Criminalization without Harm

Georgia's Foreign Agent Law 3.0 Exposes the Structural Gaps of Criminal Law Theory and Article 7 ECHR

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08.04.2026 doi: 10.59704/ad820ef9a5564bfc

On March 4, 2026, the Georgian Parliament passed yet another wave of anti-democratic changes to the Law on Grants and the Criminal Code. The law now criminalizes political expression if individuals or civil society organizations (CSOs) receive foreign support without prior government authorization. Extending the law's scope to individuals, these amendments mark another qualitative shift in the autocratization cycle recently documented in the OSCE Moscow Mechanism report on Georgia.

Beyond clear violations of freedom of expression and association aimed at silencing critical voices, the Georgian case reveals a structural gap in criminal law theory and practice – the lack of substantive limits on criminalization and the misleading presumption of state good faith in criminalization theory. At the same time, the Georgian case shows that this need not be so. At least two concrete rules against criminalization emerge from the Georgian case, namely, that conduct cannot be criminalized solely because government authorization is denied and/or based on mere suspicion about harmfulness. The Georgian case also shows that the failure to review criminalization for bad faith misses the opportunity to provide the most tailored and needed response to the ultimate tool of autocratization – criminalization of all dissent.

Georgia's Foreign Agent Law 3.0

Under the new amendments, a "grant" is defined so broadly that it encompasses virtually any transfer, monetary or in-kind, from a foreign source to a Georgian individual or entity if the funds are used to influence "any part of society" regarding domestic policy.[1] Failure to obtain prior authorization for such funding now triggers criminal liability when an organization or individual engages in political expression. Sanctions include imprisonment for up to six years. Furthermore, the legislative package aggravates money laundering offenses when undertaken for the purpose of influencing politics in Georgia, raising potential penalties to twelve years.

The result is a system where (unauthorized) foreign funding alone transforms otherwise lawful conduct into a criminal offence. Criminality now depends not on independently wrongful conduct, but on two elements: a foreign link, however tenuous, and the absence of government authorization.

The Missing Theory of Criminalization

Few theorists have discussed substantive limits to criminalization, while those who did tend to presume that the state acts in good faith when criminalizing conduct to prevent some public harm, however trivial (see, e.g., Husak). This theoretical framework is no longer adequate in contexts like Georgia, where criminal law is weaponized against all forms of dissent, targeting conduct that threatens no genuine public interest, but only the ruler's grip on power.

The Georgian case not only exposes the limitations of criminalization theories that presume the state's good faith in preventing actual harm to societal interests but also demonstrates how concrete limits on criminalization can operate in practice. At least two such rules can be drawn from the Georgian case: first, conduct cannot be criminalized solely because authorization is denied, where the same conduct is lawful if

[1] The definition is further specified to cover technical services or the work of the representative offices registered in Georgia of legal entities of other states. Besides, the law permits retroactive application for the pending grants issued prior to adoption of the law.

authorized; second, conduct cannot be criminalized on the basis of mere suspicion about harmfulness, where the underlying act is not inherently wrongful.

Indeed, the absence of state authorization does not render conduct wrongful, just as mere suspicion of harm cannot substitute for actual harmfulness. Violation of such basic standards naturally raises the question of whether the state has any legitimate purpose in criminalizing the conduct. Such concrete rules that operationalize abstract criminalization theories and whose breach triggers an inquiry into state good faith are particularly necessary for contexts of autocratization such as Georgia, where bad-faith state action has become the new norm.

ECtHR's Articles 7 and 18 Gap

The ECtHR is increasingly confronted with such contexts. The most evident, though delayed, adaptation to this new reality has occurred under Article 18 ECHR, which prohibits restrictions of rights for any purpose other than that for which they have been prescribed, i.e., for ulterior purposes. This shift became visible with the relaxation of evidentiary standards in *Merabishvili v. Georgia* in 2017, in which the Grand Chamber held that the evidentiary standard of "beyond reasonable doubt" is sufficient to establish a predominant ulterior purpose, replacing the previously required threshold of incontrovertible proof. While the Court now frequently applies Article 18 in cases involving pre-trial detention pending trial (see *Navalnyy v. Russia*; *Selahattin Demirtaş v. Turkey (No. 2)*), it has still refrained from extending Article 18 to the more intrusive context of criminalization itself under Article 7 – despite the fact that charges under Article 7 often form the basis for the very pre-trial detentions scrutinized under Article 18. The Court justifies this inconsistent approach through a formal reading of Article 7 as an absolute guarantee of "no punishment without law." This reading renders Article 7 beyond restriction, so that Article 18, which expressly regulates the conditions under which rights may be restricted, is not applicable.

This is not to say that the current approach to Article 7 is entirely incapable of addressing undue criminalization. The Court has gradually expanded Article 7 beyond the prohibition of retroactivity to include prohibitions on: unforeseeable or inconsistent laws; use of criminal law by analogy; manifestly unreasonable judicial interpretations; strict liability without a mental element. However, without combining Article 7 with Article 18, ECtHR misses the opportunity to capture the reality in contexts such as Georgia – namely, that criminalization is not undue by error but by design. Such an accurate qualification is especially necessary when it comes to instrumentalized criminalization, which functions as the most powerful tool for chilling dissent and consolidating autocratic rule.

The Court's formal justification for rejecting the applicability of Article 18 to Article 7 is unconvincing not only because calling a spade a spade is essential when the state's motive for criminalization is self-serving, but also because the Court's own interpretation of Article 7 reveals its non-absolute character. This is most evident in the inherently relative concepts of foreseeability (as in the requirement of foreseeable criminal law) and reasonableness (as in the prohibition of its manifestly unreasonable judicial interpretation), both of which necessarily introduce limitations. For instance, when elaborating on the principle of foreseeability, the Court states that the burden to seek judicial interpretation (*Del Río Prada v. Spain [GC]*, *Jorgic v. Germany*) and even legal advice (*Chauvy and Others v. France*, *Cantoni v. France*) will not necessarily render norms unforeseeable. This suggests that Article 7 already contains implicit limits. Incoherence persists, however, when the Court refuses to invoke Article 18 in the context of Article 7 to address ulterior motives, reflecting an outdated view of the latter's static absolute nature.

The pressure to develop limits on criminalization under Article 7, particularly with regard to state motives, will only intensify in autocratization contexts such as Georgia. The sooner the Court responds to this reality by adopting a more comprehensive and substantive interpretation of Article 7 – including allowing its combined use with Article 18 – the greater the prospects for doctrinal coherence. The Grand Chamber will have the opportunity to reject this exces-

sively formal reading of the Article 7-18 relationship in the pending case *Kavala v. Türkiye (No. 2)*communicated this January. Its position will also be decisive for the ECtHR applications submitted from Georgia. The applicants argue that coordinated waves of amendments to the administrative and criminal offence codes, together with manifestly unreasonable interpretations by domestic courts, were designed to chill dissent and consolidate an autocratic regime – an argument that can be fully assessed only through a combined reading of Articles 7 and 18.

Conclusion

Georgia's "foreign agent" law 3.0 as an instance of instrumentalizing criminal law exposes the structural need to further develop both criminalization theory and ECtHR jurisprudence under Article 7. The limiting principles on criminalization derived from the Georgian law in question, namely, that conduct cannot be criminalized solely based on lack of authorization and/or suspicion of harmfulness, demonstrate the feasibility and necessity of developing abstract theories in ways that enhance their practical relevance. The emerging case law under Article 7 can be read as moving, albeit implicitly, toward recognizing substantive limits on criminalization. Yet this development remains incomplete so long as it excludes an examination of the state's good faith in adopting criminal prohibitions, leaving the jurisprudence lagging behind the realities of autocratization contexts. Without such evolution, the ECtHR risks a paradox: harmless conduct may be criminalized without meaningful scrutiny under Article 7, even when driven by bad faith, while less intrusive measures, such as pre-trial detentions linked to those same offences, remain reviewable under Article 18.

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SUGGESTED CITATION

Begadze, Mariam; Papuashvili, Ana: Criminalization without Harm: Georgia's Foreign Agent Law 3.0 Exposes the Structural Gaps of Criminal Law Theory and Article 7 ECHR, Verfassungsblog, 08.04.2026, doi: 10.59704/ad820ef9a5564bfc.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20260408-173439-0.