

Amendments to the “Law on Broadcasting” – Threat of Censorship Through Biased Interpretation of the European Union’s Directive

Davit Kutidze,¹ Irina Gurgenchashvili²

The paper was drafted on the basis of Gnomon Wise’s research study³ “Limiting Freedom of Expression in the Name of Fighting Hate Speech?!” (01.09.2020)

On 7 September 2022, the draft amendments⁴ to the Law of Georgia on Broadcasting⁵ were submitted in the Parliament of Georgia. The amendments were proposed by the ruling Georgian Dream party’s MPs. The vaguest and simultaneously the most controversial element of the draft amendments is perhaps regulation of hate speech. Hate speech largely falls under a category of subjective perception or assessment and there is no internationally recognized or universally adopted definition among public or media industry. Regulation of hate speech is associated with huge risks, because instead of accomplishment of some benevolent objectives, we may end up with disproportionate suppression of the freedom of expression. In turn, this could lead to self-censorship of journalists/media at the very least where in the worst case it may enable the regulator to curtail critical media.

It is important to understand that when debating the choice between regulation and self-regulation of the media, we are walking on a thin line between encouragement of hate and freedom of expression.⁶ Here, it is necessary to take into consideration multi-purpose objectives of freedom of expression, since the latter is one of the basic conditions for self-fulfilment of every individual.⁷ It could be a desire of each and every person to communicate his/her feelings and sensations both verbally and non-verbally as well as share with the world elements of interest about himself/herself which would be unimaginable without freedom of expression. The second most important issue is the role of freedom of expression in protecting other fundamental human rights. In particular, without freedom of expression it would be impossible to self-organize, spread information, alert and mobilize if other fundamental rights

¹ Researcher at Research Institute Gnomon Wise, e-mail: d.kutidze@ug.edu.ge

² Executive Director at Research Institute Gnomon Wise, e-mail: i.gurgenchashvili@ug.edu.ge

³ Kutidze, Davit and Gurgenchashvili, Irina. 2020. “Limiting Freedom of Expression in the Name of Fighting Hate Speech?!” Research Institute Gnomon Wise. Accessible at: <https://bit.ly/3DEINbc> (20.09.2022).

⁴ Draft amendments to the Law of Georgia on Broadcasting. Accessible at: <https://bit.ly/3f3zean> (20.09.2022).

⁵ Law on Broadcasting. Accessible at: <https://bit.ly/3DEm8LO> (20.09.2022).

⁶ Goodmen, Ellen. 2006. Media Policy and Free Speech: The First Amendment at War with Itself. 35 Hofstra L. Rev. 1211.

⁷ Mendel, Toby. Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights.

were put into danger. In other words, freedom of expression is one of the best tools of protecting human rights. The third aspect is about social development which would remain unachievable without open and transparent communication which in turn is only provided by the freedom of expression.

Fight against hate speech in media environment could be three-pronged: self-regulation, co-regulation and regulation of media. It is important that of those three methods, only self-regulation and to a certain extent co-regulation can be considered as tools which are less prone to censorship and usually do not hinder full realization of freedom of expression.

Self-regulation is one of the most widespread and at the same time less dangerous forms of media responsibility. It is a so called code of conduct, prepared by media and media associations themselves which essentially implies freedom of media from the government interference but being responsible vis-à-vis the public. The main advantage of this model is non-interference of the government and therefore it is associated with less risks that the government could be tempted to curtail freedom of critical media. Speaking on advantages of self-regulation as opposed to regulation, it is often underscored that media professionals are more knowledgeable about their so called “internal kitchen” and they are better suited to draft a code of conduct rather than the government which is normally less aware about every important principles of media work. It should also be taken into consideration that in a modern era when media market is getting progressively global, going beyond boundaries of any specific state and offering media consumers world without borders, it is increasingly difficult to curtail it with legislation of a certain country. Of additional importance is that self-regulation allows the government to avoid the so called bureaucratic expenses and offers more flexible and cheaper system.⁸ Flexibility of the self-regulation model can be very relevant in those countries where judiciary is overloaded and each court ruling is associated with a lengthy process. For instance, overloaded judiciary, in particular the undecided lawsuits from the consumers against media organizations which were lingering for years was one of the main reasons of establishment a self-regulation body, the Press Council, in Bosnia-Herzegovina.⁹ In addition, the focus of main criticism and concerns of those who oppose media regulation is that countries where democracy is on a shaky ground and there is a clear inclination towards authoritarianism media regulation is usually abused in order to suppress freedom of speech and expression. This argument is corroborated by numerous examples across the world, such as curtailing free media on the ground of fighting hate speech in Rwanda, Venezuela and the Russian Federation.¹⁰ Moreover, there are instances how

⁸ Puddephatt, Andrew. 2011. The Importance of Self-Regulation of the Media in upholding freedom of expression. UNESCO CI Debates No. 9 (February): 2176-3224.

⁹ Zurovac, Ljiljana. 2018. The role of the media self-regulatory mechanisms. Via URL: <https://bit.ly/3SgX2Wn> (20.09.2022).

¹⁰ Kutidze, Davit and Gurgenshvili, Irina. 2020. “Limiting Freedom of Expression in the Name of Fighting Hate Speech?!” Research Institute Gnomon Wise. Accessible at: <https://bit.ly/3DEINbc> (20.09.2022).

unfathomable and oftentimes overly restrictive legislation have posed problems to numerous journalists and media organizations across some EU member states with advanced democracy.

What does the Proposal of the “Georgian Dream” MPs Change – Major Controversial Issues

As mentioned earlier, the most concerning element is that a specific aspect of media work which currently falls under self-regulation, will now become a subject of regulation. In particular, a special article (55² – prohibition of programs and advertisements, containing hate speech and calls for terrorism) is to be added to the “Law on Broadcasting” which will prohibit “such a program or advertisement that contains information inciting violence or hatred against a person or group based on disability, ethnic, social origin, gender, sex, gender identity, nationality, race, religion or belief, sexual orientation, skin color, genetic characteristics, language, political or other opinion, membership of a national minority, property, birth or age, except where necessary due to the content of the program.¹¹ It is also “prohibited to show such program or advertisement that contains calls for terrorism”.

According to the current version of the Law of Broadcasting, violations with respect to hate speech (sections 2 and 3 of Article 6) are reviewed by a broadcaster’s self-regulation mechanism independently and decision cannot be appealed in the GNCC or court. In case draft amendments are approved, responding to such violations will become an obligation of an administrative body which is Georgian National Communications Commission (GNCC). In regard to penalties, the GNCC will give a reasonable time to the provider of audiovisual services or/and radio broadcaster to address or prevent violation. In addition, GNCC has to impose penalty charges over a broadcaster if the latter fails to take written notice into consideration. After imposition of a penalty charge for the first time, if violation continues or there is a new case of violation in the course of one year, a broadcaster will be fined with double amount or public administrative proceedings will be launched to suspend license/authorization. After being fined for the second time, amount of fine doubles again or process of suspending license/authorization is launched.

As mentioned earlier, in light of current situation when hate speech is part of subjective perception and thereby lacking a comprehensive and universally recognized definition, regulation of hate speech is associated with some very high risks. In particular, there is a risk to end up with disproportionate restriction of freedom of expression which may lead to self-censorship of journalists/media or/and censorship from the government. Therefore, it is completely unclear how spread of hatred based on

¹¹ According to the section 3 of Article 56 the current law, the following phrase “except where necessary due to the content of the program” – continues as follows: “And when it is targeted to illustrate existing hatred”.

property and political views can be identified. It is also vague what criteria should GNCC use to confirm such violation. Therefore, theoretically speaking, this article could fit to virtually indefinite spectrum of expression and transform into a censorship weapon into the hands of an administrative body (GNCC). The Georgian Charter of Journalistic Ethics and Media Advocacy Coalition see exact same risks when it comes to regulation of hate speech.¹²

Apart from the abovementioned, a special article on “right to reply” (52¹) is also added to the “Law on Broadcasting”. According to that article, “any interested party whose legal interests has been damaged by the assertion of incorrect facts in a broadcaster’s program shall have a right to reply in a manner prescribed by this law.” This manner is defined in the following sections of the Article 52¹: “The interested party shall be entitled to demand that a broadcaster issue a correction or retraction of incorrect fact in 10 days after making a statement, including assertion of fact, with commensurate means and form when correction should be of the same length as initial statement and made approximately in the same time when the initial statement was made”. In addition, “refusal of a broadcaster to correct a wrong fact in a statement with commensurate means and forms or retract a statement can be appealed to the GNCC or a court”. This issue also creates unjustified risks of interference in freedom of expression. According to MediaOmbudsman NGO,¹³ this amendment could possibly result in such expansion the rights of a interested party which may lead to “higher risks of interference in the freedom of expression from the politicians or/and political activists”.

Yet another dangerous amendment, proposed by the draft law, is as follows – under current legislation, “Legal acts of the GNCC may be appealed to a court as determined by legislation” (Article 8, Section 7). In accordance with the proposed amendment, “Court accepting the lawsuit for a review will not lead to suspension of legal act of the GNCC, except for the case, when the court decides otherwise” (Article 8, Section 7). Therefore, under a current legislation, if the GNCC rules against a broadcaster the latter may appeal to a court and once lawsuit is submitted, execution of GNCC’s ruling will be suspended until the final court ruling. However, the proposed amendment increases a risk that immediate execution of the GNCC’s legal act, without substantial consideration from a court, will inflict an irreparable damage to a broadcaster.

¹² The Georgian Charter of Journalistic Ethics. Statement of Media Advocacy Coalition on Amendments to the Law of Georgian on Broadcasting. Accessible at: <https://bit.ly/3xCnPVm> (20.09.2022).

¹³ Luka Pertaiia. Netgazeti. Bill of the “Georgian Dream” Worsens State of Media – Mediaombudsman. Accessible at: <https://bit.ly/3S280PS> (20.09.2022).

Manifested Objective of the Draft Law and Relevance of the Accompanying Arguments

The explanatory note¹⁴ of the draft law says that the sole objective of the proposed amendments is to fulfil an obligation of harmonization of Georgian legislation with the EU's Audiovisual Media Services Directive 2010/13/EU¹⁵ which is envisaged by the EU-Georgia Association Agreement. However, of necessary mention is that the EU's Directive does not envisage immediate execution of the legal acts adopted by the GNCC (whether or not they were appealed to a court). Therefore, justification of this specific amendment with the EU's Directive is not suitable.

With respect to other abovementioned controversial issues, first and foremost in terms of regulation of hate speech, explanatory note of the draft law says that “according to the Article 6 of a new version of EU's Audiovisual Media Services Directive 2010/13/EU, member states will ensure with appropriate means that audio-visual media services provided by media service providers under their jurisdiction does not contain inciting violence or hatred against a person or group based on disability, ethnic, social origin, gender, sex, gender identity, nationality, race, religion or belief, sexual orientation, skin color, genetic characteristics, language, political or other opinion, membership of a national minority, property, birth or age, except where necessary due to the content of the program. It is also prohibited to make calls for terrorism. According to the new requirements set forth by the new version of the EU's directive, hate speech definition is introduced and prohibition of programs and broadcasts containing calls for terrorism is put in place. Given the requirements of the EU's Directive, GNCC will be entitled to respond to the facts of violation of these regulations”.

Before we move to the evaluation of this argument, of note is that amending the Article 56 of the current law and moving the hate speech from self-regulation into regulation was also planned by the 2019 draft law proposed by the GNCC.¹⁶ The aim and argumentation were the same – harmonization of Georgian legislation with the European Union's regulations. Explanatory notes of both 2019 and current draft law includes section 44 of the declarative component of the EU's Directive which says that while self-regulation might be a complementary method of implementing this Directive, it cannot substitute the obligations of the state, stemming from this Directive and even if co-regulation mechanism is in place, it should allow for the possibility of state intervention in the event of the Directive's objectives are not being met.

¹⁴ Explanatory note for the draft amendments to the Law of Georgia on Broadcasting. Accessible at: <https://bit.ly/3qNGfi9> (20.09.2022).

¹⁵ European Union's directive 2010/13/EU. Accessible at: <https://bit.ly/3DMoGX8>. 14 November 2018 amendments to the EU's directive 2010/13/EU. Accessible at: <https://bit.ly/2VQ7qlq> (20.09.2022).

¹⁶ Draft amendments to the Law of Georgia on Broadcasting (2019). Accessible at: <https://bit.ly/3qTGaJO> (20.09.2022).

It is also necessary to take a look at the arguments of the authors of the draft amendments that the EU's directive unavoidably requires appeal of the violations in the Article 56 of the Law of Broadcasting, particularly the hate speech, to the GNCC or to a court. According to the authors of the bill, their aim is based on section 44 of the Directive's declarative statement. However, the text of section 44 at full length reads as follows: "A careful analysis of the appropriate regulatory approach is necessary, in particular, in order to establish whether legislation is preferable for the relevant sector and problem, or whether alternatives such as co-regulation or self-regulation should be considered. Furthermore, experience has shown that both co-regulation and self-regulation instruments, implemented in accordance with the different legal traditions of the Member States, can play an important role in delivering a high level of consumer protection. Measures aimed at achieving public interest objectives in the emerging audiovisual media services sector are more effective if they are taken with the active support of the service providers themselves. Thus self-regulation constitutes a type of voluntary initiative which enables economic operators, social partners, non-governmental organizations or associations to adopt common guidelines amongst themselves and for themselves". In addition, the directive also says that "Member States should, in accordance with their different legal traditions, recognize the role which effective self-regulation can play as a complement to the legislative and judicial and/or administrative mechanisms in place and its useful contribution to the achievement of the objectives of this Directive. However, while self-regulation might be a complementary method of implementing certain provisions of this Directive, it should not constitute a substitute for the obligations of the national legislator. Co-regulation gives, in its minimal form, a legal link between self-regulation and the national legislator in accordance with the legal traditions of the Member States. Co-regulation should allow for the possibility of State intervention in the event of its objectives not being met. Without prejudice to formal obligations of the Member States regarding transposition, this Directive encourages the use of co-regulation and self-regulation. This should neither oblige Member States to set up co-regulation and/or self-regulatory regimes nor disrupt or jeopardize current co-regulation or self-regulatory initiatives which are already in place within Member States and which are working effectively".

This text shows that there is no unequivocal call that the Directive obliges to regulate its requirements, in this case for hate speech, in a new manner. Furthermore, this clause gives a straightforward discretion to the member states not to change existing systems if they work effectively. Therefore, position of the authors of the bills, that the Directive imposes some obligations to Georgia and consequently, it is necessary to amend/update existing mechanisms of hate speech regulation, is not relevant.

Of additional note is that according to Section 7 of Article 4 of the EU's Directive, **it is necessary to have a consensus between major stakeholders when making such decision which is lacking in this**

case. Furthermore, broadcasters and NGOs as well as professional union of the journalists (Charter of Ethics) categorically oppose such regulation of the issue.¹⁷

There is one more important factor in terms of compliance of the existing legislation with the EU's Directives: amendments proposed by the GNCC in 2019 (which were identical to amendments proposed in 2022 in terms of regulation of the hate speech) was followed by fierce criticism from the broadcasters, Charter of Ethics and NGOs. As stakeholders did not manage to have an agreement on the issue, the GNCC sent a letter to the European Commission with a following question: "If hate speech remains to fall entirely under self-regulation, without mechanisms to appeal to a court or to the GNCC, will or will not that contradict the EU's Directive?" After months-long communication with the European Commission, the official answer is that **there is no blanket formula to implement the EU's Directive into a national legislation and final decision should be made by a certain country. In addition, it is not indicated either whether or not leaving hate speech as a matter of self-regulation will contradict the EU's Directive. It is also emphasized that any regulation should have a broad support to stakeholders whom it affects. Each new regulation may attract opposition from those who are affected. Therefore, it should be carefully implemented and could be enforced in phases. This should help them to determine and evaluate their roles in this process.¹⁸**

Therefore, as we see, European Commission also did not give a straightforward recommendation to the GNCC to adopt this or that regulation. Moreover, the correspondence illustrates that the European Commission would not have considered this issue at all as a decisive factor when making assessment whether or not Georgia had implemented the EU's Directive. As expected, it is a country concerned that should make a decision as it is often the case in line with the EU's directives.

In regard to yet another novelty of the draft amendments which is "right to reply" Chapter 9 of the EU's Directive 2010/13/EU does indeed underscores necessity of its implementation. However, it is also noted that procedures should be determined for judicial review and it never actually says that an administrative body (in case of Georgia that would be the GNCC) is entitled to interfere in the content of a broadcaster's product.

¹⁷ The Georgian Charter of Journalistic Ethics. Statement of Media Advocacy Coalition on Amendments to the Law of Georgian on Broadcasting. Accessible at: <https://bit.ly/3xCnPVm> (20.09.2022).

¹⁸ Correspondence between the GNCC and the European Commission. Accessible to Gnomon Wise through request of public information from the GNCC (2020).

Amendments to the “Law on Broadcasting” warrants extremely scrupulous analysis and assessment, specifically in light of expanding list of subjects which will become subjects of regulation under the new law. In particular, draft amendments introduce a concept of “media service” which consists of audiovisual media services and radio broadcasting. In turn, categories of audiovisual media services are TV broadcastings, on-demand audiovisual media service¹⁹ and audiovisual advertising communication. In addition, explanatory note of the draft amendments reads that video-sharing platform service²⁰ is yet another novel type of service which is slated for the regulation by the law.

Introduction of proposed regulations on violations discussed in this paper could possibly threaten freedom of speech and expression. It goes without saying that determination of such types of violations, that is, pinpointing a boundary between freedom of speech and violation of rights of a specific group is always difficult. On top of that, there is a no clear-cut definition of the hate speech. The situation is further complicated by the fact that authority to interfere in media content, and determine whether or not a hate speech regulation was violated, is exclusively granted to the GNCC which is an administrative body. And this happens in light of obscurity who from the GNCC will be in charge of reviewing the appeals and what criteria will be applied. In addition, as mentioned earlier, immediate execution of the GNCC’s decision (without substantial review of a court) can inflict an irreparable harm to the freedom of speech and by extension, all journalistic works.

Adoption of the amendments to the “Law on Broadcasting”, proposed by the “Georgian Dream” MPs, hastily²¹ and without a consensus, will deepen concerns that these regulations can be abused by the incumbent or any succeeding governments. All the more when speaking about Georgia’s current weak and fragile democracy, which has been increasingly shifting to authoritarianism in the past few years.²²

¹⁹ On-demand audiovisual media service is a new audiovisual service type, envisaged by the draft amendments, which implies service offered to the customers to select and watch programs according to their individual demands and to watch when they want to from the catalogue of programs selected by the provider of audiovisual media service.

²⁰ Video-sharing platform service is a type of service where a principal purpose or an essential functionality of the service or its dissociable section is to provide programs or/and user-generated videos, by means of electronic communications networks to the general public, in order to inform, entertain or educate without editorial responsibility of the video-sharing platform provider.

²¹ On 20 September 2022, the Parliament of Georgia adopted draft amendments to the “Law on Broadcasting” at the first hearing.

²² Zedelashvili, Davit (2021). Rule of Law in Georgia. Verfassungsblog. Accessible at: <https://bit.ly/3BvxKgD> (20.09.2022).