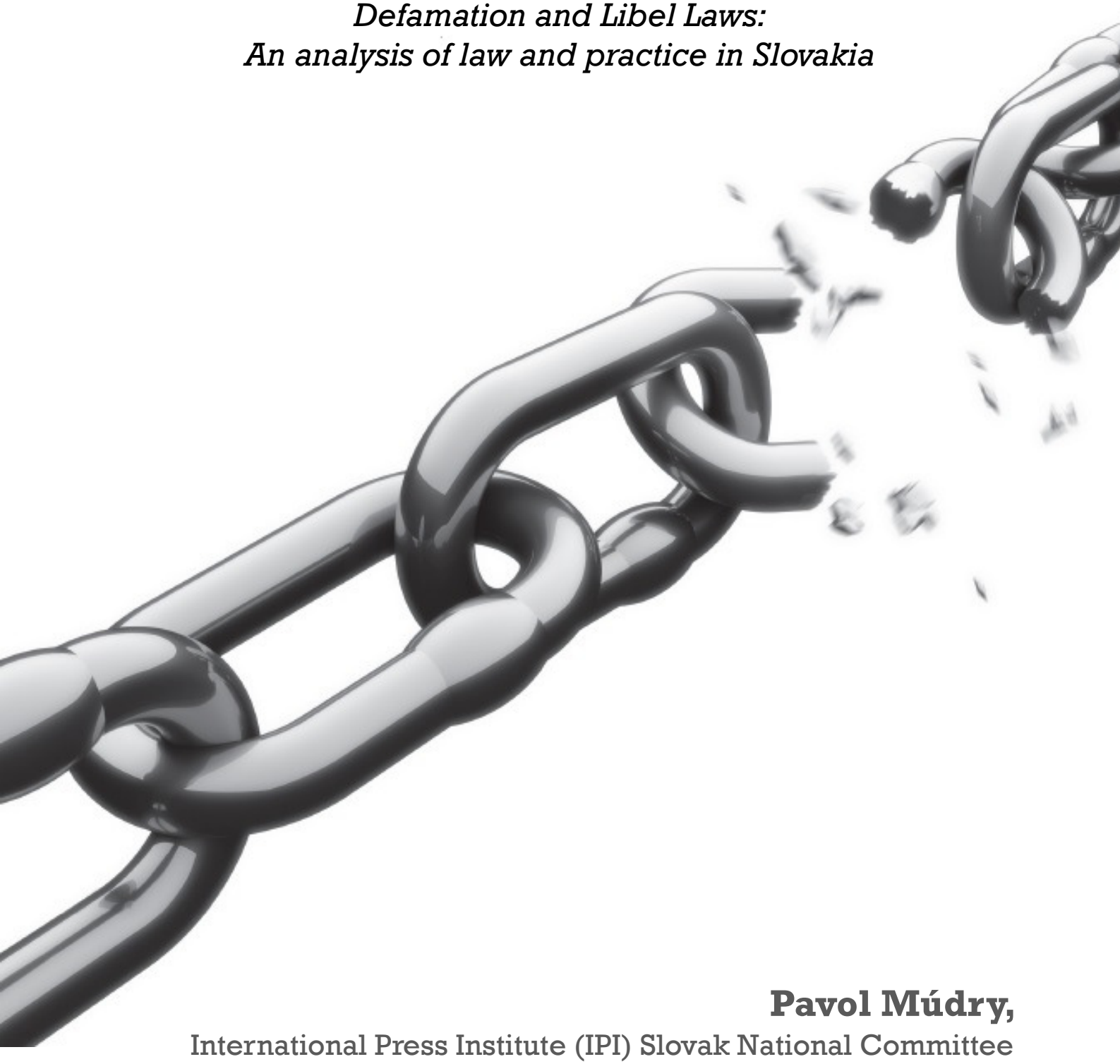
Freedom of the Media
25 Years Later

Defamation and Libel Laws:
An analysis of law and practice in Slovakia



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Bratislava, November 2014

About this Report

The analysis was prepared as background material for an international open specialist discussion on

Freedom of the Media, 25 Years Later: We Need a Change of Legislation

held on Tuesday, November 25 at the Primate's Palace in Bratislava, Slovakia.

This analysis focuses on freedom of expression and legal action to protect reputation in the Slovak Republic, with a particular focus on court decisions to award financial compensations for non-pecuniary damage

The analysis was initiated and compiled by **Pavol Múdry, chairman, International Press Institute (IPI), Slovak National Committee**, in cooperation with **VIA IURIS**, a Slovak non-profit legal watchdog and and public accountability centre. It shall serve after the event as a source of information for media, media associations, as well as legislators and the executive in Slovakia as a support document in facilitating the required legislative changes.

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1. Rationale

This analysis offers an insight into some circumstances concerning legal actions related to the protection against libel and the right to freedom of expression, particularly in connection with judicial decisions to award financial compensations for non-pecuniary damages to the plaintiff.

The analysis is not intended to offer a comprehensive assessment of all aspects of the protection of freedom of expression or all aspects related to legal actions related to the protection against libel. It builds on an analysis published by VIA IURIS in 2011[1] (hereafter the "2011 VIA IURIS analysis").

The analysis draws upon legal regulations and accessible major rulings by general courts issued in 2011–2014.

2. Legislative framework on the protection of reputation (civil law)

The constitutional framework for freedom of expression is stipulated in Art. 26 of the Constitution of the Slovak Republic No 460/1992 Coll. (hereafter the "Constitution"):

> *(1) Freedom of speech and the right to information shall be guaranteed.*
>
> *Everyone has the right to express his or her opinion in words, writing, print, images or by other means and also to seek, receive and disseminate ideas and information freely, regardless of the state borders . No approval process shall be required for press publishing [...].*

Similarly, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter the "Convention") states, in Art. 10 par. 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.* […]

At the same time, the Constitution and the Convention set out limits and possibilities to restrict freedom of expression. The Constitution in Art. 26 par. 4, states:

> *The freedom of expression and the right to seek and impart information may be restricted by law, if such measure is necessary in a democratic society to protect the rights and freedoms of others, of state security, public order, or public health and morals.*

Similarly, the Convention, in Art. 10 par., 2 reads:

> *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.*

[1] WILFLING, P., KOVÁČECHOVÁ, E.: *Freedom of Expression and Libel Charges: A Comparison of Approaches by Courts in Slovakia, in the USA and at the European Court for Human Rights in Charges Filed by Public Officials* [Sloboda prejavu a žaloby na ochranu dobrej povesti: Porovnanie prístupu súdov na Slovensku, v USA a Európskeho súdu pre ľudské práva k žalobám verejných činiteľov]. VIA IURIS – Centrum pre práva občana, Pezinok, 2011. http://www.viaiuris.sk/stranka_data/subory/analyzy/bsudy.pdf.

The reading of the Constitution as well as of the Convention thus shows that the restriction of the freedom of expression may only be applied when three requirements are met cumulatively:

- Restriction must be established by law,
- The measure must be necessary in a democratic society,
- The measure shall aim to protect at least some of the legitimate objectives set out in Article 26 par. 4 of the Constitution, and/or Art. 10 par. 2 of the Convention.

An investigation of whether the matter concerned did meet all three prerequisites shall be subject to the proportionality test (see further in this document).

The above shows that, when the remaining requirements (i.e., legal restrictions, a measure inevitable in a democratic society) are met, freedom of expression may also be restricted in order to protect the rights and liberties of others and/or protect the reputation of others.

The fundamental legal framework for the protection of a physical person is set out by the Slovak Civil Code No 40/1964 Coll. (hereafter the "Civil Code") in paragraphs 11 to 15. It sets out that an individual,

> *has the right to the protection of personality, particularly life and health, civil honour and human dignity, as well as privacy, one's own name and expressions of personal nature.*
>
> Civil Code, par. 11.

Par. 12 of the Civil Code awards protection to expressions by an individual, such as documents of private nature, portraits, images, video and audio recordings concerning the individual. Those may only be produced upon consent by the individual concerned, apart from their use for official purposes endorsed by law, or for scientific and artistic purposes, press, film, radio and television reporting.

The Civil Code further sets out the means of civil legal protection available to an individual who may defend himself or herself against unauthorised interference with their person (Civil Code, par. 13):

- Delaying legal action through which the plaintiff seeks to order a defendant "to refrain from unauthorised interference with their personality;
- Remedial action through which the plaintiff may claim "elimination of consequences of such interferences";
- Redress claim on the basis of which the plaintiff may claim "adequate redress".

3. Forms of redress available

An adequate redress may entail moral compensation (apology, withdrawal of defamatory statements), as well as financial compensation. Non-pecuniary compensation in financial terms, however, may only be awarded when no other means of redress proves sufficient, which may particularly be the case when the dignity or social status of an individual has been significantly impaired. These reasons are, however, only mentioned illustratively. Additional circumstances may therefore arise to justify the award of financial compensation.

A court shall determine the amount of financial compensation. According to the Civil Code, the Court should take into consideration the gravity of damage incurred and the circumstances that led to the breach of the law. More detailed criteria for determining the amount of non-pecuniary damages are defined by the decision-making practice of the European Court of Human Rights (ECtHR), as well as by ordinary courts and the Constitutional Court.

The 2011 VIA IURIS analysis suggested that the lower courts, at least, were awarding public servants and public figures excessive or disproportionate amounts of compensation for non-pecuniary damage in libel lawsuits against the media. In addition, court decisions were said to not make it clear the decisive reasons for awarding such amounts to politicians or judges. The judicial arguments were brief and general and were often even missing references to the awarded financial compensation. Moreover, the judicial practice has shown a notable tendency to award incomparably higher compensations (nominally tens to hundreds of thousands of euros) to public figures and public officials in comparison to private persons.

The monitored period of 2011–2014 continues to show a trend to award higher amounts of compensation to public officials and public figures. At the same time, however, moderate improvement in the judicial reasoning has been noted. The reasoning no longer contains merely the general quotation of the legal clauses, but also their application and interpretation in connection with specific facts of a particular case.

4. Key recent developments in Slovakia related to freedom of expression and the protection of reputation

In addition to some key decisions by general courts and the Constitutional Court (addressed further in this document), the monitored period brought additional developments that proved significant for freedom of expression and protection against libel.

a) Bonano Bar affair

In the Bonano Bar in Rajecké Teplice, just a few weeks following a mass shooting in Devínska Nová Ves that claimed the lives of seven people, a number of high-ranking judicial representatives were entertained by a lawyer dressed in a similar manner as the shooter, Ľubomír Harman. In attendance at the bar were a number of Supreme Court judges, a judge from the Regional Court in Žilina, a judge from the District Court in Čadca, a lecturer from the law school, and the Deputy Prosecutor General attended the party. The daily *Nový čas* published photographs and video footage of the event. Over time, most of those present at the party pressed libel charges, claiming that the publication wrongly drew an association between the published images and the mass shooting in Devínska Nová Ves. In addition to an apology they claimed high amounts of non-pecuniary compensation (together they first claimed a total of €940,000).

With one exception that involved ending the proceedings, the court has so far ruled only on a single case, accepting the plaintiff's claim for apology by *Nový čas* (the plaintiff being the Supreme Court Judge Daniel Hudák), but not yet deciding on a non-pecuniary compensation. It is also possible that the case will close with out-of-court settlement as proposed by a judge who postponed the hearing to 7 November 2014.

The decision on the Hudák Case is not yet published (and has not, as yet, come to force). Yet it seems to be without grounds and in conflict with the limits set out by the Constitution and the Convention. According to the available information, the images published are genuine and true. In line with its role as the watchdog of democracy, the media have a responsibility to report on the peculiar party of high-

ranking judicial representatives as a matter of public interest. This particularly applies in the situation in which the Slovak judiciary has been facing long-term criticism and extremely limited public trust.

b) Use of criminal libel law against journalists

The monitored period brought three more significant threats of pressing criminal libel charges against persons in connection with their work in the media: **Zuzana Petková** in connection with her reporting on the salary received by the wife of Štefa Harabín, chairman of Slovakia's Supreme Court; **Zuzana Piussi** for having shown in her film *Illness of the Third Power* (Nemoc tretej moci) images of Judge Helena Kožíková, and journalist **Dušan Karolyi** for an article about an ex-official of Slovakia's organised-crime task force (ÚBOK), who was suspected of abusing his powers of a public official. All three cases of criminal charges were eventually withdrawn.

The Karolyi case is illustrative of an attempt by a plaintiff to frighten a journalist instead of having genuine suspicion that a crime was committed. Karolyi was accused of the crime of libel in line with **Art. 373 of the Slovak Criminal Code** No 300/2005 Coll. Libel is defined in the Criminal Code as the publication of false information about an individual, whereby the information is likely to significantly damage the individual's respect within the society, at work, damage family relations or cause other type of damage. The available information makes it clear that Karolyi merely described activities and court procedures related to an investigation into possible abuse of power by a public official. Moreover, he identified the person concerned with a full first name and only a last name initial. The above suggests that the very first premise of the aforementioned nature of a crime of libel was not met, i.e. the publication of false information or data about a particular individual. Therefore, there were no grounds to press criminal charges in this matter.

5. OSCE concerns over levels of compensation for non-pecuniary damage in libel cases in Slovakia.[2]

In May 2013, Dunja Mijatović, the OSCE Representative on Freedom of the Media sent a letter to the Slovak Minister of Foreign Affairs, Milan Lajčák. She expressed concern over extravagant compensations for non-pecuniary damages claimed by judges in libel disputes. The letter stated, *inter alia*, that it is an inevitable role of the media to set a mirror to society and inform the public on issues of public interest. Mijatović argued that public officials have to endure higher degree of criticism also by the media. She thus responded to the charges pressed by several judges and prosecutors concerning media articles related to the Bonano bar event of 2011 who claimed a total of €940,000 in compensation for non-pecuniary damage. In her letter Mijatović also referred to the charges pressed by the Specialised Criminal Court Judge Michal Truban, who claimed €150,000.

6. Amendment of Act No 215/2006 Coll. on compensations of victims of violent crimes

Act No 146/2013 Coll., adopted in May 2013, amended the act on compensations of victims of violent crimes. *Inter alia*, a clause was introduced to the Act that sets out the extent of damages in case of victims of the crime of rape, sexual violence or sexual abuse. The victims thus gained the right to payment of compensations for non-pecuniary damage incurred in an amount up to ten times the minimum wage (par. 5.1 of the above Act). In case the crime caused death, compensation may be awarded up to fifty times the minimum wage.

[2] "OSCE media freedom representative concerned about Slovak judiciary seeking high damage awards in defamation cases", 2 May 2013, http://www.osce.org/fom/101240.

This information is relevant in investigating whether compensation for non-pecuniary damage in case of libel is awarded in a reasonable and proportionate amount. According to the ECtHR decision in *Karhuvaara and Iltalehti vs. Finland* (2004) compensation for non-pecuniary damage ought to be awarded in an amount that is not inadequate to those awarded in similar cases, e.g. to victims of violent crimes. It is clear that this approach is virtually unknown in the Slovak context.

7. Selected court decisions (2011–2014)

Slovak courts currently apply ECtHR procedures. In disputes related to interference in personal rights, they guard simultaneously two competing fundamental rights: the right to freedom of expression and the right to protection against libel. Following this procedure, a court decides which right has greater weight and priority in a given case. Courts apply the proportionality test, and/or point out the fundamental ECtHR principles and criteria.

A number of lengthy cases originated in Slovakia around the turn of the millennium and have remained subject to judicial proceedings well into the monitored period of 2011–2014.

a) *Mečiar vs. Ringier*

In the ***Mečiar vs. Ringier*** the Slovak Constitutional Court (III. ÚS 385/2012 of 21.01.2014) directly listed the criteria for the assessment of the degree of constitutional protection of freedom of expression in cases of collision with personal rights. The case involved a conflict between former Slovak Prime Minister Vladimír Mečiar and the publisher of the *Nový čas* daily for articles that the daily ran in 2004 when Mečiar was running for president. The articles in question suggested that Mečiar was in a poor mental state. A district court ordered to publisher to apologise and compensate the plaintiff Sk 1 million for non-pecuniary damages. The decision to issue an apology was confirmed by a regional court, which, however, overruled the financial compensation. The latter was thus returned to the district court for new proceedings. In assessing individual criteria the Constitutional Court stated, *inter alia*, that "a vital democracy requires executive power to be exposed to detailed monitoring not merely by the legislature and courts, but by the public and media as well."

In connection with the criteria of intention, aim and motif the Constitutional Court stated:

> *The greater the effort on the part of the author of the defamatory expression to find the truth and/or an effort to exert the required professional precision, the greater the need to take into consideration the weight of the freedom of expression. For, unlike in cases of intentional defamation, such conduct is beneficial for the development of democracy even at the cost of publishing some imprecise information in some cases.*

b) *Ľudovít Hudek vs. Petit Press*

The Regional Court in Bratislava assessed ECtHR individual criteria in ***Ľudovít Hudek vs. Petit Press*** (File 6Co/47/2014 of 25.04.2014). In that case, a court had already passed a decision requiring the defendant to apologise, but was still deciding on entitlement to financial compensation for non-pecuniary damage. The case arose in response to an article that stated that the plaintiff, former Slovak Interior Minister Ľudovít Hudek , had publicly admitted his participation in the crime of the kidnapping of the son of former Slovak President Michal Kováč and that an investigation in the case was only prevented by amnesties issued by Vladimír Mečiar. The plaintiff demanded compensation in the amount of €16,596.96. The regional court took into consideration the role of the media in a democratic society, the fact that the subject of the material was information of public interest and related to a public official. The objected statements were primarily evaluative ones made in good will. Based on thus set proportionality test the regional court argued that all facts evidenced that the charge

(in connection with the compensation for non-pecuniary damage) should not be supported and returned the case to the court of first degree.

c) *Vladimír Lexa vs. Petit Press*

The proportionality test proved decisive also in ***Vladimír Lexa vs. Petit Press***, a case that arose from an article about business activities of the Lexa family and privatisation. The plaintiff demanded an apology and compensation for non-pecuniary damages in the amount of €33,194. A district courted support the request for apology, but rejected that claim for compensation. The Bratislava Regional Court (File 3Co/206/2009 of 14.04.2011) upheld the decision related to the apology but granted the claim for compensation for non-pecuniary damage, awarding €7,000. The Regional Court took into the account the fact that the plaintiff was no longer a public official, having left politics over a decade ago. Thus the criticism was not a matter of public interest (the criticised facts were over a decade old) and the information in the article concerned was not true and no longer current.

On the contrary, the Slovak Supreme Court (File 6Cdo/169/2011 of 26.06.2013 – the ruling received the 2014 Ruling of the Year award) applied the proportionality test and reached an opposite decision:

- Mr Lexa as the plaintiff was a person in public interest what was exacerbated by the fact that his son was the former Director of the Slovak Intelligence Service;
- The matter concerned privatisation of mil and bakery corporation which is, in its very nature,

Subject of public interest whilst a discussion about them ought to be deemed open and of public benefit. The benefit concerns uncovering and redemption of flaws in the process that might surface only over a longer time period, but also in terms of transparency of future privatisation. In case of the plaintiff the published information was subject to public interest the more so, that he took part in the privatisation as former member of the Government that launched the process and significantly participated in its execution.

8. Media as a watchdog of democracy

In ***Mečiar v. Ringier*** (III. ÚS 385/2012) the Constitutional Court stated:

> *To remove the right of the complainant to "speculate" about the "nervous stability" of politicians, as long as she had sufficient facts for such evaluator consideration, would come to clear conflict with the eminent role that media and journalists play in a legal state.*

Therefore, according to the Constitutional Court, simplification, exaggeration, provocation are permissible also in article titles such as "nervous collapse" and "poor mental state" that were presented to the court in the particular case. The courts also decided that media do not have to verify accuracy of all used information to the full extent.

a) *Ján Sokol vs. W Press*

In ***Ján Sokol vs. W Press*** the Regional Court in Trnava upheld (File 11Co/278/2012 of 15.05.2013) a lower court decision. The case arose in response to articles published in the weekly *.týždeň* about the plaintiff that discussed, *inter alia*, non-transparent and dubious management of finance in the archdiocese. The first degree court (the District Court Trnava, file 16C/226/2009 of 28.03.2012, however, stated:

> *It is not pivotal whether the circumstance were fully proven, … in terms of the subject to the proceedings it is decisive whether the doubts existed prior to the publication of the articles that was based on the very circumstance and use of the funds from the sale of land. Even if the management of funds rived later correct, with reference to the above and the freedom of expression, there is no legal barrier to publish the controversial information.*

The Court further stated:

> *The publication of the articles released information that came from a number of sources. It therefore involved a means to inform the public not in an attempt to convince it about the true and verified information, but about suspicious circumstances. It arises from the above principles it is no possible to justly request the defendant to verify the information in full extent which is ultimately not possible.*

b) *Mečiar vs. Ringier*

Similarly in ***Mečiar vs. Ringier*** the Constitutional Court (III. ÚS 385/2012) ruled

> *The requirement for entirely precise material claims would impose on journalists a burden that of promises that they cannot fulfil. In the interest of preserving the freedom of press certain simplification is acceptable, whilst the decisive factor is that the overall message of a given information reflects the truth.*

c) *Vladimír Lexa vs. Petit Press*

In ***Vladimír Lexa v. Petit Press*** (the article about the Lexa business in a mill and bakery corporation, and its privatisation), the Slovak Supreme Court decided (File 6Cdo/169/2011 of 26.06.2013) that,

> *According to the ECHR judicature (…) press, as long as it contributes to public discussion on matters of legitimate interest ought to commonly have the right to rely on the content of official reports without having to be required to carry out an independent research. Otherwise its vital role of a watchdog might be undermined.*

d) Requirement to prove accuracy of claims

Ivan Lexa vs. Michal Kováč concerned claims made by the defendant about the plaintiff suggesting that Lexa was directly responsible for the kidnapping of the son of former Slovak President Kováč. Bratislava District Court I decided (File 11C/42/1996 of 13.06.2011) that the defendant had to apologise to the plaintiff and pay him a compensation for non-pecuniary damage in the amount of €3,319. The court argued that the defendant accused the plaintiff of a crime, even though there is no valid ruling on the case. The court deemed the claims made by the defendant to be statements of facts and,

> *Even if the future showed the material claims to be true, nothing changes the fact that, at the time when the claims were expressed, the guilt of the plaintiff and/or his participation in the crime was confirmed by a court ruling.*

e) Passive legitimation of author of an article

In ***Vladimír Lexa vs. Marián Leško*** the plaintiff asked for apology and compensation for non-pecuniary damage in the amount of SK 100,000 in connection with an article about an alleged assets of the Lexa family. Whilst the district court upheld the claim by the plaintiff and als awarded the financial compensation (Sk 15,000), the Bratislava Regional Court overturned the decisions (file 14Co/392/2011 of 02.07.2013) arguing that the defendant is not passively legitimised.

The court did not see an obstacle here even in the fact that, at the time of writing the incriminated article, the defendant did not work for the publisher as a contracted staff writer, but was self-employed. The court argued that the situation was similar to that of self-employed people when there is a need to examine the chronological and material relationship of the author to the delivery of the publisher's mission, and not his formal status vis-à-vis the publisher.

f) The need to provide a space for readers to form their own opinion

Courts have stated that what matters in case of evaluative judgements is for the media to create a space for information recipients (readers) to be able to form their own opinion on the basis of the information received.

A situation when the plaintiff is a judge, and above all a Supreme Court Judge, is seen by the Constitutional Court as a case in which the person concerned ought to bear greater degree of criticism. In ***Štefan Harabin vs. Petit Press*** the Constitutional Court overruled (file I. ÚS 408/2010 of 16.06.2011) the original decision by a regional court also because,

> *... a judge as a representative of pubic power ought to accept that his or her performance may be subject to criticism. He or she should be therefore expected to possess a higher degree of tolerance and detached perspective than in common people. Even higher is the degree of acceptance of permissible criticism among the Supreme Court Judges given the subject of their decision-making activities and/or the fact that they decide on the most serious case that are often publicly known. That degree is higher in their case than in that of judges in the lower courts.*

g) Deciding on compensations for non-pecuniary damages

During the monitored period courts continued the trend of awarding excessive compensation for non-pecuniary damage, particularly in cases in which judges were plaintiffs. Court decisions show that when deciding on the amount of compensation for non-pecuniary damages, courts took into consideration whether the interference came via a daily with wide or nationwide coverage and with a relatively high print run (over 70,000 copies), whether an article appeared on the front page and the duration of the damage (Regional Court, file 3Co/334/2011, ruling of 01.12.2011 on *Harabin vs. Petit Press*).

In the same matter different courts examined and decided on similar facts differently. The Constitutional Court took into consideration a fact that the plaintiff (a publisher of a daily newspaper), ran a series of articles in the same daily explaining the background to the case that led to pressing the charges by a judge who was named in the incriminated article. Thus the claim by the plaintiff received some factual basis that enabled the readers to draw their own conclusions. The Court thus upheld the claims by the plaintiff.

A particular reason for awarding (financial) compensations for non-pecuniary damages was that,

> *An apology itself merely declares publicly that an unauthorised interference into personal rights occurred. Such an apology also contains a negative element in "a public revival of a topic". As such is unable to shed public light on the specific circumstance of the case.*
>
> District Court Banská Bystrica (File 14C/131/2010 of 29.02.2012) on ***Michal Truban vs. Petit Press***

9. Conclusions and recommendations

Conclusions

- It is positive that courts have applied principles and criteria applied by the European Court of Human Rights in examining statements in terms of their possible interference in personal rights, even though the principles and criteria are not always applied properly.

- It seems problematic that a protectionist tendency in relation to judges prevail when the latter are targets of criticism of their conduct or procedures or other performance. It is likely that the approach is affected by the fact that judges are deciding about judges.

- Despite a number of moderate court decisions (particularly appellate courts and those deciding on the bass of extraordinary remedial means), the Slovak courts continue to award inappropriately high compensations for non-pecuniary damages to public officials or public figures, often with confused, inadequate and even bizarre reasoning.

- The aforementioned cases make it clear that the means of pressing libel charges is often used above the framework of the original legislative intention and greater degree of protection is naturally awarded to the protection of privacy of individuals (i.e. public officials and public figures) than to the right to freedom of expression. That results in the three absurd criminal prosecutions of the journalist and the film-maker. In their case there were no grounds whatsoever to launch the prosecution. On the contrary, it is welcome that, under public pressure, all three proceedings were withdrawn.

Recommendations:

- The principles and criteria used by the ECtHR ought to always be emphasised and applied in defence of the right to the freedom of expression. This is especially true in connection with the use of irony, unpleasant and expressive statements, particularly by journalists.

- The theory of the right to justifiable error in case of the media should continue to be developed and applied in Slovak court practice.

- Judges should be hesitant in deciding on libel charges as remedial means for a given situation.

- Judges who decide on cases involving the judiciary ought to bear in mind the alarming state of public perception of the judiciary ain Slovakia.

- Compensation for non-pecuniary damages should be comparable to other financial compensations, e.g., those awarded to victims of violent crimes pursuant to Act 215/2006 Coll. or pursuant to Act 514/2003 Coll. on responsibility for damages caused in the exercise of public power. In those Acts, the maximum amounts are set by law. There is no reason why compensation for violent crime resulting in disability or death ought to so significantly lower than compensation for non-pecuniary damage caused by libel (particularly libel against judges). Here, Slovak courts should apply the ECtHR's ruling in *Karhuvaara and Iltalehti v. Finland*, according to which compensation for non pecuniary damages caused by interference into personal rights ought to be comparable with the amounts awarded to victims in similar cases. The flaw is unlikely to be remedied merely with a change of application practice in courts, but through a change of the relevant legislation.