

INFORMING THE PUBLIC ABOUT ONGOING CRIMINAL CASES AND PROCEDURAL GUARANTEES OF THE ACCUSED**

ABSTRACT

Public hearing of criminal cases is an important element of the state-legal criminal process. The public has a legitimate interest in being informed about ongoing criminal cases and in assessing the extent to which criminal justice is administered in accordance with their expectations. The openness of administration of criminal justice precisely serves the requirement of public awareness. Due to the fact that a large part of criminal cases may not even reach the stage of discussion on the merits in court, and it is terminated at the stage of investigation, therefore the public is interested not only in hearing criminal cases in the courtroom and their results, but also in the administration of criminal cases at the stage of investigation. Accordingly, both the media and investigative and criminal prosecution bodies ensure provision of information to the public on current criminal cases and the satisfaction of the latter's legitimate interest in providing information.

Incorrect and unbalanced public information about criminal cases may pose significant challenges and threats to the fairness of criminal proceedings, the rights of the accused and the interests of justice. In particular, the presumption of innocence and the right to privacy of the accused are at risk. Accordingly, the criminal law enforcement bodies and the media should be aware of the existing threats and pay special attention to the implementation of the correct information policy when informing the public about the criminal case and the accused persons.

This article discusses the role and influence of the media in the criminal justice process, reviews the risks that may threaten the procedural guarantees of the accused, the interests of justice, and develops separate recommendations in the direction of a balanced information policy.

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I. INTRODUCTION

In the era of mass information and communication means, the access of citizens to information is virtually unlimited. At the same time, the influence of the media on public opinion is constantly increasing. Due to the fact that the public shows a special interest in criminal cases, many media outlets pay a lot of attention to criminal chronicles and try to gain particular interest of the public. However, this can seriously jeopardize both the dignity of individuals and the independence of judges, and at the same time sacrifice the rules of procedural fairness.¹ As a rule, when informing the public about ongoing criminal cases, the participants of the process are identified and stigmatized, and/or as a result of the dissemination of prejudicial information, the accused is tried by the media, even before the court pronounces its judgement.

Threats that may endanger the criminal process and the procedural guarantees of the accused due to an unbalanced information policy should be of particular concern to the Prosecutor's Office and investigative bodies, which regularly provide information to the public about individual criminal cases. The present article reviews the importance and features of information policy in criminal cases, also emphasizes the above-mentioned threats and outlines the main principles of a balanced information policy as a recommendation.

II. THE ROLE AND INFLUENCE OF THE MEDIA IN THE CRIMINAL JUSTICE PROCESS

In a rule-of-law and democratic state, there is a high interest in providing information to the public on the activities of criminal justice bodies and implementation of justice. In case of committing a crime, members of society have special expectations for criminal prosecution and justice bodies, that the criminal should be identified and prosecuted as quickly as possible.² The universality of the implementation of criminal justice precisely serves the requirement of public awareness.

Criminal justice authorities in a democratic and rule-of-law state need public trust and recognition. To that end, the activities and results of the activities of the above-mentioned bodies should be understandable and acceptable to the population. Criminal law enforcement agencies can gain trust and recognition from members of society only through publicizing their activities. Thus, the prerequisite for gaining recognition

¹ Heiner Alvar, 'Principle of Publicity According to the German Criminal Procedure' in Giorgi Tumanishvili and others (eds), *The Influence of European and International Law on Georgian Criminal Procedure Law* (Meridian Publishing House 2019) 440.

² Patrick Schul, *Kriminalberichterstattung und Stigmatisierung aus strafrechtlicher und medienpsychologischer Sicht: Vorverurteilung und Öffentlichkeit* (Freie Universität Berlin 2017) 99.

and trust is to communicate with and provide information to members of society.³

Public criminal proceedings in a democratic and rule-of-law state are important not only at the trial, but also at the investigation stage. The public is interested not only in the discussion of criminal cases in the courtroom and their results, but also how diligently the criminal prosecution body performs its function. The mentioned interest is completely understandable, because a large part of the cases may not even reach the stage of discussion on the merits in the court and be terminated at the stage of the investigation within the prosecutor's discretionary powers. Therefore, the transparency of the investigation process can satisfy the legitimate interest of public awareness. To that end, the Prosecutor's Office must ensure that the investigation process is not kept secret and beyond public control. The Prosecutor's Office should ensure transparency of the investigation process by regular provision of information to the population, in order to gain the trust of the members of the public along with the criticism of its activities and the decisions made. Therefore, the active relationship of the Prosecutor's Office with the public and the transparency within the permissible limits of the investigation process represent a kind of democratic national necessity.⁴ The public Prosecutor's Office communicates with the public not directly, but through indirect, intermediary ways, more precisely, through the media. In the current conditions, the media is the main means of communication between the population and the criminal justice authorities. Of course, the court proceedings are usually public, but the media is still the main and often the only source of information for the population. Only a few people are able to attend public court proceedings. Most people get information through the media. Consequently, the criminal justice authorities, from the beginning of the investigation to the trial of the case, depend on the media as the main disseminator of information to gain the trust and recognition of the public.

The dissemination of information on criminal law cases by the media is also of great importance in the direction of implementation of the goals of the punishment. Media plays a particularly significant role in the implementation of the general prevention of punishment. Without media, the general preventive goals of punishment would be difficult to realize. Consequently, criminal law enforcement agencies are essentially dependent on the media for the successful performance of their functions.⁵

Based on the above, media pays special attention to the activities of the criminal justice bodies and informing the public about criminal cases. Media interest is even higher

³ Winfried Hassemer, „Grundsätzliche Aspekte des Verhältnisses von Medien und Strafjustiz“ (2005) 3(25) *Strafverteidiger* 167.

⁴ Ralph Alexander Lorz and Julia Bosch, „Rechtliche Parameter für die Öffentlichkeitsarbeit der Justiz – Eine aktuelle Analyse aus Anlass des sog. „Mannesmann“ - Verfahrens“ (2005) *Archiv für Presserecht* 97.

⁵ Anna Reike, *Die Rolle der Staatsanwaltschaft in der Mediengesellschaft: Möglichkeiten und Grenzen staatsanwaltschaftlicher Öffentlichkeitsarbeit im Ermittlungsverfahren* (Verlag Dr. Kovac 2012) 137.

in high-profile criminal cases. The provision of information to the public about the criminal proceedings by the media is understood as part of the implementation of its public function, because in this way the activities of the state bodies come under public control.⁶ In addition, media also fulfills the function of spreading legal awareness in the society by covering the ongoing processes in the law enforcement and justice bodies.⁷ In general, the activities of the media are aimed at influencing the process of individual and public opinion formation by providing information on current criminal cases to a wide range of addressees.⁸ Of course, media is the main means of disseminating information on ongoing criminal cases, but it should also be noted that media does not disseminate publicly information with the content and form that the criminal justice authorities want and imagine. Media creates an image of law enforcement bodies in the society according to its own idea. Media is not a “notary of justice”⁹ because media operates according to its own rules. The image publicized by the media in many cases is in accordance with the views of a large part of society regarding the said bodies. In order for the public to have a real idea and picture of the criminal justice bodies and their activities, the aforementioned bodies cannot remain in a passive role and depend only on what information the media disseminates. They are forced to actively communicate with the public through the media and thereby actively influence the formation of public opinion. If the criminal justice authorities want the information about their activities not to be distorted by the media, they should actively contribute to informing the public about current cases and provide all important information about the current processes to the public. They must provide information to the public in such a way that it is understandable to any non-lawyer ordinary citizen.¹⁰

It should be noted that intensive media dissemination of information about ongoing criminal proceedings can seriously jeopardize not only important constitutional and procedural guarantees of the accused (e.g., the right to a fair trial, the presumption of innocence, the right to privacy), but also harm the goals and principles of the criminal justice process itself. Therefore, media can play a dangerous role for the criminal justice process.¹¹ For example, with excessive media activity at the investigation stage and media coverage of the details of the ongoing criminal case, the right to privacy of the accused and other persons participating in the process may be violated. The risks of

⁶ *ibid*, 119.

⁷ Christine Danziger, *Die Medialisierung des Strafprozesses: Eine Untersuchung zum Verhältnis von Medien und Strafprozess* (BWV, Berliner Wissenschafts-Verlag 2009) 26.

⁸ Reike, *supra* note 5, 119.

⁹ Winfried Hassemer, *Warum Strafe sein muss: Ein Plädoyer* (2. Auflage, Ullstein 2009) 111.

¹⁰ Thiesmeyer Heinrich, „Anzeige von Strafjustiz vs. Medien und Öffentlichkeit“ (1964) *Deutsche Richterzeitung* 73; Reike, *supra* note 5, 140.

¹¹ Claus Roxin, „Strafprozess und Medien in Einheit und Vielfalt der Rechtsordnung“ in *Festschrift zum 30 jährigen Bestehen der Münchener Juristischen Gesellschaft, Vorstand der Münchener Juristischen Gesellschaft e.V.* (C.H.Beck 1996) 97.

such interference arise when the identity of individuals participating in the investigation process is made public by the media and they are referred to as defendants.¹² For the media, it is the personal component that plays the main role, because the identification of a person is an important journalistic way of attracting the attention of the public.¹³ Identification of the accused by the media may result in their stigmatization in society. At the stage of the investigation, there is only speculation on the part of individuals regarding the commission of a crime. This is the early stage of the criminal process, which should usually be followed by a discussion of the case on the merits in court. According to the stories spread by the media, sometimes even at the stage of the investigation, the accused is actually declared guilty, which causes great damage to the personal and business reputation of the accused. In some cases, even the termination of the criminal prosecution against the accused cannot fix the damage caused to the accused by the media, because the “public inquisition” of the accused has already been carried out through the media.”¹⁴

In addition to the above, media can harm the investigation process by covering the facts in a tendentious and biased manner. For example, media can force law enforcement agencies to start an investigation.¹⁵ Due to exaggerated media coverage of certain circumstances in society and dissemination of information based on their own sources the Prosecutor’s Office may fail to withstand public pressure and initiate criminal prosecution against a specific person, even when in reality there were no sufficient prerequisites to initiate criminal prosecution.¹⁶ Also, the effective conduct of the investigation and the establishment of the truth may be hindered by making the investigative actions and their results public by the media, and the public announcement of the names of the persons identified as a result of the investigation. In addition, when the details of the criminal case are widely publicized in the media and the public opinion about the guilt or innocence of the person is formed, this may have a serious impact on the impartiality and independence of the judge hearing the criminal case or the witnesses participating in the case.¹⁷

¹² Reike, supra note 5, 115; on the constitutional protection of personal data, see Judgment of the Constitutional Court of Georgia N1/3/407 “Georgian Young Lawyers Association and Citizen of Georgia - Ekaterine Lomtadze v. the Parliament of Georgia”, 26 December 2007.

¹³ Ewald Behrschmidt, *Kriminalberichterstattung in der Tagespresse* (Kriminalistik Verlag 1998) 337.

¹⁴ Roxin, supra note 11, 97; Christian-Alexander Neuling, *Inquisition durch Information: Medienöffentliche Strafrechtspflegeim nichtöffentlichen Ermittlungsverfahren* (Duncker & Humblot 2005) 30.

¹⁵ Tilmann Job, *Prozessführung der Staatsanwaltschaft und Medien* (2005) 3(25) *Strafverteidiger* 175.

¹⁶ Sabine Sasse, „Justiz und Medien” in Thomas Schuler and Christian Scherz (Hrsg.), *Rufmord und Medienopfer* (Ch.Links Verlag 2007) 69.

¹⁷ Reike, supra note 5, 118.

III. RIGHT TO A FAIR TRIAL

The right to a fair trial is the most important principle of the criminal process and, at the same time, one of the main procedural guarantees of the accused (the convicted as well as the acquitted). The right to a fair trial is granted to the accused by the first part of Article 8 of the Civil Code. Also, the first paragraph of Article 6 of the European Convention on Human Rights provides for the right to a fair trial. The principle of fair process originates from the first paragraph of Article 9 of the Constitution of Georgia, that is, from the constitutional requirement of inviolability of human dignity. It follows from the principle of inviolability of human dignity that it is not allowed to degrade a person to a mere object of state or public activity. Human dignity will be violated if the person becomes a means to achieve some goal. The obligation to protect dignity falls on the state, especially during criminal prosecution. Therefore, in the criminal process, the accused must have the status of an active subject of the process, which, first of all, means having legal opportunities to actively influence the course of the process and its outcome. Therefore, fairness of the process involves giving the accused a chance to effectively defend himself/herself against the charges presented by the prosecution, which is materially and personally much better equipped than the accused. The above-mentioned guarantee applies both during the discussion of the case on the merits in court and during the investigation stage,¹⁸ so the prosecutor must take care of ensuring the guarantees based on the principle of fair process at the investigation stage itself.

At the stage of the investigation, the sentiments created by the excessive information policy of the Prosecutor's Office and the tendency of the media to inform the public about the ongoing investigation can deprive the accused of the ability to effectively protect his/her rights and influence the process. Public sentiments caused by such information policies usually affect the objectivity and independence of prosecutors, courts and witnesses, which jeopardizes ensuring a fair trial.¹⁹ At the same time, the European Court of Human Rights also recognizes that an inappropriate (insulting the accused) media campaign, in certain circumstances, may cast a shadow on the fairness of the trial process by influencing public opinion and, therefore, on the composition of the jury,

¹⁸ Judgment of the European Court of Human Rights N50541/08, 50571/08, 50573/08, 40351/09 "Ibrahim and others v. The United Kingdom, 13 September 2016; Judgment of the European Court of Human Rights N42371/02 "Dvorski v. Croatia, no. 25703/11, 20 October 2015; Judgment of the European Court of Human Rights, Pavlenko v. Russia", 4 October 2010.

¹⁹ Joachim Bornkamm, *Pressefreiheit und Fairneß des Strafverfahrens: die Grenzen der Berichterstattung über schwebende Strafverfahren im englischen, amerikanischen und deutschen Recht* (Nomos 1980) 207; Christian Altermann, *Medienöffentliche Vorverurteilung – Strafjustizielle Folgerungen für das Erwachsenen- und für das Jugendstrafverfahren? Eine rechtsdogmatische Analyse auf der Grundlage einer empirischen Erhebung (Experteninterviews)* (Duncker & Humblot 2009) 32.

which is invited to make a decision related to the guilt of the accused.²⁰ The principle of a fair process can be violated even if the Prosecutor's Office provides media with information about the criminal prosecution initiated on the fact of a crime committed by a particular person, without first informing the accused about the charges. If the accused learns from the media for the first time that he/she is known as an accused, it will be difficult for him/her to give reasoned answers to the media regarding the charges against him/her, which will actually eliminate the opportunity for him/her to properly defend himself/herself against the charges presented.²¹ Accordingly, the principle of a fair trial should protect the accused not only from the excessive information policy of the Prosecutor's Office, but it gives rise to the obligation of the Prosecutor's Office to inform the accused about the current investigation, its results and the existing accusations, before he/she provides information about the aforementioned to the media.

IV. PRESUMPTION OF INNOCENCE

The presumption of innocence as the most important procedural guarantee is based on the principle of the rule of law. Paragraph 5 of Article 31 of the Constitution of Georgia states that a person shall be presumed innocent until proved guilty, in accordance with the procedures established by law and the court's judgment of conviction that has entered into legal force. At the same time, no one shall be obliged to prove his/her innocence. The burden of proof shall rest with the prosecution (Paragraph 6 of Article 31 of the Constitution of Georgia). The presumption of innocence as an essential component of the right to a fair trial is also found in the European Convention on Human Rights; according to Article 6, Paragraph 2, every person accused of a crime is presumed innocent until proven guilty according to law. The requirement of presumption of innocence should be considered both at the stage of investigation and during the judicial review of the case. Until the court makes a final decision regarding a person's guilt, the representatives of the criminal justice authorities, as well as the court, should refrain from making statements that create the impression that the person's guilt has already been established.²² Therefore, it will be inconsistent with the presumption of innocence if the judge starts the case with the attitude that the accused is already guilty. In addition, the judge should not express an opinion regarding the guilt of the accused

²⁰ Judgment of the European Court of Human Rights N1 "Mustafa Kamel Mustafa (Abu Hamya) v. The United Kingdom", 18 January 2011; Judgment of the European Court of Human Rights N30971/12 "Abdulla Ali v. The United Kingdom", 14 December 2015.

²¹ Reike, *supra* note 5, 96.

²² Judgment of the European Court of Human Rights N9043/05 "Natsvlishvili and Togonidze v. Georgia", 24 April 2014; Judgment of the European Court of Human Rights N39820/08, 14942/09 "Shuvalov v. Estonia", 19 May 2012; Judgment of the European Court of Human Rights N20899/03 "G.C.P. v. Romania", 20 December 2011; Giorgi Tumanishvili, *Criminal Law Process, overview of the general part* (Publishing House "World of Lawyers" 2014) 80-81 (in Georgian).

during the hearing of the case. Also, even if the court acquits the accused or terminates the criminal prosecution, it should not create the impression that the accused is guilty.²³

As mentioned, the requirement of presumption of innocence should also be taken into account by the representatives of the criminal prosecution body. In public statements based on their factual circumstances, they should not convince the public that the accused is already guilty prior to the court decision.²⁴

Regarding the extent to which the requirements of the presumption of innocence apply to private individuals and media, there is a difference of opinion in the legal literature. Some of the authors believe that the presumption of innocence protects the accused not only from inappropriate statements of representatives of state bodies, but also from inappropriate information policy of the media and, thus, they extend the principle's effect to the activities of the media as well. The mentioned authors believe that public dissemination of information about a criminal case is as sharp a weapon against the accused in the hands of the media as the authority to punish the offender in the hands of the state authorities.²⁵ However, such an opinion is rejected by most authors. There is no shared opinion that recognizes the purpose of the presumption of innocence as well as the protection of the accused from the media. The purpose of the mentioned principle is seen only in the protection of the accused from the representatives of state bodies and not from third (private) persons.²⁶

In addition, it should be noted that the presumption of innocence cannot prevent the criminal prosecution body from informing the public about the ongoing investigation. The presumption requires only that statements surrounding a criminal case must be made with great care and in an appropriate manner. Moreover, the European Court of Human Rights recognizes the obligation in a democratic society, on the part of the relevant authorities, to inform the public when it comes to serious allegations or when an investigation is initiated into the alleged criminal activities of high political officials. However, even in such a case, officials need to make statements to the media in a measured way and respect the requirements of the presumption of innocence.²⁷ When speaking about the ongoing investigation, the representatives of the Prosecutor's Office should refrain as much as possible from publicizing the details of the case, and it should be clear from the statements made to the media that the case concerns only the alleged commission of a

²³ Judgment of the European Court of Human Rights N57435/09 "Paulikas v. Lithuania", 24 April 2017; Reike, *supra* note 5, 99-100.

²⁴ "G.C.P. v. Romania", *supra* note 22.

²⁵ Florian Stapper, *Namensnennung in der Presse im Zusammenhang mit dem Verdacht strafbaren Verhalten* (Berlin-Verl. Spitz 1995) 67.

²⁶ Walter Berka, *Medienfreiheit und Persönlichkeitsschutz: Die Freiheit der Medien und ihre Verantwortung im System der Grundrechte* (Springer-Verlag 1982) 352; Winfried Hassmer, *Vorverurteilung durch die Medien?* (1985) 33 *Neue Juristische Wochenschrift* 1921.

²⁷ Judgment of the European Court of Human Rights N57435/09 "Paulikas v. Lithuania", 24 April 2017.

crime by a person. As already mentioned, the statements of the Prosecutor's Office cannot be formulated as if the person's guilt has already been proven.

Based on the presumption of innocence, the accused cannot suffer socio-ethical discrimination in the ongoing criminal process. There is a danger of this when the identity of the accused is revealed in the media. Accordingly, some scholars believe that publicly revealing the identity of the accused contradicts the requirement of the presumption of innocence, because it stigmatizes the accused in the society.²⁸ In their opinion, the disclosure of the identity and image of the accused, together with the information exposing the crime of the accused through the media, contains a clear danger of stigmatizing the accused. Even when the Prosecutor's Office does not call a person guilty in public statements, the public identification of the accused provides a basis for the public to consider the person guilty due to insufficient objective information about the criminal case.²⁹ This opinion is not shared in the legal literature, and many authors believe that the above-mentioned opinion is an attempt to inappropriately expand the scope of the presumption of innocence, which does not have appropriate dogmatic foundations.³⁰ According to the prevailing opinion in the legal literature, the principle of presumption of innocence should exclude only that a person is considered guilty before the court's guilty verdict enters into legal force, and not that the Prosecutor's Office communicates with the media and informs the public about current criminal cases. When the prosecution provides information to the public in a measured and appropriate way, even if it reveals the identity of the accused, the presumption of innocence is not violated. The identification of a person by indicating that he/she has the procedural status of the accused and there is only an assumption about the possible commission of a crime by him/her, does not constitute a declaration of guilt of the person by the Prosecutor's Office. Such a declaration, to a certain extent, even if it creates the impression of a person's guilt to the public, it will still fall within the framework of the presumption of innocence. Therefore, in the legal literature, it is considered that the disclosure of the identity of the accused in public statements by the Prosecutor's Office does not in itself constitute a violation of the principle of presumption of innocence, if it is not accompanied by an indication of the person's guilt and the disclosure of such personal data of the accused, which makes the person an obvious criminal in the eyes of the public.³¹

²⁸ For example, Peter Zielemann, *Der Tatverdächtige als Person der Zeitgeschichte* (Duncker & Humblot 1982) 80-81.

²⁹ Klaus-Dieter Höh, *Strafrechtliche Anonymitätsschutz der Beschuldigten vor öffentlicher Identifizierung durch den Staatsanwalt* (Diss. Bonn 1985) 13; Kristian Kühl, „Persönlichkeitsschutz des Tatverdächtigten durch die Unschuldsvermutung“ in Hubmann Heinrich (Hrsg.) *Festschrift für Heinrich Hubmann zum 70. Geburtstag*, Hans Forkel (Metzner Verlag 1985) 253.

³⁰ Neuling, *supra* note 14, 248; Brigit Dalbckermeyer, *Der Schutz des Beschuldigten vor identifizierenden und tendenziösen Pressemitteilungen der Ermittlungsbehörden* (Peter Lang 1993) 112.

³¹ Reike, *supra* note 5, 105.

V. THE RIGHT TO PRIVACY

As mentioned, the public statements of the Prosecutor's Office about the ongoing investigation and the information disseminated through the media about the accused person contain substantial risks of violating the right to privacy of the accused. The information policy of the Prosecutor's Office and the active coverage of information by the media can lead to the stigmatization of the accused in the society and harm both his/her business reputation and personal relationships.

In this context, it is important to specify the content of the right to privacy. According to the first paragraph of Article 15 of the Constitution of Georgia, personal and family life shall be inviolable. This right may be restricted only in accordance with law for ensuring national security or public safety, or for protecting the rights of others, insofar as is necessary in a democratic society. According to the definition of the Constitutional Court of Georgia, "in general, private life refers to the private sphere of an individual's life and development. The right to private life, on the one hand, means the ability of an individual, personally, at his/her own discretion, to independently create and develop his/her private life, and, on the other hand, to be protected and secured in his/her private sphere from the interference of the state, as well as any other persons."³² It should be noted that the individual aspects of the mentioned right are very broad. According to the definition of the European Court of Human Rights: guaranteed by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, "the right to private life extends to all aspects of personal identity, such as: a person's name, photo, or physical and moral inviolability; the main goal of the guarantee defined in Article 8 of the Convention is to ensure the personal development of every person without interference, which is manifested in his/her relations with other people. Accordingly, there are points of intersection with other persons, including in public contexts, that are protected by private life, and the publication of a photograph may invade a person's private life, even when he/she is a public figure."³³

Thus, a person's right to anonymity derives from the guarantee of inviolability of private life. Anonymity means that individuals independently decide to remain unrecognizable, unidentified in public space.³⁴ Therefore, a person should be protected from arbitrarily informing the public about the important circumstances of his/her life by state bodies or the media. Accordingly, it is an interference with the right to private life of a person when the identity of the accused is made public by the media or the

³² Judgment of the Constitutional Court of Georgia N1/3/407 "Georgian Young Lawyers Association and citizen of Georgia Ekaterine Lomtadze v. the Parliament of Georgia", 26 December 2007, II-4.

³³ Judgment of the European Court of Human Rights N40660/08, 60641/08 "Von Hannover v. Germany", 7 February 2012.

³⁴ Gerald Neben, *Trivale Personenberichterstattung als Rechtsproblem. Ein Beitrag zur Grenzziehung zwischen Medienfreiheit und Persönlichkeitsschutz* (Duncker & Humblot 2001) 161.

Prosecutor's Office.³⁵ The interest of the accused in being protected from the disclosure of his/her identity derives from his/her right to anonymity. However, in order to identify a person, it is not mandatory to make his/her identity public. In some cases, to identify a person, it is completely sufficient to name his/her place of residence, profession or age. Identification of a person takes place even when he/she is identifiable only in his/her immediate surroundings.³⁶

A person's right to his/her own photo is part of the right to anonymity. With the guarantee of inviolability of personal life, a person is protected from taking photos or videos without his/her permission, as well as from the distribution of such materials.

Another aspect of the guarantee of privacy is the right to socialize. Any convicted person should have the chance to regain his/her place in the society as a full member of society after serving his/her sentence. The media, by intensive coverage of information about the person who committed the crime, can create a threat to the resocialization of the person, because the process of resocialization involves the participation of society. Creating a negative image of the accused (convict) by the media strengthens the distance of society from the latter.³⁷ The right to socialize is also particularly important for the accused. The dissemination of information that a person has the procedural status of the accused can also jeopardize the socialization process of the accused. As a rule, members of the society who are not familiar with the law, even at the stage of investigation, equate the accused with the criminal. Accordingly, the state bodies are obliged to show maximum attention when making statements about the committed crime and avoid the threat of encroaching on the basic rights of a person arising from the disclosure of information.³⁸

It is important to note that the right to privacy is not absolute. Democracy relies on the existence of a reasonable balance between private and public interests, "restriction of the majority of rights is inevitable, because their realization often creates a conflict of values... while the conflict of interests is inevitable, the need for their harmonization and fair balancing arises."³⁹ "One of the most important conditions for the stability of the modern state is the correct and fair determination of priorities between private and public interests, the creation of a reasonably balanced system of relations between the government and people. This, first of all, finds expression in the adequate legislative

³⁵ Peter Kotz. „Strafrecht und Medien“ (1982) 1 Neue Zeitschrift für Strafrecht 14.

³⁶ Udo Branahl, Medienrecht, Eine Einführung (5. Auflage, VS Verlag für Sozialwissenschaften 2006) 124.

³⁷ Decision of the Federal Constitutional Court of Germany N35, 202 (234, 235, 237) so-called "Lebach decision", 5 June 1973.

³⁸ Friedrich Kübler, „Sozialisationsschutz durch Medienverantwortung als Problem richterlichen Normierens“ in Friedrich Kübler Medienwirkung und Medienverantwortung, Überlegungen und Dokumente zum Lebach-Urteil des Bundesverfassungsgerichts (Nomos-Verlagsgesellschaft 1975) 12.

³⁹ Judgment of the Constitutional Court of Georgia on case N1/1/477 "Public Defender of Georgia v. the Parliament of Georgia", December 22, 2011, II-45.

determination of the content and scope of each specific right.” “The right to inviolability of private life can be limited in a democratic state in order to achieve the legitimate goals provided for by the Constitution, with the mandatory observance of the condition that the interference with the right will be necessary and proportionate to the achievement of the legitimate goals.”⁴⁰

It should also be taken into account that the European Court of Human Rights recognizes the public interest in providing information about the progress of the criminal proceedings to the public. When there is an assessment of the public interest in disseminating information and the resulting interference with the right to privacy of the accused, the public interest in informing the public about the crime usually takes precedence. The one who violates the law and by his/her actions harms the individual legal good of another person or infringes on the collective legal good, along with criminal sanctions, he/she must also accept that the interest of awareness aroused in the society by his/her actions will be satisfied by different ways of communication in the society existing in the conditions of free communication. However, the preference of the public interest for public awareness does not operate without limitation. The interference with the right to privacy of the accused caused by the dissemination of information about the crime and the person who committed the crime should be done taking into account the principle of proportionality. The interference with the right to privacy of the accused cannot be more intense than is necessary to satisfy the public’s interest in information. In addition, by disseminating information, the harm caused to the accused should be proportionate to the gravity of the crime committed. Accordingly, disclosing of the identity of the accused or the perpetrator, sharing his/her picture or other identification is not always allowed. This is especially to be considered in cases of minors or less serious crimes.⁴¹

The Prosecutor’s Office must assess in each specific case which interest should be given priority. At the same time, the intensity of interference in the personal life of the accused caused by the dissemination of information and all the negative consequences that his/her public statements may have for the accused should be taken into account.⁴² Among the evaluation criteria is the gravity or particularity of the crime charged. The more the

⁴⁰ Judgment of the Constitutional Court of Georgia N1/1/625,640 “Public Defender of Georgia, Citizens of Georgia - Giorgi Burjanadze, Lika Sajaia, Giorgi Gotsiridze, Tatia Kinkladze, Giorgi Chitidze, Lasha Tughushi, Zviad Koridze, Non-entrepreneurial (Non-commercial) Legal Entity “Open Society Georgia Foundation“, Non-entrepreneurial (Non-commercial) Legal Entity “Transparency International– Georgia”, Non-entrepreneurial (Non-commercial) Legal Entity “Georgian Young Lawyers’ Association”, Non-entrepreneurial (Non-commercial) Legal Entity “International Society for Fair Elections and Democracy” and Non-entrepreneurial (Non-commercial) Legal Entity “Human Rights Center” v. the Parliament of Georgia”, 14 April 2016, II-29.

⁴¹ Decision of the Federal Constitutional Court of Germany N35, 202 (234, 235, 237) so-called “Lebach decision”, 5 June 1973.

⁴² Reike, *supra* note 5, 75.

crime is distinguished by its serious consequences, the way it was committed or the particularity of its victim, the higher the public interest in information and, therefore, the more justified is the interference with the right to privacy of the accused.

The next evaluation criterion is the degree of suspicion against a person regarding the commission of a crime, that is, how relevant and convincing evidence exists against a person. The higher the probability of a person committing a crime, the more justified it is to restrict his/her right to privacy in order to satisfy the public interest. However, based only on the mentioned criterion, it is unjustified for the Prosecutor's Office to publicize and identify the accused. Along with the mentioned criterion, there should be other evaluation criteria that jointly justify the limitation of the basic rights of the accused.⁴³

When evaluating the interests, the personality of the accused should also be taken into account. When there is a special public interest in the identity of a person, this circumstance may justify the identification of the accused in the media. Thus, the public identification of the accused depends on the extent to which he/she is a recognizable person. Famous persons are those who lead a public life and are in the center of public attention. In the legal literature, absolutely and relatively recognizable persons are distinguished from each other. Absolutely famous persons include such persons who attracted public interest not because of a one-time event, but due to their status and importance, they are specially treated in the center of public attention. Such persons are, for example, heads of state, politicians, famous scientists, artists, actors and prominent sportsmen, as well as other persons who have gained a special place in society by their activities and status.⁴⁴ Although the right to privacy of such persons is protected, they usually have to tolerate the public distribution of photos and facts about their private life.⁴⁵ Accordingly, absolutely well-known persons should also tolerate the fact of their alleged crime along with disclosing their identity being spread to the world by means of media. The higher the trust and status of such persons in the society, the less their right to privacy is protected.⁴⁶ This approach is justified by the argument that absolutely famous people make public the individual details of their personal life in different ways and try to gain recognition in the society by using the media. Those who, by their behavior, public function or distinguished public status, attract the interest of the public

⁴³ Sabine Schröer-Schallenberg, *Informationsansprüche der Presse gegenüber Behörden* (Duncker & Humblot 1987) 136.

⁴⁴ Peter von Becker, *Straftäter und Tatverdächtige in den Massenmedien. Die Frage der Rechtmäßigkeit identifizierender Kriminalberichte. Eine Untersuchung zur beispielhaften Konkretisierung von Medienverantwortung im demokratisch-sozialen Rechtsstaat* (Nomos 1979) 155; Dalbkermeier, *supra* note 30, 67.

⁴⁵ Zielemann, *supra* note 28, 102.

⁴⁶ Helmut Kerscher, *Gerichtsberichterstattung und Persönlichkeitsschutz, Eine empirisch-rechtspolitische Studie über Entstehung und Wirkung identifizierender Gerichtsberichterstattung* (Universität Hamburg 1982) 338.

in a special way, are obliged to tolerate the existing public interest towards them.⁴⁷

In contrast to absolutely famous persons, relatively famous persons include such persons who have received public interest from an event, based on the fact that it happened. Therefore, in their case, public interest is captured not by the person himself/herself, but by a certain event.⁴⁸ In this regard, the question arises as to how well-known persons are those who were not known to the public before committing the crime, and the committed crime and its status as a defendant drew the attention of the public. There are no uniform positions in this regard. In the legal literature, some of the authors do not consider the accused person to be a relatively well-known person, while some recognize them as such.⁴⁹ The third, intermediate opinion is recognized, which considers the accused persons to be relatively known persons, taking into account individual circumstances, in individual cases and not always. In this case, each specific case and the special circumstances that attracted public interest are acceptable. Therefore, the relative recognition of the accused depends on the special interest of the public in the specific crime.⁵⁰

VI. BALANCED INFORMATION POLICY STANDARDS

As mentioned above, the reporting of information about a criminal case is associated with certain risks in terms of ensuring a fair criminal process and important guarantees for the accused. Therefore, the media and law enforcement agencies, as a result of the assessment and analysis of individual risks, should correctly conduct their information policy in this area. The standards developed for the correct planning and implementation of the information policy will help them in this regard.

When it comes to media coverage of crime, the code of conduct of broadcasters⁵¹ should be considered in this regard, which provides guidelines to media outlets. An important obligation that the Code imposes on the media is to ensure the provision of accurate information. According to Article 13, Part 2 of the Code, the broadcaster is

⁴⁷ *ibid.*, 339; Neben, *supra* note 34, 243; Christoph Degenhart, „Das allgemeine Persönlichkeitsrecht, Art. 2 I iV mit Art. 1, I GG“ (1992) *Juristische Schulung* 361.

⁴⁸ Kerstin Gronau, *Das Persönlichkeitsrecht von Personen der Zeitgeschichte und die Medienfreiheit* (Nomos 2001) 46; Kerscher, *supra* note 46, 336.

⁴⁹ Joachim Bornkamm, „Die Berichtserstattung überschwebende Strafverfahren und das Persönlichkeitsrecht des Beschuldigten“ (1883) *Neue Zeitschrift für Strafrecht* 102; Dalbkermeier, *supra* note 30, 73; Neuling, *supra* note 14, 235.

⁵⁰ Gronau, *supra* note 48, 338; Herwigh Engau, *Straftäter und Tatverdächtige als Personen der Zeitgeschichte, Ein Beitrag zur Problematik identifizierender Mediendarstellungen* (Peter Lang 1993) 192.

⁵¹ Resolution of the National Communications Commission of Georgia on the approval of the “Code of Conduct for Broadcasters”, “Code of Conduct for Broadcasters” <<https://matsne.gov.ge/ka/document/view/82792?publication=0>> [last accessed on 15 December 2022].

obliged to provide the audience with reliable and accurate information, not to allow the dissemination of false or misleading information. Accordingly, the media should refrain from disseminating unverified and unreliable information. The information provided by them to the public about the criminal case should be based only on verified and real factual circumstances. At the same time, the media should be especially careful about the right to privacy. It is obliged to maintain a balance between freedom of information and the legitimate expectation of privacy.⁵² When reporting a crime, the broadcaster should not identify the accused, unless his/her name is known to the public or the case is of public interest.⁵³ Thus, the circumstances belonging to the sphere of private life can become known to the public only if the public's interest in providing information clearly outweighs the interest of the privacy of a person.⁵⁴ At the same time, there must be the minimum evidence that confirms the correctness of the disseminated information and gives it a high value for informing the public.⁵⁵ It is not allowed to disseminate information in such a way that the accused person is clearly guilty. It is also not allowed to cover clearly one-sided or incorrect information in order to impress the public. When reporting information, the arguments and facts presented by the defense side should also be taken into account.⁵⁶

When media does not cover the information obtained based on its own sources, but the information disseminated by the criminal justice bodies, in this case, the criminal justice body itself is responsible for the reported information, not the media. At this time, the media appears to us only in the role of an information carrier, it plays the role of a sort of mediator in relation to informing the public.⁵⁷ Media has every reason to trust the information released by the Prosecutor's Office and to cover it with the assumption that the Prosecutor's Office acts in good faith and does not provide the public with information that is not sufficiently supported by the evidence in the case. Media can rely on the data of the Prosecutor's Office and not conduct a journalistic investigation themselves, if they have no reason to doubt the legality of the actions of the Prosecutor's Office. In the same way, journalists can disclose the identifying information of the accused, if such information is disclosed to the journalists by the representatives of the judicial bodies. Media can have confidence in the state bodies that the judicial bodies provide such information to the public only as a result of the high public interest in the case, the seriousness of the committed crime, the sufficient evidence in the case, the identity of the accused and the rights of the accused.⁵⁸ Criminal

⁵² *ibid*, Article 34.

⁵³ *ibid*, Article 49, part 3.

⁵⁴ Karl Egbert Wenzel, *Das Recht der Wort- und Bildberichterstattung* (5. Auflage, Verlag Dr. Otto Schmidt 2003) 151.

⁵⁵ Decision NVI ZR 51/99 of the German Federal Supreme Court, 7 December 1999.

⁵⁶ *ibid*; Reike, *supra* note 5, 216.

⁵⁷ Wenzel, *supra* note 55, 136; Dalbkermeier, *supra* note 30, 213.

⁵⁸ Reike, *supra* note 5, 217.

justice authorities should take into account the fact that media may not disseminate the information provided by them in exactly the same form and volume. It is characteristic of the media to disseminate information in such a way that it will have a greater effect on the society. Therefore, before disseminating information, criminal justice authorities must correctly assess the existing risks and then take responsibility for disseminating information.⁵⁹

As mentioned, the active cooperation of the Prosecutor's Office with the media and informing the public about ongoing criminal cases is permissible and even desirable, if, at the same time, personal identifying data of the accused is not made public. This not only satisfies the public's awareness, but also provides the opportunity for the members of the public to evaluate, control and criticize the activities of the criminal prosecution body. Therefore, public relations of the Prosecutor's Office is the most important achievement of democracy.⁶⁰ The problem and the risks of violating the most important guarantees of the person arise when the prosecution and investigative bodies identify the accused. In this case, public and private interests are in conflict with each other. In such cases, the state authorities are obliged to properly assess the conflicting interests and take into account all the legal and factual circumstances. It has to be determined to what extent the public interest exceeds the interest of protecting a person's right to private life, how intense the disclosure of a person's identity will be, interference in his/her private life and what negative consequences this will have for ensuring the important guarantees of a person.⁶¹

In order to inform the public, as a rule, it is sufficient to disseminate information about the course of the investigation and the measures taken, in particular, it is sufficient to disseminate information about the detention, arrest, search and indictment of a person. In contrast, public disclosure of investigation details should be avoided in the first place.⁶² In addition, information about the charges presented to the person should be disseminated in a measured and correct way, so as to avoid making premature and incorrect conclusions about the guilt of the person by the members of the society. Therefore, the Prosecutor's Office and the investigative body should limit themselves to talking only about the actual circumstances of the committed crime and should refuse to evaluate the results of the investigation, the personality of the accused and his/her guilt, since such evaluations are related to the risks that the simple suspicion of a person's guilt will be perceived by members of the society as unmistakable evidence of his/her guilt.⁶³

⁵⁹ *ibid*, 218.

⁶⁰ Lorz and Bosch, *supra* note 4, 110.

⁶¹ Berlin Administrative Court Decision N27A262.00, 5 October 2000.

⁶² Roxin, *supra* note 11, 108.

⁶³ Reike, *supra* note 5, 229.

It is important that the investigative body or the Prosecutor's Office does not conduct an information campaign unilaterally, only with the involvement of the media. The accused and his/her lawyer must also be involved in the communication process. Before providing information related to the accused to the media, the accused or his/her lawyer must be informed about it. When the accused is aware of the information spread about him/her in the media, he/she has the opportunity to prepare in advance for public response and statements to be made to the media. Also, the accused should be given the opportunity to influence the process of publicizing such information that affects him/her. Without the involvement of the accused or his/her lawyer, the issue of making public relevant information about the personality of the accused should not be decided unilaterally and easily. The latter should also have the opportunity to present their own positions and arguments.⁶⁴

VII. CONCLUSION

In summary, it can be said that the criminal justice authorities and the media must pay special attention to the implementation of the correct information policy when informing the public about the criminal case and the accused. Despite the high public interest in individual criminal cases, it is necessary to inform them in a balanced way, which also means taking into account the guarantees given to the accused and the interests of justice. In addition, when making statements, be especially careful with the representatives of investigative bodies and the Prosecutor's Office, because media informs the public based on this information, and in this case, the criminal justice body itself is responsible for the information, not the media.

⁶⁴ *ibid*, 235.