

**BRIEF OF AMICUS CURIAE EQUALITY NOW**  
**IN RELATION TO THE COMPLAINT OF P.U. AGAINST E.M. AT THE SUPREME**  
**COURT OF GEORGIA**

23.06.2021

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## Equality Now and Interest of Amicus Curiae<sup>1</sup>

Equality Now is an international human rights organization that advocates for the protection and promotion of the rights of women and girls worldwide, with a membership network of individuals and organizations in more than 160 countries. Founded in 1992 Equality Now advocates for women and girls around the world and has a long history of working to achieve legal and systemic change. For nearly 30 years, with a team of lawyers and legal experts, Equality Now, which has hubs in Beirut, London, Nairobi and New York and staff and consultants across the globe, has focused on four main program areas: promoting legal equality and ending sexual violence, sex trafficking and harmful practices.

In light of the emerging use of defamation lawsuits in Georgia against survivors of sexual harassment to silence and retaliate against them, which is in violation of international human rights law, Equality Now has a strong interest in the outcome of this case. Equality Now looks to the Supreme Court of Georgia to uphold the standards of the European Convention on Human Rights and other international human rights instruments Georgia is bound to that protect the rights of women survivors of gender-based violence and discrimination, including their right to talk publicly about their experiences of abuse. Through this case, the Supreme Court of Georgia can set a good precedent for countries in the region in the effort to combat violence against women as well as promote the equality of rights under the Constitution of Georgia and ensure the rights of women are upheld.

### **I. The right to freedom of expression applies to women survivors who talk publicly about their experiences of violence and discrimination and is protected under international human rights law**

1. International human rights law binding on Georgia guarantees the right to freedom of expression, which includes protecting the right of survivors of gender-based violence, including sexual violence and harassment, to talk publicly about their experiences of violence and discrimination. Freedom of expression is protected under article 10<sup>2</sup> of the European Convention on Human Rights (ECHR),<sup>3</sup> article 19 of the International Covenant on Civil and Political Rights (ICCPR)<sup>4</sup>, article 19 of the Universal

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<sup>1</sup> Equality Now would like to thank and acknowledge the global law firm, DLA Piper, for its contributions to the legal research and analysis of this brief.

<sup>2</sup> **Article 10 ECHR: Right to freedom of expression:***1. 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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

<sup>3</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Controls System of the Convention*, opened for signature 13 May 2004 CETS NO 194 (entered into force 1 June 2010).

<sup>4</sup> Article 19 of the ICCPR requires Georgia to guarantee everyone the right to freedom of expression, including the freedom to seek, receive, or impart information or ideas of any kind, regardless of frontiers. *International Covenant on Civil and Political Rights*, 1966, Art.19, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx#:~:text=Article%2019&text=Everyone%20shall%20have%20the%20right,other%20media%20of%20his%20choice>.

Declaration of Human Rights (UDHR) as well as in numerous regional human rights treaties demonstrating the global significance of this fundamental human right. According to The Committee on the Elimination of Discrimination against Women (CEDAW Committee), which interprets the provisions of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Convention) that is legally binding on Georgia, freedom of expression for women is indivisible from and interdependent with their other human rights, especially their right to a life free from gender-based violence.<sup>5</sup> Therefore, the obligation to protect women from gender-based violence, which is binding upon Government entities and private individuals in Georgia, including the judiciary, encompasses the obligation to protect the freedom of expression of women when they speak about gender-based violence that they suffered.

2. The right to freedom of expression under article 10 of the ECHR comprehends the freedom to hold opinions, the freedom to impart information and ideas and the freedom to receive information and ideas. Freedom of expression is applicable not only to information or ideas that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.<sup>6</sup> Even in instances when the information is offensive, shocking or disturbing, the European Court of Human Rights (ECtHR) has consistently held there is little scope for restrictions on speech that is political or the debate of questions of public interest.<sup>7</sup> This applies to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about.<sup>8</sup> The ECtHR has even held that aspects of someone's private life may be disclosed on account of the interest that the public may have in being informed about certain personality traits of the public figure concerned.<sup>9</sup>
3. This fundamental right to freedom of expression undoubtedly extends to survivors of sexual violence, including sexual harassment. This is particularly important given the context in which sexual violence takes place - within the framework of prejudicial myths and stereotypes that often blame and shame women for the violence done to them. Speaking out about violence can fundamentally change the social discourse around this issue and shift the focus of accountability onto the perpetrator where it should belong. When women survivors share their experiences of violence and harassment, their right to do so is protected under international human rights law even when their public expressions offend, shock, disturb, or disclose aspects of someone's private life. Upholding survivors right to speak out about their experiences is not only aligned with international human rights law but is a critical contributing factor for combating violence against women. Georgia should ensure that the voices of survivors, such as E.M. , are not restricted, as their experiences are a matter of public interest and their right to speak out is not only protected by international human rights law but further protects and ensures the right to live free from gender-based violence.

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<sup>5</sup> CEDAW/C/GC/35

<sup>6</sup> Pedersen and Baadsgaard v. Denmark, Appl. no. 49017/99 Judgment of 17 December 2004, § 71

<sup>7</sup> European Court of Human Rights, Guide on article 10 of the European Convention on Human Rights – *Freedom of expression* (Last updated on 31 August 2020) [126]; Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland [GC], § 167;

<sup>8</sup> *Id.* at § 171

<sup>9</sup> Couderc and Hachette Filipacchi Associés v. France, Appl. no. 40454/07, Judgment of 10 November 2015, § 99, referring to *Ojala and Etukeno Oy v. Finland*, Appl. no. 69939/10, Judgement of 14 January 2014 §§ 54-55, and *Ruusunen v. Finland*, no. 73579/10, Judgement of 14 January 2014, §§ 49-50.

## **II. The right to freedom of expression of survivors cannot be restricted except under very limited circumstances provided by The European Court on Human Rights and which are not met in the current case**

### **A. The European Court on Human Rights considers relevant factors when balancing freedom of expression and right to respect for private life**

4. Under international human rights law, only under very limited circumstances can the freedom of expression be restricted and any interference with article 10 ECHR must be duly justified.<sup>10</sup> One limited exception is for the protection of the reputation or rights of others, codified under article 10 (2) of the ECHR. While the ECHR does not mention a 'right to reputation' explicitly and only refers to the word 'reputation' as an exception to the right to freedom of expression in article 10 (2) ECHR<sup>11</sup>, case law of the ECtHR considers that reputation is part of article 8 ECHR<sup>12</sup> providing the right to respect for private and family life, home and correspondence.<sup>13</sup>
5. The ECtHR provides guidance to States on how to balance freedom of expression and the right to respect for private life. The Court established certain rules relating to the balancing of the right to reputation against the right to freedom of expression. Especially noteworthy, according to the ECtHR, is that not any claim relating to reputation can give rise to a claim under article 8 ECHR. In order for article 8 to be invoked in defamation cases, an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to the personal enjoyment of the right to respect for private life.<sup>14</sup> In addition, the Court has also pointed out that article 8 ECHR cannot be relied on to complain of a loss of reputation which is the foreseeable consequence of one's own actions.<sup>15</sup>
6. When balancing freedom of expression and the right to respect for private life, the ECtHR uses relevant factors which may include.<sup>16</sup>
  - a. ***"The contribution to a debate of public interest;***
  - b. ***The degree to which the person concerned is well known and the subject of the report;***

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<sup>10</sup> Monica Macovei, 'Freedom of expression: A guide to the implementation of Article 10 of the European convention of Human rights, Human rights handbook', no.2 (Council of Europe, 2<sup>nd</sup> ed, 2004) 7.

<sup>11</sup> Tanya Aplin and Jason Boslan, 'The uncertain landscape of article 8 of the ECHR: The protection of reputation as a fundamental human right' in A. Kenyon, *Comparative Defamation and Privacy Law* (CUP, 2016) ch 13, 1.

<sup>12</sup> Article 8 ECHR: Right to respect for private and family life: *1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

<sup>13</sup> Mariette Jones, 'Is EU law effective in preventing forum shopping for the pursuit of actions arising from online infringement of personality rights?' in Russell Weaver, a.o. (eds). *Privacy in a Digital Age: Perspectives from Two Continents* (Carolina Academic Press 2017) 47, 47.

<sup>14</sup> European Court of Human Rights, Guide on article 8 of the European Convention on Human Rights – *Right to respect for private and family life home and correspondence* (Last updated on 31 December 2020) [146].

<sup>15</sup> Article 10 guidelines no. 109; Axel Springer AG v. Germany, Appl. no. 39954/08, Judgment of 7 February 2012 §§ 83-84; Couderc and Hachette Filipacchi Associés v. France, Appl. no. 40454/07, Judgment of 10 November 2015, § 43MGN Limited v. the United Kingdom, Appl. no. 39401/04, Judgment (merits) of 18 January 2011, § 142; Sidabras and Džiautas v. Lithuania, Appl. nos. 55480/00 and 59330/00, Judgment of 27 July 2004, § 49.

<sup>16</sup> Von Hannover v. Germany (no. 2), Appl. nos. 40660/08 and 60641/08, Judgment of 7 February 2012, §§ 109-113; Axel Springer AG v. Germany, Appl. no. 39954/08, Judgment of 7 February 2012, §§ 89-95.

- c. Prior conduct of the person concerned;**
- d. The method of obtaining the information and its veracity; and,**
- e. The content, form and consequences of the publication."**

7. The balancing of the above relevant factors is critical because restricting freedom of expression can have a significantly detrimental impact and lead to the silencing of important voices in a society. The protection of the reputation or rights of others is also provided under article 19, paragraph 3<sup>17</sup> of the ICCPR. Especially relevant is that the UN Human Rights Committee which interprets the provisions of the ICCPR specifically cautions "that States parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression. Specifically, paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights."<sup>18</sup> It is important to note that when survivors speak out about their experiences of sexual violence, harassment or discrimination, they are advocating not only for their own human rights to be upheld but for the rights and protection of other women in the fight against gender-based violence.
  
8. The Supreme Court of Georgia should heed the precautions and guidance provided by the ECtHR and the UN Human Rights Committee and strongly consider the rulings from courts in other jurisdictions, including India,<sup>19</sup> Russia,<sup>20</sup> the Netherlands,<sup>21</sup> the USA,<sup>22</sup> and France.<sup>23</sup> For example, in a recent defamation case decided by the Delhi High Court of India, *Mobashar Jawed Akbar v. Priya Ramani*,<sup>24</sup> MJ Akbar filed a defamation lawsuit against P. Ramani after she made statements in print media and online platforms calling MJ Akbar a sexual predator. MJ Akbar's claims were dismissed because the court recognised that P. Ramani disclosed the truth regarding the incident of sexual harassment against her, based on the testimony of P. Ramani and her friend, and that she made the publication in good faith and for the protection of other women's interest regarding sexual harassment at the workplace.<sup>25</sup> The court reasoned that "the right of reputation cannot be protected at the cost of the right of life and dignity of women, and right of equality before the law and equal protection of the law guaranteed under the Indian Constitution. The woman has a right to put her grievance at any platform of her choice and even after decades."<sup>26</sup> The Supreme Court of Georgia should ensure that the right of reputation is not protected at the

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<sup>17</sup> International Covenant on Civil and Political Rights, *Article 19. 1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.*

<sup>18</sup> UN Human Rights Committee, General Comment N34, CCPR/C/GC/34, §23

<sup>19</sup> The Court of Shri Ravindra Kumar Pandey, New Delhi, *Mobashar Jawed Akbar v. Priya Ramani*, 17 February 2021 (India).

<sup>20</sup> The Supreme Court of the Russian Federation, *Aleksey Alekseyevich Migunov v. Ekaterina Alekseyevna Fyodorova & Ors*, Case No. 2-2979/2020, 28 January 2021 (Russia)

<sup>21</sup> The Court of Amsterdam, *claimant v. TMG Landelijke Media B.V.*, 2018 (The Netherlands)

<sup>22</sup> Supreme Court of the State of New York, *Sagaille v. Carrega*, Case No. 2020-02369 154010/18, 9 March 2021 (USA) and Court of Appeal of State of California, *Wentworth v. Hemenway*, 5 June 2019 (USA)

<sup>23</sup> Cour d'Appel de Paris, *Muller c/ Brion*, Arrêt du 31 mars 2021, N° RG 19/19081 (France)

<sup>24</sup> The Court of Shri Ravindra Kumar Pandey, New Delhi, *Mobashar Jawed Akbar v. Priya Ramani*, 17 February 2021 (India).

<sup>25</sup> *Id.*, at page 72.

<sup>26</sup> *Id.*, at page 90.

cost of the rights of women survivors of gender-based violence and discrimination in Georgia, including their right to freedom of expression and to live a life free from violence.

**B. Application of the European Court of Human Rights' balance test to the current matter reveals it would be contrary to international law and a violation of human rights to restrict E.M. 's freedom of expression**

***a. Contribution to a debate of public interest***

9. An essential criterion to the issue of a right to speak out is the contribution to a debate of general interest. The ECtHR has consistently held there is little scope for restrictions on political speech or on the debate of questions of public interest.<sup>27</sup> While the definition of what constitutes a subject of general interest will depend on the circumstances of the case,<sup>28</sup> the margin of appreciation of States is thus reduced where a debate on a matter of public interest is concerned.<sup>29</sup>
10. In the ECtHR's view, "public interest ordinarily relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community".<sup>30</sup> This is also the case regarding matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about.<sup>31</sup> The ECtHR has explicitly accepted that aspects of private life may be disclosed on account of the interest that the public may have in being informed about certain personality traits of the public figure concerned.<sup>32</sup> This strengthens the rationale that the public would have an interest in being informed about aspects of a public official's behaviour in carrying out his role that demonstrate his personality traits and conduct as they relate to sexual harassment against women in the workplace.
11. In the present case, P.U. is a public official found by the Department of Equality of the Public Defender's Office to have abused his position of power by sexually harassing E.M., who at the time was a subordinate employee, and creating a hostile working environment. As outlined in the extracts of evidence included in the decision of the Public Defender's Office, the harassment, discrimination and hostile work environment lasted for more than two years. Making the public aware of his actions is of interest as it may prevent future sexual harassment from P.U. as well as others in similar positions in the Government institutions of Georgia. It is unquestionable that the underlying situation qualifies as a matter that contributes highly to a debate of public interest.

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<sup>27</sup> European Court of Human Rights, Guide on article 10 of the European Convention on Human Rights – *Freedom of expression* (Last updated on 31 August 2020) [126]; *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], § 167;

<sup>28</sup> *Von Hannover v. Germany* (no. 2), Appl. nos. 40660/08 and 60641/08, Judgment of 7 February 2012, § 109; -Axel Springer AG v. Germany, Appl. no. 39954/08, Judgment of 7 February 2012, § 90

<sup>29</sup> *Couderc and Hachette Filipacchi Associés v. France*, Appl. no. 40454/07, Judgment of 10 November 2015, § 96, referring to *Editions Plon v. France*, no. 58148/00, 2004-IV, § 44.

<sup>30</sup> *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, Appl. no. 931/13, Judgment of 27 June 2017, § 171

<sup>31</sup> *Id.*, § 171

<sup>32</sup> *Couderc and Hachette Filipacchi Associés v. France*, Appl. no. 40454/07, Judgment of 10 November 2015, § 99, referring to *Ojala and Etukeno Oy v. Finland*, Appl. no. 69939/10, Judgement of 14 January 2014 §§ 54-55, and *Ruusunen v. Finland*, no. 73579/10, Judgement of 14 January 2014, §§ 49-50.

12. It is particularly important to underline that when E.M. was invited to talk about her experience in a tv show, she had already delivered evidence regarding the sexual harassment and the Public Defender's Office had ruled in her favour, establishing that P.U. had sexually harassed E.M. The Public Defender's Office of Georgia is mandated by the Constitution and Organic Law of Georgia to oversee the observance of human rights and fundamental freedoms on the territory of Georgia and it is charged specifically with identifying cases of infringement of human rights.<sup>33</sup> The Public Defender's Office is also a national equality body, mandated by the Law of Georgia on the Elimination of All Forms of Discrimination to "discuss the applications and complaints of natural and legal persons or groups of persons, who consider themselves to be victims of discrimination."<sup>34</sup> The Public Defender's Office is authorized to confirm the fact of discrimination and apply to the relevant body or persons with recommendations to take specific measures in response to discrimination committed.<sup>35</sup> Given the expertise and mandate of the PDO, its decisions are always a matter of public interest as they directly relate to the protection of human rights and fundamental freedoms and protection from discrimination in Georgia, including sexual harassment which constitutes a form of discrimination<sup>36</sup>. When E.M. spoke publicly about her experience, she provided details already found to be in violation of her human rights and fundamental freedoms, confirmed by the PDO, which is a matter of public interest. In addition, since the PDO found in favour of E.M. and since the CEDAW Committee has established that gender-based violence includes harassment and is a form of discrimination under the CEDAW Convention<sup>37</sup>, the statements of E. Meskidze were true and therefore P.U. is not able to rely on the provisions of article 8 of the ECHR since any loss of reputation was the foreseeable consequence of his own actions.<sup>38</sup>
13. Furthermore, upholding survivors' right to freedom of expression is of public interest because it helps to encourage societal change necessary to combat sexual harassment and other forms of sexual violence against women. Such change can only occur when the public is informed about the current state of affairs, form opinions about what is right and wrong, and learn from survivors themselves. If the public is never informed about discrimination based on sex and harassment or if survivors' voices are silenced, discredited, or restricted, the public will remain uninformed which stifles political involvement and inhibits societal change. Historically, laws protecting women only came after women spoke out about being treated unfairly which led to societal outcry and demands for legislative and institutional reforms.
14. Sexual harassment and sexual violence should be of particular interest to the public of Georgia. The 2017 National Study on Violence against Women in Georgia, by UN Women, GEOSTAT and the European

<sup>33</sup>Public Defender (Ombudsman) of Georgia, EQUINET <[https://equineteurope.org/author/georgia\\_publicdefender/](https://equineteurope.org/author/georgia_publicdefender/)>

<sup>34</sup> Article 6.2.a

<sup>35</sup> Article 9.3

<sup>36</sup> Law on the Elimination of All Forms of Discrimination, Art. 2.

<sup>37</sup> "Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include:...(h) The right to just and favourable conditions of work." General Recommendation No. 19 of the CEDAW Committee (1992):

[https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/INT\\_CEDAW\\_GEC\\_3731\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf)

"Gender-based violence...takes multiple forms, including acts or omissions intended or likely to cause or result

in...harassment..." General Recommendation No. 35 of the CEDAW Committee (sixty-seventh

session):<https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx>

<sup>38</sup> Article 10 guidelines no. 109; Axel Springer AG v. Germany, Appl. no. 39954/08, Judgment of 7 February 2012 §§ 83-84;

Coudere and Hachette Filipacchi Associés v. France, Appl. no. 40454/07, Judgment of 10 November 2015, § 43MGN Limited v. the United Kingdom, Appl. no. 39401/04, Judgment (merits) of 18 January 201, § 142; Sidabras and Džiautas v. Lithuania, Appl. nos. 55480/00 and 59330/00, Judgment of 27 July 2004, § 49.

Union, found that overall 26% women have experienced sexual harassment or sexual violence.<sup>39</sup> As of 12 March 2021, it has been recorded by UN Women that workplace sexual harassment is experienced by one in every 10 women in Georgia.<sup>40</sup> Thus, it is not only in the interest of survivors such as E.M. to be able to speak out but it is in the State's interest to have survivors' voices heard in order to combat sexual harassment.

15. The Georgian Supreme Court should consider the rulings from The Court of Appeal of Paris and the Court of Amsterdam. In *Cour d'Appel de Paris, Muller c/ Brion*,<sup>41</sup> a French woman posted tweets denouncing the sexist comments and inappropriate behaviour of a male counterpart as part of the #MeToo and #balancetonporc movements<sup>42</sup>. She was sued in the French courts for defamation against the plaintiff and damage to his reputation. The Court of Appeal found that she was in her right to denounce these physical or verbal assaults likely to undermine the dignity of women and which have long been tolerated or passed over in silence and cannot be perpetuated. In such circumstances, the court stated, a conviction, even if only civil, would be a disproportionate interference with freedom of expression and would be likely to have a deterrent effect on the exercise of this freedom.<sup>43</sup> The court further stated that information disclosed was based on sufficient evidence for the public good and in the public interest for the protection for other women's interest in general regarding sexual harassment.<sup>44</sup>
16. In a Court of Amsterdam case, *claimant v. TMG Landelijke Media B.V.*,<sup>45</sup> the claimant, who had been given an award by the Dutch government for helping families from Suriname in a vulnerable situation, sued a newspaper that published an article that claimed he had conducted pedophile actions and touched underaged girls inappropriately. After learning that the claimant had been nominated for the award, girls had come forward with allegations of pedophilia against him. While the interest of the claimant lay in the fact that he should not be exposed to frivolous accusations, the court considered the chance that the girls lied to be small and acknowledged the journalist ensured sufficient due diligence in reporting. Most importantly, the judge noted the importance that the newspaper be able to publicly express itself in a critical, informative, opinion-forming and cautious manner on matters of general interest and that sexually transgressive behavior is abusive conduct that affects the whole of society.<sup>46</sup>

***b. The degree to which the person concerned<sup>47</sup> is well known and the subject of the report***

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<sup>39</sup> The 2017 National Study on Violence against Women in Georgia, by UN Women, GEOSTAT and the European Union, p. 49: <https://www.geostat.ge/media/26061/National-VAW-Study-Report-ENG.pdf>

<sup>40</sup>“Five more governmental organizations adopt internal anti-sexual harassment mechanisms,” UN Women, 12 March 2021 <<https://georgia.unwomen.org/en/news/stories/2021/03/five-more-governmental-organizations-adopt-internal-anti-sexual-harassment-mechanisms>>

<sup>41</sup> Cour d'Appel de Paris, Muller c/ Brion, Arrêt du 31 mars 2021, N° RG 19/19081 (France)

<sup>42</sup> #MeToo is a social movement against sexual abuse and sexual harassment where survivors publicise their own experiences of sexual harassment and abuse to raise awareness, empower and bring solidarity among survivors, and help to combat sexual harassment against women. The phrase "Me Too" was initially used in this context on social media in 2006, on Myspace, by sexual harassment survivor and activist Tarana Burke and, following the 2017 allegations of sexual abuse and assault perpetrated by producer Harvey Weinstein, the #MeToo movement grew and sparked its own iterations in countries across the world; the French version is #BalanceTonPorc, widely translated as “squeal on your pig”.

<sup>43</sup> Cour d'Appel de Paris, Muller c/ Brion, Arrêt du 31 mars 2021, N° RG 19/19081 (France)

<sup>44</sup> *Id.* at page 11, §4.

<sup>45</sup> The Court of Amsterdam, claimant v. TMG Landelijke Media B.V., 2018 (The Netherlands)

<sup>46</sup>*Id.* at para 4.8

<sup>47</sup> Tbilisi Court of Appeals, Georgia Case No: 330210018002489228 2b/318-20, 9 December 2020

17. The ECtHR has reiterated that the extent to which an individual has a public profile or is well-known influences the protection that may be afforded to his or her private life.<sup>48</sup> The role or function of the person concerned and the nature of the activities that are the subject of the freedom of expression constitute other important criteria.<sup>49</sup> According to the caselaw, a distinction must be made between private individuals and persons acting in a public context, such as political figures or public figures. Accordingly, whilst a private individual unknown to the public may claim particular protection of his or her right to private life, the same is not true of public figures.<sup>50</sup> The ECtHR reiterates that the right of public figures to keep their private life secret is, in principle, wider where they do not hold any official functions and is more restricted where they do hold such a function. Furthermore, not only are public figures expected to have a greater degree of tolerance to criticism about their behaviour when the information is of public interest, the ECtHR extends the status of public figure to any person who could be regarded as a public figure, namely persons who have entered the public arena, albeit through their acts or their position itself.<sup>51</sup>
18. In *Kacki v. Poland*, the ECtHR emphasised the importance of the role and function of an individual targeted by the impugned statements. In this case, an individual accused a member of the European Parliament of having offered one of his assistants paid employment in return for sexual favours in an interview that was published in a daily newspaper. Here, the ECtHR considered the accused to be a public figure. Furthermore, the ECtHR considered that the public figure in this matter did not request any correction or retraction of the allegation from the newspaper nor did he pursue any other action that could have remedied the alleged infringement of his right to reputation. Instead, he chose to lodge a private bill of indictment with a criminal court against the journalist who published the accusatory statements and the court found this to be a disproportionate response to defamation.<sup>52</sup> Therefore, the ECtHR demonstrates that it is important to consider whether someone is a public figure and whether the actions taken by the public figure to remedy any loss of reputation are proportionate.
19. In the case at hand, P.U. is a former Head of XX and thus held an official public position. The Tbilisi Court of Appeals establishes that it is undisputed that P.U. is a public figure and thus the standard for defamation of a public figure applies to him.<sup>53</sup> Given the public role, status and importance of P.U. and his impact and influence on other women colleagues, the public has a significant interest in being informed of his actions and he should be held to a higher degree of criticism about his behaviour.
20. Further, it is relevant to note that given P.U.'s status as a public figure, he is able to reach a larger audience than a private person generally can when expressing himself. This means that following the

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<sup>48</sup> European Court of Human Rights, Guide on article 10 of the European Convention on Human Rights – *Freedom of expression* (Last updated on 31 August 2020) [133].

<sup>49</sup> *Axel Springer AG v. Germany*, Appl. no. 39954/08, Judgment of 7 February 2012, § 91.

<sup>50</sup> *Axel Springer AG v. Germany*, Appl. no. 39954/08, Judgment of 7 February 2012, § 91; *Von Hannover v. Germany* (no. 2), Appl. nos. 40660/08 and 60641/08, Judgment of 7 February 2012, § 110.

<sup>51</sup> *Kapsis and Danikas v. Greece*, § 35 and *Verlagsgruppe News GmbH v. Austria*, App. No. 76918/01, Judgement of 14 December 2006.

<sup>52</sup> *Kacki v. Poland*, Appl. no. 10947/11, Judgment of 4 July 2017, § 53: "The Court notes also that M.C. did not request a correction or retraction from the newspaper. He did not institute civil or criminal proceedings against A.R. Likewise, he did not institute civil proceedings against the applicant or editor of the newspaper through which the alleged interference with his right to reputation could have been remedied. Instead, he chose to lodge a private bill of indictment against the applicant with a criminal court (see paragraph 12 above)."

<sup>53</sup> Tbilisi Court of Appeals, Georgia Case No: 330210018002489228 2b/318-20, 9 December 2020 [36].

Public Defender's decision and the TV program where the statements were made, he had the opportunity to explain the situation from his own perspective and command a wide audience, arguably larger than E.M. could. Instead of offering his perspective to the public or attempting to publicly correct the statements, P.U. immediately lodged a lawsuit against E.M. for defamation. Given his reach and status as a public figure, this is a disproportionate response to E.M.'s statements.

21. Even more concerning and an important factor to note, is given P.U.'s influence on the media outlets as a public figure, he has a greater potential to encourage the spread of false information and to strengthen gender-based stigma. This is evident in *E. M. v. Sandro Kachakhidze and Salome Gogokhia*<sup>54</sup> where it was found that respondents violated the 1st<sup>55</sup> and 7th<sup>56</sup> principles of The Georgian Charter of Journalistic Ethics. In this case, the respondents, who are TV journalists, stated publicly that the court had found that P.U. had not committed harassment against E. M. - while this was not a matter of examination of the first instance court. The Charter Counsel held this to be in violation of principle 1 as the "circumstance [sexual harassment] has already been established by the Public Defender, which is not subject to appeal."<sup>57</sup> Furthermore, the journalist broadcast P.U.'s statement, "this person is old, the grandmother of two children, and I am not interested in her as a woman, I am not into this person."<sup>58</sup> The Charter Counsel found this "helps to reinforce stigma and stereotypes on the basis of gender" in violation of principle 7.<sup>59</sup> Not only are public figures's behavior of sexual harassment a matter of public interest but their influence to perpetuate gender stigma, stereotypes, and discrimination should not be ignored.

### ***c. Prior conduct of the person concerned***

22. The ECtHR also takes account of an individual's prior conduct in assessing the degree of tolerance to criticism expected. The ECtHR articulated, for example, that "the conduct of the person concerned prior to publication of the report [is also a factor] to be taken into consideration."<sup>60</sup> Moreover, the ECtHR is clear that article 8 ECHR cannot be relied on to complain of a loss of reputation which is the foreseeable consequence of one's own actions.<sup>61</sup>

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<sup>54</sup> E.M. against Sandro Kachakhidze and Salome Gogokhia, Case N - 311, 11 January 2020, <https://www.qartia.ge/ka/gadatsyvetilebebis-dzebna/article/79790-ekaterine-meskhidze-sandro-katcakhidzis-da-salome-gogokhia-s-tsinaaghmdeg>

<sup>55</sup> Principle 1 of the Charter: "Journalists must respect the truth and the public's right to receive accurate information."

<sup>56</sup> Principle 7 of the Charter: "Journalists must understand the danger of encouraging discrimination by the media; Therefore, everything should be done to prevent discrimination against any person on the basis of race, sex, sexual orientation, language, religion, political and other beliefs, national or social origin or any other sign."

<sup>57</sup> E.M. against Sandro Kachakhidze and Salome Gogokhia, Case N - 311, 11 January 2020

<https://www.qartia.ge/ka/gadatsyvetilebebis-dzebna/article/79790-ekaterine-meskhidze-sandro-katcakhidzis-da-salome-gogokhia-s-tsinaaghmdeg>

<sup>58</sup> Ibid

<sup>59</sup> Ibid

<sup>60</sup> *Axel Springer AG v. Germany*, Appl. no. 39954/08, Judgment of 7 February 2012, § 92, *Von Hannover v. Germany* (no. 2), Appl. nos. 40660/08 and 60641/08, Judgment of 7 February 2012, § 111.

<sup>61</sup> European Court of Human Rights, Guide on article 10 of the European Convention on Human Rights – *Freedom of expression* (Last updated on 31 August 2020) [109]; *Axel Springer AG v. Germany*, Appl. no. 39954/08, Judgment of 7 February 2012, §§ 83-84; *Couderc and Hachette Filipacchi Associés v. France*, Appl. no. 40454/07, Judgment of 10 November 2015, § 43; *MGN Limited v. the United Kingdom*, Appl. no. 39401/04, Judgment (merits) of 18 January 2011, § 142; *Sidabras and Džiautas v. Lithuania*, Appl. nos. 55480/00 and 59330/00, Judgment of 27 July 2004, § 49.

23. In this case, there had already been a decision issued by the PDO of which P.U. was well aware. While the case was being decided, P.U. was heard and invited to bring arguments and evidence forward to defend his position. The PDO decided in E.M.'s favour and, due to this favourable ruling, E.M. was invited to speak about her experiences publicly. Subsequent statements made by E.M. were reiterations of P.U.'s prior conduct, which had already been established to be sexual harassment. Therefore, as a result of the PDO case, P.U.'s legitimate expectation to private life had already been greatly reduced and, most compellingly, due to P.U.'s own conduct of sexual harassment, he cannot complain of a loss of reputation under article 8 ECHR as this is the foreseeable consequence of his own actions.
24. The Supreme Court of Georgia should ensure the protection and right to freedom of expression for survivors at least as fervently as did the Supreme Court of the Russian Federation in *Aleksey Alekseyevich Migunov v. Ekaterina Alekseyevna Fyodorova & Ors*.<sup>62</sup> In this matter, the claimant claimed that the respondent's false allegation of rape, posted on Facebook and disseminated by the two other respondents, defamed his honour, dignity and business reputation. The Supreme Court of the Russian Federation pointed out that the case constituted a conflict between the right to freedom of expression of a woman who had experienced sexual violence and the protection of reputation.<sup>63</sup> The court reasoned that citizens' right to the protection of their honour, dignity and business reputation is their constitutional right, but courts must ensure a balance between this right on the one hand, and other rights and freedoms guaranteed by the Constitution of the Russian Federation including freedom of thought, speech, mass information, and the right to freely speak, receive, transmit, produce and disseminate information by any lawful means. Cases involving the sexual abuse of a woman have peculiarities of consideration due to their high social significance and require the courts to be particularly careful in determining the subject matter of proof.<sup>64</sup> Ultimately, the Supreme Court decided in favor of the respondent because a person cannot invoke the protection of the right to privacy in actions for damages to reputation where this was a foreseeable consequence of his or her own conduct, such as the commission of unlawful acts.<sup>65</sup>

***d. The method of obtaining the information and its veracity***

25. Where it examines an application lodged under article 10, the ECtHR will examine the way in which the information was obtained and its veracity.<sup>66</sup> Also relevant is the factual basis on which the expression is based. However, the need to provide a factual basis is less stringent where the facts are already known to the public.<sup>67</sup> In such a case, the possible impact on the reputation of the accused is more limited.<sup>68</sup> Moreover, even in situations of unproven statements of fact, the ECtHR has found a violation of freedom of speech because it was impossible to prove the facts.<sup>69</sup>

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<sup>62</sup> The Supreme Court of the Russian Federation, *Aleksey Alekseyevich Migunov v. Ekaterina Alekseyevna Fyodorova & Ors*, Case No. 2-2979/2020, 28 January 2021 (Russia)

<sup>63</sup> *Id.* at page 2, §6

<sup>64</sup> *Id.* at page 3, §15

<sup>65</sup> See also resolution in case *Axel Springer AG v. Germany*, Grand Chamber, Appeal no. 39954/08, 7 February 2012

<sup>66</sup> See, *Von Hannover v. Germany* (no. 2), Appl. nos. 40660/08 and 60641/08, Judgment of 7 February 2012, see also *Axel Springer AG v. Germany*, Appl. no. 39954/08, Judgment of 7 February 2012, § 90-95: "*The way in which the information was obtained and its veracity are also important factors.*"

<sup>67</sup> *Wirtschafts-Trend Zeitschriften-Verlags GmbH v. Austria*, Appl. no. 58547/00, Judgment of 27 October 2005, § 35.

<sup>68</sup> See for example *Verlagsgruppe News GmbH v. Austria*, App. No. 76918/01, Judgement of 14 December 2006, § 30.

<sup>69</sup> *Flux v. Moldova* (no. 1), Appl. no. 28702/03, Judgment of 20 November 2007, § 31, 35.

26. Furthermore, the ECtHR recognises the defence of truth (*exceptio veritatis*) in defamation proceedings.<sup>70</sup> Considering the defence of truth to be a safeguard for defendants in defamation cases, the ECtHR finds “it is important for the defendant to be afforded a realistic chance to prove that there was a sufficient factual basis for his or her allegations.”<sup>71</sup> In this matter before the court, E.M. was not only afforded the realistic chance to prove her allegations but the Public Defender’s Office confirmed her allegations amounted to sexual harassment, which is a form of sexual violence under international law (see para 33).
27. In this case, E.M. was invited and interviewed by a TV program following the decision of the Public Defender in her favour, establishing that P.U. committed acts of sexual harassment. As previously outlined, the PDO of Georgia is a national equality body and is mandated to oversee the observance of human rights and fundamental freedoms in the territory of Georgia, as well as decide cases of discrimination and it holds particular specialized expertise necessary to identify cases of infringement of human rights.<sup>72</sup> Thus, the experience that E.M. shared on the TV program had already been established to be sexual harassment, which is a form of sexual violence (see para 33). Therefore, it should be fully recognized that the Public Defender’s Office confirmed the veracity of E.M.’s statements and thus the truth of her statements should safeguard her against the instant defamation complaint.

***e. The content, form and consequences of the publication***

28. Regarding the content of publically made statements, the ECtHR has found that in the context of civil defamation proceedings, the requirement to prove that the allegations were "substantially true on the balance of probabilities" was a justified restriction on freedom of expression.<sup>73</sup> This indicates a threshold for which a statement can be proven, namely when it is substantially true on the balance of probabilities. Here, examining the balance of probabilities in this case, it is unclear how the balancing act ended up on the side of P.U. . Considering the overwhelming evidence, including text messages, emails, business correspondence and multiple witnesses, as well as the findings of the PDO, it suggests the Tbilisi Court of Appeals imposed on the victim a higher threshold and a more rigid burden of proof than previously set by the ECtHR. Holding women to a higher burden of proof than men constitutes discrimination and is in direct conflict with General Recommendation 33 of the CEDAW Committee.<sup>74</sup>
29. Regarding form, the ECtHR has always considered that article 10 of the ECHR protects not only the substance of the ideas and information expressed but also the form in which they are conveyed. For instance, one element often considered when assessing the content of the statement is the use of insulting or offensive terms.<sup>75</sup> However, the ECtHR has determined that the use of terms such as "racist agitation,"

<sup>70</sup> European Court of Human Rights, Guide on article 10 of the European Convention on Human Rights – Freedom of expression (Last updated on 31 August 2020) [209]

<sup>71</sup> *Morice v. France* [GC], § 155, with further references

<sup>72</sup> Law of Georgia on Elimination of All Forms of Discrimination, Art. 8-9.

<sup>73</sup> European Court of Human Rights, Guide on article 10 of the European Convention on Human Rights – *Freedom of expression* (Last updated on 31 August 2020) [200]; *McVicar v. the United Kingdom*, §§ 84 and 87.

<sup>74</sup> CEDAW, General Recommendation 33, para. 25 - "(iii) Corroboration rules that discriminate against women as witnesses, complainants and defendants by requiring them to discharge a higher burden of proof than men in order to establish an offence or to seek a remedy"

[https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/CEDAW\\_C\\_GC\\_33\\_7767\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_33_7767_E.pdf)

<sup>75</sup> *Chauvy and Others v. France*, Appl. no. 64915/01, Judgment of 29 June 2004, 2004-VI, §§ 211 and 231.

"idiot," "Nazi," "Neo-Nazi," and "fascist," do not automatically justify restriction of freedom of expression.<sup>76</sup> Here, the statements made by E.M. were broadcasted on TV programs. The TV programs seem to have broadcast direct quotes from E.M. where she talks about her experiences while working for the defendant. The statements made do not refer to offensive or insulting terms that go beyond the scope of her experience. No use was made of any excessive exaggeration or provocation, or insulting or offensive terms, which constitute insulting speech. Therefore, there is no reason to limit E.M.'s freedom of speech based on the content and form of the expression and the expression falls within the scope of what is legally permissible.

30. Finally, regarding consequences, it is not underestimated that someone who is accused of discrimination, harassment and violence faces personal and professional consequences and those consequences can be significant and, if the allegations are untrue, disproportionate and unfair. Nonetheless, the ECtHR is clear that article 8 ECHR cannot be relied on to complain of a loss of reputation which is the foreseeable consequence of one's own actions<sup>77</sup> and it had already been established by the PDO that P.U.'s conduct rose to the level of sexual harassment. Furthermore, the ECtHR has stressed the importance of the proactive role of the press, namely to reveal and bring to the public's attention information capable of eliciting interest or giving rise to debate in society. Thus, E.M. acted in line with the ECtHR's approval of press engagement.
31. Therefore, considering the content, form and consequences of E.M.'s speech in addition to the 4 other relevant factors mentioned above that the ECtHR calls into consideration, it would be unreasonable, unjustified and a violation of human rights and international law binding on Georgia to restrict E.M.'s freedom of expression in this instance.

### **III. Upholding survivors' right to freedom of expression is fundamental to protecting the rights of women, especially the right to live free from violence, and is essential for the prevention of sexual violence**

#### **A. Survivors' right to freely express their experiences of sexual harassment is indivisible from and interdependent to their right to live free from violence**

32. For women, the right to live a life free from violence, specifically gender-based violence, is dependent on their right to freedom of expression being fully enjoyed. As noted above in para 1 CEDAW Committee explicitly states that "women's right to a life free from gender-based violence is indivisible from and interdependent with other human rights, including...freedom of expression."<sup>78</sup>

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<sup>76</sup> See, e.g., *Scharsach and News Verlagsgesellschaft mbH v. Austria*, Appl. no. 39394/98, Judgment of 13 November 2003, 2003-XI, §§ 127 and 137; *Unabhängige Initiative Informationsvielfalt v. Austria*, Appl. no. 28525/95, Judgment of 26 February 2002, 2002-I, §§ 275 and 283; *Oberschlick v. Austria* (no. 2), Appl. no. 20834/92, Judgment of 1 July 1997, §§ 1274-75.

<sup>77</sup> Article 10 guidelines no. 109; *Axel Springer AG v. Germany*, Appl. no. 39954/08, Judgment of 7 February 2012 §§ 83-84; *Couderc and Hachette Filipacchi Associés v. France*, Appl. no. 40454/07, Judgment of 10 November 2015, § 43; *MGN Limited v. the United Kingdom*, Appl. no. 39401/04, Judgment (merits) of 18 January 2011, § 142; *Sidabras and Džiautas v. Lithuania*, Appl. nos. 55480/00 and 59330/00, Judgment of 27 July 2004, § 49.

<sup>78</sup> CEDAW/C/GC/35

33. Furthermore, sexual harassment is a form of violence under international human rights law. The Istanbul Convention declares sexual harassment as violence against women, “recognising, with grave concern, that women and girls are often exposed to serious forms of violence such as...sexual harassment...which constitute a serious violation of the human rights of women and girls and a major obstacle to the achievement of equality between women and men.”<sup>79</sup> Foundationally, the Declaration on the Elimination of Violence against Women, the first universal international instrument that provided a definition of violence against women, included “sexual harassment and intimidation at work” as forms of violence in its article 2.<sup>80</sup>
34. When survivors of sexual harassment are discouraged from speaking out about their experiences, restricted in their expression of it, or discredited when they do come forward, violence against women, which includes acts of sexual harassment, persists and perpetrators enjoy impunity. Survivors in Georgia are often stigmatised, revictimised and discriminated against when they come forward about their sexual violence experiences, and barriers to freedom of expression mean delays in the prevention and eradication of violence against women. In order to effectively combat sexual violence and protect survivors, their right to freedom of expression must be viewed as fundamental, essential, and their speaking out about sexual harassment should be normalised.
35. Demonstrated by the Delhi High Court of India<sup>81</sup> in its recent defamation case discussed in para 8, the right to freedom of expression is inherently linked to a woman’s right to live a life free from gender-based violence. In this landmark case, the Judge stated that “sexual abuse, if committed against [a] woman, takes away her dignity and her self confidence” and when the woman speaks out about her sexual abuse experience and in turn makes an “attack on the character of [the] sex-abuser or offender” the woman’s expression is “self defence after the mental trauma suffered by the victim regarding the shame attached with the crime committed against her.”<sup>82</sup> While the accused, Ms. Priya Ramani, felt it was important to speak out about her personal experience of sexual violence not just for herself but for other women, the judge equated Ms. Ramani’s expression of her experience to self-defense. A self-defense that was not outweighed by the offender’s right to reputation.
36. In the case at hand, E.M. endured years of sexual harassment before coming forward. This is not unexpected as gender-based violence is under-reported in Georgia.<sup>83</sup> In particular, sexual harassment remains a prevalent form of sexual violence in Georgia. In 2017, UN Women, in partnership with GEOSTAT, conducted the National Study on Violence against Women in Georgia, which was the first comprehensive study in Georgia to explore sexual harassment.<sup>84</sup> This study found that 26 per cent of women have experienced sexual harassment or violence in Georgia,<sup>85</sup> of whom 10 per cent of women have reported experiencing it in the workplace.<sup>86</sup> As recently as 12 March 2021, it has been recorded by

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<sup>79</sup> Istanbul convention, preamble

<sup>80</sup> A/RES/48/104 - Declaration on the Elimination of Violence against Women - UN Documents: Gathering a body of global agreements (un-documents.net)

<sup>81</sup> The Court of Shri Ravindra Kumar Pandey, New Delhi, Mobashar Jawed Akbar v. Priya Ramani, 17 February 2021 (India)

<sup>82</sup> *Id.*, para 37, page 90

<sup>83</sup> CEDAW/C/GEO/CO/4-5, para 20(b)

<sup>84</sup> National Study on Violence Against Women in Georgia 2017, UN Women, < nationalstudyonviolenceagainstwomen2017.pdf >

<sup>85</sup> *Ibid*

<sup>86</sup> “Georgian Government advances prevention efforts on sexual harassment,” UN Women, 26 Sept 2019,

<https://georgia.unwomen.org/en/news/stories/2019/09/georgian-government-advances-prevention-efforts-on-sexual-harassment>

UN Women that workplace sexual harassment is experienced by one in every 10 women in Georgia. Tamar Sabedashvili, UN Women Country Representative ad interim in Georgia, reports that “Governments and employers have due responsibility to prevent sexual harassment and develop special procedures to eliminate sexual harassment and other forms of discrimination against women in the workplace. In this connection, we commend civil service organizations that have stepped up and adopted internal regulations on workplace sexual harassment contributing towards creating safe and more enabling working environments in the civil service.”<sup>87</sup> While strides have been made to address sexual harassment, more needs to be done to foster a culture that prevents sexual harassment from occurring, holds perpetrators, rather than victims, accountable, and uplifts the voices and experiences of survivors.

37. Therefore, if Georgia allows lawsuits, such as defamation, to be interpreted and wielded in a manner that restricts or prevents women from expressing their experiences of violence and discrimination, this will only serve as an additional barrier to access to justice for survivors and stifle the prevention of future violence. Georgia must ensure the protection of the voices of survivors just as fervently as it commits to combating violence against women.

**B. Defamation lawsuits that aim to silence survivors or retaliate against them are a form of gender-based violence and in direct violation of international law**

38. The Istanbul Convention specifically obligates Georgia to protect victims from “intimidation, retaliation and repeat victimisation.”<sup>88</sup> Furthermore, Article 17 of the ECHR explicitly states that “nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.” Similarly, the Anti-Discrimination Law of Georgia further obligates Georgia to protect women who seek remedy for the violation of their rights Article 12.1 as it states, “no person may be subject to any negative treatment or influence for submitting an application or a complaint to relevant bodies or for cooperating with them in order to protect himself/herself from discrimination.”<sup>89</sup>
39. The intent of these laws is to prevent the negative treatment of, revictimisation of, and retaliation against survivors who come forward to express the destruction of their rights and freedoms. These laws were enacted to protect survivors who speak out against the sexual harassment, just as E.M. did, and to prevent the current actions being taken by P.U. and unjustly condoned by the lower courts.
40. The defamation lawsuit filed by P.U. is a tactic of intimidation, retaliation, and negative treatment toward E.M. in response to her speaking out about the sexual harassment he committed against her. The defamation lawsuit itself and its intended outcome seek the destruction of E.M.’s right under the ECHR and undeniably subjects her to repeated secondary victimisation. For example, if E.M. is forced to appear on the same television outlet and publicly deny the facts, as the first and second instance

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<sup>87</sup>“Five more governmental organizations adopt internal anti-sexual harassment mechanisms,” UN Women, 12 March 2021, <https://georgia.unwomen.org/en/news/stories/2021/03/five-more-governmental-organizations-adopt-internal-anti-sexual-harassment-mechanisms>

<sup>88</sup> Istanbul Convention, Article 56.1.a

<sup>89</sup> Georgian Anti-Discrimination Law, Art. 12.1

courts' decisions require her to do, this is an example of revictimisation as she will not only have to re-live her experiences but will be forced to publicly minimize and discredit her own experience of sexual harassment, despite her experience having been affirmed by the PDO. Finally, it should not go unnoticed that P.U. 's filing of a defamation lawsuit in retaliation is not only a violation of internal law but also the perpetuation of gender based violence.

41. The Special Rapporteur on Violence Against Women, in a report on online violence, including sexual harassment, explains that the act of threatening survivors with legal proceedings in an attempt to prevent them from reporting their situation is another form of gender-based violence.<sup>90</sup> The Special Rapporteur on Violence Against Women cautions that the use of defamation lawsuits against women who speak out about their experiences “may form part of a pattern of domestic violence and abuse.”<sup>91</sup> To allow a defamation lawsuit to be used in this manner not only effectively muzzles the survivor as an advocate of her human rights (like it was effectively done by the decisions of the first instance court and the court of appeal in this case) but allows for the continued commission of gender-based violence and discrimination against the survivor, and, potentially, those that would be silenced by her treatment.
42. Courts in the USA have also found this to be true, finding that defamation suits like the instant one may constitute a form of retaliation against or a tool to silence survivors who speak out. For instance, in the United States, The Supreme Court of the State of New York, Appellate Division, First Judicial Department, in *Sagaille v. Carrega*<sup>92</sup> reasoned that defamation suits like the instant one may constitute a form of retaliation against those with the courage to speak out since most survivors cannot afford years of litigation, nor do they want to be retraumatized through the discovery or endure continued unwanted interaction with the person alleged to have assaulted them through the litigation process. The Court of Appeal of the State of California found in *Wentworth v. Hemenway*<sup>93</sup> that the plaintiff who filed a defamation lawsuit against a woman who accused him of sexual harassment brought the lawsuit to silence the defendant thus unduly interfering with her free speech rights on an important issue of public concern.
43. Defamation lawsuits filed against survivors of sexual violence are akin to “strategic lawsuits against public participation” (SLAPPs), a term applied to lawsuits filed by large corporations with substantial legal and financial resources against activists or journalists who often have a scarcity of both. Attorney Evan Mascagni, policy director at the Public Participation Project, an organization seeking to expand American anti-SLAPP protections, explains “the success of a SLAPP suit doesn’t depend on winning at trial — it comes from dragging an opponent through a costly, time-consuming legal battle and, making their ‘life a living hell.’”<sup>94</sup>

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<sup>90</sup> A/HRC/38/47 (n 31) para 31.

<sup>91</sup> *Id.*

<sup>92</sup> *Sagaille v. Carrega*, 2021 N.Y. Slip Op. 1369 (N.Y. App. Div. 2021), Index No. 154010/18 Appeal No. 13314 Case No. 2020-02369, 9 March 2021 (US) at Page 2, column 2, §3.

<sup>93</sup> Court of Appeal of State of California, *Wentworth v. Hemenway*, 5 June 2019 (US) at page 9, col.1 §1, and col 2, §2

<sup>94</sup> Could BC’s New Anti-SLAPP Law Help #MeToo Survivors? Legal experts say it remains to be seen, but south of the border, examples are emerging. The Tyee (May 2019), <https://thetyee.ca/News/2019/05/07/BC-Anti-SLAPP-Law/>

44. Professor of Law David B. Oppenheimer studied and examined cases of defamation from around the world<sup>95</sup> that were launched by men in response to women speaking out about their sexual harassment. He found that “defamation law has been weaponized to silence women who complain about sexual harassment, and others who report misconduct.” Rather than the law shielding women survivors, the law silences them. Oppenheimer also noted that “if the law fails to protect the right to speak out about abuses like sexual harassment and violence, those who benefit from unequal power will use that power to sustain inequality, including gender inequality.” Finally, Oppenheimer cautions that unless free speech protections are afforded to women survivors, then the cost will be grave and intolerable.<sup>96</sup>
45. Finally, a predominant characteristic of gender-based violence is the unequal power differential that exists between the offender and the survivor and it is this very same power differential that is exploited both in the commission of sexual harassment and the subsequent use of the law to silence or discredit the survivor. Defamation suits have been shown to have a chilling and prohibitive effect on public participation and conduct of free speech. Professor of Law Puja Kapai<sup>97</sup> of the University of Hong Kong notes “this demonstrates ... how male perpetrators feel empowered to use the full force of the law to threaten and muzzle their accusers, rare as it is to have them speak out.”<sup>98</sup>
46. In the instant case, the defamation lawsuit launched by P.U. against E.M. is not only retaliatory but it perpetuates gender-based violence by seeking to silence her and continuing to leverage the power disparity that exists between them. Evidenced by P.U.’s insistence that E.M. retract her statements on public television, the intent and impact of this defamation lawsuit is to muzzle and chill E.M. into silence and discredit her. The Supreme Court of Georgia should not ignore that P.U.’s actions were already established to be a form of sexual harassment by the PDO and the Court should not permit the practice of weaponizing defamation lawsuits to silence women who complain about sexual harassment. The consequence of such precedent is grave.

### **Conclusion**

For the reasons stated above, *amicus respectfully* requests that the Court grant E.M.’s complaint and exonerate her of the obligation to renounce publicly the harassment that she suffered. **Such a ruling will demonstrate that the Supreme Court of Georgia adheres to the European Convention and other human rights standards that Georgia is bound to.**

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<sup>95</sup> Professor of Law David B. Oppenheimer is a Clinical Professor of Law Faculty and Co-Director, Pro Bono Program Director, at the Berkeley Center on Comparative Equality and Anti-Discrimination Law. In his research, he examined cases of defamation from China, United Kingdom, France, Egypt, United States, Israel and Australia.

<sup>96</sup> David. B. Oppenheimer, *Defamation Law is Being Weaponized to Destroy the Global #MeToo Movement: Can Free Speech Protections Help Counter the Impact?*, Chapter 40.

<sup>97</sup> Professor Puja Kapai is Deputy Director and Fellow of the Centre for Comparative and Public Law, Deputy Director of the Summer Social Justice Institute, and Assistant Professor of Law at the University of Hong Kong. She is also a Visiting Research Fellow with the University of New South Wales, Australia.

<sup>98</sup> Puja Kapai, *#MeTOO as Catharsis for Hong Kong’s Child Sexual Abuse Victims: Confronting Cultures of Silence and Shame and Creating Conditions for Substantive Change*, chapter 26.