

How the New Defamation Law is Applied in Bosnia-Herzegovina

JOURNALISTS HAVE NOT PROFITED TOO MUCH

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March 23, 2005

Journalists in Bosnia-Herzegovina are the only ones in South East Europe who have not been faced for two years with the threat of being sentenced to prison or paying high fines for defamation like their colleagues in all neighboring countries of the former Yugoslavia.

But, they are not entirely sure if the new system at the very start has turned out to be better or worse than the old.

Almost three years ago, defamation was officially decriminalized in Bosnia-Herzegovina. This means that it was legally removed from criminal legislation and shifted to the area of civil law, and possible trials were moved from criminal proceedings to civil action.

The change is not insignificant. Quite the contrary, the new law is much more liberal and modern. But still, it has betrayed the initial, and one must admit, naïve hopes of journalists that there will be less defamation lawsuits.

Actually, quite the opposite happened. Today, namely, there are substantially more lawsuits than a few years ago and journalists finally had to realize that with the abolishment of criminalization – defamation itself was not abolished. Nor defamation action.

Radical Turnaround

Charges pressed by politicians against journalists and media were customary in all newly-created countries of the former Yugoslavia over the past 15 or so years. In this environment, with representatives of totalitarian authorities in Serbia and Croatia excelling by the number of criminal lawsuits, the political elite in Bosnia-Herzegovina, naturally, did not lag behind.

True, the possibility of initiating civil action to collect damages along with criminal trials had existed even before, but it was rarely used. Most suits were criminal and the plaintiffs were usually satisfied with journalists or editors being sentenced. Even when the sentence did not exceed the scope of a lesser fine or a suspended prison sentence. Only in rare cases did plaintiffs, along with criminal sentences, file civil suits and ask for high monetary compensation.

Journalists, on the other hand, were not indifferent to criminal trials, knowing that prison in these cases is not entirely ruled out. Still, it is a fact that not a single journalist or editor in the last 20 or so years in Bosnia-Herzegovina had been sentenced to prison or gone to prison, although two cases occurred in the late 90's when editors were given suspended sentences and in one case – a fine. A suspended sentence does seem harmless, but it can always become a prison sentence if the criminal act is repeated and should be understood as a serious threat to the right to freedom of expression, especially since certain journalists had several lawsuits breathing down their necks.

Even a fine, which could be pronounced in criminal proceedings, can become a prison sentence – if the amount that is handed down is not paid, as a recent case of a journalist in Croatia showed. The journalist believed that he was not responsible and refused to pay the fine, as a result of which the court ordered him to go to prison for 60 days. Since a public scandal around the case erupted and might have had unpleasant consequences for Croatia because this was the first journalist in the former Yugoslav countries, at the start of the new millennium, who would have had to go to prison for defamation, the fine was instead paid by the Justice Minister who saved Croatia even greater embarrassment.

Journalists in Bosnia-Herzegovina today, however, do not have hanging over their heads the threat of going to prison for defamation, nor paying a fine into the state budget!

Both entities that make up Bosnia-Herzegovina, less than three years ago, passed separate, but basically equal laws on defamation, definitely decriminalizing this field and allowing trials of this sort exclusively in civil action.

Thus, there are no more criminal proceedings, there are no more fines or prison sentences and, furthermore, in these new laws (in further text referred to, because they are equal, as Law) there are no defamation trials. True, the possibility of libel trials has remained under the law that regulates obligations, which had existed even before and had rarely been used, but even these are civil trials.

This was a radical turnaround making Bosnia-Herzegovina unique in Europe. It was made under the influence of the international community and under the pressure of the domestic media environment.

Balance Between Rights and Obligations

In this “shift” from criminal to civil proceedings, the new law, for a very justified reason, “leaves out” some earlier criminal acts from this field, such as “violation of the reputation of the state (BiH, as well as both entities), their flags, coat-of-arms and anthem, constituent peoples...” It had earlier been stipulated that charges for these criminal acts would be pressed *ex officio* by the state prosecutor.

Leaving out this kind of “protection” of the state, state organs and symbols, and abolishment of the state prosecutor’s obligation to do this *ex officio*, is considered one of the democratic achievements of European societies and it is no surprise that it was done here, although judges in initial public discussions on the law assessed this move as “absurd.”

“Is it possible that no one will answer if they subject the state and its symbols to ridicule?” A judge concluded that *“from now on, hence, anyone can torch the state flag and go unpunished.”*

The judge, with experience from a system in which authorities were very concerned with symbols and little concerned with people and their reputation, of course, could hardly imagine new relations in which some other values would prevail. And these are significantly different.

The introductory part of the new law, in Article 2, literally reads *“...the right to freedom of expression as it protects both the contents of an expression as well as the manner in which it is made, and is not only applicable to expressions that are received as favorable or inoffensive, but also to those that might offend, shock or disturb.”*

Since insult is not even mentioned in the new law, but only defamation, the wording of Article 2 (*that might offend, shock or disturb*) has simply shocked legal experts (chiefly judges), but to say the truth, some of the journalists as well. Namely, some judges in Bosnia-Herzegovina, under the influence of the old school and many years of personal experience, assessed again that it is “absurd that no one answers for insult” and that, moreover, this is practically allowed.

This assessment was reached by part of the judges and journalists by referring to a right guaranteed under this law to journalists (editors and others) not to reveal the identity of a

confidential source, nor a document that may reveal the identity of a source. Some of them, namely, understood this as a possibility of automatic defense simply by saying that the journalist and editor had used information provided by a “confidential source.”

The matter, however, is not that simple. The new law really does encourage freedom of the press and freedom of expression, even expression “*that might offend, shock or disturb,*” but this is only one side of the coin. The other implies – a responsible press and responsible journalists. In the case of journalists, they will answer and bear consequences for defamation if “*they willfully or negligently made or disseminated the expression of false fact*” (quoted from the Law). What is asked of journalists and the press, therefore, is reasonable conduct, in line with the professional code, and conduct which is not malicious.

A journalist, for instance, can defend herself/himself in court even if s/he had published false information (the Law reads *fact*) if s/he can prove that s/he acted professionally (in line with the journalist Code) and in good faith. This practically means, for example, if s/he can prove s/he had reason to believe that the facts expressed are true and that s/he based her/his story on several sources and sought, in addition to other people, also the opinion of the person written about. Good faith is also measured by how s/he acted upon finding out that something untrue was published (based on whether a correction, apology or something similar was published). On the other hand, a journalist will not be able to defend herself/himself if s/he knew or could have known that the facts on which the story was built were – untrue. The burden of proving the truthfulness or untruthfulness of the facts lies on the prosecutor, not on journalists.

All this is also true, naturally, in cases referring to protection of identify of confidential sources. The same rule applies here – the journalist takes upon himself or herself the responsibility for the published fact and for professional conduct. In other words, an anonymous source cannot be used to hide irresponsible conduct on the part of the journalist and press in general and the publishing of fact that they (the journalist and press) “knew or may have known” was not true.

Protection of a confidential source is not a privilege for journalists that frees them of liability, but it is a privilege because it allows them to get information (cases of various abuses by public officials) they otherwise could not get. This is a democratic institute that protects public interest. Getting such information – even when the authorities do not like it – is a key public interest.

Generally speaking, along with all the above, this law in Bosnia-Herzegovina encourages both the press (journalists) and the injured natural and legal persons, who may seek court protection in case of defamation, to resolve all disagreements in as simple a way as possible even without

court. If, however, the injured party does file a suit, the court has an obligation at the very start to examine if there is a possibility to reconcile the parties in order to avoid further proceedings. Secondly, in making a determination of compensation, the court is obliged to establish if the plaintiff or defendant had previously taken any measures to mitigate the harm caused by the defamatory character of an article or expression (issuance of a correction and apology).

The law, actually, urges the plaintiff to first address the media outlet in which his or her reputation has been harmed and to obtain satisfaction this way, and to address the court only if he or she failed to obtain it this way, or if the harm that occurred is so great that it cannot be repaired by issuing a correction. In any case, the court is obliged to assess if the plaintiff acted this way, just as it is obliged to assess if the defendant, in good will, had issued a correction or apology, as a result of which it can reduce the amount of compensation awarded.

On the practically endless list of those who may take action based on this law, there is an important limitation which excludes an entire structure that had previously used this right most of all. Authorities and governments!

In the law, the term “*public authorities*” is defined as “*any legislative, judicial, executive or other body of authority... with a public competency and any legal person which is owned or controlled by a public authority*”. Consequently, they are all barred from becoming plaintiffs.

A suit, thus, cannot be filed by a government, assembly, court, public enterprise or institution, but it can be filed – in their own name – by government members, public officials, judges... In this case, however, their suits are not suits of head of government, minister or judge, but solely private suits of citizens.

As can be seen, the Bosnian-Herzegovinian law has entirely accepted the highest international democratic standards whose intent, first of all, is to encourage the right to freedom of expression, but also to protect the right to the reputation and privacy of natural and legal persons.

Journalists are highly protected by this law, provided they work responsibly and professionally, while politicians in principle have a much lower level of protection compared to what they once had. Not only do they not enjoy special protection; they must also show a much higher degree of tolerance to public criticism – compared to ordinary citizens – because they hold public office.

Journalists, on the other hand, must bear in mind that the new legal “privileges” oblige them very much.

It is only now that journalists are learning this lesson the hard way.

Triple Increase in Number of Suits

After two years of implementation of the new law on protection against defamation, one may conditionally say, judging by the initial effects, that journalists have not really “profited” very much.

Firstly, as has already been said, the number of suits against journalist has not decreased, as they had expected; on the contrary, it has increased considerably. True, they are no longer tried in criminal proceedings, but in civil action, but this is not a particular advantage since a good number of cases now end in verdicts awarding monetary payouts to plaintiffs. True, they are not excessively high, but they are not completely insignificant either.

When the previous suspended sentences and fines pronounced by courts are compared to the present monetary compensation, it turns out that it “paid” to use defamation before, while today – it does not pay.

Close to 350 suits were filed with cantonal and district courts in both parts of Bosnia-Herzegovina in these two and a half years, which is triple the number in, say, the previous two or three years. Of this, two-thirds of the suits were filed with the Sarajevo Cantonal Court, which is logical since this is the most developed part of the country and a city with the biggest concentration of all media.

When this number of 350 suits is compared to the total number of media outlets today, it turns out that every outlet has been sued at least once. More than three hundred suits to roughly three hundred media outlets! Or, looking by the number of journalists, it would mean that every tenth journalist in Bosnia-Herzegovina has been sued.

Of course, these are just statistics which cannot paint an accurate picture because most media outlets and their journalists have never been sued. But, some have been sued so many times that they feel as if “a new suit arrives every other day.”

Some real statistics can provide a much more realistic picture: by the end of 2003, when most suits were filed, the most sued papers were “*Dnevni Avaz*” and its editions (30 suits), followed by the weeklies “*Slobodna Bosna*” (22) and “*Ljiljan*” (15), the daily “*Oslobodjenje*” (13), *Federal TV* (8), the magazine “*Dani*” (6)... In the meantime, in 2004, some of them have been sued again so these figures are not final. Looking at the number of suits filed against them, those that “excel” again are

the papers “*Dnevni Avaz*” and “*Slobodna Bosna*” and, among electronic media, *Federal Television*. In the majority of cases, suits were filed against publishers, editors-in-chief and, when they are known, authors of articles.

Who are the plaintiffs and what do they request? Compared to earlier practice, the number of classical politicians who bring action has decreased somewhat, but a new phenomenon has appeared – journalists suing journalists! Generally speaking, suits have been filed by public figures, whether senior state officials, leaders of political parties, ministers, municipality heads, heads of office, people from security agencies, directors of public institutions, enterprises, university professors... All suits, as required by the law, were filed in their own names, with the exception of several suits filed by commercial companies requesting material compensation.

So, action is usually brought by people from public life. There are two reasons for this: first, they are written about the most and, as expected, usually critically; second, because these court proceedings cost quite a lot and so-called ordinary people – even if they have reason to address the court – cannot afford it. True, they have a legal possibility to ask the court to exempt them from paying court expenses, but they usually do not know about this and do not request it.

Among the plaintiffs are also politicians and high-ranked state officials (close to 60 suits, with some having two or more suits; therefore the number of these persons is lower than the number of suits), as well as retired police and security service employees (15 suits, some also with five or six), lower-ranked civil servants (15 or so suits), company directors (10 or so), etc.

Entirely unusual in comparison to other countries, even to practice over the past years in Bosnia-Herzegovina itself, right after politicians by the number of suits are – journalists! Journalists have filed close to 40 suits against other journalists and media!

The record-holders, again, are from the largest news publisher in Bosnia-Herzegovina (“*Avaz*”): the founder and owner of the publishing house himself filed, in the name of the company and in his own name, close to 30 suits by the end of 2004, mostly against other media, and some against well-known public figures.

“*Avaz*” journalists filed another three suits – two personal and one collective suit signed by as many as 40 journalists.

Several journalists working for other media outlets, on the other hand, have sued “*Avaz*” editors and journalists, as well as some other papers.

One Million Marks for Mental Anguish?!

Based on data on compensation requests made in defamation suits, one can answer, at least partly, the question of how come there are so many new suits.

In a television interview, the founder of the news and publishing company “Avaz” said in early 2004 that the total amount of compensation requested in suits against “Avaz” and its editions amounted to 2.5 million marks (approximately 1.3 million euros) and that the total amount of compensation that “Avaz” requested from others was – equal to that! In both cases, this is without the additional court expenses and paying the high rates of lawyers, which so far – according to unofficial information – have cost “Avaz” several hundred thousand marks.

It seems that this is exactly where we can find the answer to the question on the number of suits: in the possibility of seeking monetary compensation – which the Law on the Protection against Defamation does not limit by any absolute amounts; it limits it in principle through clauses that make the whole matter significantly relative. This possibility was understood by certain public figures as an opportunity to strip the opponent.

Disproportionate compensation requests appeared, on one hand, as an expression of a vengeful climate created in the political elite in relation to the media – because the media, generally speaking, were becoming increasingly critical of those in power – and, on the other, as a result of an illusion of an unexpected opportunity in this country, as in some publicized cases in the world and neighborhood (Croatia), to “make easy bucks.”

Although most of the damage requests are relatively moderate, from 10,000 to 20,000 marks (5,000 to 10,000 euros), quite a few confirm the much bigger appetites of the allegedly injured parties. They requested 100,000 or 200,000, even half a million marks, and there are even some who think that their reputation and mental anguish cannot be saved by any amount less than one million marks! Even a million and a half – in two cases, and two million marks – in one case!

In one suit, damages of three million marks were requested (the absolute record so far!) from a daily newspaper that had the highest reputation and prestige in the country and also in the world in the 90’s (“*Oslobodjenje*”) – for alleged material harm that appeared following an article. But, the plaintiffs, the “*Lijanovic*” company, withdrew the suit in the meantime.

If in these cases the appetites were immoderate and the “harm” and “mental anguish and suffering” were overestimated, the plaintiffs soon had to cool down, even regret what they had done, because they soon realized that the courts – even when they ruled in their favor – in these extreme cases awarded damages not higher than one or two percent of the requested amount!

The courts, naturally, took the only stand possible which is in line with case law in awarding damages for harm in similar cases and in the spirit of the new regulations – the new Law on Civil Proceedings, as well as this defamation law. The former law determines payment of court expenses, and the latter the amount of damages awarded.

The Law on the Protection against Defamation had the most influence on the courts’ stand to stay within this relatively moderate framework of compensation. Namely, it prescribes that *“compensation shall be proportional to the harm caused”* and shall be awarded *“solely with the purpose of redressing the harm.”* The court is obliged to have regard for *“whether the amount of damages awarded would likely result in severe financial distress or bankruptcy for the person who allegedly caused the harm”* (in this case media).

When what is written in the Law is translated into practical language, the obligation of the media to pay the awarded and estimated compensation remains, but they will not go under for it. Unless they persevere in repeating false stories for which they will keep going to court...

Hence, the “passions cooled down” after the first verdicts. Of close to 40 handed down by the Cantonal Court in Sarajevo in the first half of 2004, there is a considerable number in which the plaintiff’s request was entirely thrown out (14), while all allegations were accepted and the requested damages awarded in just one verdict (10,000 marks). In all other cases in which the courts ruled in favor of the plaintiffs, the amount of damages awarded was not higher than 2,000 to 8,000 marks (20,000 to 200,000 requested). In only several cases, the awarded damages are 10,000 to 15,000 marks, in three cases – 20,000 marks, but the Supreme Court, ruling upon an appeal, reduced one of them to 15,000 marks.

However, the awarded damages of 20,000 marks were not financially “profitable” either since each side was ordered to pay its own court expenses. In these three verdicts, they were very high, i.e. insignificantly lower than the damages awarded.

Namely, in all cases when the plaintiff’s request is only partially accepted – here they were as much as 10 times higher than the amounts awarded (!) – under the Law on Civil Proceedings, the court may (and in most verdicts it does) order each side to pay its own court expenses, including

court tax which is not so low, as well as lawyers' fees. The bigger the damage request, as in these three cases, the higher the court taxes.

Of course, those that fared the worst were those that made huge damage requests and – lost the case. The “*Kalen*” company from Zenica, for instance, requested one million marks in compensation for alleged harm inflicted by a local television station in Zenica. After its suit was thrown out in second-instance proceedings, it has to pay, along with its own expenses, also the court expenses of the sued party amounting to as much as 73,144 marks (around 37,000 euros)!

Those who requested the most – got burnt the most.

Journalists, however, are not satisfied with paying the damages awarded even when they are not higher than some 10,000 marks. They believe this is too high for the situation in Bosnia-Herzegovina today and, in particular, that it is not proportional to damages awarded by courts in case of, for example, loss of a family member (for mental anguish caused by the loss of a child, for example, around 10,000 to 15,000 KM). Can this mental anguish, the journalists ask, be compared to any anguish or loss of reputation for defamation?

Initial Disorientation of Courts

The experience of these two years has shown that courts were not ready for the start of implementation of the new defamation law, or even the new law on civil action. Therefore, in the beginning, suits accumulated and trials were usually prolonged. This can partly be explained by the fact that the Bosnian-Herzegovinian judiciary has been undergoing reform from the late 90's, which is only now being brought to an end, and that judges themselves have been facing the challenge of their own (re)election. Due to this situation, those interested suffered – those who were denied, due to time elapsing, the right itself (to protection of privacy, dignity and reputation); media organizations – with suits hanging over their heads like the sword of Damocles; as well as the judiciary – for losing public trust.

The most unfortunate for courts was the very start of implementation of the defamation law. Namely, in mid-2003, before any verdicts were handed down, the Cantonal Court in Sarajevo whirled up quite a lot of dust by its decisions on temporary prohibition of writing.

Using a possibility provided by the Law, plaintiffs regularly requested at the beginning of trials that temporary measures to prohibit any writing (about them) be issued – while the proceedings are ongoing. This possibility really is stipulated by the Law, but only as an exception which may be

applied only “*if the injured person can make probable with virtual certainty*”... that he or she “*will suffer irreparable harm as a result of further dissemination of the expression*” (dissemination of an expression of false fact). But, since the court in Sarajevo, out of six requests, immediately accepted and issued four such orders, it seemed as if a very restrictive exception might become – quite a customary rule!

Naturally, this caused turmoil of dissatisfaction among the public, especially the journalist community, because it was understood as an introduction of censorship through the back door. Probably partly under the influence of these reactions, after these four orders - there were no more measures of this kind.

If, therefore, the entire 2003 was lost – with only 10 or so first-instance verdicts in courts in the whole country – the situation started to change the year after. Statistics from the Cantonal Court in Sarajevo will provide the best picture of these changes: last year, 80 new suits were filed with this court (in 2003 there were as many as 192!); first-instance verdicts were passed in 67 cases, while 12 suits were thrown out and 29 were withdrawn. In 2004, 60 appeals were filed with the Supreme Court against this court's first-instance decisions.

The Supreme Court of the Federation of Bosnia-Herzegovina passed 37 second-instance verdicts so far – in which appeals were rejected and first-instance verdicts confirmed, and 10 or so in which first-instance verdicts were basically confirmed, but the amount of damages awarded was changed (in two cases they were insignificantly increased, and in three reduced), or the amount and manner of payment of court expenses was changed. This court also passed 16 decisions on appeals regarding procedural matters in first-instance proceedings.

Professionalism and Self-Regulation

The fact that in courts there are hundreds of lawsuits against journalists and media and tens of sentences passed against them, despite such a favourable law for them, reveals at least two more things: a relatively low degree of professionalism in the media themselves and non-functioning of the newly-established system of press self-regulation.

It is true that the large number of defamation suits against journalists and media, as well as the high damages sued for, may be a limiting factor for media freedom, but on the other hand, they are equally an indicator of the rather massive threatening, even violation, of human rights in the media!

Media violate human rights because they actually – violate their own code of ethics. According to a Council of Europe monitoring, most violations of the Press Code in newspapers can be found in crime sections, or in sections in which own opinions are presented as facts, and also in one-sided presentations of controversial issues, denial of the right to reply... To illustrate, several suits were filed because media outlets refused to publish a reaction and correction by the injured party and all of them, without exception, were resolved in court – at the expense of journalists and media.

In addition, the high number of suits can be explained by the present situation in Bosnian-Herzegovinian journalism which is completely fragmented. The fragmentation is mostly based on political and ideological divisions, with the prevalent interests not being the interests of the profession, or often of the public either, which results every now and then in severe, often very dirty, “media wars.” A multitude of five or six journalist unions and associations operate in Bosnia-Herzegovina and some of them are ethnically based. These divisions and the occasional severe conflicts, by the nature of things, sometimes result in these mutual suits in court.

Of course, most suits could be avoided if the self-regulation system operated with more efficiency or, better put, if all media outlets accepted and earnestly supported the Press Council. This body has been operating for just a few years and is composed of an equal number of prominent journalists and public figures from the whole country who do not hold any political or state positions. The Council is able to resolve the majority of disputes much faster than courts and at a lesser cost (for people who address it, actually, at no cost at all) and, in cases when necessary, to offer full satisfaction to everyone who believes their human dignity and reputation have been violated in any article in any paper.

The problem, however, is not this body; the problem lies in the media that do not support and encourage the work of the Council. And when this is not done by those who by the nature of things should be the most interested, one cannot expect the public to trust the journalists’ own system of self-regulation more than they trust it themselves.

This is why the Council, on average, receives some 30 complaints from citizens each year, while courts, as we have seen, receive hundreds.

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The article was written in the framework of the project The stumbling of the media in times of transition. The project is supported by the South East European Network for the Professionalization of the Media (SEENPM) and implemented by Media Plan Institute Sarajevo with partner organizations – Media Center Belgrade, Albanian Media Institute Tirana, International Center for Journalist Education Opatija, Macedonian Media Institute Skopje and Montenegrin Media Institute Podgorica. All articles will be available at the end of April in a book in English and Bosnian/Serbian/Croatian.