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## Introduction

**Freedom of expression and defamation: When will politicians stop to massively sue journalists**



*Illustration/BH Journalists*

During the period of last 17 years, since the implementation of laws covering the protection from defamation in Bosnia and Herzegovina, a vast number of indictments or charges pressed against journalist and media representatives have come from politicians. At this specific moment, Bosnian courts have to resolve and settle over 170 active cases regarding defamation, which represents a significant number comparing to other neighboring countries and many European countries as well. Media community in BiH often experiences charges pressed by local politicians as not only an imposed pressure aimed against freedom of expression, but also as powerful and strong mean of economic media exhausters, particularly in cases when politicians submit and file in tens of indictments against single media house. European Court of Human Rights practice, which comprehend that all public figures should demonstrate a higher level of tolerance, as far as texts, articles and posts that concern them and that are published or posted by media representatives are concerned, local courts have tended to implement and apply the above mentioned practice in very insufficient way and most of the time they do it selectively.

In this sense, the Initiative lodged in by Mr. Damir Arnaut, an MP with the Parliamentary Assembly of Bosnia and Herzegovina requiring amendments regarding the Defamation Law has appeared encouraging.

## Events

17.03.2020.

[Politicians must accept criticism in the media as part of freedom of expression, not as defamation](#)

21.03.2020.

[The Council of Ministers of BiH is taking measures to ensure the necessary protection of media teams](#)

21.03.2020.

[Socially responsible companies donate protective equipment to media outlets in BiH](#)

## Press releases

19.03.2020.

[BH Journalists and EFJ: Politicians and media must report responsibly on COVID-19](#)

20.03.2020.

[BH Journalists: Postpone conferences and public meetings for journalists unrelated to the coronavirus pandemic](#)

31.03.2020.

[BH Journalists: Public invitation to crisis staffs of the Federation of BiH and Sarajevo Canton](#)

## Media about the media

06.03.2020.

[The UN Special Rapporteur presents a report on violence against female journalists](#)

09.03.2020.

[Increased sentence to Marko Colic for attempting to murder BN television journalist](#)

17.03.2020.

[EFJ warns: Forcing journalists to gather in the newsrooms during a pandemic is irresponsible and unnecessary!](#)

17.03.2020.

[Regional journalists' associations are seeking financial support for the media outlets](#)

## Vacancies

No open vacancies

These amendments should incorporate different standards of acceptance, tolerance and proving of defamation when it comes to indictments filed in by public figures and all in accordance with the European Court of Human Rights practice. It will take some time since the passing of these amendments will be passed in Entities and Brcko District, despite the fact that most local politicians – representatives with the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina managed to identify and recognize this particular problem. This somehow gives some kind of hope to media community that the number of indictments submitted by public figures will in the near future reduce, and that local courts would show more tolerance and significantly in conformance with European Court of Human Rights practice.

We should outline that the problem of submitting and filing in vast number for indictments and charges pressed against BiH media representatives was recently highlighted in most recent report by American State Department, covering the issue of human rights in the world. This report used the information provided by Free Media Help Line in Bosnia and Herzegovina; a special service of free legal aid aimed for journalists working in Bosnia and Herzegovina.

State Department report and information provided by Free Media Help Line confirmed that local BiH courts often make no distinction between different media genres, such as news and comments, and that long – lasting court proceedings additionally worsen financial and economic situation within media community.”Years of inaccurate and wrong law implementation have resulted in pressure imposed against journalists, media houses and their representatives in Bosnia and Herzegovina which in general jeopardized and endangered freedom of speech”, claimed the report author.

The issues and questions covering indictments, charges, court practice in our country and the world, including personal experiences in this particular field shall, in this E-journalist Bulletin edition are covered by Damir Arnaut (an MP), Biljana Radulovic and Amila DrekoVIC (both female lawyers) and Milanka Kovacevic, a female journalist.

*Maja Radević, E-journalist Bulletin editor*



*"A bright example of domestic practice is the decision of the court in Visoko which its judgment explicitly referred to the case law of the European Court of Justice when it dismissed a lawsuit against journalists and defamation media brought by the mayor of the municipality. However, this case is an exception, not a rule in BiH, it is necessary to incorporate standards from the case law of the European Court of Justice into domestic law, with the aim of protecting journalists, the media and the public themselves. "*

## **You've got a microphone, you don't need judgment: Implementation of democratic standards based on indictments for defamation by public figures**

*By: Damir Arnaut*

During its 7 Session, the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina passed the Initiative recommending all governments and Entity Assemblies in BiH (including Brcko District) – under whose direct and explicit authority the issue had been – to pass the amendments regarding the protection from defamation in terms of having different standards accepted and incorporated into a coherent unit, including tolerance and presenting arguments, evidence and proofs, as far as the alleged defamation against public figures is concerned and in relation with physical entities and all in accordance with the European Court of Human Rights practice. I personally lodged this initiative in August 2019 and the path of its legal passing lasted nearly seven months. Although it is a common practice in democratic countries, the laws of Entities and Brcko District, regarding the protection from defamation, do not comprise and contain provisions that would thoroughly and precisely define the implementation of different standards, as far as the alleged defamation against public figures in relation with physical entities is concerned. The existing provisions that require that the law can be interpreted in way that it would enable and ensure the fundamental principles of freedom of expression, that is, it would be in accordance with to European Convention, seem somewhat insufficient, taking into consideration that local (domestic) courts rarely and seldom decide to implement and apply the European Court of Human Rights practice in this manner.

As far as this practice is concerned, ever since the case *Lingens Vs Austria* from 1986, European Court clearly stated that it would be required to accept, implement and apply a higher level of tolerance when it comes to criticizing public figures (particularly politicians) in comparison with common folk, that is, comparing to ordinary physical entities or plain citizens.

When European Court then decided that *"the limits and boundaries of accepted critics are therefore wider when they concern politicians as such comparing with physical entities. As oppose to latter (subsequent), this early and unavoidable party exposes oneself to more thorough questioning of every single word one says, (including every political move), by both journalists and wider public audience and it is certainly necessary that one should demonstrate a higher level of tolerance respectively"*.

*This verdict served as a precedent in line of later cases under the European Court, including few cases coming from our region with *Mladina Vs Slovenia* and *Tesic Vs Serbia* both from 2014.*

*European Court also decided that the fine imposed against media house "would represent a sort of censorship which should discourage media houses in terms of getting involved incriticizing of that kind in the future"*

## Free Media Help Line

### Actual cases:

#### 1. Muhidin Zivojevic, photojournalist of Faktor.ba:

Photojournalist of Faktor.ba portal Muhidin Zivojevic was verbally attacked on 01/16/2020. by an unknown man, while standing in a public parking lot and photographing the arrival of a Sarajevo Canton Assembly members in session. The man approached Zivojevic and, with curses, threats and nudges, required him to stop filming. The attacker introduced himself as a person from the "Cantonal Government" and although he did not have any accreditation, he unsuccessfully tried to provoke the reaction of the nearby police, eventually returning to Zivojevic and telling him that he would "remember" him. The BH Journalists Steering Committee called on the competent officials of the Sarajevo Canton to urgently identify the person who attacked Zivojevic and to take legal sanctions against him.

#### 2. Editorial board of Capital.ba, Banja Luka

Head of the Representative Office of the Republika Srpska in Russia, Dusko Perovic, on 02/21/2020 made open threats against the editorial board of Capital portal and its editor-in-chief Sinisa Vukelic for publishing the story of Russian investor Rashid Serdarov and Comsar Energy company.

In a phone call to the newsroom, Perovic threatened that he would "close" the Capital portal himself if editor Sinisa Vukelic once again wrote anything about the work of Comsar Energy. The BH Journalists and the FMHL informed about the threats domestic and international organizations for the protection of freedom of expression and safety of journalists, including the Russian Embassy in BiH, and requested the RS MUP to investigate the case urgently.

#### 3. BNTV journalist Vladimir Kovacevic and Klix.ba portal

During a press conference on February 14 this year, BiH Presidency member Milorad Dodik verbally attacked BNTV journalist Vladimir Kovacevic, calling him and the media outlet he works for a "traitors".

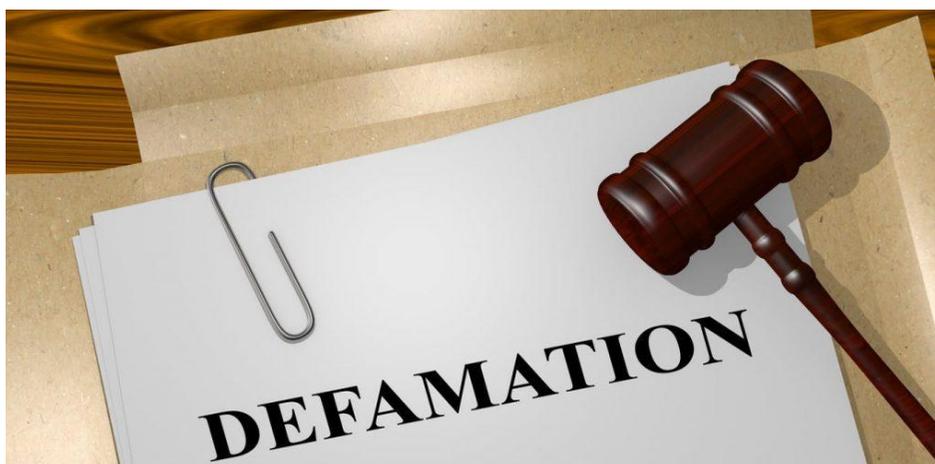
At a special session of the National Assembly of the RS 26.02.2020. in Banja Luka, Dodik has publicly called the portal Klix.ba a "hostile media" for Republika Srpska. In recent years, the FMHL has registered at least 20 verbal attacks and threats from Milorad Dodik to journalists and media outlets from across BiH. "Due to the frequency of attacks, BH Journalists will request from the European Federation of Journalists, the Council of Europe and the OSCE Office for Media Freedom special reactions and interventions to protect the freedom of expression and safety of journalists throughout BiH, and in particular in the entity of Republika Srpska", said the statement from BHJA and FMHL.

and that "the above outlined fine would in context of political debate, most probably discourage journalists to make their contribution in public debates regarding the issues that concern the life in local communities" (Lingens)

As far as the practice in other democratic societies in concerned, in 1964, the Supreme Court of USA (NY Times Vs Sullivan) decided that public figures as parties involved in defamation indictments should prove that not only the information that had been released was faulty, incorrect and untrue, but they were also obliged to prove that the media actually imposed "actual malice" on purpose, that is, to prove that they (media house) had known that the information was in the first place faulty and inaccurate or to prove that the they (media house) impetuously disregarded and neglected the question of whether the information they release and made available to general public was true, accurate and correct.

This kind of approach is justified, taking into consideration that public figures (especially political officials) deliberately expose themselves in public and may in return (reasonably) expect a higher level of public interest regarding their work, political moves, statements and opinions. Additionally, public figures have significantly easier approach to public information sources (with the purpose of defending themselves from critics) than it is the case with physical entities, including the protection of their reputation which they may request through such public information channels, rather than merely seeking justice throughout court processes. Finally, defamation indictments by public figures display most of such legal charges pressed against journalists in Bosnia and Herzegovina, which significantly shackles media to create critical – based reports regarding the issues that public may find interesting, thus imposing unpermitted limits to freedom of expression in general.

Courts in Bosnia and Herzegovina very rarely implement the above outlined European Court practice, despite the fact that they are, pursuant although to Article II of the Constitution of BiH, obliged to do so, so this initiative is therefore obviously required and necessary.



Illustration/BH Journalists

A bright example of local (domestic) practice was the case in the town of Visoko where the local Court had explicitly referred to European Court practice, once they decided to dismiss the indictment against journalist and media house, based on alleged defamation. Legal charges were pressed by female municipal mayor of the town of Visoko. However, bearing in mind that this case was an exception, rather than the rule, it would be necessary and required to impose standards deriving from the European Court practice in Bosnia and Herzegovina with the purpose of providing journalists' protection, including the protection of media houses, their representatives, but also the protection of general public that relies on free media in order to be provided with as many information as possible in regard with issues that public may show interest in.

In that sense, it would be required to highlight that the above outlined initiative lodged in the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina was passed only during the second round of voting, due to lack of votes coming from the Republic of Srpska Entity and because of the provision of the Constitution of BiH by which the sustained votes cannot be taken into account for the purpose of common majority (or even Entity majority) during the second round of voting.

Namely, the Initiative was, during the first round of voting, supported by 12 MP's (Naša stranka, SDP, DF, SBB, Nezavisni blok and A-SDA); 7 MP's voted against (SNSD), while 18 MP's remained sustained (SDA and HDZ) or some MP's failed to vote (SDS and PDP).<sup>1</sup>

Second round of voting was more favorable and the Initiative passed with 21 votes FOR (Naša stranka, SDP, DF, SBB, Nezavisni blok, A-SDA and SDA, except Denis Zvizdić); no votes AGAINST (SNSD and HDZ MP's had already left the Assembly session); one sustained vote (Denis Zvizdic) and four MP's that did not vote at all (SDS and PDP).<sup>2</sup>

These results, including the turnover by the SDA party position (when they decided to alter from "sustained" party in the first voting round to the party that voted FOR the passing of the Initiative), as well as the fact that political party representatives coming from the RS Entity did not support the Initiative, displayed that the amendments of the Defamation Law at this partial moment is more intense in the Federation of BiH than in the Republic of Srpska.

In any event, the Initiative significantly raised public awareness regarding the need of having implemented different standards between public figures and physical entities, as far as defamation indictments are concerned, including the necessity of reducing the number of cases containing charges pressed against media representatives by politicians and key and crucial role that journalists and media play in terms of promotion of debates concerning the issues that general public considers

crucial in democratic societies. Non – government organizations, such as BH Journalists – that, from the very beginning, provided unlimited support to this particular Initiative and individual media houses that may have an impact on Entity level representatives to, based on the Initiative itself, pass necessary and required amendments with the purpose of its cutter and complete implementation.

**Sources:**

1. Voting results during the 5th Session of House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, Vote Number 48., pages. 95-96.  
[http://static.parlament.ba/doc/125286\\_Rezultati%20glasanja%20za%205%20sjednicu%20PD%20od%2026-02-2020.pdf](http://static.parlament.ba/doc/125286_Rezultati%20glasanja%20za%205%20sjednicu%20PD%20od%2026-02-2020.pdf)
2. Voting results during the 7th Session of House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, Vote Number 19., pages. 39-40.  
[http://static.parlament.ba/doc/125827\\_Rezultati\\_glasanja\\_za\\_7\\_sjednicu\\_PD\\_od\\_11-03-2020.pdf](http://static.parlament.ba/doc/125827_Rezultati_glasanja_za_7_sjednicu_PD_od_11-03-2020.pdf)



*"In most cases, practice of the domestic courts is to evaluate the entire content of the disputed expression, not only the parts which the plaintiff, ie the party marks in the lawsuit, as well as the assessment of the context in which the expression arose, determine whether the journalist adhered to general professional standards, check his own sources ..."*

## **Charges for compensation as a result of libeling: Court practice in BiH and the implementation of the practice by the European Court of Human Rights**

*By: Amila Drekočić*

One of many challenges that professional journalism has been facing for decades is indeed the prosecutions and charges, (requiring compensations claims based on defamation (libeling)) appearing throughout public information sources, since these legal charges are commonly filed in by physical entities, legal entities, anonymous individuals, as well as public figures that professional journalists often encounter during their professional careers. Law on Protection against Defamation is (in all three Entities), more or less, defined as defamation that results in violating someone's reputation and honor, (including both physical or legal entity) by exposing, revealing or releasing untrue or incorrect information to third party or parties. Responsibility by all those held responsible, including authors, chief-in-editors or publishers, as well as any entity or person that may have been supervising, monitoring or controlling the revealed, released or exposed content, is clearly defined regardless to weather that content appeared in public intentionally or unintentionally. Courts are not bound to legal basis of charges, and accordingly, if the case circumstances justify that, courts are allowed to adjudge compensations, including released insults of offences and all pursuant to Law on Obligation Relationships.

In democratic societies having fundamental values and freedoms (liberties) protected by international conventions, constitutions, laws and other state legislations, the right to freedom of expression is one of the most protected values in most countries, including Bosnia and Herzegovina. Freedom of expression is protected by the European Convention for the protection of Human rights and Fundamental Freedoms which has the priority over all other local and domestic legislations. It is also protected by the Constitutions of Bosnia and Herzegovina, including the Law on Protection against Defamation in both Entities and Brcko district. The interpretation of the Law on Protection against Defamation in all three Laws is clearly and precisely defined in terms that it enables the principles of the freedom of expression in the first place.

As oppose to that, the right of an individual is equally protected, including one's reputation and honor that may be endangered and jeopardized when released, revealed or exposed contents or information clearly represent defamation, that is, once the content is proved to be incorrect or posted as untrue information. In this case, the damaged party, based on the legal provisions of the Law on Obligation Relationship, shall be entitled to release the verdict in public, that is, the correction. This also obliges the accused party to withdraw the statement that had damaged the damaged party or anything else that may result in accomplishing the purpose that shall be attained by compensation accordingly.

Court shall, based on mental pain suffered, including the violation of honor and reputation, and if the case permits it, particularly having monitored the scope of mental pain suffered and if its duration justify

it, adjudge righteous compensation verdict, regardless to material damage that had been caused by the defamation, and in case that there were no material damage, the court shall also, during the decision making (based on compensational claims, and including its value), take into serious consideration the significance of damaged common goods and the purpose of the compensation itself, that is, it will thoroughly observe that compensations do not get misused in terms of misusing them according to their nature and common public purposes, all pursuant to Law on Obligation Relationship.

### **Facts Vs Valid Judgment**

Therefore, in court proceedings based on charges pressed against journalists, the court determines, defines and eventually adjudges the compensational verdicts, non – material damages due to violation of personal rights, that is, violation of reputation and honor. Reputation is objective category and represents public and general opinion about someone, while the honor is subjective category and represents the opinion of a person; person as a member of social community about oneself. In legal theory and practice, the absence of non-material damage has its own way of defining and proving, and we shall not cover this particular issue in this text. Regardless to that, these must or at least they should be met so the courts could determine their existence in respect of a damaged party, which comes as result of a cause and consequence relationship with the expression of a journalist, that is, in relationship with a person that has legally been defined as the accused party.

On the other hand, and prior to determining the existence of a non – material damage and pursuant to practice of the European Court of Human rights, the court shall affirm whether the disputable expression represented a fact whose validity and truthfulness can be checked, or an opinion, that is, valued judgment. In order to investigate the facts that during the investigation process proved to be incorrect and untrue, one should be held responsible, whereas, there is no responsibility for an opinion or valued judgment (in general). Factual claim represent the expression that relates to past events whose truthfulness can be determined and which relates to particular event, objective states, venues or similar things, whose truthfulness can again be determined, proved and assessed in objective manner during the proceeding itself. If the case concerns the claims regarding the actual on fictional circumstances that cannot be confirmed and proved in practice, or if the objective assessment emerges, that is, if the absence cannot be proved in reality; or a common subjective assessment, conclusion or opinion about other party, the untruthfulness of such statement accordingly cannot be confirmed and proved because it would not contain the minimum required facts that could be check by concrete and objective proofs.

Local practice of domestic courts confirms that local courts, more or less, obey this particular principle of determining whether the content represents a fact or merely an opinion, that is, valued judgment which, in every individual and concrete case, determine whether the indictment shall have legal foundations or not, that is, whether there will be legal foundation referring to responsibility of journalists. Forms of journalists' expressions posted in their texts or articles that damaged parties often refer to in their claims as "defamation expressions", are rather difficult to be identified as objective and thus precisely defined as factual claims, that is, expressed opinion. This often occurs in practice and reality and it often leaves lawyers with no possibility for adequate assessment of success during certain legal disputes from that point of view and the overall outcome of the entire process thus becomes uncertain and this lasts until the very end. Apart from this objective, the thin line between facts and valued judgments as far as controversial expressions by journalists are concerned, there is a subjective element which also appears in practice and which relates to the way to which the appointed judge shall assess and evaluate certain content, which again, additionally disables possibility for assessment and uncertainty of the outcome of particular process in every specific and concrete case given.

Some contents in reality, despite the fact that they can be determined as untruthful by applying objective arguments, can be treated as facts whose truthfulness, that is, designated accused party fails to prove, shall be treated by court as valued judgment, or in other terms, the opinion about the damaged party based on more or less confirmed and proved, relevant and factual foundation thus on one hand releasing the accused party of any responsibility and vice versa. What seems to be a good principle applied by local courts and which relies to European Court of Human Rights practice, also contributing the accomplishment of principles of free expression, is the practice that local courts in most cases assess and evaluate the entire content of disputable expression which does not only refer to parts that the plaintiff, that is, the damaged party, outlines in the indictment, as well as the assessment of contexts in which the expression had emerged, determine whether the journalist was holding to common professional standards, checking the sources etc, based upon which the court shall determine objective case assessment and in every concrete case shall take all circumstances into consideration thus evaluating the existence of the violation of rights in contrast with the right to freedom of expression and also assess, based on displayed arguments and evidence of that particular case, the success of one, that is, the other party of that specific dispute. The European Court of Human Rights recommendation states that the right of freedom of expression can be limited only in exceptional situations. As a result of such approach, there are many verdicts and stances by both European Court of Human Rights and local courts that, to some extent, appear rather contradictive, i.e., in contrast with previous and passed court decisions as well as with the provisions pursuant to Law on Protection Against Defamation.

Therefore, there are verdicts that oblige the plaintiff where the burden of presenting evidence and proof shall be put on the plaintiff in terms of imposing the plaintiff with the obligation where the plaintiff should prove that the posted article or publically released information is untrue and that there was no public interest as far as it revealing is concerned.

Unlike this specific stance, there are previously passed and accepted stances that the burden of proving the truthfulness of posted content during the compensation processes following the defamation charges pressed against a journalist, editor or publisher) which has its foundation and basis in presumption of untruthfulness for a claim, that is, to question the untruthfulness in relation with the damaged party until proved otherwise and which finds its expression in the assumption of innocence



*Illustration/BH Journalists*

during criminal proceeding followed by, unless proved otherwise, must be confirmed and proved.

Also, there are stances that, if proofs appear during the process that some claim represent the defamation, the presumption of the emerging of non – material damage of the damaged party and it will not be particularly necessary and required to apply the process of proving the emerged damage according to principles that no one should endure the defamation. There are also verdicts implemented by local courts where the courts assessed whether the plaintiff had managed to prove the existence of non – material damage disrespecting this specific principle.

The European Court of Human Rights practice has developed the practice claiming that there will be responsibility imposed for expressed opinion if it is not based on relevant factual basis and this court has accordingly acted in terms of a minimum of basis that must be met in order to have the opinion based on relevant factual claims; otherwise the same can be exaggerated and accordingly drag along the responsibility of the accused party. Local and domestic court practice this assessment of expressed opinions often lacks so the accused party often, without relevant proves, is liberated and released from responsibilities for expressed opinion that had no foundations as far as factual claims are concerned. Additionally, courts are not provided with relevant evidence and proof either.

### **Legal uncertainty and misuses**

Therefore, local court practices is wide and mostly conformed with the European Court of Human Rights practice which is, as previously stated, versatile itself and also in contrast with previously outlined stances including wide range of various and different stances regarding relevant issues required for ringing and passing court decisions in this particular field. This, one hand, leaves local courts with numerous possibilities required for passing righteous decisions that are not necessary related with mere implementation of legislation and application of pre-defined legal court practice during situations when legal institutions should pass righteous decision, but also, on the other hand, leaves vast space for misuse of such situations which may include the creating of diverse and contradictive practice which additionally may lead to legal uncertainty in this specific branch.

Experts in this field had long ago appealed requiring the amendments of the Law on Protection Against Defamation provisions which was passed in the Republic of Srpska in 2001 and in the Federation of Bosnia and Herzegovina and Brcko District in 2003 and all of these amendments should be in conformity (as experts have been insisting) with the European Court of Human Rights practice. This process should also include the amendments of the provisions in terms of previous practices of these Laws during the period of last 17, that is, 19 years.

One of such last initiatives was the initiative imposed by Damir Arnaut, an MP Representative who had been insisting on amendments implementation in order to release the overloaded courts from countless number of indictments filed in by public figures thus lowering the pressure on journalists and media representatives as a result of such indictments. It is the fact that local courts have been overloaded with numerous and in most cases, countless number of indictments with often no legal foundations filed in by public figures that, according to the European Court of Human Rights practice, should have a higher level of tolerance towards the critics in relation with anonymous individuals, including anonymous individuals.

Indictments are often filed in as a result of subjective feeling of getting insulted just by reading certain articles, texts or posts (which cannot display a bass that may have resulted in a damage), and a need for personal payback directed against journalists or particular media houses, all the way to immoral incentives aimed for payments and by doing this, the so called damaged parties enter, completely unnecessary, the court proceedings and processes, imposing them thus with extra and additional cases and exhausting thus court capacities often referring to guaranteed rights. Law on Protection Against Defamation should definitely be thoroughly revised and eventual amendments and alterations should also include as many special experts, lawyers, legal representatives,

journalists as possible, analyzing thus present and current practice of local courts in terms in the implementation of the existing laws, the European Court of Human Rights practice and find best possible solutions and determine specific and particular requirements and necessities of our society, including the possibilities of judiciary institutions with the purpose of fulfilling and meeting requested tasks as far as the rule of law implementation in all its guaranteed local laws and international conventions is concerned, and all with the purpose of better protection of the right to free expression, without pressures imposed on media representatives; without unnecessary and unfounded indictments that burden and ballast our courts, but also with obligatory implementation of the mechanisms required for the protection of every individual right from every single misuses of rights.



*"The judgment in its most important part confirmed that the defendants, therefore, Direct and me, were not malicious, that they were expressing a critical opinion, that the expression was true because the allegations were largely proved and, most importantly, to me that we adhered to professional standards "*

## **Indictment for Defamation – an experience that no journalist wants to go through**

*By: Milanka Kovačević*

Indictment for defamation against "Direkt", a local web site and me as a journalist, finally came to a conclusion in most appropriate and best way. Indictment was rejected and dismissed and the plaintiff was ordered to pay for all court expenses and costs in full. Still, this was an experience that we would rather circumvent.



*Illustration/BH Journalists*

It came to an end. After almost two decades of professional journalism I had been indicted for defamation which included the violation of reputation and honor of Žarko Laketa who, at the time, was the mayor of Trebinje Police administration and who was requesting the compensational fee of BAM 3.000.00. He sued "Direkt", a local web site, including the author, that is, myself, for incorrect, inaccurate, false and faulty information released and posted in several posts. These posts were covering the issue of current situation in Trebinje Police administration, including the biography and work of the mayor himself.

The posts indicated nepotism, violation of procedures; mobbing, autocracy, ties and links with interesting figures (as far as security issues were concerned), as well as influence trade. All allegations were supported by material evidence that revealed that the first police officer of the southern part of the Republic of Srpska was at the same time a successful businessman and millionaire as well. Actually, his company had been registered under his spouse's name and ownership was later transferred to his daughter, although several witnesses, including his own partner, later confirmed that it was Žarko Laketa that was actually pulling all business strings. Despite the law which clearly defined that a police officer, apart from being in a police service, could not perform any other duty and do any business whatsoever, unless she or he had a special permit to do so that could be issued by the Minister himself only, this "law protector" in East Herzegovina was contrariwise and in front of the local public and during his police service working time, driving trucks for his own company and making business deals.

And this was not the only violation of the law and the rules of the police service. He would appear at political rallies and gatherings of the ruling political party, namely SNSD,

although the police officials were strictly banned from attending any kind of political rallies and meetings unless they were appointed to provide security services.

However, after the “Direct” journalists managed to “fold up the puzzle” and collect necessary details, the “star” of this story released a denial followed by the indictment.

Laketa denied almost every single allegation, including those claiming that he had several properties and business premises in the town of Nevesinje and allegations confirming that had previously been legally convicted for the abuse of official position.

Preparation hearing resulted in a lawsuit alignment and claiming the compensational request to five thousand BAM (BAM 5.000, 00) because of another post (article/text) which appeared in the meantime and which, according to the words by his lawyer, presented Mr. Laketa with defamation and violated his social reputation. He was, presenting the reasons that resulted in a lawsuit alignment, speaking rather loudly, using offensive language, insulting terms that altogether seemed more appropriate for criminal, rather than civil procedure. However, Basic Court of Trebinje female judge paid no attention to such presentation, behavior and manners and she additionally and gladly accepted a lawsuit alignment in its full form. Despite the fact that we filed in a legal complain to such procedure, demanding that she should be excused from the court procedure, our enquiry and claim was dismissed and rejected so we had to wait for main proceeding.

After a neuropsychiatric presented the expert opinion regarding mental health of the plaintiff, she observed the level of mental pain after the posting of controversial texts. This was followed by the speech delivered by the plaintiff’s legal representative whose crucial argument was that Žarko Laketa had been a police officer for nearly 30 years with impeccable career disregarding the fact that the plaintiff had actually previously been a convicted person.

The verdict, in its most crucial part, confirmed that the accused party („Direkt”) and myself had no cruel intentions (act of malice); instead our posts expressed a critical view and our reporting was thus accurate and true because allegations were in most cases proved and what was most important for me, we did manage to remain professional following ethic standards.

Verdict also confirmed another important thing; namely it was explicitly outlined that the verdict deleted from criminal evidence does not make one a person with no criminal record.

Lawyer’s experience confirmed that our courts often restrictively implement and apply the Law on Protection against Defamation.

Also, they often outline that their knowledge regarding European Court practice and associated conventions, as far as the issue of defamation is concerned, is to some extent insufficient and limited.

Releasing the disclaimer (denial) or correction has never been a reason for them to dismiss or reject the indictment. Extenuating circumstances were taken into

consideration only when defining fine which was, according to some, against the core of that law.

The law itself, along with its core, according to Bojana Rikalo opinion (Basic Court of Trebinje female judge) was „on our side“. Same opinion was shared by the District Court of Trebinje officials, so the process itself was terminated after less than 12 months.

Although the professional standards were not fully met and material evidence proved exactly what we had been writing about, the question was what the final decision would be if we had not been supported by BH Journalists. This support was not only professional, but it was also friendly based and it had a huge and I should say crucial impact in this specific court case.



*“In court process, despite the difference between value judgments and facts, the journalist remains obliged to point out and prove this difference throughout the proceedings. It is forgotten that the journalist must act urgently, place information, that the journalist is neither a prosecutor nor a judge, that time is measured in seconds to place information, etc. ”*

## Freedom of expression, European values and COVID-19

By: Biljana Radulović

Freedom of thoughts is one of the fundamental human rights that people have been fighting for since the beginning of the world.

We could additionally talk and discuss about Demosthenes, Socrates, Galileo, Voltaire, Zola and many other great thinkers and philosophers of human thoughts.

Today, during the COVID – 19 pandemic, the question of freedom of speech shall be the most important issue in the forthcoming future.

Perhaps, the masks that we use to cover our mouths symbolically indicate the powerlessness of expression with physical obstacle covering the mouth even to those that do not use their own thoughts of speech.

Everyone with the intention of expressing their opinion, point out, indicate, show or prove something that she or he may think, believe in it and they mostly encounter obstacles in terms of a system or individually.

### Freedom of expression and European Court

From the European Court practice point of view, the role of media is unquestionable. Freedom of expression does represent one of the most important pillars of democracy.

Press also plays a very important role in any democratic society. Although it should not cross certain boundaries, borders or limits, especially as far as reputation and rights of others are concerned. The role of press is to release, reveal, expose or post information including the ideas covering most issues that may be interesting to general public in accordance with its own duties, tasks, assignments and finally its responsibilities. Press does not only have a task to share such information and ideas, but general public also has the right to receive and accept such information and ideas. Otherwise, press would not have the capacity and would not be able either to perform its crucial role of being “the keeper of public interest “. 1

*“Everyone is entitled to freedom of expression. This right includes freedom of having personal opinion, receiving and releasing information and ideas without being interfered by governing authorities regardless to boundaries and limits. This Article does not prevent states (countries) to request permits and licenses required for work of companies dealing with television, radio and cinema programs. Since using of these permits kedges and by default drags in numerous duties and responsibilities, it can undergo formalities, conditions, limits, boundaries, borders or fines and punishments defined by the law which should be considered as required and necessary legal tool and mechanism in democratic*

*societies demonstrating and displaying interests of national security, territorial integrity or public security, with the purpose of preventing the emerging of violations or criminal, health protection or protection of moral, including again the protection of reputation of rights of others parties; prevention of releasing (revealing) information shared in confidence or due to protection and preservation of authorities, including non – biased courts.”*

The right to freedom of expression comprehends the right to sustain with open opinion expression. In case, K vs. Austria in 1993, the complainant of presumption was imprisoned, because he had refused to testify in criminal record proceeding processes held against him.

European Commission for Human Rights discovered the violation of rights regarding the expression, based on the right of complainant of presumption who wanted to defend himself by remaining silent, although it failed to determine the violation of rights for fair trials<sup>2</sup>.

The court has treated freedom of expression as fundamental human right, emphasizing that is important not only as direct right, but it also serves as precondition for democracy values and other associated human rights. Pursuant to Article 10, Item 2, it cannot apply only to provide “information” or “ideas” that are considered as desirable or non – insulting (non – offensive) but it also applies to those that are insulting or offensive, shocking or disturbing. These are the requests set by pluralism, tolerance and freedom of opinion and without them there can be no “democratic society”<sup>3</sup>.

Looking from historical perspective, European Court had for the first time taken into consideration the right to freedom of expression in case De Becker vs. Belgium with the final verdict adjudged in 1962.<sup>4</sup>

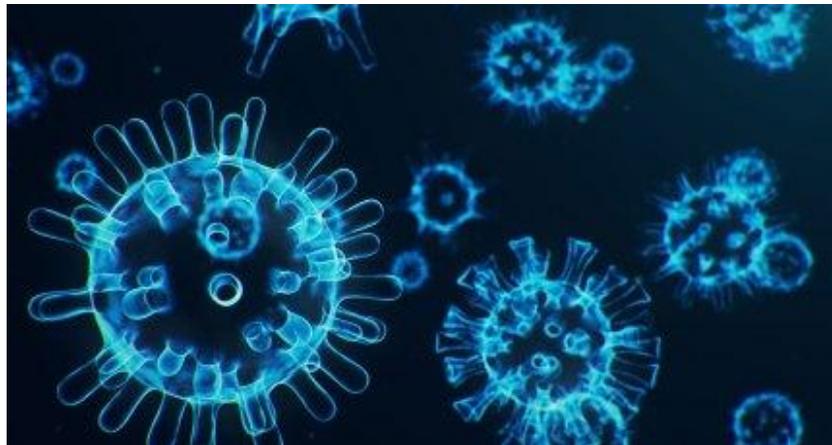
Generally speaking, European Court emphasized that banning a journalist from working represented serious forcing of sanctions, not only in the sense of the influence imposed on journalists, but also because of the opinion that such sanctions may have terrifying effect on global community. In this case, journalist was sentenced to death because of his collaboration with German Nazi authorities during WW II. The sentence was modified and altered and the journalist was later set free, although he was banned to take any part in newspaper writing for the rest of his life. European Court of Human Rights decided to remove this case from its list because, at the moment when this case reached the Court, Belgium had already amended its associated laws and this question thus represented nothing but mere academic significance. However, European Commission for human rights (as one of the previous bodies of present acting court) that was deciding on cases during the initial stage of the procedures, released formal report outlining that life ban would violate freedom of expression.

The Commission highlighted great importance to extreme circumstances in this specific case. Belgium had, during the period when the ban was adjudged, coming out from a five year war and enemy occupation and the journalist had committed treason. Under these circumstances, temporary ban could have been justified. However, the Commission was convinced that in time, as the society was exiting the mist of war, the ban should have been revised once again.

### **Freedom of Expression and journalist**

Filing a lawsuit is a common appearance when the accused journalist recognizes herself or himself, even if her or his name cannot be highlighted anywhere in the article, text or post, or even if the full name does not appear anywhere in posted article or text, which additionally allows her or him to file in a lawsuit requesting compensation accordingly.

In fact, the accused journalist may make conclusions in terms of believing that a journalist is hinting plaintiff; that is, that journalist reveals information concerning plaintiff and that she or he had posted an article or text upon which one may recognize that plaintiff is subject to defamation, including faulty and inaccurate conclusions, wrong interpretations, presents public with false picture displaying that posted article or text does indeed relate to the plaintiff etc.



*Illustration/BH Journalists*

Subjective experience by individuals may be rather dangerous, especially during the crisis periods when rights to righteous procedure become subsidiary, comparing to rights to live and when freedom of expression thus becomes questionable.

During court procedures, despite the difference line between valued judgments and facts, journalists are held responsible to indicate, point out, confirm and prove this particular difference during the entire judiciary process. Additionally, we somehow tend to forget that during this kind of court proceedings journalists must act promptly, reveal, release and expose information because of the fact that journalists are neither judges nor prosecutors and that the time required to release, reveal and expose information is measured in seconds etc.

“Even where a statement amounts to a value judgment, the proportionality of interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive”<sup>5</sup>

If at the time of posting an article or text a journalist has enough reasons to believe that certain information was accurate, true or correct, she or he should not be sanctioned. News cannot be considered as “temporary merchandise and anyone, even in the case when certain news is late in publishing or posting, may take away all its value and public interest for it”<sup>6</sup>.

“The court reckons that local governing authorities should have provided the accused journalist with the opportunity to support his allegations. It would be against the spirit of Article 10 to allow the limitations of freedom of expression of his allegations mostly based on manner and way they had been presented. Basically, general public should be provided with true delivered statements, regardless to their tone or negative consequences directed against those upon which the statements were initially directed”<sup>7</sup>.

### **Freedom of expression and COVID-19**

Nowadays, during the limited work conditions when freedom of speech may result in a spread of panic and sharing false information, a question of whether we are going to become society or societies where freedom of expression exists in its genuine form and shape, or we are going into the censorship period, is completely justified.

The emerging of COVID-19 opened many legislative questions in systems that developed special strategies, proclaimed state of emergencies etc.

In what way shall the rights required to provide journalists’ protection will be ensured and secured, since journalists, according to some, spread and share false information, including panic etc? This also concerns any other individual (beside local journalists), because at present most of us spend most of our time in self – isolation. Can such measurements be misused and become arms used for fight with unlike – minded persons?

Laws must ensure undisturbed and uninterrupted work for all journalists covering the issue of corona virus pandemic, so the general public could receive required and necessary information. Also, values of European Court must not be neglected and forgotten for a moment, because what happens today will tomorrow be yesterday.

**Sources:**

1. Thoma Vs Luxembourg, 2001, item 5
2. Case K. vs. Austria, 1993, item 11 and Gillberg vs. Sweden, 2012
3. Handyside vs. United Kingdom, 1976, item 49.
4. De Becker vs. Belgium, No. 214/56 from 27.03.1962.
5. Jerusalem vs. Austria, No. 26598/95 from 21.02.2001.item 43.
6. Sunday Times vs. UK, No. 13166/87, 26.11. 1991.
7. Csanic vs. Hungary, No. 12188/06 from 20.01.2009.item. 43.