

DEJAN LUČKA

ANALYSIS

OF SPECIFIC JUDGEMENTS RELATING TO
DEFAMATION IN CIVIL LAWSUITS
IN BOSNIA AND HERZEGOVINA, WITH AN
OVERVIEW OF DEFAMATION CRIMINALIZATION
IN THE REPUBLIKA SRPSKA

BH JOURNALISTS ASSOCIATION

2023



This analysis was conducted with the support of the US Government through the United States Agency for International Development (USAID)'s program for supporting independent media in Bosnia and Herzegovina (MEA), implemented by Internews in partnership with FHI360 and local partners.

The creation and publication of this analysis were also made possible through the generous support of the American people through USAID.

The content is the sole responsibility of the BH Journalists Association and does not necessarily reflect the views of USAID or the US Government.

Dejan Lučka

ANALYSIS

**OF SPECIFIC JUDGEMENTS RELATING TO
DEFAMATION IN CIVIL LAWSUITS
IN BOSNIA AND HERZEGOVINA, WITH AN
OVERVIEW OF DEFAMATION CRIMINALIZATION
IN THE REPUBLIKA SRPSKA**

2023

CONTENT

INTRODUCTION	5
I FACTUAL BASIS OF CASES AND COURT DECISIONS	6
1. The Capital.ba Case	6
2. The Helać Case	8
3. The Centar Case	11
II ANALYSIS OF COURT ASSESSMENTS	13
1. The Capital.ba Case	13
2. The Helać Case	18
3. The Centre Case	26
4. Differences in Court Proceedings	33
III TWO DECADES ERASED – CRIMINALIZATION OF DEFAMATION	37
CONCLUSION	41
LITERATURE	42
1. Law	42
2. Case Law	42
3. Publications and Texts	43

Abbreviations:

Analysis – Analysis of certain judgments related to defamation in cases where journalists and media houses are defendants

BiH – Bosnia and Herzegovina

European Convention; ECHR – European Convention for the Protection of Human Rights and Freedoms

European Court; ECtHR – European Court of Human Rights

FUCZ – Federal Administration of Civil Protection (*Federalna uprava civilne zaštite*)

Committee – United Nations Human Rights Committee

ICCPR – International Covenant on Civil and Political Rights

The Capital.ba Case – Company Dwelt d.o.o. and Stefan Krneta v. the Association for the Promotion of European Standards and Improvement of the Business Environment and others

The Helać Case – Kadrija Kolić v. Arijana Helać

The Centre Case – Suad Suljić v. Centre for Creative Activities and others

INTRODUCTION

The Analysis of Specific Judgements Relating to Defamation in Civil Lawsuits in Bosnia and Herzegovina, with an Overview of Defamation Criminalization in the Republika Srpska (hereinafter: the Analysis) represents an examination of specific rulings concerning defamation within the legal system of Bosnia and Herzegovina (hereinafter: BiH), involving journalists and media as the defendants.

Three (3) judgments related to defamation cases in Bosnia and Herzegovina were examined as part of the Analysis. They include one first-instance judgment of the Basic Court in Banja Luka, one first-instance judgment of the Municipal Court in Sarajevo and one first-instance judgment of the Municipal Court in Tuzla.¹

The Analysis was conducted by comparing the above mentioned cases with relevant legal and constitutional provisions in Bosnia and Herzegovina and its entities, as well as with international instruments and standards for the protection of human rights, specifically the *freedom of expression*, especially in the practice of the European Court of Human Rights in Strasbourg.

All terms used in this text to denote the male or female gender include all genders in those parts of the text that are not gender specific and may refer to multiple genders.

¹ The first and third judgments are written on nine (9) pages of A4 format, while the second judgment is written on twenty-four (24) pages of A4 format.

I

FACTUAL BASIS OF CASES AND COURT DECISIONS

1. THE CAPITAL.BA CASE

In the case of ***Dwelt d.o.o. and Stefan Krneta v. Association for the Promotion of European Standards and Improvement of the Business Environment and others***² (hereinafter: ***the Capital.ba case***), it involved a defamation lawsuit filed against the association of the same name from Banja Luka. The plaintiffs in this case were one legal entity, Dwelt d.o.o., a company³ focused and highly specialized in developing a platform for the energy sector, and one natural person, Stefan Krneta, the founder and legal representative of that company.

The plaintiffs believed that the *Capital.ba* portal caused damage to the company Dwelt and the natural person Stefan Krneta with certain allegations. Specifically, the *Capital.ba* portal reported on the public procurement process initiated by a public authority, involving the procurement of software for billing electricity services to end customers. The plaintiffs stated that the aforementioned portal published nine articles about the subject in question, and Stefan Krneta was identified in each of those articles as the son-in-law of the former minister in the Government of the Republika Srpska, Ranko Škrbić, and Dwelt as the company of the son-in-law of the former minister in the Government. The plaintiffs believed that false, tendentious and malicious claims were presented and conveyed, asserting that the contract award was illegal, corrupt and a result of illegal political influence, thereby continuously damaging the business reputation of Dwelt and the personal reputation of Stefan Krneta.

The actual articles reported on the allegations that Dwelt company and Stefan Krneta, together with a public company, had used every possible attempt to implement the agreed software worth several million BAM, and that the competent institutions annulled it due to illegality,

² *Presuda Osnovnog suda u Banjoj Luci no. 71 O P 34645221 P*, [Banja Luka: 31/10/2022].

³ In the following text, the term “company” will be used as a synonym for a business entity, specifically a limited liability company.

following a report from another company, i.e. that the distribution of state millions under suspicious circumstances was opposed by another company, which managed to prove that the procedure was irregular, and this was later confirmed by the Court of Bosnia and Herzegovina. However, this claim was not true because, at the time when the article was being prepared, the Court of Bosnia and Herzegovina had not yet made a decision in that case. When the decision was eventually made, it contradicted the content stated in the article.

Additionally, the articles stated that the plaintiffs had managed to persuade the company that filed the complaint to withdraw it, but too late. It was also emphasized that the plaintiff's son-in-law is a former minister in the Government of the Republika Srpska, and the negotiating process with another plaintiff was not conducted with due notifications and transparently, under the pretext of urgency.

One article also stated that the state-owned company is initiating a "royal court-like IT companies with a tender of 7.7 million BAM", mentioning that this state-owned company issued a tender for the implementation of software to support business processes for its affiliates, saying that this would be a "custom-made job" for Dwelt and Stefan Krneta, who is the son-in-law of a former minister and collaborates closely with the state-owned company and its affiliates.

The court dismissed the plaintiff's claim in its entirety as unfounded. The plaintiffs are jointly obligated to reimburse the defendant for legal costs in the amount of 1,780.00 BAM.

2. THE HELAĆ CASE

In the case of **Kadrija Kolić v. Arijana Helać**⁴ (hereinafter: **the Helać case**), a defamation lawsuit was filed against Arijana Helać from Sarajevo. The plaintiff in this case was the natural person Kadrija Kolić, who is a lawyer and public figure. The plaintiff believed that the defendant had damaged his reputation, honor, and dignity with an alleged defamation when the defendant stated in a TV show on the N1 channel on May 18, 2020, while commenting on current events, that the plaintiff had sold a vehicle worth one million BAM (a multifunctional vehicle for crowd control) to the Ministry of Internal Affairs of the Sarajevo Canton.

Appearing as a guest on N1 television, Arijana Helać responded to the journalist's question by commenting public issues such as the "Respirators" and "Asim" cases, and the state of "crime" in relation to the public procurement procedures concerning these events, which are subject of significant public attention, therefore in the public spotlight. The defendant made the following statements, among others:

"There is a lot of crime, almost everyone is involved, many political parties, and it doesn't matter which anymore. For example, a lawyer, to circle back to the first topic, Mr. Kolić, who is involved in many deals, I happened to come across a Decision by which he sold a car to the Ministry of Internal Affairs of the Sarajevo Canton, i.e. to the Police Administration, for million BAM, I wonder what kind of a car are we buying for a million BAM..."

The public procurement of a vehicle worth one million BAM did happen, but the company KM Trade was chosen as the most favourable bidder, not the plaintiff Kadrija Kolić, by the decision of the Ministry of Internal Affairs of the Sarajevo Canton. However, Kadrija Kolić is a co-owner of the aforementioned company KM Trade Ltd. After Kadrija Kolić's denial, the defendant posted a text on her *Facebook* profile stating that she doesn't understand what the problem is, that she simply quoted the decisions of the Ministry of Internal Affairs of the Sarajevo Canton regarding the most favourable bidder. She mentioned that she read a public document according to which the Ministry conducted a public

⁴ *Presuda Opštinskog suda u Sarajevu no. 65 0 P 843745 20 P*, [Sarajevo: 20/9/2021].

procurement of vehicles for special purposes and stated that the supplier was Kadrija Kolić because he is a legal co-owner of KM Trade.

One day after the defendant's controversial interview, Kadrija Kolić was a guest on a TV show on N1, where he was given the opportunity to refute the defendant's allegations, which he considered to be contentious. He also presented all the relevant facts regarding his relationship with the affiliated companies in which he is a (co)owner. On that occasion, he repeated and emphasized that the disputed contract with the Ministry of Internal Affairs of the Sarajevo Canton was concluded by KM Trade and not by him in the capacity of a natural person or a lawyer.

Also, Kadrija Kolić was the lawyer for Fahrudin Solak, the Director of the Federal Administration of Civil Protection (hereinafter: FUCZ /*Federalna uprava civilne zaštite*) and the head of the Federal Civil Protection Headquarters, who was suspended from these positions after journalists exposed the "Respirators" scandal.

Prior to the defendant's controversial interview, many journalists and media outlets questioned the business operations of the companies (co)owned by Mr. Kolić, as well as his relations, in his capacity as a lawyer, with individuals holding public office. In this context, the journalist's main question was whether the personal and business relationships that Kadrija Kolić had with public office holders had an influence on companies in which Mr. Kolić is a (co)owner obtaining lucrative jobs in public procurement tenders issued by various public entities.

In connection with this, they most often asked whether the business relationship between Kadrija Kolić, as the lawyer of Fahrudin Solak, had any influence on the fact that the company KM Trade, where Mr. Kolić is a co-owner, is often chosen as the most favourable bidder in public procurement procedures issued by FUCZ.

Journalists also questioned whether Kadrija Kolić is in a conflict of interest due to certain actions, what is the business of the companies in which Mr. Kolić is a (co)owner, as well as whether there is a connection between the company KM Trade and another company, which was awarded, when the COVID 19 pandemic already broke out, contracts worth more than 2,000,000 BAM by FUCZ.

The Court dismissed the plaintiff's claim as unfounded. The plaintiff is obliged to reimburse the defendant for the legal costs in the amount of 1,474.20 BAM.

3. THE CENTRE CASE

The case ***Suad Suljić v. Centre for Creative Activities and others***⁵ (hereinafter: **the Centre case**) involved a certain articles published on the *tuzlapress.ba* portal, which is owned by the association “Centre for Creative Activities”. The plaintiff in this case was a natural person – Suad Suljić, while the defendants were the association “Centre for Creative Activities” Tuzla from Tuzla, as well as Nedim Salaharević and Edin Skokić, also from Tuzla.

Namely, this portal published the article “Scandals that Marked 2020: Appointment of the Independent Board for the Evaluation of the Police Director’s work” in March 2021, containing certain statements about Suad Suljić.

The contentious article stated that a criminal proceeding was conducted against Suad Suljić, that Suad Suljić is “known as the lawyer who participated in the transaction of the Bosnafarm pharmaceutical company and registered it under the name of the homeless Sabalahajrudin Suljagić”, and that “one of the representatives is protecting Suljić in the TC Assembly”. The fact that the article presented truthful information to the public – the lawyer Suad Suljić being appointed to the Independent Board of the Tuzla Canton Assembly – was not disputed. However, Suad Suljić deemed other information as false and defamatory. Additionally, Suad Suljić was referred to as a “clown” on one of the defendant’s *Facebook* page.

Invoking the provisions of the *Law on Protection Against Defamation of the Federation of Bosnia and Herzegovina*, Suad Suljić demanded that the defendants publish a rebuttal on the same internet portal, which the defendants complied with.

Mr. Suljić believed that the defendants acted solely with the aim of causing harm to him as a citizen and a lawyer, since, in his opinion, they based the entire article on inaccurate, false and unverified information that defamed him.

The defendants believed that there was no element of defamation in the specific case, that there was no intention to defame Suad Suljić, and that their only goal and intention was to objectively inform and acquaint

⁵ *Presuda Opštinskog suda u Tuzli no. 32 0 P 398723 21 P*, [Tuzla: 31/5/2022].

the public with the truth. They also believed that they had the right to present their value judgment and their opinion, which they considered applicable in this case.

The court ordered the defendants to jointly pay the plaintiff the sum of 2,000.00 BAM as damages for defamation, with statutory default interest, and to publish the judgment on the internet portal *www.tuzlapress.ba* once it becomes final, as well as to reimburse the plaintiff for the legal costs in the amount of 1,060.00 BAM.

II

ANALYSIS OF COURT ASSESSMENTS

1. THE CAPITAL.BA CASE

The Basic Court in Banja Luka assessed that it was undisputedly established among the parties that the texts for which the defamation lawsuit was filed were indeed published.

In its assessment of the *Capital.ba case*, the Court referred to Article 10 of the *Convention for the Protection of Human Rights and Freedoms* (hereinafter: the European Convention; ECHR), which concerns freedom of expression, and partly through interpretation, albeit not directly, referred to the standards developed in the practice of the European Court of Human Rights (hereinafter: European Court; ECtHR). However, although it is noticeable that the Article from the European Convention protecting the freedom of expression is cited, the Court did not specifically refer to certain cases and established standards from the practice of the Strasbourg court, nor did it cite the paragraphs in the judgments in which these positions are stated, which is one of the shortcomings of this judgment.

The Court also referred to the *Law on Protection Against Defamation of the Republika Srpska*, the *Constitution of the Republika Srpska* and the *Law on Contracts and Torts* in its decision.

Although the plaintiffs argued that the disputed texts contained *falsehood*, that the first plaintiff is a *royal court's* company, that the second plaintiff is identified as the *son-in-law* of a former minister, rather than as an IT expert, and that they are awarded valuable contracts in the IT sector in a non-transparent manner because of this, the Court correctly assessed that the three publications in question do not constitute a defamation of the plaintiffs' reputation. Specifically, even though the *accuracy of the news was not confirmed*, the texts **were not of such a nature** as to *cause a decline in the plaintiffs' reputation* in public. Namely, the disputed articles concern the business activities of the first plaintiff, i.e. the company Dwelt in the energy sector. Until now, Dwelt had no references outside the energy sector, and as it is the only company in this part of Europe engaged in the production of a specific platform in question, its *business activity was not threatened* by the disputed writing.

It has been determined that *Capital.ba* accurately stated that the public company's tender awarded to the company Dwelt was cancelled by the decision of the Appeals Review Commission. However, the Court also noted that *Capital.ba* falsely reported that the BiH Court confirmed this decision, because at the time of publication, this Court had not yet made a decision, but rather made it later, and with the opposite content. Nevertheless, according to the Court's assessment, this news, *although untrue, was not of such a nature as to harm the plaintiffs' reputation*. In this regard, the Court pointed out that *Capital.ba* is a business portal whose activity involves reporting business opportunities in BiH, and to point out the shortcomings and illegalities of business operations.

The Court also stated that a later article (dated January 26, 2021) contains facts that are repeated from previous articles, with the difference that this article states the *correct factual situation* related to the cancellation of the tender that was the subject of the previous article in the sense that the Court made a decision annulling the decision of the Appeals Review Commission along with a scanned judgement of the BiH Court. According to the Court's opinion, this article somewhat corrected the incorrect information from the previous article.

As for the allegations regarding the family ties of the second plaintiff and the former minister in the Government of the Republika Srpska, the Court assessed that they are *not of such a nature* that they could harm the reputation of the plaintiffs. Namely, the title of the article indicating this familial connection may sound sensational, but if read with the rest of the text, it cannot harm the reputation of the plaintiff and is not something that could diminish the second plaintiff's reputation in the company. According to the Court, referring to Stefan Krneta as the minister's son-in-law is malicious, but it is **also a fact** that Stefan Krneta is the former minister's son-in-law, which he confirmed in his testimony. This is especially true since mentioning familial relationships and connections to the former minister is not a presenting or conveying falsehoods, so it cannot be considered defamation.

When it comes to the allegation that the company Dwelt is a "royal court's IT company", the Court assessed that the said qualification is not negative to the extent that it can affect the plaintiffs' reputation, as the text itself and the title *do not contain untrue facts* that damage the plaintiffs' reputation. Although this did not transpire, perhaps a connection

could be made here with the case of *Flux and Samson v. Moldova*, when the European Court held that sentences such as “a former state official is building himself a castle” and that “the former Minister of Construction, G. C. decided to become rich at the expense of the poor” represent value judgments, expressing the newspaper’s opinion about G. C.’s construction activities and the impact of those activities on his neighbours.⁶

As the activities of Capital.ba and its journalists are focused on **investigative journalism** in the field of economy and business, their very role is to *point out the positive and negative aspects of business*. Pointing out possible negatives in the awarding of tenders, the privileged position of certain companies, even *if they are sometimes untrue, cannot automatically be considered defamation*. According to the Court, such texts did not harm the plaintiffs’ business reputation in this case.

One of the Articles of the *Law on Protection Against Defamation of the Republika Srpska* states that, when the expression refers to **matters of political or public interest**, every person legally capable of doing business is liable for damages caused by presenting or conveying on the expression if such person *knew that the expression was untrue or negligently ignored the falsehood*. The same standard of liability applies if the injured party was or is a public official or a candidate for a position in a public authority, and, according to the general understanding of the public, has a significant influence on matters of political or public interest.⁷

The position of the European Court, which is not mentioned here, is that an important element in assessing the limitation of freedom of expression is the extent to which certain statements can contribute to a debate of public interest, and this is generally the primary criterion analyzing the proportionality of interference with freedom of expression in cases, for example, of defamation. Generally speaking, the statement’s contribution to a debate of public interest will reduce the state’s margin of appreciation.⁸

⁶ *Flux and Samson v. Moldova*, [Application no. 28700/03, 23 October 2007], § 24.

⁷ *Zakon o zaštiti od klevete Republike Srpske*, [Službeni glasnik Republike Srpske, no. 37/2001], Article 5, paragraph 3.

⁸ *Guide on Article 10 of the European Convention on Human Rights – Freedom of Expression*, [Council of Europe – European Court of Human Rights, Strasbourg: 2021], page 40.

The Court correctly notes that, in accordance with the aforementioned Article of the *Law on Protection Against Defamation of the Republika Srpska*, the untrue fact from the first article (dated December 29, 2020), stating that the BiH Court's decision confirmed the illegality of the tender awarded to the first plaintiff, is practically *disproved* by the defendant's truthful announcement in the article dated January 26, 2021, that the BiH Court did annul the decision of the Appeals Review Commission made in connection with the tender appeal.

Since damage to reputation is the very essence of defamation, meaning that the act of defamation consists of making a false or untrue statement regarding another person, endeavouring to destroy such person's reputation in the eyes of prudent members of society, the Court has determined that the defendant's expression *did not cause damage to the plaintiffs' reputation*. Namely, due to the mentioned content, the plaintiffs should not be exposed to hatred, contempt or ridicule and there is no reason for their reputation to suffer in the public.

In its rationale, the Court regarded the contested expression of the defendants as *stating their opinion* regarding the award of a tender to Dwelt by a public company. Furthermore, correctly applying human rights standards, it states that the plaintiff's expression refers to a **matter of public interest**, and not to issues from the plaintiffs' private life. Here, the Court could perhaps have referred to the practice of the European Court, which is related to the public interest, and which is based on the position that there is little room for limiting the "discussion of issues of public interest".⁹

The Court also assessed that the author of the expression is a business portal whose operations include monitoring business and economic trends, and that the proceedings established that the contested expression of the defendants represents *their value judgment*, or a *critical and analytical judgment*, which does not have the character of defamation and cannot be classified as a case of acceptable limitation of the right to freedom of expression, without the plaintiffs suffering any damage as a result.

It would also have been beneficial for the Court to refer to the practice of the European Court, which expresses the view that it is necessary to

⁹ See *Dichand and Others v. Austria*, [Application no. 29271/95, 26 February 2002], § 38–39.

make a careful distinction between facts and value judgments. The existence of facts can be proven, while the truthfulness of value judgments cannot. Also, the position of the European Court is that it would be unacceptable to prohibit a journalist from expressing a critical value judgment, except when they are able to prove their truth, which could also have been noted.¹⁰

Due to all the aforementioned reasons, the Basic Court dismissed the claim as unfounded.

¹⁰ See *Dichand and Others v. Austria*, § 42; *Dalban c. Roumanie*, [Requête no 28114/95, 28 septembre 1999], § 49.

2. THE HELAĆ CASE

The Municipal Court in Sarajevo assessed that the factual situation between the parties is indisputable and that it was established that the journalist Arijana Helać said the words in a broadcast for which she was sued for defamation. It was also undisputed that the plaintiff did not personally sell the vehicle in question to the Ministry of Internal Affairs of Sarajevo Canton, but a company whose co-owner is the plaintiff Kadrija Kolić. It was also undisputedly established that the plaintiff is a public figure.

Also, it was established that both before and after the defendant's appearance on the show, various media, i.e. internet portals (*klix.ba*, *tacno.net*, *zurnal.info*, *glasnaroda.com*, *vidiportal.ba* and others) questioned the manner of awarding contracts worth several million BAM to companies (co)owned by the plaintiff, and especially by FUCZ, whose director at the time was Fahrudin Solak, who was dismissed from his position after the indictment was confirmed for the "Respirators" case, in which the Prime Minister of the Federation of Bosnia and Herzegovina himself was accused.

It was further established that during an appearance on a show two days before the defendant's contentious statement, the show's presenter addressed the plaintiff as "the most sought-after new figure from the 'Respirators' affair". The plaintiff confirmed that the company KM Trade is "his", that he is Fahrudin Solak's lawyer, but he denied that Fahrudin Solak is also his business partner, since they know each other as neighbours. During the entire conversation, the plaintiff did not mention the *distinction* between Kadrija Kolić and the company KM Trade.

Moreover, the Court found that at the time of giving the contentious statement, the defendant held in her hand the Decision on the Selection of the Most Favourable Bidder for the "Procurement of a motor vehicle for special purposes", from which she read that the value of the said vehicle, inclusive of VAT, was one million BAM, which was sold to the Ministry of Internal Affairs of the Sarajevo Canton by lawyer Kadrija Kolić, although Article II of the Decision stated that the contract was awarded to the bidder KM Trade. In this regard, the Court found that the "document" held by the defendant in her hand while giving the contentious statement, had absolutely no mention of Kadrija Kolić, but the business company KM

Trade, of which Kadrija Kolić is the (co)owner, and it was not disputed that those facts are also known to the defendant.

The **dispute** in this case was whether the content of the contentious statement was *defamatory in nature*, i.e. whether it was a matter of presenting or conveying untrue facts or the defendant's opinion/value judgment about the plaintiff, i.e. the defendant's responsibility for damages based on defamation was disputed, and whether there are grounds for exonerating her from liability.

In the rationale, the Court refers to the provisions of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, the *Constitution of the Federation of Bosnia and Herzegovina*, the *Law on Protection Against Defamation of the Federation of Bosnia and Herzegovina*, the *Law on the Media of the Sarajevo Canton* and the *Law on Contracts and Torts*, as well as the practice of the European Court and legal theory in its decision-making.

In its conclusion, the Court stated that the defendant, guided solely by professional motives as a journalist investigating suspicious public procurements, obtained the information (the tender award decision) and immediately conveyed to the public the information that Kadrija Kolić had sold a car worth one million BAM to the Ministry of Internal Affairs. The Court also noted that the defendant had never *worked on* Kadrija Kolić before and that she had absolutely nothing against him.

According to the Court's opinion, the defendant is an investigative journalist and the very concept of "investigative journalism" refers to a *deeper, more analytical work on a piece of news, a phenomenon or a person*. In this regard, there is evidence of the plaintiff's co-ownership in companies operating in the defence industry and the interconnection of the companies (in operations and ownership structure). It is also indisputable that the plaintiff was the defence attorney of the accused Fahrudin Solak, who held the position of director of FUCZ, with which KM Trade concluded numerous contracts worth several million BAM. In addition, it is an indisputable fact that the plaintiff is a co-owner of KM Trade.

According to the Court's assessment, the defendant had neither the need nor the time to contact the plaintiff and verify any facts, as the plaintiff did not even dispute that he is the owner of the company KM

Trade, which **indeed sold** a vehicle worth a million BAM to the Ministry of Internal Affairs of the Sarajevo Canton, regardless of the fact that the sale was made only after the respondent's contentious statement. In this aspect, the Court, although it did not do so, could have perhaps referred to the practice of the European Court, in e.g. the case of *Colombani v. France*. In this case, the European Court pointed out that the media should generally have the right, when contributing to the public debate on matters of legitimate interest, to refer to the content of official reports, without first conducting independent research. Otherwise, the important role of guardians of public interest could be jeopardized.¹¹

The plaintiff interpreted the defendant's statement that he personally, and not the company KM Trade, sold the vehicle worth one million BAM, as containing elements of defamatory expression and an intention by the defendant to label him as a "criminal". However, the court correctly assessed that the defendant was guided by previously published articles that question the acquisition of lucrative contracts by companies in which the plaintiff is a co-owner and in which other media outlets equate him with those companies in which he is a (co)owner, which the plaintiff did not deny. Moreover, he emphasized that he is proud to be a member of the Board of Directors of a certain company, and in one TV show he confirmed that the company KM Trade is "his". The Court therefore *did not understand* what the specific problem was in this case.

The court also noted that the defendant did not "insert" the issue of public procurement in order to compromise the plaintiff, but **because it was her duty**. Namely, *journalistic ethics* dictate that journalists are obliged to defend human rights, dignity, freedoms and values, respect the pluralism of ideas and views, resist all forms of censorship, contribute to strengthening the rule of law and, as part of the public, participate in the democratic control of power and authority.

Therefore, according to the Court's opinion, *there is no better example of defending human rights* than the defendant's actions, especially considering the indisputable fact that the vehicle purchased as a "riot control vehicle" was bought using the citizens' money, of whom, according to Caritas Bishops' Conference of BiH, approximately 18% live below the critical poverty line, while 48% of them are on the brink of poverty or social

¹¹ *Colombani et Autres c. France*, [Requête no 51279/99, 25 juin 2002], § 65.

exclusion, i.e. it was taken from those who would be expected to riot in such cases. The court particularly noted that the situation in which BiH and the whole world found themselves (the COVID-19 crisis) “spawned” numerous scandals, as the tender procedures were “made easier” during the state of emergency.

In its rationale, the Court correctly assessed the circumstances of the case and cited leading, albeit mostly older, cases from the practice of the European Court of Human Rights, such as the *Lingens v. Austria* case. The Court also noted that it is obliged to take into account all the circumstances of the case, i.e. to appreciate the manner, form and time of presenting or conveying the statement, the nature and form of the damage caused, the tortfeasor’s good intention and adherence to the generally accepted professional standards, the consent of the injured party, the probability of the damage occurring, whether it relates to matters from the injured party’s private life or to matters of political or public importance.

Taking these circumstances into account, the Court found that the defendant **did not state at all** that the tender procedure was conducted *unlawfully*, and let alone that Kadrija Kolić was a criminal or involved in criminal activities, but rather that she was *solely focused on the spending of public funds*, which was her *duty* as a professional journalist and investigator. The plaintiff, on the other hand, did not raise any issues regarding his co-ownership of KM Trade during a guest appearance on a show, and even stated that KM Trade is his company.

Furthermore, in a very well-articulated manner, the Court also addressed the claim that the plaintiff is “involved in many businesses”. Namely, this claim is *indisputable*, as in addition to his primary profession (lawyer), he is also a *co-owner of several companies* operating in the defence industry with various public companies.

According to the court’s assessment, the defendant stated that “there is more and more crime and everyone is involved”, as a *well-known fact*, because it is difficult to comment on the situation in the state/entity/canton in any other way, where journalists discover various scandals or crimes instead of competent prosecutors, and none of them end in a final verdict. In this regard, the Court assessed that with the words “I will circle back to the topic” after which she pointed out that Kadrija

Kolić was involved in many affairs by saying “I accidentally came across the Decision where he sold a car to the Ministry of Internal Affairs of the Sarajevo Canton, i.e. the Police Directorate for one million BAM. I wonder what kind of car we are buying for a million BAM”, the defendant did not claim that the tender procedure was conducted unlawfully, but **spoke about the spending of public funds during the pandemic** that heavily affected BiH. With this, she justifiably *asked the public* about the need to purchase a riot control vehicle at a time when *citizens do not have* masks, gloves and tests, while medical workers are wrapped up in bags.

The Court maintained that the plaintiff, who did not deny being a public figure should be considered, within the meaning of the provisions of the *Law on Protection Against Defamation of the Federation of Bosnia and Herzegovina*, as a person entering the public space, so the provisions on exemption from liability for defamation are applied to the specific case.

According to the aforementioned provisions, there is no liability for defamation if a statement expresses an opinion or if the statement is essentially true, but inaccurate only in non-essential elements; if the tortfeasor is obliged by law to present or convey the statement or has presented or conveyed the statement in the course of legislative, judicial or administrative proceedings; and if presenting or conveying was reasonable. When making a decision, the court should take into account all the circumstances of the case, and in particular the manner, form and time of the presenting or conveying the statement, the nature and degree of the damage caused, the tortfeasor’s good intention and adherence to the generally accepted professional standards, the consent of the injured party, the likelihood of damage occurring, and in the event that the statement is not presented or conveyed, whether the statement represents an objective and accurate information about the expression of other persons, and whether it refers to issues from the private life of the injured party or to issues of political or public importance.¹²

In explaining its decision, which is very interesting, the Court referred to *Resolution No. 1557 (2007)* without noting that it is a resolution of the Council of Europe, which is nevertheless evident from the very specific reference to this resolution. However, it is quite possible that this is a

¹² *Zakon o zaštiti od klevete Federacije Bosne i Hercegovine*, [Službene novine Federacije Bosne i Hercegovine, nos. 59/2002, 19/2003 and 73/2005], Article 7.

mistake in citation, i.e. typographical error. Namely, the *Resolution No. 1557 (2007)*¹³ which is cited, pertains to the portrayal of a woman in marketing, and there is no reference to the standard that an article of the *European Convention* protecting freedom of expression protects not only ideas that are positively or indifferently accepted and that are not offensive, but also those that shock, disturb or offend. On the other hand, it seems that the Court's intention was to refer to the resolution of the Parliamentary Assembly of the Council of Europe known as "Toward the Decriminalization of Defamation", which differs in the citation by only one digit from the one previously mentioned. Specifically, this concerns *Resolution No. 1577 (2007)*, so it is clear that the Court mistakenly replaced the number "7" with the number "5" in the citation. In this resolution, however, reference is made to the standard that the article of the *European Convention* protecting freedom of expression protects not only ideas that are positively or indifferently accepted and are not offensive, but also those that shock, disturb or offend.¹⁴

The Court also cited the *Handyside v. United Kingdom* decision in which the European Court expressed the view that freedom of expression is an essential basis of a democratic society and that it applies to information and ideas that shock, offend or disturb either the state or some part of the population. Thus, the Court correctly observed that freedom of expression does not apply only and exclusively to information or ideas that are desirable or considered not offensive, but also to those that offend, shock or disturb an individual, group or the general public.¹⁵

In addition to citing relevant cases from the practice of the European Court, the Municipal Court correctly connects the various articles of the *European Convention*, aiming to establish a balance between the two Convention rights, thus it equates in its interpretation the right to private and family life with the right to freedom of expression and contribution to the debate of public interest, and compares them within the standards developed in the jurisprudence of the European Court.

¹³ See *Resolution 1557 (2007) The Image of Women in Advertising*, [Parliamentary Assembly, Council of Europe].

¹⁴ See *Resolution 1577 (2007) Towards Decriminalisation of Defamation*, [Parliamentary Assembly, Council of Europe], 4.

¹⁵ See *Handyside v. The United Kingdom*, [Application no. 5493/72, 7 December 1976], § 49.

Thus, the Court states that in the relationship between the two rights, it is necessary to look at the level of notoriety of the person in question and what is the subject of the report, the behaviour of the person in question before the publication of the text/statement, how the information was obtained, the truthfulness/accuracy (acting in “good faith”), and the content, form and consequences of publication. Also, the Court added that one must take into account the essential role that the media play in a democratic society, citing a judgment from the practice of the European Court and providing insight into the main issue from the aforementioned judgment.¹⁶

The Court also stated that there must be a special justification for restricting freedom of expression that affects discussions on issues of public interest, where the role of the media in promoting public discussion, ensuring public access to information of public interest, as well as in exposing official offenses and incompetence is very important.¹⁷

In this regard, the media are allowed to **use stronger language** when reporting in certain cases, and to resort to a certain **degree of exaggeration or even provocation**, and when balancing between two protected interests, it is necessary to take into account the **media’s need to promptly obtain news**. Namely, news is a *commodity with a limited shelf life* and postponing its publication, even for a short period, can *deprive* it of all its value and interest. Interestingly, these statements regarding the limited shelf life of news, the Court correctly cited the standards of the European Court, but there is no mention of some of the specific judgments of the ECtHR where these standards have been established, such as, for example, the decision in the case of *Observer and Guardian v. United Kingdom* or the decision in the case of *Prager and Oberschlick v. Austria*.¹⁸

¹⁶ The listed judgements in question: *Bladet Tromsø and Stensaas v. Norway*, [Application no. 21980/93, 20 May 1999] i *Thorgeir Thorgeirson v. Iceland*, [Application no. 13778/88, 25 June 1992].

¹⁷ This section also referred to the European Court’s practice and case *Lingens v. Austria*, [Application no. 9815/82, 8 July 1986].

¹⁸ See *Observer and Guardian v. The United Kingdom*, [Application no. 13585/88, 26 November 1991], § 60; *Prager and Oberschlick v. Austria*, [Application no. 15974/90, 26 April 1995], § 38.

Taking into account the relevant circumstances of the case in question, and the detailed assessment of the plaintiff's behaviour, both before and after the defendant's statement, which the plaintiff considered contentious, the Court found that the defendant's statement was *proportional to the objective pursued*, and was therefore *necessary in a democratic society* in accordance with the provisions of the article protecting freedom of expression within the *European Convention*. Moreover, the Court noted that sanctioning such expression by the defendant as a journalist would result in *interference* with the *defendant's right to freedom of expression*.

Therefore, according to the Court's assessment, the defendant made a concession that is **definitely in the public interest**, since there is little that is of greater public interest than justified, rational and transparent spending of public funds, and therefore the claim was deemed unfounded.

Hence, the domestic court applied the so-called the **three-part test** of the European Court, particularly assessing the proportionality of potential interference with the right to freedom of expression. Namely, when the European Court decides whether there has been a violation of freedom of expression, it applies a specific test, so state authorities can limit freedom of expression if the *limitation of freedom of expression is provided for by law*, if *such limitation has a legitimate aim* and if *such limitation is "necessary in a democratic society."*¹⁹ Before that, it is necessary to assess whether the facts of the case in question fall within the scope of application of the article prescribing freedom of expression and whether there is interference with that right.²⁰

¹⁹ See D. Bychawska-Siniarska, *Zaštita prava na slobodu izražavanja po Evropskoj konvenciji o ljudskim pravima*, [Savjet Evrope, Podgorica: 2019], pages 34–35.

²⁰ In order to answer the question of "necessity to interfere with the freedom of expression", several questions must be answered first: whether there is an *emergent social need* which requires to limit the freedom of expression, whether the desired aim is *proportional to means used to achieve it* and whether the *reasons and justifications* given by the authorities to interfere in the freedom of expression were relevant and sufficient. If the answer to "each of these questions is positive, it can be concluded that the interference in the freedom of expression was 'necessary in a democratic society'." – *Praksa sudova u Bosni i Hercegovini u pogledu prava na slobodu izražavanja* (ed. Z. Knežević), [Ustavni sud Bosne i Hercegovine – The Aire Centre, Sarajevo: 2020], page 24.

3. THE CENTRE CASE

In a rather confusing manner of writing the judgment rationale, and without separating the relevant paragraphs in the rationale in such a way that the parties' allegations and the Court's assessment can be clearly seen and distinguished, the Municipal Court in Tuzla assessed a situation where it was to be decided whether the publication of articles alleging that Suad Suljić was under criminal investigation, that he has been convicted for a criminal offence, that Suad Suljić "is known as a lawyer who participated in the transaction of the pharmaceutical company Bosnafarm and registered it to the homeless person Sabalahajrudin Suljagić", and that "one of the representatives in the TC Assembly has Suljić's back", while calling Suad Suljić a "clown", constituted defamatory expression.

The judgement in the *Centre case* quotes or paraphrases relevant provisions of the *Law on Protection Against Defamation of the Federation of Bosnia and Herzegovina* and mentions an article from the *Constitution of Bosnia and Herzegovina* that refers to the enjoyment of human rights and freedoms. Additionally, it refers to a relevant article from the *European Convention* regulating the protection of freedom of expression, as well as the obligations and responsibilities related to this article.

The practice of the European Court and the Constitutional Court of Bosnia and Herzegovina is cited only through one decision, exclusively in the section dealing with general issues related to freedom of expression. It was further stated that freedom of expression is the essential basis of a democratic society and that it does not refer only to information or ideas that are received positively or are considered not to be offensive or to which no stance is taken, but also to those that offend, shock and disturb, which are the requirements of pluralism, tolerance and free-thinking, without which there is no democratic society. However, this freedom is not absolute and can be limited, so the key role and task of the judiciary is to clearly determine the boundary between justified and necessary restrictions, and unjustified and unnecessary ones in each individual case. At the same time, one of the decisions of the Constitutional Court of Bosnia and Herzegovina²¹, is cited, while the practice of the European

²¹ *Odluka Ustavnog suda Bosna i Hercegovine broj AP 3805/09*, [Sarajevo, 25. 4. 2013].

Court is not mentioned at all, such as, for example, the case of *Selistö v. Finland*²².

However, despite the reference to a case from the practice of the Constitutional Court of Bosnia and Herzegovina, the judgment *does not question* this practice at all and *does not put it in the context* of this case, *does not use the standards* created in the practice of the European Court, *does not explain the principles* that should be followed when making judgments, therefore the standards from the practice of the European Court *do not apply* to this case at all.

Mostly everything in the judgment's rationale is reduced to quoting or paraphrasing articles from the *Law on Protection Against Defamation of the Federation of Bosnia and Herzegovina* and stating what the plaintiff and the defendant stated during the litigation process, while the judicial part of the rationale itself is very brief, insufficiently defined and poorly explained.

In the court's opinion, the disputed articles on the first defendant's internet portal, authored by the second defendant and the third defendant, which forms the basis for their liability under the *Law on Protection Against Defamation of the Federation of Bosnia and Herzegovina*, do contain *elements of defamation*. These articles allege that criminal proceedings are being conducted against Suad Suljić, that he has been criminally convicted, that Suad Suljić "is known as a lawyer who participated in the transaction of the pharmaceutical company Bosnafarm and registered it to the homeless person Sabalahajrudin Suljagić", and that "a representative of the TC Assembly has Suljić's back", as well as that Suad Suljić was called a "clown" on the Facebook page of one of the defendants.

The Court considered that the defendants acted solely with the aim of causing damage to Suad Suljić as a citizen and lawyer, taking into account the nature of Suad Suljić's profession. For these reasons, in Court's opinion, the defamation committed *carried greater weight*.

In assessing the entire case, the Court *did not apply the standards* of the European Court. Thus, there is no analysis in the Court's rationale of what in the articles constituted a *possible value judgment*, and what constituted the *facts*. Therefore, the judgment does no separate possible

²² *Selistö v. Finland*, [Application no. 56767/00, 16 November 2004], §§ 46-49.

value judgments, which cannot be proven, from facts, which can be proven.

The Court stated that the evaluation of the evidence presented by the prosecutor shows that the allegations concerning the plaintiff are not true in the part related to the criminal proceedings against Suad Suljić, and that he was criminally convicted, and in the part linking the plaintiff, the homeless person Sabalahajrudin Suljagić and the legal entity Bosnafarm, as well as in the part where Suad Suljić is called a “clown”. The Court also assessed that the defendants *did not prove* the above with the presented evidence.

This is a bad practice of the Municipal Court. Namely, while the claims related to the conduct of the criminal proceedings, the relationship between Suad Suljić, the homeless person Sabalahajrudin Suljagić and the legal entity Bosnafarm *can be proven*, the claims that Suad Suljić is a “clown” are *not provable facts*, but a **value judgment**. However, in its rationale, the Court treats all of the above *equally* and decided that all these statements are untrue *without distinguishing* value judgments and factual claims that can be proven.

Calling someone a clown is indeed a *harsh* and derogatory term, but it can certainly fall under the freedom of expression as a value judgment or expression of opinion. Namely, this expression should be viewed in the light of the European Court’s practice. In several recent cases, the European Court has ruled that even the use of terms such as “Nazi”, “idiot” or “neo-fascist” *does not automatically justify the restriction of the right to freedom of expression*.²³

When the term “clown” is placed on par with these expressions, it certainly follows that calling someone a clown is milder than calling someone a Nazi or a neo-fascist. However, nonetheless, all these expressions can fall under *freer, stronger* and even *offensive permissible expression* according to the *European Convention*. The general position of the European Court is that freedom of expression does not apply solely and exclusively to information or ideas that are desirable or considered inoffensive, but also to those that offend, shock or disturb an individual,

²³ See *Scharsach And News Verlagsgesellschaft mbH v. Austria*, [Application no. 39394/98, 13 November 2003]; *Oberschlick v. Austria (no. 2)*, [Application no. 20834/92, 1 July 1997].

group or the general public.²⁴ In this case, the court did not examine this issue at all in accordance with the ECtHR's practice, although it cited a part of this standard from the practice of the European Court in one part of the rationale.

Also, the judgment has no mention whether there was, for example, examination of whether Suad Suljić is a **public figure** and whether he must enjoy a *greater degree of tolerance for criticism* as a public figure, as well as whether the case involved **matters of public interest**. As already established in the practice of the European Court, public figures, unlike private individuals, consciously place themselves under public scrutiny, as well as their words and actions.²⁵

One of the defendants argued that the text pertains to comments in a series that is not aimed at just one person, that it consists of information gathered from other media, and that there is no liability for the publication of the text. However, the Court found that it follows from the testimony of the plaintiff that the mentioned texts published on the web portal *www.tuzlapress.ba* are untrue and inaccurate, that regardless of the fact that the defendants published a denial, Suad Suljić still stood by the claim, and that the defendants failed to prove the truth of their claims.

The Court also ruled that the burden of proof regarding the veracity of the claims in defamation proceedings, as a civil tort, *is on the defendants*, as the untruthfulness of the claims in relation to the plaintiff is assumed, until proven otherwise. It is true that in accordance with the burden of proof rules, the burden of proof in defamation proceedings does indeed lie with the person who made the potentially defamatory statement.

However, this decision *did not take into account the relevant practice* of the European Court and the BiH Constitutional Court, which will be explained in more detail below.

In determining liability for defamation, the Court did not explain whether there is no liability for defamation in this case due to, for example, the possibility that the presenting or conveying the expression was **reasonable**. In this regard, the Court did not take into account, i.e. did not explain its understanding in sufficient detail to show that it essentially

²⁴ *Handyside v. The United Kingdom*, [Application no. 5493/72, 7 December 1976], § 49.

²⁵ *Hrico v. Slovakia*, [Application no. 49418/99, 20 July 2004], § 40.

analyzed all the circumstances of the case, such as the manner, form and time of the presenting or conveying the statement, the nature and degree of the damage caused, the tortfeasor's good intention and adherence to the generally accepted professional standards, the likelihood of damage occurring even in the event that the statement is not presented or conveyed, whether the statement represents an objective and accurate information about the expression of other persons, and whether it refers to issues from the private life of the injured party or to issues of political or public importance.²⁶

In its practice, the European Court clearly **supports the right to communicate information of public interest**, of course *bona fides*, and even when such expression contains untrue or harmful statements about private individuals.²⁷ Circumstances such as whether the contentious statements refer to the personal life of the individual, or to their actions in some other social sphere of public interest, must be taken into account.

As the BiH Constitutional Court assessed in one of its more significant decisions in case number *AP 2501/15*, the practice of the European Court implies a whole range of factors that can be relevant when weighing rights and interests when deciding “on potentially conflicting rights (*the right to reputation and the right to freedom of expression*) which include in connection with the published information: non/existence of public interest, content, form and consequences of publication, non/existence of standards of acting ‘in good faith’, method of obtaining information and a number of other factors that can be very important in the circumstances of each individual case, bearing in mind that any exception that limits the right to freedom of expression must be convincingly established and explained.” In the case *AP 2501/15*, the position of the Constitutional Court was that the regular courts accepted the plaintiff's claims solely because the appellants *did not prove the truthfulness* of the claims made in the disputed newspaper article with the evidence offered and presented, “which led to the conclusion of their apparent falsehood, i.e. defamation.”²⁸

However, the Constitutional Court, in this regard, recalled the judgment of the European Court in the case of *Dalban v. Romania*²⁹ when

²⁶ See *Zakon o zaštiti od klevete Federacije Bosne i Hercegovine*, Article 7.

²⁷ See *Bladet Tromsø and Stensaas v. Norway*.

²⁸ *Odluka Ustavnog suda Bosna i Hercegovine broj AP 2501/15*, [Sarajevo, 6. 12. 2017].

²⁹ *Dalban c. Roumanie*, § 49-50.

the applicant, a journalist, wrote an article “about a series of frauds committed by the executive director of a state-owned agricultural company with connected to one of the senators, which is why the domestic courts” sanctioned him. The ECtHR found a violation of the right to freedom of expression in this case, stating that “**it would be unacceptable** for a journalist to be prohibited from expressing a *critical value judgment* unless they are able to prove its truth.” In this case, the European Court “observed that there is no evidence to suggest that the article’s description of events is completely false and that the aim was solely to incite defamatory statements against the executive director and the senator, that it did not address the aspects of his private life, but conduct and behaviour as an elected representative and that journalists *can rely on rumours* under certain circumstances when reporting on matters of public interest.” The domestic courts themselves considered that “the manner in which the applicant expressed his opinion does not correspond to reality and, therefore, constituted defamation, and that the fact that there were no grounds to initiate criminal proceedings against the executive director due to alleged fraud is sufficient to establish that the information in the article is untrue.”³⁰

Taking all this into account, the Constitutional Court considered that the regular courts, in the case of *AP 2501/15*, failed to assess whether there was a *legitimate interest* under the circumstances of the specific case to *inform the social community on certain information*, and to *bring the contentious statement into a broader context* and the context of the relevant provisions of the *Law on Protection Against Defamation*, exceeded the limits of “free judgment”, which resulted in interference with the appellant’s right to freedom of expression, which was not necessary in a democratic society under the circumstances of the specific case.³¹

Therefore, even though there is a precedent, part of which was pointed out above, which in this case the Municipal Court could refer to, and assess all significant elements of the case in accordance with it, the Municipal Court *hardly did so at all*; instead, it kept its analysis and assessment of the case to a *brief examination of the legal provisions* and the *falsehood of the expression* without investing it in detail; while it based its decision entirely on its free assessment, which left no room for a more

³⁰ *Odluka Ustavnog suda Bosna i Hercegovine broj AP 2501/15.*

³¹ *Ibid.*

detailed examination of the standards set within the framework of European human rights law.

The Court did not properly explain the harmfulness of the published false information. In other words, it did not explain its assessment in sufficient detail, according to which the publication of information to the detriment of Suad Suljić was *objectively harmful enough* and therefore capable to cause him harm in the form of a violation of the right to honour and reputation.

In this regard, the judgment did not discuss the connection between the right to reputation, the practical implications related to this case and its violation; there is no mention of the fact that an individual's right to reputation is an element of their "private life" protected by Article 8 of the *European Convention*; in addition, this Article is not placed in the context of the article protecting freedom of expression, which is Article 10 of the *European Convention*; and no cases are cited that have discussed the relationship between the two rights, nor the standards set forth therein.

This judgment was written with numerous grammatical and typing errors, which should not be the practice of the courts in Bosnia and Herzegovina. The judgment is difficult to understand in certain sections due to sentences that are not combined in a way suitable for reading by the general public, nor for reading by legal professionals.

4. DIFFERENCES IN COURT PROCEEDINGS

The three court judgments (*the Capital.ba case*, *the Helać case* and *the Centre case*) analyzed in this text have specifically assessed the legal provisions and standards of human rights in relation to freedom of expression, while placing the expression itself in a certain context. In some cases, this was done in correctly (*the Capital.ba case*, *the Helać case*), while the Centre case shows evident deficiency in the judicial decision, i.e. in the decision's rationale.

A different way of writing the judgment is noticeable, i.e. different **content of the rationale**. Namely, when it comes to the Basic Court in Banja Luka, although the *European Convention* and certain standards created in the practice of the European Court are mentioned in the rationale, there is no reference to specific cases or a more detailed explanation of certain standards in the judgment's rationale. This is certainly a shortcoming of this judgment, in which, despite this, the need for not restricting freedom of expression was correctly assessed. In *the Centre case*, the failure to use the European Court standards by the Municipal Court in Tuzla is even more evident. At the same time, the judgment itself is not properly explained at all, which does not firmly establish the judgment.

On the other hand, when it comes to the judgment of the Municipal Court in Sarajevo, the "strengthening" of the rationale is done by referring to cases from the practice of the European Court, by comparing different convention rights, and even positions created in legal theory, which is certainly commendable and should happen in all judgments of this kind.

This is particularly interesting given that there are certain differences in the laws regulating defamation in the Republika Srpska and the Federation of Bosnia and Herzegovina. Primarily, both laws determine that the right to freedom of expression is guaranteed by the *European Convention* and represents one of the foundations of a democratic society, especially when it comes to matters of political and public interest.

However, only the *Law on Protection Against Defamation of the Republika Srpska* contains a provision stating that when determining responsibility and awarding compensation in terms of this Law, the need to limit the right to freedom of expression must be clearly established in

accordance with the article protecting freedom of expression in the *European Convention* and by the case law of the European Court of Human Rights. Therefore, there is even more need for courts in the Republika Srpska to cite specific judgments and legal standards established in the practice of the European Court.

The *European Convention* itself is a very important instrument for the protection of human rights in Bosnia and Herzegovina. The rights and freedoms provided for by the ECHR and its protocols are constitutionally directly applicable in Bosnia and Herzegovina and have priority over all other laws. Laws should also be harmonized with it. In addition, it is not necessary to pass special regulations in order to apply the ECHR, because it is applied through the *Constitution* itself, and individuals can directly refer to it when protecting their rights. All levels of government are obliged to respect the provisions of the ECHR above all laws in the country concerning human rights, since the *European Convention* has become *part of the internal legal system*, meaning it is binding for all domestic courts and other state bodies.³²

In proceedings before public bodies, citizens can directly refer to the ECHR and the case law of the European Court. The judgments of the ECtHR are in fact interpreters of the text of the *European Convention*, which help to elaborate and explain it. All judgments of the European Court contain precedent standards “that have the status of binding legal norms”, but they also serve as a guide for interpreting the *European Convention* as a living instrument that must be interpreted in the light of present-day conditions.³³ This is precisely why they should be **specifically cited in the judgments** of domestic courts in Bosnia and Herzegovina.

³² D. Lučka, *Priručnik za pravnu zaštitu životne sredine u Bosni i Hercegovini* – PPZ, [Banjalučki centar za ljudska prava, Banja Luka: 2022], pages 40-41; *Constitution of Bosnia and Herzegovina - The General Framework Agreement for Peace in Bosnia and Herzegovina* – Ustav BiH, [negotiations started in Dayton on November 21, 1995 and the agreement was signed in Paris on December 14, 1995], Article II/2; D. Lučka, *Ljudska prava u Bosni i Hercegovini 25 godina nakon “Dejtona” (Lijek za krvavi sukob kao današnji temelj ljudskih prava)* – LJPBiH, [Friedrich-Ebert-Stiftung, Sarajevo: 2020], page 6; E. Arifagić-Veledar, AIRE centar, “Praksa Evropskog suda za ljudska prava u odnosu na Bosnu i Hercegovinu”, *Pravna hronika*, [Visoko sudsko i tužilačko vijeće Bosne i Hercegovine, AIRE centar: 2015], page 14.

³³ PPZ, pages 40-41; LJPBiH, page 6; M. Macovei, *Freedom of expression – A guide to the implementation of Article 10 of the European Convention on Human Rights*, [Directorate

Therefore, the way judgments directly related to human rights law are written should **follow the principle adopted** by the Municipal Court in Sarajevo. Namely, the law should not solely rely on the linguistic application of strictly prescribed *de jure* domestic norms, since this can lead to a too “rigid” view of things and failure to reach a fair outcome. Hence, it’s good to contextualize each situation and use as many relevant sources as possible. Just as the law should not be too normatively rigid, but rather be able to keep up with the changing circumstances³⁴, so the judgments must follow the latest activities of the European Court and apply the standards it has established.

It should also be noted that in these judgments, the courts **do not mention other instruments** for the protection of human rights that protect freedom of expression, such as, for example, *International Covenant on Civil and Political Rights* (hereinafter: ICCPR) which is part of *Annex I of the BiH Constitution*, i.e. additional agreements on human rights that will be applicable in Bosnia and Herzegovina or the views of the United Nations Human Rights Committee (hereinafter: the Committee). It would be beneficial to mention the ICCPR and the views of the Committee in order to *strengthen the court’s position* in certain matters.

For example, similar to the European Court, the Committee, is of the opinion that states should guarantee the right to freedom of expression, including the right to seek, receive and convey information and ideas of all kinds, regardless of borders. The right to free expression from the ICCPR includes expressing and receiving statements of all forms of ideas and opinions that can be communicated to others, and includes political discourse, comments on private and public affairs, discussion of human rights, journalism, cultural and artistic expressions, teaching and religious discourse, and may include commercial advertising. Such scope of rights may even include expression that may be considered deeply offensive, although such expression may be limited. Public interest and the fight for it within the scope of criticism should certainly always be recognized as a good “defence” in defamation cases, while the free communication of information and ideas on public and political issues between citizens, politicians and elected representatives is essential for society. This includes

General of Human Rights – Council of Europe: 2004²], page 5; *Loizidou v. Turkey*, [Application no. 15318/89, 23. 3. 1995], § 71.

³⁴ *The Sunday Times v. the United Kingdom*, [Application no. 6538/74, 26 April 1979], § 49.

a free press and other media that can comment on public issues without censorship or restriction and inform public opinion. Therefore, the media and journalists should not be unduly limited in their work through defamation convictions, except in cases where defamatory expression is indeed in question in accordance with international legal standards.³⁵

What is also very important is that judgments should be **well written**, with as few typing and grammatical errors as possible. The third analysed judgment – the judgment in *the Centre case*, is full of such mistakes, which should not be the practice of the courts in Bosnia and Herzegovina. Also, judgments should be as understandable as possible to everyone, not just legal professionals, and the said judgment is difficult to understand in certain parts of the rationale, which is also not a good practice.

³⁵ *General Comment No. 34 – Article 19: Freedoms of Opinion and Expression*, Human Rights Committee, [Geneva, 2011], § 11–13, 47.

II

TWO DECADES ERASED – CRIMINALIZATION OF DEFAMATION

As the Analysis shows, the courts **applied standards related to the right to free expression**, at least in the first two analyzed decisions. Perhaps this was not done completely with detailed rationale in e.g. *the judgment of Capital.ba*, but the decision was made absolutely in accordance with the standards of freedom of expression, as all important factors were correctly evaluated in it.

In this regard, a certain practice **has already been established** in the legal system of Bosnia and Herzegovina. According to some research (*Analysis of Recent Case Law in Bosnia and Herzegovina in the Field of Defamation*), it has been shown that court judgements in cases of defamation which were ruled, for example, in the period between January 2019 and April 2022, demonstrate that the courts in Bosnia and Herzegovina apply the standards set in the documents of the Council of Europe and the practice of the European Court more consistently than before. Namely, based on the analysis of about sixty (60) judgments of all judicial instances in BiH, progress has been observed in all areas that were previously identified as problematic, such as “distinguishing value judgments from facts, high compensation awards that could have or had ‘deterrent effect’ for freedom of expression, and failures in the fair balancing of the protection of the right to freedom of expression in relation to the right to privacy.”³⁶

In this regard, in analyzing civil proceedings related to defamation, we cannot overlook a very **negative phenomenon** that occurred in the Republika Srpska, which strongly affects the position of defamation in the legal system. Namely, the *Criminal Code of the Republika Srpska* reintroduced the **criminal offense of defamation**.

The *Criminal Code of Republika Srpska* from 2000 defined defamation as a criminal offense in the part of the Code that defined *criminal offenses*

³⁶ See *Sloboda izražavanja i sloboda medija (JUFREX 2)*, [shorturl.at/hivX3].

against honour and reputation.³⁷ However, these provisions were repealed as soon as the following year, as the **Law on Protection Against Defamation** was supposed to come into force. The *Law on Protection Against Defamation* and the *Law on Amendments to the Criminal Code of the Republika Srpska*, which repealed offenses against honour and reputation, were published in the same issue of the *Official Gazette of the Republika Srpska* at the beginning of August 2001.

Thusly, Bosnia and Herzegovina became the first country in the Western Balkans to decriminalize defamation (with, of course, subsequent defamation laws at the level of the Federation of Bosnia and Herzegovina and Brčko District of Bosnia and Herzegovina). The first years of the implementation of the new law were chaotic, as compensation claims in defamation lawsuits were enormously high, from tens of thousands to millions of BAM, but over time they became more moderate as judicial practice limited compensation to more proportional amounts (from one up to six thousand BAM, and rarely up to 20,000 BAM). As we can see, the correct application of the European Court's standards regarding freedom of expression is *slowly being established* in the judgments of domestic courts, although not entirely.³⁸

Therefore, as Mehmed Halilović aptly notes, the most important thing in the application of the laws regulating defamation is that **"the process of decriminalization of defamation has taken root**, contributing to the democratization of society and encouraging freedom of expression for everyone, not only journalists, establishing rules that all participants in the society should comply with." Although there are also negative aspects in, for example, judicial practice and deficiencies in the media, this is not a discouraging fact, since their identification is the starting point for improvements "on both sides, both in the judiciary and in journalism."³⁹

The reintroduction of defamation into the *Criminal Code* greatly affects this process and threatens to turn the practice itself upside down,

³⁷ *Krivični zakonik Republike Srpske*, [Službeni glasnik Republike Srpske, no. 22/2000], Articles 174–182.

³⁸ D. Lučka, *Treba li nam kleveta kao krivično djelo?*, [<https://dejanlucka.com/treba-li-nam-kleveta-kao-krivicno-djelo/>].

³⁹ M. Halilović, *Tužbe za klevetu protiv novinara – sredstvo pritiska na medije*, [<https://bhnovinari.ba/bs/2018/01/12/tuzbe-za-klevetu-protiv-novinara-sredstvo-pritiska-na-medije/>].

which will **not reflect well on freedom of expression**, media freedom, but also *freedom* as a concept in the entire Republika Srpska and Bosnia and Herzegovina.

Especially if we bear in mind that international human rights are founded on a principle that **defamation within the framework of criminal law poses a serious threat to freedom of expression**, and that the situation in the Republika Srpska and Bosnia and Herzegovina in general could easily turn into an open violation of the right to freedom of expression with criminalization of defamation and possible criminal sanctions.

When freedom of expression is restricted, its restrictions must be the **“last” line of defence against** certain actions and must be narrowly interpreted in such a way as to restrict only those actions which are **absolutely necessary to be restricted**. In other words, limiting freedom of expression, in this case through the criminal law, must come as an *ultima ratio* (last resort), and only when there are no milder solutions. However, milder solutions do exist within the framework of civil law. Therefore, there is no need to prescribe stricter solutions that can excessively limit the freedom of expression. However, despite this, defamation has again become a criminal offense.⁴⁰

When it comes to freedom of the media and journalistic work, they are currently not at the highest possible level throughout Bosnia and Herzegovina. According to Reporters Without Borders’ **World Media Freedom Index**, BiH scored 65.43 index points in 2023 when it comes to media freedom, which places it in 64th place in the world. Last year, BiH scored 65.64 index points, and 71.66 in 2021. This clearly indicates a step backward trend, and there is every chance that this backward trend will continue in the coming period, especially due to the criminalization of defamation and other laws aimed at limiting freedom of expression and freedom of the media. In this way, Bosnia and Herzegovina finds itself in a group of countries in a problematic situation when it comes to media freedom.⁴¹

⁴⁰ See D. Lučka, *Treba li nam kleveta kao krivično djelo?*, [<https://dejanlucka.com/treba-li-nam-kleveta-kao-krivicno-djelo/>].

⁴¹ *Global Score 2023*, [<https://rsf.org/en/index>]; *Global Score 2022*, [<https://rsf.org/en/index?year=2022>]; *Global Score 2021*, [<https://rsf.org/en/index?year=2021>];

According to this research, the media operate in a *relatively favourable* legal environment, but in an *extremely unfavourable* political and economic “milieu”, so journalists do not feel protected at the slightest while doing their job. Politicians in the country regularly attack journalists and exert influence over public media and regulatory bodies, and there are significant differences in media freedom across the country. Journalists themselves are most often exposed to verbal threats and attacks, as well as occasional physical assaults. With the re-criminalization of defamation, the very assessment of the *relatively favourable* legal environment is called into question, which in conjunction with the already standard *extremely unfavourable* political and economic factors, creates an extremely hostile atmosphere for the lives and work of journalists.⁴²

With the reintroduction of defamation into the *Criminal Code*, a huge part of the efforts of the media and the courts to ensure that the standards of the European Court are properly applied and that the journalists’ freedom of expression is not prevented are nulled. The very thought that a journalist can be criminally liable for criticizing wrongdoings is reminiscent of some dark times and practices, in which free speech did not enjoy excessive favour in society.

2023 World Press Freedom Index – Journalism Threatened by Fake Content Industry, [https://rsf.org/en/2023-world-press-freedom-index-journalism-threatened-fake-content-industry?year=2023&data_type=general]; D. Lučka, *Put BiH ka Evropskoj Uniji: Koraci unazad u odiseji koja traje - Prioritet 12 i organičavanje slobode u 2023* – P12, [Friedrich-Ebert-Stiftung, Sarajevo: 2023], page 5.

⁴² *Bosnia-Herzegovina*, [<https://rsf.org/en/country/bosnia-herzegovina>]; P12, page 5.

CONCLUSION

The judgments analyzed in this text can be essentially categorized according to the content of their rationales, from the best to the worst explained. Thus, the judgment in *the Helać case* is the best explained, while the verdict in *the Centre case* is at the bottom of the list, and between them, in the “golden middle” is the verdict in *the Capital.ba case*.

The analysis of these three judgments shows that there is a certain *correct direction* (at least in two judgments) in which the courts in Bosnia and Herzegovina are moving when it comes to defamation cases related to journalists and the media. However, different practices of the courts regarding the use of European Court standards, referencing to European Court cases, applying certain criteria related to that practice, etc. show that there is a need to for even greater efforts to train judges in this direction.

It is also noticeable that the courts show different attention to length and details in their rationales, and the judgment of the Municipal Court in Sarajevo is much better explained than the other two, especially the one in *the Centre case*. This is probably due to insufficient training of judges to apply *practically* “precedent” standards in judgments, which have not yet found full application in our judiciary, as it still relies to a certain extent on the traditional European continental legal tradition of legal reasoning. And that should be worked on in the future.

At the end of the Analysis, it should be noted that it is certainly necessary to follow up on the outcomes of all three analyzed cases *to the end*, if the decisions are also examined before the higher courts, and to reanalyze the actions of the judicial authorities after the decisions of the higher courts, compare the decisions of the higher and lower courts, and to assess whether standards created in European human rights law regarding freedom of expression and the right to respect for private and family life were applied and respected in a proper manner.

REFERENCES

1. LAW

General Comment No. 34 – Article 19: Freedoms of Opinion and Expression, Human Rights Committee, [Geneva, 2011].

Krivični zakonik Republike Srpske, [Službeni glasnik Republike Srpske, no. 22/2000].

Resolution 1557 (2007) The Image of Women in Advertising, [Parliamentary Assembly, Council of Europe].

Resolution 1577 (2007) Towards Decriminalisation of Defamation, [Parliamentary Assembly, Council of Europe].

Constitution of Bosnia and Herzegovina - The General Framework Agreement for Peace in Bosnia and Herzegovina – Ustav BiH, [negotiations started in Dayton on November 21, 1995 and the agreement was signed in Paris on December 14, 1995].

Zakon o zaštiti od klevete Federacije Bosne i Hercegovine, [Službene novine Federacije Bosne i Hercegovine, nos. 59/2002, 19/2003 and 73/2005].

Zakon o zaštiti od klevete Republike Srpske, [Službeni glasnik Republike Srpske, no. 37/2001].

2. CASE LAW

Bladet Tromsø and Stensaas v. Norway, [Application no. 21980/93, 20 May 1999].

Colombani et Autres c. France, [Requête no 51279/99, 25 juin 2002].

Dalban c. Roumanie, [Requête no 28114/95, 28 septembre 1999].

Dichand and Others v. Austria, [Application no. 29271/95, 26 February 2002].

Flux and Samson v. Moldova, [Application no. 28700/03, 23 October 2007].

Handyside v. The United Kingdom, [Application no. 5493/72, 7 December 1976].

Hrico v. Slovakia, [Application no. 49418/99, 20 July 2004].

Lingens protiv Austrije – Lingens v. Austria, [Application no. 9815/82, 8 July 1986].

Loizidou v. Turkey, [Application no. 15318/89, 23. 3. 1995].

Oberschlick v. Austria (no. 2), [Application no. 20834/92, 1 July 1997].

Observer and Guardian v. The United Kingdom, [Application no. 13585/88, 26 November 1991].

Odluka Ustavnog suda Bosna i Hercegovine no. AP 2501/15, [Sarajevo, 6/12/2017].

Odluka Ustavnog suda Bosna i Hercegovine no. AP 3805/09, [Sarajevo, 25/4/2013].

Presuda Opštinskog suda u Sarajevu no. 65 O P 843745 20 P, [Sarajevo: 20/9/2021].

Presuda Opštinskog suda u Tuzli no. 32 O P 398723 21 P, [Tuzla: 31/5/2022].

Presuda Osnovnog suda u Banjoj Luci no. 71 O P 34645221 P, [Banja Luka: 31/10/2022].

Prager and Oberschlick v. Austria, [Application no. 15974/90, 26 April 1995].

Scharsach And News Verlagsgesellschaft mbH v. Austria, [Application no. 39394/98, 13 November 2003].

Selistö v. Finland, [Application no. 56767/00, 16 November 2004].

The Sunday Times v. the United Kingdom, [Application no. 6538/74, 26 April 1979].

Thorgeir Thorgeirson v. Iceland, [Application no. 13778/88, 25 June 1992].

2. PUBLICATIONS AND TEXTS

Arifagić-Veledar, E., AIRE centar, „Praksa Evropskog suda za ljudska prava u odnosu na Bosnu i Hercegovinu”, *Pravna hronika*, [Visoko sudsko i tužilačko vijeće Bosne i Hercegovine, AIRE centar: 2015].

Bosnia-Herzegovina, [<https://rsf.org/en/country/bosnia-herzegovina>].

Bychawska-Siniarska, D., *Zaštita prava na slobodu izražavanja po Evropskoj konvenciji o ljudskim pravima*, [Savjet Evrope, Podgorica: 2019].

Global Score 2021, [<https://rsf.org/en/index?year=2021>].

Global Score 2022, [<https://rsf.org/en/index?year=2022>].

Global Score 2023, [<https://rsf.org/en/index>].

Guide on Article 10 of the European Convention on Human Rights – Freedom of Expression, [Council of Europe – European Court of Human Rights, Strasbourg: 2021].

Halilović, M., *Tužbe za klevetu protiv novinara – sredstvo pritiska na medije*, [<https://bhnovinari.ba/bs/2018/01/12/tuzbe-za-klevetu-protiv-novinara-sredstvo-pritiska-na-medije/>].

Lučka, D., *Ljudska prava u Bosni i Hercegovini 25 godina nakon „Dejtona” (Lijek za krvavi sukob kao današnji temelj ljudskih prava) – LJPBiH*, [Friedrich-Ebert-Stiftung, Sarajevo: 2020].

Lučka, D., *Priručnik za pravnu zaštitu životne sredine u Bosni i Hercegovini – PPZ*, [Banjalučki centar za ljudska prava, Banja Luka: 2022].

Lučka, D., *Put BiH ka Evropskoj Uniji: Koraci unazad u odiseji koja traje – Prioritet 12 i organizovanje slobode u 2023 – P12*, [Friedrich-Ebert-Stiftung, Sarajevo: 2023].

Lučka, D., *Treba li nam kleveta kao krivično djelo?*, [<https://dejanlucka.com/treba-li-nam-kleveta-kao-krivicno-djelo/>].

Macovei, M., *Freedom of expression – A guide to the implementation of Article 10 of the European Convention on Human Rights*, [Directorate General of Human Rights – Council of Europe: 2004²].

Praksa sudova u Bosni i Hercegovini u pogledu prava na slobodu izražavanja (ed. Z. Knežević), [Ustavni sud Bosne i Hercegovine – The Aire Centre, Sarajevo: 2020].

Sloboda izražavanja i sloboda medija (JUFREX 2), [shorturl.at/hivX3].

World Press Freedom Index 2023 – Journalism Threatened by Fake Content Industry, [<https://rsf.org/en/2023-world-press-freedom-index->

journalism-threatened-fake-content-
industry?year=2023&data_type=general].

