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**MEDIA
DEVELOPMENT
CENTER**

MONITORING OF DEFAMATION ACTIONS LITIGATIONS

SKOPJE, JULY 2014

USAID PROGRAM FOR STRENGTHENING INDEPENDENT MEDIA IN MACEDONIA,
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MONITORING OF DEFAMATION ACTIONS LITIGATIONS

REPORT NO. 2

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INTRODUCTION

The Media Development Centre (MDC), under the auspices of the USAID Programme for Strengthening of Independent Media in the Republic of Macedonia and the Project for Media Legal Reform and Responsible Media, in the period March 1 through June 15, 2014, monitored the defamation action cases tried in accordance with the Law on Civil Liability for Defamation at the Basic Court Skopje 2 in Skopje.

Having in mind the importance of the Law for the freedom of expression and media freedoms in the Republic of Macedonia, and the uncertainties surrounding the effects of its implementation, the Media Development Center conducts a continuous monitoring of defamation action trials in which journalists, editors and media outlets appear as defendants. In addition, MDC follows the defamation action cases in which state officials appear as plaintiffs.

The adoption of the Law on Civil Liability for Defamation in November 2012 concluded the process of decriminalisation of defamation and its transfer from criminal to civil courts. The media and expert community praised the decriminalisation of defamation. However, they did note that the Law has many weaknesses that could have negative effect on the freedom of expression and push the journalists in the direction of self-censorship. In 2012, MDC prepared an “Analysis of the Draft-Law on Civil Liability for Defamation” in which we listed a number of identified weaknesses of the proposed legal text. After the adoption of the Law, together with the other organisations from the coalition Front for Freedom of Expression, MDC submitted an Initiative to the Constitutional Court, in April 2013, to initiate a procedure to determine

the constitutionality of certain provisions of the Law. Fifteen months later, the Constitutional Court has not yet reviewed the Initiative.

The monitoring focuses primarily on the implementation of the Law on Civil Liability for Defamation, the conduct and action of the judges in the implementation of material and process law in trials, the implementation of the case law of the European Court of Human Rights, the European Convention on Human Rights and the other international documents and principles in the area of protection of freedom of expression, or the work of the court clerk.

In the period March 1 - June 15, 2014, MDC followed 40 trials, in more than 60 hearings, held at the Basic Court Skopje 2 in Skopje.

In addition to directly monitoring the cases, MDC maintains constant contact with the Court of Appeals. MDC’s team observes if the Court of Appeals has adopted definitive judgment, i.e. if it has ruled on the appeals filed against the sentences adopted by the Basic Court.

By the time of writing of this report, 22 trials in defamation action cases have concluded, but the judgements are not definitive because of ongoing appeals procedure.

Since the moment we started monitoring the trials on February 1, 2013, only two cases have been completed and concluded with a valid sentence:

- P4a 144/13, Nikola Gruevski vs. Tito Petkovski, and
- P4 93/12a, Sašo Jakimovski vs. Snežana Lupevska and Trinity Plus Production DOOEL Skopje, production and marketing company.



The defamation action trials are heard by three judges: Jovanka Spirovska Paneva, Vesna

Kalkovska and Nuhi Rustemi.

MANY TRIALS, FEW DEFINITIVE SENTENCES

Under the auspices of the monitoring programme, the Media Development Center follows the implementation of the Law on Civil Liability for Defamation, the conduct and action of the judges in the implementation of material and process law in trials, the implementation of the case law of the European Court of Human Rights, the European Convention on Human Rights and the other international documents and principles in the area of protection of freedom of expression.

While 22 cases covered by this monitoring have concluded in the court of first jurisdiction by the time of writing of this monitoring, a definitive judgment was issued in just two cases which were reviewed by the Court of Appeals. Those two are the cases of Prime Minister Nikola Gruevski vs. Tito Petkovski, and Sašo Jakimovski vs. Snežana Lupevska and Trinity Plus Production DOOEL Skopje.

While we have no intention to pressure the court in any way or fashion, we ought to conclude that the Court of Appeals have been slow in reviewing defamation cases involving journalists and has adopted just one definitive judgment so far.

This verdict, just as the verdict in the Gruevski vs. Petkovski case, are not sufficient for a comprehensive and detailed analysis of the implementation of the Law on Civil Liability for Defamation, international convention and, of

course, the case law of the Strasbourg Court. We were even less able to analyse the weaknesses of the Law and the necessary changes to improve it.

However, the past practice indicates that judges approach the case involving state officials different from the cases in which state officials do not appear either as plaintiffs or defendants. In the cases in which a state official or a politician appears as either the plaintiff or defendant, it is evident that they are expedited much more efficiently and the court acts with greater urgency, while the implementation of the European Convention and the Strasbourg Court Case Law is inconsistent, with the aim to secure greater protection for the honour and reputation of officials. The analysis of the two definitive judgments, in the Gruevski vs. Petkovski and Jakimovski vs. Lupevska cases, proves that conclusion.

THE VERDICT IN GRUEVSKI VS. PETKOVSKI

In this case, in the deliberation on the intent of the defendant, the Court didn't implement consistently the case law of the ECHR in Strasbourg. The Court didn't take into consideration the wider context in which the statement by the defendant was given, in spite of the fact that it referred to an extremely important subject for the society that requires the widest possible

public debate. It is, in fact, a problem of crucial importance for the society (the dispute over the name of the country) and Macedonia's membership in NATO and EU will depend on its resolution. The case law of the Strasbourg Court indicates that, when such important social issues are discussed and the intent is to provoke a public debate on issues of vital social interest, overdoing it and provocations are to be tolerated.

On the other hand, and this is again in line with the ECHR case law, politicians and holders of public offices need to have a higher threshold of tolerance than the ordinary citizens. Contrary to that principle, the plaintiff, in this particular case it happens to be the Prime Minister of Macedonia, is given greater level of protection by the actions and the verdict of the Court. It is evident both in the urgency with which the Court acted and in the high amount of the awarded compensation. The procedure in which the Prime Minister appeared as a plaintiff was completed with a definitive judgment in less than eight months, which was not the case with any other trial. The average procedure in all other cases took more than a year and a half to be completed, and the €10,000 compensation awarded is the highest compensation awarded by a civil court after the decriminalisation of defamation.

Also, when deliberating the merits of the case, the Court didn't take into account the principle that political expression (similar to the journalistic expression) is a privileged type of expression and that the politicians enjoy greater protection when they open a debate on issues of public interest. In the ruling and the determination of the awarded compensations, it didn't consistently apply the three part test on which the Strasbourg Court insists, especially in terms of proportionality of the measure that restricts the freedom of expression, i.e. the amount of the awarded compensation, with the legitimate aim that is to be achieved (protection for honour and reputation of the plaintiff).

THE VERDICT IN JAKIMOVSKI VS. LUPEVSKA

The judgment in *Sašo Jakimovski vs. Snežana Lupevska and Trinity Plus Production DOOEL Skopje* is an example of a proper implementation of the Law on Civil Liability for Defamation and international principles and standards.

In this case, the plaintiff demanded that the defendant Snežana Lupevska was liable for defamation because she presented, in her investigative journalism show "KOD" ("The Code"), false facts about the plaintiff and his property status, thus injuring his honour and reputation.

When deliberating on the merits and the evidence of the case and in its ruling, the Court fully followed the provisions of the Law and the international acts.

The Court has correctly ruled that the subject covered by the defendant was a matter of public interest, further confirmed by the fact that authorities filed criminal charges against several persons, including the plaintiff Sašo Jakimovski. Although the defendant did present information on the property owned by the plaintiff in her show, without evidence to substantiate her claims, the Court ruled that the comments, analysis and the statements aired in the show didn't present false facts regarding the very essence of the matter, i.e. that criminal activities of the members of the Commission for Awarding of Disability Pensions were discovered and prevented. The Court found that the statements on the property status of the defendant, unsubstantiated by evidence, were of secondary importance compared to the true facts and won't significantly change the meaning of the claims presented in the programme that the illegal actions in the process of allocation of disability pensions provided illegal gains for the defendant who was able to significantly increase his property status.

Also, the Court was correct to assess that, with the presentation of the facts in the show, the defendants had no intention to cause dam-



ages to the honour and the reputation of the plaintiff, because the aim of the show was to provide journalistic analysis and commentary to a social topic that was in the focus of public interest.

Therefore, the Court was correct to rule that there was no liability on the behalf of the defendants for violation of honour and reputation of the plaintiff.

JUDGES' CONDUCT AND ACTIONS

We could conclude from the monitoring so far that the presiding judges invoke the case law of the European Court of Human Rights and the European Convention. However, whether they fully and comprehensively implement them shall be determined later, once we have more definitive judgments adopted by the Court of Appeals.

In the trials covered by the MDC's monitoring, the judges, in general, provide equal conditions for the litigants to present evidence and proof and equal opportunity to take the stand and present witnesses in the hearings. Therefore, we could conclude that the Court largely adheres to the provisions of Article 6 of the European Convention of Human Rights and Fundamental Freedoms which guarantees the right to fair trial.

As already noted, there are deviations from proper behaviour, i.e. the Court has adopted different approach in a number of cases in which it has allowed for a more expedite proceedings, hearings are scheduled over shorter periods of time which allows for some cases to conclude in a quicker fashion. Such "accelerations" were noted in cases when high-ranking government officials appear as plaintiffs in defamation action cases. Such were, for example, the Nikola Gruevski vs. Tito Petkovski case, and the Minister of Interior Gordana Jankulovska vs. Petre Šilegov case. The Gruevski vs. Petkovski case concluded expressly, after a single hearing. On the other hand, the other cases need an average of five hearings before a verdict is made. MDC will continue to monitor the work of the judges, especially if the current practice to give preferential treatment to cases involving government officials as litigants, in view of the fact that the

ECHR case law prescribes that holders of public offices shall have a higher threshold of tolerance for defamation, which is not the case in Macedonia.

Therefore, over the coming period, MDC will monitor the trials in which state officials are involved as litigants, for example, the Nikola Gruevski vs. Zoran Zaev case, in which the Prime Minister demands compensation of half a million Euros from the leader of the opposition for statements related to the "Makedonska Banka" case.

The monitoring found that judges, when presiding over trials, adhere to the Law on Litigations, which was not the case in the period covered by the previous report when they tended to be too lenient towards the plaintiffs. Previously, the judges were not adhering strictly to the provisions of Article 101, paragraph 1 of the Law on Litigations, which prescribes dismissal of briefs filed by attorneys which are unclear, confused or lack all the information prescribed in Article 98 of the Law on Litigations. Previously, the judges justified such behaviour by noting that these were new types of proceedings, totally different than the criminal defamation trials. For example, the Judges tend to turn a blind eye to plaintiff's blunders in Sašo Mijalkov vs "Fokus" weekly, Jadranka Kostova and others, as well as in the Stojanče Angelov vs. Dragan Pavlović Latas case.

Also, during the period covered by this report, the judges were more likely to name a court-appointed custodian to parties that refused to receive the summons, and in a number of cases they moved to issue the summons on the Court's Public Announcements Board. We



find such practice to be a positive development that prevents the endless postponement of litigations.

During the period covered by this monitoring, more than a dozen new defamation lawsuits were filed in the Basic Court Skopje 2 that have journalists and/or media appearing as both plaintiffs and defendants. A number of such lawsuits were filed by Dragan Pavlović Latas, Editor-in-Chief of Sitel TV (private television broadcasting nationally), while the remaining lawsuits were filed by Ivona Talevska, Managing Editor of “Večer” daily.

Although no hearing has been held in any of those cases, according to the information available to MDC, in all those cases the plaintiffs seek compensations for non-pecuniary damages from other journalists and media companies for reporting “words of others”.

MDC will follow those cases closely, because the trend of journalists suing journalists or media outlets over reported “words of others” is additional threat against the freedom of information and freedom of expression in Macedonia.

COURT SERVICE

As noted in the previous report, the Court Service doesn't fulfil its tasks fully which has negative effects on actual litigations.

During the period covered by this report, the Office for Presentation of Summons and Writs, for example, often failed to present the summons for hearings and the writs to the litigants. We also noted a repeat of the practice for Court Service, i.e. the bailiffs, to list that summons have not been presented but never list as the reason the fact that the litigants refused to receive the briefs. That constitutes a violation of the provisions of Article 139 of the Law on Litigations, which states: "When the person the writ is addressed to, i.e. the adult member of his household i.e. authorized person or employee of a state body or a legal entity, refuses to receive the writ without any justified reason, the person performing the service shall leave it in the home or the premises where the respective person works or shall post the writ on the door of the home or premises. He shall mark the day, hour and reason for refusing receipt on the proof of service, as well as the location where the writ

is left, thus considering that the service is completed".

The lack of diligence on the behalf of the Office for Presentation of Summons and Writs results in unnecessary delays of many hearings and unnecessary expenses and costs for the litigants, for example, costs of procedure to get the exact home address of the defendants from the Ministry of Interior or the costs of presentation of summons through public notaries and executors.

The Court Service and the Office of Public Relations do not update the web-site of the Court on regular basis, including the information of scheduled hearings, and especially the hearings in which the verdicts are to be announced.

Regarding the general working conditions and conditions for proper conduct of litigations and hearings, we can conclude that the Court still lacks proper technical equipment to produce audio recordings of the hearings, or equipment for review of recordings saved on Compact Disc (CD) which were presented as evidence by any of the litigants.

CONCLUSIONS

- Although the Law on Civil Liability for Defamation prescribes urgency of procedures, 18 months after its adoption, we have only 2 cases that are concluded with definitive judgments. The procedures in the Court of Appeals are slow, which is a serious obstacle for proper analysis of the Law, possibilities for its improvements or the manner in which the judges implement the case law of the European Court of Human Rights, the European Convention on Human Rights and the other international documents.
- The past practice indicates that judges approach the case involving state officials different from the cases in which state officials do not appear either as plaintiffs or defendants. In the cases in which a state official or a politician appears as either the plaintiff or defendant, it is evident that they are expedited much more efficiently and the court acts with greater urgency, while the implementation of the European Convention and the Strasbourg Court Case Law is inconsistent, with the aim to secure greater protection for the honour and reputation of officials. The analysis of the two definitive judgments, in the Gruevski vs. Petkovski and Jakimovski vs. Lupevska cases, proves that conclusion.
- During the period covered by this report, we noted an increased number of cases of defamation lawsuits filed by journalists against other journalists for reported “words of others”. MDC will follow those cases closely, because that practice presents an additional threat against the freedom of information and freedom of expression in Macedonia.
- The monitoring found that judges, when presiding over trials, adhere to the Law on Litigations, which was not the case in the period covered by the previous report when they tended to be too lenient towards the plaintiffs. Also, during the period covered by this report, the judges were more likely to name a court-appointed custodian to parties that refused to receive the summons, and in a number of cases they moved to issue the summons on the Court’s Public Announcements Board. We find such practice to be a positive development that prevents the endless postponement of litigations.
- The Office for Presentation of Summons and Writs, for example, often failed to present the summons for hearings to the litigants. The Court Service regularly notes that summons have not been presented but never list as the reason the fact that the litigants refused to receive the briefs. To avoid unnecessary delays of hearings and proceedings, MDC believes that the Office of Summons should be reorganized and conditions need to be created for electronic summons and delivery of other briefs and documents.
- The Court Service and the Office of Public Relations need to update the web-site of the Court regularly, especially the section with information of scheduled hearings, and the section for publication of adopted judgments and decisions.

ANNEX I

DEBATE: “DEFAMATION –
HARNESSING THE PRESS?”

The Media Development Center, under the auspices of the USAID Project for Media Legal Reform and Responsible Media, organized, on July 11, 2014, a debate on the topic “Defamation – Harnessing the Press?”

The president of the Association of Journalists of Macedonia (AJM) Naser Selmani; the editor-in-chief of “Fokus” weekly Jadranka Kostova; the editor of Libertas.mk internet portal Aco Kabranov; and attorney-at-law Filip Medarski participated in the debate as panelists. A number of journalists, experts in the fields of media and human rights, representatives of international institutions, also participated in the debate, moderated by journalist Saše Dimovski. Although invited, the three judges that hear defamation action cases at the Basic Court Skopje 2, Skopje, didn’t appear at the debate.

The discussion focused on the findings of the 2nd Report from the Monitoring of Defamation Action Cases, which covers the period from March 1 to June 15, 2014.

Several participants in the debate concluded noted that the adoption of the Law on Civil Liability for Defamation resulted in a situation in which only about 50 of almost 300 cases tried in criminal procedure were renewed in the civil procedure and are heard in the Civil Court. However, the general conclusion was that the reduced number of defamation action cases tried in courts doesn’t necessarily mean that the freedom of expression has improved.

According to the panelists, in the cases involving just journalists and media, but not high-ranking state officials, the judges apply the case law of the European Court of Human Rights to the letter. However, if state or govern-

ment officials appear as a party in a given case, the judges have different approach and provide them preferential treatment, their adherence to the European Convention of Human Rights and the ECHR case law is far less consistent.

In such cases, the Court doesn’t recognize the public interest and fails to apply the rule of the Strasbourg Court which prescribes that holders of public office should have “a higher threshold of tolerance for public criticism”. The participants in the debate also concluded that the Court provides a much more expedient procedure in cases that involve government officials as plaintiffs. The past practice shows that judges always rule in favour of officials and award high compensations, which is not the case in other cases, in which other persons appear as plaintiffs. Such actions by the judges intensify the pressure on freedom of expression and push the journalists towards self-censorship. Another noted problem refers to the high court fees charged for filing appeals. The high trial costs and high awarded damages, according to the participants in the debate, are a serious threat for the very survival of the independent media that reserve critical approach to the Government.

The debate also noted the Law on Civil Liability for Defamation is used as an instrument of the Government to silence the journalists and the media and was adopted with that specific purpose in mind. The participants expressed their concerns over the fact that, full 15 months after it was submitted, the Constitutional Court has not yet offered a ruling on the initiative to assess the constitutionality of the Law, submitted by MDC and the Front for Freedom of Expression.



The experts in the area of human rights emphasized the fact that the Law on Civil Liability for Defamation is discriminatory and that the proponents of the Law in the Government, together with its “partners from AJM”, failed to take into account the greater public interest in the process of drafting and adoption of the Law and focused solely on the effort to protect the journalist and not all citizens. In their view, the “double standard” approach of the judges doesn’t apply just in cases involving journalists and politicians, and it is present in cases when ordinary citizens appear in court in cases against police officers.