



# Comparative legal analysis of the European and American standard of freedom of expression – which is more effective and result-oriented?

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## ABSTRACT

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Freedom of expression is critical for a state with democratic principles. A democratic society cannot exist in the absence of freedom of expression. A high quality of freedom of speech, sanctioned by statute and executed, is required for a person to voice his critical view about current events in the country without interference from the authorities. The purpose of this study is to focus on freedom of expression as one of the most important democratic values in the world. The paper discusses and analyzes the European Court of Human Rights' practice in relation to freedom of expression. It is well known that the European Court of Human Rights grants signatory nations broad discretion in determining the level of interference with freedom of speech. The paper critically assessing the component of broad discretion that it grants to the Convention's signatory states. Parallel to the analysis, precedent law from the United States of America and the American model of freedom of expression are explored, which are also critically evaluated. Parallel to the consideration of the two most essential standards, emphasis is placed on the Georgian model of free expression, which indicates the work's worth. Following the adoption of the American model of free speech at the legislative level in Georgia, the evaluation, analysis, and dissemination of full information to the public will be of the highest relevance and value.

Finally, after the debate and analysis generated throughout the work, the essential discoveries are stated, and the author's viewpoint is stated.

## INTRODUCTION

Freedom of expression is a critical component that contributes to the evolution of society, the limiting of government arbitrariness, and the personal development of individuals.<sup>1</sup> The most essential point to be discussed in the article is Article 10 of the Convention. The research will concentrate on the meaning and significance of freedom of expression, as well as European and American standards. The most important judgements of the European Court of Human Rights and the Supreme Court of the United States will be examined. Following a study of European and American standards, emphasis will be placed on the Georgian standard of freedom of speech, which is equivalent to and consistent with American approaches.

According to the analysis offered in the publication it might be argued, based on the developed reasoning, that the Convention has not been a progressive mechanism for decreasing human rights violations, specifically infringements of freedom of expression.

### 1. THE EUROPEAN COURT OF HUMAN RIGHTS' STANDARD AND LEGAL PRACTICES

Freedom of expression has long been seen as a necessary and essential component of a democratic society.<sup>2</sup> In some circumstances, the state has the ability and responsibility to interfere in and restrict freedom of expression to preserve society's and individuals' interests.<sup>3</sup> Even in the most open and free societies, not all types of self-expressions are permitted.<sup>4</sup> However, All cases relat-

ed to the restriction of freedom of expression in court are aggravated from the very beginning by the presumption of unconstitutionality...The government has a heavy burden to justify the need for appropriate restrictions.<sup>5</sup>

Article 10 of the Convention excludes from the field of protection an insulting expression, "if it equates to malicious humiliation, when the sole purpose of an insulting statement is to insult".<sup>6,7,8</sup> It should be noted that Article 10 of the Convention protects: printed documents,<sup>9</sup> radio broadcasts,<sup>10</sup> pictures,<sup>11</sup> films,<sup>12</sup> and electronic information systems. Article 10 (2) of the Convention contains a thorough list of interests. There are no other reasonable justifications for curtailing freedom of expression.<sup>13</sup>

Without a doubt, when the standard for protecting freedom of expression is high, the individual's ethical independence is given a lot of weight. In this regard, the European and American conceptions of freedom of expression differ. Unlike the European standard, which examines the substance of the case and considers moral protection as one of the grounds for restricting freedom of expression, the American standard imposes a neutral restriction.

The European Court of Human Rights in the case of *Handyside v. The United Kingdom*<sup>14</sup> set the standard for freedom of expression. The Court stated in that case that "information" or "ideas" that are insulting, distressing, or disturbing to any State or people are also protected under Article 10

1 Decision of the Constitutional Court of Georgia on the case – Public Defender of Georgia v. Parliament of Georgia, №1 / 1/468, 11.04.2012.

2 The decision of the Constitutional Court of the Republic of Georgia on the case: "Georgian Young Lawyers Association and Zaal Tkeshelashvili, Nino Tkeshelashvili, Maia Shari-kadze, Nino Basiashvili, Vera Basiashvili and Lela Guramish-vili, against the Parliament of the Republic of Georgia [2002].

3 Guide on Article 10 of the European Convention on Human Rights, Freedom of Expression, Updated – 31 August 2020, Council of Europe/European Court of Human Rights, 2021.

4 Trager, Robert E., and Donna L. Dickerson, (1999) Freedom of Expression in the 21st Century, SAGE Publications, p. 111-112.

5 Constitutional Law, Cases, – Comments, – Questions: Lockhart, Kamisar, Choper, Shiffrin; American Casebook series, 1991.

6 Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary [2016] no 22947/13, ECHR, para 76.

7 Skalka v. Poland, [2003], no.43425/98 ECHR, para. 34.

8 Savva Terentyev v. Russia, [2018], no 10692/09, ECHR, para 68.

9 *Handyside v. The United Kingdom*, [1976] no. 5493/72, ECHR.

10 *Groppera Radio AG and Others v. Switzerland*, [1990] no. 10890/84, ECHR.

11 *Müller and others v. Switzerland*, [1988] no. 10737/84 ECHR.

12 *Otto Preminger Institute v. Austria*, [1994] no. 13470/87 ECHR.

13 Mendel T., A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights p. 38.

14 *Handyside v. The United Kingdom*, [1976] no. 5493/72, ECHR.

(2) of the Convention.<sup>15</sup> The standard set by the European Court in the Handyside case still applies today. Interesting cases in this regard are: *Lingens v. Austria*,<sup>16</sup> *Castells v. Spain*,<sup>17</sup> *Oberschlick v. Austria*<sup>18</sup> and *Gachechiladze v. Georgia*.<sup>19</sup> Harris, Boyle, and Warbrick, well-known experts in European human rights law, argue that freedom of expression is critical to upholding the rights guaranteed in the Convention.<sup>20</sup> The court in the Handyside case regarded the publisher's actions as a "intervention by the state with freedom of expression." However, it thought that such intervention was important in a democratic society for moral protection and teenage moral development.<sup>21</sup> In the case of Handyside, the Court underlines that article 10 protects offensive expressions as well. In the case of *Sekmadienis Ltd. v. Lithuania*, however, the Court's explanation demonstrates that the Court considers the purpose of expression when assessing freedom of expression, explaining that insulting expression is protected under Article 10 (2) of the Convention if it was intended to contribute to a public debate,<sup>22</sup> and in the case of *Murat Vural v. Turkey*, The European Court of Human Rights takes into account the nature of the expression, the intention, and purpose of the author, when assessing abusive expression.<sup>23</sup>

*Müller and others v. Switzerland* concerned the punishment of an artist by a municipal government for displaying vulgar images. The Court stressed the necessity of respecting the national legislature's views on the procedures that must be taken to protect morals and ethics. The court has found no evidence of a breach of Article 10.<sup>24</sup>

In the case of *Otto Preminger Institute v. Austria*,<sup>25</sup> the court entirely agreed with the Austrian

court's assessment of the need to restrict freedom of expression in the grounds of respect for religious belief. "The democracy of the society would be destroyed if offensive attacks on religious groups were allowed,"<sup>26</sup> the justices said.

*Wingrove v. the United Kingdom* is a case that deals with religious morality. The screenplay was written by Nigel Wingrove, who also filmed an 18-minute video based on it. St. Teresa, who had great ecstatic visions of Jesus Christ, was the subject of the film. The film failed to get certification because it would upset parishioners. The European Court agreed with the respondent State's position and found that the restriction on freedom of expression was justifiable.<sup>27</sup>

The case of *M. Rommelfanger v. FRG* deserves special attention. The candidate worked as a doctor at the Roman Catholic Church's Foundation Hospital. The applicant and the other doctors signed a letter. The doctors who signed the letter thought that women should be allowed to undergo abortions. The doctor was fired by the hospital. The reason stated was a person's public expression of beliefs that were contrary to the Church's values. The European Commission of Human Rights determined that there was no interference with freedom of expression.<sup>28</sup>

The position of the European Court of Human Rights in the cases discussed above should not be shared. All five of the above-mentioned cases illustrate that the Court of Human Rights, in the area of morality, including religious morality and ethics, grants a wide area of freedom of assessment to nation-states and pays great attention to their valuation. It's worth noting that the European Court's viewpoint has detractors, who frequently appear to be the authors of dissenting views on crucial judgements. Giving States such a wide range of moral judgment flexibility would, in their opinion, make it impossible for the Court to determine a breach of Article 10. In his dissenting opinion, former European Court Judge Spielman, who disagreed with the court's decision in Müller's case,

15 Handyside v. The United Kingdom, [1976] no. 5493/72, ECHR, para 49.

16 Lingens v. Austria, [1986] no. 9815/82, ECHR.

17 Castells v. Spain, [1992] no. 11798/85, ECHR.

18 Oberschlick v. Austria [1997] no. 20834/92, ECHR.

19 Gachechiladze v. Georgia [2021] no. 2591/19, ECHR.

20 Harris D.G., O'Boyle M., Warbrick C, (1995). Law of the European Convention on Human Rights, Butterworths, London, Dublin, Edinburgh, pg. 372.

21 Handyside v. The United Kingdom, [1976] no. 5493/72, ECHR.

22 Sekmadienis Ltd. V. Lithuania, [2018] no. 69317/14, ECHR, para 77–81.

23 Murat Vural v. Turkey, [2014] no. 9540/07, ECHR, para 54.

24 Müller and others v. Switzerland, [1988] no. 10737/84 ECHR.

25 Otto Preminger Institute v. Austria, [1994] no. 13470/87 ECHR.

26 Lawson R.A and Schermers H.G., (1999). Leading Cases of the European Court of Human Rights, second edition, p. 573.

27 Wingrove v. the United Kingdom, [1996] no. 17419/90 ECHR.

28 Maximilian Rommelfanger v. Federal Republic of Germany [1989] no. 12242/86, EHRR.

said that nation-states should consider the value of freedom of expression. The European Court should not have jeopardized its role as a guardian over this fundamental right in a free and democratic society.<sup>29</sup> Judge Spielman's opinion should be shared, because free speech includes not only opinions or expressions that are positively perceived by the entire society or even a big part of it, but also ideas, thoughts, or expressions that are unacceptable to the government, shocking to a portion of the society, or certain people. Freedom of expression cannot be curtailed by legislation just because we disagree, are afraid, dislike it, or believe it is incompatible with societal morals or traditions.<sup>30</sup> That is why Article 10 is not the appropriate protection mechanism for free expression; it does not meet the criteria enshrined in Amendment 1 to the United States Constitution.<sup>31</sup>

## 2. THE US SUPREME COURT'S STANDARD AND LEGAL PRACTICES

The United States Constitution is the ultimate law of the country. Any exceptions to the first amendment have come straight from the United States Supreme Court.<sup>32</sup> The U.S Supreme Court has had longer legal and political experience in theorizing free speech values.<sup>33</sup> The First Amendment primarily enhances the intellectual capacity of the community.<sup>34</sup> The "obvious and real" danger test used by the US Supreme Court includes more

preconditions for protecting free expression than the European one.

### 2.1. Brandenburg v. Ohio

The "obvious and real" danger criterion was established as a standard in the case *Brandenburg v. Ohio*, and it is being used today. The freedom to self-expression is protected unless there is a very high chance of committing an illegal act or causing an obvious and real risk to the public interest, according to the case.<sup>35</sup>

*Brandenburg* was convicted under the Ohio Trade Unionism Act. The doctrine proposed in *Whitney v. California* was emphatically rejected by the Supreme Court in a majority ruling. In the judgement, the court outlined the most protective mechanisms of free expression.<sup>36</sup>

The *Brandenburg* test requires three factors for expression to be prohibited: a clear and unmistakable demand to break the law; expression that, by definition, asks for an immediate violation of the law; and a high chance that the call would result in an immediate breach of the law.<sup>37</sup>

According to the *Brandenburg* test, which is still in effect today, even the preaching of violence and hatred is protected by the First Amendment unless the elements are clearly recognized. In the *Brandenburg* case, the United States Supreme Court reversed a Ku Klux Klan member's criminal responsibility for syndicalism.<sup>38</sup>

### 2.2. Texas v. Johnson

*Texas v. Johnson* was a fascinating case in which the court said that insulting the American flag in any manner was protected by the First Amendment and

29 Müller and others v. Switzerland, [1988] no. 10737/84 ECHR.

30 Judgment of the Constitutional Court of Georgia in the case – Citizen of Georgia Yuri Vazagashvili v. Parliament of Georgia, №1 / 6 / 561,568, 30.09. 2016, para 50-51.

31 The First Amendment: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

32 Trager, Robert E., and Donna L. Dickerson, (1999). *Freedom of Expression in the 21st Century*, SAGE Publications, p. 95.

33 Braun, Stefan, (2004). *Democracy off Balance: Freedom of Expression and Hate Propaganda Law in Canada*, University of Toronto Press, p. 6.

34 Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America*, 1986.

35 Judgment of the Supreme Court of the United States in the case of *Brandenburg v. Ohio*, June 8, 1969, *Freedom of Expression*, Volume I, p. 17, 80, 181-183.

36 *Brandenburg v. Ohio*, 395 U.S. 444 (1969) <<https://supreme.justia.com/cases/federal/us/395/444/>> [Last Seen: 26 Jan, 2022].

37 Freedom Institute, *Freedom of Expression*, first volume "Freedom of Expression in the USA and Europe", Tbilisi, 2005, p. 80. [in Georgian].

38 Democratic Initiative of Georgia. *Hate speech (legal framework for Georgia)*. p. 8 <<https://www.gdi.ge/uploads/other/0/190.pdf>> [Last Seen: 27 Aug, 2022].

that restricting such expression was only permitted in the situation of "obvious and real danger." In the court judgment, Judge Brennan noted that the proper response to flag burning is to raise the flag. Because freedom of speech is guaranteed, punishing someone for burning a flag is unjustified.<sup>39</sup>

In 1984, he organized a protest in Dallas against President Ronald Reagan's policies and the actions of Dallas corporations. Gregory Johnson was arrested and sentenced to two years in jail and a \$2,000 fine after burning an American flag in front of Dallas City Hall during a protest.<sup>40</sup> The Texas Supreme Court reversed the decision following an ongoing review, ruling that flag burning was expressive expression allowed under the US First Amendment. The decision was appealed to the United States Supreme Court, which agreed with the arguments of the Texas state court while further clarifying the content of expressiveness of speech.<sup>41</sup>

"To penalize Johnson for burning the flag is to condemn him for the political protest he tried to convey by burning the flag," the court stated. Even the national flag, an essential symbol of statehood, cannot be placed above freedom of expression.

The US Supreme Court supported the Texas Supreme Court's ruling, finding that criminalizing Johnson violated the US Constitution's First Amendment. With this judgement, the court reminded the public that "the role of free speech is to encourage debate." When this function provokes excitement, anger, and rage, it can reach its highest goal.<sup>42</sup>

### 2.3. United States v. Eichman

A case with a similar problem is United States v. Eichman, in which the United States Supreme Court

restated the position it made in Texas v. Johnson.<sup>43</sup>

The Johnson case ruling was met with harsh political criticism. President Bush stated that the court failed in its ruling and that the statute needs to be amended to safeguard the state flag.

Congress enacted a legislation in 1989 making it unlawful to knowingly destroy, burn, place on the ground or floor, or step on the American flag. Texas v. Johnson was considered by Justices Brennan, Kennedy, and Scalia of the US Supreme Court, and President Bush had faith that they would reverse course and maintain the legislation.<sup>44</sup>

Again, a number of social groups protested the passing of the Flag Protection Act. At a demonstration in Seattle, four individuals were arrested, while in Washington, D.C., Johnson and other activists burnt the American flag in front of reporters outside the Congress building. Eikhman was taken into custody by police as a demonstrator. The court ruled that the detention of the specified persons was illegal after citing the ruling in Texas v. Johnson.<sup>45</sup>

The government filed an appeal of both judgments with the Supreme Court, leading to the filing of the case as United States v. Eichmann.<sup>46</sup> The judges did not alter the accepted procedure. Because the Flag Protection Act was designed to restrict speech and ideas, it was ruled to be unconstitutional. We find the following in the decision's text: "Because no one would be interested in the fate of a straightforward piece of flag that any individual is allowed to own, the underlying goal of the Flag Protection Act is to restrict communication and ideas. This action was probably meant to be used as a form of punishment for flag burning."<sup>47</sup> "Government has no right to censor the expression of any concept just because it offends or inconveniences the general population."

39 Judgment of the Supreme Court of the United States in the case of Texas v. Johnson, June 21, 1989. Freedom of Expression, Volume I, p. 71, 238-241.

40 Facts and case summary for Texas v. Johnson, 491 U.S. 397 (1989). <<https://www.uscourts.gov/educational-resources/educational-activities/facts-and-case-summary-texas-v-johnson#:~:text=Gregory%20Lee%20Johnson%20burned%20an,policies%20of%20President%20Ronald%20Reagan>> [Last Seen: 27 Aug, 2022]

41 Kublashvili K, (2020). Basic Human Rights and Freedoms, Tbilisi, p. 210-211. [in Georgian].

42 Kublashvili K, (2020). Basic human rights and freedoms, Tbilisi, p. 210-211 [in Georgian].

43 United States v. Eichman [1990].

44 Freedom Institute, Freedom of Expression, first volume "Freedom of Expression in the USA and Europe", Tbilisi, 2005, p. 71 [in Georgian].

45 Kublashvili K., (2020). Basic human rights and freedoms, Tbilisi, p. 211-213 [in Georgian].

46 United States v. Eichman. (n.d.). Oyez. <<https://www.oyez.org/cases/1989/89-1433>> [Last Seen: 6 May, 2022].

47 Kublashvili K., (2020). Basic human rights and freedoms, Tbilisi, p. 211-213 [in Georgian].

## 2.4. Street v. New York

The relationship between flag burning and freedom of expression has also been discussed by the US Supreme Court in older cases: *Halter v. Nebraska*<sup>48</sup> and *Street v. New York*.<sup>49</sup>

In 1969, the US Supreme Court made this ruling. Street ran outside, burnt an American flag, and declared aloud, "We don't need a damn flag if they treat Meredith (the killed civil activist) like that." Street had just learned of the death of one of the civil activists. The stated person was accused of violating the New York Penal Code, which imposes penalties for disrespecting the American flag by words or deeds.

The court ignored the fact that Street actually burned the flag, focusing instead on whether it was constitutional to hold him accountable for his remarks. The court's rationale is intriguing despite the fact that the case was only superficially examined and only the uttered phrase, not the direct action, was analyzed. The question of whether there was a state interest in restricting free speech was examined by the Supreme Court. Attention was given to a number of crucial factors during the debating process, the mere existence of which would be sufficient to restrict Street's right to free speech.

The judges noted in the decision: "1. A person can be restricted if he incites others to commit an illegal act. No one incited Street to commit an illegal act. He only pointed out that they did not need the American flag, 2. Freedom of expression will be limited when the words uttered by a person cause controversy among those around him, which disturbs the peace and public order. Street's words did not constitute "argumentative words." The developed reasoning proved to be enough to make a valid decision. The majority of judges considered that: "The court cannot support criminal liability based on restriction of expression. No matter how tasteless such expression is, it is protected by the Constitution."<sup>50</sup>

The decisions discussed in the paper, which were resolved by the US Supreme Court, set a high

threshold for freedom of expression. In contrast to the European Court of Human Rights, the American standard norm imposes a neutral restriction; analyzing the content and referring to morality are not important to it. As a result, the American standard for freedom of expression is higher than the European standard.

## 3. GEORGIAN STANDARD OF FREEDOM OF EXPRESSION

The first sentence of Georgia's current Constitution's Article 17 states: "Freedom of thought and its expression is safeguarded. Persecuting someone for having an opinion and expressing it is forbidden. The Georgia legislation on freedom of speech and expression states, in addition to the Constitution, that "the state respects and safeguards freedom of speech and expression as inherent and ultimate human values. These rights and freedoms serve as direct applicable legislation that places restrictions on both the people and the state in the exercise of governance."<sup>51</sup>

To express an opinion, it must be disseminated. This can be done verbally, in writing, or by any other methods, including symbolic expression, which is referred to as freedom of positive opinion.<sup>52</sup>

Symbolic expression is acknowledged as one of the modes of expression and one of the effective means of idea transmission. Press conferences are less likely to generate media and public interest than flag burning. Communicative action is referred to as expressive action or symbolic expression. Of course, the Georgian Constitution and the Georgian Law on Freedom of Speech and Expression guarantee symbolic communication as well as other kinds of expression.

It is clear that the right to freedom of speech and expression is not absolute, and there are legitimate reasons to restrict it. According to Article 8 of the Statute of Georgia, a foreseen, specifically targeted law may restrict the limitation of the designated right. The legislation that restricts this freedom must be non-discriminatory, appropriate-

48 *Halter v. Nebraska* [1907].

49 *Street v. New York* [1969].

50 *Street v. New York*. 394 U.S. 576 (1969). <[https://scholar.google.com/scholar\\_case?case=6391101560513832626&q=street+v.+new+york&hl=en&as\\_sdt=2006&as\\_vis=1](https://scholar.google.com/scholar_case?case=6391101560513832626&q=street+v.+new+york&hl=en&as_sdt=2006&as_vis=1)> [Last Seen: 27 Aug, 2022].

51 Law of Georgia on Freedom of Speech and Expression, Article 3 [in Georgian].

52 Kublashvili K., (2020) Basic human rights and freedoms, Tbilisi, p. 182 [in Georgian].

ly restrictive, directly oriented at the accomplishment of legal objectives, and critically important for the survival of a democratic society. In addition to this provision, Article 17 of the Constitution, paragraph 5, also outlines the circumstances in which this right may be restricted.

## CONCLUSION

From the discussion above, it can be concluded that, the American model of freedom of expression imposes a higher standard of protection than the European Convention on Human Rights. The standard of the European Convention on Human Rights allows the assessment of the content of freedom of expression, whereas American model imposes a restriction on freedom of expression only if its intention is to provoke an unlawful act and there is a high probability that such action will take place ("Brandenburg test"). The neutral regulation of freedom of expression that has been established

in America is the best safeguard mechanism that any legislator in the world has ever created. Therefore, the standard set by the European Court of Human Rights must be refined and brought in line with the American one.

Based on what has been discussed, we can conclude that the Georgian model protects freedom of speech and expression more than any European nation's constitution or legal system. However, even though the Georgian standard is close to the American standard, it cannot be on par with it in terms of quality because the model created by American precedent law is flawless.

This essay reinforces the idea that the standard of Article 10 of the Convention is not as progressive as the American one. Moreover, the Georgian model is more progressive and result-oriented than the standard established by the European Court of Human Rights.

That is why, the existing regulation needs to be refined to protect the right to freedom of expression more effectively.

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