CONSTITUTIONAL COURT OF MACEDONIA AND THE ECHR: DEFAMATION

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ABSTRACT

The paper examines the impact of the ECHR on the decisions of the Constitutional Court of the Republic of Macedonia (CCRM) in defamation cases not involving a politician. It focuses upon the following questions: Does the Court refer to Article 10 of the ECHR in these cases? Does it interpret freedom of expression in the light of the Convention? To answer the questions the paper analyses: 1) the case law of the European Court of Human Rights in order to find out how it has interpreted “for the protection of the reputation or rights of others” (defamation exception) as a justified and necessary restriction on freedom of expression and 2) decisions of the CCRM (concrete disputes) in defamation cases not involving a politician. The analysis reveals that it is questionable whether the CCRM seriously considers the defamation case law of the ECtHR in deciding these cases.

Keywords: Constitutional Court, Macedonia, ECHR, freedom of expression, defamation

INTRODUCTION

The literature testifies that the constitutional courts of the States Parties to the European Convention on Human Rights (ECHR) frequently refer to the case law of the ECtHR in their decisions (see: Gerards & Fleuren, 2014; Hale, 2012; 2010; Repetto, 2013; Keller & Sweet Stone, 2008; Steiner, 1995-96; Anagnostou & Psychogiopoulou, 2010), albeit some “purely perfunctory, ritualistically and rhetorically” (Sadurski 2009, 442). The paper focuses on the Constitutional Court of the Republic of Macedonia (CCRM). It aims to

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assess the impact of the ECHR on its decisions in defamation cases not involving a politician. The paper analyses the decisions of the CCRM in these cases (concrete disputes) and the defamation case law of the European Court of Human Rights (ECtHR) in order to answer the following questions: Does the CCRM refer to Article 10 of the ECHR in these cases? Does it interpret freedom of expression in the light of the Convention?

The approach of the ECtHR to defamation has been discussed in the literature many times (see e.g. Kozlowski, 2006; Macovei, 2004; Mowbray, 2004; Ovey & White, 2006). Some authors (Loucaides, 2007) speak about excessive sensitivity of the Court (over-protection of freedom of expression) in defamation cases, while others identify some restrictive trends in the approach of the Court to freedom of expression (see e.g. Voorhoof & Ó Fathaigh, 2014; Flaus, 2009). However, the vast majority of them argue it has afforded different level of protection to different category of people. Thus, Kozlowski (2006, 136) concludes that the ECtHR has developed a hierarchy of protected expression, while Goldhaber (2007, 81-82) argues that the Court has been uneven in protecting freedom of expression. One may agree that it has demonstrated no will to accept the same limits of acceptable criticism in regard to a private individual with those in regard to a civil servant and more so in regard to a politician. However, it can hardly be said that it is not sensitive to interference with freedom of expression.

The Court in Strasbourg provided useful guidelines for assessment whether an interference with freedom of expression is necessary in a democratic society. However, it seems that the CCRM fails to follow them. The paper argues that in the majority of defamation cases not involving a politician it reads the ECHR selectively and fails to seriously consider all the arguments advanced by the ECtHR under Article 10 of the Convention. In order to explain this criticism (summarized in the conclusion) Part I of the paper discusses the scope and content of freedom of expression, as guaranteed by Article 10 of the ECHR. Part II examines the protection of this freedom at national level. Part III analyses the decisions of the CCRM in defamation cases not involving a politician.

**FREEDOM OF EXPRESSION UNDER THE ECHR**

Article 10 of the ECHR provides that “everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises”. The ECtHR interprets this article broad enough to encompass
the substance of the ideas and information expressed and the form in which they are conveyed (Sokolowski v. Poland, 2005 § 44). The right to freedom of expression under Article 10 of the ECHR includes various forms of expression (artistic, commercial, political, etc.), and, it is “applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference but, also to those that offend, shock or disturb” (Dich and Others v. Austria 2002, § 37).

The Court in Strasbourg has underlined the important role that freedom of expression plays in a democratic society by reiterating many times that: 1) freedom of expression, protected by Article 10 of the ECHR, “constitutes one of the essential foundations of a democratic society (Lingens v. Austria 1986 § 41) within the meaning of the Convention” and 2) it is one of the basic conditions for progress of a democratic society Lingens v. Austria, 1986 § 41) and for “each individual’s self-fulfillment” (Lingens v. Austria, 1986 § 41). It seems that the ECtHR uses the same or similar arguments for protecting freedom of expression as the existing literature: truth, democracy and individual autonomy (see Moon 2000, 8). The Court in Strasbourg perceives Article 10 of the ECHR as guardian of the pluralism, tolerance and broadmindedness in a democratic society, including the divided one. Therefore, it requires the state both to take positive measures (see, Özgür Gündem v. Turkey, 2000 § 43) to protect freedom of expression, even in the sphere of relations between individuals (Lingens v. Austria, 1986 § 43) and to restrain from arbitrary interference with the exercise of the rights protected by the article (Özgür Gündem v. Turkey, 2000 § 42, 43). Public authorities may interfere with the exercise of the rights guaranteed by Article 10 of the ECHR only if such interference is: (1) prescribed by law (the law must meet the following requirements: to be adequately accessible (The Sunday Times v. UK (no. 1) 1979 § 49) and to be formulated with sufficient precision to enable the citizen to regulate his conduct: the citizen must be able—“if need be with appropriate advice” (Barthold v. Germany 1985 § 45)—to foresee the consequences of its action); (2) pursued legitimate aim (in the interests of national security, territorial integrity or public safety; for the prevention of disorder or crime; for the protection of health or morals; for the protection of the reputation or rights of others; for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary); and (3) necessary in a democratic society (to answer a pressing social need (Financial Times Ltd and Others v. UK, 2009 § 60) and to be proportionate to the legitimate aim pursued (Financial Times Ltd and Others v. UK, 2009 § 60)).
The paper focuses on protection of the reputation or rights of others as legitimate aim for restricting freedom of expression, that is, on defamation cases. The ECtHR has made clear that defamation proceedings constitute an interference with freedom of expression that has legitimate aim. When assessing whether the interference with freedom of expression by a judicial decision – criminal or civil – qualifies an applicant’s statement as defamatory, is necessary in a democratic society the ECtHR takes in consideration “the case as a whole, including the content of the impugned statements and the context in which they were made” (*Yankov v. Bulgaria*, 2003§ 129). Namely, in order to assess the proportionality of the interference it takes into account the following elements: (1) the nature of the interference including the nature and severity of the penalty imposed (*Scharsach and News Verlagsgesellschaft v. Austria*, 2003§ 30); (2) the position of the person who made the impugned statements (in this context, it bears noticing the Court has recognized the essential role that the press plays in a democratic society – a vital role of “public watchdog” (*Dichand and Others v. Austria*, 2002§ 40) – which may sometimes require a certain degree of exaggeration, or even provocation); (3) the position of the person who was subject of defamation (the limits of acceptable criticism are wider as regards a certain categories of persons as such (for instance, a politician(see, *Dichand and Others v. Austria*, 2002§ 42)) or civil servant exercising its powers(see, *Nikula v Finland*, 2002§ 48) than as regards a private individual(*Dichand and Others v. Austria*, 2002§ 42); (4) the subject matter and nature of the impugned statement (whether or not the statements contribute to public debate; whether the impugned statement is a statement of fact or a value judgment) and (5) the reasons given by the national courts(*Scharsach and News Verlagsgesellschaft v. Austria*, 2003§ 31). The Court takes into account other factors as well when assessing the proportionality of the interference (for instance: the means by which the impugned statement is disseminated; whether or not the statement reaches smaller audience).

The Court in Strasbourg has established different standards and criteria, which should be applied by national courts when deciding defamation cases. There are countries where national courts transform the Convention standards to standards that are more easily applicable in domestic law (see, Geraards& Fleuren2014, 243-44), but not in a manner that could be defined as a deviation from the Court’s case law.
FREEDOM OF EXPRESSION UNDER THE CONSTITUTION OF
THE REPUBLIC OF MACEDONIA: ARTICLE 16

Article 16 of the Constitution of the Republic of Macedonia provides that: *Freedom of personal conviction, conscience thought and public expression of thought is guaranteed. Freedom of speech, public address, public information and the establishment of institutions for public information is guaranteed. Free access to information and the freedom of reception and transmission of information are guaranteed. The right of reply via the mass media is guaranteed. The right to a correction in the mass media is guaranteed. The right to protect a source of information in the mass media is guaranteed. Censorship is prohibited.*

The text of the article reveals that it does not contain a limitation clause. Also, the Constitution includes freedom of personal conviction, conscience, thought and public expression of thought among those freedoms and rights which cannot be a subject to any restrictions (not even during the state of war or emergency). However, according to CCRM this does not mean that the right to freedom expression, protected by Article 16 of the Constitution, is an absolute right. It has reiterated many times that it is subject to restrictions. In the majority of its decisions the Court explained its position by referring to international law (including to the ECHR). As, it has stated many times the limits of the exercise of the freedom of thought and public expression of thought “should be sought in the wholeness of the Constitution and its determinations considering thereby the international instruments ratified in accordance with the Constitution” (CCRM2011, no. 107/2010).

The CCRM has not found a good reason to depart from this position. Furthermore, in one of its recent decisions (case concerning the forcible removal of the journalists from the Parliament’s Plenary Hall) it read Article 16 of the Constitution in conjunction with Article 10 of the ECHR. In this decision it explicitly stated that “the exercise of freedom of public address and freedom to receive information, which are guaranteed by Article 16 of the Constitution of the Republic of Macedonia and Article 10 of the ECHR, as constitutive elements of freedom of expression are not absolute, that is, they are subject to restrictions provided in paragraph 2 of Article 10 of the ECHR” (CCRM, 2014, no. 27/2013)

THE APPROACH OF THE CONSTITUTIONAL COURT TO DEFAMATION: CASES NOT INVOLVING A POLITICIAN

The CCRM has reached eight decisions (decisions on merits) in defamation cases so far (from ratification of the ECHR by the country till
2017). It has rejected all applications for protection of the rights and freedoms concerning defamation.

When it comes to the subject of defamation the analysis of these decisions reveals that only in three cases discussed by the Court the subject of defamation was not a politician.

On 16 February 2011 (CCRM 2011, no. 107/2010) the Court rejected the application for protection of freedoms and rights under Article 110 of the Constitution concerning public expression of thought submitted by a person who has been found guilty of two criminal offences of defamation for statements (against other lawyers) made in a capacity of lawyer (of the plaintiff) in his written petition to the Supreme Court (answer to the request for the protection of legality filed by the Public Prosecutor’s Office). This case is the only case where the Court in its decision explicitly refers to the case law of the ECtHR in addition to the Convention. It refers to the ECtHR’s judgment in the case *Nikula v Finland* where the Court observed that defence counsel’s freedom of expression can be subject to restrictions only in exceptional cases. The Court cited the submissions from the Interights (a survey concerning the lawyers’ privileges for statements they make while representing clients in court) which shows that a great majority of the state accord privilege for lawyers for statements they make while representing clients (see, *Nikula v Finland*, 2002).

The CCRM, in this case, accepted that freedom of expression should be balanced with the reputation and rights of others, but the way the balancing was done (the factors it took into consideration) leaves room for discussion whether it interpreted Article 16 of the Constitution based on the principles contained in the ECHR. For instance, its decision implies that it did not take into consideration the fact that the statements made by the applicant reach smaller audience. Moreover, it seems that it used the fact that the lawyer’s answer to the request for the protection of legality was accessible to the clerks in the courts against him (see: CCRM 2011, no. 107/2010). It treated the clerks in the courts as third party. On the other side, in the case *Nikula v Finland*, (and in many other cases) where the ECtHR found a violation of Article 10 of the ECHR, it took into account that the applicant’s submissions were confined to the courtroom (see, for instance, *Nikula v Finland*, 2002). Also, the CCRM found that the applicant’s claim that the established non-material damage was too high, that is, disproportionately determined by the ordinary courts, it is an issue that goes beyond the sphere of competence of the Constitutional Court (CCRM 2011, no. 107/2010).

This position is different from the position of the ECtHR. The Court in Strasbourg has established that the amount of “the award itself could constitute a violation of the freedom of expression” (*Tolstoy Miloslavsky v UK*, 1995 § 47). At the
end, it is interesting to note that the CCRM did not find a violation of the right to freedom of public expression of thought in this case while the ECtHR in the case *Nikula v Finland* (to which the CCRM referred) found a violation of Article 10 of the ECHR.

The CCRM did not, also, find a violation of the right to public expression of thought in the case where a professor had been found guilty of defamation for a column published in a daily newspaper (where he had been a longstanding regular columnist) – Decision no. 147/2011, adopted on 24.11.2011. The author in the column (title: Frankford School *vis-a-vis* Demir Hisar School) commented on the presidential elections. Among other things, he wrote that in the past the Advisor of the elected President of the Republic of Macedonia – a retired professor at the same faculty where the author worked – had opposed the admission of the now elected President at the faculty (where he had worked before his election). The Advisor, who was mentioned in the column, filed a private criminal action against the author, and, as we have already noted, the regular courts (in the first and in the second instance) have found the author guilty of defamation (and insult) referring to the faculty’s official documents. The author of the column submitted an application with the CCRM for protection of freedom of thought and public expression of thought. However, the Constitutional Court defined the impugned statements as statements of facts and concluded that: … “the interference of the state is proportionate with the legitimate aim for the protection of the reputation of the injured party and, in the judgment of this Court, the courts based their decisions on an acceptable assessment of the relevant facts and the court reached a fair balance between the two rights and did not interpret the principle of freedom of expression too restrictively, nor did it interpret the aim for the protection of the reputation of the injured party too extensively” *(CCRM 2011, no. 147/2011)*.

If we are to analyse the Court’s decision in this case we can see that the Court referred to Article 10 of the ECHR. It is quite evident that the CCRM applied the set of factors developed by the ECtHR when assessing the proportionality of the state’s interference with the freedom of expression despite the fact that it did not explicitly refer to the case law of the Strasbourg Court. Also, it provided a more detailed explanation of its findings and arguments and one can follow (much easier) its reasoning, which is not the case with other of its decisions in regard to defamation.

The decision of the CCRM in the case of Nikola Gelevski – a publisher, journalist and columnist who has been found guilty of defamation for a column published in a newspaper – speaks in favor of the last remark. In this case, Gelevski in a column under the title “Megaphones from the Fuhrer’s street” commented on the events that took place on 28 March 2009 when a
group of “counter-protestants” disrupted the protest of a group of students from the Architectonic Faculty. The author in the text, *inter alia*, accused some journalists of having a political agenda to transform the country into a totalitarian ‘kasaba’ of the Prime Minister and being the most direct supporter of the new fascist voice who continued called for lynch of those who think otherwise. One of the mentioned journalists had filed a private criminal action against the author and the outcome of this proceedings has been already mentioned at the beginning of this paragraph – the author of the column has been found guilty of defamation. On 2 May 2012 the CCRM (Decision no. 3/2012) rejected the application for protection of freedom and right to public expression of thought.

The issue whether the impugned statements constitute statements of facts or value judgments occupies an essential place in its decision (in which the Court referred to article 10 of the ECHR).

The Court of Appeal did not accept the applicant’s claim that the statements constitute a value judgments. In this context, it observed that: “in order that a statement is regarded a value judgment, it should not be related to a concrete event, concrete happening, and it should be made in abstracto. In the present case, the published text concerns a concrete event in reality and it contains a factual assertion that is subject to substantiation, proving and determination” (CCRM 2012, no. 3/2012). The CCM accepted the arguments of the regular courts. It did not examine whether the impugned statements could be considered as a value judgments despite some documentary evidence, including statements of the Association of Journalists of Macedonia condemning the hate speech of the plaintiff (refused by the ordinary courts) submitted by the applicant. The Court reproduced the findings of the regular courts, including the definition of the term value judgements provided by the Court of Appeal (quoted above) without any further explanation. It is questionable whether this definition coincide with the reading of the notion value judgments by the ECtHR based on its case law. Above all, the Court in Strasbourg is increasingly prone to opt for an extensive approach to the concept of value judgments (*Karman v Russia*, 2006 §41). For instance, in the case *Karman v Russia* found (contrary to the view of the domestic courts) that the term “local neofascist” should be “regarded as a value judgment rather than a statement of fact (*Karman v Russia*, 2006 §41).

One may agree some parts of the column (written by Gelevski) discussed in this case offend, shock and disturb. However, it has been well established that freedom of expression is “applicable not only to "information"or"ideas" that are favourably received or regarded as inoffensive or as a matter of
indifference but, also to those that offend, shock or disturb” (*Dichand and Others v. Austria*, 2002 §37).

**CONCLUSION**

The paper, first, analysed the defamation case law of the ECtHR in order to find out how it has interpreted “for the protection of the reputation or rights of others” (defamation exception) as a justified and necessary restriction on freedom of expression. Then, it analysed the decisions of the CCRM (concrete disputes) in defamation cases (from ratification of the ECHR till 2017) not involving a politician in order to establish whether the Court based its interpretation of freedom of expression (protected by Article 16 of the Constitution), in these cases, on the general legal principles contained in the ECHR and interpreted in the case law of the ECtHR.

The analysis revealed that the CCRM referred to the ECHR in all cases (by quoting Article 10), but it explicitly referred to the case law of the ECtHR only in one case. It reads the ECHR selectively, fails to seriously consider all the arguments advanced by the ECtHR under the Convention and sometimes uses definitions of terms or concepts (e.g. value judgments) that do not coincide with the case law of the ECtHR despite the fact that in the same case it refers to Article 10 of the ECHR. The CCCR failed to develop a visible and coherent set of factors to balance the freedom of expression and reputation or rights of others, and, at the same time, in the majority of cases it applies the factors defined by the ECtHR selectively and mechanically.

It seems that the CCRM uses the ECHR to justify the judgments of the ordinary courts – in particular, to justify “the protection of rights or reputation of others” as a legatine aim for restricting the freedom of expression, because, according to the Constitution freedom of personal conviction, conscience, thought and public expression of thought cannot be a subject to any restrictions.

**REFERENCES**
