

“Democracy is grounded on freedom of opinion and expression and therefore it is impossible to prohibit incitement to hatred without interfering with this freedom. But another hypothesis can be formulated. Admittedly, in democracy, a person may not be incriminated on the basis of an opinion, but only on the basis of behaviour, of an act. Does this mean that words cannot be subject to any restrictions? No. When we consider matters from this perspective, the focus shifts. The question is no longer what types of opinions or expressions are lawful or nor, but which speech acts are compatible with democracy and which are not. When it is found to have occurred, hate speech is an act and not only an opinion.”¹

I. INTRODUCTION. CONTEXT AND DESCRIPTION OF THE PROBLEM

1. Freedom of speech. Meaning, principles and limitations. — Freedom of speech is one of the fundamental principles upon which every democratic society is built.² It is an essential condition for its progress, as well as for the development of each individual. Precisely as one of the main rights of the individual, freedom of speech has also been regulated at a constitutional level in Bulgaria, in order to ensure its protection. Pursuant to Article 39 § 1 of the Constitution of the Republic of Bulgaria (CRB) “Everyone shall be entitled to express an opinion or to disseminate it through words, written or oral, sound or image, or in any other way.” The above-mentioned provision bears similarities to that of Article 10 § 1 of the European Convention on Human Rights (ECHR) which states the following: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers.” Notwithstanding its importance, freedom of speech is not an absolute right that being the reason its restriction is acceptable when it competes with other values, particularly rights and interests, which are also under the protection of the Constitution or the protection of the Convention³.

On the one hand, the possibility of restricting freedom of speech is expressly envisaged precisely within the norms which proclaim it. Article 39 § 2 of the CRB states that “This right shall not be used to the detriment of the rights and reputation of others, or for the incitement of a forcible change of the constitutionally established order, the perpetration of a crime or the incitement of enmity or violence against anyone.” Article 10 § 2 of the ECHR similarly provides:

¹ See F. TULKENS. *When to say is to do: Freedom of expression and hate speech in the case-law of the European Court of Human Rights.* – In: *Freedom of Expression: Essays in honor of Nicolas Bratza: President of European Court of Human Rights.* Oisterwijk: Wolf Legal Publishers, 2012, p. 282.

² See decision no. 7/04.06.1996 on case no. 1/1996 of the Bulgarian Constitutional Court.

³ See court order no. 997/26.10.2017 on case no. 531/2017 of the Supreme Court of Cassation of Bulgaria.

“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for the prevention of disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

On the other hand, a limitation of freedom of speech has also been applied in cases, where its implementation infringes the common to both constitutional rights and Convention rights principle of prohibition of abuse of rights. It is regulated in Article 57 § 2 of the CRB, which reads as follows: “Rights shall not be abused, nor shall they be exercised to the detriment of the rights or the legitimate interests of others.” and also in Article 17 of the ECHR: “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.” In other words, it is a deprivation of the protection afforded by the Convention for those who are found to have used the rights guaranteed by the Convention for liberticidal purposes. In the *Lawless (no. 3) v. Ireland* judgment of 1 July, 1961 the European Court of Human Rights (ECtHR) set out, for the first time, that “the purpose of Article 17, insofar as it refers to group or to individuals, is to make it impossible for them to derive from Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention; ...therefore, no person may be able to take advantage of the provisions of the Convention to perform acts at destroying the aforesaid rights and freedoms...”⁴

2. The abusive exercise of freedom of speech in litigation. — A right may be exercised in good faith or in bad faith. In the latter case, there may be a situation of an abuse in the exercise of a right⁵. As the French civilist Marcel Planiol states: “A right ends where abuse starts”. In the exercise in bad faith of the generally legally guaranteed and protected rights there is a phenomenon, where the purpose of their holder is not to implement them in accordance with their nature and within their framework, to receive the protection and assistance he is entitled to, but

⁴ See F. TULKENS. *When to say is to do...*, p. 283.

⁵ See V. ИМОВА. Вечните ищци водят до стотици дела, даже и срещу съдии. “The perpetual plaintiffs institute hundreds of proceedings even against judges”– In newspaper *Trud*, 22.01.2019.

there is a desire on his behalf to harm the rights and legitimate interests of others, respectively to harm the public interest, through their use.

The possible instances of exercising rights in abusive manner are numerous. However, as the focus of this report is the abusive exercise of the freedom of expression considered in light of the implementation in bad faith of procedural rights, we will only address that issue in particular. In principle, the right of individuals to turn to state authorities through complaints, proposals and petitions is constitutionally stated in Article 45 of the CRB: “All citizens shall have the right to lodge complaints, proposals and petitions with the state authorities.” However, in the context of the Bulgarian law of civil procedure, the power of a particular individual to initiate by way of a statement of claim proceedings constitutes the exercise of his right to litigation. It is an individual right, recognized and guaranteed by law, and does not depend on the admissibility or merits of the claim. The exercise of the right to litigation is legitimate when done in good faith.

There are instances when individuals use their right to litigation in an abusive manner. For example, the latter is exercised in bad faith when the plaintiff knows that there is in fact no violated right, but nevertheless files a claim seeking to cause harm or other adverse consequences to the opposite party or obtain some sort of benefit. We can also mention the abuse of the right to litigation when submitting documents to the court the plaintiff uses offensive language, language of enmity and hatred against the court and its decisions. On the one hand, the use of such language is incompatible with the protection sought by the parties and guaranteed by the court, and therefore violates the principle of good faith, stated in Article 3 of the Civil Procedure Code (CPC). On the other hand, the use of hostile speech, insults and threats affects the person's right, the reputation and undermines the authority of both the judges and the judiciary in general. Honour, personal dignity, the good name of the citizens and the institutions are all values protected by the Constitution and the ECHR, and their protection is the foundation for limiting the right to freedom of expression.

3. Offensive language or hate speech. — The Bulgarian legal framework lacks a legal definition of the term “hate speech” or “offensive language”. Nevertheless, the current legislation provides for both civil and criminal liability for offense (intentional humiliation of the dignity of any given person through obscene treatment) and for defamation (the conscious disclosure of untrue and shameful circumstances regarding any given person or the attribution of a crime to others) as a means of protecting honour, personal dignity and reputation, and this protection

inevitably leads to a restriction of freedom of expression. The legal background in question, however, as well as the abundant case-law accumulated in that regard over the years, cannot provide the framework of the concept under discussion – “offensive language”/“hate speech”, which will limit the cases where such language is used by certain plaintiffs in the procedural documents addressed to the court.

There is also no provision in the text of the ECHR specifically regarding the use of hate speech. At the same time, however, Article 35 § 3 (a) of the ECHR states: “The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or *an abuse of the right of individual application*.” In its case-law, the ECtHR has been able to further develop the provision in question by limiting the cases which lead precisely to the abuse of the right to litigation. They can be summarized in five categories: misleading information; *use of offensive language*; violation of the obligation to observe the confidentiality of the procedure in regard to the friendly-settlement proceedings; an action brought clearly to annoy the court or devoid of any real purpose; all other cases, which cannot be listed exhaustively⁶.

According to ECtHR case law, use of offensive language as a form of abuse of the right to litigation is evident when in the latter the plaintiff appeals to the Court, its Registry or other parties to the proceedings using particularly unpleasant, insulting, threatening or provocative language⁷ that goes beyond regular criticism⁸ and represents contempt of court after the plaintiff has been warned about the possible consequences of his behaviour⁹. The Court has thus managed to set up the criteria for distinction between hate speech and freedom of expression as guaranteed in Article 10 § 1 of the ECHR. The necessity in Bulgarian legislation to establish criteria similar to those used by the European Court of Human Rights in order to prevent abuse of the right to litigation by the plaintiffs is undisputed. The increasing number of cases in our country of people who have maliciously benefited from their guaranteed right of access to court requires the introduction of a more specific statutory regulation on the requirements the procedural

⁶ See *in toto*: *The Practical Guide on Admissibility Criteria*. European Court of Human Rights, 2018, p. 40-44; and D. HARRIS, M. O’BOYLE, ED. BATES, C. BUCKLEY, Y. ARAI, P. CUMPER, M. LAFFERTY, H. GREEN, P. HARVEY. *Law of The European Convention on Human Rights*. New York: Oxford University Press, 2014.

⁷ See *Řehák v. the Czech Republic*, application no. 67208/2001; *Duringer and Grunge v. France*, application no. 61164/2000; *Stamoulakatos v. the United Kingdom*, application no. 27567/1995; Commission decision.

⁸ See *Di Salvo v. Italy*, application no. 16098/2005, and *Apinis v. Latvia*, application no. 46549/2006.

⁹ See *Chernitsyn v. Russia*, application no. 5964/2002.

documents, which are referred to court, should meet. Accordingly, we will discuss the admissible language the plaintiffs can use when communicating with the court in more detail.

In recent years the issue of hate speech in court addressed statements in Bulgaria has started to draw public attention. Although there are certain rules allowing for reaction in situations where the court faces abusive language on the part of some applicants, it seems those rules are not entirely effective in providing appropriate counteraction. This is due to the increase in number of cases where abusive address to the court, whether oral or written, is not an incidental act of an individual overtaken by emotions but rather a systematic behaviour aiming at mocking the judiciary and its magistrates. A research performed by the Supreme Judicial Council shows that over the last few years hundreds of cases have been initiated countrywide by certain malicious citizens who do not seek judicial relief for their violated rights, but rather wish to humiliate judges, hinder or even block their work. Such individuals are referred to within the judiciary as “tireless litigants”, and for the purposes of this paper some of them will be referred to as „X“, „Y” and „Z“. Thus, the Sofia City Court (SCC) reports that, as of 5 December, 2018, X filed 649 civil and 94 criminal cases against magistrates, experts and journalists who cover the work of the judiciary. Y in turn handed in 329 civil and 39 criminal claims, and Z – 515 civil and 54 criminal claims. There are other examples of ceaseless plaintiffs and claimants. Apart from over flooding the courts with their meritless, for the most part, claims, they also use inappropriate, highly abusive language, full of insults, swear words, curses and threats.

Such behaviour should certainly not be disregarded. Repetitive claims, filled with malicious attacks, threats, insults, and slanders against judges and their relatives, represent a persistent psychological and emotional harassment. This inevitably challenges the independence and impartiality of judges, and adds additional stress to their altogether highly-responsible work, which already imposes certain limitations on them. In extreme cases such hostility may even force the judge to quit their position. Furthermore, said behaviour leads to the unjustified expenditure of public resources related to administration of the case, recusal of the reporting judge and reassignment of the case to another judge. It is not a rare occasion that such cases need to be reallocated to other judicial districts, and in certain circumstances this should not be allowed.

All of the above has led to an unambiguous conclusion on the need for specific changes to the procedural laws in force in Bulgaria – the Code of Civil Procedure, the Code of Criminal

Procedure and the Code of Administrative Procedure, which will effectively counteract the persons who abuse their right to litigation. Undoubtedly, the Bulgarian legislator is faced with a challenge. A balance should be reached in the efforts to overcome the hate speech which would impose such restrictions that will not unjustifiably impinge on the guaranteed rights to freedom of speech and access to court. In the next part of our paper we will discuss the existing legislation in Bulgaria in question in more detail, but also the legislation in other countries in and outside the European Union¹⁰. We will analyse their experience on the topic and the models developed to deal with it, and we will highlight the good practices, which could also be successfully adopted by the Bulgarian legislator.

4. Legislation currently in force in Bulgaria. — As already mentioned, current legislation in Bulgaria provides for legal grounds for the court to address the abuse of rights of litigation committed by means of offensive language. According to Article 3 of the CPC, the persons involved in legal proceedings and their representatives shall be obliged to exercise the procedural rights granted to them in good faith. Thus, if the claim can be inferred as being in bad faith because it uses humiliating or insulting language, the court may refuse to consider it, referring to the provisions of Article 3 of CPC or even directly to the provisions of Article 45 of the CRB – the prohibition of abuse of rights. In principle, there is no reason the court shouldn't apply, by analogy, the procedural rules for the work of the ECtHR provided for in Articles 35 § 3 (a) of the ECHR and discussed in the above paragraphs.

Unfortunately, Bulgarian judges rarely resort to the implementation of these measures when faced with aggressive litigants. This is so because, on the one hand, the above-mentioned rules are more of an abstract nature and lack the necessary specifics. On the other hand, Bulgarian judges always strive to strictly comply with the ethical standards of the Code of Ethics of Bulgarian magistrates, which require them to demonstrate high tolerance towards criticism, attacks, and malicious accusations, not immediately recuse themselves, but remain unbiased in the cases before them. For the above reasons, and due to judges' aspiration to do justice and fulfil their obligations to hear any claim for relief, they ignore the fact that a certain claim or application contains offensive language and deal with the case. That is why the current legal framework preventing abuse of the right to litigation is inadequate and needs urgent improvement.

¹⁰ See infra p. II.

II. COMPARATIVE STUDY OF ANTI-VEXATIOUS LITIGATION APPROACHES.

1. United States of America: legislation and case-law. — The US legal practice allows for a considerable amount of measures aimed at dealing with abusive, frivolous litigants. Some of them are punitive in nature, while others focus on prevention and deterrence¹¹.

a. Federal practice. — Efforts to streamline litigation within the reasonable boundaries of time, resources and best effort, concentrating on the resolution of the legal dispute, are reflected in the Federal Rules of Civil Procedure (FRCP), where Rule 8 of the General Rules of Pleading asks of court pleadings, both claims and defenses, that be done in “short and plain” statement/terms. The reason behind this provision is believed to be so that all parties (including the Court) “avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial.”¹²

Rule 11(b) of the FRCP provides for a sanction against frivolous, unfounded suits¹³. It has a rather broad application. It concerns all papers submitted to court, and all applicants – attorneys and unrepresented parties. The sanctions may be invoked either by a motion of the injured party, or on the court’s own initiative. The rule also offers an understanding of what forms frivolous litigation may manifest itself in, prohibiting litigation initiated “for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.”¹⁴ It also gives certain directions as to what sanctions may be imposed on the abusing party: “A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.”¹⁵ There is a twenty-one-

¹¹ See E. SCHILLER, J A. WERTKIN. *Frivolous Filings and Vexatious Litigation*, The Georgetown Journal of Legal Ethics. Vol. 14, issue 4. Washington, D.C.: Summer, 2001; p. 909-931.

¹² See *Defendants’ motion to strike in Jacob Mandel, et al. vs. Board of Trustees of the California State University, San Francisco State University, et al.*, case No. CV 3:17-cv-03511-WHO, United States District Court Northern District of California.

¹³ Cf. art. 11(b) of the FRCP.

¹⁴ See Notes of Advisory Committee on Rules (1983 amendment). Advisory Committees are part of the Judicial Conference of the United States, the policymaking body of the United States federal courts. Cf. more at <https://www.uscourts.gov/rules-policies>.

¹⁵ See FRCP art. 11(c)(4). For more examples of possible sanctions, see also Notes of Advisory Committee on Rules—1993 Amendment

day period during which frivolous litigants could withdraw or appropriately correct their improper filing.

While Rule 11 deals with frivolous litigation an example of which may be abusive litigation, Rule 12(f) provides for the means for dealing with inappropriate language, namely: the court may order striking from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act on its own initiative or on motion by a party¹⁶. Rule 12(f) motions, however, are generally disliked by judges, as expressed in written opinions, “because striking a portion of a pleading is a drastic remedy and because it is often sought by the claimant simply as a dilatory tactic.”¹⁷ Nevertheless, “a defense that might confuse the issues in the case and would not, under the facts alleged, constitute a valid defense to the action can and should be deleted.”¹⁸

The caselaw has provided for definitions of redundant, immaterial, impertinent, or scandalous matter. In one order the court says: „The purpose of a Rule 12(f) motion is to avoid the costs that arise from litigating spurious issues by dispensing with those issues prior to trial.” Immaterial matter is defined as matter that “has no essential or important relationship to the claim for relief or the defenses being pleaded.” Impertinent matter is defined as “statements that do not pertain, and are not necessary, to the issues in question.” Scandalous matters are allegations “that unnecessarily reflects on the moral character of an individual or states anything in repulsive language that detracts from the dignity of the court,” and “includes allegations that cast a cruelly derogatory light on a party or other person.” Redundant allegations are allegations that “constitute a needless repetition of other averments or are foreign to the issue.”¹⁹

A court may strike as scandalous “defamatory material,” “statements that amount to name-calling and are argumentative or disrespectful,” and derogatory allegations with “no apparent basis,” whose “only effect” is to “embarrass Defendants.” “Rule 12(f) protects parties from the improper use of judicial filings to broadcast scandalous or defamatory material.”²⁰ To be

¹⁶ Cf. art. 12(f) of the FRCP.

¹⁷ See *Waste Management Holdings, Inc. v. Gilmore*, 252 F. 3d 316, Court of Appeals, 4th Circuit 2001, Opinion of Senior Circuit Judge Hamilton, quoting CH. WRIGHT, A. MILLER. *Federal Practice & Procedure*. Vol. 5A. 2e ed. 1990, § 1380, p. 647.

¹⁸ See *Waste Management Holdings, Inc. v. Gilmore*, 252 F. 3d 316, Court of Appeals, 4th Circuit 2001, Opinion of Senior Circuit Judge Hamilton, quoting CH. WRIGHT, A. MILLER. *Federal Practice & Procedure...*, § 1381, p. 665.

¹⁹ See *Garcia v. Clovis Unified Sch. Dist.*, 2009 U.S. Dist. LEXIS 83352 (E.D. Cal. Sept. 11, 2009).

²⁰ Defendants’ motion to strike in *Jacob Mandel, et al. vs. Board of Trustees of the California State University, San Francisco State University, et al.*, case No. CV 3:17-cv-03511-WHO, United States District Court Northern District of California.

scandalous such “degrading charges [must] be irrelevant, or, if relevant, [must be] gone into in unnecessary detail...”²¹ Granting a motion to strike aims at making the proceedings less complicated. The court’s authority to strike parts of the pleading is not limited in volume. US district courts have found that they could strike large portions of the court filing if they find reasons to do so, even if they do not dismiss the claim entirely²².

b. State practice. — US state legislature has also sought to restrict such behaviour through stricter procedural rules, discretionary sanctions, etc. Applicable measures include warnings to abusive litigants that any future frivolous, vexatious claim may result in action by the court, including the restriction or denial of oral argument or, possibly, the restriction of future filings. Courts have ruled that “the repetitive filing of groundless claims unnecessarily consumes the court's limited resources and that measures are intended to prevent such litigants from further abusing the system.”²³

In a case before the Indiana Supreme Court, the court has found that the plaintiff “has burdened the opposing party and the courts of this state at every level with massive, confusing, disorganized, defective, repetitive, and often meritless filings.” Instead of sanctioning this abusive litigant, the Supreme Court has decided to “provide the courts of this state with guidance on options available to sanction and otherwise restrict the abusive and burdensome litigation tactics practiced by [the plaintiff] and a small number of other litigants in this state.”²⁴ In support of its decision the court has stated that litigants have no right to abuse the litigation process. An important point that the court makes compares the resources invested in abusive proceedings against those taken away from other parties with valid claims: “[E]very resource that courts devote to an abusive litigant is a resource denied to other legitimate cases with good-faith litigants”. The court also recognizes that “the state has a legitimate interest in the preservation of valuable judicial and administrative resources.”²⁵

Tools to deal with an abusive litigant according to Indiana state law are: award attorney's fees to the prevailing party if the other party abused its rights, review an offender’s claim and bar it from going forward, special pre-filing screening requirements for particular offenders with

²¹ See *Skadegaard v. Farrell*, 578 F. Supp. 1209, 1219, D.N.J. 1984.

²² See *Hearns v. San Bernardino Police Dep't*, 530 F.3d 1124, 1132 (9th Cir. 2008).

²³ *Lawrence Watson vs. Five justices of the Dorchester division of the Boston Municipal Court Department & others*. 458 Mass. 1025. January 11, 2011.

²⁴ See *Gersh Zavodnik v. Irene Harper*, Indiana Supreme Court, September 30, 2014.

²⁵ See *ibid*.

histories of repeated, frivolous litigation, limitation to the number of pages or words of pleadings, motions, and other filings; instructions to the clerk to reject without return for correction future filings that do not strictly comply with applicable rules of procedure and conditions ordered by the court, and others²⁶.

2. The European Court of Human Rights case-law and domestic measures. — When considering possible approaches to dealing with abusive litigants, two major issues emerge – the right to access to court and the freedom of expression. In the cases before it which concerned in some way States’ efforts to resolve abusive litigation matters the ECtHR has inevitably examined the respective domestic measures in light of the balance between human rights protection and the legitimate public interests. This part of the paper will discuss ECtHR caselaw related to access to court and freedom of expression.

a. Limitations to the right to access to court. — As mentioned at the beginning of this report, the ECtHR has found that although Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal, the “right to court” is not absolute. It may be subject to limitations where the interests of justice so require. Such limitations are left to the discretion of states, which enjoy a certain margin of appreciation. However, a prerequisite for the compatibility with the Convention of any such restriction is that the limitations applied do not restrict or reduce such access in such a way or to such an extent that the very essence of that right is impaired²⁷. Furthermore, in order to be compatible with Article 6 § 1, such limitations have to pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved²⁸.

Limitations to the right to access to court, reviewed in the ECtHR caselaw, include conditions of the admissibility of an appeal, requirements to the applicant, in connection with his appeal, to provide security for costs to be incurred by the other party to the proceedings, requirements that a defendant be represented by counsel at all stages of the proceedings, financial limitations.

In the case of *Tolstoy Miloslavsky v. the United Kingdom (no. 18139/91)* the ECtHR has touched upon, among other issues, the relation between denying access to court through financial restrictions and dealing with frivolous, vexatious or otherwise unreasonable pleadings, or abuse

²⁶ See *ibid.*

²⁷ See *Kreuz v. Poland*, application no. 28249/1995.

²⁸ See *Brualla Gómez de la Torre v. Spain*, application no. 26737/1995.

of court process. Mr. Miloslavsky, a defendant appealing a court decision, was ordered to provide security for the costs of his opponent in case the appeal would be unsuccessful, within fourteen days, failing which the appeal would stand dismissed. He did not pay the required security and his appeal was dismissed. He addressed the domestic court about the same case on two more occasions. The plaintiff in the initial proceedings moved to strike out the action as an abuse of process and as being vexatious and frivolous. The court struck the case out as being an abuse of the process of the court.

Before the ECtHR Mr. Miloslavsky complained, among other things, that the court's order making his right to appeal conditional upon his paying security for costs constituted a breach of his right of access to court. Considering whether there had been a violation of Article 6 § 1 of the Convention the ECtHR referred to its caselaw, reminding of its two-tier test of the limitations to access to court which fall into the margin of appreciation of the State: 1) if the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired, and 2) if the restriction pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. Under this test the ECtHR found that the security for costs order pursued a legitimate aim, which was to protect the opposing party from being burdened with legal costs, which he could not recover, if the appeal was unsuccessful. Furthermore, the ECtHR stated that, "since regard was also had to the lack of prospects of success of the applicant's appeal, the requirement could also be said to have been imposed in the interests of a fair administration of justice". Moreover, the ECtHR found that the national court had considered whether the measure would amount to a denial of justice to the defendant with view to the merits of the appeal and reached the conclusion that the conditions placed on Mr. Miloslavsky appeal did not impair the essence of his right of access to court, neither were they disproportionate for the purposes of Article 6 § 1 of the Convention.

Apart from the security for costs provision discussed in *Miloslavsky*, which was eventually held to conform with Article 6, another provision in UK law allows for the prevention of vexatious litigation, namely the Section 42 orders. These are orders issued by the High Court which prevent a vexatious litigant from instituting legal proceedings or continuing with any pending proceedings without first obtaining leave from the High Court. The orders may be issued for a specified period or remain in force indefinitely. The High Court shall allow for proceedings

only upon being satisfied that the proceedings or application are not an abuse of the process of the court in question and that there are reasonable grounds therefor.²⁹ Proceedings to declare a party a vexatious litigant and issue an order may only be brought by the Attorney General upon complaint of the injured party. Orders may include civil proceedings, criminal proceedings, or both (“all proceedings order”).

Another remedy for injured parties in UK law is the civil restraint order. It could be limited (a particular case), extended (restraining the party from making any applications concerning matter related to the proceedings in which the order is issued) or general (restrains the vexatious party from filing any claim in any court without prior permission).³⁰ The order does not involve the Attorney General and is said to be issued in a speedier manner than the Section 42 order, which also includes a hearing of the vexatious litigant.

Another limitation on the right to access to court which the ECtHR has discussed is the pre-filing court permission. The Court has accepted that there can be cases where the prospective litigant must obtain prior authorization before being allowed to proceed with his claim³¹. In the case of *Golder v. the United Kingdom (no. 4451/70)* the Court has found that there is room for limitations permitted by implication. Such limitations may concern regulations relating to minors and persons of unsound mind. This decision has been interpreted as allowing for the control of vexatious litigants on the part of the courts as an acceptable form of judicial proceedings.³² In any case, as pointed out in the separate opinions to the judgement, whether limitations shall be enforced in a certain case may only be decided by a judge.

b. Insulting language, vexatious litigation and abuse of the right to petition. — The ECtHR has had the occasions to discuss when claims for judicial relief constitute abuse of rights and may therefore be restricted or denied review. As the Court has stated, rejection of an application on grounds of abuse of the right of application is an exceptional measure³³.

As already set out in this paper, there will be an abuse of the right of application where the applicant, in his or her correspondence with the Court, uses particularly vexatious, insulting, threatening or provocative language – whether this be against the respondent government, its

²⁹ Cf. section 42 of the Senior Courts Act 1981.

³⁰ See more in Auerbach, Simon. *When the time has come to say: ‘stop’*, available at: https://www.judiciary.uk/wp-content/uploads/2016/01/auerbach_dealing-with-vexatious-litigants-summer2012.pdf

³¹ See *Ashingdane v. the United Kingdom*, application no. 8225/1978.

³² *Litigation: restraining vexatious litigants*, available at: http://www.cms-lawnow.com/ealerts/2003/01/litigation-restraining-vexatious-litigants?cc_lang=en, last accessed March 24, 2019.

³³ See *Miroļubovs and Others v. Latvia*, application no. 798/2005.

Agent, the authorities of the respondent State, the Court itself, its judges, its Registry or members thereof. In *Řehák v. the Czech Republic* (no. 67208/01) the Court has stated that “the applicant’s allegations are intolerable, exceeding the bounds of normal criticism, albeit misplaced, and amount to contempt of court. Such conduct by the applicant – even supposing that his original application would not be deemed manifestly ill-founded – is contrary to the purpose of the right of individual petition, as provided for in Articles 34 and 35 of the Convention. There is no doubt whatsoever that it constitutes an abuse of the right of application within the meaning of Article 35 § 3 of the Convention” and must be rejected as such.” These conclusions are reiterated also in the *Apinis v. Latvia* (application no. 46549/2006) decision on the admissibility of the application, where the applicant’s allegations have been found to be “insulting and threatening”, and “intolerable to a level which exceeds the bounds of normal criticism, albeit misplaced, and amount to contempt of court”.

In principle any conduct on the part of an applicant that is manifestly contrary to the purpose of the right of individual application as provided for in the Convention and which impedes the proper functioning of the Court or the proper unfolding of the proceedings before it can be considered as an abuse of the right of application³⁴. In *Duringer and Others v. France* (application no. 61164/2000 and 18589/2002) ECtHR has come to the conclusion that “the remarks repeatedly made, without any foundation, remarks which are totally offensive and preposterous, cannot fall within the scope of the provisions of Article 34 of the Convention.” The persistent use of insulting or provocative language by an applicant may be considered an abuse of the right of petition³⁵. If, during the proceedings, the applicant ceases using offensive remarks after a formal warning from the Court, expressly withdraws them or, better still, offers an apology, the application will no longer be rejected as an abuse of application³⁶. On the contrary, in cases where apart from using offensive language the applicant does not follow the Court’s procedure in terms of time-limits, submissions, etc., in good faith, the Court may strike a case out of its list of cases under Article 37 § 1 (a) of the Convention where the circumstances lead it to believe that the applicant does not intend to pursue the application.

c. Insulting language and limitation to the right to freedom of expression. — The issue of abusive language and defamatory allegations particularly against judges has been discussed in

³⁴ See *Miroļubovs and Others v. Latvia*, application no. 798/2005; *Koch v. Poland*, application no. 15005/2011.

³⁵ See Commission decision in *Stamoulakatos v. the United Kingdom*, no. 27567/1995.

³⁶ See *Chernitsyn v. Russia*, no. 5964/2002, application no. 5964/02.

a number of cases before the ECtHR. The subject matter for examination concerned the states' discretion to restrict or interfere with a person's right to freedom of expression. In its caselaw the Court has repeatedly stated that such restrictions are legitimate, if they are prescribed by law, pursue a legitimate aim and are necessary in a democratic society.

In the cases before it the ECtHR has given consideration to a number of factors, for example: the nature and exact manner of communication of the statement, the context in which it was made, the extent to which it affected the judge³⁷, whether fair balance was struck between, on the one hand, the need to protect the authority of the judiciary and, on the other, the protection of the applicant's freedom of expression, whether the statements could be regarded as part of a public debate about the state of the judiciary, whether the abusive allegations contained any factual basis to support them³⁸, whether the abusive statements reached the public (in the media), or were submitted only to the court, whether the abusive statements implicated the normal course of justice. When deciding on the appropriateness of the punishment, the ECtHR considers the gravity of the guilt, the seriousness of the offence and the repetition of the alleged offences. In the above cited cases of *Zdravko Stanev* and *Lopuch* both applicants were convicted for defamation. However, in the latter case no violation of Article 10 of the Convention was found, whereas in the first case the Court ruled a disproportionate interference with the applicant's right to freedom of expression.

It is important to note that Ms. Lopuch wrote to the court in Poland on numerous occasions with various complaints about the civil proceedings, alleging that some of the judges were party to a "mafia like setup". Her letters were not left unanswered. Moreover, the judge who replied to her repeatedly drew her attention to the inappropriate terms she used and requested her to use appropriate language. Consequently, she was made aware that the language in her communication with the court was inappropriate and that her conduct was open to criticism. The court that found her guilty of defamation considered this aspect of the case as well as the fact that she failed to conform with the advice she had received.

Another important aspect of the ECtHR case-law gives consideration of the public interest of maintaining the authority and impartiality of the judiciary. The court needs to enjoy public confidence and should therefore be protected against unfounded attacks. Magistrates must, in

³⁷ See *Zdravko Stanev v. Bulgaria No. 2*, application no. 18312/2008.

³⁸ See *Lopuch v. Poland*, application no. 43587/2009.

order to perform their duties, enjoy this confidence without being disturbed. It may therefore be necessary to protect them from offensive verbal attacks while on duty³⁹. What is at stake as regards protection of the authority of the judiciary is the confidence which the courts in a democratic society must inspire in the accused, as far as criminal proceedings are concerned, and also in the public at large⁴⁰.

Parties are entitled to comment on the administration of justice as part of a broader public debate on the state of the judiciary and any other democratic issue. However, there are certain boundaries which must not be overstepped. In this regard the ECtHR makes a distinction between criticism and insult. “If the sole intent of any form of expression is to insult a court, or members of that court, an appropriate sanction would not, in principle, constitute a violation of Article 10 of the Convention”⁴¹. In the case of Mr. Skalka, he wrote to the court president, using undisputedly insulting words, such as “irresponsible clowns” (directed to all the judges in the division), “a limited individual”, “a cretin”, “some fool”, and derogatory tone. Furthermore, he did not formulate any concrete complaints, however, sufficed to solely express his anger and frustration. The ECtHR found that “an appropriate sentence for insulting both the court as an institution and an unnamed but identifiable judge would not amount to a violation of Article 10 of the Convention” and went on to decide whether the punishment was appropriate (in this case, eight-month imprisonment), concluding that it was disproportionately severe. Applying the same test, the ECtHR found a violation of Article 10 in the case of Mr. Saday, sentenced to six-month imprisonment for insulting the court, however, again stating that his behaviour made it necessary for the court to impose a punishment.

III. DIFFERENT APPROACHES OF COPING WITH ABUSIVE CLAIMS OR APPLICATIONS.

CONCLUSIONS AND PROPOSALS FOR LEGISLATIVE IMPROVEMENTS

Using abusive speech in legal proceedings should be neither juridically irrelevant nor admissible⁴². Considering the legal systems in the European Union one can find diverse solutions.

³⁹ See *Saday v. Turkey*, application no. 32458/1996.

⁴⁰ See *Lopuch v. Poland*, application no. 43587/2009.

⁴¹ See *Skalka v. Poland*, application no. 43425/1998.

⁴² See *Erbakan v. Turkey* (application no. 59405/00); and also B. RAINEY, E. WICKS, C. OVEY. *The European Convention on Human Rights*. Sixth Ed. New York: Oxford, p. 436ff. But see *contra*: H. CANNIE, D. VOORHOOF. *The abuse clause and freedom of expression in the European Human Rights Convention: an added value for*

The question is – which ones are the best ones?⁴³ This report cannot resolve the problem in general, but it might outline some of the most popular and efficient sanctions. Within the variety of contexts, it could maintain proposals for legislative improvements in the judicial systems, in which there is, as it looks like, *legal vacuum* regarding the subject under discussion.

1. Inadmissibility of claims and applications with abusive content. — The claim or application containing abusive speech and its responses are contrary to the public policy (cf. for example Article 13 § 5 of American Convention of Human Rights). Such plaintiffs' and defendants' submissions are contrary to good faith and they could be grounds for restriction of freedom of expression⁴⁴ because they impinge on the authority of the judiciary as *per* Article 10 § 2 of ECHR⁴⁵. Pleadings with hate speech are an abuse of right of freedom of expression (cf. Article 17 ECHR)⁴⁶.

Hence, the ECtHR reiterates the inadmissibility of any individual application containing abuse of the right, i.e. intolerable or endless pleadings, speech of hate or outraging the authority of the court, criticism beyond the normal bounds, religious hatred⁴⁷, ethnic hatred⁴⁸, glorification of violence⁴⁹, racial hate speech⁵⁰, sexual orientation hate speech⁵¹ etc.⁵² (cf. Article 35 § 3 (a)

democracy and human rights protections? Netherlands Quarterly of Human Rights, 2011, vol. 29, no. 1, pp. 54ff; they suggest that European Court should not exclude any type of speech categorically from the protection of art. 10 of the European Convention of Human Rights.

⁴³ Cf. also F. TULKENS. *When to say is to do...*, p. 280. The author examines two approaches in acts of European Court of Human Rights: first one – as an exclusion from the protection under art. 17 ('Prohibition of abuse of rights'); second one – as a restriction on the protection provided for by art. 10 ('Freedom of expression'), § 2 of the Convention of Human Rights.

⁴⁴ See *Ždanoka v. Latvia*, judgment of 16.03.2006 (application no. 58278/00).

⁴⁵ Cf. F. TULKENS. *When to say is to do...*, p. 283-284.

⁴⁶ See *Mirošubovs and Others v. Latvia* (application no. 35939/10). However, it is interesting from legal historical perspective to be pointed out that the European Court of Human Rights during the cold war has adopted a broader interpretation of art. 17 ECHR, namely, maintaining that ideology of the ECHR was incompatible with the existence of the communist party in the countries of (Western) Europe. (Cf. *German Communist Party v Federal German Republic*, decision of 20.07.1957, application no. 250/57; but see also F. SUDRE. *Droit européen et international des droits de l'homme*. Paris: PUF, 2006, p. 206, no. 148.)

⁴⁷ See *Norwood v. the United Kingdom*, decision of 16.11.2004 (application no. 23131/03).

⁴⁸ See *Ivanov v. Russia*, decision of 20.02.2007 (application no. 35222/04).

⁴⁹ See *Şener v. Turkey*, decision 26.06.2007; *Sürek (no.1) v. Turkey*, decision 08.07.1999 (application no. 26682/95) and other.

⁵⁰ See *Soulas and Others v. France*, decision of 10.07.2008 (application no. 15948/03); *Leroy v. France*, judgment of 02.10.2008 (application no. 36109/03); *Féret v. Belgium*, judgment 16.07.2009 (application no. 15615/07); *Le Pen v. France*, 20.04.2010 (application no. 18788/09).

⁵¹ See *Vejdeland and Other v. Sweden*, judgment of 09.02.2012 (application no. 1813/07); *Snyder v. Phelps et al.*, judgment of United States' Supreme Court of 2011 (cit. supra).

⁵² See also *Gough v. United Kingdom*, 28.10.2014 (case no. 49327/11).

ECHR)⁵³. Anyway, such an application, as mentioned above, is against the purpose of the right of individual application (cf. Article 34 and 35 ECHR)⁵⁴.

The utility of this approach, i.e. claims and applications which contain abusive speech to be deemed inadmissible, is that the litigants who abuse their rights are permanently removed from the trial. Their contrary to the public policy conduct receives sanction which is strict and harsh. Nevertheless, such a method entails disadvantages. It is quite restrictive, because the litigants do not have the opportunity to rectify their submissions and requests according to the instructions of the court. In any case, this could be qualified as a violation of the right to a fair trial (Article 6 ECHR).

2. Orders or motions of the judge to the querulants. — Another solution of the problem with claims and applications containing abusive speech is for the judge to be obliged to give orders or instructions to the claimants and applicants to get their submissions in compliance with the procedural rules. This approach is used in Rules of European Court of Human Rights. Consequently, if the party fails to abide to the instructions to get the claim or application or its pleadings in accordance with the rules for normal and appropriate court language⁵⁵, i.e. without hate speech, provocation and so on, its act should be struck out⁵⁶. But if he or she rectifies the claim or application according to the orders of the judge, there are no procedural impediments for trial. What are the *pros* and *cons* of this approach?

In the first group, on the one hand, given the fact that this is the most flexible method of coping with abusive claims and applications, the abusing party could get its submissions up to the standard of normal trial according to the orders of the judge or court as the case may be. On the other hand, the doors of the court procedure are open to the party, despite the fact that he or she has been acted abusively, for his or her procedural behaviour is violating neither the law nor the public policy.

In the second group, i.e. the one with the weaknesses of the approach under discussion, the judicial system would have to make expenses and involve human resources to deal with persons who flagrantly offend the public policy. Furthermore, sometimes it is obvious that giving orders to one who repeatedly petitions authorities or pursues legal actions based on manifestly

⁵³ See *Correia de Matos v. Portugal* (application no. 56402/12).

⁵⁴ See *Řehák v. the Czech Republic* (application no. № 67208/01).

⁵⁵ But see also *R. v. Keegstra* case of Canadian Supreme Court (cit. supra).

⁵⁶ See *Chemitsyn v. Russia*, decision of 24.02.2005 (application no. 57950/00).

unfounded grounds using abusive language in his or her acts might be quite pointless. In such cases querulants should be stopped immediately, without being given a new chance to file their abusive grievances again and without court systems being obliged to lose resources for meaningless causes.

3. Liabilities to the litigants: for damages, costs, fines. — Plaintiffs' and defendants' submissions which offend good faith in court trials by using abusive speech in their claims, applications, pleads and so on should be regarded by law as offence of it⁵⁷. *Firstly*, one who intentionally exercises legal actions and pleads in the trial in bad faith, could be held *liable for damages* according to the Civil Law. This legal approach, for example, is embodied in Article 3 of the Bulgarian Code of Civil Procedure. The positive aspect of this conclusion is that the opposing party in the proceedings could be remedied against his or her losses. Nevertheless, the negative aspect of it is that *animus nocendi*, i.e. the subjective state of mind of the querulant of abusive language or speeches is so hard to prove that in some cases it could be hardly possible for the opponent to get compensation.

Secondly, claimants and applicants with abusive motions or language may be held *liable for costs of litigation* and especially for those of them that were redundant as concerning their pleads. This legal approach is adopted in Article 11(b) § 1 of Federal Rules of Civil Procedure⁵⁸. *Thirdly*, the abusive party in a dispute may be held *liable for a fine payable to the court*. Such a responsibility with a view of administrative law by an order of the judge could be found in the Article 11 (c) § 4 of the Federal Rules of Civil Procedure as well as in Article 89 of the Bulgarian Code of Civil Procedure, namely in the latter case for an insult of the court, party, counsel, witness or expert.

The beneficial aspects of the approaches considered above are that the judge is able to react and interrupt immediately the individual who exercises his or her procedural rights contrary to their purposes. In many cases these actions of the court would suffice to deter the abuser. But it is doubtful if this will be appropriate in all cases. Therefore, the downsides of the impugned solutions are that the claimants and applicants, although obliged to pay costs of litigation or fines to the courts, could continue to insult, threaten, provoke, use intolerable speech, etc. Hence, the

⁵⁷ But see *Handyside v. United Kingdom*, 07.12.21976 (application no. 5493/72).

⁵⁸ See supra *Garcia v. Clovis Unified Sch. Dist.*

second and third approaches to cope with litigants should be used jointly with another, more effective one.

4. Liabilities to the litigants: for unlawful acts; striking a portion of a pleading. — *Fourthly*, litigants using abusive language in their submissions or pleads to the court could be held *liable for a crime or administrative offence*. These liabilities could unquestionably be quite efficacious as they may aim at re-educating the querulant⁵⁹. Another *pro* aspect of this technique is that the judge should not have to impose by himself or herself accountability to the party who violates the rules of procedure whether it is a criminal or an administrative offence. The court has simply to make a referral to the relevant state authority, for example a public prosecutor.

But *cons* arguments against this decision are also obvious. On the one hand, the public liabilities are uttermost remedy to cope with unlawful behaviour; this is especially true for the criminal responsibility⁶⁰. On the other hand, the liability for a crime or an administrative offence could hardly be effective enough to resolve the problem with litigants. That is because this remedy does not affect the immediate conduct of the abusive parties in the legal proceedings. These liabilities just sanction their abusive conducts in an *extra-procedural* way. In other words, abusive speech or pleadings still remain *in the trial* and against the opposing party and the judge is still confronted with the question “How to cope with these litigants?”.

Fifthly, another way to deal with abusive litigation is *striking a portion of a pleading*. This remedy is well known in Anglo-Saxon law systems, as it was mentioned above (see for example Article 12(f) FRCP). Leaving aside that this is an unfamiliar authority of the court in Continental Europe as it is not recognized in these classical procedural codes (cf. Article 24 of modern French CPC⁶¹), however, the approach under consideration should be used very strictly⁶². For it could be

⁵⁹ See for example *Gough v. United Kingdom*, 28.10.2014 (application no 49327/2011): “Article 10 [ECHR] does not go so far as to enable individuals, even those sincerely convinced of the virtue of their own beliefs, to repeatedly impose their antisocial conduct on other, unwilling members of society and then to claim a disproportionate interference with the exercise of their freedom of expression when the State, in performance of its duty to protect the public from public nuisances, enforces the law in respect of such deliberately repetitive antisocial conduct.”

⁶⁰ Cf. for example *Lopuch v. Poland* (application no. 43587/09); *Zdravko Stanev v. Bulgaria* (application no. 32238/2004); *Saday v. Turkey*, *Skalka v. Poland* (application no. 43425/1998); *Ceylan v. Turkey* (application no 23556/1994); *Tammer v. Estonia* (application no. 41205/1998).

⁶¹ Article 24 § 1 of French CPC says: “Parties are held to act at all times with due respect to the law.” Paragraph 2 rules: “The judge may, according to the seriousness of the infringement, pronounce even *sua sponte* [on its own motion] injunctions, delete writings, declare them defamatory or order the printing and posting of his judgements.”

⁶² See for example *Garaudy v. France*, decision of 24.06.2003 (application no. 65831/2001). The European Court of Human Rights applied art. 17 ECHR and deprived the applicant of right to invoke art. 10 ECHR. The grounds for such an assertion was disclaim of the reality of clearly established historical facts such as crimes against the humanity, public defamation of a group of persons, namely, in this instance – the Jewish community.

normatively subsumed as a *non-liquid*, i. e. as a denial of the court to solve the case or, in other words, as something contrary to the right to a fair trial (Article 6 ECHR). Nevertheless, this remedy could be very effective to remove the parts of the pleads or claims addressed to the court which contain massive, confusing, disorganized, defective, repetitive, scandalous, impertinent, redundant, immaterial and often unmeritorious sections of claims or speeches.

5. Conclusions. — In view of the matter under consideration, the following conclusions could be drawn: In order to cope with abusive claimants and applicants, the Member States should embrace different approaches as the latter ones pointed out above. Enacting them in diverse correlation to one another, the European States may overcome abusive exercise of rights by the litigants in a systematic and comprehensive manner. This is essential because different legislative solutions offer to the legislative bodies methods which every Member States should implement in their domestic legal systems considering the variety of domestic procedural laws.

Furthermore, one of the approaches discussed above should be regarded as the most appropriate. Has someone been using abusive language or pleadings, the court should be able to give orders or instructions to him or her to get his or her acts in compliance with the relevant procedural rules for claims', applications' or pleadings' contents. The querulant's grievances which do not conform with the orders or instructions of the judge – continuing to use intolerable or endless pleadings, speech of hate or outraging the authority of the court, criticism beyond the normal bounds, etc. – should be declared inadmissible by the court, i.e. the procedure he or she has initiated should be terminated *via* subsequent act of the judge.

6. Proposals for legislative amendments. — Taking into consideration the complexity of the problem of using abusive speech in legal proceedings, a proposal for *de lege ferenda* could be made about Bulgarian legal system. In the Article 101 of the General Provisions of CPC a new part should be included as follows: “*Submissions presented by the parties to the court should not contain inappropriate or offensive language.*” Failure on the part of the litigant to comply with above rule after being ordered to rectify the submissions in a prescribed time period should result in his or her claim being rejected by the court.