

## THE BOUNDARIES OF A LAWYER'S FREEDOM OF EXPRESSION

### ABSTRACT

In a democratic society, the restriction of a lawyer's freedom of expression may be justified only in exceptional cases, accompanied by adequate procedural safeguards and subject to a number of necessary preconditions.

The paper examines the scope of lawyer's freedom of expression in view of its key principles and within the prism of the case-law of the European Court of Human Rights in terms of its content, form of expression, purpose, the circumstances of the case, and the overall context. The focus is placed on the challenges present in Georgian law, particularly on the deficiencies concerning the qualitative standards of the legal provisions used as a basis for interfering with a lawyer's freedom of expression, the shortcomings in judicial practice, and the lack of adequate procedural safeguards.

The conclusion outlines the measures to be undertaken to ensure effective legal practice in Georgia, in light of the growing risks to the lawyer's role in the administration of justice and the erosion of public trust in the legal profession.

### I. INTRODUCTION

Democracy, together with the principles of subsidiarity and shared responsibility enshrined in the ECHR, constitutes a fundamental basis of the modern European public order.<sup>2</sup> In a democratic state, freedom of expression plays a fundamental role in the full realization of numerous other human rights. At the same time, it serves as both an indicator and a driving force of progress for individuals and society as a whole.<sup>3</sup>

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<sup>1</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms, hereafter "the ECHR" (1950).

<sup>2</sup> Judgment of the European Court of Human Rights N53600/20 "Verein Klimaseniorinnen Schweiz and Others v. Switzerland", 9 April 2024. Paragraph 411.

<sup>3</sup> Judgment of the European Court of Human Rights N56925/08 "Bédat v. Switzerland", 29 March 2016. Paragraph 48.

The legal creation of the modern understanding of freedom of expression in continental Europe was established as early as the French Revolution, notably embodied in one of its most significant achievements - the Declaration of the Rights of Man and of the Citizen.<sup>4</sup> This stands as clear evidence of the profound importance of freedom of speech, rooted in events centuries past. It is noteworthy that the Georgian Constitution 1921 already guaranteed the right to freedom of expression and thought, including the right to disseminate those; hence, it can be confidently stated that the Constitution of the Democratic Republic of Georgia, in terms of the regulation of rights and other characteristics, was equal to the constitutions of its contemporaries and, in essence, aligned with the legal evolution and constitutional standards of Europe.<sup>5</sup>

In a democratic state, freedom of expression is an indicator,<sup>6</sup> motivator,<sup>7</sup> a clear manifestation of individuality, and one of the most essential rights in the pursuit of perfection.<sup>8</sup> The exercise of the right to express opinions fosters pluralism, encourages public and informed debate on matters of societal importance, and promotes individual participation in public life - where everyone, including lawyer,<sup>9</sup> is ensured the freedom to express opinions, regardless of citizenship or any other status.<sup>10</sup> At the same time, a differentiated standard is justified in relation to representatives of public institutions,<sup>11</sup> as their relationship with the state is of a specific nature and, in addition to general responsibilities, they are also expected to uphold the authority of the public service.<sup>12</sup>

Freedom of expression protects a lawyer's right to free speech in the course of professional activity,<sup>13</sup> including the intention to exert intellectual influence and shape

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<sup>4</sup> Article 11, Declaration of the Rights of Man and of the Citizen, National Constituent Assembly of France, 26 August 1789.

<sup>5</sup> Besik Loladze and Ana Pirtskhalashvili, *Fundamental Rights, Commentary* (Georgian National University 2023) 12-13, Article 32, Georgian Constitution, 21 February 1921.

<sup>6</sup> See note 3, paragraph 48.

<sup>7</sup> Jamlat Gvidiani, 'The Constitutional-Legal Standard of Freedom of Expression: Georgian and European Perspective' in Dimitri Gegenava (ed.), *Giorgi Kverenchkhiladze 50* (Sul Khan-Saba Orbeliani University Press 2022) 96-97.

<sup>8</sup> *ibid*, 99.

<sup>9</sup> Judgment of the European Court of Human Rights, N51000/11 "Radobuljac v. Croatia", 28 June 2016. Paragraph 51; Tamar Avaliani, "Restriction of Freedom of Expression to Protect the Authority and Impartiality of the Judiciary: Compatibility of the Georgian Model with the Standards of the European Court of Human Rights" in Konstantine Korkelia (ed.), *Human Rights Protection, the Pandemic, and the Rule of Law* (Collected Articles) (Office of the United Nations High Commissioner for Human Rights 2021) 61; Judgment of the Constitutional Court of Georgia N1/1/468 "Public Defender of Georgia v. the Parliament of Georgia", 11 April 2012. Paragraph II-26.

<sup>10</sup> Autorenkollektiv, Hans Hofmann und Hans-Günter Henneke (Hrsg.), *Grundgesetz Kommentar zum Grundgesetz* (Carl Heymanns Verlag 2022) Art.5, Rn.11.

<sup>11</sup> Rolf Schmidt, *Grundrechte-sowie Grundzüge der Verfassungsbeschwerde* (16. Auflage, Grasberg bei Bremen 2014) 184.

<sup>12</sup> Autorenkollektiv, *supra* note 10, Rn.11.

<sup>13</sup> Judgment of the European Court of Human Rights N29369/10 "Morice v. France", 23 April 2015. Paragraph 134.

common opinion through value-based judgments without coercion upon others.<sup>14</sup> In addition to information that is received positively or indifferently, protection also extends to expressions that may be shocking, disturbing, or even offensive to society, and such characteristics do not diminish the value or weight of the expression.<sup>15</sup>

The aim of this paper is to review the prerequisites for justifying interference with the right to freedom of expression, in the context of emphasizing the importance of the lawyer's role in the administration of justice and the significance of the extent of freedom of expression in a democratic society. It seeks to identify the challenges existing in Georgian law concerning the exercise of a lawyer's freedom of expression, propose possible solutions to these issues, and raise awareness of the topic within professional circles.

## II. THE LAWYER'S ROLE IN THE ADMINISTRATION OF JUSTICE

The duty to uphold the rule of law and ensure the fair administration of justice, as well as the lawyer's freedom, independence, and the obligation to perform professional functions both competently<sup>16</sup> and in good faith<sup>17</sup> constitutes the fundamental principles of legal profession.<sup>18</sup>

Legal practice serves the public goal of upholding justice and protecting human rights, which primarily entails the practical implementation of the principle of the rule of law.<sup>19</sup> In this process, the lawyer plays a significant role as a guardian of the public legal order, as they can make a decisive contribution to the delivery of quality justice and to building public trust in the system.<sup>20</sup> The formation of trust in the justice system is directly linked to the existence of trust in the lawyer's ability to provide effective representation,<sup>21</sup> since the lawyer essentially acts as an intermediary between society and the court.<sup>22</sup>

<sup>14</sup> BVerfG Urteil vom 15. Januar 1958, 1 BvR 400/51, Rn. 36.

<sup>15</sup> Barbara Rox, *Schutz religiöser Gefühle im freiheitlichen Verfassungsstaat?* (Mohr Siebeck 2012) 281.

<sup>16</sup> Article 3, paragraph c, Law of Georgia on Lawyers, 20 June 2001, Legislative Herald of Georgia, 22, 06.07.2001.

<sup>17</sup> *ibid*, Article 5, paragraph a.

<sup>18</sup> *ibid*, Article 3, paragraphs b, d, e, g, h.

<sup>19</sup> Judgment of the Constitutional Court of Georgia N1/5/323 "The Georgian Citizens George Vacharadze, Artur Kazarov, Levan Chkheidze, George Berishvili, Shorena Oskopeli and Nino Archvadze v the Parliament of Georgia", 30 November 2005. Paragraph II-2.

<sup>20</sup> Judgment of the Constitutional Court of Georgia N1/6/1424,1490 "The Georgian Citizen Lasha Janibegashvili v the Parliament of Georgia", 04 November 2016. Paragraph II-19.

<sup>21</sup> See note 13 *supra*, paragraph 132.

<sup>22</sup> Judgment of the European Court of Human Rights N31611/96 "Nikula v. Finland", 21 March 2002. Paragraph 45.

The degree of a lawyer's freedom is of utmost importance for the proper administration of justice.<sup>23</sup> Therefore, the state has an obligation to act in a balanced manner when restricting a lawyer's expression and to create a legal environment in which the lawyer is protected from disproportionate restrictions, inadequate sanctions, and persecution.<sup>24</sup> All of the above clearly confirms that in ensuring the fair and effective functioning of the justice system as a whole, the lawyer - and consequently, their freedom of speech and opinion - plays a pivotal role.

### III. FREEDOM OF EXPRESSION OF A LAWYER

The degree of a lawyer's freedom in a democratic, rule-of-law state is one of the key indicators of both the credibility of the legal system and the overall standard of justice.<sup>25</sup> A lawyer has the right to use all means not prohibited by law or professional ethics in order to protect the interests of their client.<sup>26</sup>

In general, freedom of expression promotes openness to new ideas within society and strengthens the capacity for critical thinking. It protects all forms of opinion and encompasses the processes of discussion, judgment, and ideological debate<sup>27</sup> - including, in some cases, the dissemination of untrue information made without intent.<sup>28</sup> Engaging with opposing viewpoints has a positive impact on the essence of the right to freedom of expression and plays a significant role in the formation of objective truth.<sup>29</sup>

A lawyer's freedom of expression extends not only to the content of a statement but also to the manner in which it is conveyed, and includes the duty to protect the client's rights to the fullest extent, including through criticism of the court. However, expressions aimed solely at insulting the court fall outside the scope of protection.<sup>30</sup> Freedom of expression also encompasses the right to subjectively perceive and emotionally present certain events, especially when such expression serves as a response to an emotional attack and/or perceived injustice. In order to determine the objective content and purpose of an expression, the assessment must take into account the overall context of the case

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<sup>23</sup> Judgment of the European Court of Human Rights N8932/05 "Siałkowska v. Poland", 22 March 2007. Paragraph 111.

<sup>24</sup> Cf. *ibid*, paragraph 112. The Legal Acts and Regulations Concerning the Profession of Lawyer, Council of Europe / GBA 107 <<https://rm.coe.int/-/1680788226>> [last accessed on 19 April 2024].

<sup>25</sup> See note 20 *supra*, paragraph II-30.

<sup>26</sup> See note 16 *supra*, Article 6, paragraph 1.

<sup>27</sup> Michael Lotharund Martin Morlok, *Grundrechte* (4. Auflage, NomosLehrbuch 2014) Rn. 133, 205-210.

<sup>28</sup> Judgment of the Constitutional Court of Georgia N1/6/561, 568 "The Georgian Citizen Yuri Vazagashvili v the Parliament of Georgia", 30 September 2016. Paragraph 52.

<sup>29</sup> *ibid*, paragraph II-51.

<sup>30</sup> Judgment of the European Court of Human Rights N40975/08 "Čeferin v. Slovenia", 16 January 2018. Paragraph 44. See note 9 *supra*, paragraph 61.

and the factual circumstances,<sup>31</sup> particularly in instances involving the imposition of criminal responsibility.<sup>32</sup>

A lawyer is entitled to make negative public statements about individuals involved in the administration of justice,<sup>33</sup> as well as criticize the courts and the functioning of the justice system.<sup>34</sup> The permissible limits of such criticism are defined by adherence to the general norms of conduct for lawyers and the principles established by the European Lawyers' Association and the European Convention of the Profession of Lawyer.<sup>35</sup>

In cases involving criticism of the judicial system and the functioning of legal proceedings, a lawyer enjoys a heightened standard of protection under the right to freedom of expression,<sup>36</sup> even when the criticism is sharp or potentially serious. In such contexts, the scope of the state's discretion to interfere is narrower than usual.<sup>37</sup> A judge, as a representative of a fundamental state institution, is subject to a greater degree of personal criticism than an ordinary citizen, but to a lesser extent than a politician.<sup>38</sup> At the same time, compared to representatives of the executive and legislative branches, judges require a higher level of protection against offensive attacks.<sup>39</sup>

A differentiated approach is justified depending on whether the lawyer exercises their freedom of expression inside the courtroom, within the court building, or outside it. During court proceedings, the lawyer is obliged to vigorously represent the client's position, including through sharp criticism, which state representatives must tolerate, provided that personal insults are excluded.<sup>40</sup> In proceedings before a court, the lawyer benefits from a high standard of protection under freedom of expression, and any restriction of this right may negatively impact both the lawyer's and the client's interests. At the same time, in order to ensure effective proceedings, it is essential that public officials involved in the process are protected and shielded from unjustified pressure.<sup>41</sup>

Despite the admissibility of criticism directed at the court, the institution and its members must be protected from entirely unfounded, deliberate, and offensive attacks, including through the imposition of strict sanctions if necessary.<sup>42</sup> This necessity is

<sup>31</sup> BVerfG, Beschluss vom 10 März 2016, 1 BvR 2844/13, Rn. 24. BVerfG Beschluss vom 10 Oktober 1995, 1 BvR 1476/91, Rn. 125.

<sup>32</sup> *ibid.*, Rn. 127.

<sup>33</sup> See note 22 *supra*, paragraph 46.

<sup>34</sup> See note 30 *supra*, paragraphs 56, 58.

<sup>35</sup> See note 13 *supra*, paragraph 134.

<sup>36</sup> *ibid.*, paragraph 125.

<sup>37</sup> See note 3 *supra*, paragraph 48 (ii).

<sup>38</sup> See note 9 *supra*, paragraph 59. Cf. See note 22 *supra*, paragraph 48.

<sup>39</sup> Judgment of the Constitutional Court of Georgia N1/4/1394 "Zviad Kuprava v the Parliament of Georgia", 27 July 2023. Paragraph II-9.

<sup>40</sup> See note 13 *supra*, paragraphs 136-137.

<sup>41</sup> Cf. note 22 *supra*, paragraphs 48-50.

<sup>42</sup> Judgment of the European Court of Human Rights N68924/12 "Słomka v. Poland", 6 December 2018. Paragraph 64.

further heightened by the fact that judges operate within a framework of discretionary powers and, due to the nature of their judicial functions, have limited opportunities to respond to such criticism.<sup>43</sup>

A lawyer is authorized to comment on judicial proceedings and procedural shortcomings outside the courtroom and to provide information to the public through the media (television, press, etc.), which should also be assessed in the context of the freedom of press. The greater the public interest in the case or in the functioning of a public institution, the higher the level of protection afforded to the lawyer's statements and the narrower the scope for state interference. At the same time, a lawyer's statement must not constitute a mere personal attack or insult, and serious allegations must not be devoid of a reasonable connection to factual circumstances.<sup>44</sup>

A lawyer cannot benefit from the protection of freedom of speech if the expression is solely aimed at defamation, personal insult, or a targeted attack on an individual's dignity.<sup>45</sup> Each case must be assessed within its overall context, without interpreting offensive language in the abstract, as excessive or offensive criticism alone does not constitute sufficient grounds to classify the expression as defamatory and/or to justify interference.<sup>46</sup>

It can be said that a lawyer's exercise of freedom of expression requires the highest level of protection when appearing before the court, as well as when commenting on matters of significant public interest outside the courtroom. In contrast, such a necessity does not arise in situations involving the court premises or surrounding areas, and/or within a limited circle of persons, even when offensive statements are made, as such expressions are unlikely to have a substantial negative impact on either the independence of the judiciary or the effectiveness of justice.

Alongside freedom of expression, the Constitution of Georgia guarantees "the unhindered exercise of a lawyer's rights",<sup>47</sup> which includes protection against unjustified state interference in legal practice, such as the imposition of unwarranted conditions, and ensures that lawyers are able to freely perform their professional duties and responsibilities.<sup>48</sup>

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<sup>43</sup> See note 13 *supra*, paragraph 128.

<sup>44</sup> *ibid*, paragraphs 125, 138, 139, 153.

<sup>45</sup> Bverf Gbeschluss vom 19 Mai 2020, 1 BvR 362/18, Rn. 14-16.

<sup>46</sup> *ibid*, Rn. 17.

<sup>47</sup> See note 7 *supra*, 99. Article 31, paragraph 3, The Georgian Constitution, 24 August 1999. Official Gazette of the Parliament of Georgia, 31-33, 24.08.1995.

<sup>48</sup> See note 20 *supra*, paragraphs II-29, 35.



#### IV. RESTRICTION ON A LAWYER'S FREEDOM OF EXPRESSION AND ITS LEGITIMATE AIMS

Freedom of expression is not an absolute right and is accompanied by certain responsibilities and duties, placing a moral burden on those who exercise it.<sup>49</sup> A lawyer's freedom of expression - whether exercised inside the courtroom, outside of it, or through public statements - may be subject to proportionate restriction in pursuit of a legitimate aim.<sup>50</sup> Sanctioning a lawyer for contempt of court, suspending legal practice,<sup>51</sup> or imposing any form of penalty for critical commentary or offensive expression<sup>52</sup> constitutes an interference with the right to freedom of expression.<sup>53</sup>

The exercise of freedom of expression is accompanied by the duty to respect the constitutional rights of others, which, in combination with the prohibition of the abuse of human rights,<sup>54</sup> provides a legitimate basis for restricting this right.<sup>55</sup> In addition, a clear legitimate aim for restricting a lawyer's expression may be the protection of the independence and impartiality of the judiciary.<sup>56</sup>

Imposing a fine on a lawyer for contempt of court serves to uphold the proper conduct of judicial proceedings, to promptly address and deter violations, to sanction specific misconduct, and to protect the authority of the court from unfounded and offensive attacks.<sup>57</sup> Moreover, the imposition of criminal liability may be justified as a legitimate aim for protecting the authority of the court, maintaining public confidence in the judiciary, and ensuring the unobstructed and proper administration of justice. The Constitutional Court of Georgia deems it necessary to restrict offensive expressions directed at a judge within the courthouse through the use of criminal sanctions; however, it avoids assessing the constitutionality of imposing criminal liability for the same conduct when it occurs outside the court premises.<sup>58</sup>

Under Georgian legislation, a lawyer may be subjected to sanctions for disrupting order in the courtroom, including a fine, removal from the courtroom, or, in extreme cases,

<sup>49</sup> Canadar Arslan, *Meinungs- und Kunstfreiheit gegen die Religionsfreiheit: wie viel Schutz für religiöse Empfindlichkeiten* (Verlag Dr. Kovač 2015) 67-68. See note 9 *supra*, paragraph 58.

<sup>50</sup> Judgment of the European Court of Human Rights N31611/96 “Nikula v. Finland”, 21 March 2002. Dissenting Opinion of Judges Caflisch and Pastor Ridruejo. Paragraph 3.

<sup>51</sup> Judgment of the European Court of Human Rights N81024/12 “Bagirov v. Azerbaijan”, 25 June 2020. Paragraph 52.

<sup>52</sup> See note 31 *supra*, Rn. 109-110.

<sup>53</sup> See note 30 *supra*, paragraph 45.

<sup>54</sup> Articles 7 and 10, ECHR (1950).

<sup>55</sup> Rox, *supra* note 15, 266.

<sup>56</sup> Article 17, paragraph 5, the Georgian Constitution, 24 August 1995. Official Gazette of the Parliament of Georgia 31-33, 24.08.1995.

<sup>57</sup> Judgment of the Constitutional Court of Georgia N2/2/558 “The Georgian Citizen Ilia Chanturaia v the Parliament of Georgia”, 27 February 2014. Paragraphs II-12-13, 23.

<sup>58</sup> See note 39 *supra*, paragraphs II-20, II-30, II-36, II-49.

detention for up to 60 days.<sup>59</sup> These sanctions may be imposed if the lawyer disrupts the court proceedings, disobeys a judge's order, displays disrespect towards the court, or demonstrates clear and/or gross disrespect toward a participant in the proceedings or the court/judge, as well as if their actions are aimed at obstructing the proceedings.<sup>60</sup> In cases of inappropriate conduct by a lawyer, the court's ruling is additionally forwarded to the Association of Lawyers.<sup>61</sup> Contempt of court that involves insulting a participant in the proceedings, including a judge, is subject to criminal liability and may result in a sentence of imprisonment for up to two years.<sup>62</sup>

It is evident that in Georgia, for the restriction or sanctioning of a lawyer's expression to be justified, the expression must be assessed as contempt of court, gross contempt, and/or insult - offenses that may carry significant penalties, including imprisonment. Accordingly, legitimate questions arise: Where is the line drawn between these concepts? Can such sanctions be applied equally to conduct occurring during court proceedings and to conduct outside of them? How should these terms be clearly distinguished and exhaustively defined? How should the application of sanctions be regulated to avoid arbitrariness and does the vagueness of these terms risk enabling discretionary abuse by public officials?

Considering that an offensive position expressed in insulting language - whether outside the courtroom proceedings but within the court building or outside it - has a similar impact on the effectiveness of justice, and that such impact is unlikely to be critically harmful, the imposition of equally severe criminal sanctions under identical provisions of criminal law for contempt shown during a hearing and outside of it cannot be considered equivalent.

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<sup>59</sup> Article 212, Law of Georgia on "the Civil Procedure Code of Georgia", 14 November 1997, Official Gazette of the Parliament of Georgia, 47-48, 31/12/1997. Cf. Article 366, Law of Georgia on "the Criminal Code of Georgia", 22 July 1999, Legislative Herald of Georgia 41 (48), 13.08.1999.

<sup>60</sup> Georgian Civil Procedure Code, *supra* note 59, Article 212, paragraphs 3 and 7.

<sup>61</sup> *ibid*, Article 212, paragraph 4.

<sup>62</sup> Article 366, paragraph 2, Law of Georgia on "the Criminal Code of Georgia", 22 July 1999, Legislative Herald of Georgia, 41 (48) 13.08.1999.



## V. PREREQUISITES FOR INTERFERENCE WITH THE EXERCISE OF FREEDOM OF EXPRESSION

### 1. GENERAL REQUIREMENTS AND PROCEDURAL SAFEGUARDS IN THE GEORGIAN CONTEXT

For the purposes of the ECHR, any interference with a lawyer's freedom of expression constitutes a violation of that freedom if the conditions of the interference are not defined by an applicable law, do not pursue a legitimate aim, and/or are not necessary in a democratic society, and cannot be justified by "relevant" and "sufficient" reasons.<sup>63</sup> In order to justify such interference, the applied law must be interpreted within the framework of a reasonable interpretation of the Constitution, taking into account the degree of impact of the restriction on the right and the necessity of preserving the value-based standard of the essence of freedom of expression.<sup>64</sup> It is essential to maintain a fair balance between competing interests, ensuring that the severity and extent of the sanction are proportionate to the legitimate aim pursued.<sup>65</sup> Equally important is the clear demonstration of the relevance and sufficiency of the reasons for the interference.<sup>66</sup> The assessment must consider not only the use of insulting or offensive language but also its connection to the factual circumstances of the case and the overall context of the proceedings.<sup>67</sup>

At the same time, it is crucial to ensure procedural safeguards that uphold the fundamental principle of the rule of law, guarantee the right to a fair trial, and protect the lawyer from arbitrary interference by the authorities.<sup>68</sup> The absence of such safeguards renders the interference illegitimate and undermines the process of building and maintaining trust in the justice system.

In this context, the guarantees of a fair trial, the degree of judicial impartiality, and the reasonableness of the time limit for appeal appear problematic under Georgian law, since in cases of contempt of court, it is the very same judge who felt personally offended who imposes a fine on the lawyer under civil legislation, often without even granting the lawyer an opportunity to present a defense.<sup>69</sup> Moreover, there is no clearly defined procedure for appealing such decisions. As a result, the court, by referring to the analogy of law, sets a 48-hour time limit for appeal,<sup>70</sup> which, considering the importance

<sup>63</sup> See note 22 *supra*, paragraphs 31, 47.

<sup>64</sup> See note 31 *supra*, Rn. 111-117.

<sup>65</sup> See note 30 *supra*, paragraph 47, 67.

<sup>66</sup> See note 9 *supra*, paragraph 57.

<sup>67</sup> *ibid.*, paragraphs 62-63.

<sup>68</sup> See note 42 *supra*, paragraphs 64-66, 70.

<sup>69</sup> Ruling of Tbilisi Court of Appeals, N2b/sp-03-23, 17 March 2023.

<sup>70</sup> Ruling of Supreme Court of Georgia, Nas-855-805-2015, 4 April 2016, 35.

of a lawyer's freedom of expression and their role in the administration of justice, is an unreasonably short period for preparing a qualified appeal and is substantially shorter than the 12-day period prescribed for submitting a private complaint.<sup>71</sup>

## 2. THE REQUIREMENT OF LEGAL QUALITY

For the purposes of the ECHR and in light of the autonomous interpretation of its terms, any law used to restrict a lawyer's freedom of expression must meet the requirement of legal quality, meaning that it must be accessible to the public and foreseeable in terms of its scope and consequences.<sup>72</sup> The legal norm must be formulated with sufficient clarity to enable individuals to regulate their behavior accordingly and to clearly anticipate the potential legal consequences of their actions. Since it is practically impossible to formulate a norm with absolute clarity - and, at the same time, it is even desirable for it to be adaptable to varying circumstances<sup>73</sup> - the practice of its application and the interpretation provided by the court become decisive.<sup>74</sup>

It is notable that despite the existence of sanctions for contempt of court and insults, Georgian legislation does not provide a unified definition of "contempt of court". Its general and vague character therefore creates the risk that, in specific situations, a person's involuntary or inappropriate behavior, potentially caused by stress and/or emotional strain, or even a legitimate tactic used in the defense of a client and their position may be interpreted as contempt of court.<sup>75</sup> Moreover, in the absence of a comprehensive and unified definition of "insult," the criminalization of insulting a judge grants state officials, acting in the name of the state, an unlimited power and creates fertile ground for arbitrariness; while prohibiting certain vulgar or offensive words further increases the risk of unjustified restrictions on the very essence of freedom of expression.<sup>76</sup>

Based on Georgian judicial law, contempt of court is understood to include failure to appear at a court hearing without a valid excuse,<sup>77</sup> violation of courtroom conduct rules, unethical or disruptive behavior by lawyers aimed at obstructing proceedings,<sup>78</sup> and the use of obscene language and/or non-verbal forms of expression to insult the judge,

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<sup>71</sup> Civil Procedure Code of Georgia, *supra* note 59, Article 416.

<sup>72</sup> Judgment of the European Court of Human Rights N17224/11 "Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina", 27 June 2017. Paragraph 68.

<sup>73</sup> *ibid*, 70.

<sup>74</sup> See note 51 *supra*, paragraph 54.

<sup>75</sup> See note 57 *supra*, paragraph II-39.

<sup>76</sup> Dissenting opinion of Giorgi Kverenchkhiladze, Judge of the Constitutional Court of Georgia, concerning the Judgment N1/4/1394 of the Constitutional Court of Georgia, 27 July 2023. Paragraph III-26.

<sup>77</sup> Ruling of the Supreme Court of Georgia Nas-6-2023, 4 May 2023.

<sup>78</sup> Judgment of the Grand Chamber of the Supreme Court of Georgia Nas-664-635-2016, 2 March 2017. Paragraph 245.

parties, victim, expert, specialist, witness, or other participant<sup>79</sup> in the proceedings.<sup>80</sup> Even “heated verbal disputes or arguments” between lawyers during the hearing may be regarded as contempt of court.<sup>81</sup>

It should be noted that the court itself also avoids providing a clear definition of “contempt” and/or “insult,” and when attempting to interpret these concepts, it relies on the aforementioned general and rather unforeseeable supplementary terms, which further blur the boundaries of a lawyer’s freedom of expression.

Georgian legislation and judicial practice do not provide a clear definition of (gross) contempt of court or insult. This uncertainty is further exacerbated by the fact that factually identical conduct may lead to a sanction of imprisonment under both criminal and civil legislation, by the radical disparity<sup>82</sup> between the applicable sanctions, and by the possibility of imposing criminal liability even for the use of vulgar language, without any prior examination of the factual circumstances of the case or clarification of the underlying reasons for such inappropriate expression.

There is no doubt that the more ambiguous and undefined a concept is when used as a basis for restricting a particular right - especially the right to freedom of expression - the greater the risk to the effective exercise of constitutional rights and, ultimately, to the societal progress, which depends on essential public debate as a cornerstone of a modern democratic society.

The lack of clarity in concepts and the resulting unfavorable situation in Georgia is further exacerbated by the limited accessibility of court decisions,<sup>83</sup> and, at the very least, the scarcity of judicial practice in higher instances, also possibly due to the fact the possibility of appealing court orders on the imposition of fines or the expulsion of individuals from the courtroom for contempt of court has only been available since 2014.<sup>84</sup>

Given all of the above, the degree of the court’s obligation to provide a higher standard of reasoning for its decisions is heightened in order to clarify, taking into account the context and setting of the lawyer’s expression, what particular behavior, form of expression, or content may be considered contempt of court.<sup>85</sup>

<sup>79</sup> Ruling of the Supreme Court of Georgia N1134ap-22, 25 January 2023. Paragraphs 7 and 10.

<sup>80</sup> Ruling of the Supreme Court of Georgia N1134ap-22, 25 January 2023. Paragraphs 7 and 10.

<sup>81</sup> See note 69 *supra*.

<sup>82</sup> See note 63 *supra*.

<sup>83</sup> <<https://courtwatch.ge/articles/judicial-acts>> [last accessed on 19 April 2024].

<sup>84</sup> See note 57 *supra*, paragraph II-39.

<sup>85</sup> *ibid*, paragraph II-40.

### 3. THE SOCIAL NECESSITY OF INTERFERENCE WITH FREEDOM OF EXPRESSION

In a democratic society, the necessity of restricting freedom of expression arises only in the presence of a pressing social need, the final assessment of which falls within the prerogative of the court, exercised through the reasonable and good faith use of its discretionary powers.<sup>86</sup> It is important to maintain a fair balance between competing interests, even between the necessity of protecting the authority of the court and the protection of the lawyer's freedom of expression.<sup>87</sup> To justify interference, the reasons for sanctioning must be considered "relevant" and "sufficient", and the factual circumstances must be adequately assessed.<sup>88</sup>

The prerequisites for restricting a lawyer's freedom of expression, particularly in the courtroom, must be narrowly interpreted, and the necessity must be convincingly justified.<sup>89</sup> It is important to emphasize that in a democratic society, any restriction on a lawyer's freedom of expression, even involving minor criminal liability,<sup>90</sup> is considered necessary only in exceptional cases.<sup>91</sup>

### 4. THE "CHILLING EFFECT" OF THE LAW

The restriction of freedom of expression can have a "chilling effect" due to the risks of self-censorship.<sup>92</sup> When an individual fears that their fundamental message may be misunderstood and, as a result, they may face criminal or civil liability from the state, it creates a fertile ground for the unjustified limitation of the realization of freedom of expression.<sup>93</sup> Imposing responsibility for insult and broadly interpreting such responsibility, which may not be necessary to protect a legal interest or may leave no space for free expression, contradicts the constitutional standard of freedom itself.<sup>94</sup>

Criminal penalties for offensive expression, aimed at protecting the authority and reputation of the judiciary, particularly under conditions of ambiguous concepts, carry a "chilling effect".<sup>95</sup> Neither monetary fines nor their moderate nature are sufficient to mitigate the "chilling effect" on the exercise of freedom of expression and the potential

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<sup>86</sup> See note 3 *supra*, paragraph 48 (ii).

<sup>87</sup> See note 30 *supra*, paragraph 47.

<sup>88</sup> *ibid*, 48.

<sup>89</sup> See note 3 *supra*, paragraph 48 (i).

<sup>90</sup> See note 22 *supra*, paragraph 55.

<sup>91</sup> See note 13 *supra*, paragraph 135.

<sup>92</sup> See note 76 *supra*, paragraph V-33.

<sup>93</sup> BverfG Beschluss vom 25. Oktober 2005, 1 BvR 1696/98, Rn. 33.

<sup>94</sup> See note 31 *supra*, Rn. 118.

<sup>95</sup> See note 76 *supra*, paragraph III-26.

risk of negative impact, especially in the case of a lawyer, whose duty is to effectively defend their clients.<sup>96</sup> At the same time, sanctions against a lawyer may have additional negative side effects, such as damaging the lawyer's reputation and leading to a loss of public trust in them.<sup>97</sup>

The “chilling effect” of norms leading to the sanctioning of a lawyer for “contempt of court” negatively impacts the lawyer's ability to freely express opinions, register protests, and effectively exercise other procedural rights and obligations. It leads to inappropriate restraint and ineffectiveness in legal practice, thus violating not only the lawyer's freedom of expression but also the defendant's right to a fair trial.

In light of this, the authorities, including the judiciary, must take into account the impact of restrictive norms on the extent to which lawyers can exercise their right to freedom of expression, to ensure that, due to the “chilling effect”, the legislative provision does not exceed its intended regulatory scope or restrict the right to a greater extent than intended by the legislator<sup>98</sup> - a risk that is tangible under Georgia's current legal framework.

## VI. CONCLUSION

The issues discussed above confirm that both the role of the lawyer and the protection of freedom of expression are essential pillars in ensuring a fair and effective functioning of the justice system.

Similar to commenting on matters of public interest in any space, the freedom of expression of a lawyer in the courtroom should be protected with high intensity, just as other participants in the proceedings should be safeguarded from unfounded and offensive attacks. In contrast, the scope for state interference in a lawyer's freedom of expression is broader outside the courtroom. However, considering the negative impact that critical expression outside the courtroom can have on the effective administration of justice, the intensity of such interference is reduced.

In Georgia, the expression of a lawyer's opinion or words as “contempt of court”, “gross contempt”, or “insult” may lead to both administrative liability and imprisonment; however, the definition of these terms and the clear distinction between them remain unclear. The necessity for the precise definition of these terms is highlighted by the fact that “gross contempt” under civil legislation carries a prison sentence of up to two

<sup>96</sup> See note 13 *supra*, paragraph 127.

<sup>97</sup> *ibid*, 176.

<sup>98</sup> Judgment of the Constitutional Court of Georgia N2/2/516,542 “Citizens of Georgia - Aleksandre Baramidze, Lasha Tughushi, Vakhtang Khmaladze, and Vakhtang Maisaia v. the Parliament of Georgia”, 23 May 2013. Paragraph II-8.

months, while “contempt of court” expressed through insult may result in imprisonment for up to two years under the Criminal Code. The ambiguity is further increased by the provision of imprisonment as a punishment under both criminal and civil legislation, as well as the inconsistent and radically different sanctions for factually identical conduct including the imposition of administrative liability without examining the overall context of the case, evaluating the facts, and clarifying the reasons for the inappropriate expression.

Due to the ambiguity, legislative norms create a “chilling effect” on freedom of expression, which negatively impacts the quality of freedom of expression, hinders the effective exercise of procedural rights, and leads to undue restraint and inefficiency in legal practice - ultimately resulting in the violation not only of the lawyer’s freedom of expression but also of the defendant’s right to a fair trial.

Under civil legislation, when a lawyer is sanctioned with non-custodial penalties, the issue of exercising the right to a fair trial becomes complicated. This is because the same judge who feels disrespected imposes the sanction on the lawyer, and the matter is not considered separately from the main case. The lawyer is effectively not given the opportunity to provide an explanation, nor do they have effective means to influence the final decision. At the same time, the time frame for appealing the court’s decision is set unreasonably short (48 hours) and this is determined solely based on an analogy to procedural legislation.

In light of the above, the legislative framework should be refined, and the norms restricting a lawyer’s freedom of expression within the scope of legal practice should be included solely in the Administrative Offenses Code of Georgia. The legislator should adopt the single term “contempt of court” and establish a clear definition for it, eliminating the use of additional, vague, and overlapping terms. The types of sanctions should be reviewed, consolidated under a single legal provision, and the judiciary should be granted broad discretion in determining the severity of the penalty.

At the same time, a higher standard of reasoning for court decisions must be ensured, whereby judges assess and resolve cases within the framework of a constitutionally consistent and reasonable interpretation, with strict adherence to procedural guarantees, not merely by identifying isolated instances of using inappropriate language or offensive words, but by evaluating the overall context of the case and determining the extent to which such expression may negatively affect the effective administration of justice. Through this approach, it should become clear what specific behavior, form of expression, or content may constitute contempt of court, and how the type and severity of the penalty should be determined.