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The Right to Freedom of Expression with Regards to the Personality Rights to Honor and Reputation

Personality rights maintain a special position in the wide specter of human rights. Personality rights law being on the edge of the human rights law, civil and criminal law strengthens the status of an individual, assures the presentation of a self to external world and at the same time the protection of a self from external world. Though the exercise of this or that personality right often causes the interference into other individual's personality sphere. With this regards various personal interests often get into conflict. For example, the exercise of the right to freedom of expression may result in the infringement of dignity, the rights to honor, to public image and reputation, the protection of which rights is the most commonly used ground for the limitation of the freedom of expression.

The Article presents a review of freedom of expression in relation to the personality rights to honor and reputation and the mechanisms of the balance practiced by the European Court, as well as the existing situation in Georgian legislation and case law.

Key words: *freedom of expression, personality rights, honor, reputation, reality of facts and value judgments.*

1. Introduction

Personality rights¹ maintain a special position in the wide specter of human rights. Personality rights law being on the edge of the human rights law, civil and criminal law strengthens the status of an individual, assures the presentation of a self to external world and at the same time the protection of a self from external world² through the mechanisms of civil law and criminal law.

The exercise of this or that personality right often causes the interference into other individual's personality sphere. With this regards various personal interests are often overlapped and get into conflict. For example, the exercise of the right to freedom of expression may result in the infringement of dignity, the rights to honor, to public image and reputation. The protection of honor and reputation is the most commonly used ground for the limitation of the freedom of expression.³ The controversy of that kind forms a conflict between the fundamental values of democracy.⁴

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¹ About Feasibility of Introduction of term "Personality Rights", and the parallel use of other terms of Civil Code of Georgia see *Kereselidze D.*, *The Most General Systematic Notions of Private Law*, Tbilisi, 2009, 132-133 (in Georgian).

² *Van der Sloot B.*, *Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of Big Data*, 31 (80) *Utrecht Journal of International and European Law*, 25, 2015, 26.

³ *Gabekhadze D.*, *Reputation as the Basis to Limit Freedom of Expression, European Standards of Human Rights and their Influence on Georgian Legislation and Practices*, *Korkelia K.(ed.)*, Tbilisi, 2006, 53 (in Georgian).

⁴ *Pasca A.*, *Les poursuites-Bâillons: frontière entre liberté d'expression et droit à la réputation*, *lex Electronica*, revue du Centre de recherche en droit public, Vol. 14, № 2, 2009, 9.

The freedom of expression is the right of a constitutional level. From one side it creates the opportunity to organize free discussions on the matters of social interest and represents the important matter of public interest by itself⁵ for the development of democratic society,⁶ and on the other hand the aim of protection of the freedom of expression is to provide a guarantee for individual's full flourishing, for his/her self-realization.⁷ Correspondingly, the freedom of expression is an integral and important part of individual right to free development of one's personality in the vast meaning of the word. The interests of providing capacity for the individual to develop his identity, to create his persona fall under the personality rights protection sphere.⁸

It is natural that despite its importance, the freedom of expression is not an absolute right. "Reputation" is emphasized as one of the most valuable rights directly listed in the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred as "European Convention") and the International Covenant on Civil and Political Rights⁹, which can define limits to the freedom of expression.

The text of Article 10.2 of the European Convention is actually repeated in Point 4 of Article 24 of the Constitution of Georgia¹⁰ without mentioning the term "reputation". In particular, according to the mentioned norm, the legal limitation of freedom of expression is possible under the conditions which are necessary to protect rights and dignity of others.

In its turn the unconditional protection of honor together with the protection of human dignity is guaranteed by Article 17 of the Constitution of Georgia¹¹. In a judgment №2/1/241 of March 11, 2004 on the case – *Akaki Gogichaishvili versus the Parliament of Georgia* – the Constitutional Court of Georgia indicates that the rights to inviolability of honor and dignity form the part of the absolute rights category, hence are not subordinate to any kind of limitations.¹²

Alike the other personality rights, honor and reputation constitute the elements of non-material, moral sphere, the protection of which is ensured.¹³ These rights protect social and societal life of an individual, his/her relations with the society and external environment.¹⁴

As a rule, the legislation of various countries do not cover the definition of notions of reputation and honor.¹⁵ The material scope imparted to these notions is ambiguous. In Georgian legislation

⁵ Civil Chamber at the Supreme Court of Georgia February 20, 2012 Decision №-1278-1298-2011, See <<http://www.supremecourt.ge/files/upload-file/pdf/ganmarteba7.pdf>>, [09.11.2015] (in Georgian).

⁶ Compare *Handyside versus the United Kingdom* (1976), cited in February 20, 2012 decision №-1278-1298-2011 by Civil Chamber at the Supreme Court of Georgia, see <<http://www.supremecourt.ge/files/upload-file/pdf/ganmarteba7.pdf>>, [09.11.2015] (in Georgian).

⁷ *Brun H.*, Libertés d'expression et de presse; droits à la dignité, l'honneur, la réputation et la vie privée, *Revue Générale de Droit*, Vol. 23, Issue 3, 1992, 451.

⁸ *Van der Sloot B.*, Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of Big Data, 31 (80) *Utrecht Journal of International and European Law*, 25, 2015, 27.

⁹ European Convention, Point 2 of Article 10, International Covenant, Point 1 of Article 17.

¹⁰ Constitution of Georgia, Agencies at the Parliament of Georgia, 31-33, Tbilisi, 1995.

¹¹ Constitution of Georgia, Article 17, 1, "Human honor and dignity are Inviolable".

¹² See judgment, <<http://constcourt.ge/ge/legal-acts/judgments/moqalaqe-akaki-gogichaishvili-saqartvelos-parlamentis-winaagmdeg-117>>, [09.11.2015] (in Georgian).

¹³ *Saint-Pau J.Ch.*, *Droits de la personnalité*, Paris, 2013, 945.

¹⁴ *Ninidze T.*, *Comments on Georgian Civil Code*, Vol. I, Tbilisi, 2002, 64 (in Georgian).

the term of “business reputation” is used in line with the notion of “honor”, which reflects the level of assessment of a person’s professional or other qualities by the society.¹⁶

A rigorous separation of the terms – honor, reputation and business/professional reputation – has mainly the theoretical sense while from the practical point of view it cannot be important, as opposed to the freedom of expression the mechanisms of protection of these rights are not differentiated by law. It is more important to define the common, unite sphere of action for these rights and the scope of their application.

According to the analysis of various countries legislation the issue of balance between the rights to freedom of expression and honor and reputation is not predetermined in favor of one of them. It particularly refers to the approaches used by European Court of Human Rights (hereinafter referred as European Court), which rules each concrete case separately taking into account the circumstances of the particular case.

The Article presents a review of freedom of expression in relation to the personality rights of honor and reputation and the mechanisms of the balance practiced by the European Court, as well as the existing situation in Georgian legislation and practice in this regard.

2. Case Law of European Court of Human Rights

According to some authors, in the cases involving the conflict between the freedom of expression and the right to reputation European Court’s legal reasoning suffers from a lack of clarity, consistency and transparency.¹⁷ The Court has developed just a few interpretable criteria which can be used in general as a balancing means in any case involving the conflict between human rights.

At early 2000 the European Court did not consider reputation as one of the fundamental personality rights protected by the European Convention. It was regarded rather as a private interest which, based on Point 2 of Article 10 of European Convention was a value worthy of protection.¹⁸ The member countries could, but were not obliged to restrict the freedom of expression in the favor of this kind of interest.¹⁹ For the first time the Court mentioned that the reputation is a right guaranteed by Article 8 of the Convention and thus the element of the right to respect for private life with regards to the *Radio France vs. France* (2004) case;²⁰ while in the case *Chauvy vs. France* (2004) the Court for the first time indicated on the conflict between the fundamental right to freedom of expression and the privacy right.²¹ The Court in the case of *Pfeifer vs. Austria* (2007) mentioned that per-

¹⁵ *Baramidze N.*, Some Peculiarities on Court Cases and Compensation of Moral Damage Related to Honor, Dignity and Business Reputation Protection, *Justice and Law* (magazine), № 4, Tbilisi, 2011, 112 (in Georgian).

¹⁶ Supreme Court of Georgia decision № 3k, 376-01, dated July 18, 2001 cited: *Kereselidze D.*, *The Most General Systematic Notions of Private Law*, Tbilisi, 2009, 146-147 (in Georgian).

¹⁷ *Smet S.*, Freedom of Expression and the Right to Reputation: Human Rights in Conflict, *American University International Law Review*, Vol. 26, Issue 1, 2010, 187.

¹⁸ *Ibid*, 187.

¹⁹ *Van der Sloot B.*, Privacy as Personality Right: Why the ECtHR’s Focus on Ulterior Interests Might Prove Indispensable in the Age of Big Data, 31 (80) *Utrecht Journal of International and European Law*, 25, 2015, 31.

²⁰ *Smet S.*, Freedom of Expression and the Right to Reputation: Human Rights in Conflict, *American University International Law Review*, Vol. 26, Issue 1, 2010, 193.

²¹ See Resolution, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61861>>, [10.11.2015].

son's reputation, even if that person is criticized in the context of a public debate, forms part of his or her personal identity and psychological integrity and therefore also falls within the scope of his or her "private life (i.e. the scope of Article 8)".²²

Hence in other subsequent cases²³ examined in the abovementioned and recent periods the Court defined reputation and honor as parts of the right to respect for private life and, doing so, these individual rights which were deliberately excepted by the authors of the Convention from its scope, are now positioned under the scope of Article 8. Thus the scope of application of right to privacy was widened.²⁴ Correspondingly the Article 8 was transformed into personality rights protection Article of the Convention.²⁵

European Convention does not specify the measures which a state can use to protect the right to honor and reputation, hence the legislation of various countries considers both civil and criminal regulations with this regards. Though, the Court often mentions, that the sanctioning of freedom of expression must not cause the chilling effect of this right. There are some decisions made by European Court when even light, non-criminal sanctions are considered non-proportional in the cases when the restriction of freedom of expression is not well-grounded.²⁶

2.1. Reality of Facts Stated and Value Judgment Which is not a Subject of Verification

Aiming at protecting honor and reputation the freedom of expression can be limited in two directions: spreading the humiliating facts which are not true and using the offensive word expressions.²⁷ In the first case the European Court separates statement of facts from value judgments and defines different results for each of them.

Fact is an objective event free from subjective attitudes which gives the opportunity of assertion of their rightness or wrongness.²⁸ Correspondingly, in case of fact statement the author has to bring more justifications to prove the fact in other case the reputation of the addressee will be considered defamed. Accordingly, it will be logical to ensure that the reality of the indicated facts is considered the basis of release from the responsibility for defamation while exercising the freedom of expression.²⁹

²² *Van der Sloot B.*, Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of Big Data, 31 (80) Utrecht Journal of International and European Law, 25, 2015, 32.

²³ For example see *Rothe vs. Austria* (2012); *A vs. Norway* (2009), cited by *Van der Sloot B.*, Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of Big Data, 31 (80) Utrecht Journal of International and European Law, 25, 2015, 32.

²⁴ Right to Privacy.

²⁵ *Van der Sloot B.*, Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of "Big Data", 31 (80) Utrecht Journal of International and European Law, 25, 2015, 32, 44.

²⁶ *Smet S.*, Freedom of Expression and the Right to Reputation: Human Rights in Conflict, American University International Law Review, Vol. 26, Issue 1, 2010, 203.

²⁷ *Kereselidze D.*, The Most General Systematic Notions of Private Law, Tbilisi, 2009, 146 (in Georgian).

²⁸ *Gabekhadze D.*, Reputation as the Basis of Limitation of Freedom of Expression, European Standards of Human Rights and their Influence on Georgian Legislation and Practice, *Korkelia K. (ed.)*, Tbilisi, 2006, 58 (in Georgian).

²⁹ Compare *Kereselidze D.*, The Most General Systematic Notions of Private Law, Tbilisi, 2009, 146-147 (in Georgian).

Furthermore, the European Court states that if the case refers to the dissemination of an information (the areal of media activity) which is the matter of serious public concern, journalists are required to aspire and care for the truth as opposed to the absolute truth, i.e., spread of the real facts.³⁰ Hence the determining factor is not the wrongness or the rightness of the fact but the attitude of the fact disseminator towards the accuracy of the information.³¹ The European Court put the “short validity” of information as the basis of the decisions of that kind and mentioned that if the media representatives are requested to check the maximum of truthness of the facts “it is doubtful that journalists manage to publicise any information at all”.³²

The European Court under the “duties and reponsibilities” (referred to the Point 2 of Article 10 of the European Convention) demanded from the journalists considers the obligation to act honestly, to transfer the reasonably cross-checked and trustworthy information within the norms of journalistic ethics.³³

The European Court is even more loyal with regards to the value judgments. Value judgment apart from the statement of facts “is the product of subjective foresight of external world by an individual, and is not susceptible of proof”.³⁴ According to the approaches used by the European Court the evaluation of consideration occurs in consistency with the existing circumstances in which the consideration/value judgment was expressed as well as in light of its stylistic admissibility.

After *Handyside* case the Court, when processing the *Hertel versus Switzerland* case³⁵ (1998), reconfirmed that the freedom of expression works not only for expressing the idea which is favorably received or regarded as inoffensive or as a matter of indifference, but also for the idea which offends, shocks or disturbs.³⁶ Such expressions, as “fascist”, “Nazis”, “idiot”, “abnormal” and etc. taken separately do not defame the right to reputation; the attention should be paid to the context and the situation these words are used in and, particularly, to the previous actions of another party.³⁷ Despite the abovementioned facts the Court has strict attitude towards racist expressions which preach for the racial intolerance and discrimination³⁸ as well as towards the disclaimer of historically proved facts. The Court qualifies this kind of expressions as an abuse of right and based on the

³⁰ *Kublashvili K.*, Basic Rights, Tbilisi, 2003, 298 (in Georgian).

³¹ *Gabekhadze D.*, Reputation as the Basis of Limitation of Freedom of Expression, European Standards of Human Rights and their Influence on Georgian Legislation and Practices, *Korkelia K.(ed.)*, Tbilisi, 2006, 59 (in Georgian).

³² *Ibid.*, 60.

³³ *Smet S.*, Freedom of Expression and the Right on Reputation: Human Rights in Conflict, *American University International Law Review*, Vol. 26, Issue 1, 2010, 228.

³⁴ *Gabekhadze D.*, Reputation as the Basis of Limitation of Freedom of Expression, European Standards of Human Rights and their Influence on Georgian Legislation and Practices, *Korkelia K.(ed.)*, Tbilisi, 2006, 63 (in Georgian).

³⁵ See decision, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59366>>, [09.11.2015] (in Georgian).

³⁶ *Flauss J.F.*, The European Court of Human Rights and the Freedom of Expression, *Indiana Law Journal*, 2009, 818.

³⁷ *Smet S.*, Freedom of Expression and the Right to Reputation: Human Rights in Conflict, *American University International Law Review*, Vol. 26, Issue 1, 2010, 208.

³⁸ *Gabekhadze D.*, Reputation as the Basis of Limitation of Freedom of Expression, European Standards of Human Rights and their Influence on Georgian Legislation and Practices, *Korkelia K.(ed.)*, Tbilisi, 2006, 64 (in Georgian).

power of Article 17 of the Convention excludes them from the scope of Article 10 of the Convention.³⁹

Often a value judgment has some factual basis and it is difficult to separate it from the allegation of fact. Though if there is no sufficient factual basis under the evaluation the Court has stricter attitude towards it. In case of *De Haas and Gijssels versus Belgium*⁴⁰ (1997) the Court pointed out that the opinion may be excessive, “in particular in the absence of any factual basis”.⁴¹ In case *Petrina versus Romania*⁴² (2008) the European Court ruled that statements directly accusing a named individual and completely devoid of a factual basis cannot benefit from the defense of exaggeration or provocation.⁴³

Accordingly, when a value judgment has a clear factual basis, less attention is paid to its stylistic acceptability; while the attitude of the Court towards the expressed value judgments which have no factual basis is more strict.

2.2. “The Limits of Acceptable Criticism”

The European Court draws attention to the status of the plaintiff. In particular, the Court separates several categories of persons: politicians, public servants⁴⁴, public figures⁴⁵ and private individuals – natural persons. The Court considers that the limits of acceptable criticism vary depending on each category of persons. The politicians’ right to reputation is less protected given the fact that they enter on their own will the sphere where the criticism towards them is highly expected. A politician “inevitably and knowingly lays himself open to close scrutiny of his every word and deed”.⁴⁶

The next category towards which the range of acceptable criticism is less broad than towards the previous category are public servants. Though, the intensity of defense of public servants is lower than that with regards to private individuals. Within this category lawyers (judges, prosecutors) are distinguished and more protected by the European Court, taking into account a high interest of the society and the importance of the trust towards them.⁴⁷ Exercise of freedom of expression may possibly abuse the reputation of the court, but also the authority and professional reputation of a judge. The European Court considers that the court members must enjoy particular public confidence

³⁹ *Gotsiridze E.*, Expression of Consideration not Protected by the Article 10 of European Convention, European Standards of Human Rights and their Influence on Georgian Legislation and Practice, *Korkelia K.(ed.)*, Tbilisi, 2006, 115 (in Georgian).

⁴⁰ See decision, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58015>>, [09.11.2015] (in Georgian).

⁴¹ *Gabekhadze D.*, Reputation as the Basis of Limitation of Freedom of Expression, European Standards of Human Rights and their Influence on Georgian Legislation and Practices, *Korkelia K.,(ed.)*, Tbilisi, 2006, 65 (in Georgian).

⁴² See decision, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-88963>>, [09.11.2015] (in Georgian).

⁴³ *Smet S.*, Freedom of Expression and the Right to Reputation: Human Rights in Conflict, *American University International Law Review*, Vol. 26, Issue 1, 2010, 233.

⁴⁴ Public Servant.

⁴⁵ Public Figure.

⁴⁶ *Lingens Versus Austria* (1986), cited, *Smet S.*, Freedom of Expression and the Right to Reputation: Human Rights in Conflict, *American University International Law Review*, Vol. 26, Issue 1, 2010, 205.

⁴⁷ *Smet S.*, Freedom of Expression and the Right to Reputation: Human Rights in Conflict, *American University International Law Review*, Vol. 26, Issue 1, 2010, 226.

and correspondingly must be protected from actually unjustified destructive attacks, moreover that the judges cannot publicly respond to criticism⁴⁸ as they have taken the obligation to “abstain”.⁴⁹

As for the public figures, the Court points out that since this category willingly chooses to lay themselves open to public scrutiny, similarly to political persons they have to demonstrate a greater degree of tolerance to criticism.⁵⁰

The Court does not discuss the importance of the right to reputation for abovementioned distinct categories, it only changes the “limits of accepted criticism”⁵¹ according to the status.

The abovementioned approach is the result of drawing attention to matters of public interest. If we consider that the main goal and essence of freedom of expression is an opportunity to conduct open political discussion, then the sanctioning for defamation will work depending on whether the appealing party is a politician or an ordinary private individual. Yet in case we consider that the main goal of protection of freedom of expression is the protection of personal autonomy, then it makes no difference who the appealing party is.⁵²

2.3. Form of Expression

Defamation can have various forms: oral or written, public (by means of magazines, books, TV or radio comments) or private (letter) and can derive from direct statement or be implicit. The European Court believes that the oral expressions require more protection than the written ones as the author has time to think before publishing it.⁵³

The form of statement shall not serve the only purpose of causing sensation.⁵⁴ The Court also draws attention to the group of people, the audience where the statement or other form of offensive evaluation was articulated. For example, if the article was published in a widely spread newspaper/magazine the responsibility of the author of statement is much higher than in case when the information was disseminated through specialized publications. Saying this the reputation can be damaged through spread of statement in a wide audience, but in case the audience is limited the defamation of the reputation is not confirmed.

Other forms of statements or expressions are evaluated based on the objective criteria, in particular, only in cases when it can be reasonably considered that the reputation of the third person is defamed.⁵⁵

⁴⁸ *Macovey M.*, Freedom of Expression, Article 10 of the European Convention on Human Rights, Guidelines, 2005, 152 (in Georgian).

⁴⁹ *Zoidze B.*, Comments on Constitution of Georgia (Chapter two, Georgian Citizenship. Basic Human Rights and Freedoms), Tbilisi, 2013, 279 (in Georgian).

⁵⁰ *Smet S.*, Freedom of Expression and the Right to Reputation: Human Rights in Conflict, American University International Law Review, Vol. 26, Issue 1, 2010, 205.

⁵¹ *Ibid.*, 207.

⁵² *Meyerson D.*, The Legitimate Extent of Freedom of Expression, 52 University of Toronto Law Journal, 2002, 332.

⁵³ *Smet S.*, Freedom of Expression and the Right to Reputation: Human Rights in Conflict, American University International Law Review, Vol. 26, Issue 1, 2010, 212-213.

⁵⁴ *Flauss J.F.*, The European Court of Human Rights and the Freedom of Expression, Indiana Law Journal, 2009, 819.

⁵⁵ *Pasca A.*, Les poursuites-Bâillons: frontière entre liberté d’expression et droit à la réputation, Lex Electronica, revue du Centre de recherche en droit public, Vol. 14, № 2, 2009, 9.

3. Georgian Legislation and Case Law of the Court

In Georgia the matters related to the freedom of expression are regulated by the law on “Freedom of Speech and Expression”⁵⁶ dated June 24, 2004. The mechanism of private law to protect honor and professional reputation of a natural person is defined by Articles 18 and 19⁵⁷ of the Civil Code of Georgia. The Court case law is not very numerous; Georgian court often refers to the standards established by the European Court. The overall results indicate on the tendency of prioritization in favor of freedom of expression.

3.1. Conditions of Limitation of Freedom of Expression Defined by Law

The law on freedom of speech and expression guarantees the freedom of expression and permits its restriction in favor of other rights or interests only in very rare cases (actually in the form of exclusion) when the other rights are defamed through the exercise of freedom of expression.

There is a separate chapter in Law devoted to the mechanisms of restriction of freedom of expression in cases of defamation. Defamation is defined as a statement containing a substantially false fact bearing significant harm to a person’s reputation and dignity.⁵⁸ Hence, during the statement of facts the norms defining and regulating defamation and corresponding responsibilities are used to regulate the right to freedom of expression.

The law separates the defamation of private and public persons. According to Article 13 a person shall bear responsibility under the civil law for defamation of a private person, if the plaintiff proves in court that the statement of the respondent contains a substantially false fact in relation to the plaintiff, and that the plaintiff suffered damage as a result of this statement. In case the plaintiff is a public person besides the abovementioned two requirements he has to meet the third requirement as well: he has to prove that the falseness of the fact was known to the respondent in advance or the respondent acted with apparent and gross negligence, which led to spreading a statement containing a substantially false fact.⁵⁹

Besides defining different results for different status of plaintiff the law contains many norms particularly complicating the practical chance to impose responsibility for defamation. From this point of view it is noteworthy that the burden of proof of all circumstances lies with the plaintiff. Moreover, the law prescribes full or partial release of a respondent from the responsibility (cases of absolute and qualified privilege) in many cases:

Article 5 does not impose any responsibility on a parliament and Sakrebulo member, as well as on the authors of statements made at the request of an authorized body, within the framework of political debates, parliament/Sakrebulo sessions, meetings of committees, in court and in the presence of the Public Defender. It is absolutely unclear what is meant under the statements made “at the request of an authorized body” and why a person is completely released from the liabilities if he/she makes a

⁵⁶ See <<https://matsne.gov.ge/ka/document/view/33208>>, [10.11.2015] (in Georgian).

⁵⁷ See <<https://matsne.gov.ge/ka/document/view/31702>>, [10.11.2015] (in Georgian).

⁵⁸ See Sub-point „e” of Article 1.

⁵⁹ See Article 14 of the Law.

statement of false facts at the request of an authorized body. At the same time this norm allows and states that any kind of lie and false facts are acceptable in political debates and, accordingly, creates a chance to mislead the society; hence it turns out that the more crucial is the plausibility and not the truth, i.e. the ability to persuade the public in “the truth” despite the existing reality.

Article 15 lists the qualified privileges for defamation. Some of the points are blur and must not serve the basis of releasing a person from the responsibility. Let us review each of them:

According to Article 15 a person is granted a qualified privilege for defamation in case of a statement containing substantially false fact if:

- a) he/she took reasonable measures to verify the accuracy of the fact, but was unable to avoid a mistake, and took effective measures in order to restore the reputation of the person damaged by the defamation;
- b) he/she aimed to protect the legitimate interests of society, and the benefits protected exceeded the damage caused;
- c) he/she made the statement with the consent of the plaintiff;
- d) his/her statement was a proportional response to the plaintiff's statement against him/her;
- e) his/her statement was a fair and accurate report in relation to the events attracting public attention.

Sub-points “a”, “c”, “d” fully correspond to the standards developed by European Court. As for the sub-point “b” – it is not advisable to use it independently as the protection of interests of the society cannot compensate the damage caused by a false fact dissemination. Otherwise it is a case of misleading the society; hence in this case where not only the person suffers but the public interests as well. Here again the standard of care and the act performed by the journalist is of particular importance. Correspondingly, it is suggested to use only the first part of the criterion defined by sub-point “b” in combination with the criterion defined by sub-point “a”. The same could be said with regards to criterion defined by sub-point “e”: the media coverage based on false facts even excluding any fault of author cannot be considered “just” and “accurate” no matter whether there is an interest in the society and that the society has right to have the information. In this case the respondent may be released from reimbursement for damaged person but not imposing him/her obligation of the negation of the publicized information or announcement of the court decision may cause an unjust result.⁶⁰

As for the restrictions on value judgments, the law defines a notion of “obscenity”. In particular, according to the sub-point “f” of Article 1 obscenity is a statement, which does not have any political, cultural, educational or scientific value and which rudely violates the universally recognized ethical norms. According to Article 9 of the same Law, regulation of the content of speech and expression may be established by law in case of obscenity or direct abuse. Though there is no concrete regulation in Law related to such cases. For example, if a person considers that the other person

⁶⁰ In case the fact of defamation is proved Article 17 considers the consequent legal results regarding the freedom of speech and expression: 1. In relation to defamation, a respondent may be required by court to publish a notice on the court decision in a form determined by the court. 2. Forcing a respondent to apologize shall be unacceptable. 3. If the respondent makes a correction or denial within the time limit determined by the law, but publishing the correction or denial is not sufficient for proper reimbursement of the damages caused by the defamation to the plaintiff, the respondent may be required to reimburse property and/or non-property (moral) damages to the plaintiff.

is a “Scoundrel”, “Shameless”, “Immoral” and so on and announces it through TV, the addressee is unable to sue him for defamation since these words express the subjective attitude of a person and are not based on a concrete fact. To protect his dignity, honor and reputation through civil code the plaintiff can refer to Article 18 of civil code.⁶¹ Though Article 18 is more of general character than the Law on “Freedom of Speech and Expression” and does not regulate specifically the preconditions of protection of dignity and honor.

3.2. Case Law

The Supreme Court of Georgia ruled on 65 cases of defamation for the period of 2000 – 2015.⁶² Out of this number 21 cassation appeals were considered inadmissible or left without review. The big majority of the rest of the appeals were left without changing the previous instances decisions – giving the priority to the freedom of expression.

The Civil Chamber of the Supreme Court made important clarifications in a decision Nas-1278-1298-2011 on February 20, 2012.⁶³

The court evaluated obscenity of the expressions like: “immoral ass”, “Cynics“, “Pinochet equal man”. With this regards the court stated that it is not always possible to intervene with freedom of expression of a person aiming at protection of dignity, business reputation and honor of other person but only when it is necessary in a democratic society. The court took into account the previous decisions of the European Court (Handyside versus UK, 1976; Lingens versus Austria, 1986) and concluded that “people have to bear and listen to defaming, shocking and perturbing ideas and information as in a democratic society the necessity to limit freedom of expression arises in very rare cases”.

The Court also indicated on the necessity of guaranteeing freedom of media, as a matter of particular public interest. Taking into account that in the mentioned case the dispute araised during a discussion between parties on the matter of public interest the Court evaluated the published article in its full context as value judgments expressed in a sharp (rough) form but not as obscenity.

As it is obvious from the decision the court is trying to do maximum to avoid the qualification of “obscenity” and states that it is possible to give this qualification only in particular and exceptional cases despite that the phrases used violate “the ethic norms established in the society”. Besides this, it seems, that the court is inclined to qualify used phrases as an idea or consideration, value judgment, more than a statement of facts, as it was outlined in the mentioned decision.⁶⁴

Discussing an issue of imposing a burden of proving the falseness of the fact on a plaintiff the Supreme Court sets an exclusion in the sphere of criminal law deriving from the principle of the presumption of innocence. In particular, the court considers that it is impossible to require from a

⁶¹ See <<https://matsne.gov.ge/ka/document/view/31702>>, [09.11.2015] (in Georgian).

⁶² See decision, <<http://prg.supremecourt.ge/CaseCivilResult.aspx>>, [11.11.2015] (in Georgian).

⁶³ See <<http://www.supremecourt.ge/files/upload-file/pdf/ganmarteba7.pdf>>, [09.11.2015] (in Georgian).

⁶⁴ The Statement Published in the Article: “A.F. is known as a person who during the hard Civil War threw the fat in the fire and provided the gangs which invaded Samegrelo with the intellectual support “ – was defined by the Court as an expression of an idea.

person to prove that he has not committed a crime and hence the announcement containing this information is defamatory. This kind of requirement would be completely contrary to the presumption of innocence.⁶⁵ The fact that there is no final guilty verdict is sufficient to conclude that a plaintiff has carried out the burden of proving that the disseminated information contains essentially false facts.⁶⁶

It is particularly noteworthy that by the decision Nas-1052-1007-2014 of the Supreme Court dated September 30, 2015⁶⁷ the Court put even more limits on the scope of application of rights to honor and business reputation by the following important explanations:

First of all the Court mentions that “only identification of the fact of spreading defamative statement is not sufficient to satisfy the defamation claim. The necessity of restriction of freedom of expression is defined by the accepted standards in a democratic society. In other words the restriction should represent an urgent necessity for the society. In the process of decision-making regarding the restrictions of freedom of expression the problem of balance between the public and private interests arises. The balance between the freedom of expression and individual’s interest must be maintained through considering the particularities of each separate case, at the same time the limits of acceptable criticism, the freedom of media, public interests should be taken into account”.

The court continues with the review of preconditions to use Article 13 of the Law on Freedom of Speech and Expression and points out that to impose a responsibility on a person for defamation, three precondition are necessary to be in place: the disseminated information must refer to the plaintiff, it should contain substantially false facts and should damage the honor and business reputation of the plaintiff.

The court in a concrete case discusses the appropriateness of defense of the plaintiff as a legal entity of private law. In Point 1.12 of motivation part the court refers to the decision made by the Supreme Court in 2001 according to which the Court considered that it is impossible for a legal person to suffer from moral harm because “under the concept of a moral harm an extra patrimonial interest is meant which has no material equivalent (spiritual or physical pain, feeling or other) . Hence the demand from the legal person on reimbursement of moral damage has no legal basis”. Taking into account the abovementioned the Court makes a conclusion that since there was no moral harm done to the plaintiff there was no defamation case.⁶⁸

Thus the Court actually rejects the right of legal persons to honor which does not correspond to the approach established by European countries to recognize and defend honor of a legal person.⁶⁹

The Court recognizes the existence of such an extra patrimonial right of legal person as the right on business reputation. The Court defines that “the business reputation of a legal person can be

⁶⁵ See decision №1559-1462-2012 made by the Civil Chamber of the Supreme Court of Georgia on January 9, 2014, Decisions of the Supreme Court of Georgia on Civil Cases №4, Tbilisi, 2015, 13.

⁶⁶ The decision №-179-172-2012 made by the Supreme Court of Georgia on January 9, 2014, decisions of the Supreme Court of Georgia on Civil Cases № 4, Tbilisi, 2015, 29.

⁶⁷ See <<http://prg.supremecourt.ge/DetailViewCivil.aspx>>, [09.01.2016] (in Georgian).

⁶⁸ See Point 1.13 of the Motivation Part of decision.

⁶⁹ About the Defense of Legal Person’s Honor by the Court of German Federation, see *Kereselidze D.*, *The Most General Systematic Notions of Private Law*, Tbilisi, 2009, 132.

considered violated if the disseminated information influences and contradicts the “marketing image” chosen by a person, i.e. Impression, which the legal person wants to establish towards it in the society while the disseminated information causes his failure in the face of the third parties”. Even in this case the Chamber of Cassation considers that in case of non-demonstration of proof of a concrete property, material damage the claim cannot be satisfied.

4. Conclusion

As we have seen the action of public interest in favor of freedom of expression is strong which in some cases gives the priority to this freedom thus causing conflict with the other individual personality rights. Taking this into consideration, imposing certain limitations to the freedom of expression can be justified by not only the argument that it causes the damage to other party’s interests but also can be reviewed from the point of view of freedom as the freedom including responsibility as well.⁷⁰ Existence of concepts of Duties and Responsibilities is inevitable for the development and progress of a society. Development and progress, in its turn, is impossible on a condition of accepting unlimited expression of anything. This is the main motivation for the countries to establish different levels of regulations of the freedom of expression to ensure the civil society progress. For example, in the legislation of Canada the concept and initial meaning of freedom of expression does not encompass the disclosure of very private issues and brute instincts related to the feelings of individuals when as usual such disclosure is pre-determined by only economic speculations.⁷¹ This kind of expression is excluded from the protection under the realm of freedom of expression.

In Georgia the probability of protecting reputation through court is low as the Law on “Freedom of Speech and Expression” restricts this opportunity, which is due to the burden of proof laid completely with a plaintiff. The presumption that all doubts have to be resolved in favor of freedom of expression is also defined.⁷² Correspondingly, “Article 17 of the Constitution of Georgia and this law create serious anachronism”.⁷³

Article 2 of Law on freedom of Speech and Expression provides, that the law must be interpreted in compliance with the European precedential Law, however the European Law and European Court itself with its approaches are “much more moderate”.⁷⁴

It is highly recommended that the Georgian legislation becomes closer to European Convention and Court position, which does not impart apparent advantage to freedom of expression taking

⁷⁰ Compare *Meyerson D.*, The Legitimate Extent of Freedom of Expression, 52 University of Toronto Law Journal, 2002, 340.

⁷¹ *Gotsiridze E.*, Expression of Idea not protected by Article 10 of European Convention, European Standards of Human Rights Protection and Their Influence on Georgian Legislation and Practice, *Korkelia K.(ed.)*, Tbilisi, 2006, 100 (in Georgian).

⁷² See Article 7 – Standard and Burden of Proof.

⁷³ *Gotsiridze E.*, Comments to Georgian Constitution (Chapter Two, Georgian Citizenship. Basic Human Rights and Freedoms), Tbilisi, 2013, 114-115 (in Georgian).

⁷⁴ *Gotsiridze E.*, Comments to Georgian Constitution (Chapter Two, Georgian Citizenship. Basic Human Rights and Freedoms), Tbilisi, 2013, 115 (in Georgian).

into account the social responsibility related to this right. It is important not to prevent the realization of rights to honor and professional reputation in real life. The rule of burden of proof defined by law on freedom of speech and expressions needs to be reconsidered; other separate norms of the law also require reconsideration, including the list of privileges indicated in Article 5 and 15; it is also desirable to define by the law the concrete mechanisms of protection against obscenities and abusive expressions.

The Georgian Court must recognize the existence of the right to honor of legal persons, as well as recognize violation of honor and reputation using the definition given to defamation by Law. It is not admissible to require additional precondition – existence of material damage – for satisfying plaintiff's non-property claims for defamation: negation of disseminated statement, dissemination of a respond or taking other extra patrimonial measures. Existence of material damage must be considered as necessary precondition for remuneration of damage, only in cases when the reimbursement of damages suffered is claimed.