

FREEDOM OF EXPRESSION VS. RIGHT TO PRIVACY: THE ROLE OF ECHR IN MODELLING CIVIL LIABILITY FOR DAMAGE

Abstract.....	1	III. <i>Is the protection of the rights balanced in the law of the Republic of North Macedonia?...</i>	9
I. <i>Introduction</i>	1		
II. <i>The right to privacy and the freedom of expression in the ECHR</i>	2		

Chaque parole a des retentissements. Chaque silence aussi.
Jean-Paul Sartre

Abstract

The European Convention on Human Rights in Article 8 provides that everyone has the right to respect for their private and family life. This is generally known as the right to privacy, in which the public authority may not interfere but also should create mechanisms for its protection. Article 10 of the ECHR provides that everyone has the right to freedom of expression. The exercise of the freedom, since it carries with duties and responsibilities, may be subject to restrictions, necessary in a democratic society, in the interest of intel alia protection of the rights of others including their privacy.

How these two rights interrelate and what is to be done in case of ‘conflict’ are one of the key questions when it comes to liability for damage that arises from the breach of the right to privacy. This is of particular interest when it comes to the work of the media when providing insight into the private life of persons. The key question is when such exposure is to be considered relevant for the public interest.

On a national level, the right to privacy is guaranteed by the Constitution. So is the freedom of expression. The breach of the right to privacy may lead to liability for damage if all conditions for the arise of such obligation are met. The paper examines and discusses when the breach of the privacy will (not) give rise to a right to claim damages for the breach of the right of privacy having in mind the need to balance this right and the freedom of expression.

Key words: privacy, reputation, freedom of expression, ECHR, liability, damage

I. INTRODUCTION

The European Convention on Human Rights in Article 8 provides that everyone has the right to respect for their private and family life. This is generally known as the right to privacy, in which, as per Article 8(2), a public authority may not interfere. The concept of the right to privacy is quite broad and includes different aspects of a person’s identity and integrity including in relations with others. Thus, the right to privacy includes the right to protection of one’s reputation. Article 10 of the ECHR provides that everyone has the right to freedom of expression. The exercise of this freedom is necessary to initiate and support the democratic process in a country. However, it also carries duties and responsibilities, so it may be subject to restrictions, but only those that are necessary in a democratic society. One of the restrictions of the freedom of expression is the protection of the rights of others including the right to

* Neda Zdraveva, PhD., Associate Professor, Ss. Cyril and Methodius University in Skopje, Iustinianus Primus Law Faculty, e-mail: n.zdraveva@pf.ukim.edu.mk

privacy. This in the broad sense would mean protection of one's reputation. The European Court of Human Rights in its jurisprudence established that Article 10 and Article 8 deserve "equal respect", thus ECtHR may be required to verify whether the domestic authorities struck a "fair balance" when these two values come into conflict. Where the right to freedom of expression is being balanced against the right to respect for private life, the Court has established several criteria aimed to achieve protection of both rights.

The law of the Republic of North Macedonia provides different mechanisms and instruments for protection both of the right to privacy but also for protection of the freedom of expression. The protection of the right to privacy on a national level means providing both criminal and civil liability for interference with one's private sphere. The protection of the freedom of expression provides for exceptions that exclude the civil liability for breach of privacy and in particular the right to reputation when the public interest is in the reason for interference with one's privacy. In this paper, we will examine if the positions of the national legislation correspond to the practice of the ECtHR and what could and should be expected in the future.

II. THE RIGHT TO PRIVACY AND THE FREEDOM OF EXPRESSION IN THE ECHR

1. The Right to Privacy

The right to private life is a fundamental one, recognized as a substantive legal value.¹ The ECHR does not define the meaning of the term 'privacy'. Article 8 provides for the right to respect of one's private and family life against arbitrary interferences. The primary purpose of this article of ECHR is to provide protection against interference of the public authorities in with private and family life, but also as set by the European Court of Human Rights practice with home and correspondence. This kind of protection, as a negative obligation of the States, is seen as the essential object of Article 8 (*Kroon and Others v. the Netherlands*, para. 31). The Court, however, finds that the states also have positive obligations to ensure that Article 8 rights are respected even as between private parties (*Bărbulescu v. Romania* [GC], para. 108-111) i.e., that the states adopt measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (*Evans v. the United Kingdom* [GC], para. 75; *Odièvre v. France* [GC], para. 40).

Private life is a broad concept. The ECtHR does not consider it possible or necessary to attempt an exhaustive definition of the notion of "private life" (*Niemietz v. Germany*, para. 29). It covers the integrity of a person, both physical and psychological (*X and Y v. the Netherlands*, para. 22) and aspects of an individual's social identity (*Mikulić v. Croatia*, para. 53). Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8 (*B. v. France*, para. 63; *Burghartz v. Switzerland*, para. 24; *Dudgeon v. the United Kingdom*, para. 41; *Laskey, Jaggard and Brown v. the United Kingdom*, para. 36). Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world (*Burghartz v. Switzerland*, para. 47; *Friedl v. Austria*, para. 45). When it comes to the relations with others, the Court finds that limiting the notion 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, is too restrictive. 'Respect for private life must also

¹ For example, American jurisprudence places great importance on the notion of privacy as control over personal information and the autonomy to decide with whom to share it. See further Levin Avner, Patricia Sanchez Abril; "Two Notions of Privacy Online," *Vanderbilt Journal of Entertainment and Technology Law* 11, no. 4 (Summer 2009), p. 1008

comprise to a certain degree the right to establish and develop relationships with other human beings' (*Niemietz v. Germany*, para. 29).

ECtHR also establishes that the notion of "private life" does not to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world (*Niemietz v. Germany*, para. 29).

As seen, the concept of private life extends to different aspects related to personal identity - name, photo, or physical and moral integrity. "The guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings."² Thus, the concept of 'privacy' as per the case-law of the Court, covers personal information which individuals can legitimately expect should not be published without their consent (*Axel Springer AG v. Germany* [GC], para. 83). The protection is afforded to everyone, including people known to the public, as they have a legitimate expectation that his or her private life will be protected (*Von Hannover v. Germany (no. 2)* [GC], para. para. 50-53 and 95-99; *Sciacca v. Italy*, para. 29; *Reklos and Davourlis v. Greece*, para. 40). Such position of the courts makes it understandable why protection is extended to the right to reputation, understood as part of the right to respect for private life protected under Article 8 (*Axel Springer AG v. Germany* [GC], para. 83; *Chauvy and Others v. France*, para. 70; *Pfeifer v. Austria*, para. 35; *Petrina v. Romania*, para. 28; *Polanco Torres and Movilla Polanco v. Spain*, para. 40). However, the protection of the reputation under Article 8 to be evoked certain conditions should be met, as set by the case law of the Court. Thus, the attack on a person's reputation must attain a certain level of seriousness and be made in a manner causing prejudice to personal enjoyment of the right to respect for private life (*Axel Springer AG v. Germany* [GC], para. 83; *Bédat v. Switzerland* [GC], para. 72; *Denisov v. Ukraine* [GC], para. 112; *Balaskas v. Greece*, para. 40; *Vučina v. Croatia (dec.)*, para. 31; *Miljević v. Croatia*, para. 61-62). Meeting this condition is related both to the social and professional reputation (*Denisov v. Ukraine* [GC], para. 112). There must also be a sufficient link between the applicant and the alleged attack on his or her reputation (*Putistin v. Ukraine*, para. 40). When assessing the breach of the right, the Court is of a position that it should be taken into account how well-known the person is at the time of the alleged defamatory statements, the extent of acceptable criticism in respect of a public figure being wider than in respect of ordinary citizens, and the subject-matter of the statements (*Jishkariani v. Georgia*, para. 40; *Fürst-Pfeifer v. Austria*, para. 46).

In addition, it should be noted that in assessing the breach a person's reasonable expectations as to privacy may be a significant, though not necessarily conclusive, factor (*Magyar Helsinki Bizottság v. Hungary* [GC], para. 57). Whether or not there has been a 'reasonable expectation' to privacy would require determining whether the person in concern had an expectation of privacy and if that expectation was reasonable.³ This, however, may prove more controversial as the exitance of the expectation is a subjective matter while the reasonableness is an objective check on whether the claimant's subjective wishes or desires are to be satisfied.

In addition, as per the Court's finding although the rights covered under Article 8 are non-transferable, as the reputation of a deceased member of a person's family may, in certain circumstances, affect that person's private life and identity, the ECtHR finds that it comes within the scope of Article 8 (*Jakovljević v. Serbia (dec.)*, para. 30-31).

² Guide on Article 8 of the European Convention on Human Rights - Right to respect for private and family life, home and correspondence; Council of Europe/European Court of Human Rights, 2021

³ On the implications of the application of such test and the potential risk pertinent to its application see further Eric Barendt, 'A reasonable expectation of privacy: a coherent or redundant concept?' in: Andrew T. Kenyon (ed.), *Comparative Defamation and Privacy Law*, Cambridge University Press, 2016, p. 96-114

2. The Freedom of Expression

The European Convention is based on the Universal Declaration of Human Rights, where Article 12 provides protection of against arbitrary interference with privacy, family, home or correspondence, and attacks upon honour and reputation. The protection of the of honour and reputation was heavily discussed in the preparation of the Universal Declaration as it is principally concerned with horizontal relationships and attacks by or through the media. “Although it was finally accepted under the UDHR, the authors of the ECHR, only focusing on vertical relationships (between state and citizen) did not include the protection of a person’s reputation as a subjective right under the right to privacy, but transferred it to paragraph 2 of Article 10 ECHR, containing the right to freedom of expression.”⁴

Article 10(1) of the European Convention guarantees the right to freedom of expression so as to include “the freedom to hold opinions and to receive and impart information and ideas without interference by a public authority and regardless of frontiers.” Thus, the freedom of expression includes the right to communicate and to express oneself in any form (through words, pictures, images and actions such as public protest and demonstrations) and through any medium. The expression in terms of the content conveyed could be political, artistic and even commercial when related to issues of public interest.⁵

The position of the European Court of Human Rights when it comes to the protection of the freedom of expression is clear. The freedom of expression, as provided by the Court, constitutes one of the essential foundations of a [democratic] society, one of the basic conditions for its progress and for each individual’s self-fulfilment (*Handyside v. the United Kingdom*, para. 49; *Lingens v. Austria*, para. 41). Thus, the states are expected to create a favourable environment for participation in public debate, enabling, in particular the media, to provide a forum for expressing opinions and ideas without fear, even if they are contrary to the positions of the public authorities or the general public including if they are irritating or shocking to the public (*Dink v. Turkey*, para. 137; *Khadija Ismayilova v. Azerbaijan*, para. 158).

Freedom of expression is subject to exceptions. Those exceptions, as per the Court, must be construed strictly and the need for any restrictions must be established convincingly (*Stoll v. Switzerland* [GC], para. 101, *Morice v. France* [GC], para. 124; *Pentikäinen v. Finland* [GC], para. 87). As per Article 10(2) of the Convention, the exercise of the freedom of expression may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests for the protection of the reputation or rights of others. Thus, protection against defamation is one of the limits of the freedom of expression. ECHR does not provide a definition of defamation.⁶ In establishing the constituent elements of defamation, the Court requires that there be an objective link between the impugned statement and the person suing in defamation. Thus, mere personal conjecture or subjective perception of a publication as defamatory does not Suffice to establish that the person was directly affected by the publication (*Reznik v. Russia*, para. 45.) The Court observes that, while paragraph 2 of Article 10 of the Convention recognises that freedom of speech may be restricted in order to protect the reputation of others, defamation laws or proceedings cannot be justified if their purpose or effect is to prevent legitimate criticism of public officials or the

⁴ Bart van der Sloot, “Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of 'Big Data'”, *Utrecht Journal of International and European Law*, Vol. 31, No. 80, pp.25-50

⁵ Elvin Abbasli, "The Protection of the Freedom of Expression in Europe: Analysis of Article 10 of the ECHR," *Baku State University Law Review* 2, no. 1 (December 2015): p. 18-23

⁶ Guide on Article 10 of the European Convention on Human Rights - Freedom of expression; Council of Europe/European Court of Human Rights, 2021, p. 36

exposure of official wrongdoing or corruption (*Cihan Öztürk v. Turkey*, 2009, para. 32). The essential function of the press is always taken into account when an assessment is made whether in the given situation a restriction of the freedom of expression is permissible or not.⁷ Further, the Court requires the level of seriousness of the attack on reputation to be such so as to cause prejudice to personal enjoyment of the right to respect for private life (*Bédard v. Switzerland* [GC], para. 72; *Axel Springer AG v. Germany* [GC], para. 83; *A. v. Norway*, para. 64). Having in mind that the protection of the reputation could be a limitation to the freedom of expression, the benchmark in analysing the proportionality of such interference is determining the extent to which the statements that are considered defamatory may contribute to a debate of public interest. In this regard, the ECtHR consistently holds a position that the scope of Article 10(2) does not cover restrictions on political speech or on debate of questions of public interest (*Stoll v. Switzerland* [GC], para. 106; *Castells v. Spain*, para. 43; *Wingrove v. the United Kingdom*, para. 58).

3. Balancing the rights

The right to privacy and the freedom of expression, as we have seen, could be in conflict. In such cases, the national courts have to decide how the conflict is to be resolved. Giving supremacy of one right to the other is not the preferred option. Rather, the court should uphold both human rights to the extent possible. As this is not always possible, the court would have to determine which right deserves preference over the other. There are different (academic) approaches as to the method that may be applied by the court.⁸

The European Court of Human Rights applies two methods in assessing if the interference with the right to privacy, including the reputation, is justified. First, the Court uses the “classical” method of analysing proportionality so as to establish if in the specific case before it Article 8 would apply. The second method, to be further analysed and discussed here is the method of balancing the rights.

Privacy rights under Article 8 provide for wide-range protection of one’s personality. When balancing those rights with other Convention rights, the Court has found that the State is called upon to guarantee both rights and if the protection of one leads to an interference with the other, to choose adequate means to make this interference proportionate to the aim pursued (*Fernández Martínez v. Spain* [GC], para. 123). When balancing freedom of expression protected by Article 10 and the right to respect for private life protected by Article 8, the Court has developed a methodology and the general principles of this methodology have been summarised in various judgments, particularly those of the Grand Chamber (*Perinçek v. Switzerland* [GC], para. 198; *Axel Springer AG v. Germany* [GC], para. 83-84; *Von Hannover v. Germany (no. 2)* [GC], para. 104-107). The Court has established criteria so as to how to assess if the protection under Article 10 would be afforded even when there are privacy breaches. They include the following: 1. contribution to a debate of general interest; 2. how well known is the person concerned and what is the subject of the report; 3. his or her prior conduct; 4. the method of obtaining the information and its veracity; 5. the content, form and consequences of the publication; and the 6. severity of the sanction imposed (*Axel Springer AG v. Germany* [GC], para. 89-95). These criteria are not exhaustive and should be regarded specifically in the circumstances of each case (*Axel Springer SE and RTL Television GmbH v. Germany*, para. 42; *Jishkariani v. Georgia*, para. 46). Further, we will examine the criteria in more details.

⁷ Pieter van Dijk, Fried van Hoof, Arjen van Rijn, Leo Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights*, 4th edition, Intersentia, Antwerpen-Oxford, 2006, p. 775

⁸ Stijn Smet, "Freedom of Expression and the Right to Reputation: Human Rights in Conflict." *American University International Law Review*, vol. 26, no. 1, 2010, p.183-236. HeinOnline.

a. Contribution to a debate of general interest

The main duty of the press is to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest, which the public has a right to receive, including reporting and commenting on court proceedings (*Axel Springer AG v. Germany* [GC], para. 79). In this regard, the press has an important proactive role - to reveal and bring to the public's attention information capable of eliciting the general interest and of giving rise to a debate within society (*Couderc and Hachette Filipacchi Associés v. France* [GC], para. 114). The definition of what constitutes a subject of general interest will depend on the circumstances of the case, and ECtHR recognizes it not only where the publication concerned political issues or crimes (*White v. Sweden*, para. 29), but also where it concerned sporting issues or performing artists (*Nikowitz and Verlagsgruppe News GmbH v. Austria*, para. 25) However, the press must not overstep the bounds regarding the protection of the right of the others including the protection of the reputation (*Kaboğlu and Oran v. Turkey*, para. 74).

b. How well known is the person concerned and what is the subject of the report?

The role or function of the person concerned and the nature of the activities that are the subject of the media content constitute another important criterion. In this regard, the ECtHR finds that a distinction has to be made between private individuals and persons acting in a public context, as political figures or public figures. Accordingly, the level of protection afforded to a private individual unknown to the public is much higher than the one enjoyed by public figures. (*Minelli v. Switzerland* (dec.), para. 2). As per the Court in balancing the right to privacy and the freedom of expression, a fundamental distinction needs to be made between reporting facts capable of contributing to a debate in a democratic society, relating to politicians in the exercise of their official functions and reporting details of the private life of an individual who does not exercise such functions (*Von Hannover v. Germany*, para. 63; *Standard Verlags GmbH, v. Austria* (no. 2), para. 47). The key in deciding is the aim of the information provided. In certain special circumstances, the public's right to be informed can extend to aspects of the private life of public figures, particularly where politicians are concerned. However, when the publication including details of the person's private life has the sole aim of satisfying the curiosity of a particular readership, the freedom of expression should have a narrow interpretation (*Von Hannover v. Germany*, para. 66; *Hachette Filipacchi Associés (ICI PARIS) v. France*, para. 40; *MGN Limited v. the United Kingdom*, para. 143).

c. Prior conduct of the person concerned

One of the factors to be taken into consideration in balancing the rights is the conduct of the person concerned prior to publication of the report. However, the mere fact of having cooperated with the press on previous occasions cannot serve as an argument for depriving the party concerned of all protection against publication of the report or photo at issue (*Egeland and Hanseid v. Norway*, para. 62).

d. Method of obtaining the information and its veracity

The ECtHR held that the way in which the information was obtained and its veracity are also important factors in establishing whether protection will be provided as per Article 10 of the Convention. The Court is of a position that the journalist would enjoy protection in relation to reporting on issues of general interest under if they act in good faith and on an accurate factual basis, as well as if they provide “reliable and precise” information in accordance with the ethics of journalism (*Fressoz and Roire v. France* [GC], para. 54; *Stoll v. Switzerland* [GC], para. 103).

e. Content, form and consequences of the publication

The way in which the media content is published and the manner in which the person concerned is represented in it should also be taken into consideration (*Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft m.b.H. v. Austria* (no. 3), para. 47; *Reklos and Davourlis v. Greece*, para. 42). This also includes the issue of the consequences of the publication arising from the outreach of the media content – depending on if the media is local or national or has a large or limited circulation. (*Karhuvaara and Iltalehti v. Finland*, para. 47)

f. Severity of the sanction imposed

The nature and severity of the sanctions imposed by the national authorities is a factor to be taken into consideration when assessing if the interference with the exercise of the freedom of expression for the purpose of protection of *inter alia* the right to privacy was proportional (*Pedersen and Baadsgaard v. Denmark* [GC], para. 93; *Jokitaipale and Others v. Finland*, para. 77).

4. Sanctioning the breach of rights

Having in mind the specific goal of this paper we will further examine the principal positions of the ECtHR when it comes to the sanctioning for breach of the rights to privacy with specific attention to the civil and restorative measures and sanctions. The criminal sanctioning of the breach of the right to reputation as immanent to the privacy not only is not relevant for the national jurisprudence (as insult and defamation have been decriminalized in 2012) but also as in international context is seen as anachronistic and counterproductive⁹

The European Court of Human Rights holds its principal position that excessive sanctions alone, even where there are legitimate, may breach the right to freedom of expression. In part, this is due to the ‘chilling effect’ such sanctions may have ‘on the press in the performance of its task of purveyor of information and public watchdog’ (*Dyuldin and Kislov v. Russia*, para. 43). The sanction should, therefore, be proportional so as not to constitute a with the freedom of expression guaranteed by Article 10. In assessing the proportionality nature and severity of the sanctions are to be taken into account (*Cumpănă and Mazăre v. Romania* [GC], para. 111). The ECtHR accepts that damages may be awarded to the person who has suffered damage due to a breach of their rights covered by the European Convention. In addition, the Court finds that other measures aimed to restore the position of the injured party may be imposed.

a. Damages

The court has not dealt with the issue of the conditions under which, as set by the national law, a damage claim may arise. It focused more on the calculation of the damages providing several guidelines to the national authorities.

The Court accepts that national laws concerning the assessment of the damage and the calculation of the damages have to provide for flexibility so a variety of factual situations are covered and the damages are tailored to the facts of the particular case (*Tolstoy Miloslavsky v. the United Kingdom*, para. 41; *OOO Regnum v. Russia*, para. 78). However, the national law, thus court practice, must have adequate and effective safeguards at the relevant time against disproportionately large awards (*Tolstoy Miloslavsky v. the United Kingdom*, para. 51; *Independent Newspapers (Ireland) Limited v. Ireland*, para. 105). In order to be considered proportional i.e., not to be considered as interference in the freedom of expression, the damages

⁹ Amal Clooney, Philippa Webb, "The Right to Insult in International Law." *Columbia Human Rights Law Review*, vol. 48, no. 2, Spring 2017, p. 1-55. HeinOnline.

should not have harmful effects to the liable party so their economic situation should be taken into account (*Delfi AS v. Estonia* [GC], para. 161; *Kasabova v. Bulgaria*, para. 43; *Tolmachev v. Russia*, para. 53-55). It is considered adequate in the assessment of the proportionality of damages awards if the nature of the other penalties and legal costs imposed on the liable person is taken into account (*Ileana Constantinescu v. Romania*, para. 49). The ratio behind such positions of the Court is in the fact that the damages should not have a “chilling effect”. They should serve the purpose to redress the injured party, however not to silence the press altogether. Thus, the Court seeks to ensure that damages awards against press companies are not so high that they threaten the economic foundations of the media (*Blaja News Sp. z o. o. v. Poland*, para. 71) or to their closure (*Timpul Info-Magazin and Anghel v. Moldova*, para. 39). The sanctioning, even when the damages are in an amount of symbolic compensation should always be of a kind not to have a chilling effect on the right to freedom of expression (*Brasilier v. France*, para. 43; *Paturel v. France*, para. 49; *Desjardin v. France*, para. 51).

b. Non-material means of redress

The Court recognizes the right of reply (response), retraction or rectification, court order to issue and publish an apology as means of redress.

The ECtHR finds that the right to reply is an important element of freedom of expression, flows from the need not only to be able to contest untruthful information but also to ensure a plurality of opinions, especially in matters of general interest such as literary and political debate itself. The Court is of a position that State has a positive obligation to protect it by ensuring that the person concerned has a reasonable opportunity to exercise the right of reply and that in case of denial it can be challenged before the competent domestic authorities (*Melnychuk v. Ukraine* (dec.), para. 2). The requirement to publish a retraction, apology or even a judicial decision in a defamation case is seen as a legitimate exception to the editorial policy (*Eker v. Turkey*, para. 45; *Melnychuk v. Ukraine* (dec.), para. 2). The purpose of the regulations governing the right of reply is to safeguard the interest of the public in receiving information from a variety of sources and thereby to guarantee the fullest possible access to information (*Ediciones Tiempo v. Spain*, para. 2).

When it comes to the retraction and apology, the Court holds different opinions. On the one hand side, the Court finds that to make someone retract his or her own opinion by acknowledging his or her own wrongness is a doubtful form of redress and does not appear to be “necessary” (*Kazakov v. Russia*, para. 30) as well as that this measure is capable of producing a chilling effect (*Karsai v. Hungary*, para. 36). In other cases, however, the Court finds that the issuance of an apology or publication of a court’s judgment finding the statements to be defamatory is a sufficient remedy when the other sanctions could deter others from criticising public officials and limit the free flow of information and idea (*Cihan Öztürk v. Turkey*, para. 33). The different positions of the Court stream from the different circumstances of the cases. The underlining notion is that the sanction imposed is to be proportionate so as not to have negative effects on the exercise of the freedom of expression. The same could be seen when the Court considers the orders for publication of the court decision as a means for redress. Thus, depending on the circumstances, a court decision ordering the applicant to publish a notice of a ruling in a national newspaper at his own expense could have a deterrent effect of the sanction, in view of the importance of the debate in which the applicant had legitimately sought to take part (*Giniewski v. France*, para. 55). In other circumstances, this is seen as a rather symbolic remedy that cannot be considered excessive or disproportionate (*Chauvy and Others v. France*, para. 78, *Cicad v. Switzerland*, para. 62)

III. IS THE PROTECTION OF THE RIGHTS BALANCED IN THE LAW OF THE REPUBLIC OF NORTH MACEDONIA?

The protection of the privacy in Macedonian law is provided first of all by the Constitution¹⁰ where Article 25 guarantees to every citizen "respect and protection of the privacy of his personal and family life, dignity and reputation." At the same time the Constitution, in Article 16, establishes that the freedom of speech, public address, public information and the establishment of institutions for public information, including free access to information and the freedom of reception and transmission of information, are guaranteed. This also includes the guarantee of the right of reply and the right to a correction in the mass media is guaranteed. As expressly provided by the Constitution, censorship is prohibited.

The Law on Obligations¹¹ sets the protection of personal rights as a principle (Article 9-a) providing that every natural and legal person, in addition to the protection of property rights, has the right to protection of his personal rights in accordance with the law. Personal rights, in the sense of LOO, mean the rights to life, physical and mental health, honour, reputation, dignity, personal name, the privacy of personal and family life, freedom, intellectual creation and other personal rights. The situations when one wrongful act leads to breach of more than one right are possible and the liability will be established having in mind the circumstances of the case in their entirety¹² The breach of the personal rights constitutes immaterial damage (Article 142) and the injured party has the right to claim: a) the court or any other authorized body to order ceasing of the act that violates the personal right and to order the elimination of the consequences of the act (Article 144) and b) damages (Article 187-a). When it comes specifically to the right to the reputation the special Law on Civil Liability for Insult and Defamation¹³ is applicable.

Insult and defamation as notions are in fact notions of criminal law. The legislator, in 2012, in order to decriminalize insult and defamation, given that journalists and the media were called to the highest level of criminal liability, solved the "problem" by introducing a separate law that operationalizes civil liability issues. It seems that in regulating these issues, the legislator did not sufficiently take into account the existing legal solutions, which provide a broad framework for protection regardless of who commits the violation and to whom the violation was committed. The analysis of the law basically shows that the central issue of interest is the responsibility of the journalistic profession - the media as legal entities and employed journalists, although the scope of the law is, or should be, wider.

The Law on Civil Liability for Insult and Defamation is based on guaranteeing freedom of expression and information "as one of the essential foundations of a democratic society" (Article 2 (2)), in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 10) and the case-law of the European Court of Human Rights, aims to define the restrictions on these freedoms by setting "strict conditions for civil liability for insult and defamation" (Article 2 (2)). In doing so, LCLID gives an unequivocal advantage to the European Convention for the Protection of Human Rights and the views of the European Court of Human Rights, in cases where the court by applying its provisions cannot resolve a particular issue related to determining liability for insult or

¹⁰ Constitution of the Republic of North Macedonia ("Official Gazette of the Republic of Macedonia" no. 1/92, 31/98, 91/01, 84/03, 107/05, 3/09, 49/11 and 6/19), translation from https://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia-ns_article-constitution-of-the-republic-of-north-macedonia.nsp

¹¹ Law on Obligations („Official Gazette of the Republic of Macedonia" no. 18/01, 04/02, 05/03, 84/08, 81/09, 161/09 and 123/13; hereinafter: LOO

¹² Гале Галев, Јадранка Дабовиќ - Анастасовска, *Облигационо право*, ЦЕППЕ, Скопје, 2009, стр. 651

¹³ Law on Civil Liability for Insult and Defamation („Official Gazette of the Republic of Macedonia" no. 143/2012); hereinafter: LCLID

defamation or considers that there is a legal gap or conflict of provisions between the law and the ECHR or the practice of the ECtHR (Article 3).

The LCLID defines both insult (Article 6) and defamation (Article 8). In both cases, the liability is grounded on intent to affect the honour and the reputation of the injured party.

The LCLID provides that there are exceptions to the liability. When assessing them against the criteria set by the ECtHR one can identify the general intention for protection of the public interest and upholding the significance of the public debate. Thus, in accordance with Article 7(2) there a person will not be liable for insult if in a scientific, literary or artistic work, in serious criticism, in the performance of official duty, journalistic profession, political or other social activity, in defence of the freedom of public expression of thought or other rights or in the protection of the public interest or other legitimate interests, expresses a humiliating opinion of another, if: 1) from the manner of expression or from his other circumstances it could be established that it has no meaning of insult; 2) did not cause significant damage to the honour and reputation of the person and 3) it is not stated solely in order to humiliate the person of another or to belittle his honour and reputation. Further, a person who expresses a humiliating opinion about a holder of public office in the public interest, will not be held liable if they prove that the statement it is based on true facts, or there was reasonable reason to believe in the truth of such facts, the statement contains justified criticism or incites debate in the public interest or is given in accordance with the professional standards and ethics of the journalistic profession. Similarly, the liability for defamation will be excluded if *inter alia* the media presents facts related to issues of public interest by referring to serious sources of knowledge about their veracity, towards which the defendant acted with due diligence in accordance with the professional standards of the journalistic profession.

The problem arises when it comes to the mechanisms for redress. The LCLID foresees both the material and the immaterial damage that arises to be compensated. Having in mind, as one can guess, the need the sanction not to have a chilling effect for the media in particular it caps the damages that may be awarded (Article 18). Further on, the LCLID provides that in the calculation of the damage all of the circumstances of the case are to be taken into consideration including the economic position of the tortfeasor. This however, without further specification of the meaning and without its direct interrelation with the need the sanction not to have a chilling effect is contrary to the general principles of the Law on Obligations that does not provide for the possibility the economic position of the tortfeasor to be taken into consideration when the damage is caused with intent.

How the provisions of the LCLID as *lex specialis* and the LOO as *lex generalis* will be applied in a particular case by the court will be of utmost importance in defining if there is an adequate balance of the rights.

We find that simple reference to the provisions of the European Convention on Human rights and the case-law of the European Court of Human Rights (and only to Article 10) is not a sufficient mechanism. The national courts should have a full and though understating of the meaning of the protection of both rights and the consequences when there is a disbalance.

Bibliography:

1. Amal Clooney, Philippa Webb, "The Right to Insult in International Law." *Columbia Human Rights Law Review*, vol. 48, no. 2, Spring 2017, p. 1-55. HeinOnline.
2. Bart van der Sloot, "Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of 'Big Data'", *Utrecht Journal of International and European Law*, Vol. 31, No. 80
3. Elvin Abbasli, "The Protection of the Freedom of Expression in Europe: Analysis of Article 10 of the ECHR," *Baku State University Law Review* 2, no. 1 (December 2015)

4. Eric Barendt, '*A reasonable expectation of privacy*': a coherent or redundant concept? in: Andrew T. Kenyon (ed.), *Comparative Defamation and Privacy Law*, Cambridge University Press, 2016
5. Levin Avner, Patricia Sanchez Abril; "Two Notions of Privacy Online," *Vanderbilt Journal of Entertainment and Technology Law* 11, no. 4 (Summer 2009)
6. Pieter van Dijk, Fried van Hoof, Arjen van Rijn, Leo Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights, 4th edition*, Intersentia, Antwerpen-Oxford, 2006
7. Stijn Smet, "Freedom of Expression and the Right to Reputation: Human Rights in Conflict." *American University International Law Review*, vol. 26, no. 1, 2010, p.183-236. HeinOnline.
8. Гале Галев, Јадранка Дабовиќ - Анастасовска, *Облигационо право*, ЦЕППЕ, Скопје, 2009
9. Guide on Article 8 of the European Convention on Human Rights - Right to respect for private and family life, home and correspondence; Council of Europe/European Court of Human Rights, 2021
10. Guide on Article 10 of the European Convention on Human Rights - Freedom of expression; Council of Europe/European Court of Human Rights, 2021
11. Constitution of the Republic of North Macedonia ("Official Gazette of the Republic of Macedonia" no. 1/92, 31/98, 91/01, 84/03, 107/05, 3/09, 49/11 and 6/19), translation from https://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia-ns_article-constitution-of-the-republic-of-north-macedonia.nsp
12. Law on Civil Liability for Insult and Defamation („Official Gazette of the Republic of Macedonia" no. 143/2012)
13. Law on Obligations („Official Gazette of the Republic of Macedonia" no. 18/01, 04/02, 05/03, 84/08, 81/09, 161/09 and 123/13)

Cases

- A. v. Norway, no. 28070/06, 9 April 2009
- Axel Springer AG v. Germany [GC], no. 39954/08, 7 February 2012
- Axel Springer SE and RTL Television GmbH v. Germany, no. 51405/12, 21 September 2017
- Balaskas v. Greece, no. 73087/17, 5 November 2020
- Bărbulescu v. Romania [GC], no. 61496/08, ECHR 2017 (extracts)
- Bédat v. Switzerland [GC], no. 56925/08, 29 March 2016
- Bédat v. Switzerland [GC], no. 56925/08, ECHR 2016
- Błaja News Sp. z o. o. v. Poland, no. 59545/10, 26 November 2013
- Brasilier v. France, no. 71343/01, 11 April 2006
- Burghartz v. Switzerland, 22 February 1994, Series A no. 280-B
- Castells v. Spain, 23 April 1992, Series A no. 236
- Chauvy and Others v. France, no. 64915/01, ECHR 2004-VI
- Chauvy and Others v. France, no. 64915/01, ECHR 2004-VI
- Cicad v. Switzerland, no. 17676/09, 7 June 2016
- Cihan Öztürk v. Turkey, no. 17095/03, 9 June 2009
- Couderc and Hachette Filipacchi Associés v. France [GC], no. 40454/07, ECHR 2015 (extracts)
- Cumpănă and Mazăre v. Romania [GC], no. 33348/96, ECHR 2004-XI
- Delfi AS v. Estonia [GC], no. 64569/09, ECHR 2015
- Denisov v. Ukraine [GC], no. 76639/11, 25 September 2018
- Desjardin v. France, no. 22567/03, 22 November 2007
- Dink v. Turkey, nos. 2668/07 and 4 Others, 14 September 2010
- Dudgeon v. the United Kingdom, 22 October 1981, Series A no. 45
- Dyuldin and Kislov v. Russia, no. 1914/02, 7 June 2007

Ediciones Tiempo v. Spain, no. 13010/87, Commission decision of 12 July 1989,
 Decisions and Reports 62
 Egeland and Hanseid v. Norway, no. 34438/04, 16 April 2009
 Eker v. Turkey, no. 24016/05, 24 October 2017
 Evans v. the United Kingdom [GC], no. 6339/05, ECHR 2007-I
 Fernández Martínez v. Spain [GC], no. 56030/07, ECHR 2014 (extracts)
 Fressoz and Roire v. France [GC], no. 29183/95, ECHR 1999-I
 Fürst-Pfeifer v. Austria, nos. 33677/10 and 52340/10, 17 May 2016
 Giniewski v. France, no. 64016/00, ECHR 2006-I
 Hachette Filipacchi Associés (ICI PARIS) v. France, no. 12268/03, 23 July 2009
 Handyside v. the United Kingdom, 7 December 1976, Series A no. 24
 Ileana Constantinescu v. Romania, no. 32563/04, 11 December 2012
 Independent Newspapers (Ireland) Limited v. Ireland, no. 28199/15, 15 June 2017
 Jakovljević v. Serbia (dec.), 5158/12, 13 October 2020
 Jishkariani v. Georgia, no. 18925/09, 20 September 2018
 Jokitaipale and Others v. Finland, no. 43349/05, 6 April 2010
 Kaboğlu and Oran v. Turkey, nos. 1759/08 and 2 Others, 30 October 2018
 Karhuvaara and Iltalehti v. Finland, no. 53678/00, ECHR 2004-X
 Karsai v. Hungary, no. 5380/07, 1 December 2009
 Kasabova v. Bulgaria, no. 22385/03, 19 April 2011
 Kazakov v. Russia, no. 1758/02, 18 December 2008
 Kazakov v. Russia, no. 1758/02, 18 December 2008
 Khadija Ismayilova v. Azerbaijan, nos. 65286/13 and 57270/14, 10 January 2019
 Kroon and Others v. the Netherlands, 27 October 1994, Series A no. 297-C
 Laskey, Jaggard and Brown v. the United Kingdom, 19 February 1997, Reports of
 Judgments and Decisions
 Lingens v. Austria, 8 July 1986, Series A no. 103
 M.B. v. France, no. 22115/06, 17 December 2009
 Magyar Helsinki Bizottság v. Hungary [GC], no. 18030/11, 8 November 2016
 Melnychuk v. Ukraine (dec.), no. 28743/03, ECHR 2005-IX
 MGN Limited v. the United Kingdom, no. 39401/04, 18 January 2011
 Mikulić v. Croatia, no. 53176/99, ECHR 2002I
 Miljević v. Croatia, no. 68317/13, 25 June 2020
 Minelli v. Switzerland (dec.), no. 14991/02, 14 June 2005
 Morice v. France [GC], no. 29369/10, ECHR 2015
 Niemietz v. Germany, 16 December 1992, Series A no. 251B
 Nikowitz and Verlagsgruppe News GmbH v. Austria, no. 5266/03, 22 February 2007
 Odièvre v. France [GC], no. 42326/98, ECHR 2003-III
 OOO Regnum v. Russia, no. 22649/08, 8 September 2020
 Paturel v. France, no. 54968/00, 22 December 2005
 Pedersen and Baadsgaard v. Denmark [GC], no. 49017/99, ECHR 2004-XI
 Pentikäinen v. Finland [GC], no. 11882/10, ECHR 2015
 Perinçek v. Switzerland [GC], no. 27510/08, ECHR 2015 (extracts)
 Petrina v. Romania, no. 78060/01, 14 October 2008
 Polanco Torres and Movilla Polanco v. Spain, no. 34147/06, 21 September 2010
 Putistin v. Ukraine, no. 16882/03, 21 November 2013
 Reklos and Davourlis v. Greece, no. 1234/05, 15 January 2009
 Reznik v. Russia, no. 4977/05, 4 April 2013
 Sciacca v. Italy, no. 50774/99, ECHR 2005-I
 Stoll v. Switzerland [GC], no. 69698/01, ECHR 2007-V

Stoll v. Switzerland [GC], no. 69698/01, ECHR 2007-V
Timpul Info-Magazin and Anghel v. Moldova, no. 42864/05, 27 November 2007
Tolmachev v. Russia, no. 42182/11, 2 June 2020
Tolstoy Miloslavsky v. the United Kingdom, 13 July 1995, Series A no. 316-B
Von Hannover v. Germany (no. 2) [GC], nos. 40660/08 and 60641/08, ECHR 2012
Von Hannover v. Germany, no. 59320/00, ECHR 2004-VI
Vučina v. Croatia (dec.), no. 58955/13, 24 September 2019
White v. Sweden, no. 42435/02, 19 September 2006
Wingrove v. the United Kingdom, 25 November 1996, Reports of Judgments and
Decisions 1996-V
Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft m.b.H. v. Austria (no. 3), nos.
66298/01 and 15653/02, 13 December 2005
X and Y v. the Netherlands, 26 March 1985, Series A no. 91