

# Where is the Boundary between Freedom of Expression and a Person's Honor, Dignity and Business Reputation - Some Examples from the Georgian Court Practice

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## Abstract

Media law is a relatively new trend in the field of law, the importance of which is growing rapidly. The civilized world unanimously recognized the freedom of the press as the foundation of a democratic society. Equal importance is to ensure freedom of speech and expression as eternal and supreme human values and provide appropriate standards for their implementation. However, like most of the fundamental rights, freedom of expression is not absolute. It can be restricted, if it is necessary to protect the rights and dignity of others. The purpose of this paper is to examine the general legal principles of freedom of expression in Georgia and analysis of judicial practice in this area. Of particular importance is the conflict between the values between freedom of expression and the protection of honor and dignity of others. Specifically, the issue is where the boundary between these two fundamental rights.

**Keywords:** Dignity, Freedom of Expression, Honor, Thought

## Introduction

Freedom of expression is the oxygen of democracy (International Standards Series, 1999, p. 7). Human dignity is the basis of all fundamental rights, which occupies a special place among other human rights (Gotsiridze E., 2013, p. 108). Freedom of expression as a fundamental human right is recognized in international and regional Acts. Freedom of expression is guaranteed by the Constitution of Georgia and includes the right of everyone to freely receive and disseminate information and the right to express and disseminate his/her opinion. At the same time, freedom of expression does not belong to categories of absolute rights. The law provides legal basis for possible restriction of freedom of expression, one of which is a legitimate aim of protecting the rights and dignity of others. The purpose of this paper is to examine the general legal principles of freedom of expression in Georgia and analysis of judicial practices in this area. Of particular importance is the conflict between the values between freedom of expression and the protection of honor and dignity of others. Specifically, the issue is where the boundary between these two fundamental rights.

## Legal Basis for Freedom of Expression in Georgia

Constitution, as the act of the supreme legal force establishes the system of values where freedom of speech and freedom of expression are at the special place. In particular, Article 19 of the Constitution of Georgia provides the right for everyone to freedom of thought and Article 24 thereof provides that everyone shall be free to receive and disseminate information, to express and disseminate his/her opinion orally, in writing, or otherwise (Constitution of Georgia, 1995).

Specified constitutional values are reflected in Georgian Law on Freedom of Speech and Expression. In addition, Article 2 of

this Law states that interpretation of this Law shall be provided in accordance with the Constitution of Georgia, international legal obligations undertaken by Georgia, including the European Convention on Human Rights and Fundamental Freedoms and case law of the European Court of Human Rights (Parliament of Georgia, 2004).

European Convention on Human Rights and Fundamental Freedoms provides that everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers (Article 10 of the European Convention). It is notable that freedom of expression is provided by the Constitution of Georgia fully shares the values specified by the European Convention and this could be regarded as the evidence of harmonization with the international values (Zoidze B., 2013, p. 253).

## Right to Freedom of Speech and Thought

"Freedom of speech and opinion is one of the substantial bases of democratic society and one of the key conditions for progress of democratic society and development of individuals" (Handyside v. United Kingdom, 1976) (Korkelia K., Kurdadze I., 2004, p.199). At the same time, freedom of expression is one of the fundamental rights providing basis for other rights (Zoidze B., 2013, p. 253). Freedom of speech and thought could not be imagined without freedom of expression. In addition, "expression" implies both, freedom of expression of own thoughts and freedom of imparting and receiving of information (Korkelia K., Kurdadze I., 2004, p. 200).

Freedom of thought is the right to have one's own opinion with respect of any issue and freedom of speech implies expression of these opinions (Gotsiridze E., 2013, pp.158159). Opinion, as the

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view and the fact should be differentiated. According to explanation of the Constitutional Court of Georgia, opinion is an individual's personal, subjective assessment of one or another event, idea, fact or person, reasonability, correct or erroneous nature of which depends on individual's personal views. It is not subject to proving as it is the result of discussion, assessment. The facts are the events or circumstances actually occurred and can be wrong or right, correct. Hence, the facts shall be always based on the evidences. Consequently, imparting of the facts shall be subject to the obligation of evidencing of their rightfulness and validity; while validity of the opinion cannot be evidenced and hence, the individual expressing such opinion shall not be obligated to do so (Decision of the Constitutional Court of Georgia No: 2/1/241).

Georgian Law on Freedom of Speech and Expression provides following definition of the "opinion": Opinion – evaluative judgment, view, comment, as well as expression of views describing attitude to any person, phenomenon or subject in whatsoever form not containing the provable or disprovable fact (Parliament of Georgia, 2004). Both, the opinion and expression thereof are quite widely interpreted and include the right of criticism and expression of protest, even where it is "offending, shocking or disturbing", for the specific individual or the society as a whole (Gotsiridze E., 2008, pp. 310-311). Nevertheless, this is the freedom of expression, wherein the opportunities of free development are revealed, based on the right of self-determination and establishes universal freedom of behavior (Khubua G., 2005, p. 63).

Though, this should not be understood as absence of limits of human behavior, including freedom of expression (Zoidze B., 2013, p. 259). The scope of limitation of individual's rights should be determined on the basis of proportionality (Jorbenadze S., Bakhtadze U., Macharadze Z., 2014, p. 61). Individual independently sets the scopes of universal freedom of behavior until this does not affect the others' rights, moral laws or constitutional order (Khubua G., 2005, p. 63).

Both, Constitution of Georgia and European Convention on Human Rights contain the similar statements. In particular, Constitution of Georgia, providing freedom of speech and expression, simultaneously sets certain restrictions due to the respect to the other people's rights. In particular, Article 19 of the Constitution regards that limitation of freedom of thought is unacceptable, unless this infringes others' rights and Article 24 makes more specific provision and specifies the bases for restriction and protection of the others rights and dignity is among them.

## Freedom of the Press

Freedom of expression is equally applicable to the freedom of press, including the right of mass media to collect and impart information without censorship. Similar to freedom of opinion and information, the freedom of the press is the fundamental right of particular significance for democracy and it is the substantial component of democratic order (Kublashvili K., 2005, p. 198).

In this respect, the role of mass media is actually invaluable and it responds to the requirement of the society to be informed (Alpaidze T., 2008, p. 9). Non-performance of the key function of mass media – information dissemination – contradicts to the right of the society and individual to receive information about issues interesting for them. This approach results from the practice of the European Court of Human Rights as well, stating that "Press shall disseminate information and ideas on the issues of public interest, and not only press serves to the objective of imparting information and ideas but the society has the right to be informed." (Sunday Times (N 1) v. the United Kingdom) (Gotsiridze E., 2008, pp. 278–279).

Though, similar to the other spheres of public life, activities of mass media cannot be left without proper regulation. In the context of freedom of expression this means that mass media is the means of communication, providing, in addition to obligation of public in-

formation, the opportunity of dissemination of information violating the rights of the other person (Jorbenadze S., Bakhtadze S., Bakhtadze U, Macharadze Z., 2014, p. 20).

In this respect, legal regulation is necessary for proper operation of mass media, as the legal institute, as well as for protection of the interests of individuals, society and the state. This should not be understood as though the direct intervention into regulation of the mass media activities is acceptable. Of course not, legal norms should, on one hand, ensure protection of such values as the rights of free expression of the opinion, availability of information, political debates, criticism, and on the other – it shall not allow unreasonable infringement of such rights as honor, dignity and business reputation (Alpaidze T., 2008, p. 13).

Therefore, in imparting of information the representatives of mass media are subject to particular responsibility. While European Court of Human Rights regards that the press has the right to use exaggerated and provoking statements, with respect of providing of facts, it shall comply with the obligation of delivering of the correct and reliable information to the society and this implies re-checking of information in advance. Providing of wrong information and misleading of the society from the side of the journalists is regarded by the European Court of Human Rights as violation of the obligations and responsibilities of the journalists and considered as significant precondition for necessity of restricting of the freedom of expression (Gotsiridze E., 2008, p.301).

Constitutional Court of Georgia shares this approach. According to the explanation by the Constitutional Court, freedom of speech and thought do not belong to the category of absolute, unlimited rights. Execution of the right to speech and expression includes obligations and responsibilities, in addition to the rights. These obligations and even responsibilities are primarily conditioned by the necessity that the views, expressed, disseminated data as a result of realization of the rights shall be correct. Non-compliance with this condition opposes freedom of speech to the freedom of human honor and dignity (Decision of the Constitutional Court of Georgia No: 2/1/241, 2004). Additionally, the journalists shall follow the "unbiased and fair reportage method". This means that the disseminated information shall not be one-sided and biased. opposing ideas and views should be provided to the society and the scopes of the acceptable criticism shall be complied with (Gotsiridze E., 2008, pp. 301–304).

## Thought vs. Fact

On the other side, freedom of press includes not only dissemination of the facts and data, but also sharing of the views and assessments (Kublashvili K., 2005, p. 204). Standards applicable to evaluating judgment are different. Due to impossibility of cross-checking or stating whether it is right or wrong, evaluative judgment is much wider and is subject to fewer restrictions. This is results from the simple postulate that "the opinion is not subject to proving". At the same time, it is very difficult to clearly differentiate between the facts and opinions. The opinions are mostly expressed in relation to certain specific facts, deal with them and rely upon them (Decision of the Constitutional Court of Georgia No: 2/1/241, 2004). Therefore, it is excluded to argue apparently false facts but expressing and arguing of the rumors or facts where it is not clear, whether they are true or false are not excluded (Zoidze B., 2013, p. 259).

Moreover, Georgian Law on Freedom of Speech and Expression directly states that "In considering the issue of granting the status of a thought or fact, any reasonable doubt, which cannot be confirmed under the procedure established by the law, shall be resolved in favor of granting the piece of information contained in the statement the status of a thought." (Section 5, Article 7). In addition, the opinion is protected by the absolute privilege, implying that expression of the opinion is not subject to civil law responsibility (Parliament of Georgia, 2004). The same approach is accepted by the practice of the European Court of Human Rights. Where it is

unclear, whether the matter states of facts or evaluative judgment, the Court tends to seek the relevant arguments for qualifying the disputed statement as the "evaluative judgment" and thus protect the freedom of expression (Gotsiridze E., 2008, p. 332).

Numerous decisions by the Supreme Court of Georgia provide discussion of the bases for distinguishing between the opinions and facts, setting the uniform approach to this issue. The most recent practice of the Court shows both, significance of the issue and necessity of its interpretation and regulation. In its decisions the Court provides quite wide discussion of the problems of distinguishing between the opinions, facts and provides the following definitions:

Term "opinion", in its wide sense, means judgment, attitude or evaluation, true or false nature whereof fully depends on the individual, his/her subjective attitude. While the facts, normally, lack subjective attitude, they come from the objective circumstances, i.e. we can cross-check the facts, find out, whether they have actually occurred or not. Therefore, cross-checking of the facts and establishing whether they are true is possible. In many cases the opinions and facts are closely linked and it is difficult to differentiate them. This is because forms of expression rarely contain only one of them. Mostly the expressions contain both, evaluative and factual elements. The opinions often rely upon and deal with the facts and the facts, on their side, provide basis for the opinions accepting or rejecting them. Therefore, in qualifying the disputed statement either as a fact, or as an opinion, regarding the statement context, its parts can be isolated but this method is reasonable only where this does not cause loss or falsifying of the content of statement and its true sense. If such isolation is impossible without falsifying the statement contents, such statement should be regarded entirely as an opinion, or view, evaluative judgment and hence, shall be included fully into the sphere protected by the fundamental right.

The Court specifies that for adequate qualification of the disputed statement its contents, form of expression and context thereof, factual elements composing it shall be examined. One of the key signs qualifying the libelous statement is specifying of the facts close to reality, more specific and not general, with mostly objective contents than subjective and, what is the most important, their evidencing is possible.

For strengthening of its judgment, the Court has also made reference to the case law decisions by the European Court of Human Rights, according to which the opinion (evaluating judgment) cannot be evidenced by the facts and therefore, no one can be obligated to evidence true nature of the opinion. Requirement of proving of the true nature of evaluative judgment is the attack against freedom of thought (*Lingens v. Austria*) (Decision of 27 May 2015 of the Supreme Court of Georgia on case No: as-1304-1242-2014; Decision of 30 September 2015 of Supreme Court of Georgia on case No: as-1052-1007-2014).

### Honor and Dignity as the Sphere Protected by the Law - Legal Basis

Article 17 of the Constitution of Georgia establishes inviolability of individual's honor and dignity (Constitution of Georgia, 1995). Human dignity is recognized as the basis of all fundamental human rights and is based on recognition of an individual as the main value (Gotsiridze E., 2013, p. 107-108). According to the explanation by the Constitutional Court of Georgia, inviolability of individual's honor and dignity guaranteed under Article 17 of the Constitution which belongs to the category of absolute rights and unlike the other fundamental rights that does not include provisions on possible restriction thereof (Decision No: 2/1/241 of 2004 of the Constitutional Court of Georgia).

Article 18 of Georgian Civil Code considers the individual's honor, dignity and business reputation in the context of personal non-property rights and provides the guarantee of protection of

these values. On the basis of the specified Article protection of the individual's honor, dignity and business reputation are guaranteed through legal action (Section 2, Article 18) and if the information defaming individual's honor, dignity and business reputation is disseminated by mass media, then it must be retracted by the same media (Section 3, Article 18) (Civil Code of Georgia, 1997).

Georgian Law on Freedom of Speech and Expression does not directly provide any provisions on honor and dignity though the Law provides the term "defaming statement" covering honor and dignity. On the basis of the above Law, the defaming statement and hence information defaming honor and dignity should imply libel and rudeness (Jorbenadze S., Bakhtadze U., Macharadze Z., 2014, p. 77). According to the terms definition provided by the Law, defamation is statement containing a substantially false fact inflicting harm on a person; a statement damaging a person's reputation (Section "e", Article 1) while obscenity is statement which does not have any political cultural, educational or scientific value and which rudely violates the universally recognized ethical norms (Section "f", Article 1) (Parliament of Georgia, 2004).

### Honor, Dignity and Business Reputation

There is no generally accepted definition of human dignity. It is considered in philosophical, religious, medical and legal contexts (Gotsiridze E., 2013, p. 108). According to the definition that is accepted in the science "honor" implies objective assessment of the individual's moral and other qualities by the society determining the society's attitude to the individual. And "dignity" implies individual's moral and other qualities, abilities, assessment of his/her duties to the society; his/her own social significance by the individual. Business reputation implies assessment of the professional and other business qualities of an individual by the society providing basis for the society's attitude towards the given individual (Ninidze T., 2002, pp.6061).

Human dignity, as a value, is much greater than the right to honor, it actually implies protection of the individual's reputation in the society's view (Gotsiridze E., 2013, p. 114). Honor, dignity and business reputation comprise the evaluative category, result of the individual's evaluation where the criteria is the society's requirements. In the process of evaluation in the mind, people deal not with the subjects and phenomena but with the information about them. Therefore, information about the individual is compared against the information about society's requirements, views formed in the society. Reputation is the gained appreciation by the society and common views about qualities, strengths and weaknesses formed on the basis of available information. Individual's business reputation is the opinion about certain individual's business qualities, abilities in the sphere of business turnover, this views are also formed in the society. For the truth, it does not matter, what the individual thinks about himself/herself, how does he/she assesses himself/herself, before correspondence of self-assessment with the society's assessment is not determined. This degree of matching is subject to protection (Barabadze N., 2011, pp.108-121).

Defaming of the honor and dignity imply dissemination of the information about an individual containing statements about violation of the law or moral norms by a person and disruptive conduct. At the same time, such information is not true. Protection of honor and dignity is the measure for restriction of freedom of speech and this is allowed and ensured by the Constitution (article 19.3) (Decision of the Constitutional Court of Georgia No: 2/1/241, 2004).

### Conflict of Values

In setting of the scopes of restriction of the freedom of expression one should clarify the acceptable extent of affecting the others' rights and dignity. For example, in the decision on *Handyside* case the European Court establishes high standards of freedom of

expression, according to which the “offending, shocking or disturbing ideas” and “information” may be protected. Democratic society relying on the values of pluralism and tolerance, in certain cases, obligates the individuals to tolerate ideas and information offending, shocking or disturbing for them.” (Zoidze B., 2013, p. 275).

Nevertheless, the standard of freedom of expression provided for in the decision on Handyside case should not be understood as though Article 10 of the Convention protected freedom of expression including the right of offending, shocking or disturbing the others, as evidenced from the practice of the European Court (Gotsiridze E., 2008, pp. 311–312). The degree of acceptability of the offending information should be determined based on the nature of offending, as well as the status of its subject in the given society (Zoidze B. 2013, p. 275). Presence of special legitimate interests of the society should be established and this is done on the basis of so called “personal” and “contents” scales. Person’s scale implies the society’s legitimate interest where the public figure, a person being in the focus of the public attention and his activities are involved, while contents’ scale implies the phenomenon to which there is particular public interest, justifying public discussions and debates and in many cases, criticism and arguing unpleasant and flagrant for many people (Kublashvili K., 2005, p. 207).

Discussion of freedom of expression in Georgian judicial practice is of particular interest. According to one of the decisions made by the Department of Civil Cases of Tbilisi Court of Appeal, freedom of expression, as the means for arranging of the free and open discussions of the issues of public interest constitutes, simultaneously, the most important public interest. This statement is of particular significance where the matter is freedom of the press and this is natural, as free exchange of the views and open public debates about the issues of public interest is provided by means of the press and other mass media. Thus, freedom of the press is of high value and therefore, its restriction, according to the practice of the European Court “requires unusually strong grounding”. According to the case law of the European Court, the issues of public interest comprise the most important factor for resolving of the conflict of values in favor of the press, certainly, the freedom of the press may be restricted as well, if there is significant basis for this. Such bases may be different, for example, severity of actual or potential damages, negligence to their obligations and responsibilities by the journalists etc. In all cases the basis for restriction of the freedom of press shall be strong and necessary in the democratic society (Case 2b/696–13 of the Tbilisi Appeal Court).

It is notable that in relation with the criticism of the politicians the scopes of “acceptable criticism” are much wider while those in relation with the private persons are significantly narrower. This means that affecting of the private person’s reputation and his/her rights in their criticism require stronger grounds (Gotsiridze E., 2008, p. 328).

According to the explanation provided by the Supreme Court of Georgia, to sustain the claim related to restriction of freedom of speech it is not sufficient to establish the fact of dissemination of the libelous statements. Nature of necessity of restriction of the freedom of expression is determined by the standards accepted in the democratic society. In other words, the restriction must be of significant social necessity. In deciding on restriction of freedom of expression the problem of balancing of private and public interests emerge. Balance between the freedom of expression and rights and reputation of the other persons shall be found taking into consideration the characteristics of the specific dispute, though the scopes of acceptable criticism; institute of freedom of the press; public interests should be all taken into consideration. In case of libelous statements against a private person, the legal composition of imposing of responsibility is determined by Article 13 of Georgian Law on Freedom of Speech and Expression. It states that the following preconditions shall exist: a) the disseminated information shall be about the claimant; b) disseminated information shall contain substantially wrong fact; c) disseminated information shall defame person’s honor, dignity and business reputation (Case No: as-1052-1007-2014, Supreme Court of Georgia).

According to the explanation by the Constitutional Court of Georgia: “where the protection of someone’s honor and dignity is the matter, it would be logical to imply restriction of the others’ freedom of speech. This is logical, as in no one of the democratic societies the freedom of speech is the absolutely protected right” (Decision of the Constitutional Court of Georgia No: 2/1/241, 2004). Adequate measure for restitution of the affected honor and dignity can be certain compensation of the moral pain caused to the affected person. In particular, measures ensuring change of the society’s opinion about the affected person, formulation of the correct views existing before dissemination of the wrong information. And this is provided by the right to respond and reject the disseminated information.

Also Constitutional Court emphasizes such measures shall have effect and influence over the society similar to the effect and influence of disseminating of the wrong and offensive information. Only thus, the moral pain caused to the person can be compensated. moreover it is logical that one or another mass media was responsible for dissemination of the wrong and offensive information and in no case this should be deemed as restriction of the freedom of speech according to the accepted practice, dissemination of the false facts does not take place within the scopes of protection of freedom of thought. The Constitutional Court makes reference to the practice of German Federal Constitutional Court, according to which wrong information as such is not subject to protection at all. The “statements intentionally containing wrong facts and the undoubtedly false statements” are beyond the scopes of protection. Protection of the expression of views is protected only as the means for the battle of minds (Decision of the Constitutional Court of Georgia No: 2/1/241, 2004).

## Conclusion

Thus, it is actually impossible to draw clear distinction between the freedom of expression and obligation of protection of honor, dignity and business reputation. Freedom of expression is similarly necessary for the democratic society as recognition of human dignity and hence protection of the honor and business reputation is. It is clear that all mentioned rights, as the most significant values of the democratic society belong to the category of fundamental rights and are subject to protection. Furthermore, mentioned rights are interpreted generously and purposively along the Constitution of Georgia, other special legislation on this field and in conjunction with an internationally recognition values of human rights.

The importance of freedom of expression in freedom of speech allows people to voice their morals and independence as well as their political views. This also includes freedom of the press and other media to receive or impart information or ideas. Moreover, the right to free expression would be meaningless if it only protected certain types of expression, so that, the right protects both popular and unpopular expression, including speech that might shock others. However, freedom of expression is not absolute and can be limited when it conflicts with other rights. One of the exceptions is when it conflicts with the rights or reputations of others. At the same time, none of discussed rights has any preference over the other, unless the basis of specific restriction is established for protection of the others’ rights and dignity and hence, against the freedom of expression. Judicial practice discussed above shows that the precondition and scopes of intervention into the freedom of expression depends on each specific case, regarding whose rights were affected, against freedom of expression and to what extent. Proportionality must however follow the limitation with due regard to the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve the purpose.

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