



Contents

Events

Press releases

Media on media

Vacancies

Free Media Help Line

Five elements of defamation and five advices to journalists

By: Mehmed Halilović

Fundamental Principles of the Law on Civil Procedure for Media Representatives in BiH

By: Nives Abdagić

If a journalist's report has been made in accordance with ethic standards, the court officials shall most certainly protect the freedom of expression, including both journalists and media house, in most appropriate ways.

Interview with Vesna Alaburić

What Decriminalisation of Defamation means for financial sustainability of investigative journalism?

By: Amarildo Gutić

Freedom of Expression or Defamation?

By: Biljana Radulović

How to avoid defamation suits?

For the period of over 15 years of the implementation of present laws on protection against the defamation, defamation charges in BiH have still served as some kind of mean and tool for confrontation against media an/or journalists, which resulted in overall discouraging effect on journalists' work and performance, particularly in smaller communities and local media houses. Apart from this, there is no reliable information regarding either total number or outcomes of court procedures regarding the cases of defamation charges. As far as the current implementation of the law on protection against the defamation is concerned (during the court procedures), temporary ban of posting or publishing have represented the most disputable court decisions, including medical expertise or free estimate or evaluation of non – material damages and determining and setting compensational claims (fines).

According Free Media Help Line data regarding defamation cases, most of the verdicts are against the favor of media, and one of the fundamental reasons for this occurrence has been the lack of understanding of differences between opinions and facts, and poor understanding of different journalists' genres. Court procedures, as far as defamation cases are concerned, are exhausting in both terms of finance and time spent at courts. When the european standards are not respected in processing defamation cases at courts, it imposes direct pressures against journalists and the media, by jeopardizing their rights to freedom of expression. Because of this, it is important for both, legal authorities and media representatives to display vast acknowledgement and comprehension of the implementation of standards, as indicated in Article 10 of the European Convention on Human Rights and judgments delivered by the European Court of Human Rights in Strasbourg.

This E – Bulletin edition is the first edition of special serial of BHJ online bulletin, implemented as part of the following project: Reinforcing Judicial Expertise on Freedom of Expression and the Media in South-East Europe (JUFREX). Through the serial of five editions, we shall publish and post expert opinions, views and analysis by judiciary representatives, including media and regulatory body representatives and international and local experts in the field of media and human rights. How to advance legal representation of journalists, editors and publishers and how to organize their defense before BiH courts during defamation cases and how to advance court and judiciary practice and processing of defamation cases in the way that would promote European values?

*This edition includes issues regarding implemetation of the European standards in processing defamation cases in BiH, the following experts shall provide their advice, opinions and views: **Mehmed Halilovic**, solicitor and media expert, **Nives Abdagic**, female judge with the Municipal court of Sarajevo, **Amarildo Gutic**, journalist of Zurnal.info, a local web site, **Biljana Radulovic**, a female lawyer from Bijeljina and we also talked with **Vesna Alaburic**, a female solicitor and an international expert.*

Arman Fazlić, E-journalist Editor

Publication is implemented in the framework of the Council of Europe's project - Reinforcing Judicial Expertise on Freedom of Expression and the Media in South-East Europe (JUFREX)

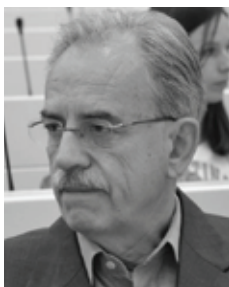
Reinforcing Judicial Expertise on Freedom of Expression and the Media in South-East Europe (JUFREX)

Funded by the European Union and the Council of Europe



Implemented by the Council of Europe

This publication is implemented with financial assistance of the EU and the Council of Europe. Opinions expressed in it do not necessarily reflect the official positions of the European Union.



Five elements of defamation and five advices to journalists

By Mehmed Halilović

So, how can we define defamation and insult? These two are not the same and must not be mistaken, which is exactly what most journalists do. Defamation and insult are not even regulated by the same law. On one hand, defamation is defined through special law (Law on Protection against Defamation), while insults are, on the other hand, subject to court procedures pursuant to Law on Obligations. Law on Protection against Defamation is defined through two Entity levels in BiH, and special one applied in Brcko District, which is mostly a copy of the two Entity laws.

For comfort, we should mention that this difference between defamation and insult was not quite clear to judges either, which was perhaps best seen through several court procedures where the courts treated one case as defamation (in one case) and insult (in another case). Let us focus this time on defamation only, because it has much wider social and media significance.

The definition of defamation is easy to find in our laws (Article 6 of the Law in FBiH and Article 6 of the Law in RS). Once we read these articles carefully we can see that there are five fundamental elements defining the defamation:

- 1) “revealing/exposing and transmitting false facts” (FBiH), that is “revealing/exposing/transmitting of something of false nature” (RS and BD);
- 2) Damage (towards physical or legal entity);
- 3) Identification of the damaged entity;
- 4) Transmitting to third and finally
- 5) Intention or inattention.

In order to qualify something as defamation, all five of the above listed elements must be met accordingly.

Let’s analyze every one of these elements.

“*False facts*”. The way that the first of all five elements has been described (“revealing/exposing and transmitting false facts” (FBiH), that is “revealing/exposing/transmitting of something of false nature” (RS and BD) is not most satisfying way, due to both lexical and logical reasons. The term “false facts” in Federal law is definitely considered as (according to law experts) what the Roman law referred to as *contradictio in adiecto* (contradiction in terms, figuratively and metaphorically speaking “round but square” or “wooden steel”). Also, the term “revealing/exposing/transmitting of something of false nature” (according to laws of RS and BD) opens many possibilities for countless interpretations by personal choice. If we leave these disadvantages aside, it is clear that what they refer to is “false or untrue allegations and false information”.

Legal liability is defined for revealing and exposing false information (“false facts”). For valued court (opinion), the liability does not exist at all, although certain qualifications (such as “idiot, fascist, dictator” or similar) must have some argument based background. These arguments and facts must not be proved because they are commonly known in public (and they can include public reveals issued by prosecutors, eventual criminal procedures, verdicts etc.).

Copy paste expertise

Events

30 Mar 2018

[Economic pressures most common form of pressure against journalists in BiH](#)

29 Mar 2018

[PBS in pre-election campaign 2016: BHRT reported in a ballanced manner, RTRS and FTV biased](#)

22 Mar 2018

[Index of media clientelism shows negative results for all South East European countries; BiH on the bottom of this list](#)

20 Mar 2018

[Free and fair media house may contribute in fair elections process](#)

Press releases

23.03.2018

[Stop censorship and pressure on BHRT](#)

01.03.2018

[Condemning the assault on BHT1 TV team in Tuzla during the protest of demobilized and retired war veterans](#)

21.02.2018

[Press release following the assault against Nedžad Latic](#)

Media on media

21 Mar 2018

[Selling of East Sarajevo RTV radio frequency illegal?](#)

15 Mar 2018

[Dragan Bursać wins European Press Prize 2018](#)

14 Mar 2018

[Members of BHRT Board of Directors appoints new chief – in – editors of BHT1 information and documentary program](#)

07 Mar 2018

[Council of Europe; New guidelines regarding media pluralism and media ownership transparency](#)



Damage. This element is a constituent part of defamation whether it concerns physical or legal entity. Of course, legal entity may suffer real and material damage, proved or assumed (future), while physical that is, non –material may not. In court practice in BiH there are very few defamation suits claimed by legal entities and their claims for compensation included very high amounts (ranging from several tens to several thousands of BAM). At the beginning of court practice in BiH the compensation claims, appealed by physical entities for anguish and reputation violation were also very high, but currently they are much lower (ranging from thousand to several thousand BAM).

How can we actually determine anguish? Court practice is unbalanced in BiH: while, on one hand, certain courts accept claims by the suitors where all medical expertise must be attached to their claims (with the intention to highlight their “sufferings” as much as they possibly can), other courts, on the other hand, make their judgments by analyzing all circumstances for each and every individual case and the latter was recommended by the European Court for the Protection of Human Rights. Reports by court experts are however often based on copy – paste principle and mostly grounded according to statements provided by the damaged entities and these statements are also provided several months (and even years) after!

My recommendation: if they sue you and if the suitor, that is, her/his legal representative requires medical expertise and if the court officials ask for your permission to take these medical expertise into consideration - make sure you reject this request at once. If the suitor insists on this, make sure they do it at the expense of the suitor. You are entitled to this for sure.

Identification of the damaged party. This must be evident and obvious, although it does not mean that the identification must be by the name only. If on certain basis everything becomes clear, that is, if the subject is indeed the damaged party (person/entity), including the company, function, duty description of this person and similar facts), this could eventually become sufficient only for law suit if other requirements are met as well.

Attention: We should be careful with media reports containing common and general qualifications such as corrupted doctor, judge or manager. In smaller communities with two or three doctors operating, four or five judges, you could face charges pressed by all three doctors, or all four judges. We should be careful with photos from archive if the illustration of the content, as they could contain incriminating and defamation elements. If the photo’s signature marks the title “hooligans rage throughout our stadiums” and if there are people on this photo that are not hooligans, but instead; the audience shouting and celebrating the goal, the audience that we know and see in our community, any one of them could press charges and submit a law suit against you. It is clear that they can suffer the damage due to context in which they are unjustly and unreasonably framed.

Taking over the revealed information

Third parties. This element presumes that defamation content is revealed and exposed (exposed or transmitted as our laws refer to). This is the key link of defamation with media houses and their representatives, although the defamation may exist even if it has nothing in common with media houses – if defamation is publically revealed during public rally or gathering, or if it’s spoken out loudly in front of particular group of people (for instance during

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Vacancies

Writer / Editor for B/H/S language, Sarajevo (UNICEF)
Deadline to apply: 06 Apr 2018

Writer / Editor for English language, Sarajevo (UNICEF)
Deadline to apply: 06 Apr 2018

“Obican radio Pty Ltd” Mostar Radio station hires journalists
Deadline to apply: 08 Apr 2018



Free Media Help Line

Actual Cases:

1. Nedžad Latić - Journalist and publicist was physically assaulted on 20 February 2018 in front of his home (tenancy building where his unit is), after leaving the mosque where he had practiced his religious duties and prayed. According to a journalist, the attacker was also praying along with Mr. Latic in the same mosque. The only known motif could be Mr. Latic public writings and views.

2. Ekipa BHT1 - On 28 February 2018, during the protests and rally of demobilized and retired war veterans in Sarajevo, BHT 1 Team were assaulted by some protestors.

Marko Divkovic, a journalist and Enes Muratovic, a cameraman, were verbally assaulted and some protestors threatened that they would damage and destroy their equipment. Assaulters tended and attempted to obstruct the TV video recording and reporting story from these public protests.

3. BHRT - Free Media Help Line has, during the last period received five complaints by media representatives claiming irregularities and lack of transparency within BHRT Board of Directors and Management Board, in terms of appointing new editors-in-chief for the radio and television.

public discussion), and if you want, in local pub. That, at the same time, represents the element that makes clear distinction between the defamation and an insult. Third parties may, but do not necessarily have to, exist in this case and can be involved in case of an insult. On the other hand, they must exist and be involved in defamation cases.

Why are two particular actions mentioned in our laws – revealing and transmitting?

The first surely, assumes the revealing of personal information and second one taking over previously revealed information from other media sources. Responsibility of course does exist for overtaken information if these contain defamation. Moreover, there have been cases in our courts where journalists and editors were charged for defamation for taking over reports and texts previously posted by other media houses and there were no charges pressed against those who had initially published these texts or posted video reports. Suitor is therefore entitled to sue anyone whom he/she considers as the party that had caused him/her most damage and this party or person does not have to be someone who had posted or revealed the original and initial story.

Of course, this doesn't mean that no one should take over and transmitted information from other media sources, but we must be extra cautious any time we estimate that such content could serve as a background for eventual defamation charges. In these cases, a minimum what you could do is to address the original author of "suspicious" texts and ask for their opinion. As far as the information on social media is concerned, including all internet sources, we should pay attention and check everything at highest possible level.

They win or lose

Intention and inattention: For journalists and editors this is the most important element. If this element is missing – they lose everything; otherwise – they get everything.

BH judiciary system, just as laws and court practices in developed countries, provide successful and adequate defense during court procedures if authors/editors or media houses and their representatives acted in good faith and unintentionally and if they complied to commonly accepted professional standards, even in cases of releasing false information that may have caused the damage to third parties.

However, it is important to outline that good will and professional conduct are not evaluated by actions only until the (disputable and suspicious) information are revealed but even after this. Revealing true information and correction of false information is duty which is not limited by time. It is journalists' duty and responsibility to reveal correct information and to rectify and re-correct false and untrue information anytime and anywhere.

Benevolence and good will, along with professional conduct must be proved and affirmed, even in public, that is, even if the court procedure is launched. The more this element is apparent and obvious, the more it becomes easier to prove in court and vice versa.

Opposite behavior (inattention and bad intentions) cannot hide and always pay high price.

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Fundamental Principles of the Law on Civil Procedure for Media Representatives in BiH

By: Nives Abdagić

One of many conclusions on the [seminar](#) for judicial and media representatives was that both journalists and editors must be part of continuous education process, as far as this, rather sensitive issue is concerned (in terms of comprehensive understanding and acknowledgment of relevant and appropriate legal theme). The purpose of this article is exactly to confirm this, that is, to bring nearer the fundamental principles of the Law on Civil Procedures (“Official Gazette of the Federation of BiH”, No 53/03, 73/05, 19/06 and 98/15) and in order to make their presence and participating (during court proceedings) as part of the civil procedures or media coverage, including the following of media reports of this issue. At certain points, this Law refers to provisions of the Law on Protection against Defamation of the Federation of BiH (“Official Gazette of the Federation of BiH”, No 59/02).

Fundamental Principles of the Law on Civil Procedure (originally and hereinafter ZPP)

Even in its initial Article 1, the ZPP defines that the Law shall determine the procedure rules, upon which the courts shall launch their discussions and consequently make decisions regarding civil procedures and all disputes (pursuant to the Law on Protection against Defamation of the Federation of BiH), are undoubtedly they shall define part of these procedures as well. Understanding the fundamental principles and rules of the ZPP is crucial for all media representatives, because its absence, according to this article’s author, often results in mistranslation, misinterpretation and incorrect conclusions of all parties involved in certain procedures, their dissatisfaction, but it also creates wrong picture send to the public whilst making reports about particular court proceedings. In this sense, critics directed against court’s decisions often emerge, including critics directed against particular judges being consequently described as biased towards certain parties involved in the process, or judges whose knowledge and expertise are described as non – competent and/or insufficient or judges making slovenly based decisions or similar situations.

Therefore, Law on Civil Procedures displays a set of rules upon which the court, during the civil court proceedings, launches and implements required actions for procedure commencement, with the purpose of bringing the decisions (based on party’s enquiry which had previously launch and initiated the entire court process) closer to all parties involved. This means that procedures are usually launched by parties involved, that is, a competent suitor by pressing the charges against the accused party and it would be incorrect to say that it is the court that files claims against the accused party or that it is the court the leads procedures against certain party.

Court is considered as an independent body of the third governing post (along with bodies of legislative and governing levels) and is entitled and responsible for law implementation, including civil procedures that either party claims in accordance with the law, not taking into serious consideration whether the filed/ submitted suit had legal foundations in the first place. Therefore, suitor in their files/claims, indicate that the accused party violates their subjective rights and consequently suitors requests appropriate and relevant protection from the court as a result of violation of their rights.

Plaintiff, during the protection from defamation proceedings and according to the above mentioned facts, claims that the accused incriminates his public reputation by releasing or transferring untrue and incorrect information and facts, by identifying and exposing the plaintiff to a third party and he / she consequently seeks protection from the court demanding the protection for his/her violated rights. Plaintiff in his claim must indicate firm elements of accusations clearly defined by Article 53 of the ZPP (particular suitor’s claim, indication of dispute value and other relevant information with each of them being precisely registered as subject), and in order to have legal appeal considered as valid and appropriate for further proceeding, this appeal can be submitted and presented to the accused party for a reply in return. Accused party is thus obliged to respond to appeal received (in written) in 30 days from the date of received law suit. In his/her response and reply to law suit he/she shall reply by indicating eventual process complaints, plead whether he/she admits or denies law suit he/she is presented

Plaintiff in his claim must indicate firm elements of accusations clearly defined by Article 53 of the ZPP (particular suitor’s claim, indication of dispute value and other relevant information with each of them being precisely registered as subject), and in order to have legal appeal considered as valid and appropriate for further proceeding, this appeal can be submitted and presented to the accused party for a reply in return.

Facts relevant to decision making shall be determined through the proving system (should they be considered as disputable), but special notice shall remain and its direction could only help the appointed court to make decision within the scope of limits of demands and requests previously set up in the proceeding process; therefore, it would only refer to what parties would require and only within the limits of facts and arguments that the court had been presented with during the process itself. This means that courts shall not, pursuant to their ex officio, lead the proceeding, but also, they shall not examine and analyze the facts, nor they would attempt to reach the full truth either in a concrete dispute. The court shall make decisions only based on what parties present in front of them; based on the results of proving process and the way the process truth shall be reached, does not necessarily mean that it has to be in parallel and match up with the real and actual truth of certain, real and existing event.

with and consequently deny law suit presenting evidence for its denial, including the evidence, proofs and facts determining the denial (Article 71, ZPP).

If the accused party, within the period defined by the law, fails to submit the reply and does not respond to received law suit, the verdict may be passed without his/her consent and presence. For the sake of correct understanding, the above mentioned shall not be considered as derived and imposed sanctions, as far as the accused party is concerned; instead this process would rather refer to a presumption, indicating that the accused party received a law suit, that he/she had read it and understood its content and that he/she would agree that the court shall make decision with meritorious discussion and without further costs and expenses of the proceeding. According to this, the accused party does not file in a complaint and is consent with verdict and without their presence. Pursuant to the above mentioned, it is required that the law suit shall be submitted to the accused party, according to the law provisions, when the lawsuit procedure officially commences.

Further proceeding consists of preparation hearing, main hearing and consequently the verdict. Preparation hearing is aimed to clarify all process objections, to clarify the core of the dispute, to identify the key evidence required for decision making (and decision making) in particular cases, to clarify and differentiate clear from unclear arguments and finally to present evidence that would outline clear but disputable facts.

Material law defines key and determining facts and during the cases related to the protection against defamation, the Law on Protection against Defamation shall provide us with the fundamental principles, recognizing and defining the crucial facts required for proceedings and determining, in order to make and pass the decision (regardless of the nature; process or merits - based decision). Consequently, we must not forget that European Convention on Protection of Human rights and Fundamental Freedoms are directly implemented and applicable in our legal and judiciary system.

Material law therefore, in cases related to the protection against defamation and to some extent, obtrudes the judges to take the following circumstances into serious consideration:

- the following defamation elements shall be considered as crucial and these include: releasing / transferring certain and untrue / incorrect information;

Identifying the damaged party, damage existence, transferring to third parties, intention or unintentional actions taken in the above mentioned proceedings

- the court, in terms of the above mentioned, clearly make the difference between clear evidence and arguments and valued courts

- the court shall pay attention to possible conflicts of two rights – the rights of privacy/reputation and right of freedom of expression

- the right of freedom of expression shall be limited in terms of law and its provisions, there must be a single or more legitimate goals and they must be present on democracy – biased society

- during the establishing and developing of balance between the right of the protection (reputation) and right to freedom of expression the following criteria shall be taken into consideration::

- a) is expressing (derived from the contribution to the discussion from interest) disputable

- b) how familiar is the public with the suitor (damaged person), is he/she public or private person and what was her/his behavior like prior to proceeding

- c) nature of information collection and its accuracy (acting in good faith and based on true and correct arguments and facts)

- d) context, form and consequences of releasing

- e) seriousness of eventual and possible sanctions .

As the above mentioned implies the court is presented with rather complex, complicated and serious task and its assignment is thus followed by the questions how shall the court manage to determine and define all of the above mentioned and flatly arguments and facts

Facts relevant to decision making shall be determined through the proving sys-



tem (should they be considered as disputable), but special notice shall remain and its direction could only help the appointed court to make decision within the scope of limits of demands and requests previously set up in the proceeding process; therefore, it would only refer to what parties would require and only within the limits of facts and arguments that the court had been presented with during the process itself. This means that courts shall not, pursuant to their ex officio, lead the proceeding, but also, they shall not examine and analyze the facts, nor they would attempt to reach the full truth either in a concrete dispute. The court shall make decisions only based on what parties present in front of them; based on the results of proving process and the way the process truth shall be reached, does not necessarily mean that it has to be in parallel and match up with the real and actual truth of certain, real and existing event.

Due to the above mentioned facts, we should seriously take the obligation of parties involved, to present all facts upon which they base their requirements and demands, including arguments and evidence necessary to confirm and support their claims. The court's task would additionally be to, after being presented with arguments and evidence, determine whether these arguments and evidence indeed served to prove and confirm the claims or other way around. According to prior, parties therefore recommend, suggest and present their evidence, and if court, pursuant to results deriving from the evidence, cannot be certain whether particular firm evidence does indeed exist or not, the rule on burden of proof shall be implemented and applied. Therefore, court cannot reject to pass the decision according to certain suitor's request, because it considers that insufficient evidence is presented; instead it must proceed with the burden of proof rule.

This consequently implies that the party which was obliged to present certain evidence and failed with presenting it, shall take the burden of unsubstantiated evidence and the facts and arguments that this party presents, shall additionally be considered as non – existing fact or evidence.

The process of affirming relevant, but disputable facts shall be processed on main hearing, because it is during this particular proceeding stage when the parties present proofs by reading them out, interrogating suitor and defendant parties involved, question witnesses, listen to expertise (expert's opinion and analysis) and finally listen to inspection presented.

If the parties present proofs in order to determine the facts that are not considered as important for decision making or if these facts are acknowledged, that is, undisputable or common known, the court shall reject the presentation of such proofs, and in this sense, we shall pay particular attention to reasons upon which the court would reject applying of certain proofs. The prior should particularly be highlighted because the court would then be obliged to implement the process in most economic and efficient way, therefore, to conduct and conclude the entire process in shortest possible time and with minimum costs and expenses required, and such justified rejection of the presentation of certain proofs does not mean the judge has been acting illegally and that judge acted against the law or that he/she disallows the party to discuss, or that judge is biased towards certain party or similar situation.

Finally, the court (based on the results of implemented process) passes the decision in terms that determined facts, evidence and arguments and treats the case as part of appropriate provisions of material law (court syllogism), which is, as we could see from the above presented facts, complex and demanding process, particularly if we take into consideration that the judge shall write certain exposition of court decisions with multiple meaning. Namely, from the verdict exposition, both suitor and accused are presented with the reasons of appeals rejection or approval being thus provided with the possibility to challenge such decision by applying remedies (appeal). By submitting expositions in written, the exceeded arbitral court proceeding is reduced, although we must not neglect the impact that decision expositions may have on education, including the prevention of inappropriate behavior in similar situations. Judge's skills, experience and involvement influences on the degree of success and how the prior task would be accomplished, but we must not neglect the circumstances and environment in which this judge performs his professional task.

After the verdict, parties have the right (pursuant to law provisions) to appeal (legal remedy which is under the jurisdiction of the second – instance courts – Cantonal courts in FBiH), including the revision (special remedy which is under the jurisdiction of the High Court of the Federation of BiH), with a notice that, if the second – instance court confirms the first – instance decision or reverse the

Judge's skills, experience and involvement influences on the degree of success and how the prior task would be accomplished, but we must not neglect the circumstances and environment in which this judge performs his professional task.

decision; the process shall be validly terminated.

Conclusion

As we can see in the above mentioned, in order to make the decision about the suitor's appeal, it is required to launch a proceeding which, in case of the lack of understanding of its norms, may lead to conclusions that again may lead the court to proceed and be biased towards the involved parties in the proceeding, that is, to "serve" one party in particular. According to this, any citizen should become familiar with the fundamental principles of civil procedure and become familiar which obligation becomes important if the case includes the party on civil procedure or in case of professional reporting about particular civil procedure. The propose of this article was exactly to support this with clear indication that civil procedure is indeed complex and according to its nature it is a constant subject to further examination. In conclusion, we outline and highlight that everyone must be clear with the fact that this is civil procedure, disputes of civil and legal nature, including the protection of defamation cases and these have nothing in common (in terms of process and material sense) with criminal felonies, criminal procedures, accusations, indictments, suspects, accused and convicted, that is criminal sanctions imposed, that is, have nothing in common with court proceedings related to criminal and legal issues and that we should always make a distinction between these two legal areas and cases that are subject of proceedings. Also, it is necessary to outline that court's decisions, as the third and independent party, to make decision regarding the adequacy or non – adequacy of the appealing request, without possibility to provide help to either party or the "serve" either of them.

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INTERVIEW

If a journalist's report has been made in accordance with ethic standards, the court officials shall most certainly protect the freedom of expression, including both journalists and media house, in most appropriate ways.

Interview with Vesna Alaburić conducted by E-journalist editor Arman Fazlić

E-journalist: *What are the fundamental values promoted by the European Court of Human Rights, as far as cases with defamation charges included, are concerned? Where are the frontiers and limits of freedom of expression in regard with the ECHR and what are the minimum principles that must be respected and obeyed based on this court's decisions?*

Alaburić: European Court of Human Rights even protects the freedom of releasing the information and ideas that may be considered as offensive, insulting, shocking or disturbing an individual or part of certain population. As far as discussions about political and similar issues considered as important in terms of public awareness, are concerned, the limits and borders of expression widely appear here.

This is why the releasing of allegations, based on defamation charges, does not necessarily have to be prevented and sanctioned, regarding the issue of public interest, also including the situations where journalists had god intentions, pursuant to rules based upon professional journalism principles. Namely, in some situations journalists simply fail to confirm and prove the correctness and accuracy of information provided, however, it is important that they take all actions required in order to check all information provided.

European Court of Human Rights point of view, may be summarized in terms of determining whether the correct information in regard with wide public interest release and excuse both journalists and media houses from any responsibility applicable for all the damages it may have caused. If the released information is not true and if it concerns wide public interest, then the so called "responsible





journalism” represents (to some extent), defense system that both journalists and media houses apply.

If journalist reports are tailored in accordance with journalist’s ethic standards, it is almost certain that the courts shall most certainly protect the freedom of expression, including both journalists and media house, in most appropriate ways.

E-journalist: *Is there a way of advancing the court practice and processing the defamation cases in BiH, in terms of promoting the Article 10 of the European Convention on Human Rights, including the implementation of standards by European Court of Human Rights in Strasbourg,*

in protecting the freedom of expression? What exactly shall the judges that work of defamation cases, be familiar with and what shall be considered important for lawyers and solicitors representing their clients (journalists/editors/media houses) as the accused party?

Alaburić: It is certainly most crucial to recognize the practice by European Court of Human Rights, but also court practices in other democratic countries. It is also important to bear in mind that certain court decisions may be well comprehended only after having examined the circumstances of particular case, since court sentences which we often use seem unreasonable in some context, while under other circumstances, they seem reasonable. Knowing rights and good preparation of media “defense”, in terms of facts provided, represent a pre – requisite to success in court proceedings.

It is also important, however, to pay attention to contented prior to media report. If journalists fail in their professional performance, not even best lawyer would not be able to “rectify” their mistakes during the court proceedings. This is why it is important to educate journalists and editors. For the beginning, it is essential to identify and recognize the assertions they use whilst entering the risky zone, in terms of charges and eventual accusations, so they could, during the preparation stage, counsel with their lawyers. The possibility of a success in certain court proceedings often depends on the presentation of certain information.

E-journalist: *Although there is no reliable information covering this particular area, experts in this field, estimate that there are many cases based on defamation charges in BH courts. It is clear that court proceedings outcomes, in cases based on defamation charges, are most frequently damaging the journalists / editors / publishers. What do these evaluations and information indicate regarding the situation, as far as freedom of expression in this country is concerned, and what kind of indicators for proper work by judiciary institutions this may represent?*

Alaburić: From Croatian perspective, the number of disputes on BiH is not a significant number. In Croatia there are thousands of these cases. I don’t believe that the number of court proceeding cases denies freedom of expression by its genuine nature. Many democracies have gone through (or still undergoing) through the stage of numerous charges pressed against publishers and journalists. High court expenses and costs, compensation and consequences deriving from releasing unreliable and unchecked allegations for media reputation, have resulted with strengthening and reinforcing the self –regulation and stricter journalist ethic standards.

European Court of Human Rights point of view, may be summarized in terms of determining whether the correct information in regard with wide public interest release and excuse both journalists and media houses from any responsibility applicable for all the damages it may have caused.

If journalists and editors express fear from being fined and from being demanded to cover all costs for compensation, fail to release information that public should be provided with, we could refer to this as to a “freezing effects” of court proceedings in terms of media freedoms. This may consequently represent the alarm and warning that something must be altered and changed urgently as far as the judiciary system or court practices are concerned.

The fact that there have been no charges pressed against BiH at the European Court for Human Rights, due to violation of Article 10 of European Convention, except in negligible cases, in fact confirms that journalists, editors, media houses and their lawyers still reckon that local court proceedings are competent, pursuant to European standards in terms of protection of freedom of expression.

E-journalist: *To what extent can journalists and media houses contribute in terms of reducing the defamation accusation? Does the implementation of ethic standards and codes of reporting may prevent defamation charges and accusations?*

Alaburić: The answer is: Absolutely yes. As I have already said, if journalists work in accordance with ethic standards, they shall be protected in any court. If not protected instantly (during the first instance proceedings), they shall certainly be protected during some other instance.



What Decriminalisation of Defamation means for financial sustainability of investigative journalism?

By: Amarildo Gutić

Media houses have vast possibility to influence the public opinion and public awareness regarding certain social appearances, issues and problems, as the nature of media and mechanisms they dispose of may largely contribute to processing and solving numerous social issues of public interest. This statement sounds really nice on one hand, but on the other, it is merely a phrase as it is also often used by politicians that are prepared to sue media houses, their representatives and journalists being critical towards their work, that is, “influence the public opinion and awareness”.

This is common for local politicians, but BH courts often neglect stances by the European Court for Human Rights, like the one in the case of „Lopez Gomez da Silva v. Portugal“:

“Limits of acceptable critics are wider in case of politicians’ characters themselves, in comparison with private figures. Politicians are inevitably and deliberately more open to particular examining of their words and action... and according to this, they must express larger scope of tolerance”.

Journalists in BiH have been under constant pressure and these kinds of pressures make their work much harder. One mechanism for obstructing the journalists in performing their work, including the posting and releasing true and investigative reports, is best seen through the defamation charges (law suits) appealed by both politicians and their close persons. Chronic absence of adequate support for the production of independent, quality – based media content is additionally complicated (due to unbalanced and biased court practice and lack of comprehension and understanding of journalists and media forms).

Since the Law on Protection against Defamation was legally passed on 15 years ago, the legislative institutions have since been attempting to convince the public that its purpose was to provide the protection for journalists and media representatives from criminal responsibility in case of defamation emerging; judiciary bodies promised that verdicts shall not be aimed towards vast financial fines and endangering media houses survival. It seems that the situation in reality is rather different. Closing down of “Slobodna Bosna”, a local weekly magazine, confirms exactly that the situation in reality was indeed different. Now days, “Zurnal” magazine is facing similar problems, (and may face similar scenario as “Slobodna



Bosna”)

since “Zurnal” is one of the very few media houses in BiH that produce investigative stories and reports, which automatically implies that they have been under constant pressure and enormous compensational reimbursements amounting from BAM 3.000.00 to even BAM 50.000.00. Not to mention the effects that eventual verdicts would have on this particular media house. It may sound brutal, but the fact that journalists write the truth does not necessarily mean that they would not be convicted of defamation. Unfortunately, the real world confirms this practice.

Frankly, not all media houses, (including journalists) are innocent and with no mistakes in their articles, texts and posts, just as all judges are not just and benevolent. This is why we must exclude generalizing, but it is possible to outline (through some examples and cases) certain problems that both journalists and media have during the process based on defamation charges.

Courts are generally complaining that they have been “loaded” with defamation charges. In reality, there are still no rejected cases following the appeal, that is, dismissed cases after the submission of reply to the charges pressed. There have indeed been cases where suitor failed to submit a single proof of evidence or argument for his/her claims for untrue journalist allegations or no evidence that may serve as the basement for defamation.

On the other hand, the response of the accused party proved and confirmed the authenticity of their stories, despite the fact that the charges are already accepted and hearings are being scheduled accordingly.

The assumption is that judges have no time to study and examine arguments for and against the accusations and charges, so they accept charges pressed and let the entire process continue, which eventually results in additional costs and expenses of court resources for hearing processes and produces unnecessary expenses and costs as well.

Another, equally significant and disputable characteristic of defamation charges is the involvement of court experts from the field of psychiatry. They provide their expertise opinions related to the degree of “anguish” that the suitor had suffered. Not once, the estimate provided by the court experts was based on expertise that was very often conducted six and even twelve months after the accused party had published, released or posted their article, text or post. One does not have to consider her / himself as an expert, in order to realize that these kinds of tests had been completed mostly on copy – paste method. In one of the many cases, (also based on defamation charges), the court expert wrote, in his report, that the suitor was “clearly disturbed and had to take medications (tablets/pills) and that he/she felt depressed for a week”. The court expert identified and determined this kind of state ten months after the article had been posted! After being asked about the precise type and name of tablets the suitor had to use, and after being asked about who prescribed them, and was the suitor able to go to work during this period, the court expert had no adequate and appropriate answers, except that he wrote what the suitor had previously told him to write down.

It becomes more and more evident that certain court proceedings with the defamation charges proceedings show almost no interests in asserting whether the defamation had even existed. Journalists attempt to prove and confirm the correctness of their allegations, but the discussion is usually directed to “anguish” that the suitor had suffered, from the moment of article/post releasing and without even being determined and confirmed whether the defamation had even existed in the first place?!

In reality there is ever – present frustration by journalists that must prove every single and even every minor detail from their article, text or post. Courts vastly neglect the issue of public interest and also, the practice is completely unbalanced as far as the estimate of valued courts is concerned. Courts are, if we could say so, rather conservative when it comes to these issues.

The question of presumption of innocence has become “slippery surface” for journalists, but for courts as well. Additionally, the first – instance verdict was recently passed, based on charges where the suitor claimed that he/she had been subject to defamation by releasing certain information, which additionally result in charges being pressed against her/him, as a result. Although the prosecutor’s office spokesperson confirmed the allegations, regarding the charges and content, the court procedure against the suitor commenced in the meantime and the verdict exposition confirmed that “presented information was insufficient in

The question of presumption of innocence has become “slippery surface” for journalists, but for courts as well.

order to prove the presumption of innocence by the suitor, until the termination of the entire process”. Should such verdict become first – instance verdict and become (partially) court practice, it would definitely mark the end of investigative journalism era, which is based on discovering, exposing and releasing the illegal deeds and irregularities by the governing authorities (politicians), with all parties involved before the judiciary official authorities even notice such occurrences. Recent case where certain female judge passed the verdict to the benefit of journalists is indeed rare. She claimed that the passion used by the accused party, in order to defend their allegations, was so intense and convincing, that she simply had to pass such verdict to their benefit.

This case reminded us of time of the beginning of the implementation of the Law on Protection against Defamation, where the interpretation of the provision of this law was that no party shall be accused and convicted, even if the allegations were false, if there was no bad intentions present and which was based on the journalists’ convincement to dispose of correct information.

But, during this period and as we had already mentioned and indicated, the convincement was that fines shall not be enormous and at present, however, two or three such verdicts could financially destroy the media house completely.

Numerous charges, even when you’re completely right, do not guarantee a verdict of release. Some local courts still pass their verdicts based on political impacts and are imposed with pressure by local suitors, especially if this suitor has certain influence in the community. A female judge of Elemental Court in the Republic of Srpska almost admitted that she had passed the verdict based of defamation charges, to the benefit of the suitor, though it was significantly reduced verdict, comparing to indemnity demand, just because the suitor was known as very influential in that particular area. Therefore, she knew that there was no basis for such verdict. Luckily, second – instance court had neither fear nor dilemma as they rejected and dismissed the suitor’s appeal.

All of the above mentioned is, we repeat, not intended to amnesty journalists in advance from their professional responsibility for releasing and exposing their texts, articles or posts. Naturally, the rules of professional journalism must be obeyed, including journalists ethics as presumption of successful defense against the defamation charges. Of course, they should have sensibility in terms of innocence presumption, but on the other hand, they should not express fear from the court that shall lead the court proceedings, including the fear from judge that shall lead the case and fear from “powerful” suitor. If journalists’ and media existence must be jeopardized, because of unbalanced court practice and the interpretation of principles of freedom of expression, then there is ground of suspicion that the Law on Protection against Defamation has become a tool that politicians shall use to close down “unsuitable and undesired” media houses.

Prior to passing of the Law on Protection against Defamation, there was penal – based journalists’ and media responsibility, but they were mostly terminated with a verdict of release or in some cases, the cases concluded with conditional discharge. Verdicts, therefore, did not jeopardize the existence of media and their staff. For the record only, in 20 European Union countries, defamation is still not treated as criminal deed or felony.

If journalists’ and media existence must be jeopardized, because of unbalanced court practice and the interpretation of principles of freedom of expression, then there is ground of suspicion that the Law on Protection against Defamation has become a tool that politicians shall use to close down “unsuitable and undesired” media houses.

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Freedom of Expression or Defamation?

By: Biljana Radulović

*“If I had to choose a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter”
(Tomas Džeferson 1787)*

If I were to describe the first thing that comes to my mind, when it comes to defamation, it would certainly be Emile Zola, a historical figure, reflection of a human kindness and his letter “*J’accuse*” (I accuse).

“I was determined that my country should not remained the victim of lies and injustice. I may be condemned here. The day will come when France will thank me for having helped to save her honor”.

Alfred Dreyfus, a military officer of Jewish origin was found guilty of treason in 1894. Based on false evidence he was sentenced for life. In his letter, sent to the president of France, Emile Zola accused reactionary military representatives that were using false documents, so they could hide true guilty person so Alfred Dreyfus, a military officer was at the end accused for treason.

Emil Zola was sentenced to one year in prison due to defamation and was fined with 3.000.00 French Francs. Also, *l’Aurore* director was sentenced to 4 months in prison and fined with 3.000.00 French Francs too. In order to avoid prison sentence, Emile Zola escaped to England. It’s been 12 years since the accusation in 1894, until the rehabilitation of Alfred Dreyfus in 1906. Zola never lived to see the end of Dreyfus affair. He was found dead on 29 Sep 1902, apparently suffocated from the chimney fumes. Was it a stupid accident? Was it assassination? We don’t know¹. To stand for someone, to support his views by openly expressing a will to defend him, to show the truth, to stand alone in front of everyone, assaulted, exposed, excommunicated, but on the other hand, to remain confident and certain that the truth, once it is launched, wipes out everything that lays ahead. We believe that what we do is serving the truth in best possible way, because of freedom, equality, brotherhood, right to freedom of expression, rule of law and so on. Similarities, from the time of Zola until today exist even today. Very few things have changed as far as misunderstanding, accusing, punishing, threatening; even the duration of acquiring a liberating decision is concerned. And today, when journalists write that court decision had been passed, unusual atmosphere in community would emerge and as a result no one, not even the journalists would feel comfortable with invalid decision. What is the origin of comments limitation? Who and for what reason is favoring this kind of standard? Could this result in pressure upon judiciary system? Is this opposite to democracy and etymology and is a complete ban of comments the next stage?

“Marriage cancelation, deriving from the fact that a woman was not a virgin at the moment when she decided to get married, a case which happened in

France last year in Lille, when the local court decided to cancel the marriage of two French citizens of Arabic origin on 1 April 2008, resulted in enormous media and public attention as this particular case opened many sensitive issues. Cancellation was required because husband discovered that during their first marriage night, his wife was not a virgin despite the fact that, before they got married, she had presented herself as “free innocent and virgin female”. He demanded and was approved



“Faire Dreyfus” présente par Philippe Oriol,

The fact that there is not enough will to have these problems solved in mediating procedures, through the implementation of ethical and professional standards and that it is necessary to advance the cooperation between journalists and lawyers with the purpose of between legal aid and protection for journalists.

with marriage cancellation. Ministry of Justice, following the court verdict, demanded from the public prosecutor to submit an appeal accordingly².

On 17 Nov 2008, the appelation court in Doyen cancelled and ruled out the Lille court decision, so the couple, at least until the County Court passes new decision, is still legally married.

The cancelling decision outlined that “in this hypothesis, deceit does not consists of main qualities, that is, does not contain key qualifications required for marriage cancelling“.

The reason why this specific case disturbed and, to some extent, upset the public, was due to the fact that the key priority considered as crucial reason in cancelling this particular marriage, Quran was given a priority; instead of favoring civil right principles, but also because of sexism based verdict (only woman must prove the loss of virginity, although the dissatisfaction is seen as exclusive loss for men only; therefore there was no sexism issue present here).

The verdict imposed another obligation within this marriage; a retroactive fidelity, which is considered as rather uncommon comparing to current and modern day ideas.

Finally, the verdict was in contrast with the French Law (without unnecessary analyzing) as this was the only issue in this case. The question was whether we could comprehend the meaning of “main qualities” of a personality and this is actually a well – known discussion, where, despite the dark zone, there is yet another belief: this is public consciousness and awareness, which limits everything the qualities of personalities of future couples in France (in 2008)³.

This case witnessed about the scope of length of both public and journalists, that managed to inform the public about the court’s decision outcome. Would

anyone have been informed that the court approved the cancellation, instead of marriage divorce, which would represent the only way to cease this marriage, if it was not courtesy of journalists that managed to reveal the case, post its content and make comments about this issue? The public would have never found out that the marriage had been cancelled due to mislead (in terms of a virginity) of a married person. Today, when we have values, defined by the European Convention of Human Rights and Freedoms, right to freedom of expression in society, is always being subject to tests.

Just to refresh our history knowledge, ever since the French Revolution, when the Declaration on Human and Civil Rights from 1789 was passed, Article 11 defined the existence of freedom of opinion and attitudes and that this was one of the most precious human rights; any citizen is entitle to speak, write and publish freely unless these freedoms and liberties are misused in cases defined by the law. An increasing number of defamation charges may indicate that we do live in a “sensitive” society, where the largest number of damaged persons include public figures that do not recognize personal responsibility and readiness for public critics and figures that attempt to revive broken or loss reputation during the court procedures, including their reputation, through compensational claims which they consider as some kind of limited and partial satisfaction. Often, the appealing claims are very high and unbalanced with European court practice.

After World War II, our court practice did not accept com-

tional Law Union Magazine ”Juriste International” 2008. 2, page. 49. Philippe

tional Law Union Magazine ”Juriste International” 2008. 2, page. 50. Philippe
professeur émérite à l’Université Panthéon-Assas, Paris





pensations of non-property damages caused by honor violation and this was in accordance with common views in regard with this issue at the time⁴. “Violation of honor”, as defined in the decision passed by the High Court of Serbia from 1949, “may serve as the fundament for compensation only if the violation caused the damage, namely if the material damages derive from the violation⁵.”

Considering that defamation compensational claims in form of money, it would be interesting to reach the statistic during last ten days, whether any compensational claim reach the

amount of BAM 1.00 or some other symbolic minimum and whether the damaged party refused to accept the money for the benefit of third party, as some usually like to announce.

During the seminar covering the topic freedom of expression, ethical standards, free and responsible journalism and good judiciary implementation, many problems were outlined that professionals encounter during their work and the decisions based on defamations by journalists.

Unacquaintance of journalism forms, insufficient knowledge of European Court for Human rights practice, obeying the decisions or innocence presumption, as well as good preparation of journalists in civil and law procedure, altogether represent basic and fundamental problems upon which these procedures are lead.

The fact that there is not enough will to have these problems solved in mediating procedures, through the implementation of ethical and professional standards and that it is necessary to advance the cooperation between journalists and lawyers with the purpose of between legal aid and protection for journalists.

Due to easier access to defamation cases, it is concluded that there is necessity for handbook with real cases and verdicts, including the advancement of cases evidence, but also devotion to more attention to online field, including comments on social media, court practice balancing in our local courts etc.

In any event, future handbook should contain new decisions passed by the Constitutional Court of BiH, since they could improve journalists' position during the procedure, just as one of their decisions, which outlined that the proof which journalists failed to prove cannot be proved invalid, instead the proof must be considered in context of standards established by the Law on Protection against Defamation and Article 10 EKZLJP (status of suitors, public interest, acceptable critics etc)⁶.

4 Naknada štete (op.a. Compensation Claim) - Obren Stanković, str. 147, Nomos 1998. godina

5 (op.a High Court of Serbia Decision) Rešenje Vrhovnog suda Srbije GZZ. 328/49 (op.a) from od 24.06.1949. godine, (op.a. Collection of High Court of Serbia Decision) Zbirka odluka vrhovnih sudova i uputstava Vrhovnog suda FNRJ, 1945-1952, I Beograd, 1952, (op.a. decision no.) odl.br. 137

6 Ustavni sud BiH AP/2193/15 od 15.11.2017. tač. 37. (op.a. Constitutional Court of BiH AP/2193/15 from 15.11.2017.item. 37)

Impressum

BH Journalists Association

Kralja Tvrtka 5/5, Sarajevo, BiH

Tel: +387 33 223 818;

Fax: + 387 33 255 600

E-mail: bhnovinari@bhnovinari.ba;

Web: www.bhnovinari.ba

Bulletin Board of Editors

Faruk Kajtaž

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