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FREEDOM OF EXPRESSION VS AUTHORITY OF JUDICIARY:

BALANCING THE COMPETING INTERESTS, THEORY AND
PRACTICE OF NATIONAL COURTS, THE EUROPEAN COURT
OF HUMAN RIGHTS, THE SUPREME COURT OF THE UNITED
STATES OF AMERICA AND THE UNITED NATIONS HUMAN
RIGHTS COMMITTEE

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INTRODUCTION

It is not uncommon for both national and international courts to impose limitations on the freedom of expression in order to protect the authority and impartiality of the judiciary. The Constitution of Georgia recognizes the protection of the independence and impartiality of judges as

legitimate grounds to limit freedom of expression.¹ A similar provision is provided by the European Convention on Human Rights.²

Recent high-profile judicial proceedings in Georgia have sparked a fierce debate in society about the scope of freedom of expression. In certain cases, court decisions were followed by negative media campaigns against the judges. At a meeting with judges, a former Secretary of High Council of Justice suggested that insulting statements and unfounded allegations against judges should be subjected to strict financial sanctions and, in this respect, legislative amendments were necessary.³ Former members of the High Council of Justice regarded the statements by politicians, the media and the non-governmental sector concerning the case of the broadcasting company “Rustavi 2”, which was pending before the Tbilisi City Court, as incompatible with freedom of expression. In their statement, they emphasized the protection of the authority of the judiciary as legitimate grounds to limit freedom of expression.⁴ Furthermore, in public and private discussions in the governing bodies of the judiciary, the idea of amending the law and making Georgian legislation more compatible with the standards of the European Court of Human Rights is gaining favour.

It is important to emphasize the fact that for the first time in recent years, a judge of the Tbilisi City Court, Vladimir Kakabadze, won a lawsuit against a businessman, Fady Asly, for slander.⁵ In order to restore Kakabadze’s honour and dignity, Asly was ordered to release a statement about the court decision through the same media outlet he first accused the judge. Moreover, he was ordered to pay a fine – 3 000 GEL – to the claimant as a compensation for moral damages.

The abovementioned facts demonstrate the importance of this issue in society. Careful regulation is needed, however, since the conflicting interests of freedom of expression and the independence of the judiciary are two key principles of a democratic society. Therefore, it is essential to find a fair balance between these competing interests to prevent excessive, disproportionate restrictions on either of the rights.

To achieve this goal, it is imperative to review and analyse the best international practices as well as the local context and challenges to find the most optimal model for balancing the competing interests at stake.

Several factors are considered when defining the scope of freedom of expression in the context of judicial independence. The first relates to the limits of permissible criticism of the judiciary in and outside of the court. The second important factor is public statements made in connection to the content of pending judicial proceedings, instances when a judge might not be the subject of criti-

1 The Constitution of Georgia, 24 August 1995, Article 24(4). Accessed: 20/11/2017

2 The European Convention on Human Rights, 4 November 1950, Article 10(2)

3 “Insulting statements and unfounded allegations against judges may become punishable, [interpresnews.ge](https://www.interpresnews.ge/), 7/10/2016 <https://goo.gl/3y5nE9>

4 “Non-judicial members of the High Court of Justice made a statement” [interpresnews.ge](https://www.interpresnews.ge/), 9/11/2016, <https://goo.gl/DMRt9Z>

5 Tbilisi City Court Decision N2/93-6817 21 September 2017

cism but the comments are related to the authority of the judiciary and the right to a fair trial for the parties to the lawsuit.

This article will review international standards regarding freedom of expression with a special focus on the legal standards set down by the European Court of Human Rights (ECtHR) and the US Supreme Court. The article will also analyse the national legislation of Georgia, court practice and local context as well as provide a critical comparative analysis to international standards.

CHAPTER I

STANDARDS FOR RESTRICTING THE CRITICISM OF THE JUDICIARY

There are some difficulties related to the criticism of the judiciary in the context of specific cases. In that regard, it is particularly difficult to adopt universal, general standards. However, analysing different court practices enables us to identify the main criteria that should be taken into account when a conflict of interest arises.

The independence of the judiciary secures the right to a fair trial for every person and therefore is not a privilege for judges, but a guarantee of respect for human rights and fundamental freedoms, allowing every person to have confidence in the justice system.⁶ Therefore, any limitations imposed on the freedom of expression should be examined in this context. Interference with this right should be permissible only to the extent that is necessary to secure the independence of the judiciary, not because judges enjoy a special privileged status.

1.1. Overview of the case law of the European Court of Human Rights

The European Court of Human Rights has consistently assessed the limits of freedom of expression with regards to criticism of the judiciary.

The case law of the Court demonstrates that states are afforded a wide margin of appreciation to adopt regulations to protect the reputation of the judiciary. However, the recent judgements of the Court set down stricter standards on imposing restrictions on freedom of expression. For instance, the Grand Chamber in the case *Morice v. France* emphasized that a high level of protection of the freedom of expression applies where the remarks concern a matter of public interest. The

⁶ Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies), Preamble

effective functioning of the judiciary was regarded as such, even in the context of judicial proceedings that are still pending.⁷

The Court highlighted that the effective functioning of the justice system falls within the scope of public interest since the judiciary is an institution that is essential for any democratic society. In this regard, the judiciary, as the guarantor of justice, must enjoy public confidence to successfully fulfil its duties. Therefore, it may be necessary to protect the judiciary from gravely damaging, unfounded allegations if such attacks undermine public confidence, especially taking into account the fact that official duties prevent judges who have been criticised from responding. Nevertheless, the Court noted that they may be subject to personal criticism within the permissible limits, unless the criticism is a gravely damaging attack or essentially unfounded.⁸

The case concerned a statement made by lawyers expressing the view that investigations into the misconduct of the judges of particular case should have been initiated due to their lack of independence and impartiality. Subsequently financial sanctions were imposed on the lawyers for defamation by the French Court. The Court examined the facts of the case and found that the interference with the exercise of their right to freedom of expression violated the European Convention. The Court held that while the remarks of the applicants could be regarded as harsh, they nevertheless should be permissible whenever they have sufficient factual basis. Constructive criticism may be beneficial, not harmful, for the justice system.

The Court emphasized that lawyers hold a central position in the administration of justice and they are intermediaries between the public and the courts. The special role of lawyers entails a number of duties; they are subject to more restrictions on their professional conduct than journalists. Nevertheless, freedom of expression also extends to lawyers, especially in the case of public interest, when they have an opportunity to inform the public about shortcomings in judicial proceedings and such conduct is in the interest of their clients. Words, alongside a pen and a keyboard, are the most powerful tools in the hands of a lawyer in the court.⁹

The Court underscored that lawyers, taking into account the interests of their client, are entitled to decide what kind of arguments they prefer to present in the court. Moreover, the interest of the fair administration of justice requires the public's confidence that their interests will be effectively represented during the judicial proceedings. Accordingly, any financial sanctions imposed on lawyers may have a "chilling effect" on their ability to effectively represent the interests of their clients. Therefore, it is crucial to find a fair balance between the competing interests at stake.

The Court generally observed that it is necessary to distinguish between statements made in the courtroom and other remarks made elsewhere, outside the court. With regards to the statements in the courtroom, his client's right to a fair trial needs to be considered. Lawyers have the primary

⁷ *Morice v. France* [GC], no. 29369/10, §125, ECHR 2015

⁸ "Restriction of freedom of expression to maintain the authority of the judiciary is unacceptable" *Transparency Georgia*, 16/11/2015

⁹ Casadevall J. *Freedom of expression: essays in honour of Nicolas Bratza*, President of the European Court of Human Rights, Oisterwijk: Wolf Legal Publishers (WLP), 2012 – pp. 235-244

duty to defend their clients' interests zealously, which means that they sometimes have to object to or complain about the conduct of the court. In addition, it is crucial that the remarks are not repeated outside the courtroom. The court took a number of factors into consideration concerning the subject of the criticism; for instance, a prosecutor, who is party to the lawsuit, has an even bigger responsibility to tolerate the most bitter criticism from the defendant.¹⁰

Remarkably, in this context the Court also provides different levels of protection between statements of fact and value judgments. The Court noted that the accuracy of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof. Therefore, the requirement to prove the veracity of a value judgment would be impossible to fulfil. Accordingly, such a requirement would violate the Convention. However, the Court also stated that even a value judgment requires sufficient factual basis, otherwise that value judgment may be considered excessive.¹¹

In 2015, the Court ruled in favour of freedom of expression in the case *Marian Maciejewski v Poland*. The case concerned a critical article by a journalist headlined "Thieves in the administration of justice". The author described the employees of the court as a "mafia-like prosecutor-judge association". The applicant was fined according to the national legislation. The Court emphasized that it is necessary to apply very close scrutiny when the sanctions imposed by a national authority are capable of discouraging members of the press in debates over matters of legitimate public interest. The Court held that media is one of the means by which society can verify that judges are performing their responsibilities in good faith, in line with the legislation. Shortcomings in the functioning of the justice system are a matter of general interest which could be legitimately discussed by journalists or others engaged in a public debate. Moreover, the statements by the journalist may seem strict and harsh, however, such exaggerated and even provocative statements remain within the acceptable limits of Article 10 of the Convention.¹²

The case law indicates that a higher level of protection is granted where the remarks are related to matters of public interest and political expression. Authorities thus have a particularly narrow margin of appreciation and interference within the right, and will be subject to strict judicial scrutiny. The Court will decide the content of matters of the public interest on a case-by-case basis. In addition, the judiciary is one of the most crucial institutions in a state and thus the acceptable limits of criticism are much wider compared to ordinary citizens. However, protection is not guaranteed against gravely damaging attacks and statements that are essentially unfounded.

In its previous case-law the Court reached decisions where interference within the freedom of speech was found unjustified on the grounds of maintaining the reputation of the judiciary. For example, in 1997 the Court held that when sufficient evidence is available to the journalists, it may prove necessary for them to be able to confront the judiciary and express critical opinion.¹³

10 Beraia, G. "Standards of the European Court of Human Rights on the freedom of expression of the lawyer in a courtroom and elsewhere", *Journal of the Georgian Association of Lawyers* "Lawyer"

11 ECtHR, *De Haes and Gijssels v. Belgium*, 24/02/1997 para. 42

12 ECtHR, *Marian Maciejewski v Poland*, 13/01/2015 para. 79

13 ECtHR, *De Haes and Gijssels v. Belgium* 24/02/1997 para. 47

The case concerned the ruling of the court whereby custody of underage children was awarded to the father. An investigation by journalists found that the father supported Nazi ideology and there was evidence that he had acted inappropriately with the children. The journalists argued that the judge appointed to the case shared the father's ideological views and the judgment was inspired by this fact. The journalists were held responsible for defamation. The Court took into the consideration that the local courts did not question the accuracy of the allegations, but instead focused on the harm of the excessive criticism based on the information. In addition, the Court noted that the interest to protect the judiciary against essentially unfounded allegations is crucial; however, when the critical views are based on sufficient research conducted by journalists, interference within the freedom of expression is not justified.

By contrast, the Court held that there would be no violation of freedom of expression where critical opinion did not have a sufficient factual basis. For example, in the case *Prager and Oberschlick v. Austria* the Court reasoned that the journalist's accusations against a judge were excessively harsh and in the absence of a factual basis, undermined public confidence in the judiciary.¹⁴

The Court did not find a violation of Article 10 in the case where a journalist, who alleged that a judge had taken advantage of her position in order to obtain illegal profits, was ordered to pay a sanction.¹⁵ After examining the facts of the case, the Court concluded that the information lacked any factual basis and therefore constituted a personal attack on the judge. Accordingly, in the case of gravely damaging attacks and essentially unfounded statements, the protection of expression is limited.

1.2. Review of the U.S. Supreme Court standards

It should be noted that the U.S. Supreme Court sets an especially high level of protection for freedom of expression, including cases that concern the maintenance of judicial independence and authority. In contrast with the European Court, the U.S. Supreme Court case has made it clear that in order to limit freedom of expression, the statement must create a clear and present danger to the independence of the judiciary. This requirement explains why interference within the sphere of public criticism and contempt of the judiciary has been limited over the past few decades.¹⁶

The Court, in the 1941 case *Bridges v. California*, upheld the view that freedom of expression, if it concerns pending judicial proceeding in court, can only be limited where the danger posed by the speech is likely to be extremely serious and imminent. According to the Supreme Court, an enforced silence solely in the name of preserving the dignity of the judiciary could result in suspicion and contempt instead of maintaining judicial authority.

¹⁴ See ECtHR, *Prager and Oberschlick v. Austria* 26/04/1995

¹⁵ See ECtHR, *Lomakin v. Russia* 17/11/2005

¹⁶ "Article 19" Background Paper on Freedom of Expression and Contempt of Court 2000 p.15

The case concerned an article published by a newspaper publisher and editor related to an ongoing case. The editorial indicated that the judge should punish the suspects, as granting probation would be a serious mistake. The second publication concerned statements against the character of the accused person. Moreover, one of the preliminary decisions of the court was described as outrageous. Authors of the publications were found guilty and the case was referred to the Supreme Court.

In the judgement, the Supreme Court noted that the assumption that respect for the judiciary can be achieved by shielding judges from criticism is not justified and is based on an incorrect perception of the character of American public opinion. The right to discuss public institutions according to one's conscience, even if it is not always with perfect good taste, is indivisible from the American mentality. Accordingly, an enforced silence by the legislation may trigger suspicions towards the particular institution instead of enhancing public confidence.¹⁷

The Supreme Court reached a similar decision in the 1945 case *Pennekamp v. Florida*. In this case the plaintiffs were the publishers of a newspaper. They criticized certain actions of a first instance court in non-jury proceedings and described it as being too favourable to criminals and the gambling business. The court found the applicants guilty of an attempt to undermine the authority of the court and obstruction of justice and fined them.

The Supreme Court held that the facts of the case did not indicate a clear and imminent necessity to interfere with the freedom of speech. The Court explained that it is crucial to analyse not only the content of the statement, but the circumstances under which they were made to find a fair balance between the competing interests.

The Court took into account the fact that the statement concerned the attitude of the judges towards those who were charged with crimes, and did not constitute an evaluation of the evidence or rulings during a jury trial. Accordingly, the existence of a clear and present danger cannot be proved. The Supreme Court disagreed with the position that such newspaper articles might influence a judge because the press coverage is important to secure their re-election. The Supreme Court did not consider such threat as dangerous enough.¹⁸

It is crucial that the Supreme Court judgement grants the media a wide range of freedom to publish reports concerning pending judicial proceedings and provide its own interpretations about the ongoing trials. According to the Supreme Court, the judiciary, similarly to other public institutions, does not enjoy any privileges that would enable it to suppress, edit or censor the public statements describing the judicial proceedings.

The media coverage of a judicial proceedings may not be considered as contempt of the judiciary if a journalist missed an essential point in the trial or, in the view of the trial judge, failed to ap-

¹⁷ SCOTUS, *Bridges v. California*, 314 US 252 – 1941, para. 270

¹⁸ See SCOTUS, *Pennekamp v. Florida*, 328 US 331-1946

appropriately summarize the details. According to the Supreme Court, the law protecting the judiciary is not designed to protect judges who may be extensively sensitive to the winds of public opinion.¹⁹

To conclude, compared to the European Court of Human Rights, the Supreme Court of the U.S. applies higher standards to interference with freedom of speech on the grounds of protecting judicial authority. For the European Court, the existence of an imminent and serious threat to the administration of the justice that is not the decisive factor; rather a potential, tangible threat is enough to constitute ground for interference.

1.3. Analysis of the case law of the United Nations Human Rights Committee

Article 19 of the 1966 International Covenant on Civil and Political Rights (ICCPR) protects the right to express one's opinions without any interference. Article 19(3) of the ICCPR on the other hand recognizes that the enjoyment of this right is related to certain duties and responsibilities. Therefore, the expression might be subjected to certain limitations if such limitations are provided by law and are necessary for the respect of the rights or reputations of others, for the protection of national security or of public order, or of public health or moral.

Similarly to the ECHR, the ICCPR permits the limitation of freedom of expression only when the interference is prescribed by law. Furthermore, the law must meet the requirement of foreseeability, that is, the law must be written with enough precision that a person would be able to foresee the consequences of their actions and these laws must be accessible. It is important that restrictions serve one of the legitimate aims prescribed by the ICCPR and that the measure is necessary and proportionate to the legitimate aims pursued. In this context proportionality requirements are essential since, in a number of cases, the restrictions prescribed by law may serve a legitimate aim, but a disproportionately harsh sanction may cause a violation of the freedom of expression.

In contrast with the Constitution of Georgia and the ECHR, the wording of the ICCPR does not explicitly mention the authority of the judiciary as permissible grounds for the limitation of freedom of expression. However, the HRC further interpreted that contempt of court could be considered as an action against public order, which is included in the ICCPR. Such proceedings are permissible only if it serves the interest of the exercise of the court's power to maintain orderly proceedings. However, it should not in any way be used to restrict the legitimate exercise of the rights of defence.²⁰

According to the HRC, the ICCPR protects the expression of opinion with particularly high standard in public debates, if it concerns public institutions and public figures. Moreover, certain forms of expression can be considered as insulting to a public figure, however it should not become grounds

¹⁹ SCOTUS, *Craig v. Harney* 1947 P. 331 U. S. 376 p.

²⁰ Human Rights Committee, General comment No. 34, Article 19: Freedoms of opinion and expression, UN Doc. CCPR/C/GC/34, 12 September 2011, para. 31.

to justify the interference. All public figures, including those exercising the highest political authority, can be subject to criticism.²¹

Unlike the European Court, the HRC did not have a rich case-law regarding the restriction of freedom of expression on the grounds of the protection of judicial authority. The Committee found a violation of the freedom of expression in the case of *Dissanayake v. Sri Lanka* where a sanction was imposed on the applicant as a result of critical opinions expressed against the court judgement, however, the observation of the committee, to a great extent, was based on the evaluation of the disproportionality of the sanction instead of the competing interests.²²

1.4. Analysis of the case law of the Constitutional Court of Georgia

The Constitutional Court of Georgia has had to examine the balance between the judicial independence and freedom of assembly and expression only once. Namely, in its decision of April 18, 2011, the Court held that the provisions of the Code of Administrative offences, which prohibited conducting manifestations near the residence of the judge, was constitutional.

The Constitutional Court in that case set down important standards, namely, judges may be subjected to personal and professional criticism, however, the permissible limits of the criticism are much narrower than the level accepted against political figures. The rationale behind this decision is that the role of the judiciary and their obligation not to engage into political debates. However, the Court found that interference within the freedom of expression could be justified in certain circumstances, such as when the criticism of a judge with the intention to influence him constitutes an unjustified interference in the private life of the judge.

The respondent – the Parliament of Georgia – indicated that holding a manifestation near a judge's residence was tantamount to coercion against judges to decide a particular case through pressure on family members. Therefore, the legitimate aim of the disputed provision is to safeguard the interests of the fair administration of justice and to guarantee judicial independence. Judicial independence is the key principle of the rule of law and influencing it through a group of discontented persons is against the interest of the administration of justice.

The Constitutional Court agreed with the Parliament of Georgia and concluded that the disputed provision was constitutional. According to the Court, the independence of a judge, as a key principle of the rule of law, encompasses the prevention of unjustified interference in a judge's personal and private life with the aim to pressure the judge. The judiciary must be protected and distanced equally from the interference of public authorities as well as different social and political groups,

²¹ Ibid: para. 38

²² Communication No. 1373/2005, *Dissanayake v. Sri Lanka*, Views adopted on 22 July 2008

and private persons. The Court also noted that the protection of the judiciary does not mean the prohibition of criticism of the judgement or the professional conduct of a judge.

Regarding the expression of a critical opinion on the professional conduct of a judge, the Court emphasized that it is a constitutional right. In addition, as a public figure, a judge has to tolerate higher public scrutiny, since criticism of his or her professional conduct or personal character might be a result of the public interest. Nevertheless, the Court disagreed with the applicant who claimed that judges are under the same obligations to tolerate scrutiny as other public figures. According to the Constitutional Court, unlike the public-political figures, the professional and especially private activities of judges enjoy higher protection since they lack the opportunity to defend themselves and engage in public-political debates. The limitations that are imposed on the judiciary stem from the principle of impartiality and serve as safeguards for public confidence towards the judicial system. The Court thus concluded that interference within freedom of expression is permissible only when the criticism of the professional conduct of judges intends to influence him and unjustifiably interferes within his private life.²³

CHAPTER II

THE LIMITS OF THE COMMENTING ON PENDING JUDICIAL PROCEEDINGS

Imposing limitations on issuing public comments on pending cases is mostly related to common law jurisdictions. This rule is known as *sub judice* and prohibits interference in cases that are under adjudication.

In practice, this rule is usually used to prohibit the publication of matters which are likely to limit and jeopardise the right of a fair trial. In other words, the rationale behind this rule is to prevent parallel legal proceedings in the media.²⁴

The main purpose behind this rule was explained in UK case-law: “the due administration of justice requires first that all citizens have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; secondly, that they should be able to rely upon obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in

23 Constitutional court of Georgia, Political associations of citizens, “movement for Unified Georgia” and Conservative Party of Georgia”, citizens of Georgia –Zviad Dzidziguri and Kakha Kukava, Georgian Young Lawyers Association, Citizens Dach'i Tsaguria and Jaba Jishkariani, The Public Defender of Georgia v. The Parliament of Georgia 2/482, 483, 487, April 18, 2011 paras. 62-79

24 Article 19” Background Paper on Freedom of Expression and Contempt of Court 2000 p.5

courts of law; and thirdly, that, once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court to decide it according to law. Conduct which is calculated to prejudice any of these three requirements or to undermine the public confidence that they will be observed is contempt of court”.²⁵

The possible violations of the *sub judice* rule would be present, for example, if a publication concerns matters that are not admissible as evidence in court, but may influence a jury, such as information about previous convictions of the accused which are not relevant to the case. Another example would be a publication declaring that the accused is guilty before the trial is over.

This rule has been recognized by the European Court as a principle, however the Court also has adopted the requirements that this rule needs to meet.

2.1. Analysis of the case law of the ECtHR

The ECtHR has a number of cases about the limitation of freedom of expression in pending legal proceedings. The general standards adopted by the Court have not undergone any major transformation over the years. The case law recognizes that states enjoy a wide margin of appreciation to adopt regulations, however, the standards set down by the Court should be met.

In this regard, the 1979 case of the Court – *The Sunday Times v. The United Kingdom* – is important. Remarkably, this decision later served as a basis of a review of UK legislation. The Court reasoned that interference with the freedom of expression served a legitimate aim – maintaining the impartiality and the authority of the judiciary, on the one hand, and safeguarding the rights and interests of litigants, on the other.

The Court stated that the Convention considers it lawful to limit freedom of expression on the grounds of the protection of the authority of the judiciary. The authority and impartiality of the judiciary has to be understood within the meaning of the Convention, taking into account the right to a fair trial. Maintaining the authority of the judiciary includes the idea that society perceives courts as the only supreme authority that can settle legal disputes. Further, it is crucial that the public have confidence in court decisions and legal proceedings.

In this context, the Court applied certain tests to examine the influence of the publication on the right to a fair trial. The publication included opinions regarding the pending judicial proceedings, thus, leading the public to form an opinion on the litigation beforehand. The national courts found that the publication would most likely be followed by the answer of the opposed party, therefore, there was a threat that the parties to litigation would be subjected to a trial by the media.

²⁵ Attorney-General v Times Newspapers Ltd: HL 1973

The Court found that the restriction of freedom of expression served a legitimate aim, but as a result of specific circumstances it did not meet the principle of proportionality. According to the Court, interference must be “necessary in a democratic society.” The word “necessary” does not mean “indispensable”, however, it also does not have the light and flexible meaning of such expressions as “admissible”, “ordinary”, “useful”, or “reasonable”.

The Court took into account the danger of “trial by media” that was indicated by the national courts. However, after examining the disputed publications, the Court reasoned that the language used in the article was not radical and did not represent the position of only one party. Furthermore, there was no emphasis on the fact that the court should reach a certain type of decision. While the publication provided a detailed review of the evidence and claims in favour of the plaintiff, it also summarised arguments in favour of the opposite party. The interpretation of the publication for readers would not be homogenous but would depend on the prejudices and prejudgements.²⁶

Freedom of expression applies not only to information or ideas that are favourably received or regarded as indifferent, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of tolerance, liberalism and pluralism, without which there is no democratic society. In the Court’s opinion, it would be impossible to consider that there can be no prior discussion of the subject matter of court proceedings – the courts cannot operate in a vacuum. However, in the context of Article 10, it is not only the role of the media to inform the public but also the right of the public to be informed. Nevertheless, the right to a fair trial, which is enshrined in Article 6 of the ECHR, needs to be taken into account. Journalists need to acknowledge that the limits of permissible comment may not extend to statements which are likely to interfere, intentionally or not, with the right to a fair trial or to undermine the confidence of the public in the role of the courts.²⁷

Recommendation Rec (2003)13 of the Committee of Ministers to member states on the provision of information through the media in relation to criminal proceedings similarly notes that the media should take into account certain interests. Moreover, the European Court notes that the freedom of media applies to information that is provocative or exaggerated to a certain degree. Furthermore, courts cannot interfere with the role of media and the preferred method to inform the public.

Aside from the criteria mentioned above, one of the essential factors for the Court was the fact that the case concerned an issue of public interest that was the subject of an active public debate. Moreover, the case regarded the rights of numerous victims, who had a vital interest in knowing the various important details of the case.

As a result, the Court concluded that interference was not necessary in order to maintain the authority of the judiciary. However, generally, there is a relatively low standard provided for freedom of

²⁶ ECtHR: *The Sunday Times v. The United Kingdom* 1979 §66

²⁷ ECtHR: *Ageyev v. Russia*, no. 7075/10, 18 April 2013, §§ 224-225

expression in the cases that concern the pending judicial proceedings. In the 1997 decision, the Court found that the publication was capable of influencing the outcome of criminal proceedings. The publication concerned the case of a government minister who was being tried in a court for tax evasion. The remarks of the journalist in the publication suggested that the accused person was guilty.

The Court reasoned that the interference with the freedom of expression pursued a legitimate aim, that is, maintaining the authority of the judiciary and the defendant's right to a fair trial. The court noted that journalists, when commenting on pending criminal proceedings, should bear in mind that their comments are likely to prejudice the issue of the guilt or innocence of the accused, and can undermine public confidence in the decisions made by the court.²⁸

2.2. The U.S. Supreme Court case law regarding the standards of freedom of expression on the pending judicial proceedings

Similar to the criticism of the judiciary, the acceptable limits of comments regarding pending judicial proceedings are much wider in the case-law of the U.S. Supreme Court. The Supreme Court considers interference with the freedom of expression justified only when there is a clear and present danger to the administration of justice. This standard was introduced in the 1941 case of *Bridges v. California*. Prior to this judgement, the case law of the Supreme Court resembled that of the European Court. Accordingly, it was considered justified to limit freedom of expression if there was a potential threat that public comments would influence the right to a fair trial.

The American experience contradicts the assumption of the European Court that turning judicial proceedings into spectacle trials in the media is likely to undermine the perception of the courts as the authority for the objective settlement of legal disputes. The American public has observed such media coverage of ongoing judicial proceedings for decades, but there is no evidence to suggest that public confidence in the judiciary has been negatively affected in any manner. In fact, compared to other countries, Americans have one of the highest rates of using the judiciary to settle legal disputes.²⁹

28 ECtHR, *Worm v. Austria*, 29/08/1997 § 50

29 Article 19" Background Paper on Freedom of Expression and Contempt of Court 2000 p.8

CHAPTER III

GEORGIAN LEGISLATION IN FAVOUR OF FREEDOM OF EXPRESSION AND THE DANGEROUS STANDARD SET BY THE COURT

It is important to note that Georgian legislation does not recognize the rule of *sub judice*, which would make public comments regarding the pending judicial proceedings subject to limitation, due to the fact that Georgian legislation on freedom of expression is based on American standards.

However, the legislation does not exclude the possibility that an individual who has suffered the outcome of public statements that are defamatory or damaging honour or reputation could seek to protect his rights guaranteed under “Law of Georgia on Freedom of Speech and Expression” However, in such cases, the subject of the dispute is the rights of a specific person, not general concepts such as the protection of the authority of the judiciary.

Courts of general jurisdiction do not have a legal basis to punish individuals for contempt of courts through public comments. Georgian legislation is completely unfamiliar with such a concept. While the Criminal Code of Georgia includes provisions protecting the independence of the court, there has not been any precedent where the court has interpreted the provision in such manner.

Moreover, Georgian legislation has a lenient position on the limits of public criticism of the judiciary outside the courtroom.

According to the “Law of Georgia on Freedom of Speech and Expression”, a civil liability may be imposed for the defamation of a public figure if the plaintiff provides sufficient evidence in court to prove the statement by the defendant was essentially unfounded, causing damage to the plaintiff and the defendant had either previously acknowledged the wrongfulness of the statement or, due to clear and gross negligence, unfounded information had been spread³⁰. This provision of the legislation makes the legal proceedings regarding moral damages for defamation extremely difficult for judges and other public figures. The current wording of the legislation implies the unequivocal will of Georgian lawmakers to provide a high standard of protection for freedom of expression when it relates to matters of public interest.

However, the recent decision of the Tbilisi City Court questions the practical implementation of the high standards set down by the legislation.

The case concerned the public comment of the businessmen Fady Asly regarding the decision of Judge Vladimer Kakabadze on a high-profile case. The businessmen claimed that Judge Kakabadze is corrupt and the decision was also influenced by corrupt arrangements.

30 “Law of Georgia on Freedom of Speech and Expression” 15/07/2004, Accessed: 20/11/2017

Tbilisi City Court shared the view of Judge Kakabadze, who is employed in the same court, and held that Fady Asly made a defamatory statement through gross negligence since the information was presented as fact and included remarks about criminal elements in the judge's activities, without applying and seeking confirmation from the competent authorities.³¹

Accordingly, the decision, in fact, eliminates the opportunity for public debate regarding the possible corrupt arrangements until the competent authorities confirm that the crime was committed by the judge. Such an interpretation poses potential threats to the protection of the freedom of expression because it limits the possibility of informing the public about an important potential crime without addressing the relevant public institutions. These are worrisome developments especially taking into account the local context where, in a number of high profile cases, wide public debate and public pressure are the only mechanisms that force the competent authorities to conduct an effective and objective investigation.

CHAPTER IV

ANGER ARISING FROM THE RESTRICTION OF FREEDOM OF EXPRESSION IN PRACTICE

Initiatives to restrict the expression of certain views poses not only the danger of unjustified limitation of the freedom of expression, but also may contradict the requirement of foreseeability of the legislation and thus have a chilling effect on the enjoyment of that right.

Restrictive regulations may become problematic with regards to foreseeability, not only on a legislative level, but also in terms of practical implementation. There is a potential threat that these court decisions might be perceived by the public as promoting certain corporate interests, as the judges themselves constitute the opposite party. While Georgian courts are faced with a serious challenge to improve public confidence in the judiciary, such restrictive regulations might aggravate the existing problem.

Maintenance of the independence of the judiciary is undoubtedly a valuable legitimate aim and it may therefore prove necessary to adopt certain legal regulations. Certainly, the executive and legislative branches have a duty to guarantee adequate and necessary protection if the members of the judiciary are under the threat of physical violence or coercion. In particular, judges should be protected from physical aggression or the threat of such aggression. However, it does not imply that the freedom of expression should be limited to protect judges from being disturbed, unless such expression lead to a particularly high scale of threats.

31 Tbilisi City Court Decision N2/93-6817, 21 September 2017

Gross interference with judicial activities in any manner in order to influence the legal proceeding constitutes a punishable crime under the Criminal Code of Georgia³². Aggravating circumstances of the crime include situations when gross interference has been committed by a public political official or using the official position. Moreover, it is a criminal offence to make any threat to kill or to damage the health or destroy the property of a judge in connection with the court hearing of a case, or commit a violent act – even if it is not life threatening – against the judge. Article 366 of the Criminal Code also defines contempt of court manifested in the insult of a judge as a punishable act.

Furthermore, the “Law of Georgia on the rules of communications with the courts of general jurisdiction” imposes a legal liability for communication with a judge in connection with a court hearing of a case if it violates the principles of judicial independence, impartiality and the principle of adversarial process.

Additionally, criminal and civil procedural law authorizes a judge to apply certain measures prescribed by law, including administrative detention, if an individual insults the judiciary or disobeys the orders of a judge. Although the abovementioned provisions of Georgian legislation reveal certain shortcomings and should be improved, particularly in connection to the foreseeability requirement, it is possible to conclude that the legislation provides essential safeguards to guarantee the independence and impartiality of the court.

In light of the current problems that are present in the judicial system, the prohibition of a public debate on matters that are of high public interest is unjustified, since it limits the opportunity to shed light on the problems within the system and to find solutions.

The Constitutional Court of Georgia reasoned that generally the state is not entitled to restrict freedom of expression on the ground that certain information or ideas might be disturbing or encourage socially unacceptable behaviour. Individuals are entitled to receive and impart information and decide themselves what information is acceptable. Based on that rationale, apart from the restrictions that are strictly necessary to a democratic society, individuals and broadcasters are entitled to disseminate all kinds of information, as it grants individuals an opportunity to choose between various ideas.³³

Protection of the judiciary from external influence, as noted above, is a valuable legitimate aim, however, it should not be understood too broadly. Public opinion should not be capable of influencing the content of the judgement. A judge therefore cannot reasonably expect that a decision will not be subjected to criticism. Accordingly, a judge, similarly to other public figures, needs to have the capacity to separate the emotions of the public from the judicial proceedings. A judge should also be able to distance himself from his own personal feelings and the repression on personal feelings should not become justified ground to limit freedom of expression.

³² Criminal Code of Georgia, Article 364(2)

³³ Constitutional Court of Georgia, Citizens of Georgia, Giorgi Kifiani and Avtandil Ungiadze v. the Parliament of Georgia 1/3/421,422, November 10, 2009, II-7

CONCLUSION

In a democratic society, which is based on the principle of the accountability of public institutions, unlimited public debates on matters of public interest, including the fair administration of the judiciary, is of the utmost importance. Freedom of expression is one of the core universal human rights and represents an important precondition for a democratic society. It is a crucial factor in a state for the development of every individual and the fostering of democratic values.

The case law of the ECtHR indicates that freedom of expression does not apply in certain exceptional circumstances when the only objective of the expression is to insult a court or to impart essentially unfounded information. These are the cases where the accusations against the judiciary are extremely grave and are not factually based. It is not justified to limit public criticism in other cases, particularly when the aim is to protect the authority and reputation of the judiciary. An even higher standard of protection of the freedom of expression is recognized by the U.S. Supreme Court, which requires the existence of an imminent and real threat.

It is essential to realize that independence is not a privilege granted to judges, but rather it is their foremost professional duty in order to guarantee the protection of human rights and freedoms of every person. Public criticism of the judiciary not only does not impose a threat, but can play an important role in guaranteeing its independence. Such criticism is a type of encouragement for judges to be faithful to their profession and prevent the influence of public opinion and the risk of bias. Accordingly, like other branches of the government, judicial authorities will benefit from the process of the public exchange of opinions.

In a state based on the principles of democracy and the rule of law, the judiciary should be the primary guarantor of the freedom of expression. Accordingly, they should be committed to making sure that society has the opportunity to be informed on matters of high public interest, including those relating to the judiciary, to form their own opinions. In that respect, any additional regulation poses serious threats of excessively restricting freedom of expression and reducing the accountability of government institutions.

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