



**RESEARCH ON INAPPROPRIATE,  
DEFAMATORY AND HATE SPEECH  
IN MEDIA CONTENT IN MONTENEGRO**

The views expressed by the author of this report are his own and do not necessarily represent the views of the OSCE Mission to Montenegro

This research paper is based on the 2019 legal situation in Montenegro.  
Current draft laws have not been considered.

## 1. General approach to applicable international standards, with a particular focus on OSCE commitments, CoE documents and case law

In Europe, freedom of expression and freedom of information are protected by article 10 of the European Convention on Human Rights (ECHR), which is the flagship treaty for the protection of human rights on the continent within the Council of Europe (CoE). This article follows the wording and provisions included in article 19 of the International Covenant on Civil and Political Rights (ICCPR) and article 19 of the Universal Declaration of Human Rights, and is essentially in line with the different constitutional and legal systems in Europe.

Article 10 reads as follows:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

Freedom of expression and freedom of information are essential human rights that protect individuals when holding opinions and receiving and imparting information and ideas of all kinds. This also presents broader implications, as the exercise of such rights is directly connected with the aims and proper functioning of a pluralistic democracy<sup>1</sup>.

On the other hand, freedom of expression and freedom of information, as well as the other rights protected in the Convention, are not absolute, and therefore may be subject to certain restrictions, conditions and limitations.

However, article 10.2 ECHR clearly provides that such constraints are exceptional and must respect a series of requirements, known as the three-part test. This test requires that: 1) any interference must be provided by law, 2) the interference must pursue a legitimate aim included in such provision, and 3) the restriction must be strictly needed, within the context of a democratic society, in order to adequately protect one of those aims, according to the principle of proportionality<sup>2</sup>.

On the other hand, international law also establishes a general obligation for States to prohibit certain specific forms of content, which are considered not to be covered in any case by the freedom of expression clause due precisely to their huge impact on other rights also protected at the international

1 See the elaboration of such ideas by the European Court of Human Rights (ECtHR) in landmark decisions such as *Lingens v. Austria*, Application No. 9815/82, Judgment of 8 July 1986, and *Handyside v. The United Kingdom*, Application No. 543/72, Judgment of 7 December 1976.

2 See for example *The Sunday Times v. UK*, Application No. 6538/7426 Judgment of April 1979.

level. In particular, article 20 of the ICCPR states:

- “1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

In a similar sense, article 17 of the ECHR also establishes the following:

“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.”

At the OSCE level, there are political commitments in the area of freedom of expression and freedom of information that clearly refer to the international legal standards existent in this area. In particular, the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE in 1990 proclaims the everyone's right to freedom of expression and states that:

“This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards”<sup>3</sup>.

Also, the very recent OSCE Ministerial Council Decision 3/2018, adopted by the Ministerial Council in Milan on 7 December 2018, establishes the following commitments for participating States:

- “1. Fully implement all OSCE commitments and their international obligations related to freedom of expression and media freedom, including by respecting, promoting and protecting the freedom to seek, receive and impart information regardless of frontiers;
2. Bring their laws, policies and practices, pertaining to media freedom, fully in compliance with their international obligations and commitments and to review and, where necessary, repeal or amend them so that they do not limit the ability of journalists to perform their work independently and without undue interference (...)”<sup>4</sup>.

It is also important to note that this report will also take into account the alignment of Montenegrin legislation in relation to EU law, particularly to Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive, hereinafter: AVMS Directive)<sup>5</sup>, and Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the

3 This document is available online at: <http://www.osce.org/odihr/elections/14304>.

4 Available online at: <https://www.osce.org/chairmanship/406538?download=true>

5 Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2018.303.01.0069.01.EN-G&toc=OJ.L:2018:303:TOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.303.01.0069.01.EN-G&toc=OJ.L:2018:303:TOC)

Internal Market (hereinafter: ecommerce Directive)<sup>6</sup>, which Montenegro is obliged to transpose as part of the accession process to the EU, started in 2012.

## 2. Constitutional principles on freedom of expression and freedom of information in Montenegro

As it has been shown, there is a solid set of international principles and standards applicable to the regulation of the exercise of the right to freedom of expression and its limits in Montenegro. The most relevant components of such framework have been described in the previous epigraph. However, it can be summarised as follows:

Freedom of expression is a fundamental universal right that is closely linked to human dignity and democracy. States have a particular responsibility in protecting the exercise of this right and creating an enabling environment for the free expression of individuals and the non-restricted formation of the public opinions.

Freedom of expression is not an absolute right and some limits, restrictions and conditions to its exercise can be imposed. However, such limits need to be considered as exceptional and respect the very clear principles established by international law in order to be legitimate: legality, necessity and proportionality.

A proper understanding of the framing of free expression in Montenegro requires, first of all, to consider the rules enshrined, with regards to these matters, in the Constitution as the highest national law.

Article 47 of the Constitution protects freedom of expression and determines the basic parameters for its protection and definition of possible limits. In particular, this provision establishes that "(e) everyone shall have the right to freedom of expression by speech, writing, picture or in some other manner". In line with international standards, this means: a) that freedom of expression is recognized and protected vis-à-vis any individual in the territory of Montenegro and thus is not applicable to nationals or to journalists only, and b) that freedom of expression is exercised through any expressive means, beyond written or audiovisual content (i.e., music, dancing, painting, artistic performances, etc.). On the other hand, the same article also provides that such right "may be limited only by the right of others to dignity, reputation and honour and if it threatens public morality or the security of Montenegro". Possible limits to the right to freedom of expression are thus mentioned with reference to some broad concepts. However, it has to be taken into account the fact that the Constitution only provides a general framework of principles, which needs to be developed and elaborated in a detailed manner by proper legislative or regulatory instruments. In other words, these broad principles that may justify the imposition of certain limits to the right to freedom of expression cannot be understood as establishing a general and discretionary power in favour of State authorities, and on their only grounds, to restrict speech. In particular, article 16.a) provides that the law, in accordance

6 Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32000L0031>

to the Constitution, shall regulate “the manner of exercise of human rights and liberties, when this is necessary for their exercise”.

Limits to the right to freedom of expression need to be clearly established by law and respect the principles of necessity and proportionality, in line with requirements deriving from international standards. The need to respect such standards is expressly acknowledged by the constitutional text in articles 9, 17, and 24. In particular, the latter determines that limits “shall not be introduced for other purposes except for those for which they have been prescribed”. Moreover, article 7 incorporates international prohibition of hate speech into the Montenegrin legal system.

Freedom of information, understood as the access by any citizen to information in the hands of public or publicly funded institutions, is protected in article 51. The scope of such right is not directly related to the specific objectives of this research.

Article 49 contains special provisions and protections regarding the specific right of freedom of the press. This includes the right to establish any media outlet. The article also contains a reference to the need to register before the competent authority. This particular requirement shall in any case be developed by specific legislation according to the principle of proportionality, in order to avoid introducing excessive or too burdensome requisites associated to the launching of the provision of a media service, in line with international legal standards and the consolidated case law of the ECtHR in this area.

This article also enshrines the right to reply as a right to “a response and (...) a correction of any untrue, incomplete or incorrectly conveyed information that violates a person’s right or interest”, as well as the right to “compensation of damage caused by the publication of incorrect data or information”. This last provision is of particular importance, as it can be seen as the statement of a “constitutional preference” for civil law remedies in cases of defamation.

Last but not least, article 50 of the Constitution contains a clear “prohibition of censorship”. It also establishes the competence of Courts to “prevent the dissemination of ideas via the public media” (here understood as media outlets available to the public, in exceptional cases of “preservation of territorial integrity of Montenegro; prevention of propagation of war or incitement to violence or performance of criminal offences; prevention of propagation of racial, national and religious hatred or discrimination”. It is obvious that these exceptions need in any case to be developed, applied, and interpreted in line with the restrictions and guarantees established in other articles of the Constitution and by international standards.

### **3. General principles and limits to the exercise of the right to freedom of expression and freedom of information, according to basic media legislation in Montenegro**

As mentioned in the previous section, the Constitution enshrines a series of general principles and protections regarding the right to freedom of expression. It also establishes the parameters,

procedures and safeguards according to which specific, justified and proportional limits to such right will be established by general or sector legislation or regulation.

The law that now needs to be taken into consideration is the Law no 01-2808/02 of 17 September 2002, known as the Media Law. This is a particularly relevant law, as it establishes some general criteria and fundamental parameters developing the regime for the exercise of the right to freedom of expression and its limits in Montenegro.

The Media Law reiterates in article 1 the need to take into account the constitutional principles as well as the applicable international standards when establishing and applying limits to the right of freedom of expression.

One important part of the Law is Chapter III, which covers media distribution and contains a series of provisions that have clear impact on the way content is regulated disseminated and thus freedom of expression is exercised in Montenegro.

Articles 11 to 17 of the Media Law establish the procedure according to which the "competent court", on the basis of the State's attorney's proposal, can ban "media programming" that *"invites forceful destruction of the constitutional system and violation of the territorial integrity of the Republic; infringes on the guaranteed human and citizen's freedoms and rights; or instigates national, racial or religious intolerance or hatred."* It is not the object of this research to describe in detail or to analyze the details regarding the above-mentioned legal procedure. It is notwithstanding important to focus on the three main areas that such a court order may cover, as well as its consequences vis-à-vis the exercise of the right to freedom of expression:

A) These provisions apply to something defined as "media programming". According to the law (article 6), media "shall be defined as either a press, radio and television, news agency services, teletext or some other form of editorially formulated programming published periodically by means of the transmission of voice, sound or picture in a manner accessible to the public", whereas programming is any kind of "information (news, announcements, opinions, reports and other information) and authorial works publicized by the media with the aim to inform and satisfy cultural, educational and other needs of the public". Although this provision seems to refer to an apparent variety of media content, it is doubtful, particularly if we look into the second definition, whether specific new forms of content, such as information or opinions posted on social media or blogs, for example, are affected by this article. This legal uncertainty may have a negative effect in the way online speech is disseminated, particularly when it comes to the use of the mentioned new forms of communication by media outlets or media actors.

B) The invitation to the "forceful destruction of the constitutional system and violation of the territorial integrity of the Republic" is a broad concept that may introduce certain problems of interpretation. The reference to "invite" probably needs to be understood as an actual provocation or incitement. On the other hand, there is also no specific reference regarding the need for a *direct* invitation in this regard. Even more important than the latter, the article does not refer to the actual intention of the

speaker as an element to be taken into consideration by the court. This means that this article may leave the door open to the prohibition of expressions or opinions which, on one hand, may merely consist of an indirect or presumed invitation to the disorders mentioned, and/or, on the other hand, were expressed without the intention of creating a risk of that nature. The latter may particularly affect the public expression of certain forms of political criticism, thus endangering the dissemination of fully legitimate pieces of protected speech, according to the applicable regional and international standards.

It needs to be reminded that the ECtHR has established since its first decision on freedom of expression (*Handyside v United Kingdom*)<sup>7</sup>, that such right does not only cover "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".

In the *Otegi Mondragon v Spain*<sup>8</sup> case, the call analyses the criminal conviction of a Basque separatist leader who called the King of Spain "he who protects torture and imposes his monarchical regime on our people through torture and violence". Acknowledging the harshness of the language used, the Court stresses that "the fact that the King occupies a neutral position in political debate and acts as an arbitrator and a symbol of State unity should not shield him from all criticism in the exercise of his official duties or – as in the instant case – in his capacity as representative of the State which he symbolises, in particular from persons who challenge in a legitimate manner the constitutional structures of the State, including the monarchy". The Court has also considered protected under article 10 of the European Convention the publication and distribution of pamphlets containing, among others, the call "on all Kurdish and Turkish democratic patriots to assume their responsibilities and oppose this special war being waged against the proletarian people" (*Incal v Turkey*)<sup>9</sup>. On the other hand, in *Soulas et autres c. France*<sup>10</sup> the Court did not see a violation of article 10 in the case of a book that criticized Islam in a very harsh manner and contained paragraphs as: "c'est seulement s'il éclate une guerre civile ethnique que la solution pourra être trouvée"<sup>\*\*</sup>, vis-a-vis "l'amplification prévisible de la délinquance et des guérillas territoriales menées par les bandes ethniques"<sup>\*\*\*</sup>. Last but not least, in *Leroy c. France*<sup>11</sup> the Court did not consider that freedom of expression clause protected a cartoon on the 9/11 New York attacks published on the following day of the event, by a newspaper established in the Basque Country area of France (where terrorist groups were also active).

Last but not least, in *Stern Taulats and Roura Capellera v Spain*<sup>12</sup> the ECtHR found that the Spanish courts had violated the freedom of expression of two citizens by imposing criminal sanctions for expressing political disapproval by burning a picture of the Spanish royals during an official visit.

7 <http://hudoc.echr.coe.int/eng?i=001-57499>

8 <http://hudoc.echr.coe.int/eng?i=001-103951>

9 <http://hudoc.echr.coe.int/eng?i=001-58197>

10 <http://hudoc.echr.coe.int/eng?i=001-87370>

11 <http://hudoc.echr.coe.int/eng?i=001-88657>

12 <http://hudoc.echr.coe.int/eng?i=001-181719>

\* "only in case of an ethnic civil war the solution can be found" (only the French version of the decision is official).

\*\* "the predictable increase of delinquency and territorial guerrillas led by ethnic gangs" (only the French version of the decision is official).



The ECtHR reasoned that the setting fire to a photograph of the royal couple during a demonstration had been part of a political critique of the institution of monarchy in general, and in particular of the Kingdom of Spain, and went no further than the use of a certain permissible degree of provocation in order to transmit a critical message in the framework of freedom of expression. Further, the ECtHR stated that the impugned act could not reasonably be construed as incitement to hatred or violence nor could it be considered as constituting hate speech. Moreover, the criminal penalty imposed on the applicants – a prison sentence, to be executed in the event of failure to pay the fine – amounted to an interference with freedom of expression which had been neither proportionate to the legitimate aim pursued nor necessary in a democratic society.

C) As it has been noted, media content can also be banned inasmuch as it is deemed to infringe on the guaranteed human and citizens' freedoms and rights. This is once again a broad prohibition that can have a clear impact on the way freedom of expression is exercised in Montenegro. As it will be shown, there are specific provisions in the Montenegrin legal system aiming at the protection of a series of human and fundamental rights. In this sense, the right to reputation is protected via concrete legal provisions on defamation. Likewise, the specific rights of children are also protected in different ways by different types of targeted legal provisions. For this reason, the general reference to guaranteed human and citizens' freedoms and rights as a legitimate reason for a court to ban a piece of media content seems to give an overbroad tool to obtain a court order banning speech on the basis of the violation of any fundamental right recognized in the Constitution. It needs to be noted that this scheme may violate the way freedom of expression is protected by international law and the case law of the ECtHR. Due to its special nature and connection to the democratic principle when freedom of expression is confronted to other fundamental rights, it is needed, in any case, to make a proper assessment of the case, in order to determine which right is prevalent in the specific circumstances. In other words: despite the way the provision in question is drafted, it would be questionable to interpret it in the sense that any interference with any fundamental right shall automatically justify the ban of a piece of media content, although the individuals affected in their rights by a publication may be tempted to use such provision precisely for this purpose.

In the case of *Fuentes Bobo c. Espagne*<sup>13</sup> the ECtHR considered that the dismissal of a journalist from the public broadcaster after harshly criticizing the members of its board constituted a violation of his expressive rights. Another interesting example is the recent case of *Matasaru v Moldova*<sup>14</sup>, on the conviction of an anti-corruption activist who erected in 2013 two large wooden sculptures on the stairs of the General Prosecutor's Office, the first being a large penis with a picture of a public official attached to its head, while the second was a large vulva with pictures of several officials from the prosecutor's office in the middle. This protest intended to draw attention to corruption and political control over the Prosecutor's Office. Domestic courts found that his actions had been "immoral" and offensive for the senior prosecutors and politicians he had targeted. They also held that assimilating public officials with genitals went beyond the acceptable limits of criticism and was not an act protected under Article 10. The ECtHR found that this conviction was manifestly disproportionate as such a sanction had gone beyond what might have been necessary to restore a balance between the various interests involved, namely the right to freedom of expression against the right to dignity. It

13 <http://hudoc.echr.coe.int/eng?i=001-63608>

14 <http://hudoc.echr.coe.int/eng?i=001-101564>

could moreover have had a serious chilling effect on others and discourage them from exercising their freedom of expression.

D) The instigation of national, racial or religious hatred as a justification to ban media content would be justified under international and regional standards. However, the specific criteria to be applied when assessing if such instigation takes place will be commented on the occasion of the analysis of more specific hate speech provisions (particularly those included in the criminal legislation).

Articles 20 to 25 establish a series of rights and duties in the “domain of information”. Provisions enshrined in these articles cover limits usually included in international standards, such as protection of rights of others, national security and interest of the judiciary, protection of minors, hate speech, and special limits to commercial communications. These limits can also be found and developed in the case law of the ECtHR, as explained in other parts of this report. This being said, a few comments need to be made on such provisions:

A) Article 20 refers to what is commonly understood as defamation, which would cover “programming that violates legally protected interest of a person referred to in the information, or that insults the honour or integrity of individual, gives or conveys untrue statements about his life, knowledge and abilities, or insults his dignity in any other way”. In such cases, “the person interested shall have the right to press legal charges with the competent court against the author and founder of the medium for the compensation of damage”. The main elements to be taken into account with regards to these provisions are the following: a) defamation aims at the protection of the public reputation of an individual when it has been affected either by the presentation of untrue facts or by the dissemination of negative and gratuitous statements which directly and unjustifiably affect the public appreciation of such person, b) defamation claims can only be pushed by the individual affected by the statements in question, as this is a matter directly related to the way each person conceives and treasures her own reputation, c) the right to reputation or honour is not absolute vis-à-vis the exercise of the right to freedom of expression; on the contrary, international standards and a very consolidated case law of the ECtHR establishes that freedom of expression shall prevail in cases where the allegedly defamatory statements are true and refer to a matter of public interest.

B) Article 21 contains three main provisions: a) the right to publish “illegally obtained” information in cases where the dissemination of such information is “in the interest of national security, protection of territorial integrity or public safety, prevention of disorder or criminal and health or moral protection, as well as the protection of reputation or rights of others, prevention of credential information disclosure or with the aim to protect the authority and impartiality of the judiciary”. This provision is in line with comparative practices and gives priority to the protection of certain modalities of the public interest vis-à-vis the possible issues derived from the illegal gathering of information. Examples of illegal gathering of information would be the use of hidden cameras or recording mechanisms, the obtention and dissemination of illegally recorded phone conversations or, usually, access to information that is not available to the general public due to specific legal protections. The list of exceptions seems to be strictly limited and not exemplificative (contrary to the case in other legal systems), which means that it is very important for the journalist aiming at disseminating this

kind of information to verify that she is properly covered by one of them. In any case, it needs to be said that these exceptions are thus very limited to extremely specific cases, and it would therefore be advisable to rather introduce a general public interest exception to be properly assessed by each professional and the court in last instance, b) the right to publish secret information if an overriding public interest justifies it, and c) the right to protect the sources.

B) Article 22 establishes: a) the general obligation for media to protect the integrity of minors, although this general principle needs to be interpreted and applied according to the specific provisions regarding minors' protection in the Montenegrin legal system, b) the obligation for media outlets to mark and distribute harmful content for minors in a way that it's the least possible for a child to use it. The law uses the common EU terminology of content that "could endanger health, moral, intellectual, emotional and social development" of minors, which already counts on an extensive set of indicators and commonly parameters across Europe, and c) the prohibition to publish the identity of a minor involved in any capacity in a criminal act, with the important exception of the cases where there has already been a convicting court decision and an overriding public interest justifies the publication (which could refer for example to cases where the case has had a special impact or importance among public opinion).

C) Article 25 contains an obligation for journalists to report on court proceedings in an "objective and true manner". This general principle is accompanied by a very specific obligation, consisting of the requirement to publish the dismissal or acquittal of a person if her charging had been previously published. These provisions also need to be understood without prejudice of the possible exercise of the right to reply with regards to any other information related to her judicial status and at any time.

The fact that this article contains the mentioned specific obligation to publish information about the final outcome of a judicial procedure when the decision to press charges had been originally reported, does not preclude the possibility to interpret and enforce the general obligation of objectivity and truthfulness with regards to many other aspects related to reporting on court proceedings. This last aspect may be particularly sensitive and problematic vis-à-vis the usual work of journalists. Despite the fact that the intention of this legal provision seems to be avoiding certain forms of misinformation or misleading of the public opinion with regards to the innocence or culpability of a person subjected to judicial investigation, the truth is that the mentioned general requirement of objectivity or truthfulness represents a clear limitation of journalistic work (in particular, investigative journalism) when reporting about matters of public interest.

Let's imagine a case of a thorough investigation undertaken by journalists and published in a newspaper in the course of several months, where clear evidences about corruption of political figures are presented to the public. Let's then imagine that a criminal court starts proceedings against these politicians precisely with regards to these matters. How will the repeatedly mentioned obligation included in article 25 impact on the reporting of the case from this moment on? Can politicians involved in the case use this provision to stop any further reports due to the existence of an ongoing criminal procedure? The broad wording of this article might lead, in some cases, to this conclusion. Even after a final decision is taken by a court, would this mean that journalists may not be able to

criticise or diverge from it? These are clear dangers posed by this provision that cannot be neglected by journalists when performing their work.

According to international standards and best practices, the fact that journalists shall properly inform about the details of ongoing or finished legal proceedings, particularly with regards to a proper presentation of the facts and a proper contextualization of the stage and consequences of each decision taken by judicial authorities, does not mean that they are prevented from expressing their own views and opinions on the case or even to publish their own findings and conclusions (even if they may diverge from what is being discussed by the court). The only (exceptional) limit would concur in cases when it can be clearly justified by the court that the "parallel" reporting by the media truly endangers or balks the outcome and fairness of the judicial investigation.

It also needs to be reminded that the ECtHR has had a generous approach vis-à-vis the scope of legitimate criticism of Court decisions: "while it may prove necessary to protect the judiciary against gravely damaging attacks that are essentially unfounded, bearing in mind that judges are prevented from reacting by their duty of discretion (...), this cannot have the effect of prohibiting individuals from expressing their views, through value judgments with a sufficient factual basis, on matters of public interest related to the functioning of the justice system, or of banning any criticism of the latter" (*Morice v France*)<sup>15</sup>.

#### **4. Self-regulation and co-regulation**

Besides these general provisions, another important area to take into account is the interaction between statutory regulation and self-regulation.

Outside the field of regulation itself, self-regulation and co-regulation are mechanisms which imply a different approach to the control of the exercise of the rights to freedom of expression and freedom of information, through means less intrusive than conventional regulation and sometimes more effective as well.

Through self-regulatory mechanisms, a certain professional sector, a group of companies or economic actors, or any other form or associative modality or partnership, are subject to a series of ethical and professional standards or principles that self-impose voluntarily, relying on its own monitoring or control mechanisms.

Contrary to statutory regulation, the violation of norms or recommendations resulting from a process of self-regulation implies the adoption of measures of moral or symbolic reproach rather than those of sanctioning or limiting. Self-regulatory systems are useful tools when they are perceived and respected as mechanisms that solve problems related to the functioning of the media through the adoption of measures that do not involve the intervention of the administrative and judicial authorities. In any case, self-regulatory regimes need, in order to prosper and enjoy the trust of third parties, appropriate and reliable mechanisms that guarantee their respect. While these mechanisms

15 <http://hudoc.echr.coe.int/eng?i=001-154265>

will be established and managed by the creators and the subjects of the self-regulatory system itself, this does not necessarily imply a lack of independence or effectiveness.

In a nutshell, in order that a certain system of self-regulation functions correctly and, most importantly, is seen as an alternative and even preferable mean vis-à-vis the mechanisms of state regulation, it must fulfill the following conditions:

a) The code of conduct that constitutes the normative foundation of the system must be drafted and adopted by consensus and with the participation and acceptance of all the actors of the system. In the media environment, the system can cover either all journalists and the media, or a specific sector of the media (print media, audiovisual media, online media etc.), or be exclusively applicable to a single medium (internal codes of conduct).

b) The content of the codes of conduct covers professional, ethical and principled standards on which there is a consensus agreement vis-a-vis its importance to ensure a pluralistic, reliable, professional media system that respects the rights of others (especially the reputation and private life, when necessary), regardful of particularly vulnerable groups, oriented towards the free formation of public opinion, protecting the safety of journalists, in short in the service of the general interest.

c) The respect of this code is guaranteed by an autonomous, non-State body. This body bases its authority on the expertise and the independence of its members. Its decisions or opinions are accepted and respected by the participating actors of the self-regulatory system, and its public dissemination helps to increase respect for ethical and professional principles. The instance may be in the form of a committee or a board or may be an individual ombudsman person (this is normally the case of the enforcement bodies of the internal mechanisms established by individual media).

d) The self-regulatory body behaves in accordance with an internal code of conduct or normative framework which clearly describes the complaint mechanisms available (normally available to the public in general), the steps to be taken in the adoption of decisions or opinions, and the different forms of intervention, either ex parte or ex officio. This internal code of conduct must define the type of decisions or opinions that may be issued, as well as its precise nature and effectiveness.

e) Self-regulatory mechanisms can be promoted through Government policies and legislation, but not be subjected to approval or oversight by State authorities.

It should also be noted that self-regulatory codes generally contain provisions complementary to those featured in the legal standards. Therefore, the main role for self-regulation is to develop, interpret, and expand legal obligations with further ethical or professional requirements, as well as to establish moral norms that are important to guarantee a proper and fair exercise of journalism yet would be excessive if imposed through legal obligations and State punishment mechanisms: definition of the public interest and matters of public interest, objectivity and honesty of journalists and the media, protection of the independence of journalists and the media from political and commercial influences (conflicts of interest, the relationship between journalists and media owners,

the relationship between journalists and government agencies, the conscience clause), respect for the rights of others (privacy, reputation, the presumption of innocence, non-discrimination), respect for the rights and interests of minors and the promotion of content that is particularly relevant to them, treatment of journalistic sources etc.

On the other hand, there is a relatively recent emergence of a new concept: co-regulation. The concept of co-regulation can have several meanings, although it can be said that it generally identifies self-regulatory initiatives and instruments which, as a last resort, have the guarantee of a possible intervention by a public (generally regulatory) body. Co-regulation may include, for example, the delegation by the public authority of the exercise of supervisory and control powers to a private entity incorporated in a self-regulatory system, which would then exercise the role of the regulator per se. Intervention by the public authorities would also occur if the decision adopted by the self-regulatory system is the subject of an appeal or if there are problems with its execution or interpretation.

It is important to note that article 53 of the current Electronic Media Law (originally adopted in 2010 and object of several amendments until August 2016, and with an official consolidated text available as of 1 September 2017) includes a series of provisions aiming at promoting self-regulation and co-regulation in the field of broadcast media, in line with some of the above-mentioned principles.

The Code of Ethics of Montenegrin journalists properly fulfills the functions of an instrument of this kind. In addition to this, it contains principles which, in line with what has already been mentioned, develop, interpret, and expand legal obligations with further ethical or professional requirements. It also needs to be noted that the Code covers the most important aspects of journalistic professionalism and ethics.

This being said, a few observations also need to be formulated in this sense:

a) While legal provisions will determine when a piece of content is defamatory, constitutes hate speech, violates other's rights or contains any other infringement or relevant legal principles and values, self-regulatory rules will serve the purpose of determining when content is inappropriate and therefore should not have been published. Consequences in the case of the former are legal penalties, while regarding the later there will be some sort of public ethical and professional reproach, in some cases accompanied by the requirement of a public reaction (apology, rectification, etc.).

b) Despite the fact that the content of the Code will be in line with the generally accepted notion of self-regulation and best comparative practices, it also needs to be noted that there is still an absence of appropriate mechanisms to guarantee a proper and independent enforcement of the Code, particularly regarding the existence of a truly independent and expert body in charge of complaints.

c) Last but not least, considering the way communication and the notion of media and journalism has changed, the Montenegrin self-regulatory system would need to acknowledge the current existence of a broad notion of journalism as an activity that cannot only be performed full-time by professional journalists, but also by other actors (particularly those present in the online sphere), in the form of acts of journalism.

## 5. Freedom of expression and limits derived from criminal legislation.

Limits to freedom of expression derived from criminal legislation are probably the most important and sensitive ones, as according to international standards are those that may have a highest impact on the way communication activities are performed. Due to the nature of criminal proceedings and punishments, they can have a particular effect at disincentivizing the work of journalists.

The most relevant provisions in this area found in Montenegrin criminal legislation (Criminal Code, hereinafter, CC) are the following:

A) Article 28 and 29 CC contain a series of provisions on liability for criminal offences. Provisions regarding the liability of editor in chief for the publication of illegal content under certain circumstances seem justified and proportionate. However, provisions in article 29 determining the possible liability of publishers, printing entities, and /or producers in certain cases seem nevertheless excessive. According to international standards and best comparative practices, liability can only affect those who have editorial capacity and therefore have actively intervened in the decision to publish or disseminate a piece of content. Establishing liability provisions beyond such actors would not only be excessive or disproportionate but also create an incentive for them to interfere in the work of journalists.

B) Article 160 CC punishes the denial of the right to express national or ethical affiliation. This needs to be interpreted as the imposition of a *positive* obligation on journalists and media outlets, who have therefore the duty to fulfil any request of this nature on the occasion of their reporting activities.

C) Article 170 CC establishes a general provision by criminalizing the disclosure of information falling in the category of professional secrets (particularly, but not only, in the cases of lawyers and physicians). However, it is worth noting that the second paragraph of this article includes a relevant exception, in line with the provisions from the Media law, already mentioned: a secret of this nature can be disclosed in the public interest or in the interest of another person. Despite the fact that these provisions do not particularly refer and apply to media or journalists, it is obvious that they need to be taken into account by them in cases when information deemed to be considered as professional secret is published. The "public interest" exception (which would be the one particularly applicable to journalistic work) is not clearly defined in the CC, but here the generally accepted definition of such term as covering issues of importance for the formation of the public opinion in a democratic society, on matters affecting the political, economic, and social life, would be applicable.

D) Article 180 CC punishes the denial or impediment to the exercise of the right to reply or correction. It is therefore important for journalists, and particularly for editors-in-chief, to bear in mind the fact that, in some cases, resistance to properly fulfill the right to reply of third parties may entail criminal responsibilities.

E) Article 197 CC contains a series of criminal provisions regarding defamation. Defamation is committed when someone "discloses or disseminates information about other person's personal

or family life and thereby potentially harms his honor or reputation". Therefore, this is the criminal law version of what is already contemplated as a civil law matter in article 20 of the Media Law. In fact, it needs to be noted that, in principle, there seem to be no proper differentiation between criminal and civil cases of defamation, and therefore, journalists and media actors may be facing responsibilities in both areas at the same time. At this point, it is worth insisting on the remarks made above regarding the existence of a series of international and regional standards advocating for the full decriminalization of defamation or at least, for the limited use of criminal law mechanisms, i.e. only in cases of very serious and damaging allegations.

The *Cumpăna and Mazare v Romania*<sup>16</sup> case involved an article that was published in a Romanian newspaper, *Telegraf*, which implied corruption in the Romanian Government. Criminal proceedings were initiated against the publishers of the article for defamation and insult—punishable offenses under the Romanian Criminal Code. The applicants were sentenced to three months for insult and seven months for defamation and were ordered to serve seven months in prison. The applicants were also prohibited from working as journalists a full year from the date that their imprisonment concluded. Finally, the applicants were ordered to pay a fine of 25,000,000 Romanian Lei (about 2,033 euros at the time). The ECtHR looked to whether there existed a "pressing social need" for the interference, which the Court found to exist because the interference was meant to protect the reputation and dignity of the defamed person. The Court found, however, that the sanction was not proportionate to the offense. The Court noted that it must, "exercise the utmost caution where the measures taken or sanctions imposed by the national authorities are such as to dissuade the press from taking part in the discussion of matters of legitimate public concern.". The Court found that, by imposing criminal sanctions (and the possibility of imprisonment) upon the press for defamation, a chilling effect emerged. Therefore, the Court concluded that, although the interference was justified, the punishment was not proportionate to the offense, and accordingly, Article 10 was violated.

Paragraph 4 of article 197 provides that disclosure of information "about other person's personal or family life while acting in his official capacity, while working as a journalist, or defending a right, or protecting interests for justified causes shall not be punished provided that he can prove that the information is true or that he had well-founded reasons to believe that the information he disclosed or disseminated was true". This is sort of a particular version of the so-called public interest exception, already mentioned here. In principle, according to international standards, freedom of expression prevails when the damaging information that is disclosed refers to issues of public interest within the context of the formation of the public opinion in a democracy. Here, what the CC seems to allow is the possibility for media to disclose any personal or family information of politicians, journalists or even activists, in cases when such information is linked to the activities of such individuals. This exception seems quite unique from a comparative point of view and may raise many doubts of interpretation when applied to specific cases: when and how a clear link can be established between personal or family information and the exercise of certain functions? Can we say that absolutely any person "acting in his official capacity, while working as a journalist, or defending a right, or protecting interests for justified causes" becomes, by this mere fact, an individual whose activities are automatically to be considered of public interest? In addition to this, journalists aiming at using this

16 <http://hudoc.echr.coe.int/eng?i=001-67816>



exception are obliged, as per paragraph 5 of the same article, to present evidence before the court in order to be able to be covered by the previously mentioned public interest defence.

The ECtHR has decided on these last matters in the landmark case of *Von Hannover v Germany*<sup>17</sup>, where it determined that publication of paparazzi pictures of Princess Caroline of Monaco and her husband while in public spaces violated their privacy inasmuch as such pictures were not part of a debate on matters of public interest: "The present case does not concern the dissemination of 'ideas', but of images containing very personal or even intimate 'information' about an individual. Furthermore, photos appearing in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution."

F) Article 198 CC contains a problematic provision, according to which those who "publicly expose Montenegro, its flag, coat of arms, or anthem to mockery" may face "a fine or a prison term up to one year". The term "mockery" is particularly broad and therefore may open the door to the criminalization of any act of humoristic or comedy nature that may involve or include the symbols mentioned above. This may also have a particular impact on expressive acts or performances that aim at expressing political criticism with the presence of the symbols in question.

In the case of *Christian Democratic Party v Moldova*<sup>18</sup> the ECtHR considers that the burning of flags can be, in certain contexts, a legitimate way to disseminate political opinions: "In the present case also the Court finds that the applicant party's slogans, even if accompanied by the burning of flags and pictures, was a form of expressing an opinion in respect of an issue of major public interest, namely the presence of Russian troops on the territory of Moldova. The Court recalls in this context that the freedom of expression refers not only to 'information' or 'idea' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb".

G) Articles 199 and 200 CC are of similar nature of the provisions contained in the previous article. According to the first one, anyone who "publicly exposes a nation, national minority or other minority ethnic group living in Montenegro to mockery shall be punished by a fine ranging from three thousand to ten thousand euros". According to the second one, the same punishment is also applicable to anyone who engages in a similar behavior vis-à-vis "a foreign state with which Montenegro has diplomatic relations, its flag, coat of arms, or anthem", as well as "the United Nations Organization, the International Red Cross, or other international organization of which Montenegro is a member". As mentioned with regards to the content of article 198, these provisions may have the effect of transforming many possible expressions of criticism of fully legitimate humor vis-à-vis the bodies, entities and States mentioned above into a criminal activity subjected to prosecution.

Even if article 201 excludes from the scope of criminal law expressions which are "given within the limits of serious criticism in a scientific, literary, or artistic work, or while acting in his official capacity, being engaged as a journalist, or defending a right, or protecting interests for justified causes, provided that the manner of expression or other circumstances prove that he has not done it with

17 <http://hudoc.echr.coe.int/eng?i=001-109029>

18 <http://hudoc.echr.coe.int/eng?i=001-72346>

the intention of discrediting one or that he can prove the truthfulness of his claims or that he had well-founded reason to believe in the veracity of what he was stating or disseminating”, the truth is that, as just mentioned, many commonly used media messages or content may still be subjected to criminal prosecution. Let’s imagine for example a television show or a cartoon that deliberately and legitimately aims at strongly criticizing the policies of another State or international organization, with the presence or appearance of a flag or a similar symbol. It is clear that there would be a direct risk for the authors of this piece of facing criminal charges.

It has to be mentioned, in this context, the announcement of the Government of Germany to repeal article 103 of the German Criminal Code (which criminalized the “abuse criticism” against a foreign head of State) following the dropping of a criminal case against a German comedian for broadcasting a harsh satirical poem on the President of Turkey. This case created an important internal debate in the country, as well as relevant tensions between the two countries involved<sup>19</sup>.

H) Article 370 CC contains the prohibition of hate speech, in direct connection to international obligations under article 20 ICCPR, as mentioned in the introductory part of this research. In this sense, paragraph 1 establishes that “(a)nyone who publicly incites to violence or hatred towards a group or a member of a group defined by virtue of race, skin color, religion, origin, national or ethnic affiliation shall be punished by a prison term from six months to five years”. According to paragraph 2, the same punishment is applicable to “anyone who publicly approves, renounces the existence, or significantly reduces the gravity of criminal offences of genocide, crimes against humanity and war crimes committed against a group or a member of group by virtue of their race, skin color, religion, origin, national or ethnic affiliation in a manner which can lead to violence or cause hatred against a group of persons or a member of such group, where such criminal offences have been established by a final judgment of a court in Montenegro or of the international criminal tribunal”. These two provisions refer to two clear forbidden types of expression: a) the public incitement to hatred or violence against a vulnerable group of individuals, in the understanding that the existence of such incitement must be intentional and reasonably established by the court, and b) publicly endorsing, minimizing or denying crimes of genocide, crimes against humanity and war crimes when they have already been declared as such by the competent court. In this case, forbidden expressions are those that incurring one of the attitudes mentioned above, create a clear risk of incitement to hatred and violence in the terms of paragraph a).

Paragraph 3 and 4 include additional provisions in this area. Paragraph 3 establishes that “(w)here the offence under paras 1 and 2 above was committed by coercion, ill-treatment, endangering of safety, exposure to mockery of national, ethical or religious symbols, by damaging property of another person, by desecration of monuments, memorials or tombs, the perpetrator shall be punished by a prison term from one to eight years”. Here the legislator describes some specific and aggravated attitudes that may be associated to the crimes contemplated in paragraphs 1 and 2. It needs to be underscored that the acts referred to in this article cannot be seen as criminal and punished per se. They constitute criminal offences only when they originate or can be directly associated to the kind of incitement repeatedly mentioned here. On the same note, paragraph 4 states that “(w)here the

19 <https://www.bbc.com/news/world-europe-37554167>

offence under paras 1 to 3 above was committed by misuse of office or where such offence result in riots, violence or other severe consequences for the joint life of nations, national minorities or ethnic groups living in Montenegro, the perpetrator shall be punished for the offence under para. 1 above by a prison term from one to eight years and for the offence under paras 2 and 3 by a prison term from two to ten years”.

The European Union has stressed, in its document “EU Human Rights Guidelines on Freedom of Expression Online and Offline” the following:

“(…) there is no universally accepted definition of the term “hate speech” in international law. The term is usually used to refer to expression that is abusive, insulting, intimidating or harassing or which incites violence, hatred or discrimination against individuals or groups identified by a specific set of characteristics. Under international law, States are only required to prohibit the most severe forms of hate speech, such as the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (Article 20.2 ICCPR and Article 4 CERD). Hate speech legislation should not be abused by governments to discourage citizens from engaging in legitimate democratic debate on matters of general interest.

In the European context, ECHR case law makes a distinction between, on the one hand, genuine and serious incitement to extremism and, on the other hand, the right of individuals (including journalists and politicians) to express their views freely and to “offend, shock or disturb”. In line with ECHR case law, the EU Framework decision on combating certain forms and expressions of racism and xenophobia by means of criminal law stipulates that the Member States shall make punishable the intentional public incitement to violence or hatred as well as the public condoning, denial or gross trivialisation of certain international crimes when carried out in a manner likely to incite to violence or hatred”.

Likewise, in *Féret c. Belgique*<sup>20</sup>, the Court has also made an important effort trying to delimitate the limits between hate speech and extreme political criticism:

“La Cour estime que l’incitation à la haine ne requiert pas nécessairement l’appel à tel ou tel acte de violence ou à un autre acte délictueux. Les atteintes aux personnes commises en injuriant, en ridiculisant ou en diffamant certaines parties de la population et des groupes spécifiques de celle-ci ou l’incitation à la discrimination, comme cela a été le cas en l’espèce, suffisent pour que les autorités privilégient la lutte contre le discours raciste face à une liberté d’expression irresponsable et portant atteinte à la dignité, voire à la sécurité de ces parties ou de ces groupes de la population. Les discours politiques qui incitent à la haine fondée sur les préjugés religieux, ethniques ou culturels représentent un danger pour la paix sociale et la stabilité politique dans les États démocratiques. (...)”

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20 <http://hudoc.echr.coe.int/eng?i=001-93626>

La Cour reconnaît que le discours politique exige un degré élevé de protection, ce qui est reconnu dans le droit interne de plusieurs États, (...) par le jeu de l'immunité parlementaire et de l'interdiction des poursuites pour des opinions exprimées dans l'enceinte du Parlement. La Cour ne conteste pas que les partis politiques ont le droit de défendre leurs opinions en public, même si certaines d'entre elles heurtent, choquent ou inquiètent une partie de la population. Ils peuvent donc prôner des solutions aux problèmes liés à l'immigration. Toutefois, ils doivent éviter de le faire en préconisant la discrimination raciale et en recourant à des propos ou des attitudes vexatoires ou humiliantes, car un tel comportement risque de susciter parmi le public des réactions incompatibles avec un climat social serein et de saper la confiance dans les institutions démocratiques.\*

In *Perinçek v Switzerland*<sup>21</sup>, the ECtHR analyzes the statements made by the Chairman of the Turkish Workers' Party in Switzerland, Mr. Perinçek, on the Armenian genocide. First, during a press conference in Lausanne, he said: "Let me say to European public opinion from Bern and Lausanne: the allegations of the 'Armenian genocide' are an international lie", and "The lie of the 'Armenian genocide' was first invented in 1915 by the imperialists of England, France and Tsarist Russia, who wanted to divide the Ottoman Empire during the First World War". Later during a public event in Zürich, he implicitly denounced the existence of the genocide by claiming that the "Kurdish problem and the Armenian problem were therefore, above all, not a problem and, above all, did not even exist." Then in September 2005, during a rally of the Turkish Workers' Party in Bern, Perinçek said: "even Lenin, Stalin and other leaders of the Soviet revolution wrote about the Armenian question. They said in their reports that no genocide of the Armenian people had been carried out by the Turkish authorities." After the second statement, the Switzerland-Armenia Association brought a criminal complaint against Perinçek. In March 2007, the Lausanne District Police Court of Switzerland found him guilty of violating Article 261 *bis* § 4 of the Criminal Code, which imposes imprisonment up to three years or a fine against "any person who publicly denigrates or discriminates against a person or group of persons on the grounds of their race, ethnic origin or religion in a manner that violates human dignity, whether through words, written material, images, gestures, acts of aggression or other means, or any person who on the same grounds denies, grossly trivialises or seeks to justify a genocide or other crimes against humanity." The court sentenced Perinçek to pay 100 Swiss francs for 90 days, a sum of 3,000 Swiss francs, replaceable with 30 days imprisonment, and 1,000 Swiss

21 <http://hudoc.echr.coe.int/eng?i=001-158235>

\*" „The Court considers that incitement to hatred does not necessarily require the advocacy of a particular act of violence or other criminal act. Personal attacks in the form of insulting, ridiculing or defaming certain parts and /or specific groups of the population, as well as incitement to discrimination, as it was the case here, are sufficient for the authorities to give priority to combating racist speech in the face of irresponsible freedom of expression and violation of the dignity or even the security of these parts or groups of the population. Political speech that incites hatred based on religious, ethnic or cultural prejudices is a danger to social peace and political stability in democratic states. (...)

The Court recognises that political speech requires a high degree of protection, which is recognised in the domestic law of several States, (...) through parliamentary immunity and the prohibition of prosecution for opinions expressed within the Parliament. The Court does not dispute that political parties have the right to defend their opinions in public, even if some of them offend, shock or disturb part of the population. They can therefore advocate for solutions to immigration problems. However, they must avoid doing so by advocating racial discrimination and using vexatious or humiliating language or attitudes, as such behaviour may provoke reactions from the public that are incompatible with a peaceful social climate and may undermine confidence in democratic institutions." (only the French version of the decision is official).

francs to the Switzerland-Armenia Association for its non-pecuniary damages. The ECtHR concluded that the reasons given by the domestic court of Switzerland were insufficient to justify his conviction. In particular, it held that in light of all circumstances, the conviction neither amounted to a “pressing social need” nor it was “necessary in a democratic society.” The Court analysed a number of relevant factors, such as the nature of the statements, the place and time when they were expressed, the extent to which the rights of Armenians were consequently affected, and the severity of the conviction. After taking into account all relevant factors, the it concluded that the Swiss government’s interference with Perinçek’s right to freedom of expression was not necessary in a democratic society. As a result, it found the government in violation of Article 10 of the Convention.

In a different case, in July 1985 Danish journalist Jens Olaf Jersild interviewed a group of radical youths from a xenophobic group, the Greenjackets, as part Danmarks Radio’s Sunday News Magazine. The interview, which was broadcast via radio, featured several clips of Greenjacket members making derogative statements about minority racial groups and immigrants. Jersild and Lasse Jensen, the head of Danmarks Radio’s news section, were later convicted of aiding and abetting the Greenjackets in publishing racist statements and were ordered to pay a fine. The ECtHR (*Jersild v Denmark*)<sup>22</sup> noted the principles of free expression are particularly relevant to the media, which plays a vital in society as “public watchdog.” The Court determined that the information in the broadcast touched upon an issue that is important both inside and outside Denmark: racial hatred. It also held that the Danish government violated Jersild’s right to freedom of expression stating that “although the specific remarks made by the Greenjackets, read out of context, were highly offensive, the way in which they were presented and the objective pursued by the applicant were, in the circumstances, sufficient to outweigh the effect, if any, on the reputation or rights of others.” The ECtHR found that the Danish government had not adequately demonstrated that a limitation on expression was warranted by a legitimate aim, and thus, the limitation was not “necessary in a democratic society,” as required by Article 10.

The case *Maryia Alekhina and others v Russia*<sup>23</sup> concerned three members of the Russian feminist punk band *Pussy Riot*, who, in 2012, attempted to perform one of their songs, “Punk Prayer – Virgin Mary, Drive Putin Away”, from the altar of Moscow’s Christ the Saviour Cathedral. The performance was meant to express their disapproval of the political situation in Russia at the time and of Patriarch Kirill, leader of the Russian Orthodox Church, who had criticized the protests following the December 2011 election. The performance only lasted slightly over a minute because cathedral guards quickly forced the band out. A video recording of the performance was made and uploaded to their website and to YouTube. One and a half million viewers watched it in the ten days following publication. Following several complaints, three members of the group were arrested and charged with the aggravated offence of “hooliganism motivated by religious hatred”. They were remanded in custody and they remained in pre-trial detention for just over five months. The domestic Court found that they had committed the crime in a group, acting with premeditation and in concert, and sentenced each of them to two years in prison. In 2014, the Presidium of the Moscow City Court, to which the case had been transferred, reviewed the case. It upheld the findings that the members’ actions had amounted to incitement to religious hatred or enmity and dismissed the arguments concerning

22 <http://hudoc.echr.coe.int/eng?i=001-57891>

23 <http://hudoc.echr.coe.int/eng?i=001-184666>

breaches of criminal procedure at the trial. At the same time, it removed the reference to “hatred towards a particular social group” from the judgment as it had not been established which social group had been concerned. It reduced each member’s sentence to one year and eleven months in prison. The ECtHR considered that the sanctions applied had been “exceptionally serious” and, therefore, the interference was not “necessary in a democratic society”. Furthermore, the domestic courts’ declaration that the video materials available on the internet were “extremist” and the ban that was subsequently imposed did not meet a “pressing social need” and was disproportionate to the legitimate aim invoked. Therefore, article 10 was found to have been violated.

## **6. Freedom of expression within the framework of electronic media legislation.**

Since the 40s-50s of the last century, the audiovisual media (mainly traditional audiovisual media, i.e. radio and television) have been the subject of particularly intensive intervention by the state authorities. This intervention (generally known as «regulation») has, in any case, different features compared to other possible forms of state control vis-à-vis other media (including the print media, where self-regulation is the most appropriate instrument).

This idea of state regulation is usually linked to the use of a public resource, as are the airwaves. This scarce resource would justify the intervention of the public authorities insofar as it is necessary to guarantee that the use of this space is ordered and that, from a technical point of view, no interference occurs.

However, there are other reasons that help to understand the existence and permanence, even in this period of digital abundance, of a public intervention that normally extends to the dissemination of audiovisual content across the various platforms available. In short, these reasons are:

- a) the key role and power of audiovisual and television content in shaping the public opinion in a modern, visual and immediate way;
- (b) the fact that citizens mainly form their opinions within the audiovisual public sphere and, consequently, the functioning of this public space is directly related to the functioning of the political system and democracy;
- (c) the interest of States in «controlling» the actors who have an important role in the process of shaping public opinion, in order to avoid excessive concentration of media power in private hands.

The regulation of audiovisual communication is therefore a mainly national issue. However, there are important examples of establishing standards or principles in this area at the regional level, the European Union or the Council of Europe being perhaps the most significant ones.

Regarding content regulation, the Electronic Media Law contains the following relevant provisions:

- A) Article 48 contains the most important limits with regards to content disseminated through

audiovisual media services providers. This provision bans “threatening constitutional order and national security”, the dissemination of hate speech (as defined in paragraph 2 of this article), and the publication of information regarding the identity of a minor involved, in any manner, in a criminal activity or event. It is important to note that the dissemination of such content may lead to the imposition of administrative penalties and other possible restrictive measures by the broadcasting regulator according to chapter IX and X of the law.

The first prohibition is even broader than the already criticized restriction included in article 11 of the Media Law. The idea of posing a threat to national security of constitutional order can be potentially associated to many fully legitimate critical political discourses, particularly those that question certain aspects of the political system enshrined, precisely, in the Constitution. The second prohibition is once again in line with other references to hate speech included in the Montenegrin legal system. The main problem here would be drawing the line, in each case, between the hate speech that triggers the mechanisms included in the Media Law, the hate speech that needs to be penalized as a criminal act, and the hate speech that would be the object of a penalty according to the Electronic Media Law. It is obvious that the parameter to be used in order to identify which instrument has to be applied in each case would be the gravity and the “danger” of the incitement in question, although it is obvious that this general criterium may create serious problems of interpretation and legal uncertainty in many specific cases.

## **7. Journalist and media activities performed through online distribution systems and platforms.**

There is no legislation or sub-legal regulations that specifically deals with content distributed through online systems. However, it is very important to note, within the framework of the present report, that certain principles derived from international and EU standards are in any case applicable to these matters, and therefore need to be kept in mind in any discussion about the legal regime applicable to online speech.

The UN Human Rights Council declared in its resolution 32/13 of 1 July 2016: “(...) the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one’s choice, in accordance with articles 19 of the UDHR and ICCPR.” In doing so, it recalled its resolutions 20/8 of 5 July 2012 and 26/13 of 26 June 2014, on the subject of the promotion, protection and enjoyment of human rights on the Internet.

Previously, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, in his Report of 16 May 2011, outlined the importance of the Internet as a platform that enables individuals to share critical views and find objective information”.<sup>24</sup> At the same time, he warned that restrictions on the exercise of the right to freedom of expression through the Internet can take various forms, including blocking and filtering. Such measures may be incompatible

with States' obligations under international human rights law and create a broader "chilling effect" on this specific right. The Rapporteur also warned about the fact that:

"States' use of blocking or filtering technologies is frequently in violation of their obligation to guarantee the right to freedom of expression, as the criteria mentioned under chapter III are not met. Firstly, the specific conditions that justify blocking are not established in law, or are provided by law but in an overly broad and vague manner, which risks content being blocked arbitrarily and excessively. Secondly, blocking is not justified to pursue aims which are listed under article 19, paragraph 3, of the International Covenant on Civil and Political Rights, and blocking lists are generally kept secret, which makes it difficult to assess whether access to content is being restricted for a legitimate purpose. Thirdly, even where justification is provided, blocking measures constitute an unnecessary or disproportionate means to achieve the purported aim, as they are often not sufficiently targeted and render a wide range of content inaccessible beyond that which has been deemed illegal".

These principles have also been outlined by the Council of Europe in the Recommendation CM/Rec (2011) 7 of the Committee of Ministers to member states on a new notion of media:

"Despite the changes in its ecosystem, the role of the media in a democratic society, albeit with additional tools (namely interaction and engagement), has not changed. Media-related policy must therefore take full account of these and future developments, embracing a notion of media which is appropriate for such a fluid and multi-dimensional reality. All actors – whether new or traditional – who operate within the media ecosystem should be offered a policy framework which guarantees an appropriate level of protection and provides a clear indication of their duties and responsibilities in line with Council of Europe standards. The response should be graduated and differentiated according to the part that media services play in content production and dissemination processes. Attention should also be paid to potential forms of interference in the proper functioning of media or its ecosystem, including through indirect action against the media's economic or operational infrastructure"<sup>25</sup>.

The international mandate-holders on freedom of expression, including the UN Rapporteur on Freedom of Opinion and Freedom of Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression, in their Joint Declaration of 1 June 2011 on freedom of expression and the Internet<sup>26</sup>, stated the following:

"(...) When assessing the proportionality of a restriction on freedom of expression on the Internet, the impact of that restriction on the ability of the Internet to deliver positive freedom of expression outcomes must be weighed against its benefits in terms of protecting other interests.

25 Available at: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805cc2c0](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cc2c0)

26 Available at: <http://www.osce.org/fom/78309>





"Any request, demand or other action by public authorities addressed to internet intermediaries that interferes with human rights and fundamental freedoms shall be prescribed by law, exercised within the limits conferred by law and constitute a necessary and proportionate measure in a democratic society. States should not exert pressure on internet intermediaries through non-legal means. (...)

States should take into account the substantial differences in size, nature, function and organisational structure of intermediaries when devising, interpreting and applying the legislative framework in order to prevent possible discriminatory effects. (...)

Any legislation applicable to internet intermediaries and to their relations with States and users should be accessible and foreseeable. All laws should be clear and sufficiently precise to enable intermediaries, users and affected parties to regulate their conduct. The laws should create a safe and enabling online environment for private communications and public debate and should comply with relevant international standards. (...)

Any legislation should clearly define the powers granted to public authorities as they relate to internet intermediaries, particularly when exercised by law-enforcement authorities. Such legislation should indicate the scope of discretion to protect against arbitrary application. (...)

Any request, demand or other action by public authorities addressed to internet intermediaries to restrict access (including blocking or removal of content), or any other measure that could lead to a restriction of the right to freedom of expression, shall be prescribed by law, pursue one of the legitimate aims foreseen in Article 10 of the Convention, be necessary in a democratic society and be proportionate to the aim pursued. State authorities should carefully evaluate the possible impact, including unintended, of any restrictions before and after applying them, while seeking to apply the least intrusive measure necessary to meet the policy objective. (...)

State authorities should not directly or indirectly impose a general obligation on intermediaries to monitor content which they merely give access to, or which they transmit or store, be it by automated means or not. (...)

State authorities should ensure that the sanctions they impose on intermediaries for non-compliance with regulatory frameworks are proportionate because disproportionate sanctions are likely to lead to the restriction of lawful content and to have a chilling effect on the right to freedom of expression. (...)

State authorities should ensure that notice-based procedures are not designed in a manner that incentivizes the take-down of legal content, for example due to inappropriately short timeframes. Notices should contain sufficient information for intermediaries to

take appropriate measures. Notices submitted by States should be based on their own assessment of the illegality of the notified content, in accordance with international standards. (...)

States should guarantee accessible and effective judicial and non-judicial procedures that ensure the impartial review, in compliance with Article 6 of the Convention, of all claims of violations of Convention rights in the digital environment.

States should proactively seek to reduce all legal, practical or other relevant barriers that could lead to users, affected parties and internet intermediaries being denied an effective remedy to their grievances.”

In this specific area, although EU law is not part of international standards, but bearing in mind that this is precisely a draft to be adopted within the EU, the Directive 2000/31/EC, known as the e-commerce Directive<sup>30</sup>, establishes liability exemptions for intermediaries under certain conditions of lack of knowledge of illegal activity or information and expeditious removal and disabling upon knowledge (article 14). The Directive also includes an important provision regarding the absence of any legal obligation for providers to monitor content (article 15).

In line with all these standards, any future legislative initiative in this area must take into account the following principles:

- a) According to international standards, freedom of expression and its limits apply both online and offline. This also means that, as a matter of principle, the distribution system is not relevant when it comes to enforce general legal categories such as defamation, hate speech, protection of sources and others.
- b) As a matter of principle, and unless clearly established otherwise, written and audiovisual media are to be subjected to the same type of norms no matter the distribution system that is used (print or websites in the case of written media, spectrum, cable or web in the case of audiovisual media).
- c) Intermediary platforms, and particularly hosting services (such as Twitter, Facebook, YouTube, etc.), hold no responsibility for the content they facilitate, unless the requirements established in the e-commerce Directive are met.
- d) Responsibility of news portals vis-à-vis comments posted by third parties needs to be regulated according to the parameters established by the European Court of Human Rights in the decision of *Delfi v Estonia*<sup>31</sup> and other successive landmark cases that fine-tune the criteria of the Court.

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30 Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32000L0031>  
31 <http://hudoc.echr.coe.int/eng?i=001-155105>

## 8. Main conclusions and recommendations

1) *Media law needs to be amended in order to incorporate the following:*

- a) Introduce a general list of protections, rights and safeguards for journalists, in line with international standards.
- b) Define and protect journalistic activity in the broadest possible terms, in order to avoid uncertainties and cover all forms of dissemination of information (including the use of new online media)
- c) Eliminate any general power (even for Courts) to ban expression on broad and ambiguous grounds (such as national security, human dignity, constitutional order or rights of others), and refer these matters to specific sector legislation and procedures.
- d) Establish a series of parameters with regards to the limits of the rights to freedom of expression and freedom of information vis-à-vis the rights to reputation and privacy, in line with international standards and the case law of the ECtHR.
- e) Reformulate obligations of journalists when reporting about Court cases, avoiding the imposition of requirements that would hinder their right to engage in investigative reporting as well as to criticize judicial decisions.

2) *The self-regulatory system in place must be improved in order to guarantee the following:*

- a) The existence of a Code of Ethics accepted and owned by all journalists and media outlets, beyond divergent particular, political and economic interests.
- b) The existence of an oversight and implementation mechanism based on the principles of expertise, independence and moral authority.

3) *Criminal provisions affecting freedom of expression need to be modified in the following aspects:*

- a) Limit liability only to those who have editorial capacity and therefore have actively intervened in the decision to publish or disseminate a piece of content.
- b) Introduce a clear and proper interest exception applicable to cases of disclosure of professional secrets.
- c) Repeal provisions criminalizing any form of defamatory act, referring this matter to civil law standards and procedures.
- d) Repeal provisions that criminalize exposing "Montenegro, its flag, coat of arms, or anthem", "a nation, national minority or other minority ethnic group living in Montenegro, a foreign state with which Montenegro has diplomatic relations, its flag, coat of arms, or anthem", as well as "the United Nations Organization, the International Red Cross, or other international organization of which Montenegro is a member", to mockery.

*4) Media policies and international assistance must support the application of hate speech provisions established in different Montenegrin laws in line with international standards and the parameters and case law of the ECtHR. These initiatives may consist of promoting self-regulation in these specific areas, organizing journalists' trainings, or engaging with courts and regulatory bodies through specific seminars and debates, among others.*

*5) References in the Electronic Media Law to content obligations that may enshrine broad and ambiguous - particularly with regards to possible threats to the constitutional order or national security - and thus create problems of legal certainty must be eliminated.*

*6) It is advised to promote a regulation of the provision of digital services different from traditional media and audiovisual media services, on the basis of the principle of technological neutrality and incorporating the fundamental liability exemptions established by the EU legislation on electronic commerce. Discussions about the role of online platforms (particularly social media) in facilitating the exercise of the right to freedom of expression and achieving a fair balance between legal obligations and internal terms of use and community guidelines need to be promoted by national policy makers and international stakeholders present in the country. Dialogue between platforms, users and regulatory and policy bodies need to be promoted by the same bodies.*

## **About the author**

*Joan Barata is an international expert in freedom of expression, media freedom and media regulation. He currently is Intermediary Liability Fellow at the [Center for Internet and Society of the Stanford Law School](#).*

*He holds a PhD in Law from the University of Barcelona and a M.A. from the European Academy of Public Law, European Public Law Organization (Greece). As a scholar, he has been actively speaking and doing extensive research in these areas, working and collaborating with various universities and academic centers, from Asia to Africa and America, authoring papers, articles and books, and addressing specialized Parliament committees.*

*He held the position of Principal Adviser to the Representative on Freedom of the Media at the Organization for Security and Cooperation in Europe (OSCE). Before that, he was a Professor of Communication Law and Vice Dean of International Relations at Blanquerna Communication School (Universitat Ramon Llull, Barcelona). He was also Professor at the University of Barcelona, the Open University of Catalonia, and the Universitat Pompeu Fabra, as well as visiting scholar at the University of Bologna and the Benjamin N. Cardozo School of Law (New York).*

*He provides regular advice to international organizations, NGOs, Governments, legislators and regulators in most regions of the world, including Africa, Asia and Latin America.*

*Moreover, he also has a strong regulatory experience as Head of President's Cabinet (2005-2009) and Secretary General of the Catalonia Audiovisual Council - [CAC](#) (2009-2011) and member of the Permanent Secretariat of the Mediterranean Network of Regulatory Authorities - [RIRM](#) (2006-2011).*



