Оригинални научни рад

342.727:341.6(4)
doi:10.5937/zrpfns55-35291

Sanja V. Đajić
University of Novi Sad
Faculty of Law Novi Sad
S.Djajic@pf.uns.ac.rs

FREEDOM OF EXPRESSION, STRONG LANGUAGE AND PUBLIC SERVANTS*

"The freedom of expression cases before the European Court of Human Rights are mostly about rights not to be shut up."[1]

Abstract: *The aim of this contribution is to examine the scope of the freedom of expression of private persons in their encounters with public servants while the latter is on duty. Such situations are bound to happen quite often, sometimes accompanied with intemperance and strong language, so the relevance of the application of human rights to these encounters could potentially be significant. Discussion will be presented against the case-law of the European Court of Human Rights in order to assess whether and to what extent freedom of expression protects against public servants. Given the tendency of the Court to set different scrutiny tests for different categories of expression, and to contextualize expressions and limitations imposed, the ambition of this contribution is to establish whether the Court has distilled a special set of rules for the use of strong language against civil servants while performing public duties. While a regular balancing exercise can include a variety of legitimate interests that potentially can limit freedom of expression, one particular interest will be singled out, that is the right to privacy of public servants and how the balancing of the right to the reputation of public servants with the freedom of expression of private persons can play out.*

Keywords*: freedom of expression, European Court of Human Rights, Article 10 of the European Convention on Human Rights, civil servants, strong language, insult.*

---

* The author gratefully acknowledges the support of the University of Novi Sad Faculty of Law Project (*Legal Tradition and New Challenges in Law*). This article is the result of the research conducted on this Project.

[1] Karen Reid, "Words in the workplace", *Freedom of Expression – Essay in honour of Nicolas Bratza* (eds. Josep Casadevall et al.), Oisterwijk, The Netherlands: Wolf Legal Publishers, 2012, 383-390, 383.

INTRODUCTION

The idea behind this article is to examine the relationship between the freedom of expression of citizens, on one hand, and public servants (civil servants, public officers),[2] on the other, and which is the road less travelled in otherwise abundant takes on freedom of expression. While freedom of expression usually arises in the context of the press or the general public who politically criticise elected officials, this freedom can also be situated within the context of encounters between private individuals and state authorities even if such situations are not in the spotlight as the former. On the other hand, such situations are bound to happen quite often, sometimes accompanied with intemperance and strong language, so the relevance of the application of human rights to these encounters could potentially be significant. Thus, the aim of the article is to examine the existing case-law of the European Court of Human Rights on this particular issue, alone and in conjunction with other rights and freedoms, in order to assess whether and to what extent freedom of expression protects against public servants. As this is a large group of persons who do not belong to the special category of politicians and public figures, and who do not have all possible instruments for the protection of their privacy or reputation as the latter, it would be illuminating to see how the balancing between the right to privacy and to the freedom of expression has been evolving.

The article will begin with the overview of the case-law of the European Court of Human Rights on freedom of expression cases involving public servants. The second part will address whether and to what extent freedom of expression provides protection against public servants and whether the existing case-law has distilled a separate category of expression subject to special rules. The third part will place the problem in a broader context of balancing between freedom of expression and right to privacy, or more precisely, between the freedom of expression and the right to reputation of public servants. This particular dichotomy is thus to be discussed from the perspective of the relationship between the right to the protection of dignity of public servants and the right of the public to speak to and about lower levels of state authority.

---

[2] Expressions "public servants", "civil servants" and "public officers" will be used interchangeably throughout the article as they denote in most general terms government employees other than those appointed or elected. This is because different terms are used in various national legal systems so in order to avoid restrictions which might arise due to the exclusive use of one particular expression, all terms encompassing specified category of government employees will be used. In addition, the European Court of Human Rights seems to use expressions "public servants" and "civil servants" interchangeably.

EUROPEAN COURT OF HUMAN RIGHTS CASE-LAW ON FREEDOM OF EXPRESSION IN MATTERS INVOLVING ENCOUNTERS WITH PUBLIC SERVANTS

The freedom of expression envisaged in Article 10 of the European Convention on Human Rights (ECHR)[3] has been one of the cornerstones of the human rights protection established by the Strasbourg system.[4] This human right has been deeply embedded in the liberal doctrine and national legal traditions of Member States of the Council of Europe, so parliamentary democracies are difficult to be imagined without individual freedoms to express opinion in a variety of circumstances. It has also been recognized as a human right by a number of other international human rights instruments.

Article 10 (Freedom of expression) of the ECHR reads as follows:

1. 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.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests 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.

Therefore, freedom of expression in all its varieties is the entitlement guaranteed by paragraph 1 of Article 10 which still can be limited under the conditions set forth in paragraph 2 of the same provision. However, there is a presumption in favour of freedom of expression.[5] The usual approach of the ECtHR is to scrutinize

---

[3] Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome, Nov. 4, 1950, effective Sept. 3, 1953, 213 U.N.T.S 222, as amended by Protocol No. 11, ETS No. 155, entered into force on 1 November 1998 (hereinafter ECHR or Convention).

[4] "Freedom of expression has been described as the touchstone of all rights…. It is vital freedom for development, the functioning of democracy, and modern economies."- Kevin Boyle, Sangeeta Shah, "Thought, Expression, Association, and Assembly", *International Human Rights Law* (eds. Daniel Moeckli et al.), Oxford University Press: Oxford, 2010, 266.

[5] "The balancing, therefore, starts with the presumption in favor of freedom of expression, the exceptions to which must be narrowly construed." – Eric Barendt, *Freedom of Speech*, Oxford University Press: Oxford, 1985, 65.

whether the expression in question can come under the scope of Article 10[6] and then to proceed with an analysis of the second paragraph of Article 10, which are the conditions for lawful limitation of the freedom. This analysis requires answers to questions whether a limitation has been prescribed by law and pursued a legitimate aim, and whether such limitation was necessary in a democratic society which requires the application of the so-called proportionality test in assessing if there was a less intrusive way to protect a legitimate aim without unnecessarily limiting the right to speech.[7]

While it is clear that the issue of expression will more likely appear within the context of political debate and the freedom of the press, this still does not exclude a number of diverse situations in which freedom of expression can protect speech or other manifestations of one's opinion and belief. The relevance and recognition of different facets of freedom of expression have been amply proven by the case-law of the Strasbourg Court. The Court's landmark decisions on freedom of expression in democratic societies have become famous and its findings on the nature and relevance of expression have resonated in a number of the Court's decisions:

> "In this connection, the Court has to recall that freedom of expression, as secured in paragraph 1 of Article 10 (art. 10-1), constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment. Subject to paragraph 2 (art. 10-2), 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. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'."[8]

---

[6] The ECtHR can dismiss the claim on the basis that particular type of expression does not fall under the scope of Article 10. See, e.g. *Garaudy v. France*, App. no. 65831/01, Decision of 24 June 2003; *Norwood v. The United Kingdom*, App. no. 23131/03, Decision of 16 November 2004; *Witzsch v. Germany* (no. 2), App. no. 7485/03, Decision of 13 December 2005.

[7] General principles applicable to limitations: "Legality: any limitation on a freedom must be set down or prescribed in law. A restriction cannot be legitimate where it is the arbitrary whim of an official. National law must set out the ground of restriction in clear and precise terms. Legitimate aim: the interference or restriction must follow a legitimate purpose, that is, be based on one of the exhaustive grounds of limitation listed in the international standards which define the freedom. Proportionality: the restriction must be 'necessary' in the sense that there is 'a pressing social need' for it and that any measure taken in the minimum required to achieve the purpose of the limitation in a democratic society. Presumption of freedom: freedom is the rule, its limitation is the exception. … The onus is on the authorities in the particular case to show that it is legitimate to restrict it." – K. Boyle, S. Shah, *op. cit*., 258.

[8] *Lingens v. Austria*, App. no. 9815/82, Judgment of 8 July 1986, para. 41. (This particular phrase has been used in around 300 judgments of the Court).

An exchange of ideas and information seems to be of the utmost importance in cases involving so-called political speech which includes politicians and the press,[9] public debate of a range of actors on a variety of issues,[10] broad public discussions on issues for society as a whole,[11] and so on. A common approach to political speech has been to limit the margin of appreciation of states in order to liberate political speech and the press from different limitations. There has been a general understanding that political expression plays a central role in the operation of Article 10 of the Convention and that the limits of acceptable criticism are wider in relation to political debate.[12] However, freedom of expression cannot be restricted to the relationship between politicians and press, or politicians themselves. Apart from political expression, the Court also recognized other forms of protected expressions, such as commercial,[13] academic,[14] scientific, broadcasting,[15] artistic,[16] and they all fall within the ambit of Article 10.

---

[9] European Court of Human Rights, *Guide on Article 10 of the European Convention on Human Rights – Article 10*, Council of Europe, 2021, para. 12.

[10] *Jerusalem v. Austria*, App. no. 26958/95, Judgment of 27 February 2001, para. 38.

[11] *Toranzo Gomez v. Spain*, App. no. 26922/14, Judgment of 20 November 2018, para. 64; *Lewandowska-Malec v. Poland*, App. no. 39660/07, Judgment of 18 September 2012, para. 70; *Monnat v. Switzerland*, App. no. 73604/01, Judgment of 21 December 2006, para. 70.

[12] Dominika Bychawska-Siniarska, *Protecting the Right to Freedom of Expression under the European Convention on Human Rights*, Council of Europe: Strasbourg, 2017, 63.

[13] *Markt Intern Vergal GmbH and Klaus Beermann v. Germany*, App. no. 10572, Judgment of 20 November 2009; *Krone Verlag GmbH & Co. KG v. Austria* (no. 3), App. no. *39069/97*, Judgment of 11 December 2003. See also: Maya Hertig Randall, "Commercial Speech under the European Convention on Human Rights: Subordinate or Equal," *Human Rights Law Review*, no. 1/2006, 53-86.

[14] "We submit that in determining whether 'speech' has an 'academic element' it is necessary to establish: (a) whether the person making the speech can be considered an academic; (b) whether that person's public comments or utterances fall within the sphere of his or her research; and (c) whether that person's statements amount to conclusions or opinions based on his or her professional expertise and competence. These conditions being satisfied, an impugned statement must enjoy the utmost protection under Article 10, as indicated in paragraph 6 above. Where and how (*inter alia*, in what form of publication or to what audience) the "speech" was given or was otherwise made public is a secondary, auxiliary and often not decisive factor." – Joint Concurring Opinion of Judges Sajó, Vučinić and Kūris in *Mustafa Erdoğan and Others v. Turkey*, App. nos. 346/04 and 39779/04, Judgment of 27 May 2014.

Also: *Sorguç v. Turkey*, App. no. 17089/03, Judgment 23 June 2009, *Sapan v. Turkey*, App. no. 44102/04, Judgment of 8 June 2010; *Mustafa Perinçek v. Switzerland*, App. no. 27510/08, Judgment of 15 October 2015.

[15] *Sigma Radio Television Ltd v. Cyprus*, App. nos. 32181/04 and 35122/05, Judgment of 21 July 2011.

[16] *Müller and Others v. Switzerland*, App. no. 10737/*84*, Judgment 24 May 1988; for general discussion on the EctHR treatment of artistic freedom of expression, see Eleni Polymenopoulou, "Does One Swallow Make a Spring? Artistic and Literary Freedom at the European Court of Human Rights", *Human Rights Law Review*, 2016, 16, 511–539.

What can be different is the proportionality test which can depend on the categorisation of expression to be protected given the relevance of the exchange of information and ideas, on one hand, and other prevailing interests that can expand margin of appreciation of states and thereby expand limitations of the freedom, on the other. Article 10 provides, unlike in other rights enshrined in the Convention, that freedom of expression carries with it duties and responsibilities, which expands legitimate considerations for limiting the freedom. However, all these considerations highly depend on the context within which it has been exercised. Therefore, freedom of expression will always be subject to the balancing test and will depend on the context where the expression took place.

Context discussed in this article embraces situations of encounters of private persons with civil servants acting in an official capacity. These encounters tend to happen quite often and potentially can involve a significant number of participants not only because they involve private persons that outnumber categories of high-profile public persons and politicians but also because the number of civil servants equally outnumber the former group. These are common situations which may involve daily run-ins with police, law enforcement officers, inspectors and similar categories of public servants which dispense governmental and public powers and commonly with the right to use force. Given that strong language might easily pervade in verbal encounters discussed herein it is useful to be reminded of the relevance of context for the assessment of freedom of expression in relation to insulting language: "The context of an insult can be distilled into seven factors: (i) what was said, (ii) who said it and to whom, (iii) how was it said, (iv) when was it said, (v) where it was said, (vi) what intent the speaker had, and (vii) what impact the statement had."[17]

Janowski v. Poland[18] seems to be the first Court's case where the issue was whether freedom of expression covers a verbal encounter between individuals and civil servants acting in their official capacity.[19] In *Janowski* the Grand Chamber analysed whether the verbal attack of the applicant against two municipal guards warranted a fine issued against the applicant in a criminal proceeding. The criminal offense for which the applicant was fined was the prohibition to hinder civil servants in performing their duties, which was the result of two insulting words ("oafs" and "dumb") he used

[17] Amal Clooney, Philippa Webb, "The Right to Insult in International Law", *Columbia Human Rights Law*, 2/2017, 1-55, at 25.

[18] *Janowski v. Poland*, App. no. 25716/94, Grand Chamber Judgment of 21 January 1999.

[19] This was the case brought under the old system where the application was first entertained by the Commission which found a breach of Article 10 of the Convention. – *Ibid*., paras. 17, 21.

against two municipal guards.[20] As in other cases, the Court here also undertook a step-by-step balancing test: it first confirmed that the criminal conviction for verbal attack against civil servants had been interference with the applicant's guaranteed right,[21] which was the conclusion that eventually allowed for subsuming the verbal exchange with civil servants under Article 10. Then the Court examined whether the interference was prescribed by law[22] and whether it pursued a legitimate aim that is to be found in paragraph 2 of Article 10. As to the latter, the Court noted that Poland argued two separate legitimate aims: prevention of disorder and "protection of the reputation and the rights of the municipal guards as the second legitimate aim."[23] Notably, the Court accepted only the prevention of disorder as a legitimate aim in this case.[24] As the final step, the Court examined the standard "necessary in a democratic society" which amounts to a proportionality test, i.e. whether there was a pressing social need that could justify the limitation of the applicant's freedom of expression and whether national authorities adduced relevant and sufficient reasons to justify the interference.[25]

While the Court eventually found that there was no breach of Article 10, thereby reversing the Commission's decision, it still drew important conclusions. The Court agreed with the Commission that civil servants acting in official capacity are subject to wider limits of acceptable criticism than private individuals, but not to the same extent as politicians. The reason which presumably led the Court to conclude that civil servants exercising their duties find themselves somewhere between private individuals and politicians is the public confidence which civil servants should enjoy in order to be successful in performing their duties.[26] The Court also noted that the applicant insulted municipal guards during an incident which took place in a square,[27] a public place, but also that the guards were trained in how to respond to such language.[28] For the Court, the national authorities provided relevant and sufficient reasons for limiting the freedom of expression of the applicant especially given the fact that his criminal conviction had been significantly reduced and was likely to be quashed which left the

[20] *Ibid*., para. 14.
[21] *Ibid*., para. 22.
[22] *Ibid*, para. 24.
[23] *Ibid*., para. 25.
[24] *Ibid*., para. 26.
[25] *Ibid*., paras. 30-31.
[26] *Ibid*., para. 33.
[27] *Ibid*., para. 32
[28] *Ibid*., para. 34.

respondent State within the legitimate margin of appreciation.[29] Notably, it was a majority judgment where as many as five judges dissented with the view that there was a breach of Article 10 because two insulting words could not provoke public disorder. Therefore, no pressing social need for punishing the applicant existed, but also because national authorities were left with too wide a discretion in punishing verbal insults as a criminal offense.[30]

Despite the fact that the *Janowski* case upheld the limitations of freedom of expression in relation to the use of insulting words against civil servants, it still stands as an important decision for controlling punishments of private individuals for strong language used in front of or against public officers. The rationale of *Janowski* is that a verbal exchange between a private individual and civil servant falls within the ambit of Article 10, but also that civil servants are presumed to have been trained to handle such situations.

In addition, the Court rejected the argument according to which criminal conviction was justified as a measure for the protection of civil servants' reputation – the criminal sanction was acceptable for the protection of public order. Finally, the Court manifestly assessed the character of the sanction against the legitimate aim pursued, i.e. there was solely a fine that was likely to be removed. In addition, dissenting judges were sensitive to factual surroundings that prompted the applicant to use two criminalized words and labelled the given situation as one of "verbal intemperance",[31] "banal discussion with municipal guards",[32] "spontaneous and lively discussion",[33] "lively exchange",[34] or "sense of frustration"[35].

The ECtHR used *Janowski* in subsequent cases when dealing with similar issues and as support for a variety of conclusions reached therein.[36] For example, the case *Yankov v. Bulgaria*[37] relates to, inter alia, disciplinary punishment of a detainee for insulting officials in the draft manuscript of a book found by wards during the search of the applicant's cell. Pursuant to regulations adopted on the basis of legislation on execution of punishments, the prison authorities punished the applicant with disciplinary measure of a seven-day confinement. The Court

---

[29] *Ibid*., para. 35.

[30] Dissenting opinions of Judges Mr Wildhaber, Sir Nicholas Bratza, Mr Rozakis, Mr Bonello, Mr Casadevall.

[31] Dissenting opinion of Mr Bonello, at 18.

[32] Dissenting opinion of Mr. Casadevall, at 20.

[33] Dissenting opinion of Mr. Wildhaber, at 13.

[34] Dissenting opinion of Sir Nicholas Bratza, at 16.

[35] *Ibid*.

[36] According to the HUDOC database Janowski was invoked by the Court in 102 cases. In 71 cases there was a violation of Article 10 of the ECHR. See: http://hudoc.echr.coe.int/eng#{"fulltext":["\"JANOWSKI v. POLAND\""],"languageisocode":["ENG"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"]}. (accessed on 23 November 2021).

[37] *Yankov v. Bulgaria*, App. no. 39084/97, Judgment of 11 December 2003.

found violation of Article 10 of the Convention for various reasons, from the fact that the insults were not disseminated by Yankov, and that the handful of police officers who had read the manuscript could not amount to 'public',[38] to the fact that "civil servants have a duty to exercise their powers by reference to professional considerations only, without being unduly influenced by personal feelings. The need to ensure that civil servants enjoy public confidence in conditions free of undue perturbation can justify an interference with the freedom of expression only where there is a real threat in this respect."[39] Therefore, despite the fact that the applicant used expressions for describing police and prison wards, such as "well-fed idlers", "simple villagers", "a provincial parvenu" and "powerful unscrupulous people",[40] the Court, while contextualizing as always, tipped the balance in favour of freedom of expression.

While the majority of decisions invoking *Janowski* discussed the freedom of the press in relation to actions of civil servants, we shall here limit the analysis to those cases that considered the issues that were at the heart of the *Janowski* judgment, such as the encounter between private persons and public officers outside media context, which are relevant for our discussion. In *Raichinov v. Bulgaria*[41] the applicant was criminally convicted and fined for using insulting words against the deputy public prosecutor during the judicial council meeting. The Court found that there was a breach of Article 10 mostly because the incident happened during the meeting where only 25 members of the judicial council were present. Since the public was not involved, the Court found that the remarks were made before a limited audience and that the negative impact, if any, was quite limited.[42] In addition, the Court observed that this remark did not hinder the insulted public official from performing his duties so that grounds for limiting freedom of expression could not be invoked.[43] The Court also thought that a criminal conviction as such was too harsh and that a civil remedy could have been used instead,[44] which is the criterion relevant for the proportionality test.[45]

---

[38] *Ibid*., para. 141.

[39] *Ibid*., para. 142.

[40] *Ibid*., paras. 66 and 136.

[41] *Raichinov v. Bulgaria*, App. no. 47579/99, Judgment of 20 April 2006.

[42] *Ibid*., para. 48.

[43] "However, the need to ensure that civil servants enjoy public confidence in such conditions can justify an interference with the freedom of expression only where there is a real threat in this respect." – *Ibid*.

[44] "However, the assessment of the proportionality of an interference with the rights protected thereby will in many cases depend on whether the authorities could have resorted to means other than a criminal penalty, such as civil and disciplinary remedies." – *Ibid*., para. 50.

[45] "However, the assessment of the proportionality of an interference with the rights protected thereby will in many cases depend on whether the authorities could have resorted to means other than a criminal penalty, such as civil and disciplinary remedies." – *Ibid*., para. 50.

There were similar considerations in *Kazakov v Russia*[46] and *Bezymyannyy v Russia*[47] where violations of freedom of expression were found because of the limited effect of the insulting words (letter sent to the military commander and public prosecutor respectively) even though there was only a civil remedy awarded against the applicant in favour of a military officer and a judge, so "the defamation proceedings resulted in an excessive and disproportionate burden being placed on the applicant."[48] In a similar private letter related defamation case, the Court found the breach of Article 10 because "the letter did not pose a threat to the Academy officials' enjoyment of public confidence, as its contents were not made known to the general public and no press or other form of publicity was involved."[49] Therefore, the lack of an adequate audience seems to necessarily imply that reputation as such cannot be tarnished[50] regardless of the words used: in *Skalka v Poland* extreme derogatory words, addressed in a letter to the high judicial authority, were not seen as sufficient to justify criminal sanction on the basis of insulting state authorities.[51] The addressees of the insulting words were unknown to the applicant and no genuine personal relationship actually existed, so the Court, while acknowledging that words were only insults and not criticism,[52] went on to conclude that the applicants' words were those of "anger and frustration."[53] The Court found that imprisonment of eight months was too severe to justify the interference with the applicant's freedom of expression.[54]

In *Mariapori v. Finland*[55] the applicant was punished for making statements, in the capacity of an expert witness, about tax fraud allegedly committed by tax

[46] *Kazakov v. Russia*, App. no. 1758/02, Judgment of 18 December 2008.

[47] *Bezymyannyy v Russia*, App. no. 10941/03, Judgment of 8 April 2010.

[48] *Kazakov*, para. 31, *Bezymyannyy*, para. 44.

[49] *Syrik v. Ukraine*, App. no. 6428/07, Judgment of 31 March 2001, para. 45.

[50] As explicitly noted in another similar case: "The fact that they were never made public is relevant, as the case-law indicates, to the assessment of the proportionality of the interference under Article 10 of the Convention …Their negative impact, if any, on the officers' reputation was thus quite limited." – *Sharanov and Palfreeman v. Bulgaria*, App. nos. 35365/12 & 69125/12, Judgment of 21 July 2016.

The lack of public was crucial for Court's finding against defamatory character of the used words. E.g. *Gregoridades v. Greece*, App. no. 24348/94, Judgment of 25 November 1997 (GC); *Sofranschi v. Moldova*, App. no. 34690/05, Judgment of 21 December 2010; et al.

[51] "That letter had been aimed at insulting an unidentified judge of the Penitentiary Division and all judges of the Katowice Regional Court. The applicant had referred to these judges as "irresponsible clowns". Furthermore, he had referred to an unidentified judge of that court in a particularly insulting manner, labelling him several times "a small-time cretin" ("*kretynek")*, "a clown" ("*błazen*"), "an illiterate" ("*analfabeta*"), "a fool" ("*dureń*"), "such a limited individual" ("*tego rodzaju ograniczone indywiduum*"), "outstanding cretin" ("*spotęgowany kretyn*")." – *Skałka v. Poland*, App. no. *43425/98*, Judgment of 27 May 2003, para. 26.

[52] *Ibid*., paras. 36.

[53] *Ibid*., para. 37.

[54] *Ibid*., para. 42.

[55] *Mariapori v. Finland*, App. no. 37751/07, Judgment of 6 July 2010.

inspectors, that was referenced later on in a book she published about taxation. She was sentenced to parole and ordered to pay damages to the tax inspectors. The ECtHR found that: "[a]lthough the national authorities' interference with the applicant's right to freedom of expression may have been justified by the concern to strike the balance between the various competing interests at stake, the criminal sanction and the accompanying obligation to pay compensation imposed on her by the national courts were manifestly disproportionate in their nature and severity, having regard to the legitimate aim pursued by the applicant's conviction for defamation."[56] Although the case before domestic courts was presented to the public both by the media and the applicant's book, the Court reverted to *Janowski* to clarify the position of civil servants who could be reasonably expected to tolerate certain statements in certain situations. In this case it was the fact that the applicant acted as a witness and as such was expected to give her view of the facts.[57]

In *Marinova and Others v. Bulgaria*,[58] five applicants "alleged that their conviction and punishment for making complaints against public officials, coupled with the orders to pay damages to those officials, were in breach of their right to freedom of expression."[59] All applicants complained about public servants to their superiors though in different contexts: for acts of teachers to the school headmaster, and for acts of police officers to their superiors. After all their complaints had been dismissed the applicants were convicted for defaming public officers and additionally were ordered to pay damages to these officers for reputational harm. By joining the applications, the Court manifestly identified the judicial pattern in Bulgaria and decided to deal with it in a single judgment. The Court here ruled that both criminal sanctions and fines ordered on that basis should be assessed together with damages awarded directly to public servants – in other words, both criminal and civil sanctions should be viewed together as penalty and interference with the freedom of expression.[60] The Court added that legitimate aims pursued by the interference with freedom of expression differ with respect to justification of the impugned measure where the protection of reputation of others provide

[56] *Ibid*., para. 68.

[57] *Ibid*., para. 66.

[58] *Marinova and Others v. Bulgaria*, App. nos. 33502/07, 30599/10, 8241/11 and 61863/11, Judgment of 12 July 2016 (All applications were joined under Rule 42 § 1 of the Rules of Court. – para. 68 of the Judgment).

[59] *Ibid*., para. 3.

[60] "The judgments against Mrs Marinova, Mr Zlatanov and Mr Findulov, finding them guilty of defamation, subjecting them to fines – and in the case of Mr Findulov also to a public reprimand – and ordering them to pay damages (see paragraphs 10, 18 and 29 above), constituted an "interference", in the form of a "penalty", with their right to freedom of expression under Article 10 of the Convention. Such interference will only be compatible with that Article if it was "prescribed by law" and was "necessary in a democratic society" for one of the aims set out in its second paragraph." – *Ibid*., para. 79.

lesser justification than, for example, maintenance of the authority of judiciary.[61] The Court finally found the breach of Article 10 given that interference was not proportional to the legitimate aim pursued.

What is also relevant to this discussion is whether any vulgar language automatically amounts to an insult which in turn can serve as a legitimate aim for limiting freedom of expression by criminal or civil sanctions. The Court did have the opportunity to entertain the character of expressions which are on their face vulgar but the context within which they are used can significantly change their meaning and relevance for evaluating their insulting character.[62] That was as early as *Janowski* case where dissenting judges stressed the context in which insulting words were spoken as "verbal intemperance" or as the result of "frustration". In subsequent cases the Court took into consideration whether the punished applicants acted in bad faith.[63] In *Gavrilovici v. Moldova* the Court noted that the applicant was in a state of despair and anger, and his words were uttered in the course of an oral exchange and not in writing after careful consideration.[64] Therefore "the effect of his speech must in the circumstances have been minimal, especially given that all those present were well aware of the tensions between the applicant and I.M. and had heard the statements which had provoked the applicant's reaction."[65] Consequently in *Gavrilovici* the five-day prison term could not be justified against this background especially because the domestic court failed to "examine the context in which the applicant's alleged statement had been made."[66]

FREEDOM OF EXPRESSION VIS-À-VIS PUBLIC SERVANTS: A SPECIAL CATEGORY OF EXPRESSION?

In order for the freedom of expression to be applicable in an individual case, there should be 'expression' falling within the scope of Article 10. As illustrated by the Strasbourg jurisprudence, freedom of expression protects a variety of forms

---

[61] "Moreover, the aim sought to be achieved by the applicants' convictions was not the maintenance of the authority of the judiciary, which may supply greater justification for such measures, but the reputation of the public officials concerned." – *Ibid*., para. 91 (references omitted)

[62] Apart from the situations entertained herein, there are others where insulting language can indeed be tolerable on the basis of freedom of artistic expression or as a style of satire (E.g. *Grebneva and Alisimchik v. Russia*, App. no. 8918/05, Judgment of 22 November 2016).

[63] *Savitchi v. Moldova*, App. no. 11039/02, Judgment of 11 October 2005; *Kazakov v. Russia*, App. no. 1758/02, Judgment of 18 December 2008; *Marin Kostov v. Bulgaria*, App. no. 13801/07, Judgment of 24 July 2012; *Marinova and Others v. Bulgaria*, App. nos. 33502/07, 30599/10, 8241/11 and 61863/11, Judgment of 12 July 2016.

[64] *Gavrilovici v. Moldova*, App. no. 25464/05, Judgment of 15 December 2009, para. 58.

[65] *Ibid*., para. 59.

[66] *Ibid*., para. 61.

and types of expression, from political to artistic and commercial. ECtHR has also recognized that critique targeting the work of public servants on duty is protected by Article 10 of the ECHR. However, to be treated as "expression" eligible for protection it is not always necessary that such expression must at all times have the form of critique. It is the context and form which may attract the protection despite its content and substance. The commentaries of the Convention and Court's case-law demonstrate that such context and the requirement of balancing equally between freedom and a variety of legitimate aims justifying restrictions of the former relates also to the functioning of the civil service.[67]

In *Janowski* and in cases that followed (and in few cases that preceded it[68]), it was the Grand Chamber that did not outrightly dismiss the possibility to engage in Article 10 discussion despite the use of vulgar language outside political debate. The Court could have found that the situation in *Janowski* was outside the ambit of freedom of expression and go for incompatibility *ratione materiae* with the provision of the Convention.[69] However, in this and other cases the indecency of expression did not disqualify it from the protection. The Court called some quite derogatory words (infidel cops, lowbrows) as a "provocative metaphor" and "emotional appeal".[70]

Recently the Court clarified that situations of close encounters and verbal protests squarely fall under the concept of expression within the meaning of Article 10. In *Skolka v. Poland*, where national courts issued a custodial penalty to the applicant for shouting slogans in the courtroom, the Court found the breach of Article 10 but also clarified the scope of protected speech: "In its extensive case-law on freedom of expression, the Court has on many occasions held that protests, such as these taking the form of physically impeding certain activities, can constitute expressions of opinion within the meaning of Article 10 and that the arrest and detention of protesters can constitute interference with the right to

---

[67] "The Court will attempt to strike a fair balance between the rights of the individual and the interests of the state in ensuring the functioning of the civil service." – Phillip Leach, *Taking a Case to the European Court of Human Rights,* 3rd ed., Oxford: Oxford University Press, 2011, 366.

[68] E.g. *Grigoriades v. Greece*, App. no. 24348/94, Judgment of the Grand Chamber of 25 November 1997. The application was first submitted to the Commission which found violation of Article 10 of the Convention. The case was subsequently referred to the Court's Chamber which relinquished its jurisdiction to the Grand Chamber. The Grand Chambered also found violation of Article 10. The case revolved around the criminal sanction for insult against armed forces that was allegedly present in the applicant's letter to military authorities regarding accusations of the conduct of applicant's superiors during his military service. The letter contained strong and intemperate remarks.

[69] As confirmed in a recent case law: "The Court reiterates that offensive language may fall outside the protection of freedom of expression if it amounts to wanton denigration; but the use of vulgar phrases in itself is not decisive in the assessment of an offensive expression." – *Savva Terentyev v. Russia*, App. no. 10692/09, Judgment of 28 August 2018, para. 68.

[70] *Savva Terentyev v. Russia*, para. 72.

freedom of expression."[71] In *Savva Teryentsev v. Russia* the Court found the breach of Article 10 despite quite vulgar and offensive language directed to the police because: "it was rather the applicant's emotional reaction to what he saw as an instance of an abusive conduct of the police personnel."[72] Moreover, the situations characterized by oral exchange of arguments, as opposed to written statements, where individuals have no benefit of having time to reflect on their communication, seem to tip the balance in favour of free speech.[73] In all of the analysed cases harsh words were addressed to civil servants on duty as a reaction to dissatisfaction with the situation and sometimes were just expressions of anger, despair and frustration.[74] Therefore, reactive statements made by private individuals targeting civil servants, usually police officers on duty, are 'expressions' protected by the right to freedom of expression.

The ECtHR has repeatedly refuted formalism and required the assessment of the whole context instead of a semantic exercise, precisely in cases dealing with offensive and insulting language addressed to state authorities.[75] If derogatory, defamatory and indecent words and expressions were not uttered with premeditated plan to offend police forces either in their public or private capacity but were rather the reaction to situation and expressions of fear and despair, this is the context within which these words are to be assessed. In *Yankov* case the Court observed that persons in custody are particularly vulnerable so the punishment for allegedly false accusations requires particularly solid justification in order to be considered "necessary in a democratic society".[76]

---

[71] *Slomka v. Poland*, App. no. 68924/12, Judgment of 6 December 2018, para. 58.

[72] *Savva Terentyev v. Russia*, para. 86.

[73] "It should also be observed that the applicant's remark, while liable to be construed as a serious moral reproach, was apparently made in the course of an oral exchange and not in writing, after careful consideration." – *Raichinov v. Bulgaria,* para. 51.

[74] *Skalka v. Poland*, para. 37.

[75] "In the present case, the domestic decisions in both sets of proceedings cited the expressions which the courts regarded as contemptuous, without giving the context in which they had been made. They seem to have relied solely on the semantic meaning of the words and phrases the applicant used. None of the courts explored the relation of the impugned statements to the facts of the case." – *Čeferin v. Slovenia*, App. no. 40975/08*,* Judgment of 16 January 2018, para. 62.

Also: "[T]he Court considers that the domestic courts in both sets of contempt of court proceedings, in their examination of the case, failed to put the applicant's remarks in the context and form in which they were expressed." – *Čeferin v. Slovenia*, App. no. 40975/08*,* Judgment of 16 January 2018, para. 55.

"Turning to the reasoning of the domestic courts, the Court observes that they focused on the nature of the wording used by the applicant, limiting their findings to the form and tenor of the speech. They did not try

to analyse the impugned statements in the context of the relevant discussion and to find out which idea they sought to impart." – *Savva Terentyev,* para. 82.

[76] *Yankov v. Bulgaria*, para. 134.

On the other hand, the Court is sensitive to the position of civil servants to the extent that their function and reputation as such indeed mandate protection. The rationale for this protection lies in legitimate concerns regarding the authority[77] of and public confidence in public service.[78] This finding goes hand in hand with understanding that civil servants are necessarily exposed to general public while performing their functions. Both *Janowski* and its followers root for the protection of civil servants to the extent greater than that for other public figures.

On the other hand, public servants are subject to higher limits of acceptable criticism as compared to private individuals.[79] The higher limits of acceptable criticism means a higher degree of tolerance for actions of private persons[80] which seems to be especially pertinent for security forces.[81] As noted by the ECtHR in *Janowski case*, police officers are trained how to respond to strong and impulsive language,[82] the proposition that was reaffirmed and elaborated in subsequent case-law: "In the Court's view, being a part of the security forces of the State, the police should display a particularly high degree of tolerance to offensive speech, unless such inflammatory speech is likely to provoke imminent unlawful actions in respect of their personnel and to expose them to a real risk of physical violence. It has only been in a very sensitive context of tension, armed conflict and the fight against terrorism or deadly prison riots that the Court has found that the relevant statements were likely to encourage violence capable of putting members of security forces at risk and thus accepted that the interference with such statements

---

[77] "It is a common ground between the parties that this interference was … in pursuit of a legitimate aim, namely the protection of the authority of and the public confidence in the judiciary." – *Slomka v. Poland*, para. 67.

[78] "In this connection, the Court has observed in several cases that it may be necessary to protect public servants from offensive, abusive and defamatory attacks which are calculated to affect them in the performance of their duties and to damage public confidence in them and the office they hold." – *Siryk v. Ukraine*, App. no.

6428/07, Judgment of 31 March 2011, para. 41 (The Court found that particular circumstances of the case did not disclose threat to public confidence in public officials because the letter's "contents were not made known to the general public and no press or other form of publicity was involved." The Court found breach of freedom of expression.)

[79] "The Court reiterates that civil servants acting in an official capacity are, like politicians, subject to wider limits of acceptable criticism. Admittedly those limits may in some circumstances be wider with regard to civil servants exercising their powers than in relation to private individuals. However, it cannot be said that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the same extent as politicians and should therefore be treated on an equal footing with the latter when it comes to the criticism of their actions." – *Mariapori v. Finland*, para. 56, *Nikula v. Finland*, App. no. 31611/96, Judgment of 21 March 2002, para. 48.

[80] *Raichinov v. Bulgaria*, para. 48; *Syrik v. Ukraine*, para. 45; *Lešnik v. Slovakia*, App. no. 35640/97, Judgment of 11 March 2003.

[81] *Savva Terentyev v. Russia*.

[82] *Janowski v. Poland*, para. 34.

was justified"[83] The limits of tolerance will be crossed "when it has been convincingly demonstrated that the persons concerned deliberately sought to harm the officials whose conduct they criticised while being aware that their allegations against those officials were false, and when the measures [against the persons concerned] are proportionate."[84]

Aims which can serve as legitimate aims for the limitation of expressions against civil servants, as provided for in the Convention and aired by the Court, include military discipline, national security,[85] public order,[86] authority of judiciary,[87] public confidence in public services,[88] reputation of the public service,[89] and reputation of public servants. While only the last one (reputation of public servants) serve to protect a clearly private interest, all others represent genuine public interests. This public/private interest distinction could potentially be illuminating for assessing the Court's take on freedom of expression in encounters between private individuals (as opposed to public figures or journalists) and civil servants (as opposed to public figures and politicians) and could mandate an additional discussion, especially because in all of the cases in which the Court accepted a protection of private interest of a public servant as a legitimate aim, in principle, always found, on the facts of the case, breach of Article 10 of the Convention. The reputation of public servants indeed seems to be the weaker ground for any limitation on freedom of expression.[90] In *Janowski v. Poland*, in which the Grand Chamber did not find a breach of freedom of expression, it was the protection of public order that served as a legitimate aim. The Grand Chamber refuted that the protection of the reputations of municipal guards in the incident could have served as a legitimate ground for limiting freedom of expression.[91]

An important aspect in the assessment in all these cases is to what extent the public gets involved because the negative effects of offensive speech highly depend on the existence and size of an audience witnessing the inflammatory vocabulary. The extent of dissemination precedes any qualification

---

[83] *Savva Terentyev v. Russia*, para. 77.

[84] *Marinova et al. v. Bulgaria*, para. 94.

[85] *Grigoridades v. Greece*.

[86] *Janowski v. Poland*.

[87] *Slomka v. Poland*.

[88] *Bezymyannyy v. Russia, Kazakov. Russia*.

[89] *Skalka v. Poland, Savva Terentyev.*

[90] "Moreover, the aim sought to be achieved by the applicants' convictions was not the maintenance of the authority of the judiciary, which may supply greater justification for such measures, but the reputation of the public officials concerned." – *Marinova et al. v. Bulgaria*, para. 91.

[91] *Janowski v. Poland*, paras. 25-26.

of the speech's consequences under any possible ground for interference.[92] Statements that are published, disseminated in the media and/or available to a wide audience are more likely to damage someone's reputation or affect other interests protected by paragraph 2 of Article 10. Conversely, a limited audience necessarily minimizes the negative effect of the speech. The latter situation can include both written and verbal comments, but the former, usually pursued as petitions or appeals to state authorities, will *per definitionem* exclude audience and the general public. In verbal encounters the Court found, for example, that 25 members of the judicial committee constituted "a limited audience, at a meeting held behind the closed door"[93]. The ECtHR referred to the requirement of the public when assessing the proportionality test in *Yankov* (only the police guards who read the impugned text),[94] *Skalka* ("It was not an open and overall attack on the authority of the judiciary, but an internal exchange of letters of which nobody of the public took notice."[95]) *Ceferin* (courtroom),[96] *Teryentsev* (blog with limited number of viewers).[97] As the Court explained: "Limited impact of the impugned statements is the most important aspect of its assessment of the proportionality of the interference."[98]

In addition, and as a separate requirement for justifying the punishment of the expression, is the procedural safeguards in cases involving freedom of expression, the lack of which can amount to breach of Article 10: "In the light of the shortcomings in the impugned procedure, the Court cannot consider that the restriction on the applicants' right to freedom of expression was accompanied by effective and adequate safeguards against abuse."[99]

Finally, the nature and severity of sanctions is the last step in deciding on the proportionality between state interference and an individual's freedom of expression: "Restrictions must not be overboard……[R]estrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst

[92] Proportionality test comprises the assessment of the form of dissemination: "The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination." – Human Rights Committee, *General Comment no. 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, 12 September 2011, para 34.

[93] *Raichinov v. Buglaria*, para. 48.

[94] *Yankov v. Bulgaria*.

[95] *Skalka v. Poland*, para. 42. Similarly in *Kazakov v. Russia*, para. 29; *Siryk v. Ukraine*, para. 45; *Marin Kostov v. Bulgaria*, para. 46; *Marinova et al. v. Bulgaria*.

[96] "Moreover, they were confined to the courtroom, as opposed to the criticism of a judge voiced in, for instance, the media." – *Čeferin v. Slovenia*, para. 54.

[97] "In such circumstances the Court considers that the potential of the applicant's comment to reach the public and thus to influence its opinion was very limited." – *Savva Terentyev*, para. 81.

[98] *Sofranschi v. Moldova*, App. no. 34690/05, Judgment of 21 December 2010.

[99] *Slomka v. Poland*, para. 69. Also, *Mariapori v. Finland*, para. 64; *Gavrilovici v. Moldova*, para. 61.

those which might achieve their protective function; they must be proportionate to the interest to be protected."[100] The European Court of Human Rights tends to see criminal and penal sanctions as the most severe interference with someone's freedom of expression: "imposing criminal sanctions on someone who exercises the right to freedom of expression can be considered compatible with Article 10 '… only in exceptional circumstances, notably where other fundamental rights have been seriously impaired …' (see, *mutatis mutandis*, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 115, ECHR 2004-XI)."[101] Consequently criminal punishments mandate particularly strong justifications to strike a balance through the proportionality test between the limitation of the freedom and attaining the legitimate aim. Limitations on freedom of expression are not limited to criminal or disciplinary measures but also include decisions on damages against applicants. Restrictions can include obligations to offer an apology or to retract defamatory statements. The combined effect of all restrictions imposed by decisions of state courts or other state authorities is measured in a single balancing test. From this perspective both criminal and civil sanctions, though seemingly distant and unrelated, are seen together as a single restrictive measure and as such evaluated against one's freedom.

Most of the cases dealing with freedom of expression against civil servants demonstrate that it is usually the proportionality test where the state measure is found to be too excessive to pass it. Criminal punishments which failed to pass the strict scrutiny test include, for example, eight months prison sentence for a criminal offence of insulting a state authority (in a strongly worded letter to supervising authority of the prison),[102] a five-days prison term for insulting a member of the regional administrative council,[103] a fine and a public reprimand for defaming a deputy public prosecutor at the judicial meeting,[104] 14-days in a solitary cell as a criminal sanction and disciplinary measure for insulting prison authorities in a letter to a public prosecutor,[105] 14 days in prison for contempt of court for shouting slogans in a courtroom,[106] insulting the police officer on duty by submitting a claim against him to his superiors.[107] Even a suspended prison sentence was found to be disproportionate to the legitimate aim because the nature of the criminal offence was too harsh and part of the punishment (a comment on the blog was qualified as a criminal offence of inciting hatred and enmity and

[100] Human Rights Committee, *General Comment no. 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, 12 September 2011, para 34.

[101] *Gavrilovici v. Moldova*, para. 60.

[102] *Skalka v. Poland*.

[103] *Gavrilovici v. Moldova*.

[104] *Raichinov v. Bulgaria*.

[105] *Marin Kostov v. Bulgaria*.

[106] *Slomka v. Poland*.

[107] *Findulov and Zlatanov v. Bulgaria* (case *Marinova, Findulov and Zlatanov v. Bulgaria*).

humiliating the dignity of a group of persons on the grounds of their membership of a social group, that "social group" being the police forces).[108] However, decisions on damages awarded to civil servants in their private capacity represent restrictions on freedom of expression and are as such subject to the balancing test. The amount of damages can be decisive, alone[109] or in combination with other civil remedies awarded, such as an apology and retraction together with a moderate sum awarded as damages.[110] Finally, the combination of criminal and civil sanctions is most likely to distort the balance and lead the Court to conclude that such a combination constitute disproportional and severe punishment which is not necessary in a democratic society.[111] Therefore, harsh sanctioning measured against the harm caused by derogatory speech which qualified for the protection, will almost certainly lead to the violation of Article 10 regardless of the pursued legitimate aim. In case the legitimate aim is the reputation of a public servant, this is nearly certain. Given the special case of the concept of the private reputation of public servants, we shall now turn to discuss its meaning and scope within the law of the European Convention on Human Rights.

PUBLIC SERVANTS AND RIGHT TO PRIVACY – A SPECIAL CASE FOR THE REPUTATION OF PUBLIC SERVANTS?

In the majority of the freedom of expression cases discussed above the issue was whether the reputation of public servants was harmed by derogatory expressions. The Court did not exclude the possibility of reputational harm to public servants but this issue was somehow entangled with other considerations not entirely compatible with the concept of privacy, such as public order or the protection of the integrity of a public function. However, in none of the cases where the reputation of public servants was accepted as a legitimate aim the Court found the protection of reputation proportional to the limitation of freedom of expression. In sum, in all these cases freedom of expression was found to be breached. This prompts one to look at the problem from the perspective of reputational harm. Reframing the issue leads to the question: what is considered to be a protected reputation of a public servant? This requires an examination of several linear issues: the concept of reputation in the law of the European Convention on Human Rights, how it operates for the protection of public servants in terms of their assumed obligation to tolerate public criticism, and their expected ability to handle the vigorous behaviour of unruly citizens.

[108] *Savva Terentyev v. Russia*.
[109] *Siryk v. Ukraine*.
[110] *Kazakov v. Russia, Bezymyanny v. Russia*.
[111] *Marinova et al. v. Buglaria, Mariapori v. Finland*.

Therefore, the answer requires the examination of how reputation is conceptualized as part of privacy in general, and how it can operate either as a limitation of the expression envisaged in Article 10(2) of the Convention or as a self-standing right and claim under Article 8. The first question involves the issue of proportionality while the second amounts to weighing between two equally valid human rights. In both cases the underlying issue is how to assess the concept of privacy of public servants given their position in the case law on freedom of expression.

Reputation is not expressly mentioned in Article 8 of the Convention which was expanded not before 2004 to include it within the ambit of right to privacy.[112] Once it was accepted by the Court as part and parcel of the privacy there has remained the issue of its conceptualization, a task that has turned out to be difficult. In the case of *Chauvy and Others v. France* the Court regarded the right to reputation as "a right which is protected by Article 8 of the Convention as part of the right to respect for private life."[113] However, in the case of *Karako v. Hungary*, the Court challenged the understanding that the "right to reputation" is part of right to privacy.[114] The Court started its analysis by distinguishing between personal integrity rights that fall under the "right to privacy" and qualified reputation as "a matter related primarily to financial interests or social status".[115] The Court concluded that reputation might come under Article 8 protection "mostly when the factual allegations were of such a seriously offensive nature that their publication had an inevitable direct effect on the applicant's private life" i.e. to undermine his personal integrity.[116] The evolving and not entirely consistent case law of the Strasbourg Court on "reputation" seems to have established the "seriousness threshold"[117] that needs to exist in order to attract the protection of one's reputation. In a seminal case on Article 8 and concept of reputation, *Axel Springer v. Germany*, the Grand Chamber confirmed the seriousness test for the protection of reputation within the right to privacy, as well as the need for balancing between values protected by Articles 8 and 10 of the Convention:

"… [T]he right to protection of reputation is a right which is protected by Article 8 of the Convention as part of the right to respect for private life … The concept of 'private life' is a broad term not susceptible to exhaustive definition, which covers the physical and psychological integrity of a person….In order for

---

[112] Tanya Aplin, Jason Bosland, "The uncertain landscape of Article 8 of the ECHR: the protection of reputation as a fundamental human right?", *Comparative Defamation and Privacy Law* (ed. Andrew T. Kenyon), Cambridge University Press, Cambridge 2016, 265-290, at 266.

[113] *Chauvy and Others v. France,* para 70.

[114] *Karako v. Hungary.*

[115] *Karako v. Hungary*, para 22.

[116] *Karako v. Hungary*, para 23.

[117] T. Aplin, J. Bosland, 276-278.

Article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life …When examining the necessity of an interference in a democratic society in the interests of the 'protection of the reputation or rights of others', the Court may be required to verify whether the domestic authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely, on the one hand, freedom of expression protected by Article 10 and, on the other, the right to respect for private life enshrined in Article 8."[118]

These cases demonstrate that reputation has become part of Article 8 protection and as such can be weighed against expression protected by Article 10, but they also demonstrate that reputation is not protected without certain qualifications.

Apart from these leading cases relevant for the conceptualisation of reputation in general, there are cases which dealt specifically with the reputation of public servants. In a very recent *Sağdıç v. Turkey* case, the applicant was a high-ranking officer in the armed forces who claimed a breach of his right to protect reputation before Turkish courts on account of several articles published in daily newspapers which accused him of the involvement in an alleged plan to overthrow the government. His claims before domestic courts were denied. The European Court, relying inter alia on *Janowski v. Poland* (freedom of expression case) qualified the applicant's position as the one of public servant, that being relevant for the assessment of margin of criticism public officials are expected to tolerate: "As for politicians, the limits of admissible criticism are wider for civil servants acting in the exercise of their official functions than for private individuals. However, it cannot be said that officials knowingly expose themselves to close scrutiny of their actions in the same manner as politicians."[119] As for reputation, the Court found that "For Article 8 to apply, the damage to reputation must reach a certain level of seriousness and have been carried out in such a way as to harm the personal enjoyment of the right to respect for private life."[120] Having noted that these articles represent an example of irresponsible journalism lacking veracity and good faith, The Court ultimately found there was a breach of the right to protect reputation as the Turkish courts failed to strike a balance between the freedom of expression and the right to the protection of privacy.

All the cases discussed herein in relation to protection of reputation, including the *Sağdıç v. Turkey*, dealt with claims of reputational harm that resulted from dissemination of damaging information in newspapers and media. Although these cases revolve around the dissemination of information to the general public or to

[118] *Axel Springer AG v. Germany*, Grand Chamber, Judgment of 7 February 2012, paras. 83-84.

[119] *Sağdıç v. Turkey*, App. no. 9142/16, Judgment of 9 February 2021, para. 33.

[120] *Ibid*., para. 25.

a considerable large audience, they are nevertheless useful for the issues discussed herein: reputation of public servants in face of someone's freedom of speech. While the reputation of public servants is protectable under Article 8 and can equally serve as an exception to Article 10, for it to be protected there is a double threshold to be reached. First, "damage to reputation must reach a certain level of seriousness and have been carried out in such a way as to harm the personal enjoyment of the right to respect for private life" and even if that happens public servants are expected to manifest a wider level of tolerance towards acceptable criticism while performing public functions. This medium scrutiny test for the protection of reputation of public servants is moderate compared to politicians, on one hand, and private citizens, on the other. Combined with the "seriousness threshold" standard which by itself could be difficult to meet for opening the door to Article 8 protection, it seems that it is actionable only in circumstances involving the audience, judged by existing case law which does not disclose other situations of more private settings. This 'moderate' level of protection of the reputation of public servants mirrors the understanding of reputation within paragraph 2 of Article 10 of the Convention.

CONCLUSION

The reputation of public servants has a limited protection for a variety of reasons which all depersonalize civil servants whilst performing public duties. It sounds nearly counterintuitive to protect the privacy of public servants, to protect the concept of self-esteem and the psychological integrity of a governmental post. However, the law does provide for this possibility but in circumstances which are more limited than one would expect. In other words, while it is certainly wise to be less vocal in encounters with civil servants and police officers, it seems that freedom of expression provides a contextualised defence for strong language face to face with governmental employees, especially if the limitation of the former is based on the protection of reputation of the civil servants.

REFERENCES

Literature

Aplin, Tanya, Jason Bosland, "The uncertain landscape of Article 8 of the ECHR: the protection of reputation as a fundamental human right?", *Comparative Defamation and Privacy Law* (ed. Andrew T. Kenyon), Cambridge University Press, Cambridge 2016, 265-290

Barendt, Eric, *Freedom of Speech*, Oxford University Press: Oxford, 1985

Boyle, Kevin, Sangeeta Shah, "Thought, Expression, Association, and Assembly", *International Human Rights Law* (eds. Daniel Moeckli et al.), Oxford University Press: Oxford, 2010

Bychawska-Siniarska, Dominika, *Protecting the Right to Freedom of Expression under the European Convention on Human Rights*, Council of Europe: Strasbourg, 2017

Clooney, Amal, Philippa Webb, "The Right to Insult in International Law", *Columbia Human Rights Law*, 2/2017, 1-55

European Court of Human Rights, *Guide on Article 10 of the European Convention on Human Rights – Article 10*, Council of Europe, 2021

Hertig Randall, Maya, "Commercial Speech under the European Convention on Human Rights: Subordinate or Equal," *Human Rights Law Review*, no. 1/2006, 53-86

Human Rights Committee, *General Comment no. 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, 12 September 2011

Leach, Phillip, *Taking a Case to the European Court of Human Rights,* 3rd ed., Oxford: Oxford University Press, 2011

Polymenopoulou, Eleni, "Does One Swallow Make a Spring? Artistic and Literary Freedom at the European Court of Human Rights", *Human Rights Law Review*, 2016, 16, 511–539.

Reid, Karen, "Words in the workplace", *Freedom of Expression – Essay in honour of Nicolas Bratza* (eds. Josep Casadevall et al.), Oisterwijk, The Netherlands: Wolf Legal Publishers, 2012, 383-390

Schabas, William, *The European Convention on Human Rights: A Commentary*, Oxford: Oxford University Press, 2016

European Court of Human Rights cases

Axel Springer AG v. Germany, App. no. 39954/08, Judgment (Grand Chamber) of 7 February 2012

Bezymyannyy v Russia, App. No. 10941/03, Judgment of 8 April 2010.

Čeferin v. Slovenia, App. no. 40975/08*,* Judgment of 16 January 2018

Garaudy v. France, App. No. 65831/01, Decision of 24 June 2003;

Gavrilovici v. Moldova, App. No. 25464/05, Judgment of 15 December 2009

Grebneva and Alisimchik v. Russia, App. No. 8918/05, Judgment of 22 November 2016

Gregoridades v. Greece, App. No. 24348/94, Judgment of 25 November 1997 (GC);

Grigoriades v. Greece, App. No. 24348/94, Judgment of the Grand Chamber of 25 November 1997

Janowski v. Poland, App. No. 25716/94, GC, Judgment of 21 January 1999

Jerusalem v. Austria, *App. no.* 26958/95*,* Judgment of 27 February 2001

Kazakov v. Russia, App. No. 1758/02, Judgment of 18 December 2008.

Kazakov v. Russia, App. No. 1758/02, Judgment of 18 December 2008;

Krone Verlag GmbH & Co. KG v. Austria (no. 3), App. No. *39069/97*, Judgment of 11 December 2003.

Lešník v. Slovakia, App. no. 35640/97, Judgment of 11 March 2003.

Lewandowska-Malec v. Poland, App. No. 39660/07, Judgment of 18 September 2012

Lingens v. Austria, App. No. 9815/82, Judgment of 8 July 1986

Mariapori v. Finland, App. No. 37751/07, Judgment of 6 July 2010
Marin Kostov v. Bulgaria, App. No. 13801/07, Judgment of 24 July 2012;
Marinova and Others v. Bulgaria, App. Nos. 33502/07, 30599/10, 8241/11 and 61863/11, Judgment of 12 July 2016
Marinova and Others v. Bulgaria, App. Nos. 33502/07, 30599/10, 8241/11 and 61863/11, Judgment of 12 July 2016
Markt Intern Vergal GmbH and Klaus Beermann v. Germany, App. No. 10572, Judgment of 20 November 2009
Monnat v. Switzerland, App. No. 73604/01, Judgment of 21 December 2006,
Müller and Others v. Switzerland, App. No. 10737/*84*, Judgment 24 May 1988
Mustafa Erdoğan and Others v. Turkey, App. Nos. 346/04 and 39779/04, Judgment of 27 May 2014.
Mustafa Perinçek v. Switzerland, App. No. 27510/08, Judgment of 15 October 2015.
Nikula v. Finland, App. no. 31611/96, Judgment of 21 March 2002
Norwood v. The United Kingdom, App. No. 23131/03, Decision of 16 November 2004;
Raichinov v. Bulgaria, App. No. 47579/99, Judgment of 20 April 2006.
Sağdıç v. Turkey, App. no. 9142/16, Judgment of 9 February 2021
Sapan v. Turkey, App. No. 44102/04, Judgment of 8 June 2010;
Savitchi v. Moldova, App. No. 11039/02, Judgment of 11 October 2005;
Savva Terentyev v. Russia, App. no. 10692/09, Judgment of 28 August 2018
Sharanov and Palfreeman v. Bulgaria, App. Nos. 35365/12 & 69125/12, Judgment of 21 July 2016.
Sigma Radio Television Ltd v. Cyprus, App. Nos. 32181/04 and 35122/05, Judgment of 21 July 2011.
Siryk v. Ukraine, App. no. 6428/07, Judgment of 31 March 2011
Skałka v. Poland, App. No. *43425/98*, Judgment of 27 May 2003
Slomka v. Poland, App. no. 68924/12, Judgment of 6 December 2018
Sofranschi v. Moldova, App. No. *34690/05*, Judgment of 21 December 2010
Sofranschi v. Moldova, App. no. 34690/05, Judgment of 21 December 2010
Sorguç v. Turkey, App. No. 17089/03, Judgment 23 June 2009
Syrik v. Ukraine, App. No. 6428/07, Judgment of 31 March 2001
Toranzo Gomez v. Spain, App. No. 26922/14, Judgment of 20 November 2018
Witzsch v. Germany (no. 2), App. No. 7485/03, Decision of 13 December 2005.
Yankov v. Bulgaria, App. no. 39084/97, Judgment of 11 December 2003

Сања В. Ђајић
Универзитет у Новом Саду
Правни факултет у Новом Саду
S.Djajic@pf.uns.ac.rs

Слобода изражавања, грубе речи и државни службеници

Сажетак: *Циљ овог рада је да испита домашај и поље примене слободе изражавања приватних лица у њиховој комуникацији са државним службеницима када ови врше јавна овлашћења. Овакве ситуације су доста честе и у њима може доћи до вербалног сукоба у којем ће се разменити увреде и грубе речи. Имајући у виду извесност оваквих ситуација и учешће службеника који врше јавна овлашћења примена стандарда из области људских права је у таквим ситуацијама могућа а можда чак и неопходна. Одговор на ово питање се тражи у пракси Европског суда за људска права у домену положаја државних службеника и њихове обавезе да покажу професионалност и стрпљивост у поступању са грађанима и у погледу обавезе да поштују њихову слободу изражавања. Европски суд за људска права је у својој пракси установио стандарде заштите за различите облике изражавања који се разликују и по томе у којој мери је и под којим условима могуће ограничити изражавање. Намера ауторке је да утврди да ли је Европски суд у својој пракси установио посебан стандард за примену члана 10 Европске конвенције о људским правима на однос државних службеника и приватних лица. Пошто постоје различити легитимни циљеви због којих је дозвољено ограничити слободу изражавања, овде ће посебно бити испитан један конкретан легитимни циљ а то је право на заштиту угледа и части државних службеника и на који начин и под којим условима Европски суд одмерава сукоб слободе изражавања приватних лица и права на заштиту угледа и части државних службеника.*

Кључне речи: *слобода изражавања, Европски суд за људска права, члан 10 Европске конвенције о људским правима, државни службеници, грубе речи, увреда.*

Датум пријема рада: 07.12.2021.
Датум прихватања рада: 30.12.2021.