



# Freedom of Expression and Protection of Independence and Impartiality of the Judiciary

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*Promoting Rule of Law  
in Georgia (PROLoG)*

*„In the U.S. we have the First Amendment. It was not written to protect only the  
speech we like.  
The public can say anything it wants about the Judiciary, Judges or their decisions. In  
response,  
we say nothing. We speak through our opinions and nothing more.  
That is the part of the price I pay for doing the job that I do”*

*Judge Allyson K. Duncan,  
U.S. Federal Appellate Judge (Fourth Circuit)*

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## Introduction

The importance of freedom of expression is unanimously recognized among democratic countries under the rule of law. Law theorists, philosophers, international organizations, human rights institutions, and international, regional and national courts put particular emphasis on the need for the effective realization of this right and the threats arising from its unjustified restriction.

The formation of a democratic society is impossible without the protection of human rights and freedoms, and indeed it is the independent and impartial judiciary that guarantees such protection. However, in a lot of cases the judiciary as a whole or a specific judge and/or their judgments become targets of criticism and, in some cases, offensive expressions. In that situation, it is extremely important, that a fair balance is established between freedom of expression and the independence and impartiality of the judiciary.

According to the Constitutional Court of Georgia (hereinafter referred to as the "Constitutional Court") the Constitution "gives the freedom of information a prominent place and pays great attention on it. In the society where freedom of opinion is recognized and protected by the constitution, freedom of information is also protected. Without freedom of information, it is unthinkable to provide a vital discussion and thought-provoking process which is one of the main characteristics of the free society. In order to form an opinion, it is necessary to obtain the information, and the freedom of dissemination of information ensures that the opinion is transmitted from the author to the addressee. Apart from the public burden, freedom of information is of great importance for the personal and intellectual development of an individual".<sup>1</sup>

The European Court of Human Rights (hereinafter referred to as the "ECtHR") as early as in 1976, in the case of *Handyside v. the United Kingdom*, for the first time, set out what has afterwards<sup>2</sup> become a mantra when discussing freedom of expression:

"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 favorably 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>3</sup>

In the last few years, initiatives (legislative proposals) connected to the restriction of the freedom of expression for the protection of the abuse of religious feelings, adoption of the law on defamation, to stirring up the enmity and contextual control of creative work has specially increased, and a majority of them came from representatives of Georgia's highest legislative body.

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<sup>1</sup> Constitutional Court of Georgia 30 October 2008, *The Public Defender of Georgia and Georgian Young Lawyers' Association v. Parliament of Georgi*. II-10.

<sup>2</sup> ECtHR *Morice v. France* (GC) 23 April 2015, para 124. Available at: <https://bit.ly/2S6TZn6>

<sup>3</sup> ECtHR *Handyside v. the United Kingdom* 7 December 1976. Para. 49. Available at: <http://bit.ly/39kP7kQ>

In addition to such initiatives by the legislature and the president, non-judge members of the High Council of Justice (hereinafter referred to as the “HCoJ”), expressed the need of regulations in order to restrict expressions and comments criticizing the judiciary. In their view, freedom of expression in some cases risks to undermine the authority of the judiciary and adversely affect public confidence in them.<sup>4</sup> Obviously, the protection of the independence and impartiality of the judiciary is the legitimate aim, but it is important to have an adequate means of achieving it.

This research deals with the analysis of international and national practice regarding establishing the fair balance between two important interests - the right to freedom of expression and protection of the independence and impartiality of the judiciary. The experiences and international practices of other countries reflected in this report will be incorporated into key findings and recommendations that we believe will help maintain both a high standard of freedom of expression and the independence of the judiciary and thus increase public confidence in it.

## **Key Findings:**

- The ECtHR, in its rulings of various periods, clearly distinguished between statements of fact and value judgments. According to the Court's assessment, when the statement is equivalent to a value judgement, the extent of the interference may depend on whether there is a sufficient "factual basis" for the appealed statement. If there is not, such value judgement might be considered as excessive. In order to distinguish between factual allegations and value judgement, it is necessary to take into account the circumstances and general tone of the statement. It should also be borne in mind that statements on matters of public interest may constitute to value judgement rather than stating a fact.
- If we do not consider cases where the assault is extremely harmful and unfounded, judges are part of the state's fundamental institutions and may be subject to criticism. Thus, during the exercise of their official authority, they extend to a wider range of permissible criticism than in the case of ordinary citizens.
- While assessing the statements directed to judges, the fact, that judges are unable to react/reply to the statements due to judicial ethics, should be taken into account. However, this cannot be the ground of restriction of the expression of opinions or value judgments based on facts or comments on issues of public interest, such as the functioning of the justice system.
- In a country governed by the rule of law, the court as a guarantor of justice must enjoy the confidence from the public. Thus, it may be necessary to protect this trust against highly damaging attacks that are inherently unfounded. Accordingly, the proper functioning of the judicial process and the avoidance of interferences

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<sup>4</sup> Statement of the High Council of Justice of Georgia on alleged violations of the freedom of expression. Available in Georgian language at: <http://bit.ly/2U20TK9>

with the administration of justice are considered, in all reviewed jurisdictions, as legitimate aims to restrict the right to freedom of expression, holding that such restrictions must sufficiently precise be prescribed by law, contain guarantees against arbitrary applications and in their application be proportionate and necessary in a democratic society.

- Unlike court decisions and the work of the judiciary as a whole, a more rigorous approach can exist regarding the exercise of the right to freedom of expression in the courtrooms, which prevents conducting proper court process and impedes the administration of justice.
- The ECHR's approach regarding criticism of the judiciary has developed over time and is now geared towards more protection of freedom of expression than at the initial stage of practice.
- Within the framework of the research, the analysis of the judgments delivered by the common courts, revealed a tendency that the courts of general jurisdiction of Georgia apply less substantiated judgment standard while using imprisonment sanctions. In most cases, instead of applying constitutional standard, the ECHR standard is applied, which sets lower standard on freedom of expression.
- While restricting the freedom of expression in order to ensure the smooth and proper administration of justice, the judge has the opportunity to be guided by criminal or civil law proceedings, as well as the relevant articles of the Code of Administrative Offenses. Such an approach will ensure that the legitimate aim of the use of lighter means of criminal liberty is achieved.
- In assessing the restriction on the freedom of expression by the ECtHR, particular attention is paid to the proportionality of the sanctions applied. Accordingly, the proportionality of the deprivation of liberty provided for in Article 366<sup>5</sup> of the Criminal Code may be put under question in cases where the abusive expression was not made directly in the face of the judge, thus, it did not, therefore, affect its impartiality and independence.
- The majority of barristers, representatives of universities and courts gathered in 5 different cities across Georgia consider that the sanction provided by Article 366 of the Criminal Code of Georgia is severe and unacceptable. For a relatively small group - imprisonment is a severe punishment, but it can have a deterrent effect. The sanction provided for by Article 366 of the Criminal Code was also considered as “severe” by the judges, who took the part in the interviews.

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<sup>5</sup> **Article 366 of the Criminal Code; Contempt of court**

1. Contempt of court manifested in the insult of a participant of legal proceedings, - shall be punished by a fine or community service for one hundred and eighty to two hundred and forty hours or with imprisonment for up to a year.
2. The same act manifested in the insult of a member of the Constitutional Court, of a judge or a juror, - shall be punished by a fine or corrective labor from one to two years, or with imprisonment for up to two years.

- Generally, barristers and university professors participating in the research consider that the criticism of the court is acceptable as it promotes the improvement of the system and therefore should not affect the independence and impartiality of the judge. However, in some cases, respondents have stated that a judge's criticism may provoke the latter against a particular party. As regards to the distinction between criticism of judgment and of the judge itself, only in a small number of cases it was suggested that it was impossible to distinguish between the judge's personal criticism and the judgment's criticism

# Research Methodology

## Research Objectives

The objective of the present research is to gather the information and conduct a comparative analysis of the standards in the USA, Georgia, as well as under the European Convention on Human Rights (ECHR) as interpreted and applied by the European Court of Human Rights (ECtHR) concerning freedom of expression and protection of the authority and impartiality of the judiciary. In particular, the research covers:

- legislation with regard to defamation of judges, contempt of court (an insult of a participant of legal proceedings, a member of the Constitutional Court, a judge, a juror, a member of the public prosecutor's office) and with regard other aspects related to coverage and debate about the judiciary and the administration of justice;
- the relevant case-law of the Supreme Court of the United States, the Supreme Court of Georgia and the European Court of Human Rights.

The necessity of conducting the abovementioned research stems from some alarming court precedents of unjustified interferences, unnecessary restrictions and often disproportionate sanctions in relation to the right to freedom of expression when reporting about the judiciary or court proceedings over the last period in Georgia.<sup>6</sup> It should also be mentioned that during the hearings at the High Council of Justice with the judicial candidates for the Supreme Court in July-August, 2019, opinions expressed by the candidates in relation to this issue have made an impression that judges are more inclined to restrict freedom of expression when it comes to critical (sometimes offensive) views with regard to the judiciary rather than to show high tolerance towards such expressions, when they are related to reporting and debate on matters of public interest and the public's right to be properly informed about the administration of justice. Therefore, it seems that their attitudes are not fully in accordance with international standards on the right to freedom of expression when it concerns the judiciary.

## Research Methodology

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<sup>6</sup> In a short period of time common courts considered the following cases:

- a) Criminal case against Zviad Kuprava. On August 1, 2019, Zviad Kuprava was sentenced to 9 months imprisonment by the Tbilisi City Court. The case is related to the incident of June 11, 2018, when Zviad Kuprava was on a one-hour break in the cafeteria of the courthouse. At that time, the police approached Zviad Kuprava and called for him to leave the cafeteria and appear in the courtroom. Zviad Kuprava used offensive expression towards the judge, but the judge was not abused face-to-face. Subsequently, a judge questioned as a witness in the case noted that he found out about the incident after the hearing, therefore, Zviad Kuprava's statement had no bearing on his independence and impartiality.
- b) The case of Buba Nachkebia's administrative offense. In 2019, the Buba Nachkebia made an insulting statement about the lecturer in the closed group of the social network - Facebook and posted an internet meme on him. Tbilisi City Court described the action as an administrative offense, namely petty hooliganism.
- c) Civil Case against Fady Asly; In 2017, Tbilisi City Court Judge Vladimir Kakabadze sued Fady Asly, the chairman of the International Chamber of Commerce (ICC), for defamation. Kakabadze demanded GEL 20,000 for moral damages. Kakabadze's lawsuit was initially upheld by both the City and Court of Appeals and ordered Fady Asly to pay him GEL 3,000 in compensation. The Supreme Court reversed the lower court's ruling and found no signs of defamation in Fady Asly's statements.

In order to conduct the present research, the following methods of research were applied:

- Desk Research – examination and analysis of the gathered information (internal and international legislation, internal and international case law (court decisions), legal documents, legal literature);
- Qualitative Research – gathering the information through in-depth interviews with target groups<sup>7</sup> about the attitudes and professional experience regarding the restriction of freedom of expression in relation to the judiciary and analysis of the information obtained.

### **Processed Information**

In the frames of **the desk research** the following information and documents are examined and analyzed:

- Legislation of the USA regarding freedom of expression;
- Legislation of the USA regarding protection of the authority and impartiality of the judiciary;
- Case law of the USA regarding freedom of expression in the light of protection of the authority and impartiality of the judiciary;
- Relevant provisions of the European Convention on Human Rights regarding freedom of expression and the protection of the authority and impartiality of the judiciary;
- Recommendations, resolutions and declarations of the Council of Europe on the issue of freedom of expression and defamation, and on the media coverage of court proceedings;
- Case law of the European Court of Human Rights regarding restriction of freedom of expression in order to protect the authority and impartiality of the judiciary;
- Georgian legislation regarding freedom of expression;
- Georgian legislation regarding protection of the authority and impartiality of the judiciary;
- Georgian case law and statistics regarding freedom of expression, especially in cases where freedom of expression was in conflict with the interest of maintaining the authority and impartiality of the judiciary;
- Interpretations and opinions expressed in the legal literature regarding freedom of expression with respect to the judiciary.

In the frames of **the qualitative research** the following information and issues are examined and analyzed:

- The attitudes of the representatives of professional circles regarding freedom of expression with respect to the judiciary;
- The professional experience of the representatives of professional circles regarding freedom of expression with respect to the judiciary.

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<sup>7</sup> The focus groups consisted of the representatives of professional circles, in particular the members of the Georgian Bar Association, university professors, practicing lawyers, judges of common courts and members of the Constitutional Court, as well as, court staff. The focus group meetings were conducted with the help of Caucasus Research Resource Center (CRRG-Georgia).

## Scope of the Freedom of Expression

The role and importance of freedom of expression in the process of individual self-development and the formation of a democratic society is recognized by a number of national legal provisions and international treaties. This chapter discusses the protected sphere of the freedom of expression guaranteed under Article 17<sup>8</sup> of the Constitution of Georgia and Article 10 of the European Convention on Human Rights (hereinafter referred to as the “European Convention”) and relevant decisions of the Constitutional Court and the ECtHR.

"The first sentence of Article 17(1) of the Constitution of Georgia and the second paragraph of the same article protect the right to freely receive and impart information without substantive filtering of information."<sup>9</sup> As for paragraph 5 of the same article, according to the preconditions of the restriction established in it, “The restriction of these rights may be allowed only in accordance with law, insofar as is necessary in a democratic society for ensuring national security, public safety or territorial integrity, for the protection of the rights of others, for the prevention of the disclosure of information recognized as confidential, or for ensuring the independence and impartiality of the judiciary”.

Like the first and second paragraphs of Article 17 of the Constitution of Georgia, Article 10 of the European Convention: “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”. However, article 10(2) exhaustively lists the legitimate aim for which such a right may be restricted.

Article 24 (1) of the Constitution of Georgia in force until December 16, 2018 protected the right to freely receive and disseminate information, as well as to express and disseminate opinions, and paragraph 4 of the same article established the grounds for restriction of a given right. The equivalent right protected under Article 24 (1) and (4) of the old version of the Constitution, is guaranteed by the first sentence of Article 17(1) and paragraph 5 of the current version of the Constitution of Georgia<sup>10</sup>. Accordingly, for the purposes of this research, the practice established by the Constitutional Court regarding the freedom of expression enshrined under Article 24 of the old version of the Constitution is relevant.

According to the explanation made by the Constitutional Court of Georgia, freedom of speech and expression includes "People's views, beliefs, information, as well as the means

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<sup>8</sup> Constitution of Georgia, 1995. Article 17. Available at: <https://bit.ly/3bqvw3y>

<sup>9</sup> Constitutional Court of Georgia 2 August 2019 *Alexander Mdzinarashvili vs. Georgian National Communications Commission*. II-19.

<sup>10</sup> Constitutional Court of Georgia 4 July 2019 *Besik Katamadze, David Mzhavanadze and Ilia Malazonia against the Parliament of Georgia*. II – 1,2. Also *Alexander Mdzinarashvili vs. Georgian National Communications Commission*. II – 1-3.

used to express and disseminate them are protected, including the press, television, and other means of dissemination of information and opinion."<sup>11</sup> The above non-exhaustive list allows the individual to decide for himself/herself in what form, in what way they want to express themselves, to express their views / opinions, unless, of course, this contradicts the grounds for the restriction provided for in the relevant article of the Constitution itself.

Freedom of opinion is a prerequisite for the exercise of other freedoms provided for in Article 10 of the European Convention. "Any restrictions to this right will be inconsistent with the nature of a democratic society".<sup>12</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>13</sup> and also, the negative aspect, that one should not be forced to reveal his/her own opinions.

The fact that freedom of expression does not only mean having or holding an opinion, but also the possibility of obtaining and disseminating information freely by oneself, is clearly seen in the following explanation of the Constitutional Court – "Unlike Article 24 of the Constitution of Georgia, which guarantees the free dissemination and obtaining of information from universally available sources, from information carriers that are useful for obtaining and disseminating information, Article 41 of the Constitution of Georgia does not regulate obtaining of the information from universally available sources".<sup>14</sup>

The right to disseminate information and ideas has a special place in the political life of the country and in the establishment of democratic institutions. It is impossible to hold free elections in the absence of this right. 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>15</sup> Moreover, a full exercise of the freedom to impart information and ideas allows for free criticism of the government, which is the main indicator of a free and democratic society.<sup>16</sup>

In addition to the issues of political and public importance, freedom of expression protects freedom to impart information and ideas on economic matters (the so-called

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<sup>11</sup> Constitutional Court Plenum 18 April 2011, *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.

<sup>12</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>13</sup> EU Human Rights Guidelines on Freedom of Expression Online and Offline. pg. 3. Available at: <https://bit.ly/3elX1gI>

<sup>14</sup> Constitutional Court of Georgia 30 October, 2008, *The Public Defender of Georgia and Georgian Young Lawyers' Association v. Parliament of Georgia.* II-11

<sup>15</sup> EU Human Rights Guidelines on Freedom of Expression Online and Offline. pg. 3. Available at: <https://bit.ly/3elX1gI>

<sup>16</sup> Protecting the right of freedom of expression under the European Convention on Human Rights, pg.13. Available at: <https://bit.ly/2xXKe3d>

commercial speech), as well as distribution of artistic creation and performance as a form of distribution of opinion.<sup>17</sup> “through his creative work, the artist expresses not only a personal vision of the world but also his view of the society in which he lives. To that extent art not only helps shape public opinion but is also an expression of it and can confront the public with the major issues of the day”.<sup>18</sup>

## Offensive expression

Offensive expression is worth mentioning separately while discussing the protected sphere under the freedom of expression. It is noteworthy that the discussion of the basics of freedom of expression, including restrictions on offensive expression, has a philosophical history in addition to the legal one. Prominent English philosopher, psychologist, sociologist, economist, and political scientist John Stuart Mill, in his famous work “On Liberty”<sup>19</sup> notes, that the restriction of freedom of expression must be subject to the “one simple principle” that we now know as the principle of harm, according to which: the only purpose that would justify the use of force against any member of a civilized society against their will is the suppression of harm to others“.

According to Mill’s estimation, any consideration should be given the opportunity to see the light of day, no matter how immoral it may be to anyone – “If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind”.<sup>20</sup>

To impose particular attention to this kind of expression is relevant for the purposes of the present research, as 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. However, it should also be noted that the legislation does not specify what kind of action/expression it considers under “insult”. In general, it can be concluded from the wording of the article, that in the legislator's view, contempt is a broader and more widespread notion, part of which is insult.

While discussing the offensive expression, the Constitutional Court shared the standard established by ECtHR in the case of *Handyside v. the United Kingdom* and ruled the following: “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

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<sup>17</sup> Protecting the right of freedom of expression under the European Convention on Human Rights, pg.14.

Available at: <https://bit.ly/2xXKe3d>

<sup>18</sup> ECtHR. Müller and Others v. Switzerland, 24 May 1998, report of the Commission, paragraph 70.

<sup>19</sup> John Stuart Mill, (1859) “On liberty”. Available at: <https://bit.ly/2wHvoOf>

<sup>20</sup> *Ibid.*

criticism and sarcasm. These are the demands of tolerance, pluralism, forbearance, which are an indispensable source of nourishment for democracy".<sup>21</sup>

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>22</sup>

In the same judgement, the Constitutional Court states, "In general, speech should be treated as an object of justice in an extreme case, when it is objectively necessary. We cannot restrict freedom of expression through justice just because we disagree, we are afraid, we hate, we think it is inappropriate for society's morals or traditions. For the freedom of expression and, therefore, to the viability of democracy the law should pay special attention to exactly such negative attitudes. The best way to balance freedom of expression is the expression itself - because any opinion, expression that you disagree with, dislike, or disregard for, can be refuted by opposing views and ideas that you share, like, or think are right."<sup>23</sup>

Based on the above explanations, we can conclude that the sphere protected by freedom of expression includes, among other things, offensive expression. Before focusing on the different approaches of the ECtHR in this regard, it should be noted that Article 9 (1) (c) of the Law of Georgia "on Freedom of Speech and Freedom of Expression"<sup>24</sup> sets out one of the preconditions for restricting abusive expression, namely: "Regulation of the content of speech and expression may be established by law, if it concerns: [...] to direct abuse". We can assume that such standard of restriction is related to the face-to-face, offensive expression based on the elimination of confrontation and the provision of public order.

The "clear and present danger test" was first voiced in the case of *Schenck v. United States*<sup>25</sup> considered by the United States Supreme Court. Following the involvement of the United States in World War I, congress passed a so-called "anti-espionage" decree criminalizing any obstruction to the country's military operations. Schenck, the secretary general of the Socialist Party of Philadelphia, was accused of violating the act, in particular, a resolution was passed in the party's headquarters to print 15,000 pamphlets and then distribute them by mail or other means to conscripts. The pamphlet cited the 13th Amendment to the United States Constitution and sought to explain why the authors

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<sup>21</sup> Constitutional Court of Georgia 30 September 2016. *The citizen of Georgia Iuri Vazagashvili v. the Parliament of Georgia*. II-40

<sup>22</sup> *Ibid.* II-41. See also Constitutional Court of Georgia 26 October 2007. *The citizen of Georgia Maia Natadze and others against v. The President of Georgia*. II-13.

<sup>23</sup> *Ibid.* II-50,51.

<sup>24</sup> Law of Georgia "on Freedom of Speech and Expression". Available at: <https://bit.ly/2REHXAZ>

<sup>25</sup> US Supreme Court 3 March, 1919, *Schenck v. United States* 249 U.S. 47 (1919); Available at: <http://bit.ly/2PMAMGg>

of the pamphlet considered compulsory military service to be the worst form of despotism.<sup>26</sup>

Based on the decision of the Supreme Court of the United States on the case of Schenck, it has given Congress wide-ranging discretion in restricting freedom of expression during the war. In former U.S. Supreme Court Justice Oliver Wendell Holmes's opinion: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. ... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree".<sup>27</sup>

Thus, the "clear and present danger test", in the early years of its existence, allowed the government to limit expressions with "bad tendency." As the practice of the Supreme Court at the time reveals,<sup>28</sup> this test restricted freedom of speech more than it did in the early stages of development, but after judgment in the Brandenburg case<sup>29</sup>, it became a guarantee of freedom of expression. The test expanded the scope of the right and covered most forms of expression. The new standard set by the Supreme Court in this case was as follows: the expression cannot be restricted unless it is aimed at the immediate commitment of an illegal act and there is a high probability that such an action will take place. According to the Brandenburg Test, which is still in force today, if the above signs are not clearly identified, even the preaching of violence and hatred is protected by the First Amendment of the US constitution. Furthermore, in order to make the test clear, it should be noted that in the Brandenburg case, the U.S. Supreme Court overturned the criminal liability of a member of the Ku Klux Klan for syndicalism.

At the same time, the practice of the ECtHR has developed in a relatively different direction. In particular, in the case of Handyside, the ECtHR notes that Article 10 of the European Convention protects offensive, shocking, and unacceptable public statements.<sup>30</sup> Despite the fact, that the ECtHR has maintained this approach and includes to use offensive language in the protected sphere of freedom of expression, in contrast to the Constitutional Court, pays special attention to one additional component – the aim.<sup>31</sup> According to it, offensive expressions are protected, if they have a certain value for the society, contribute to the public discussion or other similar purposes. And as for the expression, the sole purpose of which is to humiliate a person, to violate his honor and dignity, this expression will not be able to enjoy the freedom of expression guaranteed by Article 10 of the European Convention.

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<sup>26</sup> Rurua Nikoloz, "Freedom Act", Schenck v. United States, pg.411.

<sup>27</sup> US Supreme Court of 3 March, 1919, *Schenck v. United States* 249 U.S. 47 (1919); Available at: <http://bit.ly/2PMAMGg>

<sup>28</sup> The "clear and present danger test" underwent some certain changes before it was finally established. The "bad tendency test" was also used with it. See cases: *Abrams v. United States*: 250 U.S. 616 (1919); *Gitlow v. New York*: 268 U.S. 652 (1925); *Dennis v. United States*: 341 U.S. 494 (1951); In total, from 1940 to 1951, the court used this test in 12 cases. Available at: <http://bit.ly/39bLiOR>

<sup>29</sup> *Brandenburg v. Ohio* 395 U.S. 444 (1969); Available at: <https://bit.ly/2K3zjrM>

<sup>30</sup> ECtHR. *Handyside v. the United Kingdom*, 7 December, 1976. Para. 49. Available at: <http://bit.ly/39kP7kQ>

<sup>31</sup> ECtHR. *Sekmadienis V. Lithuania*. 30 January, 2018 Para. 80-81. Available at: <http://bit.ly/2Tg6gXu>

In view of all the above mentioned, when discussing the protected sphere of freedom of expression guaranteed by the Constitution of Georgia and the European Convention, we have in mind first of all: the right to receive and disseminate opinion, views and information. As for the protection of offensive expressions, the Constitutional Court of Georgia and the ECtHR have developed a slightly different practice regarding this issue. We believe that the current practice of the Constitutional Court of Georgia does not need to be reconsidered in this regard. Regulation in accordance with applicable law provides for the protection of freedom of expression to a higher standard than it is provided by the minimum standard of the European Convention.

## **The Rule and Procedure for Verifying the Justification of restriction of the Freedom of Expression**

As it was mentioned, “Freedom of expression 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. The legislature is obliged, when establishing restrictive norms, to strike a reasonable balance between the goal to be achieved and the limited right, so that human rights are not restricted beyond what is necessary for the existence of a democratic society.”<sup>32</sup> Accordingly, this Chapter deals with the rule and procedure for verifying the justification of restriction of freedom of expression in accordance with the Constitution of Georgia and the European Convention.

Article 17(5) of the Constitution of Georgia and Article 10 (2) of the European Convention establish the steps/stages according to which the right should be intervened. Domestic authorities may interfere with the exercise of freedom of expression where three cumulative conditions are fulfilled:

(1) the interference is prescribed by law; (2) the interference is aimed at protecting one or more of the following interests or values: national security; territorial integrity; public safety; prevention of disorder or crime; protection of health; morals; reputation or rights of others; preventing the disclosure of information received in confidence; and maintaining the authority and impartiality of the judiciary; (3) the interference is necessary in a democratic society<sup>33</sup>. Any restriction, condition, limitation or any form of interference with the freedom of expression may only be applied to a particular exercise of this freedom. The content of the right to freedom of expression may never be touched. It is clear that the restriction on content will be considered as neglect of the exercise of this right.

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<sup>32</sup> Constitutional Court of Georgia of 14 May, 2013. *Citizens of Georgia- Aleksandre Baramidze, Lasha Tugushi, Vakhtang Khmaladze and Vakhtang Maisaia v. The Parliament of Georgia*. II-7.

<sup>33</sup> Protecting the right of freedom of expression under the European Convention on Human Rights, pg. 32. Available at: <https://bit.ly/2xXKe3d>

At the same time, it should be noted that the existence of a “legitimate aim” is not always sufficient to justify the restriction of freedom of expression. According to the requirements of the principle of proportionality, the restriction should not lead to a restriction of a person's right to a higher degree than it is necessary for the existence of a democratic society. It is necessary to examine whether it is necessary to restrict the freedom of expression in this form in order to ensure the security of the state and whether there is a less restrictive means of exercising the right for achieving the same goal.

The constitutional order does not recognize a hierarchy between human rights, and the constitution does not provide for and cannot allow any right to take superiority over other right/rights. "The right is a legitimate interest that justifies the restriction of another person's freedom in a democratic society."<sup>34</sup> Therefore, despite the great importance of freedom of expression, both for a democratic society and for the personal autonomy and self-realization of each individual, in certain cases, the state is authorized and obliged to intervene in freedom of expression in order to ensure the autonomy of others, to protect the legitimate interests of individuals or society. „[...] Therefore, despite the great importance of freedom of expression, it is not absolute and can be restricted to protect the rights of others, including reputation”.<sup>35</sup>

In accordance with Article 17 (5) of the Constitution of Georgia and Article 10 (2) of the European Convention, 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.

All of the above preconditions are of cumulative nature. In order for the restriction to be considered in accordance with the Constitution/Convention, it is necessary for all three of them to exist simultaneously. Given that the Constitutional Court of Georgia and the ECtHR Justice use the same test, each step of the restriction in this chapter will be considered in the light of the practice of both courts.

## **Prescribed by Law**

The formulation of Article 17 (5) of the Constitution of Georgia, as well as Article 10 (2) of the European Convention, directly and unequivocally indicates that the first and unconditional stage of the restriction is - to be prescribed by law. At the stage of verifying

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<sup>34</sup> Constitutional Court of Georgia 10 November 2009. *Citizens of Georgia Giorgi Kipiani and Avtandil Ungiadze v. The Parliament of Georgia*. II-1.

<sup>35</sup> Constitutional Court of Georgia 30 September, 2016. *Citizen of Georgia Iuri Vazagashvili v. The Parliament of Georgia*. II-45-47.

the determination of – prescribed by law, two aspects are assessed - the formal and qualitative characteristics of the law. In view of the above, the existence of any restrictive mechanism shall be considered incompatible with the Constitution (and, consequently, with the European Convention) if its grounds do not derive from the current legislation. This issue, in its turn, consists of two sub-issues, the first of which is the term "law" itself and the combination of those normative acts that are under the umbrella of the term. As regards the second sub-issue, it is related to the qualitative standard of legislation.

“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. The formal requirement established by the Constitution that this or that issue should be regulated by law serves as defining Parliament of Georgia as decision making authority on this issue. In particular, the Constitution of Georgia namely mentions issues that only the Parliament of Georgia has the authority to regulate (regulated by law). In addition, the delegation of authority to another body by Parliament to regulate [...] issues, in its essence, in each individual case, is considered to be regulated by law (unless the Constitution mentions the prohibition of delegating authority) and meets the formal requirements of the Constitution. At the same time, the competent body to delegate authority from the legislator should be determined by law. It should be noted that the scope of consideration of the body exercising the delegated authority is limited by human rights and constitutional principles”.<sup>36</sup>

In general, the legislature is obliged to adopt clear, unambiguous, predictable legislation (norms). This circumstance is one of the crucial criteria in assessing the constitutionality of a norm. Such an obligation of the legislature derives from the principle of the rule of law. "Law can be considered only the product of legislative activity that meets the requirements of the quality of law. The latter implies the conformity of the law with the principles of the rule of law and legal security. For the real observance of these principles, the availability and foresight of the law is of practical and crucial importance. The quality of the law requires that the regulation be so clear that a person whose right is intervened could able to adequately recognize the legal status and conduct his/her actions accordingly.”<sup>37</sup>

The more intense the interference in human rights, the stricter the requirements for the legislature. At this time, the legislator is obliged to provide the public authorities with guidelines that gives them possibility to make predictable, legitimate, necessary or inevitable decisions while giving the citizen an idea of what measures will be taken against him.

The foresight and accessibility of the law also includes the necessary condition that the permissible actions of the persons authorized to restrict the right be specific, understandable and clear. "Such a requirement of the law is necessary to limit and further

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<sup>36</sup> Constitutional Court of Georgia 27 March 2017. *Citizen of Georgia Giorgi Kraveishvili V. the Parliament of Georgia*. II-19-20.

<sup>37</sup> Constitutional Court of Georgia 26 December, 2007, *Georgian Young Lawyers' Association and the citizen of Georgia Ekaterine Lomtadze v. the Parliament of Georgia*. II-11.

control the person (authority) authorized to intervene in the right, as these officials have to reach a specific public interest, which derives under the rule of law. In order to comply with the rule of law, the law must provide the effective protection of the right against arbitrary interference by the authorities. This, in the first place, implies that the authority of the government in this area is defined in details by the law itself, with a sufficient degree of clarity. Accordingly, the law should not allow the judiciary or the executive to independently determine the scope of its actions. If a person authorized to interfere in the right does not know exactly and specifically the scope of his / her possible actions, on the one hand, the risk of incorrect, excessive interference in the right will increase unintentionally, and on the other hand, the temptation to deliberately abuse the right, the legitimate result of which is the violation of the right.”<sup>38</sup>

The ECtHR has an identical approach to the – “prescribed by law”. 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>39</sup>.

“The Court reiterates that the expression “prescribed by law” in the second paragraph of Article 10 requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects. As regards the requirement of foreseeability, the Court has repeatedly held that a norm cannot be regarded as a “law” within the meaning of Article 10 § 2 unless it is formulated with sufficient precision to enable a person to regulate his or her conduct. That person 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>40</sup>

With only very rare exceptions, the ECtHR has taken the position of the State to restrict the freedom of expression on the basis of common law or the principles of international law. For example, in the case of *The Sunday Times*, the Court held that the British common law on the contempt of court was sufficiently clear to satisfy the requirement of „prescribed by law”. Also, in two cases<sup>41</sup> against Switzerland, the court granted the state the right to rely on norms of international law for domestic use to satisfy a requirement of “ prescribed by law.”

Once it is established that the grounds for the restriction were in fact derived directly from the law or that the authority delegated it to the competent body has been duly

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<sup>38</sup> *Ibid.* II-14.

<sup>39</sup> ECtHR. *The Sunday Times v. the United Kingdom*, 26 April 1979. Para. 49. Available at: <http://bit.ly/2TynqhB>

<sup>40</sup> ECtHR. *Brisic v. Romania*. 11 December, 2018. Para. 91-92. Available at: <http://bit.ly/2I8rvnE>

<sup>41</sup> ECtHR. *Groppera Radio AG and others v. Switzerland* 28 March, 1990. Available at: <https://bit.ly/3bSB6f9>  
Also ECtHR *Autronic AG v. Switzerland*. Available at: <https://bit.ly/2IKI2De>

exercised, the qualitative characteristics of the law should be examined. In assessing the latter, it is taken into account how predictable the norm is based on which the freedom of expression is restricted. "The restrictive norms of freedom of expression must be provided for in clear and unambiguous, narrowly purposeful law."<sup>42</sup>

"The law must be accessible, predictable and precisely defined, and must contain other guarantees to protect against the risk of arbitrariness. The norm on which imprisonment is based must be sufficiently precise for a person, even with proper counseling, to anticipate the degree to which a given circumstance is consistent with the outcome of an action "<sup>43</sup>

The ECtHR has ruled in the case of *Rotaru v. Romania*, that the domestic law could not be considered a "law" for the purposes of the Convention because it was not formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his conduct.<sup>44</sup> Also, in the case of *Petra v. Romania*, the court reiterated, that "the domestic provisions applicable to the monitoring of prisoners'..... leave the national authorities too much latitude and the implementing regulations did not satisfy the requirement of accessibility.... Romanian law did not indicate with reasonable clarity the scope and manner of exercise of the discretion conferred on the public authorities".<sup>45</sup> "foreseeable and unambiguous legislation, on the one hand, protects a person from the arbitrariness of the law enforcer, and on the other hand, guarantees that the person will receive a clear message from the state to be able to correctly perceive the norm, determine which actions are prohibited by law and which actions may result in legal liability. A person must have the opportunity to foresee the signs of prohibited action in his or her actions and to conduct his or her own behavior in accordance with the rules established by law."<sup>46</sup>

The Constitutional Court of Georgia emphasized on the special importance of the foreseeability of law in relation to the norms defining the crime. In the Court's opinion, "from the point of view of foreseeability of law defining the crime, it is important that determining of the true content and scope of each of its elements was possible, so that the addressee could correctly perceive the law and behave according to its requirements, at the same time, be protected from the arbitrariness of the law enforcer. "It is necessary that the content accuracy of the norm was unambiguous. The norm must be sufficiently defined not only in terms of content but also in terms of the subject matter, purpose and scale of the regulation, so that the addressee can properly perceive the law and implement his or her behavior in accordance with it, to foreseen the consequences of the behavior"<sup>47</sup>.

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<sup>42</sup> Constitutional Court of Georgia 10 November, 2009. *Citizens of Georgia Giorgi Kipiani and Avtandil Ungiadze v. The Parliament of Georgia*, II-7.

<sup>43</sup> Constitutional Court of Georgia 25 December, 2006. *Citizens of Georgia Vakhtang Masurashvili and Onise Mebonia v. The Parliament of Georgia*.

<sup>44</sup> ECtHR. *Rotaru v. Romania*. 4 May, 2000. Para 55. Available at: <https://bit.ly/2jGmdQP>

<sup>45</sup> ECtHR. *Petra v. Romania*. 23 September, 1998. Para 37-38. Available at: <https://bit.ly/2wiVBIX>

<sup>46</sup> Constitutional Court of Georgia 14 May, 2013. *Citizens of Georgia- Aleksandre Baramidze, Lasha Tugushi, Vakhtang Khmaladze and Vakhtang Maisaia v. The Parliament of Georgia*. II-30.

<sup>47</sup> *Ibid.* II-31.

Similarly, to the practice established by the ECtHR and Constitutional Court of Georgia's in terms of the requirement to be prescribed by law, the practice in terms of foreseeability of the law is identical. The quality of Law, in turn, stipulates that where national law provides the power of imprisonment, it must be sufficiently accessible, accurate, and predictable in its use to avoid all risks of arbitrariness. (See *Nasrulloev v. Russia*, no. 656/06, §71, 11 October 2007, and *Mooren v. Germany* [GC], no. 11364/03, §76, 9 July 2009). "The standard of "lawfulness" set by the Convention thus requires that all law be sufficiently precise to allow the person – 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 (see *Baranowski v. Poland*, no. 28358/95, § 52, ECHR 2000-III)".<sup>48</sup>

## Legitimate Aim

Following the formal and substantive nature of the law and the foreseeability of the norm, the Constitutional Court examines which legitimate aim the restriction is intended to achieve. In assessing the constitutionality of the norm, the existence of the legitimate aim to restrict the right is crucial. In assessing the impugned acts, first of all, it is necessary to find out the purpose that motivated the legislator to adopt them. Using the principle of proportionality, the constitutionality of the means of achieving of legitimate aim of the legislator can be assessed (The decision of the Constitutional Court of Georgia of 19 December, 2008 on the case of "Rusenergосervice Ltd., Patara Kakhi Ltd., Gorgota JSC, Givi Abalaki Individual Farmer Enterprise and Energia Ltd. v. Parliament of Georgia and the Ministry of Energy of Georgia" II-9)<sup>49</sup>. "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>50</sup>

"The Constitution provides for the restriction of this aspect of freedom of expression in order to ensure the goods protected by the Constitution itself and sets out an exhaustive list of grounds for restriction. In particular, according to the article 24, the right to freely receive and impart information, to express and impart his/her opinion orally, in writing or by in any other means may be restricted by law on such conditions which are necessary in a democratic society in the interests of ensuring state security, territorial integrity or public safety, for preventing of crime, for the protection of the rights and dignity of others, for prevention of the disclosure of information acknowledged as confidential or for ensuring the independence and impartiality of justice".<sup>51</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

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<sup>48</sup> ECtHR. *Kakabadze and others v. Georgia*. 2 October 2012. Para 62. Available at: <https://bit.ly/3bOvIKx>

<sup>49</sup> Eremadze K. - Balancing Interests in a Democratic Society, 2013. P.27

<sup>50</sup> Constitutional Court of Georgia 11 April, 2012. *The Public Defender of Georgia v. Parliament of Georgia*. II-53.

<sup>51</sup> *Ibid.* II – 29,30.

wording of Article 10(2) and the jurisprudence of the Court, that the list of interests found in Article 10(2) is exclusive, in the sense that no others are considered appropriate”.<sup>52</sup>

"In some cases, freedom of thought and expression may prevail over other rights, but the legitimacy of this must be assessed in court in accordance with the principle of proportionality. In each individual case, the court must assess the infringed right or the threat of infringement of a right that may be contained in a particular program or information and oppose it to the need for interference in the freedom of expression. The court should be given the opportunity to assess the value of the form and content of the expression, its public significance and, on the other hand, the damage caused by the exercise of this right.”<sup>53</sup>

## **The Necessity and Proportionality of the Restriction**

In the third part of the test for assessing the constitutionality of the restrictions on freedom of expression, the necessity of the restriction and the proportionality of the selected means are exercised. “in case of existence of the legitimate aim and the need of its real protection, only the possible circumstances for restricting the right envisaged by the Constitution should be used, but, of course, again in the manner and within the limits established by the Constitution. In this regard, in search for the right and effective way, the legislature must first meet the requirement that the regulation chosen by it achieve a legitimate aim, that is, that it (regulation) should actually be focused on protecting and securing a legitimate aim. The restrictive measure should be an appropriate, acceptable means of achieving the aim. There must be a direct and real connection between the goal and the means to achieve it. At this time, the circumstance of what scale and intensity of damage is expected to be avoided is required for achieving a specific legitimate aim is taken into consideration. A specific form of interference in the right must be sufficient to prevent such threats and to protect the legitimate aims provided for in the Constitution. He must, of course, be able to secure specific aim, interests; Otherwise, both public and private interests will be harmed in the same way”.<sup>54</sup>

Like the Constitutional Court of Georgia, the ECtHR also pays special attention to the necessity and proportionality of the restriction. Moreover, “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 now includes some version of the following principles governing its assessment of necessity, which derive from its very early jurisprudence, in most of its judgments: The Court has noted that, whilst the adjective “necessary”, within the meaning of Article 10 (2) (art. 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

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<sup>52</sup> Mendel T., A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights p.38. Available at: <http://bit.ly/2wv1bUM>

<sup>53</sup> Constitutional Court of Georgia 10 November, 2009. *Citizens of Georgia Giorgi Kipiani and Avtandil Ungiadze v. The Parliament of Georgia*.

<sup>54</sup> Eremadze K. - Balancing Interests in a Democratic Society, 2013. P.27

implies the existence of a “pressing social need” ( See, for example, *Sunday Times (No. 1) v. the United Kingdom*, 1979, § 59.) In terms of assessing whether the measures were necessary to address a ‘pressing social need’, the Court has frequently stated “In particular, the Court 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. (see *Cumpănă and Mazăre v. Romania*, 2004, § 90)”.<sup>55</sup>

In its turn, in determining the existence of such a need, the Contracting Parties to the European Convention shall have a certain limit of discretion (the margin of appreciation). In this regard, the ECtHR has reiterated that, whereas there is the interference in the rights and freedoms set forth in Article 10 (1) of the Convention, a strict supervision shall be exercised in the light of the importance of the right. The importance of the mentioned rights has been repeatedly emphasized by the court. Therefore, the need to restrict them must be established convincingly (see cases: *Autronic AG v. Switzerland*, para. 61; *Worm v. Austria*, para. 47<sup>56</sup>; *Dupuis and Others v. France*, para. 36). It should also be noted that there are cases when the ECtHR has found the reasons for the state's intervention to be insufficient to present a “pressing social need” (see cases: *Wille V. Liechtenstein*, Para 70; *News Verlags GmbH v. Austria*. Para 60).<sup>57</sup>

The Constitutional Court of Georgia also focuses on determining the necessity and proportionality of restrictions. According to it, “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>58</sup>

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

As discussed in the previous chapter, in the Constitution of Georgia, as well as in the European Convention, one of the legitimate goals of restricting freedom of expression is “to ensure the independence and impartiality of the judiciary”, and “to ensure the authority and impartiality of the judiciary”. We believe that such a difference in terms is not accidental and may, in some cases, play an important role in resolving the case. In our opinion, “authority” is a more comprehensive concept than independence. It is through the provision of independence and impartiality that it is possible to strengthen the

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<sup>55</sup> Mendel T., A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights p.39. Available at: <http://bit.ly/2wvlbUM>

<sup>56</sup> Freedom of expression in Europe, Case-law concerning Article 10 of the European Convention on Human Rights. Pg.11.

<sup>57</sup> ECtHR. *Wille V. Liechtenstein*. Para 70, Also *News Verlags GmbH & Co.KG v. Austria*. Para.60

<sup>58</sup> Constitutional Court of Georgia 11 April, 2012. *The Public Defender of Georgia v. Parliament of Georgia*. II-44.

authority of the judiciary in the eyes of the public. It should also be noted that there is no unanimous agreement on this issue and it is a subject of discussion in legal circles. The present chapter is devoted to the cases under three different jurisdictions<sup>59</sup> where the courts have argued for a fair balance between freedom of expression and the independence/authority and impartiality of the judiciary.

Under Georgian legislation, the various legal acts envisage the possibility of restricting the freedom of expression in order to ensure for smooth implementation of Judicial work, including imposing different liabilities (removal from the courtroom, fine and/or administrative arrest) for non-performance of procedural duties and for disrupting order in a courtroom.<sup>60</sup>

Administrative offenses are also considered *lex specialis* - the right to assemble/demonstrate, if at such time the entrance to the court is blocked, or the assembly/demonstration is held at the judge's place of residence or in the common court of Georgia<sup>61</sup>.

Some of the above-mentioned norms have been appealed to the Constitutional Court at various times. In one of the first cases, the Constitutional Court stated 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 of violating fundamental human rights. Adequate protection of fundamental human rights in Georgia is a constitutional obligation of the government."<sup>62</sup>

In the above-mentioned case, the court, in the process of decision-making, touched upon issues such as: the essence of effective justice and the role of judicial authority, personal impartiality of the judge and the role of honor and dignity in the provision of it. The impugned norm allowed the judge to immediately take appropriate action to prevent the violation of the law, so as not to impede the proper conduct of the judicial process. In this regard, the Court emphasized that "the legitimate aim of the restriction provided for by the impugned norms is to ensure prompt, effective and fair trial, to ensure order in the courts, to prevent obvious and rude disrespect to the court and to protect its authority."<sup>63</sup>

According to the Court, this legitimate aim remains unchanged even when a disrespectful and offensive expression is directed to a particular judge. "This aim is identical in preventing disrespect to any individual and, naturally, should be decisive even when disrespect to the court is expressed against the judge as a person, against his honor and dignity. Naturally, even in this case, the presumption of impartiality of the judge must be applied, because he/she represents the court in the administration of justice, therefore, he/she has no right to be subjective and to make a wrong, unfair decision. This is

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<sup>59</sup> Including the case law of the Constitutional Court of Georgia, European Court of Human Rights and US Supreme Court.

<sup>60</sup> Criminal Procedure code of Georgia, Article 85. Available at: <https://bit.ly/2VA8rpG> Civil Procedure Code of Georgia, Article 212. <https://bit.ly/352ms2I>

<sup>61</sup> Administrative Offences Code of Georgia, Article 174<sup>1</sup> (3). Available at: <https://bit.ly/2xWawDm>

<sup>62</sup> Constitutional Court of Georgia 25 December, 2006. *Citizens of Georgia Vakhtang Masurashvili and Onise Mebonia v. The Parliament of Georgia*. Para 2.

<sup>63</sup> *Ibid*, Para 1.

important and necessary for him/her as well as for the authority of the Judiciary as a whole".<sup>64</sup>

An important explanation has been made by the court regarding the motives and purposes of criminalizing disrespectful behavior towards the court under criminal law, according to which, "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>65</sup> On the basis of the substantiation developed by the Court, it can be concluded that the restriction of freedom of expression may be aimed solely at the smooth, efficient and effective conduct of the judicial process.

Another case that is important in considering the restrictions set forth in Article 17 (5) of the Constitution is the decision of the Constitutional Court of Georgia of 18 April 2011, where the Court noted that, "The independence of a judge, as one of the main principles of the legal state, also implies noninterference in his/her professional activities and or personal life in order to make an influence on 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. At the same time, protection of the independence of the judge, judiciary does not imply the restriction of the criticism of a court decision(s) or the professional conduct of a judge. 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>66</sup> "Expressing an opinion on the activities of a judge is a constitutional right [...] Criticism of his / her activities, arguing about his/her professional or personal qualities may be substantiated by the public interest."<sup>67</sup>

This approach is supported by the practice established by the Constitutional Court, according to which critical thought is protected by the Constitution, including those that may be perceived by a part of the society as too strict or inadequate<sup>68</sup>.

The fact that judges, as well as the judiciary as a whole are under special public scrutiny while exercise of their powers, is clearly indicated by the ECtHR. „Questions concerning the functioning of the justice system, an institution that is essential for any democratic society, fall within the public interest. In this connection, regard must be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a State governed by the rule of law, it must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against gravely damaging attacks that are essentially unfounded, especially in view of the

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<sup>64</sup> *Ibid*, Para 3.

<sup>65</sup> *Ibid*, Para 3.

<sup>66</sup> Constitutional Court of Georgia 18 April, 2011. *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-68.

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

<sup>68</sup> *Ibid*, II-106.

fact that judges who have been criticized are subject to a duty of discretion that precludes them from replying (see *Prager and Oberschlick v. Austria*, 26 April 1995, § 34, Series A no. 313; *Karpetas v. Greece*, no. 6086/10, § 68, 30 October 2012; and *Di Giovanni v. Italy*, no. 51160/06, § 71, 9 July 2013).<sup>69</sup>

According to the assessments made by the Constitutional Court in frames of the above-mentioned case, "In order to ensure the proper functioning of the institution,<sup>70</sup> ... the existence of the legislative regulation in order to achieve its legitimate aim of uninterrupted work, protection from pressure, ensuring the independence of the judiciary and impartiality, is justified".<sup>71</sup> In the event of a confrontation between the freedom of expression and the independence and impartiality of the judiciary, the Constitutional Court has made it clear that: "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>72</sup>

The reasoning developed by the Constitutional Court in the above-mentioned two decisions makes us believe, that the aim of the restriction set forth in Article 17 (5) of the Constitution of Georgia is to ensure the smooth and efficient functioning of the judiciary, Which, in its turn, can be achieved by guaranteeing the independence and impartiality of the judiciary. According to the "clear and present" danger test, as well as according to the formed position of the Constitutional Court in the above cases, the judge's personal disrespect does not threaten his/her impartiality (even in case of the existing threat, the party is provided by the leverages ensured under procedural legislation).

It should also be noted that there is an opinion that the protection of the authority of the judiciary is not considered as a legitimate aim of restricting freedom of expression, but a final result achieved by ensuring the independence and impartiality of the judiciary by promoting its proper functioning. Thus, the authority of the Judiciary is not itself an object of legal protection, but the result of two independent legal interests, the independence of the judiciary and the provision of impartiality. And other informal social factors or sentiments related to the authority of the Judiciary are legally irrelevant.

While discussing the restriction of freedom of expression for ensuring the independence and impartiality of the Judiciary, the norms<sup>73</sup> forbidding blocking a courthouse entrance, holding assemblies or demonstrations at the place of residence of a judge or in common courts of Georgia has to be discussed separately, which imposes administrative detention for up to 15 days. Also, according to Article 9(5), of the Law of Georgia „on Assemblies

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<sup>69</sup> ECtHR: *Morice v. France*. 23 April 2015. Para. 128. Available at: <https://bit.ly/2S6TZn6>

<sup>70</sup> Constitutional Court of Georgia 18 April, 2011. *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-59.

<sup>71</sup> *Ibid*, II-60.

<sup>72</sup> Constitutional Court of Georgia 18 April, 2011. *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-60.

<sup>73</sup> Administrative Offences Code of Georgia. Article 174<sup>1</sup>(3). Available at: <https://bit.ly/2xWawDm>

and Demonstrations, “<sup>74</sup> The court, in the vicinity of the building of which an assembly or demonstration is held may impose a requirement to hold the assembly or demonstration away from the building, but not more than 20 meters away, to prevent blocking the building and interruption of the operations of the institution, and to ensure the independence and impartiality of the court. The decision referred to in this article shall be taken for each specific case, considering the current circumstances and public interest.....so that the concept of the constitutional right to hold assemblies and demonstrations is not neglected.

According to the Court’s assessment, “under the Article 24 of the Constitution of Georgia, restriction of freedom of expression is permitted to ensure the independence and impartiality of the Judiciary. The Constitutional Court shares the defendant's view that, in the present case, the restriction of the right to assemble and demonstrate under the impugned norm serves as the legitimate aim of defending the interests of justice, the independence of the judiciary, and the influence of the judge.

The independence of a judge, as one of the main principles of a legal state, implies noninterference 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>75</sup>. At the same time, “the purpose of the assembly (demonstration) near the place of residence of a judge, is to get as close as possible to the private sphere of the judge as the addressee of protest or solidarity. It should be noted that the plaintiff does not deny this either. This form of expression does not leave its addressee free to choose, it digs into the private sphere of the judge in order to influence him/her. This factor distinguishes the assembly (demonstration) near the place of residence between for example, by expressing one's opinion (criticism or solidarity) in the media. Declaring an impugned norm unconstitutional in such cases will leave the judge without the possibility of protection from unjustified interference in his personal life. In view of the above, the Constitutional Court notes that the impugned norm is a proportionate means of achieving a legitimate aim – ensuring the independence of the judge (court) and the protection of the judge's personal life”.<sup>76</sup>

Finally, the Court held that “the impugned norm constitutes the assembly (demonstration) carried out near the place of residence of a judge, by interfering in the private life of a judge with the aim to influence him/her as an administrative offense. The prohibition imposed by the impugned norm is related to the cases when holding the assembly (demonstration) near the place of residence of a judge, is considered as a tantamount interference in his/her private life and personal space. The ratio of the administrative penalty provided for in the impugned norm should be possible by taking these criteria into account”.<sup>77</sup>

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<sup>74</sup> Law of Georgia “on Assemblies and Demonstrations”, 1997. Available at: <https://bit.ly/3cWeFWK>

<sup>75</sup> Constitutional Court of Georgia 18 April, 2011. *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>76</sup> *Ibid*, II-68.

<sup>77</sup> *Ibid*, II-69.

The Supreme Court of the United States is a clear example of the struggle for distancing the Judiciary from the authorities of different branches of government and the influence of the majority over the views of judges. The United States judiciary is often tasked with reviewing the legality of controversial, high-profile government actions, there is a long history of public criticism of judicial officers dating back to the nation's founding.<sup>78</sup>

One of the first such cases concerns the 1819 decision of the United States Supreme Court as to whether Congress had the power to establish a national banking system.<sup>79</sup> The positive response to this question by the Supreme Court has led to the years of public attacks on the Court. Criticism of the court was heard not only by ordinary citizens, but also by politicians who opposed the broad interpretation of federal power. Former President of the United States Thomas Jefferson was among the authors of the criticism, who called the court "subtle corps of sappers & miners constantly working underground to undermine the foundations of our confederated fabric".<sup>80</sup>

American federal judges hold life appointments, subject to a rarely invoked impeachment process requiring the approval of both houses of Congress, and cannot have their salaries reduced during their tenure in office. Because of these robust protections, the federal judiciary has continued to rigorously police the separation of powers required by the United States Constitution even during times of heightened judicial criticism.<sup>81</sup> The experience of the United States shows that providing judges with appropriate guarantees contributes to increasing the degree of their independence and impartiality. It is difficult to achieve public trust towards the judiciary, and often quite fragile, given the role that judges play in their decisions in the country's political life.

In frames of the present research several focus groups were conducted with the participation of special target groups: lawyers, representatives of the universities and courts. The majority of them think that the Court's criticism is necessary, as this is the measurement of a democratic society and at the same time it helps the Judiciary to detect the challenges and problematic issues, which needs to be improved. However, in the regions, part of the respondents noted that the criticism of the judges may have effect on judge's impartiality and independence. According to some members of this group of professional circles, the criticism may make the judge biased in the decision-making process, which will ultimately have a negative impact on the author of the criticism. There is a different approach of this part of the respondents between the personal criticism of the judge and the criticism of judge's decision. This can be explained by the fact that in relatively small regions, where there is a closer social/kinship relationship between judges and lawyers/other representatives of the legal field, the margin of criticism on actions committed by a person as a judge and by the same person as an ordinary citizen is more fragile.

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<sup>78</sup> Hon. Marilyn L. Huff, *The Effects of Public Criticism of the Judiciary on Judicial Independence*, pg.1. Available at: <https://bit.ly/2Xl9meT>

<sup>79</sup> *McCulloch v. Maryland*, 17 U.S. 4 Wheat. 316 316 (1819). Available at: <https://bit.ly/3e6rzTG>

<sup>80</sup> Letter of Thomas Jefferson to Thomas Ritchie, 25 December 1820. Available at: <https://bit.ly/3aUBkLL>

<sup>81</sup> Hon. Marilyn L. Huff, *The Effects of Public Criticism of the Judiciary on Judicial Independence*, pg.2. Available at: <https://bit.ly/2Xl9meT>

According to the experience of the United States, it can be said, that in addition to the legislative regulations, which will ensure the independence and distancing of judges, it is important for the judges themselves to carefully consider their role in the daily life of the society, protection of their private interests and in elimination of the unjustified interference from the state. It is true that ensuring the independence and impartiality of the judiciary is the legitimate aim for the restriction, but by tightening the legislation, it will only cause fear in the society rather than trust.

The criticism of the judiciary and maintaining the authority of the judiciary as a branch is a transversal notion, which is approached through the prism of a number of Articles of the European Convention.<sup>82</sup> Based on the scope and objectives of the research, the practice connecting to the Article 10 of the European Convention will be discussed.

As mentioned above, the restriction of the freedom of expression will not be in conflict with the Convention if the restriction is (1) prescribed by law, (2) serves to achieve one or more of the purposes set out in Article 10 (2) of the European Convention, and (3) such interference is necessary for a democratic society. One of the grounds set out in Article 10 (2) of the European Convention is the maintenance of the authority and impartiality of the judiciary.<sup>83</sup> It should also be noted that it is possible to determine what the European Court implies in the authority of justice by combining the decisions made at different times. In a broad sense, the term includes both, "Public prosecutors are civil servants whose task it is to contribute to the proper administration of justice"<sup>84</sup>, as well as Clerks and Judges.<sup>85</sup> In the process of determining the volume and content of the term, the case of the *Sunday Times* played its role, where the court clarified that "The term "judiciary" comprises the machinery of justice or the judicial branch of government as well as the judges in their official capacity".<sup>86</sup>

The most recent explanation given by the court regarding the "authority of justice" implies that in practice, the phrase "authority of the judiciary" includes, in particular, the notion that the courts are, and are accepted by the public at large as being, the proper forum for the ascertainment of legal rights and obligations and the settlement of disputes relative thereto; further, that the public at large have respect for and confidence in the courts' capacity to fulfil that function<sup>87</sup>.

The analysis of the cases found and discussed in the research reveals that in the cases discussed by the ECtHR, the justification of the government's restriction of freedom of expression is mainly based on the necessity to maintain public respect and trust and proper functioning of the judiciary. It should also be noted that in cases that are discussed

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<sup>82</sup> ECtHR. Judicial Seminar 2018 "The Authority of the Judiciary" pg.3. Available at: <http://bit.ly/2VHYQ0H>

<sup>83</sup> Article 19 of the International Covenant on Civil and Political Rights, which is substantially close to Article 10 of the European Convention, does not provide for such a restriction.

<sup>84</sup> ECtHR. *Lesnik v. Slovakia*. 11 June, 2003. para. 54. Available at: <http://bit.ly/32M5XXt>

<sup>85</sup> ECtHR. *Prince v. the United Kingdom*, 13 March, 1986. Available at: <http://bit.ly/39tscEc>

<sup>86</sup> ECtHR. *The Sunday Times v. the United Kingdom*, 26 April, 1979. Para. 55. Available at: <http://bit.ly/2TynqhB>

<sup>87</sup> ECtHR.: *Morice v. France*. 23 April 2015. Para. 129. Available at: <https://bit.ly/2S6Tzn6>

substantively (cases on merits), the decisions are made at the last stage of the so called „three-part test “- "necessary in a democratic society", in terms of proportionality.<sup>88</sup>

As already mentioned, the approach of the ECtHR regarding the criticism of the judiciary has not always been unified, if in the initial decisions the court was more inclined to maintain the authority and impartiality of Judiciary, over time the tendency was changed in favor of the protection of the freedom of expression.

At the initial stage of forming the court practice, the ECtHR explained the restriction of freedom of expression by the inability of the judiciary to respond, in particular, in the case of *Prager and Oberschlick*, the Court stated: “Regard must, however, be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been criticized are subject to a duty of discretion that precludes them from replying”.<sup>89</sup>

The inability and inappropriateness of making statements by the Judiciary was emphasized in the case of *Buscemi*. The Court stresses, that the judicial authorities are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges. That discretion should dissuade them from making use of the press, even when provoked. It is the higher demands of justice and the elevated nature of judicial office which impose that duty”.<sup>90</sup>

However, this approach of the ECtHR should not be understood as if the judges are deprived of any opportunity to express their opinion. “If it is necessary to criticize another power of the state or a particular member of it in the course of a judgment in a dispute or when it is necessary in the interests of the public, that must be done. For example, therefore, courts may criticize legislation or the failure of the legislative to introduce what the court would regard as adequate legislation. However, just as with the other powers of the state in relation to the judiciary, criticism by the judiciary must be undertaken in a climate of mutual respect.

Judges, like all other citizens, are entitled to take part in public debate, provided that it is consistent with maintaining their independence or impartiality. The judiciary must never encourage disobedience and disrespect towards the executive and the legislature “.<sup>91</sup>

According to the opinion of the Consultative Council of the European Judges (CCJE), “Individual courts and the judiciary as a whole need to discuss ways in which to deal with such criticism. Individual judges who have been attacked often hesitate to defend

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<sup>88</sup> David Kosar, Freedom of Speech and Permissible Degree of Criticism of Judges, Central European University, Budapest, Hungary 2007, pg.19. Available at: <http://bit.ly/2TpzWuV>

<sup>89</sup> ECtHR. *Prager and Oberschlick v. Austria*, 26 April 1995. para. 34. Available at: <https://bit.ly/3aGUXwQ>

<sup>90</sup> ECtHR. *Buscemi v. Italy*, 16 September, 1999. para. 67. Available at: <http://bit.ly/2Vl4cI6>

<sup>91</sup> Consultative Council of the European Judges (CCJE) – Opinion No.18 (2015) "The position of the judiciary and its relation with the other powers of state in a modern democracy". Para. 42 Available at: <https://bit.ly/2USJDcg>

themselves (particularly in the case of a pending trial) in order to preserve their independence and to demonstrate that they remain impartial. In some countries, councils for the judiciary or the Supreme Court will assist judges in such situations. These responses can take the pressure off an individual judge. They can be more effective if they are organised by judges with media competence".<sup>92</sup>

Like the above-mentioned opinion, participants of the focus group also believe that in response to criticism against judges, the judiciary should be able to assert its position. According to one part of the respondents, this may be done by the judges themselves, and the other part thinks that it is the competence of the special services of the court.

The United States Code of Conduct for Judges, like many codes of conduct for judges operating across Europe, stipulates that in response to the criticism against judges, "a judge should not make public comment on the merits of a matter pending or impending in any court".<sup>93</sup>

Of course, the primary purpose of judges is to discuss disputes before them. It is how they gain the trust of the public, and when the issue of protection of judges from criticism from various branches of government becomes topical, one of the first groups that can offer this protection is the main beneficiaries of the court service - citizens. As for the communication between the society and the judiciary, the Speaker-Judges and the Councils of Justice, within the scope of their authority, promote communication between the two parties on the topics they need. It is through these bodies that it is possible to engage in constructive dialogue between the judiciary and critics of its activities.

Another important aspect to consider when determining the limits of acceptable criticism against judges is the place judges occupy in the list of persons with a high obligation to abidance. According to the standard established in the case of *Lingens*, "the limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10(2) enables the reputation of others - that is to say, of all individuals - to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues."<sup>94</sup>

An even more detailed explanation has been made in the case of *Castells* regarding this standard. "The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion".<sup>95</sup> Accordingly, state institutions and politicians are at one end of the "scale" of permissible criticism

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<sup>92</sup> *Ibid.* Para. 53.

<sup>93</sup> Code of Conduct for United States Judges. Canon 3(A)(6), Available at: <https://bit.ly/2V9tHRX>

<sup>94</sup> ECtHR. *Lingens v. Austria*, 8 July, 1986. para. 42. Available at: <https://bit.ly/2y9xnvr> Also the case of *Dupuis and Others v. France* Para. 40.

<sup>95</sup> ECtHR. *Castells v. Spain*. 23 April, 1992. para 46. Available at: <http://bit.ly/2vC9Sd9>

based on the practice of the ECtHR, and then ordinary citizens on the other side. There was almost no clear explanation of the hierarchy of persons between these two extreme poles before the case of *Morice* and *Peruzzi*. According to the explanations made by the court in the mentioned cases, the judges, “when acting in their official capacity they may thus be subject to wider limits of acceptable criticism than ordinary citizens”.<sup>96</sup> “However, it cannot be said that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the extent to which politicians do and should therefore be treated on an equal footing with the latter when it comes to criticism of their actions”.<sup>97</sup>

Transparent and open administration of justice is one of the main interests of the society. Both the parties of the dispute, other interested individuals, the monitoring organizations, media and in certain cases politicians have an interest in the decision made in the courtroom.

Consequently, in addition to the fact that the object of criticism may be different - a particular judge / decision or the judiciary as a whole - the author of the criticism also may be different - an ordinary citizen, a party of a dispute, the media, and, not infrequently, politicians. In the latter case, there is not only a critical / offensive expression, but also a political expression, which in turn enjoys a special degree of protection. It should also be noted that not only do statements made by politicians carry political content, but the entire trial can be the object of political interest. Political content may not be reflected in all decisions taken by the common courts, but decisions made by the constitutional courts always affect the country's political agenda, as judges of the Constitutional Court, within the scope of their authority, review the compliance of certain legislative norms with the Constitution of the country, play the role of a negative legislator - they point out to the members of the Parliament to amend or otherwise change the legislative framework.<sup>98</sup> Given this, the risks of unjustifiable restriction of the freedom of expression is even more clear.

In parallel to the case law of the ECtHR, the approach of the Supreme Court of the United States of America is extremely interesting when discussing the public servants with high obligation to abidance and the protection of freedom of expression to a different degree. According to the practice of the United States Supreme Court, the political expression enjoys the highest degree of protection, which is followed by a religious, scientific, social expression, commercial expression, defamatory expression, the profane, non-indecent, so-called adult expression. At the lowest level of protection is indecent expression and the expression, threatening national security and peace or imminent threat.<sup>99</sup> As for the degree of the obligation to abidance, it is determined whether the addressee of the statement is treated within the notion of "public figure".

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<sup>96</sup> ECtHR. *Morice v. France*. 23 April 2015. Para. 131. Available at: <https://bit.ly/2S6TZn6>

<sup>97</sup> ECtHR. *Peruzzi v. Italy*, 30 June, 2015. para. 52. Available at: <http://bit.ly/2uXx2d0>

<sup>98</sup> An important explanation was made by the ECtHR regarding the role of the Constitutional Court Judges in the case of *Amihalachioaie v. Moldova*. Available at: <http://bit.ly/3cwB90X> In the case, the court ruled more in favor of protection of the freedom of expression and found the violation of Article 10.

<sup>99</sup> Okruashvili M, Kotetishvili I. - Freedom of Expression. Volume 1. “Freedom of expression in the US and Europe” pg.23. Liberty Institute, 2005.

*Sullivan's* case plays an important role in shaping the practice of the US Supreme Court in relation to the burden of proof in disputes arising on the basis of defamatory statements. The court ruled that public officials would only be able to pay damages for defamatory statements if they proved that the statement was made with "actual malice", which is possible if the (1) statement was made with knowledge of its falsity (2) or with reckless disregard of whether it was true or false.<sup>100</sup> The burden of proof rested not with the author of the statement but with the person against whom the defamation statement was made. The standard set in the *Sullivan* case, which concerned only civil disputes and public servants, soon extended to criminal disputes<sup>101</sup>, candidates for public office,<sup>102</sup> and public figures.<sup>103</sup> The notion of a "public figure" unites all individuals, regardless of their professional activities, who may influence the definition of public policy or political debate.

From all the above, it is logical that judges are also included in the definition of a "public figure" and the permissible limit of criticism against them is easier to measure. This position is supported by the explanations made in the cases of *Sullivan*<sup>104</sup> and *Landmark Communications*.<sup>105</sup>

The high standard of protection of the expression directed to the judiciary is also conditioned by the fact that such an expression is considered as a "political expression",<sup>106</sup> Accordingly, when the author of the expression is a non-lawyer, he/she she enjoys the highest standard of protection under the First Amendment to the U.S. Constitution. While the state seeks to restrict the expression of ordinary citizens or journalists in order to ensure a fair criminal proceeding, or to prevent interference in the administration of justice, the Doctrine of the First Amendment imposes high demands.

When discussing the authors of critical statements directed to the Judiciary, the cases in which the disputed statements belonged to the lawyers should be singled out separately. According to the practice of the ECtHR, lawyers have a special role in raising /

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<sup>100</sup> US Supreme Court. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Available at: <http://bit.ly/2ToGNuR>

<sup>101</sup> US Supreme Court. *Garisson v. Louisiana*, 379 U.S. 64 (1964). Available at: <http://bit.ly/3aluB3A>

<sup>102</sup> US Supreme Court. *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971). Available at: <http://bit.ly/2TPw1Np>  
Also the case of *Rosenblatt v. Baer*. Available at: <http://bit.ly/2TBdMLt> According to the court, the notion of public servants does not unite employees in all public services, but those who are in charge of making an important decision. The term "refers to those employed by the state who have, or are considered by the public to have, a significant responsibility to control the activities of the state."

<sup>103</sup> US Supreme Court. *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967). Available at: <http://bit.ly/3asCzrU>

<sup>104</sup> *New York Times Co. v. Sullivan*. Syllabus, 1963. "Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision... Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice." 254, 272-273. Available at: <http://bit.ly/2ToGNuR>

<sup>105</sup> *Landmark Communications, Inc. V. Virginia*, Syllabus, 1978. "the law gives judges as persons, or courts as institutions . . . no greater immunity from criticism than other persons or institutions... The operations of the courts and the judicial conduct of judges are matters of utmost public concern." 829, 839. Available at: <http://bit.ly/39qV27S>

<sup>106</sup> Rodney A. Smolla, *Regulating the Speech of Judges and Lawyers: The First Amendment and the Soul of the Profession*, February 2015. Available at: <http://bit.ly/2Tp6USy>

maintaining public trust in the judiciary. In *Kyprianou's* case, the Court ruled, that, “The special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar. Regard being had to the key role of lawyers in this field, it is legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence therein).<sup>107</sup>

The court was even more critical in its earlier rulings against lawyers. A rather strict, and exemplary example of restriction of the freedom of expression is delivered in the case of *Wingerter v. Germany*,<sup>108</sup> where the Court considers putting the jurisdiction of the Court of Mannheim under question by the applicant and did not determine the violation of the Article 10 of the European Convention and compared it to the cases of *Meister*<sup>109</sup>; *W.R*<sup>110</sup> and *Mahler*.<sup>111</sup>

However, all this should not be understood as if lawyers do not enjoy freedom of expression at all. „Consequently, freedom of expression is applicable also to lawyers. It encompasses not only the substance of the ideas and information expressed but also the form in which they are conveyed. Lawyers are thus entitled, in particular, to comment in public on the administration of justice, provided that their criticism does not overstep certain bounds Those bounds lie in the usual restrictions on the conduct of members of the Bar, as reflected in the ten basic principles enumerated by the CCBE for European lawyers, with their particular reference to “dignity”, “honor” and “integrity” and to “respect for ... the fair administration of justice”. Such rules contribute to the protection of the judiciary from gratuitous and unfounded attacks “.<sup>112</sup>

The ECtHR has held a different position from the above examples in the case of *Amihalachioaie v. Moldova*<sup>113</sup>, where the applicant, in addition to being a lawyer, at the same time was the head of the Moldovan Bar Association, whose abusive statements were related to the activities of a professional organization whose membership was revoked by the Moldovan Constitutional Court. In this case, the focus was not directly that the applicant was a lawyer, but on his elected representative authority. Consequently, the

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<sup>107</sup> ECtHR. *Kyprianou v. Cyprus*, 15 December, 2005. para. 173. Available at: <http://bit.ly/2vGjZOb>

<sup>108</sup> ECtHR. *Wingerter v. Germany*. 21 March 2002. Was declared inadmissible based on the article 35(3,4) of the European Convention. Available at: <http://bit.ly/2Vl6aJu>

<sup>109</sup> ECtHR. *Meister v. Germany*. 10 April, 1997. Was declared inadmissible based on the article 27 (2) of the European Convention. Available at: <http://bit.ly/3ctPkUT> (The court did not consider the restriction of insulting remarks made by the lawyer towards judges and other persons as a violation of Article 10 of the European Convention).

<sup>110</sup> ECtHR. *W.R v. Austria*, 30 June, 1997. Available at: <http://bit.ly/3cuUjEU> (The court declared the part of the application inadmissible. The applicant's view that the judge's opinion was "ridiculous" was not considered as a violation of Article 10 of the European Convention).

<sup>111</sup> ECtHR. *Mahler v. Germany*. 14 January, 1998. Available at: <http://bit.ly/2Tkz9l6> The application was declared inadmissible. According to the applicant, the prosecutor drew up a offence report "in a state of complete intoxication", which was also not considered as a violation of Article 10 of the European Convention).

<sup>112</sup> ECtHR. *Morice v. France*. 23 April 2015. Para. 134. Available at: <https://bit.ly/2S6TZn6>

<sup>113</sup> ECtHR. *Amihalachioaie v. Moldova*. 20 July, 2004. Available at: <http://bit.ly/3cwB9OX>

decisions of the ECtHR within the part of the authors of the criticism may be considered sudden and inconsistent.

The ECtHR, in one of its most recent cases, *Ottan v. France* has found a violation of freedom of expression under Article 10 of the Convention by a state, who imposed an administrative sanction, in particular fine to a lawyer, for the following statement made to the jury at the courtroom after the court hearing, "I always knew it was a possibility. With a white – all-white – jury on which not all communities are represented, combined with, let's face it, a very weak prosecution and a trial that was conducted in an extremely biased fashion, the door was wide open for an acquittal, it's no surprise."<sup>114</sup>

The ECtHR, unlike the National Court, did not consider the applicant's above-mentioned statement to be an assessment made on racial grounds. "the Court considers that the applicant's statement reflected a widely held view that the impartiality of judges, whether professional or lay judges, is a virtue that does not exist in a vacuum but is the result of considerable efforts to shake off unconscious bias rooted, in particular, in geographical and social background and liable to arouse fears in persons being tried of being ill-understood by persons of different appearance to them".<sup>115</sup>

This case is interesting also because of two other circumstances, namely:

a) As jurors and professional judges deliberate on an equal footing on the verdict and sentence, the Court considers that the limits of acceptable criticism of the former, when they are involved in trying criminal offences, are the same as those applicable to judges (see *Morice*, cited above, §§ 128 and 168). Thus, in the present case, the fact that the applicant mentioned only the lay jury in his remarks did not mean that his right to criticise the judicial authority extended beyond the limits outlined above.<sup>116</sup>

b) The court fully shared the approach established in *Morice* case regarding the different standards of freedom of expression in the courtroom and beyond. The expression of a judge in the "courtroom" may be related to the client's right to a fair trial, therefore the principle of fairness tends to protect free and often powerful manner of exchanging arguments between the parties (see the cases of *Nikula* § 49, and *Steur* § 37). Lawyers have an obligation to "diligently protect the interests of their clients" (see *Nikula's* case, § 54), which means that in some cases, they must decide whether it is worth expressing dissatisfaction with the court's action (see *Kyprianou's* case, § 175)".

"Turning now to remarks made outside the courtroom, the Court reiterates that the defence of a client may be pursued by means of an appearance on the television news or a statement in the press, and through such channels the lawyer may inform the public of shortcomings that are likely to undermine pre-trial proceedings. The Court takes the view, in this connection, that a lawyer cannot be held responsible for everything published in the form of an "interview", in particular where the press has edited the statements and he or she has denied making certain remarks. ... Similarly, where a case

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<sup>114</sup> ECtHR. *Ottan v. France*. 19 April, 2018. Para 13. Available at: <http://bit.ly/2PJ6AvG>

<sup>115</sup> *Ibid.* para 64.

<sup>116</sup> *Ibid.* para 71.

is widely covered in the media on account of the seriousness of the facts and the individuals likely to be implicated, a lawyer cannot be penalised for breaching the secrecy of the judicial investigation where he or she has merely made personal comments on information which is already known to the journalists and which they intend to report, with or without those comments.<sup>117</sup>

Finally, when evaluating the statements made by the lawyers, the court takes into account and pays special attention to the following circumstances:

- The applicant's as a lawyer's status;
- The contribution to the debate that has become the subject of public interest;
- The nature of the statements;
- The specific circumstances of the case;
- Imposed sanction;

As in the case of *Morice*, in the case of *Ottan*, the Court notes "that the penalty imposed on the applicant was the lightest possible in disciplinary proceedings – "merely ...[a] warning" according to the Court of Cassation. Nevertheless, it observes that this is not a trivial matter for a lawyer and that even when the penalty is the lightest possible, that fact cannot suffice in itself to justify the interference with the applicant's freedom of expression".<sup>118</sup> It is only in exceptional cases that restriction – even by way of a lenient criminal penalty – of defence counsel's freedom of expression can be accepted as necessary in a democratic society.<sup>119</sup>

Despite the many differences in approaches between the ECtHR and the United States Courts, there are also similarities between the two jurisdictions. In particular, there is a strong attitude towards the freedom of expression of lawyers and judges compared to others. Like the assessment of the ECtHR, the United States Supreme Court considers that the lawyers, because of their special role in proper administration of justice, should refrain from criticizing the judiciary, as this may adversely affect the society's trust towards judicial institutions. In addition, given that the activities of lawyers are largely controlled by the Code of Professional Ethics, they have repeatedly been disciplined for making statements that undermined the dignity of the judicial process,<sup>120</sup> prevented its proper conduct<sup>121</sup> or challenged the functioning of the judiciary.<sup>122</sup> Punishment of lawyers in a disciplinary manner at different times was also based on grounds such as: unjustified conviction of judges for discrimination on sexual or racist grounds, unjustified attack on a judge or unjustified accusation of a serious criminal offense. However, it should be noted that in a number of decisions, the courts have given priority to the lawyer's

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<sup>117</sup> ECtHR. *Morice v. France*. 23 April 2015. Para. 138. Available at: <https://bit.ly/2S6TZn6>

<sup>118</sup> ECtHR. *Ottan v. France*. 19 April, 2018. Para 73. Available at: <http://bit.ly/2PJ6AvG>

<sup>119</sup> ECtHR. *Morice v. France*. 23 April 2015. Para. 135. Available at: <https://bit.ly/2S6TZn6>

<sup>120</sup> Pennsylvania Supreme Court 2 May, 1980. *COMMONWEALTH of Pennsylvania v. Donald Dwayne RUBRIGHT*. Available at: <http://bit.ly/2TksNCn>

<sup>121</sup> Connecticut Court of Appeals 24 September, 2003. *Notopoulos v. Statewide Grievance*. Available at: <http://bit.ly/32Rsou5>

<sup>122</sup> Supreme Court of Idaho 13 August, 1996. *IDAHO STATE BAR v. TOPP*. Available at: <http://bit.ly/2uS4bHE>

freedom of expression. A clear example of this is the case of *Sawyer*<sup>123</sup>, where the court found that, "Given that, the lawyers are free to criticize state law," and the right ensured under the first amendment to the constitution cannot be restricted by the Code of Ethics until it "prevents the administration of justice". Later, the Supreme Court further expanded this approach, and first in the case of *NAACP*<sup>124</sup> and then in *Gentile*<sup>125</sup> ruled, that on the one hand, it is impermissible to disguise the prohibition of professional misconduct by disregarding constitutional rights, and on the other hand by punishing the right protected by the first amendment, if there is no real damage that has been made to the right / interest.

It can be concluded, that the Doctrine of the First Amendment of the Constitution of the United States makes it easy to restrict the freedom of expression of judges and lawyers when it comes to functional justification, in particular the elimination of unwanted interference in the court proceedings. When the purpose of the regulation is to restrict the freedom of expression of a lawyer in the courtroom, or when a judge reveals lawyer's intention to disrupt a proceeding, the Constitution cannot be as lenient as it is generally possible in the case of a market of ideas.

In *Sacher's*<sup>126</sup> case, the Supreme Court found it appropriate to impose sanctions on lawyers over statements made in the courtroom. In contrast, the difficult First Amendment problems are triggered when government regulations are grounded not in palpably functional rationales, but in more ethereal values such as promoting respect for the rule of law, maintaining professionalism and public confidence in the legal system, and safeguarding the dignity of the profession.<sup>127</sup>

Another important aspect of the study is the court's differing approach to what / who is being criticized. "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>128</sup>

In the *Barfod* case, the court based its decision on justifying the court and drawing a line between personal attack, "The impugned statement was not a criticism of the reasoning in the judgment...but rather .... a defamatory accusation against the lay judges personally, which was likely to lower them in public esteem and was put forward without any supporting evidence".<sup>129</sup>

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<sup>123</sup> US Supreme Court 29 June, 1959. *In re Sawyer*. Available at: <http://bit.ly/3aosEDF>

<sup>124</sup> US Supreme Court 14 January, 1963. *NAACP v. Button*. Available at: <http://bit.ly/32MJgCs>

<sup>125</sup> US Supreme Court 27 June, 1991. *Gentile v. State Bar of Nevada*. Available at: <http://bit.ly/2Tn8EeN>

<sup>126</sup> US Supreme Court 10 March, 1952. *Sacher v. United States*. Available at: <http://bit.ly/3cuhpLz>

<sup>127</sup> Rodney A. Smolla, *Regulating the Speech of Judges and Lawyers: The First Amendment and the Soul of the Profession*, pg.11. February 2015. Available at: <http://bit.ly/2Tp6USy>

<sup>128</sup> ECtHR. *Morice v. France*. 23 April 2015. Para. 131. Available at: <https://bit.ly/2S6TZn6>

<sup>129</sup> ECtHR. *Barfod v. Denmark*, 22 February, 1989. Para 35. Available at: <http://bit.ly/38jiMJP> (A similar argument was used in the case of *Amihalachioaie* in a dissenting opinion by Judge Pavlovcschi; "The applicant's impugned statement was not a criticism of the reasoning of the Constitutional Court's

The court drew a relatively clearer line between criticism and personal attack on *Skalka's* case: "A clear distinction must, however, be made between criticism and insult. 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>130</sup>

*Peruzzi's* case is also evidenced the court's different approach in assessing the critical statements made against the particular judges. According to the court's assessment, blaming judge in "taking unfair and arbitrary decisions" would not go beyond the scope of Article 10 of the Convention as such a statement is more of an evaluative reasoning than a statement of fact.<sup>131</sup> While saying that the judge was "biased" or had "willfully made mistakes, by malicious intent, serious misconduct or negligence" was considered beyond the scope of Article 10 of the Convention.<sup>132</sup>

An even wider list of what would be considered personal insults was proposed by the court in the *Radobuljac* case, according which, the applicant's critical appraisals, which specifically addressed the judge's conduct in his client's case and distanced himself from the judge's general professionalism assessment, had nothing to do with the comments that the court or the former Commission found amounted to personal insult such as: willfully deciding to distort reality, unhesitatingly lying or, further, issuing an untruthful report containing false and malicious information.<sup>133</sup> It is also considered as a personal attack on a judge and goes beyond the scope of Article 10 of the Convention to challenge the professional competence of a trial judge. The same can be said of the use of offensive terms such as "irresponsible clowns", "limited individuals" and "incredible cretins".

Interestingly, the views of some of the members of the focus groups regarding the above-mentioned controversial statements differed from those of the ECtHR. According to most respondents, some of the above statements fall within the scope of freedom of expression. In particular, expressions like:

- "The judge makes arbitrary and unjust decisions; he/she is biased and deliberately makes mistakes";
- "The judge willfully distorts the reality, lies without hesitation, makes a decision containing false information";
- "Judges are torturers in robes";

In only few exemptions, the focus group participants noted, that it would have been better if politicians and lawyers had refrained from making such statements, unlike ordinary citizens. The separation of these two groups may, on the one hand, be explained in order to protect oneself from the influence of public opinion (the case of politicians), and on the

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decision, but rather a defamation against the judges of the court, as well as the Supreme Court as a whole, against the supreme authority of the country's judiciary").

<sup>130</sup> ECtHR. *Skalka v. Poland*, 27 August, 2003. para. 34. Available at: <https://bit.ly/3c6ZIkA>

<sup>131</sup> ECtHR. *Peruzzi v. Italy*, 30 June, 2015. para. 57-59. Available at: <http://bit.ly/2uXx2d0>

<sup>132</sup> *Ibid*, para 60.

<sup>133</sup> ECtHR. *Radobuljac v. Croatia*. 28 June, 2016. Para 66. Available at: <http://bit.ly/2TnaU60>

other hand, it may be explained by reference to the Code of Professional Conduct (the case of lawyers).

Of course, making negative statements that may affect a particular judge / judges or those involved in litigation does not necessarily imply a violation of the permissible criticism. In *Morice's* case, where the Grand Chamber overturned the court's original decision regarding the violation of Article 10 of the Convention, the Court found that despite the negative and hostile content, the statement was intended to emphasize the functioning of the investigation process, which was the object of public interest. "A lawyer should be able to draw the public's attention to potential shortcomings in the justice system; the judiciary may benefit from constructive criticism".<sup>134</sup>

The practice of the United States in determining the object of criticism differs from that of the ECtHR. The Supreme Court does not differentiate between criticism of judges and criticism of the reasoning behind their decisions. This is strengthened by Judge Brennan's position in the above-mentioned *Garrison* case: "Of course, any criticism of the manner in which a public official performs his duties will tend to affect his private, as well as his public, reputation... The public official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant".<sup>135</sup>

Therefore, in both cases<sup>136</sup> it is important to use a "real malicious intent" test. Within the jurisdiction of the United States, the high standard of protection of critical opinions expressed against the government and specific judges is ensured not only by the first amendment to the Constitution, but also by the judges' understanding of the role and importance of their position. In *Craig's*<sup>137</sup> case, when discussing the notion of judges, it was noted that they are brave people who can successfully cope with a severe climate. The view that only those should be appointed as judges who are highly resistant against criticism was supported by judges, such as Judge Frankfurter<sup>138</sup> and Judge Scalia<sup>139</sup>.

Another decision by the ECtHR, which preceded the cases of *Morice* and *Ottan* and in which the court did not find a violation of Article 10 of the Convention, is also noteworthy. In particular, the case of *Zugic V. Croatia*, where the applicant was fined 500 Croatian kunats for insulting the court.

According to the materials presented in the case, the first part of Article 110 of the Croatian Civil Procedure Code contains the following: "the court shall fine a natural

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<sup>134</sup> ECtHR. *Morice v. France*. 23 April 2015. Para. 167. Available at: <https://bit.ly/2S6TZn6>

<sup>135</sup> US Supreme Court 23 November, 1964. *Garrison v. Louisiana*, pg.379 U.S. 77. Available at: <https://bit.ly/3bvtEXv>

<sup>136</sup> Criticism of the judge and his/her decision.

<sup>137</sup> US Supreme Court 19 May, 1947. *Craig v. Harney*. Available at: <http://bit.ly/2vD4vKO>

<sup>138</sup> US Supreme Court 3 June, 1946. *Pennekamp v. Florida*, Available at: <http://bit.ly/32NiEkG> (Judge Frankfurter noted, that "weak characters ought not to be judges").

<sup>139</sup> According to the US Supreme Court Justice Scalia, "judges should adopt a "rope-a-dope" posture when criticized, taking the hits passively until their adversaries wear themselves out". The quote is taken from an article prepared by Tony Mauro on June 22, 2007 for the National Journal of Law - "Press frets as more judges sue for libel". Available at: <http://bit.ly/38jpXlf>

person between 500 and 10,000 [Croatian] kunas, or a legal entity between 2,500 and 50,000 [Croatian] kunas, if they commit a serious abuse of the rights they have in the proceedings, The fine can be imposed on a party and an intervener, as well as on their representative if he or she is responsible for the abuse of rights".<sup>140</sup> Courts of first and second instance in Croatia deemed that the applicant insulted the court. According to the decision of Zagreb Municipality: "the defendant Nikola Žugić from Zagreb ... is hereby fined 500 [Croatian] kunas because in his appeal of 27 December 2005 he insulted the court by stating: 'It is indicative to mention here that the judge, before dictating the operative provisions of the judgment, asked the defendant whether 'he would pay this', to which the defendant replied 'where did you get that idea?' and asked whether she had examined the case file.... Unfortunately, the court did not record these dialogues between the judge and the defendant in the minutes. What judicial professionalism this is!".<sup>141</sup>

According to the decision of the Zagreb Municipality, such behavior on the part of the applicant was disrespectful to the court, questioning the judge's knowledge and experience, which was an inadmissible form of communication with the judge, it was a direct insult to the judge as a person. Zagreb County Court dismissed the applicant's appeal and upheld the first-instance decision. The relevant part of that decision read as follows: "It is to be noted that by the statements made in the appeal the defendant demonstrated disrespect for the court, which undoubtedly represents an improper way for the parties to communicate with the court, and exceeds the limits of a civilized and fair relationship with the court as an institution of a society".<sup>142</sup>

According to the ECtHR, "the work of the courts, which are the guarantors of justice and which have a fundamental role in a State governed by the rule of law, needs to enjoy public confidence. It should therefore be protected against unfounded attacks. However, the courts, as with all other public institutions, are not immune from criticism and scrutiny. Therefore, while parties are certainly entitled to comment on the administration of justice in order to protect their rights, their criticism must not overstep certain bounds. In particular, a clear distinction must be made between criticism and insult. If the sole intent of any form of expression is to insult a court, or members of that court, an appropriate sanction would not, in principle, constitute a violation of Article 10 of the Convention".<sup>143</sup>

According to the court, there was no reason why the dispute should have been resolved in a different way from the one established by the national courts. The court once again returned to the cases previously considered, where it did not find a violation of Article 10 of the Convention, namely: the case of *Saday*, where the Turkish judicial system was characterized as "torturers in robes", as well as *W.R. v. Austria* and *Mahler v. Germany*.

The case of *Zugic v. Croatia* is significant for Georgian reality to the extent that the article existing and used by the Croatian Courts for punishing the contempt of court is similar with the provision of the Criminal Code of Georgia, where the most lenient sanction is

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<sup>140</sup> ECtHR. *Zugic V, Croatia*. 31 August, 2011. para 19. Available at: <http://bit.ly/2uRbP52>

<sup>141</sup> *Ibid*, para 13.

<sup>142</sup> ECtHR. *Zugic v. Croatia*. 31 August, 2011. para 15. Available at: <http://bit.ly/2uRbP52>

<sup>143</sup> *Ibid*, para 45.

also fine, but the requested information from the courts revealed, that the court makes virtually no use of this type of punishment and almost always considers imprisonment as a proportionate punishment for the committed act.

As already mentioned, the approach of the United States to the restriction of criticism of the judiciary is markedly different from the practice of the ECtHR. It can be said that a different approach is due, on the one hand, to the extensive record of the first amendment to the Constitution of the United States itself, according to which, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"<sup>144</sup> and on the other hand by fully understanding the role and place of the judiciary in the organization of the state, making it accountable to the public. "state and federal judges have weathered cycles of intense criticism that have peaked and troughed throughout our nation's history".<sup>145</sup> „The criticism of judges probably began the moment that judges first issued decisions that occupants of other branches found disagreeable “.<sup>146</sup>

Former President of the United States, Franklin Roosevelt also addressed the freedom of expression in his special speech on January 6, 1941, before Congress. Among four freedoms, the president said, that the first was freedom of expression.<sup>147</sup> Consequently, it is not surprising that the United States has always been and is considered to be the primary defender of the freedom of expression.

The first amendment to the United States Constitution does not say anything about the grounds for restricting the freedom of expression, though it should not be understood as if freedom of expression is an absolute right. The Supreme Court of the United States uses the so-called "clear and present" danger test<sup>148</sup> when discussing restriction of freedom of expression. Which implies that the freedom of expression should be restricted only if it is aimed at the immediate causing of an illegal act and there is a high probability that such an action will take place.<sup>149</sup>

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<sup>144</sup> First Amendment to the Constitution of the United States. Available at: <https://bit.ly/2YIXvOq>

<sup>145</sup> Citizens for Independent Courts, *Uncertain Justice: Politics and America's Courts, II. The Criticism of Judges in Historical Context*. Pg.131. (New York: The Century Foundation Press, 2000) Available at: <http://bit.ly/32MAOmK>

<sup>146</sup> Michael Hawkins, *Dining with the Dogs: Reflections on Criticisms of Judges*, pg. 1355. Available at: <http://bit.ly/2PMFkff>

<sup>147</sup> Franklin D. Roosevelt's "Four Freedoms". Available at: <https://bit.ly/2U4Cp4m>

<sup>148</sup> US Supreme Court 3 March, 1919. *Schenck v. United States* 249 U.S. 47 (1919); Available at: <http://bit.ly/2PMAMGg>

<sup>149</sup> Hate Speech (legal framework for Georgia). Georgian Democracy Initiative (GDI), 2014. Available at: [http://bit.ly/3aAR\[vj](http://bit.ly/3aAR[vj)

## The Practice of the Common Courts of Georgia

In frames of the research, public data on the cases considered by criminal courts under Articles 366 of the Criminal Code of Georgia was requested. According to the information provided by the Supreme Court of Georgia, the number of cases considered by all three instances of courts is as follows:

Years	District (city) Courts		Courts of Appeals		Supreme Court	
	Considered with the deliberation of a judgment		Considered Appeals		Considered Appeals	
	Case	Individual	Case	Individual	Case	Individual
<b>2014</b>	4	4	2	2	-	-
<b>2015</b>	7	11	4	7	-	-
<b>2016</b>	4	4	1	1	4	7
<b>2017</b>	7	10	4	7	1	1
<b>2018</b>	4	5	3	4	4	7
<b>2019 (4 months)</b>	2	2	1	1	-	-

In addition to the Supreme Court, information was requested from each of the district (city) and appellate courts regarding the cases considered with the same article. In the case of the district (city) and appellate courts, the reporting period was relatively extended and data from the period from January 1, 2009 to June 7, 2019 were requested. As it was found out from the received information, some of the courts did not consider such a case during the reporting period. For example: Tetrtskaro, Samtredia, Sachkhere, Telavi, Akhalkalaki, Tsageri, Khashuri and Gurjaani district courts. There were cases when the requested information was incompletely submitted. For example, according to the information provided by the Tbilisi City Court, statistical registration, processing and deployment of the court decisions in the requested public database are not carried in a form as requested, therefore, only three copies of judgments with the protection of personal information were provided.

In the process of processing the information received from the district (city), appellate and supreme courts, the focus was on: the factual circumstances of the case, the substantiation developed by the court (explanation of the above-mentioned norm/determination of the conformity of the action committed with the disposition) and the size of the sentence imposed on the offender by the court.

Based on the analysis of these judgments, several common characteristics were identified, namely:

- The vast majority of offenses were committed in the court building, during the proceedings in the courtroom, directly by the accused or by a person close to him;

- The courts rely on the testimony of witnesses and audio recordings of the hearing in substantiation of the decisions;
- Except for rare exceptions (which will be considered separately), almost none of the judgments explain the essence and scope of the criminalized act under Article 366 of the Criminal Code;
- In judgments provided by the Common Courts a practice, definition or standard established by the Constitutional Court or the ECtHR regarding the restriction of freedom of expression are not at all mentioned or are mentioned very generally;

Article 366 of the Criminal Code of Georgia consists of two parts, the first of which – envisages the criminal punishment for the contempt of court manifested in the insult of a participant of legal proceedings, and the second - the same act manifested in the insult of a member of the Constitutional Court, of a judge or a juror. For the purposes of the research, we have narrowed the issue only to actions punishable under Article 366, Part 2 of the Criminal Code. In terms of the explanations made by the court in the verdict, the rare exception is the verdict of the Zugdidi District Court of February 1, 2017 in the case N1 / 681-16. Although the verdict was based on Article 366 (1) of the Criminal Code, the explanations given by the court on a number of issues are interesting. In particular, “the Court draws attention to the fact that the accused, by insulting the witness, at the same time showed disrespect to the court, as while the trial was conducted in the presence of a judge, a gross, inadmissible violation of the rules of procedure was committed in the courtroom. Which violates the authority of the court and is directed against the normal functioning of the court.”<sup>150</sup>

During the legal assessment of the action, the court reiterates that “the crime provided for in the first part of Article 366 of the Criminal Code of Georgia violates the authority of the court, causes moral damage to the victim. Hinders the normal functioning of the court.”<sup>151</sup>

With regard to "authority of the court", neither Article 17(5) of the Constitution of Georgia, nor Article 366 of the Criminal Code of Georgia provides "authority of the court", for the legitimate grounds for restricting the freedom of expression, unlike the European Convention.

The definition of “insult” proposed by the same court is also important. According to the Zugdidi District Court, in the mentioned case, “the crime under consideration was objectively reflected in insulting by the participant of the legal proceedings. The insult can be expressed in verbal form. Insult is an act that violates the honor and dignity of a person in an irregular manner, which can be done both verbally and in action.”<sup>152</sup>

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<sup>150</sup> Judgement of Zugdidi district court of 1 February, 2017 on case N1/681-16.

<sup>151</sup> *Ibid.*

<sup>152</sup> Judgement of Zugdidi district court of 1 February, 2017 on case N1/681-16.

In terms of legal substantiation, paragraphs 3.2 and 3.3 of the judgment of the Tbilisi City Court of 22 February 2019 is also interesting, where it is discussed an object of crime for the purposes of Article 366(2) of the Criminal Code, also - the boundary between insulting the court and criticizing the judge on the basis of the practice of the ECtHR. The mentioned judgement belongs to the small group, in which the court explains the criminalized action and the object of the crime under Article 366.2 of the Criminal Code of Georgia. "Article 366 (2) criminalizes the disrespect of the court, which is manifested in the insult of a judge. The object of the crime is the normal functioning of the court, as the body that administers justice - and the authority of the court, and the additional object is the honor and dignity of the judge".

Regarding the protection of the honor and dignity of a judge, it should be clearly stated that the practice of the Constitutional Court of Georgia in no case does recognize the honor and dignity of a judge as an additional object of protection.

The judgement is also distinguished by mentioning the decisions of the ECtHR. Speaking about the determination of the margin between the insult of the court and the judge's criticism, the Tbilisi City Court used the case of *Mikhaylova v. Ukraine*, namely para 88, in which the court generally mentions, that "while parties are certainly entitled to comment on the administration of justice in order to protect their rights, their criticism must not overstep certain bounds.... If the sole intent of any form of expression is to insult or attack the dignity of a court or its members, an appropriate sanction would not, in principle, constitute a violation of Article 10 of the Convention"<sup>153</sup>

Based on the facts of the case referred to in the judgement, the applicant filed a motion to dismiss a judge, which was substantiated by his previous experience and an article in one of the newspapers (which referred to the judge). In the applicant's discretion, the mentioned judge deliberately did not take into account his arguments, and each time he was presented as a party or representative, the judge was taking a decision contrary to his position. In the process of reviewing the motion of dismissal, there was a dispute between the applicant and the judge during consideration of one of the previous cases, when the judge decided to postpone the case. Based on the mentioned controversy, the secretary of the session filled in the statement on the fact of committing an administrative offense against the applicant by judge's instruction. Based on this statement, the applicant was accused of insulting the court. Eventually, the applicant was found guilty of insulting the court and sentenced to 5 days of administrative detention.

Under that circumstances, according to the ECtHR, "the applicant was not a lawyer and so could not have been subjected to disciplinary measures; this limited the range of sanctions available to the domestic court in respect of her misconduct. It remains the case, however, that a less severe sanction, a fine, was available to the ,but the court did not specifically address the question of why it considered a custodial sentence to be the most appropriate sanction, even though it appeared to be its duty to do so under domestic law. The Court considers, therefore, that the penalty imposed on the applicant was

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<sup>153</sup> ECtHR: *Mikhaylova v. Ukraine*. 6 June, 2018. para 88. Available at: <https://bit.ly/2WkPPII>

disproportionately severe and was thus capable of having a “chilling effect” on individuals (including lawyers) conducting representation in court proceedings”.<sup>154</sup>

In view of all the above, it is desirable that the Common Courts not only copy-paste the general content of the ECtHR case law, but also consider the standard that the Court seeks to establish. Especially, while the standard of freedom of expression in Georgia is even higher than the minimum standard set by the European Convention and is almost equal to the American model. At the same time, it is important that the courts try to use less restrictive sanctions, such as community service or fines. We share the view that there is a need for an independent and impartial Judiciary in a democratic society, but we believe that this legitimate aim can be achieved through the use of less restrictive punishments.

We base our opinion regarding the use of less restrictive punishments on one hand on the opinions formulated by Judges Ketevan Eremadze and Konstantine Vardzelshvili in the case of “Citizens of Georgia Vakhtang Masurashvili and Onise Mebonia v. The Parliament of Georgia”,<sup>155</sup> and on the other hand on the views of the legal practitioners participating in the focus groups conducted within the research.

At the moment of the court hearing, according to Article 212 (5) of the Civil Procedure Code of Georgia, the presiding judge was authorized to issue an order on sentencing the person to imprisonment for up to 30 days if there was a case of explicit and/or gross disrespect towards the court. In the mentioned case, the court considers, “that while assessing the differing and sometimes conflicting views of theorists, practicing lawyers, and law enforcement it has become clear, that the content of the violation in the norm is not clearly formulated, which is why it can be used only in each specific case, based on the definition of the norm, which again, due to its inaccuracy and ambiguity, is heterogeneous”<sup>156</sup>

However, the ambiguity of the norm is due not only to the inability to determine its species, but also to the content itself. In particular, according to Article 366 of the Criminal Code of Georgia, the following action is considered as a crime, “Contempt of court manifested in the insult of a participant of legal proceedings”. This crime shall be punished by a fine or community service for one hundred and eighty to two hundred and forty hours or with imprisonment for up to a year. A qualifying circumstance is the same act committed against a member of the Constitutional Court, a judge or a juror.

“Therefore, on the one hand, the crime is the Contempt of court, which is manifested in the insult of a participant of legal proceedings, the judge or juror, and on the other hand, the impugned norms establish responsibility for explicit and/or gross disrespect towards the court. [...] Furthermore, the subject of the assessment is what constitutes to “explicit and gross” disrespect, whether it includes insult, or vice versa, disrespect, even if it is explicit and gross, exists until the action has escalated into insult. While in article 366 of the Criminal Code of Georgia disrespect includes insult, it can be assumed that even in the

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<sup>154</sup> The decision of the European Court of Human Rights of 6 June, 2018 on the Case: *Mikhaylova v. Ukraine*. para 95,96. Available at: <https://bit.ly/2WkPPJI>

<sup>155</sup> The decision of the Constitutional Court of Georgia of 25 December, 2006 on the Case of “Citizens of Georgia Vakhtang Masurashvili and Onise Mebonia v. The Parliament of Georgia”.

<sup>156</sup> *Ibid.* Para 2.

case of impugned norms, disrespect for the court may manifest in insult of judge, the case party and other attendees. The formulation of the impugned norms cannot exclude such assumptions. [...] Based on the above circumstances, it is necessary to mention: when legislation introduces such measures of liability as imprisonment, (1) The content of the offense itself must be clearly established, for which this measure of liability is provided; (2) It must be very clearly and distinctly different from other types of offenses against the same object and the liability imposed on it. Adherence to these conditions is essential because, on the one hand, the offender must know exactly what content the offender is being held in custody for, and, on the other hand, the judge should be able to use the relevant norms correctly and adequately”.<sup>157</sup>

As for the views of the legal practitioners participating in the focus groups, the respondents had different opinions on the terms used in Article 366 of the Criminal Code – “Contempt of Judge” and “disrespect of the court”. For the lawyers and part of the university’s representatives participating in the focus group, in addition to the ambiguity of the content of these terms, it is unclear why violations of the norm can be a criminal case. Moreover, during one of the meetings, it was emphasized that the ambiguity of the terms might call into question the constitutionality of the norm. According to the second part of the respondents, the disrespect to the court can be manifested in the behavior and violation of the procedural rules of the court proceedings. According to this group of legal practitioners, insulting a judge can be expressed in verbal abuse when insulting words are used against him/her and/or there is an indication on a physical defect. During the meetings, the opinion was also expressed that the violation of the procedural rules is a violation of order and not an expression of disrespect for the court. It was also noted that what a judge considers to be insulting is individual and depends on the judge’s perception.

The focus of the discussions within focus groups was also to assessment of the statements and terms that have been disputed at various times before the ECtHR in the context of the discussion on the protection of a fair balance between freedom of expression and the authority and impartiality of the Court. For some of the respondents, including court representatives, all of the statements were within the scope of freedom of expression. Only a small group assessed the statements were as offensive.

Therefore, it is clear that there are difference opinions in professional circles as to what can be considered “insulting a judge” and “disrespecting the court” under Article 366 of the Criminal Code of Georgia. This provides the basis for the assumption that a unified, established view of these terms may not be established within the judiciary itself, consequently, in each individual case it will be difficult to predict in advance which action will be considered a crime.

The cases of Zviad Kuprava<sup>158</sup> and Fady Asly<sup>159</sup> will be discussed separately from the general practice of the common courts.

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<sup>157</sup> The decision of the Constitutional Court of Georgia of 25 December, 2006 on the Case of “Citizens of Georgia Vakhtang Masurashvili and Onise Mebonia v. The Parliament of Georgia”. Para 2.

<sup>158</sup> Politician, member of the Political Party “United National Movement”.

<sup>159</sup> Businessman, Head of the Georgian Representation of the International Chamber of Commerce.

In the Tbilisi City Court, administrative proceedings were conducted against Zviad Kuprava regarding an administrative offence allegedly committed by him. During the proceedings, the judge announced a one-hour break during which Zviad Kuprava went to the court's cafeteria. During the break, representatives of the Ministry of Internal Affairs of Georgia approached Zviad Kuprava, demanded him to leave the cafeteria and return to the courtroom. In response, Zviad Kuprava said that he would be back on time. The representatives of the Ministry of Internal Affairs of Georgia continued requesting him and told him that the judge was waiting for him. To this Kuprava responded that he did not care about the judge (namely, "He could not be arced about the judge"). These factual circumstances were considered as contempt of court manifested in insulting a judge.<sup>160</sup>

In its judgement of 1 August, 2019, the Tbilisi City Court clarified that "one of the subjects of the court hearing is whether the phrase uttered by Zviad Kuprava is disrespectful to the judge and whether the court dining hall may be the scene of the crime."<sup>161</sup> It is noteworthy that the court itself states in the judgement, that Judge "Lasha Tavartkiladze did not file a complaint against Zviad Kuprava before the law enforcement agencies and he testified before the investigation for the first time on June 22, 2018, by the initiative of the prosecution, from the position of the victim, he would administratively punish Zviad Kuprava for insulting him at the court hearings".<sup>162</sup> Such assessment of a judge who is also a victim in a particular case, is interesting due to several factors, namely: when discussing the Article 366 of the Criminal Code of Georgia, the Court clarifies that the introduction of this norm was "dictated by the development of democracy in Georgia and with the purpose of judicial reform" and that the threat of a crime lies in the violation of the authority of the court, and that it is morally damaging for the victim – personally for the judge, as well as it also lowers the degree of public confidence in the court. In addition, the Court notes that the personal assessment of the offender's conduct by the victim is not essential to the objective composition of the offense.

The above reasoning leaves the sense of contradiction, since on the one hand the court declares that it is important to protect the dignity and honor of the judge, which is violated by the insulting statement made against him, however, on the other hand, he clarified that the personal assessment of the victim should not be given importance. Consequently, the legitimate question arises as to how the violation of a person's honor and dignity should be defined if his or her personal attitude is not taken into account.

The Court cites the standard of assessment of the offensive expression established by the ECtHR in the case *Kudeshkina v. Russia* and explains that "an insulting statement may fall outside the scope of protection of freedom of expression if it is intended only to degrade a person's dignity". This standard has been discussed in detail in previous chapters of the research, and it was noted that, unlike the ECtHR, the standard established by the Constitutional Court of Georgia, the offensive expression can only be restricted if it is detected during face-to-face communication, which we do not face in the previous case.

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<sup>160</sup> Freedom of Expression in Georgia – Georgian Democracy Initiative (GDI), 2020. Pg.24 Available at: <https://bit.ly/3b0UHsA>

<sup>161</sup> Judgement of the First Instance Court on Zviad Kuprava case N1 / 3888-18. pg.18

<sup>162</sup> *Ibid.* Pg. 19.

The second no less high-profile case was the civil dispute initiated by Judge Vladimer Kakabadze against Fady Asly, in the same court in which he exercised his judicial powers. Fady Asly called a judge, who imposed a considerable fine on the companies belonging to the members of the International Chamber of Commerce, “corrupt”. His statement reads as follows: “Justice Vladimer Kakabadze is a corrupt judge. He adopted the decision as a result of corrupt dealings; the judge grossly deceived and blackmailed the companies.”

Judge Vladimer Kakabadze initiated civil proceedings at the Tbilisi City Court, claiming defamation and demanding compensation of damages. It is noteworthy that Vladimer Kakabadze is employed by the same court. Before the start of the proceedings, the Tbilisi City Court responded publicly to the statement of Fady Asly. The court’s statement opened as follows: “The judiciary strongly condemns and deems it impermissible to allow spreading information tarnishing the dignity and professional reputation of a judge”.

The Tbilisi City Court’s statement virtually referred to the information as already established facts. Despite the absence of a minimum standard of impartiality, Vladimer Kakabadze’s claim was examined and upheld by the Tbilisi City Court and Fady Asly was ordered to pay 3,000 GEL. The judgment was upheld by the Tbilisi Court of Appeals.<sup>163</sup>

According to the judge, the term "corrupt" and many other terms, which were established by the Court of Appeals and later confirmed by the Court of Cassation that it did not belong to the defendant, but was the statements made by journalists, violating his honor and dignity, as well as his official reputation. It should be again noted, that according to the practice established by the ECtHR, the statements made by journalists in the form of interviews, of which the party claims that it has not made such a statement, cannot be the basis for the latter's liability.

In general, regarding the defamation, it should be noted that the starting point for the ECtHR is to ensure that the measures taken by the state do not have a "chilling effect" 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>164</sup> based on the fear of disproportionate punishment<sup>165</sup> or fear<sup>166</sup> of initiating an investigation against him/her based on the laws that contain too wider content. The "chilling effect" is detrimental not only to an individual but to society as a whole<sup>167</sup>. Because at such times the society is deprived of the opportunity to freely receive and disseminate the information it wants.

Given the negative impact of the "chilling effect", it is logical that the court strongly assesses the proportionality of the used sanction. The Court recalls “that in assessing the

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<sup>163</sup> Freedom of Expression in Georgia – Georgian Democracy Initiative (GDI), 2020. Pg.19. Available at: <https://bit.ly/3b0UHsA>

<sup>164</sup> ECtHR. *Vajnai v. Hungary*, 8 October, 2008. Para. 54. Available at: <http://bit.ly/2TwBngc>

<sup>165</sup> ECtHR. *Cumpănă and Mazăre v. Romania* [GC], 17 December 2004. Para 114. Available at: <http://bit.ly/3cEjIRs>

<sup>166</sup> ECtHR. *Altuğ Taner Akçam v. Turkey*, 25 October, 2011. Para 68. Available at: <http://bit.ly/2vC34MF>

<sup>167</sup> ECtHR. *Cumpănă and Mazăre v. Romania* [GC], 17 December 2004. Para 114. Available at: <http://bit.ly/3cEjIRs>

proportionality of the interference, the nature and severity of the penalties imposed are also factors to be taken into account”.<sup>168</sup>

Another important circumstance that the ECtHR focuses on in every decision-making process is the clear distinction between statements of facts and value judgements.<sup>169</sup> Following the case of *Lingens*, the Court clarifies that “a careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof... As regards value-judgments this requirement is impossible of fulfilment and it infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10”.<sup>170</sup> However, it should be noted that it is not easy to draw such a clear line in all cases, and the ECtHR has focused on this difficulty in a number of decisions.

In the case of *Prager and Oberschlick*, the Court reiterates, „that the press is one of the means by which politicians and public opinion can verify that judges are discharging their heavy responsibilities in a manner that is in conformity with the aim which is the basis of the task entrusted to them.”<sup>171</sup>

Chapter 4 of the Law of Georgia “on Freedom of Speech and Expression” separately deals with the issue of defamation. Articles 13 and 14 of this law distinguish cases between the defamation of a private and public persons. Unlike the first case, when “a person shall bear responsibility under the civil law for slander of a private person, if the plaintiff proves in court that the statement of the respondent contains a substantially false fact in relation to the plaintiff, and that the plaintiff suffered damage as a result of this statement”<sup>172</sup>, in the second case, the law additionally establishes, that in order a person to bear responsibility under the civil law for slander of a public figure, “it is necessary, that the falseness of the stated fact was known to the respondent in advance, or the respondent acted with apparent and gross negligence, which led to spreading a statement containing a substantially false fact”<sup>173</sup>.

As part of the dispute between Judge Kakabadze and businessman Fady Asly, the Court of Cassation stated that “in the present case, it is indisputable that the information disseminated by the defendant in the media was related to the decisions made by the judge of the Tbilisi City Court, consequently, the subject of evaluation is not only the issue of the individual judge, but also the issue of the authority of the court in general. In this regard, it is true that the lower instance courts have focused on case law, which assesses a judge's personal rights and reputation and judicial authority in society (cases: *Kingcses v. Hungary*; *Meister v. Germany*; *W.R. v. Austria* and etc.), however, whether the authority of the judge and/ or the court has been violated by a public statement, in a particular case, should be decided using a proportionality test based on the context of the whole

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<sup>168</sup> ECtHR. *Skalka v. Poland*, 27 August, 2003. Para. 38. Available at: <http://bit.ly/2IeUzKh>

<sup>169</sup> ECtHR: *Schwabe v. Austria*; *De Haes and Gijssels v. Belgium*, Para. 47; and *Prager and Oberschlick v. Austria*, Para. 3.

<sup>170</sup> ECtHR. *Lingens v. Austria*. 8 July 1986 on the Case: Para. 46. Available at: <http://bit.ly/2Q1ee4L>

<sup>171</sup> ECtHR. *Prager and Oberschlick v. Austria*. 26 April 1995. Para 34. Available at: <http://bit.ly/2PMfww8>

<sup>172</sup> The Law of Georgia “on Freedom of Speech and Expression”. Art. 13. Available at:

<https://bit.ly/2REHXAZ>

<sup>173</sup> *Ibid*, Article 14.

statement (Determination of the scope of the right, whether there has been an interference with the right, whether there are grounds for restriction that is proportionate to the achievement of a legitimate aim). In one of the cases (*Marian Maciejewski v. Poland* №34447 / 05, 13 January 2015), where the actual circumstances concerned the critical article of the journalist against the employees of the Judiciary system, under the headline "thieves in the Justice System", the author of the article noted that there was a "mafia-like association of judges-prosecutors." The journalist was fined for defamation under domestic law.

The ECtHR has ruled that Poland has violated freedom of expression. The ruling emphasized that the ECtHR would use a strict test to assess the restriction of the freedom of expression in cases where sanctions prevent the media from covering debates in which there is a public interest. Deficiencies in the Judiciary are issues on which there is a high level of public interest, so it is legitimate for journalists and other individuals to discuss these issues in public debates. "Even if the phrase at issue seems harsh, the Court recalls that persons taking part in a public debate on a matter of general concern – like the applicant in the present case – are allowed to have recourse to a degree of exaggeration or even provocation, or in other words to make somewhat immoderate statements".<sup>174</sup>

In the same decision<sup>175</sup>, the court noted that "before examining the content of the impugned statement, it considers it important to highlight the current events in Georgia: in a situation when the reform of the Judiciary is ongoing and the judiciary is within the high public interest, restriction of freedom of speech should be allowed only in the event of a special, overt and negative attack on the judiciary / judge, which aims to weaken the role of the judiciary, to violate the independence of the judiciary, and only this should be the aim of the applicant. Otherwise, the interference of the state authorities in the freedom of expression may harm the interests of the country, making it impossible for the public to express its views on the progress of the reform, which, of course, will have a negative impact on the country's interests and the administration of effective justice. According to case law, issues related to the functioning of the judiciary, which is an extremely important institution for a democratic society, is within the high public interest. In this regard, it is necessary to take into account the special role of the Judiciary in the society".

The part of the decision where the Court of Cassation distinguishes between the legal norms to be used in the courtroom and the legislative records to be used in the evaluation of statements made outside the courtroom is very important. In particular, the Court of Cassation notes that "with regard to the authority of the judiciary, as well as the rights of the individual judge, it should be noted that certain regulations are established by the legislation of Georgia to take preventive measures in order to avoid danger when misconduct or certain statements are made in the courtroom. Procedural legislation (see, for example, Articles 211 and 212 of the Criminal Procedural Code of Georgia) establishes the rules of liability for violating the order and the possibility of imposing an appropriate sanction. In order to avoid the negative consequences of the information spread outside the courtroom, the person to against whom the information was spread, has the right to

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<sup>174</sup> ECtHR. *Marian Maciejewski v. Poland*. 14 April, 2015. Para.79. Available at: <https://bit.ly/3c7FPtU>

<sup>175</sup> Supreme Court of Georgia 16 April, 2019. *Vladimer Kakabadze v. Fady Asly*. Para. 1.4.6

publish retaliatory information in the same media outlets in which the statement was made according to the article 14 (4) of the Civil Code".

In addition to all of the above, the Cassation Chamber has taken into account the ongoing reforms in the judiciary, the resonance that the dispute has had in which Fady Asly and Judge Kakabadze participated as parties and, consequently, the judge reviewing the dispute, cited practice of the ECtHR and established: "In the case under consideration, the Cassation Chamber considers that the impugned phrase by the defendant in the statements is not specific enough, no facts are stated in it, but rather the opinion of the publisher of the statement and his personal attitude and comment on the event and which makes it possible to consider this statement as a thought and not as a fact... Due to the high level of public interest, such a debate, the sole purpose of which is not to discredit the court / judge, despite of the sharply negative and undesirable context of the expression, cannot be subject to unconditional restriction".

Based on the explanations given in the judgments of the Common Courts, we can identify several important issues related to Article 366 of the Criminal Code, namely:

- a) The main purpose of criminalizing a particular action is to ensure the proper, effective and smooth implementation of the legal process. Regardless of who is being punished, in all cases, there is an obstacle to the smooth running of the process. According to the court, the existence of such a fact damages the authority of the judiciary;
- b) According to the formulation of the norm, one of the forms of expression of disrespect is insult, which in turn allows for a logical conclusion, that disrespect includes other forms of expression including insult. However, the norm is problematic insofar as it does not provide a clear explanation as to where the line runs between other, non-punishable expressions under the term of disrespect and insults. The wording of the norm and the superficial practice established by the common courts around it do not provide a sufficiently clear explanation as to what type of action a person should refrain from taking.

## Conclusion

Based on the results of the present study, it can be said that according to the jurisdictions, the practice established by the courts is different. However, it is clear that in all the above jurisdictions, the maintaining the authority/independence and impartiality of the judiciary is a legitimate aim. Nor does the fact that the public and especially the parties have an increased interest in the body responsible for administering justice cause controversy. The measure of open and democratic governance is precisely the degree of public involvement in the process and the ability of that community to speak freely about the shortcomings identified in the process. Consequently, there is an urgent need to maintain a fair balance between freedom of expression and the independence and impartiality of the judiciary.

Individual judges and the judiciary in general play a significant role in shaping a democratic society. It itself is one of the primary guarantees for the protection of fundamental human rights. In this process, it is important that the public has the confidence towards the judiciary. It is possible to gain trust first of all by making legally based decisions, which in itself reduces the number of critics and at the same time, it helps to weaken the negative attitude towards the system. That is why it is important for judges to be protected from external institutional interference as well as from threats within the system itself, and not to be interfered during the administration of justice. In the long process of establishing the authority of the judiciary, it is equally important to have proper legislative regulation, as well as to see due respect for the other two branches of government and for the judges themselves to understand their authority and their role in a democratic society.

Conversely, the tightening of freedom of expression and the imposition of disproportionate sentences for actions whose foresight and substantive quality may be the subject of discussion, not only will it have a negative impact on the exercise of the freedom of expression, but it will also have a negative impact on the development of the judiciary itself. Whereas, only open and substantiated debate allows individuals to freely exchange ideas between each other. Practice established by the Constitutional Court of Georgia, current legislative regulations (except for Article 366 of the Criminal Code) and, as revealed from the answers of the respondents participating in the focus groups, the representatives of the legal field themselves create the necessary basis to help increase the authority of the judiciary without unjustified restrictions on freedom of expression in society.

## **Recommendations:**

### **To the Parliament of Georgia:**

- Review the possibility of using imprisonment as a punishment for actions provided for in the first and second parts of Article 366 of the Criminal Code of Georgia.

### **To the Common Courts of Georgia:**

- To 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;
- 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;
- To respond to even harsh statements addressed to the court/judges with more substantiated decisions in accordance with the standards established by the Constitutional Court of Georgia regarding the freedom of expression. In the extreme cases, when making retaliatory statements, choose a unified application form, which will be disseminated specifically by the court whose judge / the court as a whole was the subject of the offensive statement.