



Scan to know paper details and
author's profile

The General and Unclear Character of the Defamation Law

Alesia Balliu

ABSTRACT

The right to freedom of expression takes on paramount importance in a democratic society, but it is not absolute because of the need to safeguard other human rights, such as reputation and honor. Possible slander is the result of public debate based on the freedom of expression. Many states have included defamation laws in their legislation, which are part of the Civil Code, the Criminal Code, or both. However, international experts call for decriminalize defamation to keep the freedom of expression of journalists and public right for information. In developing countries problems such as the real implementation of the offense legislation, the general and unclear nature of the laws, which creates the ground for the use and interpretation of defamation law in favor of the most powerful people. The legal anti-defamation package in Albania, which includes a series of amendments aims at reducing the violation of the dignity of people through online media reporting. It has caused a lot of controversy among professionals. They have considered it as a violation of online freedom of expression.

Keywords: freedom of expression, media, reputation, criminal and civil defamation laws, albania, anti-defamation package.

Classification: FOR CODE: 180199p

Language: English



London
Journals Press

LJP Copyright ID: 573367
Print ISSN: 2515-5784
Online ISSN: 2515-5792

London Journal of Research in Humanities and Social Sciences

Volume 20 | Issue 16 | Compilation 1.0



© 2020 Alesia Balliu. This is a research/review paper, distributed under the terms of the Creative Commons Attribution-Noncommercial 4.0 Unported License (<http://creativecommons.org/licenses/by-nc/4.0/>), permitting all noncommercial use, distribution, and reproduction in any medium, provided the original work is properly cited.

The General and Unclear Character of the Defamation Law

Freedom of Expression, Media and Defamation Laws from a Comparative Point of View between European Countries and Albania

Alesia Balliu

ABSTRACT

The right to freedom of expression takes on paramount importance in a democratic society, but it is not absolute because of the need to safeguard other human rights, such as reputation and honor. Possible slander is the result of public debate based on the freedom of expression. Many states have included defamation laws in their legislation, which are part of the Civil Code, the Criminal Code, or both. However, international experts call for decriminalize defamation to keep the freedom of expression of journalists and public right for information. In developing countries problems such as the real implementation of the offense legislation, the general and unclear nature of the laws, which creates the ground for the use and interpretation of defamation law in favor of the most powerful people. The legal anti-defamation package in Albania, which includes a series of amendments aims at reducing the violation of the dignity of people through online media reporting. It has caused a lot of controversy among professionals. They have considered it as a violation of online freedom of expression.

In this context, this article aims to check and analyze the academic, legal and journalistic literature on freedom of expression, media and defamation laws in both European countries and Albania. In support of this goal, the article relies on the comparative and analytical method of international standards and current practice of European countries, focuses on the case study of Albania and its specifics on the recent legal changes of the anti-defamation package.

Keywords: freedom of expression, media, reputation, criminal and civil defamation laws, albania, anti-defamation package.

I. INTRODUCTION

The right to freedom of expression is one of the foundations of building a democratic society. Despite its importance, this right is not absolute. The limits are related with a violation of reputation and human rights. To ensure a balance between freedom of expression and safeguarding the reputation or honor of persons from unjustified harm, many states have included in their legislation defamation laws, which are part of the Civil Code, the Criminal Code, or both. Based on legal practice, many international experts have spoken out against criminal sanctions and called to decriminalize the defamation law. Threats of imprisonment often force journalists to use self-censorship, restricting not only their freedom of speech but also the public's right for information on matters of public interest. Applicant states of the European Union continue to use defamation and criminal insult laws, leading to insecurity in media freedom. Journalists are intimidated and self-censored by defamation and criminal offense laws because of extreme prison sentences or heavy fines. Drafting these laws to protect the honor and dignity of public officials, there is a possibility that the latter may use these privileges to protect themselves from criticism by depriving the public of the right to full information. However, any legal definition must comply with the European Convention on Human Rights.

In developing countries there are problems with the real implementation of breach legislation.

Also, the general and unclear character of the laws creates the ground for the use and interpretation of defamation law in favor of the most powerful. The legal anti-defamation package in Albania includes a series of amendments with the aim to reduce the violation of the dignity of people through online media reporting. It has caused a lot of controversy among professionals in the field of media, who perceive a possible violation of online media freedom. These amendments shift the responsibility for adjudicating and enforcing high fines to administrative bodies. Despite the need to regulate media activity, the right to freedom of expression must prevail in any democratic society.

In this context, this article aims to check and analyze the academic, legal and journalistic literature on freedom of expression, media and defamation laws in both European countries and Albania. In support of this goal, the comparative and analytical methods of international standards and current practice of European countries, focusing on the case study of Albania and its specifics on the recent legal changes of the anti-defamation package.

II. FREEDOM OF EXPRESSION

2.1 *Freedom of expression and media in the countries of the European Union*

The right to freedom of expression is one of the main conditions of social and personal progress. According to Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers¹. This right protects both non-offensive information or ideas that are offensive, shocking or disturbing as a result of pluralistic principles, tolerance and open-mindedness in a democratic society². The Convention also stipulates that the

¹ BIRN Albania, 'Liria e Shprehjes dhe e Medias në Manuali i Drejtësisë', Reporter.al., (2017), Online in: <https://www.reporter.al/manualidrejtësisë/download/LIRIA%20E%20SHPREHJES%20DHE%20E%20MEDIAS.pdf> (Accessed on 25.09.2020).

² Handyside v. UK, request no. 5493/72, 7 December 1967.

right to freedom of expression includes the obligations or responsibilities to submit to the formalities, conditions, restrictions or sanctions provided by law for the proper functioning of a democratic society³. This is due to the need to safeguard national security, territorial integrity or public safety, protect law and order and prevent crime, protect health and morals, protect the dignity or rights of others, to prevent the dissemination of confidential data or to guarantee the authority and impartiality of the judiciary⁴. Here we mention the need for licensing of audiovisual, television or cinematography broadcasting companies⁵.

Media supports the process of exchanging cultural, social and political information. Also, their most valuable function is to raise accountability of public authorities by revealing the truth about various political, social, economic, cultural, environmental and public information issues in this regard. Freedom of expression takes on a special importance for journalists in the exercise of media activity. Through information, the media enable the public to take part in decision-making and promotion of the rule of law and democracy. In this context, the press has the duty to provide information and ideas on political issues and in any other field of public interest, but also the public has the right to receive this information⁶. However, the freedom of expression of journalists is not an absolute right. In exercising their role as political watchdogs for the collection and dissemination of information of public interest through television, newspapers, online media and other media⁷, they are forced not to infringe on the reputation and rights of others⁸. They must adhere to the ethical standards

³ Council of Europe, 'European Convention on Human Rights' (n/a), Online in: https://www.echr.coe.int/documents/convention_eng.pdf (Accessed on 25.09.2020)

⁴ Ibid.

⁵ Ibid.

⁶ Ahmet Yildirim v. Turkey, request no. 3111/10, 18 December 2012.

⁷ Note: Definition of the European Court of Human Rights (ECHR) in BIRN Albania, Liria e Shprehjes dhe e Medias në Manuali i Drejtësisë (2017), Reporter.al., Online in: <https://www.reporter.al/manualidrejtësisë/download/LIRIA%20E%20SHPREHJES%20DHE%20E%20MEDIAS.pdf> (Accessed on 25.09.2020).

⁸ Cumpănă and Mazăre k. Romania, request no. 33348/96, 17 December 2004.

of journalism to give correct and reliable information⁹, applying the principle of good faith and obligation to support possible allegations on a sufficient factual basis¹⁰. The relationship between accusations and facts is fair. The increasing severity of the accusations implies the need for as complete and consistent facts as possible. Such as in the case where a journalist is going to file a criminal charge against a person he must own all the sufficient facts before transmitting this charge publicly. On the other hand, the prosecution should also have the right to respond to the accusations leveled against it.

In this context, the media should specify the difference between the opinion related to the subjective judgment of values, as well as the facts which are fair and provable¹¹. The journalist is not required to verify the facts if he relies on credible circumstances or sources¹². Verification of facts commented by journalists, when the latter rely on articles or statements of others is unreasonable¹³ despite the fact that their professional activity includes the reporting of the latter or on the establishment and moderation of platforms for expressing attitudes and opinions to other persons. Journalists may be punished or held accountable for reporting statements made by others only in very rare cases and with strong reasons, as otherwise they could not effectively exercise their primary function as political observers. Of course, that they can not abuse their freedom of expression or commit legal offenses because of their profession, as they are the subject of criminal investigations like any other person.

1.2 Freedom of expression and media in Albania

Articles 22 and 23 of the Constitution of the Republic of Albania sanction the right to freedom of expression and information. Article 22 guarantees freedom of expression, freedom of the press, radio and television and prohibits prior

ensorship of the media¹⁴. The constitution also stipulates the possibility of legal authorization for the activity of radio and television stations.

Article 23 of the Constitution guarantees the right to information and all citizens, under the law to be able to receive information on the activity of state bodies and persons exercising state functions as well as to attend meetings of collectively elected bodies¹⁵.

Media regulation in Albania is based on Articles 22 and 23 of the Constitution of the Republic of Albania as well as Law No. 97/2013 "On audiovisual media in the Republic of Albania", Law no. 91/2019 "On some changes and additions to Law no. 97/2013 "On audiovisual media in the Republic of Albania", as amended, while there is no legal regulation for the print media. These laws bring to attention the right to information as well as the obligations in the field of personal data protection, resources and signaling. The law designates the Audio-Visual Media Authority as the regulator of audio broadcasting, audio-visual and support services¹⁶. Supervision on the codes, regulations and activity of this institution is performed by the Appeals Council. More specifically, it examines the degree of respect for dignity, moral, ethical norms in the media and fundamental human rights, such as information, public awareness, etc. by providers of audiovisual services, in cooperation with state institutions or agencies such as the Commissioner for Protection from Discrimination, the Commissioner for Personal Data Protection, etc.

Media self-regulation is a challenge in the Albanian context due to the implementation of the Code of Ethics; it is not a legal obligation for the journalist or media organization where he works, but remains at the discretion of the latter. Also, non-profit organizations dealing with media

⁹ Radio Franca et al. v. France, request no. 53984/00, 30 March 2004.

¹⁰ TønsbergsBlad AS and Haukom v. Norway, Complaint no. 510/04, 1 March 2007.

¹¹ Lingens v. Austrisë, complaint no. 9815/82, 8 korrik 1986.

¹² McVicar v. United Kingdom, request no. 46311/99, 7 May 2002.

¹³ Thorgeir Thorgeirson v. Iceland, request no. 137778/88, 25 July 1992.

¹⁴ OSCE, Constitution of the Republic of Albania (2020), Online in: <https://www.osce.org/albania/41888> (Accessed on 25.09.2020).

¹⁵ Ibid.

¹⁶ BIRN Albania, 'Liria e Shprehjes dhe e Medias në Manuali i Drejtësisë, Reporter.al, (2017) Online in: <https://www.reporter.al/manualidrejtjesise/download/LIRIA%20E%20SHPREHJES%20DHE%20E%20MEDIAS.pdf> (Accessed on 25.09.2020).

issues have played a not very consolidated role in this context.

Standardization and use of best practices related to ethics by media organizations is the object of action of the Albanian Media Council, which is a non-profit organization of journalists, active since 2015. On the right to information, it has been implemented in Albania since 1999 but has undergone radical legal changes in 2014. In this context, journalists as well as any other citizen have the right to access official documents and obtain information within certain deadlines. Also, penalties are provided for public officials who do not provide the public with the information required by the request for information submitted in physical form or online. However, law no. 119/2014 "On the Right to Information" makes a reclassification of secret documents, to which the public may or may not have access, and regulates the publication of partial information. Also, public institutions should publish online in the information about their activity to inform the public. In the framework of the above law, the coordinators for the right to information and the Commission for the Right to Information started their activity. Citizens, including journalists, who have not been provided with information upon request by public institutions or when the information has been partial have the right to appeal to the institution of the Commissioner for the Right to Information. The applicant, who may be a person, non-profit organization or company may request information in paper or electronic form as in the case when this information is compiled by the respective institution, as well as when it is compiled by other people or institutions. The facts have shown that the exercise of the right of access to information to public institutions has been widespread by journalists. However, they have met obstacles in obtaining information online on court cases, deadlines, etc. They also face some challenges in terms of reporting information by the courts, as the way information is collected by these institutions must be done legally and ethically. In these cases they must rely on the Law on Personal Data Protection, the Law on the Right to Information and the Code of Civil and Criminal

Procedure¹⁷. Furthermore they should inform the interviewees about the media being interviewed, although this may be clear from the logos as well as how to use the content of the interview. In case the journalist is denied access to information, he/she must make such a fact public. It can also rely on anonymous sources or gossip when information is vital to the public by specifying it in detail.

A positive example in this regard is the court case between BIRN Albania¹⁸ and the State Intelligence Service (SHISH), which proved successful in favor of the media organization. The latter demanded declassifying the documents of the former Security archive to obtain information on the number of persecuted persons in the communist period and to shed light on the infamous methods of persecution of Albanian citizens by the secret police of the communist regime¹⁹. At the end of the trial, the Administrative Court of Tirana forced the State Intelligence Service to declassify the above-mentioned information and make it available to BIRN Albania.

Law no. 8457, dated 11.02.1999 "On information classified as State Secret" regulates the publication of this type of information and punishes with fines and imprisonment of up to five years persons who can do such a thing, a case that has not happened in recent years. Also, in the framework of Law no. 9887, dated 10.03.2008 "On the Protection of Personal Data", as amended, the courts of first instance and those of appeal in Albania have anonymized the decisions published in the online database, although something like this has been challenged and considered by journalists as evading the accountability of the judiciary to the public²⁰.

¹⁷ Ibid.

¹⁸ Note: BIRN Albania is part of Balkan Investigative Reporting Network which is a network of non-governmental organizations promoting the right to expression, human rights and democratic values in Southern and Eastern Europe. For more see: BIRN, 'About BIRN' (2017), Online në <https://birn.eu.com/about-birn/> (Accessed on 25.09.2020).

¹⁹ BIRN Albania, 'Liria e Shprehjes dhe e Medias në Manuali i Drejtësisë', Reporter.al. (2017), Online in: <https://www.reporter.al/manualidrejtjesise/download/LIRIA%20E%20SHPREHJES%20DHE%20E%20MEDIAS.pdf> (Accessed on 25.09.2020).

²⁰ Ibid.

II. CRIMINAL AND CIVIL DEFAMATION

2.1 International standards for criminal and civil defamation law

Defamation is a damage to a person's reputation. It is categorized as a civil offense, criminal or both. Approaches to defamation laws on freedom of speech vary according to different legal traditions. In English-speaking countries, traditional defamation law places more importance on reputation protection than on freedom of speech, while US defamation law, which dates back to the 1960s, places more emphasis on protecting freedom of speech than traditional law. In continental European jurisdictions there are differences in the prevalence of criminal and civil defamation, the link between defamation and the right to privacy, and so on. Asian, African, and South American jurisdictions further restrict freedom of speech in accordance with the content of the respective law, its use by public officials, and its enforcement by the courts²¹.

In this context, international legal experts first met in London from 29 February to 1 March 2000 and offered a set of principles on Freedom of Expression and Protection of Reputation²². Another expert meeting on Freedom of Expression and Defamation was held in London on 4 December 2015 to review principles according to international law and standards, state practices and its general principles of law recognized by the community of nations²³. The aim was to balance the right to freedom of expression and the need to protect a person reputation. Both of these rights are guaranteed in the United Nations, regional human rights

instruments, national constitutions and relevant laws worldwide²⁴.

2.1.1 Principle 1: Freedom of opinion, expression and information

Based on this principle, every person has the right to have their own opinions, to express themselves freely, to seek, receive and impart information and ideas using different channels. The only limitation in this regard is the protection of the reputation of others, which is also defined in international law. However, censorship or prior restrictions on publication are not permissible. Restrictions on the right to freely express or receive and impart information must meet certain conditions. First, they must be based on a clearly reasonable law. It should be accessible and clear and allow people to predict whether an action is legal. Second, there must be a legitimate interest in the reputation for which its protection is guaranteed and the effect of that protection must be clearly demonstrated. Third, there must be a belief that restrictions on freedom of expression and information along with protection of reputation must be necessary in a democratic society. Excluded are cases where there are less restrictive and accessible means by which legitimacy can be protected and when there is a proportionality between the benefits of protecting reputation and the risk posed by freedom of expression in certain circumstances.

2.1.2 Principle 2: The legitimate purpose of defamation laws

The purpose and effect of defamation laws should relate only to the protection of the reputation of people or entities and their right to sue against damage or downgrading in public.

Defamation laws cannot be justified when they hinder legitimate criticism of corrupt officials; when protecting the reputation of objects, such as flags, etc.; when defending the reputation of the state or nation; when the non-existent reputation of people or entities is protected or when feelings or a subjective understanding of honor are protected. Also, defamation laws can not be

²¹ A. T. Kenyon, 'Liber, Slander and Defamation'. The International Encyclopedia of Journalism Studies, Wiley Online Library (2019), Online in: <https://doi.org/10.1002/9781118841570.iejs0110> (Accessed on 25.09.2020).

²² Article 19, 'International Workshop on Freedom of Expression and Defamation', London (2000), Online in: <https://www.article19.org/wp-content/uploads/2018/02/defining-defamation.pdf> (Accessed on 26.09.2020).

²³ Article 19, 'Defining Defamation: Principles on Freedom of Expression and Protection of Reputation' (2017), Online in: [https://www.article19.org/data/files/medialibrary/38641/Defamation-Principles-\(online\)-.pdf](https://www.article19.org/data/files/medialibrary/38641/Defamation-Principles-(online)-.pdf) (Accessed on 26.09.2020).

²⁴ Ibid.

justified when they protect interests other than reputation such as maintaining public order, national security, friendly relations with foreign states or governments, which are subject to other specific laws. According to Principle 2, a statement may be considered defamatory when its publication seriously or substantially damaged its reputation based on an exact factual basis.

2.13 Principle 3: Defamation of public bodies

This principle addresses the defamation of public authorities in the legislative, executive and judicial branches of government. According to this principle, public authorities can not file a defamation lawsuit. This principle is based on the democratic importance of open criticism of public authorities, the limited public nature of the reputation enjoyed by these authorities, and the many ways where they are available to protect themselves from criticism. Even when they have filed defamation lawsuits in court, the aim has been to protect the entity from criticism and not personal interests or reputation.

2.14 Principle 4: Criminal Defamation

Based on principle 4, criminal defamation laws should be repealed and replaced when necessary with civil defamation laws²⁵. Even if they are considered by states as the main tool for addressing unjustified attacks on reputation they must comply with specific conditions. First, no one should be punished for criminal defamation if the party who suffered the defamation has a reasonable suspicion and proves that the statements are false and that their falsity has been recognized by the party that committed the defamation with the intent to cause harm to the other party. In this context, public authorities, including the police and prosecutors, should not be involved in initiating or prosecuting defamation cases²⁶. According to the fourth principle, they should be exempted from sanctions for violating defamation laws, imprisonment, probation, suspension of freedom

of expression through the media, excessive fines and other severe criminal penalties²⁷.

On the one hand the criminalization of defamation or any other activity is related to the state interest to control it and, on the other hand the criminalization of defamatory statements is unnecessary to provide proper protection for the reputation, which is a private interest. The practices of some countries have shown that the most powerful have abused the criminal laws of defamation because their interest has been to limit criticism and public debate. Also, criminal defamation laws have been used illegally to safeguard the public interest. Meanwhile, there are other countries that have relied on criminal defamation laws as the only means of protection from reputation attacks. Therefore, the fourth principle is based on meeting the conditions mentioned above to minimize in practice the possibility of abusive restrictions on freedom of speech.

2.15 Principle 5: Ensure a fair trial in defamation cases

According to this principle, the right to challenge the validity of a restriction on freedom of expression in court belongs to every human being, as a subject of human and constitutional rights. Every state should guarantee effective access of persons to the judicial system on defamation suits including legal aid when necessary. The defendant should not be harmed in bringing a case to court and should be able to take evidence freely. The legal framework for defamation cases and the courts should provide effective rules and practices for defamation addressing procedures.

The law should also provide faster and less costly alternative mechanisms for resolving disputes in addition to court proceedings, so that they do not apply lower standards of freedom of expression.

2.16 Principle 6: Procedural protection against annoying court cases

This principle relates to the issue that laws should give defendants an effective remedy, such as specific legislation on strategic lawsuits against

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

public participation or general procedural rules against potential abusive plaintiffs who do not bother to prove their reputation. their own, but try to prevent criticism of their actions.

2.17 Principle 7: Jurisdiction

Principle 7 deals with the jurisdiction of the courts in the case of defamation. This jurisdiction should be exercised according to law, only in the case when the actual damage that has been done has a substantial connection with the state. This happens when the plaintiff has a high reputation in the state, the damage is significant in this regard, the jurisdiction is the most appropriate in which the act of defamation can be done and there are no lower standards than the applicable principles on freedom of expression²⁸. In this context, the purpose of principle 7 is to restrict plaintiffs from using their legal procedures in jurisdictions where they are more likely to win their cases.

2.18 Principle 8: Limitation and Reasonable Delivery

A defamation suit must be completed within one year from the date of publication. This rule can only be reviewed in exceptional circumstances. Defamation proceedings should limit the negative impact of delay on freedom of expression. At the same time they must provide an effective time limit within which defendants can carry out their defense. The plaintiff should be allowed to sue only once for a substantially identical statement when published by the same person, for the same audience, in a similar format and medium²⁹. In the event that a defamation lawsuit targets the online media news archive, courts should use a less restrictive remedy (such as notes attached to defamation news) than deleting them.

2.19 Principle 9: Resource protection

In the event that a journalist or other person has obtained information from confidential sources and intends to disseminate it as a result of relevance to the public interest, he should have

the right not to disclose the identity of these sources without suffering any particular harm to this direction. In the event of a defamation case, this right should not be revoked or restricted.

2.1.10 Principle 10: Proof of essential truth

According to this principle, the defendant is released from liability if the disputed statement of fact is substantially true. When defamatory statements involve matters of public interest, the plaintiff bears the burden of proving the veracity of each statement. In this case, issues of public interest are those issues related to the executive, legislative and judicial branches of government, public figures, public officials and policies in various fields such as environment, economy, justice, etc.

2.1.11 Principle 11: Public officials

The defamation law should not provide public officials with special protection for their status compared to other citizens starting with the processing of complaints, the standards for determining whether a defendant is responsible, and the penalties that may be imposed in this aspect. This is due to the fact that public officials should tolerate more criticism of their activity compared to ordinary citizens as they are directly involved in matters of public interest.

2.1.12 Principle 12: Reasonable publication and matters of public interest

This principle enables the protection of publications deemed reasonable in the public interest despite the factual statement being found to be false. A reasonable distribution taking into account the circumstances of a particular case should take into account the importance of freedom of expression in public affairs and the right of citizens to receive information in a timely manner. This principle benefits all persons who are engaged in collecting and disseminating information in the mass media. Since their job is to provide information to the public, they often cannot wait for every fact to be verified before publishing a news story. In this way, journalists or persons who have acted reasonably or in accordance with professional standards should be

²⁸ Ibid.

²⁹ Ibid.

protected and those who have acted irrationally should be prosecuted. In the case of social media, where communicators are not always media professionals the standards need to change, as they do not have the same resources in terms of producing, verifying or publishing information. When assessing such cases the courts should take into account the specific characteristics and personal context of the author as well as the ability of his controversial statements to contribute to a debate of public interest³⁰.

2.1.13 Principle 13: Expression of opinion

The defamation law should not hold persons accountable for expressing their opinions because these value judgments cannot be proven to be true or false as they do not contain factual connotations nor can they be reasonably interpreted, as it may contain jokes, satire, hyperbole, etc. In this way, the courts can judge whether a statement is an opinion. Language and context can lead to the meaning of statements as opinions even though they may indicate facts.

2.1.14 Principle 14: Privileges

This principle applies to the privileges that certain statements have to be exempted from liability in the context of defamation law. The only condition is that they must not have been done maliciously but in the performance of a duty or legal, moral or social interest. This includes statements made during the proceedings of legislative bodies, local authorities, judiciary, bodies with official mandate to investigate human rights abuses, etc. This principle helps people to speak freely before the court about what they have said.

2.1.15 Principle 15: Innocent publication and the words of others

According to this principle, defamation law should not hold anyone responsible for accurately reporting the words of others, without being the author, editor or publisher and without being aware that it could contribute to the spread of defamation. Journalists must apply the principles

of professional ethics and good practice when reporting the words of others.

Even persons who distribute news online are exempt from the liability law for defamation when they make no modification to the content. Furthermore, they should not be required to monitor or restrict the content of information in the absence of an order from the competent institutions for the specific case. The person is liable for only if he does not carry out this order.

2.1.16 Principle 16: Anonymity and Defamation

Since freedom of expression can also be exercised anonymously, especially in digital technologies, any restrictions on defamation must be in accordance with the law, protect a legitimate interest in reputation and be necessary in a democratic society. Courts may disclose the identity of a person online if a plaintiff's request for anonymity meets the notification requirements, details of defamatory statements, and the need to disclose the identity in the circumstances of a matter of public interest. According to this principle, the obligation to register personal data before accessing and using the Internet should be abolished as it is contrary to international human rights law.

2.1.17 Principle 17: The role of remedies

This principle concerns the role of remedies in defamation law. No remedy should be compulsorily applied to statements which according to the principles of restriction of freedom of expression expressed in Principle 1 are not considered defamatory. A remedy for defamatory statements should be aimed at correcting the damage to the plaintiff's reputation and not punishing those responsible for spreading the allegations³¹. It is preferable to use voluntary or self-regulatory systems to limit the damage to the plaintiff's reputation.

2.1.18 Principle 18: Non-pecuniary remedies

The use of non-pecuniary remedies by the courts should take precedence to remedy the damage to

³⁰ Ibid.

³¹ Ibid.

reputation caused by the defamatory statement. There are two categories, the right of correction, which has to do with the obligation of the media itself to correct the wrong material, as the wrong information has been pointed out, and the right of reply, which is given to the person who claims to rights have been violated by the media, to rectify this situation. The right of reply applies only when the right of redress is not sufficient to remedy the damage to the claimant's reputation. The right of reply should be available to the claimant only to respond to inaccurate facts and not to comment on the views of readers. The answer should take on similar importance to the article but cannot be kept in the media if it is out of proportion to the original article, if it is abusive or illegal as well as when presenting new issues or commenting on accurate facts³².

2.1.19 Principle 19: Property Rewards

Property rewards are given as compensation when the damage caused by defamatory statements is not remedied with non-property rewards. They must be proportionate to the damage committed and must take into account the financial capacity of the defendant. Compensation for financial damage caused by defamatory statements is given when the loss is proven, while in relation to compensation for non-pecuniary damage there must be a fixed compensation ceiling, the exceeding of which can occur only in exceptional cases, when the plaintiff proves that the defendant was aware of the falsity of the statement and used the latter to cause harm to the plaintiff.

2.1.20 Principle 20: Interim Ordinances

According to this principle, interim injunctions should not be applied before publication in the context of a defamation action. These orders must be enforced by the court of order after the merits have been examined and the plaintiff has presented evidence that the statement was defamatory, causes irreparable harm and any possible defense was unfounded.

³² Ibid.

2.1.21 Principle 21: Permanent Prohibitions

According to this principle, permanent prohibitions should be applied only by court order and in specific cases of defamatory statements and people responsible for their publication. They should serve the defendant to decide how to stop further publications.

2.1.22 Principle 22: Costs

This principle relates to costs incurred by both defendants and plaintiffs. In setting these costs the court must take into account the effect that its decision has on freedom of expression. The high costs of judicial protection may prevent the publication of information of public interest in the future.

III. CRIMINAL AND CIVIL DEFAMATION LAWS IN THE EUROPEAN UNION

3.1 Defamation laws and freedom of expression in the European Union

The European Court of Human Rights has recognized freedom of expression as one of the foundations of a democratic society, as a basic condition for human progress and development³³. It is closely related to the right to freedom of information, which includes the activity of the mass media. One of the most important tasks of journalists is to investigate and publish critical material about people, corporations, and governments. The public has the right to receive this information that affects their interests. Thus, freedom of expression enables not only journalists but anyone else to take part in free political debates which is the basic concept of a democratic society³⁴. If the freedom of expression of a journalist is violated, the right of everyone else to receive information and ideas is violated³⁵.

³³ International Press Institute, 'Freedom of Expression, Media Law and Defamation' (2015), Online in: http://legaldb.freemedia.at/wp-content/uploads/2015/08/FoE-MediaLaw-Defamation_ENG.pdf (Accessed on 26.09.2020).

³⁴ Castells v. Spain, Judgment of 23 April 1992, Series A no. 236.

³⁵ Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85 of 13 Nov. 1985, Series A no. 5, 7 HRLJ 74 (1986), para 30.

However, Article 10 of the European Convention on Human Rights restricts the freedom of expression provided by law to respect the rights and reputations of others and to protect national security, public order, public health and morals, territorial integrity or public safety, confidentiality of information, authority and impartiality of the judicial system³⁶. The European Court of Human Rights mentions the fact that any restriction must adhere to the three-part test (be based on law, serve a described purpose, such as national security interests, etc., and be necessary in a democratic society), also mentioned as part of the first principle of the Standards of Freedom of Expression and Protection of Reputation.

In this context, freedom of expression forms the basis of penalties for defamation³⁷. That is why defamation laws are important for journalism. Legal risks can force journalists not to publish material in the public interest.

Defamation law is a protection against unlawful attacks on a person's honor and reputation³⁸. Article 10 of the European Convention on Human Rights mentions the legitimate ground for restricting freedom of expression because of the rights and reputation of others. In accordance with the content of the Standards of Freedom of Expression and Protection of Reputation, mentioned in the above section, the European Union has determined that only a person can sue to protect his right to reputation and not symbols, public offices, institutions, a group of people or a representative of a deceased person. In the case of European countries many defamation laws have been used practically and intentionally to address

issues that are subject to other laws, such as to penalize criticism of public officials³⁹.

The legal treatment of defamation varies in the legislations of different countries in terms of the division between civil, criminal or both forms of defamation; persons who can sue or who have the burden of proof; remedies; procedures etc. Defamation is divided into "libel", when it appears in print and in "slander" when it appears in spoken language. In some legislations, the term "insult" appears, which refers to defamation of state offices, symbols, institutions, although it is not part of the international definition of reputation protection⁴⁰. The term "criminal defamation" refers to the situation when defamation is a criminal offense under state criminal law. In this case, state prosecutors gather evidence for defamatory statements, which are tried in the criminal justice system and may be accompanied by imprisonment. The term "civil defamation" refers to a civil error that is determined by a private action before a civil court and is followed by an order for monetary compensation, the publication of a correction or pardon depending on the specific circumstances⁴¹. The purpose of the defamation law as a whole is to reconcile the protection of reputation and freedom of speech⁴². It is preferable that defamation criminal laws be repealed in favor of civil ones⁴³, as they represent a potential threat to freedom of expression. While international jurisprudence has provided for the abolition of the criminal offense of defamation of the state, the European Court of Human Rights has not completely ruled out defamation lawsuits by governments, but they can only be raised in

³⁶ International Press Institute, 'Freedom of Expression, Media Law and Defamation' (2015), Online in: http://legaldb.freemedia.at/wp-content/uploads/2015/08/FoE-MediaLaw-Defamation_ENG.pdf (Accessed on 26.09.2020).

³⁷ Article 19, 'International Workshop on Freedom of Expression and Defamation', London (2000), Online in: <https://www.article19.org/wp-content/uploads/2018/02/defining-defamation.pdf> (Accessed on 26.09.2020).

³⁸ OHCHR, 'International Covenant on Civil and Political Rights' (n/a), Online in: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx#:~:text=Article%2017,against%20such%20interference%20or%20attacks> (Accessed on 27.09.2020).

³⁹ International Press Institute, 'Freedom of Expression, Media Law and Defamation' (2015), Online in: http://legaldb.freemedia.at/wp-content/uploads/2015/08/FoE-MediaLaw-Defamation_ENG.pdf (Accessed on 26.09.2020).

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Article 19, 'International Workshop on Freedom of Expression and Defamation', London (2000), Online in: <https://www.article19.org/wp-content/uploads/2018/02/defining-defamation.pdf> (Accessed on 26.09.2020).

⁴³ International Press Institute, 'Freedom of Expression, Media Law and Defamation' (2015), Online in: http://legaldb.freemedia.at/wp-content/uploads/2015/08/FoE-MediaLaw-Defamation_ENG.pdf (Accessed on 26.09.2020).

situations where public order is violated⁴⁴. Also, this court has not completely ruled out the possibility of criminal defamation charges. However, they must be carried out under strictly defined conditions, such as meeting the criminal standard of evidence beyond a reasonable doubt; fulfilling the fact that the alleged defamatory statements are false and when the mental element of the crime is satisfied, i.e. the statements were issued even though they were known to be false⁴⁵. Also, according to the European Court of Human Rights, imprisonment should not be part of sentences, nor should other suspensions of freedom of expression or the right to practice journalism. Furthermore, persons should not turn to criminal law when a more effective civil law alternative is available⁴⁶. It is more acceptable for defamation to be a purely civil matter, as the state's involvement in prosecuting alleged defamers may give additional protection to officials and the government.

Even in the case of civil defamation, current practice highlights some issues. According to the European Court of Human Rights, a true statement cannot be legitimately restricted to protect a person's reputation. Protection can only be exercised against a well-deserved reputation. The term reputation should be well defined, as doubts arise as to whether a public figure enjoys more reputation than a non-public person. In this case, reputation can be associated with the term "dignity", which is equally guaranteed to all persons.

If we refer to the logical publication, the European Court of Human Rights does not justify a possible penalty in this case, as it is important the publication of materials in the public interest by the media that acts as a "public watchdog"⁴⁷. The public interest, in this case, rests on restrictions on freedom of expression. Furthermore, unintentional mistakes by journalists should not be penalized to restrict the freedom of the media in gathering and disseminating information.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

Another issue under discussion is the expression of opinions that can be defamatory. In this regard, the European Court of Human Rights has guaranteed that no one can be limited to expressing an opinion. In the case of journalists, their opinion means how they understood the fact and this differs from the very existence of the fact. Here we mention the case of a political activist who declared an epithet of dislike on the French president, who even though he was found guilty of insult. However, according to the European Court of Human Rights, his freedom of expression had been violated⁴⁸.

On the right to reputation, Article 12 of the Universal Declaration of Human Rights states that no one should be subject to arbitrary interference with his privacy, family, home, correspondence, honor and reputation, guaranteeing his protection against such attacks⁴⁹. The European Court of Human Rights considered that "honor and reputation" are a fundamental right that must be protected even when a particular person is criticized in the context of a public debate. Since reputation includes personal identity and psychological integrity it can be considered part of a person's private life⁵⁰.

As for the proper way to deal with defamation, European practice has shown cases where prison sentences for defamation are considered to be disproportionate to the impact they have had on freedom of expression. Big financial bills have aimed more at punishing the slanderer than correcting the mistake. Defamers have also chosen the jurisdiction that brings you the most benefits to filing their lawsuit.

However, the best way to deal with defamation cases is non-pecuniary damages aimed at correcting the error, such as publishing an apology or correcting the news. This type of compensation is less harmful than as monetary that should be considered only when other legal remedies are insufficient to repair the damage and when there is convincing evidence of its existence.

⁴⁸ Eon v. France, Application No. 26118/10, Judgment of 13 March 2013.

⁴⁹ Ibid.

⁵⁰ Ibid.

In the case of criticism of public officials, defamation laws have provided greater protection, mainly in legislation that includes the notion of "insult", so criticism of an official is for his entire office. There are times when they are legitimized to use taxpayer contributions to fund a defamation lawsuit or harsh punishment for those who defame these public figures. However, the European Court of Human Rights, in line with international standards, held that restrictions on criticism of politicians should be broader than in the case of other people, as freedom of public debate is a fundamental democratic right⁵¹. Moreover, the tolerance of politicians towards journalists and the general public should be high, especially when they themselves make public statements that are subject to criticism⁵². According to the European Court of Human Rights, the government is an institution and not a person, so it has no right to reputation. For this reason, it must be open to public criticism. Promoting free public debate is an important feature of a democratic society⁵³ which relies on freedom of expression.

In this context, members of parliament have a privilege in terms of their reporting statements to parliament. They are not legally responsible for defamatory statements in parliament, just as a media professional who reports these statements is not liable. Also, officials and public figures are generally subject to a higher degree of criticism than others. The protection of their privacy is covered by Article 8 of the European Convention on Human Rights. In the case where a politician filed a lawsuit for violating the right to privacy in an Austrian newspaper, after the latter had posted a photo of him and an article in the context of critical allegations, the European Court of Human Rights ruled that the newspaper the rights of Article 10 of the European Convention on Human Rights were violated⁵⁴.

⁵¹ Ibid.

⁵² *Oberschlick v. Austria*, Judgment of 23 May 1991, Series A no. 204

⁵³ *Feldek vs. Slovakia*, Application No. 29032/95, Judgment of 12 July 2001.

⁵⁴ *Krone Verlag GmbH & Co. KG vs. Austria*, Application No. 35373/97, Judgment of 26 February 2002.

In another case, the court assessed the role of the media as a "public watchdog" stating that although the press should not exceed the limits of protecting the reputation of others, it should disseminate information and ideas on issues of public importance, since the public also has the right to receive them⁵⁵. Moreover, she has appreciated when the press has acted in good faith⁵⁶. Also, Article 10 is applicable not only to information and ideas that are favorably accepted or considered offensive but also to those that offend, shock or disturb the state or any sector of the population⁵⁷. Moreover, the court rules in favor of the media when the latter publishes articles that are part of an ongoing public debate as part of a local, national and international concern, in which the views of a range of stakeholders are reported⁵⁸.

Another issue facing the European Court of Human Rights is religious defamation, as many European countries have passed laws banning defamation of religions. There is also the crime of libel blasphemy, in common law countries. However, there is a lack of a uniform European conception on this issue⁵⁹. Thus, the doctrine of the "margin of appreciation" is applied, which allows states flexibility in applying the European Convention on Human Rights, especially in terms of public morality, where each country displays its cultural differences⁶⁰. In a Slovenian case, a writer published an article criticizing the head of the Roman Catholic Church for demanding a ban on a movie and film poster for reasons of public morality and thus being sued for defamation of nation, race and faith, which the court ruled contrary to Article 10 of the European Convention on Human Rights. The article, according to her, did not unjustly interfere with the right of believers to practice their religion, nor did it

⁵⁵ *Thorgeirson vs. Iceland*, para 63.

⁵⁶ *Bladet Tromsø and Stensaas vs. Norway*, Application no. 21980/93, Judgment of 20 May 1999.

⁵⁷ Ibid, para 62.

⁵⁸ Ibid, para 63.

⁵⁹ *Giniewski vs. France*, Application no. 64016/00, Judgment of 31 January 2006, para 44.

⁶⁰ International Press Institute, 'Freedom of Expression, Media Law and Defamation' (2015), Online in: http://legaldb.freemedia.at/wp-content/uploads/2015/08/FOE-MediaLaw-Defamation_ENG.pdf (Accessed on 26.09.2020).

denigrate the content of their faith⁶¹. In another case, in Austria, the court did not find a violation of Article 10, the offense that a film did to the Roman Catholic Church, on the grounds that people should avoid expressions that are offensive to others, violate their rights and do not contribute in some form of public debate leading to human progress⁶². Thus, the court relied on the criminal defamation of libel blasphemy.

Other cases have included lawsuits in the expression of humor, satire and the opinions of others, which have been repealed by the European Court of Human Rights as invalid. Humor and satire cannot be taken seriously, nor can journalists be held responsible for publishing the statements of others.

In terms of the burden of proof in defamation law, there is a difference in European legislation compared to American law. Common law countries, such as the United Kingdom, Ireland, Malta and Cyprus, follow the approach of Roman law, according to which the burden of proof falls on the party who can prove the claim as the opposite presents difficulties. In the case of defamation proceedings, the responsibility for proving whether a statement is true falls on the defendant⁶³.

The cases of the European Court of Human Rights have shown progress in the protection of anonymous sources of information, which is one of the basic conditions for freedom of the press, as reflected in the professional laws and codes of conduct of some countries. This practice is important for the well-functioning of a democratic society. Anonymous sources of information can only be disclosed when justified by a substantive request in the public interest, when the information is not readily available in other ways and the provision of information is unlikely to endanger the journalist's health or well-being or

limit others who receive information from the same sources in the future⁶⁴.

In terms of remedies and penalties, there is a risk that journalists may be imprisoned simply because they have exercised their freedom of expression and profession. According to the European Court of Human Rights, defamation of a person or journalist in the context of a matter of legitimate public interest does not justify his imprisonment.

With regard to monetary rewards to compensate for losses that cannot be accurately calculated such as the loss of reputation, the court must consider not only the latter but also the potential impact of large monetary prizes on the defendant and on freedom of expression and media in society⁶⁵.

This practice was followed by the European Court of Human Rights in the McLibel case, where it ruled that the size of the damage price should take into account the resources available to the defendants⁶⁶.

In addition to the European Court of Human Rights, international human rights law also applies to the national courts of European countries. Almost all states are part of the European Convention on Human Rights, so any restriction on freedom of expression is based on Article 10 thereof. They are also part of the International Covenant on Civil and Political Rights, the implementation of which is monitored by the Human Rights Committee. However, there are variations in the application of the obligations of international law by the group of states: monistic and dualistic. In monist countries, international law is automatically part of the national legal framework, i.e. it is applied in domestic affairs, while in dualist countries the obligations arising from international treaties become national law after the approval of the legislature. In the case of the European Convention on Human Rights, the situation is different, as its protocol 11 has binding

⁶¹ Klein vs. Slovakia, Application no. 72208/01, Judgment of 31 October 2006, paras 51-52.

⁶² Otto-Preminger-Institut vs. Austria, Application No. 13470/87, Judgment of 20 September 1994, para 49.

⁶³ International Press Institute, Freedom of Expression, Media Law and Defamation (2015), Online in: http://legaldb.freemedia.at/wp-content/uploads/2015/08/FOE-MediaLaw-Defamation_ENG.pdf (Accessed on 26.09.2020).

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Steel and Morris vs. United Kingdom, para 96.

jurisdiction over the parties to the convention, i.e. persons who can not provide a solution to the violation of their rights under the convention can go to the European Court of Human Rights. Although the judgments belong to the state to which they apply, other European countries have followed the interpretation offered by this court as more convincing and authoritarian.

3.2 Abuse of defamation laws in the European Union

Promoting the right to freedom of expression on the one hand and preserving the reputation of persons on the other hand is not something easily achievable in the practice of European countries. A report by the International Institute of Journalism in 2015⁶⁷ said that the law on defamation in the European Union is out of balance. According to the report, most European Union member states have criminal defamation provisions, with imprisonment being one of the possible punishments. In this context, prosecutions against journalists continue and they receive criminal sentences. Public officials or public figures enjoy greater protection in defamation law than other people. Most European countries have criminal laws punishing insults against objects, such as the state, symbols and state institutions. The report cites criminal defamation laws as defined in broad terms, which jeopardizes the inclusion of opinions in the context of democratic debate. Protections of journalists based on standards of truth and good faith are largely lacking in criminal and civil law or their effectiveness in their use is low. Also, the report cites that there are very high compensation prices aimed at keeping the press calm. The formal adaptation of international standards on defamation and their application to the legal practice of national courts and the European Court of Human Rights is still completely unconsolidated⁶⁸. Very few European countries have repealed laws on defamation and criminal

insult, despite the broad international consensus among legal experts and advocates of freedom of the press on the disproportionate restriction imposed by criminal penalties for defamation on freedom of expression⁶⁹.

The International Press Institute has published several cases of threats to press freedom in Europe, as follows:

In 2015, an Athens court sentenced an investigative journalist to 26 months in prison (suspended for three years) for uncovering an IMF list of tax evasion in Greece for the role played by a business tycoon in the Cypriot financial crisis of the years 2012-2013. In 2016, his sentence was overturned by the appellate court⁷⁰.

In 2010, two German investigative journalists were convicted of defamation after reporting their allegations of links between court officials and a juvenile brothel, a conviction that was overturned on appeal following a public appeal⁷¹.

In the context of criminal defamation, some criminal cases have been raised in Turkey against journalists but also other citizens for criticizing President R. T. Erdogan.

Defamation laws are part of the problem. The rest is related to the abuse of civil defamation laws, in the case where non-pecuniary damages are not specified in the law. This fact enables the plaintiffs to claim very high monetary damages. When a Finnish media outlet reported that the Slovenian prime minister had demanded a bribe from a Finnish defense contractor, she was indicted along with the journalist who reported the story with 1.5m euros in damages. After much effort and high spending on lawsuits, the Slovenian prime minister lost and was sentenced to two years in prison for corruption. These are some of the negative examples brought by disproportionate defamation laws on freedom of expression and the press in Europe.

⁶⁷ International Press Institute, 'Out of balance. Defamation Law in the European Union: A Comparative Overview for Journalists, Civil Society and Policymakers' (2015), Online in: <https://ipi.media/wp-content/uploads/2016/08/IPI-OutofBalance-Final-Jan2015.pdf> (Accessed on 27.09.2020).

⁶⁸ Ibid.

⁶⁹ International Press Institute, 'Defamation Laws in Europe 2016-2017' (n/a). Online in: <http://legaldb.freemedia.at/defamation-laws-in-europe/> (Accessed on 27.09.2020).

⁷⁰ Ibid.

⁷¹ Ibid.

IV. CRIMINAL AND CIVIL DEFAMATION LAWS IN ALBANIA

4.1 Defamation laws and freedom of expression in Albania

The Constitution of Albania guarantees the freedom of expression, press, radio and television, as well as prohibits the prior censorship of the media. Also, Article 23 of the constitution guarantees the right to information. Everyone has the right, in accordance with the law, to receive information on the activity of state bodies, and persons exercising public functions⁷². The restriction of fundamental rights can occur only on the basis of law, in the public interest and for the protection of the rights of others in proportion to the situation it has dictated and not to exceed the restrictions provided for in the European Convention on Human Rights. In this context, the European convention is used as a minimum to guarantee the protection of fundamental rights, which means that Albanian courts can provide a higher level of protection but not restrict the exercise of rights more than what is provided in the convention⁷³. As Albania has ratified the European Convention on Human Rights and its protocols, as part of international instruments it becomes part of the domestic legal system and prevails in conflict cases, over the common laws of the country, especially when the latter are inconsistent. The Constitutional Court is the body that makes the final and binding decision on the judicial review of statutes and norms that do not comply with the Constitution or an international agreement. In cases where the constitutional rights of a person are violated, he has limited access to the Constitutional Court, as this happens only in relation to the constitutional right to a fair trial and only with a referral of a judge in case of violation of the freedom of the person's expression. Although a very rare practice, after the exhaustion of domestic remedies, people can take

⁷² OSCE, 'Constitution of Republic of Albania', (2020), Online in: <https://www.osce.org/albania/41888> (Accessed on 27.09.2020).

⁷³ Human Rights Watch. 'The cost of speech: Violations of Media Freedom in Albania, Human Rights Watch Reports, Vol.14, No.5. (D) (2002), Online in: https://www.hrw.org/reports/2002/albania/albania0602-04.htm#P508_92221 (Accessed on 27.09.2020).

the country to the European Court for violation of their rights under the European Convention on Human Rights⁷⁴.

Based on the European Commission's latest report on the European Union Enlargement Package⁷⁵, Albania has a moderate degree of respect for freedom of expression, as threats and intimidating language against journalists have increased, although these acts have been systematically condemned⁷⁶. The code of ethics for journalists was updated in 2018, including adjustments for online media. However, implementing legislation related to freedom of expression is challenging according to the European Commission. The protection of journalists' labor and social rights needs to be strengthened⁷⁷ as practice has shown many cases of intimidation of journalists and threatening actions against them, including political discourse. A report by the Institute for Development, Research and Alternatives in 2019 entitled "Media Panorama in Albania" noted that more than a third of journalists face serious concerns of self-censorship due to pressure from government, political parties and media owners, in addition to verbal or physical assaults experienced by a third of reporters⁷⁸. In the same year, serious attacks on journalists and the closure of critical television programs were reported⁷⁹. During the state of emergency due to the devastating earthquake, the government blocked several internet portals, while the police arrested a 25-year-old girl for "spreading panic" on her Facebook page in posts related to the

⁷⁴ Ibid.

⁷⁵ European Commission. 'EU Enlargement Package 2019' (2019). Online in: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/freedom_of_expression_2019.pdf (Accessed on 28.09.2020).

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ IDRA. 'Media panorama in Albania 2019', (2019), fq. 8-19. Online in: <https://www.idrainstitute.org/files/Panoram%20C3%20ABn%20e%20Medias%20n%20C3%20...> (Accessed on 27.09.2020).

⁷⁹ BalkanInsight, 'Attack on Albania Crime Journalist's Home Condemned' (2018), Online in: <https://balkaninsight.com/2018/08/30/attack-against-albania-journalist-...> (Accessed on 27.09.2020) BalkanInsight, 'Last TV Shows Critical of Albanian Govt are Cancelled (2019), Online in: <https://balkaninsight.com/2019/08/29/last-tv-shows-critical-of-the-gove...> (Accessed on 27.09.2020).

consequences of the earthquake⁸⁰, who remained in prison for three days in a row.

Freedom of expression implies the possibility of statements that may harm the honor and reputation of others. In Albanian legislation, defamation is a civil and criminal offense. In the case of criminal defamation, the legal categorizations are related to simple insult, simple defamation, insult and defamation of public officials in relation to their public function and defamation against the President of the Republic⁸¹.

According to Article 119, intentional inflating is punishable by a fine of 50,000 to 1 million ALL and when committed in public by a fine of 50,000 to 3,000,000 ALL. Article 199 provides as a criminal offense punishable by a fine or imprisonment of up to two years, the distribution of racist or xenophobic material or insult with racist or xenophobic motives through a computer system. Although not specifically defined in this article, public insult has been interpreted by Albanian courts as degrading, immoral images or actions or mocking words. Guilty for public insult can be the persons who commit the above acts in the presence of seven or eight persons, including the insult that is spread by the mass media⁸².

Article 120 of the Criminal Code provides for acts of "libel" defamation. According to this article, intentional distribution of statements that affect the honor and dignity of a person with full awareness that they are false, is punishable by a fine of 50,000 to 1,500,000 ALL, while in the case where the act of defamation is public and damages some persons more than once is punished with a fine from 50,000 to 3,000,000 ALL. Pursuant to this article, a media outlet that has published a false or defamatory statement

may not be held criminally liable if the publication was made in good faith or under conditions where the accuracy of the information was not checked under the circumstances.

Insult and defamation against public officials are defined in Chapter VIII of the Criminal Code, Articles 239 and 240, respectively. Even in this case, the charge of insult is based on the deliberate dissemination of false information. The provisions in question specifically protect persons who perform a state function or public service and become victims of defamation for reasons related to their state activity or public service. Defamation sentences against public officials in all circumstances are the same as those applicable to general defamation. However, sanctions related to insulting public officials are many times higher than those related to simple insults. In both cases, the crimes can be investigated and prosecuted only at the request of the alleged victim in contrast to the criminal procedure, which initiates the prosecution of crimes after notifying the public prosecutor's office⁸³. In this context, the law guarantees procedural privileges to public officials compared to citizens, who can only take the actions set out in Articles 119 and 120. According to Articles 239 and 240, public officials must file a complaint with the police or a public prosecutor. who then takes over the investigation and prosecution of the case in court. Unlike public officials, a citizen, based on Articles 119 and 120, files a complaint in court bearing the burden of proof to prove the allegations or damage. A pre-trial investigation is not involved in this case. The prosecutor take parts in the trial of the cases and recommends the acquittal or acquittal of the defendant⁸⁴.

An insult to the judiciary is dealt with in a separate article of the Criminal Code. Under section 318, insulting a judge or member of a panel of judges, prosecutors, defense counsel or an arbitrator because of their activity in a case is

⁸⁰ BalkanInsight, 'Last TV Shows Critical of Albanian Govt are Cancelled (2019), Online in: <https://balkaninsight.com/2019/08/29/last-tv-shows-critical-of-the-gove...>(Accessed on 27.09.2020).

⁸¹ Human Rights Watch, 'The cost of speech: Violations of Media Freedom in Albania', Human Rights Watch Reports, Vol.14, No.5. (D) (2002), Online in: https://www.hrw.org/reports/2002/albania/albania0602-04.htm#P508_92221 (Accessed on 27.09.2020).

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Penal Code of Republic of Albania, Botim i Qendrës së Botimeve Zyrtare, (Tiranë, 2017), Online in: http://www.pp.gov.al/web/kodi_penal_2017_1200.pdf (Accessed on 27.09.2020).

punishable by a fine or imprisonment of up to three months.

In addition to criminal defamation, Albanian legislation also includes civil defamation. The Civil Code stipulates that if a person has suffered damage to his honor or personality, i.e. a non-pecuniary but moral damage, he enjoys the right to compensation. The responsibility for the misdemeanor lies with the defendant if he has caused an unlawful damage, ie has violated the rights and interests of another person protected by legal order or good practice and has acted guilty, ie has intentionally committed wrongful acts. As in the case law of European countries, the verification of the content of a qualified defamatory statement excludes the defendant from responsibility, as well as its commission in good faith, but this is not clearly stated in the legislation. The fact of the amount of moral damages, the standards of responsibility and the determination of the level of sentencing also remain undetermined⁸⁵.

Another shortcoming of the Civil Code lies in the reasonable provision of permissible defamation and the level of responsibility in this regard, which gives the court broad discretion in enforcing civil defamation laws. Meanwhile, Article 10 of the European Convention on Human Rights states that the restriction of freedom of expression must be prescribed by law and formulated with sufficient precision to enable the citizen to regulate conduct in accordance with the legislation.

Human rights experts and representatives of media organizations oppose laws that turn defamation into a criminal offense. Imprisonment has a shocking effect on media freedom and democratic debate in a society. In many countries, criminal defamation laws have been overused and misused by governments and high-ranking people to intimidate and punish the investigative media, which perform the function of "public watchdog". Experts have described the criminal sanctions for

defamation as excessive, disproportionate and unnecessary. Less restrictive remedies for freedom of expression can be used as adequately as possible to protect the honor and good reputation of public figures. Non-criminal means of compensation, which can provide adequate protection for victims of defamation. Defamation criminal laws are less appropriate in democracies, where freedom of expression is strongly promoted for human progress. In this way, international experts have called for the repeal of criminal defamation laws in European countries, including Albania. Basically criminal defamation is not appropriate for free expression. If we refer to the laws on defamation in Albania, they create conditions for public officials to be able to use procedural privileges to benefit from the resources and authority of the public prosecutor to eliminate the criticism of the investigative media in matters of public interest. In this way they enjoy greater protection compared to other citizens. On the other hand, public prosecutors are far from protecting themselves from the inappropriate influences of powerful persons especially when investigating defamation cases. Protecting the reputation of public officials and state authority as an institution through the provisions of the Criminal Code runs counter to the principles of international law, according to which government institutions and public officials, because of their status, should be more open to public criticism than citizens, but above all they should be subject to public scrutiny to detect, make public and resolve possible abusive issues of public interest.

4.2 Anti-Defamation Package

Freedom of expression is especially important when developing online, as publishing and participating online are the only actions a journalist can take, unlike when he or she can express himself or herself "offline" in some ways. In this context, any restriction on online content severely restricts freedom of expression. Despite the need to protect the reputation of people, national security, etc., any broad restrictions on

⁸⁵ Human Rights Watch, 'The cost of speech: Violations of Media Freedom in Albania', Human Rights Watch Reports, Vol.14, No.5. (D) (2002), Online in: https://www.hrw.org/reports/2002/albania/albania0602-04.htm#P508_92221 (Accessed on 27.09.2020).

the right to expression are unacceptable and should be strictly defined⁸⁶.

One way chosen by the Albanian government to reduce the violation of the dignity of people through online media reporting is the legislation proposed under the name of "anti-defamation package". This package of amendments related to the law on Audiovisual Media and the Law on Electronic Communications was announced in December 2018, passed for public consultation in 2019. After the adoption of the first amendments to the anti-defamation package in 2019, although by many international experts described as government censorship of online media⁸⁷. The adoption of the second amendments to this package is expected in 2020. The international community raised concerns about the scope of the definition of electronic publishing, the extension of the domain registration obligation and the consequences of non-registration⁸⁸. The general and vague character of the law that portals can be penalized for "insulting public morals" or publishing "fake news" was described by some international experts as shocking to media freedom⁸⁹.

The anti-defamation package contains legal provisions for the empowerment of an administrative body, such as the Audiovisual Media Authority, which will review within 48 hours complaints of people, businesses, institutions, when they claim that they have been

⁸⁶ G. Hariharan, 'Understanding International Standards for Online Freedom of Expression' in Global Information Society Watch 2017, Creative Commons Attribution 4.0 International (CC BY 4.0) (2017), Online in: <https://www.giswatch.org/en/freedom-expression/international-standards-and-regional-trends> (Accessed on 28.09.2020).

⁸⁷ Human Rights Watch, 'The cost of speech: Violations of Media Freedom in Albania', Human Rights Watch Reports, Vol.14, No.5. (D) (2002), Online in: https://www.hrw.org/reports/2002/albania/albania0602-04.htm#P508_92221 (Accessed on 27.09.2020).

⁸⁸ European Commission, 'EU Enlargement Package 2019' (2019), Online in: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/freedom_of_expression_2019.pdf (Accessed on 28.09.2020).

⁸⁹ A. Ruçi, 'Shqipëri: Paketa ligjore Anti-Shqipëri sërish në qendër të debatit' (2020), Online in: <https://www.dw.com/sq/shqip%C3%ABri-paketa-ligjore-anti-shqip%C3%ABri-sh-n%C3%AB-qend%C3%ABr-t%C3%AB-debatit/a-54985644> (Accessed on 28.09.2020).

defamed, violated dignity and privacy. from traditional and online media and will order the media to remove such reports, or severe fines will be applied to the latter. The Electronic and Postal Communications Authority obtains the right to write in the pop-ups of their websites or portals, which appear every time someone clicks on them, on the fact that the media or portal in question has defamed or violated the dignity of the person, business or institution. In case the media or portal does not react even after pop ups, then the Electronic and Postal Communications Authority) has the power to block the signal even through the operators providing Internet services (Internet Service Providers, ISP) to block the domain of certain websites by made public access to them throughout the territory of Albania impossible⁹⁰.

The draft submitted for consultation to the Venice Commission, according to the latter is not yet ready for adoption, as it is still unclear and this creates the possibility that the legislative power given to an organization like the Audiovisual Media Authority extends to people⁹¹.

Proposals for change by the Venice Commission relate to some of the international standards for safeguarding freedom of expression and professionalism in the media. According to him, the scope of law enforcement should be narrowed, explicitly excluding and listing any non-professional online media, such as personal blogs or social network users. At this point, the Albanian authorities have agreed to clarify the provision as the purpose of the law is only online media and not people using the Internet or social networks⁹².

⁹⁰ A. Ruci, 'Gazetarët kundër paketës antishqipërie të qeverisë', European Journalism Observatory (2020). <https://al.ejo-online.eu/kryesoret/gazetarët-kunder-paketës-antishqipërie-te-qeverisë> (Accessed on 28.09.2020).

⁹¹ Mapo, 'Komisioni i Venecias "rrezon" Ligjin Antishqipërie, Rama: Do bëjmë ndryshime' (2020), Online in: <https://gazetamapo.al/komisioni-i-venecias-rrezon-ligjin-antishqipërie-rama-do-bejme-ndryshime/> (Accessed on 28.09.2020).

⁹² Mapo, 'Paketa Antishqipërie, Balla e lexon ndryshe opinionine Venecias, Nuk rrezon nismën' (2020). Online in: <https://gazetamapo.al/paketa-antishqipërie-balla-e-lexon-ndryshe-opinionin-e-venecias-nuk-rrezon-nismen/> (Accessed on 28.09.2020).

Also, according to the commission, the provision of de-anonymization of all Albanian online media sources should be reviewed, excluding in a taxable manner the identity of internet users other than the professional media provider. In this regard, the authorities have confirmed the amendment of the relevant provision by explicitly citing the exemption of the law from the obligation to anonymize Internet users other than media service providers⁹³. Other recommendations related to the legal provision of the selection of human resources and the functioning of the Appeals Council to guarantee transparency and political impartiality, reviewing the selection of members of the two main bodies under the Anti-Defamation Package and reviewing complaints by adding safeguards procedural to ensure due process and proportionality of sanctions⁹⁴.

Despite the fact that the anti-defamation legal package was drafted with the support of experts from European Union countries, based mainly on the Croatian model, many analysts and journalists say that the regulatory mechanisms violate freedom of expression, due to the high possibility that the attributes of data to the Albanian Audiovisual Authority can turn it into a censorship agency based on the traditional one-sided political use of this institution⁹⁵. In the draft law, the administrative measures taken by the Council of the Board of the Audiovisual Media Authority are executed without going to court, which is contrary to the fundamental rights of the person⁹⁶. In this case, this institution takes over the competencies of a court, while the Electronic and Postal Communications Authority takes over the enforcement powers and this violates the freedom of expression of every citizen on social media or online platforms⁹⁷.

The package was also described as inciting the self-censorship of journalists. According to K.Voko, Director of the Balkan Investigative Reporting Network (BIRN) for Albania, the

package encourages self-censorship of journalists. If a journalist is under the threat of fines that are many times higher than his monthly salary, he will be inclined to the so-called "protocol news", which hardly provides sufficient and quality information to the public. In the event that fines, rightly or wrongly, are immediately executed by the Audiovisual Media Authority, journalists will have to anticipate the seizure of their bank accounts after any writing that could violate the "dignity and privacy" of an official or a business. The bill does not make any clear distinction between a media or a personal or collective blog and in these circumstances anyone is at risk. The legal package aims to create a fast and efficient mechanism to punish media critical of the government⁹⁸.

Anti-Defamation Law on Online Media, restricting journalists' access to information, banning journalists and activists and closing of critical shows with the government" are among the reasons why Albania has lost two places in the World Media Freedom Index published by Reporters Without Borders for 2019⁹⁹.

One possible solution in this regard, presented by journalists and supported by the Venice Commission is the self-regulatory operation and respect of the online media accountability system¹⁰⁰. However, the authorities need to focus on strengthening law enforcement and avoiding corruption in this regard, as medical legislation and the legislation as a whole are increasingly adapting to European standards.

V. CONCLUSIONS

Freedom of expression, media and defamation are very important legal terms in a democratic

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Vërtetmatës, Censura dhe autocensura "ulën" indeksin e lirisë së medias në Shqipëri (2020), Online in: <https://vertetmates.mk/censura-dhe-autocensura-ulen-indeksin-e-lirise-se-medias-ne-shqiperi/> (Accessed on 28.09.2020).

¹⁰⁰ A. Ruçi, 'Shqipëri: Paketa ligjore Anti-Shpifje sërish në qendër të debatit' (2020), Online in: <https://www.dw.com/sq/shqip%C3%ABri-paketa-ligjore-anti-shpifje-s%C3%ABrish-n%C3%AB-qend%C3%ABr-t%C3%AB-debatit/a-54985644> (Accessed on 28.09.2020).

society. Therefore, they must be clearly defined in the legislation, to prevent the possibility of misinterpretation in a civil or criminal trial. Due to the very nature of the right to freedom of expression, it is preferable for defamation to be decriminalized by European countries, including developing countries such as Albania, as freedom of expression promotes social progress. In addition to adapting defamation laws in line with international standards and good practice, their de facto implementation must be guaranteed, which would increase public confidence in their right to freedom of expression, as well as opportunities for journalists not to self-censor but to perform the function of "public watchdog" as effectively as possible.

BIBLIOGRAPHY

- Ahmet Yildirim v. Turqisë, request no. 3111/10, 18 December 2012.
- Article 19, Defining Defamation: Principles on Freedom of Expression and Protection of Reputation (2017), Online in: [https://www.article19.org/data/files/medialibrary/38641/Defamation-Principles-\(online\)-.pdf](https://www.article19.org/data/files/medialibrary/38641/Defamation-Principles-(online)-.pdf) (Accessed on 26.09.2020).
- Article 19, International Workshop on Freedom of Expression and Defamation, London. (February 29 – March 1, 2000). Online in: <https://www.article19.org/wp-content/uploads/2018/02/defining-defamation.pdf> (Accessed on 26.09.2020).
- BalkanInsight, 'Attack on Albania Crime Journalist's Home Condemned' (2018), Online in: <https://balkaninsight.com/2018/08/30/attack-against-albania-journalist-> (Accessed on 28.09.2020)
- BalkanInsight, 'Last TV Shows Critical of Albanian Govt are Cancelled' (2019). Online in: <https://balkaninsight.com/2019/08/29/last-tv-shows-critical-of-the-gove...>(Accessed on 26.09.2020).
- BIRN Albania, 'Liria e Shprehjes dhe e Medias në Manuali i Drejtësisë' (2017), Reporter.al., Online in: <https://www.reporter.al/manuali-drejtësisë/download/LIRIA%20E%20SHPREHJES%20DHE%20E%20MEDIAS.pdf> (Accessed on 25.09.2020).
- BIRN, 'About BIRN' (2017), Online in <https://birn.eu.com/about-birn/> (Accessed on 25.09.2020).
- Bladet Tromsø and Stensaas vs. Norway, Application no. 21980/93, Judgment of 20 May 1999.
- Castells v. Spain, Judgment of 23 April 1992, Series A no. 236.
- Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85 of 13 Nov. 1985, Series A no. 5, 7 HRLJ 74 (1986), para 30.
- Council of Europe, 'European Convention on Human Rights' (n/a), Online in: https://www.echr.coe.int/documents/convention_eng.pdf (Accessed on 25.09.2020).
- Cumpănă dhe Mazăre k. Romania, kërkesa nr. 33348/96, 17 dhjetor 2004.
- Eon v. France, Application No. 26118/10, Judgment of 13 March 2013.
- European Commission, 'EU Enlargement Package 2019' (2019), Online in: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/freedom_of_expression_2019.pdf (Accessed on 28.09.2020).
- Feldek vs. Slovakia, Application No. 29032/95, Judgment of 12 July 2001.
- Giniewski vs. France, Application no. 64016/00, Judgment of 31 January 2006, para 44.
- Handyside vs. United Kingdom, request no. 5493/72, 7 December 1967.
- Hariharan, G., 'Understanding International Standards for Online Freedom of Expression in Global Information Society Watch 2017', Creative Commons Attribution 4.0 International (CC BY 4.0) (2007), Online in: <https://www.giswatch.org/en/freedom-expression/international-standards-and-regional-trends> (Accessed on 28.09.2020).
- Human Rights Watch, The cost of speech: Violations of Media Freedom in Albania, Human Rights Watch Reports, Vol.14, No.5. (D) (2002), Online in: https://www.hrw.org/reports/2002/albania/albania0602-04.htm#P508_92221 (Accessed on 27.09.2020).

20. IDRA 'Media panorama in Albania 2019' pp 8-19. Source: <https://www.idrainstitute.org/files/Panorama%C3%ABn%20e%20Medias%20n%C3%...>
21. International Press Institute, 'Freedom of Expression, Media Law and Defamation' (2015), Online in: http://legaldb.freemedia.at/wp-content/uploads/2015/08/FoE-MediaLaw-Defamation_ENG.pdf (Accessed on 26.09.2020).
22. International Press Institute, 'Out of balance. Defamation Law in the European Union: A Comparative Overview for Journalists, Civil Society and Policymakers' (2015). Online in: <https://ipi.media/wp-content/uploads/2016/08/IPI-OutofBalance-Final-Jan2015.pdf> (Accessed on 27.09.2020).
23. International Press Institute, Defamation Laws in Europe 2016-2017 (n/a), Online in: <http://legaldb.freemedia.at/defamation-laws-in-europe/> (Accessed on 27.09.2020).
24. Kenyon, A. T., 'Liber, Slander and Defamation' (2019). The International Encyclopedia of Journalism Studies, Wiley Online Library, <https://doi.org/10.1002/9781118841570.iejs0110>.
25. Klein vs. Slovakia, Application no. 72208/01, Judgment of 31 October 2006, paras 51-52.
26. Kodi Penal i Republikës së Shqipërisë, (Tiranë: Botim i Qendrës së Botimeve Zyrtare, 2017), Online in: http://www.pp.gov.al/web/kodi_penal_2017_1200.pdf (Accessed on 27.09.2020).
27. Krone Verlag GmbH & Co. KG vs. Austria, Application No. 35373/97, Judgment of 26 February 2002.
28. Lingens vs. Austria, request no. 9815/82, 8 July 1986.
29. Mapo, 'Komisioni i Venecias "rrezon" Ligjin Antishqipije, Rama: Do bëjmë ndryshime' (2020), Online in: <https://gazetamapo.al/komisioni-i-venecias-rrezon-ligjin-antishqipije-rama-do-bejme-ndryshime/> (Accessed on 28.09.2020).
30. Mapo, 'Paketa Antishqipije, Balla e lexon ndryshe opinionin e Venecias, Nuk rrezon nismën' (2020). Online in: <https://gazetamapo.al/paketa-antishqipije-balla-e-lexon-ndryshe-opinionin-e-venecias-nuk-rrezon-nismen/> (Accessed on 28.09.2020).
31. McVicar vs. United Kingdom, request no. 46311/99, 7 May 2002.
32. Oberschlick v. Austria, Judgment of 23 May 1991, Series A no. 204.
33. OHCHR, 'International Covenant on Civil and Political Rights' (n/a). Online in: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx#:~:text=Article%2017,against%20such%20interference%20or%20attacks> (Accessed on 27.09.2020).
34. OSCE, 'Constitution of the Republic of Albania' (2020), Online in: <https://www.osce.org/albania/41888> (Accessed on 25.09.2020).
35. Otto-Preminger-Institut vs. Austria, Application No. 13470/87, Judgment of 20 September 1994, para 49.
36. Radio Franca et al. vs. France, request no. 53984/00, 30 March 2004.
37. Ruci, A., 'Gazetarët kundër paketës antishqipije të qeverisë', (European Journalism Observatory, 2020), Online in: <https://al.ejo-online.eu/kryesoret/gazetar-et-kunder-paketes-antishqipije-te-qeverise> (Accessed on 28.09.2020).
38. Ruçi, A., 'Shqipëri: Paketa ligjore Anti-Shqipije sërisht në qendër të debatit' (2020). Online in: <https://www.dw.com/sq/shqip%C3%ABri-paketa-ligjore-anti-shqipije-s%C3%ABri-n%C3%AB-qend%C3%ABr-t%C3%AB-debatit/a-54985644> (Accessed on 28.09.2020).
39. Steel and Morris vs. United Kingdom, para 96.
40. TønssbergsBlad AS and Haukom k. Norvegjisë, Complaint no. 510/04, 1 March 2007.
41. Thorgeir Thorgeirson vs. Iceland, request no. 137778/88, 25 July 1992.
42. Thorgeirson vs. Iceland, para 63.
43. Vërtetmatës, Censura dhe autocensura "ulën" indeksin e lirisë së medias në Shqipëri (2020), Online in: <https://vertetmates.mk/censura-dhe-autocensura-ulen-indeksin-e-lirise-se-medias-ne-shqiperi/> (Accessed on 28.09.2020).

This page is intentionally left blank