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# ANALYSIS OF THE DRAFT LAW ON AMENDMENTS TO THE CRIMINAL CODE OF REPUBLIKA SRPSKA

- impact on media  
freedoms, civil society  
and freedom of expression

Nasir Muftić, Tahir Herenda,  
Harun Išerić, Kristina Ćendić

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# EXECUTIVE SUMMARY

- 1) In BiH, defamation and insult were included in the criminal law until 1999. More precisely, in the countries of the former Yugoslavia, it was especially Article 133 of the Criminal Code, called “verbal delict”, which was used to deal with anyone who opposed the position of the authorities, and there are numerous examples when citizens were sentenced to imprisonment for allegedly violating the provisions of this Article. When defamation was decriminalized at the beginning of the 21st century, the laws on protection against defamation were seen as well-tailored and in line with international standards of freedom of expression, so according to the index of media freedom, BiH ranked very high, which contributed to the overall democratization of society.
- 2) The wording used in the Draft sets out the definitions of the crime broadly. Bearing in mind that speech is criminalized, the draft text leaves considerable room for different interpretations of various provisions, which can lead to uneven application of the law and undermine legal certainty. Also, given the combination of broad wording and high penalties, these wordings have a potentially very significant chilling effect. Although the question of legitimate aim is usually a formality in the ECtHR practice, the way the Draft is positioned in the public discourse leaves doubt about the legislator’s intentions. The bases for the exclusion of illegality taken from the CC SFRY do not contribute to the elimination of the potential for uneven application, that is, they do not provide protection against a lack of legal certainty and a chilling effect.
- 3) Criminal liability for defamation and insult in RS would create an additional instrument for conducting strategic lawsuit against public participation (SLAPP), which would result in self-censorship of journalists, activists, academics and citizens. Ultimately, this would lead to the impoverishment of public debate on topics of public interest, and would prevent journalists and activists from performing their function of the public watchdog.
- 4) The criminalization of defamation and insult in the RS would be against the standards developed by the CoE, OSCE and UNESCO, as well as the recommendation of the European Commission. The legislator cannot ignore the existence of a consensus at the level of these organizations on the necessity of decriminalizing defamation, and especially cannot ignore the positions of EU bodies, bearing in mind the obligation to harmonize BiH law with EU law and the international obligation of entities to assist BiH in fulfilling its obligations in the EU integration process.

- 5) The recriminalization of defamation and insult is against the international trend of decriminalization that exists in Europe and around the world.. BiH went through the process of decriminalizing defamation and insult at the beginning of the 21st century, making a break with the long-standing practice that existed before that. Re-criminalization would be a significant step backwards and as such against the trend of increasing individual rights and creating an environment for the development of a democratic society.

# INTRODUCTION

At its second regular session, held on March 23, 2023, the National Assembly of the RS (hereinafter: NS RS) adopted the Draft Amendments to the Criminal Code of the RS (hereinafter: CC of the RS),<sup>1</sup> which, among other things, introduces a new chapter of criminal offenses (criminal offenses against honor and reputation) into the Criminal Code of the RS (hereinafter: CC of the RS), and incriminates insult and defamation.<sup>2</sup> Stating the reasons for adopting the Draft, the proponent points to the existing criminal legislation of neighboring countries and emphasises that even European Union (hereinafter: EU) member states have the criminal legislation that prescribes criminal offenses against honor and reputation. However, the proponent simultaneously admits that the EU tends towards decriminalization and completely ignores the practice of the European Court of Human Rights (hereinafter: ECtHR), standards developed by other Council of Europe (hereinafter: CoE) bodies, as well as the UN Human Rights Committee. Therefore, it did not give any specific reasons for the criminalization of the defamation and insult. However, these were given by the president of Republika Srpska (hereinafter: RS), Milorad Dodik, who was the first to announce the criminalization,<sup>3</sup> pointing out that *the slander was used to discredit the institutions of the RS, its legitimate and legally elected representatives, and to portray it as a completely disordered society that, as such, cannot exist independently*.<sup>4</sup> On 12 May, 2023, he announced the adoption of the Proposal for Amendments to the CC of the RS at the next session of the NS of the RS, including the incrimination of defamation and insults<sup>5</sup> although at that time the public discussions on the Draft had not yet been completed.

The process of re-incrimination of defamation and insult in the RS has caused nega-

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1 Criminal code of RS, "Official Gazette of RS", no 64/17, 104/18, 15/21, 89/21.

2 Draft amendments to the CC RS, with the explanation, is available at the website of the National Assembly of RS: <https://www.narodnaskupstinars.net/?q=la/narodna-skup%C5%Altina/sjednice/materijali-za-sjednice/materijali-za-drugu-redovnu-sjednicu>, accessed on 3 May 2023.

3 Milorad Dodik first did it on his Twitter profile on October 31, 2022, and then at the constitutive session of the National Assembly of RS, 15 November 2022 (Dodikovi zakoni na putu autokratije: Kadija te tuži, kadija ti sudi, available at: <https://www.klix.ba/vijesti/bih/dodikovi-zakoni-na-putu-autokratije-kadija-te-tuzi-kadija-ti-sudi/221220016>, accessed on 3 May 2023).

4 Milorad Dodik, Republika Srpska će pravno urediti svoj javni prostor, available at: <https://dodik.net/republika-srpska-ce-pravno-urediti-svoj-javni-prostor/?pismo=lat>, accessed on 3 May 2023.

5 Milorad Dodik o Zakonu o kleveti i novinarima: Ima bitangi..., available at: <https://6yka.com/bih/milorad-dodik-o-zakonu-o-kleveti-i-novinarima-ima-bitangi>, accessed on 3 May 2023.

tive reactions from the association of journalists,<sup>6</sup> non-governmental organizations,<sup>7</sup> the Institution of Human Rights Ombudsman of Bosnia and Herzegovina,<sup>8</sup> CoE,<sup>9</sup> EU,<sup>10</sup> OSCE,<sup>11</sup> UN,<sup>12</sup> international community in BiH<sup>13</sup> and international non-govern-

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- 6 For a reaction of BiH Journalist Association, see: BH novinari upozoravaju: Vlada RS želi gasiti medije kako bi “pojačala” ugled i čast političara!, available at: <https://bhnovinari.ba/bs/2023/03/03/bh-novinari-upozoravaju-vlada-rs-zeli-gasiti-medije-kako-bi-pojacala-ugled-i-cast-politicara/>, accessed on 3 May 2023. BH novinari poručili poslanicima Narodne skupštine RS: Odbacite Vladin prijedlog kriminalizacije klevete i tražite mišljenje Venecijanske komisije, available at: <https://bhnovinari.ba/bs/2023/03/12/bh-novinari-porucili-poslanicima-narodne-skupstine-rs-odbacite-vladin-prijedlog-kriminalizacije-klevete-i-trazite-misljenje-venecijanske-komisije/>, accessed on 3 May 2023. BH novinari: Današnja odluka NSRS je poraz demokratije, slobodnog društva i slobodnog novinarstva!, available at: <https://bhnovinari.ba/bs/2023/03/23/bh-novinari-danasnja-odluka-nrs-je-poraz-demokratije-slobodnog-drustva-i-slobodnog-novinarstva/>, accessed on 3 May 2023.
  - 7 Initiative for monitoring the european integration of BiH, Statement of the Initiative for Monitoring the European Integration of B&H: Amendments to the Criminal Code of the RS further restrict the already threatened freedom of expression, available at: <https://eu-monitoring.ba/saopštenje-inicijative-za-monitoring-evropskih-integracija-bih-izmjene-krivcnog-zakonika-rs-dodatno-organicavaju-vec-ugrozenu-slobodu-izrazavanja/>, accessed on 3 May 2023.
  - 8 Ombudsmeni o kriminalizaciji klevete u RS-u: Svako ograničenje mora biti proporcionalno cilju, available at: <https://www.klix.ba/vijesti/bih/ombudsmeni-o-kriminalizaciji-klevete-u-rs-u-svako-ogranicenje-mora-biti-proporcionalno-cilju/230316122>, accessed on 3 May 2023.
  - 9 For the reaction of the Commissioner, see: Mijatović pozvala na povlačenje izmjena Krivičnog zakona RS-a kojima se inkriminira kleveta, available at: <https://avaz.ba/vijesti/bih/814287/mijatovic-pozvala-na-povlacenje-izmjena-krivcnog-zakona-rs-a-kojima-se-inkriminira-kleveta>, accessed on 3 May 2023. Platform to promote the protection of journalism and safety of journalists: Bill to re-criminalise Defamation and Insult in Republika Srpska, available at: <https://fom.coe.int/en/alerte/detail/107638987;globalSearch=false>, accessed on 3 May 2023.
  - 10 The Diplomatic Service of the European Union: Bosnia and Herzegovina: Statement by the Spokesperson on the defamation law in Republika Srpska, available at: [https://www.eeas.europa.eu/eeas/bosnia-and-herzegovina-statement-spokesperson-defamation-law-republika-srpska\\_en?ettrans=hr](https://www.eeas.europa.eu/eeas/bosnia-and-herzegovina-statement-spokesperson-defamation-law-republika-srpska_en?ettrans=hr), accessed on 3 May 2023.
  - 11 OSCE Representative Ribeiro and Ambassador Aggeler deeply worried about decision to criminalize defamation in Republika Srpska, Bosnia and Herzegovina, available at: <https://www.osce.org/representative-on-freedom-of-media/538404>, accessed on 3 May 2023.
  - 12 Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the rights to freedom of peaceful assembly and of association: Bosnia and Herzegovina: Defamation must not be re-criminalised, say UN experts, available at: <https://srfreedex.org/bosnia-and-herzegovina-defamation-must-not-be-recriminalised-say-un-experts/>, accessed on 3 May 2023.
  - 13 OHR: Proposed changes to the RS Criminal Code warrant additional public debate and consideration, available at: <http://www.ohr.int/proposed-changes-to-the-rs-criminal-code-warrant-additional-public-debate-and-consideration/>, accessed on 3 May 2023. Peace Implementation Council Steering Board: Joint Statement by the Ambassadors of the Peace Implementation Council Steering Board, available at: <http://www.ohr.int/zajednicka-izjava-veleposlanika-zemalja-clanica-upravnog-odbora-vijeca-za-provedbu-mira/>, accessed on 3 May 2023.

mental organizations.<sup>14</sup> The common feature of all reactions is the condemnation of the attempt by the public authorities in the RS to criminalize defamation and insult, that this represents a strengthening of the trend of stifling and undermining freedom of expression, independent media and non-governmental society, and ultimately that this ensures an encouraging environment for civil society, and which is an obligation of BiH from the process of European integration.<sup>15</sup>

The attempt to criminalize defamation in the RS is just one of the attacks on freedom of expression by the public authorities in recent years. Let's remember that during the COVID-19 pandemic, the authorities in the RS passed acts<sup>16</sup> with an attempt to regulate fake news. OSCE pointed out that these were undermining media freedom and freedom of speech.<sup>17</sup> In 2021, the NS RS incriminated the "Damage to the reputation of Republika Srpska and its peoples",<sup>18</sup> contrary to international and European standards for the protection of freedom of expression.<sup>19</sup> In addition, it is necessary to point out a rare phenomenon in BiH, which happened in the RS, namely the pre-

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- 14 Bosnia and Herzegovina: Call on the National Assembly to reject defamation law amendments, available at: <https://www.ecpmf.eu/bosnia-and-herzegovina-call-to-reject-defamation-law-amendments/>, accessed on 3 May 2023. Republic of Srpska, Bosnia and Herzegovina: EFJ and IFJ call for defamation to remain under civil law, available at: <https://europeanjournalists.org/blog/2023/01/25/republic-of-srpska-efj-and-ifj-call-for-defamation-to-remain-under-civil-law/>, accessed on 3 May 2023. Article 19, Bosnia and Herzegovina: On the Amendments on Criminal Libel in the Legislation of Republika Srpska, available at: [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiK7tGgIvT-AhX0\\_rslHQRIDmYQFnoECAUQAQ&url=https%3A%2F%2Fwww.article19.org%2Fwp-content%2Fuploads%2F2023%2F05%2F4May2023\\_Republika-srpska-criminal-defamation-analysis.pdf&usq=AOvVawOHTK7ZhLLhB99nEGkRh-nd](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiK7tGgIvT-AhX0_rslHQRIDmYQFnoECAUQAQ&url=https%3A%2F%2Fwww.article19.org%2Fwp-content%2Fuploads%2F2023%2F05%2F4May2023_Republika-srpska-criminal-defamation-analysis.pdf&usq=AOvVawOHTK7ZhLLhB99nEGkRh-nd), accessed on 3 May 2023.
  - 15 Contrary to priority number 11 of the European Commission for BiH in the Opinion on BiH's application for membership in the European Union, available at: [https://neighbourhood-enlargement.ec.europa.eu/document/download/5804b1ab-c7c5-4cb9-bfa5-b241a5f4a0f8\\_en?filename=20190529-bosnia-and-herzegovina-opinion\\_en.pdf](https://neighbourhood-enlargement.ec.europa.eu/document/download/5804b1ab-c7c5-4cb9-bfa5-b241a5f4a0f8_en?filename=20190529-bosnia-and-herzegovina-opinion_en.pdf), accessed on 3 May 2023.
  - 16 Odluku o zabrani izazivanja panike i nereda za vrijeme vanrednog stanja (Decision on the Prohibition of Causing Panic and Riots During an Emergency Situation Declared on the Territory of RS), "Official Gazette of RS", no 26/20, which was then replaced by Decree on the Prohibition of Causing Panic and Riots During an Emergency Situation Declared on the Territory of RS, "Official Gazette of RS", no 32/20.
  - 17 OSCE Media Freedom Representative Désir and Head of Mission to Bosnia and Herzegovina Kavalec concerned about measures against coronavirus "fake news", available at: <https://www.osce.org/representative-on-freedom-of-media/449041>, accessed on 3 May 2023. OSCE concerned about decree against "fake news" in Republika Srpska, Bosnia and Herzegovina, and calls on authorities to withdraw it, available at: <https://www.osce.org/representative-on-freedom-of-media/450115>, accessed on 3 May 2023.
  - 18 "Official Gazette of RS", no 89/21.
  - 19 See: Išerić, Harun, Herenda, Tahir, Muftić, Nasir. Inkriminacija negiranja genocida u BiH: između bh. politike i slobode izražavanja. Sarajevo: Youth Initiative for Human Rights BiH, 2022. Available at: [https://www.academia.edu/87894384/Inkriminacija\\_negiranja\\_genocida\\_u\\_BiH\\_izme%C4%91u\\_bh\\_politike\\_i\\_slobode\\_izra%C5%BEavanja\\_Incrimination\\_of\\_genocide\\_denial\\_in\\_BiH\\_between\\_BiH\\_politics\\_and\\_freedom\\_of\\_speech](https://www.academia.edu/87894384/Inkriminacija_negiranja_genocida_u_BiH_izme%C4%91u_bh_politike_i_slobode_izra%C5%BEavanja_Incrimination_of_genocide_denial_in_BiH_between_BiH_politics_and_freedom_of_speech), accessed on 3 May 2023.

ssure on journalists to discover their journalistic sources.<sup>20</sup> Ultimately, one should keep in mind the wider context of the atmosphere in BiH, in which attacks, threats and pressures against journalists are socially acceptable, as well as the trend of impunity for such acts.<sup>21</sup> That is why the Ombudsman prepared a Special report on the status and cases of threats against journalists in Bosnia and Herzegovina (hereinafter: BiH),<sup>22</sup> where they noted that journalists are “a frequent target of threats and political pressure”.<sup>23</sup> Therefore, the attempt to criminalize defamation and insult represents the expected sequence of activities of the public authorities in the RS.<sup>24</sup> Apart from the reaction and condemnation, there was no concrete legal action. For example, an opinion on the Draft could have been requested from the European Commission for Democracy through Law (hereinafter: Venice Commission), or from the OSCE Representative for Freedom of the Media, who could, with the power of their authority, act on the public authorities in the RS.

This document represents one of the ways in which the non-governmental sector in BiH tries to encourage the public authorities in BiH to use the remaining pressure mechanisms so that the incrimination of defamation and insult does not occur, that is, it offers additional arguments against incrimination within the public debate on the Draft. In the first part, a brief review of the process that the legal order of BiH has undergone is offered: from criminal, civil, and re-criminal liability for defamation and insult in BiH (that is, in RS). The second part is devoted to the analysis of the compliance of the proposed criminal provisions on defamation and insult with the standards of the ECtHR, as the most authoritative body for the protection of human rights in Europe. Finally, the third part contains an overview of the standards in the field of criminal liability for defamation, which were created by the bodies of CoE, EU, OSCE, UNESCO, and elaborates on how they are relevant for the procedures of the adoption of the Draft.

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20 SafeJournalists: Nedopustivo ponašanje policije nad novinarima u Bosni i Hercegovini, available at: <https://safejournalists.net/portfolios/safejournalists-nedopustivo-ponasanje-policije-nad-novinarima-u-bosni-i-hercegovini/?lang=sr>, accessed on 3 May 2023.

21 Bosna i Hercegovina – Indikatori nivoa medijskih sloboda i sigurnosti novinara 2022., available at: <https://safejournalists.net/resources1/bosna-i-hercegovina-indikatori-nivoa-medijskih-sloboda-i-sigurnosti-novinar-a-2022/?lang=bs>, accessed on 3 May 2023.

22 Džumhur, Jasminka, Jukić, Nives, Mitrović, Ljubinko. Special report on the status and cases of threats against journalists in Bosnia and Herzegovina. Sarajevo: The Institution of Human Rights Ombudsman of Bosnia and Herzegovina, 2017. Available at: <https://ombudsmen.gov.ba/Download.aspx?id=220&lang=BS>, accessed on 3 May 2023.

23 *Ibid.*, p. 56.

24 The public authorities in the RS also announced the adoption of the Law on “Foreign Agents of the RS”, so in March 2023 the Government of the RS adopted the Draft Law on the Special Register and Publicity of the Work of Non-Profit Organizations. See: Zakon o stranim agentima RS po uzoru na ruski, a ne američki model, available at: <https://www.slobodnaevropa.org/a/zakon-o-stranim-agentima-rs-dodik/32343761.html>, accessed on 3 May 2023.

# I. HISTORICAL ACCOUNT OF THE LEGAL REGULATION OF DEFAMATION AND INSULT IN BOSNIA AND HERZEGOVINA

In Bosnia and Herzegovina, defamation was a part of the Criminal Code until 1999, first within the Federal People's Republic of Yugoslavia (FNRY), then the Socialist Federal Republic of Yugoslavia (SFRY), as well as after gaining its independence. In the countries of the former Yugoslavia, as well as in BiH, defamation and insult were a criminal offense, even though "criminal laws exist to punish objectively socially dangerous acts that harm society as a whole, such as murder, abuse, theft, fraud, incitement and inciting violence and hatred and the like."<sup>25</sup> For defamation and insult as criminal acts, there were measures in the form of punishment but even the very threat of punishment (and not, for example, a compensation for damage) represents a restriction of freedom of expression. After the end of the Second World War, in 1946, the Constitution of the Federal People's Republic of Yugoslavia was adopted, Article 21 of which stated that any statements inciting national, racial or religious hatred and discord were punishable. This was the first time that freedom of speech was included in such a document at the state level. Furthermore, according to Article 27, citizens were guaranteed freedom of the press, speech, association, assembly, public meetings and manifestations. In addition, Article 46 provided that federal laws are valid throughout the territory of the Federal People's Republic of Yugoslavia, and if the provisions of federal laws and laws of the republics were not in line with one another, federal laws would apply. Later, in the Constitution of the Federal Republic of Yugoslavia from 1974, Article 167 guaranteed freedom of information and public expression, as well as freedom of speech and public speaking. It was especially emphasized that "citizens have the right to express and publish their opinions through the means of information," while Article 168 guaranteed the right to receive information, and stated that the media are obliged "to truthfully and objectively inform the public, and to publish the opinions and information coming from

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25 Srdić, Mladen u Halilović, M. and Džihana A., "Media Law in Bosnia and Herzegovina", INTER-NEWS u Bosni i Hercegovini 2011. Available at: [https://issuu.com/internewsbih/docs/medij-sko\\_pravo\\_u\\_bih\\_bos](https://issuu.com/internewsbih/docs/medij-sko_pravo_u_bih_bos) , accessed on 05 April 2023.



bodies, organizations and citizens that are of interest to the public”. In addition, Article 169 briefly stated that scientific and artistic creation is free. However, as we will see in the following examples, the practice, even in such cases, was still somewhat different, because there were provisions in criminal laws that were often used to limit freedom of speech in numerous means of public expression.

When it comes to the criminal law of Yugoslavia after World War II, the Criminal Code - General Part was adopted on December 4, 1947. It was largely created under the influence of Soviet criminal legislation, while the complete Criminal Code (CC) of the FPRY, adopted on July 1, 1951, was mainly modeled after European legislation (mainly Swiss), and the amendments followed in 1959.

Finally, nine criminal codes (one at the state level, six at the level of the republics, and two provincial) were adopted, based on the SFRY Constitution of 1974. These codes mainly adopted the solutions of the amended CC from 1951. Thus, the Criminal Code at the state level from 1976, among other things, mentioned reputation in the sense of damage to the reputation of a state, a foreign state or an international organization. Article 157 stated:

- (1) Whoever publicly exposes to contempt the SFRY, its flag, coat of arms or anthem, the Presidency of the SFRY, the Parliament of the SFRY, the Federal Executive Council, the armed forces, the President and members of the Presidency of the SFRY, the President of the Parliament of the SFRY or the President of the Federal Executive Council in connection with the performance of their functions, shall be punished by imprisonment for up to three years.

Contrary to current international standards according to which public figures must show a greater degree of tolerance for statements about them, especially when it comes to how they perform their official duties, which contributes to the public debate, according to the above mentioned, the reputation of public officials was particularly protected. However, in the second paragraph, it is stated that “for exposure to insults of the highest authorities or representatives of those authorities, the perpetrator will not be punished if the offensive expression is made in a scientific, literary or artistic work, in a serious critique, in the performance of official duties, journalistic, political, self-governing and other social activities, in the defense of a right or the protection of legitimate interests if it can be seen from the manner of expression or from other circumstances that they did not do so with the intention of disparagement, or if they prove the statement to be true, or if they prove that there was a well-founded reason to believe in the truth of what was expressed or conveyed.” From this it seemed that journalists in SFRY still had some degree of protection when performing their work.

The Federal CC also made a special reference to the violation of the reputation of a foreign country, its flag, coat of arms or anthem, or the head of a foreign country or the diplomatic representative of a foreign country in the SFRY, and the prescribed punishment was imprisonment for up to three years. In connection with freedom of expression, a special reference to hate speech was made in Article 134 of the Cri-

minal Code<sup>26</sup>, and there were also special provisions on criminal liability for criminal offenses committed through the press and other means of public information and communication (Article 27).<sup>27</sup>

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26 “Whoever provokes or incites nationalism, racial or religious hatred, discord or intolerance among peoples and nationalities living in the SFRY, will be punished with imprisonment from one to five years.”

27 “(1) The responsible editor, i.e. the person who replaced him at the time of providing the information, is criminally liable for criminal acts committed through newspapers or other occasional printed publications, through radio, television or film newspapers:  
1) if by the end of the main trial before the first instance the author remained unknown by the court;  
2) if the information is published without the consent of the author;  
3) if at the time of publication of the information there were real or legal obstacles to the prosecution of the author, which are still ongoing.  
(2) The editor, i.e. the person who replaces him/her, is not criminally liable if, for justified reasons, he/she did not know about any of the circumstances mentioned in point. 1. to 3. paragraph 1. of this Article.”

## I.1. VERBAL DELICT

When it comes to freedom of expression, including defamation as a criminal offense, the most significant article of the Criminal Code of the SFRY from 1976 was Article 133. Colloquially called ‘verbal delict’, this Article referred to an ‘Enemy propaganda’, and it was followed by a measure from Article 67 of the same law under the name “Prohibition of public speaking”. These two articles were very often used to limit the freedom of expression for all those who spoke against the consensus of the time. These two articles were repealed in 1990 when a reform was attempted to democratize society, whereby the name ‘Enemy Propaganda’ was changed to ‘Calling for a violent change in the constitutional order’. Often characterized as dangerous and infamous, Article 133 read:

- (1) Whoever, by means of an inscription, leaflet, drawing, speech or in any other way, calls or encourages the overthrow of the power of the working class and working people, the unconstitutional change of the socialist self-governing social order, the breaking of brotherhood and unity and equality of peoples and nationalities, the overthrow of the organs of social self-governance and authorities or their executive bodies, to resist the decisions of competent authorities and self-governance that are of importance for the protection and development of socialist self-governing relations, security and defense of the country, or maliciously and untruthfully portrays socio-political conditions in the country, shall be punished by imprisonment from one to ten years.
- (2) Whoever commits the act referred to in paragraph 1 of this article with help or under the influence from abroad shall be punished by imprisonment for at least three years.
- (3) Whoever sends or transfers agitators or propaganda material to the territory of the SFRY for the purpose of committing the offense referred to in paragraph 1 of this article, shall be punished by imprisonment for at least one year.
- (4) Whoever creates or reproduces enemy propaganda material with the intention of dispersal, or who keeps this material even though they know it is intended for dispersal, shall be punished by imprisonment from six months to five years.

Here, propaganda is understood as actions that spread, provoke or reinforce the belief in the correctness of certain ideas among a group of individuals, in order to initiate certain activities. Propaganda was punishable when it incited any kind of attack on a person/community, and in particular, this included statements aimed at overthrowing the state system (e.g., the Law on Criminal Offenses Against the People and the State, Article 9). This criminal offense specifically included “malicious portrayal of socio-political conditions in the country”. This article was seen as extremely restrictive and based on this legal provision, numerous procedures were initiated which often ended with very severe punishments for those who in some

way opposed the former communist regime. Not only were many people persecuted and ended up in prisons because of their disagreement with the authorities, but because of criminal convictions they could not even find jobs afterwards. There were tens of thousands of citizens of Yugoslavia who were punished because of their statements and expressions, and everything was according to the communist law, which was interpreted according to the instructions and needs of daily politics: arrest, imprison, sentence, confiscate property, abolish civil rights, abolish the right to education, study, etc.”<sup>28</sup> Therefore, Article 133 is exactly the one to which the story of defamation and insult as criminal acts in CC of the SFRY comes down.

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28 See: “From the margins of the political spectrum” - Verbal delict is “coming back”. available at: <https://croativ.net/s-margin-politickoga-spektra-verbalni-delikt-se-vraca-18014/> , accessed on 04 April 2023.

## I.2. APPLICATION OF ARTICLE 133 OF THE CC OF SFRY IN PRACTICE

All those who criticized the authorities and all those who were seen as “unfit” were most often tried according to Article 133 mentioned before. There are numerous examples when the authorities used this Article to deal with dissenters, which greatly curtailed freedom of expression, and the chilling effect this caused became greater and greater. For instance, in 1971, Mihailo Đurić, a professor at the Faculty of Law at the University of Belgrade, was convicted for speaking at an expert meeting during a public debate on constitutional changes. The entire discussion and Đurić’s article on this topic were published in the journal “Annals” of the Faculty of Law in Belgrade. Although the intention was to provide the authorities with material for the drafting of constitutional amendments, the magazine was banned, as was the newspaper “Student” which also published the professor’s speech, and all its copies were to be destroyed.

On July 17, 1972, the District Court in Belgrade sentenced professor Mihailo Đurić to two years of rigorous imprisonment, referring to “hostile action against the social and state order”, “inciting and calling for the destruction of the brotherhood and unity of the people of Yugoslavia”. “malicious and untrue portrayal of socio-political circumstances”. Although the Supreme Court of Serbia reduced the prison sentence from two years to nine months on January 4, 1973, the Teaching and Research Council of the Faculty of Law did not let the professor back to teaching until 1989. Đurić was judicially rehabilitated on January 4, 2010 by the decision of the District Court in Belgrade, “in the explanation of which it is said that the conviction violated not only the constitution of the SFRY but also the Universal Declaration of Human Rights.”<sup>29</sup>

This case was not the only one though, and the stifling of freedom of speech gained momentum especially after the death of Josip Broz Tito in 1980. Therefore, in 1981, a member of the leadership of Matica Hrvatska, Marko Veselica, was sentenced to a much longer prison term, more precisely - to 11 years in prison when he wrote critically about the authorities in the SFRY in the magazine ‘Der Spiegel’.<sup>30</sup>

Only by simply criticizing the government meant that the people who did it became enemies of the state. This did not apply only to political speeches and debates, instead there was the banning of books, magazines, newspapers, and even theater plays and films. All those who were not fitting in, faced trumped-up charges, and the authorities regularly referred to the above-mentioned Article 133, which defined

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29 Time, “One Tragic Paradigm”. available at: <https://www.vreme.com/vreme/jedna-tragicna-paradigma/> , accessed on 04 April 2023.

30 Time, “One Tragic Paradigm”. available at: <https://www.vreme.com/vreme/jedna-tragicna-paradigma/> , accessed on 04 April 2023.

“verbal delict”.<sup>31</sup> Some of the cases that attracted the public’s attention were a prison sentence for Gojko Đogo for the collection of poems “Vunena vremena” (*Woolly times*), the banning of Dragan Antić’s book “The Case of Đogo - documents”, the banning of the theater play “Golubnjaca” in Novi Sad, the cancellation of the show “Belgrade, good morning” by Dušan Radović on the program of Studio B, the banning of Ljubomir Simović’s collection of poems “Istocnice”, seven months in prison for the Dubrovnik poet Milan Milišić, the cancellation of the publishing organization “Zapis”, the prevention of the normal publication of the newspaper “Književne novine” (*Literary newspaper*), the banning of the play “Politics as a fate”, etc.<sup>32</sup> In an attempt to stop the persecution of dissidents, on November 10, 1984, the Committee for the Defense of Freedom of Thought and Expression was founded. However, this committee gathered only those who were in Belgrade, but the petitions submitted by the committee also referred to the defense of all critics of the government from other republics, too. One of those petitions included a request for the release of Alija Izetbegović, sentenced to prison for the “Islamic Declaration”.<sup>33</sup> It would later turn out that behind the support provided by the petition were very problematic ambitions of its signatories.

*This case is one of those that best illustrates the repression of freedom of expression carried out by the communist regime of SFRY, and is known as the Sarajevo Process, or the trial of Muslim intellectuals.*

*This court process was initiated in 1983, when a group of intellectuals was accused of criminal association, hostile action and counter-revolution according to Articles 114 and 136 of the Criminal Code of the SFRY.*

*On March 23, 1983, the State Security Service of the Socialist Republic of BiH (SDB SRBiH) carried out the “Trebević” operation, when numerous intellectuals were arrested on charges related to the Islamic Declaration written by Izetbegović in the 1970s, although it did not refer to Yugoslavia.*

*The State Security Service extorted statements from numerous witnesses, who then gave a second version when the case came before the court, but then only the first version was taken into account.<sup>34</sup> At that time, only certain media attended the trial, so it could not be characterized as completely public. More precisely, some headlines and articles in the newspapers were characterized as a verdict before the verdict:*

31 Kljakić, Slobodan, “Dissidents of all nations, unite”. Available at: <https://www.politika.rs/scc/clanak/344396/Tema-nedelje/Disidenti-svih-naroda-ujedinite-se>, accessed on 04 April 2023.

32 Kljakić, Slobodan, “Dissidents of all nations, unite”. Available at: <https://www.politika.rs/scc/clanak/344396/Tema-nedelje/Disidenti-svih-naroda-ujedinite-se>, accessed on 04 April 2023.

33 Borogovac, Muhamed (1995). War in Bosnia and Herzegovina. Zadar: Narodni list dd ISBN 953-96380-9-7. p.17.

34 Isaković, Zehrudin (2005). Biography. Sarajevo: Alija Izetbegović Museum, p. 22.

“They undermined social order” ( Oslobodjenje),  
“The goal of the Islamic Republic” (Politika Express),  
“Against the enemies of Allah” (Politika ),  
“A small but poisonous company” (Svijet),  
“Against the Constitution in the name of the Quran” (Start),  
“Declaration of darkness and hatred” (Oslobodjenje),  
“Ghosts of the past in a terrorist cloak” (Oslobodjenje),  
“God in the service of fratricide” (Svijet) etc.<sup>35</sup>

*The first-instance verdict imposed a total of 90 years of punishment for the accused.* <sup>36</sup>

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35 See: “Sarajevo trial of 1983 - trial of Muslims and Muslims”. Available at: <https://historija.info/sarajevski-proces-1983-godine-sudjenje-muslimanima-i-muslimanima/> , accessed on 25 April 2023.

36 Isaković, Zehrudin (2005). Biography. Sarajevo: Alija Izetbegović Museum, p. 23.

## I.3. DECRIMINALIZATION OF DEFAMATION

As we can see, in the former Yugoslavia, even expressing criticism about someone else could significantly limit the freedom of both media actors and citizens in general. The Criminal Code of the SR of BiH contained Criminal Offenses Against Honor and Reputation, so Article 80 specifically referred to defamation and stated:

- (1) Whoever conveys something untrue about another that can harm his/her honor and reputation, will be punished with a fine or imprisonment for up to six months.
- (2) If the offense referred to in paragraph 1 of this article was committed through the press or other means of public information and communication or at a public gathering, the perpetrator shall be punished by imprisonment for up to one year.
- (3) If what is untruthfully stated or conveyed is of such significance that it could lead to serious consequences for the injured party, the perpetrator shall be punished with imprisonment from three months to three years.
- (4) If the defendant (proves the truth of his/her claim or if he proves that he/she had a well-founded reason to believe in the truth of what he/she stated or conveyed, he/she will not be punished for defamation, but he/she can be punished for insult (Article 81), i.e. for disparagement by transferring for a criminal offense (Article 83).

Nevertheless, in democratic societies, all those who express a certain opinion should not be criminally prosecuted, nor convicted as criminals, especially not because the verdict for these acts remains in the criminal record and the person is considered convicted, which can have negative consequences when seeking employment. Because of this, the European Court of Human Rights emphasized that the imposition of even a very mild criminal sentence means that the person has a criminal record and this has a chilling effect on media actors.<sup>37</sup> Therefore, the post-war judicial reform in Bosnia and Herzegovina included defamation, too, primarily aiming at its decriminalization, which should contribute to a greater freedom of expression and democratization of society.

Namely, during the post-war years, numerous criminal proceedings were conducted against media actors, and so on July 30, 1999, the High Representative made a decision on freedom of information and the abolition of defamation and insult as cri-

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37 Srdić, Mladen u Halilović, M. and Džihana A., "Media Law in Bosnia and Herzegovina", 2011. Available at: [https://issuu.com/internewsbih/docs/medijsko\\_pravo\\_u\\_bih\\_bos](https://issuu.com/internewsbih/docs/medijsko_pravo_u_bih_bos) , accessed on 05 April 2023.



minal offenses.<sup>38</sup> According to this Decision, the entities had to harmonize their laws with the European Convention on Human Rights and Fundamental Freedoms and decriminalize defamation and insult. Both international and domestic experts were included in the expert group that prepared the proposal for the new law, and the draft law was sent to the entity parliaments for adoption through the Office of the High Representative and the OSCE Mission to BiH. And so, in BiH the following were adopted: two laws at the level of two entities and one law at the level of the Brčko District<sup>39</sup>. This also meant the adoption of generally accepted European standards in this area, expressed primarily in Article 10 of the European Convention on Human Rights and Fundamental Freedoms and in the jurisprudence of the European Court of Human Rights in Strasbourg.<sup>40</sup> It was decided, therefore, that liability for defamation should be of a civil-legal nature and that these laws actually deal with the compensation for damage caused to someone's reputation by defamatory expressions. The laws on protection against defamation were, therefore, "revolutionary" in their own way, as the first national laws in Europe that completely decriminalized defamation and insult in both normative and practical terms.<sup>41</sup>

In the Republika Srpska, the NS RS adopted the Law on Protection against Defamation, which entered into force in 2001, while the Parliament of the Federation of Bosnia and Herzegovina (hereinafter: FBiH) did so a little later, when the High Representative made a decision on November 1, 2002, promulgating the Law on Protection against Defamation in FBiH.<sup>42</sup> In the Brčko District of Bosnia and Herzegovina, the Law on Protection against Defamation entered into force in 2003. During this period, it was expected that the number of lawsuits against journalists and the media would decrease, but in fact that number increased to as many as 300 in just the first two years of application of the new laws. When this number was compared "with the total number of media outlets, both electronic and printed, it turns out

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38 See: "Decision on the restructuring of the Public Broadcasting System in Bosnia and Herzegovina and on freedom of information and the abolition of criminal penalties for insult and defamation". Available at: [http://www.ohr.int/decisions/mediadec/default.asp?content\\_id=31174](http://www.ohr.int/decisions/mediadec/default.asp?content_id=31174) , accessed on 01 May 2023.

39 Law on protection against defamation of the RS (Banja Luka, July 2001). Official Gazette of the RS No. 28/94. Entered into force on August 1, 2001. Law on protection against defamation of FBiH (Sarajevo, 2003). Official Gazette of FBiH No. 19/03. Entered into force in 2003. Law on protection against defamation of the Brčko District of Bosnia and Herzegovina (Brčko, 2003). Official Gazette of the Brčko District of Bosnia and Herzegovina No. 14/03. Entered into force in 2003.

40 See: "Decision on the restructuring of the Public Broadcasting System in Bosnia and Herzegovina and on freedom of information and abolition of criminal penalties for insult and defamation". Available at: [http://www.ohr.int/decisions/mediadec/default.asp?content\\_id=31174](http://www.ohr.int/decisions/mediadec/default.asp?content_id=31174) , accessed on 01 May 2023.

41 Srđić, Mladen u Halilović, M. and Džihana A., "Media Law in Bosnia and Herzegovina", 2011. Available at: [https://issuu.com/internewsbih/docs/medijsko\\_pravo\\_u\\_bih\\_bos](https://issuu.com/internewsbih/docs/medijsko_pravo_u_bih_bos) , accessed on 05 April 2023.

42 See: "Decision promulgating the Law on protection against defamation of the Federation of Bosnia and Herzegovina". Available at; [http://www.ohr.int/decisions/mo-hncantdec/default.asp?content\\_id=28424](http://www.ohr.int/decisions/mo-hncantdec/default.asp?content_id=28424) , accessed on 28 April 2023.

that every media outlet was sued at least once, as well as every tenth journalist.”<sup>43</sup> In addition, the compensation claims were also high and amounted to 20,000 up to 200,000 KM, and even several million KM.<sup>44</sup> However, before 2004, there were no judgements, because “in some way, the courts avoided making decisions and cases of this type were resolved slowly, or rather, not at all, until the adoption of new entity laws on civil procedure. Namely, these procedural laws significantly accelerated the first-instance civil proceedings and limited the possibility of postponing hearings and other ways of delaying the proceedings.”<sup>45</sup> Although it seemed that the amounts requested for compensation had stabilized, which were certainly lower than in the first years of the application of the law, they were still problematic for media actors in BiH, especially because some media had to pay certain amounts and several times a year, so the total amount was sometimes very high. According to the media freedom index of “Reporters without borders”<sup>46</sup> for the year 2022, BiH generally records a decline in media freedom. Namely, in 2021 it was in 58th place, while in 2022 it took 67th place. If we compare these positions with those of 20 years ago, then this drop is particularly big, because in 2004, BiH was 21st, which was certainly thanks to the new laws on protection against defamation. Therefore, here we can conclude that in BiH the issue of freedom of expression, including the treatment of defamation and insult, went from criminalization to modernization, and that the new laws took a big step towards the democratization of society because modern international standards were accepted. Better to say, by decriminalizing defamation and insult, a detour was made from the previously valid provisions of the former state, so the introduction of the criminal offense of defamation would represent a turn towards once again restraining and stifling freedom of expression.

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43 Halilović, Mehmed: “How the new law on protection against defamation is applied in Bosnia and Herzegovina: journalists are sued by politicians, but also - by journalists!”. Media Online . Available at: <http://www.mediaonline.ba/ba/pdf.asp?ID=324&n=KAKO%20SE%20U%20BIH> . accessed on 04 May 2023.

44 Srđić, Mladen u Halilović, M. and Džihana A., “Media Law in Bosnia and Herzegovina”, 2011. Available at: [https://issuu.com/internewsbih/docs/medijsko\\_pravo\\_u\\_bih\\_bos](https://issuu.com/internewsbih/docs/medijsko_pravo_u_bih_bos) , accessed on 05 April 2023.

45 Srđić, Mladen u Halilović, M. and Džihana A., “Media Law in Bosnia and Herzegovina”, 2011. Available at: [https://issuu.com/internewsbih/docs/medijsko\\_pravo\\_u\\_bih\\_bos](https://issuu.com/internewsbih/docs/medijsko_pravo_u_bih_bos) , accessed on 05 April 2023.

46 See: “Freedom Press Index”. Reporters Without Borders. Available at: <https://rsf.org/en> accessed on 02 May 2023.



## II. CONFORMITY OF THE DRAFT WITH THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Bearing in mind that the proposed Draft *prima facie* encroaches on the freedom of expression of individuals, it is necessary to consider whether the proposed text is a basis for violating this right. The ECHR is directly applicable and its provisions are above all laws in BiH,<sup>47</sup> and the Constitutional Court of BiH in its judgments extensively refers to the practice of the ECtHR as an interpreter of the ECHR. In this sense, the contested provisions of the Draft will be analyzed through the prism of ECtHR practice.

When we talk about freedom of expression, this right can be limited by state authorities, but such restrictions must meet three conditions – they must be prescribed by law, they must pursue a legitimate aim, and they must be necessary in a democratic society.<sup>48</sup> Only if a specific restriction meets all three conditions, state interference in this right is allowed. This means that if the state authorities do not fulfill only one of these three conditions, their actions constitute a violation of the individual's freedom of expression. The ECtHR therefore analyzes the facts of each individual case on which it decides through the so-called tripartite test. This part of the analysis of the provisions of the Draft will be structured according to the sequence of the tripartite test.

An important note of the author of this text is that the ECtHR decides on specific cases of encroachment on freedom of expression, while this analysis, due to the nature of the matter, is abstract and focused on the text and on the hypothetical possibilities of criminal prosecution arising from the text. Precisely due to the fact that this analysis does not have a specific factual situation that was brought under the provisions of the proposed amendments, the analysis will primarily be focused on the first part of the tripartite test, i.e. the test of lawfulness or the quality of the law, which is the most abstract part of the test when it is applied by the court. In this sense, as an attachment to this document, several infographics have been created in order to bring the reader closer to the shortcomings and risks of the legal solutions mentioned in the Draft.

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47 Constitution of Bosnia and Herzegovina, Article II/2.

48 Schabas, William. The European Convention on Human Rights: A Commentary. First edition. Oxford Commentaries on International Law. Oxford, United Kingdom: Oxford University Press, 2015, str. 469-480.

## II.1. LAWFULNESS TEST

The first condition set by the ECHR is that the restriction in question is prescribed by law. However, this does not mean that this condition is fulfilled by the mere existence of the legal text. That legal text must meet certain conditions. In particular, in its practice the ECtHR has developed a “lawfulness test”<sup>49</sup> which is focused on four questions. The ECtHR first examines whether there is a law, and it should be noted that the term “law” is interpreted more broadly in ECtHR practice. Namely, the ECtHR itself emphasizes in its interpretations that “it has always understood the term ‘law’ in its ‘material’, not ‘formal’ sense, which means that it also includes by-laws and unwritten sources of law.”<sup>50</sup> When it comes to this part of the legality test, the ECtHR as a rule follows the decisions of national courts on whether there is a law or not, and intervenes only when it is obvious that the legal basis is not valid or that the interpretation of the local courts is unreasonable,<sup>51</sup> and this part of the text is therefore less relevant.<sup>52</sup>

The second condition implies the availability of the legal act, and it was defined in the case of *Sunday Times v. United Kingdom*: “the law must be adequately accessible: the citizen must be able to obtain some adequate indication of what legal rules are applicable in a given case.”<sup>53</sup> The amendments in question have not yet reached the stage of publication in the official newspaper, and in this regard we cannot even discuss the (non)fulfillment of this condition.

The third condition relates to predictability. The prohibition in question should be precise enough to allow the average citizen to adjust his behavior and avoid the sanction, that is, in the words of the court itself, “a norm cannot be considered ‘law’ unless it is formulated precisely enough to enable the citizen to regulate his own conduct: he must be able - if necessary with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences that he gives action implies”<sup>54</sup> The ECtHR stipulates the obligation of the persons to whom the norm applies to, in the event that they are not legal experts, contact them in order to be able to adjust their behavior,<sup>55</sup> and if the text of the law is so vague or generally

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49 Greer, Steven. *The European Convention on Human Rights: Achievements, Problems and Prospects*. Cambridge Studies in European Law and Policy. Cambridge, UK ; New York: Cambridge University Press, 2006, str. 201

50 *Kafkaris v. Cyprus*, application number 21906/04, 12 February 2008. [GC], para. 139.

51 *Ilias and Ahmed v. Hungary*, application number 47287/15, 14 March 2017, para. 63.

52 Gerards, Janneke. *General Principles of the European Convention on Human Rights*. Cambridge: Cambridge University Press, 2019, p. 203.

53 *Sunday Times v. United Kingdom*, Application No. 6538/74, 26 April 1979, para. 49.

54 *Ibid.*

55 *Perinçek v. Switzerland*, application number 27510/08, 15 October 2015. [GC], para. 138.

formulated that even legal experts cannot predict how that act will be interpreted, there is a high probability that this part of the test will not be met.<sup>56</sup>

The fourth condition refers to the arbitrariness of the procedure, which becomes relevant if the violation is decided by an authority that is not a court. Since the Draft provides for criminal prosecution at the request of the injured party, and the court decides on any criminal offense, the scope for arbitrariness is narrowed.

Below follows an analysis of the quality of the draft law.

### a) Test of the legality of Article 208a of the Draft (insult)

The text of the article of the law criminalizing the insult is as follows:

- (1) Anyone who insults another will be fined from 5,000 KM to 20,000 KM.
- (2) If the act referred to in paragraph 1 of this article was committed through the press, radio, television or other means of public information or at a public gathering or in another way, as a result of which the offense became accessible to a larger number of persons, it shall be punished by a fine of 10,000 KM up to 50,000 KM.
- (3) If the perpetrator was provoked by the unworthy behavior of the offended party or if the injured party accepted his apology before the court for the committed act, the court may release him from punishment.
- (4) If the offended party reciprocated the insult, the court may release both or only one of the perpetrators from punishment.

Analyzing the international legal acts that regulate freedom of expression and consequently insult, Clooney and Webb list as many as seven elements that are relevant when we talk about the criminalization of insult: (i) what was said, (ii) who said it and to whom, (iii) how said, (iv) when it was said, (v) where it was said, (vi) what intention the speaker had, and (vii) what effect the statement had.<sup>57</sup> Although the aforementioned seven elements represent the contextualization of speech, which is more in the hands of the court than the legislator, it is worth noting that the draft does not provide any closer definition of the criminal offense except for the verb “insult”. Although the verb in question is well-known and understandable to every individual, when we talk about incrimination, it is necessary to keep in mind that such a broad criminal offense can have different interpretations by different courts, which would introduce legal uncertainty. The law defines the qualified form of this

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56 Gerards, Janneke. *General Principles of the European Convention on Human Rights*. Cambridge: Cambridge University Press, 2019, p. 208.

57 Amal Clooney, AM; Philippa Webb. *The Right to Insult in International Law*. Columbia Human Rights Law Review 48, no. 2 (Spring 2017): 1-55, p. 24-25.



criminal act, as well as the grounds for exclusion of criminal responsibility, but when defining the essence of the criminal act, only one verb was used, which is subject to different interpretations and understanding in practice.

What is particularly important to note is the qualified form of committing the criminal offense referred to in paragraph (2), where a stricter punishment is provided if the offense was accessible to a larger number of persons, with the use of different communication channels as a special feature of this criminal offense. Since insult through the media is a qualified form of criminal offense, this means that paragraph (1) includes “ordinary” insult, i.e. that insult that is not available to most people. In practice, this could mean that even insults uttered in front of a small number of pe-



**Građanin A je u tekstu na svom Facebook profilu napisao za političara da je nepismen, da nije dostojan da obavlja funkciju na kojoj se nalazi i da bi trebao dati ostavku. Političar je podnio prijavu i tužilaštvo je otvorilo istragu protiv građanina A.**

Ovaj materijal je izrađen uz podršku regionalnog projekta SMART Balkan – Civilno društvo za povezan Zapadni Balkan kojeg implementira Centar za promociju civilnog društva (CPCD), Center for Research and Policy Making (CRPM) i Institute for Democracy and Mediation (IDM) a finansijski podržava Ministarstvo vanjskih poslova Kraljevine Norveške.



ople or even privately are potentially punishable. If we take into account the very narrow description of the way the criminal offense was committed on the one hand, and the fact that a private conversation is also potentially punishable on the other, the scope for punishment is very wide. Potentially, a slightly harsher private conversation (or at least not a conversation that takes place through one of the listed media) could entail criminal liability.

The “unworthy behavior” of the injured party was cited as the basis for exemption from punishment, which again represents a legal standard that is almost impossible to define, and a legal standard that can also lead to uneven judicial practice, i.e. legal uncertainty. As a reminder, the impossibility of predicting the consequences of an individual’s behavior is something that the court has in mind in this part of the test.

The wording used in prescribing this criminal offense broadly defines the types of committing the crime, to the point where it is questionable whether even a person who is an expert in this field can predict whether his/her behavior falls under the prohibition. In this sense, it is highly questionable whether the provision in question passes the legality test of the ECtHR.

## b) Test of the legality of Article 208b of the Draft (defamation)

The text of the article of the law criminalizing defamation is as follows:

- (1) Whoever states or conveys something untrue about another that may harm his honor or reputation, knowing that what he states or conveys is untrue, will be fined from 8,000 KM to 30,000 KM.
- (2) If the act referred to in paragraph 1 of this article was committed through the press, radio, television or through social networks, at a public meeting or in another way, due to which it became available to a large number of persons, it will be punished by a fine of 15,000 KM up to 80,000 KM.
- (3) If what is presented or conveyed has led or could lead to serious consequences for the injured party, the perpetrator will be fined from 20,000 KM to 100,000 KM.

The first thing we would like to draw the reader’s attention to is the fact that the wording of this part of the Draft, that is, the definition of a criminal offense, is almost identical to the provisions of the Criminal Code of SRBiH that were mentioned earlier in this paper. In this sense, the recriminalization of defamation completely negates any progress that has been made in BiH since its decriminalization, except for the circumstance that the prison sentence was replaced by a fine. The definition of the criminal offense and its qualified forms is literally identical to that of the communist times. Bearing in mind the general trends in the development of human rights in general and freedom of expression specifically in post-war BiH, this kind of legislative intervention represents a huge step backwards.

In order to better understand the shortcomings of the proposed provisions, it is necessary to compare them with those currently in force. As a reminder, the definition



of defamation in the existing Law on Protection from Defamation defines defamation as follows:

*Any business-capable person who causes damage to the reputation of a natural or legal person by stating or conveying an expression of something untrue, identifying that person to a third party, is liable for defamation, if that person caused damage in the capacity of the author, editor or publisher of the expression, or in the capacity of a person who has in some other way effectively controlled the content of that expression, as well as the legal entity that published the expression.*<sup>58</sup>

Additionally, it is worth noting that the existing solution meets the legality test of the USBiH.<sup>59</sup>

It is important to keep in mind the fact that the ECtHR applies a greater degree of strictness when it comes to the provisions of criminal law, that is, it requires a greater degree of precision of the norm.<sup>60</sup> Therefore, even if the existing and the proposed solution have the same degree of precision, by the nature of things, the solution from the CC RS will be subject to a greater degree of scrutiny. In civil law, overbroad wording can be problematic, but the consequences are less serious than in criminal law. In civil law, overly broad wording can lead to vagueness and uncertainty regarding the obligations and rights of the parties, which can lead to protracted litigation and ineffective resolution of legal problems. However, this situation is not as serious as in criminal law, where overly broad wording can have significant consequences for people's lives and social stability. The absence of legal certainty in criminal law can lead to a situation where people do not know which behaviors are punishable, which creates the risk of arbitrary actions of state authorities and abuse of power.

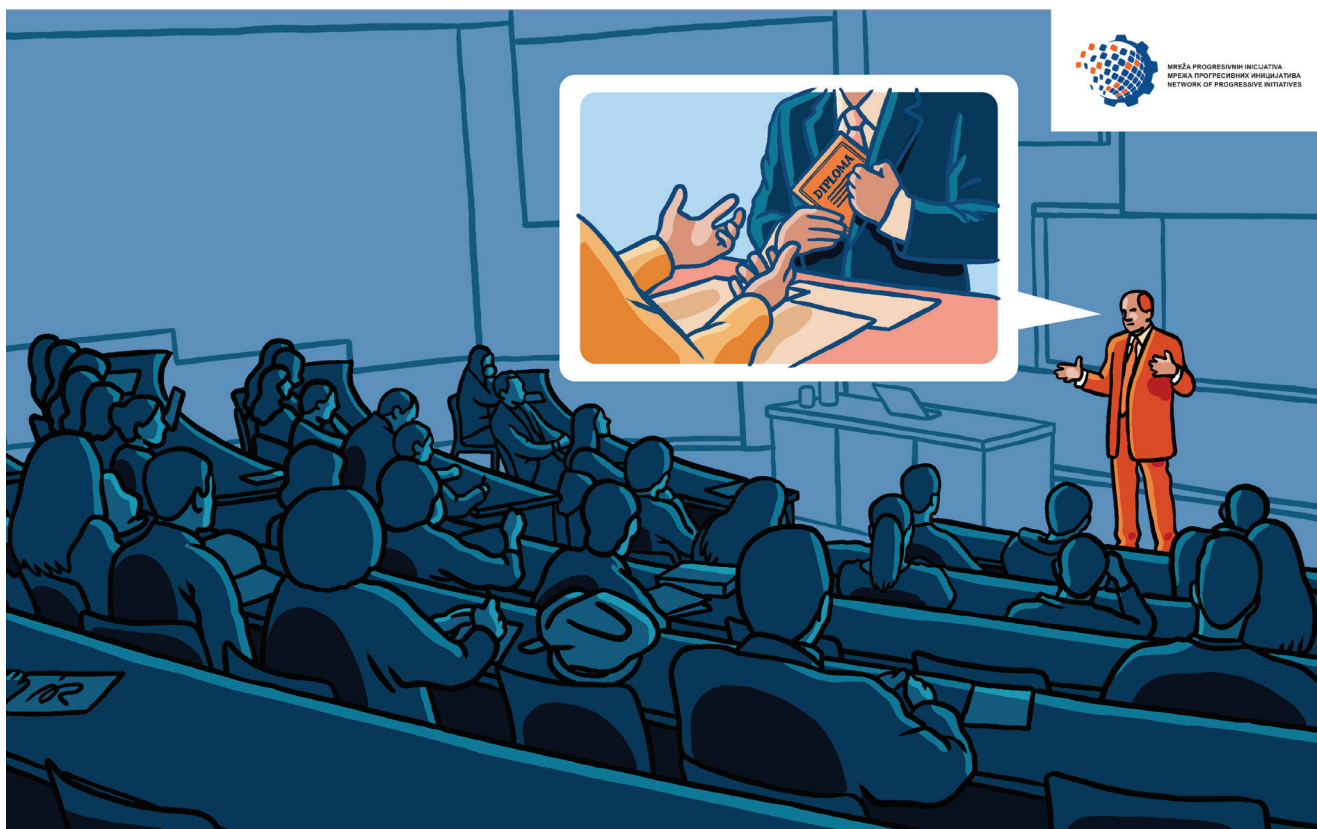
The existing (civil law) solution prescribes causing damage to a person's reputation as a consequence by which the existence/non-existence of defamation will be assessed. The proposed (criminal law) solution contains the wording "may harm", which means that it is not necessary that the harm actually occurs, but only that the existing expression has the possibility of harming. From this comparison follows the conclusion that the new solution "lowers the bar" for defamation, which in light of the considerations from the previous paragraph further worsens the situation.

Furthermore, the identification of the injured party to a third party is explicitly stated in the existing solution, while its absence in the proposed one calls into question the legal certainty of the norm - will the court demand that the injured party is identified? To what extent the perpetrator must be recognizable with regard to the expression in order for criminal prosecution to occur - does the perpetrator have to be completely distinguished from the others, or is it the mere fact that someone can be recognized in a certain statement (although third parties will not necessarily recognize him) enough to be punished? Again, it is very possible that different co-

58 Article 5, Law on protection against defamation, "Official Gazette of RS", no. 37/2001.

59 See e.g. Decision of USBiH AP 4632/14.

60 *Savva Terentyev v. Russia*, application number 10692/08, 28 August 2019, para. 85, *Altuğ Taner Akçam v. Turkey*, application no 27520/07, 25 October 2011, para. 93-94.



**Univerzitetski profesor je na javnom predavanju rekao kako postoji sumnja da je diploma jednog visokog zvaničnika stečena nezakonito. Navedeni zvaničnik je dao ostavku, a tužilaštvo je otvorilo istragu.**

Ovaj materijal je izrađen uz podršku regionalnog projekta SMART Balkan – Civilno društvo za povezan Zapadni Balkan kojeg implementira Centar za promociju civilnog društva (CPCD), Center for Research and Policy Making (CRPM) i Institute for Democracy and Mediation (IDM) a finansijski podržava Ministarstvo vanjskih poslova Kraljevine Norveške.



urts have different understandings of this standard, which leads to legal uncertainty, which consequently strengthens the chilling effect of this provision. Also, we again note the “lowering of the bar” for defamation.

The qualified form of this criminal offense from paragraph (2) has the same effect as the qualified form of insult - paragraph (2) deals with the public form of defamation, which implies that paragraph (1) is focused on defamation that is not accessible to a large number of people, i.e. that incriminates defamation uttered in a private circle. Such a broad prohibition, combined with the above considerations, also calls into question the viability of this law in a hypothetical test of legality, and also leaves room for prosecution for various forms of expression that should not be subject to prohibition in a democratic society.

### c) Test of the legality of Article 208v of the Draft (Disclosure of personal and family circumstances)

The text of the proposed article reads:

- (1) Whoever presents or conveys whatever from the personal or family life of a person that may harm his honor or reputation, will be fined from 10,000 KM to 40,000 KM.
- (2) If the act referred to in paragraph 1 of this article was committed through the press, radio, television or through social networks or at a public meeting or in another way, due to which it became available to a larger number of persons, the perpetrator will be fined 20,000 KM up to 100,000 KM.
- (3) If what is presented or conveyed has led or could lead to severe consequences for the injured party, the perpetrator will be fined from 25,000 KM to 120,000 KM.
- (4) The truth or falsity of what is stated or transmitted from the personal or family life of a person cannot be proven, except in the cases referred to in Article 208d. of this Code.

Paragraph (1) contains so far potentially the most unclear provision - who presents or conveys **whatever** from the personal or family life of a person **that may harm** his honor or reputation. Regarding the content of the speech, it can literally be anything (“whatever”) from the family or personal life of the individual (hypothetically - the way in which the child of a high-ranking official is employed), while regarding the consequences, the potential to harm the individual’s honor or reputation is sufficient. Such an unusually broad encroachment on an individual’s freedom of expression is further complicated by paragraph (4), which stipulates that the truth of what is said is irrelevant, except in the context of Article 208d, which will be the subject of a separate analysis in the third part of the test.



Bivša supruga gradonačelnika je za najčitaniji list u državi izjavila kako gradonačelnik ima vanbračno dijete i kako ju je više puta varao dok su bili u braku. Popularnost političara je pala u javnim anketama. Tužilaštvo je otvorilo istragu protiv njegove bivše supruge.

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Paragraph (2), as with defamation and insult, qualifies this criminal offense committed through some channel of mass communication, which again leaves us with the conclusion that speech made in a smaller circle is also punishable.

Paragraph (3) introduces another unclear legal standard - “severe consequences”, and the question arises as to how judges make a distinction between “ordinary” and “severe” consequences in the case of a violation of honor or reputation. Such a qualified criminal offense remains an additional area for the chilling effect.

#### d) Test of the legality of Article 208g of the Draft (Public exposure to ridicule because of belonging to a certain race, religion or nationality)

The text of the provision reads:

*Whoever publicly scorns or despises a person or group because of belonging to a certain race, skin color, religion, nationality or because of ethnic origin, sexual orientation or gender identity, will be fined from 20,000 KM to 100,000 KM.*

The purpose of this ban is questionable considering the fact that the existing Art. 359 of the CC RS already provides for public incitement or incitement of violence and hatred, where the grounds listed in the above text are enumerated. The only novelty of this solution is exposure to scorn or contempt on the basis of prohibited grounds, which again raises the question of the justification of such a criminal offense in the light of the already proposed criminal offense of insult and its very broad setting. Although vague, this proposed crime does not have the potential for harmful effects like the three previously elaborated.





Aktivista za prava žrtava rata je izjavio kako se kandidat na izborima za Narodnu skupštinu, koji je po nacionalnosti Hrvat, treba stiditi zbog zločina koji su počinjeni u Jasenovcu. Također je izjavio da svi Hrvati trebaju uputiti kolektivno izvinjenje zbog zločina počinjenih u Drugom svjetskom ratu. Tužilaštvo je otvorilo istragu protiv aktiviste.

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## II.2. THE EXISTENCE OF A LEGITIMATE AIM

Article 10 prescribes the legitimate aims that restrictions on freedom of expression may pursue, and they include the protection of national security, territorial integrity, public safety, the prevention of disorder and crime, the protection of health and morals, the reputation and rights of others, the prevention of the dissemination of confidential information, and the preservation of authority and impartiality judiciary.<sup>61</sup> The ECtHR has a wide range of tolerance in recognizing the existence of legitimate aims and is often inclined to accept the claims of the respondent governments. In the words of the court itself, “in the cases that concerned those provisions<sup>62</sup>... respondent governments usually have a relatively easy task of persuading the Court that the interference had a legitimate objective, even when the applicants convincingly argue that it actually had an undeclared hidden objective ... Cases in which the Court has expressed doubt about the cited objective without deciding on that question...left the question open ... or rejected one or more of the cited goals ... is few. Even rarer are the cases where it has found a violation of the article in question solely because of the lack of a legitimate aim ... although in a recent case the Grand Chamber found the absence of a legitimate aim and still went on to examine whether the interference was necessary.”<sup>63</sup>

However, if the authorities present a goal that is not discussed in the domestic proceedings or which cannot be found in the preparatory documents of the domestic legislation, the ECtHR may conclude that there is an indication of a false justification for the purposes of the proceedings before the court. However, uncovering hidden goals often requires a thorough analysis of the facts of the case, taking into account the content of national decisions and legislation, and, if necessary, using additional sources such as the development of legislation in a certain area and politicians’ statements in the media.<sup>64</sup>

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61 Article 10 paragraph 2 ECHR.

62 In *Merabishvili v. Georgia*, application number 72508/13, 28 November 2017, para. 294, the court refers to articles 8-11.

63 *Merabishvili v. Georgia*, application number 72508/13, 28 November 2017, para. 295-296.

64 Gerards, Janneke. *General Principles of the European Convention on Human Rights*. Cambridge: Cambridge University Press, 2019, p. 226.

## a) The legitimate aim of Art. 208a-208g of the Draft

It would be common to assume that the legitimate goal of criminalizing insult and defamation must be some variation of protecting the reputation and rights of others as a legitimate goal stated in Art. 10 (2) ECHR.

However, in the light of the above considerations about politicians' statements in the media as a potential factor in understanding the legitimate goal, it is worth emphasizing that Milorad Dodik, as the self-proclaimed initiator of these amendments<sup>65</sup> in his column that he wrote on the occasion of the discussion on this law, he outlined the reasons for these amendments. From the text of the column, it is not possible to clearly and concretely determine the goals of the legislative reform in question. However, it can be understood from the text that Republika Srpska intends to legally regulate its public socio-political and media space in accordance with international legal standards and legitimate goals. The goals of this reform are aimed at protecting the internal sovereignty of Republika Srpska and its citizens, and at creating a stable socio-political life without hate speech and fake news that can threaten the safety of citizens. Also, according to the text of the column, the reform is aimed at preserving the long-term and sustainability of the Republika Srpska and preventing attempts to influence its life from the outside and the centralization of power.<sup>66</sup> In the Draft itself, in the section "Reasons for passing the law" there is a very general wording: "Telling untruths, personal and family situations, exposing certain categories of persons to contempt exceeded any norm of socially acceptable behavior and in every way devalued human dignity, physical and spiritual integrity, human privacy, as well as personal and family life." It is unclear what these norms of socially acceptable behavior are, who determines them, how we determine to what extent we tolerate said behavior, why the criminal law response is adequate, etc. However, it is certainly clear that even such a flat explanation is not related to the explanations of the informal initiator of the law. The section "Explanation of proposed solutions" contains only reworded articles of the Draft and is not relevant in that sense.

Although the ECtHR generally takes a *laissez faire* approach when considering this part of the test, it is clear that there is a potential dissonance in terms of legitimate aims between the proponents of the amendments and the traditional legitimate aim of protecting the rights and reputation of others. In the light of the general considerations about the legitimate aim, and bearing in mind the fact that this is about recriminalization, the possible discussion of the USBiH or the ECtHR on this issue would be somewhat more complex than the usual consideration of the legitimate aim.

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65 <https://twitter.com/MiloradDodik/status/1587051984506568704> accessed on 10 May 2023.

66 See e.g. Milorad Dodik's column in which he states the reasons for these amendments: <https://lat.rtrs.tv/vijesti/vijest.php?id=505973> accessed on 10 May 2023.



## II. 3. NECESSITY IN A DEMOCRATIC SOCIETY

The third part of the test, which is extremely important in the analysis of ECtHR cases, is not covered in detail in the text of the ECHR itself. This part of the test represents the essence of the analysis in the majority of cases in which the Court issues judgments. In cases concerning freedom of expression, the ECtHR in the *Sunday Times* judgment explained the meaning of “necessity in a democratic society”, through questions such as: whether the “interference” complained of by the person was in accordance with a “pressing social need”, that whether it was “proportionate to the legitimate aim” and whether the reasons given by the national authorities to justify it were “relevant and sufficient within the meaning of Article 10 (2)”.<sup>67</sup>

In the *Vajnai* case, the ECtHR somewhat defined “pressing social need” by deciding that measures taken to curb only speculative danger and protect democracy were too restrictive and could not be considered a “pressing social need”.<sup>68</sup>

The court did not always adhere to the “pressing social need” standard and sometimes instead looked to the least restrictive measure or used the appropriateness test.<sup>69</sup> For certain specific areas of freedom of expression, the ECtHR has developed more specific standards.

Despite the variations in this part of the test, the essential issue considered by the ECtHR concerns the balance between the legitimate aim which the state seeks to achieve and the rights of the individual which are threatened or limited by that aim. In this part of the analysis, the test will be focused on the conditions for the exclusion of criminal prosecution prescribed by the legislator himself.

Namely, the list of exclusions of responsibility, which is, we can say, a list of circumstances that the courts, as a rule, give importance to when determining a violation of Article 10, that is, it is a list of circumstances that is extremely relevant for balancing. The proposed amendments therefore represent a kind of “preventive balancing”.

The part of the Draft that refers to the exclusion of illegality reads:

*There is no criminal offense under Art. 208a. to 208v. of this Code, if it is an offensive expression or presentation of something untrue in a scientific, professional, literary or artistic work, in the performance of a duty prescribed by law, a journalistic invitation, political or other public or social activity or the defense of a right, if from the manner of expression or from other circumstances, it follows that it was not done with the intention*

67 *Sunday Times v. United Kingdom*, Application No. 6538/74, 26 April 1979, para. 62.

68 *Vajnai v. Hungary*, application number 33629/06, 07 August 2008, para. 55.

69 Gerards, Janneke. *General Principles of the European Convention on Human Rights*. Cambridge: Cambridge University Press, 2019, p. 230.

*of disparagement, or if the person proves the truth of his statement, or that he had a well-founded reason to believe in the truth of what he stated or conveyed.*

Before the analysis, it is worth mentioning that this provision of the Draft has significant similarities with the provision from the CC of SFRY which refers to the exclusion of illegality in the criminal offense of insulting authorities or representatives of authorities, which was mentioned earlier. Although in this paper we did not engage in a deep analysis of the practice of applying the CC of SFRY, the fact that the wording related to the exclusion of illegality is taken from the period and legal acts that are synonymous with state censorship is enough to require significant attention when analyzing these provisions.

Reading this provision, we conclude that for the exclusion of illegality it is important that the speech was made in the performance of a call/activity, and with the additional alternative condition that a) there is no intention to disparage or b) with the defense of the truth. Simplified - in order to rule out illegality, a person performing an activity must either speak without the intention of defaming someone, or must speak the truth/justifiably believe in the truth of the statement. All other forms of expression are punishable.

Regarding the first point, we consider the following circumstances to be insufficient: in the era of mass communication, the relevant speech that needs to be protected is not only the speech of persons exercising their rights for the purpose of performing a profession or activity. Most often, speech is used by individuals in a private capacity, and exemptions from criminal liability formulated in this way do not include private persons in their expression. Since defamatory speech is also punished, this would de facto mean that the person who writes the article (journalist) can invoke these provisions a defense, but any private person who shares that article on a social network (spreads) would potentially be criminally liable. This kind of regulation of the area represents an interesting form of censorship - the original speaker himself can count on not being prosecuted, if he creates content as part of his calling or activity, and if he fulfills one of the two alternatively set additional conditions. The person who shares the content, if such a thing does not belong to his/her activity or vocation, may be prosecuted. A situation where the original speaker has no responsibility and the person transmitting his/her content has responsibility is absurd. However, this absurdity has another effect, which is to reduce the reach or popularity of certain content. For a person professionally engaged in a certain activity, it is not enough that he is allowed to make a certain statement. If he wants his statement to be read (which is crucial for many professions), it must also be shared via the Internet. Precisely by punishing the sharers of some content, the legislator here performs an extremely sophisticated form of censorship. This gives this solution an extremely potent chilling effect. To this should be added the lack of a definition of journalists and journalistic calling anywhere in the domestic legislation. We can reasonably assume that a journalist working in conventional media would be recognized as such in the eyes of the court, but it is an open question what would happen to an online blogger or a citizen-journalist, or a whole series of hybrid phenomena that do not fit into the traditional concept of a journalist? For these categories there is a special degree of legal uncertainty, where it is hypothetically possible for some bona fides to create and share certain content expecting that their actions are not illegal.



Poznati kolumnista napisao je nedeljnu kolumnu u kojoj vrijeđa gradonačelnika grada XY u RS-u. Tužilaštvo je, na inicijativu gradonačelnika, otvorilo istragu. U istrazi je tužilac razgovarao sa kolumnistom, koji je tvrdio da je on kao kolumnista vršio svoju dužnost kao novinar te je zbog toga potrebno da bude izuzet od krivičnog gonjenja.

Also, any satirical expression would be punishable, and we remind you of the ECtHR's attitude towards satire: "satire is a form of artistic expression and social commentary, and with its characteristic features of exaggeration and distortion of reality, it naturally aims to provoke and agitate. Accordingly, any interference with the artist's right to such expression must be scrutinized with particular care."<sup>70</sup>



**Tokom rasprave sa političarem na Facebook-u, građanin je napisao komentar kako političar piše, priča i izgleda kao da je došao iz srednjeg vijeka - nepismen je, mrmlja umjesto da govori, a izgleda kao da ga je krava žvakala. Tužilaštvo je otvorio istragu protiv građanina.**

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70 Vereinigung Bildender Künstler v. Austria, Application No. 8354/01, para. 33.



The above wording does not leave any room for the accused person to defend himself by referring to satire, or to any other art form, unless it is part of his activity or calling.

Continuing with the consideration of satire, we can touch on the first alternative point of exemption from responsibility, i.e. the absence of intent to disparage. Proving the intention of disparagement, including its absence, seems like a task that is very difficult to perform in a specific situation. Furthermore, disparagement in some of its manifestations (specifically satire) is speech that enjoys special protection in ECtHR practice, therefore this exemption from criminal prosecution seems inadequate.

After all, the defense by truth, as the second alternative condition, is the last one listed as a basis for the exclusion of illegality. First of all, the legislator does not distinguish between a value judgment and a factual statement, but the exclusion of illegality is exclusively linked to the facts and their accuracy. This would mean that value judgments are essentially indefensible - it is impossible to make a statement in which you are giving only your own assessment of a person, unless you can prove the same statement. It was precisely the absence of a distinction between a factual statement and a value judgment that was a key circumstance for the ECtHR to establish a violation of Article 10 in this particular case, where it assessed this absence as “incompatible with the principles arising from Article 10.”<sup>71</sup> It is also important to emphasize that even with factual statements, the ECtHR takes care that the defense of the truth is not the so-called *probatio diabolica* (trans. devil’s proof), and to respect the principle of equality of arms of the two parties in the proceedings.<sup>72</sup>

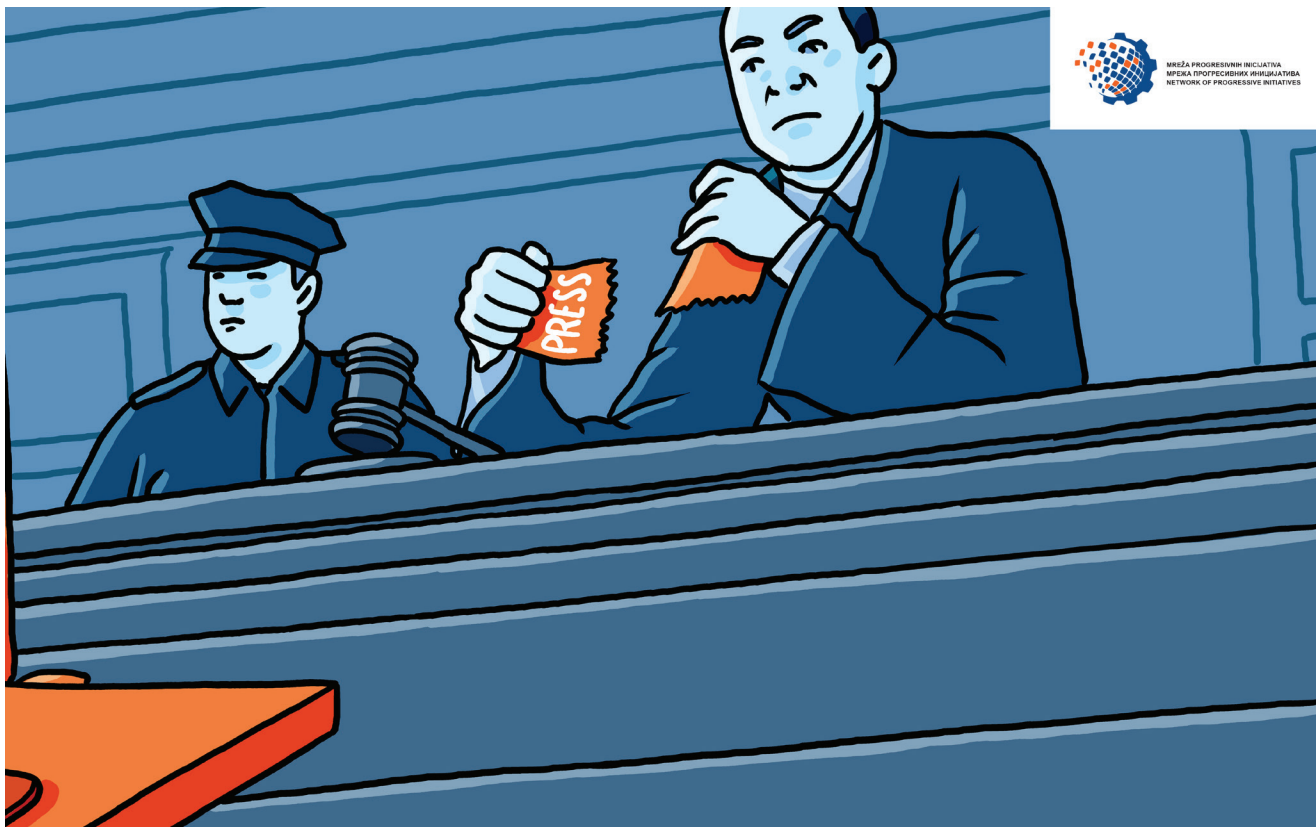
Special emphasis should be placed on the provisions relating to the disclosure of personal and family circumstances, in which it is stated that the truth of what has been said is not relevant, except in the cases referred to in Art. 208 d. Since the condition for the exclusion of illegality is making a call, this means that persons who present or pass on someone’s personal or family circumstances can be criminally liable if their speech is true, but if it is not related to making a call/activity. This *de facto* means that gossip is a potential crime.

When we talk about balancing the rights of the individual and the interests of the community, an important part of the act of balancing is the threatened punishment. Although the punishment in this case is a fine and not imprisonment, the very fact of a criminal sanction carries with it certain consequences that mere compensation in civil proceedings does not have (introduction to the criminal record, stigmatization as a perpetrator of a criminal offense...). In addition, the ECtHR states that unpredictably large damages in defamation cases can have a chilling effect and therefore require the highest degree of scrutiny.<sup>73</sup> Bearing in mind the previously elaborated and broadly defined nature of the criminal offense on the one hand, and the amount of the fines on the other hand, it is clear that there is a huge chilling effect of such

71 Gheorghe-Florin Popescu v. Romania, Application number 79671/13, 12 January 2021, para. 32.

72 Roca, Javier García, and Pablo Santolaya, eds. “The Right to Freedom of Expression in a Democratic Society (Art. 10 ECHR).” In *Europe of Rights: A Compendium on the European Convention of Human Rights*, 371–401. Brill | Nijhoff, 2012. [https://doi.org/10.1163/9789004219915\\_021](https://doi.org/10.1163/9789004219915_021), p. 378.

73 *Independent Newspapers (Ireland) Limited v Ireland*, Application No. 28199/15, 15 June 2017, para. 85.



**Tužilac je, u nedostatku pozitivnopravnih odredbi koje bi regulisale pitanje definisanja novinara, zaključio kako kolumnista nije novinar i nastavio sa postupkom.**

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provisions. The chilling effect is potentially the most significant consequence of the passed law - it is possible that a very small number of people will actually be prosecuted, but the damage is not only sanctioned speech, but also words that remained unspoken due to unclear laws and fear of abuse. The application of the law is not necessary at all in order to achieve the desired effect, in the words of Milorad Dodik: "Freedom is limited by the freedom of others and only then do we get the form of freedom that society needs." Europe says it has such laws, but does not use them. Here, we will also bring them, so we will not use them"<sup>74</sup>

The wording used in the Draft sets out the definitions of the crime broadly. Bearing in mind that speech is criminalized, the draft text leaves considerable room for different interpretations of various provisions, which can lead to uneven application of the law and undermine legal certainty. Also, given the combination of broad wording and high penalties, these wordings have a potentially very significant chilling effect.

Although the question of legitimate aim is usually a formality in ECtHR practice, the way the Draft is positioned in the public discourse leaves doubt about the legislator's intentions.

The bases for the exclusion of illegality taken from the CC SFRY do not contribute to the elimination of the potential for uneven application, that is, they do not provide protection against a lack of legal certainty and a chilling effect.

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74 <https://www.nezavisne.com/novosti/bih/Dodik-Zakon-o-kleveti-potreban-jer-se-ljudi-osjecaju-ugrozeno/766858> accessed on 10 May 2023.

### III. CRIMINALIZATION OF THE DEFAMATION AND INSULT IN THE LIGHT OF THE OF EUROPEAN AND INTERNATIONAL STANDARDS

In the third part of the paper, we will present the standards developed by European and international organizations (CoE, EU, OSCE and UNESCO) in the field of criminal liability for defamation and insult. The CoE is a leading regional organization in the field of human rights protection, of which BiH has been a member since 2002. Primarily through soft law instruments (recommendations and resolutions) its bodies have developed a corpus of standards for the protection of freedom of speech, which aim to promote the decriminalization of defamation and insult. The importance of EU law for BiH is multifaceted. First of all, the Stabilization and Association Agreement between the EU and BiH obliges BiH to harmonize its existing and future legislation with the EU law.<sup>75</sup> This obligation was further emphasized by the granting of candidate status for EU membership (December 2022). Compliance of BiH legislation with OSCE and UNESCO acts is also significant, since they represent the highest standards in this area. That's why we give a brief overview of them here.

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75 Stabilization and Association Agreement between the EU and BiH ("Official Gazette of BiH – International Agreements", no. 10/08, 1/17, 8/17), Article 70.



## III.1. COUNCIL OF EUROPE

Due to the potential chilling effect on freedom of expression created by excessively protective defamation laws, the CoE bodies continuously promote the decriminalization of defamation and guide member states (46 of them) on how to ensure the application of defamation laws in accordance with human rights protection standards.

CoE institutions, namely CoM, PACE, Commissioner, Venice Commission, CDMSI, have built a body of soft law with the aim of decriminalizing defamation in CoE member states. Although the resolutions and recommendations of CoE bodies do not impose legal obligations on states, they represent an important indicator of trends among CoE member states.<sup>76</sup> At the same time, the national legislator cannot simply ignore the existence of a consensus in regional and international organizations on the decriminalization of defamation, but must take this into account when enacting regulations.<sup>77</sup> Finally, the ECtHR has repeatedly and in different cases referred to the CoE's efforts to decriminalize defamation.

In two declarations, the CoM addressed the issue of defamation in the area of freedom of political discussion in the media (from 2004)<sup>78</sup> and libel tourism (from 2012).<sup>79</sup> In the Declaration on Freedom of Political Debate in the Media, it was pointed out that the state, government or any other institution of executive, legislative or judicial power *should not be protected* by criminal law from defamatory or insulting statements (paragraph II). In addition, the Declaration states the following in the context of media sanctions for defamation and insult:

*“Damages and fines for defamation or insult must bear a reasonable relationship of proportionality to the violation of the rights or reputation of others, taking into consideration any possible effective and adequate voluntary remedies that have been granted by the media and accepted by the persons concerned.”*

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76 Venice Commission, Opinion on the Compatibility of the Laws “Gasparri” And “Frattoni” of Italy with the Council of Europe Standards in the Field of Freedom of Expression and Pluralism of the Media, CDL-AD(2005)017, p. 25, available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2005\)017-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2005)017-e), accessed on 3 May 2023.

77 CDMSI, Study on the alignment of laws and practices concerning defamation with the relevant case-law of the European Court of Human Rights on freedom of expression, particularly with regard to the principle of proportionality, CDMSI(2012)Misc11Rev2, p. 36, available at: <https://rm.coe.int/study-on-the-alignment-of-laws-and-practices-concerning-alignment-of-l/16804915c5>, accessed on 3 May 2023.

78 CoM, Declaration on freedom of political debate in the media (adopted on February 12, 2004), available at: <https://rm.coe.int/09000016805ddd8f8>, accessed on 3 May 2023.

79 CoM, Declaration of the Committee of Ministers on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation, “Libel Tourism”, to Ensure Freedom of Expression (adopted on July 20, 2012), available at: [https://wcd.coe.int/ViewDoc.jsp?Ref=-Decl\(04.07.2012\)&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383](https://wcd.coe.int/ViewDoc.jsp?Ref=-Decl(04.07.2012)&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383), accessed on 3 May 2023.

*Defamation or insult by the media should not lead to imprisonment, unless the seriousness of the violation of the rights or reputation of others makes it a strictly necessary and proportionate penalty, especially where other fundamental rights have been seriously violated through defamatory or insulting statements in the media, such as hate speech” (paragraph VIII).*

In the 2012 Declaration, the CoM pointed out the danger of libel tourism, including in cases of criminal liability for defamation (paragraph 5).

PACE has repeatedly reaffirmed its position on the need to decriminalize defamation in CoE member states.<sup>80</sup> In its Resolution from 2007, PACE first welcomes the efforts of the OSCE Representative on Freedom of the Media aimed at decriminalizing defamation (paragraph 10), and points out with great concern the existence of the possibility of imprisonment of journalists for defamation law violations (paragraph 11, 12). The following is an unequivocal position:

*“The Assembly consequently takes the view that prison sentences for defamation should be abolished without further delay. In particular it exhorts states whose laws still provide for prison sentences – although prison sentences are not actually imposed – to abolish them without delay so as not to give any excuse, however unjustified, to those countries which continue to impose them, thus provoking a corrosion of fundamental freedoms.” (paragraph 13).<sup>81</sup>*

A few years later, in 2015, PACE called on CoE member states to review the provisions of their national laws on defamation, in accordance with Resolution 1557 (2007), and in particular those provisions relating to criminal penalties for defamation (paragraph 11 of Resolution 2035 [2015 ]). When CoE member states attempted to crimi-

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80 Towards decriminalisation of defamation, Resolution 1577 (2007), available at: <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17588&lang=en>, accessed on 3 May 2023. Towards decriminalisation of defamation, Recommendation 1814 (2007), available at: <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17587&lang=en>, accessed on 3 May 2023. Protection of the safety of journalists and of media freedom in Europe, Resolution 2035 (2015), available at: <https://pace.coe.int/pdf/651b6bf32dd2699146f941f8e-434d51a0ff5c98adbce1ac9b15e180e9269126f/res.%202035.pdf>, accessed on May 3, 2023. Attacks against journalists and media freedom in Europe, Resolution 2141 (2017), available at: <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23400&lang=en>, accessed on 3 May 2023.

81 In this regard, compare with M. Dodik’s statement: “Of the 47 member countries of the Council of Europe, 36 European countries have provided for defamation as a criminal offense / and mostly not only with fines but also with provided prison sentences/. Almost all EU member states recognize defamation as a criminal offense and most provide not only fines, but also prison sentences for it. Most US states also recognize defamation as a crime.” “(...) what is normal in the EU, when it is applied in an identical way in the Republika Srpska, suddenly becomes abnormal, so what is not a suppression of freedoms in the EU is considered a suppression of those freedoms in the Republika Srpska.” “(...) It is encouraging, however, the statement and recognition of Mr. Peter Stan, EU spokesperson for foreign and security policy issues, that most EU countries recognize and treat defamation as a criminal offense and that, in this context, the criminalization of defamation does not deviate from European standard.” Milorad Dodik, Republika Srpska će pravno urediti svoj javni prostor, available at: <https://dodik.net/republika-srpska-ce-pravno-urediti-svoj-javni-prostor/?pismo=lat>, accessed on 3 May 2023.

nalize defamation and prescribe criminal sanctions for defamation, PACE expressed “serious concern” (paragraph 10 of Resolution 2141 [2017]).

Commissioner has continuously, since 2011, stressed its position on the necessity of decriminalizing defamation and insult.<sup>82</sup> What’s more, the Commissioner was of the opinion that the criminalization of defamation is not in line with human rights,<sup>83</sup> that it undermines the freedom of the media,<sup>84</sup> and finally that the decriminalization of defamation is a prerequisite for harmonizing national legislation with European standards.<sup>85</sup> At the end of 2022, in his speech at the anti-SLAPP conference, the Commissioner reiterated the necessity to decriminalize defamation.<sup>86</sup>

The Venice Commission, as part of its authority to issue opinions on legislative proposals, as well as in opinions given in the capacity of *amicus curiae*, issued opinions on laws in the field of media law (including BiH laws),<sup>87</sup> and several times it delivered

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82 Commissioner, Human rights and a changing media landscape, p. 11, available at: <https://rm.coe.int/human-rights-and-a-changing-media-landscape/16809075da>, accessed on 3 May 2023. See also Annual Activity Reports for 2022 (available at: <http://rm.coe.int/native/0900001680aaeb5d>, accessed on 3 May 2023., p. 22), 2020 (available at: <http://rm.coe.int/native/0900001680a2150d>, accessed on 3 May 2023, p. 7), 2016 (available at: <https://rm.coe.int/native/090000168070ad23>, accessed on 3 May 2023, p. 22, 42), 2015 (available at: <http://rm.coe.int/native/09000016806da981>, accessed on 3 May 2023, p. 8, 12), 2014 (available at: <http://rm.coe.int/native/09000016806da60d>, accessed on 3 May 2023, p. 11, 14, 26), 2013 (available at: <http://rm.coe.int/native/09000016806daa24>, accessed on 3 May 2023, p. 10, 12), 2012 (available at: <http://rm.coe.int/native/09000016806dabe5>, accessed on 3 May 2023, p. 4, 12), 2011 (available at: <http://rm.coe.int/native/09000016806da691>, accessed on 3 May 2023, p. 18), 2010 (available at: <http://rm.coe.int/native/09000016806da583>, accessed on 3 May 2023, p. 10, 24, 25, 26).

83 Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, Annual Activity Report 2012, CommDH(2013)5, p. 4, available at: <https://rm.coe.int/native/09000016806da864>, accessed on 3 May 2023.

84 Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, Annual Activity Report 2011, CommDH(2012)1, p. 3, available at: <http://rm.coe.int/native/09000016806da691>, accessed on 3 May 2023.

85 Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, Annual Activity Report 2010, CommDH(2011)4, p. 10, available at: <http://rm.coe.int/native/09000016806da691>, accessed on 3 May 2023.

86 Speech at the European Anti-SLAPP Conference, available at: <https://www.coe.int/en/web/commissioner/-/speech-at-the-european-anti-slapp-conference>, accessed on 3 May 2023.

87 Venice Commission, Opinion on Freedom Of Expression and Freedom of Access to Information as Guaranteed in the Constitution of Bosnia And Herzegovina, CDL-INF (2000) 15, available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-INF\(2000\)015-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-INF(2000)015-e), accessed on 3 May 2023.

opinions on issues of defamation.<sup>88</sup> The commission pointed out that civil liability for defamation has a less chilling effect for freedom of expression, in contrast to criminal liability.<sup>89</sup> In addition, prison sentences for defamation should be abolished in the absence of exceptional circumstances justifying such a severe sanction, and high fines should be applied carefully to avoid discouraging journalists or other commentators from contributing to discussions of public interest.<sup>90</sup>

Ultimately, in 2013, the Venice Commission noted that “despite the trend towards decriminalization or introducing lighter penalties, there are still countries where defamation is not only a criminal offence but also subject to prison sanctions. However, in most cases, the relevant penal provisions are reportedly not or rarely enforced.”<sup>91</sup>

In 2005 and 2012, CDMSI published two studies dedicated to defamation and freedom of expression, in the light of ECtHR practice:

- 1) Examination of the alignment of the laws on defamation with the relevant case-law of the European Court of Human Rights, including the issue of decriminalisation of defamation (2005)<sup>92</sup> and
- 2) Study on the alignment of laws and practices concerning defamation with the relevant case-law of the European Court of Human Rights on freedom of expression, particularly with regard to the principle of proportionality (2012).<sup>93</sup>

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88 Venice Commission, Amicus Curiae Opinion on the relationship between the Freedom of Expression and Defamation with respect to unproven defamatory allegations of fact as requested by the Constitutional Court of Georgia, CDL-AD(2004)011, available at: [https://www.venice.coe.int/webforms/documents/CDL-AD\(2004\)011-e.aspx](https://www.venice.coe.int/webforms/documents/CDL-AD(2004)011-e.aspx), accessed on May 3, 2023. Venice Commission, Opinion on the Legislation on Defamation in Italy, CDL-AD(2013)038, available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)038-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)038-e), accessed on 3 May 2023. Venice Commission, Opinion on the Legislation pertaining to the Protection against Defamation of the Republic of Azerbaijan, CDL-AD(2013)024, available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)024-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)024-e), accessed on 3 May 2023.

89 Venice Commission, Opinion on the Legislation on Defamation in Italy, CDL-AD(2013)038, para. 78, available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)038-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)038-e), accessed on 3 May 2023.

90 *Ibid.*, para. 79.

91 Venice Commission, Opinion on the Legislation pertaining to the Protection against Defamation of the Republic of Azerbaijan, CDL-AD(2013)024, para. 56, available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)024-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)024-e), accessed on 3 May 2023.

92 This study is not available online.

93 CDMSI, Study on the alignment of laws and practices concerning defamation with the relevant case-law of the European Court of Human Rights on freedom of expression, particularly with regard to the principle of proportionality, CDMSI(2012)Misc11Rev2, available at: <https://rm.coe.int/study-on-the-alignment-of-laws-and-practices-concerning-alignment-of-l/16804915c5>, accessed on 3 May 2023.

In a study from 2012, the following was noted:

*“Criminal provisions on defamation still feature in the legislation of most Council of Europe member States. Sanctions involving imprisonment range from three months to seven years but are generally in the region of one to two years. In practice, in the great majority of these countries, criminal penalties are rarely applied to defamation. In several states, however, criminal prosecutions continue to be brought on a regular basis, particularly against journalists. Moreover, media professionals continue to be given custodial sentences in certain countries.”<sup>94</sup>*

At the time, it was noted that about half of the CoE member states had taken concrete actions or were considering steps to decriminalize defamation or mitigate the sanctions that could be imposed. However, even then, phenomena of “recriminalization” were noticed in countries that had already decriminalized defamation. The study highlighted “clear trend towards abolition of sentences restricting freedom of expression and a lightening of sentences in general.”<sup>95</sup>

CDMSI is of the opinion that in democratic societies, defamation is not a matter for criminal law, but for civil law.<sup>96</sup> In the conclusion of the study, it was pointed out that “There is a general consensus among the different specialised bodies of international and regional organisations that not only the application of criminal sanctions but also the mere fact that such sanctions could be applied have substantial undesirable effects on freedom of expression and information. This phenomenon is referred to as “judicial harassment”.”<sup>97</sup>

The CoE Platform for the Protection of Journalism and Safety of Journalists, which reports on serious threats to the safety of journalists and media freedom in Europe in order to strengthen the CoE’s response to threats and the accountability of member states, has called on CoE member states to repeal criminal defamation laws in line with international standards, and to abolish laws that provide prison terms for defamation.<sup>98</sup>

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94 *Ibid.*, p. 7.

95 *Ibid.*

96 *Ibid.*, p. 35.

97 *Ibid.*

98 CoE, Annual report 2021 by the partner organisations to the Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists: Wanted! Real action for media freedom in Europe, available at: <https://rm.coe.int/final-version-annual-report-2021-en-wanted-real-action-for-media-freed/1680a2440e>, accessed on 3 May 2023.

## III.2. EUROPEAN UNION

As we mentioned earlier, the nature of EU law is such that BiH will have to incorporate them into its legal system in the process of joining this organization. In this regard, special attention should be paid to the Commission Recommendation (EU) 2022/758 of 27 April 2022 on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings ('Strategic lawsuits against public participation').<sup>99</sup> First of all, the European Commission calls on the member states of the Union to pay special attention to the CoE documents we mentioned earlier ("Towards the decriminalization of defamation", PACE resolution 1577, "Towards the decriminalization of defamation", PACE recommendation 1814). Furthermore, the European Commission encourages the use of administrative and civil law to deal with cases of defamation, provided that these provisions have a less repressive effect than the provisions of criminal law. The recommendation also emphasizes that CoE recommendations and guidance must be taken into account as far as possible. The progress reports, which assess the progress made by the countries of the Western Balkans and Turkey towards EU membership, are also significant. In these reports, BiH is evaluated year after year with similar wording and without significant changes in sphere of media freedom. The relevant parts of the latest reports emphasize the following:

*"Although defamation has been decriminalised since 2002, politicians and public officials continue to use civil suits to intimidate journalists. To prevent an environment that forces journalists into self-censorship, courts should step up their efforts to ensure an expedient processing of defamation cases and consistency of case-law on damages awarded."*<sup>100</sup>

*"Despite the decriminalisation of defamation since 2002, politicians continue to use civil suits to intimidate journalists. Courts should step up their efforts to ensure an expedient processing of defamation cases and consistency of case law on damage awards, to prevent any chilling effect that would force journalists into self-censorship."*<sup>101</sup>

99 "The Official Journal of The EU", L 138/30.

100 Commission staff working document Bosnia and Herzegovina 2022 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2022 Communication on EU Enlargement Policy, 31, dostupno na: <https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-10/Bosnia%20and%20Herzegovina%20Report%202022.pdf> accessed on 3 May 2023.

101 Commission staff working document Bosnia and Herzegovina 2021 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2021 Communication on EU Enlargement Policy, 28, dostupno na: <https://neighbourhood-enlargement.ec.europa.eu/system/files/2021-10/Bosnia%20and%20Herzegovina%202021%20report.PDF> accessed on 3 May 2023.



*“Defamation has been decriminalised since 2002, but politicians continue to use civil suits to intimidate journalists. Courts should step up their efforts to ensure an expedient processing of defamation cases and consistency of case law on damage awards, to prevent any chilling effect that would force journalists into self-censorship.”<sup>102</sup>*

Therefore, the EU has recognized on several occasions and using almost identical wording that defamation and insult are decriminalized in BiH, but still does not mark the media environment as safe. Civil liability for defamation is used to intimidate journalists. If defamation and insult were criminalized in such an environment, the police would get an additional tool for intimidation and control over the media. That tool would be much more powerful, since it is a criminal procedure, and a civil procedure. After NSRS supported changes to the Criminal Code, in March 2023, the EU issued a statement expressing regret, and it was pointed out that this was a step in the wrong direction, taking into account the candidate status and priorities of the European Commission. into the question of the strategic commitment of the ruling parties in the RS for BiH’s accession to the European Union.<sup>103</sup>

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102 Commission staff working document Bosnia and Herzegovina 2020 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2020 Communication on EU Enlargement Policy, 29, dostupno na: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020SC0350> accessed on 3 May 2023.

103 Bosnia and Herzegovina: Statement by the Spokesperson on the defamation law in Republika Srpska, available at: [https://www.eeas.europa.eu/eeas/bosnia-and-herzegovina-statement-spokesperson-defamation-law-republika-srpska\\_en?s=51](https://www.eeas.europa.eu/eeas/bosnia-and-herzegovina-statement-spokesperson-defamation-law-republika-srpska_en?s=51) accessed on 3 May 2023.



### III.3. ORGANIZATION FOR SECURITY AND COOPERATION IN EUROPE (OSCE)

The OSCE's position on the treatment of defamation and insult is that journalists should not face criminal justice as a potential consequence of their work, but at the same time, in many member states, this is unfortunately not the case. Often this is due to writing critical stories about public officials or institutions.

The OSCE Representative on Freedom of the Media advocates the complete decriminalization of defamation and the fair consideration of such cases in dispute resolution bodies or civil courts.<sup>104</sup> In a 2021 publication, this body noted with great concern that, while fully recognizing the need for the authorities of all member states to protect their citizens against violent and terrorist behaviour, the tendency of the authorities to use accusations of "extremism" and terrorism against journalists and other media workers.

In a 2017 report<sup>105</sup>, the OSCE published information according to which three-quarters (42) of the organization's 57 member states in their national legal systems treat defamation and insult through criminal legislation. In the vast majority of these cases, defamation and/or insult carries a potential prison sentence.<sup>106</sup> The OSCE condemned this state of affairs, arguing such a position through almost a consensus of international courts and institutions in charge of human rights. It is also stated that 15 OSCE member states do not have criminal law provisions that would treat defamation and insult (Armenia, BiH, Cyprus, Estonia, Georgia, Ireland, Kyrgyzstan, Moldova, Montenegro, Norway, Romania, Tajikistan, North Macedonia, United Kingdom and Ukraine). In the case of the US, there is no criminal defamation or insult law at the federal level, but such laws do exist at the state level.

At that time, there was a noticeable trend of decriminalization of defamation and insult in the OSCE member states, as evidenced by the fact that most of the states that did so abolished their criminal law provisions in the past 10 years. The report states that among the countries that have done so, it is possible to notice two groups. The first is a group of common law countries that traditionally have decriminalized defamation. The second group consists of the former member states of Yugoslavia, in which a decriminalization campaign was carried out, since there is

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104 Decriminalization of defamation, available at: <https://www.osce.org/fom/decriminalization-of-defamation> accessed on 3 May 2023.

105 Organization for Security and Cooperation in Europe's Office of the Representative on Freedom of the Media's Special report legal harassment and abuse of the judicial system against the media, 2021, Available at: [https://www.osce.org/files/f/documents/c/f/505075\\_0.pdf](https://www.osce.org/files/f/documents/c/f/505075_0.pdf) accessed on 3 May 2023.

106 Defamation and Insult Laws in the OSCE Region: A Comparative Study, 2017, Available at: <https://www.osce.org/files/f/documents/b/8/303181.pdf> accessed on 3 May 2023.

a recorded series of abuses of the criminal justice system, and thus the risk of this happening in the case of freedom of expression.

A significant finding of this study relates to the issue of the application of criminal legislation in the countries where it is in force. Although criminalization in itself is problematic, the problem is less if these provisions are rarely or never applied in practice. However, the OSCE states that this is not the case in many European countries. The study offers evidence that criminal laws in the area of freedom of expression continue to be applied, including their application against the media, although states differ among themselves. The general conclusion of the OSCE is that only in a very small number of EU member states in modern times has the use of criminal sanctions against the media been unrecorded.

Regarding the announcement that the RS will criminalize defamation and insult, Teresa Ribeiro, the OSCE representative for media freedom, stated on March 4, 2023 that since BiH was the first country in the region to decriminalize defamation in its entire territory in 2001, and that he sees the announcements about criminalization as a step backwards in the already fragile environment of media freedom in the RS entity, where only a few free and independent media operate today.<sup>107</sup>

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107 OSCE Representative Ribeiro and Ambassador Aggeler deeply worried about decision to criminalize defamation in Republika Srpska, Bosnia and Herzegovina, available at: <https://www.osce.org/representative-on-freedom-of-media/538404> accessed on 3 May 2023.

### III.4. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION (UNESCO)

In its 2022 annual report on the misuse of the judicial system to attack freedom of expression, UNESCO highlights the following negative impacts of the criminalization of defamation and insult<sup>108</sup>:

Time	When faced with a criminal lawsuit, a journalist will have to invest time in meeting with lawyers, testifying, preparing appeals, etc.
Financial resources	The concerned journalist will have to cover the costs of legal defence, and to pay the fine that is sometimes part of the criminal sanctions, which can sometimes be significant. A criminal process can also involve the freezing of assets. An aspect to be noted is that, in most legal systems, if there is a conviction involving a fine, the money goes to the State, rather than to financially compensate the person defamed.
Professional career and image	Some cases involve the suspension of journalistic work while proceedings are ongoing, or as part of the sanctions ruled by the court. The stigma associated with being criminally prosecuted can also result in job loss and negatively impact future work opportunities, which could be further undermined if the case results in a criminal conviction that would remain in a journalist's record. Work continuity can also be impaired by the seizing of data, computers, phones and other equipment during the legal proceedings. Criminal cases can also lead to the closing of media outlets.
Psychological effects	A criminal prosecution may include arrest and detention, interrogation, going through a trial and facing possible imprisonment, which are emotionally draining. An international travel ban and restrictions to move beyond certain areas within the defendant's country may also apply. Powerful plaintiffs may also portray the journalist as a liar, an enemy of the State, etc., which can lead to public vilification and harassment both online and offline.

108 The “misuse” of the judicial system to attack freedom of expression: trends, challenges and responses, available at: <https://unesdoc.unesco.org/ark:/48223/pf0000383832> accessed on 4 May 2023.

Deprivation of liberty and other related consequence	If convicted, in addition to deprivation of liberty, the journalist must also face other consequences related to the poor conditions prevailing in prisons in many countries, which can sometimes be deadly.
Self-censorship, undermining freedom of expression and access to information	A journalist who has faced a criminal prosecution, and peers who are aware about it, may be hesitant about covering the same topic or other controversial ones, or may be discouraged from doing so by editors or media outlet owners. Suspended prison sentences, common in many countries, mean that although not imprisoned, the journalist is likely to feel under constant threat, also leading to self-censorship. The mere existence of criminal defamation legislation implies that journalists work under the continued risk of facing prosecution, even in countries where it is rarely or never used. All the above greatly impacts on freedom of expression and the public's right to know.

As UNESCO states<sup>109</sup>, the trend of decriminalization of defamation, which gained momentum a decade ago, has been stalled since 2022, and some countries are even re-criminalizing defamation and insult. As a result, 160 countries have criminalized defamation or insult.<sup>110</sup> Several countries have tightened or reintroduced defamation and insult provisions by introducing new laws dealing with cyber security, “fake news” and hate speech. In addition to the criminalization of defamation or insult, there has been an increased use of civil actions to protect against defamation or insult, which often result in disproportionate damage and a disturbing effect on freedom of expression and the work of journalists. In Western Europe and North America, defamation remains in the criminal laws of 20 out of 25 countries, and most retain imprisonment as a penalty. Between 2003 and 2018, five countries repealed laws criminalizing defamation and insult, and one partially repealed them. In Central and Eastern Europe, there has been an increase in the use of defamation laws, which are in force in 15 of the 25 countries in the region, most of which include the possibility of imprisonment as a sanction. Ten countries have abolished all general provisions against defamation and insult, while four have introduced partial decriminalization. UNESCO recommends that states repeal criminal defamation laws and replace them with appropriate civil defamation laws in line with international standards. This is especially due to the misuse of criminal defamation proceedings as a powerful tool in SLAPP proceedings.

109 Defamation laws and SLAPPs increasingly “misused” to curtail freedom of expression, available at: <https://www.unesco.org/en/articles/defamation-laws-and-slapps-increasingly-misused-curtail-freedom-expression> accessed on 3 May 2023.

110 The “misuse” of the judicial system to attack freedom of expression: trends, challenges and responses, available at: <https://unesdoc.unesco.org/ark:/48223/pf0000383832> accessed on 4 May 2023.

## III.5. CONCLUSION

**Criminal liability for defamation and insults in the RS would represent an additional instrument to be used as a strategic lawsuit against public participation.** Civil and criminal defamation proceedings are the most common types of proceedings that represent strategic lawsuit against public participation, which were initiated, not in order to satisfy justice due to the violation of the right to reputation, but in order to silence a journalist, activist, academic worker, citizen, or prevent his participation in public discussion and public life, through abuse of rights. Recently, it was pointed out the increase of such lawsuits in BiH, targeting journalists and environmental activists. While the public authorities are being passive in reacting to this social phenomenon, in the RS, through the criminalization of defamation and insult, is introducing an additional form of SLAPPs into the legal system, which has a more frightening effect on freedom of speech than is the case with civil proceedings for defamation.

**The legislator cannot ignore the European and international consensus on civil liability for defamation, as well as the legal obligations of BiH on the way to its EU membership.** The developed European and international standards on civil liability for defamation and the removal of criminal liability from the national legal order cannot be ignored by the legislator in the RS just because these are examples of soft law. First of all, there is a European consensus on this issue - both in the CoE and the EU - organizations of which BiH is a member and whose membership it aspires to. Secondly, the ECtHR when deciding on the violation of human rights and fundamental freedoms, regularly refers to soft law instruments developed by PACE, CoM, Commissioners or the Venice Commission, because these indicate the existence of a consensus at the CoE level on a one legal issue. The Constitutional Court of BiH acts in a similar way. In particular, the authority of the Venice Commission, which may appear in some proceedings as an *amicus curiae* (friend of the court), should be emphasized. In the end, the recommendation of the European Commission on the removal of defamation from criminal laws should be emphasized, as well as the need to implement such a recommendation. RS has an obligation that arises from the Constitution of BiH to help BiH fulfill its international obligations, including those from the process of European integration.

**Recriminalization of defamation and insult is completely undesirable.** It is evident that many countries in Europe today consider defamation and insult to be a criminal offense. As international standards and soft law show, these are negative phenomena that should disappear in the time ahead. And this is indeed happening in Europe, where there is a trend towards the decriminalization of defamation and insult, since there is a broad consensus about the pernicious nature of criminal sanctions for freedom of expression, and that individuals should be able to express their opinions and ideas without fear of prosecution, all as long as they do not incite violence or participate in hate speech. However, while some countries in Europe retain defamation and insult as a criminal offense, while others position them more and more within the framework of civil law and thus remove them from the domain of criminal law, we are not aware that some strive to do what is foreseen in the Draft - make

a full circle and to criminalize something that was decriminalized about two decades ago. This is a negative tendency and sends a strong message of disrespect for human rights, should the draft be adopted. It would be a step backwards for the protection of human rights, not only for journalists, but also for activists, academics, opposition politicians and others who use freedom of speech to criticize and fight for the public interest.

## IV. BIOGRAPHIES OF THE AUTHORS

**Nasir Muftić** is a senior assistant at the University of Sarajevo - Faculty. He graduated from the Faculty of Law of the University of Sarajevo in 2016, and obtained the title of LL.M. at the Central European University in 2017, and a doctorate at the University of Sarajevo in 2023. He was an intern at the Constitutional Court of the FBiH and the Supreme Court of the FBiH. Before starting his doctoral studies, Nasir worked as a legal advisor at BH Telecom d.d. in the areas of media and telecommunications law, civil litigation, intellectual property rights, drafting contracts in the economy and compliance with regulations. Nasir studies the intersection of civil law, private law and technology. He is engaged as a lecturer and consultant on media law and policy projects organized by the Council of Europe, the European Union, the Council of Ministers of BiH and the Organization for European Security and Cooperation. He has passed the bar exam and is a permanent court interpreter for the English language.

**Tahir Herenda** is a senior assistant at the University of Sarajevo - Faculty of Law, where he is currently pursuing his doctoral studies. In 2016, he graduated from the Faculty of Law in Sarajevo as one of the best students of his generation and was awarded the Golden Badge, and at the same faculty he received his Master's degree in 2018, also with the Golden Badge. After working in the real sector (KMPG Tax&Advisory and BBI Bank), he was employed as an assistant at the Department of Legal History and Comparative Law. In 2022, he will complete his master's degree at the Central European University in Budapest (with honors). He was a researcher at the Max Planck Institute for Comparative Public and International Law in Heidelberg and the Karl Franzens University in Graz. He is the author of several works published in Bosnia and Herzegovina and abroad. He is active in the sector of non-formal and extracurricular education in the field of education of high school students and students of community colleges.

**Harun Išerić**, MA iur., senior assistant at the University of Sarajevo - Faculty of Law, where he is also a PhD student. He is a member of the Complaints Commission of the Press and Online Media Council of Bosnia and Herzegovina (2021-2025). He held the position of Director of the Clinic for International and European Human Rights Law (2016-2018). He passed the bar exam before the commission of the Ministry of Justice of Bosnia and Herzegovina (2022). Harun actively cooperates with international and non-governmental organizations in BiH in the field of media law. He participated in national and international conferences, and published several scientific and professional papers, including papers published in the last BiH media law book (Amer Džihana [ed.], Media law: framework for free and responsible media activity,



Center for the Promotion of Civil Society, Sarajevo, 2022). His fields of interest are: constitutional law, administrative law, human rights, media, elections, environmental law.

**Kristina Ćendić** works as a researcher at the SHARE Foundation and as the coordinator of the Oxford Media Policy Institute. She obtained her doctorate in the field of media law, and in particular deals with the topics of freedom of expression, defamation and digital rights. Kristina completed her master's studies in the field of democracy and human rights at the Center for Interdisciplinary Studies in Sarajevo. She obtained another MA degree in the field of political science at the Faculty of Political Sciences in Belgrade. Kristina previously worked for the "Internet Policy Observatory" project led by the Annenberg School for Communications from Philadelphia, and from 2011 to 2015 she worked as a coordinator of the media law component within the USAID project Strengthening Independent Media in Bosnia and Herzegovina implemented by Internews.





