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THE RIGHT TO PRIVACY IN EMPLOYMENT AND ITS PROTECTION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

I. INTRODUCTION

One of the basic, endogenous features attributed to labour law is its dynamism, ie. the ability to adapt to current socio-economic changes, which, among other factors, are usually driven by technical and technological progress. In this regard, the role of digitalization in the world of work is of great importance. In circumstances where the prerogatives of employers to supervise and control the work process not only did not fade but further deepened bearing in mind the sophisticated methods of monitoring, surveillance and control, the privacy of the employee is exposed to serious threats that question its existence. Modern information and communication technologies and "smart" devices enable employers not only to resort to "ordinary" methods of monitoring and surveillance such as reading employees' private e-mail but also to more sophisticated ones, such as installing an application on the devices used by employees that can track their locations twenty-four hours a day, biological devices to monitor their metabolism, etc.[1] Given the fact that employees are increasingly disclosing their personal information and expressing their views and opinions on social media, employers have an additional "channel" for monitoring and supervision. Although certain methods and techniques of monitoring and surveillance used by employers may act intrusive to the privacy of employees, employers often have a legitimate interest in applying such methods and techniques. Hence, it becomes more than obvious that the employee's right to privacy in the context of employment and its balance with the legitimate interest of the employer to monitor and supervise business operations, is a fluid right which is subject to different interpretations.

The right to privacy has the legal status of a fundamental human right. The protection of the right to privacy is regulated by several UN human rights instruments. [2] The genealogy of the right to

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[1] Katsabian.T, Employees' Privacy in the Internet Age: Towards a New Procedural Approach, (Berkeley Journal of Employment and Labor Law), pp.205, 2019.

[2] Such are, for example, the Universal Declaration of Human Rights (Article 12) and the International Covenant on Civil and Political Rights (Article 17).

privacy in European organizations (Council of Europe and the European Union) dates back to the adoption of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights) of 1950. The Council of Europe later adopted another significant legal instrument for the protection of privacy, the adoption of which corresponds to the early stages of the development of information and communication technologies, and as a consequence, to the frequent risks of personal data misuse. It is the *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 1981*, which establishes the basic principles for the collection, storage and use of personal data and which lays the foundations for the adoption of the *Recommendation on the Protection of Personal Data Used for Employment Purposes of 2015*. [3] The right to privacy protection, including the right to protection of personal data is subject to regulation in other legal instruments adopted by the European Union. In that regard, legislative acts which are worthy of a mentioning are *Directive 95/46 on the Protection of individuals with regard to the processing of personal data and on the free movement of such data* of the European Parliament and the Council of EU of 1995, *Directive 2002/58/EC on Privacy and Electronic Communication of 2002*, as well as the *Charter of Fundamental Rights of the European Union* (which for the first time, consolidates human rights including *the right to privacy* in one document, regardless of whether such rights are treated as civil and political or economic, social and cultural rights) and the *Treaty on the Functioning of the European Union of Lisbon of 2007* (which regulates the right to personal data protection in its Article 16). To the previous "list" of legal instruments, most of which are legally binding, can also be added the International Labour Organization (ILO) *Code of Practice for the Protection of Workers' Personal Data of 1996* and the *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data of 1980.* With the normative approach applied in almost all the aforementioned legal instruments, the right to privacy protection, including the right to protection of personal data, is regulated in a general way, without being adjusted and placed in the context of employment.

One of the most important legal sources in Europe governing the right to privacy is the European Convention on Human Rights (ECHR), while one of the most significant authorities with jurisdiction to decide cases of violation of this right and to interpret its scope is the European Court of Human Rights in Strasbourg (ECtHR). In the subsequent parts of this paper, we analyze the role of the ECHR and the ECtHR in regulating and interpreting the right to privacy in the context of employment, in order to, among other things, draw the attention to the Macedonian legislator and contribute to more adequate demarcation between the protection of the right to privacy of employees on the one hand and the admissible interference with this right by employers, on the other.

[3] With the adoption of the *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 1981*, in fact, a "parallel regime" for the protection of the right to privacy was established, as compared to the general regime arising from the approach taken in Article 8 of the ECHR. The parallel regime, actually means an introduction of a new channel of privacy protection which is more practical, compared to the general regime, because, at least in the initial stages of the evolution of this right (the 60s and 70s of the last century), the term "private life" was interpreted restrictively and placed in the context of protection from interference by public authorities, but not in the context of protection from interference by private entities, such as employers. However, the two "parallel regimes" for regulating the protection of personal data are not mutually exclusive but provide complementary protection of the right to privacy of people. See Otto. M, The Right to Privacy in Employment: A comparative analysis, (Hart Publishing), pp.70, 2016.

II. NOTION DETERMINATION OF THE RIGHT TO PRIVACY UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN COURT OF HUMAN RIGHTS AND ITS ADAPTATION TO THE EMPLOYMENT RELATIONSHIP CONTEXT

The right to privacy is subject to regulation of the European Convention on Human Rights. The ECHR governs the right to privacy as follows:

Right to respect for private and family life

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

By analyzing the normative description of the right known as the *"right to privacy"* provided for by the ECHR, two of its features immediately come to the fore. First, the right to privacy is an all-embracing right consisting of four constituent elements (right to private life, right to family life, right to one's home and right to correspondence). All constituent elements are complementary and mutually inclusive and can be subsumed under the colloquial term "right to privacy". Second, the way the right to privacy is formulated is rather amorphous. The protection of the right to privacy is not expressed in the form of "prohibition" nor the form of "explicit entitlement" but as a "*right to respect for one's privacy*" which is construed as a negative right denoting an idea of refraining from acting.[4] In theory, there are various interpretations of the right to privacy. According to one such interpretation the right to privacy means the right to be left alone. [5] Its main purpose is to preserve the "private space" of the individual that should be protected from interference by others. Described as such, the right to privacy includes every aspect of ordinary life, from the clothes we wear, the food we eat and the television shows we enjoy to the sexual preferences we have or the friendships we establish. [6] According to another interpretation, the right to privacy boils down to the need to control personal information (ie personal data that we do not want to make available to others without our consent) thus establishing control over our own lives. The right to privacy, at least in the initial stages of its development, was first analyzed in the context of protecting the individual against interferences and potential abuses caused by a public authority (especially the totalitarian regimes). However, a public authority is not the only authority that can endanger one's privacy. Authority, defined as a position of "superiority" arises from the power relations that exist in the field of employment relations. Hence, the right to privacy as a human right is more regularly placed in the context of employment relations, with the subjects of protection of this right in

[4] Otto.M, op.cit, pp. 69.
[5] Hames.D.S and Diersen.N, The Common Law Right to Privacy: Another Incursion Into Employers' Rights to Manage Their Employees?, (Labor Law Journal), pp.757, 1991.
Katsabian.T, op.cit, pp.208.
[6] Collins.H, Ewing. K.D and McColgan.A, Labour Law, (Cambridge University Press), pp.415, 2012.

addition to citizens (in the broadest sense), becoming the employees in their relationships with the employers. The adaptation of the right to privacy in the employment context is a consequence of the significantly enlarged scope of the protection of private life which "goes beyond that of a persons' home". [7] This interpretation first emerges from the seminal judgment of the European Court of Human Rights in the case of "*Niemietz v. Germany*" of 1992.[8] In the judgment, the ECtHR stated that: … "*it would be too restrictive to limit the notion (privacy) to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle".* Furthermore, the Court emphasized that: "*respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings"...* hence*, "the notion of private life should also include activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people develop relationships with the outside world".* The significance of this judgment is reflected in the fact that through it, the European Court of Human Rights, implicitly expands the scope of the right to privacy to areas and relationships which go beyond the private home of a person and encompass, inter alia, relationships that are established between employers and employees, that is, employment relationships. Such an extensive understanding of the right to privacy is gaining widespread acceptance, and at the same time, is beginning to actualize the issue of protection of human rights in the workplace. However, despite the significance of this judgment, it remains unclear to what extent the right to privacy protection will be extended to the workplace to protect employees from unjustified interference in their private sphere by employers. The attempt to address this dilemma and to detect cases where inadmissible interference with the right to privacy of employees has been established is an extremely complex legal challenge faced by the Strasbourg jurisprudence, ie. ECtHR. This is because the boundary between what constitutes a legitimate interest of employees to protect their human right to privacy in the context of employment on the one hand and what is a legitimate managerial and supervisory prerogative of employers on the other is very narrow. One of the key indicators used to establish the scope of the right to privacy (in the context of employment) and to determine whether or not there is interference (intrusion) in the employee's right to privacy by the employer in a particular case, is the so-called "*reasonable privacy expectation*" of the employee. The concept of "reasonable privacy expectation" has first emerged in the jurisprudence of the United States of America.[9] This concept was then transmitted and adapted by the jurisprudence in Strasbourg, although its understanding and interpretation are significantly different compared to those in the United States. According to the interpretation in the United States, the reasonable privacy expectation of employees in the context of the employment relationship is quite limited. Interpretations are based on the assumption that for the entire period of time that employees are under the management, supervisory and regulatory authority of employers, their privacy expectation is very low and they cannot automatically seek privacy protection. The protection of the right to privacy is not treated as an absolute right even in Europe and the persons who invoke this right must prove the existence of a reasonable privacy expectation.[10] A good example of this

[7] Bronstein. An International and Comparative Labour Law: Current Challenges, (Palgrave McMillan and ILO), pp.181, 2009.

[8] The "Niemietz v. Germany" case (72/1991/324/396) concerns a warrant to search the law office of Mr Niemietz, a lawyer (Rechtsanwalt) and Anti-clerical activist.

[9] See: Case of „Katz v US", 389 US 347 (1967) и „O'Connor v. Ortega", 480 U.S. 709 (1987).

[10] In the case of "Lüdi v Switzerland" (App no 12433/86) ECHR 15 June 1992, the ECtHR found that while committing a criminal activity (sale of two kilograms of cocaine) which was encountered by an undercover agent, the person must had known that he was involved in criminal activity and as a consequence, accept a lesser privacy

is the case of "*Halford v. Uk*" which illustrates the approach taken by the ECtHR in one of the first major decisions on the protection of the right to privacy in the context of employment[11], in which the Court interprets the principle of "reasonable privacy expectation", while, also drawing the contours of the scope of this principle. In the present case, the Court assesses whether there has been a breach of the right to privacy of the employee (Ms. Halford, Assistant Chief Constable with the Merseyside police) by the employer (Merseyside Police) caused by intercepting the employee's telephone conversations conducted on the telephone devices part of the Merseyside police internal telephone network and provided by the employer. In the proceedings before the ECtHR, the Government of the United Kingdom stated that the grounds invoked by the plaintiff (Ms. Halford) for violation of her right to privacy were unfounded, as Ms. Halford had used the telephone provided by the Merseyside Police and while conducting work-related telephone conversations, *she did not or could not have a reasonable privacy expectation*. Furthermore, the Government of the United Kingdom stated that the employer should, as a rule, *be able to monitor employees' telephone conversations without prior notice to the employees*, if such conversations are conducted on telephone devices provided by the employer. In its judgment, the European Court of Human Rights not only found that in the case, Article 8, paragraph 1 of the European Convention on Human Rights (ie the right to privacy) was concerned but also clearly stated that telephone conversations conducted from business premises of the employer as well as those made at home, fall under the scope of application of the right to "private life" and "correspondence". A matter of great importance, in this case, is the ECtHR's finding that Ms. Halford's privacy expectation was reasonable, as no evidence was found that Merseyside police had informed Ms. Halford that the internal telecommunications system she was using could be intercepted by the police, or in other words, that her office telephone conversations could be wiretapped.[12] From the analysis of this judgment, it becomes evident that employees enjoy a solid margin of protection of their employment privacy, through Article 8, paragraph 1 of the European Convention on Human Rights.

Considering the interpretation of the "reasonable privacy expectation" principle by the ECtHR in the case of "Halford v.UK", but also, in many other cases, it can be concluded that the Court's approach is oriented towards an extensive understanding of the right to privacy. In addition to "Halford v. UK", the European Court of Human Rights had the opportunity to express its position on the scope of application of the right to privacy in many other cases which included other forms of *interception of communications in the workplace.* Such were, for example, the cases of "*Copland v. UK*"[13] (in which the ECtHR found that Ms. Copland had a reasonable privacy

expectation. The Court, therefore, stated that the "interference with the privacy" of a person by an undercover agent with the task of detecting criminal activity will not be considered a violation of the right to privacy.

[11] The case of "Halford v. UK" (Application no. 20605/92) concerns a gender discrimination procedure initiated by Ms. Halford (Assistant Chief Constable with the Merseyside police) against the employer (Merseyside police), as a consequence of the non-appointment of Ms. Halford to a higher rank in the police. During the proceedings, Ms. Halford said that she was facing a "campaign" launched against her in response to the complaint she filed. The actions taken against Ms. Halford included the interception of telephone conversations Ms. Halford conducted from her home or office, in order for the information provided by them to be used against her in the discrimination dispute.

[12] As an additional evidence to support Ms. Halford's reasonable privacy expectation, the ECtHR underlined the fact that in her capacity as assistant chief constable, she had her own office with two phones, one of which was specifically intended for private use. Ms. Halford was also clearly informed that she could use the telephones placed in her office for the purposes of her case against Merseyside police for protection against sex discrimination.

[13] According to its nature and features, the case of "Copland v. UK" (Application no. 62617/00) is related to the case of "Halford v UK". Ms. Copland was employed by Carmarthenshire College as a secretary (personal assistant to the College Principle). At the request of the College's deputy principal, the telephone, e-mail and internet usage by Ms.

expectation because she had not been informed in advance that the e-mail she sent from the employer's business premises and the Internet she used for private purposes were subjected to monitoring by the employer) and „*Barbulescu v. Romania*"[14] (in which the ECtHR found interference with Mr. Barbulescu's right to privacy, as a consequence of the fact that the employer accessed his private communications conducted via the instant messaging platform - Yahoo messenger, and then used the transcripts of those messages as evidence in the labour-law dispute before the labour courts).

Many other practices deriving from cases brought before the ECtHR were also assessed as "interferences" with the right to privacy (according to Art.8, para.1) in the context of employment. Such practices included: *drug testing* (e.g. in the cases of "Madsen v. Denmark" [15] or „Wretlung v. Sweden" [16]), *video surveillance* (e.g. in the case of *„Köpke v. Germany*"[17]), a *temporary ban on employment of former members of the KGB in the public service, and certain jobs in the private sector* (e.g. in the case of „*Sidabras and Dziautas v Lithuania*"[18]), *the storage and release of information collected in connection with a security evaluation as well as the refusal to allow the employee to refute it* (e.g. in the case of *Leander v. Sweden*)[19]; *having an extramarital relationship*

Copland were subjected to monitoring in order to ascertain whether there was an excessive use of the College facilities for personal purposes.

[14] The case of "*Barbulescu v.Romania*" (Application no. 61496/08) refers to a procedure for protection of the right to privacy initiated by Mr. Barbulescu (engineer in charge of sales in a private company), who, at the request of his employer and for the purpose of responding to customers' enquiries, created an instant messaging account using Yahoo Messenger in order to meet the requirements of the company's customers. On 13 July 2007, the employer informed Mr. Barbulescu that after monitoring his Yahoo Messenger communications, evidence was found that he had used the internet for personal purposes, in breach of the internal regulations. As a result, the employer terminated Mr. Barbulescu's employment contract.

[15] In the case of "*Madsen v. Denmark*" (Application no. 58341/00) it was questioned whether the introduction of random mandatory alcohol and drug test, requiring the employees of a Danish shipping company to provide a urine sample when on duty onboard a ship, amounted to an unjustified interference with their right to privacy.

[16] The case of „*Wretlung v. Sweden*" (Application no. 46210/99) concerns an office cleaner at a nuclear plant, who challenged the company's internal policy programme of taking urine samples from employees in order to detect the use of alcohol or drugs (cannabis).

[17] The case of "*Köpke v. Germany*" (Application no. 420/07) concerns a cashier and shop assistant employed in a supermarket, who was fired for committing theft in the workplace. The employer discovered the theft, using covert video surveillance with the help of a private detective agency. The video surveillance was carried out without prior notice to the employee, the visual data obtained from the video surveillance were processed and reviewed by only a limited number of other employees, and were used in the procedure before the competent court.

[18] The case of "*Sidabras and Dziautas v. Lithuania*" (Applications nos. 55480/00 and 59330/00) concerns two citizens of Lithuania (Mr. Sidabras - employed as a tax inspector in the tax administration and Mr. Dziautas - employed as a public prosecutor for organized crime and corruption). After Mr. Sidabras and Mr. Dziautas were identified as "former KGB agents" in May 1999, they were subjected to employment restrictions regulated by a special law, and as a result, their employment was terminated.

[19] The case of "*Leander v. Sweden*" (Application no. 9248/81), concerns a carpenter (Mr. Leander), who on 20 August 1979 started to work as a temporary replacement at the Naval Museum at Karlskrona (adjacent to the Karlskrona Naval Base which is a restricted military security zone) in a post of museum technician. Despite the expected duration of Mr. Leander's employment was ten months while the ordinary holder of the post was on leave, his employment contract was terminated on 3 September. The reason for the termination of Mr. Leander's employment contract was that at the moment of his employment, omissions were made in the procedure for his recruitment, requiring the undertaking of mandatory prior security control. Following the re-declaration of the post vacant, Mr. Leander did not get rehired, because the outcome of the security control carried out on him was unfavourable, and the post for which he applied assumed free movement and work in parts of the museum for which there are special security restrictions and entry procedures. In fact, the main reason why Mr. Leander's employment contract was terminated and he was subsequently treated as ineligible for the post, was that the police (according to the information available) classified Mr. Leander as a "security risk".

(e.g. in the cases of "*Obst v Germany*"[20] and „*Schuth v Germany*"[21]), *investigations into the sexual lives* (e.g. in the cases of *Lustig-Praen and Beckett v UK*" и „*Smith and Grady v UK*"[22]), etc.

Having regard to all the above cases, which point to various aspects and manifestations of interference with the right to privacy, it is evident that the ECtHR takes a quite broad approach in the interpretation of the right to privacy which contributes to the inclusion of various practices in different stages of the employment relationship (from job access and commencement of the employment relationship to the termination of the employment contract) which are assessed as interference with the employees' right to privacy. Such an approach by the Court is called "an integrative approach" that stems from the assumption of indivisibility and interdependence of fundamental human rights.[23] The integrative approach applied by the ECtHR is an interpretive technique of the Court, by which the rights characterized as social rights are placed in the context of the general human rights provided by the European Convention on Human Rights.[24] In this regard, for example, the right to privacy (Article 8 of the ECHR), which has the status of civil right, is closely related and linked with the right to work (as a right regulated by Article 1 of the European Social Charter). This holistic approach in the interpretation of the right to privacy was first applied in the said case of "*Sidabras and Dziautas v. Lithuania* ", in which the ECtHR, considering the consequences of the ban on the employment of former KGB agents in the public sector, but also on the restrictions on the employment of these persons in several fields of the private sector, stated that such broad restrictions "*hinder the exercise of the right to privacy*" protected by Art.8 of the Convention, as they affect the "*development of relationships with the outside world*" and cause "*serious difficulties .... in terms of earning their living*". [25] Hence, the seminal significance of the ECtHR judgment in "Sidabras and Dziautas v. Lithuania" does not only consist of the Court emphasizing the indivisibility of civil and political (on the one hand) and economic and social human rights (on the other) but also in the fact that, through such an indivisibility (i.e. integrative approach), the Court revises and further extends the scope of the right to privacy in the employment relationship context.

[20] The case of „*Obst v Germany*" (Application no. 425/03), concerns a member of the Mormon Church in Germany (Mr. Obst), employed as a European public relations officer. In conversation with his spiritual superior, the employee confided that he was sexually involved with another woman. On the advice of his spiritual superior, the employee confessed the adultery to his supervisor, who did not show any understanding of the employee's marital situation and thereupon dismissed him without notice for damaging the Churche's reputation.

[21] The case of "*Schuth v Germany*" (Application no. 1620/03), concerns an organist and choirmaster (Mr. Schuth) in a Catholic parish, who was dismissed without notice due to violation of Church's fundamental principles, according to which, marriage was enshrined as a sanctity, while adultery and bigamy were treated as a serious breach of the duty of loyalty to the basic regulations of the Church.

[22] The cases of "*Lustig-Praen and Beckett v. UK*" (Applications nos. 31417/96 and 32377/96) and "*Smith and Grady v. UK*" (Applications No. 33985/96 and 33986/96) are two different cases brought before the ECtHR covering an identical subject matter of dispute. Both cases, concern members of the United Kingdom armed forces who were homosexuals. The Ministry of Defence applied a policy which excluded homosexuals from the armed forces. All four applicants were the subject of an investigation concerning their homosexuality and were administratively discharged on the sole ground of their sexual orientation.

[23] Hendrickx. F and Van Bever. A, Article 8 ECHR: Judicial Patterns of Employment Privacy Protection, The European Convention on Human Rights and The Employment Relations (Hart Publishing), pp.190, 2013.

[24] Mantouvalou. V, Are Labour Rights Human Rights?, (European Labour Law Journal), pp.158, 2012.

[25] See: „Sidabras and Dziautas v. Lithuania" (Applications nos. 55480/00 and 59330/00)

III. THE SCOPE OF PROTECTION OF THE RIGHT TO PRIVACY IN THE CONTEXT OF EMPLOYMENT AND THE (IN) ADMISSIBLE INTERFERENCE WITH THE RIGHT TO PRIVACY BY EMPLOYERS

The protection of the right to privacy in general, and in the context of employment in particular, does not depend solely on the fact whether in a certain case, practice or measure which encroaches the private sphere of a person will be detected, but also whether such encroachment will be assessed as inadmissible, i.e. unjustified. The determination of the scope of application of the right to privacy (Article 8, paragraph 1 of the ECHR) is only the first stage in the overall protection of the right to privacy, while the establishment of the boundaries of inadmissible interference with the employee's privacy (Article 8, paragraph 2 of ECHR) is the second and perhaps most crucial stage in the operationalization and realization of the protection of the right to privacy in employment. Hence, in practice, the following dilemmas arise: "*Will any interference and intrusion into the employee's privacy be considered inadmissible, unjustified and unfounded*"?; "*How to determine when and in what cases the interference and intrusion into the employee's privacy by the employer will be considered admissible, justified, and founded*"? and finally, "*How to achieve and strike a balance between the legitimate rights and interests of the employee and those of the employer in relation to the operationalization of practices and measures that qualify or could qualify as interference with the employee's privacy in the context of employment*"? In principle, the answers to the previous dilemmas should be sought in Article 8, paragraph 2 of the European Convention on Human Rights, which outlines the contours of the "exemptions" from the absolute protection of the right to privacy, in cases *in accordance with the law and if it is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.* With this, it becomes evident that the right to privacy does not have the status of an absolute, but a qualified right, the protection of which depends on the interpretation of the restrictions, ie the abrogations provided for in paragraph 2 of Article 8 of the ECHR.[26] The protection of the right to privacy in the context of employment, inter alia, also depends on the dominant approach taken by national courts, because it's not the same if the applicants in their complaints, directly invoke Article 8 of the ECHR or its counterpart in the national Constitution of a country bounded by the application of the ECHR, or they refer to the general contract law rules and principles (e.g, the principles of "good faith" or "reasonableness")[27]. In any case, it is undisputed that in the proceedings before the ECtHR, the Strasbourg Court applies the approach arising from the mechanism of protection of human rights, but placed in the employment relationship context and adapted to the need to strike a fair balance between the rights and interests of employees on the one hand and employers on the other. In that regard, in each case brought before the Court, the Court assesses whether and to what

[26] Otto.M, op.cit, pp.79.

[27] Both mechanisms for the protection of fundamental human rights (including the right to privacy) are, in principle, an integral part of the concept of the so-called *horizontal application of fundamental human rights* in the national legal order. Horizontal application of fundamental human rights enables the protection of the rights of individuals versus other individuals or private parties. The difference between the envisaged protection mechanisms is that, while, the former refers to the ability to directly rely on the ECHR provisions guaranteeing certain fundamental rights (such as Art.8) or on their counterparts in the Constitutions of the countries bounded by the ECHR (so-called direct horizontal application), the latter, refers to the respect of fundamental rights through the interpretation of general clauses or terms in general contract law (so-called indirect horizontal application). See: Hendrickx.F and Van Bever.A, op.cit, pp.200.

extent the practice established as interference with the employee's privacy is subject to the restrictions laid down in Article 8, para 2 of the ECHR.
The restrictions (abrogations) provided in Article 8, paragraph 2 of the ECHR, result from the application of three principles, such are: 1. *legality*; 2. *legitimacy* and 3. *proportionality*. Taking into consideration the legal, social and moral value of the right to privacy, as well as the essential need to protect this fundamental right, the principles of legality, legitimacy and proportionality can fulfil their purpose as components of a "counterweight" in assessing the equitable balance between the rights and interests of stakeholders, only if applied cumulatively. In other words, dissenting and independent existence of any of these principles can lead to restriction of the inalienable right to privacy.

i. The principle of legality as a criterion for assessment of the limitation of the right to privacy

The principle of legality derives from the first part of Article 8, paragraph 2 of the ECHR, which implies that interference with the right to privacy will be allowed if it is "*in accordance with the law*". This means that the first aspect that should be taken into account when assessing the admissibility or inadmissibility of interference with the right to privacy of the individual, ie the employee, is whether such interference is provided for in the national legal order, ie the domestic law of the country subsumed under the scope of application of the ECtHR. The range of national legal sources governing potentially admissible cases of interference with the right to privacy is usually set extensively in order to cover all relevant legal sources that may regulate this issue (constitutional provisions, legislation, bylaws, collective agreements, employment contracts, general acts of the employer, etc.), but also the case law, as well as the established tradition and customs.[28] A general rule is that in cases of limitation of the right to privacy (in the context of employment), the employee should be clearly and unequivocally acquainted with the possibility of such a limitation (interference) knowing the legal source with which it is regulated[29], as well as to freely and without any defect in the declaration of the will (coercion, threat, fraud) agree to be subjected to such a limitation to his right to privacy. This principle, in theory, is also called the principle of *transparency*.[30] However, given the factual division of power between the employee and the employer within the employment relationship, it is questionable whether and to what extent an employee's free will to accept a limitation of his reasonable privacy expectation genuinely exists and as a consequence of that, the employee genuinely waives his right to privacy in the workplace. Hence, in the interpretation of the right to privacy and in the attempts to strike a fair balance between the rights and interests of employees on the one hand and employers on the other, the European Court of Human Rights, in assessing whether the interference with the employee's right to privacy is justified or unjustified, is not tied exclusively to the "voluntary" consent of the employee. On the contrary, according to the Strasbourg Court reasoning, even the determination that the employee "voluntarily" waived his privacy right, should not prevent the Court from assessing the proportionality of the privacy-invasive measures taken by the employer to limit

[28] See: case of „Wretlung v. Sweden" (Application no. 46210/99).
[29] A confirmation of this direction of interpretation is the reasoning of the ECtHR in the said cases of "*Halford v. UK* and "*Copland v. UK* ", in which, one of the main reasons why the Court found inadmissible interference with the privacy of the employees concerned was the absence of any internal act by their employers intended to regulate the scope of electronic surveillance and monitoring in the workplace, and thus on the contours of employees' reasonable privacy expectation.
[30] Wallach.S, The Medusa Stare: Surveillance and Monitoring of Employees and the Right to Privacy, (The International Journal of Comparative Labour Law and Industrial Relations). pp.207, 2011.

employee's privacy.[31] This understanding significantly contributes to the better and more appropriate protection of the objectively weaker side in the employment relationship, which is the employee.

ii. The principle of legitimacy as a criterion for limitation of the right to privacy

Like the principle of legality, the principle of legitimacy, as a criterion for limitation of the protection of the right to privacy, derives from Article 8, paragraph 2 of the European Convention on Human Rights. The principle of legitimacy is reflected in the relatively broad list of "legitimate aims" set out in the Convention, through which a limitation on the right to privacy could be justified. As "legitimate aims" for this purpose, Article 8, paragraph 2 of the ECHR envisages: *national security*, *public safety or the economic well-being of the country*, *prevention of disorder or crime*, *protection of health or morals* and *protection of the rights and freedoms of others*. The analysis of the "aims" for which limitations on the exercise of the fundamental right to privacy can be justified, leads to two important findings. First, according to Article 8, paragraph 2, the legitimate aims that justify interference with the right to privacy related to "public authority". This is somewhat understandable because the legal status of the right to privacy as a civil (human) right and the legal construction of the European Convention on Human Rights itself as a human rights instrument are primarily intended to protect human rights from violations caused by public authorities. However, given the progression in the European Court of Human Rights' jurisprudence and the adaptation of Article 8 in the context of employment, it is indisputable that the list of legitimate aims can also serve to balance the interests of the employee and the employer and the justification of the interference with the employee's privacy by the employer (although the employer does not have to have public authority status). This opinion is practically supported by several cases brought before the ECtHR, such as: "*Madsen v. Denmark*" (where the ECtHR assessed that the interference with the privacy of employees by the employer by subjecting them to mandatory alcohol and drug tests could be justified for the protection of *public safety*, having regard to the fact that the employees were members of the maritime safety crew and as a consequence, were expected to be at all times able to perform their functions in a fully adequate way), „*Pay v. UK*"[32] (where the ECtHR found that in the event of dismissal due to certain sexual activities committed within the employee's free time, the employee's right to privacy was affected, but the interference with the right to privacy was admissible due to the protection of the employer's reputation, i.e, due to the legitimacy of the aim for protection of *public morals*), etc. The previous cases refer to the matter of balancing the fundamental right of employees to privacy and the interests of employers based on the legitimate reasons set out in Article 8, paragraph 2 of the ECHR, which can in principle be referred to as reasons of public interest. The second finding, which stems from the interpretation of the exceptions to the protection of the right to privacy

[31] Otto.M, op.cit, pp.86.

[32] The case of "*Mr. Pay v. UK*" (Application no.32792/05)" concerns a probation officer specialized in the treatment of sex offenders and their victims, for whom the service in which he was employed (his employer) discovered that a private company of which the employee was a director was involved in the promotion of products connected with bondage and sado-masochism. On investigation, it also discovered that the employee took part in performances in hedonist and fetish clubs and that his company's website contained links to other websites containing photographs of him in various poses that indicated involvement in sadomasochistic activities. Although Mr. Pay enjoyed respect in the performance of his employment duties, his employer considered that Mr. Pay's conduct and activities in his spare time were incompatible with his professional duties, especially since he had worked with perpetrators of sexual offences.

governed by Article 8, paragraph 2 of the Convention, is that, in addition to the specific legitimate aims envisaged, the Convention also provides for the aim of "*protection of the rights and freedoms of others*". This legitimate aim finds an extremely large and decisive application in litigation over the protection of the right to privacy before the European Court of Human Rights. In this context, it is worth noting that the legitimate aim, as prescribed, seems too general in terms of privacy protection in the context of employment, and even, in some ways, jeopardizes the effective protection of the right to privacy, as it seems to offer employers unlimited space to justify most of the practices and measures that endanger employees' privacy. Employers may indeed have a number of legitimate reasons for taking action that could be described as intrusive to the privacy of employees (for example, an employer concerned about employees' health and safety may insist on alcohol and drugs tests, or in order to prevent theft and embezzlement, to use covert video surveillance to find the culprit, etc.), however, the most serious challenge is to resolve the dilemma of how to determine the boundaries of such legitimate reasons that can be brought under the legitimate aim of "protecting the rights and freedoms of others". Hence, the principle position that prevails in the ECtHR approach is that the accentuation of the "pure" economic or commercial interest of employers to justify their interference with the privacy of employees under the guise of the legitimate aim of "protection of the rights and freedoms of others", is insufficient to justify the practices and measures that invade the privacy of employees. In any case, the key criterion for testing the balance between the rights and interests of employees and employers, and in that regard the protection of employees' right to privacy in employment, arises from the principle of proportionality - subject to elaboration in the next section.

iii. The principle of proportionality as a criterion for assessment of the limitation of the right to privacy

The principle of proportionality is the third, but not the least important criterion for assessing the limitation of the right to privacy. The significance of this principle is reflected in the fact that it usually serves as the "last filter" of the assessment of legitimacy (existence of a legitimate aim) in the interference with the right to privacy, and therefore as "a buffer" in the protection of employees' privacy in the employment relationship. Like all previous principles, the principle of proportionality emanates from Article 8, paragraph 2 of the ECHR, ie the part of the provision which refers to the possibility of exemption from the limitation of the public authority not to interfere in the exercise of the right to privacy "*unless it is necessary in a democratic society*". In fact, the principle of proportionality derives from the notion of "necessity" which presupposes that the interference with the (employee's) right to privacy must be necessary for the public authority (ie the employer) to achieve the legitimate aim, without such interference being considered a violation of the right to privacy. However, having in mind the stretching nature of the attribute "necessity", the dilemma concerning the contours and boundaries of this notion is rightly posed. The first "legal forum" before which the scope of the principle of proportionality (ie necessity) is examined is the national legislation or jurisprudence. Here, comes to the fore the application of the so-called doctrine of "margin of appreciation", according to which the countries bound by the ECHR, can independently decide for themselves whether their actions adhere to the conditions of legality, finality and proportionality in case they would interfere with the ECHR.[33] This doctrine is rooted in several cases of the European Court of Human Rights, among which, of particular

[33] Hendrickx.F and Van Bever.A, op.cit, pp.202.

importance is the case of "Handyside v UK"[34]. Although the case of "Handyside v. UK" does not concern the right to privacy (Article 8 of the ECHR), but primarily the right to freedom of expression (Article 10 of the ECHR), it has seminal importance in qualifying the "margin of appreciation" of national legal orders, in the process of balancing the potential threat to individual fundamental human rights versus national interests (in this case, public moral), from which significant parallels are further drawn in disputes concerning the protection of other human rights guaranteed by the Convention, including the right to privacy and its implications for employment. In its judgment in the aforementioned case, the ECHR stated that… *it is not possible to find a uniform European conception of morals…* consequently… *state authorities are in principle in a better position than the international judge to give an opinion on the "necessity" of a "restriction" or "penalty" intended to meet them,* ie on the occurrence of a "*pressing social need"* that will justify the "necessity" of a restriction in the use and application of a particular fundamental human right. However, the margin of appreciation enjoyed by national authorities (legislature and competent courts) is not unlimited. The final assessment of the domestic margin of appreciation is subject to judicial review by the Strasbourg Court which can address both the "legitimate aim" and the "necessity" of a measure endangering guaranteed human rights.

The principle of proportionality is extremely important in cases where the "necessity" of intervening in the privacy of employees in the employment relationship is assessed. In principle, the interference with workers' right to privacy is considered justified if it is established that there is a reasonable link between the measures infringing this right and the nature of the employment, ie the significance that such an infringement has for the employer or if a reasonable link between the goal to be achieved (for example, the proper functioning of the employer, the prevention of illegal acts committed by employees that would be immoral or would violate the dignity of others) and the measure to be taken for achieving such a goal (for example, electronic surveillance or other form of interference with the privacy of employees that may lead to a dismissal, etc.)" is established. In a number of cases, the European Court of Human Rights has had the opportunity to illustrate its own understanding and interpretation of the principle of proportionality. The outcomes of such cases are different, sometimes in favour of workers and sometimes of employers. For example, in the said cases of "Lustig-Praen and Beckett v UK" and "Smith Grady v UK" concerning the interviewing and subsequent dismissal of the applicants (employees in the UK armed forces) only because of their homosexual orientation, the ECtHR determined that there was inadmissible (unjustified) interference with the applicants' right to privacy. Although the United Kingdom in its defence stated that there was a legitimate aim in this case (and that the discharge was in line with the Ministry of Defense policy, which excluded homosexuals from service in the armed forces, because of the close physical conditions in which personnel often have to live and work that may disrupt discipline and morale among members of the army), the ECtHR, taking into account the measures faced by the applicants (investigations of their sexual orientation, followed by detailed interviews and a report on their homosexuality) assessed that such measures were an exceptional intrusion into the applicants' private life and could not be deemed to be "*necessary in a democratic society*." Quite the reverse from this case, in the said case of „*Köpke v Germany*", the ECtHR found that the application of Ms. Köpke (cashier and shop assistant at a store) before

[34] The case „Handyside v. UK" (Application no. 5493/72) concerns a book publisher, who published a book called "The Little Red Schoolbook" intended for children ages 12 and above. The book contained information about sexual subjects, such as pornography, abortion and masturbation, and about illegal drug use. Copies of The Little Red Schoolbook in the possession of the applicant were seized and ultimately destroyed by the British authorities pursuant to the national law.

the Court to protect her right to privacy is inadmissible. In this case, the European Court of Human Rights found that national courts in Germany had struck a fair balance between the different rights and interests of the parties concerned (the employee's right to privacy versus the employer's right to property and the general public interest). Namely, despite the fact that the ECtHR considered the "covert video surveillance" and the recording and processing of personal data as a consequence of such video surveillance, as an interference with the employee's right to privacy, still, given that such video surveillance had only been carried out after losses had been detected during stocktaking and irregularities had been discovered in the accounts of the department where the applicant worked, raising and arguable suspicion of theft committed by the applicant, as well as, that the surveillance measure had been limited in time (two weeks) and space (covering the area surrounding the cash desk), and the visual data obtained had been processed by a limited number of persons authorized to detect the theft, the Court stated that the termination of the employment contract of Ms. Köpke without a period of notice was proportionate to the fulfilment of the legitimate aim of the employer (the protection of its property). Sometimes the outcome of ECtHR judgments relating to the protection of the right to privacy is different, in terms of whether it is in the interest of the employee or employer concerned, even though the subject matter of the dispute is almost identical. For example, while in the said case of "Obst v. Germany" (which concerns a dismissal of a member of the Mormon Church in Germany employed as a European public relations officer, for having an extramarital relationship) the ECtHR found that by giving the notice of dismissal, the employer (the Mormon Church) *had not violated the employee's right to privacy* guaranteed by Article 8 of the ECHR, in the other said case with similar content, "Schuth v. Germany" (which concerns the dismissal of an organist and choirmaster employed in a Catholic parish, for entering into an extramarital affair and expecting a child with another woman) the ECtHR found that by giving the notice of dismissal, the employer (the Catholic parish) *had violated the employee's right to privacy* guaranteed by Article 8 of the ECHR. In the first case, the ECtHR approved the test of balance of interests between the two parties to the dispute conducted by the German courts and reaffirmed the finding that the interference with the employee's right to privacy was admissible, having regard to the fact that the employee voluntarily confessed his adultery (and thus the violation of the principles of the Mormon Church), the visibility and significance of the position in which he was employed in the Church were incompatible with his conduct and finally, given his young age and his profession, he was expected to find another position quickly. In the latter case, the ECtHR differently assessed the interests between the parties to the dispute apropos the justification for interfering with the right to privacy and the "necessity" of the dismissal by the employer (the Catholic parish), taking into account the fact that the employee concerned, had always kept his extramarital affair quiet and had never criticized the Catholic Church's rules. However, the main argument in the "Schuth v. Germany" case, in which the ECtHR found a violation and inadmissible interference with the right to privacy, was that, as an organist and choirmaster, Mr. Schuth had only very few other job opportunities and prospects for other appropriate employment. Hence, contrary to the "Obst v. Germany case", in "Schuth v. Germany", the ECtHR found that the damage caused by Mr. Schuth's dismissal without a notice period was not with proportion to the legitimacy of the aim of protecting the reputation of the Church.

IV. CONCLUSION

The protection of the right to privacy, as a fundamental human right, is becoming an increasingly relevant topic, above all, given the increasing influence of digital technologies in the daily lives of people. The protection of employees' privacy, ie the protection of the right to privacy in the context of employment, is not subject to special regulation of the European Convention on Human Rights. However, given the field of employment relations, as a social field in which there are numerous cases of intrusions in the private sphere of employees caused by the exercise of managerial and supervisory power by employers, the right to privacy regulated in the ECHR gains extended scope of application and encompasses the cases of interference in the privacy of employees in their employment relationships. The adaptation of the right to privacy to the field of employment relationships is primarily a result of the interpretive role of the European Court of Human Rights. Despite the ECtHR's extensive approach to interpreting employees' "reasonable privacy expectations", in order to provide a broad platform for practices that would qualify as interference with employees' privacy, the Court has not yet established sufficiently clear and consistent rules for balancing the interests of employees (to protect their privacy) and employers (to protect their property, economic and other commercial interests). Hence, in many cases, notwithstanding the fact that the ECtHR found interference with the employee's right to privacy, in the end, it considered that such interference was legitimate and proportionate to the attainment of the legitimate aim for which it was committed.

The ample case law of the ECtHR in relation to cases affecting Article 8 of the ECHR (protection of privacy) offers a useful opportunity for national legal orders and judicial authorities to better understand the position of the Strasbourg Court in interpreting the right to privacy in the context of the employment relationship. Although, this paper does not concern the analysis of the right to privacy in employment in Macedonian labour law, given the fact that the issue of protection of privacy of employees under Macedonian legislation is an issue that is in its initial phase, we believe that the paper will be useful for actualization and proper understanding and interpretation of the right to privacy in the context of employment.