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The Protection of Personality Rights against Invasions by Mass Media – Case of Slovenia

I. Introduction

Like most European states, the Republic of Slovenia is lost in a chaotic labyrinth of legal approaches to personality rights. This thesis is applicable on a practical level as well as a theoretical one. The main characteristic of the legal issue "personality rights v. freedom of the press and the public's right to know" today, is that the list of decided cases on all instances in this subject matter is becoming longer and longer since Slovenia's independence. Recent decisions of the Supreme as well as the Constitutional Court on the role of legal precedents are crystallizing some of the most important problematic areas of this field – the legal basis of personality rights, as well as freedom of the press and the publics right to know, analyses of the weighing of interests, classification of personality rights, classification of the "board" right to privacy, and so on.

From the theoretical standpoint, the last dozen years, which may also be named the "third period" in the scope of research on personality rights, has however been rather poor compared to the "first and second periods", which themselves were characterized by lack of legal practice[1]. These two eras were, on the other hand, marked

[1] R. Lampe, *Pravica do zasebnosti, zagovor njene široke implementacije*, Uradni list, Lubljana 2003, pp. 196.

by theoretical works of an extremely high standard by the academic, Alojzij Finžgar. The scholar must be mentioned whenever personality rights and legal theory are linked. Finžgar had already started his scientific research into the issue of personality rights in the late fifties[2]. His last article[3] was published in 1989, which ended 40 years of theoretical efforts in this interesting and important area of law. Finžgar also was a professor of "Personality law" (*Osebnostno pravo, Persönlichkeitsrechts*) at the Faculty of Law at the University of Ljubljana for more than 40 years. Along with other important works on personality rights, which stand as Slovenias theoretical cornerstones as well as theoretical masterpieces[4] he wrote an extensive report based on an international survey on personality laws and mass media[5]. The scolars main contribution was *Osebnostne pravice (Personality Rights, Persönlichkeitsrechte*), published in 1985 by Slovenian Academy of Sciences and Arts, which also contributed to European legal culture. This work still has a tremendous impact on legal practice. The other great scholar, prof. Bogomir Sajovic, who was also the mentor of the author of this article, provided very important contributions to personality law especially with his theoretical analyses of "general rights of personality"[6].

The main characteristic of the "personality rights v. freedom of expression" issues in Slovenian law is that both personality rights

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[2] A. Finžgar, *Pravica do osebnega življenja*, Zbornik znanstvenih razprav Pravne fakultete Univerze v Ljubljani (ZZR) 1958, no. XXVII, pp. 59–83.

[3] A. Finžgar, *Francuska deklaracija o pravima čovjeka i građanina i prava ličnosti*, [in:] E. Pušić (ed.) Francuska revolucija – ljudska prava, Zagreb 1991, pp. 163–171.

[4] A. Finžgar, *Pravica do osebnega življenja*, id. 1966; A. Finžgar, *Osebnostne pravice*, id. 1985; A. Finžgar, *Civilnopravno varstvo človekovih pravic,* [in:] P. Jambrek (ed.), *Varstvo človekovih pravic*, Ljubljana 1988, pp. 125––146.

[5] S. Stromholm, A. Finžgar, et all., *Die Haftung der Massenmedien, inbesondere der Presse, bei Eingriffen in persönliche oder gewerbliche Rechtspositionen*, Türbigen 1972.

[6] B. Sajovic, *Osebnostne pravice in civilno pravo*, Pravnik, Ljubljana 1988, pp. 567–581; B. Sajovic, *Nekateri teoretični pristopi k fenomenu osebnostnih pravic*, Uradni list, Ljubljana 1990; B. Sajovic, *O pravni naravi osebnostnih pravic*, Uradni list, Ljubljana 1996.

and freedom of the press are guaranteed by the constitution. Art. 35 (entitled "protection of privacy rights and personality rights") states that the inviolability of human physical and psychological integrity, as well as his privacy and personality rights, is guaranteed. This rather confusing constitutional diction is closely analyzed in the following chapter. The basic fundamental starting-point is that Slovenian law guarantees "special personality rights" (*posebne osebnosne pravice*, *besondere Persönlichkeitsrechte*). Among others, the following are already specified in the constitution: physical and psychologist integrity and "others" personality rights as well as the right to privacy. The right to privacy has however three "roles" in Slowenian law: 1. Personality rights (*osebnostna pravica*, *Persönlichkeitsrecht*), with their legal foundation in the constitution that is protected by civil law. 2. Constitutional rights (*ustavna pravica, Grundrecht*), protected by public law. 3. Human rights (*človekova pravica*, *Menschenrecht*), protected by international law (primarily with art. 8 of the European Convention of Human Rights and Basic Freedoms). The following personality rights, which can also be analyzed as aspects of a broad right to privacy, are guaranteed and also protected directly by the constitution (and of course also by civil law): the inviolability of ones home (art. 36), secrecy of correspondence (art. 37) and the right to protection of personal data (art. 38). The aspects of the listed rights that we are interested in are only the private ones.

Art. 39 of the constitution, on the other hand, guarantees freedom of expression – *In civitae libera linguam mentemque liberas esse debere*. Or in the Slovenian version: "The freedom of expression of thoughts, speech and public appearance, as well as that of the press and other forms of public informing and expression is guaranteed. Anyone is free to choose, receive, to spread information and opinions. Everyone has the right to receive any information of public interest, for which he is legally entitled, except in cases prohibited by law". The rights guaranteed by art. 35 and those guaranteed by art. 39 from a classic collision of interests and rights. The weighing of those interests according to the concrete factual situation is "still" the only method of determination whether the rights of personality are illegally infringed.

II. The protection of Personal Rights and Freedom of Expression

There are three historical periods of personality law in Slovenian legal history. The same period of "personality law" (*osebnostno pravo, Persönlichkeitsrecht*) also apply to "privacy law", which however is not recognised as a special legal discipline. The first era dates from the fall of the Austro-Hungarian Empire until the year 1978, when Act on Obligations came into force. This period is characterized by the concept of personality rights from the Austrian civil code. This classical codification protected the following special personality rights also on Slovenian soil: the right to life (par. 1327), physical integrity (par. 1325), personal freedom (par. 163), honour (par. 1330), women's physical integrity (par. 1326) and women's psychological integrity (par. 1328).

Civil law as well as personality law in the new Yugoslavian state was fragmented. The state was divided into so-called "legal regions"[7]. Slovenian civil law was a direct successor of the Austrian civil code (ABGB). Most of the provisions of this code were valid on Slovenian soil until 1978; some of them are still valid today! Ergo, the civil law protection of personality rights was also completely based on ABGB provisions. The new Yugoslavian state introduced a number of legal acts that were applicable on federal level. The most characteristic act in view of this was the 1929 Act on the Protection of Copyrights (*Zakon o varstvu avtorskih pravic*). This Act was inspired by the 1907 German Act on Copyrights (*Kunsturhebergesetz*). Copyright law became a secondary legal source for the protection of personality rights in the sphere of artistic and related works. Although not specified literally, the Act on the Protection of Copy-

[7] S. Lapajne, *Razvoj in stanje našega državljanskega prava* (1st edn. 1934). On Serbian territory, the Serbian Civil Code, as well as in Montenegro the Montenegrinian Civil Code, independently regulated Civil Law. The Austrian Civil Code, although non-novelized, was valid in inner Croatia (not in Dalmatia, there the novelized Austrian Code was in force) as well as in Bosnia and Herzegovina. A special Civil Law regime, based on the precedents by the Supreme Court in Budapest (Kuria), was established in Voivodina.

rights (1929) protected special personality rights such as "the right to ones own image" and "the right to artistic creation" on the other. The first two mentioned rights were recognized as special personality rights, although I think they should be debated as aspects of a broader right to privacy in modern privacy law. The Act on the Protection of Copyrights is also important from a dogmatic point of view. It is one of the cornerstones that confirmed the pluralistic concept of personality rights in Slovenian law. The pluralistic concept came into being, as already mentioned, primarily because of the ABGB system.

Personality rights also received subsidiary protection within criminal law. Translated into civil law terminology, the criminal legislation enacted in 1929 protected the right to sexual integrity, inviolability of ones home, physical integrity, and personal and family life (the term is still used in the current Slovenian Code on Obligations). This historical picture from the early stage of Slovenian personal law is very important because it shows clearly the main characteristics of the systematic protection of personality laws-primarily assured by civil law, but also by criminal and subsidiary civil law legislation. These characteristic can also be traced in the positive Slovenian law.

The first period of personality law was marked by a great theoretical effort, the introduction of the civil code. The Slovenian "school", led by Professor Stanko Lapajne, offered a very important theoretical contribution to the text, which would have become a modern and highly profound civil law codification[8]. The Law of the Persons was inspired by Liechensteins Act on the Law of the Persons and Company Law (*Das Personen-und Geselschaftsrecht*) from 1926. The civil code would have guaranteed civil law protection of the following special personality rights: physical integrity, honour, freedom, inviolability of ones home, secrecy of correspondence, name, ect. The code, unfortunately, did not become law and the

[8] S. Lapajne, *Mnenja k predhodnemu načrtu državljanskega zakonika za Kraljevino Jugoslavijo*, Ljubljana 1938; S. Lapajne, *Načrt odškodninsko-pravnih določb za jugoslovanski državljanski zakonik*, Ljubljana 1938, ZZR, no. 37–38, pp. 256–268.

result was the continuation of the ABGB system of personality rights protection for nearly half a decade.

The second phase of the first era of personality law, starting after the Second World War, was characterized by a rejection of civil law protection of personality rights. It was understood that the primary civil law instrument for the protection of personality rights, that is, compensation in money for non-pecuniary loss, was not socially acceptable – A typical example of such atmosphere was te rejection of a legal action based on the revised par. 1328 of ABGB (that assures women's right to physical and sexual integrity) by the Slovenian Supreme Court in 1946[9].

The third phase of the first era of personality law had its turning point in 1964. In that year the Yugoslavia Supreme Court reached the conclusion that the plaintiff is entitled, in addition to some form of compensation, to injunction (*Unterlassung*) and removal (*Bestetigung*), as well as compensation in money for pecuniary loss, and compensation in money for non-pecuniary loss[10] in cases where his personality rights: freedom, honour, reputation, personal and family life (the court literally stated "personal and family peace") and "others". In the same year the Yugoslavian Supreme Court recognized the right to compensation in money for non-pecuniary loss because of the infringement of personality rights of handicapped girl, whose photograph was published in a medical journal. The court used the method of interest weighing (*Interessenabwägung*), weighing the interest of science due to this publication against the plaintiff's interest of not being disclosed. After these "precedents", legal practice registrated rather a small number of decisions based on infringements of personality rights.

Although not vital on a practical level, the first era was vital from theoretical point of view. During this period a number of theoretical

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[9] Judgement of the Supreme Court of Republic of Slovenia Sodba Vrhovnega sodišča LR Slovenije, 24 October 1946, Pv 350/46, published in Ljudski pravnik (Ljubljana 1946), pp. 425–426.

[10] Judgement of the Federal Supreme Court, revision No. 247/64, published in Collection of Supreme Court Judgements, Zbirka sudskih odluka IX/1, 1964, No. 29.

drafts of an act on obligations were introduce, which specified the legal tools for protection of personality rights. The most serious one was written by Professor Konstantinović, who presented the "Draft of the Code of Obligations". This great theoretical work is very important because is served as the theoretical model for the 1978 Act on Obligations. It must be stressed that during this period, precisely in 1974, the Yugoslavian federal constitution came into force. This Act finally crystallized the pluralistic concept of personality rights, although there were no serious pleas in the Slovenian legal theory for recognition of the "general right to personality". "The right to inviolability of ones personality" guaranteed by the Federal Constitution (1974) could however serve dogmatically as the legal foundation for the "general right to personality" (analogously to the concept of "personality" – "*Persönlichkeit*" from the un amended original art. 28 of Swiss civil code). The right to inviolability of ones personality, the right to personal and family life, and "others" became guaranteed directly by the constitution as special personality rights. The *UnmittelbareDrittwirkung* (direct applicability of constitutional provisions) was herewith applied also in Slovenian law.

The second era of the protection of personality rights can be introduced with the following conclusions: Legal foundations of personality rights are to be found in the fragmented constitutional provisions as well as in the Act on Obligations: Right to inviolability of ones personal and family life (art. 157 ZOR), right to honour and reputation (art. 198 ZOR), right to physical integrity; to psychological integrity; freedom and "others" (art. 200). The legislative method used in the enumeration of special personality rights.

Rights is that of a "framework enumeration", which means that other personality rights are also protected, although not literally mentioned. The "secondary" protection of personality rights was offered namely by the criminal and secondary civil law legislation. Translated into civil law terminology, the following personality rights were protected: sexual integrity, freedom, physical and psychological integrity, various aspects of the right to privacy (image, secrecy of correspondence, inviolability of the ones home, and protection of professional secrecy), and others.

Although "clearly" specified and protected with classical civil law instruments, personality rights were very rarely called upon in civil courts. The proof of this conclusion is a short list of decided cases during the "second era". Art. 157, the legal basis for injunction and removal, was a typical example of *tabula rasa* in legal practice. Personality rights were more a subject of research by a few scholars than a vital legal institute.

As already mentioned, the third era of personality law in Republic of Slovenia started with her independence in 1991. Slovenia obliged herself to protect human rights and fundamental freedoms directly by the constitution (art. 5) from 23 December 1991. In the case of personality rights, the Republic specifically obliged herself to guarantee them (art. 35) as well as freedom of the press (art. 39).

The protection of personality rights as well as freedom of expression, thought, speech, public appearance, press, receiving information, ect., is protected by fragmented jurisdiction. The constitution provides the prime guarantee as well as the prime legal protection. Personality rights are concretely protected by the classical tools of civil law by the Code on Obligations. The Slovenian Code on Obligations (2002) is the direct successor of the 1978 Act on Obligations. The legal tools for the tort law protection of personality rights are also roughly identical. Besides the tort law protection of personality rights through media law. The Media Act precisely defines exercises of the "right to corrigendum" and the "right to reply" or "the right to public answer" (literally "the right to answer"). These rights also enjoy direct applicable protection by the constitution.

The Media Act foresees two legal instruments for realization of the mentioned constitutional guarantees: "the claim for corrigendum" and "the claim to public answer". Using both as journalistic "denial" *(demanti)* is a cause for much confusion in legal theory and practice (not only Slovenian). Both of them guarantee the so-called *Waffengleichheit*, or in the words of Professor Tuor *Kampf mit gleich langen Spießen*. With "the claim for corrigendum" the complainant demands directly from the media that they correct their published information. With "the claim to the public answer" the complainant

demands directly from the media for his side of the story to be published. *Audiatur et altera pars* is the main idea of the "right to public answer".

III. The Scope of Personal Right Protection against Invasions by Mass media

Slovenian civil law does not include a special list (catalogue) of personality rights. As mentioned, their legal basis is fragmented. In this section, we are only interested in personality rights which protect against invasions by mass media. The most transparent one is undoubtedly the right to privacy. Its legal foundation is to be found directly in the constitution (art. 35). The same provision also guarantees legal protection of "other" personality rights as well as physical integrity, which can also be defined and discussed as a special personality right. The other special personality right which protects against invasions by mass media is the right to honour and reputation. The right is based in the Code of Obligations (art. 177, 179). Other legal bases of personality rights are to be found in the Criminal Code.

Before we start to analyze each right, it must be stressed that there are some differences between the criminal and civil law approaches to individual personality rights. The Slovenian Supreme Court decided in 1999 in a relevant decision[11], that the civil court has to take into consideration primarily the tort law criteria in cases where personality rights were invaded. If there criteria are insufficient, only than can the civil court use the criteria developed by criminal law. It must be understood that the civil court must treat personality rights according to civil law dogmatic. A criminal approach is only a subsidiary tool.

A typical example in practice is the confusion between "defamation" and the "violation of privacy". Both torts are very similar, the

[11] Judgement of the Supreme Court (Sodba Vrhovnega sodišča) II Ips 402/99; published in Supreme Court, Collection of Judgements, Vrhovno sodišče, Zbirka odločb 2000, (2000), pp. 179.

main difference is which right they are protecting. The tort of defamation is an illegal violation of the personality right to honour and reputation. Violation of privacy, on the other hand, is a tort where someone's right to privacy has been illegally violated. The confusion arises when the tortfeasor violates the right to honour and reputation by spreading information concerning the affected individuals private life.

The classical civil tort of defamation is clearly divided in criminal jurisdiction. The Criminal Code distinguishes the following crimes against honour and reputation: offending another individual (*žalitev*), false indictment, criminal defamation (*obrekovanje*) and slander (*opravljanje*). The last two crimes must be briefly analyzed. Criminal defamation (*obrekovanje*) is a crime in which someone asserts or spreads something untrue about someone else, although he knows these assertions are untrue. If the last element is not present – the subjective relation to the truthfulness of assertions – then the crime of offending another individual (*žalitev*) has been committed. On the other hand, the crime of slander (*opravljanje*), also called "tactless crime", is committed when someone spreads information regarding the private or family life of another, which could harm his honour and reputation. In this case the right to privacy and the right to honour are protected. The crime is committed by the violation of the right to privacy, whereby the right to honour and reputation can be objectively violated. The criminal theory and legal practice witness which facts from private and family life can be spread in order for this crime to be committed: spreading rumours concerning someones sexual life, illness, love affairs, bad habits such as alcoholism, laziness, intimate life, familiy relations, etc.[12]

The crime, of slander (*opravljanje)* is structurally the closest to the civil tort of violation of privacy. Both namely protect the right to privacy. – The main difference though is that the civil tort is much broader. It does not require the statement concerning someones private and family life to also objectively violate the right to

[12] M. Deisinger, *Penal Code – Commentary*, Kazenski zakon SRS, Uradni list, Ljubljana 1985, pp. 433.

honour and reputation[13]. Facts spread from someones private and family life that cause the civil tort of violation of privacy are described by theory as the following: facts regarding intimate life, misfortunes in families, entail diseases, ect.

The right to privacy is a very broad clause that must be systematically studied and classified. I defend the theory that there are four protected areas within the right to privacy: decisional, proprietary, informational and physical privacy. The most important area for our topic is physical privacy. Within this protected area, there are various aspects of the general right to privacy: sexual integrity, private and family life, ones image, ones name, ones voice and ones secrecy of private life. All of those aspects can be studied and understood as special personality rights (right to sexual integrity, etc.). Besides the right to private and family life, which was already mentioned, the right to ones image, name, voice and the right to secrecy of ones private life are the rights that protect the individual from the mass media.

The following special personality rights, which can be also studied as special aspects of a broader right to privacy, are frequently invaded by the mass media. The first and very important one is the right to one's image. This personality right (along with many others) is not precisely defined by Slovenian civil legislation. In the "first era of personality law" it was protected by copyright law. In the course of time it lost its precise legal foundation. The right to ones image is recognized today as a result of legal dogma. The object of this right is an individuals appearance, his image and his likeness that can be violated and infringed by its visualization, regardless of whether it is visualized by a drawing, a painting, a sculpture, a picture or any other visualization with technical support. Professor Vodinelič defines this right as a right of someone who is already visualized to decide what will happen to his visualization[14]. But can we imagine today without photographs, without news, etc.? Can we imagine that any published photograph or press contribution

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[13] Judgement of the Supreme Court, II Ips 507/2000.

[14] V.V. Vodinelić, *Lična prava*, [in:] M. Orlič (ed.), *Enciklopedija imovinskog prava i prava udruženog rada*, Beograd 1978, pp. 913–936.

would require the prior consent of the visualized? For this reason some "silent rules" are established when such visualization can take place without prior consent. Visualization in connection to a public event and visualization of a public person are typical examples. In these cases the sphere of privacy shrinks whereas, on the other hand, the sphere of the public right to know enlarges. The public right to know is dominant.

The concept of a "public person" (*javna oseba*) was also included in the Ethical Codex of Journalism from 2002. The Codex defines what was already mentioned. Interference with ones privacy is allowed only if the public interest requires such interference. The public right to know is broader in cases of reporting on public persons and those who are struggling for public offices and positions. The concept of a public person in Slovenian law is similar to the German or U.S. concept. Public persons are those who, because of their public function, their position or some other characteristics, frequently appear in public. Because of that the public has legitimate interest in being informed. Public persons are generally politicians, athletes, stars from show business, artists, businessmen, etc. Nevertheless their privacy cannot be invaded without limits. Strictly private or intimate images, also of private persons, must be kept away from the public eye. Nude images, images of emotional situations (sadness, etc.) intimate situations, in other words "boxes that must be kept closed", are and must be legally protected.

The same logic also goes for the visualization of public events. In the cases the public right to know outweighs the right to privacy of individuals. It is absurd that a journalist would have to collect the consent of all involved at a public event before being able to publish a picture or report. The rule that the public right to know in such cases is the dominant one has an exception. So called venerable groups of people and their privacy must be protected, especially children, handicapped persons, victims of crime (especially crimes of a sexual nature), the family of crime victims, etc. In these cases journalist must show greater caution in collecting information and reporting it. Special treatment holds also for those accused, indicted, and sentenced because of a crime. The general

rule of public event is applicable; although the presumption of innocence may not be violated.

IV. Tortious Liability (Fault-Based, Vicarious and Strict Liability)

The general rule of tortious liability is stated in the Code of Obligations, art. 131. According to this provision, "anyone who causes damage to another is required to reimburse the damage if he does not prove that the damage was caused without his fault". This diction defines civil liability with shifted burden proof. According to this rule, the plaintiff has to show the following essential elements of a tort:

1. Illegal act of the defendant,
2. Actual damage suffered,
3. Causal connection between the illegal act and the damage.

The fourth essential element, "fault", is presumed. The defendant has to exculpate himself, proving that the damage was caused without his fault. Fault is present (*podana*) if the defendant caused the damage intentionally or negligently. Intent (*dolus*) and negligence (*culpa*) are not defined by civil law but by criminal law. There are two levels of intent – direct intent (*dolus directus*) and indirect intent (*dolus eventualis*) and three levels of negligence – *culpa levis* (*usual neglience, običajna malomarnost*), *culpa lata* (*gross neglience or carelessness, velika malomarnost*) and *culpa levissima* (*mild neglience, manjša malomarnost*). The last three types are judged upon a partys "carefulness". A party is obliged to act in the frame of legal standard of a "good master" (*dober gospodarstvenik*) or in the professional sphere of a "good expert" (*dober gospodar*). Both standards are equal to the common law "average/reasonable person".

The Slovenian Code, as already mentioned, is a direct successor of the Act on Obligations, which in turn had its theoretical foundations in the "Draft for the Act on Obligations and Contracts" (prepared by Professor Konstantinović). The scholar took into his draft some concepts from French law that were rather foreign to the traditional Germanic civil law system. Besides the contractual "la

cause", the concept of "la faute" was also included in the new Act of Obligations (1978). According to the concept of "la faute", the following essential elements are required for a tort: damage (*dommage*), causal link (*le lien de causalité*) and *la faute*. *La faute* – "fault" or in Slovenian *krivdna odgovornost* must be understood in a broad concept. It includes namely two elements: "illegality" (as the objective element) and "fault" (as the subjective element – an individuals subjective relation to the act). Only if all of these elements are present is the individual "liable". This classical Romanic approach to a civil tort and to tortious liability was modified through practice. The objective element of *la faute* – illegality of the act (in our case intrusion into a personality right) – became the first essential element of tortious liability. Civil law offers legal protection only from illegal violations of personality rights and because of this, this test is the most important one. In 2000 the Slovenian Supreme Court explicitly defined the four essential elements of tortious liability[15].

1. "Inadmissible (illegal) harmful act" – *nedopustno (protipravno) škodljivo dejanje*
2. Damage
3. Causation
4. Fault (subjective relation to the act)

Ad 1. "Inadmissible (illegal) harmful act": An answer to the question of illegality of a violation of personality right is possible only through the weighing of interest. This method was explained in Slovenian legal literature by Professor Finžgar in an almost literary style[16]. The academic as well as legal practices were in favour of an individual approach to each case. Special circumstances of each case are crucial for the weighing of interest. In one of the rare explanation of this method by a civil court (although there were two very important ones given by the Constitutional Court[17]), the Supreme Court stated that the criteria of permissibility of an

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[15] Judgement of the Supreme Court, II ips 402/99, 19.04.2000.

[16] A. Finžgar, *Varstvo osebnostnih pravic po ZOR*, Pravnik, Ljubljana 1980, pp. 297.

[17] Judgement of the Constitutional Court U-I-51/90; Judgement of the Constitutional Court, U-I-137/93.

infringement into a personality right is stricter in private subject matters than in public ones[18].

Ad 2. "Damage": The damage suffered due to a violation of a personality right is *expressis verbis* set in the Code of Obligations. But the most important question is what kind of non-pecuniary loss the law regards as damage. The most general rule defined by theory and practice is that non-pecuniary loss must involve severe and lasting emotional distress[19]. The following emotions can be legally recognized as damage due to the violation of a personality right: emotional distress, to go astray, concussion, nervous breakdown, anger, sadness, hysteria, public shame, humiliation, degradation, and other negative emotions such as sleeplessness, confusion, shame, loss of self esteem, loss of inner peace, loss of reputation, etc.[20]

Ad 3. "Causal connection": Causal connection or causal link follows the general principles of tort law. There are no special rules on causal link in cases of personality rights v. the freedom of the press and the public right to know.

Ad 4. "Fault": Fault as the fourth element is very sensitive, especially in the shifted burden of proof system. In Slovenian tort law only usual negligence (*culpa levis, običajna malomarnost*) is presumed. In cases of intentional torts or gross negligence, the burden of proof is on the applicant. In these cases the applicant has to show all of the essential elements of tort law. These cases are very important because of compensation rules.

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[18] Judgement of the Supreme Court of the Republic of Slovenia, VS RS II Ips 272/2000, [in:] Zbirka odločb 2000, pp. 194–195.

[19] S. Cigoj, *Commentary of the art. 155*, [in:] K. Blagojević (ed.), *Komentar zakona o obveznim odnosima*, Beograd 1980, pp. 430–431.

[20] Judgement of the Supreme Court, II ips 194/92; Judgement of the Supreme Court II Ips 582/96.

Special rules on professional liability (journalist, editors, publishers)

All of the following types of liability: journalists liability, editors liability and publishers liability follow the same rule, art. 147 of the civil Code. It defines the vicarious type of liability. "A legal or natural person is liable for the damage caused by an employee during his work or in connection with his work, unless the plaintiff proves that the employee acted according to circumstances as he ought to". This definition is a typical example of a classical master and servant relationship. Regardless of who is responsible for the published article (journalist, editor or publisher), the employer is liable for the damage caused to the plaintiff. The code sets an exception, though: If the damage is caused intentionally by the employee, then the affected party can be directly covered by him. So, if a journalist intentionally causes damage by invading a plaintiff's personality rights, than the plaintiff can sue the journalist directly and not the employer. This example is rather rare in practice because of the "deep pocket" theory. There is also another exception to the general vicarious liability rule: If the plaintiff is covered by the employer and the court finds out that the damage was caused by an employee intentionally or with gross negligence (recklessly), than the employer can demand compensation directly from employee. This rule is known as the "regress claim" (*regresni zahtevek*)[21].

V. Remedies

A. Compensation in Kind

"Compensation in Kind" or in cases of infringements of personality rights *quasy restitutio in integrum* was already seen as a legal tool for the protection of personality rights by the Act on Obligations (1978). Art. 199 (entitled "publication of a judgement or of a corri-

[21] B. Strohsack, *Odškodninsko pravo in druge neposlovne obveznosti*, Obligacijska razmerja II (2nd edn. 1994), pp. 96.

gendum") stated that the Court can order a publication of a judgement, a publication of a "corrigendum" (at the expense of the defendant), or can order that the defendant must repeal (recantation) the statement with which he illegally infringed the plaintiff's personality right. Besides that the Court can order any other measure than can serve as compensation. This diction is also set unchanged in the Code on Obligations – art. 178. Publication of a judgement, publication of a corrigendum, recantation or "other measures" are forms of sanctions that are related to the "plain compensation in kind" which is rather applicable in cases of infringement of personality rights a "plain" *restitution in integrum* is *de facto* not possible.

Besides publication of a judgement, publication of a corrigendum, and recantation, the Court can also order "other measures" which can serve as compensation; the Court can also order "other measures" which can serve as compensation. Theory mentions as "other measures" withdrawal, removal or elimination of material with which the infringement of personality rights was committed. It must be stressed however that those measures may not be confused with "preventive" measures – "injunction" and "removal" – which are special legal institutes. The main difference between the "preventive" and "curative" measures (sanctions) lies in the conditions under which either of them is applicable. The plaintiff must show serious potential risk of an illegal infringement of his personality right in order to be protected with a preventive measure. On the other hand, to demand a curative measure, in this case compensation in kind (publication of a judgement, corrigendum, recantation, or "other" measure), the defendant must prove that his personality rights were infringed with a tort: Tortious liability of the defendant must be established. That is why compensation in kind (*quasi restitutio in integrum)* must be understood as a sanction for an illegal infringement of a personality right.

The Slovenian Supreme Court dealt with one of the rather rare cases of such nature[22] with compensation in kind[23]. It ruled that

[22] B. Strohsack (supra fn. 21), pp. 96.

[23] Decision of the Supreme Court, VS RS II Ips 184/2000, II Ips 185/2000, [in:] Zbirka določb (2000), pp. 208–218.

"corrigendum" of a statement (*preklic izjave*) and "withdrawal" of a statement (*umik izjave*) are types of compensation in kind. Their function as a sanction is "satisfaction" of the plaintiff because of the infringement of his personality right. The Court also gave a detailed explanation of difference between "corrigendum" and "withdrawal" of a statement. "Corrigendum" (*preklic izjave*) is a rigorous type of sanction that is applicable in cases of false (untrue, fictitious) statement, where this type of statement must be denounced and proclaimed as invalid.

It must be mentioned that the theory[24] also mentions "public apology" as a proper ("other") measure that can serve as compensation. In terms of civil law dogma "the purest form of compensation" does not only have the function of the *restitutio in integrum*, but also includes a very important element – an "honorary note".

B. Compensation in Money for Pecuniary Loss

Slovenian law foresees compensation in money for pecuniary loss in cases of violation of the personality right to honour and reputation – in a word: defamation cases. Art. 177 of the Code on Obligations states that one who insults another or "asserts or spreads untrue statements on the past, knowledge, ability or something else" of another, although he knows or should know, that those statements are untrue and causes with those statements pecuniary loss to the other, is obliged to compensate the damage. However, the author of the statements is not liable for the loss if he spreads untrue statements (a) not knowing that they are untrue and (b) with legitimate interest of spreading them. The personality rights protected with this diction are limited to the right to honour and the right to reputation although I think that some aspects of the right to privacy can also be subsumed under this diction. The phrase "or something else of another" can also be understood as "something on ones private or family life". It is also imaginable that

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[24] M. Toroman, *Commentary of the art. 199*, [in:] K. Blagojević (ed.), *Komentar zakona o obveznim odnosima*, Beograd 1980, pp. 535.

an affected individual suffers pecuniary loss because of some spread of rumours about ones private or family life.

The legal practice of the »second era« already established a rule that compensation in money for pecuniary loss does not exclude compensation in money for non-pecuniary loss[25]. Both of the sanctions can be cumulatively applied in cases where personality rights were illegally infringed upon. There were theoretical disputes over the nature of the compensation in money for pecuniary loss. Professor Radolović[26], quoting Professor De Cupis, defends the thesis that the pecuniary loss suffered because of an infringement of personality rights to honour and reputation is only a part of general non-pecuniary loss suffered. Non-pecuniary loss is, according to this thesis, the primary consequence; the pecuniary loss is only subsidiary and unrecognizable. Slovenian legal practice (as well as the formal federal one) did not recognize this thesis. It is understood that pecuniary loss is an independent type of damage (although connected) to the non-pecuniary one. Both of them can be cumulated and do not exclude each other.

Again, legal practice based on compensation in money for pecuniary loss is very poor. That is why the theoretical findings are very important. The theory[27] sees as results of infringements of personality rights to honour and reputation lower income, *lucrum cessans*, transfer to another place of employment, prevention of advancement, etc. In order to be compensated for pecuniary loss because of an infringement of a personality right (to honour, reputation, privacy), the defendant has to show the following four essential elements:

1. The defendant asserted or spread untrue statements concerning the plaintiffs past, knowledge or ability, his private or family life, or something else,

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[25] "The plaintiff can demand, besides compensation in money for pecuniary loss, also compensation in money for non-pecuniary loss in cases of defamation". Judgement of the Supreme Court of S. Republic of Croatia, Rev. 2071/83, [in:] Pregled VS Hrvatske 1984, No. 25, pp. 78.

[26] A. Radolović, *Građanskopravna zaštita subjektivnih neimovinskih prava*, Zagreb 1984, pp. 192.

[27] B. Strohsack (supra fn. 21), pp. 223.

2. Those statements are untrue,
3. The plaintiff knew or should have known that those statements were untrue,
4. He suffered pecuniary damage.

C. Compensation in Money for Non-Pecuniary Loss

Compensation in money for non-pecuniary loss is the stereotypical sanction after an illegal infringement of personality rights also in Slovenian law. As already mentioned, the first era of personality law was not in favour of this institute. Later, with the decision of the Federal Supreme court in 1964, the compensation in money for non-pecuniary loss due to violation of personality rights became common practice. Compensation in money for non-pecuniary loss is defined in art. 179 of the code. It states that the impaired party is entitled to a fair compensation in money if the "suffered physical or psychological pain". According to the code, psychological pain is relevant legal damage in cases of "reduction of life activities", "deformation", "false imprisonment", "defamation" (violation of personality rights to reputation and honour) or because of violation of a (different) personality right. The amount of compensation must be equal to the personal goods violated (art. 179, par. 2). The compensation may not be awarded against its function (literally its "purpose and nature").

The functions of the compensation in money for non-pecuniary loss in Slovenian civil law are preventive function (*Präventivfunktion*), reparation (*Ausgleichsfunktion*) and satisfaction (*Genugtuungsfunktion*). Punitive function (*Straffunktion*) as the possible fourth function and the main characteristic of punitive damages is already partly to be found in the satisfactory function. Primarily because the satisfaction awarded for the violation of a personality right should be a result of a damage and the intensity of the violation. There is no actual proof that Slovenian legal practice awards plain punitive damages.

There are no precise rules for awarding the amount of damages, except the general rule that compensation must be fair and accord-

ing to its function, and, because of this, case-to-case circumstances are crucial. The amount of damages must play the important preventive role, especially in media cases.

D. Injunction and Right of Removal

Injunction and the right to removal are preventive measures for the protection of personality rights. The main characteristic of these legal instruments is that the plaintiff does not have to prove the existence of a tort. The plaintiff only has to prove the illegality of the act with which his personality right was attacked. There are legitimate objections to the fact that the legal provision that defines the injunction and the right to removal is to be found in the Slovenian Code of Obligations in the chapter "cause of damage", precisely under the subtitle "general rules".

Art. 134 (entitled "claim for cessation of personality rights infringement") foresees both institutes – injunction and the claim to removal. The diction has namely been changed, because its predecessor – art. 157 of the Act on Obligations – with its confusing diction defined only the right to removal. It must be stressed that no outstanding legal practice is to be found according either to art. 157 or art. 134.

Art. 134 reads: "Everyone has the right to demand, from the court or any other authority, (1) cessation (desistance)of an act that infringes the inviolability of human personality, personal and family life, or any other personality right, (2) prevention of such an act, or (3) removal of its consequences". "With this action the following acts can be attacked: 1. Plaintiff can demand "prevention" or "plain injunction" (*preprečitev*, *Unterlassung*). In this case the act (infringement of personality right) is not excluded yet. The plaintiff has to prove a (reasonable) potentional illegal infringement of his personality rights in order to be awarded with such protection. 2. The plaintiff can demand "cessation" (*desistance*, *opustitev*, *Einstellung*). In this case, the act has already been executed. The plaintiff does not suffer any consequences, although his personality right is violated. 3. The plaintiff can demand "removal" (*odstranitev*, *Beseit-*

igung) of (illegal) consequences. In this case, the personality right has to be illegally violated and the consequences arising out of this act must be established. For example an article was already published. The act was illegal, because it infringed a personality right and illegal consequences are present.

E. Punitive Damages

Illogically however, "by the book" punitive damages can be a consequence if the judgement according to art. 134 is not executed by the defendant. In this case art. 134, par. 2 foresees a "civil penalty" if the defendant does not cease (desist) with his acts. This provision is to be understood as a "civil penalty" and not as "punitive damages" with their role in common law.

Theory claimed that the institute "civil penalty" was unknown to our civil law and for this reason it should be treated as "unwritten"[28]. Nowadays the civil penalty is not "foreign" in Slovenian civil law. The Act on civil execution (1998) also foresees this kind of a sanction. I must mention that civil penalty in this case is not a direct tool for the protection of personality rights. Is serves as a secondary instrument for punishing the liable party if the prior judgement was not correctly executed.

Out of curiosity is has to be mentioned that punitive damages are not completely foreign to Slovenian law. The new Act on Copyrights (1997) foresees punitive damages in cases of gross violation of copyrights. Art. 168 states that the rightful claimant can demand compensation in the amount of 200% of the "usual honoraria", regardless of the damage suffered if his copyrights was violated intentionally or recklessly. Analogously to U.S. or German tort law (especially to the "Caroline von Monaco" decisions), punitive damages could serve as an important legal tool for the protection of personality rights. Unfortunately the Slovenian legislator (supported by both law schools) did not include this type of personality rights protection in the new Code on Obligations. With this lacking,

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[28] A. Finžgar, *Osebnostne pravice*, Ljubljana 1985, pp. 49.

the Code did not advance with tort law protection of personality rights but rather stayed on the level of the Act on Obligations from 1978. A great opportunity to change and to modernize tort law protection of personality rights was missed.

F. Unjust Enrichment

The general rule of unjust enrichment, set already in the Roman law maxim *Iure naturumeaqum est neminem cum alteris detrimento fieri locupletiorem* is also included in the Slovenian Code on Obigations. Art. 109 declares that a person who got enriched on behalf of another without a legal cause must return the ill-gotten gains if it possible. If not, he must compensate the other. Theoretically the institute of unjust enrichment can also serve as a legal instrument for the protection of personality rights, although there is no relevant Slovenian legal practice to prove that.

Theoretical, unjust enrichment is a "quasi-tort". Professor Vladimir Vodinelić defended the thesis that quasi-tort is also applicable to the protection of personality rights in our law, analogously to German civil law[29]. Potential circumstances where this institute could be used for the defence of personality rights could be the following: (unjust) enrichment through illegal use of personality goods, protected by a personality right to ones name, ones image, ones voice, etc. The Slovenian Code on Obligations in art. 191–198 defines exact rules on the return of the ill-gotten gains. Art. 193 is relevant for cases of personality rights. It states that the enriched has to return everything he gained based on a violation of personality rights if he was not in good faith.

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[29] V.V. Vodinelić, *Lična prava,* [in:] M. Orlić (ed.), *Enciklopedija imovinskog prava i prava udruženog rada*, Beograd 1978, pp. 913–936.