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Introduction

Journalists, citizens and secret recording: When is the public interest more important than privacy rights?



Illustration/BH Journalists

At the end of 2014, Klix.ba, a local Sarajevo web site posted an audio recording where Zeljka Cvijanovic, a former prime minister of the Republic of Srpska, was talking about bribing several members of national assembly, in order to (by using their votes) attain a parliamentary majority, required to form a government, that is, the issue concerning the corruption in the Republic of Srpska national assembly. She then referred to assembly members as to “geezers”, and ever since this affair had become known as the “Two Geezers” affair.

Audio recording footage was accordingly forwarded to Klix.ba administrators that soon posted it on their web site, but they immediately became a subject to pressure by certain institutions. Namely, Ministry of Interior of the Republic of Srpska and Sarajevo Canton (the Police officials) searched Klix.ba premises, took mobile phones from editor-in-chief and director, including the taking of 19 hard disks thus disabling 19 personal computers from being operative and functional. The search lasted for nearly eight hours, and during this time, journalists, reporters, administrators, technicians were practically held “hostages” at their own premises and were under enormous pressure that any media house had until then experienced, all because of posting this controversial audio recording. Dutch special team of forensics later determined that the controversial audio recording was authentic, but Prosecutors’ Office of BiH had never launched an investigation about this particular case.

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The search of Klix.ba premises and police training of enforced discipline upon Klix.ba staff were at the same time the only consequences of this affair that had been the main focus of general public in BiH. Prosecutors' Office of BiH has never launched an investigation about this particular case. Not to mention that Zeljka Cvijanovic was nowhere near being legally interrogated; instead she was, courtesy of her comprehensive engagement and efforts during the "process of buying off the votes of assembly members", awarded. Namely, she is today the president of the Republic of Srpska and accordingly, her political career seems to be making progress and gradually advancing.

It has been almost ten years since these turbulent events, and in the meantime, journalists managed (courtesy of audio and video recording they had done) to discover several significant affairs, such as the affair of buying false diploma, revealed and posted by "Zurnal", and video recording with Milan Tegeltija, President of High Judicial and Prosecutors Council of BiH was clearly seen talking in a local pub about particular case that should have been "fastened" at Sarajevo Canton Prosecutors' Office. The investigation in both of these cases is still undergoing. During the "Calking" affair, which was how the journalists referred to video recording with Tegeltija being involved in it, Nermin Alesevic, (a local journalist that had made this secret recording) was indicted. Prosecutors' Office of BiH sued Mr. Alesevic for criminal offence based on bribery and other sorts of benefits, unauthorized overhearing and audio recording. As far as the affair of buying false diplomas is concerned, "Zurnal" female journalist (that had been working on this particular case) was interrogated at the Prosecutors' Office of BiH premises, where, according to her statement, she was asked to reveal her sources and contact details of diploma "mediator and seller".

Are journalist, that is, citizens, entitled and allowed to secret recording and will they eventually become subjects to legal processing and what consequences they may face accordingly? How come main perpetrators often end up without any sanctions whatsoever? Is public interest more important than privacy right and if so under what circumstances? What is the view of European Court of Human rights about using and revealing secretly recorded conversations and video material as well? These issue shall in the 76th edition of E-Bulletin be covered by texts written by the following authors: Senad Avdic, chief-in editor of Slobodna Bosna, Milan Tegeltija, President of High Judicial and Prosecutors Council of BiH, Zinaida Djelilovic, Oslobodjenje female journalist and reporter, Vanja Stokic, E-trafika (local web site) female editor and Arben Murtezic, Director of the Centre for Education of Judges and Prosecutors of the Federation of Bosnia and Herzegovina and former Chief Disciplinary Prosecutor of the High Judicial and Prosecutors Council of BiH.

Maja Radević, E-journalist editor



„The question that emerges is whether a journalist that illegally collects unauthorized video or audio recording is allowed to release, reveal or post it? The answer is simple: according to existing laws, she or he is not allowed to do so. In case of different situation, it would be to some extent acceptable if someone would manage to employ herself or himself as professional journalist and by doing so, this status would allow the person to conduct unauthorized recordings of citizens”

Journalist has no right to release or post unauthorized recording

By: Milan Tegeltija

During most recent period, criminal offence of unauthorized audio and video recording has become a trouble issue in BiH, so the question of “conflict” between this particular criminal deed (offence), public interest and “public right to be informed, to be familiar and to know”, emerged accordingly and especially become outlined in the part that concerned journalists (particularly those whose investigative reporting is primary occupation). Without any intention to appear or act as a specialist of this specific area and without intentions to scientifically analyze this criminal – legal incrimination, I shall try to use very simplified language (as much as it is possible) and make an effort in trying to explain the problem.

Namely, in elaborating this particular issue (conflict between criminal – legal incriminating criminal deed (offence) and public right to be informed, familiar and to know) we should, as with any other case, begin from the initial point, that is, start from the beginning; the definition of a criminal deed (offence). Criminal deed (offence) in its simplified form does represent illegal behavior that violates or endanger fundamental social values, rights and civil freedom. As a result, by incriminating these kinds of behaviors, pursuant to criminal laws and by defining criminal sanctions that should be imposed upon such behavior, society, through criminal legislation, protects these fundamental social values, rights and civil freedoms. This is why criminal legislation in a society has a protective role which is defined by criminal law provisions in its very initial stage through fundamental principles.

Another thing that must be explained at the very beginning is the process aspect of criminal legislation. Namely, Law on Criminal Procedure regulates and defines the procedure from its very beginning and initial stage all the way to the end. It also defines, among other things, all procedures required for collecting and providing the evidence and proofs in criminal procedure.

During the process of collecting and providing the evidence and proofs, which includes all actions that may, by any means, violate certain rights or civil freedom, the law, prescribes obligatory court approval for further and necessary actions pursuant to the law itself.

There are two basic reasons for this. The first reason is a necessity to provide and respect guaranteed rights and civil freedoms (liberties) through court control of the existing conditions and justified reasons required for the implementation of measures that encroach and go back to such rights. Second reason concerns the providing of authenticity and competence of collected evidence and proofs under such conditions that is, preventing any kind of eventual misuses of such aggressive way of evidence collecting that interfere with fundamental rights and civil freedoms.

Free Media Help Line

Current cases:

1. Dragan Bursać, freelance, Banja Luka:

At the beginning of June 2020, a journalist and columnist from Banja Luka Dragan Bursac received several death threats from several different profiles via Facebook. Bursac reported these threats to the Free Media Help Line, as well as to the competent police authorities in Banja Luka.

2. Fokus.ba and Raport.ba

Several edited videos have appeared on social networks, directly mentioning the names of journalists from Fokus.ba and Raport.ba portals who discovered the “Respirators” affair and wrote about it, publishing their photos in a very negative context and presenting a thesis about their alleged affiliation with certain politicians and political parties. The case was reported to the Department for the fight against computer crime of the Federal Police Directorate, which is investigating this crime, as well as to the Ministry of the Interior of Sarajevo Canton.

3. Sinan Gluhić, journalist RTV Zenica

Sinan Gluhic, journalist of RTV Zenica was physically attacked on 5th June by Sulejman Spahic, member of the A-SDA party. The attack was preceded by days of verbal threats and insults to Gluhic by the A-SDA leaders via telephone and social networks, especially Facebook. Gluhic was on his way to work when he was attacked by Spahic. In front of the witnesses Gluhic received death threats from Spahic, followed by a hit to the neck and face. The incident was reported to police and recorded, as well as threats Gluhic received in the previous period. On the same day A-SDA party issued a statement denying the attack happened. Zenica police administration initiated an investigation and took statements from both actors. The case is referred to the Prosecutor’s office for further actions.

4. Journalists of RTRS-a, Banja Luka

On September 8, two RTRS journalists reported to the police station that an unknown person had been constantly sending them messages of disturbing content since 2018, which caused them to feel fear and anxiety, the Banja Luka Police Department said. I. G. was arrested on September 9, and the prosecutor of the District Public Prosecutor’s Office in Banja Luka stated that the arrest was made for criminal offense of harassing. Against I.G. a report will be submitted in the regular procedure.

Right to private life, or shortly, privacy right undergoes the category of fundamental rights and civil freedoms (liberties) or liberties. During criminal procedure – investigation, it is possible to legally violate this particular right in case of existing and legally defined conditions through special investigative operational actions, including audio and visual recording.

However, in order to determine these investigative operational actions, the approval cannot be issued by the prosecutor either; instead, this special investigative operational action requires special court approval and permission that, as I had already outlined, assess and evaluates the existing of conditions and its justifications.

In case of its approval and issuing of permission, it becomes a subject to strict rules and control in order to ensure authenticity and provide competence thus preventing any misuse of this particular investigative operational action. When we explained all these initial premises there is a question whether this is about universal rule or whether there are exceptions to these rules? The answer is simple: rule is universal and there are no exceptions to it. Any evidence that has been collected in contrast and opposite to these rules cannot be used in either criminal or any other procedure. After this there is another question: What happens to the people that make video and audio recording opposite to these rules? The answer is also simple – they become subject to criminal – legal incrimination of criminal deed (offence) of unauthorized audio or video recording and therefore this is clearly indictable behavior.

Next question regarding this issue is the “conflict” between criminal deed (offence) and “public right to know”, that is, the question whether journalists that do this kind of operational action can be an exception in this case. The answer is also simple; there is no provision that would exempt a person (a journalist from) this particular responsibility.

And the last question that emerges is whether a journalist that illegally collects unauthorized video or audio recording is allowed to release, reveal or post it? The answer is also simple: according to existing laws she or he is not allowed to do so.

In case of different situation, it would be to some extent acceptable if someone would manage to employ herself or himself as professional journalist and by doing so, this status would allow the person to conduct unauthorized recordings of citizens. Or, unauthorized recording by anonymous authors would then be forwarded to journalists that would additionally release or post them. In this way, the privacy right would be bypassed and the entire process would be covered by journalism assignments. This kind of misuse cannot be tolerated in any society whatsoever. It would completely make basic right to private life for any person pointless. Privacy right can be infringed by appropriate court decision only.



“It would have been perhaps most accepted and pursuant to regular procedures that Nermin Alešević had asked Prosecutors Office to allow him to secretly record the conversation during the meeting with Milan Tegeltija at local Banjaluka pub. Afterwards, in deepest discretion and secretly and at the request of Prosecutors Office, this procedure should have been approved by Ranko Debevec, president of the Court of BiH or by some of his inferior judges. This scenario would be even very difficult to imagine, let alone conduct”

About interception, overhearing, media and price of investigative reporting

By: Senad Avdić

During the court trials at the International Criminal Court for War Crimes in the Hague (mostly related to persons convicted for “joint war crimes” in their “attempt” to make Greater Serbia), one of the most common evidence, proof or arguments were so called intercepted phone calls between highest ranked political officials of Serb Democratic Party with other Serbian officials, months prior to the beginning of war in Bosnia and Herzegovina. These included phone calls between **Radovan Karadžić** with highest ranked governing officials in Serbia, including **Slobodan Milošević**, but also phone calls and conversations between Serb Democratic Party officials and other Serbian officials coming from cultural, intelligence and military branch in Serbia. These intercepted phone calls (hundreds of them, all being used during court trials as evidence), were more or less most important evidence proving and confirming direct interference of Serbian governing authorities in their preparation of war, that is, their plans to launch a military aggression against Bosnia and Herzegovina, but also proved their partial interference in Croatia as well. This is how general public became aware of the controversial “RAM” Plan, which was a code name for “framing” all Serb – populated areas in Bosnia and Croatia, deriving directly from intercepted phone calls between Slobodan Milošević and Radovan Karadžić. “Radovan you know what “RAM” is, don’t you”, asked Serbian leader the head of Bosnian Serbs during their conversation held in autumn 1991 and Bosnian leader then replied:” I do, I do” (Transcript of this conversation was firstly published in “Vreme”, Serbian political weekly magazine).

At that time, State Intelligence Officials in Sarajevo were probably miles from even imagining that (while they were intercepting and recording these conversations) one day these phone calls would be used as court evidence and especially be used by prosecutors at the international war crime courts! However, in 1993, after UN Security Council had established International War Crimes Court for former Yugoslavia, the Hague Tribunal began first indictments for war crimes in Bosnia and Herzegovina, Sarajevo official authorities were requested to provide audio – recordings and transcripts of intercepted phone calls that, until this moment, had been periodically been released in public. In order to have these material taken into serious consideration and treated legally; Hague Tribunal demanded from Sarajevo official authorities to reply to their question whether they had legal rights to intercept these phone calls held between Serb Democratic Party officials.

According to the existing Law, phone calls interceptions by the National Security officials had to be approved by the three key institutions; namely, BiH Presidency, BiH Government and Ministry of Interior Affairs (the Police authorities). Luckily (not for every side involved in this process though), during the pre – election appointing combinations, key functions in the above listed institutions were not held by any Serb Democratic Party officials, instead they were run by **Alija Izetbegović**, **Jure Pelivan** and **Alija Delimustafić**.

Should any of the three mentioned officials disapproved the phone call interceptions and audio recordings, the whole thing would have been illegal or it would not have been conducted in the first place. Some witnesses claimed that the day the Hague Tribunal informed Sarajevo that the audio recordings were legally conducted, local prosecutors openly expressed their relief and some of them were even celebrating.

“Legally supported” interceptions

This sample from the Hague Tribunal judiciary practice may not perhaps be the most recent one, but it can still be used as main thematic line of this particular article (text): legitimate public releasing of audio and video material recordings (footages) that had been collected by secret and hidden methods and techniques. The remaining question does appear hypothetical, but it is not entirely without solid foundations: would, for instance, Radovan Karadzic, or some his collocutors whose conversations had been recorded, be able to sue media houses that have been broadcasting these conversations if there had been enough sufficient arguments proving that the recordings were illegal? Would National Security officials be officially and legally held responsible for illegal recordings or as they often refer to, held responsible for conducting “special investigation operations”?



Illustration/BH journalists

Approving special investigative operations, that is, phone conversation intercepting in post – war Criminal Law is no longer in hands of politicians (as it used to be in past period), instead, these measures have been conformed with Western practice and can be approved by court bodies upon prosecutors’ requests. Basically, and formally speaking there should not be any problems here; however, the discrepancy between normative and practical, legal and genuine is huge and insuperable. For thorough implementation of normative and pre-established regulation of presumptions we should have an independent, professional and efficient judiciary system and this system does not exist in Bosnia and Herzegovina – not even close. Judiciary system has been, according to estimates by many relevant, professional and referring analysts (both local and international) very unprofessional and

referring analysts (both local and international) very unprofessional and inefficient, because it has been strongly influenced by numerous political, economic and criminal groups and individuals.

Let us take few drastic samples in order to convince ourselves in what we already know, but rarely decide to make public discussions about it. More than four years ago, Prosecutors' Office in BiH had, as part of the investigation case against **Fahrudin Radoncic**, demanded the approval from the Court of BiH special operations including the interceptions of his phone calls and other communication means over this local politician and businessman. Court of BiH approved this demand and intercepted and collected phone call conversations were accordingly used in this particular case against Radoncic and his associates as evidence. **Goran Salihovic** was chief prosecutor at the time and **Meddzida Kreso** was president of the Court of BiH. Anyone with average knowledge is aware that, looking from present point of view, this particular action directed against Radoncic or any other political and national leader would simply not be possible. Can you even imagine, for instance, that Prosecutors' Office in BiH launch an investigation case directed against **Milorad Dodik** after open admitting during his speech in Republic of Srpska Parliament that his intelligence service operators had been overhearing and intercepting phone call conversations of his political opponents? Imagine that, as part of investigation process against Dodik, someone dares and requests the approval from Court of BiH special investigative operations (including phone call conversations and interceptions) in case directed against the member of the Presidency of BiH? Wouldn't something like this seem little bit like science fiction movie? It would be as if pre-war national security officers had to ask **Momcilo Krajisnik**, speaker of the house of representatives of BiH (Parliament) to approve overhearing and phone call conversation intercepting of Radovan Karadzic.

Judiciary epilogue of greatest judiciary and media affair last year, namely "Calking", detected by "Zurnal" (local web site) actually displayed that the only suspect in the entire case (with **Milan Tegeltija**, former president of High Judiciary and Prosecutors Council being involved in this case), was actually the person who had recorded the utmost glaring case of systematic corruption, **Nermin Alesevic**, a local businessman. "Zurnal" journalists, those who had released video recording had to undergo investigation run by the Prosecutors' Office of BiH. According to Prosecutors Office of BiH, the entire operation was conducted and video recording released illegally. As far as legal correctness is concerned, it would have been perhaps most accepted and pursuant to regular procedures that Nermin Alesevic had asked Prosecutors Office, precisely, **Gordana Tadic** or **Oleg Cavka**, to allow him to secretly record the conversation during the meeting with Milan Tegeltija at local Banjaluka pub. Afterwards, in deepest discretion and secretly and at the request of Prosecutors Office, this procedure should have been approved by **Ranko Debevec**, president of the Court of BiH or by some of his inferior judges. This scenario would be even very difficult to imagine, let alone conduct.

"Two geezers", "Calking", "Asim"...

The foundation for some of the most important stories in last couple of years in both, world and Bosnian media space had been secretly recorded, including video and audio recordings confirming criminal, corruption, immoral deeds, clientelism of holders of highly ranked functions in politics, judiciary system and health and Medicare system. Most famous case of journalists using secret recordings with the purpose of proving political corruption in Europe is without doubt the operation of "Spiegel", a German political magazine, aimed against **Christian Strache**, former Austrian vice - chancellor. The story is well known as well as its political epilogue. Certain female journalists, who had introduced herself as agent of Russian capital investors, organized a social event with Strache at Ibiza, famous Spanish holiday resort. Austrian politician, having no doubts about the true identity of this lady, promised to provide help to Russian tycoons so they could buy certain media houses in Austria, as well as some "small and tiny favors". After "Spiegel" had released the results of their investigation, not only Strache had to resign, but this affair resulted in the dismissal of entire government of Austrian, the government led by **Sebastian Kurtz**, Austrian chancellor.



Photo:N1

As far as local media affairs are concerned, in 2015 an affair titled "Two geezers" had appeared, followed by the release of secret audio recording where **Zeljka Cvijanovic**, former Prime Minister of the Republic of Srpska was talking to her collocutor about "buying off" two opposition representatives (so called "Two Geezers") needed for forming an SNSD majority in their parliament after the 2014 elections. This scandal gained a larger proportion scale when the Republic of Srpska police officials burst and stormed by force the Klix.ba (local web site) premises searching for this video recording, which at the end caused the disgust and public condemning.

Secretly recorded conversation between Milorad Dodik, former President of the Republic of Srpska and **Mate Djakovic**, a local journalist (recordings were released during the time of investigation directed against Dodik due to "Pavlovic Bank" affair), led to dismissal of **Goran Salihovic**, who, at the time, was chief prosecutor of the Prosecutors Office of BiH and whose name appeared in this process in rather compromising context as well.

A few months ago, a conflict within Party of Democratic Action (SDA) between several officials resulted in an affair titled “Asim”, where **Asim Sarajlic**, one of the highly ranked officials of this party and member of state parliament was secretly recorded in a motor vehicle by his party colleagues. Audio recording revealed but thorough and detailed mechanisms of genuine criminal, corruption, clientelism, non – democratic foundations that seemed to represent basic premises upon which a leading Bosniak national party seem to be operating. Apparently, local Cantonal Prosecutors Office followed media as far as this affair is concerned. However, the investigation was doomed to failure: namely the recording of Mr. Sarajlic was conducted secretly and thus must be treated as illegal deed, that is, it was completely against the law and legal procedure.

This journalist has recently released the audio recording with Oleg Cavka, a state prosecutor having conversation with **Muhamed Ajanovic**, Dean of the Faculty of Dental Medicine. Oleg Cavka has publicly been considered as non – institutional grey eminence in judiciary system. The recording did not appear in protected area of their offices or in a hotel room, instead the two of them were having conversation in public space, namely a local coffee shop, while having a chat about public jobs (including the overhearing of one of them), rather than talking about formal issues. Milan Tegeltija, president of the High Judiciary and Prosecutors Council in BiH told media representatives that this particular audio recording was illegal and could have been a subject to counter indictment. Tegeltija’s “hint” has very quickly been decoded with the Prosecutors’ Office of BiH where the investigation of this “case” had been launched. Through social media sources, Tegeltija directed this journalist to Criminal Law of the Federation of BiH where illegal recording is treated as criminal deed.

Article 188 of the Criminal Law of the Federation of BiH clearly states that:

“If a person conducts special operations, including the overhearing without other party’s consent or if she\he makes audio recording of a conversation or records a statement that has not been directed to her / him and allows an unwanted person to have access to recorded material or statement provided by a person that had illegally been overheard or whose conversation was audio recorded, including the saving of other email messages, she \ he will be fined or sentenced to prison with an up to three years penalty”.

Of course, this journalist was aware of what the legal boundaries were and what its conservative interpretation may present him with, including legal fines defined for violation of law provisions as well.

However and luckily there is a law institution superior to local judiciary system and whose verdicts must be obeyed by local and domestic judiciary system. Namely, we are refereeing to **European Court of Human Rights** with head seat in Strasbourg and whose competence and superiority was accepted by Bosnia and Herzegovina with its membership within Council of Europe.

Judiciary practice of European Court of Human Rights has recently been loaded with cases concerning media responsibility with their local courts considering these cases as “violation of privacy” of public figures by using secretly recorded conversations or video materials too. It is however well known that parties turn to ECHR, after having exhausted all legal possibilities with local judiciary framework and court instances within their own countries. ECHR judges evaluate, estimate and bring verdicts regarding whether subject states had violated rights and guarantees defined by the European Convention of Human Rights. This convention is constituent part of the Constitution of BiH, based on Dayton Peace Agreement

Public interest and other “minor issues”

One of so-called paradigm - tile cases related to our discussion and led by the ECHR was the case titled “Haldmann Vs Switzerland”. In 2003, four investigative reporters from Switzerland used secret cameras to record a documentary movie regarding malversations of persons that had been selling life insurance policies. After one of the recorded persons decided to sue journalists and their editing office, the Swiss court decided to fine journalists due to unauthorized video recording and broadcasting the conversation with the prosecutor.

In 2015, European Court of Human Rights cancelled the verdict of Swiss court against the four journalists claiming that “the theme of the documentary made by the four journalists was of public interest and that the report contributed in public discussion”. The verdict defined that the “ECHR had determined the presumption that the claimers (journalists) made a documentary in good faith with the purpose of respecting and obeying journalists’ ethic and journalism laws, referring to their limitations of the use of hidden and secret recordings”

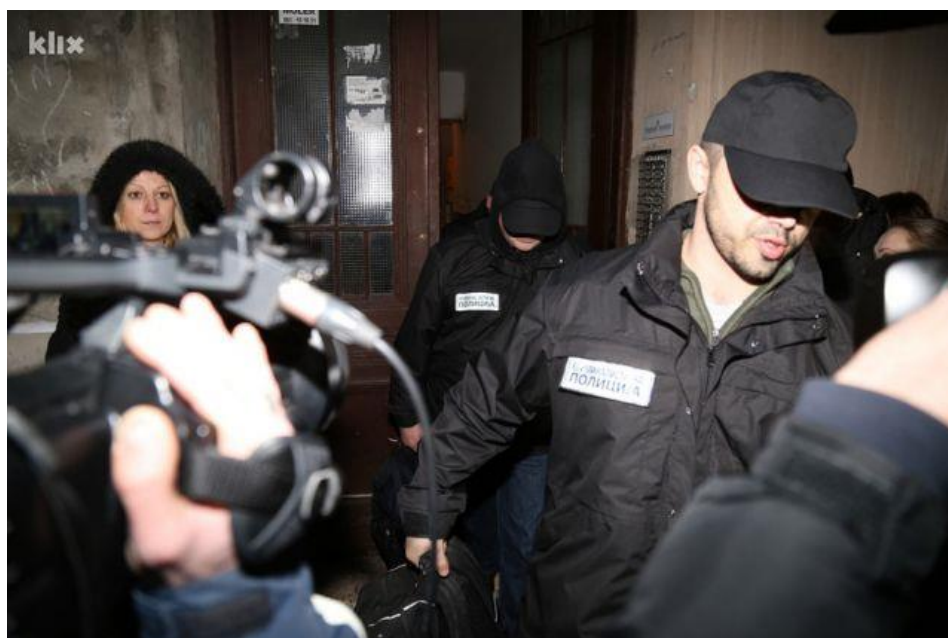
ECHR verdict also determined that “criminal verdict against journalists due to usage of hidden cameras aimed to detect misused actions in the branch of insurance was the question of public interest and that such verdict had violated the right of freedom of expression in this sense”, including the fact that the violation of privacy of insurance officials in their offices “was not sufficient enough to overrule public interests”.

Was there any issue in all Bosnian cases listed in this article, in terms of questions that should have been treated as public interest issues and were media representatives that had been collecting hidden recordings (in affairs such as “Two Geezers”, "Goran Salihović“, "Calking", "Asim", "Ajanović and Čavka"...) violating the law or were they simply doing this in order to please public interests?

Instead of answering this question (despite the fact that the answer is well known and undoubted) let us conclude that in this cases there is a confrontation of two permanently counter principles: on one hand there is a governing principle at any level or stage; a governing principle aimed to protect its non – transparency, criminal, corruption and on the other hand, there is a public principle that uses media as their instrument requiring that everything that may be considered as public interest must

be available to general public, visible and classified, even if the information are gained in an “unfair” manner and way. It is clear and obvious that these two principles shall never get “close to each other” on voluntary basis, as well as the fact that their combat is unequal as long as there are repressive mechanisms and tools used by the governing official authorities and those that act and operate on their behalf, bring decisions and verdicts. “There can be no state without public”, claimed scientific and social public, and public interest is, as we can see from the quoted verdict by the ECHR, subordinately superior to any particular interest, including state interest, especially its interest is a violation of human rights of their own citizens.

Media has for a longer period of time (both in scientific and legal cycles) been treated as the fourth pillar of governance, along with parliamentary judiciary and executive governance. According to few cases listed above, it becomes clear that they are being denied their rights by using all legal, illegal and repressive means in Bosnia and Herzegovina.





“As it has been indicated through several decisions, the Strasbourg Court and Constitutional Court of BiH, the point is to provide the balance between the burden of privacy rights and legitimate goals that tends to be accomplished and thus please general public interest. This is rather complex situation which is by all courts treated individually”

“It does not matter what was recorded, it matters who records it and how it is recorded”

By: Arben Murtezić

Vast majority of public would, just as this article is titled, describe the situation, particularly formal procedures and processes that followed after the releasing of certain recording, whose authors sometimes remain unknown, however the perpetrators are on one hand, holders of high public functions in different governing levels. On the other hand, those, less known or famous characters become famous and have 15 minutes of their unwanted and undesired glory.

I am convinced that the former comment would mostly be posted with more or less bitterness. Even the genuine, for some reason commonly – accepted, saying: “It is not important what, it is important who...” somehow seems controversial and litigious and through the introduction of ad hominem principle, it does attract the attention from the core of the issue. Along with this, when we add the process questions and human rights issues; it appears that we have entered the woods where we struggle and fail to see trees inside it. However, the question of recording and using the footages is indeed rather complex question and its complicity does not, as many often believe, derive as a result of mishandling the process by main holders of judiciary institutions.

Strictly controlled procedure

Although from this particular point of view, we refer to recordings made by citizens (including journalists), I shall remind you what the situation with recording is, as far as special operational actions taken by the police official authorities is concerned in regard with this particular and rather sensitive issue. Namely, Law on Criminal Procedure of the FBiH defines that technical recording may be confirmed and approved only if there are no other ways required to collect necessary evidence or if their collection would be related to incommensurate and disproportional difficulties and this would only apply to criminal offences that result in prison sentence lasting up to three years of imprisonment or even longer sentences, but only if the prosecutors’ office manage to elaborate and explain its recommendation that would eventually allow and approve such recordings. This particular recommendation should, among other things, contain reasonable doubts, reasons, manner, ways and duration of action.

Court practice, especially during most recent period, does insist on thorough and concrete elaborations and explanations of every mandatory element of the recommendation and there have been any cases where insufficient and explained requests had been refused and rejected. Furthermore, the duration of such actions is strictly defined, including the process of material destroying and the impossibility of using random findings. It would appear interesting (if there were enough space provided), in this particular context, to analyze and make parallel between associated investigative operations and actions, and that would contain the use of undercover investigation agent that would not be allowed to take any actions whatsoever that may encourage the committing of crime offence.

Therefore, even after viewing these provisions, we may clearly see that the procedure itself is strictly controlled and aimed to particular and special cases only. Recordings may thus be used only if it is really necessary and can last only for a specific and particular period of time.

However, not even these provisions have served as endorsements to the Constitutional Court of Bosnia and Herzegovina confirming that interference into privacy would be limited to a specific measure, considered as strictly requested and necessary measure, required for preserving and sustaining democratic institutions, because they have enabled the exceptions to turn into regular rules and special operational and investigative actions have been used in a significant number of cases, so some of the key provisions of the state Law on Criminal procedure, proclaimed as unconstitutional, but still demanding larger specificity of provisions that would at the end, result in more strict and limited implementation of special investigative operational actions, which has, from legislation point of view, been obeyed with the implementation of amendments of the law that accordingly followed.

Apart from legal framework that has here been exposed in its shortest possible form, in order to attain a complete picture regarding special attention and procedure and process strictness that courts use when they approach the evaluation and assessment of the evidence (in terms of legal point of view), gained by technical recording, it would be necessary to separate few cases from numerous number of verdicts with associated evidence and proofs that were collected by official figures, declared as illegal. However, I still believe that even this is sufficient enough in order to have better and more comprehensive understanding why courts hesitate to use recordings that unauthorized entities make.

Local courts practice

Sensitivity related to jeopardizing the privacy has been adopted by the Constitutional Court of BiH by its older brother; namely the Strasbourg Court that had in the past passed several verdicts (including various types of recordings, including the case of office recording) determined and described as the violation of Article 8 of the Human Right Convention, that is, the right to privacy. However, the problem is that the practice of Strasbourg Court which indeed does provide answers to many questions, with our judiciary system regularly, does not provide the answer to central questions and this is the question of the possibility of using are recordings that had been recorded by persons that were not particularly authorized. This is because they tend to strictly obey the legal and law principles upon which they evaluate and asseed the righteousness of the entire procedure. Of course, Article 8 of the Convention cannot (in this context) be mentioned without its eternal counter – rival; namely Article 10 of the Convention, that guarantees freedom of expression, including the right of providing and reviving the information and whose good spirit would protect investigative reporting and on the other hand, it would scare highly ranked public figures in their own offices. It is the implementation of Article 10 that was approved by the Elemental Court, and later in the process (during the appeal), approved by the District Court of Banjaluka, during the court decision that had set free the FTV journalist who was indicted for illegal recording.

In BIH, local courts have implemented the views provided by Strasbourg court officials, which have described journalists as special and constituent parts of democratic society, and narrowed the right of privacy to holders of public functions on the other hand. Therefore, there are many questions, issues and limitations, as far as using of recordings is concerned in criminal process and this derived from strict and formal character of the procedure itself.

However, as it has been indicated through several decisions, the Strasbourg Court and Constitutional Court of BIH, the point is to provide the balance between the burden of privacy rights and legitimate goals that tends to be accomplished and thus please general public interest. This is rather complex situation which is by all courts treated individually.

At the end, I must emphasize, unlike recordings conducted by the official police authorities, which (naturally because of completely justified reasons and with and as part of special and academic branches) gained more attention that would again result in more results, this question still remained rather undiscovered. Having in sight its significant rise, the initiating discussion about this specific issue has multiple benefits and more notable focus will definitely follow.





“Whether the prosecutors would prosecute journalists that by unauthorized recording managed to discover something that may be considered as general public interest, especially when these discoveries clearly outline more significant discrepancies than the unauthorized recordings? It is the question of processing politics, but the prosecutors should act in most professional way in terms of balancing whether any unauthorized recording does imply the violation of protected goods that should be followed by legal action”

Secret recording may be indictable, however it is sometimes necessary

By: Vanja Stokić

“Hidden and secret recording devices may serve as important journalists’ tools, especially as far as investigation journalism is concerned. Although, the use of such devices distorts the privacy of persons being recorded; investigative reporting can justify such recording mostly when it comes to stories that are considered as public interest that journalists reveal in terms of misuses“.

These are the first lines of the “[Pravo na tajno snimanje za potrebe istraživačkog novinarstva](#)“, that was published by the Action for Human Rights, a non – governmental organization from Montenegro. It consisted of the analysis of the verdicts passed by the European Court for Human Rights, regarding the cases where journalists had been secretly recording, in order to reveal information important to general public. For instance, in “Halidmanann and others Vs Switzerland” case from 2015, four journalists involved in this case were fined, because they had been secretly recording insurance broker; whereas they managed to prove and confirm that insurance brokers had been deliberately advising their clients falsely and in a wrong way. When they appealed before the European Court for Human Rights against the verdict, the Court reconsidered and altered the initial verdict thus determining that the journalists had been denied fundamental rights to freedom of expression.

In 2006, in “Radio Twist Vs Slovakia” case, journalists were allowed to post a secret audio recording revealing a phone conversation between government vice president and highly ranked government officials, regarding the issues of privatization of public enterprise process.

“Local courts determined that even public figures were entitled to privacy protection and that the posted audio recording was private and should have thus not been broadcasted. European Court for Human Rights disagreed with such view and ECHR officials stated that this controversial phone conversation, held between two highly ranked government officials, was indeed related to public interest issue, namely, managing and privatization of public enterprises”, stated the analyst of the above mentioned court decision.

“Two geezers” and diploma buying

Klix.ba, a local web site had in 2014 posted an audio recording footage, where Zeljka Cvijanovic, a former prime minister of the Republic of Srpska, was talking about bribing several members of national assembly, in order to (by using their votes) attain a parliamentary majority, required to form a government, that is, the issue concerning the corruption in the Republic of Srpska national assembly.

She then referred to assembly members as to “geezers”, and ever since this affair had become known as the “Two Geezers” affair. Audio recording footage was accordingly forwarded to Klix.ba administrators that soon posted it on their web site, but they immediately became a subject to pressure by certain institutions. Namely, Ministry of Interior of the Republic of Srpska and Sarajevo Canton (the Police officials) searched Klix.ba premises, took mobile phones from editor-in-chief and director, including the taking of 19 hard disks thus disabling 19 personal computers from being operative and functional.

Dutch special team of forensics later determined that the controversial audio recording was authentic, but Prosecutors’ Office of BiH has never launched an investigation about this particular case.

After having discovered the buying of diplomas in 2019 in Bosnia and Herzegovina by applying secret audio recordings, Azra Omerovic, a “Zurnal” female reporter and journalist was interrogated at the Prosecutors’ Office of BiH premises and sources were in her case thoroughly checked. In 2020, the indictment raised against three persons involved in this case was confirmed.

Ivan Zada from Croatia was sentenced to four months on parole because he was making an unauthorized audio recording of official phone conversation held with HDZ parliament member. The recording was not posted or broadcasted; instead the transcript of this conversation was revealed, where member of the parliament was openly threatening the journalist.

“The verdict was enormously draconic. The female judge completely omitted and ignored the general public interest in this particular case and obviously neglected the fact that the parliament member was a public figure, which meant that there was no privacy when he was talking to me, because I did introduce myself and clearly outlined that I was journalist. She also underestimated the fact that I had more reasons to be concerned about my safety because his son was also threatening me twice. His son had previously been legally indicted and sentenced for an assault against the police officers and was sued for violence several times”, stated Zada during his interview with Deutsche Welle reporters and journalists.

Unauthorized recording is indeed illegal

Ugljesa Vukovic from Transparency International BiH organization remanded that criminal legislation of Bosnia and Herzegovina recognized unauthorized recording and voice recording as criminal offense.

“Legislator envisaged that anyone must be fined and punished if she or he uses special devices to overhear or make voice recording or even a statement which is not intended for her or him; or anyone who enables the uninvited person to take part in conversation or a statement that has been recorded in an unauthorized way or recorded statement. Important part of this part is that this is all about unauthorized recording and unauthorized recording is any recording which is being conducted without an approval or consent of a passive subject. Naturally, recording is allowed without a consent or approval, but only for the purpose of launching a criminal deed investigation or for the protection of country security and safety. However, these circumstances are clearly defined by the legal provision and law”, outlined

Vukovic.

As far as the relationship between the institutions towards journalists that collect information by secret recording is concerned, he reminded that official investigation authorities have been announcing that they shall certainly sue and indict journalists that manage to identify and detect any discrepancies by recording that may be considered as illegal and unauthorized. The outcomes of such announcements still remained unknown to me.

“It is still the question of how the prosecutors would assess the case and it then becomes the politics of criminal indictments. Whether the prosecutors would for instance prosecute journalists that by unauthorized recording managed to discover something that may be considered as general public interest, especially when these discoveries clearly outline more significant discrepancies than the unauthorized recordings? It is therefore the question of processing politics but the prosecutors should act in most professional way in terms of balancing whether any unauthorized recording does imply the violation of protected goods that should be followed by legal action, especially when it concerns the persons involved”, warned Vukovic.

Aleksandar Jokic, a lawyer, has not so far faced the cases where journalists have been collecting crucial information in this particular way. He outlined that this was not about whether journalists were allowed to record, but rather whether such evidence and proofs could be used in criminal and civil legal lawsuits.

“By law, these proofs and evidence are collected by special investigative actions and operations that are particularly defined by court officials. Therefore, I would personally say that if I happen to come across such evidence and proofs, I would treat them as illegal and accordingly would not use them in legal procedures”, claimed Jokic.

Public interest above anything else

In „Preporuke za zaštitu privatnosti u izvještajima medija“ publication, posted on BH Journalists official web site, it is outlined that journalists should apply secret and hidden recording only after they had used all other methods and when such cases concern public interests in particular.

“Secret recording in hidden investigation, whether they are conducted by media or conducted with the help of other entities, should be used only when there are no other, reasonable and less intrusive alternative way required for collecting evidence and proofs regarding serious offences. Secret recording or hidden investigation may be used only after fundamental assess of case circumstances has occurred, particularly its relevance for general public and in case of existence of less intrusive methods required for the collection of necessary information. The decision for applying secret reporting investigation should be brought at the highest possible level of media management”, they claim.

Also, media should sustain from illegal intercepting of phone calls and conversations or hacking other electronic devices, regardless whether they do it on their own or with the help and assistance of others.

“The content of private communication by politicians that is being recorded from the screens of electronic devices by using other objectives or conversations overheard from a distance by using long- range microphones, media specialists can use under special circumstances when there is a public interest that prevails (in cases of corruption or defalcation or peculating with highly ranked politicians being involved) and if these information cannot be collected or possessed by any other way applicable which is less intrusive. Even under special circumstances and conditions, the decision of applying video or audio recording that would eventually be revealed, released or posted must be approved at highest possible level of executive media managing”, it states in this publication.



“Recently, there have been more criminal cases discovered by journalists, rather than being detected by the police official authorities. However, it is concerning that journalists have consequently been subject to prosecutions, that is, they are constantly called to interrogations and asked to testify regarding their video and audio recordings, including the circumstances under which they had discovered and detected particular cases”

If video/audio recording reveals crime committed, public interest should be before private interest instead

By: Zinaida Delilović

“As soon as I heard that your wife is overheard, I decided to let you know immediately”. This statement was heard on video recording, which was posted on Slobodna Bosna portal. It would have not been strange and unusual if this statement was not forwarded to Oleg Cavka, a state prosecutor of BiH by Muhamed Ajanovic, the Dean of Dental Medicine Faculty at the University of Sarajevo. Slobodna Bosna managed to, within the 16 seconds of this video recording, to reveal real picture and situation within judiciary system of BiH. Although the video recording was released with the purpose to (once again) demonstrate and display the principles upon which the BH judiciary system is based on, the entire burden for “blame” was (again) directed against the media houses that had released and posted it in the first place. This time it happened to be Slobodna Bosna.

“No permit is required when recording is to be done in public”, claimed D. Markovic, former BH prosecutor, during the meeting session of the Temporary Investigative Commission aimed to determine the situation in BH judiciary system (held on 26 August). He also added that everything depends on “how the prosecutor would treat it”.

Still there are those that would disagree with this particular view and opinion, that is, they rather interpret this specific legal provision in different way. This is how Milan Tegeltija, chairman of the High Court and Judicial Council of BiH, while being interviewed at FACE TV, assessed that the public releasing and posting a conversation between Ajanovic and Cavka represented a “crime”. His statement and claim should not surprise anyone because certain official judiciary representatives have recently clearly demonstrated that investigative and research media based journalists disturb and annoy them instead of having them as their support.

Interrogation of journalists at Prosecutors’ Office



Novinar Žurnala: Gospodine Pehlivanoviću, nažalost niste uhapšeni. Mi smo ovo završili samo da pokažemo da radite ovaj posao.

I can't actually recall when was the last time the officials at the Prosecutors' Office of BiH launched an investigation based on investigative journalists' story. However, I do remember quite well the interrogation of Azra Omerovic, female "Zurnal" journalist. She had opened a Pandora Box of the educational system in BiH, by releasing and posting in public video recording called "How to buy a diploma in 17 days for BAM 2.500.00"

Azra managed to get the phone number of a "mediator", that is, a person involved in a diploma buying (Senad Pehlivan, a person that was indicted at the prosecutor's office of Una – Sana Canton). She called him and introduced herself as a person who was willing to purchase a high school diploma (Medical High School) from Sanski Most. She managed to record this conversation with Pehlivan and released it later on. Soon after this, she was called to Prosecutor's Office (summon was signed by Oleg Cavka, a state prosecutor). Oleg Cavka was interrogating Azra Omerovic for nearly 4 hours, since she had previously agreed to appear and cooperate with prosecutors. He was mainly interested in two things: how did she get the information and how did she get Senad Pehlivan's phone number.

"Prosecutor Cavka had, deliberately or not, completely forgotten about Article 82 of the Law on Criminal Procedure of BiH which clearly defines that "no person can be interrogated as a witness that by her or his testimony may violate the duty of holding classified information which includes religious clerk, confessor, and journalists keeping the source of the information classified".

Oleg Cavka tried to act similarly with Ana Malbasa, female journalist of "Provjereno", NOVA TV show; however, Croatian judicial system managed to protect her. Namely, Malbasa also tried to get in touch with the person that was a mediator in buying diploma papers. He wanted to have a sex with her in return. Prosecutors' Office of BiH, through international legal aid, demanded that she should be interrogated in Zagreb. However, Zagreb County Court officials advised Ana Malbasa that she may (should she wanted to do so) refuse to testify in order to protect her information sources, which was exactly what she did.

These kinds of actions by Oleg Cavka should not surprise anyone if we take into consideration the statement delivered by Gordana Tadic, a chief prosecutor of Prosecutors' Office of BiH in April 2019, when she openly addressed media representatives claiming that they should inform Prosecutors' Office or the Police official authorities about their investigation regarding criminal, misuses, intelligence affairs and similar and associated occurrences, before they release them in public. This of course included all the evidence and proofs they manage to get! It seems common sense, doesn't it?

I shall quickly refer to Croatian judicial system and their view regarding the case of Ana Malbasa, female journalists. Their reaction in this particular case deserves all compliments; however, we should not forget how they had reacted in Ivan Zad's case (who was on parole) (conditional discharge),

because he was apparently illegally recording phone conversation of HDZ (political party) member of state parliament.

During the “Diploma” and “Calking” affairs, with general public “droning” about them, it seemed that everything was actually about criminal deed and unauthorized recording, notice Mirjana Marinkovic – Lepic, member of the Temporary Investigative Commission for determining the situation in BH judiciary system.

“Unauthorized recording is actually the action of recording someone at her or his premises. This is something that characterizes and describes this criminal deed, but we have seen, despite the former, that everything still depends on how prosecutors or judges assess the situation. We had the opportunity, during the interrogation of former prosecutor with the Prosecutors’ Office of BiH (interrogation was conducted by the members of the Commission) to hear comments that there was no dilemma whatsoever with this particular deed. Therefore, it is unambiguous that if someone was being secretly recorded in public, the case cannot be treated legally as the above described criminal deed”, claimed Marinkovic – Lepic.

She added that recently, there have been more criminal cases discovered by journalists, rather than being detected by the police official authorities. However, it is concerning that journalists have consequently, been subject to prosecutions, that is, they are constantly called to interrogations and asked to testify, regarding their video and audio recordings, including the circumstances under which they had discovered and detected particular cases.

“As far as private and public interests are concerned, the protection of privacy is one of the fundamental human rights, but in these cases (the two above mentioned and listed affairs) we should observe the issue through the definition constellation and unauthorized recording. If unauthorized recording occurs in her or his premises it clearly represents a criminal deed. On the other hand, if video or audio recording, (at the same time obeying these law provisions), reveals criminal deed, it should thus be considered and treated as genuine public interest and it should accordingly be taken as evidence and initial point in regard with launching legal investigation”, concluded Marinkovic – Lepic.

Investigation, research, survey or criminal offence

Nermin Alesevic from Velika Kladusa wanted to prove on what principle has BH Judiciary system operated by making video recording footage which was later known in the public as the “Calking” affair.

“If I hadn’t made this particular video recording, no one would have believed that I was sitting at the same pub table with Milan Tegeltija”, Alesevic “complained” once to local journalists.

Exactly – no one would have believed that Tegeltija, while sitting at the local pub had said: “Nermin, send me the case file number so I could see who was involved in it and I will then let you know what I can do about this particular case”.

Tegeltija was in this case a witness, and Aleskovic was charged for unauthorized recording.

All three above mentioned video recording cases perhaps best displayed the shape of BH judiciary system, at least on state level, because we should still not forget the reaction by Una – Sana Canton Prosecutor's Office that had, based on media reports, launched an investigation regarding false diploma papers.

We asked Dzana Brkanic, a Balkan Investigative Network in BiH (BIRN) official, what makes journalists decide to make secret recording and she claimed that the decision of making such secret action does indeed demonstrate a serious undertaking.

Consulting with a director is obligatory before any BIRN journalist decides to go for secret recording, regardless to whether we refer to justifying the use of such methods and techniques or whether we talk about public interest, including whether the organization could be sued and indicted for uncertain and insecure “investigative undertaking actions”, or, at the end, whether there is a possibility that the organization could be sued or indicted for instigating and encouraging its employees to conduct a criminal offence. I personally always introduce myself and clearly point out that I am a journalist and never invite them for an “informal chat”. If I happen to record phone conversation, I indicate that as well, and every single time I ask my collocutors (interviewees) if I have their permission to publically reveal their full names as part of their statements, that is, part of our interview. Also, I introduce myself with full and correct information about myself, because the organization that I work for works on high ethic and professional principles, stated Brkanic.

BIRN Guideline covering required details about journalist' work clearly defines that projects including secret operations (such as hidden video or audio recording) can be conducted only with manager's previous consent and approval. As part of its assembly, there is a lawyer at BIRN whose task is to check the investigation and legally sensitive issues. Also, before certain text, article or post is revealed, released, published, posted or broadcasted, extremely controversial stories and interviews, including complex and complicated investigations, surveys or researches have to undergo additional checkups, controls and supervisions by chief-in-editors and directors before they finally get their approval.

- I personally consider any unauthorized recording as rather sensitive issue, unless under special circumstances when the releasing of such information would clearly serve general public interest with the purpose of detecting and revealing corruption or some other kind of criminal offence, added Brkanic.

She also added that some verdicts (passed by local courts), released journalists from criminal offence indictments, in regard with unauthorized recordings, such as the case of Damir Kaletovic, who was set free according to the Second Instance verdict passed by Banjaluka District Court council. Council members claimed that “the journalist was entitled to free expression pursuant to Article 10 of

of the European Convention on Free Expression, taking into consideration that Vitomir Popovic was public figure at the time also performing public function”.

- On the other hand, some colleagues that had released and broadcasted secret recordings failed to confirm the identities of persons they had been recording, so one should be very cautious and careful while submitting the recording to her or his editing office superiors, as far as the information sources are concerned. BH judiciary institutions have for years failed to indict, sue and legally process “big fish”, so therefore certain recordings, that had been posted in public, clearly indicating illegal discrepancies or criminal deed committed, have been left unprocessed and completely ignored by judiciary official authorities. Along with that, the system of checking the origin of assets for judiciary officials and politicians still does not exist in BiH, unlike in Albania. During the period of last three years, Albania has, by applying the “vetting” system and by checking the origin of assets, managed to dismiss over 100 managing judiciary officials, while at the same time judges and prosecutors in BiH have managed to find the ways to postpone the submission of their assets cards. This is what makes journalists’ work even more difficult (particularly those that cover this specific area) in terms of getting certain information under these circumstances in our country, even including secret recording which in this context is absolutely justified. According to my personal experience and while presenting stories that Balkan Investigative Reporting Network was working on in BiH, during the workshop where many judiciary and court official representatives were present, we were told that it would be better if we would send sensitive information to prosecutors’ offices in the first place, rather than releasing or posting them in public. Although this may sound acceptable on one hand, on the other hand it could result in a total failure because **one of the participating prosecutor (publically) asked the journalists to do his work instead of doing it himself**, concluded Brkanic.

The situation in local judiciary system in BiH has never been as chaotic as it is now. Mr. Markovic, a Former prosecutor, who had been working for 40 years, perhaps best explained what caused the creation of such chaotic environment in judiciary system in BiH. In front of Investigative Commission he stated the following: **“We face the situation where the reality is created and today we believe that certain cases are proved and confirmed if they are presented and displayed in most convincing way, rather than presenting the actual and true situation”**.

Certain judiciary officials, from time to time, should be reminded of what people often refer to as general public interest, including Article 1 of the Press and Online Media Code in BiH clearly stating that: *“The public interest, according to this Code, is defined as the procedure and/or information which has the intention of helping the public create personal opinions and decisions about issues and events, including the efforts to detect criminal and/or civil offenses, and to prevent the seduction of the public by certain statements or actions of individuals or organizations.”*