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CIVIL LIABILITY FOR NON-PECUNIARY DAMAGE CAUSED BY PUBLICATION OF INFORMATION IN THE (ELECTRONIC) MEDIA

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The right to freedom of expression is often in conflict with other fundamental rights, which require a careful weighing of conflicting rights and interests, especially in terms of assessing the proportionality and necessity of restrictions on individual rights. In this paper, the authors limit the scope of research to situations in which the right to freedom of expression (Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms) and the right to private life (Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms) are opposed. The research methodology includes a fundamental analysis of the relevant legal framework with the aim of identifying existing deficiencies in this area. In particular, the authors analyze the practice of the European Court of Human Rights, where the court weighed the balance between the right to freedom of expression and the right to respect for private life. The research results indicate the protection of the right to privacy as a global challenge in the digital environment. The authors come to the conclusion that the development of the Internet and digital technologies, which enable fast communication of a large number of users and the exchange of a large amount of data in different formats on a global level, certainly contribute to the appearance of new risks regarding the violation of the right to privacy.

Key words: *media; freedom of expression; right to privacy; weighing conflicting interests.*

1. Introduction

The term media in general (lat. medius – middle, which is between) in its primary meaning is an intermediary (singular), the one through which communication is transmitted. According to the Dictionary of the Croatian language (Šonje, 2000) medium is a means and a written or oral way of expressing something, that is, a means of communication. When

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defining electronic media, it should be kept in mind that the specific of electronic media is that, unlike traditional media, they are accessible to users only with the help of electronic or electromechanical processes, as opposed to classic media that are available in other ways. This definition is also accepted by the Media Act (hereinafter: ZM)[3] which in Article 1. a states: "Media are: newspapers and other press, radio and television programs, programs of news agencies, electronic publications, teletext and other forms of daily or periodic publication of editorially designed program content by transmission of voice, sound or image recordings. Media are not books, textbooks, newsletters, catalogs or other carriers of information that are intended exclusively for the educational, scientific and cultural process, advertising, business communication, internal work of commercial companies, institutes and institutions, associations, political parties, religious and other organizations, school gazettes, "Narodne novine", Official Gazettes of local and regional (regional) governments and other official announcements, posters, leaflets, prospectuses and banners, as well as video pages without live images and other free information. Media institutions are considered to be part of the media system that develops in each country under the influence of specific political circumstances related to the legislative framework by which the media system is regulated (Peruško, 2011). Every mass or communication medium is created by technological innovation and develops into a new culture and social form, following the needs of the audience. Each new medium takes over existing program forms and genres. A characteristic of modern media is the mixing and combination of genres. In the past twenty years, the media system and media institutions have been rapidly changing all over the world, and it is considered that the media are in transition in the West as well, not only in Croatia (Peruško, 2011, p. 36). Today's new media are characterized by the fact that they increase interaction, especially on the Internet. According to the Law on Electronic Media[4] (hereinafter: ZEM) electronic media are considered; audiovisual programs, radio programs and electronic publications that are editorially designed, produced or collected media content published via the Internet by electronic publication service providers for the purpose of public information, entertainment or education (Article 3, para.1., pt. 6. i 7. ZEM.) The development of information technologies is the reason for a larger number of users who increase the demand for new, interesting products and services, and thus the competition grows (Proso, 2012, p. 207). Computers have been in widespread use for more than half a century now, but the real problem in relation to the right to privacy actually arose with the beginning of the use of microcomputers. At the beginning of their development, computers were used exclusively by large institutions, industrial, educational, and the public did not have wide access to them. With extended use of computors in everyday life, consequently, the problem with violations of the rights of individuals in means of electronic communication have started (Rowland, Macdonald, 2005, p. 5). According to the provisions of Art. 1045 of the Obligations Act[5] (hereinafter: ZOO) if a legal entity causes damage to another, it is obliged to compensate it. According to Article 1046. ZOO damage can manifest as a decrease in someone's property (ordinary damage) and prevention of its increase (lost benefit), in which case we speak of property damage, or as a

[3] *Media Act, (Official Gazette No. 59/2004, 84/2011, 81/2013.)*
[4] *Law on Electronic Media, (Official Gazette No. 111/2021, 114/2022.)*
[5] *Obligations Act, (Official Gazette No. 35/2005, 41/2008, 125/2011, 78/2015, 29/2018, 126/2021, 114/2022, 156/2022, 155/2023.)*

violation of personal rights (non-property damage). In the paper, the authors deal with the issue of the relationship between the two rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, the right to privacy and the right to freedom of expression, all through the prism of individual decisions of the European Court of Human Rights.

2. Civil liability for non-pecuniary damage

Non-pecuniary damage can occur through the commission of a civil tort, violation of a contractual obligation or violation of a pre-contractual obligation to negotiate accordingly of the principle of conscientiousness and honesty. When non-pecuniary damage is committed by a civil delict, the liability for damage is based on the rules of non-contractual liability, with the legal basis found in the Article 1045. of the ZOO. If all assumptions of liability for damage are met[6], the person who caused the damage is obliged to repair the damage. Non-pecuniary damage is repaired in two ways: in non-monetary form – by publishing a judgment or correction, withdrawing the statement in which the violation of the right to personality was committed, or by doing something else that can achieve the purpose achieved by fair monetary compensation (Article 1099. ZOO), and, according to Article 1100. ZOO, in monetary form, i.e. by fair monetary compensation. These two ways of repairing non-pecuniary damage are not mutually exclusive, so it is possible to cumulate both forms of damage repair for the same non-pecuniary damage (Ledić, 2020, p. 6). Regarding the repair of non-pecuniary damage with fair monetary compensation, it is important to emphasize that it is not foreseen in every case, but only when the court determines it justified, taking into account the severity of the violation of the right to personality and all other circumstances of the case (Article 1100. para. 1. i 2. ZOO). When deciding on the amount of fair monetary compensation, the court will take into account the strength and duration of the physical and mental pain and fear caused by the injury, the goal served by this compensation, but also that it does not favor aspirations that are not compatible with its nature and social purpose. The provision of Article 1046. of the ZOO, which defines non-pecuniary damage as a violation of personality rights, is also linked to the provision of Article 19 of the ZOO, which defines what is considered to be personality rights.[7]

[6] Liability for non-pecuniary damage arises if all general assumptions for damage are met, namely: subjects of the relationship of responsibility for damage, damage, harmful action, causal connection, and illegality of the harmful action in the objective sense. Depending on the type of liability for damage, it is necessary to fulfill some special assumptions, for example in the case of subjective liability for non-pecuniary damage, the fault of the damager is also required as a special assumption. Art. 1049 ZOO, in connection with Art. 1045, paragraph 3 ZOO.

[7] Thus, paragraph 1 of that article stipulates that every natural and legal person has the right to the protection of their personality rights under the assumptions established by law, while paragraph 2 of Article 19 of the ZOO stipulates that personality rights include the right to life, physical and mental. health, reputation, honor, dignity, name, privacy of personal and family life, freedom, etc. The provision of paragraph 3 of Article 19 of the ZOO stipulates that a legal person has all the listed personality rights, except for those related to the biological essence of a natural person, and especially right to reputation, good name, honor, name or company, business secret, freedom of business, etc.

3. Civil liability for non-pecuniary damage caused by publication of information in the (electronic) media

3.1. Media publisher's civil liability for publication of information in the (electronic) media

Special rules on liability for damage caused by the publication of information in the media are necessary due to the recognition of the specificity of such harmful actions and should ensure the maintenance of a balance between two freedoms – media freedom on the one hand and individual freedom on the other (Ledić, 2020, p. 23).

According to ZM, if information published in the media causes damage, the publisher of the media is obliged to compensate it, except in the cases mentioned in ZM. A media publisher is any natural or legal person that publishes program content through the media and participates in public information, regardless of the technical means through which its editorially designed program content is published, transmitted or made available to the public, (Article 1. ZM). The regulations on mandatory relationships apply to the determination of liability for damage compensation, unless otherwise determined by the ZM (Article 21, para. 3. ZM). In addition to the publisher,according to Article 21, para. 7. ZM, the ZM issues the joint and several liability of the publisher and the editor-in-chief. Namely, if the published information is authorized, and certain parts contain obvious insults or defamations, the authorization does not exclude the joint and several liability of the publisher and editor-in-chief, if they did not act in good faith.[8] In the decision of the Constitutional Court (U-III/1298/2012, of 6th of December 2016.), it was pointed out that the second-instance court considers that the first-instance court examined all the circumstances essential for making a correct and legal decision and correctly established the factual situation, which the defendant only flatly disputes, so it points out that due to the content of the disputed authorized article, it ordered the journalist to go to the plaintiff verify the information contained in it, although he did not offer any evidence for these claims in the first-instance proceedings. Therefore, the first-instance court correctly established that the defendant, as editor-in-chief, did not act in good faith when publishing the disputed article, as a result of which the prerequisites prescribed by Article 21, paragraph 7 of the Media Act for the joint and several liability of the publisher and editor-in-chief were cumulatively met – that is the information containing obvious slander and insults authorized, which was confirmed by the defendant himself in his testimony, as well as that the publisher and edito r-in-chief did not act in good faith. The provision of Article 21, paragraph 2 of the ZM defines damage in accordance with the concept of the term damage as it was conceptually regulated in the Obligations Act from 1978, damage is, thus, defined as the reduction of one's property or the prevention of its increase (material damage) and the infliction of physical or psychological pain or fear on another (immaterial damage). The change in the concept of damage came with the entry into force of the ZOO from 2005. Since then, according to the objective concept of damage, non-pecuniary damage is considered a violation of personality rights. Therefore, the question was raised whether the rules of the ZM on compensation liability still have priority over the rules of the ZOO.

[8] It is also important to note the criminal responsibility that is prescribed in the Croatian criminal legislation in the form of a criminal offense called Public incitement to violence and hatred, regulated by Art. 325 of the *Criminal Act, (Official Gazette No. 125/2011, 144/2012, 56/2015, 61/2015, 101/2017, 118/2018, 126/2019)*, where the prison sentence for the commission of the offense referred to in para. 1. and 4.

In its issued legal understanding, the Supreme Court took the position that the rules of the ZM take precedence[9]. Pursuant to the provisions of Art. 22. paragraph 1. ZM non-pecuniary damage is usually compensated by publication of the correction of information and an apology from the publisher, and payment of compensation in accordance with the general regulations of compulsory law.[10] With this provision, the publication of the correction of the information and the publisher's apology is highlighted as the primary form of repairing non-property damage. And while it is not in dispute that if the damage is not fully repaired by the publication of a correction or apology, the injured party has the right to fair monetary compensation as a form of damage repair, as such the question arose as to whether the provision of Art. 22. paragraph 1. other forms of non-monetary repair of non-property damage provided for in art. 1099 of the ZOO, specifically, publication of the decision.. The Supreme Court took the position that the non-monetary repair of non-property damage according to ZM is limited to the publication of a correction or apology, that is, the possibility of its repair is excluded according to Art. 1099 of ZOO (Bukovac Puvača, 2015, p. 166) according to which the injured party can, at the expense of the injured party, demand the publication of the judgment, i.e. correction, withdrawal of the statement by which the violation was committed or anything else that can achieve the purpose achieved by fair compensation. The Supreme Court took the position that this provision of the ZOO, as a general rule, does not apply to violations of personality rights in the media, due to the rules on the relationship between general and special regulations. The legal consequences of this position in practice negatively affect the injured party because we consider the right to repair non-property damage caused by the publication of information in the (electronic) media by publishing the judgment in the same media as the most appropriate form of repair of that damage. The conceptual definition of non-property damage (such as infliction of physical pain, psychological pain and fear) in ZM is, in our opinion, unnecessary. Moreover, it should be deleted because it is in disagreement with the conceptual definition of non-property damage contained in the ZOO as a general regulation. By the provision of Article 1046 of the ZOO, namely, it already determines non-property damage, and that according to an objective criterion, as a violation of the right to personality. This terminological inconsistency of the concept of non-property damage in ZM and ZOO certainly does not contribute to legal certainty. The request sent to the publisher from Article 22, paragraph 2 of the ZM is imprecisely defined, and the

[9] „The concept of damage from Art. 22, paragraph 1 of the Media Act in connection with Art. 22. paragraph 2. ZM is judged according to the general regulations of mandatory law that are valid at the time of the formation of the mandatory relationship of compensation for damages due to information published in the media (Article 155 of the ZOO/91 or Article 1046 of the ZOO in connection with Article 1163 . 1. ZOO– a)" Legal understandings taken at the session of the Civil Department of the Supreme Court of the Republic of Croatia 15.10.2007., VSRH, Su IVg 600/2007-2, http://sudskapraksa.vsrh.hr.

[10] In the Decision of the Supreme Court No. Rev 564/2012-3 of December 8, 2015, the court found that the plaintiff had suffered a violation of the right to personality, and the lower courts correctly applied substantive law when, accepting the findings and opinion of the medical expert on the strength and duration of mental pain, accepted the plaintiff's request as partially founded and obliged the defendant to pay him HRK 10,000.00 as compensation for non-property damage. According to paragraph 1 of Article 1100 of the Law on Obligatory Relations, the court will award monetary compensation independently of compensation for property damage, and even when there is no compensation. Thus, in the same procedure, the plaintiff's request for compensation for material damage based on lost earnings was decided, whereby it was concluded that the plaintiff did not prove that the property damage he suffered was causally related to the said harmful event – statements of the defendant published in a weekly newspaper. https://www.iusinfo.hr/aktualno/u-sredistu/odgovornost-nakladnika-za-stetu-nastalu-informacijom-objavljenom-u-medijima-29618, last accessed on 22/03/ 2024.

realization of the right to protect the infringed property depends on it. The relationship between this request and the request for the publication of a correction or apology addressed to the editor-in-chief should, we believe, be more clearly defined. Cases of publication of corrections and apologies as a form of repair of non-pecuniary damage caused in the Croatian media mainly refer to unintentional errors, such as misspelled names, titles, dates, publication of the wrong photo, etc. The publication of corrections and apologies is prescribed as the primary form of repair of non-pecuniary damage caused in to the media. We do not consider the exclusion of other forms of non-monetary repair of non-pecuniary damage (and especially the publication of judgments against the damage party) to be a good legislative solution. In particular, we believe that the ZM should explicitly recognize the right of the injured party to publish the verdict against the injured party as a form of reparation for the non-pecuniary damage caused by the (electronic) media. The proposed changes would strengthen the legal position of the injured party, as it would be easier to request compensation.

3.2. Responsibility of the electronic publication provider for user-generated content

The provisions of the Directive on audiovisual media services are incorporated in ZEM, on the legal protection of services based on conditional access and services that provide conditional access and partly the provisions of the Directive on misleading and comparative advertising, which each regulate the area of audiovisual media services from their point of view. ZEM, among other things, regulates the civil liability of legal entities responsible for published content in electronic media. Pursuant to the provisions of Article 3, Paragraph 1, Item 27 of the ZEM, an electronic publication provider is a legal or physical person who provides an electronic publication service and is responsible for its content. The provision of Article 94 of the ZEM stipulates the responsibility of the electronic publication provider for content generated by the user that would violate the rights of others. This article clearly stipulates the obligation of the electronic publication provider (who is responsible for all published content, including content generated by the user), to register the user and to warn the user in a clear and easily visible way about the rules of commenting as well as the violation of the prescribed provisions. If the publisher acts in accordance with the law, ensures registration and publication of warnings, the responsibility for possible illegal content rests with the person who published the comment (Article 94, para. 3. ZEM). The ECtHR has determined in several cases that social media can nevertheless be responsible for readers' comments and other content generated by users of said media.[11] In Index.hu Zrt v. Hungary The

[11] The first case in ECtHR practice in which it examined the applicant's legal position in society and the nature of the disputed comments is Delfi v. Estonia (Delfi v. Estonia, application number 64569/09, judgment of June 16, 2015). The ECtHR stated that there are conflicting interests between the benefits of the Internet, as a platform that enables freedom of expression protected by Article 10 of the Convention, and its dangers, in the form of the possibility that hate speech and incitement to violence can be spread around the world in a few seconds, with the possibility of being permanently recorded (contrary to Article 8 of the Convention). The ECtHR examined four key aspects: the context in which the comments were written, the responsibility of the author of the comments as an alternative to the applicant's responsibility, the steps taken by the applicant to remove the comments and the consequences of the domestic procedure on the applicant. See: Čačić, I. et al., Pravo na slobodu izražavanja (članak 10.) i pravo na poštovanje privatnog života (članak 8.) iz EKLJP i sudska praksa ESLJP, Priručnik za polaznike/ice, Pravosudna akademija, Zagreb, siječanj 2023. https://www.pak.hr/wp-content/uploads/2023/05/Pravo-na-slobodu-izrazavanja.pdf, pp. 41-43., last accessed on 13/04/2024.

ECtHR considered that the Hungarian courts, deciding on the responsibility of the applicant, did not carry out an appropriate balancing between the conflicting rights between the applicant's right to freedom of expression and the right of the real estate website to respect commercial reputation. Namely, the Hungarian authorities accepted that the comments were illegal already because they harmed the reputation of the real estate website. He reiterated that in cases where comments by third-party users were in the form of hate speech and direct threats to the physical integrity of individuals, the rights and interests of others and society as a whole, this could entitle contracting states to impose liability on online news portals if they failed to take action to remove clearly illegal comments without delay, even without notice from the alleged victim or from third parties. In Magyar Jeti Zrt v. Hungary ECtHR highlighted the criteria for evaluating the responsibility of the publisher of the portal for the content to which the link is placed. The court found that the very purpose of hyperlinks is to point to other websites and Internet resources in order to provide access to information. Hyperlinks differ from traditional publications because they only direct users to content available elsewhere on the Internet, without representing that link or communicating its content. The hyperlinking party has no control over the content of the hyperlinked web page. Furthermore, the content behind the hyperlink is available to the public even before the link itself is posted. The ECtHR found that Hungarian law did not provide for any assessment of rights under Article 10 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: Convention)[12] in a situation where such an assessment was important in view of the discussion of a matter of general interest.It also meant that in this particular case there was no balance between the right to the reputation of the political party and the applicant's right to freedom of expression. The ECtHR considered that establishing strict liability could have negative consequences for the flow of information on the Internet and encourage authors and publishers of articles to completely refrain from placing hyperlinks to material over the changing content of which they have no control. According to the opinion of the ECtHR, expressed in the judgment, this could have a negative effect on the freedom of expression on the Internet. When assessing the duty of an internet portal to remove comments published by a third party, the ECtHR established four criteria for establishing a fair balance between the right to freedom of expression and the right to the reputation of a private or legal person mentioned in the comments: 1. context and content of comments, 2. responsibility author of the comment, 3. measures of the applicant and behavior of the injured party 4. consequences for the injured party and for the applicant (Ružić, 2008). The ECtHR therefore considered that the anonymous comments on the websites in question fell under the scope of hate speech and incitement to violence, therefore it was justified to order the online news portal to pay compensation for such comments (Čačić, 2023).

An increasing number of cases relate to restrictions imposed on the enjoyment of freedom of expression on the Internet. The ECtHR has recognized the importance of the Internet in exercising the right to freedom of expression: "The Internet has now become one of the main means by which individuals exercise their right to freedom of receiving and disseminating information and ideas, providing basic tools for participation in activities and debates

[12] (European) Convention for the Protection of Human Rights and Fundamental Freedoms, Narodne novine-MU no. 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10, 13/17.

on political issues and issues of general interest ... Moreover, regarding the importance of Internet sites in the exercise of freedom of expression, 'in light of its availability and ability to store and communicate vast amounts of information, the Internet plays an important role in enhancing public access to news and facilitating the dissemination of information in general: expressive activity generated by users on the Internet provides an unprecedented platform for the exercise of freedom of expression ... " (Cenqiz and others v. Turkey). Freedom of expression applies online as much as offline, and any restriction must comply with the three-part test, as set out in Article 10(2) of the Convention (Boban, 2012).

Often, the online space of comment sections of portals and social networks are perceived as places where legal restrictions do not apply or can be avoided by registering under a false identity. However, the decision of the ECtHR from 2023 in the case of Sanchez v. France no. 45581/15, is a precedent in imposing responsibility on the "owner" of the profile regarding the comments on his "wall". Namely, the Grand Chamber of the ECtHR did not find a violation of Mr. Sanchez's right to freedom of expression from Article 10 of the ECHR due to the criminal verdict pronounced after failing to remove hateful comments on his Facebook "wall". Mr. Sanchez, a French politician, was fined in criminal proceedings before a national court for failing to remove third-party comments inciting hatred of Muslims from his Facebook profile. He claimed that the fine violated his right to freedom of expression and that he was imposed a disproportionate burden of monitoring all comments posted by other users on his open and public Facebook "wall". However, the ECtHR found that the criminal conviction did not violate the rights under Article 10 of the ECHR as the comments in question were clearly illegal and discriminatory and the sentence by the French courts was a consequence of his lack of control over a communication channel that he himself had opened to the public. The court pointed out that Mr. Sanchez has an obligation to monitor and remove hateful comments, that his duty to act reasonably is greater given that he is a politician and was aware of the controversial comments posted on his profile.

4. The relationship between the right to freedom of expression and the right to privacy

4.1. Freedom of expression in light of the Convention

Article 10 of the Convention reads: "1. Everyone has the right to freedom of expression. This right includes freedom of opinion and freedom to receive and disseminate information and ideas without interference from public authorities and regardless of borders. This article does not prevent states from subjecting institutions that perform radio or television activities and cinematographic activities to a licensing regime. As the exercise of these freedoms includes duties and responsibilities, it may be subject to formalities, conditions, restrictions or penalties prescribed by law, which in a democratic society are necessary in the interest of state security, territorial integrity or public order and peace, in order to prevent disorder or crime, in order to protect health or morals, to protect the reputation or rights of others, to prevent the disclosure of confidential information or to preserve the authority and impartiality of the judiciary." Thus, the right to freedom of expression imposes certain positive and negative obligations on the signatory states of the Convention. Positive means activities that, through protection, insurance, obligations and guarantees of state bodies, will enable

citizens to exercise and protect the rights guaranteed by the Convention. On the other hand, negative obligations require state bodies to refrain from certain activities in order to prevent a possible violation of certain rights. However, the right to freedom of expression is not an absolute right. Article 10 of the Convention, as well as Article 38 of the Constitution, does not guarantee unlimited freedom of expression. Freedom of expression can be limited if it is necessary in a democratic society. For the purposes of this paper, we will briefly refer to three "tests": the legality of interference, its legitimacy and its necessity in a democratic society.

a) Lawfulness of interference

The "legality of interference" means the necessary existence of a legal basis for state interference in freedom of expression. States parties to the Convention may set restrictions, formalities or conditions only if there is a domestic legal norm that provides for such treatment. In order for a certain norm to be considered a law, it must be available and predictable and formulated precisely enough so that citizens can regulate their behavior and predict the consequences that a certain action may entail (Sunday Times v. UK, application no. 13166/87, judgement from 29th of March 1979.).

b) Legitimacy of interference

In order for the interference to be in accordance with the Convention, it must aim to achieve one of the legitimate goals listed in paragraph 2 of Article. 10. Thus, according to the Court's opinion, there was a legitimate aim for the state's interference with the applicant's freedom of expression "... in the interests of state security, territorial integrity or public order and peace, to prevent disorder or crime, to protect health or morals, to protect reputation or rights of others, to prevent disclosure of confidential information or to preserve the authority and impartiality of the judiciary". Also, it is a legitimate goal to strive to protect the reputation of a person, to protect the business reputation and interests of a legal entity (Marunić v. Croatia, application no. 51706/11, judgement from 28th of March 2017.), preventing riots and fighting racism and discrimination at sports competitions (Šimunić v. Croatia, application no. 20373/17, judgement from 22nd of January 2019.).

c) Necessity of interference in a democratic society

Necessity in a democratic society implies an urgent social need (pressing social need) to interfere with freedom of expression. At the same time, we must keep in mind that the relevant restrictions of Art. 10. must be appropriate and proportionate to the legitimate goal they serve (Mijić Vulinović, 2021). The court, implementing the test of necessity in a democratic society, must determine whether the objectionable interference was in accordance with an urgent social need. During the assessment, in Stoll v. Switzerland, application no. 69698/01, judgement from 10th of December 2007., the ECtHR emphasizes that the signatory states of the Convention have a certain freedom of assessment of the existence of such a need (margin of discretion) This freedom comes with European oversight covering both legislation and decisions made pursuant to it, including decisions by independent courts.

The ECtHR is authorized to make the final decision on whether the "restriction" is in accordance with the freedom of expression protected by Article 10. When carrying out the aforementioned supervision, the ECtHR does not aim to take the place of the competent domestic courts, but based on Article 10, it assesses the decisions made by the courts based on their free assessment. This means that the Court will consider the aforementioned interference in the light of the case as a whole, check whether the reasons given by the national authorities to justify it are relevant and sufficient, and assess whether it was proportionate to the legitimate aim to be achieved.[13] Likewise, for a measure to be considered proportionate and necessary in a democratic society, there must be no other way to achieve the same goal that would less seriously encroach on freedom of expression. Therefore, in accordance with the principle of subsidiarity, such a measure should be applied only when we have used all available means that interfere less with the freedom of expression than it.[14]

When assessing the proportionality of interference, statements of fact should be distinguished from value judgments. While the existence of facts can be proven, the truth of value judgments is not provable, so the defendant should not be required to prove the truth of the value judgment. When it comes to value judgments, the proportionality of restrictions on freedom of expression may depend on whether there is a sufficient factual basis to support those judgments, otherwise those judgments may be considered excessive. In order to be able to distinguish whether it is a statement of facts or a value judgment, it is necessary to take into account the circumstances of each case and the "general tone" of the statement in question, bearing in mind that claims about topics of public interest will, as a rule, be of value courts, not statements of fact.[15]

Case under number: U-III-458/2018 should be mentioned here. Articles published on January 31, 2015 in a daily newspaper that critically reported on the election of a judge for the third time to the State Judicial Council (hereinafter: DSV), for which there were no conditions prescribed by the Constitution of the Republic of Croatia. That judge sued the publisher of that daily newspaper and received damages. The Constitutional Court accepted the publisher's constitutional complaint, finding that the interference with freedom of expression guaranteed by Art. 38, paragraphs 1 and 2 of the Constitution was not necessary in a democratic society. The Constitutional Court first found that the competent courts found that the author of the disputed article made factual claims that the plaintiff should not have run for office and that he should not have been elected as a member of the DSV (Peček, 2019). They assessed that the author of the article did not act in good faith because, as a law graduate, he was familiar with the content of the legal provisions and with the method of retroactive application of the regulations. The Constitutional Court did not accept the conclusion of the ordinary courts that in this case it was a matter of factual assertions. According to the opinion of the Constitutional Court, the disputed article represents the journalist's opinion on how to interpret the provision of Art. 12 of the Constitution and Art. 5 of the Law on DSV, which

[13] Comparison with: *Europapress holding d.o.o. v. Croatia*, application no. 25333/06.

[14] Thus, the Court confirmed that there was a violation of the right from Art. 10. in the case of the Turkish courts that decided to block access to Google pages that host websites whose owners are being prosecuted for insulting the memory of Atatürk. The court found that the domestic courts, when making the decision to block websites, did not take into account the principle of proportionality because it is clear that they could have adopted a much milder and less extreme measure that encroaches on the applicant's freedom of expression. *Op. cit.* Ahmet Yilidirm v.Turkey, application no. 3111/10, judgement from od 18th of December 2012, § 64.

[15] Compare with *Morice v. France*, application no. 29369/10, § 126., judgement from 23rd of April 2015.

stipulates that no one can be a member of DSV more than twice, and the author's understanding of the purpose of the constitutional and legislative changes that limit the number of mandates of members of DSV. He especially emphasizes that the specific case deals with a topic of public interest, so bearing in mind that claims about topics of public interest are generally value judgments, the Constitutional Court considers that in the specific case it was a value judgment, and not a factual claim. The Constitutional Court did not even agree with the assessment of the regular courts that the journalist did not act in good faith because, as a law graduate, he should have known that the aforementioned provisions are not applied retroactively. Namely, such an opinion cannot be considered a statement made in "bad" faith, nor can the applicant, as a lawyer and journalist, be denied the right to a different opinion about the retroactivity of the "disputed" provisions of the Constitution and laws, even when that opinion is different from "official" or prevailing opinion. The Constitutional Court concluded that by accepting the claim, the courts protected the dignity, honor and reputation of the plaintiff, because it is a right protected by Art. 35 of the Constitution. However, when providing legal protection to the plaintiff, the courts had to take into account the applicant's rights arising from the constitutional guarantee of freedom of thought and expression. When a decision is made on the complaint of a person who claims that his dignity, honor or reputation has been violated by someone else's public speech, the outcome of that evaluation should be the same as when a decision is made on the complaint of violation of freedom of expression. So, we are talking about rights that deserve equal protection, and it is the task of the courts to achieve a fair balance between these rights.

4.3. The right to respect for private life in the light of the Convention

The ECtHR held that it is not possible to give a complete definition of private life, stating that it, "covers the physical and psychological integrity of a person. It can ... encompass multiple aspects of a person's physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sex life fall within the personal sphere. Private life may also include activities of a professional or business nature... The Court in Magyar Helsinki Bizottsaq v. Hungary, application no. 18030/11, judgement from 8th of November 2016, also held that there is a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life.'

The applicability of Article 8 in some contexts is determined by the seriousness test.[16] Once it is established that a measure has seriously affected the applicant's private life, the complaint will be compatible ratione materiae with the Convention and the issue of the "right to respect for private life" will be raised. In this regard, the question of applicability and the existence of interference with the right to respect for private life are often inextricably linked. In the Vučina v. Croatia, no. 58955/13, judgment of September 6th, 2013. the applicant's photograph was published in a magazine and she was wrongly identified as the wife of

[16] See relevant jurisprudence on matters of environmental protection, attack on a person's reputation in Denisov v. Ukraine, paragraphs 111 – 112 and 115 – 117 with further references; by acts or measures of a private person that adversely affect the physical and psychological integrity of another person in the case of Nicolae Virgiliu Tanase v. Romania, paragraph 128; and the psychological well-being and dignity of the individual in the case of Beizaras and Levickas v. Lithuania, paragraphs 109 and 117.

the then mayor. The court declared the request inadmissible ratione materiae. Although he accepted that the applicant may have been caused some inconvenience, he considered that the level of seriousness associated with the mislabeling of her photograph and the inconvenience she suffered did not raise a problem – either in the context of protecting her image or her honor and reputation under Article 8. (para . 42 – 51.). The ECtHR considered, for the first time, the protection of private life in case of misidentification of one person in a photograph (rather than the publication of the photograph itself). The court applied the seriousness threshold test to assess whether Art. 8. applicable in this case, taking into account the following factors: the manner in which the newspaper obtained the photograph; the reason why he used it and how it could be used in the future; the nature of the paper that issued it; and the consequences of publishing the photo for the applicant, her privacy, honor and reputation. The court also applied the principle according to which any encroachment on the rights from Art. 8. must be" in accordance with the law", which means that it must be foreseeable.

4.4. Balancing competing interests

The right to privacy and the right to freedom of expression can often be in conflict. Privacy can be a necessary precondition for exercising freedom of expression – journalists must be free from unlawful surveillance in order to protect their confidential sources of information and report on matters of public interest. On the other hand, exercising the right to freedom of expression can affect the right to privacy. These are rights that require equal respect, they are rights of equal value (Čačić, 2023).

In cases where individuals call for media interference in their private lives, the ECtHR engages in balancing between the right to freedom of expression and the right to respect for private life, each of which is protected by the Convention: "The Court checks whether the authorities have struck a fair balance when protect two values guaranteed by the Convention which may come into conflict with each other in this type of case, namely, on the one hand, the freedom of expression protected by Article 10 and, on the other hand, the right to respect for private life contained in Article 8." The ECtHR seeks to achieve balance between those two rights, and the outcome should not differ whether the cases are considered through the prism of Article 8. or Article 10: "The Court considers that the outcome of the request should not, in principle, vary depending on whether it was submitted to the Court on the basis of Article 10 of the Convention by the publisher who published the offending article or on the basis of Article 8 of the Convention by the person who is the subject of that article. Indeed, in principle these rights deserve equal respect" (Axel Springer AG v. Germany, no.. 39954/08, judgement from 7th of february 2012.).

In circumstances where the contested statement affects the reputation, honor, dignity or rights of others, this "conflict" must be resolved by weighing relevant factors related to two protected values: on the one hand, the right to freedom of expression, and on the other hand, the right to respect for the personal life of others.[17] In cases that require weighing between these two values, the outcome for a person who claims that his dignity, honor or

[17] See: *Von Hannover v. Germany*, no. 40660/08 i 60641/08, decision of 7th of February 2012.; *Islamske zajednice Brčko and others v. Bosnia i Herzegovina*, no. 17224/11, judgement from 27th of June 2017.

reputation has been violated by someone else's public speech should, in principle, be the same as if a complaint of violation of freedom of expression was decided.[18]

The ECtHR established that in cases where the right to reputation and the right to freedom of expression are in conflict, national courts should balance and analyze whether the right to freedom of expression or the right to private life guaranteed and protected by Article 8 of the Convention prevails, according to the criteria established in practice of the ECtHR. Thus, in each specific case, the court must determine whether the statement is of public interest, what is the degree of familiarity of the person to whom the statement refers, what was the previous behavior of the person to whom the statement refers, what is the content, form and consequences of the statement, and how is the severity of the imposed sanction (Šago, Boban, 2023).[19]

5. Conclusion

The right to freedom of expression, guaranteed by the Convention and the Constitution of the Republic of Croatia, is a prerequisite for the progress of democracy and freedom of expression. However, the Convention does not guarantee completely unrestricted freedom of expression. This freedom requires certain duties and responsibilities and, in this connection, may be subject to formalities, conditions, or restrictions that are prescribed by law, have a legitimate goal, and are necessary in a democratic society. Sometimes the right to freedom of expression will conflict with another right guaranteed by the Convention, making it necessary to weigh the conflicting interests and balance them.

Traditional mass media are institutions regulated by law in which professional experts with the help of technological means produce symbolic content for a wide audience, including the press, radio and television (Zgrabljić-Rotar, 2017). The characteristics of modern media, which have been conditioned by technological innovations, the Internet and the convergence of traditional media, include "the mixing and recombination of genres and the transmediality of media content" (Peruško, 2011). Digitization of the media and the emergence and spread of Internet portals as a type of media opened up new questions related to the relationship between the right to freedom of expression and the right to respect for the individual's personality rights and the right to compensation for damages caused in cases of violation thereof. The Internet has enabled increased accessibility and the amount of

[18] Compare with Narodni list d.d. v. Croatia, no. 2782/12, § 70, judgement from 8th of November 2018. The ECtHR issued a judgment in which it found that the Republic of Croatia had violated the right to freedom of expression, guaranteed by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms of the applicant, publisher of the weekly Narodni list d.d.. The case dealt with the publisher's obligation to compensate for damages due to the fact that a journalist, in the context of a discussion of an issue of legitimate public interest, presented value judgments that harmed the reputation of a judge. In cases that seek proportionality between those two rights, the outcome for a person who claims that her dignity, honor or reputation has been violated by someone else's public appearance should, in principle, be the same as deciding on a complaint of violation of freedom of expression.

[19] See Mesić v. Croatia, application no. 19362/18, judgement from 5th of May 2022. The ECtHR ruled that the applicant's right to freedom of expression guaranteed by Article 10 of the Convention was not violated and that due to the unreasonably long duration of the proceedings, his right to a fair trial was violated (Article 6 of the Convention). Taking into account the above criteria, the ECtHR concluded that the interference with the applicant's freedom of expression was "necessary in a democratic society" and that there was no violation of Article 10 of the Convention, but that there was a violation of Article 6 of the Convention. Therefore, the ECtHR awarded the applicant an amount of EUR 2,000.00 for non-pecuniary damage.

information currently available, but at the same time it has opened up possibilities for new ways of abuse (Munivrana Vajda, Šurina Marton, 2016).

It is necessary to note the importance that the Internet has on the realization of the rights guaranteed by the Convention and that millions of people through social networks and Internet portals enjoy the right to freedom of expression every day. In this regard, there is a danger that this type of guaranteed and protected expression will turn into hate speech (Mole, 2011, p.15) and public incitement to violence that are a threat to the democratic order (Hlebec, Gardašević, 2021, p. 10). Through its practice, the ECtHR has expressed fear of such possible outcomes and therefore called on states to consciously and conscientiously fight against such abuse of the right to freedom of expression. This is the attitude of many international institutions and organizations that, through their documents, conventions and resolutions, call for mutual tolerance and respect.

Confirmation of aforementioned is found in the judicial practice of the ECtHR. "The Court would also note that given the important role played by the Internet in improving public access to news and facilitating the dissemination of information, the function of bloggers and social media influencers can also be equated to that of "public watchdogs" in so far as the protection afforded is concerned Article 10 of the Convention."

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