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THE CONCEPT OF SYSTEMATIZATION OF LAW

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Abstract. The aim of this research is to highlight the differences in the systematization of legislation and legal acts based on the study of theoretical material, to achieve which a number of theoretical and practical issues of law systematization are discussed, in particular, the semantic differences between the terms "legislation" and "legal act", broad and narrow approaches to the understanding of legislation in jurisprudence, different definitions of a legal act in professional literature, approaches to the understanding of legal acts and the systematization of legislation, which made it possible to classify the existing concepts of the of law into two groups: limited and extensive, to justify that since a legal act is a broader concept than legislation, in order to make systematization activities more comprehensive, it is correct to use the term "legal act" instead of the terms "legislation", "legislative act" or "normative act" in the definitions and try to build a new definition.

The author considered those approaches to defining coordination that view it as an activity aimed at unifying normative acts or, in a narrow sense, regulating legislation, have been considered limited. The approaches of those authors who believe that systematization is not limited only to legislation, and that it is a legal activity aimed at unifying legal acts or sources of law, were considered comprehensive and more acceptable.

Keywords – *systematization, legal system, legislation, normative legal act, sub-legislative act, regulation of legal acts, legal activity, document, improvement, development of law.*

I. Introduction

The rapid development of public relations requires regular updating of regulations enshrined in legal acts, which also leads to the expansion of law-making activity and the diversity of legal acts adopted by competent entities. Under such conditions, the possibility of repetitions, inconsistencies, inaccuracies, as well as

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the presence of outdated provisions in legal regulations becomes inevitable, which certainly complicates law-making and law-enforcement practice.

Systematization is an effective means in the process of developing and improving the legal system, as a regulated mass allows the legislator to respond to changes in a timely manner, eliminating possible gaps and contradictions, and the law enforcement to clearly orient itself in the existing legal acts. In addition, a legal act is considered a source of information from which individuals obtain primary knowledge about law, legal phenomena, legal provisions, individual regulations, and legal relationships.

Thus, systematization can play a formative role for the entire legal system, which is why a comprehensive approach should be taken to studying this phenomenon.

II. Research

In the modern Armenian explanatory dictionary, the term "to systemize" means to unite, to turn into a system[2]. It can be said that the systematization of law is an activity aimed at incorporating existing legal acts into a single and internally agreed-upon system, the goal of which is to improve these acts, eliminate contradictory regulations, and, in practice, facilitate the search for legal information. Failure to carry out legal systematization activities in parallel with the growth of the normative legal mass can lead to chaos and disorder, the impossibility of correct legal regulation, incorrect application of norms, conflicts, repetitions, etc[3].

It is worth noting that all researchers consider the systematization of law to be a certain type of human activity, but most of the authors who have addressed the issue of its definition speak not about legal acts, but about the unification of legislation or normative acts. In our opinion, such an understanding is incomplete, as it does not express the essence of systematization and narrows the possibilities of this type of legal activity. To clarify what was said, before addressing these definitions, we consider it necessary to discuss how the terms "legislation" and "legal act" are perceived in jurisprudence.

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[2] **Aghayan E. B.** Explanatory Dictionary of Modern Armenian, “Hayastan"” Publishing, Yerevan, 1976, p. 800 (**Աղայան Է. Բ.** Արդի հայերենի բացատրական բառարան, «Հայաստան» հրատարակչություն, Երևան, 1976, էջ 800).

[3] **Navarro P. E.** Legal Reasoning and Systematization of Law. In: Soeteman, A. (eds) Pluralism and Law. Springer, Dordrecht, (2001). https://doi.org/10.1007/978-94-017-2702-0_14 (accessed on 03.09.2025).

In jurisprudence, the term "legislation" is interpreted in broad and narrow senses. Proponents of a narrow interpretation consider it to be the totality of all laws in force in the state[4] or the normative acts adopted by the legislative body, that is, the direct representatives of the people[5]. According to a broad approach, legislation is the totality of the state's existing legislative and sub-legislative acts[6]. In professional literature, there is also an approach that legislation is the totality of sources of law[7].

From the point of view of understanding legislation, the approach of D. A. Kerimov is interesting, who believes that it is only the totality of legislative acts, but in practice it is understood more broadly and includes not only laws, but also sub-legislative acts, which together form a unified legislative system[8].

Domestic legal regulations use a broad understanding of the term "legislation". Part 2 of Article 2 of the RA Law "On Normative Legal Acts" stipulates that a legislative act is a normative legal act adopted by the people or the National Assembly of the Republic of Armenia (Constitution, constitutional laws and laws), and legislation is the totality of legislative and sub-legislative normative legal acts /part 7 of the aforementioned article/. In our opinion, such a definition of the concept of "legislation" by the legislator is a more correct and acceptable approach than the view that it is the totality of laws or normative acts adopted by the legislative body.

This point of view is also held by D. A. Abdiyeva, expressing in her dissertation the opinion that the discussion of the legislative system cannot be limited

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[4] The concept of stability of law / edited by V. P. Kazimirchuk. - M.: Prospect, 2000, p. 9 (Концепция стабильности закона / под ред. В. П. Казимирчука. - М.: Проспект, 2000, էջ 9).

[5] **Mayakunov A. E., Ilyina S. A.** On the issue of understanding legislation in legal theory, Epoch of Science No. 26 - June, 2021, pp. 33-35, DOI 10.24412/2409-3203-2021-26-33-35 (**Маякунов А. Э., Ильина С. А.** К вопросу о понимании законодательства в юридической теории, Эпоха науки № 26 – Июнь, 2021, 33-35 էջեր, DOI 10.24412/2409-3203-2021-26-33-35).

[6] **Alekseev S. S.** State and law. Primary course 2nd ed., revised. and additional - M.: Yurid. lit. 1994, p. 108 (**Алексеев С. С.** Государство и право. Начальный курс 2-е изд., перераб. и доп. - М.: Юрид. лит. 1994, էջ 108).

[7] **Romashov R. A.** Realistic Positivism as a Type of Integrative Legal Understanding // Theoretical and Practical Problems of Legal Understanding. Proceedings of the III International Scientific Conference, held April 22–24, 2008, at the Russian Academy of Justice / Ed. V. M. Syrykh. 2nd edition. M.: RAP, 2010, p. 95 (**Ромашов Р. А.** Реалистический позитивизм как тип интегративного правопонимания // Теоретические и практические проблемы правопонимания. Материалы III Международной научной конференции, состоявшейся 22-24 апреля 2008 в Российской академии правосудия / Под ред. В. М. Сырых. 2-е издание. М.: РАП, 2010, էջ 95).

[8] **Kerimov D. A.** Culture and technique of lawmaking. M.: Yurid. lit., 1991, p. 9 (**Керимов Д. А.** Культура и техника законотворчества. М.: Юрид. лит., 1991, էջ 9).

exclusively to the totality of laws, but it is necessary to consider it as a set of laws and sub-legislative normative legal acts adopted in the state[9].

The term "legal act" is one of the most common in legal theory and practice. There are various definitions of a legal act in professional literature, which is the result of the use of this term in different meanings.

In the opinion of G. Danielyan, who addressed the issues related to the legal act, It is an official written document adopted by the people, state or local self-government bodies, state or community institutions, as well as legal entities, their separate subdivisions or institutions, within the scope of their powers, in cases and in accordance with the procedure provided for by law, which defines rights, obligations, responsibilities, limitations or other rules subject to mandatory recognition, preservation, protection, execution or application[10].

The term "legal act", according to S. S. Alekseev, is multifaceted and is used as: a) an action (conduct) - a customary legal act, that is, a legal fact that serves as the basis for one or another legal consequence, b) the result of lawful conduct, i.e. a legally significant component of the legal system, c) a legal document, i.e. an oral or written expression of will that establishes lawful conduct or its consequences[11].

Within the framework of this study, we will take as a basis the meaning of a legal act as a legal document. According to S. S. Alekseev, a legal act is an external expression of the will of the state, its bodies, and individual persons, formulated in an appropriate manner (oral or written), which includes legal norms, legal practice, individual decrees, and autonomous decisions of individuals as components of the legal system.

S. S. Alekseev, as general features of such legal acts, distinguishes the documented form, the voluntary nature and the enshrining in them of elements of

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[9] **Abdieva D. A.** Systematization of legislation in the context of transition to a new technological order: Dissertation for the Degree of Candidate of Legal Sciences: 5.1.1. Theoretical and historical legal sciences / Abdieva Datkayim Akylbekovna. - Moscow, 2024, p. 54 (**Абдиева Д. А.** Систематизация законодательства в условиях перехода к новому технологическому укладу: дис. … канд. юрид. наук: 5.1.1. Теоретико-исторические правовые науки / Абдиева Даткайым Акылбековна. – Москва, 2024, էջ 54).

[10] **Danielyan G**. Law-making activity and legal techniques. - Educational manual. - Yerevan "Tigran Mets" publishing house. 2021, pp. 55-56 (**Դանիելյան Գ.** Իրավաստեղծ գործունեություն և իրավաբանական տեխնիկա. - Ուսումնական ձեռնարկ. - Եր. «Տիգրան Մեծ» հրատ. 2021, 55-56 էջեր).

[11] **Alekseev S. S.** General Theory of Law: textbook. - 2nd ed., revised and enlarged. - M: Prospect, 2009, p. 469 (**Алексеев С. С.** Общая теория права: учебник. – 2-е изд., перераб. и доп. – М.: Проспект, 2009, էջ 469).

the legal system, that is, legal norms, practical regulations, individual orders, autonomous decisions of individuals[12].

Another author who addressed the issue, Yu. S. Salavatova, offers the following definition of a legal act: it is a form of expression of the will of a subject of law aimed at regulating public relations, which is aimed at regulating public relations and gives rise to certain legal consequences[13]. The latter differs from S. S. Alekseev's approach in that it emphasizes the possibility of legal consequences.

The specific features of legal acts reflected in professional literature are not typical for everyone. As A. A. Asanova rightly notes, there is a certain group of legal acts that have common features. The author considers them to be special legal acts. A. A. Asanova, analyzing and supplementing the characteristics characteristic of this category of legal acts in professional literature, gives the following definition: it is the external expression of the will adopted by a legal subject and given a documentary formulation in accordance with the procedure prescribed by law, which is endowed with legal force, characteristics and functions aimed at regulating public relations[14].

This author is of the opinion that such legal acts are voluntary, authoritative and binding in nature, enshrine legal regulations, results of legal practice, are adopted in accordance with the established procedure and within the scope of the jurisdiction of entities established by legislation, act as regulators of public relations, express not only the will of the state, but also the interests of individuals and organizations, are supported by various material, coercive, and incentive measures, and comply with the constitution, laws, and rules of legal technique.

Thus, we can state that a legal act is a more comprehensive concept than legislation and includes normative, internal (local), law enforcement, interpretative acts, and other legal documents.

A. S. Pigolkin notes that law-making activity cannot stop at a certain stage, because it is always in motion and develops due to the mobility of social ties and the emergence of new demands in public life that require legal regulation. The constantly changing legal system, its development and improvement, the adoption

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[12] **Alekseev S. S.** mentioned work, pp. 428-429 (**Алексеев С. С.** նշվ. աշխ., 428-429 էջեր).

[13] **Salavatova Yu. S.** Legal acts: some theoretical issues, Vestn. Mosk. UN-TA. - Series. 11. Law. 2011. No. 1, pp. 112-122, https://cyberleninka.ru/article/n/pravovye-akty-nekotorye-teoreticheskie-voprosy/viewer (accessed on 12.10.2025) (**Салаватова Ю. С.** Правовые акты: некоторые теоретические вопросы, Вестн. Моск. УН-ТА. - Сер. 11. Право. 2011. № 1, 112-122 էջեր).

[14] **Asanova A. A.** Concept and features of a typical legal act // Bulletin of the Ural Law Institute of the Ministry of Internal Affairs of Russia. 2024. No. 3, pp. 29-36 (**Асанова А. А.** Понятие и признаки типичного правового акта // Вестник Уральского юридического института МВД России. 2024. № 3, 29–36 էջեր).

of new regulatory acts, amendments to them, the abolition of outdated regulatory decisions objectively determine the need to strengthen the entire normative body, unify it into a scientifically substantiated system, and publish various collections of legislation. This activity of bringing regulatory acts into a single, regulated system is usually called the systematization of legislation[15].

According to R. T. Mukhaev, the activity aimed at unifying existing acts into a certain system by compiling unified normative acts or their collections is called the systematization of legislation. The goal of the latter is to improve existing regulatory acts, eliminate contradictions, gaps, and outdated norms, as well as ensure the convenience of using them[16].

In terms of the essence and goals of systematization, N. V. Protasov demonstrates almost the same approach. According to this author, it is an activity aimed at standardizing and improving normative material through external and internal development, the goal of which is to maintain the regularity of legislation and provide legal subjects with the necessary normative legal information[17].

D. A. Abdieva's approach differs from the positions of authors who view systematization as an activity aimed at unifying normative acts. In the latter's opinion, since systematic legislation is an adequate guarantee of providing citizens with high-quality and complete information on the normative activities of the legislative and executive authorities, this type of legal activity should not be limited only to work with legislation. The norms contained in sub-legislative acts, as well as other sources of law, are subject to systematization[18]. This approach shows that the author understands the term "legislation" in a narrow sense.

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[15] **Pigolkin A. S.** Systematization of legislation / in the textbook Theory of State and Law, edited by A. S. Pigolkin. – M.: Yurist-Izdat, 2006, p. 438 (**Пиголкин А. С.** Систематизация законодательства / в учебнике Теория государства и права, под ред. А. С. Пиголкина. – М.: Юрист-Издат, 2006, էջ 438).

[16] **Mukhaev R. T.** Theory of State and Law: Textbook. – 2nd edition, revised and enlarged. - M.: UNITY-DANA, 2005, p. 375 (**Мухаев Р. Т.** Теория государства и права: учебник. – 2-е изд., перераб. и доп. - М.: ЮНИТИ-ДАНА, 2005, էջ 375).

[17] **Protasov V. N.** Theory of State and Law: a textbook for universities – 5th edition, revised and enlarged. – M.: Yurait Publishing House, 2020, p. 91 (**Протасов В. Н.** Теория государства и права: учебное пособие для вузов – 5-е изд., перераб. и доп. – М.: Издательство Юрайт, 2020, էջ 91).

[18] **Abdieva D. A.** Systematization of legal norms in the context of digitalization, Bulletin of Moscow State Pedagogical Univ. - Series “Legal Sciences”, 2022, p. 120-126, DOI: 10.25688/2076-9113.2022.47.3.11 (**Абдиева Д. А.** Систематизация правовых норм в условиях цифровизации, Вестник МГПУ – Серия «Юридические науки», 2022, 120-126 էջեր).

According to S. S. Alekseev, systematization is an activity aimed at uniting the normative acts in law into a single, coordinated, complete system[19]. The author sees its direction and main goal in overcoming phenomena that are objectively characteristic of legislative activity and have a negative impact on the state of the mass of legislative acts. Of course, the systematization of legislation is one of the means of developing law, but, in our opinion, this is not a very correct approach, because first of all, law and legislation are not identical phenomena, and systematization cannot be limited only to the unification of normative acts.

From this perspective, we can say that the most correct approach to the issue is taken by those authors who view coordination not as a normative activity, but as an activity aimed at unifying legal acts. For example, V. N. Kartashov believes that in order to achieve regulation and improvement, various types of legal acts should be systematization[20].

This position is developed by T. V. Kashanina, justifying that not only normative, but also practical acts, as well as interpretative acts (for example, acts of higher courts) are coordinated. The author rightly notes that the constant nature of systematization work is an objective pattern of the development of law[21].

The study of the concepts of systematization discussed above allows us to divide them into groups according to the scope of the activity, and to call them limited and extensive approaches. Proponents of a limited approach can be considered those authors who believe that only legislative or normative legal acts can be subject to systematization, and supporters of the comprehensive approach, who believe that systematization is not limited to legislation alone, and that it is a legal activity aimed at unifying legal acts or sources of law.

The approach of V. A. Tomin should also be considered comprehensive, as he defines the systematization of legal acts as an activity aimed at their regulation and inclusion of existing legal documents in a single, mutually agreed system[22]. The only thing we should disagree with this author is that all legal documents can be

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[19] **Alekseev S. S.** General Theory of Law: textbook. - 2nd ed., revised and enlarged. - M: Prospect, 2009, p. 469 (**Алексеев С. С.** Общая теория права: учебник. – 2-е изд., перераб. и доп. – М.: Проспект, 2009, էջ 469).

[20] **Kartashov V. N.** Theory of the legal system of society. In 2 volumes. V. 1. – Yaroslavl: YarGU, 2005, p. 423 (**Карташов В. Н.** Теория правовой системы общества. В 2 т. Т. 1. – Ярославль: ЯрГУ, 2005, էջ 423).

[21] **Kashanina T. V.** Legal technique: textbook. - M.: Eksmo, 2007, p. 308 (**Кашанина Т. В.** Юридическая техника: учебник. - М.: Эксмо, 2007, էջ 308).

[22] **Tomin V. A.** Legal technique: textbook - St. Petersburg, 2015, p. 67 (**Томин В. А.** Юридическая техника: учебное пособие - Санкт-Петербург, 2015, էջ 67).

subject to systematization. To substantiate this, let us make the following observation.

The study shows that systematization pursues certain goals, in particular, improving and streamlining existing legal provisions, ensuring the convenience of using the material, correcting contradictory legal regulations, eliminating gaps and outdated provisions, providing necessary legal information for legal entities, etc.

In professional literature, the following types of legal documents are distinguished: normative, interpretative, legal-enforcing, law-enforcing documents, and documents that record certain legal facts (for example, passport, marriage certificate, military record book, vehicle technical passport, birth certificate, etc.) [23]. It is clear that documents that enshrine legal facts do not enshrine legal provisions, legal regulations, and, in our opinion, their systematization does not at all stem from the goals of this type of legal activity and the regularity of the development of law.

In terms of implementing the systematization of legal acts, the experience of France is also interesting, where this process is generally called codification and is understood in broad and narrow senses. In the narrow sense, codification results in the creation of a new, complex legal act regulating a certain sphere of public relations. One such example is the French Civil Code of 1804. In a broad sense, codification is the unification of various normative legal acts according to certain criteria into a single document (collection), where the legal provisions are essentially not revised. According to the French, if contradictions are revealed in this process or the need to revise outdated legislation arises, the relevant legal acts should be revised not through codification, but in the sequence of the usual legislative process[24].

III. Conclusion

Summarizing the results of the research, we can state that a legal act is a broader concept than legislation, therefore, in order to make systematization activities more comprehensive, it is correct to use the term "legal act" instead of the terms "legislation", "legislative act" or "normative act" in the definitions.

Definitions of law systematization available in the literature are classified into two groups: limited and extensive. More accurate are the broad approaches that

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[23] **Kashanina T. V.** Legal technique: textbook. - M.: Eksmo, 2007, pp. 73-74 (**Кашанина Т. В.** Юридическая техника: учебник. - М.: Эксмо, 2007, 73-74 էջեր).

[24] **Ashuraxunova Sh. T.** Systematization of legislation: theoretical legal analysis based on foreign experience, Central Asian Journal of education and innovation, Volume 3, Issue 5, May 2024, pp. 196-202, doi.org/10.5281/zenodo.11261090.

consider that all legal acts can be subject to systematization. Approaches that view systematization as an activity aimed at unifying normative acts or, in a narrow sense, regulating legislation are considered limited.

The systematization of law is a permanent legal activity aimed at unifying legal acts with general characteristics, the purpose of which is to improve existing legal provisions, eliminate contradictory regulations, gaps, outdated provisions, and ensure the convenience of using legal material.

This perception of systematization stems from the objective pattern of the development of law.

Conflict of Interests

The author declares no ethical issues or conflicts of interest in this research.

Ethical Standards

The author affirms this research did not involve human subjects.

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A FEW REMARKS ON THE LEGAL STATUS OF DAOS IN THE EUROPEAN UNION AND THE REPUBLIC OF ARMENIA

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Abstract. The development of blockchain technology has led to the emergence of a novel form of collaborative organization, known as Decentralized Autonomous Organizations (DAOs), which rely on internet-based communication and cryptographic mechanisms. The economic significance of DAOs has prompted legislators to consider appropriate legal frameworks. This article analyzes the legal status of DAOs in the European Union and the Republic of Armenia. While the EU adopted the Markets in Crypto-Assets Regulation (MiCA), it refrained from recognizing DAOs as distinct legal entities, despite preliminary considerations during the legislative process. Similarly, Armenia, through the Law on Crypto-Assets (HO-159-N), inspired by MiCA, does not explicitly address DAOs. Consequently, both jurisdictions exhibit a regulatory gap. The article demonstrates that, even in the absence of dedicated legislation, interpretative cues within these legal instruments can provide guidance on how DAOs may be treated under EU and Armenian law. By examining these frameworks, the study contributes to understanding the potential legal recognition and regulation of DAOs in different legal systems.

Keywords - *Decentralized Autonomous Organizations, decentralized finance, crypto-assets regulation, legal status, European Union, Armenia, blockchain.*

1. Introduction

The development of blockchain technology has contributed to the emergence of a new form of cooperation based on the use of internet communication and cryptographic encryption, known as decentralized autonomous organizations

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(DAOs). The scale of this phenomenon indicates its growing economic significance, which for many legislators constitutes a premise for the development of appropriate legal regulations[3]. There are numerous concepts concerning the regulation of the legal status of DAOs. Each state that undertakes an attempt to address this issue can point to its own experiences, which are often unique when compared to those of other jurisdictions.

The aim of this article is to analyse the legal status of DAOs in light of the most recent regulations adopted by the European Union (EU or the Union) and the Republic of Armenia. By adopting the Markets in Crypto-Assets Regulation[4] (MiCA), the European Union ultimately decided not to recognise DAOs as a separate legal entity, despite the fact that this issue had been subject to preliminary consideration during the legislative process. A similar approach was taken by Armenia with the adoption of the Law on Crypto-Assets (HO-159-N)[5], which, although inspired by the solutions introduced by MiCA, likewise does not directly address DAOs. Both legal acts therefore leave a significant regulatory gap. The article seeks to demonstrate that, notwithstanding the absence of dedicated regulation, it is nevertheless possible – on the basis of interpretative indications contained in both acts – to provide an answer as to how DAOs should be treated within the legal orders of the European Union and the Republic of Armenia.

2. DAOs – An Explanation of the Concept and An Definition Attempt

The first references about DAOs appeared as early as 2013, when V. Buterin, in the Ethereum white paper, suggested the possibility of programming decentralized forms of cooperation between individuals[6]. Buterin described the operational logic of virtual organizations whose functioning resembles traditional forms of collective organization, such as companies, foundations, or associations[7]. There is no single, universally accepted definition of a DAO, and existing conceptualizations emphasize different aspects of this complex phenomenon. A definition frequently cited in the legal literature is that proposed by S. Hassan and P. De Filippi, who describes a DAO as "a blockchain-based system that enables people to coordinate

[3] There are over 172.7 thousand such entities operating worldwide; see: https://daobase.ai.

[4] Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937.

[5] Act available here: https://www.arlis.am/hy/acts/210999.

[6] Buterin, V. Ethereum Whitepaper, https://ethereum.org/en/whitepaper/ (access: 02.09.2025).

[7] Czarnecki, J. Czym są inteligentne kontrakty i DAO? [in:] Zandberg-Malec, J. (eds.) *Blockchain, inteligentne kontrakty i DAO*. Warsaw 2016, p. 8, (report), https://wardynski.com.pl/publikacje/-opracowania/blockchain-inteligentne-kontrakty-i-dao (access: 17.12.2025).

and govern themselves mediated by a set of self-executing rules deployed on a public blockchain, and whose governance is decentralized (i.e., independent from centralized control)"[8].

DAOs are not established through legal procedures characteristic of traditional legal forms. The process of creating a DAO is based on the use of blockchain technology and smart contracts, which differs fundamentally from the formation of a legal person under positive law. It may be argued that the creation of a DAO does not require knowledge of legal regulations but rather programming skills. Every aspect of a DAO's operation – including rules of participation, financial management, participant voting on decisions, and amendments to the organization's source code – is expressed in the form of computer code embedded in smart contracts.

It should also be noted that DAOs function as native economic units operating within the cryptocurrency sector, particularly in its decentralized finance segment (DeFi). DAOs may be used to coordinate DeFi applications providing cryptocurrency-related services. DAO participants may govern decentralized cryptocurrency exchanges (DEXs) or lending protocols[9].

3. DAOs – Justification for the Need of Regulation

Unlike traditional forms of cooperation, DAOs are not generally recognized as subjects of law. They are neither legal persons nor even organizational units endowed with legal capacity (at least in legal systems in which legal capacity does not necessarily entail legal personality). Consequently, DAOs cannot constitute entities separate from their participants with respect to rights and obligations. This state of affairs adversely affects fundamental institutions of both material and procedural civil law. DAOs do not appear as parties to legal transactions, nor can they be regarded as owners of property within the meaning of civil law. The only assets they may hold consist of crypto-assets recorded within blockchain infrastructure (so-called *on-chain assets*). DAOs lack legal standing before courts and therefore cannot act as claimants or defendants in judicial proceedings[10]. The resulting lack of integration with the traditional financial and banking system further complicates their participation in economic transactions, particularly with

[8] Hassan, S. & De Filippi, P. Decentralized Autonomous Organization. Internet Policy Review, 2021, No. 2(10), p. 1.
[9] Shahzad, I. What Are DAOs & Why Do We Need Them?, https://medium.com/coinmonks/what-are-daos-why-do-we-need-them-23738ab528df (access: 01.12.2025).
[10] See, by contrast: CFTC v. Ooki DAO, 2022 WL 17822445 (N.D. Cal. Dec. 20, 2022).

regard to the payment of public-law obligations, such as income tax settlements[11]. There are no clear rules specifying who, within this virtual form of cooperation, bears liability for potential obligations, irrespective of whether such obligations arise from contract or tort[12]. The virtual and decentralized nature of DAOs renders traditional methods of determining applicable law – typically based on the registered seat of a legal person – potentially insufficient[13]. Under the current legal framework, the use of DAOs as vehicles for conducting business activities entails significant legal risks for participants as well as for other stakeholders, including developers and users. These groups may encounter substantial difficulties in enforcing their claims, a consequence directly attributable to the existing legal status of DAOs. Regulating the legal status of DAOs, as well as their internal and external relationships, would contribute to enhancing legal certainty, the security of economic transactions, and the overall stability of the digital asset market.

4. Overview of Global DAO Regulations

4.1. The Legal Wrapper Concept - Explanation

Legal practice and legal scholarship have developed a number of solutions aimed at facilitating the legal structuring of DAOs, offering various regulatory models and legal constructs designed to mitigate the legal risks associated with DAO operations. The concept that has gained the greatest recognition is commonly referred to as the *legal wrapper*. This solution is often presented as an entity endowed with a separate legal personality, which shields DAO participants from personal liability for obligations and serves as an interface between the DAO and the off-chain world, for instance by enabling the performance of legal acts and the settlement of tax obligations on behalf of DAO participants[14].

The creation of a legal person that "assumes responsibility" for a DAO is not, however, the only method of constructing a legal wrapper. A comparative overview of global jurisdictions demonstrates that this function may be effectively fulfilled not only by cooperative forms that result in the creation of a legal entity,

[11] An exception may arise where the laws of a given jurisdiction allow tax settlements to be made in cryptocurrencies; see. PwC Report. El Salvador's law: a meaningful test for Bitcoin, https://www.pwc.com/gx/en/financial–services/pdf/el–salvadors–law–a–meaningful–test–for–bitcoin.pdf (access: 19.06.2025).

[12] Jamka, R. Zdecentralizowane Organizacje Autonomiczne (DAO) – rekonesans potencjału rewolucyjnego, Palestra, 2025, No. 1, p. 199.

[13] Świerczyński, M. Przełomowe technologie informatyczne w prawie prywatnym międzynarodowym. Warsaw 2024, p. 169-170.

[14] Jamka, R. *op. cit*., p. 203.

but also by contractual arrangements established on the basis of the principle of freedom of contract[15]. An obligational relationship serving as a legal wrapper makes it possible to flexibly regulate the mutual rights and obligations of DAO participants without the necessity of creating a legal person.

4.2. Examples of Legal Wrappers

An analysis of so-called legal wrappers applied in selected jurisdictions demonstrates a significant diversity of approaches to the legal structuring of DAOs. In the majority of countries, no statutory provisions have yet been adopted that would explicitly define the formal legal status of DAOs. Notable exceptions include certain U.S. states. The legislatures of Vermont[16], Wyoming[17], Tennessee[18], Utah[19], and New Hampshire[20] have adopted regulations providing for a dedicated DAO subtype of LLCs.

A dedicated legal form has also been introduced in the United Arab Emirates[21], which opted for the model of a DAO association. In jurisdictions where the legislator has not resolved the formal legal classification of DAOs, the existing regulatory gap may be addressed through the appropriate application of provisions governing traditional legal forms, such as general partnerships (e.g. California, Philippines), traditional LLCs (Delaware), foundations (Switzerland), associations (California, Liechtenstein, Switzerland), limited cooperative associations (Colorado), foundation companies (Cayman Islands), and trusts (Jersey)[22].

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[15] See more in: de Lima Pinbeiro, L. Laws Applicable to International Smart Contracts and Decentralized Autonomous Organizations (DAOs) [in:] Perestrelo de Oliveira, M. & Garcia Rolo, A. (eds.), Decentralised Autonomous Organisation (DAO) Regulation, Tübingen 2024, p. 277.

[16] Vt. Stat. tit. 11 § 4173 et seq. (2025).

[17] Wyo. Stat. Ann. § 17-31-101 et seq. (2025).

[18] Tenn. Code Ann. § 48-250-101 et seq. (2025).

[19] Utah Code § 48-5-101 et seq. (2025).

[20] NH Rev Stat § 301-B:1 et seq. (2025).

[21] See DAO Association Regulations 2024 issued by the Ras Al Khaimah, https://freezone.innovationcity.com/dao-association-regulations/ (access: 17.12.2025).

[22] DAObox. DAO Legal Wrappers: Definition, Types, Jurisdictions, and Use Cases, https://docs.daobox.io/dao-legal-wrapper-design-and-creation/legal-wrappers-for-daos-definition-types-jurisdictions-and-use-cases (access: 18.12.2025).

5. An Attempt to Reconstruct the Legal Status of DAOs in the European Union Based on the MiCA Regulation

5.1. Introductory Remarks

At the level of the European Union, DAOs have not yet been subject to a separate, dedicated regulatory framework comparable to the solutions adopted in certain U.S. states. At the same time, the EU has recently adopted the Markets in Crypto-Assets Regulation (MiCA), which establishes a comprehensive legal framework for the trading of crypto-assets. Although MiCA does not explicitly address DAOs, an analysis of its provisions based on literal and functional interpretation may allow for the determination of the legal status of DAOs within the EU, as well as the potential scope of application of MiCA to DAO-related activities. Examining the legal status of DAOs from the perspective of this regulation is justified by its subject matter, namely crypto-assets, which are also widely used within DAO structures. Moreover, it cannot be overlooked that, in the practical functioning of the crypto-asset market, these organizations play a significant role. DAOs may be used to manage DeFi applications and may also acquire crypto-assets on their own account. In light of this, the decision to omit this phenomenon from the material scope of the regulation may not be entirely clear. Precisely because MiCA regulates the provision of crypto-asset services, it constitutes an important source of insight into the legal status of DAOs in the European Union, even if such forms of cooperation do not fall within the regulation's direct focus.

5.2. DAOs and the Scope of MiCA

The subject matter scope of MiCA clearly indicates that the EU legislator has focused on the regulation of services provided in a centralized manner. MiCA applies to natural persons, legal entities, as well as partnerships[23] and certain other enterprises involved in the issuance, public offering, and admission to trading of crypto-assets, or in the provision of crypto-asset services within the territory of the Union (see Art. 2(1) of MiCA). MiCA directly addresses only entities with a recognized legal status, for which there is no doubt regarding their legal capacity, which contrasts with the situation of DAOs, whose formal legal status remains the subject of intense debate.

It might therefore appear that such organizations would be excluded under the catalogue of exempted entities. However, this is not the case (see Art. 2(2) of MiCA), and the question of using DAOs in economic transactions remains

[23] See Recital 74 of MiCA.

unresolved. Certain interpretative cues, which simultaneously reflect the legislator's approach to decentralized trading, are provided in Recital 22 of MiCA. The legislative technique employed renders this recital rather opaque, and consequently, it itself requires interpretation.

5.3. "Full Decentralization" as a Criterion Excluding the Application of MiCA

The EU legislator's approach to decentralized trading is reflected in the second sentence of Recital 22 of MiCA, which states: "Where crypto-asset services are provided in a fully decentralized manner without intermediaries, they should not fall within the scope of this Regulation". Under this provision, service models that can be described as "fully decentralized" are excluded from the scope of MiCA. However, a question arises as to what exactly constitutes "full decentralization" and, more importantly, whether DAOs can be regarded as an expression of such decentralization. Consequently, it must be examined whether DAOs are excluded from the application of MiCA on the grounds that they meet this criterion.

"Decentralization" should not be understood as a binary criterion; rather, it can be viewed along a spectrum[24]. Decentralization occurs across multiple dimensions (e.g., access, development, governance, finances, and operations) and is inherently gradable[25]. Generally, the higher the degree of decentralization, the more processes can be automated, simultaneously reducing the need for human oversight or influence.

It should be emphasized that current legislation does not specify which dimension or degree of decentralization the legislator had in mind in Recital 22 of MiCA. EU law has not yet established criteria to determine when a particular model can be considered "decentralized", and no legal act decisively clarifies under what circumstances a model may lose this characteristic. Some guidance on this matter has been provided in the recently published European Banking Authority[26] (EBA) guidelines, which state that "decentralised" means the application "(...) is

[24] Veas, C. DeFi and MiCA: How much decentralisation is enough?, https://www.lexology.com/library/detail.aspx?g=ada74ccc-c1aa-4dfd-bdbc-93fcda62bdb2 (access: 10.11.2025).

[25] See more in: CFTC's Technology Advisory Committee. Decentralized Finance Report, p. 20-25, https://www.cftc.gov/About/AdvisoryCommittees/TAC (access: 10.11.2025).

[26] Guidelines amending Guidelines EBA/2021/02 on customer due diligence and the factors credit and financial institutions should consider when assessing the money laundering and terrorist financing risk associated with individual business relationships and occasional transactions ('The ML/TF Risk Factors Guidelines') under Articles 17 and 18(4) of Directive (EU) 2015/849, 16 January 2024, EBA/GL/2024/01, https://www.eba.europa.eu/sites/default/files/2024-01/a3e89f4f-fbf3-4bd6-9e07-35f3243555b3/Final%20Amending%20%20Guidelines%20on%20MLTF%20Risk%20Factors.pdf (access: 05.12.2025).

not controlled or influenced by a legal or natural person"[27]. In this understanding, for a DAO to be recognized as "decentralized" and thus excluded from the scope of MiCA, no natural or legal person may exercise exclusive control over it. Authorities responsible for implementing MiCA will, however, need to determine the extent to which human influence is permissible for a DAO to still be considered "fully decentralized"[28].

5.4. "Partial Decentralization" as a Criterion for the Application of MiCA

The exclusion of transactions in which the service provision model meets the criterion of "full decentralization" results in MiCA effectively covering only centralized or hybrid models (also referred to as "partially decentralized"), i.e. those combining centralized and decentralized elements. This is confirmed by the first sentence of Recital 22, which states that MiCA also applies where only part of the "(...) activities or services is performed in a decentralized manner".Accordingly, these are models in which decentralized components merely complement a centralized activity. This is particularly the case where traditional "(...) undertakings carry out, provide or control, directly or indirectly (...)" a given activity (see Recital 22). An example of a "partially decentralized" model is a situation in which a legal entity (the centralized element) exercises control over a decentralized cryptocurrency exchange (the decentralized element).As with the earlier discussion concerning the criterion of "full decentralization," EU (and national) authorities responsible under the Regulation for the supervision of the crypto-asset market have not yet had the opportunity to clarify how such "control" should be understood. Such clarification would undoubtedly help determine when a service provision model qualifies as "partially decentralized".

Certain sources of inspiration in this respect can be found in U.S. law, in particular in orders issued by the Commodity Futures Trading Commission (CFTC). In one such order, it was held, for example, that Deridex Inc. "(...) retained substantial control over the Deridex Protocol (...)", which was manifested in its "(...) ability to update relevant smart contract code to adjust how the smart contracts operated in order to, among other things, suspend trading or prevent users

[27] See ibidem point 21.3 d) iii (p. 21).

[28] At the same time, it is worth noting the consultation paper issued by the European Securities and Markets Authority in connection with the MiCA legislative process, which recognizes that there are various degrees and variants of decentralization, see: European Securities and Markets Authority. Technical Standards specifying certain requirements of Markets in Crypto Assets Regulation (MiCA) - second consultation paper, 5 October 2023, ESMA75-453128700-438, point 98 (p. 27). https://www.esma.europa.eu/sites/default/files/2023-10/ESMA75-453128700-438_MiCA_Consultation_Paper_2nd_package.pdf (access: 05.12.2025).

from depositing collateral"[29]. Moreover, Polish legal doctrine has expressed the view that, when making such an assessment, significance may be attached to the entity responsible for supplying the platform's software, namely whether it is a legal person (such as a company or a foundation), or whether the platform operates as open-source software developed and maintained by a community[30].

5.5. DAOs Using a Legal Wrapper and the Criterion of "Partial Decentralization"

Within the phenomenon of "partial decentralization," DAOs operating through a legal wrapper may also be identified. Such arrangements combine two elements with distinct characteristics: the legal wrapper (the centralized element) and the DAO (the decentralized element). The literature frequently argues that the use of legal wrappers leads to a limitation or even a loss of the decentralized nature of DAOs. As aptly observed by V. Villanueva Collao, legal wrappers invariably create some form of hierarchy and control and, moreover, introduce into the decentralized environment of DAOs various legal institutions, such as "fiduciary responsibility, beneficiary rights, and regulatory oversight mutate (...)"[31] and which, "(...) when introduced into the decentralized logic of DAOs and blockchain organizations, forcing DAOs to adapt in ways that could conflict with their founding ideals and culture"[32].

In light of the above, it may be argued that a DAO operating through a legal wrapper can be regarded as a "partially decentralized" organization within the meaning of Recital 22 of MiCA. The use of a legal wrapper creates a structure capable of bearing legal liability, which cannot be considered "fully decentralized." It should be emphasized, however, that the DAO itself does not thereby acquire the status of a legal person; as a rule, any liability for breaches of MiCA is borne by the legal form associated with the DAO (e.g. an LLC).

Conversely, where a DAO provides crypto-asset services without the use of a legal wrapper, it may be argued that the application of MiCA should be excluded on the grounds that such services are provided "(...) in a fully decentralized manner without intermediaries (...)".

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[29] Order, In re Deridex, Inc., CFTC No. 23-42, at 4–5, (Sept. 7, 2023), p. 4.
[30] Srokosz, W. Stosowanie rozporządzenia MiCA do DAO, https://www.witoldsrokosz.pl/pl/blog/-stosowanie-rozporzadzenia-mica-do-dao (access: 10.12.2025).
[31] Villanueva Collao, V. Decentralized(?), But Far From Disorganized: A Comparative Analysis of Legal Wrappers and the Evolving Structure of DAOs (February 18, 2025). Available at SSRN: https://ssrn.com/abstract=5143035 or http://dx.doi.org/10.2139/ssrn.5143035, p. 35.
[32] Ibidem.

6. An Attempt to Reconstruct the Legal Status of DAOs in the Republic of Armenia on the Basis of the Law on Crypto-Assets

6.1. Introductory Remarks

The most recent cryptocurrency regulations in force in Armenia share many similarities with the EU's MiCA Regulation, both in terms of their personal and material scope. Like the EU legislator, the Armenian legislator focuses on regulating crypto-asset services provided in a centralized manner. The Armenian legislator does not directly address the issue of service provision by decentralized "entities," thereby giving rise to uncertainties regarding the permissibility and the scope of regulation of this segment of the market. What is significant, however, is that the Armenian legislator has not introduced an explicit statutory exclusion for "decentralized" or "partially decentralized" models (see Art. 1.2–10 of the Law on Crypto-Assets). The absence of any references to DAOs or DeFi applications raises legitimate questions concerning the legal status of DAOs under Armenian law.

The legal definition of a "crypto-asset service provider" covers domestic legal persons, such as joint-stock companies or limited liability companies (Art. 17.2), and, in specific circumstances, also investment companies, investment fund managers, regulated market operators, payment and settlement organizations, and others (see Art. 18). In this part of the Act, the legislator clearly expresses an intention to regulate centralized transactions, specifically those involving the provision of services by legal persons, which may potentially exclude any decentralized elements from the scope of regulation. However, pursuant to Art. 22.2, the legislator provides for the possibility that services may be offered by foreign companies that have obtained a license, authorization, or registration to conduct business in their country of origin. This raises the question of whether the notion of a foreign company referred to in Art. 22.2 also encompasses entities that, in their home jurisdiction, provide services in a "partially decentralized" manner on the basis of regulatory approval, or that function as legal wrappers for DAOs (e.g. Wyoming DAO LLC). It therefore remains an open question whether the Armenian authorities will permit such service models, despite the legislature's silence regarding their existence.

6.2. The Law on Crypto-Assets and Its Approach to Decentralized Transactions

The Act under discussion regulates the provision of crypto-asset services through traditional means, namely by entities such as commercial companies (centralized

transactions). This legislative intent is indicated in Art. 17.2, which recognizes capital companies as the preferred legal form for crypto-asset service providers. However, the Act does not specify its position – using the conceptual framework derived from Recital 22 of the MiCA Regulation – towards the provision of services in a "partially decentralized" or "fully decentralized" manner. Certain insights may nevertheless be obtained through an interpretation of the personal scope provisions of the Act, as well as by observing regulatory practices based on law enforcement and supervisory activities in other jurisdictions. It may be assumed that, in most cases, entities required to comply with the statutory requirements (e.g. licensing obligations) will be capital companies (in particular LLCs), as these are most commonly used as vehicles for conducting business in the crypto-asset sector. This assumption is supported by the aforementioned Art. 17.2, which explicitly specifies joint-stock companies and LLCs as entities eligible to act as crypto-asset service providers. Given that the Act focuses on regulating corporate activity, it may be inferred that "fully decentralized" transactions fall outside its scope of application, in a manner similar to the solution adopted in the MiCA Regulation (no entity, no liability). It should be noted, however, that under Armenian law this exclusion is implicit and results from an *a contrario* interpretation. Since the Act regulates centralized transactions and remains silent on decentralized ones, it must be assumed that such transactions do not fall within the scope of its regulatory concern.

Moreover, the Armenian legislator's position with regard to the regulation of "partially decentralized" transactions – i.e. hybrid models in which a traditional legal entity (such as a company) can be held responsible for legal events (transactions) carried out through DeFi applications, including DAOs – also remains unclear. Resolving this issue is particularly important in light of the aforementioned Art. 22.2 of the Law on Crypto-Assets, which allows foreign companies to provide services within the territory of Armenia on the basis of prior authorization granted by the Central Bank of Armenia. The Armenian legal system must therefore be prepared for hypothetical scenarios in which an application for authorization is submitted by a foreign company providing its services in a "partially decentralized" model, that is, one which, in addition to its traditional legal form, relies on decentralized solutions such as exchanges or lending protocols, or simultaneously performs the function of a legal wrapper for a DAO.

At the present stage, the legal status of such "partially decentralized" structures remains uncertain under Armenian law. It cannot be assumed a priori that the legal system will refuse to recognize their existence, as these entities possess legal personality, unlike "fully decentralized" arrangements. What remains unclear,

however, is the position of the Central Bank of Armenia regarding the admissibility of such service-provision models within its jurisdiction.

6.3. Law on Crypto-assets – Approach to Legal Wrappers

The Armenian legal system does not provide provisions that would dispel doubts regarding the legal status of DAOs. By observing the general approach to the use and recognition of legal wrappers in various jurisdictions, it is nevertheless possible to draw some general conclusions regarding the status of such organizations under Armenian law. First and foremost, if a DAO is linked to a legal person governed by Armenian law, thereby forming a kind of legal wrapper, such a DAO operating under a "partially decentralized" model should be subject to the provisions of the Law and, inter alia, comply with licensing requirements. In such a case, even if the DAO itself does not possess legal personality under Armenian law and therefore cannot be a bearer of rights and obligations, the legal wrapper (e.g. an Armenian LLC or joint-stock company) can undoubtedly bear liability.

With respect to such a legal structure – unlike a DAO characterized by "full decentralization" – it is possible to determine a registered seat and tax residence in Armenia. Consequently, compliance with the Law on Crypto-assets may be effectively enforced against the DAO's legal wrapper, which constitutes a legal person under Armenian law.

7. Conclusion

The subject matter of both the MiCA Regulation and the Law on Crypto-assets is the provision of crypto-asset services. Although a significant portion of daily trading volume takes place within decentralized markets, neither of these legal acts addresses this phenomenon in a satisfactory manner. MiCA merely signals the issue in Recital 22, which raises more questions than it provides answers, while the Armenian law omits this type of market activity altogether. This does not mean, however, that decentralized trading is prohibited under the discussed legal acts, nor that activities carried out through DAOs – or the broader phenomenon of DeFi – are considered criminal. Although both acts exclude decentralized trading from their regulatory scope, they do not prohibit it outright, instead leaving this sphere unregulated. Moreover, MiCA even introduces certain exceptions allowing services provided under a partially decentralized model to fall within its scope.

In this context, it is worth noting that there are sound legal arguments supporting the classification of DAOs that use a legal wrapper as "partially decentralized" models, and thus subject to the MiCA Regulation. Nevertheless,

appropriate guidelines are needed to bring greater clarity for addressees of the law and, consequently, to facilitate legal qualification.

On the other hand, Armenian regulations – although aligned with MiCA in many respects – have been designed in a manner clearly oriented toward traditional, centralized models of service provision, such as the activities of capital companies. The Armenian law does not employ the concept of "decentralization," nor does it distinguish between its degrees. It is therefore difficult to predict the ultimate approach of domestic authorities toward "partially decentralized" models. This issue is particularly relevant because Armenian law allows foreign companies to provide services, provided that they have obtained authorization to do so in their home jurisdiction. It remains uncertain, however, whether the Armenian regulator would admit a foreign company authorized in its home country to operate under a "partially decentralized" model. Similar doubts arise with respect to "Armenian" DAOs. Although the law does not explicitly prohibit them, there is no certainty that authorities applying the law will recognize structures based on a combination of a decentralized element (DAO) and a centralized element (legal wrapper) as full-fledged participants in economic transactions.

In conclusion, a de lege ferenda postulate should be formulated, according to which many of the identified doubts would not arise if the EU legislator, followed by the Armenian legislator, decided to explicitly recognize DAOs as legal persons through the adoption of an appropriate normative act. At the current stage, in order to facilitate the functioning of DeFi, it would be advisable to issue official guidelines specifying the circumstances in which a given project may be classified as "fully decentralized", "partially decentralized", or "centralized", thereby ensuring legal certainty for developers and third parties alike.

Conflict of Interests
The authors declare no ethical issues or conflicts of interest in this research.
Ethical Standards
The authors affirm this research did not involve human subjects.

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LEGAL VOIDS AND MARKET VOIDS: HOW OUTDATED ADVERTISING LAWS THREATEN MEDIA SUSTAINABILITY IN ARMENIA

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Abstract. This study examines the critical challenge of online advertising regulation in Armenia, a post-Soviet country with a transitional democracy. The object of the study is the RA Law "On Advertising", a legal framework developed in the pre-digital era of television and print, which fails to meet the demands of the modern media environment. The purpose of the research is to analyze the gaps in this legislation and propose practical solutions. The scientific novelty lies in its empirical contribution as a comprehensive study to analyze the direct impact of vague legal concepts and restrictive advertising policies on the financial stability of local media in Armenia. The results show that recent regulations, in particular the near-total ban on gambling advertising, have led to a significant loss of revenue for media organizations, while failing to reduce the overall size of the gambling market. The practical significance of the work is that its findings and recommendations can serve as a roadmap for policymakers to reform the RA Law "On Advertising" and develop effective oversight mechanisms that balance public interest with the need for a free and financially viable press.

Keywords - *online advertising, legal regulation, media sustainability, legislative gaps, gambling advertising, post-Soviet media, Armenia, media economics.*

Introduction

The global shift to a digital media landscape has significantly reshaped the legal regulation of media worldwide. The ongoing economic crisis in journalism has been well documented. Key consequences of this crisis include a decline in the

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number of newspapers across the country, the size of television newsrooms, and the number of professional journalism positions[3]. This issue is particularly acute in post-Soviet nations like Armenia, which are navigating the complexities of a transitional democracy.

When media systems encounter financial strain, ensuring the survival of independent media goes beyond economics, serving as a vital safeguard for democracy and free expression.

This article investigates a critical juncture in Armenia's media environment where outdated legislation and recent restrictive policies intersect to threaten the viability of its online press. The crux of the problem is the 1996 Law "On Advertising"[4], a foundational piece of legislation from the pre-digital era. Its vague terminology, particularly the definition of "electronic mass media," creates legal uncertainty for a wide array of digital actors, from established news websites to independent bloggers.

This study argues that Armenia's current approach to online advertising regulation creates a paradox: while intended to protect the public from harmful content, it inadvertently undermines the financial viability of independent media, which is itself a cornerstone of the public interest. The problem is further exacerbated by broader market pressures. As Cage observes, in increasingly competitive environments, media companies often cut costs and reduce staff rather than invest in sustainable financing and quality journalism. This trend fosters a shift from substantive news coverage toward infotainment or low-cost entertainment content, leaving audiences with diminishing access to reliable information[5]. Similar concerns have been voiced in Armenia by media companies: a 2021 open letter published in 'Zhoghovurd' criticized the proposed amendments to the Law on Advertising for further endangering media revenues without offering viable alternatives[6].

The situation worsened following significant cuts in U.S. foreign aid. In 2025, the U.S. Department of Government Efficiency announced the cancellation of 139

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[3] Philip M. Napoli Social Media and the Public Interest. Media Regulation in the Disinformation Age, Columbia University Press, New York, 2019, p. 91.

[4] Law of the Republic of Armenia "On Advertising", No. HO-55, adopted on 30.04.1996, RA NA Bulletin 1996/10(1110), Article 120, May 31, 1996.

[5] Julia Cage Saving the Media Capitalism, Crowdfunding, and Democracy,Harvard University Press, 2016, pp. 19-20.

[6] "Open Letter on the Proposed Amendments to the RA Law 'On Advertising" («ԲԱՑ ՆԱՄԱԿ «Գովազդի մասին» ՀՀ օրենքում նախատեսվող փոփոխությունների վերաբերյալ») Zhoghovurd, October 15, 2021, https://armlur.am/1141714 (last accessed September 27, 2025).

grants totaling $215 million, including some initiatives in Armenia[7]. Media representatives raised concerns that without sustainable alternatives, Armenia's civil society and media sector risk becoming increasingly vulnerable to political pressures and external influence.[8]

Together, these insights underscore how restrictive regulation, combined with economic precarity, threatens both media sustainability and democratic resilience. By analyzing Armenia's legal framework and its real-world consequences, this article provides valuable insights for other transitional democracies grappling with similar challenges in the digital age.

This study is grounded in several central theoretical perspectives.

First, the loss of a single major advertising sector can have a devastating impact on a small market like Armenia's.

Second, the regulation of so-called "sinful" industries like gambling and alcohol is a constant area of policy debate. Research indicates that gambling advertisement bans can be ineffective[9] due to significant methodological challenges in measuring their direct impact[10]. Similarly, econometric studies on alcohol advertising suggest that bans can be circumvented, and their impact is highly dependent on the comprehensiveness of the regulation[11]. It is also essential to note that betting companies employ highly adaptive online marketing strategies, enabling them to swiftly shift from traditional media to unregulated platforms such as social media and influencer promotions whenever restrictions are imposed.

Third, the specific context of post-Soviet transitional democracies is crucial. Vaclav Stetka's research on media ownership in ten new EU member states in Central and Eastern Europe demonstrates that local owners frequently use media for business and political purposes, which undermines editorial independence and

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[7] US State Department axes $214 million in foreign grants, including for Armenia, Public Radio of Armenia, 16 April, 2025 https://en.armradio.am/2025/04/16/us-state-department-axes-214-million-in-foreign-grants-including-for-armenia/ (last accessed September 27, 2025)

[8] "The impact of U.S. aid cuts on Armenia's civil society and media". Civilnet, March 17, 2025 www.civilnet.am/en/news/822632/the-impact-of-u-s-aid-cuts-on-armenias-civil-society-and-media/ (last accessed September 27, 2025)

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[10] Per Binde Gambling advertising: A critical research review. London: The Responsible Gambling Trust, 2014.

[11] Henry Saffer Studying the Effects of Alcohol Advertising on Consumption, Alcohol Health Res World. 1996;20(4):266–272.

deepens the entanglement between media, politics, and the economy[12]. Similar tendencies are evident in Armenia, where media outlets remain vulnerable to political and commercial pressures. This context underscores the importance of developing diversified revenue streams, such as advertising and audience monetization, as a prerequisite for ensuring financial independence and long-term sustainability of media companies.

The rapid development of technology requires timely and adequate measures from the government; otherwise, regulation risks becoming quickly outdated and creating opportunities for abuse. Mere mechanical bans on certain types of advertising, without a comprehensive approach, are ineffective.

Main Reasearch

Armenia's current regulatory model lacks the conceptual tools to address the realities of a converged and algorithmic media environment. To analyze this multifaceted issue, the research methodology of this study is composed of two main components:

1. **Legal and Documentary Analysis:** The core of the study is a thorough analysis of the primary legal texts governing advertising in Armenia. This includes a close reading of:
   - The RA Law "On Advertising" (1996) and its subsequent amendments.
   - The RA Law "On Electronic Communication"[13].
   - The RA Law "On Lotteries"[14] and the Law "On Games of Chance, Internet Games of Chance and Casinos"[15].

This legal analysis was supplemented by a review of official reports, media publications, journalistic investigations, and public statements from stakeholders to understand the practical application and consequences of these laws.

2. **Comparative Analysis:** The Armenian legal framework and its outcomes are benchmarked against the standards set by the European Union’s Audiovisual

[12] Vaclav Stetka From Multinationals to Business Tycoons Media Ownership and Journalistic Autonomy in Central and Eastern Europe, The International Journal of Press/Politics, 2012, 17(4), pp. 433-456.
[13] Law of the Republic of Armenia “On Electronic Communication”, No. HO-176-N, adopted on 08.07.2005, RAOB 2005.08.24/54(426), Article 1034.
[14] Law of the Republic of Armenia “On Lotteries”, No. HO-3-N, RAOB 2004.01.14/2(301), Article 7.
[15] “On Gambling, Internet Gambling, and Casinos” Law of the Republic of Armenia, No. HO-1-N, RAOB 2004.01.14/2(301), Article 5.

Media Services Directive (AVMSD)[16], the Digital Services Directive (DSA)[17]. These directives provide a comprehensive model for regulating both traditional and digital media, and their clear definitions and principles serve as a useful point of comparison to highlight the gaps and ambiguities in Armenian law.

The foundational problem within Armenia's regulatory framework is that the RA Law "On Advertising" fails to provide a clear and encompassing definition of online advertising. Instead of a unified concept, the law utilizes at least three different, often overlapping terms across its various articles, creating significant confusion: "website advertising," "electronic advertising," and "electronic mass media". The application of these terms is inconsistent:

- **"Electronic advertising"** is the broadest term, seemingly covering any advertising disseminated through electronic communication networks.
- **"Website advertising"** is the most straightforward term, referring to ads on a specific domain. It is used narrowly, for example, when regulating lottery advertisements.
- **"Electronic mass media"** is the most frequently used and most problematic term. It is employed when setting major restrictions, such as the ban on advertising strong alcoholic beverages during certain hours (06:00-22:30) or regulating ads for medical products.

The central issue lies in the interpretation of "electronic mass media." Its scope is not defined, leading to a critical dilemma with two possible interpretations:

1. **A narrow interpretation:** This would equate "electronic mass media" only with officially registered online news media outlets, similar to traditional broadcasters.

2. **A broad interpretation:** This would encompass any digital platform for mass communication, including individual blogs, social media pages, and influencers, effectively making it synonymous with "electronic advertising".

This distinction is not merely theoretical; it has profound practical consequences. Under a narrow interpretation, an independent blogger or a popular social media influencer would not be subject to the same advertising restrictions as a news website regarding alcohol or pharmaceuticals, creating an unequal and unfair playing field.

[16] Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services of 10 March 2010.

[17] Directive 2000/31/EU of the European Parliament and of the Council on Audiovisual Media Services on a Single Market For Digital Services and amending Directive of 19 October 2022.

This ambiguity stands in stark contrast to the clarity of the European Union's directives.

The AVMSD provides a coherent and technologically relevant set of definitions:

- **Audiovisual Media Service:** A service under the editorial responsibility of a media service provider, the principal purpose of which is providing programs to the general public to inform, entertain, or educate. This clearly covers both traditional broadcasting and on-demand services.
- **Video-Sharing Platform Service:** A service whose principal purpose is providing programs or user-generated videos to the public, for which the platform provider does not have editorial responsibility. The provider is, however, responsible for its organization (e.g., through algorithms or tags). This definition directly addresses platforms like YouTube and Facebook Watch.
- **Audiovisual Commercial Communication:** Images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal person pursuing an economic activity; such images accompany, or are included in, a programme or user-generated video in return for payment or for similar consideration or for self-promotional purposes. This includes all forms of advertising, such as television ads, sponsorship, and product placement, providing a unified concept for all commercial content.

The comparison makes it evident that while Armenian law struggles with outdated and inconsistent terms, the EU has developed a clear, functional, and tiered system of definitions that distinguishes between actors based on editorial responsibility, creating a more predictable and equitable regulatory environment.

In 2022, Armenia enacted legislative changes[18] that effectively banned all forms of advertising for games of chance, internet games of chance, and casinos, with few exceptions. While the policy aimed to address public health concerns related to gambling, its economic impact on the media was severe and immediate. Prior to the ban, the gambling industry was the largest advertiser in the country, accounting for an estimated 40-50% of all online advertising revenue[19]. The loss of this

[18] The Republic of Armenia Law "On Amendments and Additions to the Law 'On Advertising'", No. HO-50-N, adopted on 04.03.2022, Unified Website 2022.03.07–2022.03.20, Official Publication Date: 11.03.2022.

[19] "Open Letter on the Proposed Amendments to the RA Law 'On Advertising" («ԲԱՑ ՆԱՄԱԿ «Գովազդի մասին» ՀՀ օրենքում նախատեսվող փոփոխությունների վերաբերյալ»), Zhoghovurd, October 15, 2021, https://armlur.am/1141714/ (last accessed September 27, 2025).

income has plunged many independent online media outlets into financial crisis, forcing them to downsize, cut salaries, and become more reliant on grants or political funding, thereby threatening their independence.

The ban did not eliminate gambling advertising; it displaced it. Major betting companies shifted their marketing budgets from traditional media to their official websites and social media channels, thus making this content available and easily accessible for potential users. At an earlier stage, betting companies even attempted to bypass restrictions through so-called umbrella advertising: they created their own television channels operating under trademarked names identical or closely associated with their brands. When regulatory scrutiny intensified and legislative amendments closed this loophole, these companies adapted once again by changing the names of the channels, thereby maintaining their visibility while formally complying with the stricter rules[20].

Later, with the 2022 amendments, advertising of gambling, online gambling, casinos, gaming halls, or lotteries (including totalizators) and their organizers was entirely prohibited, with the only exceptions being placement on the companies' official websites, or inside/on the buildings and premises of casinos, gaming halls, or betting offices, as well as in cases explicitly provided by law. Lottery and combined lottery advertising were allowed exclusively at the points of sale.

Furthermore, the state lacks an effective body to enforce these rules in the online sphere. The Television and Radio Commission, which regulates broadcast media, has publicly stated that it has no jurisdiction over the internet[21]. This regulatory vacuum means that while law-abiding local media outlets suffer financially, the advertising continues to reach Armenian consumers through other channels, undermining the law's primary objective.

The findings from Armenia illustrate a clear case of well-intentioned policy producing negative unintended consequences, echoing international research on policy failure. By banning gambling advertisements, policymakers sought to

[20] "From now on, Vivaro will be viewed… On December 25, the presentation of VIVARO MEDIA's TV channels will take place." (Vivaro-ն այսուհետ դիտում են… դեկտեմբերի 25-ին տեղի կունենա VIVARO MEDIA-ի հեռուստաալիքների շնորհանդեսը), Fast News, December 25, 2021
https://fastnews.am/sport/post/vivaro-n-aysvouhet-ditvoum-en-dektemberi-25-in-teghi-kvounena-vivaro-media-i-hervoustaaliqneri-shnvorhandesy (last accessed September 27, 2025)

[21] "We do not have the authority to exercise oversight over those engaged in journalistic activities on the Internet," — Tigran Hakobyan" (Համացանցում լրատվական գործունեություն իրականացնողների նկատմամբ վերահսկողություն իրականացնելու իրավասություն չունենք. Տիգրան Հակոբյան), TVNEWS, April 13, 2023թ.
https://tvnews.am/news/249999.html (last accessed September 27, 2025)

protect the public interest but simultaneously undermined another equally critical one: the sustainability of a pluralistic and financially independent media sector. This paradox is central to contemporary media economics. As Cage emphasizes, media organizations differ from ordinary companies because their essential role is not profit maximization but the provision of free, unbiased, high-quality information indispensable for democratic debate[22]. Yet, as Picard argues, mounting commercial pressures and wholesale marketization have eroded the public-interest orientation of journalism, skewing content toward profitability and away from quality[23]. Petrosyan states that The regulation of the sector must be carried out primarily with due regard to the protection of citizens' rights from dishonest (or misleading) information[24].

Such pressures are particularly acute in transitional democracies, where limited resources and fragile institutions amplify vulnerability. Judith Lohner, Irene Neverla, and Sandra Banjac found that in selected developing countries, profit imperatives and understaffed newsrooms constrain journalistic capacity, resulting in superficial coverage of complex issues[25].

Applied to Armenia, these insights underscore how restrictive regulation, compounded by structural economic fragility, produces a dual crisis: independent outlets lose both financial viability and their ability to serve as democratic watchdogs.

Ultimately, the Armenian case is a cautionary tale of how a policy, failing to account for the economic realities of its media market, can weaken democratic institutions by inadvertently undermining the financial independence of the press. According to a journalistic investigation conducted by Civilnet.am, however, the total volume of betting continued to increase during 2022–2023 despite these prohibitions[26]. Moreover, in an interview with *Haykakan Zhamanak in February*

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[22] Julia Cage Saving the Media Capitalism, Crowdfunding, and Democracy, Harvard University Press, 2016, p. 90.

[23] Robert G. Picard. "Commercialism and Newspaper Quality." Newspaper Research Journal 25 (1), p. 63.

[24] "Armenian and International Experience of Internet Legal Regulation", in New and Alternative Media: Ethical and Legal Issues (Համացանցի իրավական կարգավորման հայկական և միջազգային փորձը | «Նոր և այլընտրանքային մեդիա. էթիկական և իրավական խնդիրներ»), Yerevan, 2012, p. 49.

[25] Judith Lohner, Irene Neverla, and Sandra Banjac Conflict-Sensitive Journalism? Journalistic Role Perceptions and Practices in Democratization Conflicts // Media, Communication and the Struggle for Democratic Change, Palgrave Macmillan Cham, 2019, p. 68.

[26] "In 2023, betting continued to grow despite the Prime Minister's claims" (2023-ին խաղադրույքները աճել են՝ անտեսելով վարչապետի պնդումները), Civilner, 16 April, 2024

2025, Hayk Sargsyan, an MP from the ruling Civil Contract parliamentary faction, observed that over the past 13 years the volume of lotteries, virtual games, and bookmaker services has been growing at an accelerating pace[27]. This suggests that while advertising bans reshaped the channels through which gambling companies promote their services, they did not halt the overall expansion of the industry.

This article has demonstrated that the legal framework for online advertising in Armenia is outdated, ambiguous, and ill-equipped to handle the realities of the digital media landscape. The recent ban on gambling advertising, while motivated by public interest, has failed to achieve its goals and has severely damaged the financial sustainability of the country's independent media.

The limitations of this study must be noted: it relies primarily on legal and document analysis. Further research, such as in-depth interviews with advertisers, media managers, and regulators, would offer a more nuanced understanding of market dynamics.

Conclusion

Based on the research, the following recommendations are proposed:

1. The Law "On Advertising" must be fundamentally updated. This includes providing clear and distinct definitions for "online media," "video-sharing platforms," and "social media influencers," drawing on the clearer model of the EU's Audiovisual Media Services Directive.
2. It is essential to empower either a newly created or an already established state authority with explicit jurisdiction and sufficient technical resources to oversee advertising across digital platforms, potentially incorporating modern co-regulatory approaches.
3. To mitigate the financial damage and ensure media pluralism, the government should consider introducing non-state-controlled support

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https://www.civilnet.am/news/771976/2023-%D5%AB%D5%B6-%D5%AD%D5%A1%D5%B2%D5%A1%D5%A4%D6%80%D5%B8%D6%82%D5%B5%D6%84%D5%B6%D5%A5%D6%80%D5%A8-%D5%A1%D5%B3%D5%A5%D5%AC-%D5%A5%D5%B6%D5%9D-%D5%A1%D5%B6%D5%BF%D5%A5%D5%BD%D5%A5%D5%AC%D5%B8%D5%BE-%D5%BE%D5%A1%D6%80%D5%B9%D5%A1%D5%BA%D5%A5%D5%BF%D5%AB-%D5%BA%D5%B6%D5%A4%D5%B8%D6%82%D5%B4%D5%B6%D5%A5%D6%80%D5%A8/ (last accessed September 27, 2025)

[27] "In Armenia, $17.8 billion worth of online bets were placed in just one year: illness or addiction — how to break free?" (ՀՀ-ում 1 տարում կատարվել է 17,8 մլրդ դոլարի օնլայն խաղադրույք. հիվանդություն, թե կախվածություն, ինչպես ազատվել), Haykakan Zhamanak, 1 February, 2025, https://www.armtimes.com/hy/article/306087 (last accessed September 27, 2025).

mechanisms, such as a fund for independent journalism or tax incentives, to help media outlets transition to more sustainable business models.

By adopting a more modern and holistic regulatory approach, Armenia can create a system that genuinely protects the public interest without sacrificing the financial independence of its media. This balanced approach is crucial for the health of both its citizens and its democracy.

Conflict of Interests

The authors declare no ethical issues or conflicts of interest in this research.

Ethical Standards

The authors affirm this research did not involve human subjects.

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THE COUNTERPARTY'S SUPERIOR BARGAINING POSITION AS A FACTOR SHAPING THE EXPRESSION OF WILL

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Abstract. This article explores the legal implications of a counterparty's superior bargaining position as a factor shaping the expression of will in civil transactions. Anchored in classical and modern civil law theory, the study examines how imbalances in negotiating power—rooted in economic dominance, infrastructure control, or market dependence—can distort the autonomy of will, raising questions about the validity of the resulting contracts. The Armenian legal framework, particularly the Civil Code and the Law on Protection of Economic Competition, is analyzed to demonstrate how abuse of superior bargaining position may constitute a defect of will and render a transaction disputable. Drawing on jurisprudence, legal doctrine, and regulatory practice, the article argues that such abuse, even in the absence of traditional vitiating factors like coercion or fraud, can undermine genuine consent. It concludes that transactions concluded under these conditions should be assessed through a hybrid lens of civil and competition law, particularly where an administrative act has confirmed the abuse.

Keywords - *Superior Bargaining Position, Defect of Will, Contractual Autonomy, Abuse of Economic Power, Civil Transaction Validity.*

Civil transactions are an integral part of our lives, without which not only the proper course of civil relations but also everyday life is unimaginable. Transactions are the most common legal facts that give rise to, modify, and terminate civil rights and obligations.

The widespread use and economic importance of transactions as legal facts are evident in their being the basis for a wide variety of civil legal relationships.

Civil rights and obligations arise not only from transactions provided by law and other legal acts but also from actions by individuals and legal entities that,

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while not explicitly defined by law, nevertheless create legal consequences in accordance with the principles of civil legislation[1]:

In the matter of concluding transactions, perhaps of essential importance are the principles of freedom of contract, the inadmissibility of any arbitrary interference in private matters, and the autonomy of will.

The cornerstone of the principle of freedom of contract is the party's internal will and external expression in the matter of concluding the contract. Only the correspondence of internal will and external expression indicates the existence of a valid transaction, whereas their discrepancy indicates a transaction with a defect of will.

The principle of freedom of contract ensures the possibility of concluding a contract, choosing its form and terms, and freely formulating its content.

In accordance with the above, the legislator, with the aim of ensuring the implementation of the aforementioned principles of civil legislation—autonomy of will, freedom of contract, the acquisition and exercise of civil rights by one's will and for one's benefit, the free determination of one's rights and obligations on the basis of a contract, the determination of any contractual term not contradicting the legislation—has provided for the participants (parties) of relations regulated by the Civil Code of the Republic of Armenia the possibility to conclude both contracts provided by law or other legal acts, and also contracts not provided by them, and to define the terms of the contract, except in cases where the content of the relevant term is determined by law or another legal act.

The legislator has simultaneously provided for the principle of inadmissibility of arbitrary interference in private affairs, which implies that state authorities or local self-government bodies, or any other persons, are not authorized to interfere in the affairs of civil law subjects if they are carrying out their activities in accordance with the requirements of the law.

This principle also implies that no person, including the court, has the right to arbitrarily interfere in the contractual relations of the parties by means of changing any contractual provision at their discretion.

The Court of Cassation of the Republic of Armenia, in a previously rendered decision, analyzing the above-mentioned legal norms, has stated that every transaction (contract) is, first of all, a volitional act aimed at producing certain legal consequences. For the conclusion of a transaction, the concepts of "will" and "expression of will" have primary significance. Based on this, the Court of

[1] T. K. Barseghyan, Civil Law of the Republic of Armenia (Part One), Yerevan University Press, Yerevan, 2009, 560 pages.

Cassation of the Republic of Armenia found it necessary to disclose the content of these concepts, stating that "will" is a person's internal desire, demand, aspiration, intention, purpose, consent, while "expression of will" is the external form, means, or manner of expressing the will. A transaction is the combination of the internal will and the external expression of will of the persons who concluded it. In cases prescribed by law, a discrepancy between will and expression of will in a concluded transaction may lead to the invalidity of that transaction. Such a discrepancy may be caused either by the personal characteristics of the persons who concluded the transaction, or by the influence of external interference (see, Nelli Hakobyan and others v. "Hamkhach" LLC, Civil Case No. ԵԿԴ/1013/02/13, decision of the Court of Cassation of the Republic of Armenia dated 17.07.2015).

Nineteenth-century French thinkers Jean Domat and Robert Pothier emphasized that the foundation of a transaction is the real will of the parties (volonté réelle). If the expression of will is formally correct but does not correspond to the real will, the transaction may be annulled (e.g., mistake, error, coercion)[2]:

A representative of the German civil law school, Friedrich Carl von Savigny, believed that the will (Wille) and the expression of will (Willenserklärung) must coincide. If such coincidence does not exist, the transaction has no force. However, he also accepted the theory of "noticeable will," when in certain cases the expressed will is accepted rather than the internal one.

A representative of the Russian legal school, Gabriel Feldstein, argued that the foundation of a civil legal transaction is the real will, but the law may also protect the expressed will if that is necessary for the stability of legal relations among citizens[3].

According to Sergey Alekseev, the expression of will is considered the form of a legal act, and the law gives priority to the reliable, external form, because predictability is important for legal circulation[4].

In the legal system of the Republic of Armenia as well, there are certain mechanisms for evaluating will and expression of will in the matter of concluding a transaction and for revealing defects of will.

The Civil Code of the Republic of Armenia[5] provides for several transactions concluded with a defect of will, which are either null or disputable. In particular, in

[2] Jean Domat Les lois civiles dans leur ordre naturel, Paris, 1689, Robert Joseph Pothier Traité des obligations, Paris, 1761.
[3] Feldstein G. S., The Concept and Elements of a Legal Transaction in Civil Law, Moscow, 1911.
[4] Alekseev S. S., General Theory of Law (in 2 volumes), Moscow: NORMA, 2000.

the case of a simulated transaction, when the transaction is concluded ostensibly without the intention to produce legal consequences, the correspondence of the parties' will regarding the purposes of the given transaction is emphasized. That is, in the case where it is established that there is no real will to achieve the intended purposes or consequences of the given transaction, then the transaction is qualified as a simulated transaction.

Similarly, in the case of sham transactions, when the real will of the parties is directed toward concluding a different transaction than the one actually concluded, and there exists a joint intention to conceal the real transaction along with a certain unlawful motive, such a transaction must be qualified as a sham transaction[6].

A defect of will leads to civil legal relations that are seemingly formed between the parties, but in reality and factually have not arisen or have not developed, and are therefore unlawful and prohibited.

Transactions concluded under the influence of a material mistake, fraud, violence, or threat are considered as concluded with a defect of will.

Of course, both the criteria for identifying a defect of will and the resulting legal consequences are different.

Thus, in the case of a material mistake, the mistaken party, in any case, had the will to conclude a contract with that subject, but that will was directed toward a transaction of a different nature or with a different object or object with different characteristics.

Whereas in cases of fraud, violence, and threat, the will to conclude any transaction may be absent from the very beginning.

Particularly problematic is the identification of real will in the case of oppressive transactions.

Thus, Article 313 of the Civil Code of the Republic of Armenia qualifies as oppressive such a transaction that a person was forced to conclude, due to difficult circumstances, under extremely unfavorable conditions for them, from which the other party benefited.

Thus, for a transaction to be qualified as oppressive, several requirements must be simultaneously satisfied:

- It must be established that the person was forced to conclude that transaction;

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[5] Adopted on 05.05.1998, entered into force on 01.01.1999, Official Bulletin of the Republic of Armenia, 1998.08.10, No. 17 (50).

[6] More detailed about fictitious and sham transactions A. A. Mutafyan, Theoretical and Practical Issues of the Invalidity of Sham and Simulated Transactions in the Republic of Armenia, Yerevan, "Hayrapet" Publishing House, 2020, 216 pages.

- It must be established that the person was forced to conclude that transaction due to difficult circumstances;
- It must be established that the transaction concluded under those difficult circumstances is under extremely unfavorable conditions for the person;
- And finally, it must be established that the other party to the transaction benefited from those circumstances.

In practice, the issue becomes more complicated, since the content of the above-mentioned factual circumstances or the criteria for revealing them are not sufficiently disclosed.

By its Decision ՍԴՈ-705 of 03.07.2007, the Constitutional Court of the Republic of Armenia stated that in each case, based on the circumstances of the case, it is the court that determines whether the concluded transaction is oppressive or not. In particular, the court, based on the evidence obtained during the examination of the case, evaluates whether there was fraud, violence, threat, collusion between the representative of one party and the other party, under what circumstances the transaction was concluded, whether those circumstances were severe or not, and whether the conditions of the transaction were extremely unfavorable for the claimant or not. Only after clarifying these questions can the court come to a conclusion as to whether the principle of free expression of will and of performing actions aimed at acquiring rights and obligations in one's own interest, under civil legislation, was violated.

Thus, the criteria for assessing an oppressive transaction must be developed through judicial practice.

The study of judicial practice shows that no unified approaches have been formed, and this is, to some extent, also reasonable and logical, since the characteristics of an oppressive transaction are highly factual and can be established only under very specific circumstances, in relation to a specific subject.

Also included among transactions with a defect of will are transactions concluded as a result of malicious agreement between the representative of one party and the other party, and transactions concluded with limited authority.

In all the above cases, the defect of will concerns the absence of proper will on the part of at least one party to the transaction, for the identification of which different criteria are used.

In all cases, it is essential that the defect of will leads to the invalidity of the transaction.

In all the cases already discussed in this work, there is a common criterion: the distortion of will is the result of an external expression of will that does not

correspond to the internal will, caused by unlawful influence prohibited by law or by other motives.

In other words, the legislator has prohibited all the above-mentioned cases, providing for negative proprietary consequences (restitution, compensation for damages, etc.).

In practice, however, the defect of will may appear not only due to influence prohibited by civil law or motivated by unlawful reasons, but also when the will of the stronger party to the transaction (superior bargaining position) can "shape" the expression of will of the weaker party.

Superior bargaining position is described as such a relational legal-economic situation in which one of the parties, due to its resources, market position, dependence of the partner, or other conditions, has actual influence over the formation of the latter's expression of will and the contractual content.

1. Superior bargaining position may be conditioned by several factors:
2. Market power or exclusivity (sole license, sole producer, seller, or buyer);
3. Infrastructure essential for the distribution of the given product;
4. Information possessed by the given economic operator.

In the legal system of the Republic of Armenia, the definition of superior bargaining position is provided by the Law of the Republic of Armenia "On Protection of Economic Competition and Consumer rights"[7] (hereinafter "the Law").

According to Part 1 of Article 11 of the Law, an economic entity has a superior bargaining position if:

1. due to its significant influence or infrastructure in the relevant field, it can ensure the entry of the relevant goods into the sales market, and the economic entity that has concluded or wishes to conclude a contract with it has no possibility of selling those goods to consumers without cooperation with that economic entity, or there is no economically viable alternative, or

2. four or more commercial outlets (a commercial network) are under the general management of the given economic entity, in which the annual sales revenue exceeds a total of three billion drams, or

3. four or more commercial outlets (a commercial network) operate under the same trademark or other means of individualization owned or used by the given

[7] Adopted on 06.11.2000, entered into force on 15.12.2000, Official Bulletin of the Republic of Armenia, 2000.12.15, No. 30 (128).

economic entity, in which the annual sales revenue exceeds a total of three billion drams.

Thus, the Law distinguishes both quantitative and qualitative criteria of superior bargaining position.

The quantitative criteria relate to the number of commercial outlets under the management of the economic entity and their annual turnover, while the qualitative criterion is the significant influence in the sector and infrastructure.

The latter criterion is qualitative because it shows the actual market power of the given economic entity—the advantages that determine its "dominant" role in transactional relations.

Moreover, in the case of the quantitative criterion, it turns out that superior bargaining position is presumed if the necessary indicators are met, and there is no need to assess the significant influence in the sector.

For example, a supermarket chain with more than 4 outlets and an annual turnover exceeding three billion drams is considered to have a superior bargaining position.

In the case of the qualitative criterion, what is subject to evaluation is the influence of the economic entity on the creation of the opportunity to sell a specific product or the economic impracticality of choosing alternative routes bypassing the given economic entity.

For example, if an economic entity has a large delivery network throughout the territory of the Republic of Armenia, and another entity wants to make its product available through delivery across the entire territory of the Republic of Armenia, then the entity with the delivery network may have a superior bargaining position if only it possesses the infrastructure that meets all conditions for safe and compliant transportation of that product.

Superior bargaining position as an economic-legal phenomenon is not prohibited; however, its very existence indicates that when concluding transactions, the superior bargaining position influences the process of determining the terms of the transaction.

Even if the parties to the transaction enter into contractual relations freely and voluntarily, the stronger party in the transaction can still tilt the "scales" in its favor, realizing that the counterparty has no economically viable alternative.

In practice, such "shaping" of will often remains unnoticed, since the weaker party in the transaction accepts the reality that in the absence of alternatives, it must agree even to some economically unfavorable terms in order to enter or expand within the market or sector.

At the same time, superior bargaining position, when used to restrict competition or to gain advantages in an unfair manner, is prohibited.

Such a prohibition is directly provided in Part 1 of Article 12 of the Law, according to which abuse of superior bargaining position by economic entities is prohibited.

Abuse of superior bargaining position is characterized as any action or conduct by an economic entity that is not justified by economic conditions or factors and harms or may harm the interests of the party in a weaker bargaining position.

The law must always intervene where one party, using its superior bargaining position, imposes unfair conditions on the other party, thereby violating the principle of contractual fairness[8].

Superior bargaining position, even in the absence of a dominant position, disrupts normal competition and harms market fairness[9].

The Law provides for manifestations of abuse of superior bargaining position, among which there are also manifestations that impose conditions on the weaker party to the transaction and influence its will. In particular, the following are also considered abuses of superior bargaining position:

1. Imposing the provision of benefits, including application of discounts, and provision of additional services, in return for which the economic entity holding the superior bargaining position does not perform any action;

2. Unilateral and frequent modification of the contract or cooperation terms without the consent or knowledge of the contractual party;

3. Charging unjustified additional fees for the presentation and sale of products by vendors in the commercial facility;

4. Imposing conditions on the contractual party which relate to:

a. prohibition of concluding a contract with another economic entity;

b. provision of information regarding a contract concluded with another economic entity;

c. compensation of damages by the economic entity in cases of spoilage, damage, loss, or destruction of goods considered the property of the economic entity with superior bargaining position, except when this occurred due to the latter's fault;

d. compensation by the economic entity for expenses not related to the execution of the supply contract or further sale of the goods;

[8] Chris Willett Fairness in Consumer Contracts: The Case of Unfair Terms, Routledge, 2016

[9] Niamh Dunne Competition Law and Economic Regulation: Making and Managing Markets, Cambridge University Press, 2015

e. imposing the obligation to return goods that were not sold within a specific period, except in cases where the requirement to return goods is provided by the legislation of the Republic of Armenia or by the contract;

f. selling the goods under the trademark indicated by the entity with superior bargaining position;

g. prohibition of conducting promotions, including applying discounts or offering benefits, during the sale process.

The manifestations listed above clearly relate to those contractual terms which, under normal circumstances, should be determined through mutual consent and autonomy of will. However, due to the superior bargaining position, these terms are unilaterally determined and imposed on the other party to the transaction.

The prohibition of abuse of superior bargaining position as a civil principle existed even before the formal introduction of this institution in the Law. In particular, according to the second paragraph of point 1 of Article 12 of the Civil Code of the Republic of Armenia, it is prohibited to use civil rights for the purpose of restricting competition, as well as to abuse a dominant position in the market.

That is to say, the abuse of a superior bargaining position, even before administrative consequences were established for it, was behavior prohibited by civil law, with the consequence specified in point 2 of Article 12 of the RA Civil Code—that the court or arbitral tribunal may reject a person's request for protection of their right.

Considering that abuse of superior bargaining position implies a factor that shapes the will of the party in the weaker position, it is essential to also address the issue of the validity of a transaction concluded as a result of such abuse, in the context of a defect of consent.

When comparing a transaction concluded under abuse of superior bargaining position with other transactions concluded with a defect of will, one essential difference stands out: in the case of the former, the transaction is still concluded with a certain expression of will—without violence, threat, or mistake—yet the autonomy of will is disturbed.

For instance, in the case of an oppressive transaction, it was already noted that several valid conditions must simultaneously exist, among which the extreme hardship of one of the parties can be specifically distinguished.

In entrepreneurial relations, extreme hardship has a different meaning than in ordinary civil relations. Thus, while in normal circumstances, a party's sale of property at below-market value due to financial difficulties may be considered as acting under extreme hardship, the conclusion of a disadvantageous transaction by a businessperson for the purpose of entering a market is difficult to classify as

arising from extreme hardship. This is because, despite the unfavorable conditions, the businessperson enters into the transaction with a view toward future profit and market access.

A transaction concluded under abuse of superior bargaining position differs substantially from other transactions concluded with a defect of will, because in the latter, the will is either absent or the expression of will does not correspond to the internal intent.

Under such conditions, the question arises whether a transaction concluded under abuse of superior bargaining position can be considered as one concluded with a defect of will and thus viewed as a disputable transaction.

With respect to defect of will, it is essential to reveal the consistency between the internal will of the party and the external expression of will. The abuse of superior bargaining position is inherently tied to the stronger party exploiting the situation of the weaker party to gain better entrepreneurial or transactional terms, at the cost of the weaker party's income, disproportionate expenses, or market entry under unfavorable conditions. In such a situation, it is logical to assume that the party to the transaction could not genuinely express a will to conclude such a transaction, regardless of any apparent external expression of will.

At the same time, in this case, the defect of will does not have a classical civil law content, because the discrepancy between internal will and external expression arises solely from economic disadvantage, which may be temporary in nature. After all, if a transaction is extremely disadvantageous to a businessperson both in the short and long term, then under no circumstances would the businessperson agree to such a deal.

The competent authority responsible for detecting, exposing, and imposing liability for abuses of superior bargaining position is the Competition Protection Commission of the Republic of Armenia. The fine imposed for abuse of superior bargaining position may reach up to ten percent of the violating economic entity's turnover from the previous year.

Within the framework of the presumption of legality of a final administrative act confirming the abuse of superior bargaining position, the fact of such abuse can no longer be subject to dispute when assessing the validity of the transaction; only the connection between that abuse and the transaction's validity is subject to evaluation.

These particularities are of essential importance when discussing the validity of transactions concluded as a result of abuse of superior bargaining position. Therefore, we believe that the validity of such transactions should be assessed in the context of the conditions, circumstances, and consequences of their conclusion.

Specifically, if a transaction concluded under abuse of superior bargaining position was made in the absence of real alternatives, under conditions of extreme hardship for one party, and by the imposition of economic conditions by the party holding superior bargaining position, then such a transaction, under the existence of a final administrative act confirming the abuse, may be considered disputable. This is because there is clearly a distortion of internal will and intense unlawful influence on the external expression of will.

Conflict of Interests

The author declares no ethical issues or conflicts of interest in this research.

Ethical Standards

The author affirms this research did not involve human subjects.

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PRE-TRIAL DISPUTE RESOLUTION THROUGH MEDIATION: NEW ROLES OF THE NOTARY IN THE SERVICE OF SOCIETY THE COMPARATIVE LEGAL ANALYSIS OF UZBEKISTAN AND ARMENIA

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Abstract. This article examines modern approaches to pre-trial dispute resolution through mediation, with a particular emphasis on the new functions of the notary in this process. It analyzes the legal mechanisms for interaction between mediation and the notary profession in the context of ensuring sustainable and effective justice and preventing excessive judicial burden. Particular attention is given to a comparative legal analysis of the legislation of Uzbekistan and Armenia, which have seen active reforms in the field of alternative dispute resolution in recent years. The study explores how the institutional integration of notaries into mediation procedures contributes to greater legal certainty, procedural efficiency, and accessibility of justice for citizens and businesses. The author emphasizes that notarization of mediation agreements plays a key role in ensuring their legal validity and the trust of the parties and also strengthens the preventive function of the notariat in protecting citizens' rights and the rule of law. Furthermore, the article discusses the practical advantages of granting enforcement power to notarized agreements, reducing litigation state costs, accelerating dispute settlement, and promoting a culture of dialogue and compromise

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within society. These developments demonstrate the growing importance of the notary as an independent legal guarantor within modern systems of alternative dispute resolution.

Keywords - *dejuridisation, mediator, mediation agreement, notariat, notary, preventive justice.*

INTRODUCTION

Today in a civilized society, it is impossible to imagine the resolution of a conflict between the parties without the participation of a third party, with the help of which it would be possible to reconcile the parties, depending on the content of the dispute, its subjects, scope and its moral side.

Ten years ago such a statement of the question as ‘mediation in the practice of a notary, in the practice of a notary, a lawyer, a court’ would at least have caused surprise, at most - rejection. It seems that all the words are clear, but it would have been difficult to connect and present the terms together, would probably be difficult. Now it is our reality.

It is expected that the institutional strengthening of pre-trial dispute resolution mechanisms through mediation in the Republic of Uzbekistan and the Republic of Armenia will contribute to the development of a more effective, flexible, and accessible system for protecting the rights and legitimate interests of civil society participants. Furthermore, granting notaries new powers in mediation—specifically, to certify mediation agreements and participate in the process as a neutral intermediary—will increase legal certainty, ensure the sustainability of agreements reached by the parties, and reduce the burden on the judiciary. Thus, the integration of notaries into the mediation system may become a key factor in the development of pre-trial forms of conflict resolution and strengthening public trust in legal institutions.

The purpose of this study is to conduct a theoretical, legal, and comparative analysis of the institution of pre-trial dispute resolution through mediation in the Republic of Uzbekistan and the Republic of Armenia, as well as to identify new roles for notaries in this system as a legal mechanism for enhancing the effectiveness of protecting the rights and legitimate interests of individuals and legal entities. To achieve this goal, the following tasks are expected to be accomplished: analyze the legal framework governing the institution of mediation and notary services in Uzbekistan and Armenia, identify existing approaches to notary participation in pre-trial dispute resolution procedures, compare models of mediation and notarial participation in both legal systems, evaluate the effectiveness of existing legal mechanisms for certifying mediation agreements and their legal force, substantiate the need to expand the functions of notaries in the

field of mediation, and formulate proposals for improving legislation and law enforcement practice in order to increase the accessibility of and trust in pre-trial forms of dispute resolution.

Due to the purpose of the research, general scientific methods of induction, deduction, analysis, synthesis and others were used during the research, as well as private scientific, system-structural, legal comparative methods.

1. THE MAIN RESEARCH

With the adoption of the Law “On mediation” in the Republic of Uzbekistan, from 03.07.2018 № ЗРУ 482, mediation has become one of the developing institutions. To date, it extends to relations related to the application of mediation to disputes arising out of civil legal relations, including in business activities, as well as labor disputes and disputes arising out of civil legal relations, including disputes arising out of family legal relations, unless otherwise provided for by law.

In the Republic of Armenia, the legal basis for the institution of mediation was established by the adoption of Law №ՀՕ-351-Ն "On Mediation" on June 13, 2018, marking a significant step toward the development of alternative dispute resolution. According to the Law, mediation may be used to resolve disputes arising from civil, family, and labor relations, as well as, in cases provided for by law, other types of legal conflicts.

In both the Republic of Uzbekistan and the Republic of Armenia, mediation can be conducted in two forms: extrajudicial and judicial. In Uzbekistan, mandatory pre-trial mediation procedures have been established for certain categories of disputes. This applies in particular to investment disputes arising from foreign investors' activities in the country, as well as collective labor disputes. This practice is aimed at ensuring more effective, cost-effective, and expeditious conflict resolution. In Armenia, starting July 1, 2025, mediation also became a mandatory step, with the exception of cases stipulated by law[3], before trial in certain categories of family cases. This initiative is being implemented as part of a state campaign under the slogan "Arguing is difficult, reconciling is smart," reflecting the ideology of peaceful dispute resolution. This practice demonstrates the commitment of both countries to implementing preventive conflict resolution mechanisms, where mediation plays a special role as a tool for legal and social stabilization.

Under procedural legislation of Uzbekistan, mediation is applied before the court is removed to the deliberation room in the court of first instance. The general

[3] https://www.moj.am/article/4392

term of mediation is up to 30 days, which may be extended for a further 30 days. If the court is provided with an agreement to conduct mediation proceedings are suspended for up to 60 days. If a mediation agreement is concluded at this stage, the state fee paid is refundable.

According to the Civil Procedure Code of Armenia, mediation may be used at any stage of the proceedings, both in the court of first instance and in the appellate court. In Armenia, the initial mediation period ordered by the court cannot exceed three months. This period may be extended only once through joint mediation of the parties, for up to six months[4]. Thus, the maximum mediation period ordered by the court in Armenia is nine months. In Armenia, if the court orders mediation and the parties reach a settlement agreement within the time limit set by the court for conducting the mediation, the state fee paid is refunded.[5]

In Uzbekistan Mediation may also be applied at the stage of compulsory execution of judicial acts. In enforcement proceedings mediation is carried out only by professional mediators within a period of up to 15 days. Court costs are not refundable. In Armenia, there are no specific rules governing the use of mediation in the enforcement of judicial decisions. However, during enforcement proceedings, the parties have the right to enter into a settlement agreement. In Armenia, the enforcement officer terminates enforcement proceedings if the claimant and the debtor have entered into a settlement agreement and it is approved by the court. If enforcement proceedings are initiated by a notary with a claim for the recovery of funds, the notary terminates the enforcement proceedings.[6]

Currently, the legal framework for mediation in various legal systems is becoming increasingly important in the context of the development of alternative dispute resolution. In the Republic of Uzbekistan, mediation is governed by a set of 57 legal acts, including five codified acts: the Civil Code, the Civil Procedure Code, the Economic Procedure Code, the Tax Code, and the Labor Code. Furthermore, provisions related to mediation are contained in 12 separate laws, demonstrating a multi-layered and comprehensive approach to the legal framework for this institution.

In the Republic of Armenia, mediation is legally defined in 10 legal acts, five of which are also codified. These include the Civil Procedure Code, the Civil Code,

[4] Part 1 of Article 184, Article 185 of the Civil Procedure Code of the Republic of Armenia ՀՕ- 110-N of February 9, 2018, source: OIRA 2018.03.05/16(1374) Art.208 – Legal Information System of Armenia: https://www.arlis.am/hy/acts/206786.

[5] Part 2 of Article 187 of the Civil Procedure Code of the Republic of Armenia.

[6] Clause 1, Part 1, Article 8 of the Law of the Republic of Armenia ՀՕ-221 "On Compulsory Execution of Judicial Acts" of May 5, 1998, original source: MIRA 1998.06.15/12(45) – Armenian Legal Information System ttps://www.arlis.am/hy/acts/210008.

the Family Code, the Labor Code, and the special Law of the Republic of Armenia "On Mediation," which contains the fundamental legal provisions defining the goals, principles, and procedures for mediation, as well as the status of mediators.[7]

The use of mediation in courts in Uzbekistan		
Statistics on the abandonment of economic and civil cases in the courts in connection with the conclusion of a mediation agreement		
	Civil courts	Economic courts
2020	150	435
2021	1 166	2 013
2022	3 256	3 561
2023	2 221	5 125
Total in 2020-2023	**6 793**	**11 134**
Dynamic of growth (2020-2023)	X15	X12
In compare with court burden in 2023	0.2%	1.8%

Mediators are divided into professional and non-professional mediators. Non-professional mediators provide services free of charge. A professional mediator is a person who has undergone special training, certification and is registered in the register of professional mediators.

In Uzbekistan entry into the register of professional mediators until 2023 used to be an in-person procedure, which is now carried out electronically through public service centers and the Single Portal of Interactive Public Services[8] (previously this procedure was carried out in the traditional format through the justice authorities). The period for entering the register of professional mediators has been reduced from ten to three days.

Based on the results of the third quarter of 2025, 3000 people are registered in the register, with about 50 per cent of them being notaries (1049 notaries).

According to the legislation of Armenian, notaries are not authorized to engage in mediation. However, notaries regularly use mediation and conciliation tools in their notarial work, including notarizing transactions, handling inheritance cases, and providing consultations. It should be noted that notaries in Armenia do not have the right to certify settlement agreements reached as a result of mediation.

[7] Law of the Republic of Armenia No. 351-N "On Mediation" of June 13, 2018, source: MIRA 2018.07.04/52(1410) Art. 785 – Legal Information System of Armenia https://www.arlis.am/hy/acts/171903.

[8] Resolution of the Cabinet of Ministers No.544 of 17 October 2023 "Approving the administrative regulations for the provision of State services for inclusion in the register of professional mediators".

Although notaries in Armenia have the right to certify both contracts provided for by law or other legal acts and contracts not provided for by law, notaries do not have the specific authority to certify settlement agreements concluded as a result of mediation as transactions. At the same time, it should be noted that notaries in Armenia have the right to draft transactions or other legal documents as a notarial service. This means that mediators or parties to mediation currently have the right to contact a notary and receive the texts of settlement agreements drafted by notaries as a notarial service.[9]

But in Uzbekistan the situation is different, today practically every notary professionally or by naivety uses a certain set of mediation tools, and since 14 January 2020[10] in the Republic of Uzbekistan mediation has penetrated into notarial activity in the form of a specific notarial action - certification of a mediation agreement.

In the notarial field, notary mediators concluded approximately 300 mediation agreements between 2020 and the third quarter of 2025.

The above mentioned mediation agreements resolved disputes arising between the parties on the basis of mortgage agreements, inheritance disputes, division of property of spouses and matrimonial disputes.

In modern science there is a lot of theoretical research devoted to mediation in notarial activity, the practice of mediation is also developing. Notaries unknowingly perform certain actions of mediatory nature. Most notaries intuitively and by accumulated experience use and apply in practice conflict resolution, negotiation and communication skills. These skills in their turn are mediator's tools, without which it would not be so easy in situations when something needs to be clarified, settled, and discussed.

But there are notaries in the Republic of Uzbekistan, who do this on a professional level. They are those who have undergone professional training and received additional mediator education. They systematically and meaningfully use the acquired knowledge, skills and abilities in their practice.

The role of a notary and his main task is to ensure the legal security of the acts (transactions, facts or documents) certified by him.

The notary's activity in many respects proceeds the moment of signing a transaction (contract, agreement). He needs to check the totality of legal norms applicable to the contract, to make sure that the necessary imperative rules are

[9] Law of the Republic of Armenia "On Notariat" No. 274 of December 4, 2001, source: MIRA 2002.01.10/2(177) art.2 – Legal Information System of Armenia: https://www.arlis.am/hy/acts/190406

[10] Law of the Republic of Uzbekistan No.602 dated 14 January 2020 // National Database of Legislation// 15 January 2020, No. 03/20/602/0052.

observed and fully understood by the parties to the act, to control the validity of the will of the parties with full understanding of the essence and consequences of the accepted obligations. As a result, it is mandatory for the notary to correctly formalize and disclose the will of the parties, ensuring that the will and the expression of will correspond.

This constant preliminary control makes it possible to avoid many conflicts, the risk of which is significantly increased in its absence, which can be used in mediation practice.

In the exercise of his public powers, the notary is bound by strict ethical rules, the observance of which inevitably leads him along a path that guarantees legal and social harmony. In particular, it concerns the fulfillment by the notary-mediator of the following duties:

1) The notary-mediator is obliged to maintain objectivity. The role of the notary is to be the lawyer of the case and not of the client. The notary shall give advice and counseling in the general interest of all parties present in the transactions to be performed, which may include, for example, a mediation agreement.

2) The notary-mediator is impartial. The notary's task, which is often difficult to fulfill, is to treat all interested parties equally: he must ensure that the advice given and the checks carried out are the same for all parties to the act to be certified. It is unacceptable for a mediating notary to take the side of one of his clients in order to act against another.

3) The notary-mediator is an instrument of balance between the parties in the mediation process. He must make sure that all signatories to the mediation agreement fully realize the significance of the obligations they have voluntarily undertaken and are prepared to bear equal responsibility for both their fulfillment and non-fulfillment.

Thus, the traditional role of the notary is in many ways complementary to that of the mediator and can be used by the mediator to bring the positions of the parties closer through their trust in the mediation procedure itself.

In order to fulfill the main purpose of his activity, the notary shall endeavor to actively participate in the prevention of conflicts, not only by resolving disagreements that arise in the course of the process, but also by preventing the emergence of disputes in the future. In this sense, conflict resolution forms part of the preventive function of the notariat.

The notary is the bearer of all those characteristics of a mediator that provide the necessary safeguards to ensure that conflict resolution by out-of-court procedures meets the level of security required for the normal administration of justice.

Thus, the principles of *independence and impartiality, equality and co-operation, confidentiality, and voluntariness, the observance, which are* necessary in the work of the mediator and in direct notarial practice, are included in the ethical rules of notarial activity carried out on behalf of and under the control of the state.

Thus, notarial ethics is one of the effective tools in the service of mediation and all inherent qualities of a notary are guaranteed by his belonging to a profession strictly regulated by law, strict and constant control by professional bodies.

Thus, in light of the above, it seems possible to assert that notaries in the Republic of Armenia have the potential to participate in mediation proceedings in disputes arising during the performance of notarial acts. With the necessary level of legal responsibility, professional experience, and adherence to established ethical standards, notaries, subject to appropriate legal regulation, could act as mediators and ratify mediation agreements.

However, the practical implementation of this institution requires appropriate amendments to the current legislation of the Republic of Armenia. These amendments should provide for the legal recognition of the notary's legal status as a mediator, define the procedure for their participation in mediation proceedings, and establish the legal consequences of the certification of mediation agreements. The introduction of such regulations will not only expand the scope of mediation but will also help reduce the burden on the judicial system, increasing the effectiveness of resolving civil disputes.

Our readers may have the following question. Since in the Republic of Uzbekistan a notary acts as a mediator only for disputes arising in the course of notarial actions[11], whether the mediation agreement approved by a notary-mediator is covered by the Resolution of the Cabinet of Ministers under the President of the Republic of Uzbekistan "On approval of the list of documents for which debt collection is made in an incontestable manner on the basis of executive writings made by notaries" № 26 from 18.01.2002.

The answer is unambiguous - at present it **does not apply**, because in accordance with Part 3, Part 4 of Article 29 of the Law of the Republic of Uzbekistan "On Mediation", a mediation agreement is binding on the parties who concluded it and shall be executed by them voluntarily in the manner and within the terms provided for in it. If the parties fail to fulfill the mediation agreement, they may apply to the courts for protection of their rights.

[11] Point 145[1] of the Instruction "On the procedure for performing notarial acts by notaries" No. 3113 dated 4 January 2019.

It should be noted that there are two mediation processes in the Republic of Armenia: judicial and extrajudicial. If a licensed mediator is contacted during a trial and a settlement agreement is concluded, it may be approved by the court, in which case the proceedings are terminated.[12] If the settlement agreement is approved, the court issues a ruling.[13] Cases regarding the approval of a settlement agreement concluded extrajudicially with the participation of a licensed mediator are considered in the courts of the Republic of Armenia in a special procedure.[14] If a settlement agreement as a result of mediation is concluded extrajudicially with the participation of a licensed mediator, then each party to the mediation has the right, within six months from the date of the conclusion of the settlement agreement, to apply to the court of general jurisdiction at their place of residence with a request for the court to approve the settlement agreement concluded between the parties.[15]

It should be particularly emphasized that despite the fact that mediation for notaries-mediators in Uzbekistan is a type of notarial activity mediation agreements, in the Republic of Uzbekistan the current legislation on mediation does not provide for compulsory execution of mediation agreements.

We believe that one of the first steps toward integrating mediation into notarial practice in Armenia could be empowering notaries to approve out-of-court settlements in inheritance and family disputes and issue writs of execution based on them. This change will further reduce the workload on the courts.

Mediation is naturally compatible with the use of professional duties of a notary, including his impartiality. In this regard, in our opinion, a combination of two situations is possible: a notary may act as a mediator in disputes arising in the course of notarial actions, as well as certify mediation agreements as a notary when he is approached by the mediator and the parties. The notary may seriously assist the mediator by participating in the mediation and acting as a guarantor of the competence of the voluntary mediation procedure, as well as of the actions of the neutral professional mediator-mediator himself. Inviting a notary as a specialist to participate in the mediation procedure is fully consistent with the mediator's actions. Timely notarization of the parties and their documents by the notary will only contribute to the business spirit of the parties to the mediation process, as well as to the positive outcome of the negotiations with the signing of an objective and

[12] Clause 9, Part 1, Article 182 of the Civil Procedure Code of the Republic of Armenia.
[13] Part 3, Article 151 of the Civil Procedure Code of the Republic of Armenia.
[14] Clause 11, Part 1, Article 236 of the Civil Procedure Code of the Republic of Armenia, Chapter 39 of the Civil Procedure Code of the Republic of Armenia.
[15] Part 1, Article 288 of the Civil Procedure Code of the Republic of Armenia.

reasonable mediation agreement, which will be notarized by the notary, invited by the parties or the mediator.

Despite the fact that information about the notary-mediator is included in the Register of Professional Mediators, his participation as a professional mediator in disputes not related to notarial activity remains very controversial, as the area of mediation in notarial activity is still limited to property and inheritance disputes.

In the Republic of Uzbekistan certification of mediation agreement is carried out on the basis of the Civil Code, the laws "On Notaries", "On Mediation", "On State Duty", the Instruction "On the procedure for notarial acts by notaries" № 3113 of 4 January 2019, the Order of the Minister of Justice of the Republic of Uzbekistan "On Approval of the maximum amount of commissions charged for additional legal and technical actions performed by notaries" (Registered by the Ministry of Justice of the Republic of Uzbekistan on 29 May 2020. Registration № 3235) and other legal acts regulating notarial activity[16].

Its important, that the notary shall examine the application within the term established by law and send a notification to the parties specifying the parties, the subject of the dispute, the time and place of the mediation procedure. If the parties jointly apply for mediation, the notary shall request the parties to submit a simple written agreement on the application of mediation.

Hence the need for a state policy to promote the simultaneous support of mediation in notarial practice, as well as the participation of notaries in the mediation process. For this policy to be successful, each mediator and notary must feel personally affected in the realization of their professional practical knowledge and skills.

Joint success also requires notaries to master specialized skills and mediation techniques. In particular, additional training in psychology and business negotiation techniques is desirable.

Such training is desirable for notaries and employees of notary offices who want to establish themselves as professionals, seeking to gain the trust and recognition of

[16] Unlike other mediators, a notary mediator, when determining the mediability of a dispute, is obliged to comply with the requirements of the Resolution of the Ministry of Justice of the Republic of Uzbekistan on Combating Tax, Currency Crimes and Money Laundering at the Prosecutor General's Office of the Republic of Uzbekistan "On approval of internal control rules for countering the legalization of income from criminal activities, financing of terrorism and financing the proliferation of weapons of mass destruction in notary offices and law firms" and Appendices to Resolution No. 1 of the Ministry of Justice dated June 14, 2021 and No. 19 of the Department for Combating Economic Crimes at the Prosecutor General's Office of the Republic of Uzbekistan dated 10June 2021 "Amendments and Additions to the Resolution "On Approval of the Rules of Internal control over countering the legalization of proceeds from criminal activities, and financing of terrorism in notary offices and law firms" (reg. No. 2020 dated 19.10.2009).

their clients through their professional actions, including participation in the mediation process.

The main reference point in the application of mediation in notarial activity is the Instruction "On the procedure for the performance of notarial acts by notaries" № 3113, dated 4 January 2019, which was supplemented by Order of the Minister of Justice № 103 dated 2 May 2020 with §-14[1] points145[1] -145[11].

In accordance with the above norms, a notary acts as a mediator on the basis of the voluntary consent of the parties to a dispute to adopt a mutually acceptable solution to civil law relations, including property and inheritance issues.

A notary shall act as a mediator only for disputes arising in the course of notarial actions. Participants in mediation are the parties and the mediator. Parties to mediation may be both individuals and legal entities. The parties shall participate in mediation in person or through a representative in accordance with the law.

A notary in Uzbekistan approves mediation agreements in the following disputes:

– *family disputes (division of marital property);*

– *inheritance disputes (determination of the share in inheritance, division of inheritance, etc.);*

– *other disputes (monetary obligations, property transfer obligations, debt obligations, pledge obligations).*

In order to conduct mediation procedure, the parties by mutual agreement may apply to the notary who performed the notarial acts or to another notary.

The interested party may apply to the notary with an application for application of mediation procedure, in which it shall state its arguments justifying its claims against the other party.

The notary, within the term established by law, shall consider the application and send to the parties a notice specifying the parties, the subject of the dispute, the time and place of the mediation procedure. If the parties jointly apply for mediation, the notary shall request the parties to submit an agreement on the application of the mediation procedure in a simple written form.

When applying to a notary for the resolution of a property or inheritance dispute, the parties shall submit an identity document and the original of the notarized document that gave rise to the dispute, as well as a written agreement on the application of the mediation procedure.

The agreement on application of mediation procedure shall come into force from the moment of its signing.

During the mediation procedure, the notary shall not be entitled to restrict the rights and legally protected interests of the parties or to force them to make a decision.

Prior to the commencement of the mediation procedure, the notary shall hold meetings with all parties, as well as individually with each party, give written and verbal recommendations on the resolution of the dispute, explain to the parties the goals and objectives of mediation, rights and obligations, ensure the exchange of opinions and proposals between the parties, and propose ways to resolve the dispute.

The notary shall terminate the mediation procedure due to the following circumstances:

- conclusion of a mediation agreement by the parties;
- impossibility to reach a mutually acceptable solution to the dispute;
- conclusion of an agreement of the parties to terminate mediation without reaching an agreement on the existing disagreements (if there is a written agreement on the mediation procedure);
- a party's statement of refusal to continue mediation;
- expiry of the deadline for conducting the mediation procedure.

The notary shall confirm the mediation agreement concluded between the parties if the parties have reached a mutually acceptable decision on the terms of dispute settlement or obligations arising from the results of the mediation procedure.

The mediation agreement shall be drawn up in 3 copies, certified by a notary. One copy shall be kept in the files of the notary office.

Payment of the state duty of the notary - mediator shall be made on the basis of the Law of the Republic of Uzbekistan "On State Duty" dated 06.01.2020. (LRU № 600) according to the Annex 'Amounts of state duty rates' item "Sh1" for the certification of other agreements, except for those provided for in subparagraphs "a" – "h" determines the following amounts of duty:

- for individuals - 50 per cent of the basis calculation value (BCV)
- for legal entities or if one party is a legal entity - 1 BCV.

Payment of other expenses of the notary - mediator is made on the basis of the Order of the Minister of Justice of the Republic of Uzbekistan "On Approval of the Maximum Amount of Fees Charged for Additional Legal and Technical Actions Performed by Notaries" (Registered by the Ministry of Justice of the Republic of Uzbekistan on 29 May 2020. Registration No. 3235) regulating the following charges:

– when performing additional actions of legal and technical nature for providing explanations - 20 per cent of the BCV;

– for preparation of a certified draft of a mediation agreement as a professional mediator - 55 per cent of the BCV.

The notary shall have the right not to charge for additional legal and technical actions in the course of mediation activities, taking into account financial activities. Payment and reimbursement of costs shall be made by the parties in equal shares, unless they have agreed on a different rule.

– The Ministry of Justice has currently worked out a draft law "On introducing amendments and additions to certain legislative acts of the Republic of Uzbekistan for the purpose of developing the institution of mediation". The draft provides for the following changes in the activities of mediators:

– Creating the possibility of resolving disputes through mediation between customers and banks, as well as between consumers and insurance organisations.

– In 2023, the courts heard 115,000 cases of disputes between a customer and a bank, as well as 27,000 cases of insurance contracts, which is an average of 12 per cent of the total caseload of the courts.

– The Ministry of Justice has been designated as the authorized state body in this area;

– The Ministry approves standards for the training of mediators, rules of professional ethics, procedures for professional development, qualification examinations for inclusion in the register, and procedures for disciplinary liability.

– Qualification commissions are established to conduct qualification exams for inclusion in the mediators' register and to consider disciplinary liability of mediators;

– Mediators' Qualification Commission: conducts qualification exams for mediation candidates, suspends and terminates mediator status or decides on reinstatement, and considers appeals against their actions.

– Mandatory family mediation prior to court hearings to determine the time a child spends with his or her father or mother. It is determined that this issue should be resolved by:

– The Chairman of the Mahalla citizens' assembly and women's activists will be trained in professional mediation and will enter into mediation agreements for family disputes free of charge.

It is envisaged that mediation agreements will be made enforceable. This means that a mediation agreement will be enforceable as an executive document. This initiative is aimed at strengthening the institution of mediation, increasing trust in out-of-court dispute resolution, and expanding the powers of notaries as key

participants in the legal infrastructure. Moreover, it will significantly enhance the effectiveness and credibility of the mediation process in the country. A mediation agreement is binding on the parties who enter into it and is voluntarily implemented by them in the manner and within the timeframes specified therein. If a mediation agreement is not implemented, the parties have the right to seek legal protection.

At present, in order to increase the efficiency of the work of notaries-mediators, it is planned to introduce an electronic platform e-mediator.uz, which will include the following features:

– electronic register of mediators;

– mediator's personal cabinet;

– electronic process of passing the qualification exam (selection of questions and automatic checking of answers);

– creation of mediator's portfolio;

– electronic reporting on mediator's activities with automatic summarization of data;

– issuance of certificates of completion of training courses of mediators through integration;

– electronic templates of mediation-related documents;

– execution of electronic mediation agreements with electronic signatures and online mediation via videoconference.

– Thus, the ongoing reforms in the Republic of Uzbekistan in the field of alternative ways of dispute resolution, in particular, the inclusion in the notary's activity of powers to settle disputes, conflicts using conciliation procedures (mediation) are aimed at strengthening the role of the notariat as a body of undisputed jurisdiction, ensuring the implementation of civil turnover. These innovations deserve approval and further development.

While discussing the significant progress achieved in mediation in Armenia, it should be noted that mediation has not officially penetrated the notarial sphere. However, in recent years, in an effort to reduce court burdens, many judicial functions have been transferred to notaries, such as confirming facts of legal significance and issuing orders to seize funds, the implementation of which has seen significant success. We believe that notaries in Armenia will also be able to actively participate in mediation. For example, Chapter 39 of the Civil Procedure Code of the Republic of Armenia defines the procedure for approving a settlement agreement concluded out of court with the participation of a licensed mediator. Such cases are considered cases heard under special proceedings, which in itself presupposes the absence of a dispute between the parties. If a settlement agreement

reached as a result of mediation was concluded out of court with the participation of a licensed mediator, each party to the mediation has the right, within six months from the date of the settlement agreement, to apply to the court of general jurisdiction at their place of residence for approval of the settlement agreement reached between the parties. Based on the review of the application, the court issues a ruling approving the settlement agreement or rejecting it. A ruling approving the settlement agreement takes effect upon its publication, thereby becoming enforceable.[17] Given that mandatory mediation has been in effect in Armenia for certain family matters since July 1, 2025, we believe that, if the relevant legislative amendments are made, notaries will be able to certify and give legal force to settlement agreements reached as a result of mandatory mediation. It is worth noting that in Armenia, notaries have been certifying all transactions in family matters for many years, for which mandatory mediation has been established for the resolution of disputes. These include agreements on determining a child's place of residence, agreements on alimony payments, agreements on the division of property considered jointly owned by spouses, agreements on establishing procedures for access to a child, and prenuptial agreements. In other words, notaries in Armenia are those individuals who, in the absence of a dispute between the parties, certify transactions arising from family legal relationships and utilize conciliation tools in the process preceding the certification of transactions. Therefore, they are professionals in the aforementioned marital and family matters, possessing the relevant knowledge and experience. Therefore, we believe they will also be able to confirm settlement agreements reached in family matters subject to mandatory conciliation and make them binding. This, in turn, will facilitate the work of the courts. We hope that in the near future, legislative changes will be made that will result in notaries also officially participating in the conciliation process.

3. CONCLUSION

Thus, the comparative analysis shows that both the Republic of Uzbekistan and the Republic of Armenia are taking active steps to institutionally strengthen mediation as a form of alternative dispute resolution. However, approaches to integrating mediation into notarial practice in these countries differ significantly.

In Uzbekistan, there is a steady trend toward expanding the notary profession's functions, including by empowering notaries to use conciliation procedures as part

[17] Clause 11, Part 1, Article 236, Article 288, Article 291 of the Civil Procedure Code of the Republic of Armenia.

of their professional activities. These measures are aimed at increasing the accessibility of out-of-court dispute resolution and strengthening the role of notaries as subjects of undisputed jurisdiction. The legal mechanism for notary participation in mediation has already been enshrined in law and is being successfully implemented in practice, reducing the burden on the judicial system and enhancing legal awareness in society.

In the Republic of Armenia, significant progress can be observed in the development of mediation. However, unlike in Uzbekistan, mediation in Armenia has not yet been officially integrated into notarial practice. However, given the general trend toward reducing the burden on the judicial system, whereby notaries have already been assigned certain quasi-judicial functions (e.g., confirming legal facts, seizing funds, etc.), it can be assumed that involving notaries in mediation procedures is a logical next step in the development of legal regulation.

An analysis of current Armenian legislation confirms the existence of a legislative basis for such integration. Chapter 39 of the Civil Procedure Code of the Republic of Armenia establishes the procedure for approving out-of-court settlement agreements reached with the participation of licensed mediators. These cases are heard under a special procedure, which presupposes the absence of a dispute as such. Each party has the right, within six months of the agreement's conclusion, to apply to a court of general jurisdiction for its approval, after which the court issues a ruling that has the force of an enforceable document.

It should be particularly noted that, as of July 1, 2025, mandatory mediation for certain categories of family matters came into effect in Armenia. In this regard, it seems appropriate to consider legislatively expanding the powers of notaries to give legal effect to settlement agreements reached through mandatory mediation. This practice would build on existing experience: for many years, notaries in Armenia have been certifying agreements related to family relations, such as determining a child's place of residence, child contact procedures, alimony payments, division of joint property, concluding prenuptial agreements, and others. All of these actions involve elements of conciliation procedures preceding the notarization of transactions.

Consequently, Armenian notaries already possess the necessary knowledge, experience, and professional tools to participate in mediation procedures in family matters. Their inclusion in the mechanism for approving mediation agreements will not only improve the effectiveness of pre-trial dispute resolution but also serve as an effective mechanism for reducing the burden on the judicial system. It is hoped that the relevant amendments will soon be reflected in legislation, formalizing notaries' participation in mediation processes both institutionally and procedurally.

Conflict of Interests

The authors declare no ethical issues or conflicts of interest in this research.

Ethical Standards

The authors affirm this research did not involve human subjects.

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PROTECTION OF CHILDREN'S RIGHTS IN THE PROCESS OF MEDIA COVERAGE
Part I

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Abstract. As a result of various global changes and the widespread expansion of digital media, the activity of family influencers on social media has evolved into a multi-billion-dollar industry, often centered around children. Lacking a clearly defined legal status and excluded from negotiating or consenting to either labor or civil contracts, children ultimately become the performers or service providers under such agreements. This article analyzes the concept of "sharenting" and its potential dangers, including identity theft, psychological harm, and the deprivation of a child's ability to shape their own identity. Within the boundaries of parental autonomy, the article proposes the legal recognition of a child's "right to be forgotten," enabling individuals, upon reaching adulthood, to request the removal of their images and personal information from monetized content. This approach aims to protect both parental rights and reduce the long-term risks of exploitation and harm to children.

Keywords - *children's rights, Monetized content, Influencer, Sharenting, Right to be forgotten, Social media, Personal data Protection, Identity theft, Parental autonomy.*

Due to the various changes taking place in the world, the widespread dissemination of digital media and the activities of family influencers on social media have turned into a multi-billion-dollar industry, at the center of which children often stand. Lacking a clearly defined legal status and thus not participating, in one case, in the negotiation process of employment contract terms, and in another case, in the negotiation process of civil-law contract terms and their alignment, they ultimately become the performer of the work or the service provider envisaged under those

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contracts, as a result of which, sometimes, a number of fundamental rights of children are violated. Social networks and mass media (hereinafter – Media) play an active role in the protection of these violated rights of children and in raising public awareness in that regard. Today, more than ever, social media shape public opinion, influences people's behavior, and even becomes the basis for the competent or responsible authority to take appropriate action or to initiate proceedings. In such cases, it is the Media's coverage of the issue and the content thereof that change society's perception of the problem.

Publications by the Media relating to children, or posts made in social networks by other persons relating to or involving the participation of a child, may have a harmful effect from the perspective of the latter's safety, integration into society, and the formation of his or her own identity.

UNICEF, recognizing the enormous potential of media in the protection of children's rights, in raising awareness about the responsibility of all stakeholders in the realization of those rights, in the effectiveness of the strategies developed and the tactics implemented by the media in shaping public opinion, and in the mobilization of society to take into account the child's opinion in matters concerning him or her, at the same time emphasizes that, as stipulated in the *Convention on the Rights of the Child*[2] (hereinafter also "Convention") and in its relevant protocols, the media bears responsibility for the protection of children[3]. According to Article 17 of the Convention:

"States Parties recognize the important role of the mass media and shall ensure that the child has access to information and materials from a diversity of national and international sources, especially those that are aimed at promoting the child's social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall:

(a) encourage the mass media to disseminate information and material that are of social and cultural benefit to the child and in accordance with the spirit of Article 29;

(b) encourage international cooperation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources; …

[2] Adopted on 20 November 1989, entered into force on 22 July 1993. UN OHCHR 2008/Special Edition.

[3] See *Child Protection Policy in the Media: Ethical Guidelines to Safeguard the Best Interests of Children*, page 15: Available via the following link https://www.unicef.org/eca/media/ethical-guidelines, as of 05 May 2025.

(e) taking into account the provisions of Articles 13 and 18, encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being."

Thus, the Convention confirms the media's role as an important platform from the perspective of promoting the realization of children's rights and of strengthening their capacity to express themselves, to gain self-confidence, to develop critical thinking, and to participate in social life. At the same time, the Convention obliges the States Parties to ensure the implementation of the child's right to freely express his or her opinion in matters affecting him or her and, for that purpose, in particular, to provide the child with the opportunity, in accordance with the procedural norms of national legislation, to be heard in any judicial or administrative proceedings affecting him or her, either directly or through a representative or an appropriate body (Convention, Article 12).

In the context of UNICEF's child protection policy, guiding principles[4] (hereinafter – Principles) have been developed for the media and journalists, according to which it is necessary to:

1. Encourage children to express freely and safely their opinions and views on issues concerning them;

2. Refrain from direct or indirect interviews with children who are in psychologically difficult situations. These children must be given the opportunity to recover before presenting their stories to the public;

3. Conduct direct interviews with a child who has experienced a violation of rights only if he or she personally wishes to tell about it and to make his or her voice heard, while preserving child protection policy;

4. Take into account the safety measures to be undertaken, especially when it concerns a child who has experienced a violation of rights;

5. Encourage discussions and dialogues on the protection of children's rights with the participation of sectoral specialists engaged in child protection, thereby addressing the responsibility of stakeholders;

6. Treat the interests of children as a paramount concern, beyond the framework of individual stories.

The above-mentioned Principles apply to all media outlets that have direct or indirect contact with children, and extend to all individuals and organizations that disseminate messages or images relating to children in social media and other public platforms.

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[4] See **UNICEF, Child Protection Policy in the Media, UNICEF, "Ethical Guidelines for Reporting on Children", 2018,** cited work, pp. 9–10.

The study of international practice shows that a number of adopted documents serve as important benchmarks for the definition of children's rights in general and, in particular, for matters concerning the rights of the media in relation to those rights. Among them are: the *Ethical Guidelines on Responsible Reporting on Children*[5] developed by UNICEF in 2018; the *Child-Friendly Media 2016 Document*[6] published by the Arab League and the Arab Council for Childhood and Development, which emphasizes professional principles for Arab media when covering issues related to children's rights; the *Ethical Charter on Media Interaction with Children*[7] published in 2014 by the Higher Council for Childhood of Lebanon, which establishes standards of professional ethics for media in reporting on children and their juvenile affairs; the *Convention on the Rights of the Child* adopted in 1989 by the United Nations General Assembly, which proclaims the mandatory primacy of "the best interests of the child" and guarantees the protection of children's rights and their right to private life; and the *Universal Declaration of Human Rights* adopted in December 1948, whose Article 19 proclaims the right to freedom of expression and the right to seek, receive and impart information from the media.

For the assurance of the primacy of the best interests of the child and the protection of the right to defense, the following guiding principles developed by UNICEF are fundamental:

- The primacy of the child's interest, when any discussion in the Media related to a child may affect or endanger him or her;
- Avoiding interviews with children during protests, military actions, or the coverage of crimes-while in all cases preserving the child's anonymity;
- Demonstrating moral responsibility in direct or indirect media interaction with children-when obtaining information, clarifications, photographs, conducting live broadcasts or recorded programs-by ensuring the child's protection from any form of violence resulting from media exposure;
- Voluntarily refraining from publishing any news, story, or photograph that may endanger the child, his or her siblings, family, or peers;
- Avoiding the coverage of cases of child abuse that include degrading or private details, since such coverage may become an additional violation of the child's rights;

[5] See UNICEF, "Ethical Guidelines for Reporting on Children", 2018. Available at the following link: www.unicef.org/eca/media/ethical-guidelines, as of 05 May 2025.
[6] See Child-Friendly Media: Document of Professional Principles for Arab Media's Handling of Child Rights Issues (2016). Cairo, Arab Council for Childhood and Development.
[7] See Code of Ethics for Media Dealing with Children (2013). Beirut, Lebanese Ministry of Social Affairs.

- Avoiding compelling the child, especially victims of violence, to recount the incident, in order not to cause them further harm;
- Avoiding forcing the child to relive or repeat painful experiences;
- Providing the child with the opportunity to agree to or to refuse media coverage-without intimidation, coercion, or threats;
- Relying on reliable and substantiated information obtained from the competent state authorities and organizations-instead of personal interpretations;
- Avoiding the use of children's issues for political purposes;
- Avoiding portraying children solely as victims and instead focusing more on their achievements and potential for development;
- Verifying the accuracy of the child's account by comparing it with the views of other children or adults, preferably with both at the same time;
- Covering the general situation of children in the same status, rather than the individual story of a single child[8].

In certain situations, the disclosure of a child's identity may be in his or her best interests. Nevertheless, when the child's identity is disclosed, it is necessary to undertake appropriate measures to protect him or her from possible harm, danger, or targeting, and to provide support in the event of any labeling or retaliation. Thus, the preservation of the right to privacy in publications is of primary importance, and no information should be published that may reveal the identity of a minor and subsequently have a stigmatizing effect, thereby creating obstacles to the realization of other rights of the child (the right to work, the right to education, the right to free movement, etc.).

At the same time, the issue under discussion must be considered in both legal and ethical dimensions. The Convention, the Constitution of the Republic of Armenia, and the Law of the Republic of Armenia "On the Rights of the Child" [9] provide provisions that address the protection of the child's honor and dignity. The foundation of these legal acts is the principle of the best interests of the child and the principle of non-harm. A guiding mechanism in covering children is the *Ethical Principles of Reporting on Children*[10] adopted by the United Nations, which state that the child's identity should not be disclosed unless it is justified by the public

[8] See **UNICEF, CHILD PROTECTION POLICY IN THE MEDIA, UNICEF, "Ethical Guidelines for Reporting on Children",** cited work, p. 17.

[9] Adopted on 29 May 1996. Entered into force on 31 May 1996. RA Official Gazette 1996/10 (1110), 31 May, Art. 124, 31 May 1996.

[10] See **Ethical Guidelines for Reporting on Children: The Media and Children's Rights. Available at the following link: https://www.unicef.org/montenegro/en/ethical-guidelines-reporting-children , as of 05 May 2025.**

interest. It is impermissible to present a child in humiliating or degrading conditions, so as to avoid the risk of that same child being stigmatized later, especially by his or her peers.

The necessity to protect children from possible violations by the Media becomes even more pressing when the coverage concerns juvenile offenders. The United Nations Minimum Standard Rules for the Administration of Juvenile Justice – the "Beijing Rules" [11] – establish the most basic guarantees of due process during the adjudication of juvenile cases: "8. Protection of Privacy. 8.1 The right of juveniles to have their privacy respected shall be respected at all stages in order to avoid unnecessary publicity or labeling of the girl or boy. 8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published."

In this respect, it should be noted that the Armenian legislator has perhaps been satisfied with enshrining in Article 11(1) of the Law of the Republic of Armenia "On the Protection of Personal Data" [12] the following provision: "When obtaining the consent of the data subject, the processor shall inform him or her of: (1) the purpose of the processing of personal data; (2) the name and location (residence) of the processor; (3) information on the subjects to whom or to which the personal data are or may be provided; (4) the personal data subject to publication in publicly available sources." Thereafter, according to Article 15 of the same Law, persons who violate the legislation on personal data bear responsibility in accordance with the procedure established by law. Article 32(1)(14) of the Law of the Republic of Armenia "On Audiovisual Media" [13] provides: "Regulatory State Body carries out continuous monitoring of the activities of broadcasters and operators." This implies the monitoring of broadcast programs, the identification and recording of violations of children's rights, and the presentation of appropriate solutions. However, due to the absence of criteria, such monitoring has not yet been carried out. In this area, there is a lack of law-enforcement practice, and there are no judicial precedents relating to cases of violation of children's rights by the Media in the course of carrying out its professional activities. The reasons are several: the absence of monitoring standards, the absence of accountability mechanisms, the inaction of competent and responsible entities for the protection of children's rights, and, in many cases, the fact that the disclosure of the child's personal data is carried out by

[11] See United Nations Minimum Standard Rules for the Administration of Juvenile Justice – "Beijing Rules." Available at the following link: https://www.arlis.am/hy/acts/18505 , as of 05 May 2025.
[12] Adopted on 18 May 2015. Entered into force on 01 July 2015., RA Official Gazette 2015.06.18/35(1124) Art. 462.
[13] Adopted on 16 July 2020. Entered into force on 07 August 2020, Unified Website 27 July 2020 – 09 August 2020.

the parent himself or with his consent when he gives permission for the preparation of a report with the participation of his child—thereby rendering the Media publication and the journalist's activity ostensibly lawful.

Over the past two decades, social media platforms such as YouTube, Instagram, and TikTok have drastically changed people's modes of entertainment[14]. Ordinary citizens may gain significant income[15] and the status of "public person" [16], while research shows that there are now more than 50 million monetized content creators worldwide[17], with family influencers and children constituting part of this group. In this context, attention should be drawn to the widely spread phenomenon known as "sharenting" **[18]**, whereby parents share photographs and videos of their children online. For many influencer parents and their children, creating an image on the Internet implies numerous followers and tangible income from advertising. The children of these families, although playing a central role in the success of the content published online, are, in fact, not protected from a legislative standpoint with respect to receiving remuneration for the work performed or having control over the material published with their participation. Sharing details of children's lives in the online sphere raises particular problems, conditioned by the relative permanence of online content and the potential for mass dissemination. Sharenting subjects children to risks of which parents are often unaware, the most common of which are cases of identity theft[19] (theft of personal data, depriving the child of the opportunity to shape his or her own identity). As a result of sharenting, parents may inadvertently make their children's images accessible to sexual predators. For example, the Australian Commissioner for Children's e-Safety has reported that on certain websites used by pedophiles—one of which contained more than 45 million

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[14] See MAKING MEDIA: PRODUCTION, PRACTICES, AND PROFESSIONS, Amsterdam University Press, Edited by Mark Deuze and Mirjam Prenger, 2019, pg 363:

[15] See The Creator Economy Explained: How Companies Are Transforming the Self-Monetization Boom, CB INSIGHTS (June 15, 2021): Available at the following link: https://www.cbinsights.com/research/report/what-is-the-creator-economy/, as of 05 May 2025.
The creative economy includes a variety of businesses created by independent creators—from bloggers to influencers and writers—who monetize their skills or creations. It also includes those companies that provide services to such creators, ranging from content creation tools to the provision of analytical platforms.

[16] See **Kate Hamming,** Comment, *A Dangerous Inheritance: A Child's Digital Identity*, 43 SEATTLE U.L. REV. 1033, 1038 (2020).

[17] See **Andy Karuza**, *Make the Most of the Creator Economy*, FORBES (July 18, 2022): Available at the following link: https://www.forbes.com/councils/theyec/2022/07/18/make-the-most-of-the-creator-economy/, as of 05 May 2025.

[18] This term does not yet have an Armenian equivalent.

[19] According to Barclays' assessment, by 2030 sharenting will be the cause of two-thirds of identity theft cases directed at young people and will cost more than 900 million U.S. dollars annually. See **Sean Coughlan**, 'Sharenting' Puts Young at Risk of Online Fraud, BBC (May 20, 2018). Available at the following link: https://www.bbc.com/news/education-44153754, as of 05 May 2025.

images—almost half of the pictures had been taken directly from parents' social media accounts[20]. Although sexual predators sometimes use Photoshop programs to superimpose children's faces onto the naked bodies of others, they mostly upload unedited photographs and classify them with expressions such as "children at the beach" and "handsome boys playing in the river" [21]. On this matter, Canadian human rights defender Sharon Kirkey stated: "What a healthy and sober person sees as an innocent phenomenon, a person with sexual interest in children turns into a deeply perverted phenomenon" [22].

This problem collides with the concept of "parental autonomy." Thus, the Armenian legislator, in the Family Code of the Republic of Armenia[23], establishes the principle of the primacy of childrearing within the family, the parents' preferential right over all other persons to raise their children (Family Code of RA, Art. 51(1)). Consequently, the exclusive right to raise children and the forms and methods of exercising that right are determined independently by the parents within the scope of their "parental autonomy." Therefore, parents may freely decide whether or not to publish online their child's photograph or a video with his or her participation, and no one may restrict that right. An essential role in controlling parental behavior is played by the principle enshrined in Article 1(7) of the Family Code of the Republic of Armenia, elevated to the level of a legal principle, on "ensuring the best interests of the child," according to which any action concerning the child must derive from his or her best interests, and therefore any action that does not derive from or infringes upon the best interests of the child is impermissible. In essence, the Armenian legislator proceeds from the presumption that the parent is conscious of the "best interests of the child" and acts accordingly, while "absolute parental autonomy" is restricted by the impermissibility of actions that do not derive from or that infringe upon the best interests of the child.

The study of international practice shows that, for example, in the United States, the parent enjoys pronounced "broad parental autonomy," which makes it difficult,

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[20] See **Lucy Battersby,** Millions of Social Media Photos Found on Child Exploitation Sharing Sites, SYDNEY MORNING HERALD (Sept. 30, 2015): Available at the following link: https://www.smh.com.au/national/millions-of-social-media-photos-found-on-child-exploitation-sharing-sites-20150929-gjxe55 , as of 05 May 2025.:

[21] See id.

[22] See **Sharon Kirkey,** *Do You Know Where Your Child's Image Is? Pedophiles Sharing Photos from Parents' Social Media Accounts*, NAT'L POST (Apr. 18, 2017): Available at the following link: https://nationalpost.com/news/canada/photos-shared-on-pedophile-sites-taken-from-parents-social-media-accounts, as of 05 May 2025.

[23] Adopted on 09 November 2004. Entered into force on 19 April 2005. RA Official Gazette 2005.01.19/4(376), Art. 60.

through legal regulation, to provide real protection for the children of influencer families. Historically, the U.S. Supreme Court has maintained the position that the right of parents "to direct the upbringing of their children" is considered one of the most stable and fundamental constitutional rights. In 1923, the U.S. Supreme Court for the first time explicitly recognized that the Fourteenth Amendment to the Constitution—protection of personal liberty—also includes the freedom to raise children[24]. Two years later, in the case of *Pierce v. Society of Sisters*, it was affirmed that the freedom to raise children also includes the right to direct the upbringing and education of the child[25]. On the basis of these two cases, a tradition of strong parental autonomy developed in the United States, which is based on the conviction that as long as parents provide minimum care for children and there are no facts proving them to be abusive or neglectful, there is no need for the state to interfere in family-private matters or in the decisions made by the parent during the upbringing of the child. In U.S. legislation, the idea of family is anchored in the conviction that parents have sufficient maturity, experience, and judgment to make complex decisions concerning the life of the child—capacities which the child still lacks.

Influencers engaged in activities on online platforms frequently involve their children in their filmed advertising videos and published photographs. Two questions arise from this: first, whether such actions carried out within the framework of "parental autonomy" derive from "the best interests of the child"; and second, whether as a result of such actions the requirements set by the Labor Code of the Republic of Armenia[26] concerning the regulation of employment relations with the participation of minors are not being violated. Specifically, according to Article 17.1(2) of the RA Labor Code, persons under fourteen may only be involved in the creation (creative work) or performance of works in cinematography, sports, theater or concert organizations, circuses, television, or radio. According to Article 17.1(3), with persons under sixteen, a temporary employment contract may be concluded, if it does not hinder their compulsory education process. According to Article 17.1(4), persons under eighteen may only be involved in work that does not endanger their health (including physical and mental development), morality, does not threaten their safety, and does not hinder their compulsory education. In all these cases, a written employment contract must be concluded, which, in the case of workers under sixteen, is concluded by drafting

[24] See **ERWIN CHEMERINSKY,** CONSTITUTIONAL LAW 942 (6th ed. 2020):
[25] See *Pierce*, 268 U.S. at 534: Available at the following link:
https://supreme.justia.com/cases/federal/us/268/510/ , as of 05 May 2025.
[26] Adopted on 09 November 2004. Entered into force on 21 June 2005. RA Official Gazette 2004.12.21/69(368), Art. 1385.

a single document signed by one of the parents, foster parents, adoptive parents, or the guardian (RA Labor Code, Article 85(1)).

Drawing parallels between the situation existing in practice and the legal regulations enshrined in the RA Labor Code, we obtain the following picture: currently, in most cases, influencer parents on Instagram or TikTok involve their children under sixteen in their own blogging work—online content—exclusively within the framework of their "parental autonomy," while contractual relations are formed and an employment contract is concluded, for example, between the advertiser (in this case—the employer) and the influencer (the Contractor) only. Later, however, the influencer's minor child also participates in the performance of the advertising order, without having concluded an employment contract[27]. Furthermore, the content created on Instagram or TikTok is not included in the category of creative work provided for in Article 17.1(2) of the RA Labor Code. Thus, de facto, the minor becomes a participant in labor relations, contributes to the performance of the work, but de jure has no legal status and is not remunerated for the work performed.

This situation is not rectified even when the influencer parent concludes a service contract with the advertiser. Thus, under Article 29 of the RA Civil Code[28], a minor under the age of fourteen cannot independently conclude a transaction, and transactions on their behalf may only be concluded by their parents, adoptive parents, or guardians. Under Article 30 of the RA Civil Code, minors between the ages of fourteen and eighteen may conclude transactions with the written consent of their legal representatives—parents, adoptive parents, or trustees. In both cases, the contractual party and the person remunerated for the service which is the subject of the contract is the influencer parent[29].

Consequently, a situation arises in which the work is performed, the service is rendered, or direct participation in the performance is carried out by the minor, but the remuneration for the performance of the work envisaged by the contract is received de jure by the person who concluded the contract—in this case, the parent. At first glance, the situation falls within the concept of "parental autonomy," proceeding from the presumption that the influencer or blogger parent, as the contracting party, acted in accordance with the principle of ensuring "the best

[27] We are witnessing vivid examples on Instagram and TikTok platforms, where numerous influencers and bloggers publish various advertising videos featuring their children.

[28] Adopted on 05 May 1998. Entered into force on 01 January 1999. RA Official Gazette 1998.08.10/17(50).

[29] Within the framework of this article, we do not address the activities carried out by influencer or blogger children themselves and the existing problems thereof, since that is a subject for separate study.

interests of the child" when filming or publishing the advertising video. Parallel to this, however, in reality, there are not few cases when the content of the video implies filming in certain conditions (for example, cold or hot weather, dark settings) or performing certain actions which may present some difficulty or danger for the child, but which are necessary for filming the video envisaged by the contract. In such a case, the situation is subject to evaluation in the light of "the best interests of the child." First, whether causing the child certain physical or psychological discomfort in order to achieve the result envisaged by the contract does not violate the principle of ensuring "the best interests of the child"; second, who evaluates the conformity of the service provided under the contract with "the best interests of the child"; and third, who bears responsibility for the violation of the principle of ensuring "the best interests of the child." The addressee of all these questions, the evaluator of the situations, and the bearer of responsibility is the Contractor, i.e., the influencer or blogger parent.

The Armenian legislator has envisaged, as a sanction for parental behavior not deriving from "the best interests of the child," deprivation or restriction of parental rights. However, these cannot be applied to the situations mentioned above, since the grounds for deprivation of parental rights are exhaustively set forth in Article 59 of the Family Code, and under Article 63 of the Family Code, the restriction of parental rights is permitted only if leaving the child with the parents or with one of them is dangerous for the child due to circumstances independent of the parents (mental or other chronic illness, existence of severe circumstances, etc.). Consequently, in essence, there is no legal assessment of, nor mechanisms restraining, the actions of an influencer or blogger parent which do not derive from "the best interests of the child" but which involve lesser risks and cause certain inconveniences.

In this respect, the legislation of the United States is of interest. Despite the fact that broad "parental autonomy" is enshrined even in the Constitution, the traditional entertainment industry is one of the areas in which parental rights are sometimes limited[30]. Nevertheless, the legal regulations enshrined in the state laws of the United States do not extend to the children of influencer families, due to two circumstances: first, influencers are not considered representatives of the

[30] In the legislation of a number of U.S. states, this term is used in relation to work performed in the fields of theater, cinema, radio, or television. For example, under the legislation of the State of California, rather strict requirements are set for children working in this field—specific working hours and compliance with educational standards. For more detailed information, see Celine Simone, When Parents Decide That All the World's a Stage: Expanding Publicity Rights to Protect Children in Monetized Social Media Content, Columbia Journal of Law and Social Problems, Vol. 58, Issue 1, 2024, pp. 78–79.

entertainment industry, and second, in this case the children of influencers are regarded as working in a family business, and the laws regulating that sphere do not apply to such business activities.

Thus, the study of domestic legislation of the Republic of Armenia and of international practice shows that the involvement of children in the activities of influencers falls outside the subject matter of labor law regulation; the work performed by children in that sphere is not considered the creation or performance of creative work, but bears the characteristics of entrepreneurial activity. Therefore, children do not enjoy the rights envisaged for employees under the Labor Code, and consequently cannot benefit from the means of protection of labor rights. While traditional creative work or entertainment industry work is carried out in a studio or theater, monetized family content is largely created within the home, where the parents simultaneously perform multiple roles—acting as director, producer, scriptwriter, consultant. The total absence of legal regulation at the legislative level and the lack of sector-specific standards grant parents broad autonomy and exclusive control to decide when, where, for how long the children will work, and in what content they will be involved. Such a situation is excluded both in the context of Article 17.1(2) of the RA Labor Code, in the case of minors performing creative work, and under the state laws of the United States in the context of children's work within the "entertainment industry."

Summarizing all the above, we can state that:

- In international legal documents and in the RA Family Code, the legal obligation of everyone to act in accordance with "the best interests of the child," together with UNICEF's developed policies and published guiding principles intended to facilitate its implementation, do not fully exclude violations of children's rights by the Media during their activities;
- At the legislative level, due to the absence of monitoring criteria, and the impossibility of giving proper legal assessment, within the framework of existing regulations, to the actions of infringing Media, influencer or blogger parents in their activities that do not derive from the "best interests of the child," there is no established law enforcement practice, and no judicial precedents;
- The concept of "parental autonomy" grants influencer or blogger parents absolute autonomy in involving their children in their activities. As a result, de facto the minor becomes a participant in labor relations, contributing to the work carried out by the parent, but de jure having no legal status and not receiving remuneration for the work performed, since the content created on

social networks is not included in the category of creative works envisaged by Article 17.1(2) of the RA Labor Code;

- Taking into account the established practice, available statistics, and identified problems, the cases, order, and conditions of involving children in the activities of influencers should draw the legislator's attention, receive legal regulation, and become subject to the regulation of labor law—thus granting children the opportunity to benefit from the rights envisaged for workers under the Labor Code and the means of protection of labor rights.

Conflict of Interests

The author declares no ethical issues or conflicts of interest in this research.

Ethical Standards

The author affirms this research did not involve human subjects.

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THE RIGHT OF DISTRIBUTION OF PERFORMANCE FIXATIONS AND FIRST SALE DOCTRINE IN THE DIGITAL AGE

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Abstract. The article is dedicated to examining the unique aspects of a fundamental right held by performers - the right of distribution of the performance fixations. Although the RA Law "On Copyright and Related Rights" provides the right to distribute performance fixations, the legal regulations do not reveal the essence of the distribution right. Moreover, the law does not provide detailed regulations pertaining to the right of exhaustion, or more specifically, the doctrine of first sale, which is inherently intertwined with the right of distribution. It's worth highlighting that the concept of exhaustion rights, particularly within the digital age, has sparked extensive deliberation within international practice and scholarly circles. Consequently, this article provides an in-depth examination of the recent stances taken by both the US and EU courts concerning the notion of digital exhaustion. Based on the studies and analysis, the article summarizes that the right of exhaustion should be interpreted as applicable only in the case of the distribution of performances fixed on tangible objects. Consequently, in instances where performances are, for instance, hosted on streaming services, the doctrine of exhaustion finds no applicability. Furthermore, despite the absence of a specific response within Armenian legal practice and legislation regarding the interpretation of exhaustion rights in the digital realm, the article asserts that the interpretation within the Armenian legal system should exclude the application of the doctrine of first sale to digital fixations of performances.

Keywords - *Intellectual property; artists; performances; the right of distribution; the doctrine of first sale; the right of digital exhaustion; streaming.*

Introduction

One of the fundamental rights granted to performers[2] is the distribution right over fixations of their performances. The Law on Copyright and Related Rights of the

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Republic of Armenia (hereinafter referred to as the Law) stipulates that performers have the right to authorize or prohibit third parties from distributing phonograms and videograms containing their performances by sale or other forms of transfer of ownership, including import.

Although the Law provides for the right to distribute performance fixations, it does not clearly define the essence of the distribution right. Moreover, the Law does not include detailed provisions regarding the exhaustion of the distribution right or, in other words, the first sale doctrine, which is inherently linked to the distribution right. The exhaustion right or the first sale doctrine has been a subject of extensive discussion in international practice and the academic community, especially considering the peculiarities of the digital age. Therefore, this article analyzes the distribution right over performance fixations and the closely related first sale doctrine.

Main Research

The right to distribute performance fixations can be understood in two ways: broadly and narrowly. In the broad sense, it refers to making the originals or copies of objects protected by related rights accessible to the public through sale, transfer of ownership by other means, as well as rental, lending, or other forms of transfer of possession. In the narrow sense, the distribution right is limited to making the originals or copies of such objects accessible to the public solely through sale or other forms of ownership transfer[3].

The *Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations* (hereinafter the Rome Convention) nor the *Agreement on Trade-Related Aspects of Intellectual Property Rights*

[2] Article 42 of the Law of the Republic of Armenia "On Copyright and Related Rights" (LO-142-N), adopted on June 15, 2006 Rights (hereinafter referred to as the Law), defines:(1) Performance shall mean the performance of an actor, singer, musician, dancer, conductor, choirmaster, or other person, who acts, sings, recites, presents or otherwise performs a literary or artistic work among them expressions of folklore and art. (2) Performers are actors, singers, musicians, dancers, conductors, choirmasters or other persons who play a role, sing, recite, declaim, play or otherwise perform literary or artistic works, circus, puppet, variety and other similar shows including expressions of folklore and art.

[3] The U.S. Copyright Act includes the sale or other transfers of ownership of copies or phonorecords of copyrighted works, as well as rental, lease and lending, within the scope of the distribution right (see 17 U.S. Code § 106 - Exclusive rights in copyrighted works, https://www.law.cornell.edu/uscode/text/17/106), (access 15.09.2024).

In contrast, EU law interprets the distribution right more narrowly, distinguishing rental and lending as separate from the distribution right (see, for example, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society). This represents a clear example of how the distribution right is interpreted in narrow and broad senses across different legal systems.

(hereinafter TRIPS Agreement) explicitly address or establish provisions regarding the distribution right. However, the *WIPO Performances and Phonograms Treaty* (hereinafter Performances and Phonograms Treaty) explicitly grants performers the exclusive right to authorize making the originals or copies of their performances available to the public through sale or other forms transfer of ownership. Similarly, the *Beijing Treaty on Audiovisual Performances* (hereinafter Beijing Treaty) adopts the same approach, thereby treating the distribution right in its narrow sense in both treaties[4].

Armenian legislation follows this narrow interpretation of the distribution right, limiting it to sales and other forms of ownership transfer.

While the concept of the distribution right may appear straightforward at first glance, its practical application becomes more complex due to its intrinsic link with the first sale doctrine, or the exhaustion of rights principle. These complexities are particularly pronounced in the digital age, where the unique characteristics of digital goods and services raise numerous legal and practical challenges.

The right of exhaustion is closely linked to the distribution right. Typically, the distribution right over a specific copy of an object protected by copyright or related rights is "exhausted" or terminated upon the first sale or other transfer of ownership of that copy. In other words, the doctrine of first sale or the right of exhaustion means that rights holders must tolerate the further distribution of their protected objects or copies, including for profit, if those copies were lawfully placed into circulation with their consent through sale or other forms of ownership transfer[5].

The right of exhaustion does not apply in cases where rental is the primary means of exploiting certain types of works, such as audiovisual works or objects of related rights, for instance phonograms[6].

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[4] The Rome Convention, the Performances and Phonograms Treaty, and the Beijing Treaty are the key international instruments for the protection of performers' rights.

[5] Mezei, Péter, Digital First Sale Doctrine Ante Portas, Exhaustion in the Online Environment (June 7, 2015). JIPITEC – Journal of Intellectual Property, Information Technology and E-Commerce Law, 2015, 6(1), p. 23-71., Available at SSRN: https://ssrn.com/abstract=2615552, (access 15.01.2025).

[6] In this regard, the experience of the United States is particularly interesting, as it faced a serious issue in the 1980s. During that time, the rental of phonograms and various audiovisual works became widespread. Such rentals caused significant harm to rights holders over time. The rental of phonograms encouraged and enabled consumers to simply purchase blank tapes and record onto them, for instance, a music album they had rented. This meant that the availability of blank tapes and rentals allowed people to obtain music without paying for it. In other words, rentals became a primary substitute for sales.

A similar situation arose with computer programs, leading to amendments in Section 109 of the Copyright Act. These amendments stipulated that the first sale doctrine does not apply in cases where phonograms or computer programs, including any tape, disk, or other medium embodying such programs, are used, disposed of, or authorized for disposal for the purposes of direct or indirect commercial advantage through rental, lease, lending, or any other act or practice in the nature of

The theory of the right of exhaustion emerged simultaneously in the American and German copyright systems in the late 19th and early 20th centuries, taking particularly deep roots in American law.

The first sale doctrine in the United States has an impressive historical origin and has played a significant role in the American copyright system for nearly a century. The foundation of the right of exhaustion, or the first sale doctrine, was established by the Supreme Court in the 1908 case *Bobbs-Merrill Co. v. Straus*[7].

The background of the case is as follows: the publisher *Bobbs-Merrill Co.* explicitly printed a notice on one of its published books prohibiting the resale of the book below one dollar. However, resellers sold the book for 85 cents[8]. In this case, the Supreme Court[9] ruled that an individual who sells a copyrighted object without restrictions forfeits control over its subsequent sale. The Court differentiated the rights conferred by copyright statutes and those by patent laws, the copyright protects the author's right to produce and sell copies of the work but it does not extend to controlling the resale price of those copies once sold. [In granting copyright holders "the sole right of vending the same," the copyright law did not intend to allow the holder of the copyright to set the prices for which books purchased could be resold, at least not without a specific "contract limitation" or other "license agreement." Rather, it sought to allow an author the right "to multiply copies of his work," and this right was not infringed by subsequent discounts[10].] Accordingly, the Court upheld the reseller's right to sell the book for 85 cents.

A year after this case, in 1909, Congress codified the first sale doctrine by incorporating it into the 1909 Copyright Act, following the Supreme Court's decision.This ruling was significant not only for the American legal system but

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rental, lease, or lending. At the same time, the section provides an exception to this rule for non-profit purposes and use by educational institutions in the case of phonograms and computer programs (for detailed regulation and legislative history, see https://www.law.cornell.edu/uscode/text/17/109, https://www.law.cornell.edu/uscode/text/17/109?utm_source=chatgpt.com), (access 15.01.2025).
Thus, it can be concluded that the first sale doctrine does not apply to the rental or lending of phonograms and computer programs.

[7] Bobbs-Merrill Co. v. Straus, 210 U.S. 339 (1908),
https://supreme.justia.com/cases/federal/us/210/339/, (access 15.01.2025).

[8]The Court also discussed that the stipulated facts show that the books were purchased by those who made no agreement as to the control of future sales of the book, and took upon themselves no obligation to enforce the notice printed in the book, undertaking to restrict retail sales to a price of one dollar per copy. (See more details Bobbs-Merrill Co. v. Straus, 210 U.S. 339 (1908) https://supreme.justia.com/cases/federal/us/210/339/) (access 15.01.2025).

[9] Reis, S., 2014. Toward a Digital Transfer Doctrine-The First Sale Doctrine in the Digital Era. Nw. UL Rev., 109:

[10] Bobbs-Merrill Co. v. Straus (1908), https://firstamendment.mtsu.edu/article/bobbs-merrill-co-v-straus/, (access 15.01.2025).

also for the development of the theory of the right of exhaustion in other legal systems.

Although some national legal systems had already recognized the right of exhaustion, its first mention at the international level came with the adoption of the TRIPS Agreement. The TRIPS Agreement itself did not establish specific provisions regulating the right of exhaustion but explicitly stated that the agreement would not address the issue of exhaustion of intellectual property rights[11]. This omission stemmed from several factors: at the time, only a limited number of countries had codified or recognized the right of exhaustion through their legislation or case law, and approaches to the scope of this right varied widely among different jurisdictions[12:].

A more comprehensive international framework for addressing the right of exhaustion emerged with the adoption of two WIPO treaties: the *WIPO Copyright Treaty* and the *WIPO Performances and Phonograms Treaty*. The *WIPO Performances and Phonograms Treaty* provides that nothing in the treaty limits the freedom of contracting parties to determine the conditions, if any, under which the exhaustion of the rights applies after the first sale or other transfer of ownership of the original or a copy of the phonogram with the authorization of the producer of the phonogram[13].

The same principle is reflected in the *Beijing Treaty on Audiovisual Performances*[14], further solidifying the international recognition of national sovereignty in defining the application of the exhaustion principle. These treaties marked significant milestones in harmonizing the treatment of the right of exhaustion while leaving room for domestic flexibility.

Before the advent and widespread adoption of the internet and digital technologies, interpreting the right of exhaustion and the distribution right posed little theoretical complexity. This was primarily because both rights were originally designed to govern the transfer of tangible copies fixed on physical medium. However, technological advancements have given rise to significant debates about whether the right of exhaustion, or the first sale doctrine, can be extended to intangible digital copies of copyrighted works.

Notably, the agreed statement concerning the *WIPO Copyright Treaty*, part of the WIPO Internet Treaties, explicitly states that the expressions "copies" and

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[11] TRIPS, article 6

[12] Mezei, P., 2015. Digital first sale doctrine ante portas: Exhaustion in the online environment. J. Intell. Prop. Info. Tech. & Elec. Com. L., 6.

[13] *WIPO Performances and Phonograms Treaty* (hereinafter Performances and Phonograms Treaty), Article 6.

[14] *Beijing Treaty on Audiovisual Performances* (hereinafter Beijing Treaty), Article 8.

"original and copies", being subject to the right of distribution and the right of rental under the Articles 6 and 7, refer exclusively to fixed copies that can be put into circulation as tangible objects[15]. At first glance, this clarification might appear to definitively address the question of whether the first sale doctrine applies to intangible objects of copyright and related rights[16]. However, particularly in the last decade, debates over the scope and essence of the right of exhaustion have continued unabated.

At the heart of these discussions lies the practical significance of the right of exhaustion. The literature frequently emphasizes its benefits, which are typically grouped into four main categories: access, preservation, privacy, and transactional clarity[17].

Access: first sale improves both the affordability and availability of copyrighted works by fostering secondary markets for lawful copies and distribution models that operate outside of copyright holder control. Examples of this include libraries, secondhand bookstores, and similar institutions. In essence, the right of exhaustion allows individuals to legally acquire copyrighted and related rights objects without fear of infringing the rights of the holder[18].

Preservation, the right of exhaustion facilitates continued access to works that are no longer obtainable directly from the rights holder. This includes objects that the rights holder has chosen not to circulate due to lack of profitability, those withdrawn from circulation for political, cultural, or other reasons, and works whose rights holders are unknown or unreachable—commonly referred to as orphan works[19].

Privacy, the right of exhaustion safeguards privacy by allowing the transfer of works without requiring the rights holder's consent. This means that individuals can privately exchange works while maintaining their privacy[20].

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[15] Agreed statements concerning the WIPO Copyright Treaty (December 20, 1996). https://wipolex.wipo.int/en/treaties/textdetails/12741, (access 15.09.2024),

[16] Perzanowski, Aaron, and Jason Schultz. "Digital exhaustion." UClA l. reV. 58 (2010), https://ssrn.com/abstract=1669562, (access 15.09.2024).

[17] Joseph P. Liu, Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership, 42 WM. & MARY L. REV. 1245, 1303, 1310–11, 1320–21, 1330–33, 1336 (2001) R. Anthony Reese, The First Sale Doctrine in the Era of Digital Networks, 44 B.C. L. REV. 577, 584 (2003) (access, preservation, privacy); Molly Shaffer Van Houweling, The New Servitudes, 96 GEO. L.J. 885, 898–905, 914–16 (2008) (transactional clarity and salience), Perzanowski, Aaron, and Jason Schultz. "Digital exhaustion." UClA l. reV. 58 (2010).

[18] Ibid

[19] Ibid

[20] Reese, R. Anthony, The First Sale Doctrine in the Era of Digital Networks. U of Texas Law, Public Law Research Paper No. 57; and U of Texas Law, Law and Econ Research Paper No. 004, Available at SSRN: https://ssrn.com/abstract=463620 or http://dx.doi.org/10.2139/ssrn.463620: (access 15.01.2025).

Transactional clarity, the right of exhaustion enhances market efficiency and transparency by protecting consumers from high costs or usage restrictions on objects protected by copyright and related rights that may not be of high value. It is hard to imagine a scenario where every subsequent sale would require separate permissions from the rights holder. Instead, under the right of exhaustion, consumers can engage in straightforward and predictable transactions[21].

The significance of the right of exhaustion in the digital age has become a topic of extensive scholarly debate, as it plays a critical role in promoting the development of secondary markets and fostering innovation through various mechanisms[22].

A particularly noteworthy benefit of the right of exhaustion is its ability to enhance competition among digital platforms while reducing consumer dependency on a single platform—a phenomenon commonly referred to as "lock-in." Lock-in occurs when consumers become reliant on a specific producer, supplier, or unique service, rendering it challenging to transition to alternative providers without incurring substantial costs or facing significant inconveniences[23]. A frequently cited example involves consumers who purchase a substantial library of e-books within a single platform, only to face considerable barriers when attempting to switch to a competing platform[24].

However, despite its advantages, the application of the right of exhaustion in the digital age presents significant challenges and complexities. The most prominent concern is the increased potential for widespread copyright infringement. Unlike physical media, where obtaining and duplicating multiple copies requires significant effort and resources, the digital environment enables the near-instantaneous replication and distribution of copyrighted or related rights objects to thousands of users with minimal effort.Furthermore, even advanced technical protection measures such as Digital Rights Management (DRM) often fail to

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[21] Perzanowski, Aaron, and Jason Schultz. "Digital exhaustion." UClA l. reV. 58 (2010), https://ssrn.com/abstract=1669562, (access 15.09.2024):

[22] Reese, R. Anthony, The First Sale Doctrine in the Era of Digital Networks. U of Texas Law, Public Law Research Paper No. 57; and U of Texas Law, Law and Econ Research Paper No. 004, Available at SSRN: https://ssrn.com/abstract=463620 or http://dx.doi.org/10.2139/ssrn.463620, (access 15.01.2025).

[23] The Business-to-Consumer Lock-in Effect, University of Cambridge https://cambridgeservicealliance.eng.cam.ac.uk/system/files/documents/2014AugustPaperBusinesstoConsumerLockinEffect.pdf, (access 15.09.2024).

[24] A pertinent example is when consumers opt to remain with the Kindle application for electronic books rather than transitioning to alternative platforms like the Nook application.

provide adequate safeguards against such practices, as they can be bypassed or rendered ineffective[25].

These challenges highlight the need for a nuanced and balanced approach to the application of the right of exhaustion in the digital age, ensuring that its benefits to innovation and market efficiency are preserved while addressing the risks it poses to the protection of intellectual property rights.

In the music industry, practical experience has demonstrated that technical protection measures (TPMs) are relatively easy to bypass, enabling the unrestricted distribution of music files to an unlimited number of users. This vulnerability has led major music production companies to abandon the use of TPMs for music files. Instead, they have embraced streaming service models, such as the widely known Swedish platform "Spotify," which allows users to access and listen to music through an application for a subscription fee. This shift reflects a growing consensus that TPMs are an ineffective solution in the music industry, where circumvention remains relatively simple and widespread[26:].

The economic implications of the right of exhaustion in the digital environment, whether through potential benefits or financial losses for rights holders, remain a topic of intense debate. While arguments exist both supporting and opposing the application of this principle in the digital age, the issue must be analyzed through the lens of legal interpretation, particularly concerning reproduction rights[27], communication to the public[28], and distribution rights[29].

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[25] According to the Article 67 of the Law a technological measure for the protection of copyright and related rights shall mean any device or their components, that in the normal course of their operation, are designed to prevent or restrict acts in respect of works or subject matters of related rights which are not authorized by holder of copyright or related rights. Technological measure shall be deemed effective, where the use of a protected work or other subject matter is controlled by the right holders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject matter or a copy control mechanism, which achieves the protection objective.

[26] Reese, R. Anthony, The First Sale Doctrine in the Era of Digital Networks. U of Texas Law, Public Law Research Paper No. 57; and U of Texas Law, Law and Econ Research Paper No. 004, Available at SSRN: https://ssrn.com/abstract=463620 or http://dx.doi.org/10.2139/ssrn.463620, (access 15.01.2025).

[27] Reproduction of a work (reproduction rights) shall mean the fixation in any tangible medium directly or indirectly, permanently or temporarily by any means and in any form, in whole or in part, including the digital mediums.

[28] According to the WIPO glossary communication to pubic means the transmission, by wire or by wireless means, of the images or sounds, or both, of a work or of an object of related rights, making it possible for the images and/or sounds to be perceived by persons outside the normal circle of a family and the closest social acquaintances of the family, at a place or places the distance of which from the place where the transmission is started is such that, without the transmission, the images or sounds, or both, would not be perceivable at the said place or places, irrespective of whether the said persons can perceive the images and/or sounds at the same place and at the same time, or at different places and at different times. This right also includes the right to make performances available c to

In this context, it is crucial to examine how courts in the United States and the European Union have interpreted and applied the right of exhaustion in the digital domain. Such analysis is essential for understanding how this principle is evolving in response to the unique challenges posed by digital technologies and the broader implications for intellectual property law.

In the United States, the case *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640 (S.D.N.Y. 2013) [30], became particularly significant for interpreting the right of exhaustion in the digital environment. The defendant, ReDigi Inc., described itself as the world's first and only marketplace for pre-owned digital music. ReDigi invited users to sell legally acquired digital music files on its platform and to purchase digital music from others at prices lower than on iTunes.Unlike traditional CD sales, all transactions on ReDigi occurred exclusively in the digital environment.

The plaintiff, Capitol Records, LLC, alleged that several music files it owned were being sold on ReDigi's platform. Capitol alleged infringement of its exclusive reproduction, distribution, performance, and display rights when ReDigi allowed digital music owners to sell their lawfully purchased songs to other users on its online marketplace[31]. The court ruled in favor of the plaintiff, holding that ReDigi

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the public, a vivid example of which is making performances available to the public through streaming services.(World Intellectual Property Organization. *Guide to the copyright and related rights treaties administered by WIPO: And glossary of copyright and related rights and terms*. WIPO, 2003, 275-276)

[29] Distribution of a work (distribution rights) shall mean the putting into circulation the original or copies of a work by sale or other form of transfer of ownership as well as their importation.

[30] Jorge Anguiano, Capitol Records, LLC v. ReDIGI, Inc.: 934 F. Supp. 2D 640 (S.D.N.Y. 2013), 24 DePaul J. Art, Tech. & Intell. Prop. L. 219 (2013) https://via.library.depaul.edu/jatip/vol24/iss1/7, (access 15.01.2025).

Huguenin-Love, James. "Song on Wire: A Technical Analysis of Redigi and the Pre-Owned Digital Media Marketplace." NYU J. Intell. Prop. & Ent. L. 4 (2014): 1.

https://jipel.law.nyu.edu/wp-content/uploads/2015/05/NYU_JIPEL_Vol-4-No-1_1_HugueninLove-SongOnWireRedigiAndPreOwnedDigitalMediaMarketplace.pdf (access 15.01.2025).

John T. Soma & Michael K. Kugler, Why Rent When You Can Own: How ReDigi, Apple, and Amazon Will Use the Cloud and the Digital First Sale Doctrine to Resell Music, E-Books, Games, and Movies, 15 N.C. J.L. & Tech. 425 (2014: http://scholarship.law.unc.edu/ncjolt/vol15/iss3/3 (access 15.01.2025).

Reis, Sarah. "Toward a digital transfer doctrine-the first sale doctrine in the digital era." Nw. UL Rev. 109 (2014):

https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1193&context=nulr(access 15.01.2025).

[31] Capitol Records, LLC v. ReDigi, Inc., 934 F. Supp. 2d 640, 648 (S.D.N.Y. March 30, 2013), see also Jorge Anguiano, Capitol Records, LLC v. ReDIGI, Inc.: 934 F. Supp. 2D 640 (S.D.N.Y. 2013), 24 DePaul J. Art, Tech. & Intell. Prop. L. 219 (2013) https://via.library.depaul.edu/jatip/vol24/iss1/7, (access 15.01.2025).

Huguenin-Love, James. "Song on Wire: A Technical Analysis of Redigi and the Pre-Owned Digital Media Marketplace." NYU J. Intell. Prop. & Ent. L. 4 (2014): 1.

had violated Capitol Records' reproduction and distribution rights and that the first sale doctrine did not apply in this case[3233].

The court's analysis of the first sale doctrine is particularly significant. The court held that the sale of digital music files by ReDigi, resulting from unauthorized reproduction, could not be considered as involving lawfully obtained copies under the meaning of the Copyright Act.

One of the court's key conclusions was that the first sale doctrine does not apply to digital files in the same way it does to physical goods. The court reasoned that transferring digital files involves making a copy of the original file, which constitutes unauthorized reproduction under the Copyright Act (17 U.S.C. § 106)**.** According to the court regardless of whether that material object is a phono-record or a hard drive, the copyright holder's reproduction right is infringed upon when the music file is fixed into that new material object, distinct from the original phono-record or hard drive.

In other words, the first sale doctrine is limited to tangible, physical media—such as CDs—that the owner can place into circulation. In contrast, ReDigi did not distribute physical objects; instead, it facilitated the distribution of reproductions of

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https://jipel.law.nyu.edu/wp-content/uploads/2015/05/NYU_JIPEL_Vol-4-No-1_1_HugueninLove-SongOnWireRedigiAndPreOwnedDigitalMediaMarketplace.pdf, (access 15.01.2025).

John T. Soma & Michael K. Kugler, Why Rent When You Can Own: How ReDigi, Apple, and Amazon Will Use the Cloud and the Digital First Sale Doctrine to Resell Music, E-Books, Games, and Movies, 15 N.C. J.L. & Tech. 425 (2014: http://scholarship.law.unc.edu/ncjolt/vol15/iss3/3, (access 15.01.2025).

Reis, Sarah. "Toward a digital transfer doctrine-the first sale doctrine in the digital era." Nw. UL Rev. 109 (2014):
https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1193&context=nulr, (access 15.01.2025).

[32]The following system was in place for reselling music used on "ReDigi": To resell a lawfully purchased iTunes digital music file via ReDigi, the user must install ReDigi's "Music Manager" software, which verifies the file's lawful purchase and tamper-free status. Eligible files were transferred to ReDigi's "Cloud Locker" using a unique "data migration" method. This process breaks the file into packets(blocks of data), temporarily copies them to the user's computer buffer, deletes each packet after reading, and transfers them to ReDigi's server, where the file is reassembled and completely removed from the user's device. ReDigi argued that from a technical standpoint, its process should not be seen as making a reproduction. ReDigi emphasizes that its system simultaneously "causes [packets] to be removed from the . . . file remaining in the consumer's computer" as those packets are copied into the computer buffer and then transferred to the ReDigi server. However, according to the Court the fixing of the digital file in ReDigi's server, as well as in the new purchaser's device, creates a new phonorecord, which is a reproduction. The Court noted that unless the creation of those new phonorecords is justified by the doctrine of fair use, the creation of such new phonorecords involves unauthorized reproduction, which is not protected, or even addressed, by § 109(a).(Capitol Records, LLC v. ReDigi Inc. - 934 F. Supp. 2d 640 (S.D.N.Y. 2013) https://law.justia.com/cases/federal/appellate-courts/ca2/16-2321/16-2321-2018-12-12.html)

[33] Capitol Records, LLC v. ReDigi Inc. - 934 F. Supp. 2d 640 (S.D.N.Y. 2013) https://wilmap.stanford.edu/entries/capitol-records-llc-v-redigi-inc-934-fsupp2d-640-sdny-2013,(access 15.09.2024):

copyrighted digital files, which were stored as new physical objects on ReDigi's servers in Arizona and on the user's hard drive. Therefore, the court concluded that the first sale defense does not cover this any more than it covered the sale of cassette recordings of vinyl records in a bygone era[34].

Notably, the court also referenced a report by the U.S. Copyright Office regarding the *Digital Millennium Copyright Act* (DMCA[35]). The report concluded that the first sale doctrine, as traditionally applied in the physical world, cannot be directly transferred to the digital realm. This observation underscores the unique challenges and limitations of applying traditional copyright principles in the context of digital technologies.

This case is widely regarded as a foundational precedent within the American legal system, as it outlines the framework for interpreting the right of exhaustion, or the first sale doctrine, in the context of the digital environment. Its implications are pivotal for shaping the future of copyright law in the United States.

Parallel developments have unfolded within the European Union (EU) [36], where the right of exhaustion in the digital domain has been the focus of extensive legal and scholarly analysis. A series of landmark decisions by the Court of Justice of the European Union (CJEU) have brought this issue to the forefront. Notable cases include *UsedSoft GmbH v. Oracle International Corp.*, *Art & Allposters*

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[34] Capitol Records, LLC v. ReDigi, Inc., 934 F. Supp. 2d 655, 648 (S.D.N.Y. March 30, 2013).

[35] The Digital Millennium Copyright Act of 1998 U.S. Copyright Office Summary https://www.copyright.gov/legislation/dmca.pdf, (access 15.09.2024):

[36] It is noteworthy that the first case in the EU concerning the right of exhaustion specifically addressed sound recordings, which the European Court of Justice examined in the 1971 case Deutsche Grammophon v. Metro-SB-Großmärkte. (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61970CJ0078), (access 15.01.2025).

According to German law, Deutsche Grammophon was the rights holder of the sound recordings. It supplied the sound recordings not only in Germany but also in France. Meanwhile, Metro-SB-Großmärkte (Metro), a German retailer, acquired DG's records that had been lawfully sold in France and imported them into Germany for resale at prices lower than DG's fixed rates. DG sought to prevent Metro from selling these imported records in Germany, invoking its exclusive distribution rights under German copyright law.Metro refused to enter into an agreement to adhere to the prices proposed by Deutsche Grammophon for the supply of sound recordings. As a result, Deutsche Grammophon brought the matter to court, demanding that Metro cease selling the sound recordings.

Under German law, it was evident that the right of exhaustion applied. However, it was unclear whether the right of exhaustion would also apply within the territory of France. After extensive debates in German courts, the case was referred to the European Court of Justice.

In its ruling, the Court concluded that if a sound recording has been lawfully placed on the internal market, the intellectual property rights concerning it are exhausted, regardless of the member state in which it was placed on the market.

(Fathi-Najafi, Daniel. "Exhaustion of distributon rights in Open Source licensed software copies. A study on a Right holder's attempt of combining Open Source software with FRAND licensing." (2017), Korah, Valentine. "The Limitation of Copyright and Patents by the Rules for the Free Movement of Goods in the European Common Market." Case W. Res. J. Int'l L. 14 (1982))

International BV v. Stichting Pictoright, and *Vereniging Openbare Bibliotheken v. Stichting Leenrecht*[37]. These rulings collectively contribute to the evolving understanding of the right of exhaustion within the EU legal framework.

The *UsedSoft GmbH v. Oracle International Corp.* case[38] stands out as the first and most debated among these decisions. *Oracle International Corp.* (hereinafter "Oracle"), a producer of software, primarily distributed its products through internet downloads. Consumers who acquired these programs entered into license agreements with Oracle, which provided them with a non-exclusive, non-transferable, and perpetual right to use the software made available by Oracle, contingent upon payment.

Conversely, *UsedSoft* engaged in the resale of software licenses, challenging the conventional understanding of the right of exhaustion as it applies to digital goods. This case raised fundamental legal questions about whether and how traditional copyright principles, particularly the doctrine of exhaustion, extend to intangible digital content. By addressing these complex issues, the *UsedSoft* case has become a cornerstone for legal discourse and jurisprudence on the right of exhaustion in the EU, offering critical insights into the adaptation of copyright law to the realities of the digital age.

In October 2005 UsedSoft promoted an ‘Oracle Special Offer’ in which it offered for sale ‘already used’ licences for the Oracle programs at issue in the main proceedings. In doing so it pointed out that the licences were all ‘current’ in the sense that the maintenance agreement concluded between the original licence holder and Oracle was still in force, and that the lawfulness of the original sale was confirmed by a certificate.

Customers of UsedSoft who are not yet in possession of the Oracle software in question download a copy of the program directly from Oracle’s website, after acquiring such a used licence. Customers who already have that software and then purchase further licences for additional users are induced by UsedSoft to copy the program to the work stations of those users.

The case was litigated in German courts and, after progressing through multiple levels of judicial review, was ultimately referred to the Federal Court of Justice of Germany (the Bundesgerichtshof). The Bundesgerichtshof, in turn, sought a

[37] Case C-128/11 - UsedSoft GmbH v. Oracle International Corp., 3 July 2012, ECLI:EU:C:2012:407, Judgment of 22 January 2015, C-419/13, Art & Allposters International BV v Stichting Pictoright, ECLI:EU:C:2015:27, Judgment of 10 November 2016, C-174/15, Vereniging Openbare Bibliotheken v Stichting Leenrecht, ECLI:EU:C:2016:856, for analysis see for instance Grigoryan, Vahagn. "Tom Kabinet-The Aftermath: A critical evaluation of the CJEU's judgment and its market effects on digital distribution." (2020).

[38] *Case C-128/11* - UsedSoft GmbH v. Oracle International Corp https://curia.europa.eu/juris/liste.jsf?num=C-128/11, (access 15.09.2024).

preliminary ruling from the Court of Justice of the European Union (CJEU) to clarify several legal questions. The court faced two pivotal issues:

1. Is the person who can rely on exhaustion of the right to distribute a copy of a computer program a "lawful acquirer" within the meaning of Article 5(1) of Directive 2009/24?

2. If the reply to the first question is in the affirmative: is the right to distribute a copy of a computer program exhausted in accordance with the first half-sentence of Article 4(2) of Directive 2009/24 when the acquirer has made the copy with the rightholder's consent by downloading the program from the internet onto a data carrier[39]?

3. If the reply to the second question is also in the affirmative: can a person who has acquired a "used" software licence for generating a program copy as "lawful acquirer" under Article 5(1) and the first half-sentence of Article 4(2) of Directive 2009/24 also rely on exhaustion of the right to distribute the copy of the computer program made by the first acquirer with the rightholder's consent by downloading the program from the internet onto a data carrier if the first acquirer has erased his program copy or no longer uses it?'

In essence, the CJEU was tasked with determining the specific conditions under which the exhaustion principle could be applied to the distribution of computer programs.

In its decision, the CJEU ECJ provided the following answers to the referred questions:

- According to Article 4(2)[40] of the Software Directive[41], the right to distribute a computer program copy is considered exhausted when the rights-holder authorizes the download of that copy from the internet to a a data-carrier and grants the right to use it for an unlimited period in exchange for payment. This interpretation stemmed from the preliminary view that a sale under Article 4(2) includes any action, regardless of the method, that makes a copy of a computer program available within the EU for unlimited period of use in return for a lump-sum payment.

[39] Péter Mezei, Digital First Sale Doctrine Ante Portas – Exhaustion in the Online Environment, 6 (2015) JIPITEC 23, https://www.jipitec.eu/issues/jipitec-6-1-2015/4173/?searchterm=usedsoft, (access 15.09.2024):

[40] According to article 4(2) The first sale in the Community of a copy of a program by the rightsholder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof.

[41] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs
https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32009L0024, (access 15.09.2024).

- Based on Articles 4(2) and 5(1) of the Software Directive, when the right to use a computer program copy is resold, the second acquirer can invoke the exhaustion of the distribution right under Article 4(2), thereby qualifying as a legitimate acquirer of the program's copy.

This decision provided a foundational framework for interpreting the application of the exhaustion principle within the context of digital software distribution, balancing the rights of copyright holders with the evolving realities of the digital marketplace[42].

The court determined that UsedSoft was entitled to resell pre-owned software licenses. In addressing whether the right of exhaustion applies equally to computer programs distributed via tangible media and those downloaded from the internet, the Court held that no distinction exists between the two methods. From an economic point of view, the sale of a computer program on CD-ROM or DVD and the sale of a program by downloading from the internet are similar. Consequently, both should be subject to the same legal treatment under the principle of equal consideration.

The Court further examined whether the case involved the "distribution" of computer programs or merely "making them available to the public." This distinction was pivotal, as the first sale doctrine does not apply in cases where copyrighted works are made available to the public without an actual transfer of ownership.

The judges ultimately concluded that Article 1(2) of the Directive 2001/29 does not affect the provisions of the Software Directive. As a result, the Software

[42] See more Morris, P. Sean, Knocking on the WTO's Door: International Law and the Principle of First Sale Download in UsedSoft v. Oracle (September 22, 2012). 17 ASIL Insights 5, January 24, 2013, Available at SSRN: https://ssrn.com/abstract=2207933, (access 15.09.2024)
Rubi-Puig, Antoni, Copyright Exhaustion Rationales and Used Software: A Law and Economics Approach to Oracle v. UsedSoft (October 1, 2013). Journal of Intellectual Property, Information Technology and e-Commerce Law 4(3), 2013, pp. 159-178, Available at SSRN: https://ssrn.com/abstract=2408659 (access 15.09.2024)
Grigoriadis, Lazaros Grigorios, Exhaustion and Software Resale Rights in Light of Recent EU Case Law (February 26, 2014). Journal of International Media and Entertainment Law (2013-2014), Vol. 5, No. 1, pp. 111-128, Available at SSRN: https://ssrn.com/abstract=2403554 (access 15.09.2024)
Linklater, Emma, UsedSoft and the Big Bang Theory: Is the E-Exhaustion Meteor About to Strike? (April 1, 2014). (2014) 5(1) Journal of Intellectual Property, Information Technology, and Electronic Commerce Law (JIPITEC) 12, Available at SSRN: https://ssrn.com/abstract=2433430 (access 15.09.2024)
Mezei, Péter, The Theory of Functional Equivalence and Digital Exhaustion – An Almost Concurring Opinion to the UsedSoft v. Oracle Decision (September 16, 2014). Gellén Klára - Görög Márta (Szerk.): Lege et Fide: Ünnepi tanulmányok Szabó Imre 65. születésnapjára, A Pólay Elemér Alapítvány Könyvtára, 65., Iurisperitus Bt., Szeged, 2016: p. 387-400., Available at SSRN: https://ssrn.com/abstract=2496876 or http://dx.doi.org/10.2139/ssrn.2496876
(access 15.09.2024)

Directive should be interpreted as lex specialis in this context[43]. Accordingly, the sale of a computer program, whether distributed on tangible or intangible media, leads to the exhaustion of the distribution right under the Directive. This interpretation establishes a critical framework for understanding the application of the exhaustion principle in digital and physical contexts alike.

Addressing *Oracle*'s argument that it was not selling computer programs but merely entering into licensing agreements with customers, the Court concluded that the concept of "sale" should be interpreted broadly. The Court stated that according to a commonly accepted definition, a 'sale' is an agreement by which a person, in return for payment, transfers to another person his rights of ownership in an item of tangible or intangible property belonging to him. Consequently, the Court determined that downloading a program from the internet constitutes a transfer of ownership rights[44].

The Court emphasized that a narrow interpretation of the term "sale" would undermine the effectiveness of Article 4(2) of the Software Directive since suppliers would merely have to call the contract a 'licence' rather than a 'sale' in order to circumvent the rule of exhaustion and divest it of all scope.

Thus, the Court rejected *Oracle*'s argument that it was not selling computer programs but merely licensing them to customers.

The Court's final ruling was that second and subsequent acquirers of a license must be considered lawful purchasers who can invoke the exhaustion principle as a limitation on the rights holder's distribution right[45].

While the *Oracle* case generated significant debate and was widely regarded as a landmark decision, it is essential to acknowledge that its scope was relatively narrow, applying exclusively to computer programs. Furthermore, in the subsequent *Nintendo v. PC Box* case, the CJEU clarified that the conclusions reached in *UsedSoft* were not applicable to video games. The Court reasoned that, unlike pure computer programs, video games consist of additional elements such as graphics, music, and other features. As a result, they are inherently different in

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[43] Grigoryan, Vahagn. "Tom Kabinet-The Aftermath: A critical evaluation of the CJEU's judgment and its market effects on digital distribution." (2020) https://www.diva-portal.org/smash/get/diva2:1436082/FULLTEXT01.pdf, (access 15.09.2024):

[44] *Case C-128/11* - UsedSoft GmbH v. Oracle International Corp https://curia.europa.eu/juris/liste.jsf?num=C-128/11, (access 15.09.2024).

[45] Péter Mezei, Digital First Sale Doctrine Ante Portas – Exhaustion in the Online Environment, 6 (2015) JIPITEC 23 https://www.jipitec.eu/issues/jipitec-6-1-2015/4173/?searchterm=usedsoft, (access 15.09.2024).

nature and are governed by the Information Society Directive, rendering the exceptions outlined in the Software Directive inapplicable[46:].

Subsequent CJEU rulings on the right of exhaustion did not introduce significant changes. However, the *NUV and GAU v. Tom Kabinet* case, decided on December 19, 2019, marked a turning point, sparking intense legal and academic discourse[47].

NUV and *GAU* were associations dedicated to protecting the rights of Dutch publishers. On the other hand, *Tom Kabinet* operated a website that, among other services, served as a virtual marketplace for second-hand e-books.

In July 2014, *NUV* and *GAU* filed a complaint against *Tom Kabinet*. The Amsterdam District Court found that there was no *prima facie* copyright infringement. However, the Appellate court, while upholding the lower court's decision, imposed an injunction prohibiting *Tom Kabinet* from providing services that enabled the resale of illegally downloaded e-books. Following the Appellate court's ruling, *Tom Kabinet* restructured its platform into a reading club. For a fee, the club offered access to second-hand e-books that were either purchased by *Tom Kabinet* or donated by other members. Donors were required to provide download links and declare that they no longer retained a copy of the book.

Tom Kabinet downloaded the e-books from resellers' platforms, affixed its own mark to the downloaded copies to certify their lawful acquisition, and made them available for individual purchase or through a subscription model. However, the subscription service was eventually replaced by a membership-based system. Despite these changes, *NUV* and *GAU* filed another complaint, seeking to halt *Tom Kabinet*'s practice of making e-books available to the public.

Given the complex legal questions that arose during the proceedings, The rechtbank Den Haag (District Court, The Hague) referred the case to the CJEU, raising several fundamental issues for clarification. This referral underscored the evolving challenges associated with applying the principle of exhaustion to digital goods, particularly in the context of e-book distribution.

1. Does the right of distribution include the making available remotely by downloading, for use for an unlimited period, of e-books (being digital copies of books protected by copyright) at a price by means of which the copyright holder

[46] Grigoryan, Vahagn. "Tom Kabinet-The Aftermath: A critical evaluation of the CJEU's judgment and its market effects on digital distribution." (2020) https://www.diva-portal.org/smash/get/diva2:1436082/FULLTEXT01.pdf, (access 15.09.2024).
[47] C-263/18, NUV and GAU v Tom Kabinet, ECLI:EU:C:2019:1111. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62018CJ0263, (access 15.09.2024).

receives remuneration equivalent to the economic value of the work belonging to him**?**

2. If the answer to the first question is affirmative, does the principle of exhaustion apply in such a context?[48]

The Court, consistent with its approach in prior rulings, commenced its analysis by examining the principles enshrined in the WIPO Copyright Treaty. It determined that both the interpretation of Article 6 of the treaty and the explanatory memorandum clearly establish that the right of distribution applies exclusively to fixed copies capable of circulation as tangible objects. Consequently, the distribution right, as framed by the treaty, does not extend to works stored on intangible media, such as e-books.

In addition, the Court revisited its reasoning in *UsedSoft* but clarified that drawing a parallel between e-books and computer programs is inappropriate. The computer programs fall under the *lex specialis* provisions of the Software Directive, unlike the e-books. Furthermore, while there may be no economic distinction between downloading a computer program from a website and acquiring it on a physical medium, the situation with e-books is fundamentally different. E-books cannot be equated with physical books either economically or functionally. Specifically, intangible digital copies, unlike physical books, do not deteriorate with use, and "used" digital copies can serve as perfect substitutes for new copies.

Moreover, the Court highlighted that the transfer of e-books entails minimal effort and cost, which would have a detrimental effect on rights holders if parallel secondary markets were to emerge.

The Court then turned to the question of whether making e-books available constituted "communication to the public." Drawing from its prior jurisprudence on the rights of communication to the public and making works available, the Court concluded that the reading club allowed any interested individual to become a member. Furthermore, in the absence of technical measures to ensure that only one copy of a work could be downloaded during access or to prevent its use after the specified period, the Court underscored the significance of the number of individuals who could access the work simultaneously or sequentially.

The Court clarified that for an act to qualify as "communication to the public," it must employ a specific technical means not previously used or target a new audience not contemplated by the rights holder during the initial communication. Considering that the accompanying license permitted users to download and read

[48] Ibid

e-books on their devices, the Court ruled that such activity constituted communication to the public.

Consequently, the Court determined that downloading e-books for permanent use constitutes communication to the public, specifically making the work available in a manner that enables members of the public to access it at a time and place of their choosing. The Court further concluded that the principle of exhaustion does not apply to such acts.

The *Tom Kabinet* ruling has been the subject of significant criticism within academic circles, with scholars arguing that it fails to adequately account for the unique attributes of the exhaustion doctrine in the digital age. Nevertheless, subsequent developments within the European Union reflect a broader trend away from recognizing digital exhaustion. Despite extensive doctrinal research and numerous proposals advocating for its integration, the principle of digital exhaustion has been conspicuously absent from the copyright reform initiatives within the EU's Digital Single Market[49].

While the potential benefits of digital exhaustion can be extensively debated, especially in terms of its advantages for secondary markets, it is essential to acknowledge the unique considerations associated with exhaustion in the context of

[49] See detailed discussions Ansgar Kaiser, Exhaustion, Distribution and Communication to the Public – The CJEU's Decision C-263/18 – Tom Kabinet on E-Books and Beyond, GRUR International, Volume 69, Issue 5, May 2020, Pages 489–495, https://doi.org/10.1093/grurint/ikaa043, (access 15.01.2025).
Caterina Sganga , Is the digital exhaustion debate really exhausted? Some afterthoughts on the Grand Chamber decision in Tom Kabinet (C-263/18) (May 2020) https://copyrightblog.kluweriplaw.com/2020/05/19/is-the-digital-exhaustion-debate-really-exhausted-some-afterthoughts-on-the-grand-chamber-decision-in-tom-kabinet-c-263-18/, (access 15.01.2025).
Ghosh, Shubha and Mezei, Péter, The Elusive Quest for Digital Exhaustion in the US and the EU - The CJEU's Tom Kabinet Ruling a Milestone or Millstone for Legal Evolution? (December 1, 2020). Hungarian Yearbook of International Law and European Law, 2020, p. 249-275., Available at SSRN: https://ssrn.com/abstract=3984181, (access 15.01.2025).
Mezei, Péter, The Doctrine of Exhaustion in Limbo - Critical Remarks on the CJEU's Tom Kabinet Ruling (March 24, 2020). Zeszty Naukowe Uniwersytetu Jagiellonskiego - Prace z Prawa Wlasnosci Intelektualnej (Jagiellonian University Intellectual Property Law Review), Issue 2/2020, p. 130-153., Available at SSRN: https://ssrn.com/abstract=3560138 or http://dx.doi.org/10.2139/ssrn.3560138, (access 15.01.2025).
Sganga, Caterina. "Digital Exhaustion After Tom Kabinet: A Nonexhausted Debate." In EU Internet Law in the Digital Single Market, pp. 141-176. Cham: Springer International Publishing, 2021.
Claughton, Leo J. "Tom Kabinet: The Case of Digital Exhaustion." Interscript 4, no. 1 (2021).
Oprysk, Liliia. "Secondary Communication under the EU Copyright Acquis after Tom Kabinet: Between Exhaustion and Securing Work's Exploitation." J. Intell. Prop. Info. Tech. & Elec. Com. L. 11 (2020): 200. Geiregat, Simon. "Digital exhaustion and internal market law: Tom Kabinet." Common Market L. Rev. 58 (2021): 1207.

digital works. These considerations are particularly significant when addressing exhaustion related to performances and other intangible assets[50].

License Agreements vs. Transfer of Ownership Rights

One of the most significant challenges in practice involves determining whether an agreement constitutes a license or an actual transfer of ownership rights. The online dissemination of intellectual property objects not fixed on tangible media—particularly when governed by standard-form agreements with consumers—frequently raises the unresolved question of whether such transactions should be classified as a sale or merely a license[51].

In its landmark *UsedSoft* decision, the Court of Justice of the European Union (CJEU) adopted a broad interpretation of the term "sale." The Court held that a sale involves any agreement under which an individual transfers ownership rights to tangible or intangible objects in exchange for monetary consideration[52]. While this interpretation has been lauded for its expansive approach, it also sparked significant debate across EU legal systems. For example, while the interpretation aligned with the legal frameworks of Austria and the Netherlands, it was not readily applicable within Germany's legal system[53].

To circumvent the implications of the right of exhaustion, rights holders increasingly rely on licensing frameworks, crafting agreements that allow them to assert that no transfer of ownership has occurred. Such agreements are not only lengthy but are also frequently amended, further complicating the task of determining whether an agreement entails a transfer of ownership rights, a limited license to use[54], or the provision of services rather than the sale of digital goods[55].

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[50] Sganga, Caterina. "Digital Exhaustion After Tom Kabinet: A Nonexhausted Debate." In EU Internet Law in the Digital Single Market, Springer, Cham, 2021,141-176.

[51] Karapapa, Stavroula. "Exhaustion of rights on digital content under EU copyright: positive and normative perspectives." In Research Handbook on Intellectual Property and Digital Technologies. Edward Elgar Publishing, 2020, https://www.researchgate.net/publication/342690709_Exhaustion_of_rights_on_digital_content_under_EU_copyright_positive_and_normative_perspectives, (access 15.01.2025).

[52] *Case C-128/11* - UsedSoft GmbH v. Oracle International Corp https://curia.europa.eu/juris/liste.jsf?num=C-128/11, (access 15.09.2024).

[53] Ghosh, Shubha, and Péter Mezei. "The Elusive Quest for Digital Exhaustion in the US and the EU-The CJEU's Tom Kabinet Ruling a Milestone or Millstone for Legal Evolution?." Hungarian Yearbook of International Law and European Law (2020):

[54] Perzanowski, A. and Schultz, J., 2010. Digital exhaustion. UClA l. reV., https://www.uclalawreview.org/digital-exhaustion-2/:(access 15.09.2024).

[55] Karapapa, Stavroula. "Exhaustion of rights on digital content under EU copyright: positive and normative perspectives." In Research Handbook on Intellectual Property and Digital Technologies. Edward Elgar Publishing, 2020.

This strategic shift by rightholders also explains the growing prevalence of access-based systems, such as streaming services, over traditional download-based models. For example, *Spotify*, a prominent Swedish streaming service, does not grant users permanent ownership or the ability to download music files. Instead, it offers access to a library of music in exchange for a subscription fee. This approach underscores the industry's deliberate effort to bypass the principle of digital exhaustion.

The persistence of such practices illustrates the ongoing tension between the concepts of "transfer of ownership rights" and "license agreements." This tension is particularly pronounced in the context of digital content, where ownership remains a contentious and unsettled issue. Consequently, this unresolved dichotomy perpetuates legal and practical uncertainty in the relationships between rights holders and consumers, raising critical questions about the future of intellectual property rights in the digital age.

The Role of Emerging Technologies in Supporting Digital Exhaustion Rights

In the landmark *Tom Kabinet* case, the Court of Justice of the European Union underscored the significant risks posed by the absence of mechanisms capable of ensuring that only a single copy of a digital work could be downloaded[56]. Building on this observation, some scholars have advocated for the adoption of technologies that impose restrictions on access to digital copies, suggesting that such innovations could facilitate the application of the digital exhaustion principle.

Although this proposition appears theoretically viable, its practical implementation faces substantial challenges, particularly in verifying whether a user has effectively deleted their local copy of a digital work. Some authors have proposed the use of "forward-and-delete"[57] technologies as a means to exercise comprehensive control over the transfer of intellectual property-protected objects, thereby mitigating risks associated with the failure to delete residual digital files[58].

Others have pointed to the potential of blockchain technologies, which, they argue, could ensure that digital files are owned and transferred exclusively by a

[56] Alexandra Morgan, Paul Abbott, and Dr. Christopher Stothers, 'ECJ rules that the sale of secondhand e-books infringes copyright' Journal of Intellectual Property Law & Practice, 15.4 (2020).

[57] The essence of these technologies is that the user undertakes the obligation to delete the files in their possession from their devices after transferring them to another user.

[58] Mezei, Péter, The Doctrine of Exhaustion in Limbo - Critical Remarks on the CJEU's Tom Kabinet Ruling (March 24, 2020). Zeszty Naukowe Uniwersytetu Jagiellonskiego - Prace z Prawa Wlasnosci Intelektualnej (Jagiellonian University Intellectual Property Law Review), Issue 2/2020, p. 130-153., Available at SSRN: https://ssrn.com/abstract=3560138 or http://dx.doi.org/10.2139/ssrn.3560138, (access 15.01.2025).

single individual, mimicking the transferability of tangible media. These scholars assert that blockchain could serve as a critical tool in realizing digital exhaustion rights, as it establishes conditions for the transfer of electronic files akin to those governing the distribution of works fixed on physical media.

Additionally, technical protection measures are often cited as a complementary solution, as they could restrict the sharing of files to a finite number of users[59]. However, practical experience consistently reveals that such measures are vulnerable to circumvention, with many protection systems being relatively easy to bypass or "crack." [60]

These debates highlight an ongoing effort among proponents of digital exhaustion to align the characteristics of digital objects with those of tangible objects[61]. This approach seeks to substantiate the application of digital exhaustion by conceptualizing digital objects as functional equivalents to physical ones. However, such endeavors have repeatedly underscored the fundamental differences between digital and tangible objects, necessitating distinct regulatory frameworks for their governance[62].

In light of technological advancements, numerous scholars contend that digital exhaustion rights are becoming increasingly obsolete, particularly as new modes of intellectual property dissemination, such as streaming services, gain prominence. Others argue that evolving consumer behavior in the digital domain continually reshapes the contours of intellectual property law, rendering digital exhaustion mechanisms less relevant. This rapid technological evolution, they suggest, is more likely to prioritize bypassing traditional exhaustion frameworks than reinforcing

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[59] Reese, R. Anthony, The First Sale Doctrine in the Era of Digital Networks. U of Texas Law, Public Law Research Paper No. 57; and U of Texas Law, Law and Econ Research Paper No. 004, Available at SSRN: https://ssrn.com/abstract=463620 or http://dx.doi.org/10.2139/ssrn.463620, SSRN: https://ssrn.com/abstract=3560138 or http://dx.doi.org/10.2139/ssrn.3560138, (access 15.01.2025).

[60] Simple search on the "Google" search engine reveals 6-10 methods for removing DRMs. For instance
https://www.techadvisor.com/article/730819/how-to-remove-drm.html,
SSRN: https://ssrn.com/abstract=3560138 or http://dx.doi.org/10.2139/ssrn.3560138, (access 15.01.2025).
https://www.makeuseof.com/tag/ways-to-remove-drm-from-ebooks/

[61] Karapapa, Stavroula. "Exhaustion of rights on digital content under EU copyright: positive and normative perspectives." In Research Handbook on Intellectual Property and Digital Technologies. Edward Elgar Publishing, 2020.

[62] Watkins, Rebecca D., Janice Denegri-Knott, and Mike Molesworth. "The relationship between ownership and possession: observations from the context of digital virtual goods." Journal of Marketing Management 32, no. 1-2 (2016).

them, signaling a potential shift in the trajectory of intellectual property regulation in the digital age[63].

The Rights of Making Works Available to the Public, Distribution, and Reproduction

The right of distribution has historically applied to the transfer of copies fixed on tangible media, whereas the right of making works available to the public has emerged more recently. The latter refers to providing access to intellectual property objects in a manner that allows individuals to access them at a time and place of their choosing. The distinction between these two rights is closely tied to the applicability of the principle of exhaustion.

As previously noted, interpretations of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty hold that the right of distribution applies exclusively to the distribution of copies fixed on tangible media. This interpretation effectively separates the right of distribution from the right of making works available to the public[64]. Some authors[65] argue for abandoning the originalist interpretation of the treaty and propose extending the right of distribution to include copies fixed on intangible media. In this context, the concepts of tangibility[66], their essential characteristics, and their impact on modes of distribution have become central themes in discussions about the applicability of the principle of exhaustion.

Three scenarios are possible in this context:

1. **Tangible Media and Intellectual Property Objects:** When the intellectual property object and its physical medium are distinct and separable, such as books or music fixed on CDs, the principle of exhaustion is clearly applicable, as these are tangible objects fixed on physical media.

2. **Merged Intellectual Property and Medium:** When the intellectual property and its medium are inseparable, as in the case of sculptures or paintings, the principle of exhaustion still applies. However, the author retains some control over resale, for instance, through resale royalties.

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[63] Ibid

[64] Agreed statements concerning the WIPO Copyright Treaty (December 20, 1996) https://wipolex.wipo.int/en/treaties/textdetails/12741, (access 15.09.2024).

[65] Sganga, Caterina, Digital Exhaustion after Tom Kabinet: A Non-exhausted Debate (June 15, 2020). In T.Synodinou et al (eds.), EU Internet Law in the Digital Single Market, Springer, 2021, Available at SSRN: https://ssrn.com/abstract=3803940.

[66] According to the Blake's Law Dicitionary tangible means Something that has form and exists physically and is discernible by one or more senses. https://thelawdictionary.org/tangible/, (access 15.09.2024).

3. **Works Distributed Without a Tangible Medium:** These include works made available online without physical media. While the principle of exhaustion clearly applies to the first two categories, its applicability to the third remains contentious[67].

We contend that the right of distribution, and by extension the principle of exhaustion, pertains solely to tangible objects. This distinction arises from the fact that the right of distribution applies to goods rather than services. When copies are fixed on tangible media, it is relatively straightforward to determine whether they constitute goods. However, when dealing with electronic copies, numerous complexities arise. For example, access to electronic files, such as music files or online games, is often provided through services, meaning users typically do not acquire proprietary rights to the content they pay for[68]. Instead, they gain limited access to the service for a specified duration, raising the issue of distinguishing goods from services in the context of intangible objects.

Secondly, the principle of exhaustion applies only to the distribution of the same copy of an object that has entered the market with the rights holder's consent. This principle, first articulated in trademark law, was reaffirmed by the Court of Justice of the European Union in *Sebago v. G-B Unic*, which held that once a rights holder consents to the market placement of a product, they cannot oppose its subsequent distribution. This principle is also applicable to copyright and related rights[69]. However, with digital copies, it is difficult to determine whether the same copy is being distributed or if a new copy has been created and disseminated. For instance, when a digital file is downloaded and shared a second time, it becomes unclear whether this constitutes the same file or a new instance, complicating the application of the principle of exhaustion.

Moreover, even setting aside the conflict between the rights of distribution and making works available to the public, it is important to consider an additional issue evident in the *ReDigi* case. In that case, the New York District Court held that transferring electronic files requires reproduction, which constitutes reproduction

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[67] Sganga, Caterina, Digital Exhaustion after Tom Kabinet: A Non-exhausted Debate (June 15, 2020). In T.Synodinou et al (eds.), EU Internet Law in the Digital Single Market, Springer, 2021, Available at SSRN: https://ssrn.com/abstract=3803940, (access 15.01.2025).

[68] Ibid

[69] Karapapa, S., 2020. Exhaustion of rights on digital content under EU copyright: positive and normative perspectives. In Research handbook on intellectual property and digital technologies (pp. 483-505). Edward Elgar Publishing.

Egli, Patricia, and Juliane Kokott. "Sebago Inc. and Ancienne Maison Dubois & Fils SA v. GB-Unic SA." *American Journal of International Law* 94, no. 2 (2000): 386-391. Egli, Patricia, and Juliane Kokott. "Sebago Inc. and Ancienne Maison Dubois and Fils v. GB-Unic SA. Case C-173/98." *American Journal of International Law* (2000): 386-391.

of the work. Consequently, the first sale doctrine was deemed inapplicable. The court explicitly noted that the creation of a new tangible object constitutes an act of reproduction, subject to the rights holder's reproduction rights[70].

Digital exhaustion often leads to violations of reproduction rights because proposals advocating for secondary digital markets or specific technological mechanisms often fail to consider the requirement of downloading digital files by users. This inherently involves the reproduction of protected works, resulting in the infringement of reproduction rights. As a result, online transfers are inherently fraught with the risk of reproduction rights violations.

In conclusion, digital exhaustion inevitably generates disputes concerning the interpretation of the rights of distribution, making works available to the public, and reproduction. These conflicts underscore the need for a nuanced and evolving approach to address the unique challenges posed by digital content in the context of intellectual property law.

The Distinct Role of Performers in Intellectual Property

When analyzing the principle of exhaustion in the context of performances, it is crucial to acknowledge the unique position of performers relative to other intellectual property rights holders. Performers are among the most generous rights holders, frequently offering their performances on free digital platforms, such as YouTube, or through affordable streaming services. For example, a monthly subscription to *Spotify* begins at approximately ten dollars, granting users access to an extensive catalog of music. This fee is considerably modest compared to historical practices, where consumers often paid a similar amount for a single CD containing only ten tracks.

This contrast highlights the fundamental differences between the economics of music files and other intellectual property objects, such as e-books or software, where costs often reach hundreds of dollars. In contrast, access to music can be obtained for a minimal monthly fee, underscoring the distinct nature of performance fixations compared to other copyright-protected works.

Moreover, performers are disproportionately affected by piracy and remain among the intellectual property rights holders most in need of enhanced protection. Their vulnerability to unauthorized use necessitates a stricter regulatory framework to safeguard their rights effectively.

Granting digital exhaustion rights for digital fixations of performances would exacerbate the challenges performers face, particularly given that performances are

[70] Capitol Records, LLC v. ReDigi, Inc., 934 F. Supp. 2d 655, 648 (S.D.N.Y. March 30, 2013).

already widely accessible to the public through legal platforms. The introduction of secondary markets for digital performances would likely diminish the economic incentives for performers while undermining their control over the dissemination of their works.

Conclusion

The doctrine of first sale, or the principle of exhaustion, presents significant challenges in the digital era. We argue that this principle should be interpreted narrowly, applying only to the distribution of performances fixed on tangible, physical media. In cases where performances are disseminated through digital platforms, such as streaming services, the principle of exhaustion should not be deemed applicable.

Furthermore, while Armenian legal practice and legislation have yet to address the interpretation of the exhaustion principle in the digital environment. The Armenian legal framework should adopt an interpretation that excludes the application of the first sale doctrine to digital fixations of performances. Such an approach would align with the unique characteristics of digital fixations performances and ensure adequate protection for performers in the evolving landscape of intellectual property rights.

Conflict of Interests
The author declares no ethical issues or conflicts of interest in this research.
Ethical Standards
The author affirms this research did not involve human subjects.

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IMPOSSIBILITY OF PARTICIPATION IN PROCEEDINGS: SOME PRACTICAL KEY ISSUES

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Abstract. In the article, the procedural regulations concerning recusal, self-recusal, and exemption from participation in proceedings, as provided in the currently effective Criminal Procedure Code of the Republic of Armenia, which entered into force on 1 July 2022, as well as the practical problems existing in practice in relation thereto, have become the subject of scientific and practical analysis. In particular, the procedural procedures for terminating participation in proceedings, the subject composition, and the distinguishing features of the grounds have become the subject of detailed analysis. The relevant case law of the European Court of Human Rights and the judicial practice formed by the Court of Cassation of the Republic of Armenia in relation to certain practical issues are presented. The grounds for declaring recusal of a judge and the various interpretations existing in practice in relation thereto have become the subject of separate discussion. Special reference is made to the procedure for resolving the issue of recusal (self-recusal) or exemption from participation in proceedings. In this regard, various approaches already formed in practice in relation to certain regulations, as well as their possible solutions, are presented. In particular, with regard to this latter issue, the question of the subject authorized to decide on exemption from participation in proceedings, when it concerns judicial guarantees proceedings carried out at the pre-trial stage, has become the subject of detailed discussion and analysis.

Keywords - *recusal, self-recusal, exemption from participation in proceedings, independent, impartial, subjective approach, objective approach*.

Introduction

The legislative consolidation of circumstances excluding participation in proceedings, and in particular the provision of the institution of judicial recusal (self-recusal), stems from the requirement of the so-called presumption of

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independence[2]. The provision of this institution is one of the important mechanisms for ensuring legality in criminal proceedings and for the protection of the lawful interests of the individual[3].

The Criminal Procedure Code of the Republic of Armenia (Chapter 8) regulates in detail the procedural relations related to the impossibility of participation in criminal proceedings, in particular the circumstances excluding participation in proceedings and the procedural order for resolving the issue of impossibility of participation.

A) Procedural mechanisms for terminating participation and subject composition

The Criminal Procedure Code of the Republic of Armenia provides for two methods for terminating the participation of relevant persons in criminal proceedings: recusal or self-recusal, and exemption from participation in proceedings.

The differentiation of these methods is based both on the subject composition and on the circumstances excluding participation in proceedings.

In the presence of the relevant grounds provided by criminal procedural law, participation in proceedings by way of recusal or self-recusal may be terminated with respect to:

1. the judge,
2. public participants in the proceedings (the prosecutor, the investigator, the head of the investigative body, the head of the inquiry body, the inquiry officer),
3. auxiliary participants in the proceedings, namely the witness to procedural acts, the expert, the interpreter, or the court session secretary.

Exemption from participation in proceedings may apply to:

1. private participants in the proceedings, namely the defense counsel, the authorized representative (of the victim or the civil defendant), and the legal representative,
2. auxiliary participants in the proceedings, namely the attorney of the witness.

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[2] OKPALUBA, Matthew Chuks and MALOKA, Tumo Charles. The fundamental principles of recusal of a judge at common law: recent developments. Obiter [online]. 2022, vol.43, n.2 [cited 2025-06-09], pp.88-112, available at the following link https://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1682-58532022000200005

[3] Course of the Criminal Process / Under red. Of doctor of law, prof. L.V. Golovko. 2-nd ed., ex. - M. Statute, 2017, page 375/Курс уголовного процесса / Под ред. д.ю.н., проф. Л.В. Головко. 2-е изд., испр. – М.: Статут, 2017, էջ 375:

As regards exemption from participation for a valid reason, such a motion may be submitted only by the attorney, the legal representative, the court session secretary, the witness to procedural acts, or the interpreter.

The basis for the impossibility of participation in proceedings, in the presence of circumstances provided by law, is the conviction of the relevant person regarding the impossibility of the normal course of proceedings due to their participation. At the same time, regardless of whether a motion is submitted, criminal procedural law obliges the relevant persons who possess information about circumstances excluding their participation in criminal proceedings to report such circumstances to the interested participants in the proceedings and to the authority conducting the proceedings (Article 64, part 2). It follows from the above regulation that the existence of certain circumstances, with the exception of specific cases provided by law (for example, the grounds provided in Article 71, part 2 of the Constitutional Law "Judicial Code of the Republic of Armenia"), does not unconditionally exclude a person's participation in proceedings.

As regards the grounds for recusal (self-recusal), criminal procedural law refers, as circumstances excluding a judge's participation in proceedings, to the grounds provided in Article 71, part 2 of the Constitutional Law "Judicial Code of the Republic of Armenia", but does not limit itself thereto, additionally providing three more grounds, one of which in essence repeats the ground provided by the Judicial Code, according to which, as a private person, the judge witnessed the facts examined in the course of the proceedings, while another is of a general nature and reproduces the requirement that a judge may not participate in proceedings if other circumstances exist that may give rise to reasonable doubt regarding the judge's impartiality in relation to the given proceedings.

The institution of self-recusal is intended to guarantee the adoption of objective and impartial decisions in the sphere of justice, both in regulating procedural (procedural-law) and substantive legal relations, and is intended to guarantee the independence of the judiciary, the effectiveness of justice, and impartiality[4].

Before turning to the specific grounds, it is necessary to note that according to the case law formed by the European Court of Human Rights (hereinafter also the European Court), within the meaning of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter also the Convention), a court must be impartial. For the purpose of examining impartiality, the European Court distinguishes the subjective approach (criterion), which aims to

[4] The decision of the RA Constitutional Court of September 28, 2010, No. 918, paragraph 5/ՀՀ Սահմանադրական դատարանի՝ 2010 թվականի սեպտեմբերի 28-ի թիվ ՍԴՈ-918 որոշման 5-րդ կետը:

determine the judge's interest in the decision adopted in a specific case, and the objective approach (criterion), which is intended to determine whether the judge has ensured the necessary guarantees to exclude any reasonable doubt in this regard[5]. The application of the second criterion requires determining whether, regardless of the conduct of the person administering justice, there are facts that may cast doubt on the judge's impartiality[6].

The specific circumstances excluding a judge's participation in criminal proceedings have been identified according to the logic that such circumstances may give rise, in the mind of an impartial observer, to reasonable doubt regarding the judge's impartiality in the given proceedings.

Thus, according to Article 66 of the Criminal Procedure Code of the Republic of Armenia, a judge may not participate in proceedings if the following grounds established in Article 71, part 2 of the Constitutional Law "Judicial Code of the Republic of Armenia" are present:

1. the judge has a biased attitude toward a person acting as a party, that person's representative, attorney, or other participants in the proceedings.

In relation to the above ground, the Court of Cassation of the Republic of Armenia, in the case concerning Hrachya Nersisyan and Edgar Amiryanyan, emphasized that by providing for the institution of recusal, the legislator has закрепել the procedural guarantee that enables the removal from conducting criminal proceedings or from participation in criminal proceedings of a participant in the proceedings who is directly or indirectly interested in the outcome of the criminal case. This constitutes a guarantee of the person's right to a fair trial, the right to an effective remedy for the protection of their rights, as well as the rule of law[7]. Developing this position, in the case concerning Karen Hovhannisyan, the Court of Cassation stated that resolving the recusal declared to the authority

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[5] The decision of October 1, 1982 of the European Court in the case of ***Piersack v. Belgium,*** app. No 8692/79, paragraph 30, decision of December 16, 2003 of the European Court in the case of in the case of ***Grieves v. the United Kingdom [GC],*** app. No. 57067/00, paragraph 69/Եվրոպական դատարանի՝ ***Piersack v. Belgium*** գործով 1982 թվականի հոկտեմբերի 1-ի վճիռը, գանգատ թիվ 8692/79, 30-րդ կետը, ***Grieves v. the United Kingdom [GC]*** գործով 2003 թվականի դեկտեմբերի 16-ի վճիռը, գանգատ թիվ 57067/00, 69-րդ կետը։

[6] The decision of October 28, 1998 of the European Court in the case of ***Castillo Algar v. Spain,*** app. No. 28194/95, paragraph 45, the decision of June 6, 2000 of the European Court in the case of ***Morel v. France***, app. No. 34130/96, paragraph 42/Եվրոպական դատարանի՝ ***Castillo Algar v. Spain*** գործով 1998 թվականի հոկտեմբերի 28-ի վճիռը, գանգատ թիվ 28194/95, 45-րդ կետը, ***Morel v. France***, 2000 թվականի հունիսի 6-ի վճիռը, գանգատ թիվ 34130/96, 42-րդ կետը։

[7] The decision of the RA Cassation Court in the case of *Hrachya Nersisyan and Edgar Amiryan,* November 15, 2017, No. TD2/0005/01/16, paragraph 14/Վճռաբեկ դատարանի՝ *Հրաչյա Ներսիսյանի և Էդգար Ամիրյանի* գործով 2017 թվականի նոյեմբերի 15-ի թիվ ՏԴ2/0005/01/16 որոշման 14-րդ կետը։

conducting the proceedings and confirming the presence or absence of circumstances excluding participation in proceedings is a prerequisite for the performance of investigative or other procedural actions and the adoption of procedural decisions by the competent subject in the specific proceedings, and consequently for ensuring their legality. Addressing biased attitude as a circumstance excluding participation in proceedings, the Court of Cassation noted that the subject initiating the motion must substantiate the existence of the given ground by reference to specific facts capable of giving rise, in the mind of an impartial observer, to reasonable doubt regarding the impartiality of the investigator, and that the subject resolving the recusal or assessing the admissibility of evidence challenged on the ground that it was obtained by a person subject to recusal must provide a reasoned confirmation or refutation of the existence of the given ground. Taking this position into account, in the specific case the Court of Cassation concluded that disagreement of a participant in the proceedings with the decisions adopted by the authority conducting the proceedings, or mere reference to the circumstance that those decisions do not correspond to the interests of a specific participant, is not in itself sufficient to form a reasonable assumption regarding the lack of impartiality of the relevant subject[8].

2) The judge has participated in the examination of the given case in another court.

The identification of this ground also derives from the above-mentioned objective criterion concerning the impartiality of the judge.

In this regard, the Court of Cassation, in case No. ԵԴ/0013/06/19, made the subject of examination the question of whether the examination, by the same judge within the same proceedings, of a motion to apply detention as a preventive measure excludes the examination by that same judge of an appeal submitted to the Court of Appeal against a decision rendered, within the same proceedings, by another judge as a result of examining a motion to extend the term of detention. As a result, the Court of Cassation found that the ground under discussion excludes the examination of a case by the same judge in a higher judicial instance if it concerns the examination of an appeal or cassation complaint filed against a judicial act rendered by that specific judge within the framework of judicial guarantees of the pre-trial proceedings or as a result of the examination of the case on the merits in the same case.

[8] The decision of the RA Cassation Court in the case of *Karen Hovhannisyan*, May 27, 2022, No. EKD/0281/01/16/Վճռաբեկ դատարանի՝ *Կարեն Հովհաննիսյանի* գործով 2022 թվականի մայիսի 27-ի թիվ ԵԿԴ/0281/01/16 որոշումը։

Consequently, the examination by a specific judge of different motions within the framework of judicial guarantees of the pre-trial proceedings in the same case does not exclude that judge's examination, in a higher judicial instance, albeit within the same criminal proceedings, of a complaint filed against a judicial act rendered by another judge in relation to another motion. In particular, following the same logic, the Court of Cassation found that the examination of the initial motion to apply detention as a preventive measure in criminal proceedings does not hinder the examination, by the same judge, of subsequently submitted motions to extend the term of detention.

Developing the above-stated legal position, in the case concerning Levon Sargsyan and Suren Ghazaryan, the Court of Cassation stated that this ground unequivocally excludes the examination, by the same judge, of complaints filed against judicial acts rendered by that judge personally. However, in each specific case where the circumstance of a judge's participation in the same case at a lower judicial instance is raised as a ground for self-recusal, it must be assessed in the context of the degree of the judge's participation and the procedural actions carried out by that judge in the lower judicial instance.

In the specific case, the Court of Cassation, examining the judge's previous participation in the examination of the case in another court as a court session secretary, stated that this circumstance cannot indicate the necessity for the judge to declare self-recusal. The court conditioned this conclusion on the role of the court session secretary in criminal proceedings, as well as on the scope and nature of the procedural functions performed by that person. Under such circumstances, mere familiarization with the case materials in itself cannot lead to the reasonableness of doubts subsequently arising as to the judge's impartiality and cannot indicate the existence of grounds for self-recusal if that person later participates in the examination of the case as a judge.

Moreover, the conduct of preliminary hearings by a judge does not in itself constitute a circumstance excluding that judge's subsequent participation in the given proceedings[9]. By the same logic, a judge of the Court of Cassation's participation in proceedings does not exclude that judge's subsequent participation in the same proceedings before the Court of Cassation.

At the same time, criminal procedural law clearly establishes that a judge who has participated in the trial at the court of first instance or the court of appeal may not subsequently participate in the given proceedings.

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[9] The decision of the RA Cassation Court in the case of *Levon Sargsyan and Suren Ghazaryan*, May 17, 2024, No. ED/0064/01/21/Վճռաբեկ դատարանի՝ *Լևոն Սարգսյանի և Սուրեն Ղազարյանի* գործով 2024 թվականի մայիսի 17-ի թիվ ԵԴ/0064/01/21 որոշումը։

3) A close relative of the judge has been, is, or will reasonably be a participant in the case.

In relation to the above-mentioned ground, criminal procedural law refers to the Judicial Code of the Republic of Armenia, and in this regard the question arises as to whether, for the purposes of determining the circle of close relatives, one should be guided by the regulations of the Judicial Code of the Republic of Armenia or by those of the Criminal Procedure Code. At the same time, it should be noted that the Judicial Code of the Republic of Armenia provides for a broader circle.

Since, with respect to this ground, criminal procedural law refers to the Judicial Code of the Republic of Armenia, we consider that, when resolving the issue of recusal (self-recusal), one should be guided by the following circle of persons considered close relatives within the meaning of the Judicial Code of the Republic of Armenia: the judge's spouse; the parent of the judge or of the judge's spouse; the child of the judge or of the judge's spouse; the spouse of the child; a biological or non-biological (half-brother or half-sister) brother or sister; the grandfather, grandmother, grandchild, great-grandchild; the spouse or child of the brother or sister of the judge or of the judge's spouse; the adoptive parent or adopted child of the judge or of the judge's spouse.

4) The judge knows or reasonably should know that he or she personally, or his or her close relative, has an economic interest[10] related to the substance of the dispute or to one of the parties.

5) The judge holds a position in a non-profit organization, and the interests of that organization may be affected in the given case.

In addition to the above-mentioned grounds, Article 66 of the Criminal Procedure Code of the Republic of Armenia provides for the following circumstances excluding a judge's participation in proceedings:

1. within the framework of the procedures provided by the present Code in pre-trial proceedings, the judge has heard the accused's confession in connection with the charge brought.

The provision of such a ground excluding the judge's participation is closely connected with one of the essential innovations of the currently effective Criminal

[10] Within the meaning of this Article, the concept "economic interest" shall not include the following:
(1) managing stocks of the open joint-stock company in question through an investment fund or a pension fund or another nominee, where the judge is not aware of it;
(2) having a deposit in the bank in question, having an insurance policy with the insurance company in question, or being a participant of the credit union or the savings union in question, where the outcome of the case does not pose a significant threat to the solvency of that organisation;
(3) owning securities issued by the Republic of Armenia, a community or the Central Bank of the Republic of Armenia.

Procedure Code of the Republic of Armenia, namely, the institution of judicial deposition of the accused's testimony, where there exists a substantiated assumption that the accused may lawfully refrain from giving testimony during the trial.

2. as a private individual, the judge has witnessed the facts that are examined in the course of the proceedings;

3. other circumstances exist that may give rise to reasonable doubt regarding the judge's impartiality in relation to the given proceedings.

According to the assessment of the European Court, under the subjective criterion, the impartiality of the court or the judge operates as a presumption; therefore, until the contrary is proven, the judge is presumed to be subjectively impartial. In contrast, objective impartiality depends on external factors, and in this case the conduct of the judge acquires secondary significance. Elaborating on the objective criterion, the European Court has noted that it primarily concerns hierarchical or other connections between the judge and other participants in the proceedings, or the performance of different functions by the same person within the framework of judicial proceedings. Consequently, in each specific case it must be determined whether the nature of the given relationships and the degree of their closeness indicate that the court is not impartial.

The European Court of Human Rights has emphasized that in any case, regardless of whether both criteria or only one of them are applied, the issue of impartiality will depend on the specific facts of the case[11].

From the perspective of the objective criterion, the European Court has also emphasized the role played by the judge in the examination of the specific case, the scope and nature of the actions carried out by the judge, and has found that mere familiarization by the judge with the materials of the case does not lead to the reasonableness of doubts arising as to that judge's impartiality[12].

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[11] The decision of December 15, 2005 of the European Court in the case of ***Kyprianou v. Cyprus,*** No. 73797/01, paras. 118 and 121, the decision of January 9, 2018 of the European Court in the case of ***Nicholas v. Cyprus,*** No. 63246/10, paras. 49 and 53, the decision of January 24, 2019 of the European Court in the case of ***Ghulyan v. Armenia***, No. 35443/13, para. 45/Մարդու իրավունքների եվրոպական դատարանի՝ ***Kyprianou v. Cyprus*** գործով 2005 թվականի դեկտեմբերի 15-ի վճիռը, գանգատ թիվ 73797/01, 118-րդ և 121-րդ կետերը, ***Nicholas v. Cyprus*** գործով 2018 թվականի հունվարի 9-ի վճիռը, գանգատ թիվ 63246/10, 49-րդ և 53-րդ կետերը, *Ղուլյանն ընդդեմ Հայաստանի* գործով 2019 թվականի հունվարի 24-ի վճիռը, գանգատ թիվ 35443/13, 45-րդ կետը):

[12] The decisión of June 6, 2000 of the European Court in the case of ***Morel v. France,*** No. 34130/96, para. 45, the decision of March 4, 2014 of the European Court in the case of ***Fazlı Fazli Aslaner v. Turkey,*** No. 36073/04, para. 31/Մարդու իրավունքների եվրոպական դատարանի՝ ***Morel v. France*** գործով 2000 թվականի հունիսի 6-ի վճիռը, գանգատ թիվ 34130/96, 45-րդ կետը,

In another case, the European Court of Human Rights stated that, when examining the issue of a court's impartiality, the facts that form the basis for the emergence of doubts concerning impartiality are essential. When the issue under examination is whether there are sufficient grounds for doubts as to the court's impartiality, the position of the party raising such doubts is important but not decisive. What is decisive is whether such doubt can be regarded as objectively justified or not[13].

According to the assessment of the European Court, the existence of national procedures aimed at ensuring impartiality, in particular rules governing the removal of judges from the examination of cases, is an essential factor. Such rules indicate that national legislators pay special attention to eliminating all substantiated doubts related to the impartiality of a given judge or court and, by eliminating the causes of such doubts, attempt to ensure impartiality. In addition to ensuring the absence of bias as such, these rules are aimed at eliminating any external appearance of bias and thereby contribute to courts inspiring public confidence in a democratic society. The emergence of doubts regarding a judge's impartiality depends on the situation or the nature of the relationship. Whether such doubts are objectively substantiated or not depends primarily on the circumstances of the specific case and on the factors that must be taken into account in this regard[14].

Proceeding from the interests of justice, criminal procedural law provides that a judge is not obliged to declare self-recusal or to accept a recusal if another judicial body cannot be constituted for the adoption of a judicial act. In other words, even in the presence of circumstances excluding the judge's participation, that judge's further participation in the proceedings is lawful if another judicial body cannot be constituted (for example, where circumstances excluding participation exist with respect to three of the six judges of the Criminal Chamber of the Court of Cassation, while the examination of the accepted complaint must be carried out by a panel composed of at least four judges).

Fazlı Fazli Aslaner v. Turkey գործով 2014 թվականի մարտի 4-ի վճիռը, գանգատ թիվ 36073/04, 31-րդ կետը:

[13] The decision of May 20, 1998 of the European Court in the case of ***Gautrin and others v. France,*** No. 38/1997/822/1025-1028, para. 58/Մարդու իրավունքների եվրոպական դատարանի՝ ***Gautrin and others v. France*** գործով 1998 թվականի մայիսի 20-ի վճիռը, գանգատ թիվ 38/1997/822/1025-1028, 58-րդ կետը:

[14] The decision of the European Court in the above-mentioned case of ***Ghulyan v. Armenia***, paras. 47 and 51/ Մարդու իրավունքների եվրոպական դատարանի՝ *Ղուլյանն ընդդեմ Հայաստանի* գործով վերը հիշատակված վճիռը, 47-րդ և 51-րդ կետերը:

As regards the circumstances excluding the participation of public participants in proceedings, two of the grounds excluding a judge's participation are applicable to them, namely:

1. as a private individual, the person has witnessed the facts examined in the course of the proceedings;
2. other circumstances exist that may give rise to reasonable doubt regarding that person's impartiality in relation to the given proceedings.

The above-mentioned grounds are also applicable to the witness to procedural acts, the expert, the interpreter, and the court session secretary.

For public participants, a circumstance excluding participation in proceedings is the existence of kinship or other relations of personal dependence with the judge conducting the proceedings. This ground is, to a certain extent, identical to the circumstance excluding a judge's participation where the judge's close relative has been, is, or will reasonably be a participant in the case. Moreover, since this ground may exclude the simultaneous participation of more than one person in the proceedings due to kinship or other relations of personal dependence, criminal procedural law establishes that the person who acquired the status of a participant in the proceedings later than the others shall be exempted from participation, with the exception of the legal representative (Article 65, parts 10–11).

Criminal procedural law clearly establishes that prior participation in the given proceedings as an investigator, head of the investigative body, inquiry officer, or head of the inquiry body does not constitute a circumstance excluding the subsequent participation of such persons as public participants in the same proceedings.

As regards the circumstances excluding the participation of an attorney in proceedings, the defense counsel, the authorized representative of the victim or the civil defendant, or the attorney of a witness may not participate in proceedings if:

1. the person has participated in the given proceedings as a judge, public participant, private participant, or auxiliary participant, with the exception of cases of acting as an attorney of a witness;
2. the person is in kinship or other relations of personal dependence with an official who has participated or, at the time of the attorney's involvement, participates in the proceedings;
3. the person provides or has provided legal assistance in connection with the given proceedings to a person whose interests conflict with those of the principal;

4. the person is in kinship or other relations of personal dependence with a person involved in the given proceedings whose interests conflict with those of the principal;
5. the person may not be an attorney by law or by judicial act.

Within the same proceedings, an attorney may represent only one person (have only one principal), except where such a prohibition may reasonably endanger the interests of justice and two or more accused persons have voluntarily, knowingly, and in writing waived the possibility of being represented by separate defense counsels, or in cases of representing more than one victim or witness.

The first two of the above-mentioned circumstances excluding the participation of an attorney are also applicable to the legal representative, with the exception of a parent or adoptive parent. At the same time, for a legal representative (with the exception of a parent or adoptive parent), a circumstance excluding participation is not only kinship or other relations of personal dependence with a judge or a public participant in the proceedings, but also with a private participant. As independent circumstances excluding the participation of a legal representative, including a parent or adoptive parent, criminal procedural law provides for the following circumstances:

1. by their conduct, the person clearly harms the interests of the represented person; by their conduct, they have hindered the exercise of the rights of the represented person or have led to their violation;
2. the person may not be a legal representative by law or by judicial act;
3. there exist facts indicating the commission of an alleged crime against the interests of the represented person.

With regard to the specific circumstances excluding the participation of the witness to procedural acts as an auxiliary participant in proceedings, criminal procedural law provides for such circumstances where the person:

1. may not be a witness to procedural acts by law;
2. is in relations of personal or official dependence with the authority conducting the proceedings.

In order to exclude the permanent participation of the same person in proceedings, which may render meaningless the purpose of the participation of a witness to procedural acts, criminal procedural law establishes that the prior participation of a witness to procedural acts in an evidentiary action constitutes a circumstance excluding that person’s participation in another evidentiary action in the same proceedings. At the same time, proceeding from the necessity of ensuring the normal course of proceedings, the law provides for an exception to this rule

where the given investigative action immediately follows another evidentiary action carried out with the participation of the same witness to procedural acts.

The above-mentioned circumstances excluding the participation of a witness to procedural acts are also applicable to other auxiliary participants in proceedings, namely the expert, the interpreter, and the court session secretary. The latter may also not participate in proceedings where circumstances exist that cast doubt on their competence or impartiality. Unlike the witness to procedural acts, a person's prior participation in the same proceedings as an expert, interpreter, or court session secretary does not in itself constitute a circumstance lawfully excluding their subsequent participation.

As regards the procedure for resolving the issue of recusal (self-recusal) or exemption from participation in proceedings, on the basis of a relevant motion or upon a motion of a party, the specified issue is resolved, within the limits of its competence, by the authority conducting the proceedings.

According to Article 7 of the Criminal Procedure Code of the Republic of Armenia:

1. The authorities conducting criminal proceedings are:
    1. the investigator — from the moment of initiating proceedings until submitting the indictment or the decision to terminate criminal proceedings to the supervising prosecutor;
    2. the supervising prosecutor — from the moment of receiving the indictment or the decision to terminate criminal proceedings from the investigator until submitting the indictment to the court, approving the investigator's decision to terminate criminal proceedings, or returning the materials of the proceedings to the pre-trial investigation body;
    3. the court — from the moment of receiving the indictment from the prosecutor until the completion of criminal proceedings, as well as in judicial guarantees proceedings.

Along with the general provision assigning the authority to resolve issues of participation in proceedings to the authority conducting the proceedings, the legislator simultaneously specifies the concrete subject composition for resolving issues of recusal and exemption from participation. Thus:

1. a recusal declared against a judge is resolved by that judge. If a recusal is declared against more than one judge conducting proceedings in a collegial composition or against the entire composition of the court, each judge resolves the issue of their own recusal;
2. a recusal declared against a prosecutor is resolved by the superior prosecutor in pre-trial proceedings, and by the relevant court in judicial proceedings;

3. a recusal declared against an investigator, the head of the investigative body, an inquiry officer, or the head of the inquiry body is resolved by the supervising prosecutor;
4. a recusal declared against a witness to procedural acts is resolved by the person carrying out the evidentiary action, while a recusal declared against the court session secretary is resolved by the court.

In connection with these legislative regulations, it is noteworthy that the legislator has made the competence to resolve a recusal declared against a prosecutor dependent on the stage of the proceedings. Meanwhile, for example, the competence to resolve the issue of exempting a defense counsel from participation in proceedings is assigned to the authority conducting the proceedings, regardless of the procedural stage. In addition, as follows from the provisions of Article 7 of the Criminal Procedure Code of the Republic of Armenia, at the pre-trial stage, in judicial guarantees proceedings, the authority conducting the proceedings is the court. However, at the same time, the competence to resolve a recusal declared against a prosecutor is assigned to the superior prosecutor, who is not, in general, an authority conducting proceedings.

In connection with this regulation, the question arises as to who should resolve the issue of a recusal declared against a prosecutor or the exemption of a defense counsel from participation in proceedings within judicial guarantees proceedings. In this regard, the Court of Cassation has expressed the legal position that "with respect to the authority of the court to resolve the issue of the participation of the accused's defense counsel during judicial guarantees proceedings, the Court of Cassation notes that the court is competent to resolve only the issue of the defense counsel's participation in the judicial guarantees proceedings subject to its examination, and the decision adopted by the court on this issue will relate only to the course of the judicial guarantees proceedings, whereas issues of removing the defense counsel from criminal proceedings, involving a new defense counsel, and other issues at the pre-trial stage are subject to resolution exclusively by the investigator. That is, the subject of the court's examination is only the issue of the defense counsel's participation in judicial guarantees proceedings, while the issue of the defense counsel's participation in the general criminal proceedings is resolved exclusively by the investigator. Therefore, the conclusions of the Court of Appeal regarding the lack of competence of the court to resolve the issue of the

defense counsel's participation during judicial guarantees proceedings are unfounded."[15]

Criminal procedural law also regulates the sequence for resolving recusals declared simultaneously against several persons, providing that, as a matter of priority, the recusal declared against the person who is competent to resolve the recusals of the others shall be resolved first, and in cases where the simultaneous participation of more than one person in the proceedings is excluded due to kinship or other relations of personal dependence, the person who acquired the status of a participant in the proceedings later than the others shall be exempted from participation, with the exception of the legal representative (Article 65, parts 10–11).

Conflict of Interests

The author declares no ethical issues or conflicts of interest in this research.

Ethical Standards

The author affirms this research did not involve human subjects.

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[15] The decision of the RA Cassation Court of August 19, 2024, No. HKD/0031/06/23/Վճռաբեկ դատարանի՝ 2024 թվականի օգոստոսի 19-ի թիվ ՀԿԴ/0031/06/23 որոշումը:

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7. The decision of the RA Cassation Court in the case of *Karen Hovhannisyan,* May 27, 2022, No. EKD/0281/01/16/Վճռաբեկ դատարանի՝ *Կարեն Հովհաննիսյանի* գործով 2022 թվականի մայիսի 27-ի թիվ ԵԿԴ/0281/01/16 որոշումը։
8. The decision of the RA Cassation Court in the case of *Levon Sargsyan and Suren Ghazaryan*, May 17, 2024, No. ED/0064/01/21/Վճռաբեկ դատարանի՝ *Լևոն Սարգսյանի և Սուրեն Ղազարյանի* գործով 2024 թվականի մայիսի 17-ի թիվ ԵԴ/0064/01/21 որոշումը։
9. The decision of December 15, 2005 of the European Court in the case of ***Kyprianou v. Cyprus,*** No. 73797/01, paras. 118 and 121, the decision of January 9, 2018 of the European Court in the case of ***Nicholas v. Cyprus,*** No. 63246/10, paras. 49 and 53, the decision of January 24, 2019 of the European Court in the case of ***Ghulyan v. Armenia***, No. 35443/13, para. 45/Մարդու իրավունքների եվրոպական դատարանի՝ ***Kyprianou v. Cyprus*** գործով 2005 թվականի դեկտեմբերի 15-ի վճիռը, գանգատ թիվ 73797/01, 118-րդ և 121-րդ կետերը, ***Nicholas v. Cyprus*** գործով 2018 թվականի հունվարի 9-ի վճիռը, գանգատ թիվ 63246/10, 49-րդ և 53-րդ կետերը, *Ղուլյանն ընդդեմ Հայաստանի* գործով 2019 թվականի հունվարի 24-ի վճիռը, գանգատ թիվ 35443/13, 45-րդ կետը)։
10. The decisión of June 6, 2000 of the European Court in the case of ***Morel v. France,*** No. 34130/96, para. 45, the decision of March 4, 2014 of the European Court in the case of ***Fazlı Fazli Aslaner v. Turkey,*** No. 36073/04, para. 31/Մարդու իրավունքների եվրոպական դատարանի՝ ***Morel v. France*** գործով 2000 թվականի հունիսի 6-ի վճիռը, գանգատ թիվ 34130/96, 45-րդ կետը, ***Fazlı Fazli Aslaner v. Turkey*** գործով 2014 թվականի մարտի 4-ի վճիռը, գանգատ թիվ 36073/04, 31-րդ կետը։
11. The decision of May 20, 1998 of the European Court in the case of ***Gautrin and others v. France,*** No. 38/1997/822/1025-1028, para. 58/Մարդու իրավունքների եվրոպական դատարանի՝ ***Gautrin and others v. France*** գործով 1998 թվականի մայիսի 20-ի վճիռը, գանգատ թիվ 38/1997/822/1025-1028, 58-րդ կետը։

12. The decision of the European Court in the above-mentioned case of ***Ghulyan v. Armenia***, paras. 47 and 51/ Մարդու իրավունքների եվրոպական դատարանի՝ *Ղուլյանն ընդդեմ Հայաստանի* գործով վերը հիշատակված վճիռը, 47-րդ և 51-րդ կետերը:
13. The decision of the RA Cassation Court of August 19, 2024, No. HKD/0031/06/23/Վճռաբեկ դատարանի՝ 2024 թվականի օգոստոսի 19-ի թիվ ՀԿԴ/0031/06/23 որոշումը:

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FROM THE LUXEMBOURG AGREEMENT ONWARDS: ANTISEMITISM AND THE NORMATIVE TRAJECTORY OF GERMAN LAW

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Abstract. This article examines how normative logic embedded in reparations law continues to shape contemporary German criminal law, taking the Luxembourg Agreement of 1952 between the Federal Republic of Germany, the State of Israel and the Jewish Conference on Material Claims against Germany (JCC) as its very conceptual point of departure. Against the backdrop of rising antisemitic criminal offenses in Germany, the article focuses on the amendment of Section 46 (2) of the German Criminal Code (StGB; Strafgesetzbuch), which explicitly includes antisemitic motives among the circumstances relevant for sentencing. While this amendment has been criticized as merely declaratory or even 'symbolic', this article argues that such criticism overlooks the deeper legal genealogy of state responsibility that ultimately originates in the Luxembourg Agreement. Antisemitic motives intensify culpability and wrongfulness because they engage the foundational commitments of the post-war legal order that emerged in response to antisemitic state-driven violence. Explicitly naming such motives in sentencing law therefore constitutes a crucial institutional function by shaping investigative practices, judicial reasoning, and normative expectations within the criminal justice system. From a criminal legal perspective, the article develops an account of motives as normative indicators that affect both culpability and wrongfulness. Antisemitic motives, it argues, intensify the *Unrechtsgehalt* of an offense because they negate the equal moral status of the victim and symbolically attack the legal order that emerged in response to antisemitic state violence. The article concludes that the explicit inclusion of antisemitic motives in Section 46 (2) StGB reflects a coherent and legally grounded response to historically specific injustice and underscores the role of criminal law in stabilizing responsibility within the German legal order.

Keywords - *Luxembourg Agreement (1952); Antisemitism; German Criminal Law; § 46 (2) StGB; Sentencing Law; Motive-Based Sentencing; State Responsibility; Reparations*

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Law; Wiedergutmachung; Normative State Identity; Holocaust; Jewish Material Claims against Germany; Transitional Law.

I. The Luxembourg Agreement

The initial commitment of the Federal Republic of Germany to formally accept responsibility for compensating Jewish victims of Nazi prosecution was embodied in the Luxembourg Agreement[2], signed on September 10, 1952, by Chancellor Konrad Adenauer and Israeli Foreign Minister Moshe Sharett. Under the agreement, Germany pledged to provide Israel with three billion Deutsche Marks in financial aid and goods over a period of 12 to 14 years. The treaty marked a historic first step towards post-war reconciliation. Beyond this, Germany agreed to pay an additional 450 million Deutsche Marks to the Jewish Claims Conference[3], which represented collective Jewish compensation claims[4].

The treaty sparked intense debate in both Germany and Israel. Many Jewish critics condemned the payments as immoral 'blood money'[5], while many Germans questioned the necessity or scale of the compensation. Opposition was also evident in the Bundestag, where the agreement was narrowly approved on March 18, 1953. Although the SPD fully supported ratification[6], numerous CDU/CSU representatives abstained or voted against it[7]. In contrast, the German Democratic Republic (DDR) refused to participate in reparations. While it provided assistance to victims of fascism within its borders, it viewed itself as a fundamentally antifascist state and denied any legal responsibility as the successor to Nazi Germany[8].

From the perspective of traditional international law, the Agreement was anomalous. Reparations had historically been linked to armed conflict and imposed

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[2] Transcript of the Agreement can be accessed at https://www.bundesarchiv.de/themen-entdecken/online-entdecken/geschichtsgalerien/das-luxemburger-abkommen/ (last access: 10.12.2025).

[3] For further details on the Hague Protocols, see Rosensaft, The Early History of German-Jewish Reparations, 2001, p. 6.

[4] Individual claims related to persecution or imprisonment during the Nazi period were not affected by this agreement.

[5] On the Israeli public discourse in the 1950s and the moral rejection of reparations, please review Yablonka, The State of Israel vs. Adolf Eichmann (2004).

[6] For more about the SPD's support, review Frei, Adenauer's Germany and the Nazi Past (2002).

[7] Deutscher Bundestag, Plenarprotokoll der 243. Sitzung, 18.03.1953.

[8] Hinz-Wessels/Würz, Luxemburger Abkommen, in: Lebendiges Museum, Stiftung Haus der Geschichte der Bundesrepublik Deutschland, available on-line at http://www.hdg.de/lemo/kapitel/geteiltes-deutschland-gruenderjahre/erinnerung-und-wiedergutmachung/luxemburger-abkommen.html (last access: 15.12.2025).

through peace treaties or adjudicated liability[9]. Germany in 1952, however, was not a sovereign equal negotiating the legal consequences of war. The Federal Republic was a newly constituted state with limited sovereignty, no formal peace treaty, and no direct legal obligation under international law to compensate the State of Israel, which itself did not exist at the time the crimes were committed. The absence of a classical legal framework makes the Agreement all the more remarkable. It was not compelled by judicial enforcement, nor reducible to political expediency. Instead, it emerged from an explicit acknowledgment of responsibility for crimes committed against Jews. This acknowledgment was not framed in the language of collective guilt, but in the language of responsibility for material consequences of injustice. The Agreement's preamble refers to the 'unspeakable crimes' committed in the name of the German people and to the necessity of providing material assistance to Jewish survivors who had been deprived of livelihood, property, and homeland. This formulation is legally significant. It avoids metaphysical claims about inherited guilt while affirming that responsibility for antisemitic persecution persists despite regime change. In doing so, the Federal Republic implicitly rejected a strict doctrine of constitutional discontinuity. Instead, it adopted a concept of normative continuity: although the constitutional order of the Third Reich had collapsed, responsibility for its crimes did not evaporate with the establishment of a new state.

Legal scholarship has increasingly emphasized that this move cannot be understood merely as political symbolism. Responsibility, in this sense, attaches to the state as a legal entity that benefits from continuity of sovereignty, territory, and international recognition[10]. The Agreement can be interpreted as an early expression of a legal culture in which international responsibility and domestic constitutional identity become mutually reinforcing. The Agreement thus functions as an act of legal self-definition: the Federal Republic defined itself as a state that accepts responsibility for antisemitic injustice as a condition of its legitimacy. However, this conception of responsibility must be distinguished carefully from both collective guilt and purely moral atonement. The Luxembourg Agreement did not assert that all Germans were guilty of National Socialist crimes, nor did it reduce responsibility to a symbolic gesture of remorse. Instead, it translated responsibility into concrete legal obligations: payments, deliveries, and institutional

[9] Honig, The Reparations Agreement Between Israel and the Federal Republic of Germany, in: American Journal of International Law, vol. 48 no. 4 (1954), see especially pp. 564-566 on the unique character of the Agreement in international legal history as well as p. 570 on the absence of a formal obligation.

[10] Fuhrmann, International Law, Intertemporality, and Reparations for Past Wrongs, University of Glasgow Working Paper (2025), pp. 1-10.

arrangements designed to address the material consequences of persecution. In this respect, the Agreement exemplifies a core insight of reparations theory: that justice after mass atrocity cannot be achieved solely through punishment of perpetrators or abstract declarations of regret. It requires structural legal responses that acknowledge harm, restore a measure of agency to victims, and reconstitute the normative order that was destroyed.

The Luxembourg Agreement indisputably holds a unique historical position and is frequently invoked as a political milestone or a moral turning point, yet its deeper juridical significance is often underestimated. In legal terms, the Agreement represents neither a classical act of war reparations nor a merely diplomatic settlement between states. Rather, it constitutes a *sui generis* legal construction[11] through which the Federal Republic articulated a conception of responsibility that would later become foundational for its constitutional identity. To understand contemporary legal responses to antisemitism - particularly in criminal law - it is therefore essential to reconstruct the Luxembourg Agreement not as an isolated historical event, but as a constitutive moment in the development of a normative state identity grounded in responsibility for antisemitic injustice.

1. The Distinctiveness of the Holocaust

The centrality of Jewish claims within this reparative framework is not accidental. Antisemitism was not one discriminatory practice among others under National Socialism; it was the ideological core of a state-organized project of exclusion and extermination[12]. The Luxembourg Agreement reflects this specificity. While other victim groups would later receive recognition and compensation - often belatedly and inadequately - the early and comprehensive focus on Jewish victims underscores the recognition that antisemitic persecution represented a categorical rupture of legal and moral order[13].

Nonetheless, the Agreement also reveals the limits of law[14]. It did not, and could not, undo the crimes of the Holocaust. Nor did it provide full restitution for losses that were irreparable by definition. Yet its legal significance lies precisely in its acknowledgment of these limits. By framing reparations as partial, imperfect, and nevertheless necessary, the Federal Republic articulated a conception of justice that is compatible with legal realism rather than utopian restoration. This

[11] Bachleitner, The Path to Atonement: West Germany and Israel after the Holocaust (2023).
[12] Friedländer, Nazi Germany and the Jews, vol. 2: The Years of Extermination, 1939-1946 (2007), pp. 1-7.
[13] Zweig, German Reparations and the Jewish World: A History of the Claims Conference (1987), pp. 32 et seqq and pp. 45 et seqq.
[14] Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil (1963), p. 253.

conception would later inform the understanding of *Wiedergutmachung* as a constitutionally permissible, though inherently incomplete, response to unprecedented injustice. In a broader legal-theoretical sense, *Wiedergutmachung* can be understood as an early form of what is now called transitional justice[15].

2. The Preventive Dimension of Reparations

The Luxembourg Agreement thus marks a transition from a purely backward-looking conception of justice to a forward-looking one[16]. It is concerned not only with addressing past harm, but with establishing the normative conditions under which a new legal order can claim legitimacy. In this sense, reparations function as a constitutive act: they signal that the new state understands itself as bound by the consequences of past injustice and committed to preventing its recurrence[17]. This preventive dimension is often overlooked in discussions of reparations, yet it is crucial for understanding their relevance to contemporary criminal law.

The preventive aspect of the Agreement becomes particularly visible when one considers its reception in domestic law. Although the Agreement itself was an international treaty, its implementation required extensive legislative and administrative action within the Federal Republic. These domestic measures ranging from compensation statutes to restitution procedures embedded the principle of responsibility into the fabric of German law[18]. Over time, this embedding contributed to a broader constitutional culture in which historical injustice is treated as a legally relevant fact rather than a closed chapter. The Federal Constitutional Court would later draw explicitly on this culture when interpreting the Basic Law in light of National Socialist crimes.

3. Constitutional Responsibility Beyond Compensation

From a doctrinal perspective, the Luxembourg Agreement anticipates a key move in German constitutional law: the transformation of historical responsibility into a normative interpretive principle. This move does not collapse law into history, nor does it freeze legal development in the past. Rather, it acknowledges that certain historical experiences generate enduring normative obligations. Antisemitism, as the ideological engine of genocide, is one such experience. The legal order that

[15] Teitel, who describes reparations in post-war Germany as a ‘foundational instance of transitional justice avant la lettre’, in: Transitional Justice (2000), pp. 68 et seqq.
[16] *Ibid.*, pp. 28-31.
[17] Elster, Closing the Books (2004), pp. 170-173.
[18] Goschler, Compensation for Nazi Victims (2005), pp. 52 et seqq.

emerged in its aftermath cannot treat antisemitism as a neutral social attitude without contradicting its own foundations.

This insight is crucial for evaluating later developments in criminal law, including the amendment of Section 46 (2) StGB[19]. The explicit inclusion of antisemitic motives in sentencing law has not emerged *ex nihilo*. It was the downstream expression of a responsibility initially articulated in the context of reparations. Where the Luxembourg Agreement addressed the material consequences of antisemitic persecution, sentencing law addresses its contemporary manifestations. Both operate on the same normative premise: that antisemitism engages the constitutional identity of the Federal Republic and therefore demands a differentiated legal response.

At the same time, the Agreement also exposes tensions that continue to shape legal debates. The focus on Jewish claims has sometimes been criticized as creating hierarchies of victimhood[20]. While such critiques merit serious consideration, they must be situated within the historical and normative specificity of antisemitic persecution. The early prioritization of Jewish reparations reflects not a denial of other suffering, but a recognition of the unique role of antisemitism in dismantling the legal order itself. Later efforts to compensate other victim groups[21], though often flawed[22], do not negate this specificity. Instead, they underscore the difficulty of translating mass injustice into legal categories without loss or distortion.

The Luxembourg Agreement thus stands as a foundational moment in the legal history of the Federal Republic. It inaugurated a conception of responsibility that is neither purely moral nor exhaustively legal, but normatively constitutive – a conception that has later become integrated into the constitutional jurisprudence and, in transformed form, entered criminal law. Understanding this genealogy is essential for any serious assessment of contemporary measures against antisemitism. Without it, amendments such as the explicit naming of antisemitic motives in Section 46 (2) StGB risk being misunderstood as symbolic gestures rather than as elements of a longer, legally coherent project of responsibility.

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[19] The legislative basis for explicitly naming antisemitic motives was the so-called Act to Combat Right-Wing Extremism and Hate Crime, BGBl. I 2021, p. 441.

[20] Zimmerer, The Competition of Victims, in: Holocaust Studies 24 (2018), pp. 1-17.

[21] For the issue of compensation of Sinti and Roma, refer to BGH, judgment of 7 January 1956, IV ZR 211/55; for the compensation efforts concerning forced laborers, review BVerfG, NJW 2004, 3407.

[22] Such as the compensation of homosexual victims occurred only after the annulment of convictions in 2017 as the convictions were deemed lawful under post-war law.

II. Antisemitism and Constitutional Memory

Antisemitism in the Federal Republic of Germany cannot be understood as a merely contingent social phenomenon[23], nor as one prejudice among others that criminal law happens to encounter episodically. Rather, antisemitism is historically and structurally intertwined with the collapse of law, morality, and political order under National Socialism. This historical experience does not function merely as background knowledge; it is constitutive of the post-war German legal order[24]. The German Basic Law (GG; Grundgesetz) was drafted as a conscious response to the normative failure of law under the National Socialist regime[25], and its central commitment to the inviolability of human dignity under Article 1 (1) GG reflects an explicit repudiation of the antisemitic ideology that culminated in the Holocaust[26]. Any contemporary legal engagement with antisemitism therefore necessarily unfolds under conditions of constitutional memory. This memory is not passive or commemorative but rather normative. The explicit inclusion of antisemitic motives in Section 46 (2) StGB must therefore be understood as a deliberate normative articulation. In essence, the fundamental objective of the amendment is the protection of democratic society and a state governed by the rule of law. On a more tangible level, the provision pursues the identification of such motives at an early stage of criminal prosecution, since the investigations run by the Public Prosecutor extend to the circumstances that are substantial for determining legal consequences of an offense pursuant to Section 160 (3)[27] of the German Code of Criminal Procedure (StPO; Strafprozessordnung). It reflects the judgment that antisemitism is not merely an aggravating circumstance among others, but a form of hostility that implicates the foundational commitments of the Basic Law. Antisemitic offenses do not merely injure individual victims; they symbolically attack the constitutional promise of equal human worth that emerged in direct opposition to National Socialist ideology. This insight has long informed German constitutional jurisprudence, particularly in the case law of the Federal

[23] Rensmann, Politischer Antisemitismus im postfaktischen Zeitalter in: Interdisciplinary Studies on Antisemitism, 2025, p. 8.
[24] Böckenförde, Die Entstehung des Grundgesetzes als Vorgang der Verfassungsgebung, in: Staat, Verfassung, Demokratie, pp. 49 et seqq.
[25] On the Basic Law as a response to National Socialism and the collapse of law, see Möllers, Das Grundgesetz als die Antwort auf Nationalsozialismus, in: JZ 2011, pp. 257-265.
[26] Di Fabio, Die Kultur der Freiheit, pp. 12 et seqq.
[27] The provision of the 'obligation to clarify facts' states in its third subsection that 'investigations conducted by the public prosecution office are, as a rule, also to encompass those circumstances which are important for the determination of the legal consequences of the act', translation accessible on-line at https://www.gesetze-im-internet.de/englisch-stpo/english-stpo.html (last access: 17.12.2025).

Constitutional Court (BVerfG; Bundesverfassungsgericht), which has repeatedly emphasized that the Basic Law is a response to the collapse of justice under National Socialism.

The upsurge of antisemitic criminal offenses documented by the Federal Criminal Police Office (BKA; Bundeskriminalamt) over the past decade provides an empirical point of departure, but not the normative core, of the present inquiry. Official police statistics show a sustained increase in antisemitic crimes, with sharp escalations following major geopolitical events, most notably after 7 October 2023. Parallel civil society monitoring by RIAS[28] suggests that these figures capture only a fraction of antisemitic acts, as many incidents - particularly verbal harassment, threats, and symbolic intimidation - remain outside the so-called bright field of criminal statistics.

Understanding antisemitism as constitutionally relevant has important implications for criminal law dogmatics. It affects how culpability is assessed, how wrongfulness (*Unrechtsgehalt*[29]) is conceptualized, and how sentencing rationales are articulated. Antisemitic motives express a denial of the victim's equal moral status and thus intensify the normative gravity of the offense. This intensification cannot be captured adequately by reference to general hostility alone. It is rooted in the historical specificity of antisemitism in Germany and in its connection to a state-organized project of extermination of the European Jews. Criminal law, following the constitutional order, thus cannot remain indifferent to this specificity without undermining its own normative foundations.

Accordingly, the amendment of Section 46 (2) StGB constitutes a contemporary expression of a much older legal and constitutional commitment: the commitment of the Federal Republic of Germany to confront antisemitism through law, not merely through political condemnation or moral discourse. This commitment did not originate in criminal law. It emerged in the early years of the Federal Republic through the legal architecture of reparations, most notably through the Luxembourg Agreement. That Agreement marked the first moment in which the Federal Republic transformed responsibility for antisemitic persecution into binding legal obligations. The doctrinal logic inaugurated there - namely, that responsibility persists despite regime change and must be expressed through law - continues to inform contemporary legal responses to antisemitism, including in sentencing law.

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[28] RIAS refers to the Federal Association of Research and Information Centers on Antisemitism (Bundesverband der Recherche- und Informationsstellen Antisemitismus e.V.) with its central aim being a nationwide documentation of antisemitic incidents through its reporting portal that can be found on-line at https://www.report-antisemitism.de (last access: 16.12.2025).

[29] For the foundational doctrine of culpability and the normative assessment of wrongdoing, review Roxin, Strafrecht Allgemeiner Teil I (2020), § 16 paras. 68-74.

Situating Section 46 (2) StGB within this complex trajectory requires a methodological approach that is simultaneously historical, doctrinal, and normative. It requires moving beyond the dichotomy between symbolic legislation and instrumental effectiveness that dominates much of the critical debate. Such a dichotomy assumes that criminal law is either effective in reducing crime or normatively empty[30]. This assumption does not seem substantive, as, in a constitutional order shaped by catastrophic injustice, criminal law also performs a function of institutional memory. It stabilizes normative expectations, structures professional perception within the justice system, and articulates boundaries of tolerable conduct that are inseparable from historical experience.

At the same time, it would be illusive to claim that criminal law can solve antisemitism. Empirical evidence cautions against such expectations. Rising offense numbers after the amendment demonstrate that explicit naming does not produce immediate deterrent effects at the macro level. However, this does not render the amendment futile. Its primary function lies elsewhere: in institutional steering, in shaping investigative priorities under Section 160 (3) of the German Code of Criminal Procedure (StPO; Strafprozessordnung), and in ensuring that antisemitic motives are recognized, documented, and normatively evaluated throughout the criminal justice process. In this respect, the amendment responds to well-documented deficits in the identification and legal treatment of bias motives rather than to a lack of substantive criminal norms.

III. Federal Constitutional Court's Jurisprudence and the Transformation of Responsibility

As previously highlighted, the juridical legacy of the Luxembourg Agreement unfolds within German constitutional law, most notably through the jurisprudence of the Federal Constitutional Court, which transformed reparative commitments into a constitutional principle of responsibility[31]. From its earliest *Wiedergutmachung* decisions[32], the Court emphasized that the Basic Law was adopted in conscious opposition to the National Socialist system of injustice and must therefore be interpreted in light of that historical experience[33]. The

[30] Meier, Symbolische Gesetzgebung im Strafrecht, in: Zeitschrift für die Gesamte Strafrechtswissenschaft (2000), pp. 24 et seqq.
[31] BVerfGE 1, 97; BVerfGE 6, 132; Safferling, NJW 2010, 1401.
[32] BVerfG, judgment of 14 February 1953 – 1 BvR 27/52, BVerfGE 1, 97 (Wiedergutmachung I); BVerfG, judgment of 17 December 1953 – BvR 147/52, BVerfGE 2, 380; BVerfG, judgment of 20 December 1956 – 1 BvR 253/56, BVerfGE 6, 132 (Wiedergutmachung II).
[33] BVerfGE 1, 97 (104); BVerfGE 3, 58 (135).

constitution was thus conceived not as historically neutral, but as a normative response to the collapse of justice between 1933 and 1945[34].

On this basis, the Court upheld extensive restitution and compensation regimes that departed from general principles of equality and legal certainty. These departures were justified not as exceptional privileges, but as constitutionally required responses to extraordinary injustice[35]. The systematic deprivation of legal personhood under National Socialism rendered ordinary legal mechanisms insufficient and necessitated special reparative regimes grounded in Article 1 (1) GG[36]. Central to this jurisprudence is the Court's rejection of a strict doctrine of regime discontinuity. While acknowledging the constitutional rupture of 1949, the Court refused to accept that this rupture extinguished responsibility for past injustice. Instead, it articulated a doctrine of normative state continuity: responsibility persists where a successor state claims legal identity through continuity of sovereignty, population, and international personality[37]. Responsibility thus follows from legal self-understanding rather than moral inheritance. This doctrine extends responsibility beyond individual criminal guilt to the legal order as a whole. The constitutional obligation is not limited to punishment, but includes addressing the structural conditions that enabled systematic exclusion and annihilation[38]. Responsibility thereby becomes an enduring interpretive framework of constitutional law.

The Court's later jurisprudence on freedom of expression further consolidated this framework. In its *Wunsiedel*[39] decision, the Court upheld restrictions on assemblies glorifying National Socialism by explicitly grounding them in Germany's historical experience with antisemitic ideology[40]. The Nazi Regime was conceptualized as a unique negation of the constitutional order, justifying differentiated constitutional treatment[41]. Doctrinally decisive in this regard is the Court's elevation of antisemitism to a constitutional category. Antisemitic ideology is not treated as a mere opinion, but as a historically grounded threat to human dignity and democratic order[42]. This conceptualization shall thus have direct implications for criminal law. Antisemitic motives cannot be regarded as legally interchangeable with other forms of hostility, as they negate the premise of equal

[34] Krajewski, *Völkerrecht,* (2017), § 3 para. 28.
[35] BVerfGE 6, 132 (198).
[36] Maunz/Dürig, GG, Art. 1 para. 83.
[37] BVerfGE 23, 98 (106); Ipsen, *Staatsrecht I*, 2016, § 12 paras. 40–43.
[38] See Safferling, *Internationales Strafrecht*, 2nd ed. 2020, pp. 58–61.
[39] *Wunsiedel Decision*, BVerfGE 124, 300 (2009).
[40] BVerfGE 124, 300 (327).
[41] Möllers, *Juristische Methodenlehre (*2022), § 9 para. 54.
[42] BVerfGE 124, 300 (340); Safferling, NJW 2010, 1401 (1404).

human worth underlying the constitutional order and thus intensify the *Unrechtsgehalt* of the offense[43]. At the same time, the Court has emphasized the limits of historically informed differentiation. Constitutional responsibility does not authorize purely symbolic or expressive criminal law; differentiated treatment must remain functionally justified and doctrinally constrained[44].

IV. Conclusion: Responsibility as a Continuous Legal Commitment

As portrayed, the inclusion of antisemitic motives in Section 46 (2) StGB can only be understood adequately when situated within the longer legal genealogy of responsibility that has shaped the Federal Republic since its inception. From the Luxembourg Agreement of 1952 through the jurisprudence of the Federal Constitutional Court to contemporary criminal sentencing law, a continuous normative commitment becomes visible: the translation of historical responsibility for the Nazi injustice into binding legal form. Responsibility, in this sense, became an interpretive principle that informs legal doctrine beyond the confines of reparations law.

In this context, the amendment of Section 46 (2) StGB represented a transformation of this responsibility. It did not seek to reopen historical guilt or to instrumentalize criminal law symbolically. Rather, it embedded constitutional insight into the structured evaluation of criminal wrongdoing. By explicitly naming antisemitic motives, sentencing law acknowledges that antisemitism is not an ordinary bias, but a historically saturated form of hostility that implicates human dignity, public peace, and constitutional identity. This recognition is doctrinally controlled, proportionate, and consistent with established principles of culpability and proportionality.

At the same time, the persistence of antisemitic offenses underscores the limits of criminal law as sentencing provisions cannot eradicate social prejudice. Their function lies elsewhere: in normative clarification, institutional steering, and the reinforcement of constitutional commitments within legal practice. Measured against these functions, the amendment of Section 46 (2) StGB cannot be dismissed as symbolic legislation. It constitutes a legally coherent response within a constitutional order that understands itself as historically responsible.

Notwithstanding a wide range of political, legislative, and societal measures[45], antisemitism has demonstrably intensified again in recent years. This development

[43] Roxin/Greco, *Strafrecht AT I (*2020), § 12 para. 89.
[44] BVerfGE 124, 300 (346); Alexy, *Theorie der Grundrechte*, (1985), p. 75.
[45] See the National Strategy against Antisemitism and for Jewish Life (NASAS; Nationale Strategie gegen Antisemitismus und für jüdisches Leben), from 30.11.2022, available on-line at:

has been further aggravated in the aftermath of the Hamas terrorist attacks against Israel on 7 October 2023 and the ongoing armed conflict in Gaza. These developments underscore that antisemitism, functioning as a *bridging ideology*, poses a distinct and substantial threat to the democratic constitutional order. Ultimately, the legal treatment of antisemitism in Germany reflects a distinctive constitutional posture. It is neither backward-looking fixation nor abstract moralism, but an attempt to ensure that the legal order remains conscious of the conditions under which it emerged. The continuity from 'Luxembourg' to contemporary criminal law demonstrates that responsibility for the Holocaust is not a closed chapter, but an enduring legal task. Criminal law, in its restrained and doctrinally embedded form, is one site at which this task continues to be carried out.

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