



**FREEDOM OF EXPRESSION DURING
EMERGENCY SITUATIONS:
THE GEORGIAN AND ISRAELI CONTEXTS**

By

Nino Gobronidze

LL.M. HR THESIS
PROFESSOR: Mordechai Kremnitzer
Central European University
1051 Budapest, Nador utca 9.
Hungary

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Executive Summary

The aim of the thesis is to find out to what extent the existing framework accommodates and sets the sufficient safeguards for freedom of expression during an emergency situation. What is the role of the judiciary - status quo and how should it be arranged? What can be the possible solutions for the revealed problems? These are the main issues to be addressed by the thesis. By presenting the Georgian and Israeli case studies, the thesis will argue that some governments are inclined to use emergency powers without balancing security needs against the right to freedom of expression.

At the end the thesis concludes that there is the lack of standards accommodating freedom of expression during an emergency situation and it also shows the specific problems with the practice. Apart from identification of the problems, solutions addressing them are also sought. The events taking place in Georgia on 7 November 2007 served as an incentive for selecting the topic and thus aimed at finding the solutions for this particular case. Nevertheless, the findings elaborated in this thesis could be relevant in general, for other cases as well.

*If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind.*¹

Introduction

Essential for democratic society,² "one of the oldest claims of mankind,"³ "a precious achievement of the great democratic revolutions"⁴ – these, among others statements, define and highlight the significance of freedom of expression. Throughout its history, freedom of expression has been subject to oppression and limitation and thus its acknowledgement happened gradually. It is now generally accepted that freedom of expression contributes to democracy, is important for self-fulfillment, for finding the truth and for many other reasons.

In the 21st century when already main human rights instruments and legislations of the democratic states enshrine freedom of expression, one might believe that freedom of expression is secured from unjustified curtailment. Unfortunately, this does not reflect the reality and "it needs reaffirmation and renewed emphasis"⁵ as one witnesses the closure of TV channels, the threatening and insulting of journalists, blocking access to information and the alike.

Although no one argues that freedom of expression is an absolute right, the provisions allowing for the limitations and derogation should not leave space for abuse, especially when the case concerns an emergency situation. During an emergency, the government is granted wide

¹ On Liberty, Ch.2

² Handyside v. United Kingdom, Application no. 5493/72, 7 December, 1976, par. 49.

³ Ioana Toma and Lise Esther Herman, Free Speech : History and Controversies, Open Society Archives, 2009. p.1; available at <http://www.osaarchivum.org/images/stories/pdfs/freedom-of-speech/Free-speech-Background-Study.pdf> (last visit 25 November 2009).

⁴ Shimon Shetreet (ed.), *Free speech and National Security*, M. Nijhoff Publishers, 1991; P.3.

⁵ *Ibid.*

discretion to protect the nation⁶ and the measures used embody a great potential and a tendency to curtail rights and freedoms. Governments are eager to set the question: liberty or security and answer the question in favor of security without carrying out a balancing process of the interests. The issue of curtailing freedoms during an emergency is a broad one; this thesis will focus only on freedom of expression and the media within it. The issue is interesting because the conflicting interests the security matters and freedom of expression are of utmost importance and to keep the proper balance between them is challenging.

Much has been written about the importance of freedom of expression and its justification. Sajo, Sadurski, Barendt, Fenwick among others have produced important pieces of work on it.⁷ The European Court of Human Rights (hereinafter ECtHR) based on the European Convention on Human Rights (hereinafter ECHR)⁸ developed case law on freedom of expression and its significance. It also touched issues of its limitation and on freedom of expression clashing with other interests. As for the emergency, its nature and peculiarities have been discussed and learned by the scholars.⁹ The issue is elaborated by ECtHR by its case law. It case by case elaborated the elements of emergency situations. With regard to emergency, the International Covenant on Civil and Political Rights¹⁰ (hereinafter ICCPR) is no less important. However, not much has been written on freedom of expression during emergency situations. Only related issues such as the clash of freedom of expression with terrorism and freedom of expression

⁶ Friedrich, *Constitutional Reason of State*, pp-4-5 in Gross Oren and Fionnuala Ni Aolain, *Law in Times of Crisis Emergency Powers in Theory and Practice*, Cambridge University Press, Cambridge, 2006, page 9.

⁷ See Eric Barendt, *Freedom of speech*, New York, Oxford University Press, 2005; Wojciech Sadurski, *Freedom of speech and its limits*, Dordrecht: Kluwer Academic Publishers, 1999; Andras Sajo, *freedom of Expression*, Instytut Spraw Publicznych, Warszawa, 2004; Helen Fenwick, *Civil Liberties and Human Rights*, Routledge-Cavendish, New York, 2007.

⁸ The Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4.XI.1950.

⁹ See Jaime Orea, *Human Rights in States of Emergency in International Law*, Clarendon press, Oxford, 1992. Oren Gross and Fionnuala Ni Aolain, *Law in Times of Crisis Emergency Powers in Theory and Practice*, Cambridge University press, Cambridge 2006.

¹⁰ 16 December 1966.

during war time are more often dealt with.¹¹ What these two, on the one hand, and emergency situation, on the other, have in common is the security concern, because freedom of expression during the process of combating terrorism or war times is suppressed in favor of state security. Therefore, books not specifically dealing with the issue of freedom of expression during emergency, but books which address how security matters conflict with freedom of expression were used as main sources for this paper. *Secrecy and Liberty: National Security, Freedom of expression and Access to Information* edited by Sandra Coliver, Paul Hoffman, Joan Fitzpatrick and Stephen Bowen especially in part of the Johannesburg Principles and its commentaries were of utmost importance for the purposes of thesis. The same can be said about *Free Speech and National Security* edited by Shimon Shetreet. This book presents a comparative analysis on the issue of freedom of expression and national security. Within the freedom of expression topic it touches on the task of the media, although mainly in the context of war. This book is valuable for this paper as it touches the Israeli experience as well. As for the media during emergency, the materials on its regulation¹² in general have been used and adjusted to the thesis topic.

In view of the above considerations, the paper, by arguing that some governments are inclined to use emergency powers without balancing security needs with the curtailment freedom of expression, will show the topicality of the issue and the lack of sufficient standards. For the purposes of this paper and due to the methodology used, emergency situations invoked on the grounds of security, public safety and public order will be considered. The main issues to be addressed by this thesis are: to what extent does the existing framework accommodate and set

¹¹ See Shetreet, Shimon (ed.), *Free speech and national security*, M. Nijhoff Publishers, 1991; Sandra Coliver et al., *Secrecy and liberty: National Security, Freedom of Expression and Access to Information*, M. Nijhoff Publishers, The Hague, 1999, p. 34.

¹² Article 19, *Access to the Airwaves Principles on Freedom of Expression and Broadcast Regulation, International Standards*, Salmon Eva. Guidelines for broadcasting regulation, UNESCO and CBA, Paris, 2006 p.53 Available at http://portal.unesco.org/ci/en/files/21345/11399384219Guidelines_for_Broadcasting_Regulation.pdf/Guidelines%2Bfor%2BBroadcasting%2BRegulation.pdf (last visit 7 November 2009).

the sufficient safeguards for freedom of expression during emergency? What is the role of the judiciary -status quo and how should it be arranged? What can be the possible solutions for the revealed problems?

In order to support the thesis it was necessary to present a case study. The primary focus was made on the events taking place in Georgia in November 2007 as the event shows the diverse sides of emergency as well as freedom of expression. In fact, it was the uniqueness of this case that prompted the selection of the thesis topic and finding solutions to it. On the day at stake the government argued that the TV Company, Imedi, had been used as a tool to overthrow the government and undertook the following measures: a raid on the TV Company, announcement of the state of emergency, seizure of the property of the TV Company Imedi, suspension of its license and termination of other media means. For the case study assessment, the Georgian legislation and the reports prepared by the Human Rights Watch and the Georgian Public Defender have been used as main sources. In order to find solutions for the primary case study, it was necessary to find similar and relevant cases from other countries' experiences. It should be noted that finding a model democratic country, with a developed legal history which had the same experience was very challenging. Finally, the decision was made in the favor of Israel and two cases have been chosen.

The first case took place in 1953, when the Minister of Interior banned two newspapers owned by one and the same owner, arguing that published articles endangered the public peace. The decision was challenged by the applicant and the Israeli Supreme Court (hereinafter the Supreme Court) delivered a landmark judgment *Kol Ha'am*¹³ in favor of the petitioner. With regard to the second case, thirty-five years later, a newspaper was prohibited from publishing an

¹³ HCJ 101/54 Kol Ha'am Co. LTD v. Minister of Interior, October 16 1953. available at pdf.01z.53000730/01Z/000/730/53/eng_files/il.gov.court.lolygon//:http (last visit November 26 2009).

article containing criticism of the Head of Mosad and about the forthcoming personnel changes. It was claimed by the government that the article endangered security. The Supreme Court's decision on this case ruled in favor of the media, and is known as *Schnitzer*.¹⁴ It became another landmark decision in the history of Israeli case law.

Although the cases selected from Georgia and Israel are not identical, they have some common features that make the comparison possible and interesting at the same time. In one of the Israeli cases, similarly to the Georgian one, there was an act of banning a media channel. As for the similarities between the second case from Israel and the Georgian, in these cases security issues were at stake. Also, in all case studies the judiciary had to take a position. Although the matters on which the judiciary had to decide are different, this is still enough to create a picture of the role of judicial control in these countries.

Apart from the case similarities, the countries themselves share similar features. Both Israel and Georgia are considered democratic countries, countries where freedoms are supposed to be protected. For instance, the Supreme Court refers to Israel as a freedom loving country. According to its Constitution, Georgia is a democratic republic¹⁵. However, the means and levels of protection of rights might vary as well as the length of legal traditions, political contexts and other variables. Israel is especially interesting and relevant for this comparison, because the state of emergency has been present in Israel since its establishment.¹⁶ Although Israel has been in

¹⁴ HCJ 680/88 *Schnitzer v. The Chief Military Censor*, January 10 1989. available at pdf.01z.88006800/01Z/006/800/88/eng_files/il.gov.court.lilyon//:http (last visit November 26 2009).

¹⁵ The Constitution of Georgia, 24 August 1995, article 2, available at www.constcourt.ge (last visit 14 October 2009).

¹⁶ In Israel the state of emergency makes it possible for emergency regulations to be established for 90 days. It will cease, if the Knesset after 90 days will not extend it, but so far it has been voting for it (Shimon Shetret "The scope of judicial review of national security considerations in free speech and other areas: Israeli perspective", p. 42-43 in *Free Speech and National Security*, Shimon Shetreet (ed.), M. Nijhoff publishers, Dordrecht 1999).

constant state of emergency, freedoms were protected to the possible extent and this might make it a model country for some other countries. As Justice Brennan noted

the nation of the world, faced with sudden threats to their own security, will look to Israel's experience in handling its continuing security crises, and may well find in that experience the expertise to reject the security claims that Israel has exposed as baseless and the courage to preserve the civil liberties that Israel preserved without detriment to its security.¹⁷

In the light of all the above considerations, the structure of the paper is as follows: the first subchapter aims at covering three issues: the theoretical framework of the emergency situation under the ECHR and ICCPR; the importance of freedom of expression including the media, generally and specifically according to the ECHR; finally, exploring the current framework if any on freedom of expression and emergency. The second chapter will start by giving a brief background on the regulation of freedom of expression and emergency in Israeli. This will be followed by the actual case study. As for the last chapter, it is devoted to the primary focus of the thesis - the Georgian case study. It begins by giving a brief background of the regulatory framework on freedom of expression and emergency situations to prepare the ground for the case study. Accordingly, it is followed by the analysis of events taking place on 7 November in 2007, and comparative analysis in order to see what can be learnt from Israel.

The final point of the thesis will be the conclusion, which identifies the main challenges facing the freedom of expression during an emergency and of course drawing the relevant conclusions.

¹⁷ The Honorable Justice William J. Brennan, JR, *American Experience: Free Speech and National Security*, p. 19 in *Free Speech and National Security*, Shimon Shetreet (ed.), M. Nijhoff publishers, Dordrecht, 1999, p. 19.

Chapter I: Freedom of Expression and Emergency Situations

This chapter consists of three subchapters, the first of which addresses emergency situations - the general theories and international framework. The second explores the importance of freedom of expression including the media by presenting its main justifications and international framework. Finally, the last subchapter will bring together freedom of expression and emergency and will show whether the existing framework is sufficient to accommodate freedom of expression during emergency.

1.1. The Emergency Situations-Theoretical Framework

- *Definition and Rationale*

Scholars agree that it is difficult to define emergency situations ahead of time. As Hamilton argues, this is so because the circumstances that endanger the safety of nations are infinite.¹⁸ But at the same time, as an emergency grants huge power to the government to affect and limit rights and freedoms, there is a need for a definition at least of the situations which will lead to the announcement of emergency situations.¹⁹ This thesis will focus on the ones invoked on the basis of national security, but will touch on the public order and safety since they might overlap.

¹⁸ Clinton Rossiter (ed.), *The Federalist Papers* (New York: new American library 1961), No. 23 p. 153 (Alexander Hamilton) in Oren Gross and Fionnuala Ni Aolain, *Law in Times of Crisis Emergency Powers in Theory and Practice*, Cambridge University Press, Cambridge, 2006, page 6.

¹⁹ Oren Gross and Fionnuala Ni Aolain, *Law in Times of Crisis Emergency Powers in Theory and Practice*, Cambridge University press, Cambridge, 2006, page 5.

Defining public order, public safety and security is no less problematic. Moreover these terms are interrelated and quite often used interchangeably. For their definitions reference will be made to the Siracusa Principles on the limitation and derogation of provisions in the international Covenant on Civil and Political rights (hereinafter the Siracusa Principles). According to it, public order is “the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded.”²⁰ Public safety means protection against danger to the safety of persons, to their life or physical integrity, or serious damage to their property.²¹ As for the state security, the Siracusa Principles enumerate the circumstances that justify it - to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.²² As seen from the definitions, there might not be rigid boundaries between state security, public order and public security as in some situations the threat posed to state security might endanger public order and public safety as well. However, it should be taken into consideration that the gravity for these concerns are different, this is to say that state security embodies more gravity itself, than the others.

The rationale behind emergency is challenging too as it may require using extraordinary measures by the government that are not permitted in normal times. Unfortunately, these powers are usually used to excuse the human rights violations, because as the International Commission of Jurists argues the real emergency exists very seldom and governments consider any risk to their authority as emergency situations and ground for violation of human rights.²³

²⁰ UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4; part 1B, 22-24.

²¹ *Ibid.*, 33-34.

²² *Ibid.*, 29-32.

²³ Supra note 19, 305.

The Siracusa Principles also mention that “giving a power to government to in exceptional situations derogate from certain obligations, does not mean that it is out of legality.”²⁴ In order for emergency powers not to leave the rule of law, certain safeguards are needed on the domestic and international level. The safeguards among others can be specific and precise prerequisites for announcing the emergency and judicial review. It should be noted that not all countries might have all of these requirements, and furthermore, merely the existence of the safeguards is not effective.

- *Judicial control*

To the question of whether there should be a judicial control on the declaration of emergency situations, the answers are different. Some believe that due to the nature of the situation there should not be a control, whereas others regard the control as important.²⁵

The case of *Korematsu*²⁶ is a good example showing a different stance of judges on the matter at stake. Justice Black, writing for the majority, did not seem reluctant to review the acts of the Executive, but at the same time ruled in favor of the government. He justified the conviction by the war, and noted that it was not on racial grounds. This position clearly demonstrates the situation when the ECtHR does not officially abstain from the judicial review, but yet gives deference to the Executive and justifies actions by war. Judge Jackson dissented from the decision, because, according to him, the ECtHR should not review Executive decisions in this field at all given that it lacks the evidence and the knowledge. According to him Executives should be given freedom in matters of security and emergency. A radically different stand was taken by Judge Murphy, who argued that no wide discretion should be afforded to the Executive.

²⁴ Supra note 20, 2C. 61, See also Victor V. Ramraj (ed.), *Emergencies and the limits of legality*, Cambridge University Press, Cambridge, 2008.

²⁵ Orea Jaime, “Human Rights in States of Emergency in International Law”, Clarendon Press, Oxford, 1992, p. 41-42.

²⁶ *Korematsu v. United States*, 323 U.S. 214. 1944.

The peculiarities of an emergency are obvious, but they are not to suggest that the measures taken during emergency are removed from review and monitoring. Moreover, giving wide discretionary power demands a review, otherwise it might be abused and result in violation of human rights. Judge Jackson's position of Court not having enough competence and evidence might reflect the *status quo*. However, it is not desired. The judiciary should have access to enough evidence to check the reasonableness of the activities. As for the expertise, the Court can always refer to the experts with specific knowledge. The position of the Israeli Supreme Court in the *Shnitzer* case can be considered as a positive example when the Court checked the reasonableness of exercising discretionary powers. This decision will be examined in detail in the chapter three.

International control is no less problematic an issue. One group of people believe that emergency issues should be decided along considerations of the history of a country, so this is not an issue to be decided by international law.²⁷ Maybe therefore, states usually argue that the international community "lacks the necessary competence"²⁸ to analyze emergencies and these matters belong to the domestic jurisdiction.

For the purposes of this thesis the competence of the Strasbourg organs²⁹ will be examined. According to the ECHR, the Strasbourg organs are empowered to decide on cases rising from article 15 and did so for the first time in the *Cyprus case*, where the Commission³⁰ concluded that the government had an authority to exercise measures of discretion. At the same time it stated that the Commission was competent to examine whether the measures implemented by the government were necessary and required by the situation.

²⁷ Supra note 25, 42.

²⁸ *Ibid.*

²⁹ ECtHR and the Former Commission.

³⁰ App, 176/57, *Greece v. United Kingdom* (1958-9), 2 yearbook 174, at 176 in Clare Ovey and White, *Jacobs and White, the European Convention on Human rights*, fourth edition, Oxford University Press, Oxford, 2006, p. 442.

The Strasbourg organs believe that it is a state's prerogative to declare the emergency and they enjoy the margin appreciation while assessing the situation and measures.³¹ The theory of margin of appreciation plays a significant role while deciding the cases on emergency. The rationale behind the wide margin of appreciation is that states are in a better position to judge and to assess the whole situation.³² Although the Court concludes that the margin of appreciation is subject to its supervision³³ scholars³⁴ argue that Strasbourg organs have deferential attitude towards the national discretion, and they have not established any criteria to examine whether measures invoked by national governments are relevant and proportional.

Other authors³⁵ justify a less restrictive approach by the ECtHR, by naming several reasons. For instance: the Strasbourg organs might seem to show "sympathy with the difficulties faced by the national authorities in striking a balance."³⁶ They also bear in mind that national organs are elected and therefore are responsible in front of their population. Although, these arguments are not groundless, scholars argue that it is desirable for Strasbourg to conduct an independent assessment. "A move to recognize a margin of appreciation should not mean the renunciation of any responsibility on the part of the Convention bodies to supervise the exercise of national discretion."³⁷ The cases of abusing emergency powers once again illustrate the need of granting the narrow margin of appreciation and the supervision over it.

³¹ *Ibid.*

³² *Aksoy v. Turkey* (App. 21987/93) Judgment of 18 December 1996, (1997)23 EHRR 553, para. 68 of the Judgment in Clare Ovey, Jacobs and White, *The European Convention on Human Rights*, Fourth edition, Oxford University Press, Oxford 2006 p. 445.

³³ Greek case in *Arai-Takahashi Yutaka* The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR, Intersentia, Antwerp, New York, 2002 p. 178.

³⁴ *Yutaka Arai-Takahashi, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia, Antwerp, New York, 2002 p. 182-183.

³⁵ *Ibid.*, 187.

³⁶ *Ibid.*

³⁷ *ibid.*

1.1.2. State of Emergency according to the ECHR and ICCPR

The ECHR and ICCPR contain provisions on emergency, but at the same time, try to set some safeguards. The ECtHR, throughout its existence, has been developing and interpreting the derogation article which gives a possibility to examine article 15. As for the ICCPR, General Comment 29 and the Siracusa Principles will be looked as they were adopted to interpret the provision on derogation.

- **Substantive and formal elements**

ECHR makes it clear that the state of emergency should be announced only in case of war or public emergency which threatens the life of the nation. It elaborated more in the Lawless case.

An exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the state is composed.³⁸

In the same case, the ECtHR concluded that the “threat could be to the physical integrity of the population, to the territorial integrity, or to the functioning of the organs.”³⁹ In addition to this, the threat should be actual or imminent and the emergency should be used as a last resort.⁴⁰

³⁸Clare Ovey and Robin White , *Jacobs and White, the European convention on human rights*, fourth edition, Oxford University Press, 4th edition, Oxford 2006 p. 443.

³⁹ Supra note 25, 29.

⁴⁰ *Ibid*

The ICCPR is not very different in this respect. The only difference between it and ECHR is that, ICCPR does not name war explicitly. At the same time, the Siracusa Principles are more concrete while defining the nature of the threat.

It is the threat that affects the whole of the population and either the whole or part of the territory of the state and also that threatens the physical integrity of the population, the political independence or the territorial integrity of the state or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant.

The second element that should be considered is restriction regarding the measures. According to both international agreements, measures undertaken by the government should be strictly required by the exigency of the situation. In the *Greek* case, the Commission examined whether the measures undertaken by the government were strictly required⁴¹ and concluded that the measures were not within the scope of article 15, because they went beyond what the situation required.⁴² Another element which the Court took into consideration when considering the criteria to be met was the safeguards.⁴³

The General Comment 29 interprets strictly required measures in detail.⁴⁴ Although the state is entitled to announce an emergency and derogate from certain obligations, this is not to say that there should not be proportionality preserved in its measures. Proportionality is the feature that the limitations during peace time and those during emergency have in common. It is also emphasized that the fact that announcement of emergency is justified, does not mean that the all measures undertaken by the government are justified as well. In addition to it, the Siracusa Principles stipulate that the specific measures should be required by the situation as

⁴² *Greek case* (1969) II Yearbook, at 135-6 and 148-9 in Clare Ovey & Robin C.A. White, *Jacobs and White, the European Convention on Human Rights*, 4th edition, Oxford University Press, Oxford 2006, p. 443.

⁴³ *Lawless v. Ireland*, judgment of 14 November 1960, 7 April 1961 and 1 July 1961, Series A, Nos. 1-3; (1979-80)1 EHRR 1, 13 and 15, par. 31-8 of the judgment of 1 July 1961 in Clare Ovey & Robin C.A. White, *Jacobs and White, the European Convention on Human Rights*, fourth edition, Oxford University Press, Oxford 2006 p. 446.

⁴⁴ General Comment No. 29: States of Emergency (article 4), 31/08/2001, sections 4 and 5.

well, so that each of them will be directed to the actual, clear, present or imminent danger.⁴⁵ The third element requests that measures carried out by government should be in **consistence with** other obligations. Although, as Oraa⁴⁶ states, the application of this principle is quite poor, as the obligations of states in the field of human rights increase, this principle will find more applicability.

In addition to these substantive requirements, there are procedural requirements which should be fulfilled by the government when announcing emergency. Official proclamation of the state of emergency and notification are regarded as procedural requirements. Article 15 does not explicitly require an official proclamation. Nevertheless, this kind of obligation might still exist if one looks at its case law.⁴⁷ Unlike the ECHR, the ICCPR demands an official proclamation of emergency explicitly.

As for the notification, according to the ECHR, the government should notify the Secretary General of the Council of Europe about measures which it has taken and the reasons for them.⁴⁸ This is to ensure that states are able to exercise their right for interstate complaint and supervisory bodies to conduct the monitoring. Consequently, states would probably be more carefully while selecting the strictly necessary measures.

Although there is no explicit mentioning of the time period for making a notification, the ECtHR in the Lawless case stated that it should be done “without any avoidable delay.”⁴⁹ Contrary to time limit, the Convention explicitly requires indicating the provision from which the state had derogated from. The notification element is required by ICCPR as well. According to

⁴⁵ Supra note 20, C 54.

⁴⁶ Supra note 25, 193-206.

⁴⁷ Supra note 38, 448.

⁴⁸ Supra note 8, 4.

⁴⁹ *Lawless v. Ireland*, Judgments of 1 July 1961, Series A, No. 1; (1979-80) 1 EHRR 15, p.62 of the judgment in Clare Ovey & Robin C.A. White, *Jacobs and White, the European Convention on Human Rights*, 4th edition, Oxford University Press, Oxford 2006 p. 446.

the Siracusa Principles, breach of notification may result in deprivation of the defenses otherwise available to it in procedures under the Covenant.⁵⁰

The subchapter on emergency powers aimed at showing the rationale behind the emergency situation and its international framework. Given its sweeping nature and tendency towards curtailment of rights, the accent was made on safeguards such as judicial review and detailed regulation of it in international treaties. This analysis was necessary as freedom of expression, which will be addressed in the following subchapter, is a derogable freedom.

1.2. Freedom of Expression-Theoretical Framework

- Justifications

Generally, in the case of tension between freedom of expression and state security, public order and safety, the preference without a balancing process is given to the latter one. This practice shows a bad tendency and harsh violation of freedom of expression.

Although there are several arguments and theories for speech to be protected, none of them deal specifically with freedom of expression during emergency. Therefore, only theories that can accommodate freedom of expression during emergency will be looked at. Given that both the Georgian and Israeli cases concerned censorship and banning the media means, the special focus will be made on the justifications applicable to the media during emergency.

It is a fact that during emergency situations, governments mainly restrict political speech, which is inevitable for democracy.⁵¹

⁵⁰ Supra note 20, B 47.

⁵¹ The theory that justifies political speech during peace time and emergency is mostly associated with the Judge Brandeis's judgment and also with the Alexander Meiklejohn and is considered to be the most influential in modern western democracies (Eric Barendt, freedom of speech, Oxford University press, U.S.200, p. 18; Andras Sajo, freedom of expression, institute of public affairs, , Warszawa, 2004, p.23-24).

[Democracy] *does not trust any supreme insight in the good political order and makes it therefore the object of an open political process, in which different opinions can compete, with changing success. It relies on the inclusion of everybody assuming that mobilizing and drawing from the creative potential of everybody, is best for society in the long run.*⁵²

The underlying idea of this is that citizens should have all information which may affect them in the collective decision making process.⁵³ Furthermore, to fully exercise political rights and privileges that are given to people, they need to clearly express their opinions.⁵⁴

Finding the truth⁵⁵ might also be relevant in the context of emergency. The theory highlights the importance of the discussion for pursuing the truth. It is acknowledged as the most long-lasting argument for free speech which considers discussion as an inevitable factor in the process of finding the truth.⁵⁶ This theory is often criticized, and arguments are different. It is argued that the weak side of this argument is that the debate does not always result in finding the truth. Although this might be true, in most cases discussion leads to finding the truth. Apart from this, it is argued that Mill's theory accords freedom of expression a narrow scope of protection, given that it grants protection only to the true statements⁵⁷. Accordingly giving protection only to the true statements might cause self-censorship.⁵⁸

Apart from this, while suppressing the speech during emergency, the government should bear in mind that it is not curtailing merely the interest of the speaker, but of the audience as well. There is an interest of audience speakers' interest in communicating ideas and information and an audience interest in receiving ideas and information.⁵⁹ Even during emergency situations,

⁵² Matthias Mahlmann, *Free speech and the rights of religion*, p. 59 in Andras Sajó (ed.) "Censorial Sensitivities", Eleven International Publishing, Utrecht, 2007.

⁵³ Andras Sajó, *freedom of expression*, institute of public affairs, Warszawa, 2004, p. 25.

⁵⁴ *Ibid.*

⁵⁵ Mostly associated with JS Mill's writings on liberty.

⁵⁶ Eric Barendt *Freedom of speech*, Oxford University Press, Oxford University press, New York, 2000, p. 7.

⁵⁷ Wojciech Sadurski, *freedom of speech and its limits*, Kluwer Academic Publishers, London 1999, p.8.

⁵⁸ *New York Times v. Sullivan*, 376 U.S. 255, 279 n. 19, 1964.

⁵⁹ *Supra* note 56, 23-29.

the population has a right and interest to receive information and ideas. At the same time, there might be some restrictions in the case of compelling interest.

In the process of population receiving information, the media, as a major source of information, plays a significant role. As media enters into the picture and claims freedom of expression, the traditional understanding of speech which is concerned with freedom of the individual is no longer relevant.⁶⁰ Non-applicability of the traditional understanding of freedom of speech does not leave the media without validation, because as Sajo argues:

freedom of expression as a right goes beyond the right of the speaker and encompasses the right of all citizens to be informed. Freedom in the communicative sphere is a product of institutional freedom: the press, publishing, broadcasting and the internet.⁶¹

The democracy argument is relevant in the context of media as in addition to merely delivering information, the media is a platform for a political debate, without which democracy is unimaginable.⁶² The same author argues that people-electorate should be involved in the decision making process, they need to have an opportunity to discuss the government's activities and in this way ensure their accountability and openness. In a democratic country, it is the electorate whose view upon the policies should be taken into account. In order for the population to participate actively and be involved in the decision making process, it first of all needs information and also means of exchanging its opinions. And it is "the media who provides readers, listeners and viewers with information and that range of ideas and opinion which enables them to participate actively in a political democracy."⁶³

⁶⁰ *Ibid*

⁶¹ Supra note 53, 16.

⁶² Thomas Gibbons, *Regulating the media*, Sweet & Maxwell, London, 1998, p.1.

⁶³ Supra note 56, 417.

Media is a broad term and embodies press, broadcasting, radio and internet in some cases. Given that the Georgian case study concerns the media and the Israeli one is about press, the accent will be made on those two.

There are different approaches on the relation of freedom of expression and the press, which are summarized by Barendt. Firstly, freedom of speech and press freedom have the same meaning. According to the second approach, the media should be entitled to a different and special treatment in comparison with other private bodies due to “its role as a check on government.”⁶⁴ And lastly, the third approach emphasizes that press freedom is not a right and it should be protected only to “the degree which it promotes certain values at the core of our interest in freedom of expression generally.”⁶⁵ Whichever regulation mode is chosen, it is important that the press fulfills its role and function.

As for broadcasting, it is considered one of the most powerful and important sources of information. As Barendt argues, people expect more from audiovisual media than from the printed one. In addition to it, he believes that the print media is more subjective and with selective coverage, in contrast to the TV. However, the broadcasting might be subjective as well and therefore this argument is groundless. Because of its dominant place among means of communication, throughout history, the government has set up special rules and standards.⁶⁶ The rules are set for the licensing process and for the content as well. Basically this is done with the aim of protecting the public interest, such as prevention of crime or disorder and alike.⁶⁷ Breach of the rules and its consequences will be considered later in the light of emergency.

⁶⁴ *Ibid.*, 420.

⁶⁵ *Ibid.*, 422.

⁶⁶ *Ibid.*, 444.

⁶⁷ Eva Salmon. Guidelines for broadcasting regulation, United Nations Educational, Scientific and Cultural Organization, Paris, 2006, Available at

As a concluding remark, it should be noted that this section aimed at showing the importance of freedom of expression and answering the question why it should be protected. As was clear from the arguments presented above, there is no special justification for freedom of expression during emergency. Nevertheless, the elements of different theories can be applied for its accommodation. At the same time merely theories cannot grant protection if not enshrined and supported by the international or domestic legal instruments. The following section will explore protection accorded to freedom of expression by the ECHR.

1.2.2. Freedom of expression according to the ECHR

Freedom of expression is one of the rights enshrined in the ECHR and according to the ECtHR, it “constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man.”⁶⁸ Even though the ECtHR has a rich case law, it has not given a clear definition to this right. “The court does not consider it necessary to give on this occasion a precise definition of what is meant by information and ideas”⁶⁹ Nevertheless, from its precedents, the scope of this right can be examined.

In its landmark decision, *Handyside*⁷⁰, the ECtHR concluded that freedom of expression includes not only information that is favorably received or regarded as inoffensive, or as a matter of indifference, but also that which offends, shocks or disturbs. “Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society.’”⁷¹ As

http://portal.unesco.org/ci/en/files/21345/11399384219Guidelines_for_Broadcasting_Regulation.pdf/Guidelines%2Bfor%2BBroadcasting%2BRegulation.pdf (last visit 7 November 2009).

⁶⁸ Supra note 1.

⁶⁹ *Groppera Radio AG and others, Application no. 10890/84*, 28 March 1990, par. 55.

⁷⁰ Supra note 1.

⁷¹ *Ibid.*

was mentioned, the ECtHR case by case defined the scope of the right. Consequently, by now it includes paintings, books, photos, films, television commercials, advertisements in newspapers and statements in radio interviews. Freedom of expression implies the right to remain silent as well. In *K. v. Austria*, the ECtHR stated that testifying against one's own will is an interference with freedom of expression, because everybody has a right to remain silent.”⁷² According to the ECHR, this right could be without interference by public authorities and regardless of frontiers.

Because of the primary focus of the thesis, media regulation under ECHR is crucial. Article 10 protects not only the ideas and opinions, but the form in which they are expressed and delivered, because “any restriction imposed on the means necessarily interferes with the right to receive and impart information.”⁷³ However, the means by which a particular opinion is expressed are protected only insofar as they are means which have an independent significance for the expression of the opinion.”⁷⁴

Even if article 10 does not say anything explicitly about the press, the ECtHR attaches a significant importance to it. In its judgments the ECtHR highlighted and not only once, the role of the press and applicability of the existing principles to it. For instance, in *Lingens*,⁷⁵ the ECtHR stated that all the existing elaborated principles in regard of freedom of expression are equally applicable to the press as well. In the *Sunday Times* case⁷⁶ the ECtHR highlighted not only the right of press to disseminate information, but the public's right and interest to receive it. “Not only does the press have the task of imparting such information and ideas, the public also

⁷² Peter Van Dijk, *Theory and Practice of the European Convention on Human Rights*, Antwerp: intersentia, Oxford, 2006 p. 783.

⁷³Case of Autronic AG v. Switzerland ,Application no. 12726/87, 22 May, 1990 par. 47.

⁷⁴ Supra note 72, 780.

⁷⁵ *Lingens v. Austria*, Application no. 9815/8 8 July 1986, par. 41.

⁷⁶ *The Sunday Times v. the United Kingdom* , Application No- 13166/87 , 1991, 26 November 1991,

has a right to receive them.”⁷⁷ Moreover, it stressed that press “enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.”⁷⁸

At the same time ECtHR observes that the press should not exceed the boundaries such as reputation and rights of others and the need to prevent the disclosure of confidential information.⁷⁹

Hence, the case law of the ECtHR is a clear example of how much importance is given to the press and its role. Apart from the press, its case law regulates matters cornering broadcasting. Unlike the case of the press, article 10 contains a provision regulating broadcast: “this article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.” Special regulation of broadcast is not surprising given the arguments discussed earlier.

As the Commission concluded, this restriction applies only to broadcasting and not to the recipients. It also noted that even if it applied, requirements of the second paragraph should be fulfilled.⁸⁰ Regarding this issue, it is central to bring *Groppera Radio case* as an important source example,⁸¹ where the ECtHR stated that the third sentence should be considered in the context of limitations of article 10, paragraph 2.⁸²

ECtHR has its position towards the particular programs including ones on political speech. In *Murphy v. Ireland*⁸³, the ECtHR concluded that a margin of appreciation is wider in the sphere of religion and morals than in political speech.⁸⁴

⁷⁷ *Jersild v. Denmark*, 23 September 1994, par. 31.

⁷⁸ *Castells v Spain*, Application no. 11798/85, 23 April, 1992. par. 43.

⁷⁹ *Ibid.*

⁸⁰ Karen Reid, *A Practitioners Guide to the European Convention on Human Rights*, London: Thomson/Sweet & Maxwell, c2007 3rd edition, p 454.

⁸¹ Supra note 69.

⁸² Supra note 80.

⁸³ *Murphy v. Ireland*, Application No. 44179/98, 3 December 2003.

Freedom of expression does not belong to the category of absolute rights. It is among the rights that might be restricted. The limitations under the ECHR can be presented in three groups: the limitations that are used in the specific field such as: public emergency⁸⁵ and activities of aliens⁸⁶; so called “common limitation clauses”-article 8-11 and “specific limitation clauses”. It is also acknowledged that the ECHR contains “implied” limitations as well.⁸⁷ The first subchapter already addressed the first category of limitation with respect to emergency situations, while the second category of limitation will be dealt with in the present chapter.

When analyzing a case which involved the limitation of a right, the ECtHR examines three main factors: first of all whether the interference was prescribed by the law, if it had one of the legitimate aims prescribed by article 10, paragraph 2 and whether it was necessary in a democratic society.

ECtHR elaborated the concept of “prescribed by law” and stated⁸⁸ interference must have roots in the national law,⁸⁹ it should be foreseeable and accessible. Any interference should aim to achieve one of the legitimate aims, prescribed by the article 10 of ECHR. It should be noted that freedom of expression, unlike other freedoms in its group also contains two additional grounds for restrictions-maintaining the authority and impartiality of judiciary.

Restriction should be necessary in a democratic society. In *Handyside*, the ECtHR clarified that “necessary” is not an interchangeable term with desirable, ordinary, admissible, useful⁹⁰. In the practice of the ECtHR necessity is interlinked with “pressing social need.”

⁸⁴ Supra note 80, 455.

⁸⁵ Supra note 8, 15.

⁸⁶ *Ibid.*, 16.

⁸⁷ Stefan Sottiaux, *Terrorism and the limitation of rights: The ECHR and the US Constitution*, Hart, Oxford, 2008. p. 40-41.

⁸⁸ *The Sunday Times v. the United Kingdom*, Application No- 13166/87 199126, 6 November 1991.

⁸⁹ *Ibid.*, 86.

⁹⁰ Par. 49.

Besides pressing social need, in this context the ECtHR examines whether it is proportionate to the legitimate aim or not. As steps of proportionality test, the ECtHR has accepted that first of all the measures should be suitable to the aim. Secondly they must be the least restrictive and finally there should be a reasonable balance between the limiting measures and the aim.⁹¹ It is also accepted that the ECtHR does not always examine and follow all these three steps and proportionality is understood in more general and broad way. "Proportionality in this sense is simply a different characterization of the very act of balancing competing interests, but with an emphasis on evaluating the acceptability of all the proportions of a particular interference."⁹² It is accepted that the balancing test is a flexible one, which allows weigh claims case by case.⁹³ At the same time some scholars consider it as "unprincipled" and "incoherent".⁹⁴ The margin of appreciation discussed in the first subchapter plays a decisive role in this stage.

These were the main concepts on freedom of expression under the ECHR. The case law of the ECtHR offers clear examples of how much weight is given to freedom of expression. At the same time it is not clear how much importance will be accorded to it during emergency situation when it clashes with other interests such as security, public order and safety. The next subchapter will specifically address the issue of freedom of expression during an emergency.

1.3. Freedom of Expression during an Emergency Situation

The subchapters on freedom of expression and emergency situations clearly show that these topics have been elaborated. However, the concept of freedom of expression during

⁹¹ Supra note 87, 44-45.

⁹² Supra note 34, 14.

⁹³ Supra note 45.

⁹⁴ *Ibid.*

emergency situations does not seem to be elaborated with the same success whereas it is acknowledged that freedom of expression is “generally among the first victims when derogations from human rights are imposed in a state of emergency.”⁹⁵

This thesis will argue for both – lack of sufficient standards, as well as the challenging state of freedom of expression during emergency. The former will be addressed in the following subchapter, while the latter will be the subject of discussion in the second and the third chapters. Finding materials for this subchapter was one of the most challenging parts of this thesis. Existing problems are not sufficiently reflected in the legal literature and international standards. However, related issues such as the clash of freedom of expression with terrorism and freedom of expression during war times are more touched on by scholars.⁹⁶ What these two on one hand and emergency situation on the other hand have in common is the security concern, because freedom of expression during the process of combating terrorism or war times is suppressed in favor of state security. It should also be noted that for the purposes of this paper emergency situation apart from the state security can be invoked on the grounds of public order or safety. At the same time, the contexts of terrorism, war time and public emergency differ from each other. Despite the differences, improper balance, or furthermore the absence of the balance are present in all of them. The judicial deference and wide margin of appreciation can also be added to it. Solutions should be found for these problems in the context freedom of expression during emergency.

⁹⁵ Danilo Turk & Louis Joinet, in the Right to freedom of opinion and expression: final report by MR.Damilo Turk and Mr. Louis Joinet, Special Rapporteurs, U.N. Escor, Comm’n on Hum. Rts., 44 Sess, at 77, Un Doc. E/CN.4/Sub.2/1992/9 (14 Jul. 1992) in Sandra Coliver, Paul Hoffman, Joan Fitzpatrick and Stephen Bowen (ed.), Secrecy and liberty: National Security, freedom of expression and access to information, M. Nijhoff Publishers, p.34, 1999.

⁹⁶ See Shimon Shetreet (ed.), Free speech and national security, Martinus Nijhoff Publishers, 1991; Sandra Coliver, Paul Hoffman, Joan Fitzpatrick and Stephen Bowen (ed.), Secrecy and liberty: National Security, freedom of expression and access to information, M. Nijhoff Publishers, p.34, 1999.

As noted above finding the relevant materials was difficult, it was also difficult to find standards addressing the issue at stake. Surprisingly, only one set of principles- Johannesburg principles coming close to the topic were found and even these principles do not focus primarily on emergency situations, but rather on security concerns. The analysis of the above mentioned principles in order to find what can be relevant for freedom of expression while in an emergency will be addressed in the following subchapter. The judiciary stand has been discussed, but will be tackled in the light of case studies as well.

- **The Johannesburg principles on national Security, freedom of expression and access to information**

The Johannesburg principles on national security, freedom of expression and access to information⁹⁷ were the result of a meeting of experts in Johannesburg, in 1995.⁹⁸ In its preamble,⁹⁹ it reaffirms the belief that freedom of expression is vital to a democratic society and essential for its progress. The principles take into consideration the main human rights instruments, bear in mind the importance of people being able to monitor their government, acknowledges the necessity for judicial protection and alike. As stressed before, the main focus of Johannesburg principles is not an emergency situation. Rather it aims at regulating the issue of tension between security and freedom of expression generally and slightly touches on emergency situation as well. Although there is only one principle on emergency, other principles regulating

⁹⁷ Sandra Coliver, Paul Hoffman, Joan Fitzpatrick and Stephen Bowen (ed.), *Secrecy and liberty: National Security, freedom of expression and access to information*, Mmartinus Nijhoff Publishers, foreword, 1999.

⁹⁸ In October 1995, experts in international law, national security and human rights were gathered in South Africa to discuss such important and problematic issues as: to what extent may governments withhold information from public disclosure and prohibit expression for reason of national security. (Sandra Coliver, Paul Hoffman, Joan Fitzpatrick and Stephen Bowen (ed.), *Secrecy and liberty: National Security, freedom of expression and access to information*, M, foreword, 1999).

⁹⁹ These are principles regarding freedom of expression and access to information and only those closely related to the thesis topic will be discussed in detail.

the conflict between freedom of expression and security might be relevant in the case of emergency as well.

The first principle defines the essence of the right at stake, its scope and also acknowledges it being the subject to restrictions.¹⁰⁰ This principle refers to the famous three stage test usually applied while restricting freedom of expression. Its stages are as follow: prescribed by the law, legitimate aim and necessary in the democratic society. Although the referred test is commonly applied and accepted by the main human rights instruments,¹⁰¹ as noted in the commentary to these principles, the Johannesburg principles make it more demanding when requiring the measures to be least restrictive. As explained in the commentaries, the decision of including the least restrictive means test “reflects . . . the awareness of . . . too-common tendency of courts to accord excessive deference to Executive claims of national security.” It is also noted that “experience has shown that judicial independence is often compromised in national security cases even in ‘mature’ democracies.”¹⁰² It is interesting that although the principles themselves do not explicitly mention the margin of appreciation, the commentary argues that Johannesburg principles are not in favor of it.¹⁰³ As for the second principle, it is devoted to the legitimate national security regulating when security can be considered as a legitimate interest. According to it, state security is a legitimate interest only when there is a” genuine purpose and demonstrable effect (...) to protect a country’s existence or its territorial integrity.”¹⁰⁴

One more important principle in connection to the above mentioned one is the principle setting the threshold when can speech become the subject to restrictions. It stipulates that

¹⁰⁰ Supra note 97, 2

¹⁰¹ ECHR, ICCPR.

¹⁰² Supra note 97, 31.

¹⁰³ Ibid.

¹⁰⁴ Supra note 97, 4.

expression should intend to incite imminent violence, it should be likely to incite such violence and also there should be a direct and immediate connection between the expression and the likelihood or occurrence of such violence.¹⁰⁵ The commentary explains that even the unlawful action cannot be punishable for the incitement of non-violent activity.¹⁰⁶

No less important is the principle¹⁰⁷ which enumerates six categories of expression that are usual targets of suppression from side of government. For the purposes of this thesis, only some of them that are relevant will be discussed in detail. The advocacy of non-violent change of government is definitely one of the most problematic issues in the context of emergency and security. As will be shown from the Georgian case study, the statement about changing a government was considered as directed to overthrow of the government. As the commentary states people are entitled to advocate non-violent change of government policy or the government itself, even if this action is prohibited under national legislation. Moreover, these principles can be found reflected in several statements of the UN Human rights Committee and bodies of the Council of Europe.¹⁰⁸

Another problematic matter within this background can be considered a criticism or insult to the government, foreign governments or officials. While inclined to suppress the criticism of government, officials forget that they are obliged to bear the criticism.¹⁰⁹ The example supporting this statement will be given in Israeli case discussed in chapter two. In relation to the above discussed principles it should be added the following- given that usually, it is the political minority that advocates for the change of government or criticizes it, they should not be discriminated against.

¹⁰⁵ Supra note 97, 5.

¹⁰⁶ Supra note 97, 6.

¹⁰⁷ Supra note 97, 5.

¹⁰⁸ Supra note 97, 42.

¹⁰⁹ Supra note 97, 43.

Another important issue is that information about the violations about the human rights should not be banned. By putting limits to the dissemination of such information, the government tries to avoid the public ‘scrutiny’¹¹⁰ of its actions. Finally, the state of emergency is covered in the third principle, according to which the state is empowered to restrict freedom of expression only when there is a public emergency which “threatens the life of the country” and which is officially and legally announced. At the same time, the measure undertaken against freedom of expression should be “strictly required by the exigencies of the situation” also when and for so long as they are not inconsistent with the government’s other obligations under international law.¹¹¹

Unlike the ECHR standards, ICCPR explicitly requires the emergency to be officially and lawfully proclaimed. Another difference between, on the one hand the Johannesburg principles, and, on the other hand, ECHR and ICCPR is that it demands the danger to be such as to threaten the life of the country and not the nation. The justification for substituting the nation with country is “too frequent abuse¹¹² by governments of their authority to defend the “nation” to justify measures aimed at entrenching the hegemony of the majority national ground, its culture, or heritage.¹¹³ As it is obvious from the analysis, the Johannesburg Principles do not bring in substantively new regulatory framework for emergency situations.

Although it is clear from this principle, the Johannesburg principles do acknowledge the existence of the emergency and derogation from freedom of expression, interestingly enough the

¹¹⁰ Report of the United Nations Fact Finding Mission on the Gaza Conflict, Human Rights in Palestine and other Occupied Arab Territories, 15 September 2009, par. 166. Available at http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf, (last visit 27 November 2009).

¹¹¹ Supra note 97, 4.

¹¹² Country refers to territorial threat that makes it more objective to assess as opposed to nation which is a much more subjective term.

¹¹³ Supra note 97, 20.

absolutely opposite position can be read in the commentary. The author of the commentary argues that the Johannesburg principle on emergency “does not refer to the possibility of derogation, rather it treats emergencies as a sub-category of the general standard and narrows the circumstances in which emergency restrictions may be imposed.”¹¹⁴ This reasoning does not follow from the text of the principle itself, because as seen earlier the principles do not imply anything about non-derogation. In addition to the very broad interpretation of the text, the fact of treating an emergency as a subcategory of the general standard is not clear. Although from this comment it is hard to conclude what was meant by the author, yet two versions of its interpretation can be supposed. According to the first one, the author means setting forth an emergency among other possible grounds for restriction. Or, not allowing the derogation from freedom of expression and merely having the usual grounds for its restriction, for instance the legitimate grounds that are given in the article 10 of ECHR.

Either version seems groundless and intangible. First of all, putting an emergency as one of the grounds for restriction is not workable, because the concept of emergency is itself quite broad and embodies various grounds. Sometimes it might overlap with other grounds that are already prescribed in the limitations clause. For instance, usually during an emergency freedom of expression is curtailed in favor of security concerns, at the same time security is alone standing limitation during the peace time. Accordingly, in this case having an emergency as a separate limitation next to security, will create uncertainty about which ground to invoke. Secondly, as mentioned above, the concept is broad itself and in any case it would need the definition. As for not allowing the derogation from freedom of expression, it seems another unworkable scheme. Although the right is fundamental and crucial for the democracy and individuals, it conveys the danger as well. Therefore in some circumstances it needs a regulation.

¹¹⁴ Supra note 97, 32.

In addition to it, none of the human rights instruments consider freedom of expression as non-derogable right, but are some efforts to control abusing it. How it works in practice is another side of the picture. The author mentions that although the standards of ECHR seem precise and workable, they are often misused and abused by the government. It is hard not to agree with the author, but suggested solutions are not the best ones. It does not show how putting the emergency as a subcategory will eliminate the abuse, if the formulation of restrictions will be the same.

As a conclusion it should be noted that there are no doubts that the Johannesburg principles are crucial and probably the only ones regulating the clash of freedom of expression with security concerns. Although, as was shown, only one principle is devoted to emergency and the commentary to it is not very clear, some principles might be relevant in the context of emergency. The government, while suppressing freedom of expression in favor of national security, public order, public security during emergency, should be obliged to prove that first of all the restriction was necessitated by the time of public emergency which threatened the life of the country. Secondly, it should prove that the emergency was declared lawfully and officially. Thirdly, the imposed measure should be strictly necessitated by the exigencies of the situation. Fourthly, it should prove that the ground for invoking emergency and accordingly suppression of freedom of expression whether it be a security, public order or public peace is genuine and has a demonstrable effect to protect a country's existence. Moreover, the state should prove that expression was intended to incite imminent violence, it was likely to incite such violence and lastly that there was a direct and immediate connection between the expression and the likelihood or occurrence of such violence. In addition to it, the state should not be allowed to put

any restrictions to the categories of expression enumerated above. Finally, all measures used to restrict freedom of expression should be proportionate to the actual crime.

- **Media during emergency**

The issue not addressed by the Johannesburg principles but of utmost importance is media during emergency. The topicality of this issue among others is proved by the selected case studies, and also by the recently produced Goldstone report on Palestine. The governments have a tendency to limit the work of the media, especially the broadcasting and this way reduce the public scrutiny of their actions. Given that the main case study is the Georgian one, where the government suspended the license of the broadcaster, this issue of sanctioning the broadcaster during emergency will be highlighted. Given that there are not special standards on media regulation during emergency, reference will be made to the existing ones regulating broadcasting in general. The standards elaborated by Article 19¹¹⁵ and also the guidelines for broadcasting regulation¹¹⁶ will be used as the main reference source.

Both sources accept the possibility of sanctioning the broadcaster. According to the standards elaborated by Article 19, the whole process of imposing sanctions should be open and transparent with the presence of the broadcaster.¹¹⁷ In addition to this, while imposing the sanctions, the independent organ should bear in mind that a sanction has the purpose of protecting the public interest directed to the diverse and qualitative broadcasting.¹¹⁸ The sanctions themselves should be various and proportionate to the damage and imposed in the right order. For instance, a warning should be used in the initial stage, which if not fruitful, can be

¹¹⁵ Article 19, Access to the Airwaves , Principles on Freedom of Expression and Broadcast Regulation, London, 2000, available at <http://www.article19.org/publications/global-issues/media/standard-setting.html> (last visit 27 November 2009).

¹¹⁶ Supra note 67.

¹¹⁷ Supra note 115, 26.

¹¹⁸ Supra note 115, 27.1.

followed by a fine.¹¹⁹ As for the suspension, it is accepted¹²⁰ that suspending broadcasting is a very severe and unfair measure. Not fair because by suspending the broadcasting the punished subject is not only the broadcaster, but the audience as well. Therefore it should be used if breaches have a frequent character and all other sanctions turned out to be pointless and non-efficient.¹²¹ Bearing in mind the Georgian experience with closure of the TV company and suspension of the license, the following safeguards can be suggested: in case of emergency or the imminent danger the independent body should first of all use a warning, if not fruitful it can be followed by a fine and if the violation is not terminated, instead of suspending the license, the government should use a censorship tool regarding the particular program. Censoring the program will avoid the blocking of the whole television.

The final remark for this chapter will be that lack of sufficient standards regulating freedom of expression during emergency situations is clear. Absence of relevant standards and in some cases even safeguards, such as judicial review, leads to the unjustified curtailment of freedom of expression. There is a need for the standards which will reflect the importance of freedom of expression and the media and oblige governments to do the proper balancing of interests. As was shown, the Johannesburg Principles can be a good starting point, elements of it can be modified, elaborated and adjusted to the issue at stake. In addition to this, to see what Georgia can learn, the next chapter will deal with the Israeli case study.

¹¹⁹ Supra note 115, 27.

¹²⁰ Supra note 67.

¹²¹ Supra note 66.

Chapter II: Freedom of Expression in Emergency Situations-the Israeli Context

Chapter two is devoted to the model country which is Israel. Before assessing the cases selected for the case study, a brief overview of the legislation will be provided. This analysis aims at creating a general background on freedom of expression and emergency in Israel and will be conducted to the extent necessary for the better understanding of the case studies given in the following chapter. The aim of this chapter is to examine the cases and see what can be learned from them.

2.1. Regulation of Freedom of Expression and an Emergency in Israel

One of the important documents in the history of Israel is the Declaration of Independence.¹²²

According to it, the state of Israel:

. . .will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants (...); it will guarantee freedom of religion, conscience, language, education and culture ...¹²³

Although the Declaration of Independence, is not a normative act, it is given an utmost importance by the Supreme Court in its case law: “It expresses the vision of the people and its

¹²² It was adopted on May 14 1948, when the British Mandate over a Palestine expired. The Jewish People's Council gathered at the Tel Aviv Museum, approved the proclamation and declared the establishment of the State of Israel. (Website of Israeli Ministry of foreign affairs <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Establishment+of+State+of+Israel.htm> (last visit 16 October, 2009)).

¹²³ *Ibid.*

faith we are bound to pay attention to the matters set forth in it when we come to interpret and give meaning to the laws of the state. . . ¹²⁴

While, the Declaration of Independence is significant document in the history of Israel, it is not the only one. Although Israel sought to adopt one written constitution, in 1992 it adopted two basic laws: the basic law: freedom of occupation and the basic law: human dignity and freedom.

The Supreme Court has quite a rich case law on freedom of expression. Its decisions reflect the various interests that freedom of expression conveys. The Supreme Court has more than once acknowledged the importance of freedom of expression in disclosing the truth, self-fulfillment of the individual and generally for the democratic society. It has been especially stressing the significance of freedom of expression for the democratic regime: "the free exchange of information, opinions and points of view is essential to the existence of a democratic regime"¹²⁵. It "is a condition precedent for the existence of democracy and its proper functioning."¹²⁶ Moreover the Supreme Court accorded freedom of expression the special status-given that it secures the existence of a democratic regime which in turn, secures the existence of other basic rights.¹²⁷

All these cases are clear examples of what importance is given to freedom of expression in Israel. By now, Israel has been in the state of emergency,¹²⁸ given that the Knesset has always been voting for the promulgation of state of emergency. Definitely, the extended state of

¹²⁴ Supra note 13.

¹²⁵ Supra note 14.

¹²⁶ H.C. 372/84 Kloppe-Naveh v. The Minister of Education and Culture, 38(3) p.D. 233 (29), at p. 238.

¹²⁷ C.A. 723/84 Kloppe-naveh v. The Minister of Education and Culture, 38 (3) P.D. 233 at p.295 in HCJ 680/88 Schnitzer v. The Chief Military Censor", January 10, 1989.

¹²⁸ As it is argued it is a country with is a 'cleavaged' society and therefore there have been many tensions between Jews and Arabs as well as between religious Jews and non-orthodox Jews. ¹²⁸ These along other internal and external tensions resulted in the prolonged legal state of emergency, which will remain unless the Knesset in every 90 days does not vote for its promulgation (Weinblum, Sharon, Basic rights in a time of protracted insecurity context: the case of Israel, paper presented at the 4th ISA Annual Convention in San Francisco. March 26-29, 2008).

emergency found its reflections on the legislation. Israel integrated the Mandatory press ordinance and the Defense Regulations adopted by the British that existed before the Israeli state.¹²⁹

According to the Press Ordinance, the Minister of Interior is empowered to prohibit publishing an article if it is likely to endanger the public peace. As for the Defense Regulations, pursuant to it the Censor is entitled to prohibit publishing a material if it is or is likely to become prejudicial to the defense, public safety or public order. In addition to it, he entitled to demand material to be submitted for censorship.¹³⁰ Given the severe nature of these regulations, scholars argue this is not a desirable reality and the laws should be changed¹³¹

Although laws have not been repealed or amended, other measures have been undertaken to minimize the harshness of the Defense Regulations.¹³² One of them was an agreement between the representatives of the Editor's Committee of the daily press and the army concluded in 1949. According to the agreement, in relation with the member newspapers the military censor gave up his power to request all the material for the prior censorship, but identified certain matters.¹³³

In addition to the agreement, the Supreme Court tried to preserve freedom of expression via its case law. Its cases are very relevant and important for the purposes of this thesis, especially its two decisions- *Kol ha'am* and *Schnitzer* can be set as examples to look up to. Therefore the following subchapter will be devoted to exploring these cases.

¹²⁹ Sharon Weinblum, Basic Rights in a Time of Protracted Insecurity Context: the Case of Israel, paper presented at the 4th ISA Annual Convention in San Francisco. March 26-29, 2008.

¹³⁰ Defense regulations 87 (1)

¹³¹ *Ibid*

¹³² Segal Zeev, Security censorship: prior restraint (after the Schnitzer decision) P.218 in Shimon Shetreet (ed.), Free speech and national security, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1991.

¹³³ *Ibid*.

2.2. Israeli Case Study

As noted before, this subchapter will present two Israeli cases, one taking place in 1953 and the other in 1989. Both cases are concerned with freedom of expression being in conflict with other interests. It is noteworthy that the decisions of the Supreme Court on these matters are regarded as landmarks.¹³⁴ By presenting the said cases, the chapter aims at showing how the dilemma of balancing the conflicting interests is resolved by the Executives and the judiciary in the country with a constant state of emergency.

It is argued that 1953 was a time when the Soviet Union was a friend of Israel and when even the Union of Soviet Socialist Republics voted in favor of Israeli admission to the United Nations. During this period two communist newspapers “Kol Ha’ am” and “Al It-tihad” owned by one owner published critical comments regarding the statement made by the Israeli ambassador to United Nations about Israeli involvement in the war against the Soviet Union.¹³⁵ According to the Ambassador’s statement which was published in a newspaper, Israel could allocate soldiers at the side of the US in case of war against the Soviet Union. To be more precise, the Newspaper “Kol Ha’am” published the article “*Let Abba Eban Go and Fight Alone*” where, among other comments, it stated: “let us increase our struggle against the anti-national policy of the Ben-Gurion government, which is speculating in the blood of Israel Youth”¹³⁶. Also “let us increase our struggle for the peace and independence of Israel.”¹³⁷ This

¹³⁴ See Shamir, Ronen, “Landmark Cases” and the reproduction of legitimacy: the case of Israel’s High Court of Justice, Blackwell publishing on behalf of the law and Society Association, Vol. 24, No. 3(1990), pp.781-805, available at: www.jstor.org/stable/3053859 (last visit 27 September 2009).

¹³⁵ Tsvi Kahana & Mathew Good, Human rights in Israel-brief overview, The center for the study of democracy, ideas for good government, may 2008, available at: <http://www.google.com/#hl=en&source=hp&q=Tsvi+Kahana+%26+Mathew+Good%2C+Human+rights+in+Israel-brief+overview%2C+The+center+for+the+study+of+democracy%2C+ideas+for+good+government%2C+may+2008&btnG=Google+Search&aq=f&aqi=&oq=&fp=2755c6b3e9b2e9>, (last visit 12 October, 2009).

¹³⁶ The excerpt from the newspaper Ha-retz, March 9 1953, in H CJ 101/54 “Kol Ha am” Co. LTD v Minister of Interior, par. E, p. 18, 16 October, 1953

¹³⁷ *Ibid.*

last paragraph was especially considered as a ground for the suspension of the newspaper. As a result, “Kol Ham” was suspended for 10 days.

As for the second newspaper called “*Al It-tihad*”, it published an article “The people will not permit speculation in the blood of its sons”. The journalist wrote:

all form of surrender by the Ben Gurion Government (...)will not avail her with her American masters; moreover, her economic, political and state bankruptcy, internal and external, are beginning to be revealed to the masses, who have started to understand whether this government is dragging them-not only to unemployment, poverty, and hunger, but even to death in the service of imperialism (...) whilst those masses do not want that fate and will demonstrate their refusal.

If Ben-Gurion and Abba Eban want to fight and die in the service of their masters, let them go and fight by themselves. The masses want bread, work, independence and peace, will increase their struggle for those objectives, and will prove to Ben-Gurion and his henchmen that they will not allow them to speculate in the blood of their sons in order to satisfy of their masters.¹³⁸

Because of the above presented article “*Al It-tihad*” was suspended for 15 days. Both suspensions were based on 19 (2) of Press Ordinance.

These two decisions on the suspension of newspapers were challenged in the Supreme Court, which on 16 October 1953 delivered the decision *Kol Ha’am*.¹³⁹ As Justice Agranat, writing for the Supreme Court formulated, it had to decide on the fundamental problem of freedom of expression and the public peace. He began it by exploring the links and connections between the democratic processes and freedom of expression. “A principle of freedom of expression is closely bound up with the democratic process”¹⁴⁰. The Supreme Court elaborated the issue, by comparing an autocratic regime with the democratic one. In the former it is the ruler who knows what the best is for everybody, and therefore no one is entitled to criticize him. In contrast to this, in the democratic regime “rulers” are considered as representatives of the people and thus people can freely criticize and scrutinize leaders’ political activities. It noted that in

¹³⁸ The excerpt from the article in “*Al-Ittihad*”, March 20, 1953 in H CJ 101/54 kol Ha’am Co. LTD v. Minister of Interior, October 16, 1953.p.5.

¹³⁹ Supra note 13.

¹⁴⁰ Supra note, 8.

democracy finding the truth plays an important role. Finding the truth in its turn requires public opinion, because “It is the ordinary citizen who feels it when statutes are incompatible with his needs.”¹⁴¹ It also stressed that freedom of expression is a tool for finding the truth, since it takes all views into account.

After discussing the social interest of freedom of expression which is searching for the truth, the Supreme Court also examined other interests that freedom of expression might embody. Apart from the social interest, freedom of expression serves to “self-expression” of individual. Everyone needs a possibility to express themselves. Furthermore, even the state itself has an interest in preserving this “private” interest. To support this statement the Supreme Court cited Justice Brandeis from *Whitney v. California*¹⁴² : “the final end, *inter alia*, of the state was to make men free to develop their faculties.”¹⁴³

Despite all the importance that freedom of expression entails in itself, this is not to say that it is absolute. It is subject to restrictions especially when it clashes with other interests and values. It was noted that both interests-public security as well as free speech- encompass a socio-political importance of the first order. At the same time, the Justice writing for the majority stated that everybody agrees that in case of “supreme urgency” which is for instance a war or grave national crises the greater weight is accorded to state security. For instance, he noted that when there is war or grave national crises, greater weight is accorded to state security. On the other hand, the Justice stressed one crucial problem related to emergency-, “the problem lies in framing these limits as ultimate safeguards (for the freedom of expression) because of the tendency of legislators and judges, especially in times of stress, to regard ideas of which they

¹⁴¹ Ibid.

¹⁴² 274 U.S. 357 par. 14 (1927).

In *Kol Ha'am Co. LTD v. Minister of Interior*, par. D, p.3-9, October 16, 1953.

disapprove as dangerous to the public welfare.”¹⁴⁴ This is probably why Justice Brandeis (US Supreme Court) saw the necessity for judging “in calmness” the question of the danger comprised in publications.¹⁴⁵

At the end, the Supreme Court came to the conclusion that the dilemma should be solved by weighing the public peace against freedom of expression. The Supreme Court added that giving the preference to security can be justified only “when the situations definitely calls for it.” Although there cannot be a mathematic formula, still there should be a “rational principle” which will guide the minister to decide whether the material is “likely to endanger the public peace”. In order to elaborate the above mentioned rational principle, the Supreme Court considered it crucial to define what the expression “endangers the public peace” means. According to the explanation given to it by the Justice, any publication leading to the use of violence by others to overthrow by force the government in power of the existing regime, to the breach of the law, to the causing of riots or fighting in public or to the disturbance of order, endangers the public peace. The section of the ordinance contains not the verb “endanger”, but “likely to endanger”, so the Supreme Court proceeded with the analysis of it. According to it, the definition of likely depends on the chosen approach since there are several. In accordance with the one approach even a weak tendency might be enough, whereas based on the other approach, the Minister “must be convinced beforehand that there has been created, having regard to the circumstances in which it takes place, a link between the publication and the possibility of one of the said consequences occurring, which must lead to the inference that the occurrence of that consequence is probable.”¹⁴⁶ The Justice criticized the “bad tendency” approach seeing it as

¹⁴⁴ Encyclopedia of social science, volume 6-7, p. 455. in H CJ 101/54 Kol Ha’am Co. LTD v. Minister of Interior, para D, p.12, October 16, 1953.

¹⁴⁵ Supra note 13.

¹⁴⁶ *Ibid.*, 15.

peculiar to the autocratic or totalitarian regime which is not the case with Israel and gave several examples to support this statement. The system of laws establishing the political institutions and the Declaration of Independence are good indicators that Israel is based on freedoms and also that it is a “freedom loving state”. It was also mentioned that although the Declaration of Independence does not have legal force, it “expresses the vision of the people and its faith” and given that the law of people should be studied in the light of its national way of life, the Supreme Court is obliged to keep the declaration in mind while interpreting the laws. Applying the “bad tendency” approach equals to giving the freedom to the private opinions of the person who is entitled with these powers” and therefore its usage is not justified in the country with democratic values. Because of all mentioned the Supreme Court gave the preference to the second approach and called it as a near certainty test.

The test secures freedom of expression to a great extent contrary to the bad tendency one. What is important in the case of the probability test, suppression of ideas and views will not take place because of them being different, critical and alike. At the same time, this test enables a government to secure security and public peace too.

After finding the sufficient rationale for striking the balance, the Supreme Court highlighted the details of the test that should be taken into consideration. The Supreme Court established that the Minister has to evaluate all the circumstances of the case and estimate the affect that they can produce. The tone, offensive language surrounding the statement might be relevant as well, but should be seen in connection with other factors, not independently.

At the same time, the Supreme Court emphasized that the probability test does not depend on how imminent the danger is. In other words, the Minister does not have to prove the proximity in time, but its high probability. The Supreme Court once again highlighted that the crucial factor

of all is that there should be a high probability/near certainty that the public peace will be harmed. Although imminence of the danger might be one of the factors to be taken into consideration, it cannot be the decisive one, noted the Court.

One more important aspect of the decision is that the Supreme Court established the possibility of judicial review over of Executive discretion. What was elaborated in the decision is the Court's competence to assess the situation. It stated that if the discretion is not exercised reasonably, then the Court is entitled to review it.

Finally, the Supreme Court applied all the above developed ideas and views to the challenged cases. First it reflected on the case of *Kol Ham'am* and did not accept the Minister's argument. Although the tone of the article was not mild, according to the Supreme Court, it was not enough to prove that there was a probability to endanger the public peace. The Supreme Court concluded that the Minister used the bad tendency test not the probability one and thus reached a different conclusion. Moreover, the Supreme Court also noted that the author criticized the policy of the government which did not equal to endangering the public peace.¹⁴⁷ As for the second newspaper, as the Supreme Court noted it conveyed the same message but in more an emotional manner.

The Supreme Court drew its attention to the fact that publications were followed by the Minister's statement that the Ambassador did not make such a comment and that it was the product of the journalist's imagination. Therefore, after this statement there was no ground for public refusal to serve in the army and for violent actions of the masses.¹⁴⁸

As a conclusion regarding the case, it should be noted that this decision is of high importance, because it establishes the test and guidelines for the Minister of the Interior. The near certainty

¹⁴⁷*Ibid.*, G; 29-33.

¹⁴⁸*Ibid.*, G; 33-36

test/probability test maximally prevents an unlawful curtailment of freedom of expression and decreases the chances of unlawful weighing if the test is applied lawfully. The main rationale behind it is that the authority making the decision should estimate the probability of endangering the public peace. Only in case of near certainty that public peace will be endangered gravely can the relevant authority limit freedom of expression. The decision is important in respect of judicial review as well, given that it explicitly states that the judiciary can review the discretion of the Executive if it is exercised unreasonably.

Apart from the explicitly strong sides that the decision has, some deficiencies are clear as well. There is a lack of arguments as to why the “clear and present danger” test is not relevant to Israel and why the proximity only might be taken into consideration, but should not be a decisive factor, while deciding. According to the decision, the curtailment of freedom of expression should be used as a last resort. The rationale behind it, in my opinion, is that only when the danger is imminent and there is no physical possibility of using other means, is the government entitled to curtail freedom of expression. If the danger is not proxy in time, it means that in most cases the government has a possibility of using other means. Therefore, this factor should be considered as one of the decisive ones.

Another case in front of the Supreme Court, which is interesting for the purposes of the thesis, is the *Schnitzer* case.¹⁴⁹ The facts that become the basis of the case are as follows: The Israeli newspaper “Ha-Ir” sought to publish an article criticizing the head of Mossad and also discussing his potential replacement. The article was not permitted to be published by the Military Censor whose argument for refusal was based on the security argument. He exercised his powers in the line with the Defense Regulations, according to which the military sensor can prohibit certain matters which would be or be likely to be or become, prejudicial to the defense

¹⁴⁹ Supra note 14.

of parliament or to the public safety or to public order. The Military censor is also entitled to request the material to be submitted for review before publication.¹⁵⁰ The decision of the Military Censor was appealed and therefore the Supreme Court had to rule on it. From the beginning it should be noted that this decision cited the Kol Ha'am case in many instances and ruled in accordance with it, at the same time some notions were expanded.

The Supreme Court decided to review the values that underline the Defense Regulations. According to it, although security is the underlying notion of the Defense Regulations, other values that are typical to democratic societies should be taken into consideration as well. Sometimes these values might be in conflict with each other and this is the case when security and freedom of expression clash. Justice Barak, writing for the majority highlighted the importance of both values: "these conflicting values are basic to our legal system (...) the state cannot exist without security. Nor can the social consensus upon which the state is built."¹⁵¹

The Justice also examined in detail the values that freedom of expression embodies. In particular he touched on the importance of freedom of expression in finding the truth and generally in the functioning of democracy: "without freedom of expression democracy loses its soul"¹⁵². He also recalled its importance for the self-fulfillment of the individual. In addition to the traditional understandings of freedom of expression, the Justice highlighted one more very important aspect of the right at stake- exchange of opinions and ideas are important in the context of security. Given that security issues shape and affect the society, it is inevitable that society is informed about these issues in order for them to make relevant decisions. The Supreme Court emphasized the importance of informed citizens and the role of the media in this process: "without an alert free and diligent press there cannot be a well-informed citizenry. Only if the government is

¹⁵⁰ *Ibid.*, 7-12.

¹⁵¹ *Ibid.*, 12-13.

¹⁵² *Supra* note 13.

vigorously and constantly cross-examined and exposed by the press can the public stay informed and thereby control their government”.¹⁵³

However, like Justice Agranat, Barak accepted that if there is no leeway for freedom of expression and security to coexist, then security gets the preference. At the same time, he concluded that only a severe and grave threat can justify restriction of freedom of expression and for its estimation the near certainty test should be applied. According to the Supreme Court, this is the test that manages to protect the state security and public peace, and at the same time protects freedom of expression. What is important in this case is that the main matter at stake unlike the previous one was security not the public peace. Nevertheless, the Supreme Court did not differentiate between them, noting that there is “no reason to deviate from the general conception accepted in Israel in similar matters”. It also did not see the difference between “military” and “civil” censorship. The Supreme Court noted that although the Defense Regulation might be aiming at preventing more severe harm to security than to the public peace, still it is not a ground for applying a different test. While elaborating on the near certainty test, the Supreme Court once again departed from the US imminent danger test.

In addition, the decision is important in terms of the judiciary review over Executive discretion. The Supreme Court departed from the widely accepted theory that the military issues are not for judges to be reviewed. The Supreme Court explained that “there is nothing unique about security considerations in so far as judicial review is concerned . . . principle of separation of powers requires that they review the legality of the decisions of administrative officials”.¹⁵⁴

¹⁵³ R.F. Flinn, “the national Security exception to the doctrine of prior restraint, 13 Wm. & Mary L. Rev. (1971-72) 214, 223.

¹⁵⁴ Supra note 14, 14-16.

The judge highlighted that the Supreme Court similarly to other cases evaluates and checks the lawfulness and reasonableness of the exercise of discretion.¹⁵⁵

The Supreme Court highlighted that the discretion given to the authority should be exercised lawfully. In other words, assessment of the facts conducted by the authority and the final decision should be in accordance with the law and the rules of administrative law. Moreover, the evaluation and assessment of the facts should be done in a good faith and reasonably. Reasonableness means that another censor would have reached the same conclusion. Assessment should be grounded on “clear”, “unequivocal” and “convincing” evidences and the risks and favorable possibilities should be taken into account. If these requirements are not met, then the Supreme Court can exercise its review and assess the case.

To sum up, the *Shnitzer* case should be noted among landmark decisions because it established important concepts and principles. For the aim of this thesis, its elaboration on the importance of freedom of expression and also the possibility of reviewing Executive discretion is crucial. At the same time, this decision faces the same problem as the previous one- without any sufficient grounds it disregards the clear and the present danger test.

As a concluding remark to this chapter, it should be noted that despite the inconsistencies that both decisions might embody, they are of huge importance. It was also interesting to discover the judiciary preserving the rights and freedoms in conditions of quite harsh and severe legislation reflecting the constant state of emergency. Both of them acknowledge the importance of freedom of expression and give sufficient protection to it. The Supreme Court’s elaboration on near certainty test as well as on reviewing Executive discretion in security matters are significant given that they ensure protection of freedom of expression when it clashes with conflicting interests. Therefore, established principles might be beneficial and important not only for Israel

¹⁵⁵ *Ibid.*

and its case law, but for other countries as well especially for the ones with less entrenched legal traditions. In particular, the Supreme Court's findings will be useful for Georgia. Therefore, the next chapter will examine the Georgian case study which will be followed by a comparative analysis.

Chapter III: Freedom of Expression during Emergency Situations-the Georgian Context

The main aim of the thesis is to show, within the background of Georgian and Israeli contexts, the problems surrounding freedom of expression in emergency situations and to demonstrate that some governments are inclined to use emergency powers without balancing security needs with the curtailment of freedom of expression. It also aims at showing the stand of Courts. As noted, the primary focus of the thesis is the Georgian case study, and, therefore, although revealing the problems in this field generally, special attention will be paid to what Georgia can learn from the issues discussed.

3.1. Regulation of Freedom of Expression and an Emergency in Georgia

This subchapter will elaborate how freedom of expression and emergency are regulated in Georgia. By referring to the main acts, it will be shown what type of protection is accorded to freedom of expression and also how the issue of emergency powers is dealt with. This subchapter aims at bringing the basics to create the necessary background for the better understanding of the case study which will be analyzed in the following subchapter.

In the second chapter of the Georgian Constitution, among other rights, two articles with respect to freedom of expression can be found. For instance, according to article 19 “every individual has the right to freedom of speech, thought, conscience, religion and belief.” In addition to this, the more comprehensive article 24 declares:

1. Everyone has the right to freely receive and impart information, to express and impart his/her opinion orally, in writing or by in any other means.
2. Mass media shall be free. The censorship shall be impermissible.
3. Neither the state nor particular individuals shall have the right to monopolize mass media or means of dissemination of information.

As it is clear from the article, the Georgian Constitution acknowledges freedom of information, as well as freedom of expressing and imparting opinions. What is notable is that the second section highlights the freedom of media and bans censorship.

Apart from the Constitutional entrenchment, freedom of expression is further strengthened in the Law of Georgia on Freedom of Speech and Expression adopted in 2004. “The State recognizes and protects the freedom of expression as an inherent and supreme human value.”¹⁵⁶ As it is accepted, the Law of Georgia on the freedom of speech and expression reaffirming the freedom of expression is a progressive law and is in accordance with the Georgian Constitution.¹⁵⁷ The meaning of freedom of expression includes the following: absolute freedom of opinion, freedom of political speech and debates, obtaining, receipt, creation, keeping, processing and dissemination of any kind of information and ideas, prohibition of censorship, editorial independence and pluralism of the media, the right of a journalist to keep confidential the source of information and make editorial decisions based on his own conscience, academic freedom of learning, teaching and research, freedom of art, mastery and inventions, and others.¹⁵⁸

¹⁵⁶ Article 3, The law of Georgia on freedom of expression and speech, 24 June 2004, available at: http://www.liberty.ge/eng/page.php?genre_id=79§ion_id=2&news_id=1&from=categories (last visit 23 October 2009).

¹⁵⁷ Levan Izoria et al., *sakartvelos konstituciis komenatrebi adamianis dziritadi uflebani da tavisuflebani*, (Commentaries on the Georgian Constitution, main rights and freedoms), Meridiani, Tbilisi, 2005, p. 215.

¹⁵⁸ Supra note 156.

In addition to the abovementioned, one of the indicators of the law being in accordance with the democratic values and principles is that only civil liability for defamation is permitted. After adopting the law, the provision on the criminal liability for defamation was omitted.

Although both documents explicitly reiterate freedom of expression, the right in stake is an absolute right. According to the last clause of article 24 of the Constitution, the exercise of freedom of expression can be restricted when it is necessary in a democratic society for the interests of ensuring state security, territorial integrity or public safety, for preventing of crime, for the protection of the rights and dignity of others, for prevention of the disclosure of information acknowledged as confidential or for ensuring the independence and impartiality of justice.¹⁵⁹

Apart from the Constitution, the law on freedom of expression also devotes one article to the grounds for restrictions. It says that restriction should be established by a clear, foreseeable, narrowly tailored law. Furthermore, they should be directed to the fulfillment of a legitimate aim, should be critically necessary in a democratic society, non-discriminative and proportionally restricted.¹⁶⁰

In addition to the above mentioned grounds for restriction, freedom of expression among some other rights might be restricted during emergency. According to the Constitution, it is the president who is authorized to declare the state of emergency and restrict rights. However, the decision should be submitted to the parliament for approval.¹⁶¹

Finally, since the case study concerns suspending the license of a TV Company, a small overview of the legislation on this topic will be provided. The Georgian legislation prescribes several types of sanctions in case of violation of the Georgian legislation by a license holder.

¹⁵⁹ Supra note 15, 24.

¹⁶⁰ Ibid., 1.

¹⁶¹ Ibid., 46.

They are: notification in writing, fine, suspension, revocation of the license.¹⁶² The procedure of the sequence of using the sanctions is as follows: first should be used notification, if not fulfilled it can be followed by imposing a fine and if none of the sanctions insured eradication of the violation, suspension/revoke can be undertaken. Importantly, Georgian National Communication Commission (hereinafter)¹⁶³ is entitled to impose all the above mentioned sanctions.¹⁶⁴

Georgian legislation is in accordance with the established democratic values and principles. The most interesting side of the legislation is its applicability in the practice. The case study selected for the next subchapter will present how the above mentioned norms were used by the Georgian Government on 7 November 2007.

3.2. Georgian Case Study

- *Background*

Experts argue that with the Rose Revolution, which took place in November 2004, a new era started in the history of Georgia. One of the leaders of the Rose Revolution, Mikheil Saakashvili gained utmost popularity among the Georgian population which resulted in electing him as president with 96 percent of the vote. He was seen as a person with democratic values and principles and much hope was invested in him. However, throughout his presidency he has been facing many hardships and one of them was the event which occurred on 7th of November 2007.

¹⁶² The law on Broadcasting, 23 December 2004, Article 71 available at www.gncc.ge (last visit 20 October 2009).

¹⁶³ Georgian National Communication Commission is an independent agency among other tasks is responsible for issuing, revoking, modifying the license.

¹⁶⁴ Article 72, The law on Broadcasting, 2004, available at www.gncc.ge (last visit 20 October 2009)

The 7th of November is famous for the dispersal of a demonstration with rough methods, for storming the TV Company and taking it off the air and also for declaring an emergency situation. It is the event which has been assessed by international organizations as a setback for the Georgian democracy and which downgraded the media freedom.¹⁶⁵ The Georgian government in its turn justified the use of powers, the raid on the independent TV Company and finally the state of emergency as the only means of preventing an open, direct and major threat to government/security expressed in a planned coup.

Before starting to restore the picture of the day in question, some general background remarks should be made. It is argued that the arrest of former minister Irakli Okruashvili strongly prompted the demonstrations.¹⁶⁶ The opposition and its supporters were gathered in front of Parliament with several requests, such as early parliamentary election and releasing of so called political prisoners. Later on, they added the resignation of the president among other demands. On the 28th of October 2007, Badri Patarkatsishvili, the owner of the pro-opposition Imedi TV channel (hereinafter Imedi),¹⁶⁷ announced his decision about financing the opposition movement.¹⁶⁸ It is acknowledged that Imedi was probably the most watched and the exceptional TV Company touching critical and harsh issues.¹⁶⁹

¹⁶⁵ Freedom House, Nations in Transit, covers period of 2007. Prepared in 2008, available at <http://www.freedomhouse.org/template.cfm?page=47&nit=452&year=2008> (last visit 20 September, 2009).

¹⁶⁶ Okruashvili was arrested after he made a statement in which he accused the president with corruption and with ordering him to kill Badri Patarkatsishvili.¹⁶⁶ After his arrest several opposition parties and movements established the United National Council to carry out their activities. The rally of demonstrations started on 02 November, a couple of days before 7 November. (Human Rights Watch, Crossing the line, 2007, available at <http://www.hrw.org/en/reports/2007/12/19/crossing-line> (last visit 20 September, 2009)).

¹⁶⁷ *ibid*

¹⁶⁸ He also declared that he handed over all his shares in TV Company Imedi to his partner Rupert Murdoch's news corporation News transcript, available at Lexis Nexis database on the following address https://vpn.ceu.hu/+CSCO+dh756767633A2F2F6A6A6A2E79726B766661726B76662E70627A3A3830++/us/lnacademic/results/docview/docview.do?docLinkInd=true&risb=21_T7273980563&format=GNBFI&sort=RELEVANCE&startDocNo=51&resultsUrlKey=29_T7273980566&cisb=22_T7273980565&treeMax=true&treeWidth=0&csi=275311&docNo=54, (last visit 20 September, 2009).

¹⁶⁹ Human Rights Watch, Crossing the line, 2007, available at <http://www.hrw.org/en/reports/2007/12/19/crossing-line> (last visit 20 September 2009).

In order to restore the picture, various sources such as the transcripts of TV news¹⁷⁰, internet web portals and reports of international organizations will be used. The details of the demonstration will be discussed only to the extent that is needed for the assessment of the whole picture.

- *The sequence of events*

On 7th November in the morning, as various sources report,¹⁷¹ policemen attacked a few people on hunger strike sleeping on the steps of Parliament.¹⁷² Despite the police actions, the demonstration was renewed in front of Parliament which also was dispersed.¹⁷³ For the third time, the demonstration was renewed in a district called Rike and again dispersed.¹⁷⁴

At about 8:45 p.m., all these events were followed by the raid on Imedi. The Special Forces broke into the building and also into the studio as a result of which Imedi went off the air. It was followed by the intimidation of the staff as well as the damaging the broadcasting equipment. In addition to TV Imedi, radio Imedi was closed as well. Radio and TV Imedi were not the only ones which went off air. Several minutes after Imedi was closed, Channel Kavkasia, regional TV 25 and electronic media were also terminated¹⁷⁵¹⁷⁶

¹⁷⁰ Source of news transcript is Lexis Nexis database.

¹⁷¹ Including TV companies and Human Rights Watch.

¹⁷² Supra note 169.

¹⁷³ The protestors who were becoming more and more, could not fit on the sidewalks, and eventually closed off the road. Later, the demonstration was broken up by police with harsh methods (Human Rights Watch).

¹⁷⁴ "Harsh methods were again used to dispel the crowd, including rubber bullets and tear gas" - (News Transcript, available at Lexis Nexis database, on the following address: https://vpn.ceu.hu/+CSCO+dh756767633A2F2F6A6A6A2E79726B766661726B76662E70627A3A3830++/us/lnacademic/results/docview/docview.do?docLinkInd=true&risb=21_T7273980563&format=GNBFI&sort=RELEVANCE&startDocNo=51&resultsUrlKey=29_T7273980566&cisb=22_T7273980565&treeMax=true&treeWidth=0&csi=275311&docNo=54 (last visit 20 September, 2009)).

¹⁷⁵ News transcript, available at Lexis Nexis database on the following address https://vpn.ceu.hu/+CSCO+dh756767633A2F2F6A6A6A2E79726B766661726B76662E70627A3A3830++/us/lnacademic/results/docview/docview.do?docLinkInd=true&risb=21_T7273608566&format=GNBFI&sort=DATE,A,H&startDocNo=26&resultsUrlKey=29_T7273579116&cisb=22_T7273657362&treeMax=true&treeWidth=0&csi=10962&docNo=28, (last visit 20 September, 2009).

At about 10 p.m. after storming the Imedi, the Georgian government announced a state of emergency¹⁷⁷ and among other rights suspended freedom of expression.¹⁷⁸ According to the decree TV companies except the public broadcaster were not entitled to transmit news program.¹⁷⁹

Justifications were given by several public officials. The Defense and Security chairman noted that the attempt to stage a coup in Georgia pressed the president to issue a decree on the state of emergency. He also stressed that there were appeals by opposition leaders and other people from these channels during the day.”¹⁸⁰

The statement was disseminated by the General Prosecutor’s Office as well, which claimed that “Imedi broadcast posed an “imminent and irrevocable threat” to public safety because Imedi “started broadcasting ... alerts that the police were about to storm the main Orthodox Cathedral in Tbilisi. In a country with an overwhelming majority of Orthodox Christians ... this was in effect calling hundreds of thousands of citizens to the street, to defend their Church.”¹⁸¹ These were the main arguments and justifications given by the public officials to justify announcement of emergency situation.

The state of emergency was not the only measure used to limit or derogate freedom of expression and other freedoms. On 13 November Baratashvili, the general director, was handed

¹⁷⁶ Parliamentary reports of the Public Defender, State of Human rights in Georgia in 2007, second half, 2007, at 64. Available at <http://www.ombudsman.ge/index.php?m=331> (last visit 20 September, 2009).

¹⁷⁷ The Organization for Security and Co-operation in Europe (OSCE) press release, Vienna, 8 November 2007, available at <http://www.osce.org/item/27827.html> (last visit 20 September, 2009).

¹⁷⁸ The Presidential Decree, # 621, 2007

¹⁸⁰ News transcript, available at Lexis Nexis database on the following address:

https://vpn.ceu.hu/+CSCO+dh756767633A2F2F6A6A6A2E79726B766661726B76662E70627A3A3830++/us/lnacademic/results/docview/docview.do?docLinkInd=true&risb=21_T7273634040&format=GNBFI&sort=DATE,A,H&startDocNo=1&resultsUrlKey=29_T7273579116&cisb=22_T7273634043&treeMax=true&treeWidth=0&csi=10962&docNo=9. (Last visit 20 September 2009).

¹⁸¹ Supra note 169.

the Court order dated 7 November,¹⁸² pursuant to which Imedi TV's property was frozen and the property's owner was prohibited from using and managing it.¹⁸³ According to the reasoning of the decision, “Imedi was used as the main tool for organizing the rallies (...) which got out of control, stirred mass unrest in the capital and posed a clear and present danger of a violent overthrow of the government”¹⁸⁴ The decision did not mention Radio Imedi, while it was closed as well. As the public defender argues, there was no act that would envisage halting Radio Imedi's broadcasts and withdrawing its license.¹⁸⁵

Only on 16 November did it become known that the GNCC suspended the license of Imedi on 8 November. The ground for suspension of the license was non-fulfillment with the GNCC Act issued on 7 November which concerned broadcasting Patakacishvilis's statement on the said day. Through this Act, GNCC required Imedi to stop transmitting the statement, because it was directed to overthrowing the government. The excerpt from the statement follows: “Let no one have doubts that all my forces, all my financial resources until the last tetri will be used to liberate Georgia from this fascist.”¹⁸⁶ It is interesting that according to OSCE interim election

¹⁸² It was impossible to obtain the Court Order from the Court as it declared that it has been transmitted to the General Prosecutor's Office. The latter did not disclose the order either. Because of these, the Public Defender's and Human Rights Watch's reports will be used as a main source while examining the order. It should also be noted that according to the established practice in Georgia, the Courts disclose the interim decision only to the parties.

¹⁸³ News transcript, available at Lexis Nexis database on the following address :

https://vpn.ceu.hu/+CSCO+dh756767633A2F2F6A6A6A2E79726B766661726B76662E70627A3A3830++/us/lnacademic/results/docview/docview.do?docLinkInd=true&risb=21_T7273497131&format=GNBFI&sort=RELEVANCE&startDocNo=1&resultsUrlKey=29_T7273497134&cisb=22_T7273497133&treeMax=true&treeWidth=0&csi=10962&docNo=2, (last visit 10 September 2009).

¹⁸⁴ News transcript, available at Lexis Nexis database on the following address :
https://vpn.ceu.hu/+CSCO+dh756767633A2F2F6A6A6A2E79726B766661726B76662E70627A3A3830++/us/lnacademic/results/docview/docview.do?docLinkInd=true&risb=21_T7273497131&format=GNBFI&sort=RELEVANCE&startDocNo=1&resultsUrlKey=29_T7273497134&cisb=22_T7273497133&treeMax=true&treeWidth=0&csi=10962&docNo=2 (Last visit 10 September 2009).

¹⁸⁵ News transcript, available at Lexis Nexis database on the following address :
https://vpn.ceu.hu/+CSCO+dh756767633A2F2F6A6A6A2E79726B766661726B76662E70627A3A3830++/us/lnacademic/results/docview/docview.do?docLinkInd=true&risb=21_T7273497198&format=GNBFI&sort=RELEVANCE&startDocNo=1&resultsUrlKey=29_T7273502201&cisb=22_T7273502200&treeMax=true&treeWidth=0&csi=10962&docNo=9 (Last visit 10 September 2009)

¹⁸⁶ Parliamentary Reports of the Public Defender , State of Human Rights in Georgia in 2007, second half, 2007, Available at <http://www.ombudsman.ge/index.php?m=331> (last visit 20 September 2009).

report, this statement was transmitted by other channels as well.¹⁸⁷ More detailed account regarding the decisions of GNCC will be given later. Various organizations, local and international as well,¹⁸⁸ assessed the situation as critical and urged the Georgian government to lift the emergency situation.¹⁸⁹

After reviewing the facts, an analysis of the story will be provided. In order to keep objectivity, two versions of the sequence of events will be considered. For the first version the facts and arguments presented by the government will be questioned and analyzed critically, while for the second version the government's arguments will be taken as truth. The main question to be answered by both versions will be whether the government's actions were lawful and justified. Finally, it will be interesting to see whether the outcomes of these two versions are different.

- *Critical version of the story*

¹⁸⁷ US state department ,Country reports on Human rights practices, available at <http://www.state.gov/g/drl/rls/hrrpt/2007/100560.htm> (last visit 20 September, 2009).

¹⁸⁸ Open Society Institute, Human rights Watch, OSCE media representative, Georgian Young Lawyers' Association, Georgian Ombudsman, etc.

¹⁸⁹ **Reporters Without Borders declared that** "The evidence against this TV station's founder, if there is any, must be made public. His declared support for the opposition should not lead to the TV station's closure." Reporters without borders, 2007, available at :http://www.rsf.org/spip.php?page=article&id_article=24437 (last visit 20 September, 2009).

The OSCE Representative of freedom of the media-"While introducing a state of emergency may be in accordance with the country's constitution, the media also must be able to fulfill their constitutional vocation of informing society about events in the country," (OSCE press release, Vienna, in English 8 Nov 07 available at <http://www.osce.org/item/27827.html> (last visit 20 September, 2009))

The Georgian Ombudsman assessed the raid on Imedi and the suspension of the Imedi license, as 'outright illegal' and argued that the reason behind it was political.¹⁸⁹ (Parliamentary reports of the Public Defender , State of Human rights in Georgia in 2007, second half, 2007, at 64. Available at <http://www.ombudsman.ge/index.php?m=331> (last visit 20 September 2009)).

Human Rights Watch- Human Rights Watch prepared a report with interviews and pictures illustrating the events. It also submitted in ENP Progress Report on Georgia to the European Commission- "Heavily armed government troops also stormed Imedi, threatening and ejecting the staff and damaging and destroying much of the station's equipment, forcing the station off the air. Although the Georgian government claimed that it was responding to alleged threats of massive public disorder and a coup d'etat, these alleged threats cannot justify the level of force used". (available at :http://www.hrw.org/legacy/english/docs/2008/01/28/georgi17901_txt.htm#_ftn1

In this version three dimensions will be considered: first that the danger was not imminent because the government had in its hands all the necessary information prior to the escalation of the events. The second part will argue that the alleged statements could not pose the threat to the government. Finally, it will be shown that the decisions concerning Imedi, are backdated and unlawful.

Accusations against the opposition, Patarkatsishvili and Imedi, were taking place before 7 November, as well as during the day in question.¹⁹⁰ On 5 November several statements from the side of the government were made. For instance, the President of Georgia declared that an attack against him and the government had begun. He also referred to Imedi as a Television of hopelessness which tries to claim that nothing is done.¹⁹¹ On the same day, Defense and Security Chairman, reported that Patarkatsishvili and his friends, who were the owners of TV channel “OPT”, used this TV channel to influence Russian politics. According to Targmadze, Patarkatsishvili had the same intention in Georgia.

Apart from the statements, on 7 November, at 16:24 the Ministry of the Interior, via Georgian TV channels including Imedi, disseminated video tapes which included the conversation of Georgian opposition leaders with representatives of the Russian embassy, who according to the Minister of the Interior represent the employees of the Russian intelligence agencies.¹⁹² On the same day, but at 20:43 the president made a speech. He stated that for the last six months he had been hearing from various sources including intelligence ones about a big disorder and alternative government. He also noted that the Georgian government was aware that

¹⁹¹ http://media.ge/eng/page.php?m=news_detailed&id_num=2525 (last visit 12 September 2009)

¹⁹² http://media.ge/geo/page.php?m=news_detailed&id_num=2675 (last visit 12 September 2009).

“they have been trying to gain a foothold among some radical political parties.”¹⁹³ It was also mentioned that this was not all, and that there was “incontrovertible evidence” to be disclosed very soon. Finally, as a last point he referred to the Russian Oligarch¹⁹⁴ and noted that he called on the Georgian population to overthrow the government.¹⁹⁵

All these events were taking place before 7 November, some of them throughout the day on 7 November and before the raid on Imedi and state of emergency, which is enough to suggest that the government already had all the necessary information about the planned coup in its hands, but did not refer to any measure, until the Sameba episode when it claimed that the danger was imminent. It is obvious that before the Sameba episode the government had more alternatives to cope with the situation without restricting freedom of expression. Nevertheless, even if the government argues that the danger was imminent and posed only by the Sameba episode and some other statements, it is still doubtful that those statements could not cause an imminent danger.

The arguments and the brief overview of the statement are as it follows. The Sameba episode was the main argument against TV Company Imedi. The message in question took place after demonstrators’ dispersal at Rike at 8:30 p.m.¹⁹⁶ Although, the journalist standing in front of the church disseminated information about the possibility of Special Forces going to Sameba, she at the same time highlighted that information was not verified.¹⁹⁷ Given that only one journalist spread information, with an emphasis that information was not verified and also opposition

¹⁹³ <http://www.civil.ge/eng/article.php?id=16231>, (last visit 12 September 2009).

¹⁹⁴ Most probably he meant Patarkatsishvili.

¹⁹⁵ <http://www.civil.ge/eng/article.php?id=16231>, (last visit 12 September 2009).

¹⁹⁶ According to the Human Rights Watch it took place at 8L45, while according to the public defender it happened at 8:30.

¹⁹⁷ Supra note 169.

leaders were dispersed, it is doubtful that threat of overthrowing, or inciting the danger could have been imminent.

Apart from the Sameba episode the government pointed to the opposition's statements. Apparently, at Rike, one of the leaders declared that they would wait one hour for the Georgian people and then they “. . . know what [they] will do then”¹⁹⁸, but the question is whether this statement could have caused an imminent danger. According to the witnesses, only a few people could hear the opposition, because they had only one megaphone which could not transmit very far. Given that not many people could hear the megaphone, the probability of the oppositions' statement causing the imminent danger is doubtful.¹⁹⁹

Patarkatsishvili's statement was also argued as causing a threat and danger to the government. His statement was transmitted on 7 November at 18:28 via Georgian broadcasters including Imedi. Patarkatsishvili in his statement aired by the TV companies declares that :“Let nobody have doubts, that I shall do everything in my power, and spend all my resources to deliver Georgia from this fascist regime (...).”²⁰⁰ As seen from the statement, it does not incite people for the violence way of changing the government, whereas the probability of inciting the violence is paid an utmost attention in ECHR case law.²⁰¹ In addition to it, ECHR considers a political speech as one of the most important and supposes of politicians as bearing their criticism.²⁰² One more aspect to be taken into consideration is that the statement was aired after the dispersal of People at Rustaveli street and at the Rike, and therefore the possibility of

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ Supra note 176.

²⁰¹ See Surek and ozdemir v Turkey also *ibid.*

²⁰² *Ibid*

gathering the people again and especially of armed people posing treat to the government was very low²⁰³.

Finally, the legality and the dates of adoption of the decisions with respect Imedi will be discussed. The legal basis of the government's actions is doubtful too as it is argued that "there is evidence to suggest that the legal basis was established "after the-fact and backdated."²⁰⁴ Based on the analysis, which will be presented later in the paper, the Georgian public defender also argues that the Court order was made post-factum to "bring the barbarous actions carried out against Imedi TV Company within a legal framework."²⁰⁵

The statement in front of Sameba was transmitted at 8:46pm. The government itself asserts that a Court order about freezing the property of Imedi Company was issued on 7 November before the raid on Imedi. Human Rights Watch argues that "Given that the raid occurred at 8:46 p.m., only 15 minutes after the broadcast in question, it is hard to understand how the prosecutor's office would have had time to approach a judge for a hearing and obtain the order in such a short period." Moreover this becomes even more difficult to believe when the "raid involved hundreds of heavily armed law enforcement personnel and took place only several minutes following the broadcast."²⁰⁶

Apart from the Sameba episode, the order was based on Patarkatsishvilis and also the opposition's statements made on the Rike. The Public Defender analyzed all of them to find whether it was physically possible to file a petition and then for the court to issue an order. According to the report, the dispersal of demonstrators on Rike took place at 17:30, Patarkacishvili's statement was transmitted at 18:28 as for the raid it was conducted at 20:00. It

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

²⁰⁵ Supra note 176.

²⁰⁶ Supra note 169.

means that the prosecutor had only two hours to see the statement, identify the danger related to it, come to the conclusion that Imedi had been used as a tool to overthrow the government and therefore the necessity of some legal measures, prepare a detailed petition, reach the court, file it with the Court, wait for the decision to be delivered and finally, mobilize all Special Forces and carry out the special operation.²⁰⁷ One more interesting aspect of the story is that no order was presented to the general director of Imedi while entering forcefully in Imedi. The order was handed to him after a couple of days, on 13 November. Because of all above mentioned, it is assumed in the report that the Court order was adopted after the raid on Imedi to legalize the actions.

In addition to the question marks regarding the date of the decision, the lawfulness and legitimacy of the Court order are also questionable. According to the Georgian Criminal Code, in order to use this measure (seizure of the property), there should exist either certain types of crimes or other extremely serious crimes or their perpetration. Additionally there should be data proving that this property has been used or will be used as a tool. The Public defender argues that none of the circumstances existed and therefore the order was unlawful. The investigator did not present any evidences and merely stated that there was sufficient information Imedi to be used as a tool. The judge although not having any evidences and not being able to specify “which concrete factual circumstances served as the basis for his conclusion, that it was precisely the Imedi TV Company that would be used for criminal convictions”²⁰⁸, still seized the property. Furthermore the Court was not authorized to issue a decree on the seizure of the license, which resulted in the suspension of the license. The Georgian legislation stipulates that the decision on suspension, revoking, and alike should be made by the GNCC by the use of public administrative

²⁰⁷ *Ibid.*

²⁰⁸ *Supra* note 176.

procedure²⁰⁹. In this case there were violations of both conditions, since it was the Court who issued the decision about the seizure of the license instead of the GNCC and used criminal proceedings rather a public administrative one.

As it turned out on 16 November, except for the above discussed Court order, GNCC acts were also issued without the presence of a TV Imedi representative²¹⁰. The latter, like the former one generates some questions. As noted in the report prepared by the Public Defender, nothing related to Imedi was searchable on the website of GNCC till November 16. On 16 November Public defender discovered two acts concerning TV company-first act 673/18 issued on 07 November on “cautioning and penalizing Teleimedi” because of aired statement made by Patarkacishvili. The address, according to the GNCC could have been viewed as a clear support to and instigation for further escalation of illegal developments, contributing to the overthrow of the government.²¹¹

As for the second decision concerning the suspension of the license, it was issued on 8 November for non-compliance with the previous GNCC order by transmitting Parakacishvili’s statement after the cautioning. Baratashvili, the General Director of TV Company Imedi reported that no notification was given to Imedi on 7 November. Even if Imedi received the notice, the Public Defender argues that the decision was void, because pursuant to the law, cautioning and fining cannot be decided via one decision.²¹² One more aspect that is noteworthy according to the Georgian legislation is that the license should be suspended till the eradication of violations.²¹³ By the time the GNCC act on suspension of the license was adopted violation was

²⁰⁹ Supra note 164, 36 and 38.

²¹⁰ According to the article 9 of the General Administrative Code (23 July 1999), in urgent cases, when delaying the issuance of an administrative act may substantially undermine public or private interests, an administrative agency may render the decision regarding the issuance of the act without complying presence of the party.”

²¹¹ *Ibid.*, 50.

²¹² According to the article 71 of the Law of Georgia on Broadcasting fining is possible only after giving the notice.

²¹³ *Ibid.*, 73.

already eradicated, because Imedi did not have any physical or legal possibilities to air the “appeals investigating violence” and this way violate the law.

Contradictions were found in the preparatory actions prior to the GNCC decisions as well. Here is the sequence of events that enables the public defender office to reach the conclusion that GNCC did not adopt the decision on 7 November. The statement made by Patarkatsishvili was aired at 18:28, while the act was held at 18:00. Pursuant to this act Imedi was notified and fined, for the action that took place only 28 minutes later.

The conclusion of the critical version is that arguments provided above suggest that first of all the government had in its hand information proving the collaboration of Georgian opposition with Russian intelligence services. Thus, it should have taken appropriate, least restricted measures before 7 November. Given that the government was aware of what was happening, the argument about the danger being imminent is groundless. Secondly, even if this side of the story is neglected, the statements made throughout the day did not pose a danger to the government. Thirdly, the decisions made regarding Imedi are backdated and unlawful. Furthermore, the actions taken by the government exceeded the proportionality threshold, whereas according to the Siracusa principles the measures should be proportional and directed to the danger. The storming of the TV Company, insulting the staff and damaging the equipment cannot be regarded as proportional measures. Not even the suspension of the license after the announcement of the emergency can be considered proportional as in terms of emergency the companies were not allowed to broadcast the political news in any case. The overall evaluation of the story is that there is no justification for such measures such as: the raid on TV Company, damaging its property, suspending the license via a backdated decision, insulting the staff, and closing some other means of media cannot be justified. As a last point it should also be

mentioned that this case is a good example of how inclined some governments can be to use the emergency and imminent danger concept to curtail freedom of expression without carrying out a balancing.

- *The government's version of the story*

After considering the first so-called critical version of the story, the second version, the government's side of the story, will also be presented where none of government's arguments will be questioned. After disregarding all the inconsistencies discussed above, it will be shown whether government's actions are still justified.

"The situation in Georgia is highly escalated. More importantly, there is a clear attempt directed to overthrow the government. Therefore, in order to avoid the destabilization, it is necessary to declare a state of emergency"²¹⁴ - reads the first paragraph of the decree on the emergency situation. The main facts based on which the government reached the conclusion were the following: recorded conversations between the opposition leaders and arguably Russian intelligence service, Patarkacishvili's statement about using all his money to change the government, Imedi covering the rally of demonstrations actively, and lastly and most importantly the Sameba episode. Although the Georgian government possessed almost all this information before the 7 November, they still did not take any preventive measures thinking that it was not yet necessary. The danger threatening to public and security became clear only after Parakacishvili's statement was transmitted via broadcasters. Also, after the journalist made a statement about the possibility of Special Forces storming the church, it was assumed that danger was imminent.

²¹⁴ Presidential decree, # 621, 2007.

Is the raid on TV Company Imedi, insulting the journalists and damaging the property, announcement of emergency situation, seizure of Imedi property and license, suspension of Imedi license, closure of radio Imedi, TV Kavkasia and TV 25 justified by the danger being imminent? It is without any doubt that the government is responsible for protecting rights and freedoms, but it is also responsible for preserving the constitutional order, security and peace. At the same time, in every democratic society means used for preserving the basic values should be narrowly tailored down to the needs, in other words, they should be least restrictive ones.

If the government saw such a forthcoming danger and escalation of the events, in time that it spent on mobilizing the Special Forces and entering the independent TV company Imedi, closing other TV companies, it could have announced the emergency (which it did, but only after the raid) and introduced some means of censorship, for instance, restricting broadcasting of the political news. Suspension of the license or the closure of TV Company is a sweeping measure, which affects not only the political news section, but other programs and terminates the whole work of a TV Company which cannot be justified.

As a conclusion it should be noted that as is apparent, the findings of both versions' convey similar messages, measures such as raid on TV Company, insulting the staff, damaging the property, suspension of the license, closing other means of media without any legal basis, having backdated decisions are not justified in a democratic society. The actions were not in compliance neither with the Georgian Constitution nor other regulatory framework already discussed above. Although two versions of the events were considered, presented the arguments clearly support the critical view of the day in issue, which makes the actions of the government even harsher and impossible to justify. Finally, the discussed case study is a good illustration of the thesis statement that some governments are inclined to use emergency powers without

balancing security needs with the curtailment freedom of expression. Moreover, the case showed that the measures undertaken by the government are of a sweeping nature and the decision in favor of security is made without balancing the interests. Regrettably, a similar stand was taken by the judiciary when without evidences approved the investigator's petition; moreover it supported the Executive with its backdated decision which means that there is not a supervision mechanism over emergency powers in this situation.

After examining the Israeli and Georgian cases, it will be interesting to compare them and see what Georgia can learn from Israel. Therefore, in the next subchapter the comparative analysis will be provided.

2.3. Comparative Analysis of Georgian and Israeli Case Studies

Presenting Georgian and Israeli cases, is needed to bring them together at the end for the comparative analysis. The cases that have been selected from Georgia and Israel are not identical, but have common features that make the comparison possible and interesting at the same time. Apart from the similarities, they have some differences as well. The purpose of the comparison will be to capture the trends in these cases with respect to freedom of expression during the emergency and show what Georgia can learn from Israel.

The common characteristics of the Georgian case and the “*Kol Ha'am*” is that in both cases the means of media were banned, it was a broadcaster in the case of Georgia and newspapers in the Israeli case. However, the means used for the suspension were different. The methods used by the Georgian government were even harsher than the ones used in Israel being in the constant state of emergency. In both situations, executives used their discretion to curtail

freedom of expression and in both cases the main characters explicitly showed their negative attitude towards the government and its policy. Although, in the Georgian case expression was formed in much more critical fashion, yet, statement in the Israeli case was not mild either. In the *Kol Ha'am* the article reads: “let us increase our struggle against the anti-national policy of the Ben Gurion government.”, while the Patarkatsishvili in his statement aired by the TV companies declares that “Let nobody have doubts, that I shall do everything in my power, and spend all my resources to deliver Georgia from this fascist regime (...).”²¹⁵

The main difference lies in the stance of the Courts. Although in these cases Courts had a different matter to rule on, these decisions show well their attitudes towards the issue. In the case of Georgia, the Court issued a decree on the seizure of property from TV Company Imedi and also suspended the license, while the Israeli Supreme Court negatively ruled on the already adopted decision on suspension. Before entering into the details of the decisions, it should be noted that the unlike the Israeli case, the Georgian judge without critically assessing the argument presented by the government and without any inquired of evidences, satisfied its order. In order to capture the differences between the decisions, the main aspects of each decision should be reviewed. As argued above, in the case of Georgia, the Court unlawfully dealt with the issue of seizure of license, while not having a competence over it. Secondly, it unlawfully used the criminal procedure instead of public administrative one for the seizure of the license. Moreover, the investigator did not present any evidences of Imedi being used as a tool, neither were they inquired by the Court. In addition to this, the question marks are also in respect of the date of the decision as is argued that the decision was backdated. Unfortunately, the order does not reflect the importance of freedom of expression, and without any assessments supports

²¹⁵ Supra note 176.

Executive. Certainly, all these circumstances created a negative shadow on the Georgian Judiciary and its case law.

The situation in the Israeli case is radically different. Although the actions of Georgian and Israeli Executives might be similar, the Israeli Supreme Court, bearing in mind the importance of the freedom of expression, tried to find ways of harming the freedom of expression less. It reached the conclusion that only after applying the near certainty test, can the Executive make a decision on derogating from freedom of expression. Importantly, the Supreme Court reviewed the scope of the Executive's discretion, since according to it discretion was not exercised lawfully and this way established the precedent of judicial review of the Executive discretion. Unfortunately, there is nothing similar in the order of the Georgian Court. One might argue that although the Israeli case is similar with facts, still the main issue at stake is the public peace and not the security, and therefore judicial review and outcomes differ from each other. The brilliant answer to this question is provided in the second decision *Schnitzer* which was delivered after the censorship of the publication was challenged. The Court explicitly stated:

There is nothing special about the Defense Regulations and therefore no reason to deviate from the general conception accepted in Israel in similar matters. There is no substantive difference between "military" censorship and "civil" censorship.²¹⁶

So, the security matter should not be an obstacle for the judicial review, if the discretion is not exercised lawfully and reasonably. It is difficult to conclude why the Georgian Judge did not request evidence from the investigator and why he was satisfied with the superficial petition. Definitely, for the Georgian judiciary the approach of Israeli Supreme Court should be a good example to look upon. Other aspects of the decision are equally relevant and important for Georgia.

²¹⁶ Supra note 13, 16.

As was mentioned several times, both Israeli decisions elaborated the test of near certainty/probability and disregarded the bad tendency one. Despite the absence of the proximity element, the test is very important. The Israeli Court criticized the bad tendency test saying that it might be characteristic of an autocratic country not of a democratic one. Therefore since Israeli is a democratic country, all the possibilities of applying it should be excluded. Georgia is a democratic country as well, and therefore the bad tendency test should not be applied in Georgia either. Had the near certainty test been used in case of Georgia, probably the outcome of the case would have been different. For instance, Georgian and Israeli cases had in common aggressive tone. Although the statements in the Georgian case were formulated in more aggressive tone, than the Georgian one, the Supreme Court concluded that the tone and offensive language itself cannot be a decisive factor and should be taken into consideration only in connection with other factors and not independently.

Furthermore, the Supreme Court noted that near certainty test obliges officials to use the curtailment of freedom of expression as a last resort, when there is a high probability of the danger harming the public peace. Contrary to this, Georgian government did refer to it as the first resort and did not exhaust other available means. The Supreme Court elaborated on the elements of the tests. It stated that applying the near certainty test demands of considering circumstances all together as creating a common effect. For instance, it paid attention to the fact that after publishing the article, the Ambassador declared that the statement about Israel going against the Soviet Union was not truth and it was the result of the journalist's imagination. This means that after finding out the truth the population did not have any reason to go against the government and this way endanger the peace. In this context the parallel can be made to the Georgian case. As discussed earlier, one of the main reasons of the raid on Imedi, decision on suspension and

announcement of emergency was broadcasting Parakatsishvili's statement. As GNCC argued, Patarkacishvili's statement was inciting the danger. As the Public Defender noted at the time of broadcasting the statement, demonstrators were dispersed harshly and the possibility of gathering people once again was very low, but this circumstance was taken into consideration neither by the Court nor by the GNCC. According to the legislation,²¹⁷ suspension of license might in place be put until the violations stops occurring. At the time, GNCC adopted the decision on suspending the license, Imedi was closed and there was no physical possibility of it broadcasting the statement. Moreover, on 8 November, it was already the state of emergency and none from the TV channels except the public broadcaster were entitled to air political news. In addition to it, the Court did not take into consideration that while the journalist made a statement about storming the Sameba, demonstrators were already dispersed including opposition leaders and therefore their reassemble in the armed fashion was unrealistic. All these suggest that decisions are not in line with the principles established by Israeli Supreme Court.

As a conclusion it should be noted that the selected cases resembled each other to a great extent, having the Executive departing from freedom of expression in favor of security and public peace. At the same time, the stand that the Judiciary took created a huge difference between them. The Supreme Court established important principles for preserving human rights, such as the necessity of applying only a near certainty test and necessity of reviewing the Executive discretion, which is very relevant and important for Georgia as well. Applying the test elaborated by it will reduce the chances of curtailment of freedom of expression in Israel and elsewhere because it requires the careful assessment of situation by Executive and judiciary as well.

²¹⁷ The Law of Georgia on licenses and Permits, 24 June 2005, article 73, (2), available at: www.gncc.ge (last visit 12 October, 2009).

After comparing Georgian and Israeli cases, finding similarities and differences, it will be interesting to consider the Georgian case study in the context of ECHR.

Conclusion

The problems revealed as a result of the paper addressing the issue of freedom of expression during emergency situation can be grouped into two categories: problems with the practice and the ones with the regulatory framework.

The Georgian and Israeli cases clearly showed that during an emergency some governments are inclined, without striking a balance, to give preference to national security, public order and safety and neglect the significance of freedom of expression. It is also notable that the usual victims of suppression are the media and, as rightly noted in the Goldstone report,²¹⁸ this is conducted to avoid subjecting government's actions to public scrutiny. The problem also lies in the nature of the measures. Usually the measures applied against subjects exercising freedom of expression are disproportional and this supposedly derives from the sweeping nature of the emergency itself. They are not used as a last resort and also are not narrowly tailored down. Based on the discussed case studies, the measures applied by the governments can be a ban, suspension or even a closure of media as well as insulting journalists, among others.

Unfortunately, the problems are not restricted merely to the Executive branch. The role of the judiciary in this context is very challenging. Emergency powers, due to its tendency are to be abused and leave the boundaries of the rule of law, necessitates supervision. The different approaches of judiciaries were presented using the examples of Israeli and Georgian Courts. The Israeli Supreme Court concluded that the discretionary powers of the Executive should be subject to judicial review. Moreover, only a severe and grave threat can justify restriction of freedom of expression and for its estimation the near certainty test should be applied. In contrast to this, the Georgian judiciary not only did not apply scrutiny to the actions of the government, but issued

²¹⁸ Supra note 110.

unauthorized order and participated in backdating the decisions.²¹⁹ Apart from the domestic judicial control, emergency situations can become the subject of international control. However, as argued, ECtHR grants governments a wide margin of appreciation that reduces the efficiency of its control and supervision.

Besides the judiciary carrying out control and elaborating the guidelines, the standards and safeguards by the domestic and international regulatory frameworks should be set. This brings us to the second group of problems - the lack of sufficient standards and also the lack of elaboration of issue on freedom of expression during emergency situations. Although issues such as the clash of freedom of expression with terrorism and freedom of expression during war time are quite elaborated issues, the same cannot be said about freedom of expression during emergency. Given the importance of freedom of expression and the media, the special regulation accommodating them during emergency situations is necessary. The only relevant standard to be found is the Johannesburg principles which deal with security, and not specifically with emergencies. But as was shown in the first chapter, if modified and adjusted to the matter at stake it can be sufficient.

Apart from identification of the problems, solutions addressing them are also sought. The events taking place in Georgia on 7 November 2007 served as an incentive for selecting the topic and thus aimed at finding the solutions for this particular case. Nevertheless, the findings elaborated in this thesis could be relevant in general, for other cases as well.

²¹⁹ Although the Courts in Israel and Georgia had to rule on a different matter, the main point is that the Georgian Court showed a deferential attitude and did not critically examine the arguments presented by the government.

In the light of the material discussed in the paper,²²⁰ the following conclusions can be drawn:

Executives during an emergency, while facing the balancing dilemma on the one hand between state security, public order or public safety and, on the other hand, with freedom of expression, should strike a balance. In the process of balancing it is advisable to refer to the near certainty test elaborated by the Israel Supreme Court with one modification – imminence of the danger should be the decisive factor. The measures undertaken by the government should be proportional, narrowly tailored down and used as a last resort.²²¹ In addition to this, the Executive should prove that the ground for invoking emergency and accordingly suppression of freedom of expression is genuine and has a demonstrable effect to protect a country's existence.²²² Moreover, the state should prove that the expression was intended to incite imminent violence, it was likely to incite such violence and lastly that there was a direct and immediate connection between the expression and the likelihood or occurrence of such violence.²²³ Finally, it should not be allowed to put restrictions on certain categories of speech.²²⁴

As for sanctioning the media during emergency, it should be noted that the suspension (not even mentioning the closure of TV channels) is the most severe and harsh punishment.²²⁵ Therefore, in the case of necessity the independent body should first of all use a warning, if not fruitful it can be followed by a fine and if the violation is not terminated, instead of suspending the license, censorship of the program should be applied. This is a less harsh measure as it does not block and terminate the whole channel.

²²⁰ The recommendations are based on the Israeli Supreme Court decision (for more information see Chapter II), Siracusa Principles, General Comment 29, ECHR standards and Johannesburg Principles (for more information see chapter I).

²²¹ Based on the Siracusa Principles and the General Comment 29

²²² Based on the Johannesburg Principles.

²²³ *Ibid.*

²²⁴ *Ibid.*

²²⁵ Based on broadcasting regulation guidelines.

Finally, the domestic Courts should not be deferential but should carry out the judicial review, similarly the Israeli Supreme Court if the discretionary powers are exercised unreasonably. As for the international ones, the margin of appreciation granted by them should become subject of stricter supervision.

The above findings might be a good start for further studies on freedom of expression during emergency and in particular for elaborating the standards which will accommodate this important right during emergency and reduce its unjustified curtailment.

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