Title:
Freedom of Expression of the Media and the Civil Society:
An Analysis of the Legal Framework and the Case Law in Montenegro
WHAT IS THE PRICE OF THE FREEDOM OF SPEECH?

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An Analysis of the Legal Framework and Case Law in Montenegro

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INTRODUCTION

In 2010, MANS followed the work of judicial bodies in cases against the media and the NGOs pertaining to the right of the freedom of speech, involving criminal proceedings on the account of criminal offences of insult and defamation, and civil proceedings for the indemnification on the account of violation of honour and reputation.

We deem particularly important that full safeguards should be put in place to enable journalists, the media, the civil society and the public at large to speak freely of all matters of public interest, particularly the ones pertaining to anticorruption and organised crime. Any restriction and interference with the freedom of speech which is not compliant with the European Court of Human Rights (ECHR) standards and case law may be interpreted as protection and encouragement to criminal structures to proceed with criminal activities. For this reason, working on this project we focused particular attention to cases pertaining to the domain of the freedom of speech on anticorruption and organised crime matters.

Such cases generated particular interest of the public and the media. Hence, having as a premise the view that behaviour of persons under observation, the same applying for judges, is not the same as it would be when they know they are not being observed, we attempted to make comparisons with actions of courts in some cases which have not been so much in the public eye and covered by the media.

We learnt the facts from such cases from case files held by the project team members, and the court judgements used are found on our website. While some case files have been obtained by invoking the Free Access to Information Law, some data have been received directly from parties to the proceedings, in particular the defence lawyers representing the media and individual journalists.

The findings of monitoring the work of judicial bodies presented herein only reconfirmed the problems and challenges that Montenegrin judiciary was facing even before. Uneven case law, lengthy proceedings and high fines still give a cause for concern, although some positive developments have been noted, which are still insufficient to be able to say that the Montenegrin judiciary is ECHR compliant.

The first section of this publication contains the analysis of compliance of the Constitution and individual laws with the ECHR, while the second section features the case law analysis. This publication features a number of case studies indicative of specific situations in cases involving journalists and the media instigated by high-ranking public officials and persons believed to belong to the organised crime milieu. The studies presented herein refer to cases in which journalists were sued for writing on matters of public interest, the case law regarding the amount of compensation for non-pecuniary damages and length of proceedings. Special attention was devoted to the analysis of the disconcerting case law of High Courts to quash or modify basic court judgements based on ECHR case law.

CONCLUSIONS AND RECOMMENDATIONS

Legal Framework

Legal provisions pertaining to the right to freedom of expression and possible restriction on such freedom are not fully compliant with the European standards and contribute to perpetuation of practices in contravention to such standards. The legislative procedure in some instances is indicative of a serious lack of interest of the legislator, but also lack of professional competences in this area.

Amendments to the Criminal Code propounded in early 2011 by the Government show that the executive is not ready to decriminalise defamation and insult, as has been announced on multiple occasions; rather, the proposed amendments, as unprecedented in comparative practice, introduce discrimination and violate the constitutional principle of equality before the law, given that only journalists are exempted of criminal liability for offences that all other members of the public are still held criminally liable. Should the proposed amendments be adopted, they would continue to enable the restrictions posed on the freedom of expression contrary to the ECHR case law.

Access to Court Judgements

In 2010, the Supreme Court, High Courts in Podgorica and Bijelo Polje, the Appellate Court and the Administrative Court posted judgments on their respective websites. However, the public had limited access to the case law of basic courts which act in majority of cases. Only one third of basic courts allow access to their judgements, one third declare enforceable judgments a secret, and one third limits access to information in some other ways.

The Ministry of Justice and the Administrative Court confirm such decisions of basic courts and consider that court presidents hold a discretionary right to decide whether to declare their judgments a secret. Withholding enforceable judgments limits the room for scrutiny of the judiciary, which is not conducive to increased accountability of judges or public trust.

Case Law Analysis

The analysis of specific cases against the media and journalists, as well as civil society activists, shows that with their case law so far Montenegrin courts have created a good environment for limiting the right to freedom of speech.

Courts largely ignore the ECHR case law and opinions and penalise publication of information available in reports of state authorities and institutions, dissemination of information and facts already in the public domain, as well as transmitting and disseminating information or statements of others concerning matters of public interest.

The specific example presented herein indicates that the court punishes a journalist writing of matters of public interest, although he has undertaken everything reasonably possible at the given point in time to enable the person to whom the information pertained to give his comment. The examples show that some of the accused journalists were seriously denied the right to defence in criminal proceedings for defamation cases.

The analysis of case law indicates manifestly uneven case law concerning the amounts of fines for defamation and the amounts of awarded compensation for non-pecuniary damages for violation of honour and reputation. To that effect, the amounts of fines and damages were particularly disproportionate in cases when plaintiffs were public officials, who, by virtue of European standards, should be obliged to suffer considerably more criticism to their account. Such proceedings more often than not were completed in least time possible, much sooner than the cases in which plaintiffs would be "common" people, where at times they were even barred by statute of limitations, which leads to a conclusion that courts act differently depending on who the parties to the proceedings are.

"Persons of security interest" or persons suspected of and reported for grave crimes started replacing public officials in the role of plaintiffs. As a rule, proceedings they instigate are inappropriately lengthy, which constitutes a specific form of pressure put on the civil society and the freedom of speech. The case law created in cases launched by public officials had a significant impact on extremely high claims even in such cases. Moreover, it is not a rare occurrence that courts award amounts contrary to European standards, with total disregard of the importance and the role of the media and NGOs in combating organised crime and corruption. Police and prosecution most often fail to investigate published suspicions of corruption and organised crime activities, and courts ask from the media and NGOs to collect evidence in cases launched against them by those to whom such suspicions refer.

A specific case shown here indicates that the police and prosecution were not only unprepared to protect journalists and members of the civil society against possible consequences on the account of their statements on organised crime, but rather investigated who violated the right to privacy of persons sought by other countries for organised crime charges. This is very discouraging and intimidating for people who intended in future to speak publicly of matters of public interest.

Very rarely do courts end proceedings within reasonable time, but rather postpone the trial contrary to the rules of procedure. The decisions taken as per the requests to expedite proceedings are indicative of a very realistic possibility for this remedy to prove ineffective in practice. Complaints lodged with the Supreme Court and the Judicial Council are ineffective and very frequently remain unresponded to.

Some basic court judgements seem encouraging, since they invoke European standards and ECHR case law. It is, however, still frequently the case for superior courts to quash or modify such judgments. This could discourage judges from applying European standards, given that the number of quashed and modified judgments is one of the performance appraisal criteria.

Finally, even the recent binding legal opinion of the Supreme Court is not ECHR compliant and fails to ensure full application of European standards by Montenegrin courts.

A. LEGAL FRAMEWORK

A.1. RELEVANT SUBSTANTIVE LAW PROVISIONS

European Convention for Protection of Human Rights and Fundamental Freedoms

Article 10

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Constitution of Montenegro

Freedom of Expression
Article 47

Everyone shall have the right of expression by speech, writing, picture or some other manner.

The right to freedom of expression may be restricted only by the right of other to dignity, reputation and honour and if it threatens public morality or the security of Montenegro.

Freedom of Press
Article 49

Freedom of press and other forms of public information shall be guaranteed.

The right to establish newspapers and other public information media, without approval, by registration with the competent authority, shall be guaranteed.

The right to a response and the right to a correction of any untrue, incomplete or incorrectly conveyed information that violates a person's right or interest and the right to compensation of damage caused by the publication of untruthful data or information shall be guaranteed.

Criminal Code of Montenegro

Insult
Article 195

(1) Anyone who insults other person shall be punished by a fine in the amount of € 1.200 to 4.000.
(2) If an act referred to in Paragraph 1 of this Article is performed through media or other similar means or at some public gathering, the perpetrator shall be punished by a fine in the amount of € 3.000 to 10.000.
(3) If the insulted person returned the insult, the court may punish or free both sides, or one side from punishment.
(4) Any person who commits an act referred to in Paragraphs 1 to 3 of this Article shall not be liable to any punishment whatsoever if the statement is given within serious critique in a scientific, literary or artistic work, performance of a public service, or journalistic writing, political activity, or to defend a right or protect justifiable interests, if the manner in which the statement is expressed or other circumstances indicate it is not done on the grounds of discrediting a person.

Defamation
Article 196

(1) Anyone who speaks or transmits untrue information about someone that may harm his/her honour and reputation shall be punished by a fine in the amount of € 3.000 to 10.000.
(2) If an act referred to in Paragraph 1 of this Article is performed through media or other similar means or at a public gathering, s/he shall be punished by a fine in the amount of € 5.000 to 14.000.
(3) If untrue information said or transmitted has caused or could have caused significant harm to the injured party, the perpetrator shall be punished by a fine in the minimum amount of € 8.000.
(4) If the accused proves to have had founded reasons to believe in truthfulness of what s/he spoke or transmitted, s/he shall not be punished for defamation, but s/he can be punished for insult (Article 195), if the conditions for the existence of such an act have been met.
(5) A journalist or an editor acting with due professional care shall not be punished.

Law on Obligations

Article 207

(1) For physical pains suffered, for mental anguish suffered due to reduction of life activities, for becoming disfigured, for offended reputation, honour, freedom or rights of person, for death of a close person, as well as for fear suffered, the court shall, after finding that the circumstances of the case and particularly the intensity of pains and fear, and their duration, provide a corresponding ground thereof – award fair pecuniary

indemnity, independently of redressing the material damage, even if the latter is not awarded.
(2) In deciding on the request for redressing non-material loss, as well as on the amount of such indemnity, the court shall take into account the significance of the value violated, and the purpose to be achieved by such redress, but also that it does not favor ends otherwise incompatible with its nature and social purpose.
(3) For violation of reputation and personal rights of a legal person the court shall, if it assess that the gravity of violation and circumstances of the case provide justification, award to such legal person fair pecuniary indemnity, independently of indemnification of damage of property.
The grounds for compensation for non-pecuniary damages to legal persons were unknown in our legal system until the entry into force of the 2008 Law on Obligations envisaging it in its article 207 paragraph 3.

Since the adoption of the new Law, there has been only one case of compensation for non-pecuniary damages on the grounds of violation to business reputation by the same legal persons who instigated similar proceedings before this ground for indemnification was even envisaged by the law. In both cases the plaintiffs were the Steel Plant Željezara Nikšić and its official owner, the off-shore company MNSS BV, Amsterdam. One case ended in an enforceable decision, while the other is still pending[1].

Case Study: Forging the Law on Obligations

In early May 2008, Željezara Nikšić and MNSS BV, Amsterdam lodged an indemnification complaint against Nebojša Medojević and the daily “Vijesti” claiming "violation of business reputation", and asking for 10 million euro.

The legal representative of these legal persons was the lawyer Ana Kolarević, sister of the then Prime Minister Milo Đukanović. She was a Supreme Court judge, and now she is regarded as one of the most successful and influential lawyers in this area[2], although there are certain suspicions and controversies surrounding her work.[3]

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[1] The same plaintiffs instigated the first proceedings in 2008 against the opposition MP Nebojša Medojević and d.o.o."Daily Press", Podgorica, for the allegations from the author’s text published in the daily "Vijesti", founded by d.o.o."Daily Press". The same plaintiffs instigated the second case in April 2010 against MANS and its executive director, Vanja Ćalović, due to allegations regarding business operation of these legal persons and suspicions of possible tax evasion and money laundering, stated during the press conference held on 30 March 2010.

[2] Kolarević is the sister of Milo Đukanović, Montenegrin Prime Minister of many years. The World Finance magazine declared her the best lawyer in Montenegro in 2009 and 2010, and in 2009 she won the New Economy award as the best business lawyer in the region, stating in the rationale that she represents 80% of foreign companies operating in Montenegro. The international consortium of investigative journalists published an analysis stating that Kolarević owns US$ 3.5 million worth shares and property. She has been a lawyer since 2003, and before that she was a judge at the Basic Court in Podgorica, High Court in Podgorica and Supreme Court of Montenegro. At the time when she was representing Željezara Nikšić she was also a member of the Board of Directors there.

[3] For instance, in April 2003 she was a member of the panel of Supreme Court judges which passed the decision ordering the Tender Commission to sign the Sale Agreement for Avala hotel, Budva with Beppler and Jacobson, the second-ranked bidder with a bid much lower than the requested one. Prior to that, the Tender Commission cancelled the tender procedure after the withdrawal of the first-ranked company. The official co-owner of Bepler is Zoran Bećirović, a friend of Milo Đukanović, Kolarević’s brother. After the sale of Avala, Kolarević left the bench and started legal practice, and six months after the sale of Avala, she became legal representative of Beppler.

The legislation in force at the time of the complaint did not envisage the possibility of compensation for non-pecuniary damages to legal persons, as expressly said in the complaint itself.[4] Instead of invoking our laws, the complaint stated an example from Slovenian legislation envisaging the possibility of adjudicating just indemnification "for violation of reputation, irrespective of whether there is pecuniary damage, should it be established to be justified by the circumstances of the case''.

Hence, at the time of lodging the first complaint, the first of the three envisaged conditions – that the restriction must be stipulated in national law[5] - was not met, and all three conditions need to be cumulatively met in order for interference with the freedom of expression to be allowed by the ECHR.

The justification of the complaint states that the 10-million claim "is not usual", but that the plaintiffs "had in mind the gravity of guilt and damages incurred". The complaint also states that the intention of Medojević was to "damage the business reputation of the plaintiff in an unsubstantiated, offensive, unscrupuluous and pretentious manner" and "that he is doing all that through 'Vijesti', a high-circulation daily in Montenegro, for the ends known to them only, devoid of any human or professional responsibility, never providing arguments for any allegation''.

The complaint continues by adding that "the company is aware that the claim posed is not fully defined in the Law on Obligations, as it is in the cases regarding indemnification of natural persons..., which implies physical and mental suffering and fear, and awarding of indemnification is done to restore the damaged mental balance with the injured party''.

Less than three months after this complaint was lodged, the Parliament of Montenegro adopted the new Law on Obligations, almost with no justification of the law sponsor[6] and virtually without any debate in the Parliament.[7] Provision of Article 207 paragraph 3 was worded almost identically as stated in lawyer Kolarević's complaint referring to Slovenian legislation. Thus the Parliament removed an important deficiency of the first complaint regarding the existence of the requirement that the restriction of freedom of speech needs to be stipulated in law.

The fact that the Law of 1205 articles was adopted in Parliament without debate may indicate significant lack of professional capacities in the legislature and the unacceptable lack of interest in the delivery of the basic function of the Parliament.[8]

[4] The complaint states: "Notwithstanding the absence of an explicit provision, the ground for assessing the justification of this complaint needs to be the very protection of the rights of legal persons in accordance with the provisions of the Law on Obligations and the international law"

[5] Purusant to Article 10 paragraph 2 of the ECHR and the ECHR case law, in order for interference with the freedom of expression to be allowable it is necessary to have cumulatively in place the three conditions: that interference is envisaged by law, that it has a legitimate goal and that it is necessary in a democratic society.

[6] The Government of Montenegro accompanied the draft with a 7-page long rationale, with one paragraph only referring to the disputed Article 207 paragraph 3.

[7] The Report from the 7th sitting of the first regular session of the Parliament in 2008 (23rd Parliament) held on 21st, 29th and 31st July 2008 (page 4 states that noone applied for debate on this draft Law, while page 11 states that under item 13 it was stated that there were no amendments propunded)

[8] At the same session the total of 34 laws were adopted without deliberation.

It may not be determined with certainty whether this intervention of the legislator was motivated by enabling the legal grounds for restricting freedom of speech in similar cases. Nevertheless, it is beyond dispute that the new provision of the Law on Obligations does stipulate the ground for restricting freedom of expression which did not exist before, so it may be concluded that this intervention constitutes a step backwards when it comes to the exercise of the right to freedom of expression.

A.2. COMPLIANCE OF THE CONSTITUTION AND LAWS WITH ECHR STANDARDS

A.2.1. Constitution of Montenegro

The Constitution of Montenegro, in its Article 47 paragraph 2, allows for the restriction of the freedom of expression in order to protect the interest of other parties (public morality or security of Montenegro).

As for the restriction in order to protect interests of other persons, it seems that the emphasis on "dignity" of person in this provision is superfluous, because dignity and privacy are protected by Article 28 of the Constitution, and privacy also by Article 40. Therefore, the provision of Article 47 paragraph 2 of the Constitution envisages also actions contrary to the ECHR opinions, but which in specific context allow the degree of exaggeration and provocation which may mean the damage to honour, and dignity of other person.

The ECHR established in many judgements that freedom of expression does not protect only the information received benevolently or considered inoffensive or something that does not cause reactions, "*but also to those that offend, shock or disturb, because such are the demands of that pluralism, tolerance and broadmindedness without which there is no" democratic society""*.[9] According to ECHR, freedom of speech includes the description of persons as "grotesque", "buffoon", "coarse", "idiot", if they came as a response to a strong provocation.[10]

The shortcoming of the provision in Article 47 paragraph 2 of the Constitution lies in the fact that the linguistic interpretation indicates the cumulative application of two separate grounds for restriction of freedom of expression "...by the right of other to dignity, reputation and honour **<u>and</u>** if it threatens public morality or the security of Montenegro". The conjunction "and" is indicative of cumulative fulfilment of both grounds, and should be changed into "or" to separate the ground of protecting the interest of other persons from the grounds of protection of general public interest.

By envisaging indemnification for damages caused by publication of false information in Article 49 paragraph 3, a guarantee is introduced which is not in line with the ECHR case law. For instance, in case that a journalist should act in good faith, in line with standards of professional ethics, even slanderous statements on matters of public importance may be protected from liability. Thus, should a journalist rely on a report of a state inspector

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[9] See judgments in: Handyside v. UK, 1976; Lingens v. Austria, 1986; Oberschlick v. Austria, 1991; Jersild v. Denmark, 1994, Maronek v. Slovakia, 2001 etc.

[10] Lopes Gomes da Silva v. Portugal, 2000; Oberschlick v. Austria, no. 2, 1997

which eventually turns out to be wrong[11], or if he quotes another person, or media in an attempt to continue the public debate of public interest, and not, acting in bad faith, to arbitrarily damage somebody's reputation.[12]

As a matter of fact, the Constitution fails to provide guarantees, for instance, for the right to indemnification for damages caused by torture, inhuman or degrading treatment, but does provide guarantees for compensation for damages caused by publishing untrue data or information.

The deficiencies of the constitutional provisions in articles 47 and 49 were pointed out in the Venice Commission opinion.[13]

A.2.2. Criminal Code of Montenegro

Insult as a Criminal Offence

Pursuant to Article 10 of European Convention on Human Rights and Fundamental Freedoms,[14] freedom of expression may be restricted solely with the legitimate aim of protecting the reputation and rights of others, and only to the extent necessary in a democratic society.

On several occasions the ECHR highlighted that State Parties should resort to criminal liability for publication of untrue information only in extreme cases.[15] Such a stance was also taken by the Parliamentary Assembly of the Council of Europe in its 2007 Resolution "Towards the Decriminalisation of Defamation".[16] Accordingly, any restriction of freedom of expression must be narrowly interpreted, and the necessity for any restriction must be established credibly.[17]

Given the subjective nature of insult and defamation, it is indisputable that it is difficult to stipulate in law the substance of these criminal offences and that the legal description of the substance of these offences is rather generalised. Such a legal description of criminal offences is contrary to the principle *nulla poena sine lege certa* (no sentence without precise law), which stipulates that a legal norm must be precise and specific and to avoid to the greatest level possible the indefinite norms, a principle accepted also in the ECHR case law.

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[11] Bladet Tromso and Stensaas v. GErmany, 1991, p 65

[12] Thoma v. Luxembourg, Bladet Tromso, Lepojić v. Srbija

[13] "While these two Articles give effect to many aspects of Article 10 ECHR, it would have been preferable if they could have been drafted in a way more closely corresponded to the Convention. The Articles give emphasis to the protection of "dignity, reputation and honour" and the provision of a remedy for the publication of untrue, incomplete or incorrectly conveyed information that does not necessarily represent the Strasbourg Court's approach to Article 10 ECHR". (Venice Commission Opinion on the Constitution of Montenegro, Opinion no. 392/2006, CDL-AD(2007)047, December 2007)

[14] Law amending the Law ratifying the European Convention of Human Rights and Fundamental Freedoms, Official Gazette of Montenegro (International Treaties) 5/05.

[15] Cumpana and Mazare v. Romania, 2004, p 115.

[16] Resolution 1577 (2007) Towards decriminalization of defamation.

[17] Lingens v. Austria, 1986, p 41, Sunday Times v. United Kingdom, 1979.

Therefore, in order for a restriction of rights guaranteed by the Convention to meet the requirement "to be stipulated in law", it is not enough for the state only to formally adopt a law with restrictions, but such a law needs to be aligned with certain standards. A law must be foreseeable – formulated with sufficient precision to enable citizens to foresee what will be regarded as criminal offence to be able to regulate own conduct accordingly. Thus, an individual must be able to foresee consequences of certain conduct up to a degree which is reasonable in the circumstances.[18]

The definition of the act of committing a criminal offence which lacks precision is particularly evident with insult as a criminal offence, where the description saying "whoever should offend another" practically does not state a single feature of the given offence. In theory and jurisprudence, the statements and behaviours done with the intention of *demeaning* or *humiliating* another person are regarded as insult, and such terms are highly susceptible to ultimate subjective assessment, and thus also arbitrary. It is beyond dispute that arbitrariness is particularly unacceptable in criminal law.

According to the legal description of the substance of this offence, the existence of intention of the perpetrator is not an essential element, thus it is possible that the perpetrator does not have the intention of demeaning anyone, and still for the court to be of the opinion that he "insulted another person" and convict him of a crime. Neither this aspect is compliant with the principles established in ECHR case law, which always establishes whether the person whose freedom of speech is being restricted with the aim of protecting somebody's right to protection of honour and reputation, acted in good faith – *bona fidae*.[19]

The very principle of legality in criminal law serves the purpose of preventing arbitrary punishment based on a law which lacks precision; it sets the position of a human being and the boundaries for his free actions, and constitutes the guarantee for the exercise of freedoms and rights.

The criminal offence of insult is committed, as a rule, by presenting value judgements, and the ECHR in several cases established the violation of the right to freedom of expression due to pronouncement of criminal sanctions for stating value judgements, particularly if they are based on confirmed and undisputable facts.[20]

Defamation as criminal offence

The falsity of what is being stated or transmitted is an essential element of defamation as a criminal offence. What, to our mind, makes the provision of Article 196 of the Criminal Code problematic is the transfer to the defendant of the burden to prove the veracity of own claims or to have had founded reason to believe in veracity of what he stated or transmitted (paragraph 4).

ECHR criticised the transfer of the burden of proof to the defendant, finding that it is at times the plaintiff who is in a much better situation to prove that something is not true,

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[18] Cases Rekvenyi v. Hungary, 1999, p 34; Hashman and Harrup, 1999, Amann vs Switzerland, 1999.

[19] For instance, Prager and Oberschlick v. Austria, 1995, p 37.

[20] Lingens v. Austria

and that the obligation to prove the veracity of own statements may constitute violation of Article 10 to the Convention.[21]

However, according to the provisions of the Criminal Code, even if he proves the veracity of own allegations or that he had grounded reasons to believe in veracity of what was stated or transmitted, the defendant will not be punished for defamation, but may be sanctioned for insult. Such a provision limits the right to freedom of expression and is discouraging for all members of the public, in particular the media whose responsibility is to cover matters of public interest[22], to present allegations for whose veracity they hold evidence and whose veracity was verified, or for which there is a grounded reason to believe their veracity.

It is not a rare occurrence, nonetheless, that even the claims whose veracity was verified and is beyond dispute may be offensive for somebody. Leaving the opportunity for a person to be prosecuted and convicted for stating or conveying such claims is deemed unacceptable. In particular so when such claims refer to a matter of general interest, since it means that even the one who presents true claims on a matter of general interest may be found guilty, if such claims are offensive for somebody.

In addition, criminal conviction is also possible for the one only conveying, or using information already in the public domain or easily accessible to the public, which is again in contravention to the ECHR opinions[23].

Although ECHR has never passed a decision for the very stipulation of such criminal offences to be incompatible with the right to freedom of expression, it pointed out on several occasions that the state should use criminal measures to restrict the right to speech only as a measure of last resort and that criminal sanctions should be applied only in cases of preserving public order, and not in private disputes, which most defamation cases are.[24]

Criminal prosecution and conviction may be regarded as proportionate only in exceptional circumstances where other fundamental rights have been seriously impaired and courts should bear that in mind before invoking the relevant Criminal Code provisions.[25]

Ranges of fines envisaged for insult and defamation

Envisaged fines ranging between €1,200 and 4,000 for insult, and €3,000 and 14,000 for defamation enable the pronouncement of fines in the amounts which are excessive and disproportionate according to the ECHR criteria.[26]

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[21] Lingens v. Austria
[22] See, inter alia: Bergens Tidende and others v. Norway, 2000, Observer and Guardian v. UK, 1991, Thoma v. Luxembourg, 2001
[23] See, inter alia: Fressoz and Roire v. France,1999 and Weber v. Switzerland, 1990
[24] Castells v. Spain
[25] Gavrilovici v. Moldova, and Vujin v. Serbia
[26] Eight average monthly salaries in the case Lepojić v. Serbia*,* 2007, and six monthly salaries of the defendant, in net amounts, were considered disporportionate in the case Filipović v. Serbia, 2007.

Particularly when taking into account the possibility of compensation for non-pecuniary damages for the violation of honour and reputation through civil proceedings.

Due to the very few cases in practice held on the account of other criminal offences against honour and reputation, such as the disclosure of personal and family circumstances; damage to reputation of Montenegro; damage to reputation of a nation, a minority nation or other minority ethnic communities; damage to reputation of a foreign state or an international organisation, this Report does not deal with such provisions, although they deserve serious criticism with a view of their compliance with European standards.

Proposed amendments to the Criminal Code

In early 2011 the Government announced to decriminalise insult and defamation through proposed amendments to the Criminal Code, stating that such amendments follow the recommendations of the European Commission.

Although majority EU member states still have such criminal offences envisaged by their national laws, in practice they are almost not applied at all, and to date nine European countries fully decriminalised insult and defamation[27]. In addition PACE requested from member states still envisaging imprisonment sentences for defamation to strike them out of laws regardless whether they are being applied or not.[28]

Although we believe that the decriminalisation of insult and defamation would contribute to better application of European standards in practice, it should nevertheless be pointed out that the implementation of European standards does not imply obligatory decriminalisation of such offences. The essence of the EC recommendation lies in the application of European standards in practice through alignment of both the laws and the case law with such standards, which is possible to be done even with the existence of such criminal offences. To that effect, it is necessary that Montenegrin courts in their judgements fully apply European standards, both in criminal and in civil matters.

First draft – On 2 March 2011, the Montenegrin Ministry of Justice (MoJ) organised expert debate when the working draft of the amendments to the Criminal Code (CC) were made. The working draft[29] envisaged complete deletion of Articles 195 and 196 of CC, i.e. full decriminalisation of insult and defamation.

Second draft – On 24 March the MoJ informed the public, without any explanation and justification, that they have dropped the first draft of CC amendments and established new draft amendments envisaging only the deletion of paragraphs 2 from Articles 195 and 196[30]. The MoJ stated that such amendment excluded the possibility for the media and journalists to be criminally liable for insult and defamation.

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[27] Ireland, Great Britain, BiH, Romania (only insult), Estonia, Georgia, Ukraine, Cyprus and Moldova.

[28] Resolution *Towards Decriminalization of Defamation*', item 13, 2007

[29] The Government draft was attached to the invitation for public discussion sent to MANS and other NGOs

[30] Paragraph 2 of Article 195 of CC: If insulting is done through media or other similar means or at some public gathering, the perpetrator shall be punished by a fine in the amount of € 3,000 to 10,000. Paragraph 2 of Article 196 of CC: If an act of defamation is performed through media or other similar means or at a public gathering, he shall be punished by a fine in the amount of € 5,000 to 14,000.

However, the provisions whose deletion is proposed do not stipulate the liability of media or journalists so that their deletion would exclude the possibility for their punishment. The relevant provisions envisage stricter punishment for any perpetrator, regardless of the capacity or profession, when these offences are committed publicly. By the deletion of these provisions the liability of the media and journalists is not excluded, but the ordinary insults and defamation are just put on equal footing with the public ones. Thus, by invoking paragraph 1 of the given articles, stipulating the basic form of the said criminal offences, any perpetrator may be punished, media and journalists included.

Third draft – On 1 April 2011, the MoJ posted on its website the Draft Amendments to the Criminal Code. According to this Draft, paragraph 2 of Article 195, and paragraph 2 of Article 196 of CC are deleted, as was announced. In addition, without any explanation whatsoever, one paragraph each was added to Articles 195 and 196 stipulating that a journalist or an editor shall not be punished for insult, or defamation done via the media.

The addition of explicit provisions which exclude the liability of journalists and editors for insult and defamation done through media, does not exclude fully their liability, as pointed out in the press release issued by MoJ on 24 March. Namely, journalists and editors still may be held liable for such criminal offences, provided they are not committed through the media. Thus, for instance, it is possible that a journalist in the exercise of his profession may convey information by means not considered to be media (internet, social networks, a publication, a book etc.) and to have all the legal preconditions in place for him to be prosecuted, convicted and punished.

In addition, journalists and editors still may be held liable for the same criminal offences in any case when they are not done "through the media", which render the official Draft CC amendment absurd. According to it, journalists and editors shall not be held liable for insults and defamation only if doing so publicly, i.e. "through the media".

Moreover, the Government proposed a provision which introduces discrimination and violates the constitutional principle of equality before the law, because journalists only are exempted from criminal liability for valid criminal offences for which all other members of the public are still held liable. Also, the ECHR established that civil society activists are to enjoy the same level of freedom of expression as journalists, because as a rule they speak of matters of public interest, the fact completely ignored by the Government draft offered.

However, the official rationale accompanying the Draft CC amendments the Government submitted to the Parliament leads to the conclusion that the draft decriminalises insult and defamation, while the same offences are still retained in the law, which may indicate lack of seriousness and professional capacities in the executive. The Rationale, thus, stipulates:

> "The Action Plan to Monitor the Implementation of EC Recommendations that the Government of Montenegro adopted at its session of 17 February 2011 envisages the approval of the Draft Law Amending the CC which decriminalises defamation as one of the measures to enhance media freedoms."
>
> "The Draft envisages the deletion of the criminal part from Art 195 (insult) and Art 196 (defamation)."

The proposed amendments only reduce the maximum fines, down from €10,000 to 4,000 for insult, and from €14,000 to 10,000 for defamation. Such maximum fines are still contrary to the standards established through the ECHR case law.

Hence, even if the proposed amendments get adopted, they will still give room for restricting freedom of expression contrary to the ECHR case law. This leads us to a conclusion that the proposed Draft CC Amendments are unjustifiably presented as a fulfilment of the EC recommendation, because it manifestly is not in line with European standards and may not improve the practice in this area.

A.2.3. Law on Obligations

The compensation for pecuniary damages for violation of business reputation was possible even before the adoption of the new Law on Obligations, by invoking the general rules of indemnification. Such a provision is compliant with the Convention, since in the ECHR case law business reputation is protected by Article 1 of the Protocol 1 accompanying the Convention, as properly concluded by the High Court in Podgorica in its judgement Gž.br.34/2010.

However, the new Law envisages the compensation for non-pecuniary damages to a legal person, a solution unknown to date to legal systems in this neighbourhood, and which deviates significantly from European standards and is in contravention to the ECHR opinions.

Possibly, at first glance, this might seem a provision fulfilling the requirement that the restriction of freedom of speech must be stipulated in law, but we still believe that the restriction introduced by this provision does not fulfil even the minimal quality standards in the sense of preciseness and the ability of citizens to adapt their behaviour accordingly.

Namely, according to the ECHR opinions, in order for an interference with the rights guaranteed by the Convention to meet the requirement that it is stipulated in law it s not enough for a state to just formally adopt a law with restrictions, but this law must meet certain quality standards. To that effect, the law must be foreseeable, i.e. formulated with sufficient precision to enable the citizen to regulate his conduct. A citizen must be able to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[31]

However, Article 207 paragraph 3 of the Law on Obligations speaks of damage to reputation and rights of a person of a legal person, but does not stipulate in any way how this damage can be done, nor are there any indicators to define the notion of a person of a legal entity. These questions are left at the discretion of the court, and one would say the outcome depends on the ability of the judge to know and apply the ECHR standards, which does not really sound encouraging given our context.

Moreover, it is unclear what reputation it implies, since certainly it is not the same reputation as for natural persons, as emphasised in the rationale provided by the

[31] Rekvenyi v. Hungary, application no. 25390/94, judgment of 20 May 1999, paragraph 34

Government sponsoring the Law. Since reputation is an individual asset, and legal persons may not be holders of individual rights or assets, this provision must necessarily refer to business reputation. However, business reputation of legal persons may not be presumed, as is the reputation of individuals presumed. Many legal entities do not enjoy business reputation, since it is obtained through business operation, so it implies that the court should in each case first establish whether a legal person enjoys business reputation, and only after that it would be possible to establish possible damage to business reputation. In addition, the damage to business reputation done by a verbal act can certainly cause damage to the legal person, but solely pecuniary one, given that the non-pecuniary one exists only in case of physical and mental suffering which are certainly not inherent for legal persons.

It should be pointed out that the ECHR assesses legislation in broad terms, including by-laws[32], as well as court rulings providing for their interpretation.[33] In the case of provisions of Article 207 paragraph 3 of the LOO it is beyond dispute that there is not "a set of consistent, clear and precise decisions"[34] of Montenegrin courts to provide precise definition of their contents. Moreover, it is unrealistic to expect for Montenegrin courts to pass soon several clear and precise decisions to provide clear interpretation of the disputed provision.

The provision of law which is so vague that it does not offer in the least the clear indicators of how individuals should behave in order not to violate it does not meet the quality standards for laws in accordance with Article 10 of the Convention.[35]

The application of this LOO provision in practice will show how (un)justified it is, as well as the entities to invoke it. For the time being there remains the impression that lodging of complaints for compensation for non-pecuniary damages was not in the function of protection of business reputation, but constituted an attempt to put financial burden on plaintiffs, and to sanction the words spoken and act as a deterrent for giving similar statements in future. Such restriction of freedom of speech is inadmissible from the point of view of the ECHR opinions.

As already stated, to date two cases were instigated on this ground – one before, and one after the Law adoption. The above conclusion is further supported by setting the amount of alleged damage claims – in the first case 10 million euro, and 36,000 euro in the second, after the first instance decision in the first case to award the amount of 33,000 euro.

The plaintiffs in the case for compensation for non-pecuniary damages in the case against Vanja Ćalović and MANS, through their attorneys stated in the complaint that the actions taken by the defendants cause also future pecuniary damage "in the form of reduced number of business partners, cancellation of contracts, inability to win new

[32] Judgment in De Wilde, Ooms and Versyp case of 18 June 1971, Series A no. 12, p 45, paragraph 93

[33] Judgment in Kruslin v. France, p 21-22, paragraph 29

[34] In the case Ekin v. France the ECHR considered the issue whether there was in place "a settled line of consistent, clear and precise decisions in the French courts fleshing out the content of section 14 of the Law of 1881, as amended, in such a way that the applicant association could regulate its conduct...".

[35] The view of ECHR expressed in the judgment for the Hashman and Harrup case of 25 November 1999, Publication 1999-VIII

customers" and that they "may have a particularly adverse impact on the fact that the injured party is close to being granted a loan for revitalisation of the company Željezara Nikšić,..., which is guaranteed by the Government of Montenegro". The complaint states that such damage in that case would be subject to special legal matter.

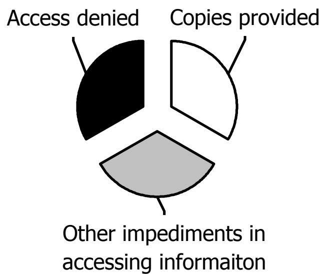
It is hard to conceive that a certain action would damage business reputation of a certain legal person to justify the compensation of non-pecuniary damages of several millions or thousands of euros, and that the same would not cause pecuniary damages. However, plaintiffs would need to prove possible pecuniary damage in a court proceedings, and they did not even lodge such complaints in any of the cases described, which is yet another confirmation of suspicions that the aim of these proceedings was not the protection of reputation and indemnification.

B. ACCESS TO COURT JUDGMENTS

The Supreme Court, the High Court in Podgorica, the High Court in Bijelo Polje, the Court of Appeals and the Administrative Court post judgments on their respective websites[36] using the initials of the parties to the proceedings instead of their full names.

Invoking the Access to Information Law, MANS requested from all basic courts in Montenegro copies of all judgments referring to compensation for damages caused by false allegations passed between 01 January 2006 and 01 September 2010.

Out of the fifteen Basic Courts, only five allowed access, five declared judgments to be secret, and five courts prevented in other ways access to judgments.



Basic Court	Access to judgments
Cetinje	Copies provided
Plav	Copies provided
Pljevlja	Copies provided
Rožaje	Copies provided
Žabljak	Copies provided
Berane	Examination allowed
Kolašin	Examination allowed
Nikšić	Examination allowed
Podgorica	N/A
Ulcinj	No response
Bar	Denied
Bijelo Polje	Denied
Danilovgrad	Denied
Herceg Novi	Denied
Kotor	Denied

This Chapter contains the data on judgments submitted to us by courts, but also the analysis of the practice of courts to declare judgments a secret or otherwise restrict access to information.

Such decisions are confirmed by the MoJ acting as per appeals of MANS, as well as the Administrative Court which decides upon complaints and, a the same time, posts own judgments on the website.

The last part of the chapter contains statistical data of cases against the media and journalists which the Government made available for the European Commission, leading to the conclusion that case law has a direct impact on the amounts requested in claims.

B.1. PUBLISHED JUDGMENTS

Basic Courts in Cetinje, Plav, Pljevlja, Rožaje and Žabljak provided copies of their judgments.

[36] www.vrhsudcg.gov.me, www.visisudpg.gov.me, www.visisudbp.gov.me, www.apelacionisudcg.gov.me, www.upravnisudcg.org

The Basic Court in Cetinje passed two judgments for compensation of damage caused by false allegations and two decisions cancelling criminal proceedings for defamation on the account of the private plaintiff renouncing criminal prosecution before the beginning of the main hearing. The same judge on the same day, 28 December 2008, passed two judgments awarding compensation for non-pecuniary damages for mental suffering sustained due to violation of reputation, honour and rights of a person.

The Basic Court in Plav passed one judgment rejecting defamation charges, two judgments by which the defendant was acquitted of charges, four judgments pronouncing the defendant guilty and punishing him for criminal offence of defamation or criminal offence of an insult, one decision dismissing the private lawsuit as untimely, and two rulings staying criminal proceedings. The amount of fines pronounced in three judgments was 600 euro each, 1,200 euro in one case, and 1,000 euro in one case which was subsequently modified by the High Court in Bijelo Polje into a 600euro fine.

The Basic Court in Pljevlja brought four judgments for criminal offence of defamation and one ruling concerning compensation for damage caused by false allegations. In criminal defamation cases, it made two convictions, one in which the fine awarded was 600 euro, and another with the fine of 2,000 euro. In one judgment the Court acquitted the defendant on the account of not enough evidence that she has committed the offence she was accused of.

The Basic Court in Rožaje made six judgments in defamation cases, nine rulings cancelling criminal proceedings on the account of private plaintiff withdrawal from criminal prosecution before the beginning of the main hearing, while there were no rulings for compensation of damages caused by false allegations. The greatest amount of fine for defamation was 2,800 euro.

The Basic Court in Žabljak passed four judgments rejecting defamation charges, two judgments acquitting the defendant, and four judgments pronouncing the defendant guilty and punishing him for defamation or insult. The amount of fines pronounced was 1,200 euros each in two judgments, 600 euro in one, and 6,000 euro in one. The amount of 6,000 euro for the criminal offences of insult and defamation is certainly disproportionate and non-compliant with European standards. Although the given case did certainly involve insults, the awarded amount deviates considerably from other fines in criminal proceedings, which raises suspicions that in awarding the amount the court was primarily led by the fact that the injured party in the given case was the head of local police.

B.2. SECRET JUDGMENTS

Courts in Bar, Bijelo Polje, Danilovgrad, Herceg Novi and Kotor declared their enforceable decisions a secret with the explanation that their publication would jeopardise the privacy of parties to the proceedings, because judgments contain personal data of defendants. These courts were of the opinion that access to judgments may be approved only by the

court president to persons who have a justified interest. Such decisions were confirmed by the Ministry of Justice acting as per appeals, as well as the Administrative Court[37].

The Basic Court in Bar denied access to information invoking the provision of the Free Access to Information Law protecting privacy and personal interests of persons and stating that the disclosure of judgments would jeopardise the private life of parties to the proceedings, since judgments contain personal data of the defendant.

As per an appeal of MANS, the MoJ[38] said that the Basic Court in Bar applied the law correctly and invoked the protection of privacy of people involved in court proceedings envisaged by Free Access to Information Law. The MoJ further stated that the Law on Courts envisages courts are only obliged to enable access to court files to parties. The MoJ further notes that the Criminal Procedure Code envisages that any person who has a justified interest may have access to court files, pursuant to the permission given by the court president, and states:

> *"Examination of individual case files, envisaged by procedural legislation, is subject to strict procedure, particularly regarding criminal case files, and thus access to information for such files implies the supremacy of Criminal Procedure Code over the Free Access to Information Law".*

Finally, MoJ concludes by saying:

> *"Court president is free to decide whether a certain person has a justified interest regarding transcription, photocopying or recording certain criminal case files".*

Although the Law on Courts envisages the right of the court president to assess the interest for inspection of case files on a case-by-case basis, this does not apply to enforceable judgments.

This would prevent public insight into the case law which is in all countries subject to studies and comments, and is used in other court proceedings.

Judgments are pronounced on behalf of people, hearings are public, and the public may only be excluded as per an explicit court decision. Judgments are pronounced publicly, their contents are transmitted by the media whose representatives attend trials.

As for the protection of privacy of people involved in court proceedings, the Free Access to Information Law envisages in its Art 13 paragraphs 2, 3, 4, and 5:

> If any part of information is restricted, relevant government agency shall enable access to the information after deleting the part of such information that is restricted.

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[37] MANS lodged a complaint with the Administrative Court as per nine requests (three complaints as per wrongful implementation of the law and three complaints for the silence of the administration), and four cases were adjudicated. All Administrative Court judgments confirm Basic Courts decisions to deny access to information, with the exception of one adjudicated in MANS's favour, but it refers to a complaint due to silence of the administration not denied access to information.

[38] Decision no 01-6088/10 as of 9.11.2010.

> Any part of information that is restricted shall be marked by indication "deletion completed", whereas the notification of the extent of such deletion shall be indicated as well.
>
> The text of information must not be destroyed or scratched by any such deletion.
>
> Access to the information, a part of which was deleted, shall be exercised in the manner provided for by item 3 in paragraph 1 of this Article.

It means that courts, if they believed that it was necessary to protect the privacy of people involved in proceedings, were obliged to delete personal data, but to publicise the remaining part of the judgment. As was stated at the beginning of this chapter, the Supreme Court, the two High Courts, the Court of Appeals and the Administrative Court post their judgments on the web, with initials of the parties to the proceedings.

The allegation of the MoJ that examination of certain case files, especially criminal ones, is governed by a stricter procedure envisaged by the Criminal Procedure Code, not the one envisaged by the Free Access to Information Law, indicates misapplication of substantive law.

Article 1 paragraph 1 of the Free Access to Information Law stipulates:

> Access to the information filed with government agencies shall be free, whereas it shall be exercised in the manner prescribed by this Law.

Article 8 of the same law envisages:

> Any government agency shall be in obligation to make possible to any applicant to access the information or a part thereof, except in cases provided for by this Law.

Thus, access to information is not governed by another piece of legislation, the Criminal Procedure Code in this case, but the Free Access to Information Law is a *lex specialis* which envisages the procedure based on which authorities enable access to information they hold. Moreover, all authorities are obliged to enable access to information except in cases envisaged by the Free Access to Information Law, not some other piece of legislation.

The term authorities inevitably includes courts, and thus the public must have access to enforceable judgments or any other information not denied access to pursuant to Art 9 of the Free Access to Information.

Provision of Art 509 paragraph 1 of CPC, envisages that the data regarding the pre-trial procedure and investigation for organised crime are official secret. Still, this provision does not envisage, nor could it, that information and evidence used in court proceedings could be secret, as concluded by the MoJ.

MANS lodged a complaint with the Administrative Court which found no infringement, but rather that the publication of judgments would jeopardise the privacy of parties to proceedings and stated[39]:

[39] Judgment U.broj 3475/2010 as of 04.03.2011.

"After the hearing held publicly, court judgements are pronounced publicly, orally, to people who have legal interest in them".

At the same time, the Administrative Court confirms that judgments should be secret, thus to protect the privacy of parties to proceedings, but it also confirms that judgments are public since being pronounced publicly orally. The question arises how it is possible for publication of already publicly pronounced judgments to violate somebody's right to privacy.

The Administrative Court also stresses that court decisions are pronounced publicly to persons who have a legal interest in that, which is not the case, given that, as a rule, judgments are pronounced publicly, before defendants but also other persons following the trial, such as members of the press.

Basic Courts in Bijelo Polje and Danilovgrad denied access to court judgments with identical justification as the Basic Court in Bar, the MoJ rejected the appeal stating the same reasons, although we have witnessed the change of the Minister in the meantime. Proceedings were launched before the Administrative Court and we are still awaiting rulings.

Basic Courts in Herceg Novi and Kotor also denied access to judgments with the same explanation as other courts, but they also stressed that MANS failed to mention the justified interest in being provided with the information. These courts referred to restrictions from CPC envisaging the obligation of the applicant to make probable their legal interest in obtaining information from the case file.

Article 1 paragraph 2 of the FAI Law stipulates:

> Any national or foreign legal and natural entity shall be entitled to access the information filed with government agencies.

Article 3 of the same Law says:

> Publishing the information filed with government agencies shall be in the public interest.

The rationale provided by the Government which was attached to the Draft Law says regarding Article 3:

> Public interest regarding disclosure of information covers all individual or other narrower interests identical to it, thus excluding in the procedure of exercising the right to access information any possibility and the need for justification of interest by persons requesting access to information.

FAI Law stipulates that anyone has the right to access information and their publication is in public interest. The Law also stipulates the obligation on the part of authorities to provide information, without the need on the part of the applicant to justify the interest in seeking information. Such a view has meanwhile been confirmed through case law.

Deciding as per the appeal on the decision of the Basic Court in Herceg Novi, the MoJ states that [40]:

> *"…it is under exclusive authority of the court president to decide whether a request for information is justified, i.e. it is his sole right to autonomous and independent assessment whether the applicant has a justified interest in obtaining the information requested. Hence, the claims from the appeal that most basic courts in Montenegro allowed access to the same type of information, as deemed by MoJ, and pursuant to the quoted provisions of the Law, does not presume the legal obligation for the president of the Basic Court in Herceg Novi to act in the same manner"[41].*

Pursuant to Art 2 of FAI Law, access to information held by authorities is based on the principles of:

1) freedom of information;
2) equal conditions for the exercise of the right;
3) openness and publicity in the work of authorities;
4) urgency.

Thus, all courts are obliged to enable equal conditions for the exercise of the right to access information and work in accordance with the principle of openness and publicity. Therefore it is beyond comprehension how come that some court presidents may have the discretionary right to decide whether the information they hold are public, particularly given that higher court instances already publicise such information, even some basic courts.

The MoJ reject the appeal against the decision of the Basic Court in Kotor with the same justification as for other courts[42], and the Administrative Court judgement[43] confirms the previously presented MoJ's stand:

> *"Examination of court files is subject to a strict procedure. Access to information for such cases does not imply the implementation of FAI Law, but the CPC, which governs the deliberation, transcription, copying and reproduction of individual criminal case files, provided there is a justified interest in doing so".*

MANS submitted a request for reviewing the court judgment to the Supreme Court. The case is still pending.

B.3. OTHER LIMITATIONS IN ACCESSING COURT JUDGMENTS

B.3.1. Examination of judgments

Basic courts in Berane, Kolašin and Nikšić enabled only examination of their judgments.

[40] Decision no 01-6398/10 as of 18.11.2010.
[41] The proceeding before the Administrative Court has been launched and is still pending.
[42] Decision no 01-6592/10 of 15.11.2010.
[43] Judgment U. Broj 3670/10 of 09.03.2011.

Basic Court in Berane granted examination of judgments. MANS filed an appeal, asking for copies of judgments to be able to disseminate information provided. Immediately after that, the Court passed a new decision deciding to submit copies of judgments after MANS has paid the cost of the procedure to be subsequently calculated. However, the decision on costs has never been made, and MANS filed an appeal which was not responded to. A complaint was lodged with the Administrative Court.

Basic Court in Kolašin granted access to judgments by examination only. MANS lodged an appeal, then repeated appeal that the MoJ did not respond to, and finally a complaint. Before the ruling, the MoJ annulled the decision of the Basic Court, because it did not allow access to information in the manner requested, i.e. did not provide copies of judgments. Nevertheless, the Kolašin Court has not passed a new decision yet, nor provided copies of judgments.

According to Article 4 paragraph 1 item 1 of the FAI Law, the right of access to information encompasses the right to ask for, receive, use and disseminate the information filed with government agencies, while the information obtained exclusively by inspection may not be shared with other interested persons or disseminated, which significantly restricts the right to free access of information.

According to Article 1 paragraph 3 of the FAI Law, access to information is guaranteed upon the principles and the standards contained in international documents dealing with the issues of human rights and freedoms.

The Universal Declaration of Human Rights, in its Article 19 guarantees the right "to seek, receive and impart information". The International Covenant on Civil and Political Rights in its Article 19 guarantees the freedom to "to seek, receive and impart information", and the Convention for Protection of Human Rights and Fundamental Freedoms in its Article 10 guarantees to everyone the freedom to "receive and impart information".

The Supreme Court of Montenegro stated in its judgment[44]:

> „A government authority has the primary obligation of considering the possibility for the exercise of the right to access information in the manner requested. Particularly so given that the right to access information encompasses the right to receive, use and impart information pursuant to Article 4 paragraph 1 item 1of the FAI Law."

Were the Basic Courts in Berane and Kolašin truly ready to publicise judgments, the amount of information requested could not be an impediment. Namely, all courts have technical capabilities of reproducing documents, and the judgments provided by other courts did not exceed one hundred or so pages in total, thus the documentation may not be regarded as too voluminous to limit the ability of courts to reproduce and provide it to the applicant.

In any case, neither of the above courts provided any justification for enabling inspection only, and not the manner requested in the application.

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[44] Supreme Court judgment Uvp.br. 83/2006 as of 08 December 2006.

Finally, we have to mention that access to information by inspection only, especially if it involves travel to other towns, considerably increases costs of access to information, which is yet another impediment to the exercise of this right.

B.3.2. Proof of application being submitted

The Basic Court in Nikšić did not respond to MANS's application, and we lodged an appeal with the MoJ. The MoJ assessed we did not have proof of having filed an application, since it was sent by surface mail, and we have a certificate of receipt, but not an endorsed copy of the application. MANS lodged a complaint with the Administrative Court, but it was rejected on the same ground as the appeal, i.e. lack of proof of filing an application.

Afterwards, the Basic Court in Nikšić responded to the application allowing inspection only. MANS filed an appeal, and then the repeated appeal, as envisaged by the procedure, but MoJ failed to act as per it, so we lodged a complaint.

This case is indicative of a substantial impediment in accessing information, because the applicant must secure proof of having filed the application, and the only proof accepted is the endorsed copy of a file, and not the delivery note provided by the postal services.

This limits substantially the right to access information, given that applicants must spend money and time to travel to the town where they wish to file an application. It practically means that any filing of an application from abroad, by Montenegrin or foreign nationals, would not be possible unless they secure logistical support in the sense of someone filing applications directly to institutions and taking endorsed copies.

If authorities fail to respond to applications for access to information, the costs of access considerably increase, because the procedure envisages the submission of repeated applications, and appeals to second instance bodies, to the same authorities to which applications were originally filed.

Basic Court in Ulcinj failed to respond as per the application, and no response came as per the appeal and the repeated appeal.

The Basic Court in Ulcinj failed to submit to us endorsed applications and appeals that we filed, although we sent enough copies with a note to return endorsed copies, given the stated problems in proving that applications were filed.

B.3.3. Judicial Information System in practice

The Basic Court in Podgorica which has the larger caseload and better capacities than other courts, did not allow access to its judgments with the explanation that it is impossible to prepare a report as per a given offence or type of dispute for the given period of time.

The Basic Court in Podgorica has the largest caseload and indisputably the greatest capacities, both technical and staffing, of all courts in Montenegro. Nevertheless, this court was the only one that asked MANS to correct the application for information by

asking us to provide information of the case file number or names of the parties to the proceedings in order to enable access to judgments. It is the only court in Montenegro stating that:

> *"It is still not possible to do a report as per specific criminal offence or type of dispute over a specified period of time".*

MANS responded that it is impossible to have the detailed information of judgments, given that they are not publicly available, and the Court rejected the application, stating that the correction was not made in the manner requested.

Judicial Information Strategy envisages:

> "Within the first stage of Judicial Information System (JIS) implementation in the first half of 2002 part of computer equipment was procured, a network built and users trained for the needs of the project. During that stage the computer equipment, the network and training were provided for the following: … Basic Court Podgorica…"

The same document from 2007 states that "the implementation of JIS software solution is being piloted in the Basic Court in Podgorica".

In late 2010 MoJ states in its "Judicial Reform Brief":

> „Judicial Information System (JIS) is in place at all locations of JIS users (MoJ) courts, State Prosecution and Institute for Execution of Criminal Sanctions), with a centralised and unique database and centrally installed applications accessible for users 24/7 in line with institutional set-up and authorities of user institutions."

Moreover, the data provided in the next chapter show that the Basic Court in Podgorica should be able to identify judgments in defamation cases, given that the Government of Montenegro made such information available to the European Commission.

Consequently, it is evident that the Basic Court in Podgorica was not willing to enable access to judgments, and thus it misused the opportunity envisaged by law to ask for more detailed information of the application filed, although fully aware what the application referred to, as well as of the fact that the applicant was unable to provide any more detailed level of information than the one already stated in the original application.

B.4. STATISTICS HELD BY THE GOVERNMENT OF MONTENEGRO

Responding to the European Commission questionnaire, the Government of Montenegro provided statistical data on court proceedings against journalists and the media. Initially, the Government provided only the data concerning criminal cases[45], according to which the total of 32 cases were led in the last five years, and average fine pronounced was some €4,500.

In its additional questions, the EC stated that the information provided does not have the data of court proceedings where fines were considerably higher, and it was only then

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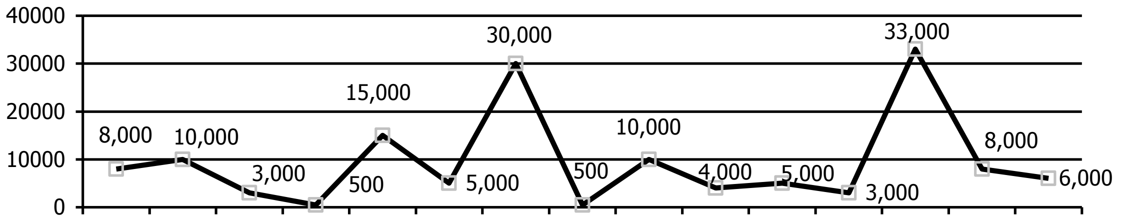
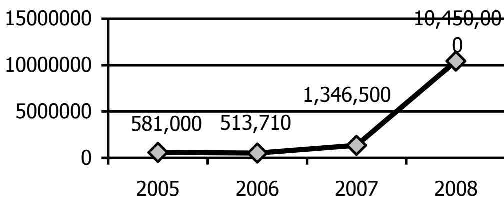
[45] Government of Montenegro, Ministry of European Integration, Responses to EC Questionnaire: II Human Rights, Podgorica, 24 November 2009.

that the Government provided the information on indemnification cases[46]. According to this source, in 69 civil cases held within the last five years, over 13 million euro was claimed in total from the media and journalists. Courts accepted claims in 15 cases, with the total amount payable by the media and journalists of some 140,000 euro. The largest amount of compensation for non-pecuniary damages was €33,000, and the lowest €500.

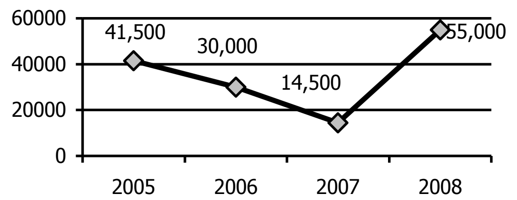


Fines awarded in civil indemnification cases over the last five years, Government of Montenegro

Such data lead to a conclusion that case law has a direct impact on the amounts claimed. Thus, the greatest amount of fine was awarded in 2008, when the greatest claim was lodged.



Total amounts of indemnification claims, by year, Government of Montenegro



Total amounts of awarded fines, by year, Government of Montenegro

[46] Responses to additional questions from the EC Questionnaire Source: II Human Rights

C. CASE LAW ANALYSIS

European Court for Human Rights stated on several occasions the essential role played by the press, and the media in general, in a democratic society, and that it is their duty to provide information and ideas on matters of public interest, and that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.[47]

In addition to the role of the media, the contribution of the civil society in discussions of matters of public interest is also very important and NGOs and their activists must enjoy equal protection as journalists when speaking publicly of such matters.[48]

With the case law to date, Montenegrin courts have created a good environment for restricting the right to freedom of expression, and such restrictions, as a rule, referred to matters of public interest. There is a negligible number of enforceable judgments where standards were applied, and the rare judgments compliant with the ECHR case law are frequently quashed by second-instance courts.

Courts ignore the ECHR case law and opinions, expressed in several judgments took the stance that sanctioning of publication of information based on or available through reports of government authorities or institutions[49], or transmission of information or facts already available to the public,[50] or to sanction transmission and dissemination of information or statements of others on matters of public interest[51] constitute violation of the right to freedom of expression envisaged by Article 10 of the Convention.

Writing and reporting on the problems of crime, especially the gravest forms described as organised crime, is indisputably of public importance and interest. The analysis shows that courts sometimes fully disregard and ignore the importance and the role of the media in writing about the gravest forms of deviant behaviour in a society.

The ECHR views that there is very little space for restricting the discussion on matters of public significance and interest[52], are almost not applied at all and are never mentioned in court proceedings, as indicated by the examples featured in this Chapter. Moreover, the examples show that the right of defence was seriously denied to some defendants in defamation cases.

In previous cases as per complaints lodged by public officials the claims referred to millions or hundreds of thousands of euro as compensation for damages to honour and reputation, and the analysis shows that case law had a significant impact on definition of claims. Unfortunately, courts frequently awarded claims of several thousands of euros, with full disregard and violation of European standards in this respect. At the same time, court showed unusual diligence in such cases.

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[47] Inter alia: Prager and Oberschlick v. Austria, 1995

[48] For the view that NGO activists enjoy same protection as journalists, because they contribute to public debate by disseminating information and ideas on matters of general public interest, see the ECHR judgment in Steel and Morris v. UK from 2005

[49] Inter alia: Fressoz and Roire v. France,1999

[50] Inter alia: Weber v. Switzerland, 1990

[51] Inter alia: Jersild v. Denmark (1994) and Thoma v. Luxembourg (2001)

[52] Tammer v. Estonia 2001, Barthold v. Germany 1985, Lopes Gomes da Silva v. Portugal 2000, Raichinov v. Bulgaria 2006 etc.

Now public officials are beginning to be replaced in their role of plaintiffs by "people of security interest" or people suspected of and reported for execution of serious crimes, and the proceedings take longer than the ones as per complaints lodged by officials.

The high amounts of claims requested put in jeopardy the economic viability of the media and attempt to be a deterrent in giving any future statements on plaintiffs. Judgements also seek to obtain some sort of "verification" in the form of a court ruling that plaintiffs could use in the public whenever any suspicions are raised regarding themselves and their activities. At the same time, instead of investigating fishy deals of plaintiffs, the police and the prosecution take depositions from journalists and NGO activists.

C.1. PUBLIC OFFICIALS VERSUS THE MEDIA

The basic features of proceedings in which public officials sue media and journalists are unusual diligence in court actions and particularly pronounced disproportion of amounts of fines and amounts of compensations for non-pecuniary damages awarded in such cases. Such behaviour may lead to a conclusion that Montenegrin judiciary is under the direct or indirect influence of the executive.

Case Study: Prime Minister v. the media

The Prime Minister of many years, Milo Đukanović collected largest amounts from media on the account of claims for mental suffering. Inter alia,

- As early as in 2003, in a case against the daily "Dan", Basic Court in Podgorca awarded to Đukanović €15,000 as compensation for non-pecuniary damages[53].
- Early last year High Court in Podgorica confirmed the Basic Court judgment obliging the daily "Dan" to pay to Đukanović €14,000 as compensation for non-pecuniary damages for transmitting articles from the Belgrade magazine "Arena".
- In the case against the Daily press, founder of the independent daily "Vijesti" and its director, Željko Ivanović, the first-instance court awarded to the then Prime Minister €20,000, and High Court changed it to €10,000. This proceeding was closed without unnecessary postponements and delays, much faster than others.

The Basic Court judge that awarded the highest amount as compensation for mental suffering of Prime Minister Đukanović - €20.000, was subsequently promoted to the High Court.

In addition to the fact that the awarded amount is disproportionate and contrary to European standards, this judgment is also a mockery of standpoints of the High Court to which this judge was appointed. Namely, according to legal standpoint of the Civil Department of the High Court in Podgorica from the session held on 20 February 2004, the largest amount of just compensation for non-pecuniary damages for mental suffering is awarded in the case of the death of one's child in the amount ranging between €15,000 and €20.000.

[53] Daily "Dan" as of 11.02.2010

Hence, on behalf of the High Court in Podgorica stands are taken by a judge who equalizes the mental suffering of a public official, the Prime Minister in this case, for damage to his honour with the maximum suffering experienced by parents when losing a child.

In September 2007 Prime Minister Đukanović lodged a complaint against Daily press, the founder of the independent daily "Vijesti" and its director Željko Ivanović claiming compensation for non-pecuniary damages in the amount of 1 million euro for Ivanović's statement given after an assault against him done after the celebration of the daily's anniversary.

Ivanović then said that "Đukanović sent his Cerberuses to beat him up" and that the assault was an expression of congratulations from those who rule Montenegro, and that is Milo Đukanović and his family, either the biological or the criminal one".

Seven days after the complaint was lodged, it was delivered to defendants for their response. A judge of the Basic Court in Podgorica, Nenad Otašević, who was conducting the first instance procedure closed the case in several months' time, passed the judgment and rejected all evidence propounded by the defendants.

In the procedure as per the complaint lodged by Đukanović, the judge admitted to have acted more diligently in this case than normally. When the defendant Ivanović commented on that, the judge said in the hearing that he acted with greater diligence because otherwise he would suffer criticism from the independent daily "Vijesti".

The same judge was adjudicating in the case referring to compensation for non-pecuniary damages as per complaint lodged by closest next-of-kin of victims of the war crime of deportation from Montenegro in 1992.

As per the complaint of nine members of the Buljubašić family v. the state of Montenegro for compensation for damages caused by the crime of deportation, judge Otašević rejected the claim saying that it was barred by limitation.

In that case it took judge Otašević 11 months to schedule the hearing.

Basic Court in Podgorica partly accepted the claim and instead of the 1 million that was requested awarded €20,000 to Đukanović. Justifying his decision the judge said:

"The amount awarded is not and may not be the equivalent to the damaged asset of the plaintiff, nor is it the aim of this compensation, because honour and reputation of a person may not be awarded a financial value. But the satisfaction to the victim gives him the opportunity to see the compensation as a pleasant event to contribute to removal of damage as an unpleasant event".

Previously, Đukanović's complaint, by his attorney, and his sister Ana Kolarević, stated that "the amount was set in accordance with standards, and that the amount requested is not an equivalent to the moral value of the plaintiff, which are much higher, but that it would constitute a pleasant event after the unpleasantness caused".

In pronouncing his judgment, judge Otašević does not feel reluctant to publicly state his

view of the manner in which the Prime Minister performs his function, and thus he says:

"All this has caused mental suffering of the gravest intensity, because the plaintiff is a very successful person discharging his responsible office honestly and conscientiously at those least popular times of transition that Montenegro is undergoing".

Both parties have lodged a complaint on the ruling and the High Court in Podgorica amended the Basic Court judgment and awarded to Đukanović €10,000 as compensation for non-pecuniary damages for mental suffering caused by damage to honour and reputation.

The amount of €20,000 awarded for "mental suffering" to former Prime Minister by a Basic Court judge is much higher than the ones usually awarded by courts for suffering due to death of closest next-of-kin and is manifestly disproportionate and contrary to European standards.

In addition, judge's public confession that he acts differently in cases due to fear, regardless be it fear of the media or high-ranking officials, which appear as parties before the court, raises the issue whether he meets the minimum requirements to be deemed impartial and independent, i.e. whether it disqualifies him as a judge.

This confession should have been a reason for judicial authorities to undertake measures, the Judicial Council in the first place. However, instead of such a response, the judge was soon promoted to the High Court in Podgorica.

The question raised here is whether advancement of such a judge is a result of political influence or judges who are afraid and on the account of that fear act differently and make judgments contrary to European standards deserve promotion.

C.2. PEOPLE OF SECURITY INTEREST VERSUS THE MEDIA

Journalists and the media accused and sued in such cases were put before the court on the account of articles in which they wrote about organised crime. Notwithstanding the fact that journalists mostly referred to official documents of state authorities and institutions, they also transmitted allegations already published in other media.

The fate of all court proceedings against the media and journalists is uncertain and they take inappropriately long time, so the question arises whether it is safer to be engaging in organised crime, than talk and write about organised crime.

The first example refers to proceedings brought by Safet Kalić from Rožaje against journalists and the media and shows that such cases are being stretched, and some even recorded the violation of the right to defence.

The data show that competent state institutions were not ready to protect journalists and members of the civil society from possible consequences due to their statements on organised crime. On the contrary, police and prosecution investigated who violated the right to privacy of people sought by other countries on the account of organised crime charges.

Case study: Safet Kalić v. the media

Safet Kalić from Rožaje lodged private complaints against journalists and the media publicising articles about him and referring to the report of Montenegrin National Security Agency (NSA) claiming that this document describes Kalić as a "person of security interest and a member of the Rožaje clan perpetrating criminal activity abroad".

Wider public learnt about Safet Kalić in 2003, when the media published[54] that Serbian Ministry of Interior issued a release stating that Safet Kalić was the main narcotics supplier of Dušan Spasojević Šiptar and the "Zemun Clan"[55]. It was published then that members of the "Zemun clan" attended his wedding, alongside high-ranking officers of Montenegrin security services, that various weapons were used, and still the police failed to intervene.

It was confirmed less than a year after Safet Kalić lodged complaints against journalists and the media when the recording of his wedding became public after an unknown person posted it on YouTube.

As ordered by the prosecution, several days upon the footage was posted, the police started investigating who did that. Thus, Veselin Bajčeta, working at MANS, and Petar Komnenić, a journalist who referred to the footage in case proceedings against him, were called for an interview by the police.

At the session of the parliamentary Security and Defence Committee discussing the Police Activity Report, the director of Montenegrin police, Veselin Veljović stated on the occasion that the recording was fake and that his colleagues from NSA and security services were abused and accused the media and the civil society for that saying that he has "information" that someone wishes to slow down Montenegro on its path towards EU by talking about organised crime.[56]

Director of Montenegro Police says the recording was fake, that members of security services were misused and accesses the media and civil society for that.

However, despite the public calling to do that, not even half a year after he raised accusations did he present a single fact to substantiate and confirm them. Neither the Montenegrin prosecution office nor the police did ever state the reasons why they believed the footage to be fake.

Kalić – Komnenić

In a case against a journalist of "Monitor", Petar Komnenić, the then NSA director refused to give a testimony of the NSA report making reference to Kalić as a person of security interest, invoking the obligation of keeping a professional secret. In addition to the report, in this case journalist Komnenić also referred to a release of Serbian police from the Op "Saber".

[54] Inter alia: "Večernje novosti", Belgrade, as of 06.05.2003

[55] Members of the "Zemun Clan" were charged with assassination of Serbian Prime Minister Zoran Đinđić, and Dušan Spasojević Šitar was killed in a Serbian police operation attempting his arrest for his involvement in Đinđić assassination

[56] Independent daily "Vijest'" of 02.07.2010, article entitled "Veljović: NSA Officers Were Abused"

Basic Court in Podgorica pronounced journalist Komnenić guilty and imposed a €2,000 fine.

The judgment concludes that Komnenić did not provide the court with an official statement from the Serbian police, and failed to admit as evidence dozens of newspaper articles of Montenegrin and Serbian media referring to the same release of the Serbian police.

The proposal to hear as a witness the Director of Serbian police, Milorad Veljović, was also rejected. In November 2010 he gave an interview to TV Vijesti from Podgorica, and part of it was also published in the independent daily "Vijesti", where he publicly confirmed that Serbian police qualified Safet Kalić from Rožaje as a narco-boss.

Commenting upon the complaints lodged by Kalić against Serbian media, the director of Serbian police said that it is a rule that criminals use complaints in an attempt to show themselves in a false light, and that states should not succumb to that.[57] He also added that police press releases referring to Kalić are a good preventive measure here and such information should not be kept away from the public.

In the criminal proceedings the court asked the defendant Komnenić to provide the press release of a government authority of another state. Since he failed to provide the release, the court interpreted it to his detriment.

The defendant in this case kept pointing to evidence in favour of his defence and the court in its official capacity should have endeavoured to procure such evidence and establish it in the main hearing, especially given the fact that this is evidence not realistically expected to be able to be procured by the defendant and furnished to the court.

The right to defence was gravely violated because the court rejected his proposal to hear a witness who could confirm his defence

Kalić – Muminović

In a case against journalist Muminović, the same court acquitted her of the charges. The judgment rationale included, inter alia, that allegations that Kalić is a "person of security interest who performs his activities primarily abroad" are not objectively verifiable, and thus the journalist was acquitted of charges.

The judgment also stated that Muminović had a justified reason to believe that what she claimed in the disputed article was true and that it was not proven that she acted in bad faith to present untrue facts slandering Kalić.

The High Court in Podgorica quashed the judgment pronouncing Komnenić guilty and the one acquitting Muminović of charges and both cases were returned for retrial to the Basic Court in Podgorica.

[57] Independent daily "Vijest"' of 12.11.2010

In the Decision abolishing the judgement of acquittal for Jasmina Muminović, the panel of judges of the High Court in Podgorica referred, inter alia, to provisions of Article 196 paragraph 4 of CC envisaging that, if the defendant proves to have had grounds to believe the veracity of what he stated or transmitted he shall not be punishable for defamation, but may be punished for insult (Art 195), if the conditions for existence of this offence were met.

Kalić – "Vijesti"

A civil case was instigated before the Basic Court in Podgorica as per the complaint of Safet Kalić against the independent daily "Vijesti". At the hearing held on 14 June 2010 it was stated that the attorneys of the parties agreed in the previous hearing that the plaintiff was not to be heard as a party to the proceedings.

Meanwhile, "Vijesti" changed their attorney, and the new one withdraws previous consent not to hear plaintiff as a party to the proceedings and asks for testimony.

In continuing trial the court decided to ask for the case file K.br.1452/08 in criminal proceedings against the journalist of the independent daily "'Vijesti'", Jasmina Muminović on the account of defamation, in which the judge, when pronouncing the judgment, stated orally that the PR of Police Directorate, Tamara Ralević confirmed that she said to the defendant in a telephone conversation that Kalić was apprehended.

At the same hearing, plaintiff's attorney changed the claim by extending it to cover also the article published after the complaint was lodged, which was objected to by the defendant's attorney that on procedural grounds it is impossible to modify the claim at that stage of the proceedings, especially not to encompass the new article.

In addition, plaintiff's attorney stated that Kalić was currently residing in Turkey and that he would not appear before the court, and the court postponed the hearing for 09 July 2010.

Pursuant to Articles 187 and 103 of the Civil Procedure Code (CPC), plaintiff's attorneys should have stated in the complaint itself the evidence they intend to propose. In addition, as per Article 286 of CPC, in its subpoena for the preparatory hearing the court should have notified the parties that they were obliged, not later than at that hearing, to propose evidence they wish to be established during the proceedings, and pursuant to Article 290 paragraph 1 of CPC, at the preparatory hearing, the court should have determined which evidence would be established at the main hearing.

Hence, the court should have decided at the preparatory hearing which evidence to establish at the main hearing, i.e. the court is obliged to assess the facts of the case with precision and in full and to that effect to decide which evidence would be established in the hearing.

In contravention to this, with its passive attitude, the court first allowed the attorneys of the parties to "agree" on issues that the court should have resolved beforehand, and then with the same passive attitude it accepted the withdrawal of the agreement by one party and decided with delay that the plaintiff should be heard as a party to the proceedings.

Such actions of the court in the given case may also be interpreted either as unfamiliarity with the CPC provisions, as a procedural law indispensible for the legality of proceedings, or as a conscious and intentional delay thus infringing upon the right of the parties to trial within reasonable time, unnecessarily causing much higher costs of the proceedings.

At the hearing held on 9 July 2010 the court stated that the plaintiff failed to appear and that there was no evidence of him being duly summoned.

Defendant's attorney was serviced the submission from the plaintiff's attorney as of 05 July 2010, and the court postponed the hearing for 13 September 2010.

The court also ordered the plaintiff's attorney to secure his appearance at the next hearing, issuing a warning that possible failure to appear would be assessed in the light of all other circumstances and evidence established.

Hence, at the preparatory hearing, the court failed to determine all the evidence to be established at the main hearing, and then subsequently decided that the plaintiff should be heard as a party to the proceedings. Instead of, at the preliminary hearing, as envisaged by the CPC, the Court ordering the plaintiff's attorney to secure the presence of the plaintiff at the subsequent hearing, the Court disregards the statement of plaintiff's attorney that the plaintiff was currently residing in Turkey and that he would appear before the court, and at the postponed hearing states inexplicably "that the plaintiff failed to appear and that there are no proofs of his due summons", which constitutes yet another reason for postponement.

In addition, Article 263 of CPC the Court invoked when postponing the hearing envisages that subpoena for the party is serviced to the attorney who is obliged to notify the party, and the provisions of Article 316 paragraph 1 item 1 of the CPC that the Court also invoked, envisages that the Court may, at the proposal of the party, postpone the hearing that already started only if, through no fault of the proposing party, it is not possible to establish some of the evidence whose establishment was determined, and which is important for proper decision to be made.

Kalić - „Monitor"

Before the same court (Basic Court in Kotor), Safet Kalić launched a proceeding against the weekly "Monitor" claiming compensation for non-pecuniary damages for violation of honour and reputation.

The hearing scheduled for 10 June 2010 was not held because the High Court in Podgorica failed to forward the case file that needed to be inspected in the evidence establishing procedure, and the Court postponed the hearing for 28 June 2010. Evidence was established at this hearing, and then the plaintiff's attorney set the claim at €30,000.

As reported by the media[58], first-instance court rejected this complaint as ungrounded and obliged the plaintiff to indemnify the defendant for the costs of the proceeding amounting to €1,100.

[58] Independent daily „Vijesti" of 21.11.2010

Through his attorney, Kalić lodged an appeal to this judgment with the High Court in Podgorica.

The case study of Ivan Delić v. "Vijesti", given below, shows that lodging complaints against the media is done in an attempt to obtain a judgment that would be constitute "verification" for the plaintiff that the suspicions and allegations publicly stated about him are false.

The plaintiff in this case admitted publicly that the allegations for which the complaint was lodged were – true. In early March 2011, the Basic Court in Cetinje, before which the first-instance proceeding took place, passed the judgment rejecting the claim of Delić.

Case Study: Delić v. "Vijesti"

The name of Ivan Delić was mentioned publicly for the first time in 2001, when the Review Committee of the Parliament of FR Yugoslavia raised suspicions against him as the one guilty of the assassination of the then Federal Minister of Defence, Pavle Bulatović.

Ivan Delić's fiancé, Marija Šurina and her brother Dario got killed on 22 September 2002 in an explosion which took place in their family home in Budva. The parents of the victims blamed Ivan Delić for the explosion because, allegedly, persons who activated the explosive thought that Delić was in the house.

Ivan Delić survived several assassination attempts. In June 2004, at a parking place at Sveti Stefan by an unknown attacker, Delić sustained minor wounds when several shots were fired at him. In August 2006, at the Kotor – Budva roadway, an unknown attacker fired at his car over 30 shots from an automatic weapon.

Delić sued the independent daily "Vijesti" for articles related to a murder that took place at a café bar "Palma" in Budva in August 2008. The complaint originally claimed indemnification for damages, only to amend it during the proceeding to request only the publication of the judgment in public media at the cost of the defendant.

Reporting on the murder of Goran Pejović from Nikšić, "Vijesti" stated that Pejović got killed accidentally, while the actual target of the professional hitman was Ivan Delić who was at the same time in the cafe bar "Palma", and who on the critical night was similarly dressed as the murdered Pejović and at whose table an equal number of people was sitting as at the victim's. As a matter of fact, same allegations could have been read in other papers.[59]

Two years after this murder, in an investigation for the murder of the owner of Zagreb magazine "Nacional" Ivo Pukanić, member of the "Zemun Clan" Sretko Kalinić aka Zver (Beast)[60] confessed to Croatian investigators that he was the one committing the murder

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[59] Inter alia: "Večernje novost" from Belgrade of 14.08.2008

[60] Sretko Kalinić aka Zver, member of the "Zemun Clan", was convicted in Serbia to several long-term imprisonment sentences. Among other things, he was convicted to 30 year imprisonment sentence for taking part in the assassination of the Serbian Prime Minister Zoran Đinđić in 2003.

in Budva and that he had an order to kill Ivan Delić, but that "by mistake" he killed a man sitting at the next table.

Only a few days after one of the hearings as per his complaint against "Vijesti", Delić publicly confirmed he believed that two years before he was the target of the member of the "Zemun clan" Sretko Kalinić aka Zver.[61]

Notwithstanding the public confession that the allegations from "Vijesti" as of two years before were true, the proceeding that was previously instigated by Delić, claiming such allegations to be damaging of his honour and reputation, was closed only in early March 2011, when the Basic Court Cetinje passed the judgment rejecting the claim.

C.3. DEFAMATION AND PUBLIC INTEREST

In its case law, the ECHR established a hierarchy of values protected by Article 10 of the Convention. In this hierarchy, the comments and debate on matters of general – public interest constitute the most safeguarded form of the freedom of expression.

The examples presented in this chapter refer to court judgments instigated against journalists and civil society activists for their allegations on matters of public interest. In the examples that follow, drawing attention to the matters of public interest should have been a reason for actions of competent institutions and services to investigate serious suspicions of unlawful actions of state authorities and civil servants. However, no such response ever came. Instead, journalists and activists who raised such matters are facing complaints, frequently even punishments and/or compensation for damages for violation of honour and reputation.

Such punishments and indemnification should, allegedly, indicate that suspicions raised by journalists and NGOs are not grounded, since they have not been proven in court. Hence, instead of investigating suspicions and gathering evidence when there are indications of the existence of criminal offences, competent authorities most often request from journalists and NGOs to gather evidence in proceedings led against them by very people to whom such suspicions refer.

Case Study: Wiretapping of judges

In October 2009, the Basic Court Podgorica passed a judgment pronouncing the journalist of the weekly "Monitor" guilty for defamation and was fined to €3,000. The proceeding against Komnenić was led as per the complaint of once president of High Court Podgorica, now a Supreme Court judge, Ivica Stanković.

Stanković sued Komnenić for the article "Judge under Surveillance" which said that Stanković was under secret police surveillance.

In his text, Komnenić referred to the statement of once High Court judge, now an

[61] "Blic", Belgrade, od 23.06.2010, Radio "Free Europe" on 23.06.2010

attorney, Radovan Mandić, who said that half of the judges of High Court Podgorica were under the secret surveillance measures. Mandić repeated such allegations before the Court in this proceeding, when being heard as a witness.

Before the pronouncement of a judgement against Komnenić, Journalist Self-Regulatory Body, again as per a complaint by judge Stanković, decided that the article was made in accordance with journalist's code and that there were no omissions on the part of the author.

Police Director, Veselin Veljović indirectly confirmed that, at the closed session of the parliamentary Security and Defence Committee, he mentioned judges Mandić and Stanković in the context of interfering with some investigations which was the reason for putting them under sirveillance.[62]

During the court proceeding, as requested by Komnenić, evidence was established by inspection the court files showing that then investigating judge of the High Court, now also attorney, Hamid Ganjola requested from Special Prosecutor to be returned as soon as possible the case file established at the proposal of the Special Prosecutor Stojanka Radović for introducing secret surveillance measures Kri.br.515/06, which he provided for inspection at her personal demand.

The text published in "Monitor" said that judge Ganjola needed this file because the judges who were under secret surveillance invoked the legal obligation of being enabled the inspection of the data gathered by their surveillance and wiretapping, given that secret surveillance measures did not give grounds for instigating a procedure against them. The State Prosecution responded that their records do not have a mention of the case file of the High Court investigating judge filed under that number and that there are no records of the High Court being asked to provide the case file.

In October 2010, the High Court Podgorica confirmed the Basic Court judgment by which Komnenić was punished for defamation with €3,000. The judgment was not delivered to Komnenić until 18 February 2011.

The topic covered by Komnenić – unlawful wiretapping of High Court judges and inexplicable disappearance of the case file on secret surveillance measures from the same Court – indisputably fall under matters of exceptional public interest. This should call for particular restrain and caution in deciding on restricting journalist's freedom of expression, especially through criminal conviction and punishment.

The statement of the former High Court judge, Radovan Mandić, not only confirmed that Komnenić had a reason to believe that the allegations of unlawful wiretapping of judges were true and that constituted reason enough for the public to know, but also imposed an obligation on competent authorities to investigate such allegations. Particularly so given that Mandić claimed before the court that his former colleague and investigating judge of the High Court Hamid Ganjola told him that he abolished his wiretapping, as well as that "half of the judges" of the same Court were wiretapped.

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[62] Asked why he retracted that at this session he mentioned the once Supreme Court president Ratko Vukotić, and he did not dispute the information concerning judges Stanković and Mandić, the Police Director "clarified" that "...he did not retract what needed no retraction...".

The European standard established through the ECHR case law is that journalists must not be requested to prove the absolute veracity of their allegations, but that it is enough to prove that they had justified reasons to believe their veracity.

None of the competent authorities in the judiciary has undertaken any action to check the allegations that High Court judges were unlawfully wiretapped and surveilled, nor has anyone checked into how the case file on secret surveillance measures "disappeared" between the court and the prosecution.

The next case study shows that courts ignore the ECHR opinions on the role played in a democratic society by the press, the media and journalists in general. According to ECHR, punishing the media and journalists for assisting in the dissemination of statements made by another person would seriously hamper the contribution of the press to discussion of matters of public interest.[63]

Dissemination of statements concerning the linkages of members of security services with narco-cartels indisputably constitutes a matter of public interest. However, the following example shows that courts ignore even the fact that a journalist has undertaken everything reasonably possible at the given time to enable the person to whom the disseminated information refers to give his statement.

Alongside the fact that competent services fail to do anything to check the allegations indicating the linkages of their officers with narco-cartels, taking measures against a journalist who disseminates such allegations may be interpreted as giving the judicial "verification", in the form of a judgment against a journalist, that the allegations he disseminated were false, and that there was no link between the security services and narco-cartels.

Case Study: national security or crime?

Before the Basic Court Podgorica, a proceeding was held against Sead Sadiković, a journalist of the daily "Monitor", as per a complaint lodged by a high-ranking official of the National Security Agency (NSA) Zoran Lazović.

In the article published in "Monitor" entitled "Columbia at Lim", Sadiković transmitted the writing of the Belgrade weekly "NIN" where Lazović was indicated as a friend and a protector of Draško Vuković from Berane and Safet Kalić from Rožaje. Lazović originally claimed compensation for damages in the amount of €10,000, only to reduce it to 1 euro in the course of the trial.

Sadiković pointed out before the court that he believed these to be matters of public interest of which the public needed to be informed and that before publishing the article he called Lazović several times on the phone numbers previously given to him by Lazović himself, in an attempt to obtain his statement on the writings of "NIN" marking him as the protector of a narco-cartel.

Since Lazović did not return his calls, Sadiković wrote the article and added he believed that he was not providing false information stating that Lazović was a friend of Kalić,

[63] Inter alia: Thoma v. Luxembourg, 2001 and Jersild v. Denmark, 1994

given that Lazović attended Kalić's wedding, and friends are the ones who get invited to weddings.

In May 2010, the Basic Court Podgorica passed a judgment rejecting the claim of Lazović as ungrounded. The rationale states that the article written by Sadiković did not violate the honour and reputation of Lazović, that the main topic of the article was the problem of growing organised crime in the north and an increasing number of people involved in organised network of drug trafficking, and that the article only transmitted the information published in the weekly "NIN".

With full disregard of this rationale and the importance of the issues written about by Sadiković, the High Court in Podgorica modified the Basic Court judgment and granted Lazović's claim.

The following example is also indicative of the inexplicable passivity of state prosecution when a criminal report is filed indicating suspicions of a corruptive deed. As already pointed out, prosecution fails to take any action they are obliged to take upon receiving a report, although the case at hand does not justify any postponement.

As a rule, suspects "defend" themselves publicly by lodging a complaint for "violation of honour and reputation" against the one who files a report. Tolerating this and encouraging such a practice is indicative of plain deterrence and discouragement of anyone who would intend to report corruption or any other crime.

Case study: Complaint on the account of reporting corruption

NGO MANS was sued by the Chief Inspector for protection of space in the Ministry of Spatial Development and Environment, Nataša Brajović. On 04 October 2010, through her attorney Zoran Piperović, she lodged with the Basic Court Podgorica a complaint claiming compensation for non-pecuniary damages in the amount of €8,000.

The complaint said that in its press release of 30 September 2010 MANS presented untrue information on the account of Nataša Brajović, "violating her honour and reputation".

In this release, MANS announced filing a criminal report against the inspectors for protection of space, Nataša Brajović and Milisav Popović for the suspicion of misuse of office and unconscientious performance of office, as well as against the company "MB Bankada" and its owner Mirko Barać for the construction without having procured a permit at Perazića Do.

Inspector Brajović failed to take any action to enforce the decision on demolition of illegally constructed structures passed on 22 March 2010. NGO MANS focuses on matters of public interest and no allegation from the release has anything to do with the private life of Brajović, nor anyone else for that matter, but deals solely with matters of public interest.

In her complaint, inspector Nataša Brajović pointed out that in the given case she acted

in accordance with the law and conscientiously and professionally took all the actions within her authorities.

In this case, the court scheduled a preparatory hearing for 14 February 2011.

C.4. COMPENSATION FOR NON-PECUNIARY DAMAGES

C.4.1. The measure of mental suffering

The specific examples confirm that Montenegrin courts very often awarded compensation for non-pecuniary damages on the account of mental suffering, without ever establishing evidence through expert witnessing of a neuropsychiatrist. At times not even a plaintiff was heard as a party to the proceedings and did not even appear before the court to testify of his mental suffering.[64]

Moreover, in certain judgments where some of influential officials would appear in the role of plaintiffs, courts explained the mental suffering by provisional and incomprehensible statements raising doubts that judiciary is under the direct or indirect influence of the executive.[65]

Case Study: Basic Court Cetinje

The executive manager of printing company "Obod" instigating a proceeding against the founders of the daily "Dan", d.o.o. "Jumedia Mont", for the allegations from that daily regarding the privatisation of "Obod" and possible wrongdoing in the company operation, asking for compensation in the amount of €100,000.

The plaintiff was given the opportunity to present his views and opinions with the first article published in the daily "Dan", but he refused to comment the accusations. In addition, after the publication of the said article, the plaintiff sent a reply which was published by "Dan" in its integral form.

The court established the mental suffering of their plaintiff by hearing his testimony and passed the judgment obligating "Dan" to pay €5,000 as compensation to the plaintiff.

The judgment of the High Court Podgorica of 14 September 2009 modified the judgment by reducing the amount the defendant was obligated to pay from €5,000 to 2,500.

[64] For instance, as per the complaint of the then Prime Minister, Milo Đukanović, director of the daily "Vijesti" Željko Ivanović was obligated to pay compensation for non-pecuniary damages in the amount of €20,000, modified to €10,000 by the High Court judgment. Again as per the complaint of the then Prime Minister, Milo Đukanović, "Dan" was obligated to pay the compensation amounting to €15,500 for transmission of allegations from Zagreb magazine "Nacional". In neither of these there was any establishment of evidence through expert witnessing of a neuropsychiatrist, nor was the plaintiff heard as a party to the proceedings.

[65] In the judgment by which Prime Minister Milo Đukanović was awarded compensation for non-pecuniary damages in the amount of €20,000, the judge justified the decision of this being mental suffering of the highest intensity using the following words: "...All this caused him mental suffering of highest intensity, because the plaintiff is a highly successful person discharging in an honourable and conscientious manner a responsible office during the times of the least popular period of transition that Montenegro is undergoing...".

In its judgement, the Court was silent on any of the following:

- That the plaintiff, being called by the journalist, declined any comment on the text,
- That the plaintiff subsequently sent a reply, published in full by "Dan",
- That the defendant obtained the information from the company participating in the public procurement procedure, as confirmed by the director of the given company, and by the "Obod" employees,
- That the operation of "Obod", where the plaintiff is the director, is a matter of public interest,
- That the journalist acted conscientiously and in good faith, with due care.

In ECHR opinions, great significance is attached to the fact whether, in addition to opinions and views referring to some persons, the same persons were enabled in the same manner to present their comments and opinions and views of the same issues. This enables the public to form an informed opinion.

Additionally, according to ECHR, there is little room for restricting the freedom of expression on matters of public interest, and the role of the press in reporting on such matters is invaluable.

The amount of compensation awarded in this judgment is also regarded disproportionate according to the ECHR opinions, even had the need for restrictions been credibly established.

Even the High Court judgment passed by the panel of three Supreme Court judges seconded to assist the High Court fully disregards all the above European standards, so it may be concluded that the compensation is awarded completely arbitrarily and provisionally.

The same judge at the Basic Court Cetinje passed on the same day the judgments obligating the independent daily "Monitor" and two journalists from this daily to compensate the non-pecuniary damages of €4,000, for the text talking about dealings of people associated with the former Prime Minister Milo Đukanović.

The complaint claimed compensation in the amount of €30,000. The court "established" the mental suffering of the plaintiff in the same manner – by hearing the plaintiff, and added that in awarding the amount of compensation he "had in mind the existing case law".

Thus, the judgement contains the previously shown failings as the previous one of the same judge.

On the other hand, the next case study is an example of the good practice of the Basic Court in Pljevlja establishing evidence through expertise to establish the existence of mental suffering on the part of the plaintiff.

Case study: Expert witness testimony on mental distress and suffering

The Basic Court in Pljevlja rejected as ungrounded the indemnification claim[66], although the defendant in this case was already convicted with an enforceable decision of defamation against the plaintiff.

In the indemnification procedure, the Basic Court established evidence through testimony of a neuropsychiatrist giving the opinion as an expert witness on mental suffering of the plaintiff.

The Court accepted the testimony and opinion of the expert witness who assessed that the plaintiff did not sustain mental suffering and rejected the claim for compensation for damages.

We believe it to be a good practice for courts to establish evidence through expert witness testimony and that it is particularly unjustified when courts not only fail to have expert witness's opinion, but do not even hear the plaintiff as a party to the proceedings, but award indemnification for non-pecuniary damages, without the plaintiff even appearing before the court.

Obviously, the court must assess objectively the opinion and findings of expert witnesses in line with the legal principle of weighing the evidence in order not to have as an established practice of expert witnesses adjudicating in place of courts.

C.4.2. Violation of business reputation

As pointed out earlier, in addition to public officials and "people of security interest", over the previous years, defamation complaints and claims for compensation of non-pecuniary damages started to be lodged even by legal persons, claiming that public allegations in relation to their dealings and suspicions expressed therein damage their business reputation.

Previous case law on this matter inspired and encouraged lodging of complaints by legal persons, and the amount of claims in such cases goes in support of such a conclusion.

Legal persons instigated such proceedings in relation to matters which are clearly matters of public interest and in which suspicions of criminal offences were raised. Notably, in such cases the competent authorities failed to act, although criminal reports substantiated by evidence proving reasonable suspicion of the criminal offences being committed were also officially filed. The Supreme State Prosecution only stated that checks of business dealings of entities to which reports referred were being made.

Such behaviour may be indicative of the possibility of the new trend in this area – intimidation and deterrence from giving statements by all those speaking of problems in privatisation and expressing suspicions that actions of "strategic partners" of the Government show elements of criminal offences.

[66] Judgment P.br 652/08 of 31.12.2008

Case study: Željezara versus media and MPs

In May 2008, Željezara Nikšić and its owner MNSS BV, Amsterdam instigated a civil proceeding for compensation of non-pecuniary damages on the account of violation of business reputation lodged against MP Nebojša Medojević and d.o.o. "Daily Press", Podgorica, for the publication of an author's text by Medojević entitled "Money Laundering Instead of High-quality Steels". The complaint stated that plaintiff's allegations damage the business reputation and ask for compensation for damages in the amount of 10 million euro.

Medojević asked in vain for the exclusion of judge Blažo Jovanić with the justification of his financial dependence on the Prime Minister Đukanović's family, whose sister was representing the plaintiffs[67].

Judge Jovanić passed the judgment P.br.546/08 of 31 July 2009 awarding to plaintiffs, instead of requested 10 million euro, the indemnification in the amount of €33,000.

In early 2010 the same judge adjudicated in the proceeding regarding compensation for damages arising from the war crime of deportation of refugees from Bosnia in 1992. The same judge awarded to children of one of the victims €15,000 each as indemnification for the death of a parent[68].

The amount awarded as per the complaint of legal persons in this proceeding, where the impartiality of the judge was seriously put into question, constitutes one of the highest awarded to that date on the account of compensation for non-pecuniary damages. Given that in that case also the legal ground to envisage indemnification to legal persons was missing, suspicions of the judge being biased seem justified and reasonable.

The acceptance of the claim regarding the independent daily "Vijesti" which transmitted the allegations of the MP, which is absolutely contrary to European standards and the ECHR case law, speaks in favour of our conclusions.[69] Such a practise constitutes an inadmissible pressure on the media in performing their role of the "public watchdogs".

High Court, Podgorica passed the judgment[70], modifying the Basic Court judgment[71] and rejected as ungrounded the claim against Nebojša Medojević and d.o.o. "Daily Press", Podgorica.

The High Court, inter alia, concluded that the Basic Court Podgorica was misapplying the Convention and ECHR case law as well as that:

"...the asset such as business reputation is not contained in Article 10 paragraph 2 of the Convention, that under "protection of reputation" the ECHR case law allowed for

[67] Judge Jovanić's brother is the driver of the majority owner of Prva banka and the Prime Minister's brother Aco Đukanović, judge Jovanić has a several-dozen-thousand euro worth a credit with Prva banka, and the plaintiffs in this case were represented by previously mentioned attorney Ana Kolarević, the sister of the majority owner of Prva banka Aco Đukanović and the Prime Minister of many years Milo Đukanović

[68] Which is an exact half of the amount awarded to children of other victims of the same deportation granted as compensation for damages in settlement with the Government of Montenegro in 2008.

[69] Inter alia: Observer and Guardian v. UK - 1991, Jersild v. Denmark - 1994, Thoma v. Luxembourg - 2001

[70] Gž.br.34/2010 of 18.05.2010

[71] P.br.546/08

restriction of freedom of speech by establishing the precedence of the right to reputation of a natural person over the freedom of expression, ... , so that business reputation of a legal person is not a legitimate aim for whose protection there is an envisaged possibility at all of restricting the freedom of speech. The ECHR case law protects business reputation through Article 1 of the Protocol 1 to the Convention – protection of property."

This was one of the first rulings of Montenegrin courts invoking the ECHR case law referring to the right of freedom of expression and which gave supremacy to the ECHR case law and the Convention over the national legislation.

Stemming from this opinion of the High Court Podgorica, it seems that any restriction of the freedom of expression for the protection of business reputation in some of the future cases, in addition to the violation of European standards, would also constitute different and unequal treatment of the parties before the court.

Although the right of the plaintiff to set the amount of the claim at their own discretion is beyond dispute, the fact remains that the impact of case law and court rulings on anyone raising claims on the same ground may not be disregarded.

The previously described proceedings has most probably had the impact on setting the amount of claims in the complaint lodged by the same plaintiffs against MANS and Vanja Ćalović, where they asked for €36,000, or €3.000 less than the amount awarded in the Basic Court judgment[72].

This primarily given that it involves the same plaintiffs, that the complaints were both based on the same ground of compensation for non-pecuniary damages on the account of alleged damage to business reputation, that the alleged damage of business reputation was caused by public allegations, i.e. a verbal act, and that the same court, Basic Court in Podgorica, adjudicated as per both complaints.

The basic difference being that at the time when the complaint against Nebojša Medojević and d.o.o."Daily Press", Podgorica, was lodged, the Law on Obligations was in force that did not envisage compensation for non-pecuniary damages for the violation of business reputation.

In August 2008 the new Law on Obligations[73], was adopted which introduced for the first time into our legal system the violation of business reputation as a ground of compensation for non-pecuniary damages in its Article 207 paragraph 3.

Nevertheless, regardless of the fact that a ground for restricting the freedom of speech is now stipulated in law[74], there is not in place another necessary requirement, namely that such restriction may be performed solely to protect some of the values safeguarded by paragraph 2 of Article 10 of the Convention, because business reputation is not contained therein.

[72] This proceeding has been covered in more detail in Chapter C.5

[73] The Law was published in the Official Gazette of Montenegro 47/2008 end entered into force on 15.08.2008

[74] Article 207 paragraph 3 of the Law on Obligations

C.5. LENGTH OF PROCEEDINGS

As already pointed out, the right to trial within reasonable time is ensured, as a rule, in cases instigated by public officials. In other cases, this is rather an exception and proceedings are quite often unjustifiably delayed, with courts infringing the provisions of procedural laws.

C.5.1. Postponements caused by courts

In practise it is not an infrequent occurrence for court proceedings to take longer than necessary and justified, and this to be the result of actions or omissions of the court. Each such case inevitably leads to unnecessary increase of the costs of the proceedings, and it is particularly unjust for such costs of the doings of the court to be borne by either of the parties, regardless of their losing the case.

This case study shows that the proceedings are delayed unnecessarily for the actions of the court, which increases the costs of the proceedings to be borne by the losing party.

Case study: Barović v. "Vijesti"

In late 2008, a businessman from Podgorica, Veselin Barović lodged with the Basic Court Podgorica a complaint against the independent daily "VIjesti" – "Daily press" and the editor in chief Ljubiša Mitrović and journalist Komnen Radević, asking from the above persons to jointly pay the amount of €100,000 as compensation for non-pecuniary damages for violation of honour and reputation.

Barović claimed that the damage was suffered through the publication of an article in the daily "Vijesti", by journalist Radević, reporting from the trial before the High Court Podgorica in a case against persons charged with murder of the police official, Slavoljub Šćekić.

The article stated that in the given trial an official police field report was read stating that on two occasions in 2005 police stopped the car owned by Barović, driven by Ljubo Vujadinović and Milan Šćekić, accused of murder of the police official.

Barović believes that the text and its heading lead to the conclusion that he gave his car to the accused that a month afterwards was used in the murder of the police official, which he claims not to be true.

At the hearing held in 22 June 2010, Veselin Barović was supposed to be heard as a party to the proceedings, as this testimony was previously decided by the court. Barović's attorney informed the court that Barović was away on business as the reason why he failed to appear before the court. Judge heard only journalist Radević, and at the proposal of the plaintiff's attorney postponed the hearing for 24 September 2004 in order to hear the plaintiff.

The plaintiff again failed to appear for the next hearing, and the court decided that the plaintiff would not be heard as a party to the proceedings. At the same hearing, the judge asked from plaintiff's attorney the addresses of witnesses Ljubo Vujadinović and

MilanŠćekić, whose testimony was proposed by the complaint.

On 22 October 2010, Court rejected Barović's claim as ungrounded. As media reported[75], in its judgment the court stated, inter alia, that Barović offered no evidence of not being the owner of the car in question and that he sold it more than 6 years before.

It took almost two years after the complaint was lodged before the court asked for the data on addresses of witnesses for whom, in the course of the proceedings, he learnt of being held in detention on the account of charges for murder of the high police official. Pursuant to the Law:

- Plaintiff's attorneys should have stated already in the complaint the names and addresses of witnesses whose testimony they propose[76].
- During prior examination of the complaint, the court should have taken measures to remove its deficiencies, i.e. for the plaintiff to submit the addresses of witnesses whose testimony he proposed[77].
- In its subpoena for the preparatory hearing, the court should have informed the parties that they were obliged, not later than during that hearing, to propose evidence they wish to be established in the course of the proceedings[78], and the court should have determined at the preparatory hearing which evidence would be established in the main hearing[79].

Given that hearing these witnesses was proposed by the complaint, the court should have decided much earlier on such a proposal given by the plaintiff and take measures for these witnesses to be subpoenaed in a timely fashion, should it regard their testimony necessary. That is to say, the complaint was lodged in late 2008, and thus, the court decided as per matters which, in proper implementation of the relevant provision of the Civil Procedure Code, should have been dealt with a year and a half before.

Seeking the addresses of the two witnesses and the allegations of the plaintiff's attorney that he is unaware of their addresses are particularly incomprehensible since it is a matter of general knowledge that these witnesses have been charged of a murder of a high-ranking police official and held in detention since the criminal procedure was instigated against them, which the court learned also in the course of this proceeding though establishment of evidence.

Therefore, the current address of these witnesses was known both to the plaintiff's attorneys and the court, thus the actions of the court in the given case can be interpreted either as lack of knowledge of the CPC provisions, which, as a procedural law, is indispensable for the procedural legality of the proceedings, or as a conscientious and wilful delaying of the proceedings, thus, in addition to violation of the rights of the parties to trial within reasonable time, also increasing unnecessarily the costs of the proceedings.

[75] Daily "Vijesti" of 28.10.2010 (Note: we have not had a chance of directly inspecting the judgment)
[76] Prusuant to provisons of Articles 187 and 103 of the CPC
[77] Prusuant to provisons of Articles 275 and106 of the same Law
[78] By virtue of Article 286 of CPC
[79] Pursuant to Article 290 paragraph 1of the same Law

In addition, by refusal to hear these witnesses a year and a half after their testimony was proposed, with the justification that the plaintiff failed to procure their addresses, given that their address is currently a matter of common knowledge, may indicate the failure to establish fully the facts of the case, in case that these witnesses' testimonies would have led to the establishment of some decisive facts.

Should the second-instance court come to such a conclusion, this would constitute grounds for abolishment of the judgment and returning the case for re-trial, which would further contribute to the prolongation of the proceedings and considerable increase in the costs.

In any case, it is unlawful and incomprehensible for a court to reject to hear testimony of certain witnesses and do so a year and a half since the establishment of this evidence was proposed, and to justify such a refusal with the fact that the proposing party failed to provide their addresses which are, beyond any doubt, known to the court.

If the statements of the judgment have been accurately reported, it may be noted that they do not correspond to the contents of the complaint and the minutes of hearings held. Both in the complaint and at the hearing the plaintiff proposed to hear witnesses in support of his claims of not being the owner of the vehicle any more which was disposed of over six years ago, which the court rejected for failure to provide their addresses, a matter of general knowledge.

Hence, it is a contradiction to reject proposals to hear witnesses with the justification that the plaintiff failed to provide their addresses and do so a year and a half after the proposal to hear these witnesses, and then state in the judgment that the plaintiff failed to offer any evidence in support of his claims.

Without any wish and intention to prejudice the decision of the second-degree court, we believe that such actions of the court have led to a ruling that, at first glance already, to our mind, has such deficiencies which could constitute the reasons for this judgment not to be upheld.

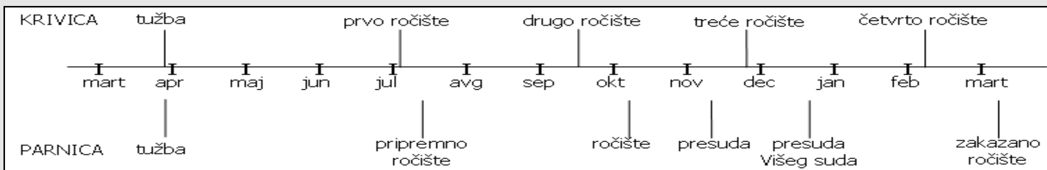
C.5.2. Applications for expediting proceedings and complaints

Case study: Željezara v. MANS

On 21 April 2010, Željezara Nikšić and its owner MNSS BV, Amsterdam, lodged with the Basic Court a private criminal complaint against the MANS executive director Vanja Ćalović for alleged commitment of a criminal offence of defamation. On the same day, the same legal persons lodged a complaint with the Basic Court against Vanja Ćalović and MANS for compensation of non-pecuniary damages on the account of "violation of business reputation", claiming from Vanja Ćalović and MANS a joint payment of €36,000[80]. The factual grounds and the evidence proposed are identical in the criminal and the civil proceedings.

[80] Stemming from the fact that over the reporting period these proceedings were in the public eye, and that it was particularly in these cases that many facts were observed that we deem significant for the analysis and the assessment, it seems that the monitoring of these cases was fully justified and beneficial for the project. In doing so, we need to note here that we have invested special efforts to provide for absolutely true and fair

Moreover, many principles and rules of the procedure are envisaged in the same manner both for the criminal and the civil proceedings, provided that in the criminal case on the account of this offence special provisions of summary proceedings from Title XXVI of the Criminal Procedure Code apply. However, the timeline provided below shows that the criminal proceedings took longer than the civil, and the narrative part below gives an overview of the course of the criminal proceedings.



Timeline of court proceedings instigated by Željezara against MANS

Complaint – The criminal proceeding was instigated on 21 April 2010 as per a private complaint of Željezara Nikšić and MNSS BV, Amsterdam, for allegations stated by Vanja Ćalović at a press conference called by MANS held on 31 March 2010. The plaintiffs enclosed with the complaint also footage of all news from all televisions covering the press conference, as well as newspaper articles.

First court session – The first session of the main hearing in this case was scheduled and held on 01 July 2010, where Vanja Ćalović presented her defence, and then responded to questions posed.

After that, the court read written evidence and postponed the main hearing for 16 September 2010, with the justification of not having the "technical capabilities" to establish evidence by inspection of the recorded material. Moreover, in preparation for the next hearing, the court decided to send a letter to the Administrative Office of the Supreme Court in order to provide the technical capabilities to play a CD. The CD was filed as evidence together with the complaint, two months before.

Believing that the judge acted unlawfully and was biased to the benefit of private plaintiffs, and that there is a manifest unequal treatment of the parties to the proceedings, on 29 July 2010 the defendant submitted a complaint on the work of this judge to the President of the Judicial Council and the Supreme Court. More than six months after it was filed, no response came as per this complaint.

Second court session - On 16 September 2010 the next session of the main hearing was held. At this court session, the attorneys of private plaintiffs proposed new evidence, without any justification which facts would be proven by such evidence and stating that, as per orders of the court, they proposed new evidence in the shortest time possible.

It was only at this session that the judge delivered to the defendant the submission of private plaintiffs' attorneys received two months before, i.e. on 05 July 2010 and postponed the hearing for 25 November, in order for the defendants to give their comments on the plaintiff's submissions. At this hearing, the judge failed to decide as per any evidence proposed by the defence as of 16 July.

presentation of all facts from these cases and to assess them primarily from the point of view of the legality and fairness of court actions.

Third court session – At the session of the main hearing held on 25 November 2010, the judge decided on evidence proposed by private plaintiffs and some of the evidence proposed by the defence, deciding to hear Danijel Brol as a witness, whose testimony was proposed by the defence in its pleadings of 16 July 2010, or four months before.

At the same session, the judge refused to take a stand on the evidence proposed by the defence in its pleadings as of 05 October 2010, providing only oral justification that evidence may be given subsequently.

The law stipulates that if the main hearing is not scheduled within a month from receiving a proposed indictment or a private complaint, the judge is obliged to inform the Court president of the reasons, who will take measures for the main hearing to be held as soon as possible[81]. In the given case, the main hearing was scheduled 2 months and 11 days after having received the complaint.

According to the Law, the main hearing commenced in summary proceedings will be completed, if possible, without interruption, when serviced subpoena the private plaintiff and the defendant will be particularly warned that the judge may immediately open the main hearing, and upon establishment of evidence presented before the court, pass the decision as per the private complaint[82]. While subpoenaed to the main hearing, the parties to this proceeding have not been warned as envisaged by the quoted CPC article, and the total of four sessions of the main hearing were held until the passing of the first-instance judgment, and the last one was held 9 months and 20 days after the complaint was lodged.

0n 02 December 2010 the defendant filed a Request to Expedite Proceedings or the Control Request to the Basic Court president indicating that the actions of private plaintiffs' attorney and the acting judge have caused inappropriate prolongation of the proceeding.

The request stated that the it took the judge five months to secure "technical capabilities" for viewing CDs, that he failed to deliver timely to the defendant own submissions and submissions of plaintiffs thus causing the postponement of more than two months, that he fails to decide in a timely fashion of proposed evidence and that he prolongs the main hearing through multiple sessions.

On 29 January 2010 the Basic Court President rejected the request as ungrounded[83] and stated that "the acting judge has continuously undertaken procedural actions never exceeding the three month deadline referred to in Article 317 paragraph 3 of CPC". He says that it was not possible for the main hearing to be dealt with in one session, because both the private plaintiffs and the defence submitted new proposed evidence in the course of the proceedings, as well as on the account of voluminous evidence".

In his Decision, the Court president failed to assess any of the allegations featured in the Control Request, failed to give any reason for non-acceptance of the allegations, no

[81] Article 447 paragraph 2 of CPC
[82] Article 454 paragraph 1 and Article 455 paragraph 4 of CPC
[83] Decision Su.VIII br.166-14/2010

reasons on the account of which he believes that the ECHR opinions referred to in the Control Request are not applicable in the given case.

As a matter of fact, Article 317 paragraph 3 of the CPC the court president referred to envisages that, if the postponement of the main hearing lasted more than three months or if the main hearing is held before other presiding judge, the main hearing must start over and all evidence needs to be established anew.

This provision envisages the manner of holding the main hearing, i.e. the obligation of the court to start anew the main hearing in envisaged situations. To that effect, the Control Request did not stipulate that the judge was violating the principle of direct evidence establishment, but the right to trial within reasonable time.

Fourth session – At the session of the main hearing held on 10 February 2011, the Court heard Danijel Brol as a witness, and then rejected all other proposed evidence. After the closing statement, at 19:00 h of the same day, six hours since the beginning of the session, the court pronounced the judgment by which Vanja Ćalović is acquitted, justifying it by the ECHR opinions and case law.

Thus, in practical terms, the control request did have an impact, although deemed unjustified by the court president.

C.6. HIGH COURTS CASE LAW

The only case ending in an enforceable judgment to this date by invoking European standards established through ECHR case law was the one as per the complaint of MNSS BV, Amsterdam and Željezara Nikšić against MP Nebojša Medojević and "Vijesti".

As far as we know, that is the only case where a High Court would invoke the European standards in modifying the ruling of the Basic Court, which plainly ignored such standards and interpreted them in a way which calls for a serious reconsideration of impartiality, but also professional capacities of the judge who passed the first instance judgment[84].

On the other hand, it is still not a rare occurrence for a High Court to confirm judgments contrary to European standards, thus leading the cases to an enforceable closure in that manner.

Regretfully, even some judgments with good rationale, showing that even Montenegrin judges can be familiar with and apply European standards, are quashed or modified by a High Court. This could discourage judges from applying European standards, given that one of the criteria for the work performance appraisals of judges is the number of quashed and modified judgments. It would mean that judges applying European standards could be appraised worse than those not even interested in such standards.

[84] More detials in the Case Study: Željezara v. Media and MPs

Moreover, some High Court judgments indicate that judges with these courts are either unacquainted with the Convention or unwilling to apply it or that they quash Basic Court judgments without even reading the judgment they quash.

Although some of the High Court rulings are based on valid provisions of laws, they nevertheless disregard and violate European standards in the area of the right to freedom of expression, which additionally justifies the need to review domestic laws with a view of their compliance with European standards.

Thus, for instance, the case presented above as per the complaint of Zoran Lazović, an NSA officer against journalist Sadiković for compensation for damages to honour and reputation, the Basic Court in Podgorica applied the European standards and rejected the claim, stating the main topic of Sadiković's article being organised crime and that the article transmits information published elsewhere. The High Court in Podgorica fully disregarded the importance of the topic Sadiković wrote about and the fact that he transmitted information on matters of public interest and modified the Basic Court judgment accepting the claim.

In the case described above per the complaint of Safet Kalić against journalist Muminović, the High Court in Podgorica quashed the first-instance acquitting judgment invoking the possibility given in law to convict of insult even when it is proven that the defendant had grounded reasons to believe the veracity of what he stated or transmitted. Such action is an example how European standards are being derogated by the application of legal provisions contrary to European standards.

The next case study refers to a case in which the High Court abolished the first instance judgment in which the Basic Court invoked the binding ECHR case law and the Convention provisions.

Case study: Provisions of the Convention do not constitute substantive law norms

In its judgment[85] the Basic Court Podgorica referred in several places to Article 10 of the Convention:

> "...As early as in 1986 the ECHR *'supported very explicitly the freedom to criticise the government: it is an obligation of the press to disseminate information and ideas on political matters and of matters in other areas of public interest. It is not only that the press has the task of disseminating such information and ideas, but citizens have the right to receive them',* this obviously does not refer only to the government, but also any entity in a democratic society, including the first plaintiff, and by extension Željezara AD, and does not include only the press, but all the media, including radio and TV journalists, and not only journalists, but all those involved in provision of public information.
>
> In addition, safeguarding the freedom of dissemination of information and ideas, the ECHR has, from the very start, made a clear distinction between information (facts) and opinions (value judgments)... ...the value judgments, in particular

[85] P.br.1807/10, the judgment rejecting the claim of Željezara Nikšić and MNSS BV, Amsterdam against MANS and Vanja Ćalović

those expressed in politics and matters of public interest, enjoy special protection as a precondition for pluralism of opinion... And the allegations of the first defendant which, as supposedly damaging, were quoted in the complaint... are, in the opinion of this Court, value judgments containing criticism, suspicion..."

This judgment pointed out to the already mentioned view of the High Court that business reputation as such is not covered by Article 10 paragraph of the Convention.

Plaintiffs appealed against the judgment and on 18 December 2010 the High Court in Podgorica quashed it[86] and returned the case for retrial stating that:

"...the rationale of the quashed judgment is too voluminous and burdened with unnecessary quotes, where certain quotes have been repeated for several times. This is confusing and it is unclear which facts and on what grounds the first-instance court took as decisive and based its ruling on, i.e. which were not regarded. The quashed judgment does not contain a legal rationale, i.e. the same is absolutely incomprehensible since it does not contain a specific substantive law provision that was invoked by the first-instance court in passing the judgment now being quashed, nor any clear reasons which led the first-instance court in deciding in the manner given..."

This points to a conclusion that High Court judges do not regard the Convention provisions as substantive law and that they fully disregard the ECHR case law or that High Court judges are able of quashing the first-instance judgments without reading them first.

C.7. Opinion of the Supreme Court of Montenegro

On 29 March 2011 the Supreme Court Bench has taken the opinion:

"Should it establish the existence of grounds for liability of journalists and the media, court decides on the amount of just compensation on the account of violation of the rights of the person (reputation, honour, etc.) taking into account all circumstances of the given case, and in particular: the importance of violated asset and the consequences stemming from it, duration of mental suffering, the aim served by the compensation for non-pecuniary damages, as well as that the awarded amount should, ***as a rule,*** *be in line with the ECHR case law, and that the awarded compensation should not be in an amount that would discourage journalists and the media in performing their role in safeguarding the democratic values of the society."*

The ECHR case law is binding for courts in all proceedings **without exception**, and the Supreme Court has a constitutional requirement[87] of ensuring the unified application of laws. Hence, the opinion of the Supreme Court that European standards should be applied "as a rule" leaves the room for "exceptions", i.e. actions taken contrary to ECHR case law.

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[86] Decision Gž.br.5769/10

[87] Article 124 paragraph 2 of the Constitution of Montenegro

Moreover, the Supreme Court dealt only with the amount of compensation, and not with the adoption of ECHR case law when it comes to restrictions imposed on the freedom of expression. Thus, for instance, the Supreme Court fails to take a stand that the boundaries of acceptable criticism are set more widely for public figures, especially public officials, as was done by the Supreme Court of Serbia more than two years ago[88]. Particularly so given that the practice shows so far that the amounts awarded as compensation for non-pecuniary damage on the account of violated honour or reputation have, as a rule, been disproportionate and contrary to European standards in cases brought by complaints of public officials.

In addition to the above, the Supreme Court's opinion refers only to cases against journalists and media, and not other persons taking an active part in discussion of matters of public interest, such as NGO activists who are increasingly more subjected to court proceedings. The Supreme Court's opinion leads to the conclusion that in such cases courts are not obliged to determine the amount of compensation which is in line with the European standards, while according to the ECHR case law, civil society activists must enjoy the same treatment as journalists.

In explaining its opinion, the Supreme Court says, inter alia:

> *"It should be noted that imposing prior limitation to compensation for non-pecuniary damages by the Supreme Court and the court in general, would be contrary to the principle of proportionality as a fundamental principle of European law, which envisages that against specific persons, under specific circumstance and facts measures are to be applied which are proportionate to the aims envisaged by regulations."*

It is true that limiting the compensation for non-pecuniary damages is contrary to European standards, but the Law for Protection of Right to Trial Within Reasonable Time[89] limits the amount of compensation for non-pecuniary damages that the state awards for infringement of this right to €300 to 5,000[90], while it is the very Supreme Court which is competent to decide on compensation for damages pursuant to this Law. In the procedure of adopting this Law and during its implementation, the Supreme Court has never indicated that limiting the compensation for non-pecuniary damages would be contrary to European standards.

Hence, it seems that the Supreme Court allows for the breach of standards in cases when it is the state that should compensate citizens for damages, while in cases when the compensation is not at the burden of the state, the Supreme Court "worries" about the compliance with standards.

Therefore, the opinion of the Supreme Court will not ensure the full application of the ECHR case law.

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[88] Opinion of the Supreme Court of Serbia of 25.11.2008, taken after the first ten ECHR judgments against Serbia

[89] Official Gazette of Montenegro 11/2007 of 13.12.2007

[90] Article 34 paragraphs 1 and 2.