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(VENICE COMMISSION)

AMICUS CURIAE BRIEF

FOR THE CONSTITUTIONAL COURT OF GEORGIA

ON THE QUESTION OF THE DEFAMATION OF THE DECEASED

**Adopted by the Venice Commission
at its 101st Plenary Session
(Venice, 12-13 December 2014)**

On the basis of comments by

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I. Introduction and background information

1. On 27 September 2014 the Constitutional Court of Georgia requested the Venice Commission to provide an *amicus curiae* brief in relation to a pending case.

2. The case concerns Article 6 of the Georgian law “On the Freedom of Speech and Expression” (hereinafter – “the Georgian law on the freedom of speech”) which provides that one cannot defend in court the reputation of his or her deceased relative¹. The case was brought by Mr V., whose son had been shot by the police in 2006. In 2013 a State official declared publicly that the police had used firearms because Mr V.’s son had been armed and ready to kill. Mr V. felt offended by that statement and sued the State official who had made it, seeking the rebuttal of that information. However, the courts referring to Article 6 of the law on the freedom of speech refused to consider that claim on the merits. Mr V. brought proceedings before the Constitutional Court of Georgia maintaining that Article 6 is contrary to Articles 17 and 42 of the Georgian Constitution which protect honor, dignity and guarantee judicial protection of rights and freedoms².

3. Having accepted the case for examination, the Georgian Constitutional Court addressed to the Venice Commission a request for an *amicus curiae* brief and put before the Commission the following two questions:

- Do deceased persons have a right to dignity?
- If so, which legal subjects should have the right to sue for defamation on behalf of a deceased?

4. Mr Huseynov, Mr Medina and Ms Thorgeirsdóttir acted as rapporteurs on this issue.

5. The present *amicus curiae* brief, which was drafted on the basis of comments by the rapporteurs, was adopted by the Venice Commission at its 101st Plenary Session (Venice, 12-13 December 2014).

II. Scope

6. The case pending before the Constitutional Court is about the reputation of Mr V.’s son. This term – “reputation” – does not lend itself to a precise definition. As it will be shown below, the right to “reputation” is often derived from or related to more general concepts of “privacy”, “dignity”, “honour”, “personality” etc. However, different jurisdictions have diverse views on the interrelation between those concepts, and international standards in this sphere are still evolving.

7. In order to restrict the scope of the present opinion, the Venice Commission will concentrate on the situations which are similar to Mr V.’s case, namely on verbal and written attacks on the reputation *per se*, i.e. on the good name of a person in the society³. They are sometimes called “defamatory statements”, i.e. those which tend to lower the person in the eyes of right-thinking people. Furthermore, the brief will focus on situations where the defamatory statement was made *after* the death of the person concerned (in order to distinguish with cases where the defamed person brought a defamation claim but died mid-process).

¹ Article 6, section 4 of the Law on the Freedom of Speech and Expression reads as follows: “A court dispute on defamation cannot be initiated on the private non-property rights of a deceased person [...]”.

² Article 17 of the Constitution of Georgia proclaims that “honour and dignity of an individual is inviolable”. Article 42 of the Constitution states that “everyone has the right to apply to a court for the protection of his/her rights and freedoms”.

³ The request, as it is formulated, speaks of “dignity” of the deceased person, but from the context it is clear that the question concerns reputational aspects of “dignity”, i.e. the good name of the deceased.

8. This brief will not touch on other aspects of privacy and dignity. Thus, it will not discuss the protection of information of a private, intimate character (medical records, paternity issues etc.). Rules regulating that aspect of privacy are too specific and irrelevant for the case now pending before the Georgian Constitutional Court.

9. Equally, the opinion will not examine business aspects of the reputation of the deceased. It appears that the Georgian law on the freedom of speech does not deny the right to defend in court commercialized, and thus inheritable, aspects of the deceased's reputation. Uses of the name, image, signature or persona of a celebrity without permission or compensation (i.e. a commercial exploitation) are also outside the scope of this report.

10. Furthermore, the opinion will not touch upon situations where the plaintiff in the defamation claim may show convincingly that his/her own reputation is directly and primarily affected. These are cases where the impugned statement negatively characterizes the plaintiff him/herself, his or her own acts, words and attitudes. The focus of our attention will be on cases where the statement would be detrimental *essentially* to the reputation of the deceased person, and where the plaintiff's reputation as an independent and responsible member of the society has not suffered⁴.

11. Finally, the Venice Commission will not address specific facts of the present case. Whereas the Venice Commission is competent to evaluate the Georgian law on the freedom of speech in matters of international law and, in particular, European standards, the Constitutional Court has the final say as regards the binding interpretation of the Constitution and the compatibility of national legislation with it. The Venice Commission recalls that the interpretation of the Constitution by the Constitutional Court is binding on all national institutions from the administrative, judicial and legislative branches, which are obliged to respect it and adhere to it.

III. Analysis

12. In a nut shell, the position presented here is that while it is constitutionally *permissible* to protect posthumous personality rights, legislatures and national courts enjoy a rather wide margin of appreciation in determining whether, and in what way, to protect such rights by recognizing a cause of action.

1. Reputation of a living person as a human right

13. At the international level "honour and reputation" are regarded as a human right. Article 17 of the International Covenant on Civil and Political Rights (ICCPR) explicitly protects "honour and reputation," which are distinct from "privacy"⁵.

14. "Reputation" is not directly mentioned in Article 8 of the European Convention on Human Rights (ECHR). Yet, the Convention provides for the protection of reputation, in particular, by referring to reputation as one of the legitimate aims that might justify interference with freedom of expression (Article 10). The European Union Charter of Fundamental Rights proclaims "human dignity" as a cornerstone guarantee in its Article 1; it also speaks of "private life" (Article 7); however, "reputation" is not mentioned explicitly in its text as a separate right.

15. The European Court of Human Rights (ECtHR) has acknowledged that Article 8 protects one's reputation against defamatory statements, at least of a certain level of gravity, and that

⁴ In some cultures "family pride" plays a very important role. In such contexts every statement can be construed extensively and a link can be drawn between, for example, the reputation of a father and the social esteem enjoyed by his son. However, the Commission will depart from a more individualistic understanding of "reputation" which seems to dominate in the modern world.

⁵ Similarly, Article 11 of the American Convention on Human Rights prohibits "unlawful attacks on honour or reputation".

such publications interfere with a person's right to private life⁶. In the *Pfeiffer* case against Austria⁷ a journalist, who had been accused of driving a person to commit suicide (as a result of the journalist's harsh criticism of that person's Nazi views), claimed that the domestic courts had failed to protect his reputation. The ECtHR held that reputation is encompassed by Article 8 as being part of the right to respect for private life and that states have a positive obligation to achieve a fair balance of protection of reputation and freedom of expression.

16. What sort of defamatory statements amounts to an interference with the "private life" is discussed in the Court's case-law. Thus, in the case of *Karakó v. Hungary*⁸ the Court held that the Convention protects, through Article 8, "core" aspects of one's reputation; it gives protection from "factual allegations [...] of such a seriously offensive nature that their publication had an inevitable direct effect on the applicant's private life" and not merely on "the external evaluation of the individual"⁹. Whatever this "threshold" may be, it is clear that the ECtHR recognizes the right to "reputation" and derives it from the concept of private life.

17. At the national level "reputation" is often construed as an aspect of "human dignity" guaranteed by some of the European constitutions. For example, human dignity is the foremost right in the 1949 German Constitution (*die Würde des Menschen*). This seems to be the case according to the Georgian Constitution, where "honour and dignity of an individual is inviolable" (Article 17). In many countries human dignity has become an important conceptual tool for human rights and democracy and plays an important role in any human rights discourse, although there is no common definition of what dignity requires across jurisdictions¹⁰.

18. This brief is based on the premise, which is not discussed in detail, that living persons do have a right not to be subject to defamatory public statements, based on the rights to "private life" or "dignity". The question that is to be discussed here is whether (and to what extent) the right to reputation survives *after death*.

2. The need to balance the reputation interest and the freedom of speech: rules to be applied when the speech concerns public figures and matters of general interest

19. The scope of the State's positive obligation to protect the reputation (be it a reputation of a living person or of a deceased) should be based not only on evaluating the reputation interests, but also with reference to the possible effect of imposing such positive obligation on the *freedom of speech*. Thus, before addressing the narrow question of protection of interests of a deceased, we must recall certain general principles which have to be applied to the assessment of permissibility of any speech under Article 10 of the ECHR. These principles should serve as a bottom line if the States decide to give protection to the reputation of the deceased.

20. The obligation to respect freedom of expression and opinion as a cornerstone right in every democratic society is binding on all member states of the Council of Europe, as well as parties to the ICCPR. Freedom of expression as protected under Article 10 of the ECHR and Article 19 of the ICCPR is an indispensable condition essential for the self-development of each individual. It is the lifeblood of democratic society, crucial for the protection of all other human rights.

⁶ See, e.g., *Puliukienė and Pauliukas v. Lithuania*, no. 18310/06, 5 November 2013, § 44: "[I]n order for Article 8 to come into play, the attack on personal honour and reputation must attain a certain level of gravity and in a manner causing prejudice to personal enjoyment of the right to respect for private life".

⁷ *Pfeifer v. Austria*, no. 12556/03, 15 February 2008, § 35

⁸ *Karakó v. Hungary*, no. 39311/05, 28 April 2009

⁹ See also *A. v. Norway*, no. 28070/06, § 64, 9 April 2009

¹⁰ See: Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, The European Journal of International Law Vol. 19 no. 4; <http://ejil.org/pdfs/19/4/1658.pdf>

21. Freedom of expression, opinion and information enables the public to hold authorities (in the widest sense of the word) accountable by realizing the principles of transparency and a wide, open, robust, public debate. Freedom of political speech is almost sacrosanct in the jurisprudence of the ECtHR where political speech covers a wide range of topics. For this reason the freedom of expression has special significance in relation to the media, the public watchdog¹¹; journalistic freedom covers possible recourse to a degree of exaggeration, or even provocation¹².

22. Freedom of expression under Article 10 ECHR is a qualified right and may be restricted under Article 10 § 2 *inter alia* “for the protection of the reputation and rights of others”. The protection of the reputation is the “legitimate aim” most frequently cited by national authorities for restricting freedom of expression. Although there are laws that allow the award of compensation if a person’s reputation has been damaged and even though such laws have the legitimate aim of protecting the reputation, their application must still be of *pressing need* in a democratic society.

23. Both the right to reputation and the freedom of expression are not absolute; nor are they in any hierarchical order, since they are of equal value¹³. So, the key issue should not be giving a priori preference to either right, but rather striking a fair balance between them whenever they may come into conflict. The question of which of the two legitimate interests will outweigh the other will depend on the context of a given case. Where free speech (guaranteed by Article 10 of the ECHR) comes into conflict with the right to private life (guaranteed by Article 8 thereof) the ECtHR has set forth the following main criteria for the balancing exercise:

- *Contribution to a debate of general interest.* The statements made in the course of a political debate as a fair comment on matters of public interest enjoy maximum protection under the Convention¹⁴. Very strong reasons are required to justify restrictions on political speech¹⁵. The penalization of a media outlet, publishers or journalists solely for being critical of the government or the political system espoused by the government can never be considered to be a necessary restriction of freedom of expression¹⁶;
- *The public status of the person subjected to criticism.* Someone who is active in the public domain must have a higher tolerance of criticism¹⁷. The limits of acceptable criticism are wider with regard to politicians acting in their public capacity¹⁸. Public figures are also those who are using public resources, are influential in the economic sector or play a role in public life¹⁹;
- *Prior conduct of the person who is the subject of criticism*²⁰. There should be a reasonable connection between known facts about the behavior, views, attitudes etc. of the person who is the subject of criticism and the negative opinion/value judgment about that person;
- *The truth defense* (where the speech contains factual statements);

¹¹ *Thorgeir Thorgeirson v. Iceland*, judgment of 25 June 1992, Series A no. 239, p. 27, § 63

¹² *De Haes and Gijssels v. Belgium*, judgment of 24 February 1997 (Reports 1997-I), § 46; *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, ECHR 1999-III, § 59

¹³ See Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe (PACE) on the right to privacy, § 11

¹⁴ *Jerusalem v. Austria*, no. 26958/95, § 40, ECHR 2001-II; compare with *Andreas Wabl v. Austria*, no. 24773/94, § 42, 21 March 2000, unreported

¹⁵ *Feldek v. Slovakia*, no. 29032/95, § 83, ECHR 2001-VIII

¹⁶ UN Human Rights Committee, General Comment No. 34, CCPR/C/GC/34, § 42

¹⁷ *Karman v. Russia*, no. 29372/02, § 36, 14 December 2006

¹⁸ *Jerusalem v. Austria*, cited above

¹⁹ See the facts of *Von Hannover v. Germany (no. 2)*, [GC], nos. 40660/08 and 60641/08, ECHR 2012; also quoting PACE Resolution 1165(1998) on the right to privacy, § 7

²⁰ *Lingens v. Austria*, 8 July 1986, § 43, Series A no. 103; *Oberschlick v. Austria (no. 1)*, judgment of 23 May 1991, Series A no. 204, § 63; *Jerusalem v. Austria*, cited above, § 42

- *Content, form and the consequences of the publication.* The mere fact that forms of expression are considered to be insulting is not sufficient to justify the imposition of penalties. However, the intensity of the speech and its effects on the reputation of the person concerned are a factor to be taken into account²¹.

This list is not exhaustive; in assessing whether the right balance between reputation interests and the freedom of speech has been struck, the Court assesses other relevant factors, for example, the *severity of the sanction* imposed on the author of the defamatory statement²². In the context of the present case the fact that it was the head of State or Government who made a statement, accusing hereby, allegedly falsely, the dead person of a serious crime, might be relevant to assess the impact (“consequences”) of the statement.

24. The ECtHR has provided that a careful distinction needs to be made between facts and value judgments/opinions. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof²³. Value judgments expressed in a political debate enjoy special protection. As to factual statements made in the course of a debate on matters of public interest, the rules developed in the Court’s case-law are designed to protect responsible journalism²⁴. The Court departs from an assumption that the duty of a journalist to verify facts should not be too cumbersome, and that the journalists who acted in good faith, professionally and in accordance with the ethics of journalism should be absolved from the obligation to prove the veracity of their factual statements beyond reasonable doubt²⁵. Of course, truth defense should be available to the journalists as well.

25. In sum, in the context of political journalism “freedom of expression” usually takes precedence over “reputation” interest of a public figure. If the State decides to give legal protection to the reputation of the deceased, it should follow the principles designed to protect free discussion about matters of general interest²⁶.

3. Three theories explaining why the reputation of a deceased person may be worth protection: interests of the deceased, interest of the society; interests of the relatives

26. The above is especially true in cases of posthumous defamation where the subject of criticism is a late historical figure whose feelings cannot be hurt anymore and whose personal “reputation interest” is quasi inexistent. Public and historical figures who have, with their decisions, had a huge impact on the lives of many cannot expect not to be criticized after their death. And, as a rule, the courtroom is not an appropriate forum for historical disputes.

27. However, defamatory statements about dead people are not limitless. There are at least three theories which explain why the State may legitimately curtail such publications.

²¹ See *Ruokanen and Others v. Finland*, no. 45130/06, § 52, 6 April 2010, where the defamatory statement concerned allegations of rape

²² See *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 59, ECHR 2007-..., *Radio France and Others v. France*, no. 53984/00, § 40, ECHR 2004-II; and *Rumyana Ivanova v. Bulgaria*, no. 36207/03, § 68, 14 February 2008

²³ *Lingens v. Austria*, cited above, § 46

²⁴ See in particular *Bladet Tromsø and Stensaas v. Norway*, cited above

²⁵ See the discussion on responsible journalism in *Bozhkov v. Bulgaria*, no. 3316/04, §§ 45 et seq., 19 April 2011.

²⁶ For further discussion on the ECtHR case-law dealing with the appropriate balance between freedom of expression and reputation see, e.g., *Axel Springer AG v. Germany* (Grand Chamber), no. 39954/08, 7 February 2012. This question has been recently examined by the Venice Commission, in CDL-AD(2013)024, *Opinion on the legislation pertaining to the protection against defamation of the Republic of Azerbaijan*, and CDL-AD(2013)038, *Opinion on the Legislation on Defamation in Italy*. For the discussion of the protection of freedom of expression under the ICCPR, see UN Human Rights Committee, General Comment No. 34, CCPR/C/GC/34, §§34, 47

a) A living person has interest that after his death his name is not tarnished

28. One possible theory is that human rights go beyond the end of life. Most living persons care about the way their body will be treated after the end of their life, what will happen to their reputation, and so forth. A person has a legitimate interest that his/her choices, reputation, secrecy of private matters, etc., will be respected after the end of life. Consequently, a practice of not respecting the memory of the dead and his/her choices *harms the living person*. Arguably, "it may be difficult to die in peace and dignity if one knows that one's reputation in the public memory and one's lifetime achievements can be destroyed without the possibility of defence"²⁷.

29. One may well argue that these concerns are irrational. But human rights are not limited to interests and beliefs that meet some strict rational test, as is evident, for instance, from the norms applicable in protecting freedom of religion. Indeed, almost any democratic system protects some interests and choices of the deceased. The most notable interest universally protected is the determination, in a will, of the material interests of the heirs of the deceased. Other notable protected interests include the right to make decisions about funerals, organ transplantation, and so forth. Personal interests of the author of a copyrighted work exist after the author's death. Thus, some interests transcend death.

30. An additional support to this position can be inferred from the case-law which recognizes, at least in principle, the right of the relatives of the deceased to continue proceedings that the deceased had started before his/her death²⁸. While this directly applies to instances in which the defamation case had been originally introduced *against* the deceased, the underlying rationale of recognizing the right of the heirs to continue the proceedings may suggest that certain rights (even non-pecuniary rights) do survive the death of the person who possesses them.

31. At the same time, the view that the deceased has a right to reputation raises several difficulties. For instance, in the context of expression which interferes with the deceased's reputation, one can only speculate what the interests of the living person were, had he/she known the relevant circumstances. It is inevitable in these cases to assign wide discretion to others, i.e. the deceased's relatives or the public, to determine if and how to act for the protection of the deceased's privacy or reputation. It thus makes questionable the idea that the one who is protected is the deceased rather than others.

32. The central difficulty is the concern that a persons' interest about his/her reputation after death bears an insufficient normative weight that can justify assigning to it a status of a human right or the recognition of a right to sue for defamation. Arguably, the interests of the living (in the current context their freedom of expression) should prevail over the reputation of the dead. Thus, it may well be argued that while living persons do have an interest about their reputation after death, this interest is not sufficiently important to justify curtailing the freedom of expression and thus to be recognized as a human right.

b) Defamatory statements are against the interest of the public to know the truth

33. A second possible theory to justify a cause of action in cases of defamation against the deceased is the inherent injustice of defamatory statements. There is a public interest in preventing an unjustified manipulation of the perception by people of the activities or positions of the relevant individual. This interest exists regardless of whether this individual is alive or dead, since what is at stake is the accuracy of the public's perception about the person and not that individual's or his/her relatives' feelings. In fact, according to this position, defamation

²⁷ Hannes Rosler, *Dignitarian Posthumous Personality Rights - An Analysis of U.S. and German Constitutional and Tort Law*, 26 BERKELEY J. INT'L L. 153, 188-189 (2008)

²⁸ See, e.g., *Dalban v. Romania*, no. 28114/95, § 39, 28 September 1999: "The applicant was convicted by the Romanian courts of libel through the press. [The] widow has a legitimate interest in obtaining a ruling that her late husband's conviction constituted a breach of the right to freedom of expression, on which he had relied in the Commission proceedings". It is not clear, though, whether the protected interest is that of the deceased or his widow.

against the deceased is a greater evil, since the dead cannot react to a publication by a counter-publication and the risk of unjustified harm to his/her reputation is greater than the risk of harm to the reputation of the living.

34. Based on this rationale, some democracies (for example, in Switzerland and Israel) deny a civil cause of action in the case of defamation against the deceased, but consider it as an offence²⁹. While the ECtHR expressed its concern about the criminalization of defamation, it did not rule out the permissibility of protecting the public interest through this measure: “[T]he dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media. Nevertheless it remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal law nature, intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith”³⁰. This approach may also justify allowing a private cause of action, as long as this measure is necessary to effectively deter defamatory publications against the deceased.

35. However, this approach raises considerable difficulties as well. Primarily, it is incompatible with a central premise of the doctrine of freedom of expression, according to which it is impermissible to interfere with this freedom for the purpose of preventing the proliferation of lies or public misconceptions. The State is not permitted to employ its powers, through either civil or criminal proceedings, to further what it views as the true reputation of a person, either alive or dead. The relatives of the deceased, as well as other interested people, are free to publicly respond to defamatory publications. More generally, the above approach runs against the basic liberal premise of the “harm principle”³¹, which narrows the protected interests in the context of defamation to the prevention of direct harm to the individual.

c) Protection of the interests of the deceased’s relatives

36. The most prevalent justification for allowing a cause of action in the current context is the possible adverse effect of defamatory statements against the deceased on his/her living relatives³². It is a position which acknowledges the potential for defamatory material to cause distress and a sense of injustice for relatives and associates of the deceased, as a “secondary damage”. This approach avoids the complicated issues that result from recognizing human rights to the dead. The suit would thus not be filed by the relatives as heirs of the deceased or on his/her behalf, but based on the relatives’ own interests. Accordingly, under this approach it is essential to prove not only the defamatory nature of the statement and its adverse effect on the deceased’s reputation, but also the *actual harm* to the relatives, caused by the defamation. This requirement substantially limits the scope of protection afforded to the deceased’s reputation, and in practice almost nullifies it; at the same time, when a defamation is proved, applying this approach may allow for the remedy of damages.

37. This theory also has its drawbacks. Expanding the cause of action to others is hardly compatible with the general norm of denying the relevance of emotional harm to third parties in defamatory publications against the living³³. The concern is that such an expansion might unjustifiably restrict freedom of speech. In addition, if emotional harm to third parties is relevant, it is hard to provide principled reasons to restrict this cause of action to the relatives while completely denying it from other interested persons (for example *de facto* partners), a concern that may raise complaints about discrimination. Thus, the introduction of the idea of “secondary damage” as a basis for a cause of action in the current context might result in either an

²⁹ In both countries, however, the right to file a complaint is granted only to the deceased’s family members.

³⁰ *Castells v. Spain*, no. 11798/85, § 46, 23 April 1992; see also UN Human Rights Committee, General Comment No. 34, CCPR/C/GC/34, § 47

³¹ According to this principle, identified with the writings of John Stuart Mill’s *On Liberty* (1859), freedom of speech can be curtailed only for the prevention of a direct violation of other person’s rights, that is for the protection against illegitimate harm the publication might cause.

³² <http://www.rightsofwriters.com/2011/01/can-you-be-sued-for-libeling-dead-john.html>

³³ In other words, if we consider that an attack on A’s reputation may cause emotional distress to B, his relative, when A is dead, why can it not cause suffering to B when A is still alive?

infringement of the right to equality, if the cause of action is awarded to a predefined, limited set of people formally related to the deceased, or a risk of a substantial “chilling effect” on would-be speakers (journalists, publishers etc.), due to the expansion of standing to every person who argues the defamation adversely affected his/her interests.

4. A comparative overview: protection of the reputation of the deceased is a common but not universally accepted legal phenomenon

a) Common law countries

38. Most common law countries, including England, United States³⁴, Scotland, Australia, New Zealand and others³⁵ typically deny a cause of action for relatives of the deceased. Interestingly, Georgia appears to be the only civil law country in Europe that, similar to common law systems, follows the rule of *actio personalis moritur cum persona*. The underlying idea is that given the importance of freedom of expression, speech should be limited only in those instances in which it directly harms the reputation of the living. Arguably, a cause of action should be awarded only to the person whose reputation was directly affected. A plaintiff cannot go around the rule that the dead cannot be (legally) defamed by restyling the claim as one for infliction of emotional distress upon the surviving family members or invasion of privacy³⁶.

39. Here is an example from a common law jurisdiction: a case brought against Charles Higham, a writer who wrote a biography of Errol Flynn and claimed that the latter had been a Nazi spy. Flynn’s daughters sued for defamation unsuccessfully. The California appeals court, in upholding the dismissal of the case, reaffirmed that defamation of a deceased person does not give rise to a civil right of action at common law in favour of the surviving spouse, family or relatives, who are not themselves defamed³⁷.

40. That being said, even in the common-law jurisdictions there are voices calling for review of the old rule that the dead cannot be defamed. The issue of the right to protect the reputation of the deceased remains contentious in the United Kingdom. After the death of Margaret Thatcher - an undeniably public figure - extreme reactions in contempt evoked the question whether some of them could be unlawful and actionable by her estate³⁸.

41. The House of Commons in the United Kingdom rejected in 2012 an attempt to amend the Defamation Bill so as to allow a dead person’s spouse or partner, relatives, siblings or offspring to sue the publisher of an article they considered defamatory up to 12 months after the death. The attempt to amend the law was motivated by the struggle of Margaret and James Watson, who have been campaigning in Scotland for a change in the law after the publication of allegedly defamatory stories about their murdered daughter, Diane, who had been stabbed to death. It is reported that the Watson’s other child, 16-year-old Alan took his life after reading an article, which alleged his sister had been a bully.

³⁴ See *Gonzales v, Times Herald Tribune Printing Co.*, 513 S.W. 2d 124, 125 (Tex. Civ. App. 1974): “Defamation of a deceased person does not give rise to a right of action at common law in favor of the surviving spouse, family, or relatives who are not defamed”. There are several states in the US, including Colorado, Nevada, Texas and Utah that recognize by statute a cause of action for “blackening the name of the dead”. However, one of these statutes, in Nevada, was declared unconstitutional (see *Nevada Press Association v. del Papa*, CV-S-98-00991-JBR (1998)). However, it appears that such legislation has never been the basis for a successful legal action.

³⁵ See John G. Fleming, *Law of Torts* 741 (9th ed. 1998); Robert Sack, *Sack on Defamation*, § 2.10.1 (4th ed., 2014); Gotz Bottner, *Protection of the Honour of Deceased Persons - A Comparison between the German and the Australian Legal Situations*, 13 BOND L. REV. 109 (2001)

³⁶ That being said, libelling the dead appears to be a crime in several States in the US: <http://antidefamationlegacylawadvocates.org/2013/03/14/criminal-statutes-regarding-defamation-of-the-deceased/>. Again, constitutionality of those provisions remains uncertain and most of those statutes apparently have never been put into practice.

³⁷ *Flynn v. Higham*, 149 Cal.App.3d 677 (1983); Restatement (second) of torts, § 560 (1977): “One who publishes defamatory matter concerning a deceased person is not liable either to the estate of the person or to his descendants or relatives”.

³⁸ <https://inform.wordpress.com/2013/04/24/reputation-and-baroness-thatcher-deceased-dominic-crossley-and-aimee-stevens/>

42. Although the bill was finally rejected, it is interesting to look at the arguments of those who supported it. The Watsons, and many others, are of the view that there is significant deficiency in the current UK and Scottish defamation legislation, which needs to be addressed. They claim that there is ample scope within section 2 of Article 10 of the ECHR to allow families to take civil defamation actions on behalf of the deceased in general with particular consideration being given to families of homicide victims. They reasoned that families of such victims cannot rebuild their family life when they “are forced to endure repeated erroneous publications being circulated in mass media about their deceased loved one”.

43. It is furthermore reasoned that the burden of proof would still lie with the claimant of defamation of the deceased action. Although obvious that the defender would not be able to cross-examine the deceased victim in person, the defender would be able to question the family of the deceased on their evidence and on the authenticity of any documented evidence put before the court. It is also reasoned that evidence withstanding close scrutiny is needed to take such action.

44. Furthermore, in the above cases it is suggested that the claimant should not seek damages albeit requesting compensation of the legal expenses incurred by him/herself. The category of relevant party to bring an action should only be the immediate family. The campaigners also consider that it should be possible to obtain an interdict preventing the publication. The proponents of the amendments are also of the opinion that there should be no restrictions on how long after the death of the allegedly defamed person an action could be brought³⁹.

b) Continental systems

45. In many countries belonging to the continental tradition the approach is different and the reputation of the deceased is deemed worthy of protection. Among those countries are France, Germany, Belarus and Russia, as well as Slovenia, Malta and Ukraine⁴⁰. This is also the situation in China⁴¹.

46. Article 240 of the Icelandic Penal Code provides that in case defamation is directed against a deceased person, this will be subject to fines or imprisonment for up to 1 year. On the basis of the aforementioned provision and Article 25 (3) of the Penal Code, if an act committed against a deceased person is punishable, the husband or wife of the deceased, his or her parents, children, adopted children, grandchildren and siblings are entitled to initiate litigation or request official prosecution⁴². In a case where a defamatory insult or allegation had been directed against a person who had been a civil servant and had deceased the Icelandic Supreme Court confirmed that his children could demand an official indictment even though the defamed individual was dead⁴³.

47. The continental approach to the protection of the reputation of the deceased may be best illustrated by the German constitutional tradition. In Germany it is possible to defend the reputation of one's deceased relative with reference to the constitutional principle of respect for human dignity. This position was explicitly adopted by the German Federal Constitutional Court in its 1971 *Mephisto* case⁴⁴. The Court discussed a petition regarding a court's injunction, obtained by the son of the deceased, against the publication of a book which included defamatory statements about the deceased. On the one hand, the Court ruled that “only a living

³⁹ That being said, the Parliament rejected the proposed amendments and thus confirmed the old rule that there can be no cause of action where the reputation of a dead person is affected. For more discussion on this topic see also Lisa Brown, *Dead but Not Forgotten: Proposals for Imposing Liability for Defamation of the Dead*, 67 TEX. L. REV. 1525 (1989).

⁴⁰ See the ECtHR cases referred to below.

⁴¹ See Bo Zhao, *Posthumous Reputation and Posthumous Privacy in China: The Dead, the Law, and the Social Transition*, 39 BROOKLYN J. INT'L L. 269 (2014)

⁴² Althing's Ombudsman opinion 1359/1995

⁴³ H 637/2006; on the basis of article 242 (2) b., and article 25 (3) of the Penal Code

⁴⁴ Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 30, 173. For an English translation see Basil S. Markesinis and Hannes Unberath, *The German Law of Torts – A Comparative Treatise*, 397-402 (4th ed. 2002)

person is [...] entitled [to] the right of personality [...]. An essential precondition of the basic right [to personality] is the existence of at least a potential or a future person. It is irrelevant that a person may be affected during his lifetime by what the legal situation will be after his death [...]. It is no derogation from the freedom of action and self-determination guaranteed by [the basic right to personality] to hold that the protection of the personality expires on death". However, the Court did approve the injunction⁴⁵, based on the position that the deceased has a right to human dignity: "It would be inconsistent with the constitutional mandate of the inviolability of human dignity, which underlies all basic rights, if a person could be belittled and denigrated after his death. Accordingly an individual's death does not put an end to the state's duty [...] to protect him from assaults on his human dignity"⁴⁶.

48. There are other continental jurisdictions which opted for the recognition of the "reputation interest" of the dead people and/or their relatives, at the legislative level or in the case-law of the courts. For example, the honour and dignity of deceased people is invested with explicit protection under the Civil Codes of the Czech Republic and of Slovakia. In 2011, the Supreme Court of the Czech Republic in a case brought by daughters of a deceased person unjustifiably accused of a collaboration with the Nazi occupants during the Second World War confirmed that the right to civil honour and human dignity of the deceased person had not been respected⁴⁷.

49. The idea that prohibiting defamation against the deceased is aimed primarily at preventing the establishment of wrong public perceptions about the deceased (the second theory described above), rather than for the protection of private interests, can explain the German approach. While the German law allows for a civil cause of action for defamation against the deceased, it denies monetary damages for family heirs in the case of non-property infringement of the reputation of the deceased⁴⁸. The available remedies are only an injunction to prevent the publication, a requirement to publish a reply of the deceased's relatives, and a declaratory judgment that corrects the public record.

50. The above discussion is not aimed at resolving the debate whether it is a good approach to protect the reputation of the deceased by providing for a cause of action or not. The purpose is mainly to demonstrate that it is an issue which is subject to reasonable disagreement. Indeed, it is not a coincidence that a universal consensus has not been formed, and, consequently, the States have a wider margin of appreciation in regulating this area⁴⁹.

5. Does the ECtHR require legal protection to be given to the reputation of a deceased person?

51. The ECtHR did not explicitly recognize an independent and direct right of the deceased to reputation. At the same time, as may be inferred from the ECtHR's case-law, member States are *permitted* to award protection to posthumous personality rights, either on the basis of the right to human dignity and honour or independent of it. States *may* criminalize expressions that unjustifiably and intentionally belittle and denigrate the deceased's reputation; and they may also award a right of action to family members who were adversely affected by defamatory publications against the deceased.

⁴⁵ It must be stressed that in this case the German Federal Constitutional Court (GFCC) upheld the injunction against the publishers of the book (a restraining warrant ordering non-publication of a defamatory opinion; such injunction may require retraction of false statements), but this judgment did not assert the relatives' right to damages.

⁴⁶ The GFCC was in a later decision criticized for not having taken the freedom of art into better account. In the *Esra* decision in 2007 the GFCC for the second time in its history effectively confirmed a judiciary ruling prohibiting the publication of an "auto fiction" novel entitled *Esra*. The novel described a fictional relationship of the author with an actress and her mother (both alive). The decision was controversial, leading dissenting Judge Wolfgang Hoffmann-Riem to revisit *Mephisto* and criticizing the GFCC for not having taken the freedom of art more into account.

⁴⁷ Supreme Court, Case 30 Cdo 3176/2009, 31 August 2011

⁴⁸ For a review of the case-law in Germany on this issue see Rosler, *supra* note 27, at 161.

⁴⁹ "Where [...] there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin [of appreciation] will be wider" (*Hämäläinen v. Finland*, no. 37359/09, § 67, 16 July 2014).

52. Another question is whether the States are **required** to defend the reputation of a deceased, i.e. whether there is a *positive obligation* of the States to create legal remedies protecting the reputation of the deceased against defamatory statements, and what is the scope of this obligation.

53. The concept of positive obligations to protect a person's right from interference by private actors is not universally recognized, but it is an established principle at least in the jurisprudence of the ECtHR and many domestic constitutions. According to this approach, States are required not only to respect human rights but also to protect and promote them. Denying a person an effective remedy for the protection of his/her rights is considered as an interference with the right, which requires justification. A non-compliance with a positive obligation can be in the form of denying, or otherwise limiting, the cause of action in the case of defamatory statements against the deceased, or in denying a remedy in a specific case.

54. Although for the ECtHR a State may recognize a cause of action in defamation when a publication damaged the reputation of a deceased person, the Court assigned to this interest a **very limited scope**. Thus, in *Putistin v. Ukraine*⁵⁰ the applicant complained of a breach of the right to protection of reputation as a result of the domestic courts' refusal to rectify defamatory information about his late father. Domestic law did recognize the applicant's cause of action, and the ECtHR thus focused only on evaluating whether the specific decision, which gave preference to the publisher's freedom of expression, was justified. The Court concentrated on the rights of the deceased's family members rather than those of the deceased himself, and assigned these rights a minor weight. It ruled that while "the reputation of a deceased member of a person's family may, in certain circumstances, affect that person's private life and identity, and thus come within the scope of Article 8", when the effect of the publication on the applicant is indirect and remote, as is typically the case, preference should be given to the freedom of expression.

55. There are other examples which show that "reputation interests" of deceased public figures, such as politicians have little weight in the eyes of the ECtHR. In *John Anthony Mizzi v. Malta*⁵¹ the son and the heir of the late Prime Minister of Malta sued the applicant for civil damages regarding an arguably defamatory publication regarding the deceased, and prevailed. The applicant pleaded that the action should be dismissed on the ground that a deceased person cannot sue for libel. The domestic courts dismissed this plea, as the domestic law explicitly permitted this type of suit, and the Court did not explicitly address the validity of this provision. It ruled, however, that the freedom of expression would normally prevail in such cases, stressing that "the defamed individual passed away more than three decades before the impugned statement was published and any damage that may have been caused to the deceased's reputation cannot be considered serious in the circumstances". Judge Bratza, in his concurring opinion, suggested that "even if [an action to defend the reputation of a dead person] is in principle compatible with the requirements of Article 10, when striking the balance between the competing interests, the weight to be attached to the reputation of the deceased individual must diminish with the passing of the years and that attaching to freedom of expression must correspondingly increase".

56. Thus, the "reputation interest" of public figures who are subject to wider limits of acceptable criticism is regarded by the Court as very weak. It is nearly always outweighed by journalistic or artistic freedom of expression. However, the very fact that the ECtHR recognizes the existence of a "reputation interest" is noteworthy. From the ECtHR judgment in the case of *Putistin* cited above it may be deduced that a *serious* defamatory allegation against a *recently deceased* person may constitute a breach of the family's Article 8 rights. That would be a radical development, which would most likely have an impact in jurisdictions where such actions are not allowed.

⁵⁰ *Putistin v. Ukraine*, no. 16882/03, § 33, 21 November 2013

⁵¹ *John Anthony Mizzi v. Malta*, no. 17320/10, 22 November 2011

57. This reading of *Putistin* is somehow supported by the case of *Jelševar and Others v. Slovenia*⁵². The case concerned the applicants' complaint that their reputation had been affected owing to the publication of a book depicting the life of a fictional character whose story had been inspired by their late mother. The ECtHR considered the Slovenian courts' approach – consisting in assessing whether the story would have been perceived as either real or offensive by an average reader – had been reasonable and consistent with its own case-law. So, the Court unanimously declared the application inadmissible. It concluded that a fair balance had been struck between the applicants' right to private and family life and the author's right to freedom of expression. That being said, the ECtHR accepted the starting premise of the Slovenian Constitutional Court that “an attack on the reputation of the applicants' deceased mother could affect the applicants' own personality rights”. In other words, the ECtHR admitted that a defamatory publication may cause “secondary damage” to the relatives of the deceased, and that their interests may need protection under Article 8 of the Convention. However, in that particular case the “secondary damage” was not such as to prevail over the artistic freedom of the authors of the book.

58. It appears that the “secondary damage” element may become crucial in cases where the publication attacks the “dignity” (as opposed to the good name) of a recently deceased person. One example is *Hachette Filipacchi Associés v. France*⁵³, in which the Court addressed a violation of a French law which prohibits the publication, among other things, of an image of the body of a person who was murdered. The Court ruled that the interference in the applicant publishing company's freedom of expression was justified, since “the publication in a widely distributed magazine intensified the trauma suffered by the relatives as a result of the murder, so that they had legitimate reason to consider that their right to respect for their private life had been infringed”. It should be noted, however, that the specific result in the above case, of giving preference to the privacy interests of the relatives (or those of the deceased) over freedom of expression, is quite exceptional. This result was primarily based on the timing of the publication, immediately after the person's death, and its nature, a disrespectful depiction of the body (“dignity” or “privacy” aspect) rather than a criticism of the deceased activities or views or revealing private matters (“reputation” aspect). When these elements are lacking, the publisher's freedom would typically prevail.

59. The deceased's family members' right to privacy is normally entitled to a lower level of protection — or can justify only lesser interferences in other persons' rights — than a living person's own privacy rights. For instance, in *Editions Plon v. France*⁵⁴, the ECtHR ruled that it is impermissible to prevent the publication of a book about the late President Mitterrand, even though the publication breached the duty of medical confidentiality towards the deceased: “[D]istribution of the book [...] soon after the [deceased's] death could only have intensified the legitimate emotions of the deceased's relatives, who inherited the rights vested in him [...]. [However,] in the Court's opinion, as the [deceased's] death became more distant in time, this factor became less important. Likewise, the more time that elapsed, the more the public interest in discussion of the history of President Mitterrand's two terms of office prevailed over the requirements of protecting the President's rights with regard to medical confidentiality”. The Court stressed that the book had been published in the context of a wide-ranging debate in France on a matter of public interest, in particular the public's right to be informed about any serious illnesses suffered by the head of State, and the question whether a person who knew that he was seriously ill was fit to hold the highest national office.

60. In sum, it appears that recently the Court opened up a possibility for the relatives of a deceased person to claim that their rights had been affected by a defamatory publication concerning that person. That may lead to the appearance of a positive obligation of the State under Article 8 of the Convention to protect families of the deceased from the “secondary damage” caused to them by a defamatory statement about him or her. That being said,

⁵² *Jelševar and Others v. Slovenia* (dec.), no. 47318/07, 11 March 2014

⁵³ *Hachette Filipacchi Associés (ICI PARIS) v. France*, no. 12268/03, 23 July 2009

⁵⁴ *Editions Plon v. France*, no. 58148/00, § 42, ECHR 2004-IV

- this is a *tendency* which cannot yet be considered as “well-established case-law”; more explicit and affirmative findings of the Court are needed to conclude that Article 8 of the Convention *requires* the State to give legal protection to the reputation of a deceased;
- since there is no international consensus on that matter, the States enjoy a wide margin of appreciation in deciding how to defend the reputation of the deceased, if at all;
- in most cases the “reputation interest” of the relatives would be very weak and the freedom of speech would prevail, especially where a lot of time has elapsed since the death of the person⁵⁵ and the person whose reputation had been affected was a public figure⁵⁶ or/and the matter discussed was a matter of public interest;
- the only exception from the above may arguably concern publications which occurred in the aftermath of the person’s death and which disrespected the dignity of the defunct and seriously hurt the feelings of the family in grief (“the funerals period” exception). However, with the passage of time those considerations also become less relevant⁵⁷.

6. What legal remedies should be put in place to protect the reputation of the deceased?

61. Whether or not the ECtHR case-law provides for a positive obligation of the State to protect the reputation of the deceased is a matter of discussion. Be it as it may, the same positive obligation may be derived from the provisions of the Georgian Constitution, which elevates the rights to “dignity” and “honor” to the rank of constitutional values.

62. Those rights are defined by the Georgian Constitution as inviolable. That does not mean that they are absolute. The prevailing approach is that the positive obligation to protect the right to human dignity and honour can be limited if necessary for the protection of other human rights entrenched in the Constitution, or for the achievement of other legitimate aims. The question is what is required from the State to comply with its positive obligation to protect “dignity” and “honor” of the deceased, what legal remedies would be sufficient to protect the reputation of the deceased in given circumstances?

⁵⁵ For common-law countries it means that the impossibility of the relatives of the deceased person to protect the latter’s reputation in the overwhelming majority of cases would not raise an issue under the Convention.

⁵⁶ In rare cases the reputation interest of a public figure may be amalgamated with the reputation interest of a private person, the latter arguably calling for greater protection. That happened in the case of *Hustler Magazine v. Falwell* (485 U.S. 46 (1988), examined by the United States Supreme Court. The publication at issue in that case appeared in the *Hustler* magazine, published by Larry Flynt. That publication concerned Jerry Falwell, a well-known Baptist pastor, and represented itself as an “interview” with him recalling his first experience of sexual intercourse. According to the “interview” Falwell’s first time partner was said to be his mother, very drunk, sexually aggressive and extremely unattractive. That interview was fake and was presented as a parody. Falwell won the case in the lower courts but the Supreme Court reversed. It reasoned that as a public figure Falwell could expect to be the target of a robust, public debate, essential to the health of democracy. However, as pointed out by several commentators, the US Supreme Court disregarded another aspect of the case, namely the reputation of Helen Falwell, the late mother (1895-1977) who was here portrayed in a vulgar scene that never occurred, drunk and disgusting, committing incest. She was not a public figure. This judgment was criticized from a feminist perspective (see Diana L. Borden, *Invisible Plaintiffs: A Feminist Critic on the Rights of Private Individuals in the Wake of Hustler Magazine v. Falwell*, 35 *Gonz. L.Review*, 2000). However, as noted above (§§ 38-39), the US common law system does not recognize a reputation interest in persons who are deceased.

⁵⁷ Another exception from this rule may relate to a very specific situation where the attack on the reputation of the deceased amounted to a breach of Article 6 § 2 of the ECHR, which guaranteed presumption of innocence. Thus, in the case of *Vulakh and Others v. Russia* (no. 33468/03, 10 January 2012) a criminal suspect committed suicide to avoid arrest and the case against him was subsequently closed. Nevertheless, his accomplices were brought to trial and in the judgment against them the Russian courts identified him as the leader of the gang and declared him guilty of serious crimes, at least *de facto*. The ECtHR considered that such declaration breached the presumption of his innocence, and acknowledged that the relatives of the late suspect had standing to complain to Strasbourg. That being said, not every defamatory statement amounts to a breach of the presumption of innocence. In addition, the ECtHR case-law is not entirely consistent on this topic (see, for example, *Maskhadova and others v. Russia* (dec.), no. 18071/05, 8 July 2008). In any event, this case-law is not directly relevant to the situation under examination.

63. In answering this question it must be remembered that where “the applicant’s claim relates to the positive obligation under Article 8, the State in principle enjoys a wide margin of appreciation”. Therefore, even if the *drittwirkung* effect of the constitutional provisions is recognized at the domestic level in Georgia, the authorities still enjoy considerable freedom of choosing appropriate legal tools.

64. Further, the question about the scope of the positive obligation cannot be defined *in abstracto*, but only in relation to the aims which a given rule or a policy tried to achieve. For example, if denying, completely or in part, a cause of action for the protection of rights of the deceased or his/her relatives, aims to protect the freedom of expression, which is also a constitutional value, the decision of the legislator not to give a cause of action to the relatives may appear justified, in the light of the principles which the ECtHR applies to cases under Article 10 of the Convention, summarized above.

65. It is also important to look at the broader legal context in Georgia. It is true that Article 6 of the Law on Freedom of Speech precludes private persons to lodge defamation suits on behalf of their deceased relatives. However, the absence of a private-law remedy against defamation of the dead does not necessarily mean that the State failed to protect the reputation of the deceased. Other remedies may be sufficient to effectively prevent the denigration of dead persons. In the context of Georgia it is not clear if the contested Article 6 rules out the possibility to impose *criminal liability* to deter defamatory publications against the deceased, as far as defamation is an offence in Georgia. This should not be interpreted as a suggestion that criminal liability for the defamation is advisable; quite the contrary, the chilling effect of criminal liability is such that it is the least appropriate legal tool to regulate speech⁵⁸. However, where criminal liability is present, it indeed provides sufficient protection of the “reputation interest”, even in the absence of other less intrusive remedies. Thus, even assuming that the deceased, or the deceased’s relatives, do have a right to reputation, based on the rights to human dignity and honor, privacy or personality, it is not at all clear that this norm taken alone should be considered as a non-compliance with the positive obligation to protect these rights. As long as the law provides a reasonably effective protection of the reputation of the deceased, based, for instance, on its deterring effect, it may well be the case that the denial of a cause of action for non-property rights is insufficient to render it as a non-compliance with the State’s positive obligation.

66. If a civil-law remedy is to be introduced for such situations, it should be carefully circumscribed so that it does not encroach on the freedom of speech. A cause of action in private law inevitably consists of some limits on the realization of the right, such as burden of proof requirements, statutory time-limits for introducing an action, recognition of defenses to the publisher of a defamatory expression, limits on the available remedies, and so forth. Certain elements of the legal framework for a private-law action may be fixed once and for all at the legislative level, whereas other elements should be left at the discretion of the judge.

67. The above can be summarized as follows. In principle, under the *domestic* constitutional provisions a State may well be required to provide an effective protection to the reputation of the deceased. However, compliance with this obligation does not necessarily require introducing private-law remedies for the defamation against dead people. Moreover, it is permissible to *deny certain types of remedies* as long this policy is aimed at avoiding interference with the right to freedom of expression or other equally important considerations. Article 6 of the Law on Freedom of Speech in the current context may be regarded as deficient only if the scope of cases in which any effective remedy is denied is substantial and might apply in instances in which the harm to the deceased’s reputation is *especially severe*. States enjoy a wide margin of appreciation and it is up to them to choose the best means protecting “honor” and “reputation” best without, at the same time, encroaching on the freedom of speech.

⁵⁸ See *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 115, ECHR 2004-XI

7. Who must have a right to start legal proceedings?

68. If it is decided that a cause of action for the non-pecuniary aspect of the deceased's reputation should be recognized, the decision of who should have the right to sue would be determined according to the choice of one of the above three theories. If the first theory is adopted, the right to sue must belong to the heir(s) of the deceased or his/her estate. If the second theory is preferred, the proceedings must be initiated by the State. If the third theory is chosen, the first-degree relatives of the deceased must start the proceedings.

69. The third hypothesis needs further elaboration. Here the action is not brought on behalf of the deceased, and thus, in principle, it is not limited to persons who are formally heirs of the deceased or are otherwise authorized to represent his/her presumed interests. The cause of action is the direct harm imposed on the plaintiff due to the defamatory publication, and thus in principle the right of action can be awarded to any person. However, the importance of the freedom of expression and the concern of a chilling effect entail that the right of action should be limited to those who are likely to be able to establish a sufficiently high level of emotional harm caused by the defamatory publication against the deceased. It is reasonable to assume that these would be only the first-degree relatives of the deceased.

70. This conclusion is not clear from difficulties, since, as discussed above, setting formalistic, rigid criteria about standing, such as awarding the right to sue only to first-degree relatives of the deceased, might raise concerns about discrimination, as it denies protection from other persons who might suffer a substantial "secondary damage". The decision should probably be based on an evaluation of the expected "chilling effect" of applying an open standard, rather than a strict rule regarding who may file a suit in this context. The prevailing practice in countries seems to support the more stringent approach, awarding standing to only a limited, pre-defined set of persons, i.e. the first-degree relatives of the deceased. This solution can also contribute to limiting the period after death in which a suit can be filed.

71. In sum, the question of who should have the right to sue should be left to the discretion of the legislature, as should other aspects of establishing such a cause of action.

72. The choice should be based on giving appropriate consideration to the conflicting interests, with a preference to the right to freedom of expression. Furthermore, if the courts in each case have to go into the merits of the case in order to establish whether a plaintiff has a standing, it may overburden them. In this context, the domestic provisions granting *locus standi* in such cases to "interested parties" seem to be problematic as they might allow unjustified interferences with the freedom of expression (see, for example, Article 23.1 of the Civil Code of the Republic of Azerbaijan⁵⁹; Article 152 (1) § 2 of the Civil Code of the Russian Federation⁶⁰). The concern of a substantial "chilling effect" of a broad right to sue, in terms of the time that passed since the death, the persons/legal entities that may file a suit, and the type of harm that may justify interference with freedom of speech, should lead to imposing *rigid rule*, and thus awarding standing only to the heirs of the deceased or to first-degree relatives.

IV. Conclusions

73. The European Court of Human Rights (ECtHR) regards human dignity as underpinning all of the rights protected by the European Convention on Human Rights. Under Article 8 of this Convention, as interpreted by the ECtHR, it is the duty of States to provide an adequate legislative framework to guarantee effective protection of the right to reputation. However, most of the Court's case-law on this matter related to living persons.

⁵⁹ Article 23.1.: "[...] Claims for protection of honour and dignity of the person may be also brought by an interested party after the former's death"

⁶⁰ Article 152: "Interested parties may defend [in court] honour, dignity and business reputation of a citizen after his death"

74. The idea that the reputation of a deceased person may also need legal protection is not universally accepted. Whereas in continental Europe it is possible to defend in court the reputation of a deceased, most of common law countries follow the rule *actio personalis moritur cum persona*. On the other hand, if relatives cannot contest serious allegations or injurious portrayals directed at their deceased loved ones, not only their dignity, reputation or memory are put at risk, but so is the truth. There are various theories explaining why the reputation of the dead person needs legal protection, and those theories gain public support even in the Anglo-Saxon world.

75. The recent *Putistin* judgment of the ECtHR may have taken a step towards providing a strong argument for an action related to “posthumous defamation” – preventing the tarnishing of the reputation or dignity of those who are dead. However, this case-law is fairly recent and represents a tendency rather than a firm position. By contrast, the ECtHR case-law on the freedom of expression is time-honored (see paragraph 23 above). Where the ECtHR has to weigh reputation of public figures against critical publications about them concerning matters of public interest, it normally gives preference to the freedom of speech. This approach applies a *fortiori* to cases where the ECtHR had to assess the “reputation interest” related to a deceased person: it attaches little weight to such interest.

76. Even assuming that the European Convention and/or the Georgian Constitution *require* giving the relatives of the deceased a legal remedy to protect the latter’s reputation, the scope of the State’s positive obligation in this area should be defined with reference to the principles developed in the Court’s case-law under Article 10 of the Convention. So, again, chances are that in most cases the considerations of freedom of speech will prevail.

77. Should the Constitutional Court of Georgia conclude that the notion of “dignity” encompasses the reputation aspect and applies to deceased persons as well, criteria developed in the case-law of the ECtHR will apply. Thus, it will be up to the Constitutional Court to check whether Mr V.’s son had been a “public figure” or otherwise entered the “public arena”, to decide whether the topic was a “matter of public interest”, to define the impact of the allegedly defamatory statement in the light of its form and intensity, of the time element, of the position of the speaker (the president of the country) and of other relevant factors. If, in the opinion of the Constitutional Court, the “reputation interest” outweighs other legitimate considerations, this may require legislative changes and it will be up to the Parliament to design a new legislative framework which better accommodates all competing interests. In doing so the authorities of Georgia should act in harmony with the European Convention standards and ensure that the freedom of expression is respected. It is important to make sure that defamation laws – in both their framing and application – do not produce “a chilling effect” that will increase self-censorship within the media or academic community out of fear of legal consequences, and that the least intrusive measures are chosen to protect the “reputation interest” of the deceased and/or his or her relatives.