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Advice on Individual Rights in Europe

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CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA

The Case Law of Bosnia and Hercegovina's Courts on Freedom of Expression

Sarajevo, 2020

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EDITOR'S INTRODUCTORY REMARKS

Dear Readers,

I have the great pleasure of presenting one of the many publications the Constitutional Court of Bosnia and Herzegovina has prepared in compliance with its transparency obligation and in cooperation with the AIRE Centre. This publication provides an in-depth overview of two major areas of the European Convention of Human Rights - protection of the rights enshrined in Articles 5 and 10.

There are many reasons why we concentrated on these two rights/freedoms, each of which can be qualified as decisive. One of them, however, stood out. Before elaborating it, we need to emphasise that the legal grounds for both of these rights/freedoms are identical in all of Bosnia and Herzegovina, both the Criminal Procedure Code provisions on the right to liberty, notably on pre-trial detention and deprivation of liberty (Article 5 ECHR) and the Anti-Defamation Law provisions, constituting legal grounds for the protection of the freedom of expression under Article 10 ECHR. It would therefore be reasonable to expect that there are no differences in the ordinary courts' interpretation and application of either the standards of the European Court of Human Rights or the standards of the Constitutional Court of Bosnia and Herzegovina, which the domestic experts are much more familiar with.

This is where we come to the main reason why we decided to provide an overview of the case law concerning these two rights/freedoms.

Unfortunately, the BiH ordinary courts interpret the same legal provisions differently; they do not do so frequently, but they do it often enough to give rise to **legal uncertainty**. It goes without saying that each specific case and its factual and legal ***differentia specifica*** **is a world of its own**, wherefore ordinary courts adopt different decisions. However, our focus is not on different decisions and judgments, but on different interpretations of the same legal norms.

The problem of aligning case law in this area is a problem of applying the ECHR, which is one of the constitutional obligations, but also a problem of the courts' familiarity with the standards of **interpreting** these rights and freedoms in the relevant case law of the ECtHR, as well as that of the Constitutional Court.

Hence the need to emphasise the involvement in this project of the superb judges of ordinary courts, who invested a lot of their free time and effort in providing us with an overview of the case law of their courts and courts in areas close to them. I am sure you will also appreciate the styles the judges of ordinary courts rightly use, the styles enriching this publication, as well as the style we in the Constitutional Court use whilst following ECtHR standards. It is our firm belief that we have shown that the **standard of interpretation** does not differ regardless of the different need to implement the norms, i.e. the implementation of the norms is the obligation to protect rights/freedoms and their **technical aspect** is the kind of court that implements them.

I would like to again express my gratitude to our colleagues in the ordinary courts who worked on this publication as authors, co-authors and associates, and whose work and highly professional level of presentation warrant deep respect, which I take this opportunity to express.

On behalf of the Constitutional Court, in my own name as editor, and, I am convinced, in the name of all of you, the professional public in the broadest sense of the word, I hereby thank all of them for their latest contribution to legal thought in Bosnia and Herzegovina, especially our colleague Biljana Braithwaite of the AIRE Centre, without whose commitment and support this publication would have not been prepared.

Sarajevo, March 2020

President of the Constitutional Court
of Bosnia and Herzegovina
Zlatko M. Knežević

FOREWORD

Dear Readers,

It is with great pleasure that I address you on behalf of the AIRE Centre (Advice on Individual Rights in Europe), which supported the development of this report "Case Law of Bosnia and Herzegovina Courts on the Right to Liberty and Security and the Right to Freedom of Expression". This publication is part of our extensive activities in Bosnia and Herzegovina aimed at strengthening the implementation of the European Convention on Human Rights and ECHR standards in BiH.

In its 2019 Opinion on Bosnia and Herzegovina, the European Commission clearly highlighted the topicality and relevance of aligning the case law of BiH courts, primarily with the decisions of the BiH Constitutional Court and the European Court of Human Rights. Ensuring consistency of case law across BiH's legal orders and achievement of a higher degree of legal certainty include the need to ensure the accessibility of national case law and the existence of a forum for exchanging views on addressing individual legal issues.

Given that the availability of the highest courts' final decisions is prerequisite for harmonising jurisprudence, the AIRE Centre has partnered with the High Judicial and Prosecutorial Council in the implementation of a project involving the development of a database of the final decisions and views of the Court of BiH, the Supreme Courts of the Federation of BiH and Republika Srpska and the Brčko District Appellate Court.

The development of this report is one of the many activities we have been implementing in our excellent cooperation with the BiH Constitutional Court. Together with the BiH Constitutional Court, we have launched the Judicial Forum for BiH, which is holding its Fourth Annual Conference this year. We have also jointly organised many conferences, seminars and trainings and published a number of reports. The Judicial Forum and our many other activities are geared at promoting judicial dialogue among the highest BiH courts and alignment of national case law. This publication will benefit judges because it provides a simple and user-friendly overview both of the relevant court decisions and of statutory interpretation principles.

I would like to express our gratitude to everyone who enabled the publication of this report, above all the working group comprising Mr. Zlatko M. Knežević, the President of the BiH Constitutional Court; Mr. Zvonko Mijan, the Registrar of the BiH Constitutional Court; Ms. Sevima Sali-Terzić, the Senior Legal Adviser of the BiH Constitutional Court; and Ms. Ermina Dumanjić, the Head of the Case Law Department of the BiH Constitutional Court. I would also like to express our thanks to all other professionals who contributed to its development, notably: Mr. Davorin Jukić and Ms. Emira Hodžić (Court of BiH), Mr. Senad Tica (Supreme Court of RS), Ms. Božidarka Dodik (Supreme Court of FBiH), Ms. Silvana Brković-Mujagić (Sarajevo Cantonal Court), Ms. Biljana Majkić-Marinković (Banjaluka District Court) and Mr. Zlatan Kavazović (Brčko District Appellate Court). I would also like to express our

gratitude to the British Government for recognising the importance of this project and for supporting it.

Biljana Braithwaite
Western Balkans Programme Manager
The AIRE Centre

METHODOLOGY

We applied various approaches in the development of this report. The Constitutional Court's first (usual) approach is to provide a digest of its case law and, to an extent, of the case law of the European Court of Human Rights (hereinafter: ECtHR) and, on the basis of **dismissed/upheld** appeals, qualify specific decisions as **good or bad practice** examples. Furthermore, like in some other publications, we supplemented such an approach with concluding observations on the key reasons for our qualifications of decisions as good or bad practice examples. The second approach would involve expanding the texts with overviews of the cases of the highest ordinary courts that were reviewed and ultimately ruled on by the Constitutional Court.

The Working Group deciding on the methodology needed to define the following three key issues at the outset: the goal of the report, the purpose of the report and the target group.

Goal of the Report

The initial goal was to provide an overview of the Constitutional Court's case law and subsequently an overview of case law in Bosnia and Herzegovina. The final decision was made in the light of the project, within which this report is published, which is implemented with a view to **aligning BiH case law** in these legal fields. That final decision gave rise to the need to apply a different approach in terms of the **source of the case law**. Namely, the Constitutional Court's records include only its decisions on appeals of first- and second- (and extremely rarely) third-instance courts, which does not ensure the breadth of the approach because, of course, not all decisions in these areas are challenged by appeals.

Another issue that arose regarded the case law of not only the Supreme Courts but of the District/Cantonal Courts as well, and its alignment by the Supreme Courts. The issue of alignment of the Supreme Courts' **interpretations of norms** was just as important. It transpired that some courts had abundant case law on Article 5 but no or hardly any case law on Article 10 of the European Convention on Human Rights (hereinafter: ECHR).

Therefore, we could have provided an overview of the case law of **all District/Cantonal** Courts in Bosnia and Herzegovina and, accordingly of the case law of the Supreme Courts, the Brčko District Appellate Court and the Appellate Division of the Court of Bosnia and Herzegovina (hereinafter: Court of BiH), including the relevant case law of the Constitutional Court of Bosnia and Herzegovina, as well as that of the ECtHR. But, what would have been the purpose of such an approach requiring such extensive and painstaking work? Such an approach would be acceptable if the purpose of the publication were to **merely take stock** of the situation.

The Working Group, however, concluded that the purpose of this publication and all the work put into it was not to **take stock** of the decisions as static categories and provide a mere **historic overview** of what has been done, how and where. Such an approach would be not only at odds with the publication's **purpose** defined by the Working Group, but with its **target group** as well.

Therefore, such a static approach would be at odds with the goal, purpose and target group of the publication.

Purpose of the Report

In the opinion of the Working Group, the purpose of the report will have been achieved by fulfilling the goal – **alignment of case law**, involving the introduction of **new tools** to facilitate the overview of case law. Therefore, in addition to the **static part**/case law overview, we introduced an **active part**/the approach to interpretations of norms involving the **fulfilment of tests**, e.g. the reasonable suspicion test or the bona fide test (for Articles 5 and 10). The word 'test' does not mean that we are 'prescribing' a list of questions that need to be answered with a 'yes' or 'no' and then added up to obtain a 'positive' or 'negative' sum. On the contrary, we are suggesting a **course of interpretation**, which all judges are to take independently in their full professional capacity in specific factual and legal situations in order to arrive at their conclusions. Rather than providing a **definitive answer**, the comparative overview of the Constitutional Court's case law and ECtHR standards *illuminates the road already taken*, which will considerably help the courts address issues arising in specific cases. It goes without saying that most members of the **target group** are familiar with both the 'road' and the method, but recalling them is always useful, both for those who rarely come across these issues and for those who are aware that norms are always analysed anew.

Target Group

This report is primarily intended for **judges** of all ordinary courts, as well as the prosecutors with regard to Article 5 ECHR. Of course, we hope that the part on Article 10 will also be read with interest by journalists who are definitely walking along the line between freedom of information and violation of personality rights.

This is why we have also highlighted all the important parts, the individual elements we wrote about, the standards we referred to and specified the case law we cited and commented. In addition to regular references to the case law of the Supreme Courts, the Court of Bosnia and Herzegovina and the Brčko District Appellate Court, we also included the case law of the Banjaluka District Court and the Sarajevo Cantonal Court.

We included the case law of these two courts not only because they are the two largest second-instance courts (trying also the gravest crimes in the first instance), but because they have the most abundant case law on Articles 5 and 10 as well and are fully positioned to discuss their work, as well as the dilemmas they have had in interpreting the norms. We thus achieved two goals: first, we have enriched our overview of case law with cases that have never made it to the Constitutional Court and, second, we have provided professionals with the opportunity to familiarise themselves with the work of these courts, whose abundant case law on Articles 5 and 10 requires of them to interpret the norms addressed in this publication the most often.

The readers' attention will undoubtedly be drawn also to the method we applied to cite the relevant provisions of the law and analyse their application in the specific cases covered by this overview of case law.

This report has been prepared based on a rerview of around 150 decisions of the Constitutional Court of Bosnia and Herzegovina and 120 decisions of ordinary courts delivered in the 2015-2019 period.

The report was developed from July 2019 to March 2020 by the Working Group, comprising: Zlatko M. Knežević, President of the Constitutional Court of Bosnia and Herzegovina; Zvonko Mijan, Constitutional Court of Bosnia and Herzegovina Registrar; Sevima Sali-Terzić, Constitutional Court of Bosnia and Herzegovina Senior Legal Adviser; and Ermina Dumanjić, Head of the Constitutional Court of Bosnia and Herzegovina Constitutional Case Law Department. The following professionals also greatly contributed to the development of this extremely useful report: Davorin Jukić, Court of Bosnia and Herzegovina judge; Emira Hodžić, Court of Bosnia and Herzegovina Registrar; Senad Tica, Republika Srpska Supreme Court judge; Božidarka Dodik, Federation of BiH Supreme Court judge; Silvana Brković-Mujagić, Sarajevo Cantonal Court judge; Biljana Majkić-Marinković, Banjaluka District Court judge; and Zlatan Kavazović, Brčko District Appellate Court professional associate. The Constitutional Court of Bosnia and Herzegovina plans on drawing up a similar report on 2020 decisions in 2021.

And, last but not the least, the methodology gave all the report authors the opportunity to contribute with their **own professional opinions**, providing the readers with the chance to compare their own work with the authors' views and to gain insight in the decision-making standards in other courts.

PROTECTION OF THE RIGHTS UNDER ARTICLE 10 ECHR

FREEDOM OF EXPRESSION

Relevant National Law

Law on Protection against Defamation of the Federation of Bosnia and Herzegovina[1]

Principles Ensured by the Law
Article 2

The intent of regulating civil liability as provided for in Article 1 of this Law is to attain:

a) the right to freedom of expression, guaranteed by the Constitution of the Federation of Bosnia and Herzegovina and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette of Bosnia and Herzegovina, number 6/99), which constitutes one of the essential foundations of a democratic society, in particular where matters of political and public interest are involved;
b) the right to freedom of expression as it protects both the substance of an expression as well as the manner in which it is made, and is not only applicable to expressions that are received as favourable or inoffensive but also to those that might offend, shock or disturb;
c) the essential role of media in the democratic process as public watchdogs and transmitters of information to the public.

Definitions
Article 4

The terms used in this Law shall have the following meanings:

a) Expression - any statement, especially any oral, written, audio, visual or electronic material regardless of its content, form or manner of making or dissemination;
[...]
b) Defamation – the act of harming the reputation of a natural or legal person by making or disseminating an expression of false fact identifying that natural or legal person to a third person.

Scope of the Law
Article 5

(1) This Law applies to any request for compensation of harm for defamation, regardless of how the request is characterised.
(2) Public authorities are barred from filing a request for compensation of harm for defamation.
(3) Public officials may file a request for compensation of harm for defamation privately and exclusively in their personal capacity.

1 Official Journal of FBiH Nos. 59/02, 19/03 and 73/05. There are no major differences between the relevant provisions of this law and the Law on Protection against Defamation of Republika Srpska, Official Gazette of Republika Srpska No. 37/01 (hereinafter: Anti-Defamation Law).

Liability for Defamation

Article 6

(1) Any person who causes harm to the reputation of a natural or legal person by making or disseminating an expression of false fact identifying that legal or natural person to a third person is liable for defamation.
(2) For defamation made through media outlets the following are jointly responsible: author, editor or publisher of the expression or someone who otherwise exercised control over its substance.
(3) A person referred to in paragraphs 1 and 2 of this Article (hereinafter: the defamer) is responsible for the harm if they wilfully or negligently made or disseminated the expression of false fact.
(4) Where the expression of false fact relates to a matter of political or public concern, the defamer is responsible for the harm caused by making or disseminating the expression if they knew that the expression was false or acted in reckless disregard of its veracity.
(5) The standard of responsibility in paragraph 4 of this Article also applies where the injured person is or was a public official or is a candidate for public office, and exercises or is publicly perceived as exercising substantial influence over a matter of political or public concern.
(6) Where the expression of false fact identifies a deceased person, the first-degree heir of that person may bring a request under this Law, under the condition that the expression caused harm to the reputation of the heir.

Exemptions from Liability

Article 7

1. There shall be no liability for defamation where:
   a) by the expression an opinion was made, or if the expression is substantially true and only false in insignificant elements;
   b) the defamer was under a statutory obligation to make or disseminate the expression, or made or disseminated the expression in the course of legislative, judicial or administrative proceedings;
   c) the making or dissemination of the expression was reasonable.
2. When determining reasonableness under paragraph 1(c) of this Article, the court shall take into account all the circumstances of the case particularly:
   - the manner, form and time of the making or dissemination of the expression,
   - the nature and degree of harm caused,
   - good faith and adherence to generally-accepted professional standards by the alleged defamer,
   - consent of the allegedly injured person,
   - the likelihood that the harm would have occurred had the expression not been made or disseminated,
   - whether the expression constitutes a fair and accurate report of the expressions of others, and
   - whether the expression concerns a matter of the allegedly injured person's private life, or involves a matter of political or public concern.

Compensation

Article 10

(1) Compensation shall be proportional to the harm caused and shall be awarded solely with the purpose of redressing the harm. In making a determination of compensation, the court is obliged to have regard for all of the circumstances of the case particularly any measures undertaken by the defamer to mitigate the harm, such as:
- the issuance of a correction and retraction of expression of false fact or issuance of an apology;
- whether the defamer gained any monetary profit by making or disseminating the expression; and
- whether the amount of damages awarded would likely result in severe financial distress or bankruptcy for the defamer.

(2) A court order prohibiting or limiting the making or dissemination of an expression of false fact is not allowed prior to the publication of that expression.

(3) Preliminary court orders to prohibit disseminating or further disseminating of an expression of false fact may only be issued where publication has already occurred and the allegedly injured person can make probable with virtual certainty that the expression caused harm to their reputation and that they will suffer irreparable harm as a result of further dissemination of the expression. Permanent court orders to prohibit the dissemination or further dissemination of an expression of false fact may only be applied to the specific expression found to be defamatory and to the specific person found to be responsible for the making or dissemination of the expression.

Relationship of This Law with Other Laws

Article 15

The relevant provisions of the law governing obligations, the Civil Procedure Code ("Official Gazette of the Federation of BiH", Nos. 42/98 and 3/99), and the law on the enforcement procedure in the Federation of Bosnia and Herzegovina shall apply accordingly to issues not regulated by this Law.

Election Law of Bosnia and Herzegovina[2]

Article 7.3

(1) Candidates and supporters of political parties, lists of independent candidates, list of members of national minorities and coalitions, as well as independent candidates and their supporters, and election administration officials or those otherwise hired in the election administration are not allowed to:

[...]

(7) use language which could provoke or incite someone to violence or spread hatred, or to publish or use pictures, symbols, audio and video recordings, SMS messages, Internet communications or any other materials that could have such effect.

[...]

2 Official Gazette of BiH, Nos. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13, 7/14 and 31/16.

Media in Election Campaigns

Article 16.1

The media in BiH shall cover election activities in a just, professional and competent manner, consistently respecting the journalists' code of conduct and generally accepted democratic rules and principles, especially the basic principle of freedom of expression.

Obligations Law[3]

Publication of Judgments or Corrections
Article 199

In case of violation of a personality right, the court may order the publication of a judgment or correction at the expense of the tortfeasor or order the tortfeasor to retract the statement causing the violation or perform another action serving the purpose achieved by indemnity/compensation.

Pecuniary Damages
Article 200

(1) The court shall award equitable non-pecuniary damages for physical pain suffered, for mental anguish suffered due to diminished ability to engage in physical activities, disfigurement, harm to reputation or honour, violation of freedoms or personality rights, death of a loved one, as well as for the fear suffered. after finding that the circumstances of the case and, in particular, the intensity and duration of the pain, anguish and fear, so warrant, irrespective of pecuniary damages, even if the latter are not awarded.
(2) When ruling on non-pecuniary damage claims and the amounts of such damages, the court shall take into account the significance of the value violated, and the purpose to be achieved by such damages, and ensure that they do not favour ends incompatible with their nature and social purpose.

BiH Criminal Code[4]

Incitement of Ethnic, Racial or Religious Hatred, Discord or Intolerance[5]
Article 145a

(1) Whoever publicly incites or provokes national, racial or religious hatred, discord or intolerance among the constituent peoples and others who live in Bosnia and Herzegovina shall be punished by imprisonment for a term between three months and three years.

3 Republika Srpska: Official Journal of the SFRY Nos 29/78, 39/85, 45/89 and 57/89 and Official Gazette of Republika Srpska Nos. 17/93, 3/96, 39/03 and 74/04; FBiH: Official Journal of the SFRY Nos. 29/78, 39/85, 45/89 and 57/89, Official Journal of the Republic of Bosnia and Herzegovina Nos. 2/92, 13/93 and 13/94 and Official Journal of the FBiH Nos. 29/03 and 42/11.

4 Official Gazette of BiH, Nos. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15, 40/15 and 35/18.

5 Article 163 of the FBiH Criminal Code, Article 390 of the Republika Srpska Criminal Code and Article 160 of the Brčko District Criminal Code contain identical provisions. The following Articles are also relevant: Article 363 of the FBIH Criminal Code (unauthorised possession of or disruption of public order through a radio or television station) and Article 359 of the RS Criminal Code (public provocation of and incitement to violence or hatred

1. Article 10 ECHR

ARTICLE 10 OF THE ECHR
Freedom of Expression

1. Everyone has the right to freedom of expression. This right includes the freedom to hold opinions and to receive and impart information and ideas without interference by a public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.

The right to freedom of expression enshrined in Article 10 of the European Convention on Human Rights (ECHR) falls in the group of so-called qualified rights; the first paragraph of the Article defines the rights and the second paragraph specifies when such rights may be interfered with or restricted under the conditions specified therein. The main purpose of Article 10 is to define very broadly the freedom of expression and everything it entails, thus ensuring an extremely broad network of *prima facie* protection. Domestic courts play the main role in protecting this right, as well as the other ECHR rights, while the European Court of Human Rights plays a subsidiary role. It is not the ECtHR's role to assess whether the Contracting State used its "margin of appreciation in a reasonable and careful manner and in good faith," but rather to look at the interference in freedom of expression complained of „in the light of the entire case [...] and determine whether it was proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".[6]

Article 10 applies not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society".[7] Offensive speech, however, should be distinguished from hate speech, which, according to the Council of Europe Committee of Ministers "shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including:

6 *Hertel v. Switzerland* (App. No. 25181/94).

7 *Handyside v. The United Kingdom* (App. No. 5493/72).

intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin."[8]

Furthermore, Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed. In addition to political speech, Article 10 also protects commercial speech and artistic expression. Special protection is accorded to satire[9], poetry[10] and novels. Article 10 does not only lay down the public authorities' negative obligation, not to arbitrarily interfere in freedom of expression, but also requires of them to take positive measures to efficiently protect freedom of expression from interference by other, private individuals. In such cases, they must ensure a fair balance between the general interests of the community and the interests of individuals.

Media enjoy particular protection. Media include both traditional outlets (newspapers, radio and TV) and the so-called "new media" that appeared as a result of technological progress, i.e. use of the Internet, whose role in the enjoyment of the freedom of expression has been particularly emphasised by the ECtHR in the recent years. Any restriction imposed on media disseminating information or ideas per se constitutes interference in the right to receive and impart information and must be assessed carefully. The freedom of expression of the media, and everyone else contributing to a debate on issues of public concern[11] entails the use of stronger terms[12]. In addition, the media cannot be held liable for conveying statements by other individuals and full protection of journalistic sources must be secured.[13]

Article 10 of the ECHR applies not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.

2. Restrictions of the Freedom of Expression

Article 10(2) ECHR sets out the circumstances in which the freedom of expression may be restricted. According to ECtHR case law, the situations when such restrictions are allowed must be construed strictly, and the need for any restrictions must be established convincingly. The ECtHR recognises that the Contracting States have a certain margin of appreciation in assessing whether they need to restrict the freedom of expression, which may be based on culture, history or the legal system. The ECtHR has stated the following:

> "The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision,

8 Council of Europe, Committee of Ministers Recommendation 97(20) on "hate speech", 30 October 1997, available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680505d5b.

9 *Różycki and Kuliś v. Poland* (App. No. 27209/03).

10 *Karatas v. Turkey* (App. No. 23168/94).

11 *Steel and Morris v. The United Kingdom* (App. No. 68416/01).

12 *Thorgeir Thorgeirson v. Finland* (App. No. 13778/88).

13 *Goodwin v. The United Kingdom* (App. No. 17488/90).

> embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10. The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. [...] The Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts."[14]

The following test needs to be performed to establish whether Article 10 has been violated:

1. Do the facts of the case come within the scope of Article 10?
2. Was there an interference in rights under Article 10?
3. Was the interference prescribed by law?
4. Did the interference pursue a legitimate aim?, and
5. Was the interference "necessary in a democratic society"?

The answers to all the above questions need to be positive for the conclusion that Article 10 was not violated. Otherwise, the test ends and a violation is found when the first question is answered in the negative.

2.1. Scope of Article 10

Article 10 ECHR protects both natural and legal persons. Article 10 applies not only to the content of information but also to the means of transmission or reception, since, as the ECtHR has noted "any restriction imposed on the means necessarily interferes with the right to receive and impart information."[15] In its case law, the ECtHR has extended protection to various systems and means of imparting information, including oral expression, print material, radio shows, images, symbols, flyers, demonstrations, films and electronic information systems.

Article 10 protects not only the freedom of expression, but the right to voice one's views/opinions as well. The ECtHR concluded that ordering individuals to apologise amounted to a violation of their right to express their opinion because they were being forced to say something they did not believe. In a case in which a former army officer was ordered to pay a fine and apologise for his statement qualified as defamation, the ECtHR accepted that the fine did not raise issues under Article 10, but said the following about the apology:

> „[...] to make someone retract his or her own opinion by acknowledging his or her own wrongness is a doubtful form of redress and does not appear to be "necessary".[16]

The Constitutional Court of Bosnia and Herzegovina also extended protection to the freedom of expression involving various means of imparting ideas and information, including via print

14 *Hertel v. Switzerland*, paragraph 46.

15 *Autronic AG v. Switzerland* (App. no. 12726/87).

16 *Kazakov v. Russia* (App. no. 1758/02).

media, radio and TV shows and the Internet, but it has also ruled on cases in which it found that the statements did not come within the scope of Article 10 ECHR.

However, specific forms of expression do not come within the scope of Article 10 protection and amount to so-called unprotected expression. They include: racism, xenophobia, holocaust denial, anti-Semitism, aggressive nationalism, discrimination against minorities and migrants, including any expression "in contradiction with the Convention's underlying values, notably tolerance, social peace and non-discrimination". Individuals who made such statements may not benefit from the protection afforded by Article 10 of the Convention, by reason of Article 17 ECHR prohibiting the abuse of ECHR rights.[17]

Case Law of the Constitutional Court of Bosnia and Herzegovina

AP 454/13 – Statements inciting ethnic, racial or religious hatred, discord or intolerance do not benefit from the protection of Article 10 ECHR

The appellant was found guilty of inciting ethnic, racial or religious hatred, discord or intolerance and sentenced to one year imprisonment, suspended for a period of three years. The court found that the appellant had posted a number of statements on the publicly accessible Internet forum of a website under a pseudonym as to the course of action to be undertaken by Bosniac citizens of the Brčko District in the event of a war and the secession of Republika Srpska. He said, *inter alia*, that "that stinking Christmas is coming and everything is closed in Brčko, so I'll go out and photograph their two potential corridors through Brčko to show that they have no chance of seizing Brčko [...] In case of any military scenario, we must first launch an offensive on Bukvik, Gajeve and Cerik and neutralise the danger behind our backs, just like we did in 1992 [...] once we've dealt with those Serb villages in our hinterland, we'll have a free corridor to Gradačac and Srebrenik. We should then [...] attack Grčica and Srpska Varoš [...] and then slowly cleanse the city centre because there are a lot of buildings and a risk of heavy losses [...]Serbs who came from different shitholes live there, only few are urban Serbs, Ilicka is mostly populated by radical-thinking Serbs who would be the first to concoct [a fight] with Bosniacs from Brčko and who should be attacked and neutralised first (in case of any secessionist scenarios in the RS) [...]."

The appellant claimed that there were no elements of the crime he had been convicted of because a "closed forum" on the Internet could not be considered "a public place and he had not incited hatred, but merely expressed his opinion about a hypothetical scenario correlated with 'the real world' – i.e. frequent calls for secession by the highest Republika Srpska political authorities". He also claimed that the case attracted media attention only after the prosecutor spoke about it case and several of the local dailies reported on it thereafter.

The Constitutional Court said in its decision that the appellant could not rely on Article 10 ECHR. Namely, reliance on the freedom of expression amounted to abuse of the right under Article 10 ECHR in cases in which the ordinary courts had found that the appellant's statements included elements of the crime of incitement to ethnic, racial or religious hatred. The Constitutional Court said that this appeal claiming a violation of Article 10 should be declared incompatible with the BiH Constitution *ratione materiae* pursuant to ECtHR case law

17 See, e.g. *Pavel Ivanov v. Russia* (App. no. 35222/04) and *Rujak v. Croatia* (App. no. 57942/10).

However, given that it had already examined and dismissed the appellant's complaint under Article 6, the Constitutional Court decided to dismiss this complaint as well, given that "it does not alter the substance of its decision on freedom of expression allegations".

Note

The appellant also filed an application with the ECtHR (App. no. 48657/16), which found that, in the circumstances of the case, the interference with the applicant's right to freedom of expression did not disclose any appearance of a violation of Article 10 of the Convention.

Comment

The Constitutional Court properly applied the ECtHR standards in this case and found that the impugned expression, amounting to the crime of incitement of ethnic, racial or religious hatred, could not enjoy the protection of Article 10 because reliance on Article 10 in this situation amounted to abuse of rights prohibited by Article 17 ECHR.

AP 3764/14 – Appeal inadmissible *ratione materiae*

The appellant complained of a violation of Article 10 concerning proceedings in which he had claimed damages for defamation. However, the Constitutional Court found his appeal inadmissible *ratione materiae* because the appellant had neither published nor imparted information protected under Article 10 ECHR, i.e. the proceedings did not concern the appellant's right to freedom of expression, but the right to freedom of expression of the defendants.

2.2. Interference in the Freedom of Expression

Any restriction of the right to freedom of expression amounts to interference in that right and must be justified. The burden of proof is on the complainant, who merely needs to prove the likelihood of interference in the freedom of expression. Restrictions of this right may take different forms: penalty for defamation, ban on the publication of a text or work, etc.

2.3. Lawfulness

Any restriction of the freedom of expression must be prescribed by law, which guarantees that interference in the freedom of expression will not be arbitrary. Like many other terms in the ECHR, the term "law" has an autonomous meaning and is widely interpreted. This term comprises both the Constitution, university statutes[18] and international regulations applied in a Contracting State. For a regulation to be considered a "law" in the meaning of the ECHR, it must be published and adequately accessible, sufficiently precise and clear, "reasonably foreseeable" and of adequate "quality".

18 *Leyla Şahin v. Turkey*

Case Law of the Constitutional Court of Bosnia and Herzegovina

AP 2591/12 – Interference in the freedom of expression was not legal because the regulations were applied arbitrarily; violation of Article 10 ECHR

The appellant, who was the legal representative of a plaintiff in an administrative dispute, was fined 500 KM for contempt of court because he had written the following in his motion for an extraordinary review of the court decision "[...] the Court did not comment at all the allegations in the lawsuit, telling a story aimed at precluding the plaintiff from exercising his rights".

The court had also specified that, in case of default, the appellant would be sentenced to a day of imprisonment for every 100 KM of the fine he did not pay. The court explained that his statement was "extremely offensive to the court and the individual judge" and qualified as "especially grave and offensive the insinuation that, by "telling a story" in the case at hand, the court had consciously and intentionally precluded the plaintiff from exercising his rights".

The Constitutional Court explained that the ordinary courts had insufficiently objectively analysed the substance of the impugned statement, and that the "linguistic and legal analysis is unlikely to establish that the text at issue, which expresses doubts about the court's impartiality and professionalism, actually includes offensive allegations aiming to undermine the court's authority". The Constitutional Court said that by penalising the appellant for his statements, the courts had gone beyond the bounds of their authority because they had not based their decisions on an acceptable analysis of the relevant facts and circumstances in this case. Although the relevant provision of the Civil Procedure Code indeed provides for the punishment of individuals offending the court in their submissions, the Constitutional Court bore in mind the substance of the impugned statement and concluded that the courts had applied that provision arbitrarily, wherefore the interference in the appellant's right to freedom of expression was not "prescribed by law".

Comment

It cannot be concluded that the courts' interference in the appellant's freedom of expression was "prescribed by law" because they arbitrarily applied the relevant provision due to their failure to analyse the substance of the impugned statement with sufficient objectivity and in keeping with Article 10 ECHR standards.

2.4. Legitimate Aim

Legitimate aims justifying interferences in the freedom of expression are enumerated in paragraph 2 of Article 10 ECHR. States are not entitled to extend that list. That provision specifies that freedom of expression may be interfered with to achieve the following legitimate aims:

- In the interests of national security, territorial integrity or public safety,
- To prevent disorder or crime,

- To protect health or morals, the reputation or rights of others,
- To prevent the disclosure of information received in confidence, and
- To maintain the authority and impartiality of the judiciary.

The burden of proof that interference in the freedom of expression has pursued a legitimate aim is on the State (if the case is ruled on by the ECtHR), i.e. the one restricting the freedom of expression (if the case is ruled on by a domestic court).

Comment

The Constitutional Court has not found that the interference in the freedom of expression had not pursued a legitimate aim in any of the cases it has reviewed.

2.5. "Necessary in a Democratic Society"

The analysis of the "necessity" of the interference in the freedom of expression, i.e. the justification for such an interference, requires of the court to determine whether a fair balance has been struck between the freedom of expression and the aim pursued.

The following issues must be analysed to determine whether the interference in the freedom of expression has been "necessary":

- Whether there is a "pressing social need" to restrict the freedom of expression,
- Whether the aim pursued is proportionate to the means used to achieve it, and
- Whether the relevant authorities' reasons and justification for the interference in the freedom of expression are relevant and sufficient.

It may be concluded that an interference in the freedom of movement was "necessary in a democratic society" only if the answers to all these questions are positive.

The Constitutional Court has to date mostly reviewed the "necessity" of interferences in the freedom of expression vis-à-vis two legitimate aims listed in Article 10(2): protection of the rights of others and protection of the authority and impartiality of the judiciary.

2.5.1. Freedom of Expression and Protection of the Rights of Others

The cases in which the Constitutional Court reviewed the protection of the rights of others as justification for the interference concerned defamation, i.e. harm to the reputation of others, which falls under the scope of Article 8 ECHR protections. Although Articles 10 and 8 ECHR are equally important for the functioning of a democratic society, they may collide at times. In such cases, the courts' task is to analyse all the circumstances of the case at hand, and carefully assess which right has priority: freedom of expression or the right to privacy, which includes the right to a reputation. Such an assessment requires of the courts to take into account a number of relevant elements:

- Contribution to a debate of public interest,
- How well known the person at issue is and the subject of the report,
- Conduct of the individual at issue before the publication of the text,
- How the information was collected and its accuracy (whether the individual acted in good faith),
- Substance, form and consequences of publication, and
- Severity of the imposed penalty (where applicable).

In addition, both the ECtHR and the Constitutional Court have consistently underlined that a distinction has to be drawn between private individuals and persons acting in a public context, such as political or public figures. Whereas private individuals unknown to the public may require special protection of their right to a private life, public figures may not, as the limits of acceptable criticism are wider in their case as they inevitably and knowingly lay themselves open to close scrutiny and must consequently display a greater degree of tolerance.

Furthermore, when assessing the justification for the impugned statements, a distinction has to be drawn between facts and value judgments, the latter not being susceptible of proof. Qualification of a statement as a fact or a value judgement is an issue that primarily falls within the margin of appreciation of the national authorities, especially the domestic courts. However, where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive.[19]

The ECtHR leaves very little room for restricting political debate. Namely, it has said in its case law that "the promotion of free political debate is a very important feature of a democratic society. It [The Court] attaches the highest importance to the freedom of expression in the context of political debate and considers that very strong reasons are required to justify restrictions on political speech. Allowing broad restrictions on political speech in individual cases would undoubtedly affect respect for the freedom of expression in general in the State concerned."[20] Furthermore, in cases where journalists published the opinions and statements of others on important social issues, the ECtHR has said the following: "In short, the applicant was essentially reporting what was being said by others about police brutality. He was convicted by the Reykjavik Criminal Court of an offence under Article 108 of the Penal Code partly because of failure to justify what it considered to be his own allegations, namely that unspecified members of the Reykjavik police had committed a number of acts of serious assault resulting in disablement of their victims, as well as forgery and other criminal offences [...]. In so far as the applicant was required to establish the truth of his statements, he was, in the Court's opinion, faced with an unreasonable, if not impossible task."[21]

As per the assessment of the "proportionality" of an interference, it must be borne in mind that the ECtHR has adopted the doctrine enabling the defence of media if they can show they had acted reasonably and in accordance with professional standards, i.e. "in good faith" when they published the critical texts. Even with regards to facts, the Court has

19 *Feldek v. Slovakia*, 12 July 2001.

20 *Ibid.*

21 *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, paragraph 65.

recognised the defence of good faith as leaving the media "a breathing space for error".[22] Therefore, when it comes to facts, the court takes into account the journalists' defence that they had acted in good faith in their attempt to impart to the public accurate and reliable information in accordance with the press code of conduct. Basically, the good faith defence comes in exchange for the truth proof. Where a journalist or a publication has a legitimate purpose, the matter is of public concern, and reasonable efforts have been made to verify the facts, the press shall not be liable even if the respective facts prove untrue.

The severity of the imposed penalty is another important element in assessing whether an interference in the freedom of expression was "necessary in a democratic society". For instance, a court decision awarding non-pecuniary damages for defamation may violate the principle of proportionality between the severity of the courts' interference in the freedom of expression and the importance of the aim the interference pursues. According to ECtHR's case law, the amount of the civil damages may in itself be an infringement of Article 10 ECHR because any award made for defamation must be proportionate to the injury to reputation suffered.[23] The court has the discretion to decide what kind of satisfaction it will afford. However, this margin of appreciation is restricted precisely by the requirement of the "proportionality" between the penalty and the aim pursued. The ECtHR has consistently held that high amounts of damages awarded by courts risked to discourage open discussion of matters of public concern, even where damage to the reputation of a judge was at issue, if it was not so grave to justify an award of that size.[24]

RECAP

Relevant elements for striking a fair balance between Articles 8 and 10 ECHR:

- Contribution to a debate of public interest,
- How well known the person at issue is and the subject of the report,
- Conduct of the individual at issue before the publication of the text,
- How the information was collected and its accuracy (whether the individual acted in good faith),
- Substance, form and consequences of publication, and
- Severity of the imposed penalty.

IMPORTANT:

These elements are assessed in the light of the entire context of the case at issue.

Case Law of the Constitutional Court of Bosnia and Herzegovina

Distinction between Facts and Value Judgments

AP 3764/14 – Despite public interest in reports on the activities of the appellant, who was a public figure, the court failed to strike a fair balance between Articles 8 and 10 ECHR because the impugned statements were facts rather than value judgments and the court failed to examine their veracity; violation of Article 8 ECHR.

22 *Ibid.*

23 *Tolstoy Miloslavski v. The United Kingdom* (App. no. 18139/91).

24 *Narodni list d.d. v. Croatia* (App. no. 2782/12).

The appellant filed a claim because of the statements made in a political TV show, alleging that "the [appellant's] construction mafia is behind the [appellant's] crime [...]", that the appellant was "the real boss of this criminal organisation," that he was "legalising millions looted in this dirty business [...] of the so-called construction mafia in Banjaluka which [the appellant] had installed". The civil court dismissed the appellant's claim in its entirety, under the explanation that he was indisputably a public figure and that the impugned statements were value judgments not susceptible of proof.

The Constitutional Court examined whether the courts had struck a fair balance between the appellant's right to privacy and the freedom of the media to impart information of public interest and upheld the ordinary courts' assessment that the appellant was indeed a public figure because he was the Prime Minister of Republika Srpska at the time the impugned TV report was broadcast and that the contested statements regarded his public official duties rather than his private life. The Constitutional Court also upheld the ordinary courts' conclusion that the impugned report dealt with the alleged irregularities in the work of the RS Government, which was headed by the appellant, i.e. the construction and allocation of facilities via the Civil Engineering Institute. Therefore, the Constitutional Court concluded that the question of the appellant's conduct at the time he was in public office contributed to an issue of public interest, which the media were under the duty to inform the public about and that the public was entitled to receive such information.

However, having analysed whether the impugned statements were value statements or facts susceptible of proof, the Constitutional Court disagreed with the ordinary courts' conclusion that value judgments were at issue, and concluded that "the veracity of the impugned statements could have been ascertained in accordance with the reasonable standard of proof based on an acceptable assessment of the relevant facts". It therefore qualified as "unacceptable the ordinary courts' conclusion that the impugned statements were value judgments, and not even negative ones" and concluded that they amounted to "facts that are susceptible of proof". The Constitutional Court emphasised that "ordinary courts did not even establish whether such serious allegations were true, accepting the defendants' excuse that value judgments were at issue". It therefore found a violation of the appellant's right under Article 8, i.e. that there was a "pressing social need" to restrict the freedom of expression in order to protect the rights of others.

THE ARTICLE 10 TEST:

1. Does the case come within the scope of Article 10?
2. Was there an interference in rights under Article 10?
3. Was the interference prescribed by law?
4. Did the interference pursue a legitimate aim?, and
5. Was the interference "necessary in a democratic society"?

Comment

Determination of whether facts or value judgments are at issue is of paramount importance with respect to restrictions of the freedom of expression in defamation cases. The courts' failure to carefully examine an issue or to even examine the accuracy of the published facts at all will definitely lead to the finding of a breach of either the right to privacy under Article 8 or the right to freedom of expression under Article 10, depending on who is seeking protection.

A distinction has to be made between facts and value judgments that are not susceptible of proof, but the proportionality of the interference may depend on whether there is a sufficient factual basis to support the value judgment.

AP 965/17 – A fair balance has not been struck between Articles 8 and 10 ECHR because the courts failed to critically analyse the impugned statements aimed at offending and disparaging opponents and gave primacy to freedom of expression by concluding that value judgments were at issue

The appellant had sued for damages claiming an injury to the honour and reputation of her late husband and her own reputation by a text published on an Internet portal under the headline "Shit never sinks, it always floats?!". She singled out the following statements as defamatory "[...] that is the imposition of the political conviction of [the applicant's husband] who had betrayed his own people and fought against the Croatian anthem and Croatian flag as the only correct conviction [in the city]. The showing of the movie on [the applicant's husband] is tantamount to spitting on 40,000 residents of the [city] municipality who dreamed the Croatian dream, and to commemorating a man who had spit on that dream [...] and I will stop talking about the smelly city satisfied with itself, which stinks not only because [of the appellant's husband], but because of other traitors as well [...]", as well as the following statements "Bosniacs, on the other hand, do not have to admit that their grandfathers were Croats whose wives had been raped by Turks and this is how the Bosniac nation was created", "That Martina had not betrayed her people, she was always and first and foremost a Bosnian and Herzegovinian by nationality (whatever that may means) and my friend called her a bitch last night and insulted my [dog] Šarka, who gave birth to five of Rex's puppies in her day."

The first-instance judgment, which was upheld on appeal, said that press freedoms entailed the possibility of recourse to a degree of exaggeration, or even provocation;, and that, although the court need not approve of the journalist's polemical, aggressive and vulgar tone, Article 10 ECHR protected not only the substance of the ideas and information expressed, but also the form in which they are conveyed. The court also said that the choice of form of and manner of conveying the information was an autonomous right of the journalists and editors protected by Article 10, underlining that the court's role was not to impose on the media a desirable form

in which to express ideas and information. The court thus concluded that the requirements for awarding damages in the circumstances of this case had not been fulfilled because the defendant's value judgment about the documentary on the appellant's husband rather than defamation was at issue, and that her subjective feelings of harm were not decisive to qualify the statements as defamation.

The Constitutional Court first noted that it had already ruled on the protection of the reputation of the appellant's late husband in case No. AP 5204/15 regarding an article by another author on an Internet portal in reaction to the showing of the documentary about the appellant's late husband. In that case, the Constitutional Court examined in detail the ECtHR's case law and protection of the right to the heir's reputation and concluded that heirs were not entitled by law to claim damages for an injury to the reputation of their legal predecessors because a personality right was at issue. However, attacks on the reputation of a deceased individual may, in specific circumstances, affect the private lives and identity of that individual's family members wherefore such allegations come within the scope of Article 8 ECHR.[25]

Having examined whether the courts had struck a fair balance between the appellant's right to a reputation and the defendant's freedom of expression when they dismissed her claim, the Constitutional Court reiterated that offensive statements may fall outside the scope of the protection of the freedom of expression when they are made with the sole purpose of insulting someone. It therefore underlined that the ordinary courts had been under the obligation to carefully analyse the substance of the impugned article in its entirety in order to strike a fair balance between different interests. Bearing in mind the content of the entire text of the defendant and the context in which it was created, the Constitutional Court held that the defendant, as the author of the text, used inappropriate metaphors and vocabulary, expressing his views of the appellant's husband and the ideology colliding with his own in an offensive and vulgar manner. The Constitutional Court noted that this was the reason why the BiH Press Council Complaints Commission reacted and condemned such expression as being in contravention of the Press and Online Media Code of BiH. However, the ordinary courts had not performed a critical review of the substance of the text, which was "rife with insults, tawdry comments, intolerance, discrimination"; rather, they merely made a general assessment that the author's opinion of an ideology he disagreed with, expressed by use of vulgar vocabulary and metaphors, was at issue. The Constitutional Court assessed as inappropriate the lack of need of the ordinary courts, as part of the judicial system of a multi-ethnic state such as Bosnia and Herzegovina, to critically analyse the *prima facie* unsuitable statements by the defendant, because the impugned text in its entirety reeked of speech that could not enjoy the protection of Article 10 ECHR. The Constitutional Court also said that the text, both in its entirety and in the context, could not be taken as an example of expression that "offends, shocks or disturbs" which is permissible within press freedoms in terms of Article 10 ECHR because it was rife with offensive, intolerant, discriminatory, mongering and vulgar language. The Constitutional Court concluded that the ordinary courts had not provided in their impugned judgments the relevant and sufficient reasons for their decisions and had failed to strike a fair balance between the protection of the appellant's right to a reputation and the protection of the defendant's right to the freedom of expression.

25 *Putistin v. Ukraine*, App. no. 16882/03.

Comment

Media reporting on issues of public interest are allowed to use stronger terms, even those that "offend, shock or disturb", as the ECtHR has emphasised in its case law. However, courts must subject texts like this one to an analysis and a critical review and establish on the basis of all the circumstances of the case whether they are informing the public of an issue of public interest or using stronger terms or expressing value judgments that only aim to vulgarly offend those subscribing to different views. If they fail to perform such an analysis, then they are putting within the scope of Article 10 ECHR expression that has no other aim but to offend and disparage others and, as such, does not enjoy protection, wherefore it cannot be said that a fair balance has been struck between two colliding interests: the right to a reputation and the right to freedom of expression. In addition, a distinction needs to be drawn between extreme types of expression that may incite hate or violence and which, by virtue of Article 17 ECHR, do not come within the scope of Article 10 protection *ratione materiae*. It needs to be noted here that Article 17 ECHR should be relied on only in exceptional and extreme cases.

Contribution to a debate of public interest and status of the injured party (public figure or private individual)

AP 1848/15 – The courts had not examined all the elements of the "necessity" of the interference in the freedom of expression, especially the plaintiff's status and social standing and the existence of public interest; violation of Article 10 ECHR

The appellant (journalist) and his co-defendant were ordered to jointly pay damages for defamation to the plaintiff. The plaintiff had sued them for the following statements published about him in an article: "for over ten years, he has been dumping manure from his barn onto the road used by eighteen households in the village [...] the polluted water from his barn has been poisoning the cattle, while the road, which is used by another eighteen families, is constantly covered with manure because of the plaintiff's negligence; that plaintiff has always been throwing dead animals in the garbage dump."

The Constitutional Court noted that the courts had referred to the Anti-Defamation Law to substantiate their ruling that the appellant should pay damages for defamation, concluding that this Law explicitly set out who should bear the burden of proof. Namely, the courts concluded that the parties to the civil proceedings were under the obligation to prove the accuracy of their claims and allegations as the "failure to do so demonstrated their inaccuracy (defamation)." However, the Constitutional Court said that the explanations of the impugned judgments did not lead to the conclusion whether "the facts in the impugned article in its entirety were assessed in the context of all the other relevant criteria" (the plaintiff's status, limits of acceptable criticism, existence of public interest, etc.). The courts upheld the plaintiff's claims exclusively due to the lack of adequate evidence corroborating the appellant's allegations in a part of the impugned article and concluded that he was guilty of defamation based on that alone. The Constitutional Court pointed out that the presented evidence provided sufficient fact and that it was not disputed

during the proceedings that some of the claims in the impugned article were true (leakage of fecal water) and that the rest of the evidence was found as evidently untrue (that the plaintiff had been dumping manure on the road for over ten years) because the appellant had not proven them adequately. The Constitutional Court concluded that the explanations of the impugned judgments did not indicate whether the courts had "even examined the impugned statements against the criteria set in the substantive provisions of the Anti-Defamation Law". In particular, the courts had not defined the appellant's status and social standing (whether he was a public or private figure) or reviewed all the criteria in the context of opening the issue of the quality of work of the communal and veterinary services. Therefore, as the Constitutional Court found, the courts had failed to clarify whether "in the circumstances of the case at hand, there was a legitimate interest to inform the local community of the evident problems described in the impugned article [...] and put the contested statements in a broader context [...] of the relevant provisions of the Anti-Defamation Law". The courts thus exceeded the margin of appreciation they have under Article 10 ECHR and it cannot be concluded that the reasons specified in the explanations of the impugned judgments regarding the criteria could be considered relevant and sufficient".

Comment

In order to properly assess the necessity of restricting someone's freedom of expression, the courts must ascertain whether their statements had been directed against a public or a private figure and whether there was a public interest justifying the impugned expression. It cannot be concluded that the courts gave "relevant and sufficient reasons" for restricting the freedom of expression, another important element for assessing whether the restriction was "necessary in a democratic society", when the courts failed to explain these elements in the circumstances of the case.

Acquisition of Information and Its Veracity (Acting in Good Faith)

AP 4881/14 – Specialist doctor working in an Out-Patient Health Clinic cannot be considered a private individual and the courts have to take into account the journalist's bona fide defence that he had contacted him before publishing the article and that he had obtained the information from official sources

In this case, the appeal was filed by the publisher and editor in chief of a newspaper the courts had found guilty of defamation and ordered to pay the plaintiff 3,000 KM in damages. Namely, their article headlined "Doctor Ordering Women to Undress in Waiting Room", with the subtitle "Patients Like Camp Inmates", said that the plaintiff (a gynaecologist) was accused by a "group of patients [of the Out-Patient Health Clinic] of requiring of them to undress in the waiting room of this health institution in plain sight instead of in his office". The plaintiff also claimed that the appellants had "used words and expressions tarnishing his professional image [...] and voiced falsehoods about his reportedly scandalous and humiliating treatment of his patients, thus undermining his reputation, and violating his dignity and honour."

The court heard the journalist, who was also sued, and who said that he had found the information about the events on the official municipal website that had a post saying that the

Mayor had received an anonymous letter from a patient about "the problem of the waiting room for specialist medical examinations at the Out-Patient Health Clinic". He also said that he had called up the plaintiff to check the allegations in the anonymous letter, that the latter had denied claims that there was no cabin in his office and that he "jokingly said that 'some patients liked to perform a striptease in front of the doctor'", and that he had "adequately conveyed all the information he had collected on the municipal website, the anonymous letter and the plaintiff's statement in the impugned article". The first-instance court explained in its judgment that the appellants could have "expressed their opinion in a more comprehensible manner", i.e. that they "could have clarified why they believed that the plaintiff was humiliating the women in the way they described in the article". It also said that the substance of the article amounted to a defamatory statement and that the appellants' liability was also determined "on the basis of their conduct during the event at issue". Namely, the court explained that the appellants had written the impugned text about the plaintiff "based on the data posted on Brod's official municipal website and a patient's anonymous letter without showing the letter". The court assessed that the appellants had thus "qualified the plaintiff's work by citing an anonymous source, as they are wont to do". The court also said that the appellants "were entitled to comment the plaintiff's work from the perspective of the quality of health services, but that such a comment should have been presented on the basis of arguments, without recourse to offensive vocabulary and malicious qualifications, in accordance with the press code of conduct and approach". The second-instance court upheld the first-instance judgment, noting, among other things, that the allegations on the municipal website could have been double-checked with the Out-Patient Health Clinic staff and Director and that the appellants had been under the "obligation to prove lack of intent and negligence to cause damage to the plaintiff" and to prove "that their statements were actually true (and not untrue)."

The Constitutional Court, noted, *inter alia* that the courts had found that the article concerned the plaintiff in his private capacity. It, however, found that the impugned statements concerned the plaintiff in his capacity of specialist doctor at the Out-Patient Health Clinic, i.e. someone performing a public office, and that, in the broader context, the topic regarded the quality of health care in a specific local community and the Clinic's provision of medical services in that local community. Furthermore, the Constitutional Court said that the impugned statements could not be considered facts susceptible of proof, but value judgments (opinions) about a topic of general public concern, rather than the plaintiff's private life. The Constitutional Court also said that the way in which the appellants had obtained the information constituted a sufficient factual basis for the value judgment they voiced. It therefore concluded that the restriction of the freedom of expression had not been "necessary in a democratic society" because it was not proportionate to the plaintiff's right to a reputation.

Comment

This case also demonstrates the need to carefully assess whether the impugned statements in a specific case regard private or public figures. Public figures definitely include all individuals performing public office, wherefore they must tolerate sharper criticism that may include stronger terms. Furthermore, this case also demonstrates that the courts must take into account the entire context when assessing whether facts or value judgments are at issue. The

Constitutional Court also emphasised that the *bona fide* defence of the journalists should be taken into account, especially when the journalist clearly contacted the alleged injured party before publishing the text and obtained the information from official sources, in this case the municipality's official website.

When it comes to facts, the courts take into account the journalists' defence that they had acted in good faith in their attempt to impart to the public accurate and reliable information in accordance with the press code of conduct. Basically, the good faith defence comes in exchange for the truth proof.

AP 4483/16 – Violation of Article 10 ECHR because the journalist unsuccessfully sought the plaintiff's comment on the report before publishing it but the courts concluded that this did not suffice to prove that he had tried to check the accuracy of the published information in good faith

The appeal was filed by the public service broadcaster and author of a report in a newscast, who were found guilty of defamation. Namely, as the court explained, the broadcast report said that the Association of Citizens with Old Foreign Currency Savings accused the plaintiff, a judge, of forging documents and "acquiring proceeds of crime". The courts concluded that the appellants had not invested sufficient efforts in verifying the accuracy of the claims.

The Constitutional Court said that, both during the first- and the second-instance proceedings, the appellants had presented documents (e-mail correspondence with the public relations officer of the court the plaintiff was a judge in) that showed that the appellant (author of the report) had requested of the officer three times to explain what was at issue, with a view to professionally reporting the views of the other side. The Constitutional Court also noted that the author ended the impugned report by saying the following: "The Court was unable to find an interlocutor today who would tell us who is right." In the view of the Constitutional Court, such treatment left room for doubts about the Association's claims because the report quoted the view of only one party to the impugned proceedings, while the other party missed the opportunity it was provided to clarify the contested circumstances and facilitate the airing of a comprehensive report. In such factual circumstances, the Constitutional Court was unable to accept the ordinary courts' explanation that the appellants had not invested sufficient efforts in checking the accuracy of the claims about the plaintiff. The Constitutional Court particularly took into account that the information was to be imparted to the public on the very day a news conference was organised because, as the ECtHR had noted in its case law, "news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest."[26] As opposed to the ordinary courts, the Constitutional Court consequently concluded that the appellants had invested sufficient efforts in professionally informing the public of an issue of public interest and that the ordinary courts' interference in the freedom of expression had not been "necessary in a democratic society".

26 *Observer and Guardian v. The United Kingdom*, App. no. 16882/03.

Comment

One of the ways the media can prove their professional approach to reporting, i.e. their good faith is to provide the other side with the opportunity to comment on and refute the claims they intend to publish. In this case, the Constitutional Court found a violation of Article 10 because the courts had not assessed the efforts as "sufficient", whereby they had placed an excessive burden on the journalist and the outlet to prove their good faith, i.e. it concluded that their interference in the freedom of expression was disproportionate to the aim pursued.

AP 2501/15 – By relying exclusively on the rules on the burden of proving the accuracy of the allegations, the courts failed to assess all the relevant elements in order to strike a fair balance between Articles 8 and 10 ECHR, thus overstepping their margin of appreciation

The appeal was filed by the publisher and chief editor of a newspaper and the author of an article, who were found guilty of defamation and ordered to pay the plaintiff 3,000 KM. The impugned article published in the daily claimed that the plaintiff, the Chairman of the Managing Board of a company, had incurred damage to that company worth millions of KM during a six-month period, together with the company director. The courts qualified the claim as "statement of fact that partly contains elements of defamation". They noted that the article was published at the time the plaintiff was prosecuted for misconduct rather than abuse of authority and that he was qualified as a "looter who signed harmful procurement contracts incurring millions KM of damages to the company". The courts said that the appellants had failed to prove the accuracy of the claims and had obviously not acted in good faith, "because they published partly untrue information" since the men had been indicted for one not two crimes.

The Constitutional Court said, *inter alia,* that the ordinary courts had upheld the plaintiff's claims exclusively because the appellants' evidence did not prove the veracity of the allegations in the contested article, which led them to conclude that these allegations were "manifestly untrue". In this specific case, the courts had relied exclusively on the rules on the burden of proving the accuracy or inaccuracy of the claims in the impugned article, whilst neglecting "the entire range of other factors that may be relevant to weighing rights and interests in decisions on potentially conflicting rights". The Constitutional Court thus concluded that the courts had exceeded their margin of appreciation because they had failed to assess in this case whether there was a legitimate interest to inform the public of the irregularities in the operations of the company the plaintiff was managing during the relevant period in his capacity of Chairman of the Managing Board and against whom criminal proceedings had, indeed, been initiated, and because they had failed to assess the contested statements in a broader context and the context of the relevant provisions of the Anti-Defamation Law and the standards of Article 10 ECHR. Therefore, it concluded that the ordinary courts' interference in the appellants' freedom of expression had not been "necessary in a democratic society".

Comment

The Anti-Defamation Law is a *lex specialis* vis-à-vis the Civil Procedure Code, wherefore the rule on the burden of proof in defamation proceedings cannot be applied without the application of the standards laid down in the Anti-Defamation Law, i.e. Article 10 ECHR. Media reporting on criminal proceedings against public officials charged with abuse of authority are not under the obligation to prove that these officials are guilty of the crimes they are accused of, but they do have the duty and the right to inform the public objectively of such developments. In this specific case, the claim that the plaintiff had "ripped off" the company definitely amounted to a value judgment based on a sufficient factual basis – information that criminal proceedings had been instituted against him.

Existence of "Relevant and Sufficient Reasons" for Restricting the Freedom of Expression

AP 3430/16 – Violation of the freedom of expression because of the criminal conviction; impugned photograph and post on the appellant's Facebook profile was available to a small number of people; lack of a "relevant and sufficient reasons" for the interference in the freedom of expression

The ordinary courts found the appellant guilty of inciting ethnic, racial and religious hatred, discord and intolerance under Article 163(2) in conjunction with paragraph (1) of that Article of the FBiH Criminal Code because he posted a photograph of the Rio de Janeiro statue of Christ on his Facebook profile with the text "Let's go, rip it up", with the flag of Bosnia and Herzegovina and two dragons flying towards the statue in the background; "the first dragon's mouth was open and it was attacking the statute". In their impugned decisions, the ordinary courts essentially held that, by publishing the photograph, the appellant had "publicly incited religious hatred and intolerance against Croats, members of the Roman Catholic religion". In his defence, the appellant said that he had found the photograph on the Internet at the time the BiH national soccer team was playing a game to qualify for the world championship in Brazil, that it was showing the "symbol of Rio de Janeiro", that the "dragons are symbols of the BiH team" and that he considered his comment posted with the photograph as "written in the sports jargon". The appellant claimed that the courts had failed to clearly explain in their decisions why the publication of the impugned photograph and text amounted to the crime he was convicted of and that they had arbitrarily applied the law.

The Constitutional Court said that the described photograph could not be assessed outside the context of all the circumstances of the case, wherefore it could not be concluded that it *prima facie* incited hate on religious grounds or amounted to an attack on religion. However, the Constitutional Court concluded that the courts had not taken into account the entire context or assessed all the relevant factors when they decided to restrict the appellant's freedom of expression in this manner. The Constitutional Court observed, *inter alia*, that the courts had not specified whether they had taken into account the fact that the appellant had published the impugned photograph and text on his Facebook profile and that they were available to a small number of people, i.e. only his Facebook "friends" or that the impugned photograph became

available to the general public only when it was published on an Internet portal with a quite suggestive headline by the portal editor. The Constitutional Court concluded that the courts had failed to specify in their impugned decisions relevant and sufficient reasons that led them to conclude that the appellant's post amounted to incitement to hatred on grounds of religion, especially to such an extreme degree that they had to level such harsh punishment against him (suspended one-year prison sentence) and that they had not even tried to strike a fair balance between the protection of the rights of believers, on the one hand, and the protection of the appellant's right to freedom of expression, on the other. It further noted that, in addition to unclear and inadequate explanations of their conclusions, the ordinary courts gave absolute primacy to the protection of religious feelings, without taking into account interference in the appellant's freedom of expression. The Constitutional Court thus found a violation of the appellant's right to freedom of expression under Article 10 ECHR and his right to a reasoned decision as part of the right to a fair trial under Article 6 ECHR.

Comment

Imposition of a penal sanction, which indisputably amounts to interference in the freedom of expression, requires of the court to assess all the circumstances particularly carefully and to ensure that the penalty is proportionate to the aim pursued. In this specific case, the courts gave primacy to the protection of religious feelings without providing relevant and satisfactory explanations why they considered the post on the appellant's Facebook profile offensive in the overall context, all the more since the post was available only to a small number of people who were the appellant's Facebook "friends", and without taking into account the protection of the appellant's freedom of expression.

Violation of Companies' Business Reputation and Commercial Interests

AP 2753/16 – protection of a company's business reputation and commercial interests under Article 10(2) ECHR; publication of official information despite the relevant authorities' request not to disclose it until its accuracy is verified; violation of the company's commercial reputation; no violation

The appellant, a publisher of a newspaper, contested the ordinary courts' judgments ordering him to pay the plaintiff damages for lost income. Namely, the courts found that the plaintiff had proven that the buyers, who had concluded sales contracts with the plaintiff, had broken off the contracts on the purchase of flour because the appellant had published an untrue article (claiming that the plaintiff had imported poisoned wheat), wherefore the plaintiff had suffered damages. The courts found that the appellant had not heeded the requests of a Customs Office manager not to publish the impugned article, especially the name of the wheat importer until the results of the lab analysis of the wheat arrived; rather, he immediately published the information which, as the courts concluded, damaged the plaintiff's business reputation. After the impugned article was published, the plaintiff's business partners cancelled their contracts with him, which led the courts to conclude that the plaintiff had suffered pecuniary damage. The appellant alleged that he was a victim of unjustified interference in his freedom of expression, and referred, *inter alia*, to the ECtHR's view that journalistic freedom also covered

possible recourse to a degree of "exaggeration, or even provocation" and the outlets' reliance on the content of official reports without undertaking independent inquiries and the usual measures to verify the information when reporting contributed to a debate of public interest.

The Constitutional Court said, *inter alia*, that the courts had found that the impugned article was based on official information obtained from the relevant Customs Office and that the competent customs officers had warned that additional analyses were being conducted to ascertain the accuracy of the claims that the wheat was infected. Whilst acknowledging the possibility that the need to protect human life and health in BiH was at issue in this case, the Constitutional Court stressed that the way the impugned information was published, especially in view of the fact that the author of the article was aware that the information might not be true, led it to conclude that sensationalist reporting, rather than "exaggeration and provocation" as the appellant claimed, was at issue. The Constitutional Court also concluded that the courts had clearly explained in their judgments the reasons that had led them to find a violation of the right to freedom of expression, resulting in a violation of the plaintiff's business reputation and that the appellant should compensate the damages he incurred to the plaintiff. Consequently, the Constitutional Court concluded that the interference in the appellant's freedom of expression had been "necessary in a democratic society".

Comment

From the perspective of the ECHR, a company's commercial reputation and interests are relevant in terms of Article 10(2) because freedom of expression may be restricted to protect the business reputation and commercial interests of a company (legal person)[27], i.e. protection of the business reputation and interests of a company may be a legitimate aim under Article 10(2) ECHR[28]. This should, however, be distinguished from the issue of the protection of the "reputation" of a company (legal person) under Article 8 ECHR. Namely, according to the ECtHR's case law, there is a difference between the reputation of natural persons, regarding their social status and which may impinge on their dignity, and the business reputation of legal persons, which does not include a moral dimension entailing the protection of the right to a reputation as part of the right to a private life.

Award of Non-Pecuniary Damages for Defamation as a Penalty

AP 2043/12 – When determining the appropriate amount of damages for defamation, the court needs to take into account all the circumstances of the case, without requiring formal evidence to ascertain the "intensity and duration of mental anguish" and it needs to make sure that the amount of damages is not in violation of the "proportionality" principle.

The appellant had sued a newspaper and author of the impugned article claiming 10,000 KM in damages for defamation. The article had described the appellant, *inter alia*, as "the collector

27 *Steel and Morris v. The United Kingdom*, App. no. 68416/01.

28 *Heinisch v. Germany*, App. no. 28274/08.

of bribed souls that had it all – both in Belgrade and in Republika Srpska. [...]. It goes without saying that all those apartments are not registered in his name but in the name of his closest family members. [...] [The plaintiff] owns a comfortable apartment over 100 square meters in area [...] and, in the building in No. 69 nearby, another apartment like this one [...] and he bought over 120 square metres of office space in Block 45, where his book store is located. To illustrate, a square meter of real estate in this part of Belgrade is worth at least two thousand KM. [...] The increase in his MP salary was accompanied by an increase in his appetites, so the Speaker of the Republika Srpska Parliament recently bought a huge apartment [...] near the St. Sava Temple in Belgrade. His latest acquisition is also over 100 square metres in area and each square metre was paid at the exorbitant price of two thousand EUR (four thousand KM), which means that this nest was paid 400,000 KM. In addition to all of this, [the plaintiff] also owns a comfortable apartment in Pale and a cottage on Mt. Jahorina."

The first-instance court dismissed the motion, explaining that the defendants had not proven that the information they published in the article was true and that this constituted grounds for awarding the plaintiff non-pecuniary damages for the "mental anguish he suffered because of the harm to his reputation, dignity and honour". However, in the view of that court, for a damage claim to be valid, it was "necessary to ascertain the existence of damages, i.e. the existence of mental anguish directly associated with the publication of untrue information". The second-instance court upheld this explanation, adding that "expression of an opinion on the appellant's property was at issue, with the aim of showing that the salaries of public officials were so high that they could afford a better standard of living than the other citizens."

The Constitutional Court took into account the appellant's public office (at the time) and the above circumstances, and observed that, in the instant case, the public definitely had an interest to receive information about the appellant's property, but that the contested judgments ultimate failed to answer the question regarding the accuracy or inaccuracy of the information about his property, because the courts had addressed neither this issue nor the journalists' compliance with professional standards. In view of these deficiencies, the Constitutional Court concluded that it did "not have at its disposal facts about whether or not the courts had taken into account the relevant criteria and how, wherefore it cannot, in the circumstances of the case, provide an ultimate answer whether the dismissal of the plaintiff's claim struck a fair balance between his right to a reputation and the defendants' right to the freedom of expression." It consequently found that the impugned judgments failed to strike a fair balance between the appellant's right to a reputation and the journalists' freedom of expression.

Notwithstanding the conclusion and in view of "abundant case law on just satisfaction in defamation cases", the Constitutional Court felt it had to reiterate the standards applied in ascertaining damages in such cases. As per the dismissal of the claim because the plaintiff "had not proven that the defamation had caused him mental anguish", the Constitutional Court reiterated that penalties amounting to interferences in the right to freedom of expression had to be "proportionate to the damage done to the reputation and be prescribed by domestic law." The Constitutional Court further stated that the Anti-Defamation Law was a *lex specialis* with regard to compensation of damages in defamation cases "wherefore the making of an award needs to strike a fair balance between the right to freedom of expression and the right to a reputation, i.e. the proportionality principle needs to be applied." Therefore, neither ordinary courts nor individuals claiming damages for harm to their reputation are limited by any particular formal evidentiary means and the injured parties are not under the obligation

to require court expertise on the amount of damages; nor can that be a requirement the non-fulfilment of which may lead to the dismissal of a damage claim.

Comment

Courts need to examine all the circumstances of the case when determining damages for harm to someone's reputation, without requiring of the injured party to present any particular formal evidence to establish the "intensity and duration of the mental anguish", i.e. without the obligation to require court expertise. The courts, however, need to make sure that the amount of damages is proportionate to the aim pursued by the interference, but they also need to bear in mind that they can penalise defamation by imposing other penalties, not just fines, and protect the reputation of the individual at issue, so as not to limit the freedom of expression more than "necessary in a democratic society".

2.5.2. Freedom of Expression and Maintenance of the Authority and Impartiality of the Judiciary

Maintenance of the authority and impartiality of the judiciary concerns the trust parties to the proceedings and the public must have in courts. This is why the ECtHR established in its case law that public officials exercising judicial powers should refrain from exercising their right to freedom of expression in all cases in which the authority and impartiality of the judiciary may be brought into question. The ECtHR has also noted that, although the judiciary enjoys a particular protection, it does not operate in a vacuum and that, whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest.[29]

In principle, criticisms of judges in the media are voiced within debates on the functioning of the system of justice or in the context of doubts about the independence or impartiality of judges. Such issues are always important for the public and must not be left outside the public debate, in particular in a country experiencing the transition to an independent and effective judiciary. However, judges must enjoy public trust and must be protected from destructive attacks that are essentially unfounded. Moreover, the duty of discretion laid upon judges prevents them from reacting and defending themselves as, for example, politicians do.[30] On the other hand, the ECtHR found a violation of the right to freedom of expression of the newspaper that filed the application in this case, concluding that the impugned article regarded an issue of public interest and, although it was harmful, because it concerned extremely harsh criticisms, exaggeration and even gross metaphors about the judge, it was not offensive because use of derogatory tones in comments about judges was not in principle incompatible with Article 10 ECHR. Therefore, the domestic courts must weigh the values and interests involved in cases

29 *The Sunday Times v. The United Kingdom,* App. no. 6538/74.

30 *De Haes and Gijsels v. Belgium,* App. no. 19983/92.

where judges or other judicial actors are criticised. Certainly, where the criticism is primarily aimed at insulting or defaming the members of the judiciary without contributing to the public debate on the administration of justice, the protection afforded to freedom of expression may be narrower.

The special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar.[31] Courts may thus restrict the lawyers' freedom of expression in the event the latter undermine the authority of the court by their conduct or submissions. However, in addition to the already mentioned elements, when restricting the freedom of expression of lawyers, consideration must also be given to whether they had criticised the court or the prosecutor in the courtroom or in the media. Although lawyers may address the media in specific circumstances to protect their clients' interests, when assessing whether they should restrict their freedom of expression, the courts must determine whether criticisms of the members of the judiciary constitute a grave attack on the court, whether the comments exceed the bounds of permitted freedom of expression, i.e. whether the criticisms or comments are based on reasonable facts and whether they were voiced within a debate on an issue of public interest. Furthermore, lawyers may in principle criticise individual court decisions from the professional point of view, but they are not allowed to invoke the freedom of expression to voice their comments on the course of the proceedings and during the proceedings and thus bring pressure to bear on the court, the public et al. Therefore the courts' or the Bar's punishment of lawyers for contempt of court or voicing their views on the court or the course of the proceedings is absolutely proportionate to the legitimate aim of maintaining the authority and impartiality of the judiciary.[32]

Case Law of the Constitutional Court of Bosnia and Herzegovina

AP 4483/16 – The lawfulness of the work of a judicial institution is an important issue of public concern which the media are entitled to inform the public about; violation of Article 10 because the courts did not take into consideration the outlet's proof that it had acted in good faith.

The case regarded the freedom of the media to criticise the work of the court, i.e. the plaintiff's illegal actions in her capacity of judge of that court. Namely, the courts ordered the appellants (a public service broadcaster and its reporter) to pay her 5,000 KM in damages for defamation, because the reporter said the following in a newscast:

> "The Association of Foreign Currency Savings Account Holders faces a new problem. They can no longer check whether they have 20,000 KM in their accounts, let alone withdraw them. They blame the judge of the Basic Court [plaintiff] for everything. They claim she had forged the document allowing the former Deputy Chairman of the Association Milan Jovičić to withdraw and dispose of the money. The judge's decision on the frozen bank account is final, while, according to the reply from the court administration, the decision is not final. How is it possible for the same institution to issue two different certificates, wonders [the Chairman

31 *Schöpfer v. Switzerland*, App. no. 25405/94.

32 *Ibid.*

of the] Association which ultimately requested the freezing of the account. The account holders decided to seek justice in Strasbourg, and in order to succeed, they also engaged lawyers from Germany. The Basic Court [...] was unable to find an interlocutor today who would tell us who is right."

The report also included the following statement by the Chairman of the Association:

"The certificate, here's the certificate I can distribute copies to you if you wish, which says: 'The court has not declared that the ruling is final [...].' If they haven't agreed to split it up, everything is possible, they can again issue him a ruling allowing him to withdraw the money. We blocked that, too, and the account is still frozen. "

In their decisions, the courts stated that the evidence presented during the proceedings did not substantiate allegations voiced about the judge in the impugned report and that she had denied the accusations. The courts in particular noted that, at the time the ruling at issue was issued, the plaintiff had been working as an expert associate and could not have issued a ruling in that capacity, and that later, when she was a judge in the civil law department, she could not render decisions regarding the register of civic associations. They therefore found the appellants guilty of defamation because their contested statements were untrue, i.e. because they had not proven the accuracy of the facts they reported.

The Constitutional Court found that it was indisputable that the lawfulness of the work of a judicial institution, an important issue of public concern the media should inform the public about, was at issue. The appellants also reported the Association Secretary's claims on the court's forgery of the certificate of finality on a ruling that was not final; the Secretary had distributed documents substantiating his claims about the existence of conflicting court decisions to the journalists at the news conference. The appellants presented these documents to the Court, as well as evidence that they had asked an official of the court three times to explain what was happening before they aired the impugned report and they said in the report that they had not found an interlocutor who would "explain who is right", wherefore they had left what they had broadcast open to doubts, i.e. they had acted "in good faith". In view of all of the above considerations, the Constitutional Court concluded that the court's award of damages to the plaintiff had neither been proportionate to the legitimate aim pursued nor "necessary in a democratic society".

Comment

Issues of public concern indisputably include issues about the functioning of the system of justice, which is relevant to every democratic society and serves the interests of the community on the whole. Except in cases of ill-founded and grave attacks, judges may be subject to personal criticism within the permissible bounds, i.e. when acting in official capacity, they may be subject to broader limits of acceptable criticism than ordinary citizens. Although the authority of the judiciary enjoys strong protection, the courts cannot ignore all

the elements that have to be examined to strike a fair balance between that aim and the freedom of expression, such as: whether an issue of public concern is at stake, whether the journalists had acted in good faith, et al.

AP 816/06 – By punishing a lawyer for contempt of court, the courts violated his right to freedom of expression because they failed to analyse sufficiently objectively the substance of the impugned statements

The appellant was fined 200 KM for saying in a submission to the first-instance court that he "openly suspected judge Milica Vukić and prosecutor Meho Bradić of corruption and filed criminal reports against them" and "since they work in the High Judicial and Prosecutorial Council, anyone who wants to exercise his legitimate rights has no choice but to fall ill, go crazy or die." The courts concluded that his statements "overstepped the bounds of normal communication between a party and a court and expressed contempt of not only the judge and prosecutor at issue, but the court on the whole as well," and that the appellant had to be punished.

The Constitutional Court, however, said that ECtHR case law required of courts to assess the parties' oral and written submissions with utmost caution. Courts may not express any subjective or personal views, take sides, prejudice matters or express their personal preconceptions. In this specific case, the Constitutional Court concluded that the ordinary courts had insufficiently objectively analysed the substance of the appellant's claims because a linguistic and legal analysis of them was unlikely to "lead to the conclusion that the text at issue, which expresses doubts about the impartiality of the court, actually includes offensive statements aiming to undermine the authority of the court." The Constitutional Court also said that the lawyer's request to the court to speed up the enforcement procedure, because all the legal requirements were fulfilled, even though expressed in the form of "doubts" did not suffice to conclude that the penalty imposed on the appellant was "necessary in a democratic society".

AP 3133/09 – The court did not violate Article 10 by penalising a lawyer who continued violating procedural discipline despite a warning since his conduct undermined the authority and dignity of the court.

The appellant, who was a defence counsel in a criminal trial, was fined 1,000 KM because the ordinary courts found him in violation of procedural discipline, notably, of not complying with the orders of the presiding judge. Namely, the courts explained that the presiding judge had repeatedly warned the appellant about his style of questioning the court expert during cross examination, notably, that he should ask his questions in accordance with the law and not ask questions that had already been asked. However, the appellant told the presiding judge that he "knows how to question a court expert", that he "had mastered cross examination of witnesses and court experts before The Hague Tribunal, a long time ago" and continued examining the court expert in his style. The presiding judge warned the appellant twice that he would be fined for contempt of court if he continued in the same vein, but the appellant continued violating procedural discipline. The appellant claimed that his right to freedom of expression and expression of his own opinions was thus violated because "the court tried to

limit him in voicing his own views as defence counsel in this case, despite his request not to be interrupted, not to be limited in commenting the findings and opinion of the financial court expert."

The Constitutional Court concluded that the courts had in this case "sufficiently objectively analysed and explained the substance of the appellant's actions and conduct during the main hearing" and that the linguistic and legal analysis showed that his conduct amounted to a violation of court order and procedural discipline, undermining the authority and the dignity of the court by precluding it from conducting the proceedings efficiently and in accordance with the law.

Comment

The issue of the lawyers' freedom of expression arises only with respect to the restrictions regarding the maintenance of the authority and impartiality of the judiciary as the legitimate aim under Article 10(2), wherefore it may be concluded that the bounds of the lawyers' freedom of expression in this domain alone are extremely narrow. Restrictions of the lawyers' freedom of expression are assessed in the context of their criticisms of courts because of the substance of individual court decisions (criticism from the professional perspective), while the assessment of their blanket and arbitrary statements about courts and the judiciary in general is an altogether different matter. Therefore, punishment of lawyer for the statements they made during the proceedings, for contempt of court or for expressing their views about the court and the course of the trial is proportionate to the legitimate aim of maintaining the authority of the judiciary; the courts must always assess such statements objectively and without personal preconceptions.

AP 3408/06 – Restriction of a political party's freedom of expression during an election campaign in order to prevent hate speech; no violation of Article 10 ECHR

The Central Election Commission (CEC) fined the appellant, a political party, 10,000 KM for playing a pro-Chetnik song "Get ready, get ready Chetniks, there's a hard battle ahead!" inviting the public to attend its political rally. The decision was upheld on appeal by the Court of BiH, which explained that the appellant had used language that might incite hate or violence in violation of election law. The appellant complained of a breach of its freedom of expression, claiming that the "song was an anthem registered as such [in the Court], that it did not incite hate or violence at all and that only malicious political opponents could draw such a conclusion."

The Constitutional Court found that, given the specificities of the current situation in Bosnia and Herzegovina and the perceptions of the song in the broader context in Bosnia and Herzegovina, its playing could undoubtedly be qualified as falling under restrictions provided by election law and that such a restriction was necessary "in the light of the current situation in BiH". In addition, the Constitutional Court concluded that the restriction did not impose an excessive burden on the appellant since it was proportionate to the aim of the broader community – to maintain public safety and prevent disorder.

Comment

Although the State does not have much room for restricting political speech, it is under the obligation to ensure that political parties and candidates do not overstep the bounds of freedom of expression by their statements during election campaigns. Namely, although political parties and their candidates are entitled to publicly defend and promote their political views, they must avoid doing so in a manner inciting racial discrimination or offending or humiliating persons belonging to minority groups, because such conduct may provoke a public response incompatible with a peaceful social climate and thus undermine trust in democratic institutions. The overall political situation and context must be taken into account when assessing the impermissibility of statements made during election campaigns.

3. Article 10 and Access to Information

Article 10 ECHR guarantees the right to receive information others are willing to impart and, in exceptional cases, also the right to receive information in the possession of the authorities, where this is in public interest. It transpires from Convention case law "that there has been a perceptible evolution in favour of the recognition, under certain conditions, of a right to freedom of information as an inherent element of the freedom to receive and impart information enshrined in Article 10 of the Convention."[33] In addition to cases regarding the right of access to information of relevance to the private lives of individuals and cases regarding the collection of information as the key preparatory step in journalism, the ECtHR noted, in its judgment in the case of MHB v. Hungary a recent development in its case law in which it found interferences in Article 10 rights where the domestic authorities failed to apply law or even court judgments acknowledging the right of access to information. The ECtHR in particular noted that "Article 10 does not confer on the individual a right of access to information held by a public authority nor oblige the Government to impart such information to the individual." However, such an obligation may arise in two cases: firstly, "where disclosure of the information has been imposed by a judicial order which has gained legal force [...] and, secondly, in circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" and where its denial constitutes an interference with that right." [34] The following criteria need to be taken into account when assessing whether and to what extent the denial of access to information constitutes an interference with an applicant's freedom-of-expression rights: a) the purpose of the information request; b) the nature of the information sought, c) the role of the applicant, and d) whether the information is ready and available.

33 *Magyar Helsinki Bizottsag v. Hungary*, hereinafter: *MHB v. Hungary*, judgment of November 2016, App. no. 18030/11).

34 *Ibid.*, para 156.

AP 461/16 – Access to information; interference in this right must be examined under the relevant criteria and the appellant bears the burden of proof; no violation

The appellant, a non-government organisation, complained of a violation of its Article 10 ECHR rights because of the relevant public authority's decisions denying it access to specific information (list of the members of the Commission charged with selecting the conceptual design of the revitalisation and remodelling of a facility and minutes of its meetings) in order to protect the decision-making procedure.

RECAP

The following criteria should be taken into account in assessments of interferences in the right of access to information under Article 10 ECHR:

- The purpose of the information request;
- The nature of the information sought,
- The role of the applicant, and whether the information is ready and available

The Constitutional Court first examined whether and to what extent the right of access to information under the control of public authorities fell within the scope of Article 10 ECHR and, if it did, whether the public authorities interfered in the appellant's right. Having reviewed the relevant ECtHR case law in similar cases and the fact that the appellant was a non-government organisation which, like the media, could play the role of "public watchdog," the Constitutional Court departed from its prior case law and concluded that the right of free access to information in the circumstances of this case fell within the scope of Article 10 ECHR. As per the issue of interference in the appellant's right to freedom of expression, the Constitutional Court applied the ECtHR's criteria and concluded that the appellant had not explained why it had requested access to the impugned information, how the information would contribute to a debate of public interest, i.e. that the appellant had not even tried to demonstrate that there was a public interest warranting the publication of such information. Furthermore, the Constitutional Court said that the appellant had not explained the fields and goals of its activities and whether the impugned information concerned its activities and an issue of public interest. It therefore concluded that the relevant authorities and courts had not infringed on the appellant's right of free access to information in any way by denying it access to the impugned information, and, accordingly, that there had been no interference in its Article 10 rights.

Comment

After qualifying the right of access to information as part of Article 10 ECHR rights as inadmissible *ratione materiae* for a long time, the Constitutional Court examined ECtHR's case law in detail and aligned its case law with it. In its decision in this case, it thoroughly reviewed the evolution of ECtHR's views and application of the relevant criteria regarding free access to information as part of the right to freedom of expression.

4. Case Law of Courts in Bosnia and Herzegovina

4.1. RS Supreme Court Case Law[35]

Award of Non-Pecuniary Damages for Defamation

Injured parties do not need to present evidence of their mental anguish caused by defamation.

Banjaluka District Court Judgment No. 71 0 P 048751 11 Gž of 4 May 2012

> "Fair compensation as a form of elimination of the consequences of damages incurred by defamation comprises payment of non-pecuniary damages to restore psychological balance after a violation of personality rights, in accordance with Article 200 of the Obligations Law.
>
> When setting the amount of fair compensation, the first-instance court endeavoured to ensure that it reflected the importance of the violated value and specificities of the case at hand, bearing in mind the manner in which the violation was committed, via the public service broadcaster, that the show in which the untrue content was broadcast was seen by a large number of people and the fact that the plaintiff was a political and public figure at the time, whilst respecting the structure of the personality from the perspective of his subjective experience, the fact that the defendants had not adduced evidence of their attempts to request information on the existence or non-existence of criminal convictions against the plaintiff from the relevant institutions or deny the falsehoods they broadcast.
>
> Therefore, the first-instance court was correct to order the payment of 5,000 KM for each defamatory statement."

RS Supreme Court judgment No. 71 0 P 048751 12 Rev of 1 April 2015

> "Although the appellant's claim that the plaintiff had not adduced any evidence of the mental anguish suffered due to [...] harm to reputation, this Court finds that the presentation of evidence of the existence of the mental anguish due to the harm to the injured party's reputation is unnecessary under the Anti-Defamation Law [...] The Anti-Defamation Law is a *lex specialis* vis-à-vis the Obligations Law, wherefore a distinction needs to be drawn between the provisions on the right to compensation of damages incurred to someone's reputation in these two laws. Article 200(1) of the Obligations Law lays down the right to compensation of damages for "for mental anguish suffered due to [...] harm to reputation," whereas Article 11(1) of the Anti-Defamation Law lays down the right [...] irrespective of the existence of mental anguish. It may therefore be concluded that the Anti-Defamation Law provides for compensation of damages to victims under an objective criterion, which ultimately means that the injured party need not have necessarily felt mental anguish because their reputation was harmed [...].

35 RS Supreme Court decisions were commended by Senad Tica, a judge of that court.

In the view of this Court, the plaintiff did not necessarily have to prove mental anguish cause by harm to his reputation, or the existence of his reputation, because transferring the burden of proof of the existence of one's reputation would amount to the disparagement and chicanery of every individual who has been defamed. Namely, reputation is a category the existence of which is presumed and it designates the individuals' social standing and status as perceived by themselves and by third parties. Therefore, it might be possible to present evidence that the plaintiff's reputation was non-existent, in which case the burden of proof [...] would be on the defendants [...]."

Comment

The decision on the appeal of points of law indicates the different approaches to the award of non-pecuniary damages, i.e. draws a distinction between Article 200 of the Obligations Law and Article 11(1) of the Anti-Defamation Law. Namely, the latter provides for award of damages based merely on the court's finding of defamation, whereas the injured party does not have to prove the intensity or type of anguish suffered, while the former requires of the victim to prove the amount of damages. The injured party therefore does not need tp present evidence of the mental anguish suffered (especially by court experts).

Distinction between Facts and Value Judgments

In order to properly establish whether facts or value judgments are at issue, the courts need to take into account all the circumstances of the case at hand, including how they are presented in the media, i.e. whether they are presented as claims or as suspicions.

Bijeljina Basic Court Judgment No. 80 0 P 045385 13 P of 11 June 2014

"The submitted documents regarding the impugned press release of the defendant, news agency SRNA, indicate that the defendant had issued a report stating that there were indications that BN TV station owner V.T. had tried to racketeer RS Prime Minister M.D. and had recently, in a telephone conversation, requested of M.D. [...] to sponsor the station with two million KM in 2013 otherwise the most popular TV station would give it a hard time, that M.D.'s response to V.T.'s blackmail was published on YouTube and several portals, that the RS Prime Minister's Cabinet would neither deny nor confirm the information and said that the PM's security and legal services were analysing how V.T. had secretly recorded his telephone conversation with the Prime Minister and published it. In the view of that court, there are no grounds to uphold the plaintiffs' claims under Article 5 of the Anti-Defamation Law and Article 200 of the Obligations Law. Namely, the defendants are not guilty of defamation because the report does not claim that the main plaintiff, the owner of the BN TV station, required of RS Prime Minister M.D. to sponsor the station or it would give it a hard time. [...] In this particular case, the report merely mentions [...] the existence of a suspicion that the main plaintiff had tried to racketeer Prime Minister M.D. as described above."

The appeals court upheld the first-instance court's findings of fact and reasoning and did not further elaborate its decision.

RS Supreme Court judgment 80 0 P 045385 15 Rev of 9 February 2017

> "Liability for damages caused by defamation requires that the published information (facts) is untrue.
>
> In this specific case, as the lower courts were right to conclude, the impugned report published on the defendant's website, given its content, did not convey information, wherefore it does not amount to expression in the meaning of Article 5 of the Anti-Defamation Law. Namely, bearing in mind that the title of the impugned report ends with a question mark, and that the report states that there are indications of racketeering, but does not claim that racketeering had occurred, it cannot be concluded that the report imparted information, but rather the existence of suspicion. Therefore, it does not suffice to declare the defendants guilty of defamation. In their appeal on points of law, the plaintiffs' referral to Article 5 of the Anti-Defamation Law was ill-founded, as was their claim that the defendant had published false news because they had not been verified. The courts have already said that imparting of information was not at issue; had it been, the defendants would have borne the burden of proving the veracity of their allegations."

Comment

In order to distinguish whether the statement included facts or value judgments (the court used the word „suspicion" in this civil case), the court has to assess all the circumstances of the case, including how the media presented the matter, i.e. whether the very title or substance of the text clearly leads to the conclusion that racketeering had occurred or leaves enough room for each individual reader to come to a conclusion on its existence or non-existence.

Political Debates

Political debates allow a higher degree of freedom of expression, even use of inappropriate language, especially when the participants are voicing value judgments rather than facts.

Trebinje District Court Judgment No. 95 0 P 009397 12 Gž of 23 August 2013 065 6515890

> "The statements the defendant made at the news conference he called in the Party of Democratic Progress offices in Trebinje on 20 October 2010 need to be assessed in the light of the circumstances of the case (Article 6(1) of the Anti-Defamation Law). The defendant made the statements as a representative of the political party he is a member of and an MP in the RS National Assembly, i.e. as a senior political official. In the view of the [first-instance] court, his statements

to the journalists were essentially value judgments not expressions of fact. The impugned opinions the defendant voiced in front to the journalists, in the offices of the party he is a member of, are essentially inherent to political rhetoric and political struggle. Although his words may discomfit the plaintiff, they cannot result in restrictions of the right to freedom of expression, particularly when voiced as criticism of someone exercising an important public office, in this case the plaintiff, who is the Director of the RS Pension and Disability Fund. Recourse to a wider degree of exaggeration, or even provocation, is permitted in such expression. The defendant's statements also amount to a public debate in which he criticised the plaintiff's work in his capacity of RS Pension and Disability Fund Director, including his general knowledge and skills in exercising a public office. Article 5 of the Council of Europe Committee of Ministers Declaration on freedom of political debate in the media also provides for a wider degree of freedom of expression in political debates."

RS Supreme Court Judgment No. 95 0 P 009397 14 Rev of 6 October 2016

"Assessment of the substance of the statements leads to the conclusion that the lower courts were correct to conclude that, with the exception of a negligible part of the claims referring to "deals" with banks, the defendant had expressed an opinion, i.e. value judgments (which are not susceptible of proof) rather than facts (which are susceptible of proof). The defendant voiced the value judgments as the leader of a political party and an MP, and as someone who had worked in the RS Pension and Disability Fund and dealt with pension and disability insurance issues until 2009. His value judgments essentially boil down to criticisms of the RS Pension and Disability Fund's operations and the plaintiff's ability to manage the work of such an institution. The appeal on points of law rightly notes that the freedom of expression is not unlimited and that the same standards apply to injured parties who are public officials (Article 5(3) of the Anti-Defamation Law). Given the circumstances in which the impugned statements were made (the leader of that party made them in the offices of his political party, which gives them the character of a political debate, these statements amount to expression of opinions, there is no proof that the media published them, the statements regard an issue of political and public interest), irrespective of the unsuitable language used in some of them (which, again, is often characteristic of political statements), the lower courts were correct to conclude that exemptions of liability under Article 6 of the Anti-Defamation Law applied in this specific case."

Comment

Political debates and statements by political leaders, especially those known to the public at large, place a difficult task before the court: to assess whether their statements are political opinions about other individuals, providing them with „wider" freedom of expression than usual, or whether criteria restricting the freedom of expression apply to them.

Acquisition of Information and Its Veracity (Acting in Good Faith)

The journalists acted in good faith because they proved that they had invested reasonable efforts in verifying the facts in their report on the work of the director of a public company.

Trebinje Basic Court Judgment No. 95 0 P 007120 10 P of 15 January 2013

> "As far as the statements the plaintiff based his compensation claim on are concerned, the Court finds that the statements quoted in the lawsuit contained two kinds of expression. The first more or less contained facts the accuracy of which can be verified and which can be subsumed under Article 4(1) of the Anti-Defamation Law. The second comprises harmful actions damaging the reputation, honour and other personality rights under Article 200(1) of the Obligations Law. The Court included in the first group allegations that the plaintiff had committed grave crimes and been convicted to a suspended prison sentence. The Court bore in mind that the penalty was expunged wherefore it should be considered that the plaintiff did not have a criminal record; consequently the information about his criminal record was untrue at the time of expression. The allegation that the plaintiff had illegally bought a two-bedroom apartment is also untrue, because no evidence thereof has been adduced; the same applies to the claims about the construction of an expensive new administrative building and the employment of his party and coalition cronies in various positions in the company he is a director of."

Trebinje District Court Judgment No. 95 0 P 007120 13 Gž of 24 June 2014

> "In the view of this Court, the defendants' statements in the above-mentioned text can be considered reasonable. In this specific case, the journalist had the legitimate aim of reporting on an issue of public importance and he had invested reasonable efforts in verifying the facts. Journalists, as well as all other natural persons regularly or professionally involved in the journalistic job of seeking, receiving and imparting information to the public, even when they receive the information from a confidential source, are not under the duty to disclose the source of the information, as Article 10(1) of the Anti-Defamation Law lays down as well. When a journalist has a legitimate aim, when something of public importance is at issue and where reasonable efforts have been made to verify the facts, the media shall not be held liable even if it transpires that the facts were untrue. Such a conclusion arises also from the case law of the ECtHR and the Constitutional Court of Bosnia and Herzegovina, according to which the defence of good faith leaves the media "a breathing space for error" (ECtHR, *Dalban v. Romania*, App. no. 28114/95, judgment of 28 September 1999). Hence, the Court qualifies as legitimate the journalist's aim, to inform the public about the work of the director of a public company, including his voicing of value judgments about the director's work and facts that are true. The impugned article did not interfere in the plaintiff's private life and it concerned exclusively his professional work."

RS Supreme Court Judgment No. 95 0 P 007120 14 Rev of 8 September 2016

"In this case, the impugned TV report published information (facts) susceptible of proof and resulting in the defendant's liability, with the exception of the value judgment that the plaintiff was a person of security interest and that the value judgment is not susceptible of proof [...] wherefore that value judgment cannot give rise to liability under Article 6(1)(a) of the Anti-Defamation Law.

The appellant was correct to note that [...] erred when he said that Ruling No. Kv 4530/09 of 24 November 2009 expunged the plaintiff's record after the airing of the impugned TV report since the latter was broadcast on 23 December 2009 (i.e. after the penalty had been expunged); the Court also agrees with his claims in the appeal on points of law on legal rehabilitation. Regardless, in view of the documentation the defendant obtained before broadcasting the impugned report (on the plaintiff's criminal record) and that he need not have been aware of the legal requirements regarding the rehabilitation procedure, the Court dismisses the conclusion on his liability because the defendant can be declared liable only if he had intentionally or negligently made or disseminated the expression of falsehoods (Article 5(2) of the Anti-Defamation Law).

"As per the claims in the impugned report about the plaintiff's criminal record, the second-instance court took into consideration that the defendant had obtained those facts from the final criminal judgment in case No. K-199/04 of 9 March 2005 and a letter of the Trebinje Basic Court Ref. No. 095-0-SU-09-000588 of 7 December 2009 (this evidence was presented before the first-instance court), wherefore it was correct to conclude that the expression was essentially true and reasonable. Furthermore, the second-instance court correctly assessed that the main defendant in this case, a journalist, pursued a legitimate aim: to inform the public about the work of a public company (and, contrary to the claims in the appeal on points of law, made reasonable efforts to verify the facts), and that the media are not deemed liable in such situations, even in the event it transpires that the facts were untrue."

Comment

The Supreme Court's reasoning shows that it agreed that most of the statements regarded facts and that only one was a value judgment, but that it ultimately found that the journalist had made reasonable efforts to obtain the documentation he needed for the impugned report, i.e. that he had acted in good faith. The courts should bear in mind that not all voiced falsehoods amount to defamation per se. Only defamation that harmed the reputation of an individual enjoys protection under the Anti-Defamation Law and journalists can, under specific conditions, successfully defend themselves if they prove that they had acted in good faith even in case they had published falsehoods.

The impugned statements the defendant made during his testimony in court cannot be considered "imparting of information to a third party" because the court is not the public in the meaning of Article 5 of the Anti-Defamation Law.

Trebinje District Court Judgment No. 95 1 P 000924 16 Gž 2 of 22 January 2016

"False testimony before The Hague Tribunal amounts to contempt of court. Furthermore, as the first-instance court correctly explained, even if the lawsuit had been filed in time, there is an exemption from liability under Article 6(1)(b) of the Anti-Defamation Law in the event 'the defamer was under a statutory obligation to make or disseminate the expression in the course of legislative, judicial or administrative proceedings'.

The defendant made the impugned claims during his testimony before The Hague Tribunal on 2 February 2000 in the case of former Banjaluka chief of police S.Z. and former RS Minister of the Interior M.S., i.e. during court proceedings covered by the above legal provision."

RS Supreme Court Judgment No. 95 1 P 000924 16 Rev of 18 January 2017

"However, the lower courts did not base their decision on the inadmissibility of the claim only on the expiry of the statute of limitations; having assessed the adduced evidence, they concluded that the defendant had not committed the crime of defamation and referred to Article 6(1)(b) of the Anti-Defamation Law. The second-instance court was correct to conclude that the defendant was not liable for defamation under Article 6(1)(b) of the Anti-Defamation Law because he had made the impugned claims in court proceedings where he had been under the duty to testify. Consequently, imparting of expression to a third party was not at issue since the court does not have that attribute in the meaning of Article 5 of the Anti-Defamation Law."

Comment

Not all courts agree with the view in this decision on the appeal of points of law - that imparting information to a third party is not at issue because the court is not the public in the meaning of Article 5 of the Anti-Defamation Law. In another judgment (71 0 Mal 189604 17 Gž), the Banjaluka District Court held that the statements made by a legal counsel during a court hearing amounted to making an expression to third parties because the hearing was attended by the judge, a court reporter, the prosecutor and the defence counsel. Therefore, the question remains who can be qualified as the "public" in court proceedings in view of Article 120(1) of the Civil Procedure Code, i.e. whether the specified individuals (judge, court reporter, parties to the proceedings or their counsel) can be considered „third parties".

4.2. Banjaluka District Court Case Law[36]

Offensive statements a defence counsel made during civil proceedings about the opposing party amount to defamation under Article 5(1) of the Anti-Defamation Law. The Court took into account the fact that the statements were made before a smaller number of people attending the hearing when it decided on the amount of damages to be awarded.

Banjaluka Basic Court Judgment No. 71 0 Mal 189604 17 Mal of 25 October 2017

> "The parties to the civil proceedings disagreed on whether the defendant's following words, which were registered in the minutes of the hearing, had been addressed to the plaintiff: 'The plaintiff is prone to abuse; what is at issue here is also his abuse of his job of counsel, the plaintiff's threat against the defendant, we have material evidence what the plaintiff did to the defendant, from threatening to kill him, to taking him to court, to everything else that is not characteristic of normal communication between the plaintiff and the defendant in the legal system; the counsel has personal experience with the plaintiff, the number of lawsuits he had filed on behalf of the so-called international community against many people, including the defendant; he committed against him the crimes of racketeering, attempted extortion and grave threats; of course, if the legal system were developed, a lawsuit like this one would not even have been filed [...]', whether the information was true or had the elements of defamation of the plaintiff, i.e. whether the plaintiff (his reputation) had been harmed and whether the plaintiff felt mental anguish because his reputation had been harmed. [...]
>
> During the proceedings, the plaintiff did not prove the degree and intensity of the mental anguish he felt because of the harm to his honour and reputation, how this anguish manifested itself or its effects. The impugned statement was made by the counsel, as registered in the minutes of the hearing, and this hearing was attended, in addition to the plaintiff, by two lawyers, the acting judge and the court reporter. The content of the minutes is available to the Court and the parties to the proceedings, but not to the public at large. The concept of honour comprises one's awareness of his own worth (internal subjective honour), while his reputation, his good name, comprises the injured party's value in society and the respect others feel for him.
>
> Harm to one's honour and reputation may result in the award of non-pecuniary damages only when it is extremely grave and caused particularly grave anguish to the injured party.
>
> The plaintiff in this case did not prove that the statement caused him particularly grave anguish because of the damage to his honour and reputation, as required by Articles 7 and 123 of the Civil Procedure Code. The plaintiff failed to prove that his value in society and respect by others had been harmed, particularly since he failed to prove that even his immediate, let alone the wider community (a larger number of people) was aware of the statement harming his honour and reputation,

36 The case law of the Banjaluka District Court was commented by Biljana Majkić-Marinković, a judge of that court.

wherefore, in the Court's view, the claims in the statement had not diminished the plaintiff's value and respect by others. The final decision in the proceedings was issued back in 2015 and the public at large was not in the least aware of the proceedings for the imputations to reflect on the plaintiff's personality and damage his reputation."

Banjaluka District Court Judgment No. 71 0 Mal 189604 17 Gž of 7 February 2018

"In this specific case, in view of the content of the defendant's statement, the expression he made during the hearing before the first-instance court [...] which was registered in the minutes of the hearing [...] specifically the following part 'The plaintiff is prone to abuse; what is at issue here is also his abuse of his job of counsel, the plaintiff's threat against the defendant, we have material evidence what the plaintiff did to the defendant, from threatening to kill him, to taking him to court, to everything else that is not characteristic of normal communication between the plaintiff and the defendant in the legal system; the counsel has personal experience with the plaintiff, the number of lawsuits he had filed on behalf of the so-called international community against many people, including the defendant', this Court agrees that the statement does not have the character of defamation as defined in Article 5(1) of the Anti-Defamation Law that would harm the plaintiff's reputation and dignity and warrant compensation from the defendant. The above statement by the defendant is an expression of his opinion (a value judgment) wherefore the defendant's liability is ruled out in the meaning of Article 6(1)(a) of the Anti-Defamation Law.

The first-instance court was correct to conclude that the plaintiff had not proven that the above statement, which has the character of an opinion (described in greater detail in the reasoning of the judgment), incurred non-pecuniary damages in the form of mental anguish due to harm to his honour and reputation, which is prerequisite for awarding pecuniary damages under Article 200 of the Obligations Law for expressing an opinion offensive in content, wherefore this part of the first-instance judgment is based on a proper implementation of substantive law.

On the other hand, the defendant's following statement during the hearing before the first-instance court that the plaintiff had committed 'the crimes of racketeering, attempted extortion and grave threats' amounts to an expression of facts susceptible of proof. The hearing at which the defendant made the statement was attended by the judge, the court reporter, the plaintiff and the defendant's counsel, Banjaluka lawyers, wherefore, by stating the above facts to third parties, the defendant qualified the plaintiff as the perpetrator of the crimes of racketeering, attempted extortion and grave threats against the defendant. In the view of that court, these statements by the defendant have the character of defamation in the meaning of Article 5(1) of the Anti-Defamation Law. At the time he made the impugned expression, the defendant was representing [...] in civil proceedings wherefore he was under the obligation to comply with the professional code of conduct, contribute to the work of the judiciary and maintain public trust in it. During the proceedings, the defendant [...] did not present evidence of the accuracy of the statements he made about the plaintiff in the civil proceedings in which he had represented [...]. Given that the defendant had not proven the accuracy of the statements he had made during the hearing before the first-instance court and that he had not been under the obligation to make such statements during the court

proceedings, the Court finds that the exemptions from liability for defamation under Article 6 of the Anti-Defamation Law cannot apply and that the defendant's impugned statements have the character of defamation.

The statements, which are accessible to third parties, damaged the honour and reputation of the victim (the plaintiff in his case). Given that honour and reputation are moral value categories and components of a personality making up human dignity, the inviolability of which is enshrined in the RS Constitution, the violation of both categories of the plaintiff's personality caused him mental anguish, which constitutes grounds for awarding him non-pecuniary damages, wherefore the defendant is under the obligation to compensate the plaintiff for the damages he had suffered. During its determination of the amount of non-pecuniary damages, the Court took into account the fact that the defendant had not proven he had undertaken any measures to alleviate the damage (e.g. retract his statement, apologise to the plaintiff). The Court finds that damages in the amount of 500 KM constitute adequate satisfaction for the harm the defendant incurred by making the above statements because he had damaged the plaintiff's reputation in the presence of a small number of people, wherefore the effects of his action are lesser than they would have been had he made the statements before a wider circle of people."

Comment

This example shows that the offensive statements the counsel of a party to civil proceedings made during the hearing about the opposing party were qualified as defamation. The second-instance court awarded damages for defamation in this case. Namely, the court held that the expression of false fact about a party (plaintiff) in the civil case by the counsel of the opposing party (the defendant), along with the assessment of the aim and purpose of the information (that it was unnecessary to present the impugned facts in the case in which the counsel was representing his party) amounted to defamation under Article 5(1) of the Law on Prevention of Defamation. The Court took into account the availability of the statement, i.e. the fact that it had been made before a small number of people attending the hearing, when it decided on the amount of the damages; it also took into account other factors relevant to fixing the amount of the damages for defamation.

Publication on the Internet

The defendant was not liable for defamation because of an interview he gave to the author of an article on political corruption published on an Internet portal since he was neither the author, editor nor publisher of the expression, and did not otherwise exercise control over its substance.

Gradiška Basic Court Judgment No. 72 0 Mal 055889 18 Mal 2

"[...] The court found that [...] was the defendant, that [the journalist] was the author of the text and that the latter published the text of the interview with the defendant quoting him as saying: "Political corruption is at issue, councilmen were bought

off. We had the majority, 21 councilmen, which was a force to be reckoned with. As corroborated by all the decisions we adopted unanimously. We lost seven councilmen and the majority in the assembly overnight. In my opinion, that was a political trade-off with enough elements for the prosecutors to get involved [...]'. The author of the text said that the political group backing the local SNSD [Alliance of Independent Social Democrats] had been trying to challenge the defendant's office for nearly a year and that he would stay in it until those legally empowered to dismiss him decided otherwise. He went on to say that the local parliament had been blocked since February 2015, when a group of councilmen in the [G] Municipal Assembly switched sides, which was also the reason why the municipal budget has not been adopted yet. The author further stated that after the party transaction, 17 of the 31 councilmen at the session [...] adopted the decision to dismiss the Mayor [...] a member of the Party of Democratic Progress (PDP) and that a councilman of the Alliance of Independent Socio-Democrats [...] was appointed in his stead; that he identified MPs [...] of the SNSD and a [former] SDS [Serb Democratic Party] member as the main protagonists of political corruption in [G], together with the current Minister of Education and Culture [...]; that [...] had, together with [...] caused the political crisis; that the Assembly session, the legitimacy of which was not challenged before the courts, adopted in just one day decisions dismissing as many as 54 local officials and appointing as many individuals in their stead, a feat worthy of the Guinness Book of Records; that the municipal government, however, challenged the legitimacy of the session and the decisions adopted at it; that the case was still pending in court; which would not have happened had the rival political camp been more patient, that they took over the Mayor's Office and Assembly Hall by force and with the help of the judicial police, and changed the locks; that status quo would reign in [G] until the court had the final say.

Given that the plaintiff suffered damage because the impugned interview was published on [an Internet portal], then on [another] portal and the website [...] of a political party and that the author of the impugned report – text is a [journalist], the Court upholds the defendant's complaint refuting his liability in the context of Article 5 of the RS Anti-Defamation Law and dismisses the plaintiff's claim as ill-founded.

Article 5 of the Law specifies who is liable for defamation. The defendant was neither the author of the impugned text nor the editor or publisher of the impugned expression; nor did he otherwise exercise control of its substance. [...]"

Banjaluka District Court Judgment No. 72 0 Mal 055889 18 Gž 2 of 27 March 2019

"The parties to the first-instance proceedings did not dispute that the defendant's interview titled "We Beat Political Corruption", authored by journalist [...] was published on an Internet portal. Neither did they dispute that the interview was published under the same title also by [TV station's] Internet portal and the portal of the political party [...].

Article 5(1) of the Anti-Defamation Law applies given that the plaintiff sued the defendant for defamation published by a media outlet, an Internet portal. Under that provision, the author, publisher and other individuals who otherwise exercise control over the substance of the defamatory statements shall be held liable for defamation.

The defendant, who is not the author of the text, is not liable for defamation in the event the defamatory statements are published by the media. According to the text of the law, the individual covering a specific topic in the published information (journalist [...] in this specific situation) rather than the individual who imparted the information or gave a statement to the media outlet (in this case the defendant) is considered the author of the impugned statements. Therefore, in the view of this Court, the individuals listed in Article 5(1) of the Anti-Defamation Law rather than the defendant would be liable for the impugned expression published in the article entitled "We Beat Political Corruption". In view of the above considerations, the first-instance court was correct to dismiss the plaintiff's claim, finding that the defendant could not be held liable for defamation in this particular case."

Comment

The defamation damage claim was dismissed in this case because of the lack of passive legitimacy. The court found that the article had been published on a specific Internet portal, that it was authored by a journalist and that it was an interview which the defendant had given the journalist, the author of the article. The article dealt with political corruption. The defendant was a politician (an MP in the RS Assembly). The ordinary courts concluded that the defendant could not be found guilty of defamation under Article 5(1) of the Anti-Defamation Law because he was neither the author nor the publisher of the impugned expression and did not effectively exercise control over its substance.

4.3. Brčko District Appellate Court Case Law

The public service broadcaster was found guilty of defamation because it published information it had received from public authorities without verifying it first, because it did not prove it had made reasonable efforts to verify the information, while the public institution was found responsible for communicating such information to the relevant authority, although it subsequently admitted it had communicated wrong information about the plaintiffs. The amount of damages suffered by the plaintiffs was proven by the court experts in neuropsychiatry.

Brčko District Appellate Court Judgment No. 96 0 P 075744 15 Gž of 23 September 2015 (on appeal of Brčko District Basic Court Judgment No. 96 0 P 075744 14 P of 19 November 2014)

The first-instance judgment ordered the defendant, the public service broadcaster, to pay the three plaintiffs 5,000 KM each in damages for defamation and dismissed their claim against the secondary school. The Basic Court said, *inter alia*, that it had been established during the proceedings that the sued secondary school had sent a letter to the Mayor's office stating that the plaintiff's school certificates were forged and that it had not issued them. The school subsequently sent another letter stating that "it had made a mistake when it determined that the plaintiff's certificates were invalid" and attached the copies of their diplomas. It was also established that the sued public service broadcaster published the list of names of employees with forged diplomas in the Brčko District, including the first and last names of the plaintiffs.

The first-instance court also explained that it rejected the claim against the secondary school because it had not 'published the information about the plaintiff's diplomas in the media', since it found that the editor of the show in which the impugned information was broadcast (it was also published on the broadcaster's website) confirmed that they had 'received it from the Brčko District judicial institutions'. The court also found that the school had notified the Mayor's Office of the mistake before the public service broadcaster published the impugned information. The Basic Court noted that the broadcaster could have "exercised greater caution and verified the accuracy of the broadcast information (whereby the damage could have been avoided); however, since it failed to do so, the Court concluded that it was guilty of publishing untrue information. As per the amount of damages, the Basic Court said that it had conducted a court expertise of the duration of mental anguish suffered by the plaintiffs because of the publication of untrue information and awarded each of them 5,000 KM under Article 200 of the Obligations Law. "

The Appellate Court modified the first-instance judgment ordering both defendants to jointly pay the damages, which it reduced to 3,000 KM per plaintiff. It explained that the public service broadcaster stated in the appeal that it had not influenced "the information about the plaintiffs' diplomas", but merely imparted verbatim the information provided by the secondary school "within its remit"; that it had received the impugned information from the Brčko District judicial institutions; and that it rectified the published information in the same show on its own initiative when it found out from the lawsuit the court had referred to it for comment out that the plaintiff's diplomas were not forged. However, the Appellate Court said that the broadcaster's claims did not bring into question the validity of the first-instance decision. Referring to the Anti-Defamation Law, the Appellate Court said that a distinction had to be drawn between facts and value judgments and that, since facts were at issue in this case, the broadcaster was under the obligation to prove their accuracy before the court "and this also applies to situations in which the alleged defamers challenge the claims by asserting that the publication of specific facts amounts to imparting information obtained from third parties". The Appellate Court concluded that the broadcaster had failed to prove it had a "genuine intention" and that it had made "reasonable efforts to verify the facts it published, i.e. the fact that the plaintiffs' diplomas are fabricated". The Court stated the following:

COMPARE...

In the opinion of the Court, when contributing to debates on issues of public interest, the press should have the right to invoke the content of official reports, without conducting prior independent research. Otherwise, the vital role of the public watchdog could be endangered. The Court does not see a reason to doubt that the applicants acted in good faith in regard to this matter and therefore considers that the reasons relied upon by domestic courts were not convincing (*Colombani and Others v. France*, 51279/99).

> "Therefore, although provision of information to the public about any illegal actions by public officials is the legitimate aim of journalists in a democratic society, in this specific case, there was no genuine intention [on the part of the sued public service broadcaster] and it did not [make] reasonable efforts to verify the facts it [published], especially in view of the fact that it had not first [verified] the data it [published] in its show (a fact established during the proceedings) and that the [sued secondary school] notified the Mayor's Office that the plaintiffs' diplomas

were valid nine days before the [impugned show] was broadcast. The first-instance court was correct to conclude that the fact that the plaintiffs were married and had taken their husbands' last names was irrelevant because the plaintiffs were mentioned by their first and maiden names in the impugned report, which sufficed for third parties (above all their relatives and friends) to recognise them."

The Appellate Court found the sued secondary school also liable for damages because it had "imparted untrue information (that the plaintiffs' diplomas were forged) to a third party (the Mayor's Office)" although it later notified the same entity that it had made a mistake.

The Appellate Court said the following about the amount of damages:

"In order to be awarded non-pecuniary damages for harm to their honour and reputation, the plaintiffs had to prove both that their legally protected rights and interests were violated (that false facts were published) and that they had consequently suffered mental anguish justifying the award of damages. Given that the violations of the plaintiffs' rights were not negligible (as the first-instance court concluded as well), as demonstrated both by their statements to the first-instance court and the findings and opinions of the court experts in neuropsychiatry, this Court holds that the requirements have been fulfilled to award them damages."

Whilst acknowledging the existing case law and in view of everything the plaintiffs had been subjected to and the mental anguish they consequently suffered, this Court finds that the amount of 3,000 KM per plaintiff amounts to just satisfaction for the damages caused to them by the harm to their honour, reputation and dignity, and that a higher amount is unwarranted, wherefore it dismisses the rest of the plaintiffs' claim by due application of the above-mentioned provisions."

Although the Court found that the plaintiff had been defamed, it was unable to award her damages because it was not proven that she had actually suffered non-pecuniary damages - damages are not presumed in case of defamation; mental anguish caused by damage to one's honour is neither a generally recognised or a presumed fact, rather, it is a fact that must be established by the presentation of adequate evidence.

Brčko District Appellate Court Judgment No. 96 0 P 075854 16 Gž 2 of 8 February 2017 (on the appeal of Brčko District Judgment No. 96 0 P 075854 15 P 2 of 16 March 2016)

The first-instance court ordered the defendants to pay 1,145 KM in damages to the plaintiff for damaging her honour and reputation. The court stated, *inter alia,* the following in its reasoning:

"The plaintiff based her damage claim for defamation committed by "dissemination of falsehoods about her' on the following two statements: 'Because the whore S, who's smuggling pills while her son is smuggling gold and drugs [...]' and 'I know, son, she forced me to transport pills from the Osijek Hospital for her [...]'. She said in her claim that the defendant had messaged the statements via his Facebook profile to a third party, S.S., thus damaging her reputation 'in the community she is living and working in' and causing her mental anguish 'and fear of groundless inquiries and checks'.

In its Judgment No. 96 0 P 075854 14 P of 10 November 2014, the first-instance court dismissed the claim because it concluded that the plaintiff had not proven that the defendant was actually the author and sender of the quoted messages. However, since the first-instance court established that S.S. confirmed that the defendant had sent him the messages via Facebook, the court found that the plaintiff had proven that the defendant was the author and sender of the quoted messages and that the rules on the burden of proof required of the defendant to prove that he had not sent them. Therefore, the Appellate Court on 8 September 2015 issued Ruling No. 96 0 P 075854 15 Gž upholding the plaintiff's appeal, voiding the first-instance judgment and ordering a retrial. "

During the retrial, the Basic Court said that it had established that the defendant and S.S. had exchanged several written messages on Facebook, and that the defendant had sent S.S. the two messages quoted above: 'Because the whore S, who's smuggling pills while her son is smuggling gold and drugs [...]' and 'I know, son, she forced me to transport pills from the Osijek Hospital for her [...]'; that S.S. himself told the plaintiff about the messages and showed them to her on her computer; that the plaintiff saved the messages to a CD, that the defendant failed to prove during the main hearing that he did not have a Facebook profile and that he did not sent the impugned messages to S.S. via Facebook; that the authenticity of the substance of the quoted messages was not challenged either by S.S.' or the defendant's witnesses; and that the copies of the Facebook pages "of both S.S. and the defendant include all the elements of the prescribed shape and form". The first-instance court therefore concluded that the plaintiff's claims were well-founded.

As per the amount of non-pecuniary damages, the Basic Court said that the court expert provided sufficient data in his written findings and opinion for an analysis of the plaintiff's psychological state at the time of the defendant's action and afterwards, based on which it concluded that she had suffered mental anguish because of the harm to her honour and reputation, and set the amount of non-pecuniary damages based on the intensity and duration of the mental anguish she had suffered.

COMPARE...

The Anti-Defamation Law is a *lex specialis* in such cases, wherefore the court determining the amount of damages needs to apply the proportionality principle in order to strike a fair balance between the right to freedom of expression and the right to a reputation. The Constitutional Court of Bosnia and Herzegovina has emphasised that neither ordinary courts nor individuals seeking damages because their reputation has been harmed are limited by any particular formal evidentiary means. That primarily means that injured parties are not under the obligation to propose the presentation of evidence by court experts about the sustained spiritual anguish caused by harm to their reputation; nor can this be a requirement, the non-fulfilment of which would result in the dismissal of the damage claim. Therefore, when determining the damages caused by harm to one's honour, the court needs to examine all the circumstances of the case without requiring any particular formal evidence to ascertain the "intensity of spiritual anguish " because the very fact that someone is the victim of defamation means that some damage has been done to his reputation, Constitutional Court Decision No. AP 2043/12).

In its judgment, the Appellate Court upheld the defendant's appeal and modified the first-instance judgment by dismissing the claim in its entirety. It said, among other things, the following in its reasoning:

> "It is true that, from the perspective of the proper application of the provisions of the Anti-Defamation Law and Obligations Law, under which damage claims shall be reviewed and ruled on by first-instance courts, the established relevant facts and circumstances do not suffice to conclude that the plaintiff is entitled to compensation of damages.
>
> This Court agrees with the first-instance court that the presented evidence proves that the defendant is guilty of defamation. Namely, the defendant's liability is examined under the Anti-Defamation Law. [...]
>
> The first-instance court correctly found that the defendant had not proven he was not the author of the messages wherefore it was right to conclude that he was their author, as well as that they were defamatory because their substance could harm the plaintiff's protected rights and interests, such as her dignity, honour and reputation, and that compensation was awarded exclusively to redress the damages.
>
> However, pursuant to Article 6(1) of the Anti-Defamation Law, it was necessary to ascertain whether the non-pecuniary damages actually occurred, i.e. that they were caused, and only in that case can just pecuniary compensation be awarded, and only if so warranted by the intensity and duration of the mental anguish (Article 200 of the Obligations Law). However, as the defendant claimed in her appeal, evidence thereof was not presented: first of all, the plaintiff was not questioned (did not give a statement) in court and the findings and opinion [of the court expert] were read during the retrial and cannot serve as evidence because, under Article 267 of the Civil Procedure Code, the court expert must explain his findings and opinion at the hearing, wherefore the first-instance court was unable to ascertain whether the plaintiff had actually sustained anguish, the intensity and duration of which justified the award of damages.
>
> Therefore, a mere violation of a legally protected right or interest does not suffice for finding a defendant responsible for paying non-pecuniary damages for harming someone's honour and reputation, which the defendant actually did [...] via Facebook in the quoted messages about the plaintiff that he had sent to S.S. Award of just pecuniary damages also requires establishment of the existence of mental anguish caused by harm to an individual's honour and reputation (Article 10 of the Anti-Defamation Law), especially the intensity and duration of the mental anguish justifying the award of damages in the meaning of Article 200 of the Obligations Law. All these presumptions (imparting of false fact, existence of spiritual anguish, the intensity and duration of mental anguish justifying award of damages) must be fulfilled cumulatively, otherwise damages cannot be awarded to the plaintiff.
>
> Given that damages are not presumed in case of defamation and that mental anguish caused by damage to one's honour is a fact that must be established by

the presentation of adequate evidence rather than a generally recognised or a presumed fact, that the plaintiff had not attended the hearing or been questioned at all, and that no-one had testified that she had suffered mental anguish because of the harm done to her reputation, how such anguish manifested itself or about its intensity and duration, as the defendant correctly noted in his appeal, the first-instance court could not conclude on the basis of the presented evidence that all the relevant facts existed for a finding of mental anguish of the requisite (prescribed) intensity and duration warranting the award of financial compensation."

4.4. Case Law of the Sarajevo Cantonal Court[37]

Distinction between Facts and Value Judgments

A final criminal conviction needs to exist to claim that someone took part in "criminal privatisation", the mere fact that an investigation has been launched is not grounds for making such allegations.

Judgment No. 65 0 P 042195 16 Gž of 16 June 2016[38]

The defendant was the author of the contested article that stated, *inter alia*, that the plaintiff was "the inevitable actor of all of the most criminal and disastrous privatisations in the Federation, a famous legal consultant [...] the erstwhile law and constitutional expert of Fikret Avdić and legal adviser at the Geneva talks on Bosnia and Herzegovina. As opposed to [...]'s denial of my competence to write about his professional work, I definitely do not bring into question his ability to charge everyone for his expert services in all circumstances and to stay out of jail after them. "

In its decision on the appeal of the first-instance court, the Cantonal Court said the following among other things:

"The first-instance court qualifies as untrue the allegations that the plaintiff had been the FBiH Government's legal consultant during the privatisation of Energopetrol Sarajevo, because this privatisation was not conducted at the time the plaintiff was a member of the Commission; recapitalisation of the company was conducted at the time and the plaintiff was paid remuneration fixed in the ruling on the establishment of the Commission. The fact that the plaintiff was a member of the Commission for the Recapitalisation of the Companies BiH Steel Zenica Ironworks and Energopetrol Sarajevo does not confirm the accuracy of the allegations that the plaintiff was the

COMPARE...

The Court would underline that it does not accept the reasoning of the first-instance court, namely that the allegations of serious misconduct levelled against the claimant should have first been proved in criminal proceedings. (*Flux v. Moldova* (6), App. no. 22824/04).

37 Comments on the Sarajevo Cantonal Court's case law were provided by Silvana Brković-Mujagić, a judge of that court.

38 The judgment is also referred to in the section "Award of Non-Pecuniary Damages for Defamation".

FBiH Government's one and only legal consultant in all privatisations in FBiH. The defendant did not prove during the evidentiary proceedings his allegations that the plaintiff had been involved in all the most criminal and disastrous privatisations because claims that someone is engaged in criminal conduct require the existence of a final criminal conviction, while the mere fact that an investigation has been launched is not grounds for claiming that someone is a criminal. Therefore, the first-instance court qualified the defendant's claims as defamation.

The first-instance court found in its judgment that the defendant's claims that the plaintiff had been implicated in all the most criminal and disastrous privatisations in the FBiH and that he had been the FBiH Government's consultant on privatisation amounted to expression of falsehoods about the plaintiff's personality."

The term investigative reporting implies investigation, in-depth focus on news, a topic, a phenomenon or an individual; it does not entail perfunctory recourse to attributes such as "corrupt boss", "mobster", "crook", etc., without any evidence, such as, at the very least, a confirmed indictment. The defendants must impart true and verified information, whilst respecting professional standards and the presumption of innocence.

Judgment No. 65 0 P 076714 18 Gž 2 of 13 December 2018[39]

"The first-instance court holds that all these facts could objectively have been proven by excerpts from the relevant registers; consequently, this Court absolutely cannot accept that their allegation is a value judgment; consequently, the provisions on exemption from liability cannot apply to them given that the plaintiff is a 'public figure'; nor is Article 7(1) of the Anti-Defamation Law applicable because, in the view of the Court, what is at issue here is not an opinion; nor is the expression substantially true and only false in insignificant elements [...]

"Such reporting, where the criminal report was filed in 2001 and dismissed in 2002, cannot be considered "investigative", because the very expression investigative journalism implies investigation, in-depth focus on news, a topic, a phenomenon or an individual; it does not entail perfunctory recourse to attributes such as "corrupt boss", "mobster", "crook", etc., without any evidence, such as, at the very least, a

COMPARE...

A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions and ideas Furthermore, the domestic courts failed to make any balancing exercise whatsoever between Ms K.'s reputation and the applicant's freedom of expression and her duty, as a journalist, to impart information of general interest. They also made no reference to the overall context of the text and the circumstances under which it was written (ECtHR, *Milisavljević v. Serbia*, App. no. 50123/06).

39 This judgment is also referred to in the section "Award of Non-Pecuniary Damages for Defamation".

confirmed indictment. The defendants were under the obligation to publish true and verified information, not base their reports on unverified or obsolete evidence, without a legitimate aim, with malice and in disrespect of professional standards and the presumption of innocence. Given that it was established that the defendants published a number of texts (13 in total) identifying the plaintiff to third parties in the 5 December 2008 - 21 January 2009 period, articles that have the character of defamation harming the plaintiff's reputation and given that they ignored the plaintiff's requests to apologise and publish retractions, the first-instance court delivered the contested judgment under Articles 1, 4(d), 6(2) and (15) of the Anti-Defamation Law and Article 200 of the Obligations Law. [...]

Based on the above findings, the first-instance court was correct to conclude that the described statements includes all the elements of defamation specified in Article 5 of the Anti-Defamation Law."

The defendants are guilty of disseminating untrue allegations, wherefore they bear the burden of proving the accuracy of the disseminated content.

COMPARE...

The Court reiterates that "punishment of a journalist for assisting in the dissemination of statements made by another person ... would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so" (*Thoma v. Luxembourg*, App. no . 38432/97).

Judgment No. 65 0 P 112612 16 Gž 2 of 16 June 2016[40]

The newspaper published an article headlined "Will the International Prosecutor Take over the Disco Shootout Case" claiming that the prosecutor, who was on call the night of the incident, was prosecuting the case and that "she did not want to go to the crime scene that evening, although that is the duty of the on-call prosecutor, especially where there are casualties. Ultimately, that's what she's paid for. She did not come to the scene of the crime before 9 am the following day." The newspaper later published an article entitled "Our Journalist's Reply", which stated the following: "Court documentation proves that you came to the crime scene as many as six hours after the shootout [...] while you're trying to lecture others on ethics, the code of conduct et al, have you ever wondered how ethical it is to abuse one's office [...] the available court documentation in the possession of the Municipal Court [...] shows that you did not come to the scene of the crime at 2 am, as you claim, but in the morning hours, at around 7:30 am. That is written at the beginning of the crime scene report [...] therefore what we wrote is important, that you did not come to the scene of the crime immediately after the shootout, which occurred at five minutes past midnight. [...] You did not perform a search of the facility and you ordered the paraffin test for gunshot residue nine hours after the shootout."

In its reasoning, the Cantonal Court said, *inter alia*, the following:

"Based on the crime scene report of the Police Administration [...] Crime Police Department of 28 June 2009 and the crime scene report of 29 June 2009, the first-instance court concluded that the defendants published falsehoods about the

40 *Ibid.*

prosecutor's work; that she had not waited until the morning to go the crime scene; that she had ordered the shutdown of the Roma Disco; that the guests had left the facility; that she and that the police had visited the crime scene; that all the necessary steps had been taken to seal off the crime scene and collect the evidence, wherefore the prosecutor had performed her job professionally and promptly. [...] The first-instance court established that the published allegations were untrue, that they distorted the image of the prosecutor and her work and that the legal requirements under Article 4 of the Anti-Defamation Law have been fulfilled. [...]

The court deems unacceptable the claims in the appeal that the article had been published based on information the journalist [...] was given by lawyer [...] because the defendants are responsible also for the dissemination of false fact and bear the burden of proving the accuracy of the published facts under Articles 7 and 123 of the Civil Procedure Code, which the defendants failed to do in order to be exempted from liability under Article 7 of the Anti-Defamation Law."

Comment

The court clearly explained why it did not find the defendants guilty of defamation.

COMPARE...

The Court observes that in previous cases it has found the generally offensive expressions "idiot" and "fascist" to be acceptable criticism in certain circumstances. It is true that in criticising J.P. the applicant used harsh words which, particularly when pronounced in public, may often be considered offensive. However, his statements were given as a reaction to a provocative interview and in the context of a free debate on an issue of general interest for the democratic development of his region and the country as a whole. Their content did not in any way aim at stirring up violence [...] in adopting a narrow definition of what could be considered acceptable criticism, the domestic courts did not embark on an analysis of whether the applicant's statements could have been value judgments not susceptible of proof [...] They also failed to carry an adequate proportionality analysis to assess the context in which the expressions had been used and their factual basis [...] (Bodrožić v. Serbia, App. no. 32550/05).

The court dismissed the defamation claim as ill-founded since it found that the journalists had reasonably published facts on issues of general interest and that the plaintiff could have commented them but had failed to appear at any of the hearings.

Judgment No. 65 0 P 115865 17 Gž of 29 August 2017

The Court upheld the first-instance judgment dismissing the plaintiff's claim requiring of the weekly's chief editor to pay him 10,000 KM in respect of non-pecuniary damages for harming his honour and reputation by publishing the impugned article which said, *inter alia*, that the defendant believed that the plaintiff was not the owner of company E. only formally and that E.'s confirmation indicated that the plaintiff has been its director as of 25 August 2004. The article published in the newspaper *Oslobođenje* said that the plaintiff headed company E, that he did not fulfil the requirements to sit on the Managing Board of company S.B., and that he did not attend the Managing Board sessions during the strike and crisis in company V.

"Explaining that the impugned article was a general subjective assessment, i.e. a conclusion or an opinion about the plaintiff, that the inaccuracy of the statements could not be proven because it did not contain even a minimal amount of facts that could be objectively verified, the first-instance court found that the qualification did not amount to defamation and that the defendant's reply to the denial essentially corrected the statement and that the wrong information would not have been published had the plaintiff been willing to talk to the journalist, which, in the view of the first-instance court, showed that the defendant had attempted to verify the allegations in the impugned articles, but that the plaintiff ignored the defendant's attempt. [...]

In its reasoning, the first-instance court provided a clear and comprehensive explanation of the content of each article [...], drew links between the sources of information and the undertaken steps and concluded that the journalist reasonably disseminated the facts and that issues of public interest – i.e. the operations of the plaintiff, companies and individuals in general reflecting on the overall economic situation and the market in BiH – were at stake."

Statements that the plaintiff was "part of the Bosniac mafia" and "a mafia consigliere committing acts of crime for economic gain and to protect criminals" went beyond the bounds of permissible expression; the journalist should have checked the information refuting the substance of the impugned articles.

Judgment No. 65 0 P 116441 17 Gž 2 of 9 March 2018[41]

COMPARE...

The applicants claimed that they wrote about an issue of public interest, namely about a serious crime that had allegedly been committed by private persons and in respect of which no investigation had been started. However, the Court notes that the applicants did not mention this issue anywhere in the article, failing thus to demonstrate that the issue was of public interest. .

Moreover, the allegations were of a serious nature and were presented as statements of fact rather than value judgments.

The alleged rape was presented in the article as a fact although the criminal investigation only started after the publication of the article. Article 6(2) requires that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. The Court therefore considers that the article violated the presumption of innocence of the [baseball] players and defamed them by stating something as a fact which had not yet been established

The commission of a crime and the circumstances in which it is committed are matters of public concern. The Court's case law, however, clearly illustrates that other imperatives have to be weighed in the balance before an incident is reported by the media to the public as fact. The Court has already underscored the importance of the presumption of innocence in this connection. The right to reputation of third parties is of equal importance especially where serious accusations of sexual misconduct are concerned. (*Ruokanen et al v. Finland*, App. No. 45130/06).

41 See also the section below "Acquisition of Information (Acting in Good Faith)".

The defamation proceedings regarded a number of articles, one of which was headlined "Tentacles of the Bosniac Mob" and claimed that the plaintiff was a "mafia consigliere". The courts found the defendants (publisher and chief editor) guilty of defamation and ordered them to pay the plaintiff 5,000 KM in damages

> "In the view of this Court, the article claims that the plaintiff became a millionaire, that he bought the Railways Cooperative, worth 100 million KM for a mere 7,000 KM; these allegations are in contravention of the presented evidence, notably the certificates of the Railway Savings and Loan Cooperative of 3 March 2009 and 25 December 2008 and the notices of 11 February 2009 and 15 December 2008, demonstrating that the plaintiff does not possess a stake in the Cooperative or acquired rights deriving from a stake in the Railway Savings Cooperative and that the plaintiff is not registered as an owner of securities. Given that the impugned article includes claims that could have been checked in the register and the Railway Cooperative, the court dismisses as ill-founded the defendants' appeals that the article is the fruit of investigative journalism and the co-defendant's claim that all the impugned articles are the result of investigative journalism.
>
> The first-instance court confirmed that the articles, published on 6 August 2009, 13 August 2009, 20 August 2009 and 10 September 2009, contained grave accusations against the plaintiff that overstepped the bounds of permissible expression, because the plaintiff was publicly presented as a criminal who was part of the organised Bosniac mafia. The articles described him as the extended arm of the family [...] engaging illegally in torture and crime in BiH, from which the plaintiff millions, claiming that H.S. had installed him in a senior office to spread his tentacles to where it was the most important, and that he headed the Financial Police to prevent a review of the privatisation of S.P. The articles also described the plaintiff as a member of the wartime Moslem organisation "Sara" and alleged that he was installed in the State Investigation and Protection Agency; that he was simultaneously working for the Americans and the S family; that he bought the Railways Cooperative for 7,000 KM although its property is worth 100 million KM; that he fabricated the stories about drugs and F.R.; that he abused his office to help the Croats; and that he was vying to take over the SIPA Financial-Intelligence Department. The first-instance court said that all these articles focused on the Bosniac mafia led by war profiteer H.S. and that his key player (plaintiff) ranked high in the organisation's hierarchy, concluding that the texts overstepped the bounds of permissible expression protected under Article 10 ECHR and that the defendants should have checked the information refuting the allegations in the articles. In the view of the first-instance court, the impugned articles could not be perceived as an expression of opinion but of facts alleging that the plaintiff was part of the Bosniac mafia and a mafia consigliere committing crimes for economic gain and to protect criminals. [...]"

Comment:

The court fully and clearly established all the facts that led it to the conclusion that the defendants were guilty of defamation and awarded damages in accordance with the law.

Publication of the allegation that the plaintiff, who was the Assistant Minister and member of the Collegiate that adopted the final draft decision on allocation of funding, including to himself, notably, "that he approved state funds to himself [...] that a classical conflict of interests and abuse of office were at issue", amounted to a violation of the presumption of innocence in the absence of proof of his "arbitrary conduct".

Judgment No. 65 0 P 161030 15 Gž of 20 November 2015

The defendants (the publisher and author of the article) were ordered to jointly pay the plaintiff non-pecuniary damages for defamation in the amount of 500 KM and the publisher was ordered to publish, at his own expense, the entire judgment in the next issue of the daily that had published the article as soon as the judgment became final. Namely, the defendants published articles in several issues of the newspaper under the headlines "Assistant [Minister] Allocates State Funds to Himself' and "Never-Ending Scandals in the Federal Education Ministry, Assistant [Minister] Allocates State Funds to Himself". The author of the article said that the plaintiff was obviously in a conflict of interest and abused his office, specifying that: '[...] this means that [B] practically granted himself money. Although it is clear even to laymen that a classical conflict of interests and abuse of office are at issue [...].' The plaintiff's photograph was published alongside the article with the following caption "Shocking – scandal in Federal Education Ministry, money ends up in pockets of no-names in the world of science".

The courts concluded that the impugned articles amounted to defamation, and explained, *inter alia*, that:

> "[...] the statements at issue grossly violated the principle of presumption of innocence, thus overstepping the bounds of freedom of expression enshrined in Article 10(1) ECHR. Furthermore, the first-instance court found that the defendants had written and published untrue information about the plaintiff, directly implicating him in abuse of office, suggesting, among other things, that Branković practically granted himself state funds and that it was clear even to laymen that a classical conflict of interests and abuse of office were at issue [...].
>
> The expression at issue includes information that is susceptible of verification and proof, wherefore the defendants were to have proven that the information was true in order to be exonerated. There parties did no dispute that the plaintiff was the

COMPARE...

The Court considers that the expressions condemned by the Supreme Court in the present case amounted to an opinion, albeit expressed provocatively, as they represented the applicant's subjective assessment of the credibility of the parliamentarian's property declaration. The burden of proof in respect of such an assessment is obviously impossible to satisfy.

Sarcastic and cynical as the applicant's phrases were, in the Court's view, they did not constitute a gratuitous personal attack upon the parliamentarian [...], since they were not devoid of any factual basis [...], e.g. the kind and value of the parliamentarian's declared property, his salary level, his kinship with the Head of the President's Security Service, etc. In other words, there was a sufficiently close link between the applicant's contested phrases and the circumstances of the case (*Gorelishvili v. Georgia*, App. no. 12979/04).

Assistant Minister in the Sector for Higher Education, Science and Technology in August 2010, when the impugned articles were published, and that he was the member of the Collegiate that adopted the final draft decision of 29 July 2010 and that the Federal Minister of Education and Science granted him 1,700 KM; however, the following allegations were untrue: 'Branković practically granted himself state funds. Although it is clear even to laymen that a classical conflict of interests and abuse of office are at issue [...]' because the defendants did not prove that the plaintiff had acted arbitrarily during the adoption of the decision on allocation of funds, wherefore they failed to prove either that he was in conflict of interests or had abused his office."

See also:

Judgment No. 65 0 P 193425 18 Gž 2 of 9 May 2018

"The impugned statements impute that the plaintiff 'is Fahrudin Radončić's yes-man, that Radončić has been using him for years in his showdowns against his opponents'. Therefore, the first-instance court correctly found the defendant guilty of defaming the plaintiff by publishing the article headlined "In Whose Interests is Mercenary Amer Toskić Working" in the daily San on 20 January 2011 because such expression cannot be considered a journalist's opinion or value judgment, since factual allegations susceptible of proof are at issue."

Judgment No. 65 0 P 200786 14 Gž of 31 October 2017

"The court found the defendants guilty of defamation because they published an article in the magazine *Bum* headlined 'Zagi's Vote in the Sarajevo Canton Assembly Costs 100,000 KM and the Office of Adviser to the FBiH Prime Minister." In the view of the first-instance court, the following defamatory statements were also disputable '[T] fulfilled all his requests, which, according to the grapevine, includes 100,000 for Zagi and the post of adviser to the FBiH Prime Minister [M.M.] for his boss [S.H.]. Not only did he pocket 100K, but he got his boss [S.H.] a sinecure as well.' The court found that the allegations were not substantiated by proof and that they exceeded the bounds of permissible communication in today's world in terms of the freedom of expression and thought, dissemination of information, and that they did not comply with professional standards. The Court found that the allegations aimed at undermining the plaintiff's reputation either intentionally or with utter negligence on the part of the defendant, because the article portrayed the plaintiff to the public at large as an individual illegally obtaining financial gain for himself and gain for his superiors. The Court found that the defendants had not proven the accuracy of their allegations because they said that they had not verified them, which demonstrates that they had not acted in good faith."

Acquisition of Information and Its Veracity (Acting in Good Faith)

Media were not acting in good faith when they grossly violated the press code of conduct, failed to make reasonable efforts to verify the accuracy of the data they published and refused to publish the plaintiff's denials.

Judgment No. 65 0 P 116441 17 Gž 2 of 9 March 2018[42]

> "The first-instance court concluded that the impugned articles were written to incur damage to the plaintiff and that their content was the result of lack of good will, which must exist in professional journalism, that the defendants had not acted in good faith because they had refused to publish the denials sent by the plaintiff. The first-instance court found that the impugned articles did not amount to expression of opinions about the plaintiff, but to a gross violation of the press code of conduct because the defendants had failed to prove they had made reasonable efforts to verify the accuracy of the data, to contact the plaintiff or publish his denials."

Media are not be held liable for defamation even if it transpires that the facts they published were untrue if the issue is of public concern and they had made reasonable efforts to verify them.

Judgment No. 65 0 P 118333 17 Gž 3 of 6 February 2018[43]

The Court upheld the first-instance judgment dismissing the claim for non-pecuniary damages in the amount of 35,000 KM for defamation and discrimination due to the defendant's article claiming corruption in the highest echelons of an important political party, the senior officials of which also held important public offices. The courts said the following about the defendant's status:

> "Furthermore, the first-instance court specified that where journalists had the legitimate aim of reporting on issues of public importance and made reasonable efforts to verify the facts, the media shall not be found liable even if it transpires that the facts were untrue; the court thus concluded that, although the plaintiffs were discomfited by the facts in the impugned articles, the right to freedom of expression may not be restricted since journalists are entitled to speech that is offensive, shocking or disturbing, especially when it is borne in mind that the issues are of public concern and regard public figures.
>
> [...] Namely, having analysed the impugned articles, the first-instance court was correct to conclude that the journalists published the information in good faith and that the way in which they imparted and presented it to the public was in compliance with the provisions under which journalists expressing their views and opinions are entitled to do so in a way that will shock or disturb both the public and the person they regard; when it was ruling on the existence of defamation, the court in particular distinguished between facts and value judgments (facts are susceptible of proof while value judgments are not, see *Lingens v. Austria*, judgment of 1986).
>
> Furthermore, journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation; Article 10 ECHR protects not only the

42 See also Distinction between Facts and Value Judgments (p. 43).

43 See also the sections on "Public Figures" and "Publication of Photographs".

substance of the ideas and information expressed, but also the form in which they are conveyed (ECtHR judgment *Perna v. Italy*). The choice of form and manner of presenting information is the autonomous right of the journalist, protected by Article 10 ECHR, and the desired form of expressing ideas and information cannot be imposed on the journalists."

Public Figures

The limits of acceptable criticism are much wider in case of politicians as they inevitably and knowingly lay themselves and their activities open to close scrutiny by both the press and the public at large and must consequently display a greater degree of tolerance.

Judgment No. 65 0 P 118333 17 Gž 3 of 6 February 2018

"The first-instance court explained that [...] the plaintiffs were public figures, who were performing the highest functions in BiH at the time the impugned articles were published; the main plaintiff [...] was the leader of a political party, a full-time professor at the College of Economy, an MP in the BiH Parliamentary Assembly and a member of a number of domestic and foreign political and professional associations; the second plaintiff [...] was the deputy leader of the SDP [Social-Democratic Party], had the highest army order of "Golden Lilly"; the third plaintiff [...] was the mayor of the [...] municipality and deputy leader of the SDP. Therefore, the first-instance court held that the plaintiffs, by virtue of their office, designed the state policies and that it was thus not unusual that they found themselves on the front pages of magazines and the subject of articles. Furthermore, the first-instance court explained the importance of freedom of expression under Article 10 ECHR, noting that the freedom of expression also included the right to express one's opinion, the right to receive ideas and information and to impart them to others; it also stated that the freedom of expression was not absolute, but that its restriction was not applicable to the articles at issue. [...]

COMPARE...

Moreover, the Court considers that the size of the award of damages made against the two applicants may also have failed to strike the right balance. [...] an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered. The Court notes on the one hand that the sums eventually awarded in the present case [...], although relatively moderate by contemporary standards in defamation cases in England and Wales, were very substantial when compared to the modest incomes and resources of the two applicants. (*Steel and Morris v. The United Kingdom*, App. no. 68416/01).

These amounts appear reasonable, taking into account the length of the article and its contents which, on account of the details given and the photographs published, constituted a serious interference with the plaintiffs' personal and professional reputation. (*Armellini et al v. Austria*, 14134/07).

The first-instance court was correct to conclude that the limits of acceptable criticism were much broader with respect to politicians and other public figures than private individuals and that the plaintiffs, as senior public officials, inevitably and knowingly lay themselves and their activities open to close scrutiny by both the press and the public at large and must consequently display a greater degree of tolerance (see ECtHR's judgment in the case of *Lopez Gomez da Silva v. Portugal* delivered in 2000). The court also noted the importance of Article 10 ECHR and the special protection of the freedom of expression enjoyed by the media and journalists because of their extremely important role in imparting to the public all information of public interest."

Award of Non-Pecuniary Damages for Defamation

Although the Court found the defendant guilty of defamation, it concluded that the plaintiff was not entitled to damages because he had failed to prove he had suffered damages due to the harm to his honour and reputation.

Judgment No. 65 0 P 042195 16 Gž of 16 June 2016

"However, the plaintiff did not prove during the proceedings that he had suffered mental anguish because of the harm done to his honour and reputation by the published articles [...], i.e. that he suffered adverse effects e.g. that the community's views of him had changed, that he had to close his law office or lost his clients. The first-instance court was of the view that the court could not base its conclusion on the presumption that the published articles could have resulted in non-pecuniary damages and that the plaintiff should have proven what the damage entailed, i.e. that his honour and reputation were harmed. The court thus decided to dismiss the claim as ill-founded under Article 6 of the Anti-Defamation Law and Article 200 of the Obligations Law in conjunction with Articles 7 and 123 of the Civil Procedure Code.

The first-instance court was correct to dismiss the claims in the appeal and find that there were no legal grounds to award non-pecuniary damages because the plaintiff had failed to prove that the publication of the above defamatory statements had caused him mental anguish.

The first-instance court was correct to conclude that the gravity of the effects on the plaintiff's reputation, i.e. occurrence of mental anguish, could not be presumed.

The Court disagrees with the claims in the appeal and notes that the proper implementation of substantive law, notably Article 200 of the Obligations Law, involves the presentation of evidence of the existence of mental anguish because it is not a generally known fact and has to be ascertained in each specific case in the meaning of Article 8 of the Civil Procedure Code.

Given that the plaintiff did not prove the existence of mental anguish caused by the defendant's action (the plaintiff was not questioned, there was no court

expertise and no other evidence was presented), the court was unable to ascertain any of the elements of mental anguish wherefore there are no legal grounds for awarding damages."

Note:

The Supreme Court partly upheld the appeal on points of law and modified both judgments of the lower courts, ordering the defendant to pay 2,500 KM in damages to the plaintiff. In the reasoning of its decision, the Supreme Court also found that the defendant guilty of defamation but said the following about the compensation of damages:

> "Article 10 of the Anti-Defamation Law (hereinafter: ADL) lays down that compensation shall be proportionate to the harm caused and shall be awarded solely with the purpose of redressing the harm. In making a determination of compensation, the court is obliged to have regard for all of the circumstances of the case, particularly any measures undertaken by the defamer to alleviate the harm, such as: the issuance of a correction and retraction of expression of false fact or issuance of an apology; whether the defamer made any financial gain by making or disseminating the expression; and whether the amount of damages awarded would likely result in severe financial distress or bankruptcy for the defamer. This Court disagrees with the legal conclusions of the lower courts and holds that, once defamation is ascertained, the plaintiff does not bear the burden of proof, does not need to present particular evidence of the amount of compensation for the harm done to his reputation, because his reputation has been harmed by the very fact that he is the victim of defamation. Given that the plaintiff's denials have been published, the Court qualifies as well-founded the plaintiff's claim for damages because of the impugned statements, which the lower courts found to be defamatory and an attack on his honour and reputation harming his reputation of a lawyer, and finds the defendant liable in the meaning of Article 6 of the ADL since his statements harmed the plaintiff's reputation (Article 4(d) of the ADL) and he had failed to prove their accuracy."

Comment:

This case demonstrates the evolution of BiH case law caused by the change in the BiH Constitutional Court's approach in this area. According to the most recent views of the Constitutional Court of Bosnia and Herzegovina, which the FBiH Supreme Court has also begun to apply, mental anguish is the implicit consequence of defamation, wherefore, as soon as the court establishes defamation, it should order pecuniary compensation as a form of penalty (which is also a novelty) and redress. Which criteria the courts will apply and how when fixing the amount of the damages and whether and under which criteria the penalty redresses someone's mental anguish remain unclear and will in all likelihood continue giving rise to inconsistencies and different actions.

Although the awarded damages for defamation were higher than usual, the court was correct to award the amount to the plaintiff because the defendant demonstrated "persistence in publishing negative information, further indicating his intention to harm the plaintiff by publishing untrue information".

Judgment No. 65 0 P 076714 18 Gž 2 of 13 December 2018

> "Having analysed the first-instance court's reasoning of its judgment, the Court found that it had taken into account both criteria (how the defendant obtained the information, i.e. whether he had verified it with the individual it concerns and whether he had provided the latter with the opportunity to comment the allegations) when it examined whether the plaintiff's personality rights have been violated and to what extent. The Court disagrees with the appellant, who claims that the compensation for mental anguish suffered in this case is excessive. Although the amount of awarded damages, 14,000 KM deviates from case law, the panel of this Court believes that is reasonable given all the circumstances of the case. When determining the amount of the damages, the first-instance court acted in accordance with Article 127 of the Anti-Defamation Law. This Court fully accepts the reasons the first-instance court was guided by when it set the amount of damages at 14,000 KM in this specific case. The lower court properly applied substantive law (Article 200 of the Obligations Law) to properly and fully established facts. Namely, it established that the defendant published a total of 13 articles in the 5 December 2008 - 21 January 2009 period containing a number of untrue allegations and portraying the plaintiff in an extremely negative light. Given that the defendant demonstrated persistence in publishing negative information, further indicating his intention to harm the plaintiff by publishing untrue information, this Court is of the view that the first-instance court properly fixed the amount of the damages."

The court expert's finding that the plaintiff had suffered mental anguish and experienced everything as "harming her overall personal and professional reputation, honour and integrity" led the court to conclude that there were legal grounds to order the payment of compensation for defamation.

Judgment No. 65 0 P 112612 16 Gž 2 of 16 June 2016

> "The Court disagrees with the claims in the appeal that the first-instance court had arbitrarily assessed the findings and opinion of court expert in neuropsychiatry Kasim Brigić because he had rightly established that the plaintiff suffered mental anguish due to the publication of the impugned article. In the view of this Court, the expert - on the basis of his experience and in compliance with the rules of his profession - found that the plaintiff suffered mental anguish and experienced all of this as a violation of her overall personal and professional reputation, honour and integrity; this fact is relevant to the assessment of the legal grounds for awarding her non-pecuniary damages in the meaning of Article 200(1) of the Obligations Law."

Judgment No. 65 0 P 172606 15 Gž of 20 November 2015

"However, although the first-instance court correctly found that the publication of the impugned article caused the plaintiff mental anguish, the plaintiff failed to prove the intensity, character or duration of mental anguish during the proceedings, because no court expert analysed the circumstances of the case; the court thus awarded the plaintiff 4,000 KM in non-pecuniary damages for the harm to her honour and reputation pursuant to Article 200 of the Obligations Law, Article 10 of the Anti-Defamation Law in conjunction with Article 127 of the Civil Procedure Code. In the view of this Court, this amount is in keeping with the presented evidence and conclusions drawn from it given that Article 200(2) of the Obligations Law imposes upon the court the duty to ensure that the decision on the amount of damages does not favour ends incompatible with the nature and social purpose of the awarded damages.

Namely, the plaintiff is indisputably a public figure and, as such, must display a greater degree of tolerance towards criticisms in the media. Therefore, her claim must be weighed against social interests, wherefore she must display a higher degree of tolerance also when the limits of the freedom of expression are overstepped, since she knowingly lay herself open to such a risk when she assumed the role of a public figure. [...]

Having decided to award the plaintiff damages, the Court bore in mind that the existence of damages was established in accordance with the adopted social norms and standards and that the subjective feelings of harm of the victim of defamation were not crucial. What is apparently relevant here is the conclusion that the plaintiff's honour and reputation were damaged by the expression of false fact, wherefore the Court set the amount of damages at 4,000 KM in terms of Article 127 of the Civil Procedure Code, i.e. at its own discretion. Whilst doing so, the Court bore in mind that the purpose of the awarded damages was not to enable the victim to profit or to financially punish the defamer, but to strike a balance between the right to freedom of expression [...] and the individual's right to the protection of his reputation, also guaranteed by Article 10(2) ECHR.

According to the FBiH Supreme Court's case law, the court will find defamation if the published facts may harm the honour and reputation of an individual; the individual's subjective feelings of harm are irrelevant for the existence of damages.

Case No. 65 0 Mal 175308 17 Gž, judgment of 31 May 2017

"According to the FBiH Supreme Court's case law, the court will find defamation if the published facts are objectively assessed as potentially harming the honour and reputation of another individual; the existence of damage is assessed in accordance with the adopted social norms and standards; the individual's subjective feelings of harm are not crucial for the existence of damages. Namely, what is decisive is that the expression of false fact could have harmed the victim's honour and reputation, wherefore the court is not acting in contravention of the case law when it fixes the amount of damages relying on Article 127 of the Civil Procedure Code. "

Publication of Photographs

Although the publication of photographs of minors is "in contravention of all international standards on the protection of children," the court ruled that the plaintiffs were not entitled to damages because they had not proven that the publication of the photographs, copied from the Facebook profile of the wife of one of the plaintiffs, damaged their honour and reputation.

Judgment No. 65 0 P 118333 17 Gž 3 of 6 February 2018

The article entitled "SDP's [Social-Democratic Party's] Dream Team [...] Cruising the Mediterranean with Their Better Halves," which alleged corruption in the highest echelons of the political party, the senior officials of which held high public offices, was accompanied by a photograph of the plaintiffs with their wives and children, copied from the Facebook profile of the wife of one of the plaintiffs. The courts dismissed the claim in its entirety and explained:

> "The first-instance court further holds that the defendant had not overstepped the acceptable limits by publishing the photograph, because it had earlier been posted on the Facebook profile of the wife of the third plaintiff and others could have seen it as well.
>
> The Court dismisses as ill-founded the claim in the appeal that the first-instance court had failed to assess the violation of the plaintiffs' rights by the publication of their photograph with their family members. The Court is of the view that the publication of photographs of children is in contravention of the Convention on the Rights of the Child. The photograph posted on the Facebook profile of the wife of the third plaintiff was used since it is almost impossible to prevent the further dissemination of such photographs by modern IT-electronic technologies. Furthermore, the right to privacy does not have absolute primacy over other rights, such as the right to freedom of thought and the freedom to receive and impart ideas and information. The defendant publicly apologised and published a retraction regarding the published photograph of the plaintiffs' underage children and wives, whereby he showed that he realised he had made a mistake.
>
> Finally, the Court concludes that the publication of photographs showing underage children is in contravention of all domestic and international standards on the protection of the rights of the child, including the (Press Council's) code of conduct. However, the plaintiffs did not prove during the proceedings how the published photograph harmed their honour and reputation or their psychological integrity and private life, in the meaning of Article 7 in conjunction with Article 123 of the Civil Procedure Code."

Expression during Political Campaigns

Statements made by politicians during election campaigns cannot be deemed defamation because they are allowed recourse even to unwarranted criticism and negative and offensive statements in such circumstances.

Case No. 65 0 P 179963 15 Gž, judgment of 14 July 2016

The plaintiff claimed damages for the allegedly defamatory statements against him in an article headlined "Call [O.] for Tender" accompanied by the subtitle "Here's why did the [plaintiff] actually establish President Real Estate – to borrow money from his business friends to build the tower in Tuzla". The plaintiff's photograph was published beneath the headline along with the caption "[K.], [plaintiff] and [M.] – Who the real owner [of the daily] is". The impugned article alleged that the plaintiff was a member of a criminal organisation and the mob; that he was under an investigation; that he and N. O. had threatened the owner of "Robot komerc"; that he illegally won a contract at a tender; that he was an incapable businessman, etc. The court dismissed the claim in its entirety, and said the following in its reasoning:

> "The first-instance court concludes that the requirements have not been fulfilled for qualifying as defamation the allegations in the impugned article, which was picked up by the newspaper ***Bosanska stvarnost***, and which was published as election material during the election campaign ahead of the BiH general elections in 2010, in terms of freedom of expression via the media under Article 10(2) ECHR, under which the freedom of expression does not pertain only to views that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Having found that it was indisputable in this case that an election campaign was under way, during which the permissible limits of expression of political opinions and value judgments about political rivals were usually broader, even negative, the court finds that the statements were made with a view to attracting the votes of as many voters as possible in the political power struggle. It is realistic to expect of political parties and their leaders, if they have already agreed to run the election race, to tolerate even unwarranted criticism, as well as negative and offensive expression."

Award of Damages to Legal Persons

Judgment No. 65 0 P 073580 17 Gž of 29 June 2017

> "Article 4 of the FBiH Anti-Defamation Law defines defamation as an act of harming the reputation of a natural or legal person by making or disseminating an expression of false fact identifying that natural or legal person to a third person.
>
> Under Article 200(1) of the Obligations Law, the court shall award equitable non-pecuniary damages for physical pain suffered, for mental anguish suffered due to diminished ability to engage in physical activities, disfigurement, harm to reputation or honour, violation of freedoms or personality rights, death of a loved one, as well as for the fear suffered. after finding that the circumstances of the case and, in particular, the intensity and duration of the pain, anguish and fear, so warrant, irrespective of pecuniary damages, even if the latter are not awarded.
>
> Therefore, the existence of mental anguish as a prerequisite for non-pecuniary damages caused by harm to one's reputation goes without saying. Legal persons cannot feel mental anguish, *inter alia* because their reputation has been harmed. Since the Anti-Defamation Law does not specify the types of damage resulting from harm to the reputation of a legal person, i.e. this issue is not governed by this Law, the Obligations Law applies accordingly. Given that, in this case, the plaintiff sought

non-pecuniary damages because its reputation was harmed, the first-instance court properly concluded that harm to the reputation of a legal person can give rise only to pecuniary damages, but not to non-pecuniary damages and that the plaintiff had not presented any evidence during the evidentiary proceedings that it had actually suffered specific pecuniary damages, i.e. it had not proven the existence of specific damages."

Comment:

Obviously, the interpretation of substantive law in this legal matter was wrong (reputation – material damage). It is nevertheless obvious that damage as a consequence of the defamation must be proven.

COMPARE...

Legal persons do not enjoy the protection of their "reputation" as a moral category falling under the scope of the right to a private life under Article 8 of the ECHR. However, freedom of expression may be restricted to protect the business reputation and commercial interests of a legal person in pursuit of a legitimate aim under Article 10(2) of the ECHR (see *Heinisch v. Germany* [App. no. 28274/08] and Constitutional Court of Bosnia and Herzegovina decision in case No. AP 2753/16).

Contempt of Court

Judgment No. 65 0 Mal 175308 17 Gž of 31 May 2017

The defendants were ordered to jointly pay 2,000 KM to the plaintiff in compensation for their defamatory statements voiced in the report entitled "Privatisation of L.B." and broadcast during the political show "60 Minutes" and to publish the operational part of the first-instance judgment in the following show or a similar one broadcast in the same slot. Namely, the impugned report alleged that a criminal judgment delivered by the plaintiff, a judge, was "idiotically formulated", that he was "either a judicial dilettante or corrupt" and that, through his work, he "provided specific benefits to the criminals – the mob".

"The first-instance court relied on Articles 1, 3, 7, 8 and 10 of the FBiH Anti-Defamation Law and Article 10 ECHR and concluded that the allegations that the plaintiff was a judicial dilettante (i.e. someone who exercised his judicial office unprofessionally, improperly, irregularly, superficially or amateurishly) or a corrupt judge were facts, not an opinion. Namely, in the view of the first-instance court, it may be objectively proven whether someone conducted court proceedings unprofessionally and thus committed crimes, i.e. provided benefits for the mob, wherefore such qualifications of the plaintiff before a TV audience, i.e. the public, have the attributes of expression of false facts, unless the defendants prove that their statements were true since they are the ones bearing the burden of proving such facts [...] the defendants did not prove any of the grounds for relieving them of liability for defamation because, in the view of the first-instance court, they failed to prove that they had expressed their opinions and that their expression was substantially true and only false in insignificant elements. The first-instance court concluded that they had also failed to prove that the expression of the said facts was reasonable as they had expressed them in a show aired by a public service broadcaster and the most popular political show at the time, wherefore

the first-instance court did not identify any elements of good faith or compliance with generally expected professional standards, especially given that the report discussed facts regarding a judgment that was not final yet.

The first-instance court bore in mind that the plaintiff was a public figure, that his actions and the operations of the judiciary in general were of public importance, that the public definitely should be informed of the work of judges and the judiciary, and noted that it supported all forms of professional and in-depth investigative reporting, as well as the broadest form of freedom of expression; however, the first-instance court finds that all of the above cannot justify describing an individual to third parties as a dilettante judge committing crimes without valid and convincing evidence."

Observations on the Case Law of Ordinary Courts and Compliance with Article 10 Standards

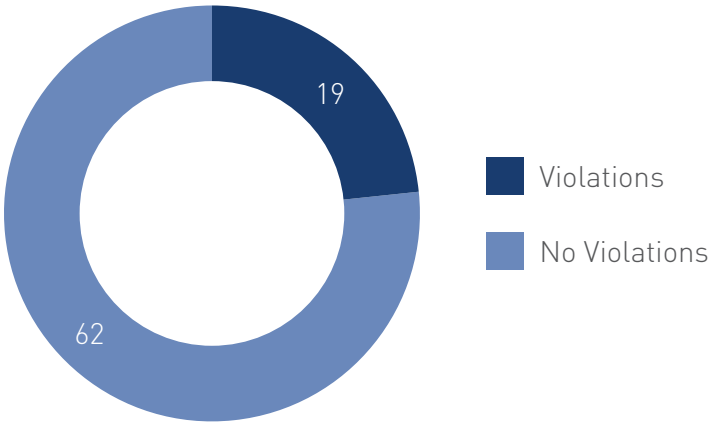
The overview of the case law of the Constitutional Court of Bosnia and Herzegovina shows that the Article 10 ECHR cases for the most part concern defamation, i.e. striking a fair balance between the freedom of expression and the right to a reputation as part of the right to a private life under Article 8 ECHR. The problems that can be identified in this case law mostly regard the distinction between facts and value judgments and award of non-pecuniary damages in case of defamation. Namely, when ascertaining whether facts or value judgments are at issue, the Constitutional Court has observed that the impugned statements are mostly divided into parts and that these parts are assessed outside the overall context. The judgments reviewed on appeal by the Constitutional Court show that the ordinary courts have only in a few cases attached sufficient importance to the existence of public interest or the injured parties' status of a public figure. Even where the courts said that public figures must display a greater degree of tolerance to criticism, even language that "offends, shocks or disturbs", it remains unclear how they assessed this in the specific cases. On the contrary, even where they assessed that a public figure who should display a greater degree of tolerance was at issue, the courts divided the impugned statements into parts and concluded that they included facts susceptible of proof and awarded damages which are not negligible given the living standards in BiH.

As far as award of damages for harm to reputation is concerned, courts still tend to conclude that the amount of damages must be proven in some way although both the ECtHR and Constitutional Court are clear on that point: award of damages for harm to one's honour or reputation does not require of the injured parties to adduce specific, formal evidence. On the contrary, courts have a wide margin of appreciation when assessing all the relevant elements to strike a fair balance between the freedom of expression and the right to privacy (including the right to a reputation) and setting the amount of just satisfaction to the injured parties. They must bear in mind that the principle of proportionality under Article 10(2) ECHR can be violated also by awarding excessive damages. This is particularly important in proceedings against the media, which are under the obligation to report on issues of public interest, since excessive damages for defamation may have a "chilling effect" on them. Which circumstances will be taken into account depends on the specific case. Perusal of the case law of the ECtHR and the Constitutional Court of Bosnia and Herzegovina shows that various elements may be relevant in awarding damages; they include the status of the injured party, existence of public interest, whether the personal attack was gratuitous, the gravity of the claims, whether the defendant acted in good faith, and the financial situation of the defendant.

Statistical Data on 2015-2019 BiH Constitutional Court Decisions

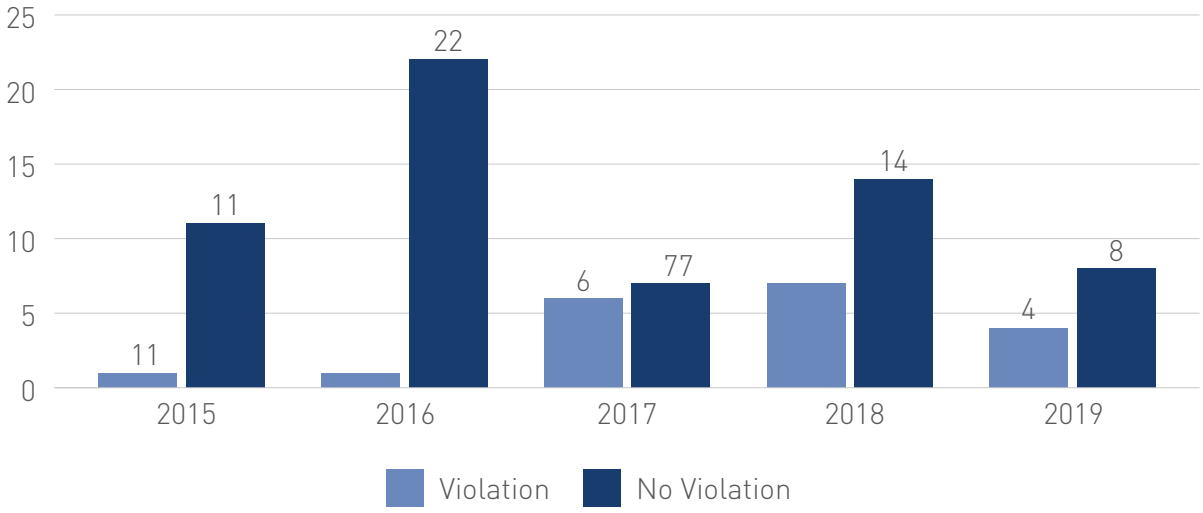
Article 10 ECHR

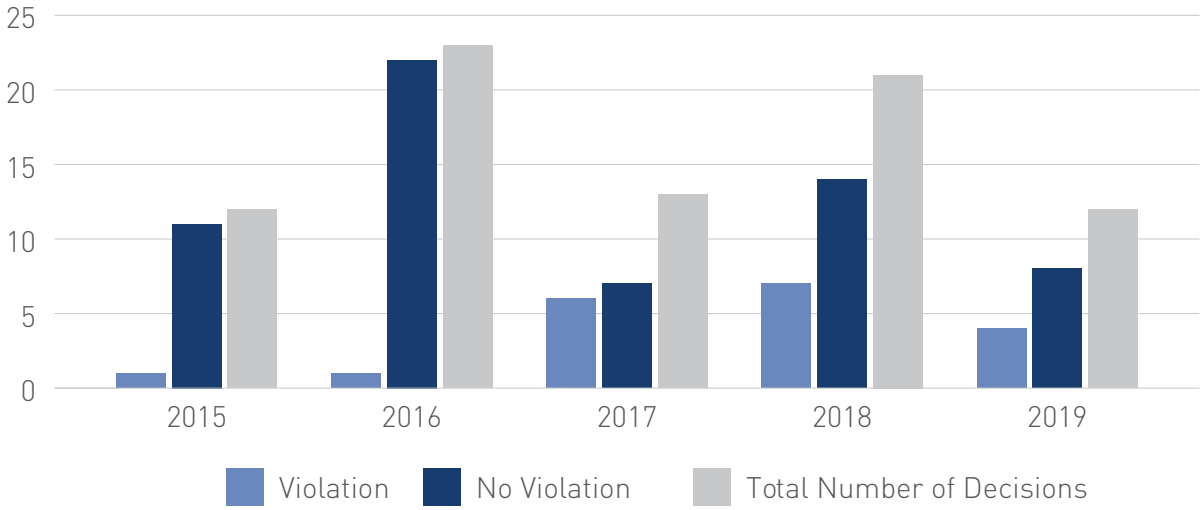
Total Number of Decisions: 81 // Violations Found in: 19 Decisions



Year	Violations	No Violations	Total Number of Decisions
2015	1	11	12
2016	1	22	23
2017	6	7	13
2018	7	14	21
2019	4	8	12

Total Number of Decisions – 81




25
20
15
10
5
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2015
2016
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Violation
No Violation
Total Number of Decisions