



MONITORING OF CRIMINAL PROCEDURES

MANUAL FOR JOURNALISTS

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1 The project was implemented in the Western Balkan region in cooperation with five partner organizations: Human Rights Lawyers' Committee (YUCOM) in Serbia, Tirana Legal Aid Association (TLAS) in Albania, the Helsinki Committee for Human Rights in RS-Bosnia and Herzegovina, Balkan Policy Research Group in Kosovo and Helsinki Committee for Human Rights in Macedonia.

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I INTRODUCTION

This manual was created within the project “Empowering the reporting on rule of law standards in Serbia, Macedonia, Albania, Kosovo and Bosnia and Herzegovina” in an effort to support journalists in the region to overcome difficulties threatening their independence and professionalism and enable them to fully realise their watchdog role in course of the rule of law reforms. For the institutions in charge of implementing these reforms to truly be held accountable, they must constantly be under the vigilant eye of the free and independent media. This is especially important with the criminal justice system which aims not only to have a punitive but also a preventative role, which depends greatly on the level of public trust on these institutions.

Publicity of criminal trials has multiple benefits for the rights of the accused as well as for the independence and accountability of the judiciary. Good understanding of criminal procedures and keen appreciation for professional and ethical reporting, enable journalists to provide to the public a much-needed insight into the work of the judiciary. Objectively and well balanced reporting brings the judiciary closer to citizens, demystifies the entire process and contributes to clarifying that acquittals or minor sentences are not always a product of corruption in the judiciary.

Re-building the shaken public confidence in the judiciary is a precondition for a successful and sustainable rule of law reforms as well as for the expected accession of our region in the European Union. A significant obstacle is the rise of authoritarianism and the decline in the states of media’ freedoms in the region. Faced with economic pressures, intimidations and physical attacks, many journalists resort to self-censorship, while others, in order to increase the diffusion of their media, resort to tabloid style writing, leading to an overall decline in media quality and objectivity.



II SPECIFIC ISSUES

1. SERBIA

Breaching the presumption of innocence is the most important violation of the law committed in the media as well as the most frequent one.² This violation is seriously undermining public confidence in the judiciary, leaving the citizens to believe that acquittals or perceived lenient sentencing are a consequence of rampant judicial corruption. This is compounded by the fact that this violation is often committed by the members of the executive branch following or even preceding arrests in publicised corruption cases. Often in these cases, the arrested are eventually acquitted leaving room for speculation that prosecution went ahead with the case unprepared, without sufficient evidence and under political pressure from the executive.

Detention against of the accused is often determined by “public disturbance” that can jeopardize the smooth and fair conduct of criminal proceedings. Paradoxically, the “public disturbance” is often caused by the tabloid media reporting that violates the presumption of innocence. While the judicial system is eventually weighted down with the responsibility for damages paid for unlawful detention, those who breach the presumption of innocence face no real consequences. Contrary to government reports claiming full completion of measures in the Action plan for Chapter 23 aiming at suppression of this widespread phenomenon, the authority competent for the written press, the Ministry of Culture and Information, has not initiated a single misdemeanour procedure in the last three years.³ Because existing legal procedures are seldom initiated by the competent authorities, there are initiatives to introduce the breaching of the presumption of innocence as a criminal act punishable by a prison term.

However, often this is not a tool for political pressure but rather a tool for increasing media’s sales. Those defendants whose rights are violated are often minors or indigent persons who have only been suspected of committing a crime and who have no means to fund legal representation at the Higher Court in Belgrade exclusively competent for media cases. It is also worth noting that

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- 2 Limited monitoring conducted regularly by the Press council, a self-regulatory body of The Independent Journalists’ Association of Serbia (IJAS), notes close to a thousand violations annually.
 - 3 Council for Implementation of the Action Plan for Chapter 23, Report No. 2/2018 on the Implementation of the Action Plan for Chapter 23, Belgrade, July 2018, Activity 1.1.6.7, p. 54.

the current bill for free legal aid explicitly forbids the providers of free legal aid from providing free legal aid in cases of defamation lawsuits, thus limiting access to justice for victims of the breach of the presumption of innocence who are unable to afford paying for legal representation.

2. MACEDONIA

Sensationalism in the past decade has been the main feature of journalism and media in Macedonia. This approach of communicating the news led to a serious violation of the rights of defendants and/or victims, but also to serious disregard of the standards of the rule of law principle.

The right to privacy of the defendants/victims and the presumption of innocence of the defendants and the suspects in the proceedings are most often and most frequently violated.

This sensationalism was a propaganda tool used by the previous government to show that it is allegedly leading a serious fight against corruption and crime. After initiated and completed proceedings against certain members of the previous ruling party, it was obvious that these actions, which were accompanied by media sensationalism, represented political persecution of their opponents or a cover-up for their own criminal acts.

During this period, the independence and objectivity of the media in Macedonia was seriously jeopardized. Partially the initiated criminal proceedings against members of the previous government as well as the so-called “bombs” lead to conclusions that propaganda and sensationalism spread by certain media were well paid from the government and political party funds. This unfavorable position of the media was covered in almost every annual report of the European Commission, as well as independent international organizations that monitor the level of transparency, independence and objectivity of the media.

Also in the ruling period of the previous government, we had many examples of persecution of a small number of independent media and journalists by the ruling majority, a kind of disciplining journalists and the media with lawsuits for insult and defamation. These complaints adopted by the court, undoubtedly, imposed an enormous amount of compensation for allegedly violating the reputation and honor of the politicians-plaintiffs.

There were even cases of criminal prosecution of journalists who were not like-minded to the past government and who were trying through investigative journalism to find out about the behind-the-scenes illegal activities of the ruling party at that time. An example of this is the condemnation of journalist Tomislav Kezarovski who was imprisoned for allegedly revealing the identity of a protected

witness in criminal proceeding. Although, according to Kezharovsky, the real reason for condemnation was the research carried out by him.

Failure to investigate the death of a journalist and editor of the weekly newspaper Focus leaves a black spot and casts a legitimate suspicion on the involvement of ruling politicians at the time in the death of this prominent journalist.

This attitude of media and journalists seriously affected the creation of public opinion and understanding of court procedures and processes, which, after several years of falling out of the regime, the consequences are still felt. Although, media has made some progress in the past two years, after the regime of the previous government demolished, the independence of the media is still fragile, and the objectivity of the reporting is impaired by sensationalism and inadequate reporting.

On the other hand, according to the statements of the journalists, the closure of the institutions and the judicial authorities as well as the lack of adequate information in the media, leaves room for the development of speculative stories that again do not support proper and effective reporting in accordance to the rule of law standards.

3. ALBANIA

Freedom of the press and the presumption of innocence are imperative to democracy in that the former maintains an informed public and the latter protects the rights of the accused. In Albania, media and communications in all fields underwent a considerable evolution, and the relationship between the public and information changed.

With the development of social media and media on the Internet, a continuous flow of information is generated in terms of which the public and the media must to be guided. People do not look for information themselves; they wait for information to be brought to them. Thus the notion of “publicity” evolved. Ensuring public access to court rooms is no longer perceived as sufficient to make a decision “public”. The state of being public implies accessibility, which in return requires bringing simple, understandable and accurate information to the widest possible range of individuals.

Judges and prosecutors have to guarantee the conduction of proceedings in accordance with the rule-of-law principle, presumption of innocence, fair adjudication and a rule that justice is rendered by court only.

How then the justice work under such reasonably high pressure of the public interests and the media? In Albania, the prosecutor leads pre-trial investigation and a prosecutor is responsible for disclosure of the information obtained during

pre-trial investigation, therefore it is a prosecutor's duty to explain the case to the public and to guarantee the principles of fair prosecution and presumption of innocence. The information offered for disclosure is typically of general kind with no evidence provided and intends to protect all parties to the proceedings, including witnesses, not to mention victims and suspects, in case of a high public interest that is measured through the principle of proportionality on a case-by-case basis.

Media through monitoring, information and mass coverage, gives the public an image of reality where he lives and beyond, makes an ally of justice through denunciations of officials violations, their abuses and abuses of various institutions, and this is the best part, but on the other hand, sometimes overcoming the limits of information or the inaccurate information leads to catastrophic consequences in the life of an individual or a society.

Lessons learned and challenges ahead in Albania:

- ▶ The Albanian legal system institutions should explain the principles, choices and strategies of its functioning in a spirit of "open state";
- ▶ It is necessary to raise awareness on the impact and significance of communication, especially in high-level cases;
- ▶ The dialogue between the media and the legal system must be continuous, first and foremost, in the times of no "crisis", because then it is easier to handle a "crisis" when it comes;
- ▶ The legal system has to agree upon a communication strategy of criminal proceedings, i.e. when, to what extent, by whom and to whom the information has to be provided; it is necessary then to stick to this strategy and to spread the message about its background and nature;
- ▶ The Albanian legal system has to guarantee the rule-of-law principle, fair prosecution and presumption of innocence.

4. KOSOVO

In Kosovo, one of the biggest concern in regard of media reporting on rule of law issues is the insufficient knowledge of journalists in criminal law and lack of proper information of consequences that result from the inaccurate and erroneous reporting.

Based on the analysis of the decisions made by Press Council of Kosovo and the Independent Media Commission infringements in media reporting on criminal cases derive as a result of the lack of clear understanding of criminal proceedings stages and principles of the criminal code.

Issues include revealing the name and personal data of individuals in the early stages of investigation, as well as drawing personal conclusions about certain individuals who have been unlawfully or similarly enriched but failing to provide evidence in supporting their claims. This is as a result of low awareness of journalists on basic criminal principles such as the fact that an individual in the Republic of Kosovo is only formally considered under investigation when the prosecution has ruled to initiate a case against that individual and when the criminal investigation is still active and has not been terminated by a final decision.⁴

Breaches in cases of presumption of innocence, wrongfully naming of suspects and of the accused and moreover, drawing conclusions that certain persons are the perpetrator of the criminal offense constitute grave violations of media in reporting.⁵

Problems have also been identified with the treatment of juveniles charged with criminal offences where information published may have revealed the identity of minors charged with a criminal act which constitutes a direct offense of the Press Code of Kosovo.⁶

Another controversial issue in Kosovo is the interference in the privacy of the people on who the media is reporting. The last and most representative case of this issue is the breach of privacy against the individuals involved in the fraud indictment with the KLA veterans list, where persons were alleged to have illegally acquired the status of veterans as beneficiaries, more than 19,000 individual personal data, including personal number, were disclosed.⁷

Such breaches by the media imply the lack of knowledge by journalists of the consequences that may result from this particular form of reporting. Thereupon, violations such as disclosure of the secrecy of the proceedings, of the identity of protected or anonymous witnesses and the like continue to happen, without penalties.

It also happens that testimonies given behind closed doors by a protected witness have been disclosed to the media. An investigation was also initiated against a lawyer who was suspected of revealing the name of the protected witness to the

4 See: Press Council of Kosovo. Decision 683 – 2018. http://presscouncil-ks.org/wp-content/uploads/2018/10/vendim_KMSHK_683-2018.pdf

5 See: Press Council of Kosovo. Decision 647-2016. http://presscouncil-ks.org/wp-content/uploads/2018/07/vendim_KMSHK_647-2016.pdf

6 See: Press Council of Kosovo. Decision 575-2017. http://presscouncil-ks.org/wp-content/uploads/2017/12/vendim_KMSHK_575-2017.pdf

7 See: Kallxo.com. Prosecution launches investigations on the veteran lists publication. 28 September 2018. <https://kallxo.com/prokuroria-nis-he-timet-per-publikimin-e-listave-te-veteraneve/>

media.⁸ In this case, while the media was reporting on the investigation against the lawyer media again publishes the name of the protected witness for which the lawyer himself was under investigation.

In addition to the challenges of dealing with criminal consequences, not a few journalists are familiar with the Press Council of Kosovo which regulates the print media and the Independent Media Commission regulating the providers of audio-visual and radio services.

5. BOSNIA AND HERZEGOVINA

The main problem that arises in reporting on court proceedings which fall in the phase of criminal prosecution or investigation process are the prejudices and subjectivity of the reporters and media in general during the reporting on the subject. Also, a significant obstacle in credible reporting is the lack of knowledge on legal terminology that unables these reporters to adapt the material for readers and public in general. The key issue in reporting is the lack of appropriate qualification of the process and lack of knowledge of the legal matters.

Lack of knowledge in media that is visible through reporting threatens to violate professional standards and the code of ethics of the profession, and leads to the violation of the presumption of innocence and the disclosure of the identity of the minor. Among other things, journalists are not familiar with their rights and obligations.

It is a basic journalistic obligation to strive for true and timely reporting, and to do so by using professional and ethical standards.

Reporting from the trial: “Media took scandal and national rhetoric to an extent that the right of the public to truthful information based on accurate and complete information is compromised”.

Judicial reporters should be guided by the highest professional ethical standards and should be aware of the rules and laws applicable by the court. All court cases are mostly located within closed systems and it is not easy to obtain information within a specific timeframe; legal terminology and procedures are complicated and require clarification. The work of court journalists reporting on war crimes in BiH is even more difficult due to the disturbing testimonies of events they themselves witnessed during the war.

Mirela Huković-Hodžić: “We are only journalists, not legal experts.” The language of the court reporters should be understandable to the public, it needs to clarify

8 See: <http://www.treci.os.sud.rs/images/Razno/OstInterniAkti/Uputstvo%20o%20akreditaciji%20novinara.pdf>

why a court decision or procedure is exactly what it is “without emotions and prejudices”.

We have a situation that it is often forgotten that journalists should treat the suspect and the accused as innocent in reporting, until the court finds them guilty. In order for journalists to avoid this basic error, it is important to use a clear and accurate terminology that defines the status of a person in a criminal procedure. The presumption of innocence is an integral part of the right to a fair trial. Consequently, opinions and information relating to criminal proceedings should be transmitted only when it does not generate prejudice on the presumption of innocence of the suspect or of the accused.

An additional problem in the reporting process is the political impact on media and journalists, which produces a biased and sensationalistic reporting. The objectivity of reporting is influenced by the factor of ownership of media houses, newspapers, and who funds them.

In Bosnia and Herzegovina, there are four legal systems in place which operate in parallel. The consequence of this is bringing citizens into a situation of legal uncertainty. The problem becomes even bigger if the subject of persons convicted of war crimes is taken into account. For the same or similar criminal offenses, the difference in sentences may be up to 20 years, depending on the court which has conducted the proceedings.



III REPORTING GUIDELINES

1. ACCESS TO THE COURTS

The court system in Kosovo consists of three levels of courts: the Basic Courts, comprising the courts of first instance; the Court of Appeal, the second instance and the Supreme Court, constituting the highest court of law.

Law no. 06/L-054 on Courts provides general legal provisions on access to the courts and judicial transparency.⁹ Article 7 of this law states that “the courts shall treat all persons in an equal manner” and that every person has the right to “equal access to the courts and no one shall be denied the right to a fair trial in accordance with the regular legal procedure or the right to equal protection of the law”.

According to the Law on Courts, “all court sessions shall be open to the public unless otherwise provided by law”.¹⁰ Article 6 of this law also highlights that “the courts shall publish all judgments on their official web site, within sixty days from the issuance of the judgment”.

Pursuant to Article 292 of the Criminal Procedure Code, after the first hearing of the parties, the single trial judge may fully close the hearings to the public throughout the main trial or only parts of it, if necessary.¹¹ This usually happens in order to ensure the safeguarding of national security and official secrecy that is protected by law; to protect the interests of children; maintain order and respect the law; protect the injured or the witnesses; preserve the confidentiality of information that would harm the court process; protection of the person or family life of the accused; or other participants in the proceedings.

The president of the court is responsible to ensure that the court and the proceedings before the court are open and transparent to the public. He/she are also responsible to ensure public access to the courts, including the access of persons from communities that do not constitute the majority in Kosovo.

The Code of Criminal Procedure provides a set of rules on the basis of which the judge keeps order in the courtroom and regulates the presence of the media in the courtroom. Pursuant to Article 299 of this Code, the judge or

9 See: Law No. 06/L-054 on Courts. Available at <https://gzk.rks-gov.net/ActDetail.aspx?ActID=18302>

10 Ibid., art. 7.

11 See: Draft Criminal Procedure Code. Article 292. <http://kryeministri-ks.net/wp-content/uploads/2019/01/PROJEKT-KODI-I-PROCEDURES-PE-NALE.pdf>

the presiding judge, after the opening session, warns the persons present to conduct themselves appropriately and not obstruct the work of the court.¹² The presiding judge also has the right to order the personal control of the persons present at the main trial. Paragraph 4 of this Article emphasises that parties and the defence counsel can audio record an open court hearings which may only be used for the purposes of procedural rights and their participation in criminal proceedings. Whereas personal data of the parties involved remain confidential and can be used only during the criminal proceedings.

Further, in paragraph 5 of this Article, it is emphasised that photography, filming, TV recording and other recordings other than official recordings are permitted, unless the judge or the presiding judge limits such recordings through a reasoned decision in writing. If the recording of the main trial is allowed, the judge has the right to limit the recording of special parts of the hearing.

The right of access to public documents is guaranteed by the Constitution of the Republic of Kosovo through Article 4, and through other articles which guarantee the transparency of public institutions.

The Assembly of Kosovo has also adopted Law no. 03/L-215 on Access to Public Documents, which guarantees citizens access to documents from public institutions.¹³ Pursuant to Article 5 of this Law, all public institutions are obliged to appoint an official who is responsible for receiving and giving an initial examination to the requests for access to public documents. Thus, the requests for access to these documents can be addressed to the unit or officer for the communication of the respective institution.

Each public institution is obliged within seven days to make a decision on whether or not it will allow access to the requested document or to explain why the request was rejected.¹⁴ If the request is rejected, after receiving the response from the public institution, the applicant is entitled within 15 days to file a request so that the decision is reconsidered on the submitted application. In case of a negative response, the applicant has the right to initiate the procedure to the competent authorities such as the Ombudsperson or other institutions. The right of access to public documents is also guaranteed by Article 10 of the European Convention on Human Rights and Fundamental Freedoms.

So far, all courts in Kosovo have appointed officials for public communications, except for the basic court in Mitrovica. The Kosovo Judicial Council has also developed several strategies and strategic plans that have primarily aimed at advancing the communication of the courts in relation to the public and the media.

12 Ibid., art. 299.

13 See: Law no. 03/L-215 on Access to Public Documents. <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2724>

14 Ibid., art. 7.

2. LEGAL RESPONSIBILITY OF JOURNALISTS

Kosovo has a Press Council which is a self-regulatory body and operates on the basis of the respect for ethics of journalism and freedom of speech.¹⁵ The Council is a non-governmental organization and acts independently. Part of this Council are a number of media including daily newspapers, news portals, portals, periodicals, newsletters and news agencies.

The Council has drafted the Press Code of Kosovo which is mandatory for journalists and media.¹⁶ This Code includes general provisions under which the duties of journalists and editors include respect for the right of citizens to be informed timely and fully, while protecting the principles of freedom of information, the right to comment properly and critical journalism. Further, these provisions emphasize that the media should respect international standards of ethnic, cultural and religious diversity, while it should never encourage discrimination or intolerance, intentionally or indirectly.

According to this code, the work of journalists must rely on reliable sources of information and thus respect the factual truth as well as the right of the public to know the truth. The media is obliged to protect the identity of those who provide confidential information, and never use photographs or documents that would mislead the public.

This code also indicates provisions as to when the media and journalists should avoid encouraging violent acts and hate speech.¹⁷ It explains that prejudicing on an individual or group based on gender, ethnic, religious, racial or other gender as well as the use of denigrating expressions with the purpose of hurting and threatening an individual or group on these grounds encourages hate and inequality.

This code explicitly states that in case of reporting on persons charged with criminal offenses, the media and journalists should not treat any individual as guilty until such a thing is confirmed by the court.¹⁸ The same applies to the privacy of individuals, except in cases where research on the personal life of an individual is of the public interest.

The Press Council scrutinizes any complaints regarding violations of the Press Code, which may be filed by anyone, via the web site, through e-mail or physical

15 See: Press Council of Kosovo Statute. Preamble. http://presscouncil-ks.org/wp-content/uploads/2015/04/Statute_PCK.pdf

16 See: Press Code for Kosovo. Preamble. <http://presscouncil-ks.org/wp-content/uploads/2018/11/Press-Code-for-Kosovo-eng.pdf>

17 Ibid., Chapter III: Incitement and Hate Speech.

18 Ibid., Chapter V: Persons Charged with Criminal Offences.

appearance of the copy.¹⁹ Complaints addressed to the Council can only be raised against the newspaper as a whole and not against journalists individually.

A complaint should be filed within one month from the date of publication of the material, whereas the decision is taken no later than three months after the filing of the complaint. The newspaper to which the complaint has been filed should respond and comment on the Council within fifty days.

The Assembly of Kosovo has also adopted the Civil Law no. 02 / L-65 against Defamation and Insult intended to regulate civil liability for defamation and insult.²⁰ According to this law, defamation means “the publication of a false fact or statement that the publisher knows or should have known that the fact and the statement is untrue, the meaning of which damages the reputation of another person” while insult means “declaring, behaving, publication of a statement addressed to another person that is derogatory”. The responsibility for defamation or insult is borne by the person who has committed or has spread defamation or insult against an individual.²¹

According to Article 5 of the Civil Code against Defamation and Insult, if such actions are carried out through the media, then the author, editor, or publisher is considered to be individually or jointly responsible. This law also foresees cases of exclusion from liability and sets limits to it for such actions. Article 9 of this Law lists the circumstances that exclude an individual from bearing the responsibility on the statements given, some of which include statements given during the proceedings of legislative bodies, statements during each stage of pre-trial, judicial or administrative proceedings, by anyone who is directly involved in this procedure (unless the statement in question is related to the judicial process), statements made before the Ombudsperson and others statements.

According to this law, compensation for defamation must be proportional to the damage caused.²² Compensation in such cases is set for the purpose of correcting the damage caused to the reputation of the person in question or for compensation on any financial loss or material damage caused. Compensation and the amount of compensation for financial losses or material damage incurred is determined by the courts responsible depending on the circumstances, the extent of the damage as well as the material condition of the person who caused the damage.

19 See: Press Council of Kosovo Statute. Article 3. http://presscouncil-ks.org/wp-content/uploads/2015/04/Statute_PCK.pdf

20 See: Civil Law no. 02 / L-65 against Defamation and Insult. https://www.kuvendikosoves.org/common/docs/ligjet/2006_02-L65_en.pdf

21 Ibid., art. 5.

22 Ibid., art. 14.

3. MINORS RIGHTS

In Kosovo, juvenile rights are guaranteed through higher legal acts and international conventions that are applicable directly to Kosovo's laws. Except for the legal framework, the sixth chapter of the Press Code is dedicated to the protection of children and juveniles while journalists report on media that includes this category. According to this chapter, journalists or media:

- ▶ Should not interview or photograph children under the age of eighteen on matters pertaining to their family without the consent of their parents or any adult who is responsible for the child.
- ▶ In no way media should identify children under the age of eighteen who are involved in criminal offenses, whether as witnesses or defendants.
- ▶ Handling narratives of personal tragedies should be carefully developed, while individuals affected by the tragedy should have an approach of understanding and discretion.²³

As a result of this chapter, the Press Council of Kosovo together with the Office of UNICEF in Kosovo have drafted a Guideline on the Protection of Children in Media, which provides detailed explanations on the implementation of chapter six of this Code.²⁴

The Child Protection Guide provides a number of recommendations on how a journalist or media should act in cases where a child is being interviewed, and how it is reported. According to this guide, journalists should, among others, pay attention to the sensitivity of the topic, the physical and emotional well-being of the child as well as the cultural, ethnic, religious, and personal experiences of the child. Likewise, a journalist should take care that the reporting in which a child is involved will not harm the child and will not present him/her in a negative context.

Further, this guide provides a list called a "Checklist for Journalists" which is recommended to be used by journalists during the preparation and after the publication of the news which includes juveniles.

In a summary of the 2017 decisions, the Press Council of Kosovo approved a complaint filed by Aurora Susuri Gunga, who filed a complaint against Blic Gazeta and Kosovarja magazine after they published an article containing photographs

23 See: Press Code for Kosovo. Chapter VI: Protection of Children and Minors. <http://presscouncil-ks.org/wp-content/uploads/2018/11/Press-Code-for-Kosovo-eng.pdf>

24 See: Press Council of Kosovo. UNICEF Kosovo. Guidelines on the Protection of Children in Media. <http://presscouncil-ks.org/wp-content/uploads/2015/04/Udh%C3%ABzues-p%C3%ABr-Mbrojtjen-e-F%C3%AB-mij%C3%ABve-n%C3%AB-Media.pdf>

of her children, which were published “without the permission, knowledge and consent of the parent”.²⁵ Board of the Council approved the complained based on the sixth chapter of the printed media code that refers to child protection, and the seventh chapter which refers to privacy and avoidance of interference and research in private life of an individual that are of no interest to the public.

4. CRIMINAL PROCEDURE OVERVIEW – KOSOVO

Writing clear, complete, comprehensible and accurate news is not possible without giving answers to five journalistic questions: who, what, where, when and why. The essence of a journalistic work is in answering the question why, which cannot be given without adequate knowledge of the legal concepts used in the courtroom. Journalists need to be well aware of the roles of the participants in the proceedings, their rights and obligations, the stages of the proceedings, and many other issues that can be found in the relevant substantive and procedural legislation.

One of the biggest challenge in the continuous monitoring of trials in criminal proceedings is their length, since trials, even for straightforward cases, can last for years. The result is a decline in citizens’ confidence in the judiciary and a shift in attention from the many problems that the judiciary face in its work and which require serious reforms.

Only through good preparation and knowledge, is it possible to communicate and translate the formal and dense language of legal norms into a language that can be comprehensible to the wide circle of citizens to whom this information must reach.

Considering the lack of legal knowledge and legal terminology as one of the biggest challenges when reporting in criminal procedures and the judiciary’s work in the Balkans’s region, this section was developed with the purpose of providing journalists with the knowledge on how the criminal procedures are conducted and to what extent courts can be open to the public.

Below is presented a summary of the new draft of the Criminal Procedure Code of Kosovo (CPCK) on the four main stages of the criminal procedures including, the investigation phase, filing of the indictment and plea, main trial and legal remedies.²⁶ The new draft code is foreseen to enter into force in January 2020.

25 See: Press Council of Kosovo. Summary of Decisions 2017. <http://press-council-ks.org/wp-content/uploads/2018/11/Permbledhje-e-vendi-meve-2017.pdf>

26 Draft Criminal Procedure Code.. <http://kryeministri-ks.net/wp-content/uploads/2019/01/PROJEKT-KODI-I-PROCEDURES-PENALE.pdf>

4.1 INVESTIGATION PHASE

Criminal procedure in Kosovo is conducted under the authority and supervision of the state's prosecutor. As investigation is conducted by the state prosecutor, the control over the actions and their legality is completed by the pre-trial judge.

The investigation phase is initiated by filing a criminal report, which should be submitted to the state prosecutor in writing, by means of technical communication or orally. The criminal report can be submitted by the Police under Article 81 of the CPCK or by any individual or injured party. Based on the data and evidence collected, the police compile a criminal report in which are presented the detected evidence in the process of collecting data.²⁷

Based on Article 102 of CPCK, investigation begins by the state prosecutor's ruling, a copy of which should be sent to the pre-trial judge. The state prosecutor's ruling specifies:

- ▶ If known, the person or persons against whom the investigation will be conducted;
- ▶ Date and time of the initiation of the investigation;
- ▶ A description of the act which specifies the elements of the criminal offence;
- ▶ Legal name of the criminal offence;
- ▶ Circumstances and facts warranting the reasonable suspicion of a criminal offence, whether any technical or covert measures of investigation or surveillance had been authorised, and
- ▶ Evidence and information which has been already collected.

Once the investigation has been initiated, the phase of gathering information on the criminal case begins. Kosovo's Criminal Procedure Code provides rules based on which gathering of information is conducted at the investigation stage. Article 156 of this code, specifies cases when the state prosecutor can terminate the investigation.

However, if an investigation has been initiated, the period within which it should be completed is two years. If an indictment has not been filed within this period, or a suspension has not been entered, the investigation should be automatically terminated.²⁸

27 Ibid., art. 79.

28 Ibid., art.157.

4.2 INDICTMENT

Kosovo has a legal system where criminal prosecution is carried out only through the indictment of the prosecutor, which is filed in the competent court²⁹ after a completed investigation and on the basis of information provided which is sufficient to suspect that the defendant has conducted a criminal offence.³⁰

Information that should be included in the content of the indictment is specified in Article 238 of CPCK. According to which, the indictment shall contain, among others:

- ▶ An indication of the court where the main trial will be held;
- ▶ Full name of the defendant and its personal data;
- ▶ Indicate whether there will be applied detention on remand or other measures and for how long;
- ▶ Legal name of the criminal offense along with the citation of the criminal code provisions;
- ▶ Time and place of the criminal offence commission as well as the object or instrument with which the criminal offence was committed;
- ▶ Explanation for the reasons based on which the indictment has been filed.

Access to the indictment is not permitted until the initial hearing is held. After the initial hearing, only some parts of the indictment, such as the name of the defendant, year of birth, legal qualification and summary of the offence can become public.³¹ While other parts, such as narrative summary of the evidence, list of exhibits, witnesses summoned to the main trials, or any discussion on the indictment regarding its background, reasoning or evidence supporting charges, will not be public until the Basic Court has rendered a judgment. Month and day of birth, address of the defendant or the personal number are among the information which should never be public.

4.3 TRIAL

Initial hearing commences before the single judge in the court where the indictment has been filed. At this hearing, the single trial judge can rule on any motion in order to extend or implement measures that ensure the presence of the defendant. A second hearing is also scheduled. Present at the initial hearing should be state prosecutor, the defendant and defence counsel.³²

29 Ibid., art.239.

30 Ibid., art.237.

31 Ibid., art.240.

32 Ibid., art.243.

While the single trial judge determines the day, hour and venue of the main trial through an order,³³ the persons summoned to the main trial include the accused, their defence counsel, state prosecutor, injured party, interpreter, witnesses as well as the expert witnesses proposed either by the state prosecutor or the accused.³⁴

The main trial is open to the public³⁵ unless the judge decides otherwise due to the reasons listed in the article 292. Exclusion of the public by the judge should be justified while the ruling for exclusion of the public shall be public.³⁶ Photography and recording of the trial apart from the official recording is allowed, unless the judge decides to limit these actions in a written decision.³⁷

After the court has rendered the judgment, the single trial judge shall announce the judgment on the date set by court. In accordance with Law on Courts, within sixty days from the date of the issuance, all judgments should be published by courts.

In Kosovo, the publication of judgments is regulated by Administrative Instruction of the Kosovo Judicial Council No. 02/2016, which stipulates that only the final and anonymous judgments may be published.³⁸

4.2 LEGAL REMEDIES

Type and general rules of the legal remedies such as fairness, content and time limits are explained in Chapter 21 of the CPCK. According to the article 377 of CPCK, a party can seek legal remedies from a court of a higher instance by filing an appeal against the judgment or a ruling of a court of lower instance. For example, if the judgment is rendered by the Basic Court, the appeal has to be filed to the Court of the Appeals, and if the judgment is rendered by the latter, the appeal shall be filed to the Supreme Court. Objection against the Basic Court decision comprises as well a type of legal remedy.

Authorised persons to file an appeal consist of state prosecutor, defence counsel, the accused, legal representative of the accused and the injured party. While a person whose property has been confiscated may also file an appeal. Reasons behind which the authorised persons file an appeal are different.

33 Ibid., art.284.

34 Ibid., art.285.

35 Ibid., art.291.

36 Ibid., art.294.

37 Ibid., art.299

38 See: Kosovo Judicial Council. Administrative instruction no. 02/2016 on anonymization and publication of final court judgments.



IV PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

European Convention on Human Rights (ECtHR) holds special importance in our legal system, making sure that domestic courts must adhere to the interpretations of the European Court of Human Rights when rendering their decisions. The work of the European Court of Human Rights has shaped up a series of legal standards that are of great importance for the freedom and responsibility of the media.

Among them, the most standards emphasize that public officials must develop a higher degree of tolerance to public criticism³⁹, that freedom of expression implies the right to express information and attitudes that insult and shock, and the right to a certain exaggeration and provocation in matters of public interest⁴⁰. In practice, ECHR highlights the role of the media as a guardian of public interest (watchdog) enjoying special protection⁴¹, stating that such protection is ensured to journalists who provide reliable and precise information in good faith and in accordance with journalistic ethics⁴². However, it is also stated that professionalism of journalists should not be judged too strict, as this can lead to a deterrent effect⁴³. In order to foster a public discussion on issues of public interest, ECtHR found that interlocutors should be allowed the right to give a proportional

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- 39 See: *Ligens v. Austria*, application no. 9815/82, 8 July 1986; *Lepojić v. Serbia*, application no. 13909/05, 6 November 2007; *Bodrožić v. Serbia*, application no. 32550/05, 23 June 2009; *Jerusalem v. Austria*, application no. 26958/95, 27 February 2001; *Biröl v. Turkey*, application no. 44104/98, 1 June 2005.
- 40 See: *Handyside v. United Kingdom*, application no. 5493/72, 7 December 1976; *Ligens v. Austria*, application no. 9815/82, 8 July 1986; *Cumpana and Mazare v. Romania*, application no. 33348/96, 17 December 2004; *Lopes Gomes de Silva v. Portugal*, application no. 37698/97, 28 December 2012; *Prager and Oberschlik v. Austria*, application no. 11662/85, 23 May 1991; *Dalban v. Romania*, application no. 28114/95, 28 September 1999; *Castells v. Spain*, application no. 1798/85, 23 April 1992.
- 41 See: *Observer and Guardian v. United Kingdom*, application no. 13585/88, 26 November 1991.
- 42 See: *Goodwin v. United Kingdom*, application no. 17488/90, 27 March 1996; *Fressoz and Roire v. France*, application no. 29183/95, 21 January 1999; *Bladet Tromso and Stensaas v. Norway*, application no. 21980/93, 20 May 1999.
- 43 See: *Yordanova and Toshev v. Bulgaria*, application no. 5126/05, 2 October 2012.

answer⁴⁴, that a certain measure of political discussion spilling into the private sphere is normal and permissible⁴⁵, and that freedom of expression enjoys a greater degree of protection in election campaigns⁴⁶. In practice, the Court also emphasizes that value statements must be based on a sufficient factual basis⁴⁷, and that the context of the media report must be considered when it comes to the transmission of hate speech⁴⁸. As stated in numerous decisions of the European Court of Human Rights, there must be a “burning social need” to limit the freedom of expression⁴⁹ and this necessity must be convincingly proven⁵⁰. In addition to the above-mentioned standards that are of great importance for the freedom and responsibility of the media, the following is a brief overview of the relevant case law of the European Court of Human Rights.

*ALLENET DE RIBEMONT V. FRANCE*⁵¹

The case of *Alletnet de Ribemont v. France* concerns comments made at a press conference on the subject of the French police budget. The Minister of the Interior, the Director of the Paris Criminal Investigation Department and the Head of the Crime Squad have all made comments regarding the investigation which was under way. The applicant in this case was declared as an instigator and an accessory to the murder of a Member of Parliament and a former minister, who was murdered in front of the applicant’s home. Such statements created the belief in the public that the applicant was guilty, and the additional effect was the pressure on the court, in terms of making the decision. This case affirmed the

44 See: Nilsen and Johnsen v. Norway, application no. 23118/93, 25 November 1999; Lopes Gomes de Silva v. Portugal, application no. 37698/97, 28 December 2012; Prager and Oberschlik v. Austria, application no. 11662/85, 23 May 1991.

45 See: Lopes Gomes de Silva v. Portugal, application no. 37698/97, 28 December 2012.

46 See: Bowman v. United Kingdom, application no. 24839/94, 19 February 1998.

47 See: Pedersen and Baadsgaard v. Denmark, application no. 37698/97, 19 June 2003.

48 See: Jersild v. Denmark, application no. 15890/89, 23. September 1994.

49 See: Bodrožić v. Serbia, application no. 32550/05, 23 June 2009; Lindon, Otchakovsky-Laurens and July v. France, application no. 21279/01 and 364487/02, 22 October 2007.

50 See: Kobenter und Standards Verlags GMBH v. Austria, application no. 60899/00, 2 February 2007; Nilsen and Johnsen v. Norway, application no. 23118/93, 25 November 1999.

51 See : Alletnet de Ribemont v. France , application no. 15175/89., 10 December 1995.

stand that the duty to respect the presumption of innocence applied to public officials as well and not only to the members of judiciary.

*PELTEREAU-VILLENEUVE V. SWITZERLAND*⁵²

In this case the applicant was a priest who had been suspected of sexual molestation. Because events in question dated back to 1991 and 1992, they were past the statute of limitations and the public prosecutor had to discontinue with the criminal procedure. In his decision which was made public, the public prosecutor made references to the fact that the priest confessed to these crimes but because of the statute of limitations the criminal proceeding had to be discounted. The applicant unsuccessfully appealed requesting a new decision which would refer only to the fact that the criminal prosecution was past the statute of limitation. Subsequently the church also conducted proceedings against the applicant during which the decision of the public prosecutor was quoted several times. He was required to resign the clergy but that decision was finally annulled by his congregation. In its decision ECtHR found that the applicant's right was breached and that there was no justification for the public prosecutor to affirm the indictment in his decision to discontinue the procedure. The Court also took in consideration that the decision was made public and that the reputation of the applicant had been seriously affected.

*BÉDAT V. SWITZERLAND*⁵³

In the following case, the applicant alleged that the fine imposed to him by the Federal Court for the publication of information covered by the secrecy of criminal investigations had violated his right to freedom of expression. He argued that the Court could not establish that the impugned article had had any influence on the trial and that the principle of presumption of innocence could not prevent individuals from forming an opinion on a case before the end of a trial. The ECtHR ruled that even though it was true that article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms protected the right to freedom of expression and the right for the public to know, journalists had to respect to right to a fair hearing, including the presumption of innocence. Even though the impugned article did not take a specific stance on the accused guiltiness, its sensationalist nature, the mocking tone used and the way the journalist highlighted the impertinence of the accused breached the presumption of innocence.

52 See: Peltreau-Villeneuve v. Switzerland, application no. 60101/09, 21 January 2015.

53 Bédât v. Switzerland, no. 56925/08, 29 March 2016.

*TOURANCHEAU AND JULY V. FRANCE*⁵⁴

In *Tourancheau and July v. France*, the ECtHR ruled that the interference from the Government temporarily prohibiting the publication of an article enclosing criminal procedures while the trial was still ongoing was justified in order to protect the right to the presumption of innocence of the accused. The facts that the article was clearly biased, that the procedural extracts cited were lacking objectivity and that the journalist concluded her article stating that one of the accused was guilty, were all demeaning the right to the presumption of innocence and to a fair trial. Thus, the ECtHR deemed that the French jurisdictions were right in their reasoning and that the right to freedom of expression of the journalist had to be balanced with the right to a fair trial.

*PINTO COELHO V. PORTUGAL*⁵⁵

In the following case, the journalist was not found guilty by the ECtHR of breaching the presumption of innocence of the accused. As a matter of fact, the Court ruled that showing for a few seconds during the reportage facsimiles of documents that were relevant during the trial, once the investigation was done, did not affect the right of the accused. Unlike other cases where the impugned articles were published by the journalists solely to please the readers' curiosity, the Court found that the journalist's reportage was not biased, the investigation was completed at the moment of the sharing and the journalist was not showing the documents by means of sensationalism, but only to rightfully inform the public. Furthermore, the ECtHR highlighted the fact that the documents were rightfully used by the journalist to corroborate the information and to attest of its credibility and trustworthiness.

VON HANNOVER V. GERMANY

The application in the *Van Hanover v. Germany*⁵⁶ case was filed against a decision by the Federal Constitutional Court of Germany rejecting a request to prohibit the publication of photographs of Princess Carolina of Monaco with her children. The German lower courts granted a ban on publishing the photographs in question, stating that the need to protect the privacy of children was greater than the need of an adult. The German Federal Constitutional Court, however, concluded that in this case there was no violation of the right to privacy, and that the princess as a public figure, must tolerate publication of her photographs

54 See: *Tourancheau and July vs. France*, no. 53886/00, 24 November 2005

55 See: *Pinto Coelho v. Portugal*, no. 28439/08, 28 June 2011.

56 See: *Von Hannover v. Germany*, application no.59320/00, 24 June 2004.

in public places, even if she is shown in the daily routine of her private life and not while performing official duties.

Deciding on the application in this case, the European Court of Human Rights, however, took a different stand, and concluded that the paparazzi photographs are recorded in a climate of constant disturbance that causes a strong sense of interference with private life and even a sense of persecution. The ECtHR then found a violation of Article 8 and concluded that the public had no legitimate interest in finding out where the applicant was or how she usually behaved in her private life, even if she appeared in public places. Everyone, including celebrities, should have a “legitimate expectation” that their private life will be protected.

VON HANNOVER V. GERMANY NO. 2

The application in the *Van Hanover v. Germany* case no. 2⁵⁷ was filed against the decision of the Federal Constitutional Court of Germany rejecting a request to ban the publication of a photograph of Princess Carolina of Monaco accompanied by an article on the bad health of her father Prince Reiner III. In its decision, in which it found that there was no violation of Article 8 of the ECHR, the Court held that public persons could not enjoy the same protection as ordinary citizens, that the earlier conduct of a person could not be a ground for denying any protection against publication of photographs, that the context in which people are displayed on photos being published may be a decisive factor, and that the manner of taking photographs (with prior permission or knowledge or hidden) may also be relevant for making a decision.

AXEL SPRINGER AG V. GERMANY

The application in the *Axel Springer AG v. Germany*⁵⁸ case was filed against a decision by a German court banning the publication of an article on the arrest of a well-known German actor for possession of cocaine, taking a stance that due to the low importance of the criminal offense there is no public interest in obtaining information about that event. In its decision finding that there had been a violation of Article 10 of the ECtHR, the court emphasized the role of the media as a guardian of public interest in a democratic society, and that the media have the duty to publish information and ideas on issues of relevance to the public, and that the public has the right to receive them. The Court also stated that for the protection guaranteed by Article 8 to apply, the attack on

57 See: Von Hannover v. Germany no. 2, application no.40660/08, 7 February 2012.

58 See: Axel Springer v. Germany, application no.48311/10, 7 February 2012.

one's reputation must reach a degree of seriousness, so that the enjoyment of this right is indeed threatened.

DELFI AS V. ESTONIA

The decision by which the ECtHR in the case of *Delfi AS v. Estonia*⁵⁹ found that the existence of responsibility of media portals for readers' comments does not constitute a violation of the freedom of expression under Article 10 of the ECtHR, has encountered much criticisms. In the ECtHR's decision in the case of *MTE v. Hungary*, special attention was paid to the fact that the imposition of liability on the internet portals could have negative consequences and lead to the closing of the comment section, which could have negative consequences for the freedom of expression of the readers themselves. Although this decision may not represent an important deviation from the Delphi case, the MTE case against Hungary shows that the ECtHR has not yet solved this issue in a coherent way that would make the right balance between the freedom of expression and its constraints. When making a decision in this case, the Court took into account the extreme nature of the comments in question, the fact that the comments were published in response to an article issued by the applicant on their information web portal, were conducted on a commercial basis, the lack of measures taken by the applicants to remove offensive comments without delay after publication and moderate sanctions imposed on applicants (320 euros).

MTE V. HUNGARY

The case of *MTE v. Hungary*⁶⁰ was an opportunity for the ECtHR to take a stance that would make a better balance between the freedom of expression and its constraints. This decision, which found violation of Article 10 of the ECtHR, was based on a substantially different factual situation in relation to the Delphi judgment. The ECtHR, finding that the applicants were to be treated as media, distinguished important differences in relation to the Delphi case, and cited the absence of profit as a motive as well as absence of hate speech. The Court's conclusion was that the comments were published on the applicant's Internet portal, which concerned the abuse of state real estate agencies, were justified and that their publication was in the public interest.

59 See: *Delfi AS v. Estonia*, application no.64569/09, 16 June 2015.

60 Ibid.

EDITORIAL BOARD PRAVOJE DELO AND ŠTEKEL V. UKRAINE

In the case of *Editorial Board Pravoje Delo and Štekel v. Ukraine*⁶¹, the court acknowledged for the first time that Article 10 of the Convention must be interpreted as imposing an obligation on States Parties to create an appropriate regulatory framework to ensure the effective protection of the freedom of expression of journalists on the Internet. In this case, the applicants were ordered to pay a fee for re-publishing an anonymous text, which was objectively defamatory, and downloaded from the Internet (with an introduction indicating the source and distancing them from the text). They were also ordered to publish denials and apologies - although this is prescribed by law.

In the law of Ukraine, there was no legal protection for journalists who re-publish content from the Internet. Any measure that limits the access to information to which the public is entitled must therefore in particular be justified by compelling reasons.

STOL V. SWITZERLAND

The case of *Stol v. Switzerland*⁶² concerns a journalist fined for publishing a confidential report by the Swiss ambassador to the United States on the strategy that the Swiss government should adopt during the negotiations, with the World Jewish Congress and the Swiss banks, in connection with the compensation for holocaust victims from the funds deposited in Swiss banks. The Grand Chamber of the European Court of Human Rights has argued that, in principle, the right to freedom of expression protects disclosure of confidential material in cases where it serves the public interest. However, the Court considered that the disclosure of parts of the ambassador's report had negative repercussions on the negotiations, especially because of articles written in an extremely sensational manner, which followed the publication of the report. The Court noted that the journalist, the applicant, had to know that the publication of the report was a criminal offense. Thus, considering the relatively low fine imposed on the journalist, the Court did not find that his right to freedom of expression had been violated. It should be noted that five judges (out of 17) voiced disagreement with the verdict, finding that most judges, in their opinions, unnecessarily focused on the sensationalist nature of the articles instead of the importance of a matter of public interest.

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61 See: Editorial Board of Pravoje Delo and Shtekel v. Ukraine, application no.33014/05, 5 may 2011.

62 See: Stoll v Switzerland, application no. 69698/01, 10 December 2007.

*TIMES 1 AND 2 V. THE UNITED KINGDOM*⁶³

In this case, the European Court of Human Rights took a stance that the duty of the press to adhere to the principles of responsible journalism, i.e. confirming the accuracy of published information (good faith, ethics, reliable information), is even more stricter when it comes to information dealing with past events in relation to which there are no urgent issues. This duty is stricter regarding the Internet archives that represent the main source of education and historical research than with the news about current affairs, which are by definition “perishable goods” (Times 1 and 2 v. the United Kingdom).

63 See: Times 1 and 2 v. The United Kingdom, application no. 3002/03 and 23676/03, 10 May 2009.

