

# **PROPOSED REFORM OF LIABILITY FOR BREACH OF HONOUR AND REPUTATION IN MONTENEGRO**

(DEFAMATION AND INSULT LAW REFORM)

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PROPOSED REFORM OF LIABILITY FOR BREACH  
OF HONOUR AND REPUTATION IN MONTENEGRO

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## INTRODUCTION

Following the principle of freedom of expression being the foundation of a democratic society, necessary for open exchange of opinion, Human Rights Action (HRA) has paid particular attention to monitoring respect for freedom of expression in Montenegro in accordance with European standards.

Our conclusions that the constitutional and statutory provisions, as well as non-mandatory training of judges on the practice of the European Court of Human Rights, do not ensure respect for freedom of expression in Montenegro have been confirmed by the European Commission's Opinion on Montenegro's application for European Union membership, published on 9 November 2010.<sup>1</sup>

In order to ensure respect for freedom of expression and right to protection of reputation and honor in Montenegro in accordance with the European Convention on Human Rights and the European Court of Human Rights case law, it is crucial to implement the reform of constitutional provisions and laws governing criminal and civil liability for violation of reputation and honor. In order to contribute to this aim, HRA has formed a working group consisting of: Ana Vukovic, judge of the Higher Court in Podgorica, Dusan Stojkovic, lawyer from Belgrade, Tamara Durutovic, lawyer from Podgorica, Veselin Radulovic, lawyer from Podgorica, Tea Gorjanc-Prelevic, LL.M., executive director of Human Rights Action and project editor, and Peter Noorlander, lawyer, Director of Media Law Defense Initiative from London, project advisor, which, after months of work, on 17 November 2010 announced the *Reform proposal for violation of honor and reputation in Montenegro*.

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1 *As regards freedom of media, intimidation of journalists and disproportionate fines for defamation are a matter of concern. Legislation and practice on defamation needs to be fully aligned with the jurisprudence of the European Court of Human Rights.* Commission Opinion on Montenegro's application for membership of the European Union, Brussels, 9.11. 2010 COM(2010) 670, [http://ec.europa.eu/enlargement/pdf/key\\_documents/2010/package/mn\\_opinion\\_2010\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/mn_opinion_2010_en.pdf).

Proposed are the amendments to two articles of the Constitution, to the Criminal Code and the Media Law, which include the following:

1. Amendments to constitutional provisions, Art. 47, *Freedom of expression* and Art. 49, *Freedom of the press*, in order to conform the permitted restrictions on freedom of expression to Art. 10, para. 2 of the European Convention on Human Rights, as well as the deletion of a guarantee of the right to damages for publishing false information, in accordance with the European Court of Human Rights case law;
2. Amendments to the Criminal Code (CC), which include:
  - Decriminalization of criminal offences against honor and reputation - deletion of criminal offences under Chapter XVII of the CC: *Insult, Defamation, Stating details from personal and family life, Damaging the reputation of Montenegro, Damaging the reputation of peoples, minorities and minority groups, Damaging the reputation of a foreign country or international organization*;
  - Introduction of two new criminal offences: *Obstructing journalists in performing professional duties* and *Assaulting journalists in performing professional duties*, following the example of criminal acts protecting officials in performing their official duties (Art. 375 and 376 of the CC).

In case the proposal for full decriminalization, which we consider an advanced solution in comparative practice, is not adopted, we have proposed:

- Harmonization of the above provisions of the CC with the standards established in the jurisprudence of the European Court of Human Rights, such as: major reduction of the maximum amount of fine; abolition of imprisonment for the criminal act *Damaging the reputation of Montenegro*; specifying the basis for the exclusion of unlawfulness; deletion of provisions on the objective responsibility of editors, publishers, printers and manufacturers for criminal acts committed through the media, etc.
3. Reform proposal also includes amendments to the Media Law:
    - Specifying the standard of "due professional care" of journalists and editors, which is the basis for the exclusion of liability for damage;



- Limiting the amount of non-pecuniary damages that may be imposed against journalists and editors as individuals and against the media founder, as a legal entity;
- Specifying the right to protection of privacy, i.e. the right to prevent disclosure of private information.

*Why did we approach this task?*

In recent years Human Rights Action has been monitoring implementation of European standards in the practice of Montenegrin courts, particularly regarding freedom of expression and its legitimate limitation for the protection of reputation and rights of others.

Since 2002 the Media Law of Montenegro provides that it should be implemented in accordance with the case law of the European Court of Human Rights. When the European Convention on Human Rights was ratified and Montenegro, in the state union with Serbia, admitted to the Council of Europe in 2003, this became an international legal obligation, explicitly emphasized at admission of Montenegro as a sovereign state to this organization in 2007. At that time, the presidents of the state, the Government and the Parliament of Montenegro in a letter to the Secretary General of the Council of Europe committed themselves to ensure that the Montenegrin courts apply the standards set forth in the case law of the Court in Strasbourg.

Now, in November 2010, the European Commission reiterated the same in its opinion on Montenegro's application for membership of the European Union, in the form of one of the seven requests that Montenegro has to meet within the next year. One of the manifestations of ignoring these European standards are disproportionate fines (e.g. that of 14,000 EUR imposed to Danilo Vukovic, deputy editor of the daily newspaper Dan in 2007, which then amounted to 38 average salaries in Montenegro) or damages imposed for mental distress due to the violation of honor in the amount of 15,000 EUR, which corresponds to the amount to be awarded for mental distress for the death of a close family member, according to the views of the Civil Section of the Higher Court in Podgorica. Other examples of practices contrary to the standards of the European Court of Human Rights are: requesting proof of the absolute truthfulness of the information published, including those transferred from other media; lack of distinction between facts and value

judgments; disregard for the public interest for consideration of important issues and provocations in order to provide a value judgment; disregard for the principle that public figures, particularly politicians and government officials, have to tolerate a higher degree of criticism, etc.

Implementation of these standards is not easy because it requires studying numerous judgments of the European Court of Human Rights, which have not been translated into Montenegrin language, nor into Serbian, Bosnian or Croatian language. Only recently the Office of the Agent of Montenegro has published translations of four judgments of the Court in Strasbourg concerning freedom of expression, which is not enough. Training of judges on the law of the European Court in Strasbourg is not mandatory, and the Supreme Court has not done anything to promote the application of this practice to date.

Bearing all this in mind, in collaboration with the Montenegrin Journalistic Self-regulatory Body, HRA organized a regional round table on 11 June 2010 in Podgorica, on the reforms implemented in the field of liability for breach of honor and reputation in line with European standards in the Western Balkans. I recommend to your attention the book *Reform of liability for defamation and insult - how to ensure the implementation of standards of the jurisprudence of the European Court of Human Rights in domestic legal order*, which includes presentations, discussion and conclusions of this inspiring event, supported by the Open Society Institute, the Council of Europe and the British Embassy in Podgorica.

One of the conclusions of the round table was that in the region it has been proved useful to implement the standards of the European Court into the legal provisions so that the judges apply these standards easier, and journalists and other “public speakers” align their behavior with the European standard, request in the form of “due professional care”. This standard, introduced in April this year into the Criminal Code as a type of the journalists’ defense from charges for defamation, is defined neither in this nor in other laws, and not even in the Journalists Code of Montenegro. Considering that we are to understand this standard only if it is appropriately prescribed by law, we have proposed two new provisions of the Media Law, in accordance with the case law of the European Court of Human Rights.

Reform proposal is based on the judgments of the European Court, the Council of Europe recommendations and good solutions from the laws

of the countries in the region, which have already implemented a similar reform. We do not think we did the best job, which is impossible to improve, but we do believe that we, in light of the opinion of the European Commission given on 9 November 2010, that “Laws and practices, with regard to establishing liability for defamation, must be fully compliant with the European Court of Human Rights jurisprudence”, offered Montenegro a well-reasoned basis for work on an emergency meeting of one of the seven criteria that will, hopefully soon, lead us to the European Union.

We pay a special thanks to the donor of this project, the Open Society Institute, and all the members of the working group, which collaborated on the development of this Reform proposal.

We hope that the Reform proposal shall be of use to the representatives of the Government and the Parliament, who are responsible for the improvement of human rights guarantees in Montenegro and meeting the criteria to begin negotiations on membership of Montenegro in the European Union.

Tea Gorjanc-Prelevic, LL.M.

*Executive Director of Human Rights Action and editor of the project  
“Reform Proposal for the liability for violation of the honor and reputation”*

(Opening speech given at the round table on 26 November 2010 in Podgorica, where the representatives of the Government, the media, NGOs and political parties discussed the Reform proposal with the members of the HRA Working Group).



# 1. REFORM PROPOSAL FOR CONSTITUTIONAL PROVISIONS (ART. 47 AND 49)

## 1.1 *Freedom of expression, Article 47*

### *Freedom of expression*

#### *Article 47*

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

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

#### *Reform proposal:*

In paragraph 2 the words „by the right of others to dignity, reputation and honor” should be replaced with words „in order to protect the reputation or rights of others or”, so that paragraph 2 reads:

The right to freedom of expression may be limited only *in order to protect the reputation or rights of others* or if it threatens public morality or the security of Montenegro.

#### *Reasoning:*

Proposed is the change of a part of paragraph 2 Article 47, concerning restriction of freedom of expression in order to protect the interests of other persons, in accordance with the provision of paragraph 2 Article 10 of the *European Convention on Human Rights* (ECHR) and paragraph 3 Article 19 of the *International Covenant on Civil and Political Rights*. The Convention and the Covenant are the main international instruments of human rights protection binding for Montenegro.

Both of these international agreements allow the limitation of freedom of expression in order to protect the general public interest (the *Covenant* allows restrictions to protect national security, public order, public health

and morals, and the *Convention* adds the prevention of disorder or crime, prevention of disclosure of information received in confidence and protection of authorities and impartiality of the judiciary) and individual interests so as to protect „the reputation and rights of others.” In an Article prescribing the protection of private and family life, the *Covenant* provides for the protection of „unlawful attacks on honor and reputation” (Article 17, paragraph 1).

Restrictions on freedom of expression permitted by the Constitution to protect the interests of society are much narrower than those provided by international treaties, while the restrictions in order to protect individual interests are prescribed so as to allow a broad interpretation. Restriction of freedom of expression by „others’ right to dignity, reputation and honor” leads the broad interpretation of allowable restrictions on freedom of expression under international agreements „in order to protect the reputation and rights of others”, especially in combination with a particularly arguable guarantee to the right to damages for publishing false information or notice under the Art. 49 paragraph 3, which will be discussed further below.

Protection of „dignity” of a person, including privacy and personal rights, is prescribed in Article 28 of the Constitution, while the right to privacy is particularly protected in Article 40. We find it excessive emphasizing the dignity and honor in the context of permitted restrictions on freedom of expression, especially because it can lead to neglect of the practice of the European Court of Human Rights (ECtHR), according to which freedom of expression in the proper context may involve a degree of exaggeration and provocation, which may lead to violation of honor and dignity of another person (i.e. the subjective perception of oneself).

The European Court of Human Rights has ruled many times that freedom of expression protects not only information that is favorably received or regarded as inoffensive or something that does not cause reactions, „but also those that offend, shock or disturb, because such are the demands of that pluralism, tolerance and broadmindedness without which there is no „democratic society” (see the judgments: *Handyside v. UK*, 1976; *Lingens v. Austria*, 1986; *Oberschlick v. Austria*, 1991; *Jersild v. Denmark*, 1994, *Maronek v. Slovakia*, 2001, etc.). Thus, the Court held that the freedom of expression includes the description of a person as being „grotesque”, „buffoon”, „boor”, „idiot”, if the use of such words is a response to strong

provocation (*Lopes Gomes da Silva v. Portugal*, 2000; *Oberschlick v. Austria*, no. 2, 1997).

In order to limit the debate of general interest, for example, about the democratic development of the country which has recently gained sovereignty, in its verdict protecting individual rights, the European Court requires to prove „a pressing social need” for such restrictions, emphasizing thus the overall importance of freedom of expression at the cost of a protection of subjective feelings and violation of the dignity of the individual. Given the complexity of establishing a balance between the protection of these freedoms and personal rights of individuals, we believe that the broad wording of allowed restrictions on freedom of expression, which may lead to erroneous interpretations of international standards in this area, should be kept to a moderate wording used by international instruments for protection of human rights, binding Montenegro, and thus ensure their proper implementation, that is, the protection of human rights in accordance with international standards.

In addition to the above, the current text of this article was unclear because the interpretation of language indicating the cumulative application of two otherwise separate grounds for restricting freedom of expression „... the right of others to dignity, reputation and honor and if it threatens public morality or the security of Montenegro.” By replacing the word „and” with „or” these two grounds are clearly separated.

## 1.2 *Freedom of press, Article 49*

### *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.

### *Reform proposal*

Delete paragraph 3 Article 49.

### *Reasoning*

The Constitution in paragraph 3 Article 49 guarantees (A) *the right to damages* caused by the publication of inaccurate data or information and (B) *the right of reply and correction* of false, incomplete or incorrectly stated information.

*(A) The right to damages for publication of inaccurate data or information*

Guaranteeing the right to damages for publication of inaccurate data or information, the Constitution introduces a guarantee that is not fully consistent with:

- a) European standards set forth in the practice of the European Court of Human Rights,
- b) the provisions of the Law on Obligations.

The European Court of Human Rights has found the so-called standard of „reasonable publication”, which means that if a journalist acts in good



faith, i.e. adhere to the standards of professional ethics, even defamatory statements on matters of public interest can be protected from liability. For example, if a journalist, or editor, has done all that was reasonably possible before he announced the news<sup>1</sup> of legitimate public interest to check its accuracy and if he had reasonable grounds to believe its truth, a conviction for damages will mean a violation of his right to freedom of expression.<sup>2</sup> This may be the case if a journalist relied on the report of the State Inspector General, which is later found to be wrong (*Bladet Tromsø and Stensaas v. Norway*<sup>3</sup>), or if he transferred the statement of another person, or the media in order to continue the debate of public interest, and not intentionally attack someone's reputation (*Thoma v. Luxembourg*<sup>4</sup>; *Bladet Tromsø*<sup>5</sup>; *Lepojić v. Serbia*<sup>6</sup>).

Law of Obligations contains the following provision: „One shall not be liable for damages caused by a false statement about another person if one has been unaware that the statement was false, and if the one or those to whom

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1 „News is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest” (*Sunday Times v. UK*, 1991).

2 „Article 10 ‘protects journalists’ rights to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide ‘reliable and precise’ information in accordance with the ethics of journalism...”, *Bladet Tromsø and Stensaas v. Norway*, 1991, para. 65.

3 *Ibid*, para. 68-72.

4 In the case *Thoma*, the European Court found that the judgments obliging a journalist to damages for harm to reputation because he quoted fellow journalist was contrary to freedom of expression guaranteed by the Convention, stating, in paragraph 64: „A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press’s role of providing information on current events, opinions and ideas.”

5 In the case *Bladet Tromsø*, the Court found that „the thrust of the impugned articles was not primarily to accuse certain individuals of committing offences against the seal hunting regulations or of cruelty to animals. On the contrary, the call by the paper on 18 July 1988 for the fisheries authorities to make a „constructive use” of the findings in the Lindberg report in order to improve the reputation of seal hunting can reasonably be seen as an aim underlying the various articles published on the subject by *Bladet Tromsø*. The impugned articles were part of an ongoing debate of evident concern to the local, national and international public, in which the views of a wide selection of interested actors were reported...” (para. 63).

6 „In any event, although the applicant’s article contained some strong language, it was not a gratuitous personal attack and focused on issues of public interest rather than the Mayor’s private life, which transpired from the article’s content, its overall tone as well as the context...” (*Lepojić v. Serbia*, 2007, para 77).

the statement was communicated had a serious interest in the matter”<sup>7</sup>, the formulation in accordance with the above international standards, but not in accordance with the disputed constitutional provision, which „guarantees” the responsibility for publishing false information. Also, the Law on Obligations provides that „in case of violation of personal rights the court may order, at the expense of the defendant, publishment of a judgment or a correction, or order the defendant to withdraw a statement in question, or anything else which may achieve the purpose also achieved by compensation”<sup>8</sup>, which is also not in line with the guarantee of damages prescribed by the Constitution. All of this puts into question the constitutionality of the Law on Obligations which relativize the constitutional guarantee, while the Constitution does not allow its limitations.

In considering the proposed deletion of paragraph 3, we should take into account the opinion of the Venice Commission, assessing Article 47 (Freedom of expression) and Article 49 of the Constitution (Freedom of the press), as follows:

„Given that these two articles in many ways contribute to the implementation of the provisions of Article 10 ECHR, it would be desirable if they could be formulated in a way that would more closely correspond to this Convention. This articles focus on the protection of „dignity, reputation and honor” and a provision that refers to a remedy for the publication of false, incomplete or inaccurate information conveyed, which is not necessarily how the Strasbourg Court interprets Article 10 ECHR.”<sup>9</sup>

An additional argument for removing the guarantee of the right to damages for publication of inaccurate data or information is the fact that in this manner it is ensured that the Constitution of Montenegro, which expressly guarantees the right as such, does not recognize any international treaty for protection of human rights, nor one of ten verified constitutions in the region, while, at the same time, it is not ensured that the Constitution guarantees, for example, the right to damages caused by torture, inhuman or degrading treatment, specifically provided for in Article 15 of the *Convention against Torture and*

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7 Art. 205 paragraph 2 of the Law on Obligations, *Official Gazette of Montenegro*, No. 47/2008, former Article 198 para. 2 of the Law on Obligations SFRY and FRY, *Official Gazette of SFRY*, No. 29/78, 39/85, 57/89 and *Official Gazette FRY*, No. 31/93.

8 Art. 204 of the Law on Obligations of Montenegro and Art. 199 of former Law on Obligations of FRY.

9 Venice Commission on the Constitution of Montenegro, *Opinion No. 392/2006*, CDL-AD (2007) 047, December 2007, translation published in „*International human rights standards and constitutional guarantees in Montenegro*,” Human Rights Action, 2008.

*Other Cruel, Inhuman or Degrading Treatment or Punishment*, which binds Montenegro. Moreover, the Constitution did not guarantee the general right to damages caused by the illegal actions of the state authorities, unlike the constitutions of some countries in the region.<sup>10</sup>

*(B) The right of reply and correction of false, incomplete or incorrectly stated information that violates one's rights or interests*

Deletion of the constitutional guarantees of the right of reply or correction of „false, incomplete or incorrectly stated information that violates the rights or interests of any person” is proposed because this constitutional provision is vaguely worded, without reference to legal regulation, and restrictions on rights to freedom of expression must be very clearly defined (see, for example, paragraph 81 *Sanoma v. Netherlands*). It is disputable whether one could give an answer to a statement that offends someone's „interest”. „Interest” is not a defined concept, as opposed to „rights” and can encompass a range of meanings, and therefore also does not meet the requirement that restrictions should be clearly defined.

Although the right of reply and correction in the media is recommended as a mechanism to prevent judicial proceedings to protect honor and reputation<sup>11</sup>, this right is not absolute, as can be inferred from Article 49 para 3 of the Constitution, because in that case it would be subject to the abuse of freedom of information. The Media Law of Montenegro provides for appropriate restrictions to the right of reply and correction, but since the constitutional provision does not refer to possible legal limit, that questions of constitutionality of these Media Law provisions.<sup>12</sup> We therefore hold that the best solution is to remove the entire paragraph 3 of Article 49 from the Constitution, and regulate the issues of the right to correction, reply and the damages in the Law.

Alternatively, the Constitution should provide that the right of correction or response is regulated by law.<sup>13</sup>

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10 See, for example, Article 35 para. 2 of the Constitution of the Republic of Serbia.

11 *Recommendation Rec (2004) 16 of the Committee of Ministers to member states on the right to reply in the new media environment; Resolution (74) 26 on the right of reply.*

12 See Chapter VI of the Media Law, *Official Gazette of MNE*, No. 51/2002, and 62/02, *Official Gazette MNE* 46/10.

13 As provided under Art. 50 para 3 of the Serbian Constitution and Art. 42 para 3 of the Constitution of Kosovo.

*Comparative law:*

*The Constitution of the Republic of Serbia* does not guarantee the right to damages for publishing false information; Art. 50, para. 3 (Freedom of the Media) provides that the exercise of the right to correct false, incomplete or inaccurately transmitted information resulting in violation of others' rights or interest and the right to reply to published information is regulated by law.

*The Constitution of the Republic of Croatia* does not guarantee the right to damages for publishing false information. Art. 38, para. 5 guarantees the right to correction to a person whose „constitutional and legal right public has been violated by the public information.”

*The Constitution of the Republic of Slovenia* does not guarantee the right to damages for publishing false information. Art. 40 guarantees the right of correction and reply to information that has caused harm to the interest or right of another person.

*The Constitution of the Republic of Macedonia* also does not guarantee the right to damages for publishing false information, but it guarantees the right to correction and reply in the media (Art. 16, para. 4 and 5).

*The Constitution of the Republic of Kosovo* (Kosovo / UNMIK) also does not guarantee the right to damages for publishing false information, but guarantees the right to correction and reply to inaccurate or incomplete information, if violated the right or interest in accordance with the law (Art. 42 , para. 3).

*The Constitution of Bosnia and Herzegovina* directly implements the rights and freedoms guaranteed by the European Convention on Human Rights, and, with regard to this, only states, among other rights, the right to freedom of expression.

*The Constitution of Bulgaria* does not contain a guarantee of damages nor the right of correction or reply.

*The Constitution of Romania* stipulates that civil and criminal liability of the media in the sphere of public information be regulated by law (Article 30).

## 2. REFORM PROPOSAL OF THE CRIMINAL CODE OF MONTENEGRO (CHAPTER XVII: CRIMINAL OFFENCES AGAINST HONOUR AND REPUTATION AND ART. 28-30)

Freedom of expression, one of the essential foundations of a democratic society, in accordance with Article 10 of the *ECHR*,<sup>14</sup> may be limited with the legitimate aim of protecting the reputation and rights of others, only to the extent necessary in a democratic society. In its practice, establishing minimum European standards, the European Court of Human Rights continuously stresses that Article 10 of the *Convention* protects not only ideas and information that are considered reasonable, inoffensive and absolutely accurate, but also those that offend, shock or disturb,<sup>15</sup> or are somewhat inaccurate and incomplete, but in the public interest, given under certain circumstances and without ill intent.<sup>16</sup>

Also, the European Court has repeatedly emphasized that States parties should resort to criminal liability for publishing false information only in extreme cases,<sup>17</sup> also emphasized by the Council of Europe Parliamentary Assembly in its 2007 resolution „*Towards Decriminalization of Defamation*”.<sup>18</sup> Therefore, the provisions of the Criminal Code of Montenegro regarding the criminal offenses against honor and reputation deserve to be reexamined in terms of compliance with the standards of the Council of Europe, *European Convention on Human Rights and Fundamental Freedoms* and views expressed in the decisions of the European Court of Human Rights, responsible for interpreting the *Convention*.<sup>19</sup> This in particular because any restriction of freedom of expression must be closely interpreted, and necessity of any restriction must be credibly established<sup>20</sup>.

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14 Law Amending the Law on Ratification of the *European Convention on Human Rights and Fundamental Freedoms*, Official Gazette (International Agreements), 5/05.

15 Inter alia: The judgment *Handyside*, 1976, para 49.

16 E.g. *Lepojić v. Serbia*, 2007, *Bladet Tromso and Stensaas v. Norway*, 1991.

17 *Cumpana and Mazare v. Romania*, 2004, para 115.

18 *Resolution 1577 (2007) Towards decriminalization of defamation*.

19 *European Convention on Human Rights and Fundamental Freedoms*, Art. 32 (Court Jurisdiction).

20 For example, *Lingens v. Austria*, 1986, para 41, *Sunday Times v. UK*, 1979.

With this in mind, the working group of Human Rights Action proposes:

- a) complete decriminalization by deletion of all criminal offenses against honor and reputation, provided for in Chapter XVII of the CC (Art. 195, Insult; Art. 196, Defamation; Art. 197, Spreading information about private and family life; Art. 198 Damaging the reputation of Montenegro (flag, emblem , anthem); Art. 199 Damaging the reputation of people, minority groups and other minority ethnic groups; Art. 200 Damaging the reputation of a foreign state or international organizations), including Art. 28-30, Special provisions on criminal liability for crimes committed through the media, providing for the Liability of editors and Liability of publishers, printers and manufacturers.
- b) In case of refusal of full decriminalization of all criminal offences of this Chapter of the CC of Montenegro, Human Rights Action particularly advocates for deletion of criminal offences from Art. 195, Art. 197, Art. 198, 199, 200, and Art. 28-30 of the CC.
- c) In case the proposal for decriminalization is rejected, it is necessary to align the formulations of criminal offenses under Chapter XVII with the European standards established in the jurisprudence of the European Court of Human Rights.
- d) We propose new criminal offences: *Prevention of journalists in performing professional duties* (Article 179 a) and *Assault on journalists in the performance of professional duties* (Article 179 b), in order to level the protection of public officials and journalists on duty.

## 2.1 *The proposal to fully decriminalise criminal offences under Chapter XVII of the CC of Montenegro: criminal offences against honor and reputation*

### 2.1.1 *Reasoning for decriminalisation*

Generally, criminal laws exist to punish objectively socially dangerous acts that harm society as a whole, such as murder, assault, theft, fraud, inciting of violence and hatred and the like. Basic means and measures of criminal law is punishment, whose application leads to the violation and restriction of freedoms and rights of the convicted person. Even the threat of punishment is a restriction of freedom. In this regard, the application of penalties and criminal repression is justified only when all other possibilities for providing adequate protection are exhausted. The legitimacy of prescribing behavior as a crime requires prior verification of fulfillment of these requirements, particularly of the criminal repression as last resort (*ultima ratio*), legitimate and justified only in such cases. Therefore, saying something bad, even if it were incorrect, about someone else, which is the essence of criminal acts of Insult and Defamation and other acts under Chapter XVII, simply does not belong to that category of social risk, nor does it provide legitimacy to the criminal repression. Journalists, NGO activists, artists and others who publicly express their position in a democratic society, not protected by immunity as MPs are, should not be condemned as criminals. Criminal liability for defamation and insult comes from an age when people fought each other in duels for harm to honor and reputation. There is no need in the XXI century for the law to remain stuck in a time when the prison sentence as a method of solving problems of honor and dignity was considered a progress in comparison to murder. This does not mean that the honor and reputation are not values that require protection. However, we find it absolutely unnecessary to protect those values by criminal law, as they have already been protected enough by the civil sanctions.

Below we present in more detail the following reasons in favor of decriminalization:

- a) inability to clearly and precisely define the crimes;
- b) availability of milder, alternative solutions;
- c) disproportion of punishment due to double prosecution and sanctioning in criminal and civil proceedings;

- d) the offender is considered to be convicted of a crime;
- e) comparative practices and attitudes of international bodies for the protection of human rights in favor of decriminalization.

a) *Inability to clearly and precisely define the crimes*

The subjective nature of the crimes of Insult, Defamation and Spreading information about private and family life, makes it difficult to define the notion of these crimes by the law, and that their definitions are inevitably too general and allow for arbitrary interpretation by courts, which is not in accordance with the principle of *nulla poena sine lege certa*, stating that imprecise norm be avoided as much as possible (*certus-precise*), also accepted by the European Court of Human Rights.

In order for the limit of the rights guaranteed by the *European Convention on Human Rights and Fundamental Freedoms* („*Convention*”) to meet a condition „to be prescribed by law”, it is not enough that the state only formally adopts the law with restrictions, the law must meet certain standards as well. The law must be predictable and precise enough to give citizens the ability to predict what shall be considered a criminal offense, so as to regulate their behavior in accordance with it. Thus, an individual must be able to predict the consequences of certain behaviors to the extent that is reasonable in the circumstances.<sup>21</sup> In this regard, the Resolution of the Parliamentary Assembly of the Council of Europe „*Towards decriminalization of defamation*” specifically states that a state should „precisely define the notion of defamation in its laws, to avoid arbitrary application of the law”<sup>22</sup>. Provision that does not even in a general way specify behavior that is defined as a criminal offense can not meet the quality standards under Article 10 of the *ECHR*.

*Article 195, Insult*

The problem of imprecise formulation of an action of crime execution is particularly evident in the crime of Insult, where the wording „a person who offends others” practically does not define one characteristic of this crime. In practice and theory an insult is considered to be a statements or

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21 Judgments of the ECtHR *Rekvenyi v. Hungary*, 1999, para 34; *Hashman and Harrup*, 1999, *Amann v. Switzerland*, 1999.

22 *Resolution 1577 (2007) Towards decriminalization of defamation*.



behavior that *belittles* or *discredits* another person, the terms subject to very subjective assessment, and therefore arbitrary interpretation particularly unacceptable in the criminal law.

Namely, a particular behavior or statements may be offensive to one person, and not to another (for example, one may be offended by being called a womanizer, gay, lazy person, former member of the Communist Party, etc, while someone else might not). In such situations, where initiating a criminal proceeding for defamation, it should be determined whether the offender acted with the intent to discredit, which is inconsistent with the legal description of the execution of this crime, because the law does not stipulate the existence of intent in this crime.

However, if this intent is not to be assessed, a person would be punished for defamation on the basis of personal feeling of the offended person to whom the statement relates, which is contrary to the principle of individual subjective responsibility (principle of guilt). All this leaves too much room for arbitrary interpretation of the law by a court, which is contrary to the principle of guilt (*nulla poena sine culpa*). The principle of legality in criminal law exists to prevent arbitrary punishment on the basis of uncertain law, determines the position of a person and limits of his free action and represents a guarantee for the exercise of freedoms and rights.

In addition, apart from the approach in theory and case law that insult is committed with the intention to discredit or humiliate, such intent is not required for the criminal offence of Insult. Therefore, it is theoretically possible that a person acted in good faith, without any intent to discredit, but that the court nevertheless finds that he „offended” another person and convicts him of this crime. In addition to opposing the principle of guilt, this view is also inconsistent with the views set out in the practice of the European Court of Human Rights, which always makes sure that the person whose freedom of expression is limited in order to protect someone’s right to protection of honor and reputation, acted in good faith - *bona fidae*.<sup>23</sup>

The provision in paragraph 4 Article 195 of the Criminal Code stipulates that a person 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*

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23 E.g, *Prager and Oberschlick v. Austria*, 1995, para 37.

*which the statement is expressed or other circumstances indicate it is not done on the grounds of discrediting a person.* This provision is also not precise enough and allows extensive and arbitrary interpretation. Specifically, the first condition, which excludes unlawfulness and the existence of the crime, includes certain activities through which a criminal offense of defamation may be committed. In addition, it is unclear on what criteria the court should determine that it is a „serious criticism” in a scientific, literary or artistic work, and whether the offenses has been committed while performing these activities. It is unclear why the illegality is excluded if the insult has been committed in the performance of official duties, as well as what are the official duties in question, and so on.

Thus, the subjective nature of the criminal act of Insult and inaccuracy of the provision of the Criminal Code which does not describe the action of that act, not even in a general way, as well as the inability to specify the action without being superficial, represent special reasons why this offense should be decriminalized.

The rule of *nulla poena sine lege certa* states that imprecise norms should be avoided as much as possible (*certus-precise*). It is true that the CC contains other incriminations, which also do not describe the action of the crime (for instance: Murder). However, despite the fact that this is the crime prosecuted ex officio and its legitimacy can not be questioned, as opposed to Insult, the consequences of such crimes are obvious and clearly visible, and every person can simply adjust their behavior in a way that will not cause this effect, which can not always be said of the criminal offense of Insult. It is undisputed that the criminal offense of Insult limits the right to freedom of expression. Since the Criminal Code does not describe the act of committing this crime and since the consequence of this crime is not visible as in some other crimes, it would seem that the court has a lot of room left for an arbitrary assessment of the necessity of restricting freedom of expression.

The crime of insult is executed, as a rule, by making value judgments, and it is known that the European Court of Human Rights has found a violation of freedom of expression in several cases because of the imposition of criminal sanctions for stating value judgments, especially if they are based on confirmed and undisputed facts (e.g. *Lingens v. Austria*).

All these reasons, along with the reasons and arguments that follow and relate to the crime of Insult and crime of Defamation, certainly justify the

effort to decriminalize Insult, even if the proposal for full decriminalization of all the provisions of Chapter XVII is rejected.

### *Article 196, Defamation*

Unlike the criminal acts of insult, CC describes the act of committing the crime of defamation as speaking or transmitting untrue information about someone, *that may harm his/her honor and reputation*, emphasizing the subjective nature of this crime as well, subject to various arbitrary interpretations, as stated above.

Unlike the criminal act of Insult, falsity of what is stated or transmitted is the main feature of the crime of Defamation. The burden of proof is particularly problematic, since the defendant has to prove the truth of his allegations or that he had reasonable grounds to believe the veracity of his statements (paragraph 4). The European Court of Human Rights in some of its decisions criticized shifting the burden of proof onto the defendant, finding that the prosecutor is apparently in a better position to prove that something is untrue, and that the obligation of proving the truth of one's statements may be a violation of Article 10 of the Convention (for example, *Lingens v. Austria*). Shifting the burden of proof from plaintiff to defendant has been criticized by the special rapporteurs and representatives for the freedom of expression of the United Nations, Council of Europe, the Organization for Security and Cooperation, the Organization of American States and the African Commission on Human and Peoples' Rights<sup>24</sup>, as well as the participants of the 2003 OSCE conference in Paris, stating that shifting the burden of proof represents unacceptable deviation from the general principle of the presumption of innocence, based on which the plaintiff bears the burden of proof.<sup>25</sup>

According to the solution from the CC, even if to prove the truth of his allegations or that he had reasonable grounds to believe the veracity of his allegations, the defendant may still be punished for defamation. This solution particularly threatens the right to freedom of expression,

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<sup>24</sup> Joint Declaration „Ten key challenges to freedom of expression in the next decade,” Washington, 2 February 2010: <http://www.article19.org/pdfs/standards/tenth-anniversary-joint-declaration-ten-key-challenges-to-freedom-of-express.pdf>.

<sup>25</sup> *Ending the Chilling Effect - Working to Repeal Criminal Libel and Insult Laws*, OSCE Representative on Freedom of the Media, Paris, 2003: [http://www.osce.org/publications/rfm/2004/06/12242\\_100\\_en.pdf](http://www.osce.org/publications/rfm/2004/06/12242_100_en.pdf).

discouraging people to make statements for whose authenticity they have solid evidence and whose authenticity is checked, and all for fear that they may be prosecuted and convicted, even in this case.

Also, in addition to stating something false, CC prescribes the transmission of something false as the act of committing the crime of defamation. This enables the criminal conviction of a person who uses or transmits information already available to the public or easily accessible to the public. The European Court of Human Rights found a violation of Article 10 of the *Convention* in the case where two journalists got sentenced for publishing information about financial and tax situation of the head of a big company, although such information was already available in public tax books (*Fressoz and Roire v. France*, 1999), and in the case where journalists and activists for environmental protection got convicted for threatening the confidentiality of judicial investigations at a press conference where the facts were already available to the public even before the press conference (*Weber v. Switzerland*, 1990).

#### b) *Availability of lighter, alternative solutions*

The crimes of defamation and insult restrict the freedom of expression. The fact is that the European Court has never ruled that the very existence of these crimes is incompatible with the right to freedom of expression, but it has repeatedly stressed that states should make use of criminal measures to limit free speech just as the last remaining solution and that criminal sanctions should be applied only to maintain public order, and not in private conflicts, that the majority of defamation cases is (*Castells v. Spain*). Further, in order to justify the limit of freedom of expression, it must be absolutely necessary, which means that there is not any other milder solution available. The prosecution and conviction may be considered proportional only in exceptional circumstances of serious attacks on individual's rights. For example, in its recent decision in the case *Gavrilovic v. Moldova*, the European Court stated:

„The Court recalls that imposing criminal sanctions on someone who exercises the right to freedom of expression can be considered compatible with Article 10 ... only in exceptional circumstances, notably where other fundamental rights have been seriously impaired ...”<sup>26</sup>

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26 Judgment of 15 December 2009, para. 60.

Similarly, in *Bodrožić and Vujin v. Serbia*, the Court found:

„Recourse to criminal prosecution against journalists for purported insults raising issues of public debate, such as those in the present case, should be considered proportionate only in very exceptional circumstances involving a most serious attack on an individual's rights.”<sup>27</sup>

The European Court of Human Rights does not support the imposition of prison sentences for insult or defamation, except in the case of hate speech or incitement to violence.<sup>28</sup> Parliamentary Assembly of the Council of Europe called all the member states to delete prison sentences for defamation in case their laws still provide it, regardless of whether they are applied in practice or not.<sup>29</sup> Although the previous reform of the Criminal Code in principle excluded prison sentence for criminal offenses against honor and reputation, except for criminal offense Damaging the reputation of Montenegro, there is still a realistic danger in Montenegro that a person convicted of any of these crimes spends some time in prison, if s/he does not pay the fine by a deadline set in the verdict.<sup>30</sup> The case of Milorad Mitrovic, president of the Ecological Society „Breznica” proves that this danger is not just theoretical, whose fine of 5,000 Euros has recently been replaced by imprisonment.<sup>31</sup> The very possibility of serving prison sentences for these crimes, in the opinion of the European Court of Human Rights, has the effect of censorship and is especially discouraging for freedom of expression.<sup>32</sup>

In *Cumpăna and Mazare v. Romania*, the Grand Chamber of the European Court explained that the exceptional circumstances that could justify the imposition of sentence could include „cases of hate speech or incitement to violence”.<sup>33</sup> Also, in 2004 the Committee of Ministers of the Council of Europe called on member states to abolish the prison sentence in all cases

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27 Judgment of 23 June 2009, para. 39.

28 *Cumpăna and Mazare v. Romania*, 2004, para. 115; *Długolecki v. Poland*, 2009, para 46.

29 *Resolution Towards Decriminalization of Defamation*, item 13, 2007.

30 Art. 39, para 6, Criminal Code, *Official Gazzette of Montenegro*, No. 70/2003, 13/2004, 47/2006 and *Official Gazzette of Montenegro*, No. 40/2008.

31 „Mitrovic returns to ZIKS”, *Vijesti*, 11 November 2010.

32 *Bodrožić v. Serbia*, 2009, para 58; *Bodrožić i Vujin v. Serbia*, 2009, para. 40-41; *Długolecki v. Poland*, 2009, para 46.

33 Judgment of 17 December 2004, para. 115; See, e.g., *Mahmud and Agazade v. Azerbaijan*, para. 50

except the most extreme ones of hate speech.<sup>34</sup> This means that, unlike defamation and insult, the imposition of prison sentences for offenses such as inciting of racial, religious and other hatred, which exists in our Criminal Code, is quite acceptable. Human Rights Action does not advocate for decriminalization of those crimes, but on the contrary, we advocate for their consistent application. The fact that such crimes exist in our CC is yet another reason for the abolition of criminal offenses against honor and reputation, which are not hate speech.

The legal system of Montenegro protects the honor and reputation through civil action for damages, which means that there is always a milder alternative to criminal sanctions. In this regard, in addition to the above issue of the legitimacy of criminal protection, it should be noted that the ECtHR on several occasions pointed out that the imposition of criminal sanctions for speech, while other alternatives are available (litigation, civil procedure), means a violation of Article 10 of the *Convention*. For example, in *Mahmud and Agazade v. Azerbaijan*, the Court took into account that the imposed punitive measure „is undoubtedly very strict, especially keeping in mind that milder alternative options existed in domestic law” (para. 50). In *Liashko v. Ukraine*, the Court held:

„The dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, *particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.*”<sup>35</sup>

In many other recent cases the European Court has held that civil law remedies for defamation take precedence over criminal sanctions.<sup>36</sup> For example, in the case *Raichinov v. Bulgaria*, the Court stated:

„the assessment of the proportionality of an interference with the rights protected thereby will in many cases depend on whether the authorities could have resorted to means other than a criminal penalty, such as civil and disciplinary remedies”<sup>37</sup>

This in itself leads to the inescapable conclusion that criminal defamation laws, if used when suitable civil law alternatives are available, violate the right to freedom of expression.

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34 *Declaration on freedom of political debate in the media*, 2004.

35 Application No. 21040/02, Judgment of 10 August 2006.

36 See, e.g., *Fedchanko v. Russia*, 2010; *Krutov v. Russia*, 2009; *Lombardo and others v. Malta*, 2007.

37 Judgment of 20 April 2006, para 39.

c) *The possibility that civil and criminal trials run side by side for the same offence, and the possibility to have two sanctions imposed*

According to current legal solutions in cases of insult and defamation it is possible to have two separate proceedings, as most often happens in practice. Starting from the prescribed range of fines for such offenses (for insult 1,200.00 to 4,000.00 €, and for defamation 3,000.00 to 14,000.00€), and unlimited amounts that may be imposed in a civil action for compensation of non-pecuniary damage, it is almost certain that the total amount in any case will be disproportionate and excessive by the standards of the European Court of Human Rights.<sup>38</sup>

Also, there is the question of justification of supplying the state budget with funds from the collection of penalties for criminal offenses of Defamation, Insult and Stating information from private and family life. These acts are prosecuted by private action. Regarding the total number of incrimination, the number of crimes that are prosecuted by private action is very low. The reason for this is in their nature, because these crimes primarily, or exclusively, insult personal interest rather than broader social interest, as the crimes that are prosecuted ex officio. So, bearing in mind the personal nature of the protected interest and disinterest of the state to prosecute for these crimes, it is difficult to find reasonable grounds for state's „interest” that the fines imposed in those proceedings be paid to the state budget. When we bring this option in connection with the possibility of damages in civil proceedings, and we add the obligation to pay the costs of both procedures (which, due to the inefficiency of the courts, often exceed the amount of fines and damages), it is almost certain that every criminal conviction could be qualified as a violation of freedom of expression. Also, it is safe to say that the penalties for these crimes, prosecuted by private action, have predominantly retributive character since the penalties are paid to the state budget and do not represent any sort of satisfaction to the victim.

d) *The offender is considered to have been convicted of a crime*

Also, one of the reasons for decriminalization of defamation and insult is the fact that the sentence for this offense remains in the criminal records and a person is considered to have been convicted. That fact in

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<sup>38</sup> Eight average monthly salaries in *Lepojić v. Serbia*, 2007, i.e. six net monthly salaries of the defendant, were held disproportionate in the case *Filipović v. Serbia*, 2007.



itself has stigmatizing effect on that person, and may have other negative consequences, for example, in employment, although these are less serious offenses, a result of issues that are not of general importance and where the state has no interest in taking prosecution of those crimes. In this respect the European Court of Human Rights has held that the imposition of even very mild criminal penalty means that the person has a criminal record and has a chilling effect on the media.<sup>39</sup>

e) *Comparative practice and recommendations by international bodies*

Nine European countries have fully decriminalized defamation and insult to date: Ireland, United Kingdom (UK), Bosnia and Herzegovina, Romania (decriminalized insult), Estonia, Georgia, Ukraine, Cyprus and Moldova. Globally, defamation and insult are decriminalized in some USA states, Ghana, Sri Lanka, Maldives, New Zealand and Mexico. Most EU member states have long ago ceased to apply the criminal acts of defamation and insult.<sup>40</sup>

In December 2008 French President Nicolas Sarkozy announced forming of a special committee to examine proposals for the abolition of criminal defamation.<sup>41</sup>

UN Special Rapporteur on freedom of opinion and expression, OSCE Media Freedom Representative and the Special Rapporteur of the Organization of American States, in 2002 joint statement<sup>42</sup> reported that criminal liability for defamation and insult is not justified limitation on freedom of expression and that those offenses should be abolished and replaced by civil liability. In 2007 their position was supported by the European Commissioner for Human Rights, which then asked the member States to immediately declare a moratorium on the application of penal codes in this area.

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39 *Dabrowski v. Poland, Dlugolecki v. Poland*, 2009.

40 Statement by Mr. Harashty, OSCE Freedom of Media Representative (OSCE media freedom representative welcomes Ireland's decriminalization of defamation, calls for crime of 'blasphemy' to be abolished, <http://www.osce.org/item/42301.html>).

41 *Nicolas Sarkozy calls for French libel reform*, 11 December 2008, <http://www.pressgazette.co.uk/story.asp?storycode=42654>.

42 *JOINT DECLARATION by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression*, [http://www.osce.org/documents/rfm/2002/12/190\\_en.pdf](http://www.osce.org/documents/rfm/2002/12/190_en.pdf).



Also, the UN Human Rights Committee has often commented on criminal defamation laws, commending their abolition where it happened,<sup>43</sup> calling for „the review and reform of laws relating to criminal defamation”<sup>44</sup> and expressing serious concern over the possibility of abuse of criminal defamation law, in particular when expressing the matters of public interest.

Regarding Montenegro, it is important to recall the recommendations we received from the Member States of the UN Council on Human Rights Working Group, in „*Universal Periodic Review*”, which also relate to the decriminalization of defamation and insult.<sup>45</sup>

### 2.1.2. *Specific reasons for decriminalization of the criminal act of Stating and transmitting information from family life (Art. 197)*

In addition to already mentioned arguments in favor of the decriminalization of insult and defamation, it should be noted that Article 197 provides a special form of insult, given that the existence of the criminal act of Stating and transmitting information from family life requires that the information stated or transmitted *might harm the honor and reputation*, while its truth or falsity is insignificant. We therefore hold that the nature of this crime, too, is extremely subjective, and that the above-mentioned reasons speaking of the impossibility of precise and clear definition of the crime are applicable here as well.

At first glance it seems that this incrimination protects the right to privacy. However, this offense is classified in the group of offenses against honor and reputation, insisting that what is stated or transmitted might harm

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43 Concluding remarks on Sri Lanka, 1 December 2003, CCPR/CO/79/LKA, st. 17.

44 For example, Conclusions in relation to Norway, 1 November 1999, CCPR/CO/79/Add.112, para 14.

45 „Adopt urgent measures to ensure that freedom of expression and press freedom are guaranteed in accordance with international standards (Sweden); change the Criminal Code and the Constitution to include international standards of freedom of expression under Art. 19 of the *International Covenant on Civil and Political Rights* (Canada); adopt all necessary measures to ensure that journalists enjoy the freedom to exercise the profession in accordance with international standards (France); examine the laws and public policies so as to decriminalize defamation and insult and take measures to protect journalists (Mexico).”

*Report of the Working Group on the Universal Periodic Review, Montenegro, Conclusions and Recommendations*, item 14, 9 January 2009, [http://lib.ohchr.org/HRBodies/UPR/Documents/Session3/ME/A\\_HRC\\_10\\_74\\_Montenegro\\_E.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session3/ME/A_HRC_10_74_Montenegro_E.pdf)

the honor and reputation, and paragraph 4, as the reason for the release of liability, prescribes the possibility of determining the truth of what is stated or transmitted from the personal or family life, which is completely contrary to the essence of protecting the right to privacy and honor and reputation.

We particularly point out that the right to privacy can be protected under the Law on Obligations (Article 207) in the form of a right to damages for violation of personal rights, and that in the draft reform of the Media Law we have included provisions which regulate the protection of privacy and provide for the right to sue for such infringement.

In case the proposal for decriminalization of criminal acts of Defamation and Insult is not accepted, there shall not be any justified criminal and political reason for prescribing this offense. In fact, any disclosure or transmission of factual allegations from personal or family life that harms the honor or reputation is already protected by the criminal acts of Defamation and Insult. In practice, insult is most often related to personal or family life, and in that case prescribing criminal offense of Stating information from personal and family life seems to be particularly unjustified.

*2.1.3 Specific reasons for decriminalization of the criminal act Damaging the reputation of Montenegro (Art. 198), Damaging the reputation of the people, minorities and other minority ethnic groups (Art. 199), Damaging the reputation of the country or international organization (Art. 200)*

The provisions of the articles whose deletion is proposed prescribe special forms of defamation or insult. However, given the prescribed punishments, especially imprisonment for the crime from Article 198, and that the perpetrators of these crimes are prosecuted ex officio, it is clear that these crimes are more serious in comparison to Insult, Defamation and Stating information from personal and family life. Therefore these criminal acts restrict the right to freedom of expression even more and so all the arguments in favor of the decriminalization of defamation and insult further gain in significance and specifically relates to the need for the decriminalization of these crimes.

The Committee of Ministers of the Council of Europe in its 2004 *Declaration on freedom of political debate in the media*<sup>46</sup> found that the state, the government and other executive, legislative or judicial authorities may be subject to criticism in the media, and that, because of its dominant position, these institutions should not be protected from insult and defamation by the criminal law.

The European Court of Human Rights does not provide a specific level of protection of political and public figures in the country, and also does not provide such protection to foreign heads of states. In the case of *Colombani and Others v. France* (2002) the applicants were convicted of „insulting a foreign head of state” for publishing an article in which, among other things, Morocco has been identified as one of the leading exporters of drugs.

The European Court of Human Rights in this case found a violation of Article 10 of the Convention, stating:

„To confer a special legal status on heads of State, shielding them from criticism solely on account of their function or status, irrespective of whether the criticism is warranted ... amounts to conferring on foreign heads of State a special privilege that cannot be reconciled with modern practice and political conceptions. Whatever the obvious interest which every State has in maintaining friendly relations based on trust with the leaders of other States, such a privilege exceeds what is necessary for that objective to be attained. Accordingly, the offence of insulting a foreign head of State is liable to inhibit freedom of expression without meeting any „pressing social need” capable of justifying such a restriction.” (para. 68, 69).

In addition to the already mentioned arguments concerning the amount of prescribed fines and the possibility of a sentence of imprisonment for the offense under Article 198, and the real possibility of converting fines to imprisonment due to actions that include solely the expression, it is absurd for Article 200 to protect the reputation of foreign countries that Montenegro has diplomatic relations with. It follows that it is permissible to attack the honor and reputation of the countries we do not have diplomatic relations with, which is hypocritical. Similarly, Article 200 para 2 prohibits ridiculing only those organizations Montenegro is a member of, which means it is allowed to ridicule some other organizations (e.g. NATO, etc.) that we aspire to become a member of, which is again a great absurdity. Also, in

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<sup>46</sup> Council of Europe Committee of Ministers, *Declaration on freedom of political debate in the media*, Adopted by the Committee of Ministers on 12 February 2004 at the 872nd meeting of the Ministers’ Deputies.

many countries whose reputation, flag, emblem and anthem are protected by these incriminations, such actions are not prescribed as criminal acts, nor are punitive, so it follows that we care about the reputation of some states more than those very countries.<sup>47</sup>

The UN Human Rights Committee clearly stated that a state does not deserve special protection by the laws on defamation. For example, in its 1999 concluding observations on Mexico, the Committee said that „it criticizes the existence of the criminal act of *defamation of the state*”. Neither the State nor its symbols have feelings and therefore can not be passive subjects of criminal acts infringing reputation. Special rapporteurs and representatives for the freedom of expression of the United Nations, Council of Europe, the Organization for Security and Cooperation, the Organization of American States and the African Commission on Human and Peoples’ Rights share the same opinion. In February 2010 they emphasized once more that all criminal defamation and insult laws are problematic, a traditional threat to freedom of expression, while being particularly concerned about those laws which ensure protection of „public authorities, state symbols and flags or the state as such.”<sup>48</sup> Also, one of the conclusions of the 2003 Rome conference organized by the OSCE Representative for Freedom of Media and the Reporters without Borders was that the state symbols and other objects (flags, religious symbols) should not enjoy either criminal or civil protection from insult and defamation.<sup>49</sup>

As for the crimes Damaging the reputation of the people, minorities and other minority ethnic groups (Article 199), we believe that the existence of the crime is not justified bearing in mind a separate crime of Inciting national, racial and religious hatred (Art. 370), which adequately deals

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47 For example, in the U.S. it is allowed to burn the American flag as a form of protest, protected by the Constitution guaranteed freedom of speech in accordance with the decisions of the U.S. Supreme Court (*Texas v. Johnson*, 1989; *United States v. Eichman*, 1990). German Federal Constitutional Court said that „an attack on national symbols, such as flag and anthem, even if rude or satirical, must be tolerated for the purpose of the constitutional protection of freedom of speech, press and art” (81 FCC 278, 294 (1990) and 81 FCC 298, 308 (1990), cited from the *Freedom of Expression and National Security: The Experience of Germany*, Ulrich Karpen, published a book, *National Security, Freedom of Expression and Access to Information*, Kluwer Law Int, 1999.

48 Joint Declaration „Ten key challenges to freedom of expression in the next decade,” Washington, 2 February 2010, item 2 d) <http://www.article19.org/pdfs/standards/tenth-anniversary-joint-declaration-ten-key-challenges-to-freedom-of-express.pdf>.

49 *Libel and insult laws: what more can be done to decriminalise libel and repeal insult laws?* 24 - 25 November 2003, Paris, [http://www.osce.org/documents/rfm/2003/11/3346\\_en.pdf](http://www.osce.org/documents/rfm/2003/11/3346_en.pdf).

with the protection from inciting and promoting hatred, unlike the vague acts such as „exposure to ridicule”. We believe that this allows for undue, excessive restrictions on freedom of expression, notwithstanding Article 201, which we consider insufficiently precise, given that as a reason for apologizing it is necessary to verify whether the statement has been given within „serious criticism”, and without „intention to discredit” - subjective and imprecise terms subject wide interpretation and inappropriate in determining criminal responsibility.

The above-mentioned special rapporteurs and representatives for the freedom of expression of international organizations UN, OSCE, OAS, BT, highlighted the particular concern over the criminal laws that „allow punishment for insulting a group, outside the narrow framework of inciting hatred.”<sup>50</sup>

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50 Joint Declaration „*Ten key challenges to freedom of expression in the next decade*”, Washington, 2 February 2010, item 2 f) <http://www.article19.org/pdfs/standards/tenth-anniversary-joint-declaration-ten-key-challenges-to-freedom-of-express.pdf>.

## 2.2 *Reform short of full decriminalisation*

In case the proposal for full decriminalization of crimes under Chapter XVII of the CC (offenses against honor and reputation) is rejected, it is certainly necessary to align provisions of the Criminal Code with the European standards. Thus, we propose the following amendments.

### 2.2.1 *Specific provisions on criminal responsibility for criminal acts committed through the media*

#### *Responsibility of the Editor*

##### *Article 28*

(1) For criminal acts committed through the media, an editor, or a person who had replaced him at the time of publication of the information is criminally responsible, if:

- 1) By the end of the main hearing before the first instance court the author has remained unknown;
- 2) The information is published without permission;
- 3) At the time of publishing the information there were actual or legal obstacles to prosecute the author, which are still ongoing.

The editor, or a person who had replaced him, is not criminally responsible if for justified reasons he was not aware of circumstances specified in paragraph 1. Item 1 to 3 of this Article.

#### *Responsibility of publishers, printers and manufacturers*

##### *Article 29*

(1) When the conditions of Article 28 of this Code are met, entities held criminally responsible are:

- 1) publisher - for a criminal offense through regular printed publications, and if there is no publisher or if there are actual or legal obstacles to his prosecution - a printer who was aware of it;
- 2) manufacturer - for a criminal offense committed through compact discs, LPs, tapes and other audio means, the film for public and private viewing, slides, videos or video-related means for a wider audience.

(2) If a publisher, printer or manufacturer is a legal entity or a state authority, a person who is responsible for publishing, printing or production is criminally responsible.

*Use of provisions from Articles 28 and 29*

*Article 30*

The provisions on criminal responsibility of persons under Art. 28 and 29 of this Code apply only if these persons under the general provisions of this code can not be considered to have committed a criminal offense.

*Proposal*

In case the proposal of decriminalization is not adopted, we suggest the deletion of existing provisions of the Criminal Code on criminal responsibility for crimes committed through the media, i.e. Articles 28-30 of the CC.

*Reasoning*

Application of existing provisions of Articles 28-30 of the CC is limited to cases where persons listed in the publication, publishing, printing or production of incriminating contents have not been involved as perpetrators, collaborator, instigators and accomplices in the act, but are the-so-called „usual suspects.”

The existing provisions of Art. 28-30 supersede the general rules of guilt and complicity in criminal acts under the provisions of Art. 26 CC. Deleting Articles 28-30 CC affirms the freedom of information. This does not mean the abolition of media liability for criminal acts, because it does not exclude the responsibility of the editor and other persons covered by a cascading responsibility for criminal acts committed through the media as an accomplice in the criminal offense with the author, but only within their own culpability in terms of art. 26, para 1 CC, a provision which stipulates that the collaborator is criminally responsible within the limits of his intent or negligence and the inciter and the accomplice within the limits of their intent.

The existing provisions on guilt for criminal acts committed through the media under art. 28-30 are in contradiction with the principle of guilt that is laid down in Article 13 of the Criminal Code, because they allow the

editor and other persons responsible for certain deliberate criminal acts, primarily against the honor and reputation, when they do not act with the intention otherwise required for such crimes. This is precisely the main reason why the guilt of the editor and other persons mentioned in the articles cited should be determined according to the general provisions applicable to all perpetrators of crimes. The provisions on guilt of the editor and other persons mentioned in Art. 28-30 CC, when it comes to crimes committed through the media, provoked justified criticism in theory and practice, primarily because this is essentially a criminal liability „transferred” from the executor to another person which does not have the elements of guilt for the execution of the crime, nor can they be transferred from the perpetrator. The so-called cascading responsibility is based on the notion of objective criminal responsibility, which should be avoided in modern criminal law. In this sense, a good example of legislation from the countries in the region is the Criminal Code of the Republic of Croatia, with the provisions of objective responsibility removed from it.

As for the responsibility of editors and publishers, the existing Article 30 of the Criminal Code provides for liability on the basis of Art. 28-29 only when they can not be held liable under general rules of liability for such crimes (in other words, even if it did not have any editorial control over the content). Although according to case law of the European Court of Human Rights it is common that editors and publishers are held liable for defamation, Article 30 creates a legal fiction, by which even when it is obvious that the editor can not be brought into connection with the committed defamation, he still may be criminally charged. Prescribed solution imposes criminal liability to someone who had nothing to do or had minor connections to the criminal offense. This is absolutely unacceptable as a basis for criminal liability, since according to the general rules of criminal law, criminal liability exists only if there is a *mens rea* (which means that the person intended to commit that offense, i.e. acted intentionally) or acted negligently (which means that the person understood that the actions taken have the effect of a criminal offense).

The objective criminal responsibility of editors, publishers, printers and manufacturers can not stand the test of common European standards that limitation of freedom of expression in each case must be „necessary in a democratic society”, i.e. that a „pressing social need”<sup>51</sup> must be determined,

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51 E.g., *Observer and Guardian v. UK*, 1995.



and that states should show restraint in resorting to criminal liability, especially where there are other available alternatives for compensation.<sup>52</sup>

Bearing in mind the advanced printing technology, i.e. that the hand-stacking - print is long obsolete, as well as the fact that printers typically have no knowledge about the content of printed material, it is generally accepted that printers and manufacturers should not be responsible for the content of the print and products (whether those be books, CDs or other forms of printed material). Similar argumentation is accepted regarding the responsibilities of those who provide Internet services, and thus the responsibility of printers and manufacturers is unacceptable.

### 2.2.2 *Insult*

#### *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.

#### *Proposal*

In paragraph 1, the words: „... from one thousand and two hundred to four thousand euros...”, replaced by the words „...up to one thousand and five hundred euros...”.

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<sup>52</sup> *Castells v. Spain*, 1992.

In paragraph 2, the words: „...from three thousand to ten thousand...”, replaced by the words „...up to three thousand euros...”.

Paragraph 3 and 4 are amended to read:

(3) The offender shall not be punished for the criminal offense referred to in paragraph 1 above if the statement is made as a part of scientific, literary or artistic work, public information, in performing official duties, political or other public or social activity, in the newspaper business, in defending the rights, unless all the circumstances indicate that it is a random personal attack.

(4) A journalist and editor shall not be punished for the criminal offense referred to in paragraph 2 above, for authentically transmitted offensive content which relates to matters of public interest, if clearly indicated the source from which the content is transmitted, so that Article 195 reads:

*Insult*

*Article 195*

(1) Anyone who insults other person shall be punished by a fine in the amount of up to € 1.500.

(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 up to € 3.000.

(3) The offender shall not be punished for the criminal offense referred to in paragraph 1 above if the statement is made as a part of scientific, literary or artistic work, public information, in performing official duties, political or other public or social activity, in the newspaper business, in defending the rights, unless all the circumstances indicate that it is an arbitrary personal attack.

(4) A journalist and editor shall not be punished for the criminal offense referred to in paragraph 2 above, for authentically transmitted offensive content which relates to matters of public interest, if clearly indicated the source from which the content is transmitted.

## *Reasoning*

### *Reducing the amount of fines prescribed*

Prescribed amount of fines should be significantly reduced so as to prevent the imposition of fines that would be well above the statutory minimum fines under Article 39, paragraph 2 of the Criminal Code (1.200,00 €). This in particular because the civil proceedings provides for damages, and the European Court of Human Rights in its practice on several occasions found which amounts of compensation shall be deemed disproportionate restriction of freedom of expression in order to protect the honor or reputation (*Lepojić v. Serbia*, 2007, *Filipovic v. Serbia*, 2008: eight, or six-monthly salaries of the defendant was held disproportionate).

Prescribing maximum fines in the amount of 1.500,00 € would allow the punishment for these crimes in any case be lower than 4 the average net salaries in Montenegro, which is still a significant amount, given that it is a less serious act prosecuted by private action. Also, it is important to keep in mind that the amounts of fines imposed in criminal proceedings shall be borne by the perpetrator of the criminal acts of defamation or insult, but paid to the state budget. The amount of fines is not, nor can it represent any satisfaction to the injured party for breach of honor and reputation, but it shows only as a kind of retribution by the state for acts that the state has no interest to prosecute (state prosecutor does not prosecute this crime *ex officio* ), which is in itself an absurdity. So, in case the decriminalization of the criminal act of Insult is rejected we see no valid reason that the maximum fine exceeds the amount of 1.500,00 €.

It should be noted that the law does not allow the imposition of a suspended sentence for this offense, because the basic condition for imposing a suspended sentence is imposing a sentence to two years in prison, and imprisonment is not prescribed for crimes against the honor and reputation. It is indisputable that the suspended sentence is milder than a fine, mainly because it is not a punishment but a measure of warning for minor offenses. Defamation and insult are undoubtedly less serious offenses, so it seems illogical that the suspended sentence is imposed in practice for more serious criminal acts, those prosecuted *ex officio* (i.e. in the practice of Montenegrin courts often for the crime Serious bodily injury), while large fines are imposed for defamation and insult. So, for more serious criminal offenses only cautionary measure are often imposed, while for less serious

offenses (Defamation and Insult) a sentence is always imposed, which is, quite simply, unfair in relation to the general purpose of imposing criminal sanctions.

Further, the provision of Article 42 of the Criminal Code lays down general rules on sentencing and following mitigating and aggravating circumstances which the court takes into consideration when sentencing: the degree of guilt, the motives for the crime committed, the degree of danger or injury to the protected goods, the circumstances under which the act is done, the past of the offender, his personal circumstances, his conduct after the perpetration of the crime, and especially his relationship with the victim of the criminal act and other circumstances related to the offender. It is also provided (paragraph 2) that the court shall take into account the financial status of the offender when imposing a fine. In determining fines for crimes of defamation and insult the Montenegrin courts are not taking into account the circumstances prescribed in Article 42 of the CC, especially the financial status of the offender (e.g., deputy editor of daily „Dan” in 2007 was fined with 14,000.00 €, and the president of the Ecological Society „Breznica” with 5,000.00 €, and the penalty for non-payment within the deadline is replaced by imprisonment). Such practice of courts further justified the proposal to delete the minimum and reduce the maximum of fines prescribed.

#### *Amendments to paragraphs 3 and 4 - excluding unlawfulness*

Amendments in paragraph 3 and 4 prescribe cases of impunity for crime, i.e. the exclusion of illegality and lack of criminal acts of insult, in an effort to harmonize the wording with the standards of the European Court of Human Rights, which has frequently found violations of freedom of expression for sanctioning offensive opinions. Those amendments, inter alia, stipulate that the perpetrator of the criminal act of insult shall not be punished if the insult is not an „arbitrary personal attack”, which is a standard in the European Court caselaw, explained in detail below (p. 32-33).

Ratio legis of current Article 195, paragraph 3 of the CC (the possibility of exemption from punishment in cases where the offended responded to the offense) concludes that the offender shall not be punished in the case of insult also provoked by an insult. Therefore, the court has the possibility of impunity in the case of the so-called retorsion insults. Such provoked insults can not be considered an *arbitrary personal attack*, and a solution

proposed covers such situations. If it is not an arbitrary personal attack, then it is much more reasonable to deem that there is no criminal offense, which is also more favorable for the perpetrator (since, if contrary, a criminal offense does exist and the offender is considered to have been convicted).

Formulation „under severe criticism” is omitted because it is a completely inaccurate standard and it is unclear based on which criteria the court should conclude that a particular case is a „severe criticism” given in the scientific, literary or artistic work. For example, satirical cartoons, protected in the practice of the Court in Strasbourg, may not be considered „serious criticism” (*Karatas v. Turkey*, 1999, para. 50-54, *Bergens Tidende and Others v. Norway*, 2000, para. 57; also, see the *Declaration on freedom of political debate in the media*, item 553).

Current wording of the paragraph 4 is left out „if the manner in which the statement is expressed or other circumstances indicate it is not done on the grounds of discrediting a person” and changed into „unless all the circumstances indicate that it is a random personal attack”. The most recent valid solution proves to be contrary to European standards, because the emphasis is on „mode of expression”. In this regard, we point to the caselaw of the European Court of Human Rights, protecting the offensive, hyperbolic and satirical way of expression (*Lopes Gomes da Silva v. Portugal*, 2000, para. 34-36, *Oberschlick, no. 2 v. Austria*, 1997, paragraphs 33-34, and the above cited cases *Bergens Tidende* and *Karatas*), and so the current wording does not guarantee that such speech shall be protected in the practice of Montenegrin courts.

In addition to these reasons, insult and defamation are related offenses, whose distinction in practice is often accompanied by difficulties, particularly with regard to the question of whether it is a factual statement, whose authenticity is proved, or value judgment, whose authenticity could not be verified. Therefore, in case the defamation and insult are still being prescribed as a criminal offense, a better legal solution would be to prescribe the basis that exclude the unlawfulness and the existence of these criminal acts in special provisions, as proposed in the amendment in paragraph 3 and 4 of Article 195 and paragraph 3 and 4 of Article 196, in a way that will be closer to European standards.

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53 Committee of Ministers of the Council of Europe, 2004: <https://wcd.coe.int/ViewDoc.jsp?id=118995&Lang=en>.

„Arbitrary personal attack” - instead of „lack of intention to discredit”

The requirement that an insult is not an arbitrary personal attack is a standard from the caselaw of the European Court of Human Rights, which holds that it is not an arbitrary personal attack when the author of the statement gives an objective explanation for it, or, when such a response was provoked by previous speech or conduct of the prosecutor:

„In the Court’s view, the applicant’s article, and in particular the word Idiot, may certainly be considered polemical, but they did not on that account constitute a gratuitous personal attack as the author provided an objectively understandable explanation for them derived from Mr. Haider’s speech... It is true that calling a politician a Trottel in public may offend him. In the instant case, however, the word does not seem disproportionate to the indignation knowingly aroused by Mr. Haider.” (*Oberschlick, no. 2 v. Austria*, 1997, paragraphs 33-34).

In *Lopes Gomes da Silva*, where a candidate in local elections has been called „grotesque”, „buffoon” and „boore”, the European Court held that the manner of expression, although sharp, was not excessive ”gratuitous personal attack”, but an acceptable response to the provocative speech of the candidate. The Court pointed out that the „political discussions often spill over to a private sphere”, but that this is a danger implied by the very nature of politics and the free exchange of ideas.<sup>54</sup>

So when an opinion has factual basis and objective explanation, then we can talk about arbitrary personal attack. In this regard, it should be noted that the factual basis and objective explanation in this case can not and should not be considered as proving the truth of opinions and value judgments. In deciding whether an arbitrary personal attack or not, it should be noted that when it comes to journalists and discussion on matters of public interest, freedom of expression includes the possibility of resorting to exaggeration or even provocation (*Prager and Oberschlick v. Austria*, 1996, para 38).

Also, bearing in mind that the Criminal Code in the Art. 39, paragraph 7 provides that the unpaid fine amounting to € 2.000, instead of imprisonment, may be replaced with the punishment of community service, reducing the maximum fine to the amount proposed would enable the convicts who do not have the funds to pay a fine to perform community service, instead of going to prison, which would be in line with European standards, as explained on page 27.

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<sup>54</sup> *Lopes Gomes da Silva v. Portugal*, 2000, paragraphs 34-36.

### *„Intention to discredit”*

Otherwise, for the criminal acts of insult by the current solution, the existence of intent of the perpetrator is not necessary. In other words, the intention is not a subjective element of this crime, because the legal description of the act does not contain it. The current paragraph 4 of Article 195 excludes unlawfulness in some cases, with the condition of absence of perpetrator's intent to discredit. So, for committing the crime of insult to the existence of intent to discredit is not necessary, while the absence of that intent represents the requirement for the exclusion of unlawfulness in cases referred to in paragraph 4, which is contradictory and illogical.

In addition, the intention of discrediting is a subjective category that can lead to violations of the above European standards easier than the formulation of arbitrary personal attack. Arbitrary personal attack directs the court towards an objective assessment of the circumstances under which the statement was made, while the intent to discredit can determine if the „contempt” was, according to all the circumstances, reasonably justified.

### *Exclusion of unlawfulness in the case of performing ”other public or social activities”*

Proposal of amendments to paragraph 3 excludes the unlawfulness and the existence of the criminal acts of insult if the statement is a part of the performance of some activities that are of public interest. Bearing in mind the attitudes of the European Court of Human Rights (*Lingens v. Austria*, 1986, *Oberschlick v. Austria*, 1991, *Oberchlick v. Austria* (no. 2), 1997), excluding unlawfulness and the existence of the criminal acts of insult proves to be necessary in cases of exercise of any other public or social activity (for example, the activities of NGOs, trade unions, etc.), provided that it is not an arbitrary personal attack.<sup>55</sup>

### *Paragraph 4 - impunity of journalists and editors for transmitting information of public interest*

The European Court of Human Rights continually emphasizes the key role of newspapers and media in general in a democratic society (*Bergens*

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<sup>55</sup> For the view that NGO activists are protected same as journalists, as they contribute to public debate by spreading information and ideas on topics of public interest, see the European Court of Human Rights ruling *Steel and Morris v. the UK*, 2005.

*Tidende and Others v. Norway*, 2000, para. 49-50). Reporting on news based on the interviews, editorially processed or not, is one of the most important tools used by the Press to able to play its role of „the public guardian” (*Observer and Guardian v. United Kingdom*, 1991). In this sense, punishing the media for the dissemination of statements provided by the other person seriously threatens the contribution of the media in debates on issues of public interest. In the case of *Jersild v. Denmark*, 1994, the European Court of Human Rights has stated:

„The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.”

Also, in *Thoma v. Luxembourg*, 2001, the Court held:

„A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press’s role of providing information on current events, opinions and ideas“.

In these cases the media have just transmitted the statements of others, and punishing them for doing so is a violation of Article 10 of the *Convention*.

However, the requirement to clearly state that the information is transferred from another source is justified and it prevents the offensive content to be transmitted with impunity. In *Europapress Holding Ltd v. Croatia*, 2009, the European Court of Human Rights has stated:

„The text is written in a way that leaves no doubt about the veracity of the information, and does not include any of its sources. Therefore, it cannot be said that the Globus journalist who wrote it was just reporting what others have said and simply failed to distance himself from the information (see, mutatis mutandis, *Radio France and Others*, cited above, § 38; *Thoma v. Luxembourg*, 38432/97, § 63 and 64, ECHR 2001-III, *Pedersen and Baadsgaard*, cited above, § 77). Instead, he has adopted controversial statements as his own, and the company that published the statements is therefore responsible for their truthfulness.”

So, keeping in mind the views of the European Court of Human Rights stated in the cited and other similar cases, the exclusion of illegality and the existence of crime in these cases would be in line with European standards. However, we recall our argument in favor of decriminalization of all criminal offenses under Chapter XVII of the Criminal Code, especially the crime of Insult,



considering the need for criminalizing offensive language in a democratic society in the XXI century, which does not constitute hate speech, outdated.

### 2.2.3 *Defamation*

#### *Defamation*

##### *Article 196*

(1) Anyone who speaks or transmits untrue information about someone that may harm his/her honor 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 charged with 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 and editor who acted with due professional care shall not be punished.

#### *Proposal*

In paragraph 1, the words „...untrue information which can damage ...” are replaced by „... false factual statements that harm...” and „...three thousand to ten thousand” replaced by the words „...up to one thousand and five hundred euro.”

In paragraph 2, the words „...five thousand to fourteen thousand” are replaced with words „... to three thousand.”

Paragraphs 3 and 4 are amended to read:

The offender shall not be punished for the criminal offense referred to in paragraph 1 and 2 if he had reasonable ground to believe the veracity of the statement.

A journalist and editor who acted with due professional care in accordance with the law shall not be punished for defamation, so that Article 196 reads:

*Defamation*

*Article 196*

- (1) Anyone who speaks or transmits false factual statements that harm his/her honor and reputation shall be punished by a fine in the amount of up to € 1.500.
- (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 up to € 3.000.
- (3) The offender shall not be punished for the criminal offense referred to in paragraph 1 and 2 if s/he had reasonable grounds to believe the veracity of the statement.
- (4) A journalist and editor who acted with due professional care in accordance with the law shall not be punished for defamation.

*Reasoning*

*Making a distinction between factual allegations and value judgment*

The legal description of the criminal act of defamation should be closer to the European standard, which requires a distinction between factual allegations and opinions (value judgment), because the existence of facts can be proved, while the authenticity of the value judgment can not be proven. 56 Unlike the current explanation of the actions of carrying out the criminal act as presenting or spreading „whatever untrue”,with this proposed amendment this action would be described more accurately,”who presents or spreads false factual assertions on behalf of someone else ...” which would allow easier distinction between factual allegations and expressing an opinion in practice, in accordance with the standards of the ECHR.

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56 *Lingens v. Austria*, 1986; *Dalban v. Romania*, 1999; *Jerusalem v. Austria*, 2001.

### *The consequence - violation of reputation*

According to the current solution, presenting or spreading something false, which *can* damage the honor or reputation, is incriminalized. So, the action that caused the damage of honor or reputation is not required, but only that the action performed could have caused such a result. With this in mind it can be concluded that the criminal act of defamation is classified as a criminal act of jeopardizing, since the result of this act consists in the possibility of violation of honor and reputation. When such a consequence is part of the essence of criminal act, as is the case with the criminal act of defamation, then this option is a significant feature of the criminal act and must be determined in each case.

It is challenging to criminalize such an unspecified and harmless consequence. Acceptable result could be already existing violation of reputation and honor. Even more so because it is more difficult to determine the possibility for a consequence to occur than the consequences itself. The mere existence of difficulties to establish that a statement really damages the honor or reputation often points that there is no criminal act of defamation and that this issue should not cause problems in practice. In addition, in cases where there is a doubt that a statement damages the honor or reputation, the court would have to address that issue in accordance with the principle in *dubio pro reo* (the doubts in favor of the defendant).

### *Reducing the amount of fines*

Arguments and reasoning for a proposal to reduce the amount of fines is the same as for the criminal acts of insult, and there is no particular need to repeat it here.

### *Deletion of Paragraph 3 - the qualified form of defamation*

Paragraph 3 prescribes the liability for defamation that led or could lead to severe consequences for the victim. Besides the inaccuracy of this provision, the main reason for its deletion is that the consequence mentioned can not be covered by the premeditation of the offenders. Otherwise, this would be a more serious criminal act. There are good reasons for punishment for the statement that led or could lead to consequences that the offender was unable to anticipate and predict. Even more so given the difficulties in determining the possibility of occurrence

of serious consequences, which, as stated, is the reason that the legislator avoids prescribing criminal acts which place the possibility of occurrence of consequences in the essence of the criminal act. Otherwise, in practice there are very few cases in which courts found reasons for the application of paragraph 3 Article 196, which is another reason to question the validity of this provision.

#### *Deletion of possibility of punishment for insult*

According to paragraph 4 Article 196 of the Criminal Code, the defendant may be punished for insult even if he proved the truth of his allegations or that he had reasonable grounds to believe the authenticity of what he was presenting or spreading. This solution particularly limits the right to freedom of expression, because it discourages citizens to state allegations for which accuracy they have solid evidence, so they have a justified fear that they could be prosecuted and convicted, even in this case.

#### *Paragraph 4 - release of liability for journalists who have acted with „due professional care”*

The standard „due professional care” (referred to in paragraph 5 Article 196 of the Criminal Code, added with the last amendments in April 2010.) is imprecise, because, as such, it is not recognized by any law, nor by the Code of journalistic ethics, the only one that currently exists in Montenegro.<sup>57</sup> This proves that it is necessary to specify the meaning of the term, proposed below in the amendments of the media law, so it is therefore proposed to emphasize here that „due professional care” is defined „in accordance with a special law”.

#### *Reasons for exclusion of unlawfulness*

Exclusion of unlawfulness and the existence of criminal act of defamation, with the proposed amendments of paragraphs 3 and 4 are defined similarly as the criminal acts of insult. However, providing the exclusion of unlawfulness with specific provisions for these criminal acts is justified by the differences and characteristics of criminal acts of insult and defamation, and in this context the proposals of amendments of Article 195 and 196 are defined. In fact, the criminal act of defamation can not be executed by presenting or

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<sup>57</sup> Code of Journalists of Montenegro: [http://www.nstcg.org/dokumenta/kodeks\\_novinara\\_cg.pdf](http://www.nstcg.org/dokumenta/kodeks_novinara_cg.pdf).

spreading value judgments, which is one of key differences between these criminal acts. Also, unlike insult, the untruthfulness of factual allegations is an essential element of the criminal act of defamation. Given the differences between the essences of these criminal acts, the case where the offender had reasonable grounds to believe the veracity of the statement is stated as a reason for excluding unlawfulness for this criminal act, which has been the reason for the exclusion of unlawfulness so far. Keeping in mind the differences between these two criminal acts, in the proposal of paragraph 4 unlawfulness is excluded even if a journalist and editor had reasonably acted with due professional care in accordance with the law.

As for the criminal act of insult, these reasons for excluding unlawfulness would be illogical and absurd, because it would require the offenders to verify the accuracy and consistency of value judgments, which is impossible. Also, if the bases for excluding unlawfulness for the criminal act of defamation were prescribed in the same way as for the criminal acts of insult, it would mean that in a scientific, literary or artistic work, public information, in performing official duties, political or other public or social activities, in the newspaper work, or in the defense of rights one may state false allegations, unless all the circumstances show that it is a random personal attack. Such a solution would be contrary to the terms of the criminal act of defamation, implying the existence of intent with the offender, which would enable deliberate stating of false allegations without punishing the offender.

The fact the untruthfulness of allegations is an essential element of the criminal act of defamation and that the criminal act does not exist if the accuracy is proven, because in this case an essential element of the criminal act is not achieved, exclusion of unlawfulness and the absence of this criminal act is justified in case where the offender had reasonable cause to believe the veracity of the statement. This statutory provision will sufficiently cover all possible situations where the imposing of criminal sanctions represents a violation of the right to freedom of expression, no matter on which occasion and questions the statement has been presented or transmitted.

The proposal in paragraph 4 is based on the specific nature of the journalistic profession and their obligation to quickly publish the news. The ECHR has taken the position that the news is „a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest” (*Sunday Times, No. 2, v. the United Kingdom*, 1991). In this regard, the journalist can not have the same level of verification of information as

the others, because in this way they would often be unable to do their job well. For a more detailed description and explanation view the proposed amendments to the media law stated below (item 3.5 and 3.7).

#### *2.2.4 Stating information from personal and family life*

##### *Stating information from personal and family life*

###### *Article 197*

(1) Anyone who spreads or transmits information about personal or family life of a person and thereby potentially harms his/her honor or 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, the perpetrator shall be punished by a fine in the amount of € 5.000 to 14.000.

(3) If what is being said or transmitted has entailed or could have entailed serious consequences for the injured party, the perpetrator shall be punished by a fine in the minimum amount of € 8.000.

(4) If the accused person has spread or transmitted information about personal or family life within performing a official duty, journalist profession, defending a right or protecting justified interest, s/he shall not be punished provided s/he proves that the information is true or that s/he had founded reasons to believe that the information s/he disclosed or transmitted is true.

(5) The truthfulness or untruthfulness of what is being said or transmitted pertaining to personal or family life is not liable to any evidence establishing procedure, except in cases referred to in Paragraph 4 of this Article.

###### *Proposal*

Delete the entire Article 197.

###### *Reasoning*

As stated in the proposal for complete decriminalization of Chapter XVII of the Criminal Code, in the case of retaining the criminal acts of insult and defamation, the article specifically does not make sense.

2.2.5 *Damaging the reputation of Montenegro; Damaging the reputation of the people, minorities and other minority ethnic groups; Damaging the reputation of the country or international organization and impunity for these crimes*

*Damaging the reputation of Montenegro*

*Article 198*

Anyone who publicly exposes Montenegro, its flag, coat of arms or anthem to mockery, shall be punished with a fine or prison up to one year.

*Proposal*

In Article 198 the words „... or prison up to one year” shall be changed to „...up to one thousand and five hundred euros...”, so that Article 198 reads:

*Damaging the reputation of Montenegro*

*Article 198*

Anyone who publicly exposes Montenegro, its flag, coat of arms or anthem to mockery, shall be punished with a fine of up to €1.500.

*Damaging the reputation of the people, minorities and other minority ethnic groups*

*Article 199*

Anyone who publicly exposes a nation, national or ethnic group living in Montenegro to mockery, shall be punished by a fine in the amount of € 3.000 to 10.000.

*Proposal*

In Article 199 the words „... three thousand to ten thousand euros...” are replaced by „...up to one thousand and five hundred euros ...” so that Article 199 reads:

*Damaging the reputation of the people, minorities  
and other minority ethnic groups*

*Article 199*

Anyone who publicly exposes a nation, national or ethnic group living in Montenegro to mockery, shall be punished by a fine in the amount of up to €1.500.

*Damaging the reputation of a foreign country or international organization*

*Article 200*

(1) Anyone who exposes to mockery a foreign state with which Montenegro has diplomatic relations, or its flag, coat of arms or anthem, shall be punished by a fine in the amount of € 3.000 to 10.000.

(2) By punishment referred to in Paragraph 1 of this Article shall be punished the one who publicly exposes to mockery the United Nations Organization, International Red Cross or some other international organization of which Montenegro is a member.

*Proposal*

In paragraph 1, the words „...with which Montenegro has diplomatic relations ...”, deleted.

In paragraph 1, the words „...three thousand to ten thousand euros...” are replaced by the words „...up to one thousand and five hundred euros”.

In Article 200, paragraph 2 the words „...or another international organization of which Montenegro is a member...”, are deleted, so that Article 200 reads:

*Damaging the reputation of a foreign country  
or international organization*

*Article 200*

(1) Anyone who exposes to mockery a foreign state, its flag, coat of arms or its anthem, shall be punished by a fine in the amount of €1.500.



(2) By punishment referred to in Paragraph 1 of this Article shall be punished the one who publicly exposes to mockery the United Nations Organization, International Red Cross or some other international organization.

### *Reasoning*

As highlighted in the proposed decriminalization of these crimes, Articles 198 and 200 of the Criminal Code prescribe specific forms of insult and defamation. Arguments concerning the deletion of the minimum and reducing the maximum fines prescribed is identical to the arguments given for the crimes of insult and defamation. Another reason for the amendment of these provisions, in case of incomplete decriminalization (which we consider a much better solution), is the possibility of a sentence of imprisonment for the offense under Article 200 of the Criminal Code, which specifically limits the freedom of expression and which has already been explained in reasoning for converting fines to imprisonment. The proposal to decriminalize this offense also explains the hypocrisy and absurdity of protecting the reputation of the state „with which Montenegro has diplomatic relations” and „international organization that Montenegro is a member of”, so we believe it is unnecessary to repeat the same arguments here.

### *Impunity for criminal acts under Articles 198 to 200*

#### *Article 201*

Perpetrator of an act referred to in Articles 198 to 200 of the present Code shall not be punished if a statement has been given within serious critique in a scientific, literary or artistic work, performance of an official duty, journalistic writing, political activity, defense of a right or protection of justifiable interests, provided that the way of expression or other circumstances prove that s/he has not done it with intention of belittling or if s/he proves the truthfulness of his/her claims or that he had founded reason to believe in veracity of what s/he was saying or transmitting.

## *Proposal*

Article 201 is amended to read:

### *Impunity for criminal acts under Articles 198 to 200*

#### *Article 201*

Perpetrator of an act referred to in Articles 198 to 200 of the present Code shall not be punished if a statement has been given within a scientific, literary or artistic work, performance of an official duty, journalistic writing, political activity, defense of a right or protection of justifiable interests, unless the circumstances prove that it is an arbitrary personal attack or if s/he proves the reasonable grounds to believe the veracity of what s/he was saying or transmitting.

#### *Reasoning*

Reasoning for proposed changes corresponds to the reasoning of the proposed amendment to Article. 195, para. 3, as discussed above.

After Article 201, a new Article 201a is added, which reads:

#### *Article 201a*

In determining liability for criminal offenses against honor and reputation, the court will take into consideration that the government and other executive or legislative authority, government officials, politicians, civil servants and public figures are obliged to tolerate greater degree of criticism in comparison to others.

#### *Reasoning*

In several of its decisions the European Court of Human Rights has taken the view that the limits of permissible criticism are wider when the criticism relates to the government. In the case of *Castells*, the European Court of Human Rights has stated:

„The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the

actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.”

With regard to the protection of the reputation of politicians, which is not excluded, ECtHR stated the following in *Lingens*:

„... Article 10, paragraph 2, provides that the reputation of others ... is protected, and this protection also applies to politicians ... but in such cases, such protection must be weighed against the interest of open discussion on political issues”.

The European Court of Human Rights has established a hierarchy of values protected by Article 10 of the *Convention*. Within that hierarchy the comments and discussion on matters of general-public interest, especially in the area of political expression, provided by public figures and media, are the most protected forms of freedom of expression. In this sense, associations or individuals who actively and voluntarily engage in public dialogue must have a high degree of tolerance towards criticism. The European Court has almost always found a violation of freedom of expression in the proceedings on lawsuits for defamation, i.e. insult of government officials and public officials (*Lingens v. Austria* - 1986, *Oberchlick v. Austria* - 1991, *Oberchlick v. Austria* - 1997).

„The dominant position enjoyed by the public authorities requires them to show restraint in the use of protection in criminal proceedings. Government in a democracy must tolerate criticism, even when it may be considered provocative and offensive.” (*Ozgur Gundem v. Turkey*, 2000, paragraph 43)

On the occasion of the ECtHR rulings against Serbia for violation of freedom of expression, the Criminal Section of the Supreme Court of Serbia on 25 November 2008 took following the legal position:

„The limits of acceptable criticism are wider in the case of public figures in relation to private persons. Unlike ordinary citizens, public figures are inevitably and knowingly exposed to close scrutiny of their every word and deed both by the journalists and the public, and therefore must exhibit a greater degree of tolerance.”<sup>58</sup>

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58 Legal position adopted 25 November 2008 at the session of the Criminal Section of the Supreme Court of Serbia.

## *2.2.6 Publication of a sentence for criminal acts against honor and reputation*

### *Publication of a sentence for criminal acts against honor and reputation*

#### *Article 203*

- 1) For condemnation of acts pursuant to art. 195 to 200 of this Code made by the media, the court shall order the security measure of public announcement of the verdict (Article 77). If it is a criminal offense under Article 195 to 197 of the Code, imposition of this measure requires the consent of the person against whom the offense was committed.
- 2) The Court will remit the perpetrator of criminal act under art. 195 to 197 of this Code and impose a measure of security of public announcement of the verdict if it finds that in order to achieve the general purpose of criminal sanctions the imposition of that measure is sufficient.
- (3) In cases under par. 1 and 2 of this article verdict will be published in the same media on the same page of the press, or in the same program of electronic media in which the information was released in which it achieved characteristics of a criminal offense or in the main news programs. The court may decide to publish the verdict in other media as well.
- (4) The court shall determine whether to publish the verdict entirely or in excerpt.
- (5) If the publication of an excerpt is made, it must include information on conviction with the verdict and a part of explanation of the verdict on the decision of the court.

#### *Proposal*

In Article 203 Paragraph 2 after the word „...measures” a fullstop is deleted and the words added „...and if it is determined that the imposition of sanctions is necessary, especially if the sanctions shows disproportionate to protect the honor or reputation”.

In paragraph 3 words „The court may decide that the ruling be published in other media” are deleted, so that Article 203 reads:

*Publication of a sentence for criminal acts  
against honor and reputation*

*Article 203*

1) For condemnation of acts pursuant to art. 195 to 200 of this Code made by the media, the court shall order the security measure of public announcement of the verdict (Article 77). If it is a criminal offense under Article 195 to 197 of the Code, imposition of this measure requires the consent of the person against whom the offense was committed.

(2) The Court will remit the perpetrator of criminal act under art. 195 to 197 of this Code and impose a measure of security of public announcement of the verdict if it finds that in order to achieve the general purpose of criminal sanctions the imposition of that measure is sufficient *and if it is determined that the imposition of sanctions is necessary, especially if the sanctions shows disproportionate to protect the honor or reputation.*

(3) In cases under par. 1 and 2 of this article verdict will be published in the same media on the same page of the press, or in the same program of electronic media in which the information was released in which it achieved characteristics of a criminal offense or in the main news programs.

(4) The court shall determine whether to publish the verdict entirely or in excerpt.

(5) If the publication of an excerpt is made, it must include information on conviction with the verdict and a part of explanation of the verdict on the decision of the court.

*Reasoning*

In addition to cases when the court finds that to achieve the general purpose of criminal sanctions it is sufficient to impose them, this ground of exemption from imposition of penalties and imposition of measures of safe public announcement of the verdict would be in full compliance with the standards and positions established in the jurisprudence of the European Court of Human Rights.

As mentioned above, the European Court of Human Rights has taken the view that prosecution and conviction may be considered proportional only in exceptional circumstances of serious attacks on individual rights. (*Gavrilovic v. Moldova*, 2009, *Bodrožić and Vujin v. Serbia*, 2009), and that States should use measures of criminal law to restrict free speech just as the last remaining solution and that criminal sanctions in general should be applied only to protect public order, and not in private conflicts, that the majority of defamation cases is (*Castells v. Spain*, 1992).

Proposed amendment to Article 203, paragraph 2 of the Criminal Code would enable easier and more consistent application of these standards in practice. Also, it is absurd that the court should require other media outlet to publish the verdict, which was not a party in the proceedings and has not even published incriminating content, so it is necessary to delete such regulation.

2.3 *Proposal of new criminal acts so as to increase the protection of journalists in performing their professional tasks*

Under Chapter XV of the CC (Criminal acts against freedoms and human and civil rights), after Article 179, Prevention of printing and distributing printed material and program broadcasting, two new articles are added:

*Obstructing journalists in performing their professional duties*

*Article 179a*

- (1) Anyone who prevents journalists in performing their professional duty which is within the scope of their powers or by the same means forces journalists to perform their professional duty, by force or threat of immediate use of force, shall be punished with imprisonment from three months to three years.
- (2) If during the execution of acts referred to in paragraph 1 of this Article, the offender offends or abuses a journalist or inflicts light bodily injury or threatens with the use of weapons, shall be punished with imprisonment from three months to five years.
- (3) If the act referred to in paragraph 1 of this Article is committed in a group or in an organized way, the offender shall be punished with imprisonment from six months to five years.
- (4) An attempted act referred to in para. 1, 2 and 3 of this Article shall be punished.

*Assaulting journalists in performing their professional duties*

*Article 179b*

- (1) Whoever assaults or threatens to assault journalists in the exercise of professional duties shall be sentenced to three years of imprisonment.
- (2) If during the execution of acts referred to in paragraph 1 of this Article a journalist suffered light bodily injury or has been threatened with the use of weapons, the offender shall be punished with imprisonment from three months to five years.

(3) If the act referred to in paragraph 1 of this Article is committed in a group or in an organized way, the offender shall be punished with imprisonment from six months to five years.

(4) An attempted act referred to in para. 1, 2 and 3 of this Article shall be punished.

### *Reasoning*

Bearing in mind the frequent attacks on journalists in the performance of professional duties in Montenegro,<sup>59</sup> we find justified the proposals emphasized in public to ensure their increased criminal protection to prevent such attacks or interference in future<sup>60</sup>. Although the working group members agree that the best form of prevention is an efficient and effective prosecution and punishment of existing cases of attacks on journalists, we believe that the proposed criminal acts could still contribute to the deterrence of potential perpetrators of the attack.

When it comes to protection of journalists in the performance of professional duties, the prescription of a separate crime would be a better solution than giving journalists the status of public officials. This is because the crimes against the state authorities protect the lawful performance of official actions. Usually official action means the execution of some regulations or decisions of competent authorities. Therefore, the professional tasks of journalists can not be equated with official actions of public officials. In this regard, a separate criminal act should protect journalistic professional tasks. These criminal acts would not protect journalists, but social and individual interests for the smooth and normal exercise of journalism.

Starting from the description of the crime Preventing public officials in the performance of official duties (Article 375 CC) and Attack on the official in performing official duties (Article 376 CC), the proposal given contains the same description of criminal acts that protect the smooth and normal exercise of journalism. In contrast to the punishment prescribed for a qualified form of a criminal offense under Article 375, paragraph

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59 Ilija Bakić (2004.), Željko Ivanović (2007.), Tufik Softić (2007.), Mladen Stojović (2008.), Boris Pejović (2008.), Mihailo Jovović (2009.), Božo Jelovac (2010.).

60 Such proposals were set forth in 2008 by the Socialist People's Party, Movement for Change and the NGO Network for Affirmation of NGO Sector (MANS).



2 of the Criminal Code, proposed Article 179a, paragraph 2, prescribes the penalty ranging from 3 months to 5 years. We consider it illogical and unreasonable to prescribe the same penalty for the basic form of the offense and for its more serious qualified form, as prescribed in the case of the crime Preventing public officials in the performance of official duties. In that case, a logical question arises regarding reasons and motives for which the legislator stipulates that qualified - more severe form of the crime.

In this way, the journalists would get the same protection in the performance of professional duties, as well as officials in the performance of official duties. Also, such protection would be in line with European standards and practice of the European Court of Human Rights, emphasizing many times „a positive obligation” of the state under Article 10 of the *Convention* (*Özgür Gündem v. Turkey* - 2000, *Dink v. Turkey* - 2010) to provide such protection. In this regard, States are required to create a secure environment for the enjoyment of freedom of expression, and prescribing these crimes would certainly meet this requirement.<sup>61</sup>

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61 As regards comparative practice, we know that similar crime is specified in Art. 144 of the Criminal Code of Russia, and that there is an initiatives in Serbia to introduce such act.

### 3. MEDIA LAW REFORM PROPOSAL

#### 3.1 *Proposal of amendments to Article 1 - Basic principles and application of the Law in accordance with international standards*

##### *Article 1*

Media in Montenegro are free.

Media censorship is forbidden in Montenegro.

Montenegro provides and guarantees freedom of information at the level of the standards in international documents on human rights and freedoms (UN, OSCE, Council of Europe, EU).

This law should be interpreted and applied in accordance with the principles of the *European Convention on Human Rights and Fundamental Freedoms* (ECHR), with the use of common law practice of the European Court of Human Rights (ECtHR).

##### *Proposal*

Paragraph 4 is supplemented, and the content of the brackets in paragraph 3 is deleted, so that Article 1 reads:

##### *Article 1*

Media in Montenegro are free.

Media censorship is forbidden in Montenegro.

Montenegro provides and guarantees freedom of information at the level of the standards in international documents on human rights and freedoms.

This law should be interpreted and applied in accordance with the practice of international bodies competent to monitor implementation of international human rights agreements, and especially with the use of common law practice of the European Court of Human Rights.

## Reasoning

### *Amendment to paragraph 3 - Standards in accordance with the practice of international bodies that oversee their implementation*

Previous paragraph 3 stipulated that the freedom of information is guaranteed at the level of standards contained in international documents on human rights and freedoms, with the abbreviations of international organization which have adopted these international instruments listed in parentheses, which is inappropriate in a legal text, so we suggest that the parentheses and its contents be deleted.

### *Amendment to Paragraph 4 - application of the law in accordance with the practice of international bodies responsible for monitoring the implementation of international agreements on human right, especially the caselaw of the European Court of Human Rights*

Paragraph 4 particularly emphasizes the *European Convention on Human Rights* and the case law of the European Court of Human Rights. However, as this Convention is one of the international agreements already mentioned in paragraph 3 and the European Court of Human Rights is one of the international bodies whose practice is relevant to the interpretation of contracts referred to in (the others being, for example, *International Covenant on Civil and Political rights* and the practice of the UN Commission on Human Rights), we believe it is necessary to amend this paragraph. Essentially the same provision was contained in Article 10 of the *Charter on Human and Minority Rights and Civil Liberties of Serbia and Montenegro* (Off. Gazette SCG, no. 6/03), and despite the proposal of Human Rights Action to introduce that very provision to the Constitution, and later to the Law on the Constitutional Court, unfortunately that has not been done. Although particular reference to the European Court of Human Rights in addition to the existing definition may be unnecessary, we believe that it still should be emphasized, as the most important source of law in this area.

### *Deletion of paragraph 4*

Despite the fact that the intention of highlighting the application of the *European Convention on Human Rights* and the European Court caselaw is undoubtedly positive, this however means repeating the contents of paragraph 3, especially after its proposed amendment.

### 3.2 *Proposal of amendments to Article 2 - basic principles*

#### *Article 2*

The Republic of Montenegro (hereinafter referred to as: the Republic) shall guarantee the right of free founding and undisturbed work of media based on: the freedom of expression; freedom of investigation, collection, dissemination, publicizing and receiving information; free access to all sources of information; protection of man's person and dignity and free flow of information.

The Republic shall guarantee equal participation in information to both domestic and foreign legal and natural persons in compliance with both this Law and the Broadcasting Law.

#### Proposal

In paragraph 1, the words „Republic” and „(hereinafter referred to as Republic)” are deleted.

A new paragraph 2 is added as follows:

„The right to freedom of expression protects the content and manner of expression and does not apply only to the expression considered to be reasonable and inoffensive, but also to the one that may offend, shock or disturb, especially when it comes to matters of public interest.”

A new paragraph 3 is added as follows:

„The media play an important role in a democratic society as public observers, commentators and transmitters of information.”

In current paragraph 2 the word „Republic” changes to „Montenegro”, and paragraph 2 shall become paragraph 4, so that Article 2 reads:

*Proposal of amended article*

*Article 2*

The Republic of Montenegro shall guarantee the right of free founding and undisturbed work of media based on: the freedom of expression; freedom of investigation, collection, dissemination, publicizing and receiving information; free access to all sources of information; protection of one's person and dignity and free flow of information.

The right to freedom of expression protects the content and manner of expression and does not apply only to the expression considered to be reasonable and inoffensive, but also to the one that may offend, shock or disturb, especially when it comes to matters of public interest.

The media play an important role in a democratic society as public observers, commentators and transmitters of information.

Montenegro shall guarantee equal participation in informing local and foreign legal and natural persons, in accordance with this Act and the Broadcasting Law.

*Reasoning*

Following the example of the introductory articles of the Law on Defamation of the Federation of Bosnia and Herzegovina, Official Gazette of BiH, no. 32/04, art. 2 and the Law on Defamation of the Republic Srpska of BiH, Official Gazette of RS, no. 67/01, art. 1, we propose adding paragraphs 2 and 3, which highlight some of the basic principles of interpretation of freedom of expression in relation to the media from the European Court of Human Rights.

### 3.3 Proposal of new Article 2a - Interpretation of the law

#### Proposal of a new article

##### *Article 2 a*

No provision of this Law shall be interpreted and applied in a manner that would lead to revocation of a right guaranteed by this Law or its restriction to a greater extent than prescribed.

##### *Reasoning*

This is an important provision that sets the rules for the interpretation of the provisions of this law governing freedom of expression. Similar provisions are contained in Art. 5 of the *International Covenant on Civil and Political Rights*<sup>62</sup> and art. 17 of the *European Convention on Human Rights*.<sup>63</sup>

Purpose of the provision is to prevent the abuse of the law to the detriment of freedom of expression. In case of doubt, publication shall be considered free. Regarding the exception, it will be interpreted closely as possible. In other words, the restriction of freedom of expression will be allowed to the extent necessary to ensure a balance with another right, for example, the right to privacy. The provision ensures that in case of doubt, the right to freedom of information shall outweigh, and on the other hand it does not allow exceptions to be interpreted broadly, which would be contrary to the guarantees of this right given by the Constitution and the principle of this law. The rule exists so that the right to freedom of expression would not

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62 „1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.”

63 Article 17 - Prohibition of abuse of rights.

„Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

be constrained more than is *necessary in a democratic society*, which is a standard specified in Art. 10 para. 2 of the *European Convention on Human Rights*, considered by the European Court in each case of application of restrictions on freedom of expression with some legitimate purpose, such as protecting the reputation and rights of others.

3.4 *Proposal of amendments to Article 4 - basic principles, the urgency of judicial protection and access to information in the possession of public authorities and other legal entities with public authority*

*Article 4*

Media are free to publish ideas, information and opinions about occurrences, events and persons, while respecting the Constitution, laws and ethical rules of journalism.

Court decides on violation of freedom of information stipulated by the Constitution and the law, in an urgent procedure.

Information available to the legislative, executive and judicial authorities, companies and institutions entrusted with public authority, is available to the public, in compliance with the Law on Free Access to Information.

*Proposal:*

In paragraph 1, the words „respecting the Constitution, laws and ethical rules of journalism,” shall be replaced with words „in accordance with the Constitution, international standards and law.”

Paragraph 2 is amended to read: „The Court decides in urgent procedure on violation of freedom of information.”

In paragraph 3, the words „Companies and institutions” are replaced with words „public institutions and other legal entities”, so that Article 4 reads:

*Article 4*

Media are free to publish ideas, information and opinions about occurrences, events and persons, in accordance with the Constitution, international standards and laws.

Court decides on violation of freedom of information in an urgent procedure.



Information available to the legislative, executive and judicial authorities, public institutions and other legal persons entrusted with public authority, is available to the public, in compliance with the Law on Free Access to Information.

### *Reasoning*

Minor changes are proposed in the first paragraph for greater accuracy. In addition to the Constitution and laws, the application of international standards is emphasized as well. It is proposed to delete references to „ethical rules of journalism” given that the amendments propose to provide legal definition of the standard „due journalistic care”, and we believe that the court should not apply the rules of ethics of journalism (Code of journalistic ethics), but the journalist’s self-regulatory body.

The existing second paragraph provides that the court decides in urgent procedure on violation of the Constitution and the freedom of information established by the law. The proposal omits that the freedom of information is prescribed by the Constitution and the law, since it is also regulated by numerous international documents, which are binding for Montenegro.

Therefore, the current legal provision is contrary to Article 1 which stipulates that Montenegro provides and guarantees freedom of information with respect to the standards contained in international instruments on human rights and freedoms, and the practices of international bodies that are responsible for supervising their implementation.

The third paragraph contains less terminological corrections in terms of persons or bodies that possess information available in accordance with the special Law on Free Access to Information (*Official Gazette*, No. 68/2005).

### 3.5 *Proposal of new Article 4a - the standard of Due Professional Care*

Proposal of a new article:

#### *Article 4 a*

A journalist is obliged to reasonably verify the truthfulness and completeness of every information before its publishing.

Before publication of information, a journalist and responsible editor has to make a reasonable effort to give an opportunity to the person the information relates to express his/her opinion, if that does not prevent timely disclosure of information.

A journalist is obliged to publish other people's information, ideas and opinions credibly and completely, and if the information is taken from other media, a journalist is obliged to cite that media.

The degree of due professional care is proportional to the gravity of the possible consequence of the published information.

#### *Reasoning*

##### *New article 4a - specifying standards of due professional care*

Because of the importance of journalists' due professional care in releasing information, it is necessary to emphasize and define this standard, which represents adequate attention to the circumstances. It is necessary to prescribe this duty as legal, to ensure proper understanding of the standard of accountability by the courts and media.

##### *Paragraph 1 - checking the veracity of the information*

Condition for the admissibility of the publication is that the information is *examined with due care* before its publication, i.e. due professional care, within certain limits, which vary from case to case. Note that the appropriate care with regard to circumstances is the care *allowed and imposed to journalists by the circumstances of the case*. This *standard* relates to verification of accuracy and completeness of the information, and other conditions for admissibility of publication, for example, is there consent for publication of private letters, audio recording or photographs, assessed in

each separate case. If at the time of publication, the journalist had ample reason to believe that certain information is true, it should be considered that he has acted with due care. The European Court has recognized the importance of swiftness of publication of news in the media business, and stressed that the news is „a commodity that is disappearing, and postponing its publication, even for a short period, can take away all its value and interest” (*Sunday Times (no. 2) v. United Kingdom*, 1991). Therefore, the standard of due care must be assessed in the context of what is reasonable to do in the short term in order to verify the authenticity of the news, which should be taken into account in each case. For example, the European Court assessed „the extent to which the newspaper could reasonably regard the Lindberg report as reliable with respect to the allegations in question. The latter issue must be determined in the light of the situation as it presented itself to *Bladet Tromsø* at the material time, rather than with the benefit of hindsight” (*Bladet Tromsø and Stensaas v. Norway*, para 66).

The obligation of the previous review with due care does not mean that a journalist may publish information only if entirely convinced about its veracity. The information in respect of which a journalist still has doubts may be published as well when there is *justified interest* in their publication, provided that there is an obligation to point that out, i.e. the reasons for having doubts: what is uncertain shall not be published as certain, nor shall a journalist omit to state it is not certain, and other information may not be constructed on that information. The Court emphasized the importance of a way of presenting the information in respect of which there is no evidence of truth, including, for example, interrogative sentences (*Bladet Tromsø, Flux v. Moldova*, no. 6, etc.). If a journalist fails to point out that that information is beyond doubt, he does not act with due care. Thus, in the *Europapress Holding v. Croatia*, 2009, the Court found no violation of Art. 10 of the *Convention*, inter alia, because the editor of *Globus* did not act in accordance with due care:

„The article was written in a manner leaving the reader in no doubt as to the truthfulness of the published information and made no reference to its source. Therefore, it cannot be said that the *Globus* journalist who wrote it was merely reporting what others had said and had simply omitted to distance himself from the information (see, mutatis mutandis, *Radio France and Others*, cited above, § 38; *Thoma v. Luxembourg*, no. 38432/97, §§ 63 and 64, ECHR 2001-III; and *Pedersen and Baadsgaard*, cited above, § 77). Rather, he adopted the offending allegations as his own, and the applicant company which published them was therefore liable for their veracity (see, mutatis mutandis, *Rumyana Ivanova*, cited above, § 62).”

Below are the excerpts from the case law of the Supreme Court of the Republic of Serbia, matching the European standards:

„Due professional care appropriate in certain circumstances is the care allowed and imposed to a good journalist by the circumstances of the case, bearing in mind the rules of the journalistic profession. Legal standard of such care is directly proportional to the severity of violations of rights, or interests caused by the release of information, meaning that greater attention is needed in checking the factual basis for the information.” (Judgment of the Supreme Court of Serbia, rev. 2898/2007 of 13 March 2008).

„The media law cannot require from journalists to establish the truth of facts as in judicial proceedings (correspondence with reality and elimination of all reasonable doubt), and for freedom of expression and publication of factual statements it is not necessary to have evidence of their absolute truth, it is sufficient to express and publish the information after verifying that it is true in accordance with the appropriate circumstances of the case, or in accordance with journalistic attention (Judgment of the Supreme Court of Serbia, Rev. 3139/2007 of 19 March 2008).”

#### *Paragraph 2 - addressing the person to whom the information relates*

The duty of journalistic care also includes *addressing a person to whom the information relates*, in order to hear his opinion before publishing the information. If it was impossible to previously determine the accuracy of the information, even with due care and reasonable effort to get in touch with those to whom the information relates, the publication is allowed. In the case of *Flux v. Moldova* (no. 6), 2008, the Court ruled in favor of the respondent State, finding that the journalist had acted unprofessionally, because despite the expressed serious allegations of corruption at the expense of the plaintiff he did not attempt to get a statement from the plaintiff, nor did he subsequently accept to publish that statement about the allegations. Also, in *Europapress Holding v. Croatia*, the Court emphasized „that where particularly serious allegations have been made by one of the parties to a dispute, particular vigilance is called for. In such situations journalists, rather than automatically giving credence to such allegations, should ascertain whether they were true by obtaining further information and, if appropriate, by hearing the other side’s version of the facts”(para 68).

#### *Paragraph 3 - republishing claims from other media*

Improper claims presented to a journalist in the statement or interview, or during live broadcast on radio or television (broadcasting of an event, studio

shows, talk shows etc.), although broadcasted by radio or television, are not illicit disseminations. In *Thoma v. Luxembourg*, the ECtHR has stated: „The general requirement for journalists to systematically and formally distance themselves from the contents of statements that might offend or provoke others or damage their reputation is not in accordance with the role of the press to provide information on current events, opinions and ideas” (para 64)

If the mass media outlet, however, in any way *joined* someone else’s improper statement by adopting and published it as their own (for example through a commentary, subtitle, editorial presentation etc.), it shall be deemed that the statement in question is their own (see the above cited judgment *Europapress Holding v. Croatia*, para 60).

A journalist can not be held liable if accurately conveyed the information of public interest he’s been told by others; sanctions in such cases may be justified only when there are particularly strong reasons (*Jersild v. Denmark*, 1994, paragraph 35, and *Pedersen Baadsgaard v. Denmark*, 2004, paragraph 77).

*Paragraph 4 - degree of due care is proportionate to the gravity of possible consequences*

Examination of information prior to publication must be in proportion to weight of given statements (*Prager and Oberschlick v. Austria*, 1995, paragraph 37). If the factual allegations are extremely serious, the greatest possible caution in their checking and moderation in their publication must be shown. Such allegations should not be overstressed, making the situation more dramatic than it really is (*Radio France and others v. France*, 2004, par 39). Therefore, journalist must always act with an awareness of the possible consequences of publication, and with the severity of possible consequences, the degree of his due care on a prior assessment grows as well.

In *Cumpana and Mazare v. Romania*, 2004, the Grand Chamber of the European Court emphasized:

„While the role of the press certainly entails a duty to alert the public where it is informed about presumed misappropriation on the part of local elected representatives and public officials, the fact of directly accusing specific individuals by mentioning their names and positions placed the applicants under an obligation to provide a sufficient factual basis for their assertions... This was particularly so because the accusations against Mrs. R.M. were so serious as to render her criminally liable., (para. 101-102).

3.6 *Proposal of amendments to Article 20 - Liability of the founder, editor and journalist*

*Liability for damages caused by the media*

*Article 20*

The founder of the media is responsible for the published program content, unless this Law provides otherwise.

If the media publishes the program content that violates legally protected interest of a person to whom the information relates or harms the honor or integrity of an individual, states or transmits false statements about his/her life, knowledge and abilities, the person has a right of action to the competent court for damages against the author and founder of the media.

*Proposal of amended article*

*Article 20*

The author, responsible editor and founder of the media have the joint responsibility for damage caused by publication of false, incomplete or other information, which publication is prohibited by this Law, and which violates the reputation or rights of a person, if it is proven that the author or responsible editor acted contrary to due professional care.

Reasoning

Current article 20 of the Media Law prescribes the responsibility of the media founder and the journalists, as an author, for the damage caused by the media.

The proposal differently regulates damages caused by the media. In addition to the media founders and program content author (journalist), it is proposed to hold the editor-in-chief liable as well. They have joint liability.

The existing Media Law does not stipulate liability for the editor for published program content, which is unusual in the comparative practice.<sup>64</sup> However, bearing in mind the role of editor-in-chief in regulating the media, especially in the final decision on the publication of information (graphics, titles, subtitles, etc.), it is necessary to prescribe his responsibility, too. Editor in chief is an authority before the journalists, and a link between the media (business) and journalists (journalism). As the editor and usually a journalist himself, he should be the most capable one, and therefore the most responsible, to take care of the interests of the public media and to use his knowledge and experience to prevent publication of information that are the result of ignorance, inexperience or bad intentions.

The editor has the power to ultimately decide what shall be published, hence it is natural and reasonable for him to bear the responsibility together with the media founder and journalists, who can not change the decision of the editor.

We have also made changes in wording to comply with European standards. Article 10 of the *European Convention on Human Rights* in paragraph 2 among the legitimate objectives of restrictions on freedom of expression states „the reputation and rights of others”.

In the proposed Article 20 the term „an individual” is missing, because of the alignment of the Media Law with the Law of Obligations adopted in 2008 and which, unlike the previous one, provides that a legal entity shall be awarded damages for harm to reputation and personal rights, if a court deems that the severity of the violation and the circumstances justify it (Article 207, paragraph 3).

Here it is necessary to distinguish between false and incomplete program content and false and incomplete program content that causes damage. It is indisputable that any false content is not necessarily offensive or causes damage. Therefore it is necessary that the law stipulates that one shall be held liable only for false and incomplete information that caused the damage.

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64 The European Court caselaw shows that in European countries, generally, media editors are held liable (France, Austria, United Kingdom). Most of the media laws in the region also prescribe the liability of the chief editor: The Law on Public Information of Serbia („*Official Gazette RS*”, no. 61/2005), Law on Media of Croatia („*Official Gazette*”, 59/04), the Law on Media of the Republic of Slovenia and the Laws on protection against defamation of Bosnia and Herzegovina Federation and the Republic Srpska, Bosnia and Herzegovina, also lay the responsibility on the chief editor.

The amended article stipulates that the burden of proof for the action of a journalist and editor inconsistent with due professional attention is not on the defendant („if it is proven that the author or editor acted contrary to due professional care”). When assessing whether they acted with due professional care all the circumstances are taken into account and all the evidence offered to determine whether the journalist acted with due care appropriate in given circumstances.

The European Court of Human Rights in some of his decisions criticized shifting the burden of proving to the defendant, finding that the plaintiff is in a better position to prove that something is true, and that the obligation of proving the truth of his statements, especially in the case of value judgments, represents a violation of Article 10 of the Convention (*Lingens v. Austria*).

On the other hand, the requirement to prove that the factual statement is substantially true, in accordance with a reasonable standard of proof, to the degree of probability, in civil proceedings, is not contrary to Article 10 of the Convention (see, for example, *McVicar v. the United Kingdom*, para 87, *Europapress Holding v. Croatia*, art. 54 and 63). The burden of proof on the defendant has been criticized by the Special Rapporteurs and Representatives for the freedom of expression of the United Nations, Council of Europe, the Organization for Security and Cooperation, the Organization of American States and the African Commission on Human and Peoples' Rights<sup>65</sup>, and the 2003 OSCE conference participants in Paris, who said that shifting the burden of proof to the defendant particularly in criminal proceedings is unacceptable deviation from the general principle of the presumption of innocence, based on which the plaintiff bears the burden of proof.<sup>66</sup>

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65 Joint Declaration „Ten key challenges to freedom of expression in the next decade,” Washington, 2 February 2010. <http://www.article19.org/pdfs/standards/tenth-anniversary-joint-declaration-ten-key-challenges-to-freedom-of-express.pdf>.

66 *Ending the Chilling Effect - Working to Repeal Criminal Libel and Insult Laws*, OSCE Representative on Freedom of the Media, Paris, 2003; [http://www.osce.org/publications/rfm/2004/06/12242\\_100\\_en.pdf](http://www.osce.org/publications/rfm/2004/06/12242_100_en.pdf).



### 3.7 *Proposal of new Article 20a - Exclusion of liability for damage*

#### Proposal of a new article

##### *Article 20 a*

The media founder, editor and author of program content are not liable for damages if they acted with due professional care, and especially if the program content that caused the damage was:

- 1) essentially true, and false only in unimportant elements;
- 2) based on the facts that the author had reasonable grounds to believe that they are complete or accurate, while there was a legitimate public interest to be familiar with this information;
- 3) accurately transferred from discussion at the session of the legislative, executive or judicial authorities, bodies of local self-government or at a public meeting; or from the act of the state bodies or other legal persons entrusted by public authority, and its meaning has not been changed by the journalistic editing;
- 4) of public interest, transmitted as a quote from other media or published within an authorized interview;
- 5) from private life, true or complete, and the circumstances of the case show that the author in good faith concluded that the damaged party agrees to its publication;
- 6) from private life or personal recording, which may have been published without authorization of the person in stake;
- 7) an opinion of the author, whose publication was in public interest, and if given in good faith.

On the course of determining responsibility of the person from paragraph 1, the court will take into account all circumstances of the case and especially the manner, form and timing of the publication, the probability of causing damage in the case if the program content would not have been published, as well as the reasons for speedy publication.

## Reasoning

*New Article 20a - Exclusion of liability of the author of program content, editor and founder of the media in case of compliance with due professional care*

Due to many lawsuits against journalists in Montenegro and very often not the best handling by the courts, it is necessary to lay down in the Media Law situation when the media founder and text author are not liable for damages resulting from publishing or transmitting information. These are always those cases when they acted with due professional care. Also, certain situations are prescribed when liability for damages is excluded. Although there are numerous cases of the European Court which set standards for these situations, it is necessary that the most important standards are defined as legal norms.

*Item 1 - Publishing content which is essentially true, and false only in insignificant elements*

In each separate case it shall be assessed whether the content is essentially true, and whether any misrepresentation refer to the information of peripheral importance to the main. Such a legal solution is prescribed in the defamation laws in BiH, determining the exempt from liability for defamation as follows: „if an opinion is stated or if the statement is substantially true and false only in insignificant elements”.<sup>67</sup> Also, the draft law on defamation, which was recently introduced in the House of Lords of the British Parliament provides that the defendant may invoke the defense that the publication was „substantially true.”<sup>68</sup>

*Item 2 - Publishing content based on information for which there are reasonable grounds to believe it is complete or accurate, and the public has a valid interest to be aware*

When assessing whether there are circumstances which exclude liability for damages it is taken into account whether it is information for which there is a legitimate public interest to be informed. There is a number of

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67 Article 7 of the Law on defamation of the Federation of Bosnia and Herzegovina and Art. 5 of the Law on defamation of the Republic Srpska, Bosnia and Herzegovina.

68 See [www.parliament.uk](http://www.parliament.uk) for full text *Defamation Act*.

European Court rulings related to expressing opinions on matters of public interest. Thus, for example, the Court, in the case *Thorgeirson v. Iceland* (1992) where the applicant was sentenced for defamation for publishing articles about alleged police brutality based on the stories of the alleged victims, has found a violation of Article 10 because the texts appeared at a time when there was public debate about police brutality, and that the texts were dealing with issues of "serious public concern."<sup>69</sup>

However, if a media engages in an obvious personal attack on a party, publishes uninvestigated claims of an anonymous source and denies a right to respond, the Court will not accept that the issue continues to involve public interest:

"In response to the principal's reply, the applicant newspaper published a further article on 14 February 2003. It argued before the Court that the purpose of that article was to discuss issues of public interest (see paragraph 19 above); however, in view of the repetition of some of the accusations made against the principal taken from the article of 4 February 2003 and of the language used, the Court regards this article more as a form of reprisal against the persons who had questioned the newspaper's professionalism. Indeed, the tone of the article indicates a degree of mockery and the article contains innuendo about an alleged personal relationship between the principal and a teacher, without any evidence of such or regard to the reputation and authority which school teachers must have in the eyes of their pupils."<sup>70</sup>

*Item 3 - Transmitting information from discussions at the meetings of legislative, executive and judicial authorities, or the acts of these authorities*

It seems that the situation where information is transmitted from parliamentary debates or debates of executive authorities does not create doubt about the exclusion of responsibility of journalists and should not be specifically explained. It should also be stressed that the journalist is not liable when transmitting information from a document of the competent state authority. The European Court has taken such position in the verdict *Bladet Tromsø and Stensaas v. Norway* (1999), para 68 and 72, where the Court held that the defendant newspaper „have reasonably relied on the official report and there was no need to check the accuracy of the facts from the report”.

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<sup>69</sup> *Thorgeirson v. Iceland*, 1992, paras 67-68.

<sup>70</sup> *Flux v. Moldova* (no. 6), 2008, para. 30.

#### *Item 4 - Transmitting information of public interest from other media and publishing interviews*

This provision specifies provisions of Art. 4a, paragraph 3 on due professional care when transmitting other people's information. The journalist is not responsible if faithfully conveyed information of public interest told to him by others, and punishment in such cases can be justified only when there are particularly strong reasons (*Jersild v. Denmark*, 1994, paragraph 35, and *Pedersen Baadsgard v. Denmark*, 2004, paragraph 77).

Emphasizing that the statement is a quote is a form of journalists' distancing from transferred claims. In the verdict *Thoma v. Luxembourg*, 2001, para. 64, the Court held that „the applicant had taken sufficient precautions when mentioning that the statement is a quote”. However, we can not go to extremes with checking the accuracy of the information and distancing from what is transmitted. Therefore, the Court concluded in the same verdict, as already stated in comments on Art. 4a, para. 3, that journalists can not be required to constantly, systematically and formally distance themselves from the contents of citations.

It is particularly important to exclude liability in cases where the information is published in the authorized interview. Improper claims presented to a journalist in the statement or interview, or during live broadcast on radio or television (broadcasting of an event, studio shows, talk shows etc.), although broadcasted by radio or television, are not illicit disseminations. In terms of interviews, the European Court found that „the punishment of journalists for helping to spread statements of others through interviews would seriously obstruct media in contributing to public debate on matters of public interest, and can not be supported unless there are particularly important reasons” (*Jersild v. Denmark*, 1997).

If the media, however, in any way *joined* someone else's improper statement and published it (with commentary, editorial presentation), as stated in the above-cited case *Europapress Holding v. Croatia*, it is considered as if the transferred claim is their own.

The courts in in the above situations have different practice, which generally sanctions the transfer of information whose authenticity can not be proven, so it is expected that the proposed new Article 20a contribute to the alignment of practice in Montenegro with European standards and legal security.

### 3.8 *Proposal of new Article 20b - Limiting the amount of non-pecuniary damages*

Proposal of a new article

#### *Article 20b*

The author of the program content and the responsible editor may not be obliged to the award of non-material damage by the media that exceeds four times the amount of the average monthly wage in Montenegro.

The founder of the media may not be obliged to the award of non-material damage by the media in the amount that may cause great material loss or bankruptcy of the founder.

On the course of determination of the level of damage, the court will take into account whether the injured party requested publication of a correction or answer, as well as whether the responsible editor published the correction, answer or apology.

#### *Reasoning*

*New article 20b - limiting the amount of non-pecuniary damages.*

It is necessary to limit the maximum amount of non-pecuniary damages done by the media, to prevent imposing fines which would cause disproportionate restriction of freedom of expression in relation to the actual need for protection of the reputation (*Cumpana and Mazare v. Romania*, 2004, para 111). Bearing in mind that the limit on the possible imposition of non-pecuniary damages already exists in the Montenegrin legal system, in the Law on Protection of Rights to a trial within a reasonable time, we believe that it is entirely appropriate to introduce restrictions to this law which would ensure that damages are proportionate and in accordance with standards of the European Court of Human Rights.

*Paragraph 1 - limiting the amount of damages paid by a journalist and editor*

The current legal practice has shown that in many cases the right to compensation is realized for purely commercial reasons, since courts

award disproportionately high amount. This practice encourages the filing of lawsuits.

Case law in Montenegro is extremely inconsistent. Inconsistency exists for the compensation of non-pecuniary damages for harm to reputation and honor, especially that of politicians and government officials, and if these damages are compared with damages awarded for a disability. Range of damages for violation of the reputation ranges from € 3,000 to 15,00071, while € 3,000 is awarded for a 10% disability. The high amounts paid by the media in Montenegro threaten their survival and lead to self-censorship, which is unacceptable in a democratic society. It must be borne in mind that the Montenegrin market is small and that the revenues of the media are far lower than those of the media in Europe.

In determining the amount of damages in each case the European Court requires that the amount of compensation is proportionate with the violation of reputation, and when assessing the proportionality it is taken into account whether the damages are imposed to a legal entity - the founder of the media or the editor or journalist as an individual. It also takes into account the financial capacity of legal entities, for example, is it a media giant or not (*Europapress Holding v. Croatia*, para. 73).

In the case of individuals, the European Court, for example, in the case *Filipovic v. Serbia*, 2007, concluded that the compensation equal to six-month net earnings of the applicant was disproportionate. In the case against Great Britain, the Court found that, although the awarded damages were relatively modest in relation to damages awarded by the courts in that country, were nonetheless significant given the modest income of the applicants (*Steel and Morris v. the United Kingdom*, para. 77). On the other hand, the Court did not find that the fine of 8,000 euros for defamation for the largest newspaper publisher in Croatia, Europapress Holding, was disproportionate, given that one fifth of the amount demanded has been awarded, and the size of the defendant publisher (*Europapress Holding v. Croatia*, para 73).

There is a dilemma in determining the maximum amount of compensation - whether to prescribe a specific amount or present descriptively a request

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71 Judgment of the Higher court in Podgorica of 18 May 2007, according to which the defendant DOO JU „Medija Mont” (founder of the daily *Dan*) is to pay 15,000 euros of damages for violation of honour and reputation to the plaintiff Dusanka Jeknic, as well as the legal costs in the amount of 672.50 euros.

for proportionate damages. Since the salary in Montenegro changes rather frequently, it seems more appropriate that the maximum amount of compensation is tied to the average monthly salary in Montenegro, published each month by the Statistical Office of Montenegro. Most recent average monthly salary was 465 EUR.

*Paragraph 2 - limiting the amount of damages paid by the media founder*

In 2007 the Parliamentary Assembly of the Council of Europe in the resolution *Towards decriminalization of defamation* urged the governments to „establish reasonable and proportionate restrictions on the maximum amount of damages, so that the survival of the media does not come into question” (item 17.8), and to introduce adequate guarantees against the imposition of damages disproportionate in relation to the actual damage”(item 17.9).

The proposed limitation of damages „as the amount which could lead to severe financial difficulties or bankruptcy of the founders of the media” means that depending on the case the economic status of the media founder shall be determined, in accordance with the obligation of Montenegro to the Council of Europe. The courts are to apply reasonable standards, especially considering the amount of damages that are imposed in practice for death or bodily injury. The Court has compared, for example, the compensation for the violation of reputation and compensation to victims of „serious violence” and found that it is disproportionate to award more for a violation of reputation (*Karhuvaara and Iltalehti v. Finland*, 2004, para. 54).

*Paragraph 3 - circumstances relevant in determining the amount of damages*

In awarding damages the courts will take into consideration whether the defendant has taken measures to mitigate the damage by using the right to reply or correction and, on the other hand, whether the media published the reply or correction in accordance with the law.

Laws in the region contain similar solutions. Defamation Law of the BiH Federation in Article 8 under the title „The obligation to mitigate the damage” provides that „the victim shall take all necessary measures to mitigate damage caused by the expression of untrue fact and, in particular, requesting a correction of the expression from the defendant”.

The Media Law of the Republic of Croatia prescribes previous request for a correction or apology as a condition for filing a claim to court for non-pecuniary damages. „A person who has previously asked the publishers to publish a correction or apology to the disputed information when a correction is not possible is entitled to a right to sue for non-pecuniary damage in accordance with the general provisions of the law of obligations” (Article 22, paragraph 2). The attitude of the working group is that the right of access to court should not be limited with the previous requirement to publish a correction or reply, but that it is necessary that the court, in determining damages, take into account whether such a request is filed, and adopted, in accordance with the law.



### 3.9 *Proposal of new Article 20c - Responsibility of state authorities and rights of state and political authorities*

Proposal of a new article

#### Article 20c

State is always responsible for damage caused by publication of false, incomplete or other information originating from the state body, no matter the guilt.

The state body may not file a claim for damages due to violation of reputation.

The holders of state and political functions may file the claim for damages exclusively in their personal capacity.

On the course of debate of a public interest the persons from articles 2 and 3 as well as other public figures are obliged to sustain higher level of criticism than other persons.

#### *Reasoning*

##### *New article 20c - Responsibility of state authorities*

This article is in line with the general rules of liability. It provides the state's liability for all damages caused by the publication of false, incomplete or other information published by its organ. The state is always responsible for the work of its organs. The Law on Public Information of Serbia prescribes the same solution in Article 84 entitled „Objective responsibility of the state” which stipulates that „the state is always held liable for the damage caused by the publication of false or incomplete information that originates from a state authority, regardless of guilt.”

In this sense, the responsibility of journalists for damages resulting from the publication of false, incomplete or other information is excluded, since journalists can not be required to verify information obtained from the authorities. The European Court in its verdict *Colombani (Le Monde) v. France* (2002) found that „when contributing to public debate on matters of legitimate interest, the media in general may rely on official reports and they are not required to carry out their separate research”.

*Paragraph 2 - Prohibition for government authorities to file claims for harm to reputation*

It is useful to provide that the state authorities are not allowed to file claims for harm to reputation. The same solution are stipulated in laws in BiH, which provide that „the public body is not allowed to claim for damages for defamation”<sup>72</sup>

This position is stated in numerous judgments of the European Court. In *Castells v. Spain*, 1992, the Court found that „ the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media”. *Declaration of the Committee of Ministers of the Council of Europe on freedom of political debate in the media* 2004 includes explicit prohibition of initiation of criminal proceedings for defamation and insult by the state institutions. Also, one of the conclusions of the 2003 Rome conference organized by the OSCE Representative for Freedom of Media and Reporters without Borders was that ”public or state bodies should not be allowed to institute defamation law suits”<sup>73</sup>

*Paragraphs 3 and 4 - Claims filed by holders of government functions in their individual capacity and degree of tolerance for criticism of politicians, civil servants and other public figure*

Freedom of information and degree of its limitation varies depending on the subject of information: to whom the information relates. State authority has the weakest protection from information, weaker than a politician, politician weaker than a civil servant, and civil servant lower than a private citizen; state authority is obliged to tolerate the most, a politician more than a civil servant, a civil servant more than a private citizen.

In a democratic system, acts or omissions of the government shall be subjected to strict control not only by the legislative and judicial authorities but also by public opinion (*Erdogdu and Ince v. Turkey*, 1999, paragraph 54). The authority of a democratic state must tolerate criticism, even

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72 The Law on defamation of the Federatin Bosnia and Herzegovina, Article 5, para 2 and the Law on defamation of the Republic Srpska, Art. 4, para 2.

73 *Libel and insult laws: what more can be done to decriminalise libel and repeal insult laws?* 24 - 25. novembar 2003, Paris, [http://www.osce.org/documents/rfm/2003/11/3346\\_en.pdf](http://www.osce.org/documents/rfm/2003/11/3346_en.pdf).

when it may be considered provocative or offensive (*Özgür Gündem v. Turkey*, 2000, para. 60). Permissible criticism of politicians is wider than permitted criticism of private individuals, and a politician is obliged to a greater degree of tolerance than a private citizen. A politician inevitably and knowingly exposes himself to close scrutiny of every word and deed, both by journalists and by the general public. (*Lingens v. Austria*, 1986, para. 42, *Barfod v. Denmark*, 1989, para. 35, *Oberschlick v. Austria*, 1991, para. 59, *Janowski v. Poland*, 1999, para. 33, *Oberschlick v. Austria* ( no. 2), 1997, para. 29, *Lopes Gomes da Silva v. Portugal*, 2000, para. 30, *Tammer v. Estonia*, 2001, para. 62).

A politician whose attitudes are provoking must also accept provocative statements about himself (*Oberschlick v. Austria* (no. 2), 1997, para. 33, 34), because the nature of political debate implies the use of exaggerated and offensive terms (*Lopes Gomes Da Silva v. Portugal*, 2000, paragraph 34, *Roseiro Bento v. Portugal*, 2006, para. 43).

Fierce political debates easily turn into personal debates, and this is one of the risk accepted along with the participation in political life (*Roseiro Bento v. Portugal*, 2006, paragraph 43, *Lopes Gomes da Silva v. Portugal*, 2000, paragraph 34). But when common citizens or non-political organizations engage in public debate, they have to tolerate more than others who do not (*Jerusalem v. Austria*, 02.27.2001, para 38, 28). So, if the individual brought his private life in connection with public life, we can not talk about the violation of right to privacy (recording of a persons participating in public incident or statement made during public appearances). Accordingly, the scope of unauthorized intrusions into one's privacy depends on the extent to which that person attracts attention. However, the media can not rely on any notion of celebrity as a justification for intrusive following and recording. E.g. publishing photos of Caroline of Hanover riding, shopping, going to a restaurant, beach, etc., clearly come within the sphere of her private life (*von Hannover v. Germany*, 2004, para. 63 and 64):

„The Court considers that a fundamental distinction needs to be made between reporting facts - even controversial ones - capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. The situation here does not come within the sphere of any political or public debate because the published photos and accompanying commentaries relate exclusively to details of the applicant's private life.”

Politicians, as public figures, are not entirely deprived of their right to privacy either. Specifically, it must be determined in a specific case whether there is a prevailing need to protect something as inaccessible to the public and in accordance with the so-called „Functional limitation”. Functional limitation involves narrowing of their inaccessibility to the public regarding the functions they hold. This means that, without the consent, it is allowed to publish information from private life of the state or political officials, whose publication is important to the public with regard to the position or function they hold or are running for. The definition of a public persona who is not a politician or civil servant, is offered in Article 23d, item 1.

### *3.10 Proposal of provisions on the right to privacy*

Bearing in mind that the right to protection of private life is guaranteed by the Constitution of Montenegro (art. 40), but that the Media Law does not contain any provisions on the right to privacy with regard to prohibition of publication of data from private life or exceptions from this rule in accordance with arts. 8 and 10 of the *European Convention on Human Rights* and the case-law of the European Court of Human Rights, we hereby propose articles that should provide for appropriate practice of the media and courts in this field.

#### *3.10.1 Proposal of new articles 23a and 23b - Giving consent to publishing private information*

Proposal of a new article

##### *Article 23a*

Information from private life or personal written record (letter, diary, note, digital recording etc.), an image (photograph, cartoon, film, video, digital, etc.) and voice recording (tape, digital, etc.) - may not be published without the consent of the person the information relates to.

Consent is also needed for direct transmission of image or voice (by means of television, radio etc.).

Information and records specified in paragraph 1 of this article can not be published without the consent of a person to whom they are intended, or a person concerned, if the publication can violate the right to privacy or any other right of that person.

Consent given for one publication, in a certain way or with a certain purpose, is not considered to be the consent for repeated publication, in any other way or for other purposes.

If the consent to obtain information or to obtain or access the record, included material award, the consent for publication shall be deemed to be given.

### *Article 23b*

If the person referred to in Article 23a of this law died, consent to publish is given by the spouse of the deceased, children from the age of sixteen, parents or siblings, the legal entity the deceased was a part of (organ, member, employee), if the information or records concern his/her participation in that legal entity, i.e. a person authorized by the deceased.

The termination of a legal entity does not terminate the right of participants of the legal entity that the information or record personally relates to.

It is believed that the consent is given if it has given by any person referred to in paragraph 1 above, regardless of whether the other parties refused to give it.

### *Reasoning*

The aim of the proposed regulations is to ensure the right to privacy or information from the private life regarding its publication in the media. The concept of private life includes legitimate right not to disclose one's personal information without prior consent. This includes the right to use one's own facial appearance, and publication of photographs therefore falls within the sphere of a protected private life (see Von Hannover v. Germany para. 50-53), as well as voice, private records and correspondence, as stated in the proposed regulations, modeled on the provisions of the Law on Public Information of Serbia (Art. 43).

For the protection of information from private life after death of a person it relates to, Art. 23b defines the persons who could give consent to the disclosure of such information after the death or termination of a legal entity to which it relates.

3.10.2 *Proposal of new Articles 23c i 23d - Exceptions to the protection of privacy rights*

*Article 23c*

Notwithstanding Article 23a of this Act, information from private life or a personal record may be published without the consent of the person to whom it relates if:

- 1) the person intended the information or a record to the public;
- 2) the person has given rise to publication of the information or record by his/her conduct;
- 3) the person did not object to obtaining information or making a record, although s/he known that it is done for publication;
- 4) it is a record from a public place.

*Article 23d*

There is no violation of right to privacy if publishing information where the legitimate public interest prevails over the protection of privacy, especially if:

- 1) the information, or personal record, refers to the personality who attracts the attention of the public by his/her statements, conduct and other actoins in connection with her personal or family life, or a state or political officer, and publishing is important given the fact that the person performs that function;
- 2) the information or a record refers to the occurrence or event of interest to the public and publication is in the interest of science or education;
- 3) the publication is necessary to warn about the risk (prevention of the criminal offense, spreading of infectious diseases, environmental protection, finding missing persons etc).

*Reasoning*

The proposed articles prescribe circumstances under which disclosure of private life is not an invasion of privacy or violation of privacy rights.

Although those situations are quite clear, it seems useful to regulate them and thus remove any doubt from the wording of the law as much as possible.

The proposed Article 23d provides the exception to the right to privacy, which is not limited to the number of cases by the principle of *numerus clausus*, as is the case in the Law on Public Information of the Republic of Serbia. Following the example from the Media Law of the Republic of Croatia,<sup>74</sup> in each case there is a possibility to estimate whether a justified interest of the public to be informed should prevail over the right to privacy of an individual.

Protection of private life, protected by Art. 8 of the *European Convention*, should be brought into balance with the right to freedom of expression, and particularly the public's right to be informed, in accordance with Art. 10. The substance of Article 8 is to protect the privacy of the individual from interference by state authorities. However, the European Court found that the state, in addition to the negative obligation to act with restraint, has a positive obligation to provide protection for family and private life and found that «the boundary between positive and negative obligations of the state in this case is not possible to define precisely» (*Von Hannover*, para. 57, *Stjerna v. Finland*, 1994, para. 38). The essence is the justification of public interest which competes with the right to privacy in this case. Although the privacy of anonymous person is less protected than the privacy of public figure, particularly political official,<sup>75</sup> in cases when such a person gets involved with the politician and participates in a family

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74 Article 8 of the Media Law of the Republic of Croatia: "There is no violation of right to privacy, if regarding information the benefit of public interest prevails over the protection of privacy in relation to the activities of journalists or information.»

Article 7 para 2 of the Media Law of the Republic of Croatia: "A person who performs a public duty has the right to privacy, except in cases related to public duty which a person performs.»

Article 7 para 3 of the Media Law of the Republic of Croatia: "A person who attracts attention by his/her statements, conduct and other activities in connection with his/her personal or family life can not require the same level of privacy as other citizens.»

75 In 2004 *Declaration on freedom of political debate in the media* The Committee of Ministers of the Council of Europe found that although private and family lives of politicians and civil servants deserve protection from disclosure in the media pursuant to right to privacy under Article 8 of the Convention, information about their private life may be revealed when they are of immediate public concern regarding the way they perform their duty, although even so one has to take into account the need to avoid damage to third parties. In the case in which politicians and civil servants draw attention to their personal life, the media have a right to criticize it.



incident that leads to litigation, that person no longer has the right to expect the protection of privacy and identity from disclosure, because it is considered that there is a legitimate public interest to be informed about these events (*Iltalehti and Karhuvaara v. Finland*, 2010). On the other hand, the European Court found that the privacy of politicians is quite reasonably protected when the sole purpose of disclosing information from his/her private life is to satisfy public curiosity and provide cost-effective goods to the media (admissibility decision in the case of *Société Prisma Presse v. France* (application no. 66910/01 and 71612/01, 2003).

In order to facilitate understanding of the balance that needs to be achieved between the right to public information and the right to privacy of individuals, provided are the examples of legitimate exceptions to the right to privacy, in the case of public figures, civil servants and political officials; interest of science or education, and warning of the danger, in line with exemptions recognized by the European Court, or mentioned in the Law on Public Information of the Republic of Serbia.

When interpreting the balance between privacy rights and freedom of expression, an area still not sufficiently defined in the law of the European Court of Human Rights,<sup>76</sup> it is necessary to take into account the following documents of the Council of Europe: *Declaration on the mass media and human rights*, in Resolution of the Parliamentary Assembly of the Council of Europe no. 428, 1970<sup>77</sup>, *Recommendation of the Committee of Ministers of privacy on the Internet*, no. R (99) 5, and the Resolution of the Parliamentary Assembly of Council of Europe Right to Privacy, no. 1165 of 1998.<sup>78</sup>

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76 For example, in one of the most striking cases which ought to define many standards, the case *Von Hannover v Germany*, 2004, where the first instance court found that the media violated the right to privacy of Carolina of Monaco, is currently, upon appeal, being considered by the Grand Chamber of the European Court of Human Rights.

77 <http://assembly.coe.int//main.asp?link=http://assembly.coe.int/Documents/AdoptedText/TA70/ERES428.htm>.

78 <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta98/eres1165.htm>.

### 3.10.3 Proposal of new Article 23e - Claim for violation of the right to privacy

#### *Article 23e*

In case of violation of right to privacy, or rights to personal records, the person whose rights have been violated may file a suit to require:

- 1) failure to release information or records;
- 2) submission of records, exclusion or destruction of the published records (video or sound recordings, negatives, exclusion from the publication, etc.);
- 3) compensation;
- 4) publication of the court ruling.

#### *Reasoning*

New article regulates what may be required in a claim in case of violation of right to private life.

Although the right to damages and the publication of the verdict may be accomplished based on the Law of Obligations, it seems useful to stipulate, in one place, requirements that can be set in a claim for violation of the right to private life.

Basic forms of violation of right to private life are: unauthorized disclosure of private life (for example, data on sexual habits, relationships, hygiene and neatness of the apartment, family situation), images (photography, film, video and other recordings of a persons, including immediate broadcast of image or voice on the radio or television), audio record of one's voice (for example, tape, digital or other recording of what a person have spoken, including live broadcast) and one's personal written records (diaries, letters, personal messages, etc.) So, even when the unauthorized disclosure does not „intrude” and does not intrude „noticeably” private lives of persons, unauthorized disclosure is a violation of privacy rights. E.g. it is not necessary to publish some intimate scenes footage, publishing footage from a birthday celebration at the beach, the supermarket, in restaurants and so on, is also a violation of privacy rights. Unauthorized publication in the mass media represents more severe, qualified form of violation.

Publication of data from private lives may include stating that information as own knowledge or spreading information, as someone else's knowledge. Violation of the right to privacy exists, but not the crime of Stating and transmitting information from personal and family life (we propose its deletion), although the information stated or transmitted from personal or family life is not false and can not harm the honor or reputation of individuals. Privacy is a right protects independently, apart from the honor and reputation. Stating or transmitting information alone violates privacy rights, even when true („publication of what is true and describing real events may under certain circumstances be prohibited: the obligation to respect privacy”, *Markintern Verlag GmbH and Klaus Beermann v. Germany*, 1989, paragraph 35).

Disclosure is unauthorized if the person to whom the published data relates did not give valid consent, and there was no legal permission for disclosure without consent.

Similar provisions are stipulated in Article 46 of the Law on Public Information of the Republic of Serbia.