



# **Considering Cases Related to the Restriction of the Freedom of Expression for protecting the Independence and Impartiality of the Judiciary**

*(Guideline)*

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I N S T I T U T E  
*Promoting Rule of Law  
in Georgia (PROLoG)*

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## Introduction

Freedom of expression, as one of the fundamental human rights, is recognized by the Georgian Constitution and a number of (binding) international treaties or conventions. In addition to being inseparable from the dignity of the individual, it is also a necessary foundation for a democratic society, one of the basic preconditions for its development and for the self-realization of each individual.<sup>1</sup> The state has a responsibility to respect, protect and ensure the full enjoyment of freedom of expression for all individuals. The exercise of this right equally contributes to the self-development and self-expression of the individual, as well as to his or her participation in processes of public importance. Freedom of expression is a universal right, it applies equally to all people and its protection is equally important everywhere for each individual.

"The right to freedom of expression is one of the prerequisites for the existence of a democratic society and its full development. Uninterrupted dissemination of opinion and information ensures diversity of views, promotes public and informed discussion on important issues for the public, makes it possible for each member of the community to be involved in public life".<sup>2</sup> Therefore, this right allows people to conduct public discussions on a variety of issues, including those on matters of interest for society. It also allows people to express their opinion openly and publicly, orally, in writing or in the form of a performance. And it makes that people can freely share with each other all kind of opinions, both acceptable and likable to the majority of the society, as well as sharp, critical and unpopular opinions.

When it comes to the welfare and progress of the state, public criticism is naturally directed, in many cases, at government officials, who, based on their powers, have the potential to have a significant impact on the country's democratic development. For many years, the judiciary has been the object of sharp public criticism. However, while everyone can express their opinion, no matter how harsh and outrageous it may be, judges have a high obligation of abidance to criticism based on their legal status. For the vast majority of judges therefore such sharp or offensive criticism is unacceptable. In their view, it is an impediment to "ensuring the independence and impartiality of the judiciary."<sup>3</sup>

Restrictions of the freedom of expression, as well as any other right, require special precautions from judges, so as not to arbitrarily and disproportionately restrict the right to freedom of expression. To this end, it is necessary for judges, on the one hand, to realize and respect the importance of freedom of expression in a democratic society, and on the other hand, to have adequate knowledge of the national and international standards for restricting this right. Accordingly, the purpose of this document is to provide a guideline

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<sup>1</sup> ECtHR: *Lingens v. Austria*, 8 July 1986; *Sener v. Turkey*, 18 July 2000; *Thoma v. Luxembourg*, 29 June, 2001; *Maronek v. Slovakia*, 19 April 2001; *Dichand and Others v. Austria*, 26 May, 2002, *Satakunnan Markkinaporssi and Satamedia v. Finland* 27 June 2017; *Pentikainen v. Finland* 20 October 2015; *Ibrahimov and Mammadov v. Azerbaijan* 13 February, 2020.

<sup>2</sup> Constitutional Court of Georgia 30 October 2008. № 2/3/406,408. On the Case: "The Public Defender of Georgia and Georgian Young Lawyers' Association v. Parliament of Georgia", II-26.

<sup>3</sup> This approach was identified through the analysis of the opinions expressed by the majority of judges participating in the Supreme Court judges competition in July-November 2019.

for judges on the basic principles established at the international and domestic level in relation to cases of restriction of freedom of expression on the grounds of ensuring the authority, independence and impartiality of the judiciary.

This document is based on the standards established by the European Convention on Human Rights and Fundamental Freedoms (hereinafter referred to as “European Convention” or “ECHR”) and the European Court of Human Rights (hereinafter referred to as “ECtHR”), as well as the Constitutional Court of Georgia. The first chapter of the document discusses the area protected by the freedom of expression (the right to have an opinion, the right to disseminate and receive information and ideas, offensive expression). The second chapter discusses the grounds of restriction of freedom of expression (restriction test). The third and fourth chapters discuss in more detail the issue of restricting freedom of expression on the grounds of ensuring the authority, independence and impartiality of the judiciary. At the end of the guideline a conclusion is presented and appropriate recommendations are made to the judges.

## **Chapter 1**

### **The Scope of the Freedom of Expression**

The right to freedom of expression, at the international and local level, is protected by a number of legal documents. For the purposes of this guide, we will focus only on the European Convention and the Constitution of Georgia.<sup>4</sup>

Article 17 of the Constitution of Georgia provides:

*„1. Freedom of opinion and the expression of opinion shall be protected. No one shall be persecuted because of his/her opinion or for expressing his/her opinion.*

*2. Every person has the right to receive and impart information freely. “*

Article 10 of the European Convention stipulates:

*1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises “.*

As can be seen from the above records, the area protected by freedom of expression includes:

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<sup>4</sup> See also Article 19 of the Universal Declaration of Human Rights and Article 19 of the International Covenant on Civil and Political Rights. Although this guideline focuses on specifically on ECHR, as it is a binding Convention for Georgia as a member of the Council of Europe and that the Convention has direct applicability in the legal order of Georgia, while the ECHR has also the most developed system of external supervision by the European Court of Human Rights.

### ***Freedom to hold opinion***

According to the Law of Georgia “on Freedom of Speech and Expression”, “Everyone, except an administrative body, shall have the freedom of expression, which shall imply: a) absolute freedom of thought;”<sup>5</sup> According to the same law, “Thought shall be protected by an absolute privilege”<sup>6</sup> which means the full and unconditional release of a person from liability under the law.

“Freedom to hold opinions is a prior condition to the other freedoms guaranteed by Article 10”, and “any restrictions to this right will be inconsistent with the nature of a democratic society”.<sup>7</sup> The state should not try to indoctrinate its citizens. Moreover, the dissemination of only one-sided information by the state may create serious and unacceptable obstacles to the passage of opinion. This right also includes the right to change an opinion whenever and for whatever reason a person so freely chooses<sup>8</sup> and also, the negative aspect, that one should not be forced to reveal his/her own opinions.<sup>9</sup>

### ***The right to express and impart information and ideas***

The right to express and impart information and ideas has a special place in the political life of the country and in the establishment of democratic institutions. The ECtHR has emphasized the importance of the right to freedom of expression and of imparting information and ideas on political and other issues of public interest. In the case of *Lingens for instance*, the ECtHR stated: “Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them”<sup>10</sup>

According to the Constitutional Court of Georgia “People's views, beliefs, information, as well as the means used to express and impart them are protected, including the press, television, and other means of dissemination of information and opinion.”<sup>11</sup> This allows the individuals to decide for themselves in what form, in what way they want to express themselves, and to express their views or opinions. As this right is not absolute however, restrictions or limitations can be applicable on certain grounds, as provided for in the relevant article of the Constitution itself.

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<sup>5</sup> The Law of Georgia “on Freedom of Speech and Expression”. Art. 3 (2a). Available at: <https://bit.ly/2REHXAZ>

<sup>6</sup> Ibid. Article 4 (1).

<sup>7</sup> Human rights handbooks, No. 2. A guide to the implementation of Article 10 of the European Convention on Human Rights. pg. 8 Available at: <https://bit.ly/39xsVTI>

<sup>8</sup> EU Human Rights Guidelines on Freedom of Expression Online and Offline pg.3. Available at: <https://bit.ly/3elX1gI>

<sup>9</sup> ECtHR *Vogt v. Germany* 26 September 1995. Available at: <https://bit.ly/3cNStPc>

<sup>10</sup> ECtHR: *Lingens v. Austria*, 8 July 1986; *Sener v. Turkey*, 18 July 2000; *Thoma v. Luxembourg*, 29 June, 2001; *Maronek v. Slovakia*, 19 April 2001; *Dichand and Others v. Austria*, 26 May, 2002, etc.

<sup>11</sup> Constitutional Court Plenum 18 April 2011, on the case of “political party” *Movement for United Georgia*”, *Political Union of Citizens*” *Georgian Conservative Party*”, *the citizens of Georgia - Zviad Dzidziguri and Kakha Kukava*, *Young Lawyers' Association*, *the citizens: Dachi Tsaguria and Jaba shkariani*, *the Public Defender of Georgia V. the Parliament of Georgia*” II-3.

### ***The right to receive information and ideas***

The right to freedom of expression includes freedom to seek and receive information. It is a key component of democratic governance as the promotion of participatory decision-making processes is unattainable without adequate access to information.<sup>12</sup> This part of the right also implies the ability of the individual to investigate for what purpose, and who is processing the information about him/her.

### ***The offensive expression***

Offensive expression is worth mentioning separately while discussing the scope of the freedom of expression. This issue is of particular importance given the fact that the punishable action under Article 366 of the Criminal Code of Georgia - Contempt of court is manifested in the insult of a participant of legal proceedings, Judge or Juror. However, the legislation does not specify what kind of action/expression it considers under "insult". Accordingly, when an offensive expression is directed to a court / judge, the legislation provides for the possibility of restriction of freedom of expression on the basis of the subjective definition of the legislative term - "insult". This, in turn, makes the issue of proportionality of the imposed sanctions problematic and controversial.

At many occasions since its 1976 judgment in *Handyside v. the United Kingdom*, the ECtHR has emphasized the importance of protecting offensive speech:

*"Freedom of expression constitutes one of the essential foundations of such a (democratic) society, one of the basic conditions for its progress and for the development of every man... it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that **offend**, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".<sup>13</sup>*

The Constitutional Court of Georgia shares the approach of the European Court of Human Rights:

*"free speech is valued, because it includes not only the views or expressions which are acceptable to all, or are positively perceived, for the whole society or even for the greater part of it, or echo the opinion and taste of the majority, or is not considered to be ticklish, but it also includes ideas, thoughts or expressions that are unacceptable for the government, part of society or individuals, is shocking and that may upset society, people, even offend them, that can cause outrage in the community, as well as it includes criticism and sarcasm. These are the demands of tolerance, pluralism, forbearance, which are an indispensable source of nourishment for democracy.*

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<sup>12</sup> Dirk Voorhoof, Investigative journalism, access to information, protection of sources and whistle-blowers. 24 March 2017, Available at: <https://bit.ly/3bM0N0v>

<sup>13</sup> ECtHR: *Handyside v. the United Kingdom* 7 December 1976; *Sunday Times v. the United Kingdom* 26 April 1979; *Lingens v. Austria* 8 July 1986; *Oberschlick v. Austria* 23 May 1991; *Morice v. France* (GC) 23 April 2015 and *Terentyiv v. Russia* 28 August 2018;

*Each person is individual, unique, different, and this is what creates a chance for diversity and, therefore, progress. It is therefore impossible to limit and thoroughly exhaust those opinions or expressions, to define a terminology that is entirely acceptable to society, to all people. The even more insurmountable task is to artificially agree or unconditionally share such views, and as a result, everything else is declared beyond the law... [...] Therefore, the state has no authority to divide thoughts into "right" or "wrong", "desirable" or "undesirable" and other categories. If a person is unable to say what h/she thinks or if he/she is forced to say what he/she does not agree with, then they are insulting the basis of human rights – one's dignity".<sup>14</sup>*

According to the law of Georgia “on Freedom of Speech and Expression”, Regulation of the content of speech and expression may be established by law, if it concerns among others slander, direct abuse and threat.<sup>15</sup> Based on the current legislation and the practice of the Constitutional Court of Georgia, it can be concluded, that the "offensive expression" is within the scope of the freedom of expression and the restriction of the freedom of expression during direct abuse (face-to-face, offensive expression) serves for the purpose of maintaining public order and security.

## **Chapter 2**

### **Grounds of Restriction of the Freedom of Expression**

Despite of the special importance of freedom of expression, it is not an absolute right and “it can be restricted with the legitimate aim set forth in the Constitution of Georgia by using appropriate means to achieving the goal.”<sup>16</sup> The so-called „three party test“ of restriction of the right is (almost) identical in both the Constitution of Georgia and the European Convention.

Article 17 (5) of the Constitution of Georgia sets out the preconditions on the grounds of which it is possible to restrict freedom of expression. In particular:

“the restriction of these rights may be allowed only in accordance with law, insofar as is necessary in a democratic society for (1) ensuring national security, (2) public safety or (3) territorial integrity, (4) for the protection of the rights of others, (5) for the prevention of the disclosure of information recognized as confidential, or (6) **for ensuring the independence and impartiality of the judiciary.**”

Similarly, Article 10 (2) of the European Convention stipulates that:

“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of

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<sup>14</sup> Constitutional Court of Georgia 30 September 2016 on the case of “the citizen of Georgia Iuri Vazagashvili v. the Parliament of Georgia” II-41

<sup>15</sup> Law of Georgia “on Freedom of Speech and Expression”. Article 9(1). Available at: <https://bit.ly/2REHXAZ>

<sup>16</sup> Constitutional Court of Georgia 14 May 2013 on the case of “Citizens of Georgia- Aleksandre Baramidze, Lasha Tugushi, Vakhtang Khmaladze and Vakhtang Maisaia v. The Parliament of Georgia” II-7.



national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or *for maintaining the authority and impartiality of the judiciary*".

Notice that with respect to the judiciary, the European Convention envisages "maintaining the authority and impartiality of the judiciary", whereas the Georgian Constitution considers "ensuring the independence and impartiality of the judiciary" to be a legitimate aim for restricting the right to freedom of expression. Furthermore, the list in Article 10 § 2 ECHR of the legitimate aims for interfering with the right to freedom of expression is more extensive. Unlike the Constitution of Georgia, it includes public interests such protection of "health" and "morals", and the prevention of "disorder or crime". In view of the above, the Constitution of Georgia guarantees a relatively higher degree of protection of the Freedom of Expression than the minimum standard provided for in the European Convention.

Such a difference in terms is not accidental and may, in some cases, play an important role in resolving the case. This distinction should not be left out of the attention of judges, as "authority" is more comprehensive concept than independence. It is through the provision of independence and impartiality that it is possible to strengthen the authority of the judiciary in the eyes of the public

In order for the restriction of freedom of expression to be consistent with the Constitution and the Convention, it must meet a so-called three-part test, under which, is checked:

1. Whether the restriction is prescribed by law;
2. Existence of the legitimate aim for which the restriction is intended;
3. The question of the necessity of restriction and the proportionality of the means of its achievement.

### ***Prescribed by Law***

Any interference in the right to freedom of expression must be based on the requirements of the law adopted by the legislature. This precondition also applies to the quality of the law itself. According to the standard of the ECtHR (which is also shared by the Constitutional Court of Georgia), the law must be public, accessible, predictable and must provide a clear explanation of the circumstances in which an individual's freedom may be restricted. In particular, at the stage of verifying the determination of – prescribed by law, two aspects are assessed - the formal and qualitative characteristics of the law. "**The formal requirement** of being prescribed by law provided by the Constitution is satisfied when (1) the issue is directly regulated by law; Or (2) the legislature has delegated the authority to regulate the issue to another competent authority by law".

In assessing **the qualitative characteristics** of the law, it is taken into account how predictable the norm is based on which the freedom of expression is restricted, to what extent a person can understand the content of the norm, the consequences of disobedience to it, and direct his actions in accordance with the norm. "The restrictive

norms of freedom of expression must be provided for in clear and unambiguous, narrowly purposeful law." <sup>17</sup> "The law must be accessible, predictable and precisely defined, and must contain other guarantees to protect against the risk of arbitrariness."<sup>18</sup>

The standard set in the *Sunday Times* case, to which the ECtHR returns in the process of resolving each subsequent case, combines two requirements, "Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail".<sup>19</sup>

### ***Legitimate Aim***

The second step is the assessment of the legitimate aim pursued. According to the Constitutional Court of Georgia, "The government is empowered to impose formal, substantively neutral restrictions on the exercise of the right to freedom of expression, although such restriction (regulation) should be aimed at achieving a legitimate aim and should be a prerequisite for achieving this goal." <sup>20</sup>

Similar to the verification of the stage of "prescribed by law", the approach of the Constitutional Court of Georgia as well as the ECtHR is identical in terms of defining legitimate aim. "The second part of the test for restrictions on freedom of expression is that the restriction must pursue a legitimate aim or interest. It is clear, both from the wording of Article 10(2) and the jurisprudence of the Court, that the list of interests found in Article 10(2) is exclusive and exhaustive, in the sense that no others are considered appropriate"<sup>21</sup>

### ***The necessity and proportionality of the restriction***

In the third part of the test for assessing the constitutionality of restrictions on freedom of expression is whether pertinent and sufficient reasons can justify the necessity of the restriction in a democratic society and whether the restriction or sanction is proportionate to the aim pursued. "...There must be a direct and real connection between the goal and the means to achieve it. At this time, it is also important to consider the extent and scale of the damage that is expected to be achieved. It must, of course, be able to

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<sup>17</sup> Constitutional Court of Georgia 10 November 2009 on the case of "*Citizens of Georgia Giorgi Kipiani and Avtandil Ungiadze v. The Parliament of Georgia*", II-7.

<sup>18</sup> Constitutional Court of Georgia 25 December 2006 on the Case of "*Citizens of Georgia Vakhtang Masurashvili and Onise Mebonia v. The Parliament of Georgia*".

<sup>19</sup> ECtHR, *The Sunday Times v. the United Kingdom*, 26 April 1979, Para. 49. Available at: <http://bit.ly/2TynqhB>

<sup>20</sup> Constitutional Court of Georgia of 11 April 2012 on the case of "*The Public Defender of Georgia v. Parliament of Georgia*" II-53.

<sup>21</sup> T. Mendel, A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights p. 38. Available at: <http://bit.ly/2wvlbUM>

secure specific goals, interests, otherwise, the public and private interests will be harmed in the same way".<sup>22</sup>

According to the Constitutional Court of Georgia a restriction is in accordance with the Constitution "if it is necessary to ensure the goods protected by the Constitution in a democratic and free society, and if the goods protected by the restriction of expression exceeds the harm caused by the restriction."<sup>23</sup>

Like the Constitutional Court of Georgia, the ECtHR also pays special attention to the necessity and proportionality of the restriction. In practice, the vast majority of cases decided by the European Court are decided on the basis of the third part of the test for restrictions, namely through a consideration of whether, taking into account all of the circumstances, the restriction is necessary in a democratic society. The Court has noted that, whilst the adjective "necessary", within the meaning of Article 10 § 2 is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable" and that it implies the existence of a "pressing social need". In terms of assessing whether the measures were necessary to address a 'pressing social need', the Court has frequently stated that in particular it "must determine whether the reasons adduced by the national authorities to justify the interference were 'relevant and sufficient' and whether the measure taken was 'proportionate to the legitimate aims pursued'". In doing so, the Court has to satisfy itself "that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10"<sup>24</sup>.

## **Restriction of the Freedom of expression for ensuring the Independence and Impartiality of the Judiciary**

### **Standard established by the Constitutional Court of Georgia**

#### *Protected legal good and their balance*

As already mentioned, freedom of expression may be restricted in order to ensure the independence and impartiality of the court or the judiciary. However, it is necessary to maintain a fair balance between these two legal goods, which is primarily enshrined in the Constitution of Georgia. The Constitutional Court states, that "the main thing that democratic countries focus on is that achieving and protecting the most important goal of the state, such as judicial authority and effective justice, should not be at the expense

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<sup>22</sup> Constitutional Court of Georgia 11 June 2013 on the case of "*The citizen of Georgia Tristan Mamagulashvili v. the Parliament of Georgia*". II-30.

<sup>23</sup> Constitutional Court of Georgia 11 April 2012 on the case of "*The Public Defender of Georgia v. Parliament of Georgia*" II-44.

<sup>24</sup> ECtHR *Cumpănă and Mazăre v. Romania* (GC) 7 December 2004, Para 90. See also T. Mendel, A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights p. 39. Available at: <http://bit.ly/2wv1bUM>

of violating fundamental human rights. Adequate protection of fundamental human rights in Georgia is a constitutional obligation of the government.”<sup>25</sup>

„The independence of a judge, as one of the main principles of a legal state, implies non-interference in his/her professional activities and/or personal life in order to influence him/her. The judge must be equally distanced and protected from the interests of the government as well as various public or political groups and/or personal interests<sup>26</sup> At the same time, protection of the independence of the judge or other members of the judiciary does not imply a prohibition on criticism of court decisions or the professional conduct of judges. The Constitutional Court particularly emphasizes that “the expression of one’s own attitude towards the activities of the Court, including through assemblies (demonstrations) in the vicinity of the Court, is a constitutional human right.”<sup>27</sup> With regard to certain criticism of judges’ activities or their professional or personal qualities, the Constitutional Court has clarified that such criticism “may be substantiated by the public interest.”<sup>28</sup> This approach is supported by the practice established by the Constitutional Court, according to which, the Constitution protects critical thinking, including those that may be perceived by some as too strict or inadequate.<sup>29</sup>

The Constitutional Court offers a formula for maintaining a proper balance between freedom of expression and the protection of the independence and impartiality of the judiciary: “The right to express one’s opinion and to hold a rally (demonstration) must be guaranteed, except when the exercise of this right prevents the court from working smoothly.”<sup>30</sup>

It should be noted that the Constitutional Court considers the smooth and efficient conduct of the judiciary process as the motive and purpose of criminalizing the behaviour that shows disrespect to the court in criminal law. It states that “disrespect towards the judiciary is not an offense directed to the judge’s personal dignity, but an impediment to the proper administration of justice. Authority, to assess such action and to impose sanctions, is considered as an integral part of the functioning of the legal state and a concomitant factor of the authority of a judge. This ensures the efficient and proper implementation of legal proceedings.”<sup>31</sup>

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<sup>25</sup>Constitutional Court of Georgia 15 December, 2006 on the Case of “Citizens of Georgia Vakhtang Masurashvili and Onise Mebonia v. The Parliament of Georgia”. Para 2.

<sup>26</sup>Constitutional Court of Georgia 18 April 2011 on the case of “Citizens Political Union “Movement for United Georgia”, Citizens Political Union “Conservative Party of Georgia”, Citizens of Georgia – Zviad Dzidziguri and Kahka Kukava, Georgian Young Lawyers’ Association, Citizens of Georgia – Dachi Tsaguria and Jaba Jishkariani, The Public Defender of Georgia v. Parliament of Georgia”. II-66

<sup>27</sup> *Ibid*, II-68.

<sup>28</sup> *Ibid*, II-67.

<sup>29</sup> *Ibid*, II-106.

<sup>30</sup> *Ibid*, II-60.

<sup>31</sup> Court of Georgia 25 December 2006 on the Case of “Citizens of Georgia Vakhtang Masurashvili and Onise Mebonia v. The Parliament of Georgia”.

## **Minimal standards established by the ECtHR**

### ***The limits of permissible criticism***

The object of public criticism may be a particular judge, a decision, or the entire judiciary. According to the ECtHR, “bearing in mind that judges form part of a fundamental institution of the State, they may as such be subject to personal criticism within the permissible limits, and not only in a theoretical and general manner. When acting in their official capacity they may thus be subject to wider limits of acceptable criticism than ordinary citizens”.<sup>32</sup> Making negative statements that may affect a particular judge / judges or those involved in litigation does not necessarily fall outside the scope of permissible criticism, if making the statement is related to an issue of public interest. In such cases, the European Court of Human Rights also considers, that “the judiciary may benefit from constructive criticism”.<sup>33</sup>

In determining the scope of the permissible criticism, the European Court of Human Rights pays special attention to the purpose of the expression. It states, that “If the sole intent of any form of expression is to insult a court, or members of that court, an appropriate punishment would not, in principle, constitute a violation of Article 10 § 2 of the Convention”.<sup>34</sup>

### ***Proportionality of the sanction used while restricting the freedom of expression and the "chilling effect"***

The ECtHR attaches great importance to the use of proper and appropriate, least restrictive means to achieve the legitimate aim of restricting the freedom of expression, so that the measures taken by the state do not have a "chilling effect"<sup>35</sup> on the debate over the issue of public interest. According to the court, we are facing the „chilling effect" when a person applies "self-censorship"<sup>36</sup> based on the fear of disproportionate punishment or a fear of initiating an investigation against him/her based on the laws that contain too wider content.<sup>37</sup> The Court recalls “that in assessing the proportionality of the interference, the nature and severity of the penalties imposed are also factors to be taken into account”<sup>38</sup>.

It should be emphasized that despite the necessity and importance of an independent and impartial Judiciary in a democratic society, the legitimate aim of restricting the freedom of expression can be achieved through the use of less restrictive punishments than

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<sup>32</sup> ECtHR *Morice v. France* (GC) 23 April 2015, para. 131. Available at: <https://bit.ly/2S6TZn6>

<sup>33</sup> *Ibid*, para. 167.

<sup>34</sup> ECtHR *Skalka v. Poland* 27 August, 2003. para. 34. Available at: <https://bit.ly/3c6Zlka>

<sup>35</sup> ECtHR: *Kabanov v. Russia*, 3 February 2011; *Tavares de Almeida Fernandes and Almeida Fernandes v. Portugal*, 17 January 2017;

<sup>36</sup> ECtHR *Vajnai v. Hungary* 8 October, 2008. Para 54. Available at: <http://bit.ly/2TwBngc>

<sup>37</sup> ECtHR *Altuğ Taner Akçam v. Turkey*, 25 October, 2011. Para 68 Available at: <http://bit.ly/2vC34MF>

<sup>38</sup> ECtHR *Cumpăna and Mazăre v. Romania* (GC) 7 December 2004. Para 114. Available at: <http://bit.ly/3cEliRs>

imprisonment, such as: warning, community service, fine. This is also read in the decisions of the ECtHR, where the violation of Article 10 of the European Convention is ruled in the part of the proportionality of the sanction chosen by the judge.

## **Conclusion**

The proper exercising of the right to freedom of expression is vital for all individuals. Therefore, judges, as guarantors of protecting the human rights, should be especially careful in dealing with such cases, which are related to the possible restriction of freedom of expression. The smooth and proper functioning of the Judiciary, as a means of ensuring the independence and impartiality of the judiciary, is indeed a worthy protection. However, it should not be protected through treating speech as an object of justice. In resolving the conflict between these two legal interests, judges must, first and foremost, be guided by the high standard of protection of freedom of expression established by the Constitutional Court of Georgia.

### **Recommendations:**

- Where, there is no clear and immediate threat of obstruction of the judicial process by the applicant, Judges should refrain from punishing a person under criminal law, in particular by using an imprisonment as a punishment. Especially when current legislation of Georgia provides for the use of less restrictive means of punishment for violating the order in the courtroom;
- The judges should apply the use of imprisonment as a punishment under Article 366 of the Criminal Code only in the most radical circumstances. Such cases may occur when there is damage of the inventory in the courtroom or a repetitive abuse from a person;
- The judges should be guided by the standard established by the Constitutional Court of Georgia when substantiating decisions on restriction of freedom of expression, even manifested in offensive forms;
- When quoting the case law, it is important that judges fully understand the similarity between the case before them and the factual circumstances of the case law. The decision to restrict freedom of expression based solely on basic legal principles will not meet the standard set by the Constitutional Court of Georgia and the European Court of Human Rights in assessing the restriction of this right.