assume that the property had been acquired through the defendant's criminal activity, under the Russian Criminal Code.

After the judgment in the criminal case became final and legally binding, the convict's ex-wife, Lyudmila Godlevskaya, filed three lawsuits with the courts of territorial jurisdiction demanding the lifting of the ban on disposing of her property. Ms Godlevskaya argued that the real estate was her property under the marriage agreement, which she had purchased with her own funds. She further contended that the criminal conviction had failed to establish that the convict used embezzled funds specifically to acquire this property. In all three instances, the domestic courts rejected the applicant's claim on the grounds that the final judgment of conviction had established the illegality of the acquisition of the disputed real estate, and therefore the measure through which Lyudmila Godlevskaya was deprived of her property rights was lawful and, based on the Russian Family Code, that the applicant had no right to challenge the *res judicata*⁶⁰ authority of the criminal judgment in the civil courts. The civil courts agreed with the conclusions reached by the criminal courts that the marriage contract held no legal force against third parties.⁶¹

The European Court of Human Rights noted that the marriage agreement, on the basis of which the applicant Ms Godlevskaya was subject to a separation of property regime, had not been disputed, annulled or terminated. Consequently, it was undisputed that the applicant had purchased the real estate in question and registered it in her own name. Therefore, under Russian law, the property belonged solely to Ms Godlevskaya.

The European Court explained that the prohibition on disposing of or alienating the property, even if not implemented, constituted an interference with the right to property. This interference stems from the rules of use/disposal of property, and therefore violated the applicant's right to the peaceful enjoyment of her possessions, which had to be assessed in accordance with the requirements of Article 1 of Protocol No. 1. The ECtHR emphasised that any measure interfering with the right to the peaceful enjoyment of property must be based on national law and not be arbitrary. Lawfulness is an essential condition for

60 Latin phrase that translates to "a matter judged."

61 <https://hudoc.echr.coe.int/eng?i=001-213861>, last accessed on 27 January 2026, para 24 (Translated from French).

compliance with Article 1 of Protocol No. 1 and implies that the norms of national law must be sufficiently accessible, clear and foreseeable in their application to ensure that arbitrary acts are avoided by the State authorities.

The principle of legality requires that it be verified whether the measures applied by the courts at the national level have produced results that are in conformity with the principles of the Convention.⁶²

In the *Godlevskaya* case, the European Court of Human Rights found the measure of confiscation of property applied by the national court to be incompatible with Russian law, and noted that the applicant was not named as a civil respondent. Thus, she was not held civilly liable for the damage caused by the crime. The Court noted that the measure challenged by the applicant, in substance, constituted a serious interference, amounting to a permanent and uncompensated deprivation of property from an individual who had never been charged with – let alone convicted of – a criminal offence. The ECtHR meticulously examined the national legal framework. The objective was to verify whether a sufficient legal basis existed to satisfy the requirement of legal certainty, which is an intrinsic and essential component of Article 1 of Protocol No. 1 to the Convention.⁶³

During this case, the ECtHR examined in detail the regulations of the Russian Criminal Code, criminal procedure legislation, family legislation, and the Civil Code, and distinguished the *Godlevskaya* case from the *Bokova* case,⁶⁴ in which the order to freeze and subsequently sell the property concerned not personal property, but the mass of common property, since it was established in the criminal proceedings that this property was obtained through the criminal activities of the applicant's (*Bokova's*) husband. In the criminal case of *Godlevskaya's* husband, it was established that Ms *Godlevskaya* herself had sufficient income to purchase the disputed property (which was later subject to confiscation). Moreover, in the criminal case, it was not established that the disputed property

62 ECtHR, *Lelas v. Croatia*, N 55555/08, judgment adopted 20.05.2010, became final on 20.08.2010, <https://hudoc.echr.coe.int/eng?i=001-98827>, last accessed 27 January 2026, para 76.

63 <https://hudoc.echr.coe.int/eng?i=001-213861>, last accessed on 27 January 2026, para. 53 (Translated from French).

64 ECtHR, *Bokova v. Russia*, N 17879/13, 16.04. 2019 <https://hudoc.echr.coe.int/eng?i=001-192783>, last accessed on 27 January 2026, para. 51.

was purchased with financial funds appropriated by a convicted party (Godlevskaya's ex-husband).

Objectives of Directive 2014/42 of the European Parliament and of the Council of 3 April 2014

Although the current Criminal Code of Georgia does not recognise confiscation of property as an additional punishment, which was declared unconstitutional by the judgment of the Constitutional Court of Georgia on 21 July 1997,⁶⁵ it is relevant to consider the general discussion of the current Directive 2014/42 of the European Parliament and of the Council,⁶⁶ which concerns the regulation of confiscation and freezing (suspension of further use/disposal) of proceeds from crime and property used as the subject of crime in the European Union. The Supreme Court of Georgia also refers to the key issues of this directive in its decision, which are being discussed in this article. The aim of the Directive is to establish minimum rules and regulations for the effective legal protection of persons against whom measures of confiscation or suspension of the further disposal of property have been applied. The Directive provides for the freezing (suspension of further use/disposal) of property which may subsequently be subject to confiscation, including in criminal cases. This Directive is without prejudice to the procedures established by the Member States of the European Union, which carry out measures of confiscation of property.

To ensure legal clarity, the Directive, Article 2 defines several important concepts (terms): (1) proceeds are defined as any economic benefit derived directly or indirectly from a crime; it may consist of property in any form and includes any subsequent reinvestment or transformation of direct proceeds and other valuable benefits; (2) property means property of every description, whether material or immaterial, movable or immovable, as well as legal documents or instruments evidencing ownership or interest in such property; (3) instrumentalities means any property which is used or intended in any way, in whole or in part, for the commission of a criminal offence or criminal offences; (4) confiscation means the final seizure of property by a court order in connection with a

65 See footnote 52.

66 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02014L004220140519&qid=1769606546833>, last accessed on 27 January 2026.

criminal offence; (5) freezing means the temporary prohibition on the transfer, destruction, transformation, disposal or movement of property, or the temporary taking over of control or custody of property; (6) criminal offence is defined as any act falling within the specific list of offences categorised under Article 3 of the same Directive.

Article 6 of the Directive regulates the confiscation of third-party property separately. According to the first paragraph of Article 6, Member States are required to take the necessary measures to ensure the confiscation of proceeds and other property the value of which corresponds to the proceeds which were transferred directly or indirectly to third parties from suspects or accused persons, or which were obtained by third parties from suspects or accused persons, provided that, at least, the third parties knew or should have known that the purpose of the transfer or acquisition was to avoid confiscation, which must be based on specific facts and circumstances, including taking into account that the transfer or acquisition was made free of charge or at a price significantly below the market value. The second paragraph of Article 6 of the Directive stipulates that the first paragraph is without prejudice to the rights of bona fide third parties.

Article 8 of the Directive sets out the guarantees on the basis of which the Member States are to take the necessary measures to ensure that persons affected by the measures provided for in this Directive have the right to an effective remedy and a fair trial in order to protect their rights (8.1). The Member States must take the necessary measures to ensure that the decision to freeze the property is communicated to the person affected by it, and that, as far as possible, the decision to freeze the property is communicated in a timely manner. Such communication must at least briefly state the grounds on which the decision is based. In order to avoid jeopardising an ongoing criminal investigation, the competent authorities may defer the communication of the freezing measure to the affected person (8.2). The prohibition on further use/disposal of the property remains in force only for as long as it is necessary to preserve the property for possible subsequent confiscation (8.3). Member States shall ensure that the person, whose property is affected by the applied measure has an effective right to appeal to a court in accordance with national law. These procedures may require that, if the initial freezing order was issued by a competent authority other than a court, such an order must first be submitted to a court for validation or review before it can be formally appealed (8.4). Frozen property that

has not subsequently been confiscated shall be subject to immediate return. The conditions and procedural rules for the return of such property are determined by national law (8.5). EU Member States must take the necessary measures to ensure that any confiscation order states the reasons for the confiscation and that the order is communicated to the persons whose property is subject to confiscation. Member States must ensure that the person against whom the confiscation order is made has an effective right to appeal to a court (8.6). In accordance with Directive 2012/13/EU⁶⁷ and Directive 2013/48/EU,⁶⁸ persons whose rights are affected by a confiscation order should have access to a lawyer throughout the confiscation procedure, which is necessary for the protection of their rights. The persons should be duly informed of such a right (8.7). In the procedures referred to in Article 5 of the Directive (extended confiscation), the affected party should have an effective opportunity to challenge the circumstances of the case, including the specific facts and available evidence on the basis of which the property is considered to be the proceeds of crime (8.8). Third parties should have the right to claim ownership or other property rights, including in the cases referred to in Article 6 (8.9). If a person who has been the victim of a criminal offence has a claim against a party against whom confiscation has been applied under this Directive, Member States shall take the necessary measures to ensure that the confiscation measure does not prevent such persons from obtaining compensation to the extent of their claim (8.10).⁶⁹

67 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, <https://eur-lex.europa.eu/eli/dir/2012/13/oj/eng>, last accessed on 27 January 2026.

68 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, <https://eur-lex.europa.eu/eli/dir/2013/48/oj/eng>, Last accessed on 27 January 2026

69 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02014L004220140519&qid=1769606546833>, last accessed on 27 January 2026.

Conclusion

Within the framework of judicial law, “the most common practice is to grant the judge the right and the authority to develop and supplement the law, through judicial interpretation.”⁷⁰

Nevertheless, the judgment of the Supreme Court of Georgia, which I have discussed, concerns a specific case and, as a matter of judicial practice, cannot be extended to all cases, since the *contra legem* interpretation is inherently case-specific. The interests of the innocent owner are still unprotected at the legislative level. There are no clear rules that would allow a person to protect the right to property that was used as an object/for the commission of a crime by third parties, without the owner's knowledge or involvement. The regulation of procedural rules serves to protect substantive rights. “Access to justice dictates that a right must not be overburdened by excessive evidentiary requirements. A right is only meaningful if its exercise does not exhaust the individual. Rights must exist within a reality where they do not cause resentment among the people.”⁷¹

70 Shalva Papuashvili, Legal Trends (Development through Judicial Law and Access to Law), Georgian Law Review 6/2003-4, 458 (in Georgian, translated from Georgian).

71 Bessarion Zoidze, Rezeption des Europäischen Privatrechts in Georgien, Tbilisi 2005, 130 (translated from Georgian)

Die Expertenempfehlungen von Professor Knieper sind weiterhin relevant für Kasachstan¹

Ich lernte Prof. Dr. Dres. h. c. Rolf Knieper 1998 kennen, als er einen Gastvortrag an der Kasachischen Staatlichen Juristischen Universität in Almaty hielt. Anschließend absolvierte ich mein Master- und Promotionsstudium an der Universität Bremen unter seiner Betreuung. Zudem arbeitete ich zwei Jahre im Büro der Deutschen Gesellschaft für Technische Zusammenarbeit (GTZ)- in Almaty als örtlicher Koordinator eines Projekts zur Förderung von Rechtsreformen in Transformationsländern, das damals von Prof. Knieper geleitet wurde. Besonders eng arbeiteten wir mit ihm während der Anfertigung meiner Dissertation von 2002 bis 2005 sowie bei der Übersetzung seiner Monographie „Recht und Geschichte“ ins Russische zusammen. Da ich damals noch recht jung war, prägte die persönliche Kommunikation mit Herrn Prof. Knieper maßgeblich meine Ansichten zu vielen Rechtsfragen. Im Jahre 2005 hatte ich die Ehre, auf einer internationalen Konferenz in Bremen anlässlich seiner Emeritierung einen Vortrag im Namen seiner Schüler zu halten.

Seitdem ist viel Zeit vergangen, und heute feiern wir im Rahmen einer Festkonferenz den 85. Geburtstag von Herrn Prof. Knieper.

Während seiner Jahre an der GTZ und seiner Zusammenarbeit mit Juristen in Kasachstan, insbesondere im Bereich des Privatrechts, hat Prof. Rolf Knieper

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1 Dieser Bericht gibt die persönlichen Meinungen und Ansichten des Autors wieder. White & Case übernimmt keine Verantwortung für den Inhalt des Berichts.

maßgeblich zur Entwicklung des Rechtssystems unseres Landes beigetragen und sich einen festen Platz in der kasachischen Rechtsgeschichte gesichert.

Meiner persönlichen Beobachtung nach lag Rolf Kniepers Stärke als Leiter des GTZ-Projekts nicht nur in seiner umfassenden praktischen Erfahrung und seinem fundierten Wissen in verschiedenen Rechtsgebieten, sondern auch in der Ausstrahlung seiner Persönlichkeit, die von jedem, der persönlich mit ihm zu tun hatte, gespürt wurde.

Obwohl Prof. Knieper in erster Linie ein westeuropäischer Jurist ist, gelang es ihm in Kasachstan, sowohl mit erfahrenen hochrangigen Regierungsbeamten als auch mit jungen Jurastudenten produktiv zu kommunizieren. Während die Stärke des GTZ-Projekts darin lag, die Erfahrungen mit Rechtsreformen in mehreren postsowjetischen Staaten zu integrieren, war Prof. Kniepers persönliche Stärke, meines Erachtens, sein Verständnis für die Mentalität, das Rechtsbewusstsein und die Lebensweise in unserem Land zu jener Zeit. Später, während meiner praktischen Tätigkeit in der Gesetzgebung und anderen Bereichen, konnte ich persönlich feststellen, wie weit die überwältigende Mehrheit der anderen westlichen Berater davon entfernt ist, die Realität des Landes, das heißt den Kontext verschiedener Rechtsfragen, zu verstehen.

In Kasachstan war Prof. Kniepers Expertise maßgeblich für die Rechtsreform, vor allem aufgrund seines tiefgreifenden Einflusses auf die Ansichten und Positionen einflussreicher Juristen in Regierung und Wissenschaft. Besonders hervorzuheben ist dabei die Rolle von Herrn Prof. Dr. *Maidan Suleimenov*, der als Bindeglied zur kasachischen Juristengemeinschaft fungierte, unter anderem durch die regelmäßigen jährlichen Lesungen zum Zivilrecht, bei denen Prof. Knieper seine Hauptvorträge hielt.

Wie schon zuvor und bis heute lese ich oft die Werke und Veröffentlichungen von Prof. Rolf Knieper. Diese – nunmehr distanzierte – Kommunikation mit ihm ist für mich persönlich immer eine Art Test für das rationale Verständnis von verschiedenen Rechtsfragen.

Meiner Ansicht nach sind jedoch viele seiner kritischen Überlegungen und Ratschläge für Kasachstan heute leider genauso relevant wie vor 20 Jahren. Warum „leider“? Weil sich das kasachische Rechtssystem, abgesehen von wenigen positiven Ausnahmen, meiner Meinung nach im Laufe der Jahre eher rückwärts entwickelt hat.

Ein Beispiel für die positive Entwicklung des kasachischen Rechtssystems in den letzten zwei Jahrzehnten ist die Entwicklung und Verabschiedung der

Verwaltungsgerichtsordnung unter Einbeziehung deutscher Erfahrungen. Diese Ordnung basiert auf besonderen prozessualen Regeln (spezielle Beweislastverteilung, aktive Rolle des Gerichts), die im Vergleich zum traditionellen Zivilprozess Privatpersonen in Streitigkeiten mit staatlichen Regierungsbehörden zusätzlich unterstützen und stärken. Parallel zu dieser Reform wurden Fachgerichte und Richtergremien geschaffen, deren Arbeit die Situation in Streitigkeiten dieser Art deutlich verbessert hat. Allerdings wurde auch diese Reform nicht vollständig umgesetzt. Insbesondere die progressiven Prinzipien und Ansätze der Verwaltungsgerichtsordnung wurden in anderen spezialisierten Verwaltungsgesetzen verschiedener Wirtschaftssektoren nicht ausreichend implementiert.

Ein weiteres, relativ aktuelles Beispiel für institutionelle und legislative Änderungen, die ich im Hinblick auf die nachhaltige Entwicklung des Rechtssystems als rein positiv bewerten würde, ist die Abschaffung des Verfassungsrats und die Wiedereinführung des Verfassungsgerichts.

In anderen Bereichen der Gesetzgebung und des Rechtssystems ist es in der letzten Zeit leider schwierig, Beispiele für systemische Reformen zu nennen, die langfristig zur nachhaltigen Entwicklung des Rechtssystems des Landes beitragen würden.

Die aktuelle Gesetzgebungspraxis in Kasachstan ist mangelhaft. Das Prinzip der Gesetzesstabilität spielt bei der Verabschiedung neuer Gesetze kaum eine Rolle. Viele Gesetzbücher werden verabschiedet, die inhaltlich keine echten Gesetzbücher darstellen. Zahlreiche Gesetze könnten inhaltlich problemlos als untergeordnete Rechtsvorschriften gelten. Die Gesetzessprache ist wortreich und deklarativ. Selbst im Vergleich zu Gesetzen aus der (post-sowjetischen) ersten Hälfte der 1990er-Jahre hat sich die Sprache der heutigen Gesetzgebung und Rechtspraxis verschlechtert. Die Grundprinzipien der rechtlichen Regulierungspolitik (wie die Rechtfertigung von Gesetzen durch wirtschaftliche und andere Berechnungen, Förderung des Wettbewerbs, Rechtssicherheit, Verhältnismäßigkeit, Rationalität, Kohärenz und Vorhersehbarkeit von Rechtsvorschriften) werden in der Praxis nicht umgesetzt. Die juristische Wissenschaft ist vom realen Gesetzgebungsprozess entkoppelt.

Das Zivil- und Gesellschaftsrecht ist größtenteils veraltet und dringend modernisierungsbedürftig. Eine Modernisierung findet jedoch nicht statt. Dasselbe gilt auch für Land-, Investitions- und Baurecht. Als die jüngsten Beispiele für die sich im Regulierungsbereich anhäufenden gravierenden Probleme könnten die

Versuche genannt werden, ein neues Baugesetzbuch und ein neues Digitalgesetzbuch zu entwickeln. Gleichzeitig werden Gesetze in Kasachstan häufig geändert, oft nur um den unmittelbaren Bedürfnissen des bürokratischen Apparates gerecht zu werden.

Die Rechtswissenschaft ist nur im Bereich des Privatrechts hoch entwickelt, nicht zuletzt dank der Bemühungen von Professoren *Maidan Suleimenov* und *Anatoly Didenko* und ihren jeweiligen wissenschaftlichen Schulen. Im öffentlichen Recht hingegen liegt der Fokus der Forschungen tendenziell nur auf aktuellen, dringlichen Einzelfragen, während konzeptionelle Fragestellungen (von denen es viele gibt) vernachlässigt werden. Eine Ausnahme bilden die jüngsten Arbeiten zum allgemeinen Verwaltungsrecht, die am Wissenschaftlichen Zentrum für verwaltungs- und deutsches Recht der Maqсут Narikbayev Universität durchgeführt werden. Diese Arbeiten sind maßgeblich durch die Verabschiedung und Anwendung der oben genannten Verwaltungsgerichtsordnung motiviert.

Wie schon zuvor werden nur wenige wissenschaftliche Kommentare zu den Gesetzen veröffentlicht, die als Grundlage und Bindeglied zwischen Wissenschaft und Rechtsprechung dienen könnten. Es ist in der Rechtsprechung nicht üblich, dass Gerichte ihre Rechtsauffassungen ausreichend begründen sowie wissenschaftliche Kommentare oder Publikationen zitieren.

Absolventen von Rechtsschulen, die sowohl ein Bachelor- als auch ein Masterstudium absolviert haben, weisen beim Eintritt in die Berufspraxis Lücken in ihrem Wissen über die grundlegenden Aspekte und Fragestellungen des Zivilrechts auf.

Das Rechtssystem erlebt alarmierende Anzeichen von Rechtsnihilismus, niedrigen professionellen Standards und einer Verwischung der grundlegenden Grenzen zwischen Privat- und öffentlichem Recht.

Oben habe ich lediglich einen sehr kurzen Überblick und allgemeine Beispiele gegeben. Insgesamt scheint es dem Rechtssystem an klar definierten, gründlich analysierten und geplanten zukünftigen Entwicklungsrichtungen zu mangeln. Daher bin ich der Meinung, dass die Empfehlungen von Prof. Knieper, die er vor 20 oder mehr Jahren als Leiter des GTZ-Projekts und deutscher Professor gegeben hat, für Juristen im öffentlichen und privaten Sektor des kasachischen Rechtssystems noch lange relevant und nützlich bleiben werden.

A Few Words in Honour of Professor Rolf Knieper on His 85th Birthday

I became acquainted with Mr Knieper through the work on the Civil Procedure Code of the Republic of Azerbaijan. In the 1990s, following the declaration of independence, Azerbaijan embarked on a process of legal reform.

At that time, I held the position of the Deputy Chairperson of the Baku City Court and headed the Judicial Chamber for Civil Cases. For this reason, I was appointed the head of the working group responsible for drafting the Civil Procedure Code of the Republic of Azerbaijan.

The work was difficult but fascinating. We collected, analysed, and adapted legislative acts, legal systems, and experiences from various countries. Assistance and expert assessments were provided by the Council of Europe and the German Technical Cooperation Agency (GTZ) (now the German Agency for International Cooperation GIZ). The head of the legal reform project in Azerbaijan on behalf of GTZ was Mr Knieper. I consider myself fortunate to have had the opportunity to meet him, work with him, and learn from him. I have never ceased to admire his intellect, erudition, and, of course, his vast knowledge and experience.

He is a professor of civil and commercial law at the University of Bremen, Honorary Professor of the Kazakh Humanitarian Law University and Caspian University, Honorary Doctor of Law of Tbilisi State University and the University of Chisinau in Moldova, an Honorary Citizen of Georgia, an Honoured Lawyer of Mongolia, Legal Advisor to the Government of Chad, Coordinator of technical assistance projects of the World Bank in the Central African Republic, and an

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arbitrator at the International Chamber of Commerce, the International Centre for Settlement of Investment Disputes, and the Kazakhstan International Arbitration Centre.

Yet this list is by no means exhaustive.

For several years, Mr Knieper and his colleagues carried out expert evaluations of our work on the draft Civil Procedure Code of the Republic of Azerbaijan.

He was always composed, demanding, attentive, meticulous – scrupulous in the best sense of the word – while at the same time delicate, understanding, responsive, and deeply humane.

His visits to Baku were both a trial and a celebration for us. A trial, because we had to present the results of our work and not fall short of expectations; and a celebration, because exchanging views with Mr Knieper was always effortless and intellectually stimulating. During breaks between meetings, discussions and consultations – his itineraries were invariably demanding – he took great interest in Azerbaijani culture, history and, of course, cuisine.

Mr Knieper's openness and goodwill are also demonstrated by the fact that, during the visits of our delegation to Germany, he welcomed us into his home. We met his daughter Judith, a young and beautiful woman who, following in her father's footsteps, was a lawyer and specialised in banking law at the time.

My family and I will always be grateful to Mr Knieper for his help in organising consultations with ophthalmologists in Bremen for my younger daughter. He learned about the problem by chance and immediately offered his assistance. The surgeries performed helped preserve her eye cosmetically for several decades.

After the legal reform in Azerbaijan was successfully carried out, sadly, our joint work eventually came to an end. However, our communication – though infrequent – continued.

Whenever Mr Knieper came to Moscow for various events, and by then I was already working in Moscow, he always found the time and opportunity to meet and talk; warmly recalling our joint work, sharing stories about his family and new projects, and expressing genuine interest in my professional achievements and family affairs.

Dear Mr Knieper, thank you for having been – and for continuing to be – a part of my life.

Please accept my deepest respect. I wish you good health and strength for new projects. I am certain that there are many more ahead of you.

Blockchain Technology and Artificial Intelligence in Law

Discourse and deliberation surrounding blockchain technology have become increasingly prevalent in contemporary society. While the subject is widely discussed, it remains insufficiently understood by many. The technology was invented by Satoshi Nakamoto. Initially, even the inventor did not take his creation seriously; however, in 2009 the system was deployed on a computer network and the business concept became operational.

The primary question arising in relation to blockchain technologies is whether the technology is beneficial and to what extent it is secure. At first glance, the underlying concept of blockchain technology appears relatively straightforward: a vast, shared-use database that operates without centralised management.¹ At present, all financial transactions and documentary circulation are conducted through intermediaries. Banks, various governmental authorities, and notaries attest to the authenticity of executed transactions. In other words, an intermediary is required. This technology, however, offers services without the need for an intermediary.²

In plain terms, blockchain is an immutable, decentralised computer network used to facilitate various virtual transactions — for example, the purchase, sale, or lease of cryptocurrency such as Bitcoin and other digital coins, or of any other alienable products or property, including real property. Unlike standard

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1 Bryce Suzuki, Todd Taylor, Gary Marchant, BLOCKCHAIN: How it will change your Legal Practice, Arizona Attorney, February, 2018.

2 Satoshi Nakamoto, Bitcoin: A Peer-to-Peer Electronic Cash System, <<https://bitcoin.org/bitcoin>>.

currencies, it is not physically printed; rather, it is generated, stored, and expended electronically.³ Such is the brief characterisation of the technology, which appears quite attractive. The answer to the first question has thus been provided — a matter of considerable significance.

Concerning security, it is notable that this database is neither governable nor centralised. Information stored on one block is linked to all other blocks, and any modification thereto is instantaneously reflected across all of them. Accordingly, no external party is capable of effecting any change without such modification being observable or accessible to others. The system operates securely in this respect. The blockchain database is protected against both cyberattacks and physical destruction, given that records contained therein are stored not in any single location, but globally, within a public database through block-based entries.

As early as 1967, Paul Baran — one of the principal architects of the packet-switching system that became the foundation of the internet — predicted the emergence of a centralised "computer utility" that would offer computational services in the same manner as energy companies supply electricity. Today, this model is embodied primarily in the information empires of Amazon, Google, and other cloud technology companies. As Baran had predicted, they offer convenience at the cost of privacy.⁴

Consider the following scenario: a governmental authority seeks to alter the registration of rights over immovable property. In the case of blockchain technology, such alteration cannot be effected covertly or concealed; in other circumstances, however, the deletion, concealment, or erasure of prior data would be within the authority's power. Naturally, such a dramatic scenario is practically inconceivable; yet the theoretical possibility exists. Therefore, even from this example alone, it may be asserted that the new technology is secure. Numerous other practical instances may be adduced demonstrating circumstances in which new technology may be deployed from a legal standpoint.⁵

3 *Huang-chin Sung*, When Open Source Software Encounters Patents: BLOCKCHAIN as an example to explore the dilemma and solutions, *The John Marshall Law School Review of Intellectual Property Law*, 55, 2018.

4 *Joshua Kopstein*, The Mission to Decentralize the Internet, *The New Yorker*, Dec. 12, 2013.

5 *George Walker*, Financial Technology Law — A New Beginning and a New Future, 50 *INT'L LAW.* 137, 171 (2017).

The new technology constitutes the Internet of Things, which is automated and operates autonomously, free from state jurisdiction by virtue of the principle of the extraterritoriality of the internet. To illustrate: is it possible to prohibit online casinos? It is practically impossible, since restricting their registration within an existing jurisdiction will not result in their removal from the network. To state it even more plainly, if an online casino is banned on Georgian territory, it will register on the internet under a domain — in Las Vegas, for instance — and no government will be able to restrict its activities without blocking the website in its entirety, which would itself be unlawful, given that access to the internet has been recognised as a right under recent constitutional amendments.

By way of illustration: a businessman has three sons, all married but childless. The businessman wishes to bequeath his estate to whichever son first has offspring and leaves a testament to that effect. The testament is notarially authenticated and uploaded to the blockchain system. Upon the registration of information concerning the testator's death in the relevant registry, the system initiates a search for the deceased's grandchildren. Once the relevant information is reflected in the blockchain system, the property is registered in the name of the father of the firstborn child in order of date of birth. For such scenarios, it is necessary that birth registration in the blockchain system be prescribed as mandatory by law. Likewise, the property must be duly registered, and the system will handle all remaining steps automatically. In other words, a different person becomes the owner of the property.

The principal concept of blockchain technology, from a legal standpoint, resides in its flexibility. Particularly attractive in this regard are so-called "smart contracts," which contemplate the existence of standard-form contract templates in which only the personal information of the parties is substituted. Consider a deed of gift by which a father donates an automobile to his son. The drafting of such a contract requires no particular effort, provided it contains no special stipulations. Accordingly, the parties need only enter their identification data into the system and the contract is complete. There is no need for the parties to appear before any authority or to obtain any further authentication. Without leaving one's home or office, a contract may be concluded, the service fee paid virtually, and the outcome received. Such a contract is a self-executing agreement between two or more parties, which is triggered once pre-determined norms and conditions have been satisfied. It operates on the principle of: "if this condition is met, then this outcome follows." This technology drastically

reduces expenditure of time and resources and is practically accessible to any user without the need to leave one's home or office.⁶

For example, the vast majority of notarial services will be verified and confirmed by technology in real time — that is, the technology will perform everything that a human notary intentionally performs, with the distinction that this technology cannot be falsified or delayed. It goes without saying that notaries will continue to be necessary — for the execution of testaments and analogous procedures, for instance — however, the absolute majority of their activities is replaceable by this technology. The same applies to the public or civil registry, the Mayor's office, and municipal services, which means that the physical "one-stop shop" principle is obsolete, and the virtual "one-stop shop" principle resolves the absolute majority of issues without any queuing. Most significantly, this technology eliminates corruption.⁷

What may be opposed to all of this? How may one argue against it? Returning to the businessman's example: the same registration may be carried out through a flexible electronic service and does not necessarily require blockchain technology. The registration system performs searches and subsequent procedures independently. Equally, in the case of blockchain technology, numerous problems may be envisaged. For instance, the issue of the father of the businessman's firstborn grandchild qualifying as an unworthy heir, or the legal assessment of the circumstances of the child's birth (born incapacitated, survived only a few days, etc.). In other words, human resources — in this case, a legal adviser — cannot be dispensed with. Flexibility, speed, security, and protection accordingly remain open questions.

Nevertheless, existing blockchain technology affords the possibility of substantially transforming the mechanisms of hitherto operative private and public service delivery. By way of illustration, it suffices to cite the savings of more than USD 700 million by the American legal profession alone — expenditure previously incurred solely in respect of paper, transport, and time — as a result of the introduction of electronic signatures and associated technologies.

Conclusion: This technology reduces the necessity for intermediaries — lawyers, notaries, operators, and other providers of public or private services —

6 *S.H. Spencer Compton, Diane Schottenstein*, Blockchain Technology and Its Applicability to the Practice of Real Estate, *New York State Bar Real Property Law Journal*, Spring/Summer, 2017.

7 *Ronald L. Chichester*, Technology and the Law: Wide Open Spaces: How Blockchain has Moved Beyond Currency, *Texas Bar Journal*, April, 2017.

standing between citizens and regulatory frameworks. This, in turn, engenders tension with numerous existing and established legal principles. Technology does not possess "inner conviction"; there is no adversarial process at play; there is no possibility of evaluating evidence. Everything is contingent upon the technology, wherein the "human" factor is excluded. In a custody proceeding, a judge may be persuaded that a child should be placed in the mother's care notwithstanding her lower income, because she devotes more time to the child. Technology, however, in such a case would calculate figures, and the child might be placed with the father who has no time for the child whatsoever, but whose "data" — financial means, place of employment, or size of residential premises — are more favourable. Technology would prefer a 100-square-metre residential property, 90 square metres of which constitute communal space, while being incapable of properly evaluating a 50-square-metre property where 20 square metres are designated exclusively for the child. Technology selects that which is mathematically superior in data.

Perhaps, however, decisions made today without the weight of tradition or sentiment may in fact prove more acceptable. A prerequisite for smart contracts is the digital signature, which is already being rapidly adopted and integrated across various authorities. Paper-based documents have long ceased to be relevant, and information is accessible in digital and electronic form. State authorities are making increasingly active use of electronic registries and services. Merely a decade or two ago, even the exchange of information by electronic mail was uncommon. Today, almost every ordinary citizen transmits and receives information from various networks. A mandatory condition for the registration of a business entity in the commercial registry is the provision of an electronic mail address, through which the party will receive various notifications. Ordinary individuals engaged in routine commerce are already able to process information received by electronic mail and respond accordingly, and this has become commonplace.

From a legal perspective, what further benefits can blockchain offer? There is a view that, with the assistance of blockchain, the law may become more accessible. Today, the use of legal services is quite costly for ordinary citizens. Accordingly, the codification of law is commencing, and in this process, in addition to smart contracts, normative acts will also be codified in a form comprehensible to computers. If the codification of normative acts is successfully accomplished, it will offer citizens a great many services. Blockchain applications will be created

that bring citizens considerable benefits — making services that are currently less accessible to them, such as the engagement of qualified counsel, affordable and inexpensive.

In Georgia, with a view to facilitating the electronic execution of real property transactions, the Public Registry has created a new innovative product — the "smart contract" — which has been available to Georgian citizens since October 2024.⁸ As a result, Georgian citizens may, using internet-connected devices from any location in the world without leaving their homes, and through a secure application employing AI technology, conveniently and securely enter into transactions, obtain mortgage loans, make purchase payments, and register ownership (receive an extract). The latter is uploaded via the blockchain system into a shared database.⁹ The extent to which this innovation is beneficial and distinctive is, however, somewhat difficult to assess.

In what other formats and directions might this technology be utilised? For example, notaries may issue writs of execution in respect of documents issued in electronic form through blockchain technology. Discussion concerns the registration in the blockchain system of credit agreements concluded in electronic form in the course of remote banking services. The topicality of this subject was occasioned by the difficulty arising in confirming the authenticity of such documents in the course of debt recovery by means of a notarial writ of execution. Through the blockchain system, it is possible to verify such credit agreements in their original form without the submission of paper-based documentary carriers. Moreover, each document is assigned a unique sequence of characters — a so-called hash — for subsequent placement in the blockchain system. The process proceeds as follows: the credit agreement is signed by the natural person and the bank's representative through the remote service; the agreement is then assigned a hash, which is placed in the blockchain system. When a writ of execution is requested from the notary, the bank transmits the package of documents to the notary in electronic form, and the notary generates a hash and compares it against that already placed in the blockchain system. If there is a

8 *Laura M. Padilla*, Real Estate Trends: Title and Blockchain Technology, 2023, California Western School of Law. <https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1429&context=fs>.

9 <https://www.forbes.ru/tehnologii/339025-aleksandr-ivanov-waves-platform-tehnicheskii-nichto-ne-meshaet-organizovat>.

match, the document is authentic and the notary may issue the writ of execution.

In general, the effective implementation of blockchain technology is contingent upon firm political will. To put it differently, its revolutionary character and the consequences flowing therefrom are only realised when it is recognised and implemented by the state. The benefits derived therefrom simplify the procedures by which citizens receive services and reduce the cost of such services; they also create unique opportunities for restructuring state and private services in order to ensure qualitatively new, ultramodern public service delivery. Blockchain has already exerted a transformative influence on the banking and financial industry, and in the near future this influence will qualitatively alter the existing financial sector by decentralising it and reducing the role and influence of the state over the economy as a whole.

In the near future, if the system becomes operational and state authorities express their consent to participation therein, it is highly probable that voting in state elections may also be conducted using blockchain technology, thereby eliminating the probability of falsification or alteration of data — though the extent to which any particular state desires this outcome is a separate matter.

A subject related to blockchain is cryptocurrency and, in particular, Bitcoin. Cryptocurrency is electronically generated money, produced through a special algorithm by means of modern computer technologies. Electronic money — Bitcoin, for instance — has value insofar as it contains information.¹⁰ The question arises as to how one may trust electronic money that one cannot see. The answer is simple. When one holds a credit card (VISA, Mastercard, etc.), one credits and pays funds thereon without seeing the monetary unit as a paper-based documentary carrier. The question therefore is: why may that money not exist in electronic form? The issue, however, is something else entirely. Behind every country's currency stands the state. And who — or what — stands behind cryptocurrency? Bitcoin, Litecoin, Ethereum, and other cryptocurrencies, just like the US dollar, euro, or rouble, are merely means of payment. The form in which they exist and the extent to which they are acceptable depends on state policy. By February 2015, Bitcoin had already been accepted as a means of payment by more than 100,000 commercial establishments. Bitcoin may also be used for investment purposes. According to a 2017 study by the University of

¹⁰ <https://www.bbc.com/news/articles/cy5w2k5k5ylo>.

Cambridge, the number of unique and active users of cryptocurrency wallets increased from 2.9 million to 5.8 million between 2013 and 2017, with the majority being Bitcoin users.

In Georgia, as in many countries, so-called mining hardware was acquired, installed, and systematically operated on a mass scale for the purpose of generating cryptocurrencies. Individuals made substantial investments and generated electronic money. The large-scale participation of miners in the generation of electronic money and the increased complexity of generation algorithms reduced the volume of electronic money produced, which in turn caused an increase in its value.

There are two types of electronic money: generative and non-generative. Generative electronic money includes Bitcoin, Ethereum, Waves, and others. Non-generative electronic currency encompasses those monetary units that function as a means of buying and selling on a particular blockchain platform, registered as coin units of a specific quantity. Such monetary units may be created by any natural or legal person. The trustworthiness of electronic services has long ceased to be a matter of concern. Modern technological processes are so refined and secure that they no longer give rise to doubt. Other questions do, however, arise — specifically those pertaining to legal advice and legal protection.

One of the principal issues of blockchain technology is its public nature. In our businessman's example, this technology operates on the condition that all information is made public: the testament, the registration of the fact of birth, the right of ownership over property, and so forth. The system will function only if this information is public and accessible, since programmatic search is effective only when data is placed within the search system.

As regards the negative aspects of all of this: information concerning a testament is confidential. Likewise, the disclosure of information regarding the fact of a birth is undesirable. The businessman's son may well have no desire either to receive the property or to have disclosed the fact that he has had a child. This is personal information that every person has an obligation to protect. In other words, our ostensibly protected system does not and cannot protect personal information, because without disclosure it cannot and does not function. Thus, the question arises: do we need new technology? Do we recognise it? In the case of Georgia, this question has been partially answered. Specifically, the National Agency of the Public Registry has commenced duplicated registration: the

registration of rights over immovable property is registered both with the state authority — in the database of the National Agency of the Public Registry — and in the blockchain system. The same will apply to the commercial registry.

On 22 April 2016, a Memorandum of Understanding was concluded between the National Agency of the Public Registry and Bitfury Group Limited (registered in the Cayman Islands, company registration number: 288026). The document provided for the creation of a blockchain-based pilot system for the real property registration process and the provision of the technical and organisational preparation necessary for its operationalisation. Following the successful completion of the pilot phase, on 7 February 2017, the parties concluded a new memorandum aimed at operationalising the system in a live environment. Under the terms of the agreement, Bitfury Group Limited undertook to place information concerning extracts prepared by the Public Registry in the global blockchain network. Bitfury Group Limited is a global leader in blockchain technologies and a full-scale provider of digital solutions. The company was founded in 2011 by Val Vavilov. It commenced operations in Bitcoin mining and the manufacture of related hardware, but has significantly expanded its profile over the years and today creates third-generation web infrastructure (Web 3.0). Information concerning real property ownership in Georgia is, pursuant to Georgian law, public and accessible to all. Information concerning immovable property — the owner, area, address, and public-law restrictions — is reflected in an extract, which is likewise accessible on the Agency's website. The storage of information on the Public Registry's servers and its publication on the website guarantees data security within the country; through the decentralised blockchain database, however, the Public Registry further ensured the security of information at the international level, given that in the event of the destruction, damage, or hacking of data within the country, the data is preserved in unaltered form in the global blockchain network. Using blockchain's so-called "hashing" technology, each extract was assigned a unique hash code — a cryptographic sequence of characters designated exclusively for a specific document, which changes entirely even in the event of a minimal alteration. This mechanism ensures the authentication of the document at any moment and excludes the alteration or falsification of information. Hash codes were generated by the Public Registry and transmitted to the partner company (Bitfury Group) for placement in the global blockchain network. The partner had no access to the Public Registry's primary source data, thereby ensuring the confidentiality of information and a high

standard of systemic security. The said service was extended to ongoing registration transactions and did not provide for the payment of any additional fee by the citizen. As of 18 January 2021, 3,523,192 unique hash codes generated by the Public Registry had been registered in the blockchain network, which to date constitutes the final statistical indicator of the use of this technology. In 2018–2019, negotiations were conducted with Bitfury Group Limited regarding the improvement of the existing hashing system and the introduction of an automated solution; however, agreement was not ultimately reached.

On 3 December 2025, the Ministry of Justice of Georgia concluded a memorandum with StegX LLC — a company incorporated in Georgia — which, in collaboration with Hedera, one of the leading blockchain ecosystem platforms, provides for the migration of data held by the National Agency of the Public Registry to a blockchain network through the most advanced digital technologies in the public sector. Furthermore, on 12 January 2026, with a view to introducing advanced technologies in the real property sector, the Ministry of Justice concluded a Memorandum of Understanding with PRYPCO TECHNOLOGIES, one of the largest real property technology companies. The memorandum provides for the establishment of a cooperation framework in the area of real property tokenisation, which implies the transformation of real property into an intangible asset.¹¹ Several years ago, at one of the annual Constituency Meetings of the International Monetary Fund and the World Bank held in Georgia, the idea was raised that tax administration — with the exception of value added tax — could be implemented by means of blockchain technology. Discussions were also ongoing regarding the use of blockchain in the Revenue Service for the issuance of licences and permits.

Georgia is among the first countries to employ the technological achievements of blockchain in the registration of real property and business. The summary evaluation of the Public Registry system states that the immutable and transparent nature of blockchain may facilitate the elimination of fraudulent documentation confirming land ownership rights, create an immutable history of land transactions, and ensure real-time verification of land ownership.¹²

¹¹ <https://www.napr.gov.ge/ka/news>.

¹² Laura M. Padilla, *Real Estate Trends: Title and Blockchain Technology*, 2023, California Western School of Law. <https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1429&context=fs>.

Returning to the question of which professions the new technology will replace, it must be noted that the replacement of lawyers and legal advisers is technologically impossible (so long as the well-known humanoid robot Sophia has not attained the highest stage of intellectual development). With regard to registrars, a considerable amount of human resources will indeed be saved, since this process is technologically replaceable.

As regards notaries, questions remain. A notary is a person who draws up and authenticates contracts, documents, and facts, and — most importantly — establishes a person's identity and legal capacity. How can an electronic service replace all of this? The subject of contracts, as we have seen, is straightforward; but what of identification? Who must ensure, and by what means, that a given individual signing a document — even electronically — is in fact the person claimed? And was that person's expression of will free from coercion? In such cases, the physical presence of a notary remains indispensable. The identification of a person and the authenticity of their expression of will cannot be established without a notary, unless signature by means of one's own DNA becomes possible — which, in the age of modern technological processes, may not be such a distant prospect. As regards subsequent acts — such as the uploading of a signed document, registration in a given system, generation, and similar processes — this is already an excellent environment for blockchain technology. "With a simple gesture, paper-based documents are rendered obsolete and blockchain endures."

Alongside blockchain technology, the programmatic application of artificial intelligence is becoming increasingly relevant today. Ordinary people are already using it and consulting it on various matters. Let us do the same and pose the following question: will artificial intelligence replace the work of a notary? The response would be as follows:

"It will not fully replace notaries; however, it will fundamentally transform their work.

Artificial intelligence (AI) will be more of a 'smart assistant' for notaries than a competitor. Here is why:

1. What will AI do in place of the notary?

AI is capable of performing 90% of routine and technical tasks:

Document preparation: generating standard contracts within seconds.

Error detection: identifying inconsistencies or deficiencies in a text that a person might miss.

Identification: confirming identity through biometric data and facial recognition technology.

Blockchain integration: the secure and immutable recording of transactions in digital registries.

2. What cannot AI replace? (The human factor)

The notary's function is not merely the affixing of a seal. There are critical moments in which the machine is, for the time being, powerless:

Freedom of will: the notary must ascertain whether a person is acting under duress, blackmail, or the influence of narcotic substances. AI has difficulty perceiving the nuances of human emotions and psychological pressure.

Legal consultation: the notary explains to the parties the legal consequences of a transaction, which requires an individualised approach.

Ethics and liability: in the event of an error, the notary is held accountable (including in terms of property liability). The imposition of legal liability upon an algorithm remains an unresolved issue for the time being.

What will change in the near future?

We shall have a 'hybrid notariate':

Processes will become faster and less expensive.

Queues and bureaucratic barriers will disappear.

The notary will become a 'digital mediator,' responsible only for final verification and the ethical dimension.

Myth: 'Due to AI, notaries will become unemployed.'

Reality: Only those notaries who refuse to adopt technology will become unemployed."

The extent to which the foregoing response is realistic is a matter left to the reader's deliberation. One must, however, not forget the essential point. Artificial intelligence finds answers by generating information placed in the internet space. But it is the human being who places that information there. Human beings invent, write, publish articles, create medicines, and assess real circumstances with their inner conviction. The answers provided by artificial intelligence are the product of all this information. Were it not for the information supplied by human beings, artificial intelligence would be incapable of producing a response. Therefore, a robot cannot replace a human being. A robot does not

possess emotional intelligence, creative thinking, critical analysis, or the capacity to adapt to complex situations.

For the human being, the most important thing is the human being.

Rechtliche Aspekte der Regelung gemeinschaftlicher Beziehungen

Anwendungsbereich der gemeinschaftsrechtlichen Normen

Die Beziehungen zwischen Personen mit gemeinschaftlichem (gemeinsamen) Recht sind durch die Artikel 953–968 des Zivilgesetzbuches Georgiens bestimmt. In Artikel 954 hat der Gesetzgeber einen besonderen Terminus für die Teilnehmer einer gemeinschaftlichen Rechtsbeziehung eingeführt und sie „Mitanteilhaber“ genannt, die Subjekte des Privatrechts sein können (Art. 8). Im Unterschied zum absoluten (gemeinsamen) Recht an einer Sache, bei dem der Berechtigte sich gegen jeden Eingriff verteidigen kann, ist die Forderung in schuldrechtlichen Beziehungen – und darunter auch in gemeinschaftlichen Rechtsbeziehungen – auf die gesetzlich auferlegte Pflicht des anderen Mitanteilhabers beschränkt. Der Gläubiger kann nur vom Schuldner ein aktives Tun oder Unterlassen verlangen.¹ In dieser Beziehung können die Mitanteilhaber je nach Ausübung des gemeinsamen Rechts an der Sache entweder Gläubiger oder Schuldner sein. Deshalb hat der Gesetzgeber die Teilnehmer einer gemeinschaftlichen schuldrechtlichen Beziehung nicht als Miteigentümer, Mitbesitzer oder Mitnutzer bezeichnet, sondern als „Mitanteilhaber“. Beispiel: Wenn von einer gemeinschaftlichen Sache eine Gefahr ausgeht und dadurch das Eigentum, Leben oder die Gesundheit eines Dritten geschädigt wird, haften die Mitanteilhaber gemäß Art. 965 solidarisch. Begleicht jedoch nur ein Mitanteilhaber den Schaden gegenüber dem

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1 *Chanturia*, Kommentar des Zivilgesetzbuchs Georgiens, Buch 2, 25.

Dritten, so entsteht ihm als Gläubiger gegenüber den übrigen Mitanteilhabern als Schuldner ein Anspruch auf anteilige Erstattung der gezahlten Summe im Verhältnis ihrer Anteile (Art. 960).

Das gemeinsame Recht an einer Sache oder einem immateriellen Vermögenswert kann gleichzeitig mehreren natürlichen Personen, mehreren juristischen Personen oder beiden gemeinsam zustehen. Beispiel: Wenn ein Erblasser sein unbewegliches Vermögen sowohl seinen gesetzlichen oder testamentarischen Erben (natürliche Personen) als auch einer Institution oder Organisation vermacht, bei der er zuletzt tätig war, entsteht gemeinsames Eigentum sowohl für die Erben als auch für die juristische Person.

Bemerkenswert ist auch, dass Subjekte einer gemeinschaftlichen Rechtsbeziehung Minderjährige (geschäftsunfähige), Jugendliche oder Personen mit psychosozialen Unterstützungsbedarf sein können, die ihre Rechte und Pflichten entweder selbst oder mit Hilfe eines Unterstützers wahrnehmen.

Damit gemeinschaftliche Rechte bestehen, sind folgende Voraussetzungen erforderlich:

1. mindestens zwei Mitglieder (natürliche oder juristische Personen)²,
2. ein Recht, auf das sich gemeinschaftliche Rechte erstrecken können,
3. die Möglichkeit, gemeinschaftliche Rechte auf ideelle Anteile zu verteilen.³

Gemeinschaftliches Eigentum kann sowohl kraft Gesetzes als auch durch Vertrag entstehen (Art. 173.1.1). Deshalb verweist Art. 953 nicht ausdrücklich auf die Entstehungsgründe gemeinschaftlicher Rechte, sodass die Vorschriften dieses Kapitels auf alle Beziehungen zwischen Personen angewendet werden können, denen gemeinschaftliche Rechte an einem bestimmten Vermögenswert kraft Gesetzes oder Vertrages zustehen.

Das anteilige gemeinschaftliche Recht entsteht häufig kraft Gesetzes, also ohne (oder gegen) den Willen der Mitanteilhaber.⁴ Gesetzliche Grundlagen sind u. a.:

- Art. 192 ZGB: gemeinsames Eigentum an einem Schatz,
- Art. 194 ZGB: gemeinsames Eigentum durch Vermischung beweglicher Sachen,

2 MüKoBGB/Karsten Schmidt BGB § 741 Rn. 9.

3 Erman/Aderhold, BGB, 14. Aufl., § 741. PWW/ von Dittfurth §741 Rn. 1.

4 Hirsch, Schuldrecht Besonderer Teil, 4.Aufl, 2016, 324.

- Art. 195 ZGB: gemeinsames Eigentum an einer neuen beweglichen Sache durch Verarbeitung,
- Art. 182 Abs. 1 ZGB: gemeinsame Nutzung einer Grenzanlage (z. B. Zaun), wenn nicht eindeutig einem Nachbarn zugeordnet. Weitere gesetzliche Grundlagen: Art. 1158 (gemeinschaftliches Eigentum der Ehegatten), Art. 1306, Art. 1336 sowie andere erbrechtliche Vorschriften.

Gemeinschaftliches Recht kann auch durch zivilrechtliche Verträge entstehen, deren Gegenstand die Übertragung von Eigentum oder Nutzungsrechten ist – etwa wenn mehrere Personen gemeinsam eine Sache kaufen, wenn ein Geschenk mehreren Personen zukommt oder wenn durch gemeinsame Arbeit ein Werk entsteht (Miturheberschaft).⁵ Auch bei Leasingverträgen kann ein gemeinschaftliches Nutzungsrecht entstehen. In solchen Fällen regeln Kauf-, Schenkungs- oder Leasingverträge die Beziehung zu Dritten, während die Beziehungen zwischen den Erwerbern, Beschenkten oder Leasingnehmern durch die Vorschriften über gemeinschaftliche Rechte bestimmt werden, sofern kein spezieller Vertrag (z. B. Gesellschaftsvertrag, Ehevertrag) oder Sondergesetz (z. B. Gesetz über Wohnungseigentümergeinschaften,⁶ Gesetz über Urheberrechte) einschlägig ist.

Art. 953 ZGB verweist nicht ausdrücklich auf die rechtliche Natur des gemeinschaftlichen Rechts, insbesondere ob es sich um Miteigentum oder Mitbesitz handelt. Nach Sachenrecht kann mehreren Personen sowohl gemeinsames Eigentum (Art. 173) als auch gemeinsamer Besitz (Art. 155 Abs. 4) zustehen.⁷

Wenn zwei oder mehrere Personen gemeinsam eine bestimmte Sache mieten oder pachten, so wird das Verhältnis zwischen diesen Personen und dem Eigentümer der Sache – als Vermieter/Verpächter einerseits und Mietern/Pächtern andererseits – durch die einschlägigen Vorschriften über Miete oder Pacht

5 Artikel 11 Absatz 1 des georgischen „Gesetzes über das Urheberrecht und verwandte Schutzrechte“ besagt, dass das Urheberrecht an einem Werk, das von zwei oder mehr Personen geschaffen wurde (Mitauteurschaft), gemeinsam den Miturhebern zusteht, unabhängig davon, ob das Werk ein einziges, unteilbares Ganzes bildet oder aus Teilen besteht, von denen jeder eine eigenständige Bedeutung hat. Das Verhältnis zwischen den Miturhebern kann durch eine Vereinbarung zwischen ihnen geregelt werden.

6 Hirsch, Schuldrecht Besonderer Teil, 4. Aufl., 2016, 323.

7 In der Rechtsliteratur wird die Auffassung vertreten, dass der Besitz faktischer Natur ist und eine Form des Rechtsverhältnisses darstellt, jedoch kein Recht ist; daher bestehen keine Miteigentumsrechte in Bezug auf den Besitz. *Erman/Aderhold*, BGB, 14. Aufl., § 741; *MüKoBGB/Schmidt*, BGB § 741 Rn. 17.

geregelt. Das Verhältnis zwischen den Mietern/Pächtern selbst kann jedoch nicht durch die miet- oder pachtrechtlichen Normen geordnet werden, sondern richtet sich im Wesentlichen nach den Artikeln 953–968 des Zivilgesetzbuches, wobei die Besonderheiten zu berücksichtigen sind, die das gemeinschaftliche Eigentum vom Mitbesitz unterscheiden.

In der georgischen juristischen Literatur wird hierzu die Auffassung vertreten, dass die Ansprüche und Rechte der Subjekte gemeinschaftlicher Rechte dem Eigentümerrecht zuzurechnen sind, insbesondere das Recht auf Teilung in natura, Verwaltung, Verfügung usw. Allerdings ist festzuhalten, dass gemeinschaftliche Rechte sämtliche dinglichen und schuldrechtlichen Rechte umfassen, die mehreren Personen an einer Sache zustehen können – also nicht nur Rechte, sondern auch Pflichten.⁸

Daher ist das gemeinschaftliche Recht das Recht der Anteilseigner auf ihren ideellen Anteil, was im englischen Rechtsdiskurs als „systematische rechtliche Einheit“ bezeichnet wird.⁹

Bei der Ordnung der Rechtsbeziehungen zwischen Mitanteilhabern ist zur Vermeidung von Konflikten das zivilrechtliche Prinzip der Gleichheit der Parteien zu beachten. Da die Grundlage des gemeinschaftlichen Rechts das Eigentumsrecht der Mitanteilhaber am Gegenstand ist, muss bei der Regelung ihrer Beziehungen sowohl die volle Herrschaft jedes Mitanteilhabers über den Gegenstand als Eigentümer als auch die proportionale Verwirklichung der Interessen aller Mitanteilhaber gewährleistet sein. Bekanntlich hat eine Sache im Rahmen gemeinschaftlicher Rechte keinen alleinigen Eigentümer; keiner der Mitanteilhaber kann über das Ganze allein verfügen.

Für das gemeinschaftliche Eigentum als absolutes Recht ist kennzeichnend, dass die Miteigentümer gegenüber Dritten als einheitlicher Eigentümer auftreten. Dritte dürfen sie nicht an der Ausübung der Eigentumsbefugnisse hindern.

Im Rahmen gemeinschaftlicher Rechte üben die Mitanteilhaber ihre Herrschaft und Eigentümerbefugnisse gemeinsam aus. Aus dem Wesen des Rechts folgt, dass kein Mitanteilhaber ohne Zustimmung der anderen einen Vorteil oder

8 მოთაძე, საერთო საკუთრებისა და საზიარო უფლებების მარეგულირებელი ნორმების შედარებითი ანალიზი საქართველოს სამოქალაქო კოდექსის მიხედვით, სამართლის ჟურნალი, 2009, #2, 20.

9 MüKoBGB/ Schmidt, BGB § 741 Rn.1.

eine Sonderstellung beanspruchen darf. Deshalb hat der Gesetzgeber die Ordnung ihrer Beziehungen ausdrücklich geregelt.

Die gesetzlichen schuldrechtlichen Normen zur Ordnung gemeinschaftlicher Beziehungen lassen sich in zwei Gruppen einteilen:

1. Normen, die die internen Beziehungen der Mitanteilhhaber regeln (z. B. Nutzung, Verwaltung, Pflege der gemeinschaftlichen Sache).
2. Normen, die die Beziehungen der Mitanteilhhaber zu Dritten regeln (z. B. Verträge über Instandhaltung mit Bauunternehmen oder Kreditverträge zur Finanzierung gemeinschaftlicher Ausgaben).

Der Gegenstand gemeinschaftlicher Rechte kann jedes Recht sein, dessen gemeinsame Ausübung zulässig ist. Bloßer faktischer Besitz reicht nicht aus, um ein gemeinschaftliches Recht zu begründen.¹⁰

Gemeinschaftliche Rechte entstehen meist in Form von Miteigentum an Grundstücken oder beweglichen Sachen, können aber auch Forderungen, Patente¹¹ oder andere nach Art. 7 ZGB zulässige materielle oder immaterielle Vermögenswerte betreffen. Der Gegenstand des gemeinschaftlichen Rechts ist das Gut, in dem sich der Anteil jedes Mitanteilhhabers widerspiegelt.¹²

In der juristischen Literatur besteht Uneinigkeit darüber, ob zur Ordnung der Beziehungen zwischen Personen mit gemeinschaftlichem Recht schuldrechtliche oder sachenrechtliche Normen anzuwenden sind. Manche Autoren meinen, die einschlägigen Vorschriften sollten im Sachenrecht verankert sein, da sie dinglichen Charakter haben. Dabei ist zu beachten, dass die sachenrechtlichen und schuldrechtlichen Normen unterschiedliche Funktionen erfüllen.¹³

Einige Autoren vertreten die Auffassung, dass die gemeinschaftsrechtlichen Vorschriften nicht im Abschnitt über gesetzliche Schuldverhältnisse des Zivilgesetzbuches enthalten sein sollten, sondern durch die entsprechenden Paragraphen im Sachenrechtsbuch bestätigt werden müssten, da sie der Meinung sind, diese Vorschriften hätten einen sachenrechtlichen Inhalt.¹⁴ Es ist zu beachten, dass die gemeinschaftsrechtlichen Vorschriften des Sachenrechts und die schuldrechtlichen Vorschriften völlig unterschiedliche Funktionen erfüllen.¹⁵

¹⁰ *Erman/Aderhold*, BGB, 14. Aufl., § 741.

¹¹ *Hirsch*, Schuldrecht Besonderer Teil, 4. Aufl., 2016, 322.

¹² *Bichia*, Gesetzliche Rechtsverhältnisse, 2016, 52 (in georgischer Sprache).

¹³ *Schnorr, Randolph*, Die Gemeinschaft nach Bruchteilen, (§§ 741-758 BGB), 2004, 25.

¹⁴ *Todua, Willems*, Schuldrecht, 2006, 97 (in georgischer Sprache).

¹⁵ *Hirsch*, Schuldrecht Besonderer Teil, 4. Aufl., 2016, 323.

Beim gemeinschaftlichen Eigentum ist jeder Miteigentümer unabhängiger Eigentümer seines Anteils; die Rechte sind voneinander unabhängig. Das Eigentumsrecht ist absolut, da jeder Miteigentümer gegenüber den anderen und gegenüber Dritten die ungestörte Ausübung verlangen kann. Doch sobald die Miteigentümer Besitz, Nutzung oder Verfügung gemeinsam ausüben, entstehen neben absoluten auch relative Rechte und Pflichten – sowohl untereinander als auch gegenüber Dritten. Deshalb kann die gemeinschaftliche Beziehung nicht allein als sachenrechtliche Beziehung betrachtet werden. Es ist ebenfalls zu beachten, dass die Ordnung der Beziehungen zwischen Miteigentümern im Zusammenhang mit der Ausübung und dem Schutz gemeinschaftlicher Rechte nicht allein durch sachenrechtliche Normen möglich ist, sondern auch schuldrechtliche Normen erforderlich sind. Die gemeinschaftsrechtlichen Vorschriften haben keinen rein sachenrechtlichen, absoluten Inhalt, da sie zwar die Rechte und Pflichten der Miteigentümer an einem gemeinsamen Objekt regeln, jedoch etwa bei der Pflege, Verwaltung oder Verfügung über das gemeinsame Eigentum die Beziehungen zwischen den Miteigentümern oder zu Dritten bereits relative, verhältnismäßige Beziehungen darstellen, die umfassend durch schuldrechtliche Normen geregelt werden.

Gemeinschaftliche Rechte gehören zu den gesetzlichen Schuldverhältnissen insofern, als die Rechte und Pflichten zwischen den Mitanteilhabern auf der Grundlage schuldrechtlicher Normen entstehen und ihre Beziehungen gesetzlich geordnet sind.¹⁶

Dabei ist jedoch zu berücksichtigen, dass sich das in diesem Kapitel vorgesehene rechtliche Regime gemeinschaftlicher Rechte nicht unbedingt auf jede Art von Vermögen anwenden lässt. So gilt es beispielsweise nicht für Vermögen, das während der Ehe durch Erbschaft oder Schenkung erworben wurde (Art. 1161.b), oder für Gegenstände des individuellen Gebrauchs – mit Ausnahme von Schmuck –, selbst wenn sie während der Ehe mit gemeinsamen Mitteln erworben wurden; sie gelten als Eigentum des Ehegatten, der sie benutzt (Art. 1162). Ebenso gilt: Wenn das Erbe ein landwirtschaftlich genutztes Grundstück ist, dessen Teilung unmöglich ist und andere Erben dort nicht wohnen und nicht gemeinsam mit dem Erblasser wirtschafteten, entsteht kein

16 *Althammer*, Schuldrecht III-Besonderer Teil 2: Gesetzliche Schuldverhältnisse, 2015, 6; *Akhvlediani*, Schuldrecht, 1999, 251-252 (in georgischer Sprache); *Bichia*, Zur Bestimmung der Rechtsnatur von Miteigentumsrechten, *Law Journal*, Nr. 2, 2022, 41–58 (in georgischer Sprache).

gemeinschaftliches Recht (Art. 1332.1). Gemeinschaftliche Rechte entstehen auch nicht hinsichtlich solcher vermögensrechtlicher Rechte und Pflichten, die persönlicher Natur sind oder die nach Gesetz oder Vertrag ausschließlich dem Erblasser zustehen oder nur zwischen Gläubiger und Schuldner zu deren Lebzeiten bestehen und mit deren Tod enden (Art. 1330).

Zwar kennt die georgische Gesetzgebung die „öffentliche Sache“ nicht als besondere Kategorie,¹⁷ doch kann Eigentum des Staates – etwa Bodenschätze, Grundstücke, Wälder oder Wasser – aufgrund einer Lizenz oder eines Pachtvertrages mehreren Personen zur Nutzung überlassen werden. Die Beziehungen dieser Personen zu der sogenannten öffentlichen Sache können sowohl durch einen öffentlichen Akt (z. B. Lizenz) als auch durch die einschlägigen Vorschriften des Zivilgesetzbuches über gemeinschaftliche Rechte geregelt werden, soweit diese mit dem rechtlichen Regime solcher Sachen vereinbar sind. Selbstverständlich können die in Art. 963 oder 964 vorgesehenen Vorschriften über Aufhebung oder Verkauf gemeinschaftlicher Rechte hier nicht angewendet werden.

Die Vorschriften zur Ordnung der Beziehungen zwischen Personen mit anteiligem Eigentum beziehen sich hauptsächlich auf Miteigentum, finden aber auch Anwendung auf beschränkte dingliche Rechte wie Hypothek, Nießbrauch, Pfandrecht, Vorkaufsrecht, Bau- und Servitutsrechte.¹⁸

In der georgischen juristischen Literatur und Rechtsprechung ist eine aktuelle Frage, ob die Vorschriften über gemeinschaftliche Rechte auch auf das Gemeinschaftseigentum der Mitglieder einer Wohnungseigentümergeinschaft anwendbar sind („Gesetz über Wohnungseigentümergeinschaften“, Art. 5.1). Es ist festzuhalten, dass die Anwendung der Art. 953–968 ZGB zur Ordnung der Beziehungen zwischen Mitgliedern einer Wohnungseigentümergeinschaft hinsichtlich des Gemeinschaftseigentums nur dann möglich ist, wenn das Gesetz über Wohnungseigentümergeinschaften keine abweichenden Rechte und Pflichten vorsieht.¹⁹

17 Mikaberidze, Der Begriff der Sache im Immobilienrecht und das Problem des Eigentums an einer Sache in der georgischen Gesetzgebung, „Justice and Law“, 2013, 1(36), 109 (in georgischer Sprache).

18 Erman/Aderhold, BGB, 14. Aufl., § 741.

19 Bei der Erörterung des Anwendungsbereichs der Artikel 963–964 wird auf eine solche abweichende gesetzliche Regelung Bezug genommen: Urteil der Zivilkammer des Obersten Gerichtshofs von Georgien, Aktenzeichen as-1601-2025, 3. April 2026.

Die bloße Vielzahl von Personen bedeutet nicht automatisch, dass ihnen gemeinschaftliche Rechte an einem mit gemeinsamen Mitteln erworbenen Vermögen zustehen. Beispiel: Wenn die Gründer einer juristischen Person (Unternehmen oder Nichtunternehmen) mit gemeinsamen Mitteln Vermögen für die Gesellschaft erwerben und dieses im Eigentum (Bilanz) der Gesellschaft registriert wird, entsteht kein gemeinschaftliches Eigentum der Gründer, sondern nur der Gesellschaft selbst – etwa eine GmbH oder eine andere Organisationsform – ist Eigentümerin. Das bedeutet, dass die Vorschriften über gemeinschaftliche Rechte nicht auf die Beziehungen zwischen Gesellschaftern oder Gründern einer juristischen Person hinsichtlich des Gesellschaftsvermögens angewendet werden können. So ist es unzulässig, dass ein Gesellschafter einer Handelsgesellschaft gemäß Art. 963 die Herausgabe seines Anteils in natura aus dem Gesellschaftsvermögen verlangt, selbst wenn eine Teilung nach dieser Norm möglich wäre. Auch das „Gesetz über Unternehmer“ sieht eine solche Möglichkeit nicht vor. In der georgischen Literatur wird betont, dass eine GmbH kein gemeinschaftliches Eigentum der Gesellschafter darstellt. Zwar sind die Gesellschafter Anteilseigner und verwalten die Gesellschaft entsprechend, doch ist die GmbH eine eigenständige juristische Person und Eigentümerin ihres Vermögens. Dies ist ein wesentliches Merkmal des Gesellschaftsrechts, und die Anwendung der Vorschriften über gemeinschaftliches Eigentum aus dem Sachenrecht wäre hier unangebracht.²⁰ Ebenso ist die Anwendung der Vorschriften über gemeinschaftliche Rechte auf Vermögen, das sich im rechtmäßigen Besitz privatrechtlicher juristischer Personen (Unternehmen oder Nichtunternehmen) befindet, nicht gerechtfertigt.

Die Beziehungen zwischen Mitanteilhabern ähneln stark denjenigen, die zwischen den Parteien eines Vertrages über gemeinsame Tätigkeit (Art. 930–940 des Zivilgesetzbuches Georgiens) entstehen. Der Unterschied besteht jedoch darin, dass die Nutzung oder der Gebrauch des im Rahmen gemeinsamer Tätigkeit erworbenen Vermögens ausschließlich den Zwecken dieses Vertrages dient und die Beziehungen zwischen den Parteien durch die im Vertrag festgelegten Rechte und Pflichten und nicht durch das Gesetz geregelt werden.

Mitunter kann ein gemeinsames Recht an demselben Objekt nicht nur georgischen natürlichen oder juristischen Personen, sondern sowohl georgischen als

²⁰ *Chanturia, Ninidze*, Kommentar zum Unternehmergeetz, 1996, 219 (in georgischer Sprache).

auch ausländischen Rechtssubjekten zustehen. Ebenso kann das gemeinschaftliche Recht georgischer natürlicher oder juristischer Personen ein Objekt betreffen, das sich im Ausland befindet usw. Mit anderen Worten: Wenn in einer gemeinschaftlichen schuldrechtlichen Beziehung ein ausländisches Element beteiligt ist, muss zunächst Art. 39 des Gesetzes „Über das internationale Privatrecht“ angewendet werden, dem zufolge die gemeinschaftlichen Rechte der Mitanteilhhaber nach dem Recht des Landes geregelt werden, in dem diese Rechte bestehen. Bestehen die gemeinschaftlichen Rechte in Georgien, so sind die streitigen Beziehungen nach georgischem Recht zu ordnen.²¹

Das Recht der Mitanteilhhaber am gemeinschaftlichen Vermögen ist in Form von Anteilen aufgeteilt, die als „ideelle Anteile“ bezeichnet werden.²²

Vorkaufsrecht bei Anteilen in gemeinschaftlichen Beziehungen

Nach den gemeinschaftsrechtlichen Vorschriften hat ein Mitanteilhhaber das Recht, über seinen ideellen Anteil selbständig und nach eigenem Ermessen zu verfügen, außer wenn die Mitanteilhhaber zuvor ein Vorkaufsrecht vereinbart haben. Bemerkenswert ist, dass Art. 959 Abs. 2 ZGB den Mitanteilhhaber, der seinen Anteil veräußern möchte, verpflichtet, diesen zunächst den übrigen Mitanteilhhabern zum Kauf anzubieten. Lehnt diese ab, darf der Anteil nur dann an einen Dritten verkauft werden, wenn die Mitanteilhhaber dies zuvor vereinbart haben. Aufgrund der Gesetzesänderung vom 11. Mai 2007 wurde das gesetzliche Vorkaufsrecht aufgehoben; seine Existenz und die rechtlichen Folgen seiner Ausübung hängen seither von der Vereinbarung der Mitanteilhhaber ab.

Es ist jedoch zu beachten, dass Art. 959 Abs. 2 keine besonderen Bestimmungen über die Form einer solchen Vereinbarung enthält. In diesem Fall ist zunächst Art. 326 ZGB anzuwenden, dem zufolge die rechtlichen Normen über vertragliche Beziehungen auch auf nichtvertragliche Beziehungen angewendet werden können, sofern keine abweichende Regelung vorgesehen ist. Die Vereinbarung der Mitanteilhhaber über das Vorkaufsrecht ist gemäß Art. 327 Abs. 3 ZGB als Vorvertrag anzusehen. Da ein Vorvertrag in der Form abgeschlossen werden muss, die für den Hauptvertrag vorgesehen ist, bedarf eine Vereinbarung über das Vorkaufsrecht an einem Grundstück gemäß Art. 183 und 323 ZGB der

21 Vgl. Beschluss der Zivilkammer des Obersten Gerichtshofs von Georgien, as-1489-1405-2012, Beschluss vom 11. Februar 2013.

22 Zoidze, Das georgische Sachenrecht, 2. Auflage, Tb. 2003, 102 (in georgischer Sprache).

Schriftform und der Registrierung im öffentlichen Register. Wird eine solche Vereinbarung nicht schriftlich abgeschlossen und registriert und veräußert ein Mitanteilhaber seinen Anteil an einen Dritten unter Umgehung dieser Vereinbarung, so bleibt eine Klage der übrigen Mitanteilhaber auf Ungültigerklärung des Kaufvertrages erfolglos, wenn der veräußernde Mitanteilhaber das Bestehen der Vereinbarung bestreitet oder der Erwerber auf die Richtigkeit und Verlässlichkeit der Eintragungen im öffentlichen Register verweist, insbesondere darauf, dass hinsichtlich des streitigen Anteils keine rechtlichen Beschränkungen registriert sind.

Teilung des Anteils in natura aus dem gemeinschaftlichen Vermögen

Ein Mitanteilhaber kann den Wunsch haben, nicht länger Teil einer gemeinschaftlichen Rechtsbeziehung zu sein, und die Teilung seines ideellen Anteils in natura verlangen, um individuelles Eigentum zu begründen. Es ist zu beachten, dass ein solcher Anspruch nicht durch die sachenrechtlichen Vorschriften über gemeinschaftliches Eigentum abgesichert ist, sondern durch die schuldrechtlichen Normen des Zivilgesetzbuches, die die Möglichkeit der Teilung des gemeinschaftlichen Vermögens in natura vorsehen.

Wenn das gemeinschaftliche Recht sowohl ein Grundstück als auch darauf errichtete Gebäude betrifft, kann nicht verlangt werden, dass nur das Gebäude oder nur das Grundstück geteilt wird. Denn die Vorschrift sieht die Teilung des gesamten Objekts in natura vor – sowohl des Gebäudes als auch des Grundstücks. Würde das Gericht nur die Teilung des Gebäudes zulassen, verbliebe das „unbebaute Grundstück“ im gemeinschaftlichen Eigentum, was dem Inhalt der Norm widerspräche.²³

Art. 963 ZGB bestimmt, dass die Aufhebung des gemeinschaftlichen Rechts möglich ist, wenn das gemeinschaftliche Objekt in gleichartige Teile geteilt werden kann. Dies bedeutet jedoch nicht, dass die Teilung nur in gleich große oder gleichwertige Parzellen erfolgen muss. Mit „gleichartig“ ist gemeint, dass die Parzellen dieselbe Funktion erfüllen und für denselben wirtschaftlichen Zweck geeignet sind, also etwa Zugang zu Verkehr und Infrastruktur haben.²⁴

23 Vgl. Zivilkammer des Obersten Gerichtshofs Georgiens, 12. März 2026 Tbilisi; Zivilkammer des Obersten Gerichtshofs von Georgien, Az. as-532-506-2013, Beschluss vom 08.07.2013.

24 Vgl. Zivilkammer des Obersten Gerichtshofs von Georgien, Az. AS-596-823-08, Beschluss vom 15. Januar 2009.

Der Wert des gemeinschaftlichen Objekts bezieht sich auf seinen Haushalts- und wirtschaftlichen Zweck. Das Objekt darf durch die Teilung nicht seinen Gebrauchswert verlieren, den es vor der Teilung hatte.²⁵ Ziel der Vorschrift ist daher, dass die Teilung des gemeinschaftlichen Vermögens in natura so erfolgt, dass das jedem Mitanteihaber zugeteilte Vermögen weder seinen Zweck verliert noch im Umfang von seinem ideellen Anteil abweicht.

Die Bestimmung in Art. 963, wonach die Verteilung gleicher Anteile unter den Beteiligten durch Losentscheid erfolgt, betrifft nicht die Verteilung der ideellen Anteile, sondern die Notwendigkeit der Losziehung entsteht bei der Teilung des gemeinschaftlichen Gegenstandes in gleich große Teile, wenn die Mitanteihaber sich nicht darüber einigen können, welcher Teil jedem von ihnen zufallen soll.²⁶ In diesem Fall vereinbaren die Parteien, eine Losziehung durchzuführen, und entsprechend deren Ergebnis erfolgt die Teilung des gemeinschaftlichen Gegenstandes in natura ohne Anrufung des Gerichts.

Mitunter kommt es in der Praxis vor, dass vor Gericht eine Losziehung zwischen den Parteien durchgeführt wird, um zu klären, welcher der vier in einem Sachverständigengutachten vorgeschlagenen Varianten der Teilung des gemeinschaftlichen Gegenstandes in natura zur Aufhebung des gemeinschaftlichen Rechts zwischen den Parteien führen soll. Es ist zu beachten, dass die Zivilgesetzgebung für die Entscheidung dieser Frage keine Möglichkeit der Losziehung zwischen den Parteien vorsieht.²⁷

Die rechtlichen Folgen der Anwendung von Art. 963 hängen im Wesentlichen nicht vom Ziel der Teilung des ideellen Anteils in einen realen Anteil in natura oder vom Willen der übrigen Mitanteihaber ab, sondern davon, ob der gemeinschaftliche Gegenstand gemäß dieser Norm teilbar ist.

Es ist hervorzuheben, dass Art. 963 ZGB keine Bestimmungen über die Möglichkeiten enthält, die sich aus einer entsprechenden Umgestaltung des gemeinschaftlichen Gegenstandes ergeben könnten.²⁸

Im Hinblick auf Art. 963 kann die Schlussfolgerung gezogen werden, dass der Gesetzgeber einerseits die Rechte und Interessen jedes Mitanteihabers so weit

25 Vgl. Oberster Gerichtshof Georgiens, Zivilkammer, Nr. AS-670-631 2011, Beschluss vom 16. Juni 2011.

26 Vgl. die Entscheidung der Zivilkammer des Obersten Gerichtshofs von Georgien vom 16. Juni 2014, Nr. AS-401-378-2014.

27 Vgl. das Urteil des Obersten Gerichtshofs von Georgien vom 16. Juni 2014, Az. 401-378-2014.

28 *Bichia*, Rechts- und deliktische Verpflichtungen, Tbilisi, 2024, 91 (in georgischer Sprache).

schützt, dass ein Antrag auf Teilung des gemeinschaftlichen Vermögens nicht erfüllt wird, wenn durch die Teilung der Wert des Anteils eines anderen Mitanteilhhabers gemindert würde – etwa weil das Gebäude auf dessen Grundstücksteil kein direktes Licht hätte, oder das abgeteilte Grundstück keinen unmittelbaren Zugang zur öffentlichen Straße hätte, oder es nicht über ebenso fruchtbaren Boden verfügte wie das dem Kläger zugeweilte Grundstück usw. Ein solcher Antrag wird vom Gericht nicht erfüllt. Demnach ist die Aufhebung des gemeinschaftlichen Rechts durch Teilung in natura nur möglich, wenn die Teilung ohne Wertverlust erfolgen kann;²⁹ zugleich muss die weitere Bedingung erfüllt sein, dass der gemeinschaftliche Gegenstand genau entsprechend den ideellen Anteilen der Mitanteilhhaber geteilt wird.

In einem Fall erklärte das Kassationsgericht, dass Art. 963 tatsächlich die Möglichkeit der Teilung in gleiche Teile betrifft, da, wenn die Anteile der Parteien nicht bereits durch Vertrag oder ein anderes Eigentumsdokument festgelegt sind, die Parteien den gemeinschaftlichen Gegenstand zu gleichen Anteilen nutzen. Daher muss der gemeinschaftliche Gegenstand in natura gleichmäßig zwischen ihnen geteilt werden, und es ist unzulässig, den Anteil eines Eigentümers auf Kosten eines anderen zu vergrößern.³⁰

Eine Teilung des gemeinschaftlichen Gegenstandes in natura gemäß dieser Norm darf nicht allein nach der faktischen Besitzregelung erfolgen, die die Parteien über Jahre hinweg praktiziert haben, und ihnen entsprechend der faktischen Nutzung Anteile in natura zugeweiht werden.³¹ In einem Zivilverfahren stellte das Gericht klar, dass Art. 963 ZGB keine gesetzliche Möglichkeit einer Teilung in natura vorsieht, wenn dadurch zusätzliche Kosten für die Parteien entstehen würden. Der Sinn dieser Vorschrift besteht darin, dass der gemeinschaftliche Gegenstand von vornherein ohne zusätzliche Arbeiten teilbar sein muss (entsprechend den Anteilen).³² Nach dieser Norm kann eine Klage auf Teilung des Anteils eines Mitanteilhhabers in natura aus dem gemeinschaftlichen Vermögen nur dann erfolgreich sein, wenn die Aktenlage, insbesondere das

29 Hirsch, Besonderer Teil des Schuldrechts, 4. Auflage, 2016, 324.

30 Vgl. Zivilkammer des Obersten Gerichtshofs von Georgien, Beschluss vom 9. Januar 2014 Nr. as-496-472-2013.

31 Siehe auch Zivilkammer des Obersten Gerichtshofs von Georgien, Beschluss vom 16. September 2013, Nr. as-907-852-2012.

32 Vgl. Zivilkammer des Obersten Gerichtshofs von Georgien, Beschluss vom 1. April 2016, Az. 468-447-2015.

Sachverständigengutachten, auch die Möglichkeit einer realen Teilung der Flächen entsprechend den Anteilen der übrigen Miteigentümer bestätigt – unabhängig davon, dass diese selbst keinen entsprechenden Antrag gestellt haben und auch keine Aufhebung des gemeinschaftlichen Rechts wünschen, sondern nach der Teilung des Anteils des Klägers weiterhin gemeinschaftliche Eigentümer des verbleibenden Gegenstandes bleiben.³³

Wenn das gemeinschaftliche Objekt teilbar ist und durch eine solche Teilung einem Mitanteihaber mehr oder weniger Fläche zufallen würde als seinem ideellen Anteil entspricht, hat das Gericht nicht das Recht, einer solchen Teilung zuzustimmen, selbst wenn eine Partei bereit ist, den anderen Mitanteihabern eine Geldentschädigung für die Verringerung ihres Anteils zu zahlen und entsprechend den realen Anteil des klagenden Mitanteihabers zu vergrößern. In der gerichtlichen Praxis ist es häufig der Fall, dass der Kläger, der die Teilung seines Anteils in natura verlangt, bereit ist, den übrigen Mitanteihabern den Wert der verringerten Fläche und damit den Wert der ihm zusätzlich zugeteilten Fläche zu erstatten, wenn ihm nach dem ingenieurtechnischen Gutachten mehr Fläche als seinem Anteil entspricht zugeteilt werden müsste, da eine andere Teilung des gemeinschaftlichen Gegenstandes unmöglich ist. Doch wenn die Mitanteihaber darüber keine Vereinbarung treffen, hat das Gericht nach geltendem Zivilrecht nicht das Recht, von sich aus oder auf Antrag des Klägers über die Gewährung einer Geldentschädigung für den verminderten Anteil des anderen Mitanteihabers zu entscheiden.³⁴

Wenn ein Mitanteihaber durch das Gericht die Teilung seines Anteils in natura aus dem gemeinschaftlichen Objekt erreichen will, muss er eine Gestaltungsklage erheben, die auf die Änderung oder Beendigung des bestehenden gemeinschaftlichen materiell-rechtlichen Verhältnisses gerichtet ist.³⁵ Liegen beide in Art. 963 vorgesehenen Voraussetzungen gleichzeitig vor, trägt die Beweislast für die Teilung derjenige Mitanteihaber,³⁶ der sie verlangt, also der Kläger.

33 Vgl. Zivilkammer des Obersten Gerichtshofs von Georgien, Beschluss vom 4. April 2014, Az. 81-78-2014.

34 Bürgerliches Gesetzbuch der Georgischen SSR (Ausgabe von 1964), Artikel 117.2. Der letzte Satz sah vor, dass im Falle einer unverhältnismäßigen Beschädigung des gemeinsamen Eigentums bei dessen Aufteilung der Zuteilungsempfänger eine finanzielle Entschädigung erhalten sollte.

35 *Liluashvili*, Zivilprozessrecht, 2005, 286.

36 *Erman/Aderhold*, BGB, 14. Aufl. § 752.

Mitunter wird in der gerichtlichen Praxis die Klage eines Mitanteilhhabers auf Aufhebung des gemeinschaftlichen Rechts in natura gleichgesetzt mit dem Antrag auf Teilung eines Anteils aus dem Gemeinschaftseigentum einer Wohnungseigentümergeinschaft (z. B. Keller, Dachboden usw.), was falsch ist. Dies ergibt sich daraus, dass Art. 4 Abs. 2 des Gesetzes „Über die Wohnungseigentümergeinschaften“ zwingend die Regeln und Bedingungen für die Abtrennung und Übertragung von Gemeinschaftseigentum in das individuelle Eigentum eines Mitglieds festlegt, die sich grundlegend von Art. 963 Abs. 1 unterscheiden.

Mitunter verlangt ein Kläger, der einen Anteil am Gemeinschaftseigentum einer Wohnungseigentümergeinschaft hat, die Teilung seines Anteils in natura gemäß Art. 963 ZGB und benennt die übrigen Mitglieder der Gemeinschaft als Beklagte. Erscheinen diese Beklagten jedoch nicht zur vorbereitenden oder Hauptverhandlung oder legen innerhalb der gesetzten Frist keine Klageerwidern vor und haben dafür keinen triftigen Grund, muss das Gericht bei der Prüfung des Antrags des Klägers auf Erlass eines Versäumnisurteils Art. 230 Abs. 2 der Zivilprozessordnung anwenden. Unabhängig davon, ob nach dem Gutachten des Sachverständigen die Teilung des Gemeinschaftseigentums in gleichwertige Teile ohne Wertminderung möglich wäre, darf die Klage rechtlich nicht als begründet angesehen und kein Versäumnisurteil zur Stattgabe erlassen werden.

Wenn hingegen zwischen den Parteien eine gemeinschaftliche Rechtsbeziehung besteht und nur der Kläger zur Verhandlung erscheint, der gemäß Art. 963 Abs. 1 die Teilung seines Anteils in natura verlangt, während der Beklagte ohne triftigen Grund nicht erscheint, muss das Gericht bei der Entscheidung über den Antrag des Klägers auf Erlass eines Versäumnisurteils zwingend Art. 230 Abs. 2 ZPO berücksichtigen. Es ist zu prüfen, ob die im Klageantrag angegebenen Umstände die Klage rechtlich rechtfertigen; andernfalls wird das Gericht die Klage abweisen. Dabei muss das Gericht sich etwa auf das Gutachten des Sachverständigen stützen, in dem ausdrücklich die Möglichkeit der Teilung des gemeinschaftlichen Gegenstandes zwischen den Mitanteilhhabern gemäß Art. 963 bestätigt sein muss.³⁷

37 Vgl. das Urteil der Zivilkammer des Obersten Gerichtshofs Georgiens vom 17. Oktober 2011, Az. 1234-1254-2011.

Aufhebung des gemeinschaftlichen Rechts durch Veräußerung des gemeinschaftlichen Objekts

Wenn ein Mitanteihaber gemäß Art. 964 ZGB Klage auf Verkauf des gemeinschaftlichen Vermögens erhebt, muss er zunächst nachweisen, dass eine Teilung des gemeinschaftlichen Rechts in gleichwertige Anteile ohne Wertminderung oder Funktionsverlust unmöglich ist. Es ist jedoch zu erläutern, dass der Mitanteihaber nach ständiger Rechtsprechung hierfür kein rechtskräftiges Urteil benötigt, das eine Klage nach Art. 963 abgelehnt hat. In diesem Fall genügt es, wenn der Kläger seiner Klage ein kategorisches Gutachten eines Sachverständigen oder Auditors beifügt, das bestätigt, dass eine Teilung des gemeinschaftlichen beweglichen oder unbeweglichen Gegenstandes in gleichartige Teile ohne Wertminderung unmöglich ist.

In der Praxis kommt es häufig vor, dass ein Mitanteihaber die Veräußerung des gemeinschaftlichen Vermögens nicht deshalb verlangt, weil dessen Teilung in natura unmöglich ist, sondern allein deshalb, weil zwischen den Parteien – also den Mitanteihabern – ein schwieriges Verhältnis besteht und sie sich nicht über die gemeinsame Nutzung des gemeinschaftlichen Vermögens, insbesondere einer Wohnung, einigen können. Wenn in einem solchen Fall die Klage auf Veräußerung des gemeinschaftlichen Vermögens ausschließlich auf die faktische Konfliktsituation zwischen den Mitanteihabern gestützt ist und der Kläger nicht nachweisen kann, dass die Teilung seines Anteils nach den gesetzlichen Vorschriften unmöglich ist, kann das Gericht seine Klage nicht stattgeben. Demnach hat die Rechtsprechung allein ein angespanntes Verhältnis zwischen den Mitanteihabern nicht als Umstand angesehen, der den Gegenstand der Beweisführung in einer solchen Klage bildet.³⁸

Art. 964 Abs. 1 ZGB sieht auch die Möglichkeit der Veräußerung von gemeinschaftlichem Vermögen vor, das verpfändet oder mit einer Hypothek belastet ist, um eine Forderung zu sichern. Zwar wird in dieser Norm nur auf verpfändete Sachen Bezug genommen und nichts über mit Hypothek belastete Sachen gesagt, doch kann ihre Wirkung auch auf die zwangsweise Veräußerung von gemeinschaftlichem unbeweglichem Vermögen ausgedehnt werden, das mit einer Hypothek belastet ist. Wenn jedoch das gemeinschaftliche Vermögen zur

38 Vgl. das Urteil des Obersten Gerichtshofs von Georgien vom 30. Mai 2014, Az. as-379-356-2014.

Sicherung steuerlicher Verpflichtungen eines oder mehrerer Mitanteilhaber belastet ist, kann das Gericht eine Klage auf zwangsweise Veräußerung eines solchen Vermögens nicht stattgeben.

Art. 964 Abs. 2 ZGB regelt außerdem das Verfahren der zwangsweisen Veräußerung von gemeinschaftlichem Vermögen. Nachdem das Gericht die Klage eines Mitanteilhabers auf Veräußerung stattgegeben hat und die Entscheidung rechtskräftig geworden ist, kann der Kläger nach Erhalt des Vollstreckungstitels mit der Veräußerung des gemeinschaftlichen Vermögens beginnen. Nach Art. 964.1.2 ist vorgesehen, dass, wenn das gemeinschaftliche Vermögen ein Grundstück ist, dessen Veräußerung durch eine Auktion erfolgen muss. Zwar ist in dieser Norm nichts über die zwangsweise Veräußerung anderer unbeweglicher Sachen, etwa einer Wohnung oder eines Gebäudes, gesagt, doch müssen auch für jede andere unbewegliche Sache die Regeln über den Verkauf bei einer Auktion angewendet werden. Es ist ebenso zu beachten, dass auch gemeinschaftliche bewegliche Sachen, etwa ein Auto, zwangsweise durch Auktion veräußert werden können. Ziel der in Art. 964 Abs. 2 vorgesehenen Norm ist es, die Veräußerung des gemeinschaftlichen Vermögens in jeder Hinsicht sicherzustellen. Der Gesetzgeber hat bestimmt, dass, wenn das gemeinschaftliche Objekt bei der ersten Auktion nicht verkauft wird, eine zweite Auktion angesetzt werden muss. Bleibt auch die zweite Auktion erfolglos, enthält die Norm keine ausdrückliche Regelung darüber, wie die Veräußerung des gemeinschaftlichen Vermögens erfolgen soll oder ob das Vermögen nach einer erfolglosen zweiten Auktion überhaupt zwangsweise veräußert werden darf. In diesem Fall ist die Praxis des öffentlichen Rechtsträgers „Nationales Vollstreckungsbüro“ zu berücksichtigen, wonach eine rechtskräftige gerichtliche Entscheidung nicht vollstreckbar bleibt, wenn auch die zweite Auktion erfolglos ist.

Da das gemeinschaftliche Recht im Zivilverkehr im Wesentlichen als gemeinsames Eigentumsrecht an einer Sache besteht, müssen die Normen des Art. 964 ZGB ihrem Inhalt nach als eine Art Garantie des durch die Verfassung geschützten Eigentumsrechts angesehen werden. Mitunter kann ein Eigentümer sein Eigentumsrecht an einem Anteil des gemeinschaftlichen Vermögens nicht durch Besitz- und Nutzungsbefugnisse ausüben, doch ist sein Eigentumsrecht an der Sache mit bestimmten Erinnerungen und Emotionen verbunden, oder der Wert des gemeinschaftlichen Vermögens kann künftig erheblich steigen, wodurch auch der Wert des Anteils des Mitanteilhabers steigt. Aus all dem folgt, dass bei der Veräußerung des gemeinschaftlichen Vermögens durch Auktion die

sachenrechtlichen Normen des Zivilgesetzbuches nicht angewendet werden dürfen (z. B. ist es völlig unzulässig, in diesem Fall Art. 307 Abs. 6 ZGB anzuwenden, wonach, wenn die in Abs. 5 vorgesehene Vereinbarung nicht zustande kommt, der Spezialist innerhalb der in Abs. 1 festgelegten Frist eine dritte Auktion durchführt. Die Regeln für den Verkauf der unbeweglichen Sache bei der dritten Auktion bestimmt der Spezialist. Die dritte Auktion muss so organisiert sein, dass die unbewegliche Sache verkauft wird). Ebenso dürfen die Normen des Gesetzes „Über die Vollstreckungsverfahren“ über die Veräußerung von verpfändetem und mit Hypothek belastetem Vermögen nicht angewendet werden.

Das deutsche Gesetz über Vollstreckungsverfahren sieht spezielle Normen über die Veräußerung von gemeinschaftlichem Vermögen durch Auktion vor. Nach diesem Gesetz wird das Verfahren beendet, wenn auch die zweite Auktion erfolglos bleibt und keine Zwangsverwaltung angeordnet wird. Erfolglosigkeit liegt nur dann vor, wenn bei der Auktion kein Gebot abgegeben wurde oder alle Gebote abgelehnt wurden.³⁹

Demnach haben die Mitanteilhaber, wenn der Verkauf des gemeinschaftlichen Objekts unmöglich ist, die Alternative, entweder das gemeinschaftliche Recht an der Sache fortzusetzen oder sie im Rahmen einer gegenseitigen Vereinbarung zu teilen.⁴⁰

Interessant ist auch Art. 964 Abs. 1 Satz 3, dem zufolge, wenn die Veräußerung des gemeinschaftlichen Gegenstandes an Dritte unzulässig ist, der Gegenstand durch Auktion unter den Mitanteilhabern verkauft werden muss. Voraussetzung für die Anwendung dieser Norm ist das Verbot der Veräußerung des gemeinschaftlichen Vermögens an Dritte und zugleich die Möglichkeit der Veräußerung unter den Mitanteilhabern. Allein die Tatsache, dass das gemeinschaftliche Vermögen für einen Mitanteilhaber wertvoll ist, reicht nicht aus und kann nur in Einzelfällen berücksichtigt werden. Grundsätzlich kann das Verbot der Veräußerung des gemeinschaftlichen Vermögens auf das Gesetz, die Forderung eines Gläubigers der Mitanteilhaber, eine Vereinbarung zwischen den Mitanteilhabern usw. gestützt werden.⁴¹

Bei der Prüfung einer Klage auf Aufhebung des gemeinschaftlichen Rechts durch zwangsweise Veräußerung des gemeinschaftlichen Gegenstandes

39 Simon/Wüste in Kindl/Meller-Hannich, *Gesamtes Recht der Zwangsvollstreckung*, 5. Auflage 2026., §77 Rn. 7.

40 BeckOK BGB / Gehrlein BGB § 753 Rn. 7; Erman/Aderhold, BGB, 14. Aufl., § 753.

41 Mü/KoBGB / Schmidt, 9. Aufl. 2024, BGB § 753 Rn.11.

verpflichtet Art. 964.1.3 das Gericht, die Umstände zu berücksichtigen und angemessen zu bewerten, ob die Veräußerung des Vermögens an Dritte den Interessen der Mitanteilhaber widerspricht. Die Beweislast für die Unzulässigkeit der Veräußerung an Dritte trägt die Partei, die dies geltend macht.⁴²

Aus dem durch die zwangsweise Veräußerung des gemeinschaftlichen Vermögens erzielten Erlös werden zunächst die Gerichtskosten, dann die Kosten der Auktion gedeckt, und schließlich wird der verbleibende Betrag unter den Mitanteilhabern entsprechend ihren Anteilen am gemeinschaftlichen Recht verteilt.

Im Wesentlichen tragen die Mitanteilhaber die Last der Zahlung der Verkaufskosten gemeinsam. Bei der Verteilung der Kosten werden die Anteile berücksichtigt. Die Kosten werden aus den erzielten Einnahmen gedeckt.⁴³

42 Mü/KoBGB / *Schmidt*, 9. Aufl. 2024, BGB § 753 Rn.11.

43 Mü/KoBGB / *Schmidt*, 9. Aufl. 2024, BGB § 753 Rn.33.