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FREE MEDIA THROUGH MONITORING

Research on cases of personality rights
violation in media 2016-2018



Marijana Camović
Bojana Laković-Konatar

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Address: Njegoševa 7/2
e-mail: sindikatmedija@usscg.me
www.sindikatmedija.me

Authors: Marijana Camović, Bojana Laković-Konatar

Translator: Jelena Mitrović

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INTRODUCTION – WHY THE ISSUE OF VIOLATION OF HONOUR AND REPUTATION IS IMPORTANT

“A large number of lawsuits for violation of honour and reputation indicate weak mechanisms of self-regulation in Montenegro,” is a sentence that can often be read in domestic and international reports and that is never supported by data confirming it.

This was precisely the motive for the Trade Union of Media of Montenegro (hereinafter referred to as: the TUMM) to begin a research which findings are in front of you and which will give a concrete answer to the question whether the media and journalists in our country are really pressured by this type of lawsuit and if they are, how well-founded is that pressure. We believed that by answering that question we might also be able to answer the following - are the Montenegrin media professional enough, are journalists working in fear of filing a lawsuit against them due to violations of the personality rights and what are the mechanisms of self-regulation they rely on.

Although defamation has been decriminalized for eight years in Montenegro, there are no official statistics on the number of cases in which journalists and the media have been sued for infringement of honour and reputation in private lawsuits. Partial data previously obtained by the TUMM¹ show that, from 2011 to 2017, the courts worked on 109 ca-

ses of damages compensation for breach of honour and reputation. In these cases, the media were requested to compensate more than one million euros, while in 24 cases adopted the media were ordered to pay 45,300 euros. Therefore, in this research, we have focused on a period about which nothing is known, or the data is vague and incomplete, including 2016, 2017 and 2018 respectively.

The TUMM, in cooperation with the courts in Podgorica and Bijelo Polje, collected data on how many cases of damage compensation due to violation of personality rights (honour and reputation) were brought to these courts from the beginning of 2016 to the end of 2018, how many final judgments were adopted and how many cases are still pending. Almost all of these cases were the subject of our analysis, which consisted of monitoring court proceedings for all active cases, as well as analysing final judgments to gain insight into case law when adopting the judgments.

¹ Camovic M, Lakovic Konatar B, *Indicators on the Level of Media Freedom and Journalists' Safety 2018, Trade Union of Media of Montenegro, Podgorica*, URL: https://safejournalists.net/wp-content/uploads/2018/11/print_MNE_rezime_2018.pdf

The result of the research is a database of cases from 2016 to the end of 2018, with the following information: who sues most, what is the cause, which media are most sued, what is the outcome of court proceedings (or how many lawsuits are accepted by the court and how many are dismissed), what is the amount of damages awarded, duration of proceedings...

The report contains the findings of the monitoring of the basic courts in Podgorica and Bijelo Polje, as it was assessed that they, as the largest, also have in progress the largest number of cases on this topic. The TUMM owes its gratitude to the presidents of these courts, Zeljka Jovovic and Radule Piper, for giving us full insight into the cases we wanted to analyze and thus allowing the implementation of this project.

The question we have sought to answer is how many plaintiffs, before filing a lawsuit, try to settle the dispute through a self-regulatory body, thus obtaining satisfaction and avoiding the court proceedings. An interesting fact is that some judges turned out to disregard the fact that the media within the self-regulation process admitted their mistake and tried to correct the damage, but use that as an additional argument in the reasoning of the judgement of conviction. This information is of

great importance and shows that, in addition to necessity of educating media employees in order to respect the Journalists' Code of Ethics more, it should also explain to judges what mediation means and how important (and difficult) it is to settle the similar disputes out of court and that this should be an important circumstance when judgment is rendered.

The research on cases of violation of personality rights in media 2016-2018 is just the first step in exploring this, in our opinion, a very topical and important problem, which affects not only the media but the entire society.

RESPECT FOR THE PERSONALITY RIGHTS IN MONTENEGRO

An excerpt from one of this year's judgments of the High Court in Podgorica explains the possibilities (rights and obligations of injured parties as well as media) that Montenegrin legislation offers when it comes to violation of personality rights. This refers to the judgment "GŽ.br 1718/19" of the High Court in Podgorica in the legal matter of Plaintiff E.K. against the Defendant "Y.M. doo" from Podgorica (in which the Plaintiff was awarded €1,000 in respect of violation of the right to honor and reputation, instead of the requested €10,000). It states that "the right to full freedom of personality is standardized (Article 2016, paragraph 1); that the rights of the personality, among others, include the right to honor and reputation (Article 207); a person whose personality right has been breached has the right to protection in respect to any person who participated in it and the violation of a personality rights is unlawful if the restriction of those rights is not in accordance with the law (Article 209, paragraphs 1 and 2); in the case of a violation of a personality rights, the court shall, according to the gravity of the violation and the circumstances of the case, award financial compensation taking into account all the circumstances of the case (Article 10 a); in order to protect the personality rights, the publication of a court decision may be required (Article 151 paragraph 2)). The Law on Media ("Official Gazette of the Republic of Montenegro", No.51/2002 and 62/2002) stipulates that the media in Montenegro are free and that media censorship is prohibited, as well as that Montenegro shall provide and gua-

rantee freedom of information at the level of standards contained in the international documents on human rights and freedoms (UN, OSCE, Council of Europe, EU) and that this Law should be interpreted and applied in accordance with the principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms, using the practice of judicial precedent of the European Court of Human Rights (Article 1), but also that the founder of the media is responsible for the published media contents. Thus, if the media publishes program content that violates the protected interest of the persons to whom the information relates or which offends the honor or integrity of the individuals, states or transfers false allegations of one's life, the person concerned is entitled to file a lawsuit for damage compensation against the author or the founder of the media before the competent court (Article 20).

Judgments at both levels often refer to Articles 20 and 28 of the Media Law, as well as to the first three Article and Article 7 of the Journalists' Code of Ethics of Montenegro. Article 20² of the Media Law prescribes the responsibility of the founder of the media for the published program contents, unless otherwise provided by that law. It is also prescribed that if the medium publishes program content that violates the protected interest of a person to whom the information relates, or that offends the honour or integrity of a person, states false allegations of their lives, knowledge and abilities, the person con-

² Media Law of Montenegro, Article 20, URL: <http://media.cgo-cce.org/2013/06/14-Zakon-o-medijima.pdf>

cerned is entitled to file a lawsuit for damage compensation against the author or the founder of the medium before the competent court. Corrections or responses are governed by Article 28³, which stipulates that they must be published without modification on the same page of the printing media, or in the same TV show of electronic media, in which the program content to which the correction or response relates is published.

In its Article 1, the Code of Ethics obliges journalists to respect the truth and persistently search for it, "always bearing in mind the right of the public to know and the human need for justice and humanity". Article 2⁴ obliges journalists to supplement the incomplete and correct the incorrect information. This especially refers to information that may be harmful to someone. The correction should be highlighted appropriately. The next article, Article 3⁵, provides for the obligation to complete the incomplete and correct the incorrect information. Article 7⁶ reads as follows: "A journalist is obliged to treat the private lives of people with utmost care. The right to privacy is inversely proportional to the importance of the public function exercised by the individual, but in these cases, it is also necessary to respect human dignity."

The Montenegrin judges' response to the judgments of the European Court of Human Rights usually boils down to saying that the amount awarded, in the case of judgments of conviction, will not discourage the defendants in their further business. As a reminder, that sentence originates from the *Koprivica v. Montenegro* case, in which the Court in Strasbourg found that the right under Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, stating that "the damage compensation and costs that, upon the court order, applicant had to pay to the plaintiff were significant even when compared with the highest income in the sued state in general"⁷. This view also imposed an obligation on the Montenegrin courts to "while awarding damage compensations for breach of honor and reputation take into account that the amount of compensation is not disproportionate to the legitimate aim of limiting freedom of expression, i.e., the amount of compensation is not discouraging and produces a deterrent effect on journalists and the media"⁸.

3 *Media Law of Montenegro, Article 28, URL: <http://media.cgo-cce.org/2013/06/14-Zakon-o-medijima.pdf>*

4 *Journalists Code of Ethics of Montenegro, URL: https://www.mminstitute.org/files/Kodeks_novina-ra.pdf*

5 *Ibid.*

6 *Ibid.*

7 *Koprivica v. Montenegro, URL: <http://www.hracion.org/wp-content/uploads/presuda-Koprivica1.pdf>*

8 *The Supreme Court of Montenegro, Report on the Implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the Practice of the Supreme Court of Montenegro, January 2015 - July 2017, p.43: <http://sudovi.me/podaci/vrhs/dokumenta/8601.pdf>*

DEFAMATION IS DECRIMINALIZED. WHAT NEXT?

Although, following the recommendations of the Council of Europe, defamation and insults in Montenegro were decriminalized in mid-2011, the possibility of a lawsuit on this basis remains a serious problem. Representatives of the media community do not have a unified view on whether decriminalization was a good idea, and opinions that it needs to be reinstated into the Criminal Code can often be heard.

An analysis of the media sector in Montenegro carried out by the Council of Europe experts showed that, although decriminalization was a positive development, "there are indications that, in some situations, independent judicial decision-making in defamation cases does not exist. Furthermore, there are claims that it is influenced by political and other ruling structures"⁹

Over the past years, the European Commission reports on Montenegro pointed out that our country achieved some level of readiness in the area of freedom of expression, but that no progress has been made yet. In addition to this assessment, the European Commission in the past years also highlighted the problem of a large number of defamation lawsuits.

"The number of defamation cases still remains relatively high, indicating weak mechanisms of self-regulation. There is still no uniform approach to penalties, indicating that case law of the ECHR is not yet sufficiently known."¹⁰

This assessment was not found in the last Report for 2019, but the European Commission continues to emphasize the need for effective self-regulatory mechanisms to be put in place.

The Supreme Court document "Report on the Implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the Practice of the Supreme Court of Montenegro"¹¹ provided statistics for the period from the introduction of decriminalization of defamation to mid-2017. According to this report, from 2011 to June 2017, the Montenegrin courts had a total of 109 damage compensation cases pertaining to the lawsuits against journalists/media, out of which 80 cases were resolved.

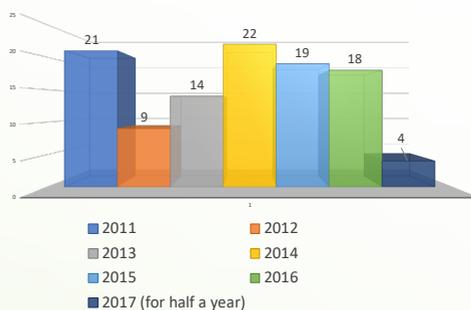


Chart 1: Number of cases per year – The Supreme Court's data

The statement of claim was upheld in whole or in part in 24 cases and a total of €45,300 were awarded. Statistics show that 19 statements of claim

9 Kersevan Smokvina and Others, Montenegro Media Sector Inquiry with Recommendations for Harmonisation with the Council of Europe and European Union standards, The Council of Europe, p.11, URL: <https://rm.coe.int/analiza-medijiskog-sektora-u-cr-noj-gori-sa/16807b4d7d>

10 The European Commission, Montenegro 2018 Report, p. 27, URL: https://eeas.europa.eu/sites/eeas/files/country_report_montenegro_2018.pdf

11 The Supreme Court of Montenegro, Report on the Implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the Practice of the Supreme Court of Montenegro, January 2015 - July 2017, p.57: <http://sudovi.me/podaci/vrhs/dokumenta/8601.pdf>

were dismissed, 32 claims were withdrawn, while 3 were rejected by court order. One case ended with a court settlement and one with a decision on absolute incompetence of the court. The Report of the Supreme Court showed that 29 proceedings were pending, while in 79 cases the decisions were final.

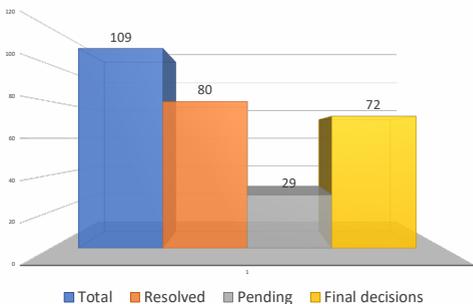


Chart 2: Case status – The Supreme Court’s data

With regard to the amount awarded, the statement of claim was adopted in 80 cases.

“In cases where the statement of claim was partially upheld or it was dismissed, the claims requested a total amount of €1,245,061 to be awarded. However, a much smaller sum was awarded, or 3.64% of the amount claimed. (...) If individual amounts per judgments are observed, they range from €500 to €2,000, while in one case a sum of €5,000 was awarded as well as €7,000 in one of the cases.”¹²

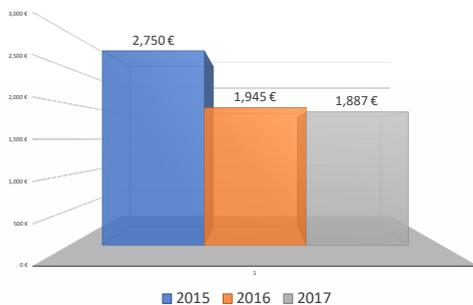


Chart 3: Average amount of compensation awarded – The Supreme Court’s data

The report showed that there was a downward trend in the number of lawsuits, but also a decrease in the amount of compensations awarded. In addition, data show that out of 109 cases, 13 of them were initiated against the media and against journalists, while in other cases, the claims were filed only against the media. Only in one case a journalist was sued, but that claim was withdrawn.

According to the Council of Europe experts, practice has shown that “it is relatively easy to sue for defamation, and relatively difficult to defend against such allegations.”

“Defamation cases can prevent journalists from speaking freely on important issues. This is an additional evidence that the defamation has a ‘discouraging effect’ on freedom of expression because it is easy to sue for defamation. The large amounts of compensation for plaintiffs, as well as the fact that courts have not yet implemented a practice in which public figures and officials must have a higher threshold of tolerance for criticism, can lead to self-censorship among journalists, because the media they work for lacks the resources to fight using legal means.”¹³

¹³ Kersevan Smokvina and Others, Montenegro Media Sector Inquiry with Recommendations for Harmonisation with the Council of Europe and European Union standards, The Council of Europe, p.91, URL: <https://rm.coe.int/analiza-medij-skog-sektora-u-cr-noj-gori-sa/16807b4d7d>

¹² Ibid, p.40

The extent to which journalists are affected by the possibility of filing a lawsuit against them for defamation is also shown by the researches conducted by the Trade Union of Media of Montenegro. Specifically, the TUMM worked for three years in a row on the "Indicators on the Level of Media Freedom and Journalists' Safety" research, which showed that the possibility to be sued due to defamation has intimidating effect on journalists. The research¹⁴ has shown that the work of almost every other journalist is influenced by the possibility of a lawsuit for violation of honour and reputation.

In a media community that does not have a unified system of self-regulation, the media and journalists interpret the Journalists' Code of Ethics differently and accordingly publish the media content that is the subject of the lawsuits. All of this is leading to a decline in professional standards and increasing pressure on those who practice this profession. On the one hand, pressures come from editors, which leads to censorship and self-censorship, but also to pressures to cross the line in criticizing some of the personalities who then file a lawsuit. However, the pressure also comes from plaintiffs who often do not understand what freedom of the media is or that they are obliged to suffer more criticism because of their position than ordinary citizens.

Experience has shown that the problem is also the fact that a small number of citizens are aware of their rights and opportunities that they can use to compensate the damages on this basis, before the case is brought to court. First of all, we are referring to the mechanisms guaranteed by the Journalists Code of Ethics of Montenegro¹⁵, as well as the media laws, concerning corrections and responses. The media are obliged to allow correction and response to be published, and following these principles could lead to a reduction in the number of court proceedings and the strengthening of self-regulatory mechanisms.

14 Ibid.

15 Journalists Code of Ethics of Montenegro, URL: https://www.mminstitute.org/files/Kodeks_novina-ra.pdf

Overview of the situation in Montenegro

The Trade Union of Media of Montenegro was informed by the Supreme Court that that court did not keep a special record of cases relating to the breach of honour and reputation. However, its representatives participate in the Working Group for Negotiation Chapter 23 on behalf of the judiciary system and, at the end of the reporting year, they obtain data on court proceedings initiated on the basis of the lawsuits that are filed against the journalists/media for damage compensation for violation of honour and reputation.

In a letter from the Supreme Court President Vesna Medenica sent to the TUMM in July it was stated the following: "In this connection, we would like to point out that courts had 38 cases of this kind in 2018: 25 cases were transferred from previous years while 13 cases were received in 2018. Out of that number, 16 cases were solved. Out of total 16 settled cases, in 10 cases the claim was partially or fully upheld (€11,700 were awarded and in one case the judgment was published), in 4 cases the claim was rejected, while in 2 cases the decision to withdraw the claim was made. The decision was final in seven cases, while 22 cases are pending".

Analysis of the period 2016-2018

The TUMM analysis, as well as data obtained from basic courts from Podgorica and Bijelo Polje, show that from the beginning of 2016 to the end of 2018, 25 lawsuits were filed against the media and/or journalists for compensation for non-pecuniary damage due to violation of honour and reputation. Out of this number, the most cases were initiated

before the Basic Court in Podgorica, or as many as 24 such cases. Six cases were delegated to the Basic Court in Niksic, one to the Basic Court in Cetinje and one to the Basic Court in Danilovgrad. One case was initiated before the Basic Court in Bijelo Polje.

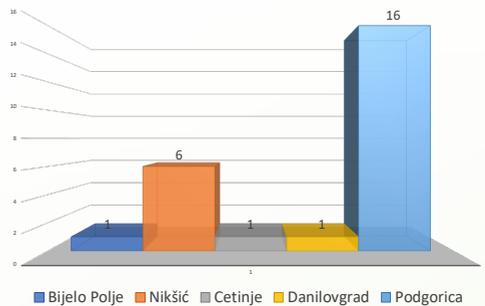


Chart 4: Number of lawsuits filed from 2016 to 2018

Out of the total number of initiated proceedings, 14 or 56% are final, while the remaining cases are pending. For some of the pending cases the hearings are still being held, while the first instance proceedings have been closed in some of the cases and they are in the High Court which should give a final say when it comes to these cases.

Our research has shown that case law is uneven at the level of basic courts, because, while the presidents of some courts are willing to provide information on both first instance and pending cases, some presidents insist on keeping the data secret until the judgment is final. Such practices make access and analysis particularly difficult, and it is surprising as well since all of the information on cases obtained during analysis and monitoring are anonymized. The TUMM was able to collect data

for 21 cases, while information on four pending cases is insufficiently known.

The analysis has shown that media were the most frequently sued due to violation of personality rights - honour and reputation - and that in some cases both editors and journalists appear as second defendants. Thus, in more than half of the cases (56%), only the media were sued, while in the remaining eight cases, for which we received information, both the media (as the first defendant) and the editor i.e. the journalist (as the second defendant) were sued. As for the type of media, it is interesting that in all cases private media were sued, that is, Public Broadcasting Service - Radio and Television of Montenegro and local public broadcasters were not the subject of any lawsuit. On the other hand, the print media (18 cases or 72%) are the most frequently sued. In two cases the portal was sued, and in three cases the electronic media - that is, television.

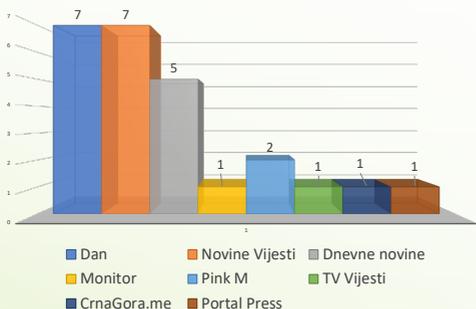


Chart 5: Number of lawsuits filed per media

On the other hand, plaintiffs are in most cases citizens, thus trying to exercise their rights. In 12 cases, a citizen filed a lawsuit for violation of honour and reputation. Public officials filed five lawsuits for compensation of non-pecuniary damage for personality rights violation. In one case, a lawsuit against the media was filed by a former director of another medium; in one case it was filed by a na-

tional company as a legal person; and in two cases businessmen looked for legal redress in this regard. In four cases, lawsuits were filed by public figures or their family members.

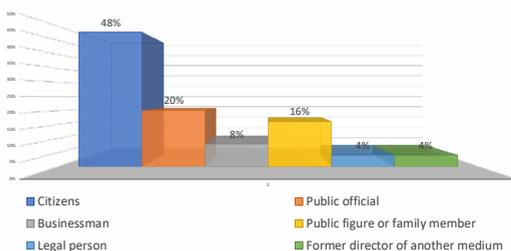


Chart 6: Who sues the media and journalists mostly

In all the cases initiated for which the TUMM could have obtained the information, the media and journalists were sued for compensation for non-pecuniary damage amounting to €274,900 due to a violation of a personality rights. The maximum amount claimed was €100,000 and the minimum was only the publication of the judgment. In five cases, the publication of the judgement was claimed in addition to the monetary amount, while in only one case it was requested from the media to publish the judgement.

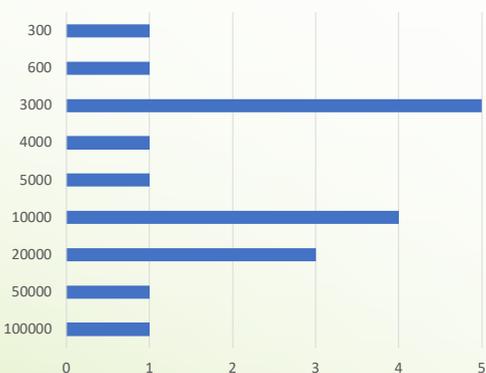


Chart 7: Amounts of statements of claim

As a final judgment was rendered in 14 cases, it

is only possible for them to obtain definitive outcomes. Thus, in six cases the claim was dismissed, in five of them the claim was partially upheld, while in one case the claim was upheld (although no compensation was claimed in that case). In one case an out-of-court settlement occurred, while one case was settled by a decision to withdraw the lawsuit.

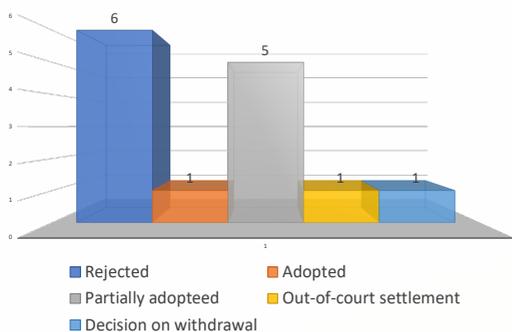


Chart 8: Case status

An analysis of the court judgements showed that in all finalized cases, journalists and the media were requested to pay €8,200 in compensation for non-pecuniary damage due to violation of and reputation. This amount makes just under 3% of the total amount claimed.

When it comes to the reasons for the lawsuits, the plaintiffs generally state misinterpretation of the facts, association with the acts they did not commit, disrespect for the presumption of innocence... What is common to most lawsuits is that the plaintiffs stated that the texts were more acceptable than the headline, that is, the headline generally violated their right to honour and reputation.

The case law has shown that plaintiffs and defendants, as well as the courts themselves, are more likely to refer to the provisions of the Media Law concerning this issue, the Constitution and the

case law of the ECHR. The Journalists' Code of Ethics has been mentioned in several cases. The court's practice was not unified even when it came to the Code interpreting because in some cases the fact that plaintiff did not exercise his right to deny was interpreted as a mitigating circumstance for the defendant. However, in other case, the fact that the media, after mediation, corrected the mistake in the way it was requested from them (withdrawal of text from the website) was assessed as an indisputable plea of guilty.

Analysis

● What we found by analyzing the judgments

The High Court did not completely amend or remand any of the analyzed cases to the first instance court for renewed procedure and decision making. The judgments have been amended only in few cases upon appeal, in the part relating to the amount that first instance court defined as optimal for damage compensation for breach of honour and reputation. The fine was reduced in each of these cases.

What media who had the role of defendants in the previous period could be find fault with is the fact that they did not strictly respect the Media Law, what was indicated in the reasoning of the judgements, and thus put themselves at a disadvantage. Thus, for instance, in the case of E.K. (the plaintiff is a cousin of a high-ranking official, and her mother is considered a public figure) against dailies "D" the court pointed to failure to comply with Article 28 of the Media Law which stipulates that the denial must be published on the same page where the disputed article was previously published and on the front page, which has not been done. Referring to the same text, it is stated that, within the head-

line, “untrue factual statement” followed by a text containing accurate information was published.

It is precisely in this judgment that the judges put the most effort into consulting the case law of the Court in Strasbourg and they justify their decision by referring to the numerous cases before the Court. The judgment of conviction was rendered to the media, which had to pay compensation amounting to €1,000 because, among other things, it did not act in good faith.

It was also noticed that, in one case, a medium was assessed to have misinterpreted the data, however the misinterpretation occurred in the text, not in the headline. This was also the reason why the same medium, the daily newspaper “D”, had to publish a judgment in favor of a state-owned company.

On the other hand, the judgment by which the publisher of the daily newspaper “V” was sued and two judgments in which the defendants were daily newspapers were founded within the judgments that ended in favor of the media. What was interesting in one case where a lawsuit was filed because of the text published in daily newspaper was that the text was not signed, and that the court accepted the argument of the Editor of Section where it was published as well as the Editor-in-Chief who testified that they did not know who wrote the text because several authors worked on it, and therefore responsibility could not have been established.

Also, a number of disputes ended up by dismissing the claims as unfounded/incomplete because the plaintiffs did not provide all the necessary information. For example, a lawsuit filed by a lawyer was dismissed because he did not provide his own address (in the case when he sued the media),

while in another case, the councilor did not provide supporting evidence - texts that allegedly caused him mental pain and non-pecuniary damage even though he was warned about it by the court.

In addition to the testimony of the injured parties, the authors of the texts causing the lawsuits and the editors, disputable texts are inevitable evidence. In one case (which has not yet been finalized), a psychiatric expert evaluation was carried out which determined the extent and duration of the plaintiff’s mental integrity violations.

The positive thing for journalists was that in none of the cases they were the first defendants and rarely second or third defendants.

Period from the filing a lawsuit to its finalizing lasts for two to three years, but as a number of cases are still pending, this average will certainly increase.

While conducting this research, the intention of the TUMM was not to enter into the justification and meaningfulness of the judgments adopted before the basic and higher courts which work have been analyzed. The intention was to point out to the frequency of filing the lawsuits and current trends hoping that all parties would notice their own failures and work to ensure that mistakes are not repeated.

● Analysis of procedures

Within the project timeframe, the TUMM researchers monitored all the hearings that took place during the reporting period (July-November 2019), more precisely, they attended the trials in four ca-

ses, which are also all active cases. In all these cases the print media were sued.

The case in which businessman M.K. from Budva sued the publisher of the medium "M." practically has not yet started because, although the lawsuit was filed in early December 2018, the preliminary hearing has not yet taken place. The case was delegated from Basic Court in Podgorica to the Basic Court in Niksic and the parties first had the opportunity to appear before a judge in early October 2019 (10 months after the lawsuit was filed), but this hearing, as well as the next one, was postponed. In this case, the first defendant is the publisher and the second defendant is the author of a controversial series of texts, published from February 2016 to mid-July 2018, pertaining to unlawful acts in the Municipality of Budva and related persons. The statement of claim has not yet been specified, but the lawsuit requested for the judgment to be published after it becomes final.

The case in which member of the opposition caucus M.K. sued the company M.N. which is the founder of the daily newspaper "D.N." has been pending for almost three years (as of January 2017). The plaintiff said in his lawsuit that "fair compensation for non-pecuniary damage for mental illness suffered shall amount to €20,000".

The case, which has been actively pending for three years, relates to dispute between businessman from Budva - B.C. and publisher of the daily "D" - "Y.M. doo" in which case the plaintiff sought compensation amounting to €100,000. The TUMM researchers attended this trial several times and

observed that both parties (especially the defendant) prolong the proceedings by proposing evidence and insisting on obtaining information formally, to which the judge pointed out several times. The lawsuit was filed because of a text published in August 2016 and related to the alleged illegal business of the plaintiff for whom it was stated to have been related to malpractices concerning, inter alia, real estate in Budva.

One of the cases, which was not completed at first instance, was closed to the public for the protection of the interests of the minor.

By the analysis of the cases still pending, it has been noticed that in some cases judges often change, which leads to a delay in the proceedings and some last longer than three years. In some cases, three judges were changed until the first instance judgment was passed.

It has already been said that different practices have been observed in the transparency of work of the basic courts and their willingness to cooperate. Thus, for example, the courts in Podgorica, Bijelo Polje and Niksic were fully open to cooperation and provided complete documentation explaining how those documents/case files could be used. On the other hand, the courts in Cetinje and Danilovgrad (to which the court in Podgorica delegated one of the cases that were on the list of those to be processed) were more restrained.

CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

The protection and respect for freedom of expression was greatly enhanced in the middle of the last century by the adoption of the Convention for the Protection of Human Rights and Fundamental Freedoms (the so-called European Convention on Human Rights - ECHR)¹⁶. Namely, after being adopted in Rome in November 1950 in a revolutionary way so far, it protected human rights and freedoms. Several years earlier, the Universal Declaration of Human Rights¹⁷ was adopted, and these two documents defined the path of post-war Europe and the world. However, the European Convention introduced two revolutionary innovations: firstly, it was the first legally binding treaty on human rights and, secondly, it introduced a mechanism by which the provisions of the Convention were enforced - the European Court of Human Rights¹⁸.

Although this document regulates a wide range of human rights, the most important right for journalists and members of the media community is right to freedom of expression contained in Article 10 of the ECHR. Although the right to freedom of expression is not an absolute right, its primary purpose is to "define freedom of expression very broadly in a way that encompasses almost all forms of expression, but also to define very broadly what constitutes interference with the exercise of this right, thereby providing an extremely wide network of prima facie protection."¹⁹ This article first of all stipulates that everyone has the right to freedom of expression, and that this right includes freedom to hold opinions and

freedom to receive and impart information and ideas without interference by public authority and regardless of frontiers²⁰. In addition, this article specifies that these freedoms do not mean that states should be prevented from requiring the licensing of broadcasting, television or cinema enterprises. Paragraph 11 of this Article also provides for "formalities, conditions, restrictions or penalties" which may restrict the exercise of freedom of expression.

"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."²¹

According to Peter Noorlander, Director of the Media Defense Law Initiative, there are certain major standards of the Council of Europe on freedom of speech and defamation. As he said, they can be summarized in four standards:

1. provide ample space for public debate on issues of public interest;
2. make a crucial distinction between statements on facts and opinions;
3. provide journalists with the right to defend "responsible journalism",
4. sanctions must always be proportionate."²²

16 Convention for the Protection of Human Rights and Fundamental Freedoms, URL: http://www.azjp.me/docs/zajednicka/medjunarodni_dok/evropska_konvencija_o_ljudskim_pravima.pdf

17 Universal Declaration of Human Rights, URL: https://www.ombudsman.co.me/docs/deklaracija_o_ljudskim_pravima.pdf

18 Mendel, Toby, Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights, p.5, URL: http://sudovi.me/files/L3Zya-HMzG9jLzYOMzAucGRm=Ibid_p_7

20 European Convention on Human Rights, Article 10, URL: http://www.azjp.me/docs/zajednicka/medjunarodni_dok/evropska_konvencija_o_ljudskim_pravima.pdf

21 Ibid.

22 Peter Noorlander, Reform of liability for breach of honour and reputation, Human Rights Action, p.27, URL: http://www.hraction.org/wp-content/uploads/2017/01/hra-reforma_odgovornosti_klevetu_i_uvredu.pdf

When it comes to the practice of the European Court of Human Rights, it began to practice this freedom ten years after it was established. Namely, according to the available data²³, the first case concerning the right to freedom of expression was analysed by the Court in 1962, which was the case of *De Becker v. Belgium*, while in its work so far it has ruled in over 1,000 cases under Article 10. In its work, the Court has repeatedly emphasized the importance and role that the media play in the practical application of Article 10.

“The press plays an important role in a democratic society. Although it must not go beyond certain boundaries, especially when it comes to the reputation and rights of others, it is its duty to communicate information and ideas on all matters of public interest, in accordance with its obligations and responsibilities. Not only is it tasked to convey such information and ideas, but the public has the right to receive it. Otherwise, the press would not be able to fulfil its essential role as a ‘keeper of the public interest’.”²⁴

The subject of this research is the violation of personality rights - honour and reputation, and the European Court of Human Rights has wealth of experience in this field. In fact, some estimates are that, from almost all countries, the majority of claims received by the Court relate to defamation or protection of the reputation of other persons. In deciding, the Court relies mainly on a three-part test that requires three questions to be answered:

- “1. whether there was interference with freedom of expression (which exists if compensation was awarded);
2. whether the interference is prescribed by law and what legitimate aim is protected and
3. whether interference was necessary in a democratic society and whether it was in propor-

tion to its legitimate aim.”²⁵

The case law of the Court and the interpretation of the Convention have paved the way to greater freedom of transmission of information concerning public interest issues, with criticisms allowed at the expense of public officials, politicians, government and “ordinary” members of society but within certain limits. Therefore, in the Court’s view, when establishing the existence of defamation, it is necessary to establish some rules and prove that defamation actually exists.

As the practice in *Ligens v. Austria* (1986)²⁶ case has shown, the facts and opinion are not the same. Specifically, in this case, the journalist (the applicant) was convicted of defamation for making rather harsh criticisms at the expense of Austrian politicians. The court, however, ordered otherwise, first of all, because politicians must show more readiness to criticize, but also because a distinction should be made between facts and opinions.

“The existence of facts can be proven, while the veracity of value judgments cannot be proven”²⁷

Current case law has shown that a large number of petitions against states have been upheld because the courts have interpreted everything as “information”, thus requiring the proving of even value judgements. The Court also interprets very broadly what value judgements are, so, for example, in the case of *Feldek v. Slovakia* (2001)²⁸, the phrase “fascist past” can also be broadly understood as having participa-

23 Mendel, Toby, *Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights*, p.8, URL: <http://sudovi.me/files/L3ZyaHMvZG9JLzY0mZAcGRm=>

24 *Ibid.*, p.11.

25 *The Supreme Court of Montenegro, Report on the Implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the Practice of the Supreme Court of Montenegro, January 2015 - July 2017*, p.48: <http://sudovi.me/podaci/vrns/dokumenta/8601.pdf>

26 *Ligens v. Austria*, URL: <http://www.bgcentar.org.rs/bgcentar/wp-content/uploads/2013/12/Ligens-protiv-Austrije.pdf>

27 *Freedom of expression - Guide to the implementation of Article 10 of the European Convention on Human Rights, Human Rights Action*, p.5, URL: [http://www.hraction.org/wp-content/uploads/Vodil%C4%8D-kroz-primjenu-%C4%8D\(ana-10-EKLJR\).pdf](http://www.hraction.org/wp-content/uploads/Vodil%C4%8D-kroz-primjenu-%C4%8D(ana-10-EKLJR).pdf)

28 *Feldek v. Slovakia*, URL: <http://europsko-pravo.blogspot.com/2014/11/>

ted in a fascist organization. However, the Court has been consistent in emphasizing the need to allow media representatives to prove the factual claims made in the texts.

The case law of the European Court of Human Rights, as well as the case law of national courts arising from petitions submitted to the court, have shown that the media/journalists can be defended if they prove that they respected professional standards or acted reasonably when publishing texts.

In some cases, such as *Thorgeir Thorgeirson v. Iceland* (1992), the Court has allowed the media to rely on rumors²⁹. The other case showed that even value judgments must be based on facts. For example, in *Flux and Samson v. Moldova* (2007), the Court held that statements used by a journalist to describe the activities of a former construction minister were value judgements “expressing a reporter’s opinion on G.C.’s activities and the impact of those activities on his neighbours”.

“Moreover, these opinions were based on facts that did not prove to be false, some of which were mentioned in the text. In these circumstances, the Court considers that newspapers cannot be expected to prove the truth of their value judgments and that, even, their opinions were not without factual basis.”³⁰

Decisions and case law provide some freedom for journalists and media to choose how they will report on issues of public interest.

“Models of objective and balanced reporting can vary considerably, depending, among other things, on a given medium; it is not up to the Court, as it is not up to the domestic courts, to impose their opinion on the reporting techniques that journalists should adopt.”³¹

Sometimes this freedom is reflected in the publication of unofficial reports³², sometimes in the publication of official reports without verifying their veracity³³, while sometimes journalists/media have freedom not to consult the opinion of the party they are reporting about³⁴. According to the Court’s opinion journalists may transmit defamatory statements and not be themselves accused of defamation³⁵. However, what is extremely important to all media representatives is the Court’s opinion that the media can use very sharp language, hyperbole, satire or figurative reporting to convey a particular message.

“It is up to the media to decide on the form of expression. For example, the Court accepted the decision to comment on criticism in the form of a satirical caricature as legitimate right.”³⁶

Although protection of reputation and personality rights of other persons is considered as justified restrictions on freedom of expression, practice has shown that it cannot, however, be arbitrary and unlimited. It is especially important to take this into account when prescribing penalties, as penalties can also be considered to interfere with freedom of expression. The penalties should therefore be “proportional to the damage to reputation and prescribed by domestic law”³⁷.

29 *Thorgeir Thorgeirson v. Iceland*, URL: <https://hudoc.echr.coe.int/eng/?i=001-57795>

30 *Flux and Samson v. Moldova*, URL: <https://www.5rb.com/case/flux-samson-v-moldova/>

31 Mendel, Toby, *Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights*, p.88-89, URL: <http://sudovi.me/files/L3ZyaHMvZG9j-LzYQMzAucGRm=>

32 *Bladet Tromsø an Stensaas v. Norway*, URL: http://www.svetevrope.si/s/levropska_sodisce_za_clovekove_pravice/slovenski_prevodi_sodb/159/index.html

33 *Colombani v. France*, URL: <http://www.hracion.org/wp-content/uploads/16-Evropski-sud-za-ljudska-prava-i-uvreda.pdf>

34 *Krone Verlag GmbH & Co. KG v. Austria*, URL: https://hrcak.srce.hr/index.php?show=clanak&id_clanak_jezik=291172

35 *Thoma v. Luxembourg*, URL: <https://hudoc.echr.coe.int/eng/?i=001-59363>

36 Mendel, Toby, *Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights*, p.92, URL: <http://sudovi.me/files/L3ZyaHMvZG9j-LzYQMzAucGRm=>

37 *Ibid.*, p.64.

CONCLUSION

Although there is a noticeable trend of (relative) decrease in the number of lawsuits filed against the media and/or journalists and editors on the basis of violation of personality rights (honor and reputation), this number is still not satisfactory because complete eradication of this practice is what should be striven for.

In order to reach this goal, it is necessary for the media to strengthen self-regulation in their newsrooms and to refrain from misinterpreting the essence of the texts in the headlines.

The fact that citizens are those who most often sue the media and/or journalists and editors shows that the perception of the journalistic community so far that the media are most often "targeted" by political and business leaders is incorrect. This information also indicates that additional work has to be invested in professionalization of the media and raising the awareness about the need to respect the Media Law and the Journalists Code of Ethics of Montenegro.

The courts, although not obliged but would assist journalism as a profession in that manner, do not yet take as a mitigating circumstance the mediation conducted by certain media with offended readers, who later appear as plaintiffs before the courts. The mediation process is rare in the media and should be encouraged, as well as the formation of any form of self-regulation that will be functional and that will serve its purpose. Self-regulation, of course, does not preclude the right of the injured party to seek redress before the court, but in that case, it is legitimate to question the purpose and ultimate goal of such a lawsuit.

LITERATURE

LEGAL ACTS

Journalists Code of Ethics of Montenegro, URL: https://www.mminstitute.org/files/Kodeks_novina-ra.pdf

Convention for the Protection of Human Rights and Fundamental Freedoms, URL: http://www.azlp.me/docs/zajednicka/medjunarodni_dok/evropska_konvencija_o_ljudskim_pravima.pdf

Media Law of Montenegro, URL: <http://media.cgo-cce.org/2013/06/14-Zakon-o-medijima.pdf>

Universal Declaration of Human Rights, URL: https://www.ombudsman.co.me/docs/deklaracija_o_ljudskim_pravima.pdf

CASES BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

Bladet Tromsø and Stensaas v. Norway, URL: http://www.svetevrope.si/sl/evropsko_sodisce_za_clovekove_pravice/slovenski_prevodi_sodb/159/index.html

Colombani v. France, URL: <http://www.hracion.org/wp-content/uploads/16-Evropski-sud-za-ljudska-prava-i-uvreda.pdf>

Feldek v. Slovakia, URL: <http://europsko-pravo.blogspot.com/2014/11/>

Flux and Samson v. Moldova, URL: <https://www.5rb.com/case/flux-samson-v-moldova/>

Koprivica v. Montenegro, URL: <http://www.hracion.org/wp-content/uploads/presuda-Koprivica1.pdf>

Krone Verlag GmbH & Co. KG v. Austria, URL: https://hrcak.srce.hr/index.php?show=clanak&id_clanak_jezik=291172

Lingens v. Austria, URL: <http://www.bgcentar.org.rs/bgcentar/wp-content/uploads/2013/12/Lingens-protiv-Austrije.pdf>

Thorgeir Thorgeirson v. Iceland, URL: <https://hudoc.echr.coe.int/eng?i=001-57795>

Thoma v. Luxembourg, URL: <https://hudoc.echr.coe.int/eng?i=001-59363>

PUBLICATIONS

Camovic M, Lakovic Konatar B, Indicators on the Level of Media Freedom and Journalists Safety 2018, Trade Union of Media of Montenegro, Podgorica, URL: https://safejournalists.net/wp-content/uploads/2018/11/print_MNE_rezime_2018.pdf

The European Commission, Montenegro 2018 Report, URL: https://eeas.europa.eu/sites/eeas/files/country_report_montenegro_2018.pdf

Kersevan Smokvina and others, Montenegro Media Sector Inquiry with Recommendations for Harmonisation with the Council of Europe and European Union standards, Council of Europe, URL: <https://rm.coe.int/analiza-medijiskog-sektora-u-cr-noj-gori-sa/16807b4d7d>

Mendel, Toby, Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights, URL: <http://sudovi.me/files/L3ZyaHMvZG9jLzY0MzAucGRm=>

Peter Noorlander, Reform of liability for breach of honour and reputation, Human Rights Action: http://www.hracion.org/wp-content/uploads/2017/01/hra-reforma_odgovornosti_za_klevetu_i_uvredu.pdf

Freedom of expression - Guide to the implementation of Article 10 of the European Convention on Human Rights, Human Rights Action, URL: <http://www.hracion.org/wp-content/uploads/Vodi%C4%8D-kroz-pri-mjenu-%C4%8Dlana-10-EKLJP.pdf>

The Supreme Court of Montenegro, Report on the Implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the Practice of the Supreme Court of Montenegro, January 2015 - July 2017: <http://sudovi.me/podaci/vrhs/dokumenta/8601.pdf>