

# THE RIGHT TO PRIVATE LIFE, AS A RIGHT OF THE HUMAN PERSONALITY

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## Abstract

*Through a theoretical and practical approach, the study proves that the regulation of the right to private life, as an autonomous subjective right included the sphere of human personality rights, represents an innovative, progressive aspect of the current Civil Code, as a part of the modern trend of the civil law of protection of the human being. The study deals with issues of practical interest such as jurisprudential solutions in Romania regarding violation of the right to private life in the online environment, television shows and press articles. Though this work, we want to highlight the relationship between the right to private life and the right to free expression, as they have been analyzed in the E.C.H.R. jurisprudence and in national jurisprudence. At the same time, the criteria considered by the Romanian courts in granting compensations for violating the right to private life, and the differentiated amount of these compensations are also presented.*

**Keywords:** civil tort liability, rights of personality, right to private life, Civile Code, jurisprudential solutions, right to dignity, moral damages.

## 1. Introduction

Enunciated by the European Convention on Human Rights (E.C.H.R.), freedom of expression (article 10) is, at the same time, an individual and indispensable right, as part of the freedom of each individual, but also a prejudicial right sometimes for others' rights achievement. More specifically, sometimes the right to freedom of expression as a fundamental right may affect the right to privacy of another person (article 8). Being a bivalent right (fundamental but also prejudicial), in the jurisprudence of the European court but also of the national courts, there is the problem of finding a balance between the exercise of the right to freedom of expression, on the one hand, and the protection of individual interests and rights belonging to other persons, on the other hand.

The freedom of expression in the E.C.H.R.'s view presupposes "duties and responsibilities", and its exercise may be subject to "formalities, constraints, restrictions or sanctions." Therefore, the possibility of state authorities to exercise certain interferences in the exercise of freedom of expression is explicitly recognized.

All these limitations of freedom of expression and the way in which they can be imposed by the state, gave rise to a non-unitary Romanian jurisprudence regarding the compensations granted for the interference in his private life, which we will analyze below starting from the provisions of domestic legislation in Romania.

The prejudice retained in the solutions of the national courts is related to the violation of the right to private life. The concrete determination of the amount of compensations equivalent to a non-patrimonial damage includes a dose of approximation. The moral compensations must represent a reasonable relationship of proportionality with the damage brought to the reputation, considering also the degree of damage of the protected social values, the intensity and the gravity of the damage brought to them. Although moral values cannot be quantified in money, the harm done to them causes serious suffering and deep damage in various forms, the intensity of which necessarily requires monetary compensation. Due to their non-patrimonial nature, an accurate assessment of moral damages in money is not possible. In general, the extent of damages is achieved by reference to factual elements, assessed in their complexity by the courts. But, in order to maintain their character of "equitable satisfaction", the compensations for moral damages must be granted in an amount that does not divert them from the purpose and finality provided by law, so as not to become an unjust material benefit, without causal justification in the damage suffered. As such, the only criterion considered by the Romanian courts is that the compensations granted should maintain a reasonable ratio of proportionality with the damage suffered, in order to ensure a fair compensation of the injured value, and without becoming an unjustified enrichment of the injured person.

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## 2. The right to private life according to the European Convention on Human Rights

The European Convention on Human Rights regulates in art. 8 The right to respect for private and family life, stipulating: "(1) Every person has the right to respect for private and family life, his home and his correspondence. (2) The interference of a public authority in the exercise of this right is not allowed except to the extent that this interference is provided by law and if it constitutes a measure, which in a democratic society, is necessary for (...) protecting the rights and freedoms of others."

At the same time, freedom of expression, defended by art. 10<sup>1</sup>, occupies a special place among the rights guaranteed by the European Convention on Human Rights, being the basis of the concept of "democratic society", which summarizes the system of values on which the Convention is built. . In this sense, article 10 paragraph 1 of the European Convention on Human Rights establishes: "Everyone has the right to freedom of expression". Although guaranteed by the state authorities as a fundamental right, freedom of expression cannot be exercised beyond any limits. As a social freedom, freedom of expression is subject to limitations, restrictions according to the purposes provided by art. 10 paragraph 2 of the Convention, namely: respect for general interests (national security, territorial integrity of contracting states, prevention of crimes, protection of public health and morals, guaranteeing the authority and impartiality of the judiciary), as well as interests of personal order (reputation and rights belonging to other people).

Therefore, the right to freedom of expression is not an absolute right. It involves certain restrictions such as the reputation and rights to privacy of other persons.

The European Convention on Human Rights guarantees that the state respects the right to private life, and freedom of expression is regarded both as an individual right and as a limit to the right to privacy. Even if an individual engages in a public debate of general interest, he is obliged not to exceed certain limits in terms of respecting - in particular - the rights of others, he is also allowed to resort to a certain dose of exaggeration, or even provocative, more precisely to be exaggerated in his statements.<sup>2</sup> However, such an attitude violates the Convention if it does not comply with the requirements imposed by paragraph 2 of Article 10.

One principle established in the E.C.H.R. jurisprudence must be taken into account, according to which the right to privacy (art. 8) and the right to free expression (art. 10) "deserve a priori equal respect."<sup>3</sup> Thus, the European Court has shown in its constant jurisprudence that a balance must be found between freedom of expression and the right to privacy, a balance that requires the liability of persons guilty of making derogatory statements, if the statements represent factual situations, without supporting evidence, made in a real campaign of denigration and reiterated in public, through media and bad faith.<sup>4</sup> Thus, the positive obligation deriving from art. 8 of the Convention must be applied if the statements likely to affect a person's reputation exceed the limits of acceptable criticism, from the perspective of art. 10 of the Convention.

In other words, it is up to the national courts to ensure the right balance between the two rights, by balancing the conflicting rights, starting from the criteria identified in the ECHR jurisprudence<sup>5</sup> as relevant in terms of preference for the right to free expression, on the one hand or respect for privacy on the other hand: contribution to a debate of general interest, notoriety of the person concerned and the subject of the report, previous behavior of the person concerned, content, form and repercussions of the publication.

<sup>1</sup> According to Article 10 of the afore mentioned Convention "Paragraph 1 - every person has the right to free 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. Paragraph 2- The exercise of these freedoms involving duties and responsibilities may be subject to formalities, conditions, restrictions or sanctions provided by law, which constitute necessary measures, in a democratic society, for national security, territorial integrity or public safety, defense of order and the prevention of crime, the protection of health or morals, the protection of the reputation or rights of others, in order to prevent the disclosure of confidential information or to guarantee the authority and impartiality of the judiciary.

<sup>2</sup> See Case Willem vs. France, Decision no. 10883/2005, point 33, 16th July 2009, available at [www.echr.coe.int](http://www.echr.coe.int).

<sup>3</sup> See Case Timciuc vs. Romania, Decision no. 28999/03, point 144, October 12th, 2010; Mosley v. United Kingdom no. 48009/08, point 111, 10th May 2011, available at [www.echr.coe.int](http://www.echr.coe.int).

<sup>4</sup> See Case Petrina vs. Romania, (Application 78060/01), Decision of October 14th, 2008, Case of Andreescu vs. Romania, (Application no. 19452/02), Decision of June 8th, 2010, final on September 8th, 2010, available at <https://jurisprudentacedo.com>.

<sup>5</sup> See Case of Axel Springer AG vs. Germany, no. 39954/08, February 7th, 2012, Case Ralu Traina Filip vs. Romania no. 46131/06, 27th May 2014, available at [www.echr.coe.int](http://www.echr.coe.int).

### 2.1. The right to private life according to the Romanian Civil Code and Constitution

The Romanian Civil Code offers an express regulation to the right to dignity and the right to privacy, distinctly, including them in the broad category of personality rights. We say that the two rights are correlative to the right to freedom of expression, because in the judicial practice of the Romanian courts, they are also considered limits of freedom of expression. Specifically, freedom of expression must not affect the privacy and dignity of others. In other words, freedom of expression ceases where the right to dignity and privacy begins. In addition, the national courts justify their solutions for granting compensation in case of violation of the limits of the right to freedom of expression, as we will show; starting from the non-observance of the right to privacy and dignity of another person.

In accordance with the provisions of art. 71 of the Civil Code "(1) Everyone has the right to respect for his private life. (2) No one may be subjected to any interference in his personal or family intimate life (...) without his consent or without observing the limits provided in art. 75. (3) It is also forbidden to use, in any way, the ... information from the private life of a person, without his consent or without observing the limits provided in art. 75." On the same line of ideas, art. 72 provides "(1) Every person has the right to respect for his dignity. It is forbidden any damage to the honor and reputation of a person, without his consent or without respecting the limits provided in art. 75." In the view of the legislator, the right to dignity is a complex right containing the right to honor and reputation of the person. The right to dignity, the right to honor and the right to reputation are aspect of the right to private life.<sup>6</sup>

The right to free expression is regulated in the Constitution of Romania<sup>7</sup> as a limit to the right to private life. Thus, the Romanian Constitutional Court has defined free expression as "the possibility of a person to manifest himself orally, in writing, through images, through sounds or through any means of public communication, thoughts, opinions, religious beliefs and creations of any kind", stating that "freedom of expression has a complex content, including freedom of speech or freedom of the press."<sup>8</sup>

At the same time, the freedom of expression is not absolute, knowing the restrictions imposed by art. 30, paragraphs 6 and 7 of the Constitution. A first category of limits aims at protecting the rights of private life of another person, "freedom of expression cannot prejudice the dignity, honor, private life of the person nor the right to one's own image" (art. 30 paragraph 6 of the Constitution).

In this sense, article 74 of the Civil Code provides that: The following may be considered as invasions of privacy: c) recording or using the image or voice of a person in a private space without their consent; d) broadcasting news, debates, investigations or audiovisual reports regarding private, personal or family life, without the person's consent h) using, in bad faith, the name, image, voice of another person."

### 2.2. The jurisprudence of the European Court of Human Rights in the matter of private life

The European Court of Human Rights (E.C.H.R.) has shown, in its constant jurisprudence, that a balance must be found between freedom of expression and the right to private life, a balance that requires the liability of persons guilty of committing derogatory statements and posting images of persons, through means of communication through the press and mass media in bad faith<sup>9</sup>.

In its jurisprudence, the European Court of Human Rights based its solutions on the provisions of art. 8 of the Convention regulating the right to private life, appreciating that the publication by the press of some photos that showed a person alone or in the company of other people, in their daily life, concerns their private life. It was noted that the issue is not the dissemination of ideas, but the information that contain personal information, and the images that appear in the media often constitute continuous harassment and even persecution of the

<sup>6</sup> See P. E. Ispas, *Freedom of expression and the right to private life. Defense of personal non-patrimonial rights*, in Titu Maiorescu University Law Review, no. XXI /2022 Hamangiu Publishing House, Bucharest, 2022, pp.35; H. D. Dumitru, *Libertatea de exprimare și viața privată. Conexiuni constituționale și civile*, în Pandactele Române, no. 5/2012.

<sup>7</sup> In Romania, freedom of expression falls into the category of fundamental rights and freedoms, being regulated by art. 30 of the Constitution according to which "(1) The freedom to express thoughts, opinions or beliefs and the freedom of creations of any kind, by word of mouth, in writing, by images, by sounds or by any means of communication in public are irrefrangible. (2) Censorship of any kind is prohibited (3) Freedom of the press also implies the freedom to set up publications. (4) No publication may be suppressed."

<sup>8</sup> See Decision of the Romanian Constitutional Court no. 756 of June 1st, 2010, available at [www.ccr.ro](http://www.ccr.ro)

<sup>9</sup> See Case Petrina vs. Romania, (application 78060/01), Decision of October 14, 2008; Case Andreescu vs. Romania, application no. 19452/02, available at [www.echr.coe.int](http://www.echr.coe.int).

person in question. In this sense, it was established that all states have the positive obligation to protect private life under the Convention<sup>10</sup>.

Synthesizing the criteria identified in the E.C.H.R. jurisprudence as being relevant regarding the preference for the right to free expression, on the one hand, or respect for private life, on the other hand, they are the contribution to a debate of general interest, the object of the report, the content, the form and the repercussions of the publication and the notoriety of the person concerned<sup>11</sup>.

Regarding the first criteria, if the statements made are necessary for informing the public or generate public debate, the right of private life and the right to free expression are not violated, and the compensations are not granted. In the Case of von Hannover v. Germany<sup>12</sup>, the plaintiffs, Princess Caroline von Hannover and her husband, Prince Ernst August von Hannover, complained of the refusal of the German courts to prohibit any further publication of two photographs which had been made during their vacation, without their knowledge, and which appeared in a German magazine. The photos were accompanied by an article about the tendency of wealthy people to rent out their vacation homes and contributed to a debate of general interest. The Court found that there was no violation of art. 8 of the European Convention and observed that it could not be stated that the article in question was a mere pretext for publishing the respective photograph or that the connection between the article and the photograph was purely artificial. The Court stated that there was no violation of the right to private life, because the article contributed to a debate of general interest.

In the case of Couderc and Hachette Filipacchi Associés v. France<sup>13</sup>, the national courts convicted the applicants - the publication director and editor of the weekly magazine Paris Match - following the publication in May 2005 of a ten-page article, announced on the cover of the magazine with the title "Albert of Monaco: A., the secret child", and which contained several photographs. The applicants claimed that the judgment against them constituted an unjustified interference with the exercise of their right to freedom of information. The Court decided that it was violated art. 10 (freedom of expression) of the Convention, finding that the arguments put forward by the French government regarding the protection of Prince Albert's private life and his right to his own image could not be considered sufficient to justify the interference and that the domestic courts had not ensured a balance between the right to respect for private life and the right to freedom of expression. The disputed article was indeed concerned with the sphere of Prince Albert's private life, but he considered that the essential element of the information contained in the article — the existence of the child — exceeded the private sphere, given the hereditary nature of the Prince's functions as head of state, covering a subject of public interest.

The second criteria, the negative consequences concern the way in which the victim's family, professional and social situation was affected. In the case of Hachette Filipacchi et Associés v. France<sup>14</sup>, the Court found a violation of the right to private life, taking into account the negative consequences of the publication of the image on the family. A few days after the assassination of a French prefect, the weekly magazine Paris Match published an article entitled "La République assassinée" (The Assassinated Republic). A two-page color photograph, taken shortly after the murder, showed the prefect's lifeless body on the ground in a pool of blood, facing the camera. The prefect's widow and children, invoking their right to privacy, made an urgent request to the courts, requesting the confiscation of copies of all magazines in which the photograph appeared and the prohibition of their sale, under penalty of payment of fines. The applicant company complained of the order requiring it to make public a statement that the prefect's photograph had been published without the consent of his family. The Court ruled that the measures taken by the French courts were proportionate to the legitimate aim pursued – to protect the rights of others – and therefore necessary in a democratic society. The Court observed, in particular, that the result of the publication of the photograph in question, in a magazine with a very large circulation, consisted in amplifying the trauma experienced by the victim's close relatives, so that they were justified in claiming that their right had been violated to respect for private life.

In the case of Bogomolova v. Russia (June 20, 2017), a photograph of a child appeared on the cover of a brochure intended to inform the public about the efforts of local authorities to protect orphans and the assistance available to families wishing to adopt. The applicant complained that the unauthorized publication of her son's photograph violated their right to private and family life. The Court decided that art. 8 was violated

<sup>10</sup> See Case of Van Hannover vs. Allemagne, June 24, 2004, available at [www.echr.coe.int](http://www.echr.coe.int)

<sup>11</sup> See Case of Axel Springer AG vs Germania, application 39954/08, Decision of February 14, 2012, available at [www.echr.coe.int](http://www.echr.coe.int).

<sup>12</sup> See Case of von Hannover v. Germany (Application 8772/10), available at [www.echr.coe.int](http://www.echr.coe.int).

<sup>13</sup> See Case of Couderc and Hachette Filipacchi Associés v. France, November 10, 2015, available at [www.echr.coe.int](http://www.echr.coe.int).

<sup>14</sup> June 14, 2007, available at [www.echr.coe.int](http://www.echr.coe.int).

(the right to respect for private life) of the Convention. In particular, it found that Russian courts did not consider whether the applicant had given her consent to the publication of the photograph, focusing instead on her consent for her son to be photographed. The Court also emphasized the false impressions and consequences that could be drawn from the context of the photograph, namely that the child photographed had no parents or was abandoned, and the effect this fact could have on the public perception of the applicant's relationship with her son.

Regarding the third criteria, a public persons cannot claim a protection of their privacy life just like a common person, unknown to the public. As a rule, according to the practice of the European Court due to their status as a public person, they could not claim compensations. In the case of *Sihler-Jauch and Jauch v. Germany*<sup>15</sup> (May 24, 2016), the German magazine *Bunte* published an illustrated article with several photos from the wedding of a well-known TV presenter and his and his wife's unsuccessful attempts before the German courts to obtain compensation. The applicants alleged that their private lives were not sufficiently protected by the domestic courts. The Court found that there was no violation of the right to private life, that the German courts had carefully balanced the claimants' right to respect for their private life and the magazine's right to freedom of expression. The domestic courts recognized the fundamental importance of the second applicant's notoriety, and in the general interest of society in relation to their wedding.

In the case of *Lillo-Stenberg and Saether v. Norway*<sup>16</sup>, a musician and an actress, well-known in Norway, complained that the media had invaded their private lives during their wedding in August 2005. The marriage ceremony was held on an island in the Oslo Fjord and was accessible to the public. Without the couple's consent, the weekly magazine *Se og Hør* later published a two-page article about the wedding, accompanied by six photographs. The Court decided that there was no violation of art. 8 (the right to respect for private and family life) of the Convention, the event being a well-known one.

By contrast, in *Peck v. the United Kingdom*<sup>17</sup>, the applicant, who was suffering from depression, complained about the disclosure in the media of footage taken by a closed-circuit television (CCTV) camera installed in the street, which shows him walking alone with a kitchen knife in his hand, attempting to commit suicide by cutting his veins, which led to images of him being widely published and circulated. The Court decided that the disclosure of the filmed sequence was not accompanied by sufficient guarantees and constituted a disproportionate and unjustified interference in the private life of the applicant, violating art. 8 (the right to respect for private life) of the Convention.

In a similar case<sup>18</sup>, the police summoned journalists and allowed them to take photographs, with a view to their publication, in which the applicant was shown in police custody, after he and another private person had been arrested by officers of a drug squad for possession of 800 grams of cannabis. The following day, a photograph of the applicant, with visible signs of violence, was published on the front page of the newspaper, together with an article calling him a "drug trafficker." The Court decided that it was violated art. 8 (the right to respect for private life) of the Convention. The behavior of the police officers, who summoned journalists and allowed them to film the applicant at the police station, without his consent and with a view to publishing the photographs in the mass media, constituted an interference with the applicant's right to respect for his private life.

### 2.3. The jurisprudence of the Romanian courts regarding the protection of the right to private life

Starting from the criteria identified in the E.C.H.R. jurisprudence, the courts have the task of ensuring the fair balance between the two rights, by balancing the conflicting rights – the right of free expression and the right of private life.

In the light of the principles laid down by the E.C.H.R. jurisprudence, the Romanian courts applied their own mechanisms in awarding moral damages<sup>19</sup> for the violation of the right to private life, noting contradictory solutions and moral damages varying from 200 euros to 30,000 euros. Also, Romanian Civile Code established in article 71 that "(1) Everyone has the right to respect for his private life. (2) Nobody can be a subject of an interference into private and family life ... without his consent". The dissemination of news, debates, images,

<sup>15</sup> May 24, 2016, at [www.echr.coe.int](http://www.echr.coe.int).

<sup>16</sup> 16 January, 2014 available at [www.echr.coe.int](http://www.echr.coe.int).

<sup>17</sup> 28 January 2003, available on [www.echr.coe.int](http://www.echr.coe.int).

<sup>18</sup> See *Toma v. Romania*, 24 February 2009, available at [www.echr.coe.int](http://www.echr.coe.int).

<sup>19</sup> See P. E. Ispas, *op.cit.*, pp. 41-44.

photo, reports on personal or family life without the consent of the person is considered an infringement of privacy.

Thus, in a number of similar cases <sup>20</sup>, the defendant being the same person, was obliged to pay compensation for violating the right to private life in the online environment in the amount of 2000 euros, respectively 4000 euros. In the mentioned cases, the defendant published on her Instagram page, in the story section, a series of photos or videos accompanied by comments regarding the plaintiffs' actions - public persons - for the promotion of certain services and products. The posts of the defendant (public person) in the online environment took place in the context in which in the public space there were numerous debates regarding "influencers" and their promotion of numerous products and services, without assuming any responsibility towards their followers and without specifying that the posts represent paid advertising, giving rise to a phenomenon of manipulation of the general public. The defendant motivated in defense that, as a public person, felt the need to take attitude and show her followers that not everything that appears on Instagram is real and not everything that these influencers post should be accepted as such. Under the prerogative of the public interest, she began to publish these satirical posts about influencers.

Compared to the fair balance between the two rights, the right to the freedom of expression of the defendant and the right to private life and reputation of the plaintiffs, the court is called to determine whether the posts are justified by a public interest and generate a debate of general interest. Indeed, the defendant's posts appeared on the background of the subject of interest of the influencers, however, the Bucharest Tribunal, in solving the cases, held that the incriminated statements reach a minimum threshold of gravity that would justify the finding of an injury to the plaintiff's image. In terms of the balance between public and private interest, the Tribunal noted that the defendant's posts cannot contribute to a real discussion and alert on the subject in question (disguised advertising and promotion of products on social networks for money), through the offensive expressions used, certainly reaching an overcoming of the balance that should exist between the public and the private interest. In other words, given the tone used in Instagram posts (slandorous, offensive expressions), the actual informational content transmitted, the social framework in which the statements are made, the courts found that the balance between public and private interest was not maintained. Furthermore, the repeated nature of the insulting and denigrating expressions addressed to the applicants (poor, hacks, criminal bitches) was taken into account, as well as the actual length of time in which these posts followed one another, as there were not just a few, isolated posts, but several successive posts.

The defendant's accounts published online, although revealing the origin of the products and their real value, accusing the plaintiffs' commercial practices, did not give the readers the opportunity to discern and verify the findings themselves, as they intentionally divert their attention from the information provided to aspects about the plaintiffs' private life, the colorful language used being likely to ridicule and minimize the plaintiffs' activity to the point of derision. Thus, it has been concluded that the ultimate purpose of the reports was not to hold public debates of general interest regarding the online behavior of influencers, but to ridicule the person in question, as a result of a language that transcends the boundaries of what is accepted as permitted by ECHR jurisprudence according to art. 10. Consequently, the role of public alert that the defendant wished to assume was diverted from its purpose recognized in a democratic society, consisting in informing the public about a matter of general interest, which clearly acts with the intention of deteriorating the public image of the plaintiffs, the abusive conduct manifested in the online environment thus failing to fall under the protection of Article 10 of the European Convention on Human Rights.

The plaintiffs requested, as an accessory end to the action, the obligation of the defendant to delete all the materials from the social media accounts (Facebook, Instagram, YouTube). In defense, the defendant invoked the fact that the alleged slanderous actions took place on the Instagram platform, story section, being notorious for the fact that these "stories" were available and could be viewed for only 24 hours. After this interval, the posts were automatically deleted from the respective section and were no longer available for viewing by the followers of the person who posted them. Unanimously, the courts pointed out that although the posts disappear after 24 hours, this aspect does not diminish the responsibility of the one who posts them, as long as they were continuous and during the time they were available for viewing they were followed by a large number of people.

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<sup>20</sup>Civil Sentence no. 1629/24th November 2021 of the Bucharest Tribunal, Civil Sentence no. 1388/19th October 2021 of the Bucharest Tribunal, unpublished..

Regarding the satirical character of the defendant's statements, the court did not share the opinion in the sense that the posts were exclusively a pamphlet. In this regard, it was argued that the defendant's posts included insulting words to the plaintiffs as a private person, and could not be strictly a pamphlet addressed to them as an influencer, meaning that the defendant's desire cannot be retained exclusively to sanction the actions of influencers in Romania. Thus, the courts held that the posts in question were not merely satirical pamphlets, but ways in which the defendant publicly and repetitively expressed her views on the plaintiffs' activities, using offensive, slanderous expressions, without them be argued through ideas, information or critical comments.

In this sense, the national courts<sup>21</sup> appreciated that the freedom of expression is not and must not be absolute, and the right to opinion and expression, like any other right, must be exercised within its natural limits, not being able to prejudice the rights and legitimate interests of other persons. In addition, it has been consistently stated in the remaining legal practice that the use of literal artifices does not change in any way the denigrating nature of the statements made through the blog and Facebook account, as defamation of a person can be done even if the information is presented in the convenient shelter of a pamphlet.

As regards the plaintiffs' status of public persons, although in the ECHR jurisprudence it has been held that public persons are more exposed to interference with their privacy<sup>22</sup>, however, the Romanian courts adopted a diametrically opposed solution. In the litigations taken as a point of reference, the Romanian courts concluded that although the plaintiffs are an active presence in the online environment, and although they have the status of public person who chose to expose their private life to the public, they benefit from protection according to art. 10 from the ECHR, provided that the limits of freedom of expression have been exceeded.

In relation to the arguments retained above, in a single isolated case, but similar to those presented above<sup>23</sup>, the court interpreted restrictively the jurisprudential criteria imposed by the case of *Axel Springer AG vs. Germany* in the analysis of the balance to be ensured between the right to freedom of expression and the right to privacy: contribution to a general interest debate, notoriety of the person concerned who is subject of the article, the previous behavior of the person in question, the method of obtaining the information and their veracity, the content, form and impact of the publication.

In relation to the stated criteria, first of all, the court found that the issues addressed by the defendant were related to a public interest issue, being topics of debate in a democratic society as they concerned the activity of public figures as influencers for the promotion of products or services. Secondly, the court held that the plaintiff was a public person, being well-known that she had participated in numerous TV shows and mass media interviews. In fact, the ECHR has seen that public persons, although recognized as having a legitimate expectation of respect for their privacy, still cannot claim a way of protecting their privacy identical to that applicable to individuals unknown to the public, so they are more exposed to capturing issues from their private lives. Thirdly, the defendant's actions were determined by the plaintiff's activity on social platforms, this being the source through which the information commented by the plaintiff was obtained together with other articles posted online, articles that were later reproduced and commented by the defendant. The central reason for the claim for damages, namely the main dissatisfaction of the plaintiff, is that the defendant used insults, obscene messages and trivialities against her in order to prove her bad faith, with the consequence of violating the right to privacy. Although the language used by the defendant was vulgar and licentious, the court (Bucharest Tribunal) took into account the fact that the European Court of Human Rights itself ruled in the sense that art. 10 of the Convention is applicable not only to "information" and "ideas" that are favorably accepted by the recipient or qualified as harmless or indifferent, but also to those that offend, shock or disturb, such a view being imposed by the demands of pluralism, tolerance and liberalism. Thus, the use of vulgar terms is not in itself decisive in the evaluation of some expressions, vulgarity can serve some stylistic purposes, style can be part of communication as a form of expression, benefiting from protection. In that regard, the Court held that, although the language used by the defendant was vulgar and offensive, the main purpose of her posts was to draw the public's attention to the services and products of blamable quality promoted by the plaintiff as an influencer. Thus, the language

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<sup>21</sup> Having as starting point the case of *Lingens vs. Austria*, Case No 12/1984, 8th July 1996, available at [www.echr.coe.int](http://www.echr.coe.int).

<sup>22</sup> See Case *Von Hannover vs. Germany* (no.1) no. 59320/00, 24th June 2004, available at [www.echr.coe.int](http://www.echr.coe.int).

<sup>23</sup> Civil Sentence no. 869 of March 22nd, 2021, of the Bucharest Tribunal unpublished. In fact, on the Instagram page used by the defendant, several instagram stories (photos and videos) were published referring to the plaintiff's person, which were accompanied by several comments of the defendant regarding the plaintiff's person and actions. The defendant also published on the you tube platform two recordings called episode 1 - Nobody stops me, and episode 2 Pinocchio asks for barbers. From the evidence administered, it appears that the defendant gave the plaintiff the nickname Pinocchio and under that name she ridiculed her and addressed offensive words to the plaintiff.

of the defendant cannot be subordinated to a single purpose of denigrating, and therefore there is no impetuous need to justify interference in the exercise of freedom of expression.

As regards the photographs in which the plaintiff appears, they were made public on the internet, which is why they no longer fall under the protection of the right to privacy, regardless of the context in which they were used, after being made public. The fact that these photographs were unrealistically and exaggeratedly distorted by the defendant, including by overlapping some drawings, cannot lead to the conclusion that they were intended to reflect or suggest reality, such a portrayal being a caricature by using satirical elements and falling within the scope of freedom of expression. In conclusion, in this case the court considered that the existence of an illicit action likely to cause damage cannot be retained and rejected the claim for damages.

Even if the newspaper benefits from the highest degree of protection, in one case<sup>24</sup>, the Court granted only 500 euros compensation. The writer qualified his published paper/work as a pamphlet and posted photos from a private party using funny words and phrases about the appearance of a public figure under the influence of alcohol. However, the court ruled that the public's right to be informed did not cover published photos and comments that exclusively concern the private lives of public figures. The author qualified his work as a pamphlet, but the court established that a simple warning like – „This work is a pamphlet” – could not be an exonerating cause of liability.

### 3. Conclusions

The prejudice retained in the solutions of the national courts is related to the violation of the right to dignity and to private life.<sup>25</sup> The right of every person to dignity, as protected by the Romanian Constitution and by Article 72 of the Civil Code, has both a subjective component consisting in the feeling of honor that each person has towards himself and an objective one, in relation to prestige, to the reputation that a person enjoys in a community. In general, the courts consider that the second component of this right is achieved through the statements and comments of the authors of online posts. Offensive posts infringe on the right to privacy of others, as long as the content of the statements concerns to a large extent strictly their private actions.

In assessing the amount of moral damages, the national courts, in the absence of legal evaluation criteria, start from the fact that the moral damages are granted as a sanction. They are compensations meant to penalize the perpetrator guilty of harm to privacy and, at the same time, are a severe warning to those who intend in the future to harm the reputation and dignity of others. Specifically, they are established by assessing, in relation to the negative consequences suffered by the victim physically and mentally, the importance of the damaged values, the extent to which these values were damaged, the intensity with which the consequences of the injury were perceived, the extent to which it was affected the professional and social family situation. In quantifying moral damages, these conditions are subject to reasonable assessment on an equitable basis, corresponding to the actual and real damage caused, so as not to lead to an unjust enrichment without just cause of the person claiming such moral damages.

The general criterion considered by the Romanian courts is the one adopted by the European Court of Human Rights in the *Tolstoy Miloslavsky* case<sup>26</sup>, respectively that of the degree of damage to the protected social values, the intensity and severity of the harm brought to them. According to the courts, the compensations must respect a principle of proportionality with the ascertained damage as well as a principle of equity following that the injured person will receive a fair satisfaction for the moral damage suffered, with compensatory effects without this being an excessive sanction for the perpetrator or an illicit or unjustified enrichment for the victim.

In addition, in the absence of a legislative criterion of assessment, the courts grant moral damages through national jurisprudence reporting, more precisely at the maximum or minimum level of damages granted by other courts in similar cases. This requires the court to make the applicability of the jurisprudential solutions for granting moral damages, in the case brought before the court, taking into account the concrete circumstances of the case. Unlike the material compensations, the extent of which is determined on direct evidence, the

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<sup>24</sup> Sentence no. 27099/2016 of the District Court 1 Bucharest, unpublished

<sup>25</sup> In one case, compensation in the amount of 500 euros was granted, the damage being quantified according to the number of views. A defamatory article was published on the author's blog page, being viewed by a number of 1436 people, out of which 846 would have accessed the like button. (Sentence no.21473 of 29 .11.2016 of the District 1 Court unpublished).

<sup>26</sup> See Case no. 8/1994, Decision no. of 13th July 1995, available at [www.echr.coe.int](http://www.echr.coe.int).



compensations for moral damages are established on the basis of the evaluation of the court, performed in each case. This is the reason why the compensations vary from 200 euros reaching 30,000 euros.<sup>27</sup>

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<sup>27</sup> See Civil decision no. 964 of April 22nd, 2021 of the High Court of Cassation and Justice. In this case, the court granted damages in the amount of 15,000 euros, considering that the statements made by the defendant and propagated in the online virtual environment, can be accessed further and do not represent information that would justify a public interest and be presented to the public without the consent of the person concerned. The statements are denigrating, defamatory, offensive, ironic and are insufficiently verified, regarding the personal life of the plaintiff, accusing her in an indirect way of drug use, which she would mask in the form of a cocktail of medications, aspects which have not been sufficiently verified and for the proof of which no pertinent evidence has been brought, some imputed facts having even a criminal connotation.