

Media and Defamation
EVEN A PORTION OF JOURNALISTS ARE NOT FOR DECRIMINALIZATION OF
DEFAMATION

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There are no taboo issues in Montenegrin journalism any more, but almost every day a new charge is brought for defamation in Montenegrin courts.

Towards the end of the last decade, independent, private media emerged in Montenegro and started writing differently – more courageously, openly and objectively, without hesitating to raise issues which, until then, had been dealt with only by the independent Montenegrin weekly “Monitor”. However, the new circumstances faced both the media and the public with a dilemma of how to establish a balance between “conflicting values” – the right to honor, reputation and privacy on one hand, and the right to be informed on the other.

Research conducted for the Montenegrin Media Institute in the first half of January showed that a total of 95 defamation charges had been processed since the adoption of the new Criminal Code (April 2004) and six of them were brought against journalists. A journalist appears as the plaintiff only in one of these cases. Based on documentation collected from media and NGOs, since the adoption of the new Criminal Code at least 13 defamation charges were brought against Montenegrin media and journalists, and one of these trials ended with a first-instance judgment.

It is interesting that there is not a single electronic media outlet on the list of those sued, while the daily “Dan” is far ahead among dailies, with five charges brought against it. At the Podgorica Lower Court, a journalist of the weekly “Monitor,” Andrej Nikolaidis, was sentenced to pay a fine of 5,000 euros after a suit was filed against him by the well-known movie director Emir Kusturica. This case was initiated and processed under the new Criminal Code. Under the new legal provisions, three more verdicts were pronounced in cases that started before the new law went into effect. The daily “Dan” was fined 6,000 euros after a lawsuit was filed against it by the Montenegrin Assistant

Interior Minister (in charge of national security), who requested 50,000 euros for suffered 'mental anguish'. The Chief of the Secret Police was awarded 7,000 euros in a trial against the company "Milenium", the founder of the now liquidated daily "Publika". Under the new law, the daily "Dan" and its Editor-in-Chief Danilo Vukovic were fined 14,000 euros after charges were brought against them by Montenegrin Prime Minister Milo Djukanovic.

According to this research, the average duration of defamation trials in courts of first instance was 124 days, or approximately four months.

Out of thirteen defamation suits filed in the last nine months, in four cases the plaintiffs were holders of political office (30.8%), while in five cases (38.5%) the plaintiffs were ordinary citizens.

Besides the already mentioned 13 ongoing processes against print media and journalists, there are an additional 31 court proceedings initiated before the adoption of the new Criminal Code. Out of this number, 21 cases are conducted against the daily "Dan" and its journalists, one against the company "Milenium"- publisher of the liquidated daily "Publika", and nine against the daily "Vijesti" for compensation of consequential damages. Eighteen suits against the daily "Dan" and its journalists are ongoing, as well as nine civil suits for compensation of consequential damages against the daily "Vijesti".

Hotel prices – a day in prison 40 euros

Under the new Montenegrin Criminal Code, which went into effect at the beginning of April 2004, defamation is still a criminal offence. However, the possibility of sentencing the accused to imprisonment is abolished and substituted with fines. A minimal fine is 1,200 euros. If the convicted person does not have the money, the sentence is carried out in such a way that for every 40 euros, one day in prison is pronounced, on the condition that the convicted person cannot be imprisoned for more than six months.

The new law defines that the damaged party may bring criminal charges for defamation within three months of the defamatory statement being published. In that case, the money from the fine awarded by the court goes to the government. A civil lawsuit can be brought within a period of three years of the act being committed, and the awarded damages go to the private plaintiff. Criminal charges and a civil lawsuit may be brought simultaneously. If the court reaches a decision in criminal proceedings, which are much faster, that a certain statement is defamatory, the judgment must be applied in the civil lawsuit as well. The only thing that remains to be determined is the amount of compensation awarded to the plaintiff.

In the new Criminal Code, defamation is classified in a group of crimes against honor and reputation, and as such regulated by article 196, which says:

(1) He who expresses or circulates something untruthful about someone else, which may damage his honor or reputation, will be fined from 3,000 to 10,000 euros.

(2) If the act from paragraph 1 of this article is performed through media or similar means or at a public gathering, the perpetrator will be fined from 5,000 to 14,000 euros.

(3) If the expression or circulation of something untruthful resulted or may have resulted in grave consequences for the damaged party, the perpetrator will be fined at least 8,000 euros.

(4) If the accused proves that he had reasonable ground to believe in the truthfulness of what he had expressed or circulated, he will not be fined for defamation, but he may be fined for insult (article 195), if conditions for the existence of this offence have been met.

Defamation action is taken upon a private suit, states the Law.

Montenegrin journalists and lawyers dealing with media have different opinions regarding decriminalization of defamation in the Montenegrin legal system. They also interpret differently a Council of Europe recommendation, which says that the burden of proof, in principle, should be upon the plaintiff. The lawyer Nikola Martinovic believes that the principle which determines that the burden of proof is on the plaintiff, in defamation cases, is actually the opposite. He assesses that the EU position is the same: The principle must be obeyed, but the principle has an exception in the field of defamation.

- It is not that somebody chooses it to be this way; this is rather a matter of logic, because if the burden of proof is on the plaintiff, the plaintiff would be forced to prove an untruth. It is only logical that it is impossible to prove an untruth. Only in the criminal offense of defamation - both here and in the rest of the world - the relevant principle says that the accused should prove the truthfulness of his allegation, not that the plaintiff should prove that it is untruthful, because that is impossible - says Martinovic.

He raises the question of justification of changing prison sentences, as prescribed by the previous Montenegrin Criminal Code, into fines.

- The prison sentence was not high, and a person convicted for the criminal offense of defamation could have been sentenced to a suspended prison sentence. The new Montenegrin Criminal Code does not allow for such a possibility. Now the minimal fine, even for the simplest form of defamation, is 1,200 euros. The fine goes up to the drastic amount of 14,000 euros, when qualified forms of defamation are concerned. I am convinced that practice will show that because of high fines, many Montenegrin citizens will be forced to go to prison for defamation, which has not been the case so far. Although the old Criminal Code prescribed prison sentences, no one went to prison for defamation, but thanks to these high fines I believe people will now go to prison, because they will not be able to pay - categorically claims Martinovic.

He opens another big dilemma: whether 'telling lies' can be a profitable business. In "times of transition", when all government institutions are very fragile and susceptible to corruption, as, no doubt, is the case in Montenegro, the newly rich, through 'their' media, can spread an untruth costing them a couple of thousand euros, but on the other hand, based on this information, they can make a much bigger profit.

With fines so high, absolute segregation has been set in place between people with money and those without it. People with money are stimulated to commit the criminal offense of defamation. One principle of criminal legislation, so-called particular gain, has been annulled. Someone may commit the criminal offense of defamation even a hundred times, and still cannot be punished in any other way except with a fine. If someone has money, it pays to do this. And, because of Montenegrin mentality, it may happen very often that these damages represent the price of someone's honor, so it turns out that a fine is in fact an insult to a person whom lies have been told about or whose rights have been infringed upon – says Martinovic.

He recalled a forgotten principle in the Montenegrin legal system, whose application may help put a stop to these abuses:

- Our courts so far have not reached a single decision that is defined by our legislation - the so-called security measure of depriving someone of unlawfully gained benefit. The fact remains that lie, to which the public responds excellently and the media make a living from it, may raise the number of sold copies. For owners of these media, it is worth paying the defamation fine, because they can earn much more through an increase in the number of sold copies. According to the Law on Criminal Proceedings, this profit cannot remain in the pocket of the person who committed the criminal offense and must be taken.

Unlike Martinovic, President of the Montenegrin Helsinki Committee **Slobodan Franovic** is in favor of absolute decriminalization of defamation. He thinks that the current Montenegrin Criminal Code is not up to European standards because the burden of proof has been shifted to the accused, instead of the plaintiff. He maintains that the prescribed fines for defamation are too high. If these fines are reviewed within the entire fining system, it is quite clear that in the case of defamation the exception is drastic, says

Franovic. He thinks that defamation should be moved to the area of civil law, which certainly does not mean smaller protection; quite the contrary.

The director of the Montenegrin Media Institute, **Vojislav Raonic**, is strongly opposed to sending journalists to prison for defamation, but he assesses that the present level of defamation liberalization in Montenegrin legislation is sufficient and “that further decriminalization should not be implemented as this move may be counter-productive”.

- It is very simple; the laws must be suited to the country, environment, mentality, judicial practice, competence of judges, understanding of the very essence of the idea of law. The right measure regarding defamation liberalization has been found – assesses Raonic.

He is also opposed to reduction of fines for this offense.

- The amount of the fine must be such to send a serious warning that this kind of thing should not happen again. The amount of the fine must be so high that we can be sure it is in no one’s interest to lightly defile people and get away with it. In addition, we must introduce a new practice that we lack at the moment. Namely, the publisher should be responsible for defamation, not the journalist. The publisher is the one holding financial and media power. The one making money from media should also take the risk of possible sanctions – stresses Raonic.

Ex prosecutor and lawyer **Vladan Djuranovic** maintains that “it turns out that everyone can defame everyone else, if they have enough money to pay for it”. He says that this circumstance should have been taken into consideration when prescribing fines for this particular offense and adds that “elimination of prison sentence for defamation is premature, to say the least, and a fine is not adequate punishment for extremely grave consequences, which this offense may produce for the damaged party, i.e. the defamed person and his family”.

- I have the impression that both the legislator and the organizations that were in favor of elimination of prison sentence failed to completely explore all circumstances necessary for defining the level of social danger posed by this criminal offense, and in relation to that to prescribe the type of punishment, i.e. criminal sanctions. I think that recommendations of foreign organizations were accepted quite uncritically, and that the situation that was taken as the dominant criterion was when political and other public figures found themselves in court as plaintiffs, and journalists as the accused. Regardless of the fact that these cases have the greatest publicity, they are not the only defamation cases – warns Djuranovic.

The problem of value judgment

There is no dilemma among Montenegrin journalists that untruth should be punished, but besides this general agreement, there is still no readiness within the journalistic community to discuss concrete, controversial cases of violation of professional and ethical standards. A regulatory body established a year ago, whose task is to point out violations of ethical and professional standards and to stimulate dialogue on controversial cases, has failed to accomplish its mission. Thanks to false solidarity, or opportunism - whatever. Thus, the courts are left to deal with defamation disputes and to resolve unclear issues that the journalist community in Montenegro is still not ready to confront.

Journalists, almost without exception, openly doubt the credibility of courts and they allege that in most defamation cases, courts rule without objectivity, unprofessionally and in favor of politicians, thus limiting the freedom of information.

Assistant Editor-in-Chief of the daily “Dan” **Danilo Vukovic** reveals that more than 50 lawsuits are currently ongoing against this daily. The majority of them, claims Vukovic, were brought by Prime Minister Djukanovic, other officials, and people “close to the government”.

- Their main objective is to financially suffocate “Dan”. Montenegrin courts are under government influence, and data that in 99% of these cases courts ruled in favor of the plaintiffs just confirms this statement. An example that serves to illustrate how Montenegrin courts rule in accordance with the law, as far as charges against our daily are concerned, regards charges brought against the late Editor-in-Chief Dusko Jovanovic, when he was still alive, and charges against me as his assistant. We were sued over the same articles, but it was stated in the lawsuit that we cannot both answer and that it will be established in court proceedings who is responsible so that he can be put on trial. Although Jovanovic, in the first hearing, said that he is responsible, not just for these disputed articles, but for all articles published in the paper, after his murder the proceedings were continued against me. And, what an absurdity, the fine was set at 14,000 euros. The court roughly trampled upon the principle of the editor-in-chief being responsible for articles published in a newspaper, not his assistant – said Vukovic.

Debates about the credibility of and abuses on the part of Montenegrin courts heated up in recent months, after a verdict was passed against Montenegrin journalist and writer Andrej Nikolaidis, who has to pay 5,000 euros for defaming the movie director Emir Kusturica. Criticizing Kusturica’s positions (published in the French “Figaro”) on the war in the former Yugoslavia, Nikolaidis named him an ‘executioner’s apprentice’, alluding directly to Kusturica’s political and other closeness with the regime of Slobodan Milosevic. Based on this verdict passed by Judge **Evica Durutovic** at the Podgorica Lower Court, the movie director additionally sued the weekly “Monitor”, requesting compensation in a civil suit of 100,000 euros!

The president of the Montenegrin Helsinki Committee, Slobodan Franovic, alleges that in Montenegro, restrictions of freedom of expression are far from legitimate and admissible under international documents, including the European Convention on Human Rights, and he points to courts rulings as the key problem. Regarding the trial of Andrej Nikolaidis, Franovic said that the Montenegrin Helsinki Committee had immediately, before the verdict was passed, stated that the trial was not in accordance with international standards.

- There is reasonable suspicion that courts in Montenegro, using direct and open abuse, are thwarting freedom of expression in order to conduct counter-lustration, in order to prevent free discussion on important issues, such as confronting the past. We have reasonable and justifiable suspicion that rulings in ongoing trials are supposed to favor counter-lustration and we include the Kusturica vs. Nikolaidis trial in this category. These cases have special importance, because they represent a certain form of confronting the past. All institutions in our society and our country have an obligation to facilitate free discussion on such important issues as confronting the past. We should apply international standards that refer to freedom of expression, primarily regarding public figures. When a public figure expresses his or her political or other positions that do not relate to private matters, then we have standards regulating the limits of admissible criticism, which are much broader compared to those for ordinary citizens. In this case, the movie director Kusturica was criticized because of his political activity. There is absolutely no question of attack on his privacy. Courts must not be used to stop criticism of someone's political activities. In the Kusturica-Nikolaidis dispute, the court acted contrary to these standards. In this case, we have a serious attack on freedom of expression. The lawsuit that was brought against "Monitor" requesting compensation is of the same character and has the same purpose – categorically states Franovic.

He also said that the written verdict has not been delivered to Nikolaidis yet, although it was passed four months ago. Franovic says this is not the only such case. For Franovic, this kind of practice of Montenegrin courts is proof that they are limiting freedom of expression and thus enabling unlawful political repression of freedom of opinion. This, he says, must not be punished in any case.

- Here we also have reasonable suspicion regarding abuse of criminal law. This is an illegitimate and unlawful restriction on freedom of expression, in this case probably politically motivated. Today, you have a number of cases involving top politicians, whose trials ended with verbal sentencing, but we are still waiting for the written, valid sentences – claims Franovic.

For the “Monitor” editor in chief, **Esad Kocan**, this case is paradigmatic because it represents a basis from which one can see how things seem when viewed from the standpoint of professional standards and ethical obligations, how this seems in an unregulated society, “when an institution that is supposed to protect rights, decides how journalists should behave”.

- If, for example, a fire were to break out and my journalist covering fires did not cover the event, in which, for example, a child was hurt, he would be disciplined. An interview with Emir Kusturica was published in the “Figaro”, in which he expresses his own opinion. To the question: “Have you changed your position regarding the war?” Kusturica replies: “No, on the contrary, I still think the war in Bosnia was started by the Americans and Alija Izetbegovic”. In line with professional standards, the way I see it, a columnist of “Monitor” who would not react to this kind of ethical fire could not be a columnist of “Monitor”. Emir Kusturica, a movie director, not a military strategy expert, has expressed his opinion on an issue raised by the “Figaro”, knowing that he, a public figure, has influence on public opinion. “Monitor” reacts to this, with its own position regarding Kusturica’s position. In the article, there is not a single fact other than Emir Kusturica being Milosevic’s ‘best man’, and we qualified Milosevic as an executioner. In this case, only one thing can be a matter of dispute - whether Milosevic is an executioner or not. Everything else is in the domain of opinion. Regarding Kusturica’s behavior, numerous photos have been taken and numerous articles published. Could we have concluded anything else, based on the facts at our disposal, except that Emir Kusturica supported Serbian policy? Based on a photo of Emir Kusturica with the chief of Milosevic’s secret police (which was not shot in secrecy), could anyone have made any other conclusion except the one made by Nikolaidis – asked Kocan.

The leader of the working group that wrote the current media laws in Montenegro, which received a lot of compliments from foreign experts, **Abaz Beli Dzafic**, stresses that the Kusturica-Nikolaidis case illustrates the “general illiteracy of judicial bodies in Montenegro in an area called jurisprudence of the European Court of Human Rights”.

- This country has not only accepted the European Convention, it has also accepted the precedents, the jurisprudence of the European Court of Human Rights; it has accepted that this jurisprudence obligates courts and judges in Montenegro. Of all defamation cases so far, only one judge referred to the European Convention and the practice of the European Court of Human Rights. It is obvious that the judge who sentenced Nikolaidis has never read anything about European judicial practice. Because if she has, she would understand that this verdict will be very interesting for the European Court of Human Rights – emphasizes Dzafic.

The judge that Dzafic first mentioned was a judge of the Podgorica Lower Court, Zoran Pajin, who passed a judgment in favor of a journalist in a lawsuit filed by the politician Harun Hadzic against the journalist Marko Djonovic, referring to the practice of the European Court of Human Rights.

The lawyer Vladan Djuranovic points out that in lawsuits filed by public figures against journalists, a balance between two equally legitimate interests should be established: to inform the public adequately, and to protect honor and reputation, i.e. privacy and family life of every individual.

- Courts are faced with the huge task of establishing, in these situations, whether we have a case of defamation or not. Very often, the dividing lines are not clear and visible, so we need to put a lot of effort into examining the case and establishing whether we are dealing with a serious journalistic article which investigates or criticizes a phenomenon or individual, or we have statements that may be defined as defamation. Media must have the freedom to investigate different phenomena and to publish information, without fear of being put to trial. However, as the media freedoms become broader, so does responsibility, and not only from the aspect of criminal law, but also from an ethical aspect, the aspect of standards, etc. – said Djuranovic.

He thinks it is worth considering, as far as the criminal offense of defamation of public figures is concerned, to narrow the area of criminal responsibility to their disadvantage, especially if it has something to do with their official status or public position.

- I think it would not be impossible to legally define this circle of persons or activities. This would avoid any debate on whether prison sentences are appropriate for defamation and, instead, debate would focus on needs: to satisfy the needs and interests regarding the right to information and to satisfy the needs and interests regarding privacy rights, family life and protection of honor and reputation – points out Djuranovic.

Slobodan Franovic is also in favor of increased protection for “ordinary citizens”, but people engaged in politics - public figures, because of this fact, must suffer more.

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