

Evolution of the media market and its legal framework in Bosnia and Herzegovina since the independence: special focus on defamation

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TESI DOCTORAL

Títol

EVOLUTION OF THE MEDIA MARKET AND ITS LEGAL FRAMEWORK IN BOSNIA AND HERZEGOVINA SINCE THE INDEPENDENCE: SPECIAL FOCUS ON DEFAMATION

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1. INTRODUCTION

In a post-communist and a post-conflict society such as Bosnia and Herzegovina, international community had quite a task to establish a new regulatory framework and ensure the respect of the right to freedom of expression. This is how the defamation laws in Bosnia and Herzegovina are in theory well-tailored and what is more, advanced compared to defamation laws in the region, but their implementation has still been questionable.

At the initiative of the Office of the High Representative in B-H, defamation was decriminalized in 2002, which was a big step forward towards enjoying freedom of expression. However, even though the main idea for passing new laws was the decriminalization of defamation that was supposed to contribute to a greater freedom of expression of the media and, consequently, to the overall democratization of the society, the practice is still rather problematic. The reason for this lies mainly in the fact that it was public figures who asked for and were often awarded big compensations for possible violations of their right to honor and reputation. The practice of defamation included in civil proceedings has therefore shown that the highest compensations were awarded to state and public officials which could suggest that courts do not adequately follow the standards of the European Court of Human Rights in Strasbourg. According to these standards it is public figures who must have the highest level of tolerance when it comes to public criticism meaning that their compensations should not be the highest, but observing the situation in Bosnia and Herzegovina, we may wonder whether the practice was/is a form of political pressure on journalists and media and particularly whether such occurrences in traditional media are now extended to Internet, too.

In order to see whether this trend transfers to news portals as well, the study will focus on the existing international literature on the issue of defamation and thus key concepts and definitions which have to do with treatment of defamatory cases. The reference to international standards shall

be brief and as the intention of the study is to present the situation in Bosnia and Herzegovina the thesis will primarily rely on gathering relevant data and cases both from the self-regulatory body and the courts that is, researches done by local organizations.

2. THEORETICAL FRAMEWORK

In a multicultural society which has, in addition, faced violent conflicts and which is hence still trying to recover, the full respect of freedom of expression and adequate implementation of relevant laws is still a big challenge. This is precisely the situation with Bosnia and Herzegovina, a formerly communist state, which in its transition had to make important decisions about the introduction of a legislative framework that would guarantee the right to freedom of expression to be enjoyed and be in line with international standards. However, numerous obstacles kept slowing this process down. They are reflected firstly in the very adoption of necessary legislation which is affected by political pressures, just as it is the case with the content of most media outlets (even public service programming), as they cannot be said to be independent to a great extent. But, the crucial concern is related to the fact that people in Bosnia and Herzegovina turn mainly to the media of their own entity, or, of their own ethnicity. Such situation disables the reforms in the sense that media outlets have a very narrow audience because the people of this divided society stick either to local media outlets they see as 'their own' or, to a greater extent, to those of neighboring countries. The content of media outlets greatly speaks to one constituent people and it is primarily dictated by media owners. However, as the owners are either close to political parties or if they are members of political parties or even public officials, journalists largely serve one political option, and the content is often aimed at criticizing political opponents. This is why it was precisely public figures/owners of media outlets that brought most lawsuits for defamation before courts in Bosnia and Herzegovina and as this trend has been particularly obvious in traditional media, now we may wonder whether the same transferred to online media which were supposed to offer more freedom of expression and contribute to pluralism in the country. Generally, we also wonder if the low quality of media content is the result of political struggles focusing more on ethno-national issues and mutual accusations in

terms of content than on using the possibilities of new technologies to exercise the freedom of expression?

2.1. RESEARCH TOPIC

As one of the fundamental human rights, right to freedom of expression should enjoy protection in legislation of any state. The legislative framework of Bosnia and Herzegovina has been created by the international community after the war and its provisions are in line with international standards and respect of human rights. But implementation of laws, and so defamation laws, too, remains problematic mainly due to political pressures and strong divisions at almost all levels.

Firstly, it is necessary to point out that media had a significant and at times devastating role in provoking the war in ex-Yugoslavia and thus the reform of media landscape was a great task for the international community and creation of a new legislative framework was approached very carefully. Over the years, it was noticed that the situation improved regarding hate speech and revocation of licenses of some media outlets, but other problems appeared and this thesis aims at analyzing them. Namely, high compensations for defamation and especially the fact that they were awarded to public figures could be worrisome for enjoyment of freedom of expression in B-H.

More specifically, it has been noticed that the majority of defamation lawsuits were in fact brought by owners of two biggest-selling newspapers, Dnevni avaz and Oslobođenje. Most often these newspapers sued each other, and their owners, although public figures and one of them being a minister, got very high compensations, the highest in the Federation of Bosnia and Herzegovina since defamation was decriminalized. The situation in Republika Srpska has proven to be similar, although it was primarily politicians who filed lawsuits and received very big amounts of money. However, comparing the two entities, another occurrence was noticed – on several occasions,

lawsuits were brought by a politician from one entity before a court in the other entity and these cases were lost, and soon after, the same plaintiff started a process in his/her own entity and won the same case, showing that not only are there pressures on journalists and editors, but on judiciary as well. Such complex situation has not so far been the topic of many researches or analyses possibly due to the fact that media outlets are often reluctant to report about these issues related to public figures and because media law in B-H in general has been a rather neglected field and it is yet to gain momentum as a field of research. Therefore, this thesis will try to find relevant and specific data to see whether the abovementioned trends extend to the online sphere, analyze them in order to open new questions, contribute with the analysis to the overall research on media law in B-H which is rather insufficient, and possibly offer recommendations for ensuring the respect of freedom of expression in this country in a better way.

2.2. METHODOLOGY

Since the topic of this thesis is focused on Bosnia and Herzegovina, on-site research aims at gathering data contributing to the idea of how freedom of expression is exercised at websites in Bosnia and Herzegovina in terms of defamatory cases, that is, whether the trend of a strong protection of public figures is transferred from traditional media to news portals.

In its theoretical part, the thesis will firstly briefly approach international standards and relevant definitions relying on international authors and documents. In its introductory part, OSCE reports will be used to give a broader picture of defamation and freedom of expression in Europe and then a special attention will be paid to definitions and treatment of public figures in defamatory cases but limiting only to key cases of such type processed at the European Court of Human Rights.

Then the focus will be on theory offered by local sources explaining the particular situation in Bosnia and Herzegovina and the environment in which media operate in general. Particularly, this part of thesis will present the specific post-war and post-communist landscape in B-H and the way in which media reform was going on.

Further on, the thesis will present the relevant legislative framework formed by the international community in B-H and go from its provisions to the actual implementation and point to key cases processed by courts.

Due to the fact that the country is severely divided, this thesis will aim at gathering data from Municipal Court in Sarajevo (Federation of Bosnia and Herzegovina) and the Basic Court in Banjaluka (Republika Srpska) as these are the courts where, in case when they skip the self-regulatory body, plaintiffs turn first as they have the jurisdiction of the first instance. The selection of these courts is based on the primary division of the state into two entities and one district.

The goal will be collecting defamation cases referring to public figures, but only politicians, in the past five years, that is, the proceedings which ended in the period from January 2009 till December 2014. At the same time, the cases will be divided into those referring to traditional (print, radio, TV) and those referring to online media, and then categorized by years in order to see a decrease or an increase of lawsuits in each category. In addition, the results of proceedings will be compared as well – both for traditional and online media that is, the thesis will assess the amount of compensations.

The cases of online media will be narrowed down to news portals (both online publications of traditional media and exclusively online media, and blogs), and will therefore exclude social networks, newsletters and other types of online content.

2.3. OBJECTIVES

- Analysis of trends of defamation lawsuits referring to traditional and online media.
- Analysis of cases regarding public figures/media owners in traditional and in online media.
- Assessment and analysis of political influences on the content of disputable articles: were articles aimed at political/business opponents or at a specific nationality?
- Comparison of the patterns in Bosnia and Herzegovina to current trends of defamation lawsuits online in other countries.

2.4. HYPOTHESIS

a) GENERAL HYPOTHESIS

The institutional system of Bosnia and Herzegovina is extremely complex as the country was divided by Dayton Peace Agreement into two entities and one district, and one entity is divided into ten cantons each with a separate government meaning that there are 14 governments in this country. In such a divided environment it is extremely difficult to have a consensus on almost every issue and hence on the proper application of legislative framework which is divided as well. This is how there are three defamation laws: the Law on Protection against Defamation of FB-H, the Law on Protection against Defamation of RS and the Law on Protection against Defamation of Brcko District. These laws have very slight differences but dilemmas and problems in their application remain the same at all levels. Therefore, this thesis will first turn to description and general analysis of the legislation which is in place in two entities and one district, and then focus on how the law is applied in the complicated system of Bosnia and Herzegovina. On several occasions courts awarded

extremely high compensations to public figures and it is particularly unusual to see that most often it was about the same person (e.g. out of the total number of lawsuits before the Municipal Court in Sarajevo between 2008 and 2012, 76% referred to the two mainstream newspapers and their owners), and these people received compensations amounting to 10,000 to 20,000 KM (5,000-10,000EUR). And thus this paper is wondering how freedom of expression is exercised at websites in Bosnia and Herzegovina in terms of defamatory cases, that is, whether the trend of a strong protection of public figures is transferred from traditional media to news portals.

b) ADDITIONAL HYPOTHESES

- a) Media ownership is closely related to affiliation with political parties, thus the independence of journalists is very limited and they serve the interests of the owners of their outlets.
- b) Instead of embracing the new possibilities offered by new technologies and ensuring the respect of freedom of expression, the trends from traditional media transfer to online media.
- c) The long-term influence of the international community contributed to a greater media freedom than the one found after the war, but with international community leaving, the political control over media is growing.
- d) Compensations for defamation are more moderate now than at the beginning of the application of the laws but the amount of lawsuits coming before courts is not becoming lower.

3. INTERNATIONAL APPROACH

Freedom of expression is considered to the foundation of any free and democratic society and a necessary condition for its development. The right to freedom of expression is thus the lynchpin of democracy, the key to the protection of all human rights, and fundamental to human dignity.

Freedom of expression is guaranteed in several international documents including *Universal Declaration on Human Rights (UDHR)*¹, *International Covenant on Civil and Political Rights (ICCPR)*², etc. It is of a great importance to protect these rights³ so as not to discourage members of the public, for fear of criminal or other sanctions, from voicing their opinions⁴. Furthermore, the right to freedom of opinion and expression is also guaranteed and protected in regional human rights treaties such as – *the European Convention on Human Rights (ECHR) Article 10*⁵, *the American Convention on Human Rights (ACHR) Article 9*⁶, and the *African Charter on Human and Peoples Rights (AHCPR) Article 13*⁷.

Freedom of speech also comes along with the right to be informed and that right does not only relate to the ideas that support the existing democratic society but also to those ideas that openly encourage development of critical thought⁸. This is why every natural and legal entity has the right to disseminate information,⁹ because dissemination of information can be seen as the basis of political and democratic pluralism in a society.

¹ *United Nations General Assembly Resolution, 217A (III)*, 10 December 1948

² *UN General Assembly Resolution 2200A (XXY)*, 16 December 1966, entered into force 23 March 1976

³ *Universal Declaration of Human Rights*, (GA Res 217A (III), UN Doc A/810 adopted in 1948), Article 19

⁴ *Barfod v. Denmark*, App no 11508/85, (ECtHR 22 February 1989)

⁵ *European Convention on Human Rights*, adopted 4 November 1950, entered into force 3 September 1953

⁶ *American Convention on Human Rights*, adopted 22 November 1969, entered into force 18 July 1978.

⁷ *African Charter on Human and Peoples Rights*, adopted 26 June 1981, entered into force 21 October 1986

⁸ *Practical Introduction to the European Standards against Discrimination*, IRZ Belgrade 2013, pp 105-107.

⁹ Reed, Robert and Jim Murdoch, *Human Rights Law in Scotland* (3rd edn), Tottel Publishing, Edinburgh, 2011

Pluralism is also related to the new, online media, which substantially changed the way organizations, communities, and individuals communicate with one another. Communication can now take on many different forms such as Internet forums, blogs, comments, newsletters, etc. It is **journalists**, too, that use social media technology to communicate with their readers and disseminate information, and those who do not write for a formal publication, but instead use the innovative technology are often referred to as “citizen” or “grassroots journalists”. The idea behind citizen journalism is that people without professional journalism training can use the tools of modern technology and global distribution of the Internet to disseminate information, create arguments or fact-check media. The definition of journalism has thus nowadays spread to a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere.¹⁰ Specifically, according to the Council of Europe (CoE) “any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communications” qualifies as a journalist. Freedom of the media as a human right is hence not only reserved for professional journalists, media companies or editorial offices and this right cannot be interpreted only in the context of traditional media but applies to any form of journalistic work for public distribution¹¹.

Apart from the changing definition of journalists, the important concept in terms of freedom of expression is the one of **public figures**. Public figures are persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life whether in politics, the economy, the arts, the social sphere, sport or in any

¹⁰ UN *International Covenant on Civil and Political Rights*, General Comment No. 34, Article 19

¹¹ The Office of the Representative on Freedom of the Media, *The Online Media Self-Regulation Guidebook*, Organization for Security and Co-operation in Europe, Vienna 2013, p 21.

other domain¹². Those who willingly step onto the public stage cannot claim to have the same rights in terms of their level of criticism as private persons. Royalty, actors, academics, politicians, etc. may not seek publicity, yet by definition, their actions are to some extent the object of public eye¹³.

3.1 UNITED NATIONS

Articles 19 and 20 of the International Covenant on Civil and Political Rights (ICCPR) provide the guarantee for the right to freedom of expression. Article 19¹⁴ states that:

1. *Everyone shall have the right to hold opinions without interference.*
2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
 - (a) *For respect of the rights or reputations of others;*
 - (b) *For the protection of national security or of public order, or of public health or morals.*

Considering the analysis of the Article 19 of UDHR, especially the Paragraph 2 it can be concluded that it requires from the States parties to guarantee the right to freedom of expression¹⁵ including the right to seek, receive, and impart information. This right includes

¹² Parliamentary Assembly of the Council of Europe, *Resolution 1165 on the right to privacy*, 1998

¹³ *Von Hannover v. Germany*, App no. 59320/00 (ECtHR 24 June 2004), Concurring Opinion of Judge Župančić.

¹⁴ *International Covenant on Civil and Political Rights*. Adopted by the General Assembly of the United Nations on 19 December 1966, Article 19

¹⁵ Dutertre, Gilles, *Excerpts from the Jurisprudence of the ECtHR*, Sarajevo 2002, pp 270 – 275.

political discourse, discussion on human rights as well as journalism¹⁶. Article 20¹⁷ focuses on a more specific topic which is applied when discussing hate speech and similar:

1. *Any propaganda for war shall be prohibited by law.*
2. *Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*

Both articles aim at protecting human rights, and it is the General comment No. 34 which in its paragraph 50 states that “a limitation that is justified on the basis of Article 20 must also comply with Article 19, paragraph 3,” while paragraph 52 emphasizes that “in every case in which the State restricts freedom of expression it is necessary to justify the prohibitions and their provisions in strict conformity with Article 19.”

3.2 COUNCIL OF EUROPE

The founding document of the Council of Europe is the Convention for the Protection of Human Rights and Fundamental Freedoms, or the European Convention on Human Rights (ECHR), while the implementation of this Convention belongs to the European Court of Human Rights (ECtHR). The crucial article for freedom of expression in this document is Article 10¹⁸ which states the following:

¹⁶ *International Covenant on Civil and Political Rights*, Adopted by the General Assembly of the United Nations on 19 December 1966, Article 20

¹⁷ *International Covenant on Civil and Political Rights*, Adopted by the General Assembly of the United Nations on 19 December 1966, Article 20

¹⁸ *European Convention on Human Rights*, adopted 4 November 1950, entered into force 3 September 1953, Article 10

1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by 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.*

Subject to paragraph 2 of Article 10¹⁹ (Art. 10 (2)), it is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.²⁰ Article 10 applies not only to the content of information but also to the means of dissemination, since any restriction imposed on the latter necessarily interferes with the right to receive and impart information²¹.

3.3 EUROPEAN COURT OF HUMAN RIGHTS

¹⁹ Ibid.

²⁰ *Handyside v. The United Kingdom*, App no. 5493/72 (ECtHR 07 December 1976).

²¹ *Autronic AG v. Switzerland*, ECtHR 22 May 1990, Series A no. 178, p. 23, § 47.

After domestic legal remedies are exhausted, the injured parties turn to the European Court to deal with their human rights being violated, and so in the case of the violation of the right to freedom of expression. The Court deals with actions taken by national authorities in freedom of expression on matters of public interest, and insists on the positive obligations for countries in terms of ensuring freedom of expression. Moreover, “another important factor that contributes to a substantial and sustainable impact of Article 10 is the high level of protection the Court has recognized vis à vis journalistic sources, whistleblowers, gathering of news and information, and more recently, the right of access to information held by public authorities and freedom of expression and information in online media and access to the internet.”²² Therefore, even though the legislations differ among European countries, the umbrella principle of Article 10 is evoked when it comes to both countries with a long democratic tradition and in newly established democracies, but with a note that “the practical and effective impact of Article 10 still differs from one member state to another”, too.²³

The European Court of Human Rights established several basic standards regarding freedom of expression²⁴:

- Debate on serious matters of public interest, particularly if found within the context of political debates enjoys the highest level of protection of European Court;
- The European Court provides a special protection of the right to freedom of expression to media and journalists due to their social role as ‘public watchdogs’ in a

²² Voorhoof, Dirk, *The Right to Freedom of Expression and Information under the European Human Rights System: Towards a more Transparent Democratic Society*, EUI Working Paper RSCAS 2014/12, p.3

²³ Voorhoof, Dirk, *The Right to Freedom of Expression and Information under the European Human Rights System: Towards a more Transparent Democratic Society*, (accessed March 23, 2016), available at: <https://inform.wordpress.com/2014/02/14/the-right-to-freedom-of-expression-and-information-under-the-european-human-rights-system-towards-a-more-transparent-democratic-society-dirk-voorhoof/>

²⁴ *European Court of Human Rights*, (accessed March 23, 2016), available at: <http://www.echr.coe.int/Pages/home.aspx?p=home>

democratic society and punishing them is allowed “only if it is justified by particularly important reasons;”

- The European Court established the norm according to which the boundaries of criticism are much broader when it comes to politicians or public officials, because they consciously expose themselves to public supervision of both journalists and the entire public thus they must express a greater level of tolerance;
- The European Court also established the standard according to which the government (authorities) must put up with a greater level of criticism as its ‘dominant position’ orders avoiding the reach for penalties, especially if there are other ways of responding to unjustified attacks and criticism;
- The European Court makes a clear distinction between facts and opinions (value judgments), because facts can be verified whereas value judgments cannot.

3.3.1 PUBLIC OFFICIALS

The supervision of public over public officials is exercised through media and their role as public watchdog which is confirmed by the Declaration of the Council of Europe on freedom of political debate in the media.²⁵ Specifically, the European Court “has significantly upgraded freedom of expression of individuals, journalists, artists, academics, opinion leaders, NGOs and activists regarding their rights to receive, gather, express and impart information contributing to public debate in society.”²⁶ The main point here is that public officials must tolerate them being the subject of public attention, and that they must tolerate

²⁵ Council of Europe, *Declaration on Freedom of Political debate in Media*, 12 February 2004, (accessed March 23, 2016), available at: <https://wcd.coe.int/wcd/ViewDoc.jsp?id=118995&Lang=en>

²⁶ Voorhoof, Dirk, *The Right to Freedom of Expression and Information under the European Human Rights System: Towards a more Transparent Democratic Society*, EUI Working Paper RSCAS 2014/12, p.3

criticism which may appear in public through media regarding their performance. Public officials and politicians should not expect to have a higher degree of right to honor and reputation than private persons and national legislations should comply with these standards. It is important to emphasize here that public figures are expected to show more tolerance regarding criticism or exaggeration because they voluntarily entered public arena and the limitations of freedom of expression in line with Article 10 of the European Convention²⁷ are to be applied restrictively. Moreover, when dealing with expressions of public interest which refer to politicians, the Court assesses the level of tolerance showed by the politician in question, whether the article(s) in question referred to the matters of public interest, and finally whether there were facts of value judgments and if there were value judgments if they contained enough factual basis.

When discussing defamation of public figures, the Court carefully assesses statements that may refer to an elected politician's morality²⁸, calling them an idiot²⁹ and even comparing their ideas to Nazi propaganda³⁰ and in these cases, there is not necessarily defamation. This is how, for example, in the case of *Oberschlick v. Austria*³¹ in 1997, the Court emphasized: "The applicant's words (idiot) could be considered polemical, but did not on that account constitute a gratuitous personal attack as he had provided an objectively understandable explanation, derived from the speech of the politician concerned this word did not seem disproportional to indignation knowingly aroused by the politician concerned."³² The Court deems that political figures must endure a "close scrutiny of [their] every word and deed by

²⁷ *The European Convention for the Protection of Human Rights and Fundamental Freedoms* Rome, 4 November 1950, entered into force 3 September 1953

²⁸ *Lingens v. Austria*, Application no. 9815/82, ECtHR, 8 July 1986, 45.

²⁹ *Oberschlick v. Austria* (no. 2), Application no. 20834/92, ECtHR, 1 July 1997, 34

³⁰ *Oberschlick v. Austria*, Application no. 11662/85, ECtHR, 23 May 1991, 63

³¹ *Supra note 29*

³² *Oberschlick v. Austria* (no. 2), Application no. 20834/92, ECtHR, 1 July 1997, 34

both journalists and the public at large”³³ and “display a greater degree of tolerance, especially when [they themselves make] public statements that are susceptible of criticism”³⁴ Furthermore, all the circumstances of a particular case are taken into account, and so the context in which disputable statements were published, that is, their benefit for public debates. Specifically, it is taken into account whether there is a public interest and the right of the public to know about the content of the allegations, therefore here we speak about the necessity in a democratic society. Moreover, the Court refers to the matter of public interest when it deals with defamation cases related to governments. And in these cases the limits of acceptable criticism are much wider than when it comes to private citizens and political figures. Similarly, when it comes to judiciary in a certain state, “the Court has been seemingly much more prone to allow for limitations of free speech in order to protect the judiciary’s reputation.”³⁵ If there are statements which refer to individual judges and are “likely to lower them in public esteem ... without any supporting evidence,”³⁶ there is a question of the need to keep the public trust in judiciary because it “must enjoy public confidence if it is to be successful in carrying out its duties.”³⁷ For example, in the case of *Prager and Oberschlick v. Austria*³⁸ the published text criticized judges in Austria stating that they were “arrogant,” and that they “harass” and “ignore the presumption of innocence.”³⁹ The article referred to all criminal judges but also named some of the explicitly, and “the source for his text, according to the first applicant, was, beside his personal experience gained when he attended trials, the

³³ *Lingens v. Austria*, Application no. 9815/82, ECtHR, 8 July 1986, 42

³⁴ *Supra note 34*, 29

³⁵ Irion, Kristina, Cavaliere, P., and Pavli, D. 2015. *Comparative study of best European practices of online content regulation. Law and policy of online content regulation, in particular defamation online, in the light of Albanian legislative proposals*. Study commissioned by the Council of Europe, Amsterdam/ Edinburgh/ Tirana, 2015. Law and policy of online content regulation, in particular defamation online, in the light of Albanian legislative proposals. Study co, p.22

³⁶ *Barfod v. Denmark*, Application no. 11508/85, ECtHR, 22 February 1989, 35

³⁷ *Ibid.*

³⁸ *Prager and Oberschlick v. Austria*, (13/1994/460/541), 26 April 1995, (accessed on 23 March 2016), available at: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>

³⁹ *Prager and Oberschlick v. Austria*, (13/1994/460/541), 26 April 1995, (accessed on 23 March 2016), available at: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>

statements of lawyers and legal correspondents, as well as reports of university researchers.”⁴⁰ In this case, the European Court reflected on the public trust that judiciary must have and that judges are under oath of secrecy thus they cannot respond to criticism and “the Court concluded that the applicants were not found guilty because of the criticism itself, but because of the scope of accusations, which turned to be unnecessarily prejudicial due to the lack of sufficient factual basis.”

This is how the limits of acceptable criticism differ when it comes to different institutions. Those that have a direct role in maintaining a democratic society or lead the country and “the centrality of freedom of speech in the democratic debate has been strongly and vehemently advocated by the Committee of Ministers in the Declaration on freedom of political debate in the media, in which the “right of the media to disseminate negative information and critical opinions concerning political figures and public officials” (which has a mirroring counterpart in the public’s right to receive them) is stated to be a necessary prerequisite to pluralist democracy.”⁴¹

One case that dealt with public figure and the level of tolerance before the European Court was **Lopes Gomes da Silva v. Portugal**.⁴² In this case, a daily newspaper criticized the elections held for the City Council of Lisbon and the leader of the right-wing party, who got the place in the Council was said to be “ideologically....grotesque.... and....a clown....an incredible mixture of crude reactionarism, fascist bigotry and coarse anti-Semitism.”⁴³ The

⁴⁰ Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p. 207

⁴¹ *Declaration on freedom of political debate in the media* adopted by the Committee of Ministers on 12 February 2004

⁴² *Lopes Gomes da Silva v. Portugal*. (37698/97), 28 September 2000, (accessed on 25 March 2016), available at: http://www.iidh.ed.cr/comunidades/libertadexpresion/docs/le_europeo/lopes%20gomes%20da%20silva%20v.%20portugal.htm

⁴³ *Ibid.*

national court charged the director of the newspaper of defamation, but the European Court had a different opinion. Namely, at this point it emphasized the importance of the text for public interest and that the text had its place in a political debate: "the limits of acceptable criticism are wider with regard to a politician acting in his public capacity than in relation to a private individual. A politician inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance." It is also important to note that even though the text was written in the style of exaggeration, the Court still decided that texts with such tone enjoy the protection regarding freedom of expression and "journalistic freedom also covers a possible resort to exaggeration or even provocation."⁴⁴ An important issue regarding this case is that the politician himself published texts with a similar tone at the same time when the applicants published disputable phrases and that by offering the public both sides of the story enabled the citizens to ultimately form their own opinion on the matter.

One of the milestone cases before the European Court when it comes to public figures is the case of **Lingens v. Austria**.⁴⁵ In this case, the Court concluded that the limits of acceptable criticism of a politician are wider than the limits of private persons, and even though political figures still have some level of protection under Article 10, it is the public interest that needs to be taken into account. This case was dealt with in 1986, and it set some of the main principles related to the Court's practice in terms of freedom of expression. Lingens was a journalist who published two texts in the Profile magazine, and the articles criticized the federal chancellor, Bruno Kreisky, on the matter of his opinion of the leader of a political party-a former member of the SS brigade in WWII, and on the matter of his attack on

⁴⁴ Ibid.

⁴⁵ *Lingens v. Austria* (9815/82), 8 July 1986, (accessed on 25 March 2016), available at: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>

Simon Wiesenthal who publicly spoke about the political activities of this political figure. The County Court of Vienna partially adopted the lawsuit for defamation brought by Kreisky and fined Lingens with 20,000 shillings, and after complaints to the Court of Appeal, the fine was lowered to 15,000 shillings. But the case reached the European Court, too, and this Court eventually decided that by charging Lingens, the state interfered in his right to freedom of expression. When dealing with this case, the Court emphasized the protection of freedom of expression even when it comes to statements which may offend, shock and disturb, and stated that “the task of mass media, namely, is to make information and ideas about political issues available and on the other hand, the public has the right to receive such information.”⁴⁶ Most importantly, the European Court explicitly stated that the “scope of acceptability of criticism of political leaders is wider than the one of the criticism of regular individuals,” and “even though politicians enjoy the protection in accordance with Article 10, paragraph 2, demands for the protection of their reputation have to be measured in relation to the interest of having an open discussion in the society related to political issues.” In this case, the text referred to matters of public interest and referred to Kreisky only as a political figure, and not as a private person, which is why Lingens’ criticism was acceptable and, moreover, some of the disputable expressions were clearly value judgments and his actions were made in good faith.

Another important case in terms of scope of tolerance of public figures is the case of **Krasulya v. Russia**.⁴⁷ In this case, newspaper 'Noviy Grazhdanskiv Mir' published one article signed with a pseudonym and spoke about the decision to change the process of electing a mayor in the city (not by the citizens but by the legislative body in the city) and

⁴⁶ *Lingens v. Austria* (9815/82), 8 July 1986, (accessed on 25 March 2016), available at: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>

⁴⁷ *Krasulya v. Russia* (12365/03), (accessed on 25 March 2016), available at: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>

that such decision was the result of pressures coming from the governor of the region in question who is “loud, ambitious and completely incompetent.”⁴⁸ The editor in chief of the newspaper was sued for defamation by the governor and the local court charged him with defamation and for one year he was on parole. When the case came before the European Court, the Court stated that the governor, as all other politicians, voluntarily exposed his actions to the public, that the article had a sufficient factual basis, that “there was very little scope under Article 10 for restriction of political debate on questions of public interest,” and finally that “the article’s subject matter did indeed raise important issues of public concern and contributed to an on-going political debate: it concerned the decision of the town legislative body to abolish mayoral elections.”⁴⁹ In addition to this the Court concluded that the article contained “subjective value judgments and could obviously not be proved,” and that “the article did not resort to offensive language and did not go beyond the generally accepted degree of exaggeration or provocation.”⁵⁰ The final decision made by the Court referred to the suspension of the prison sentence for the editor in chief.

Another case before the European Court emphasized the importance of media contributing to a political debate and that the limitations of criticism of political activities are wider when it comes to the government, too. In the case of **Bowman v. UK**⁵¹, the European Court determined that “a debate on serious matters of public interest, and particularly a political debate, enjoys the highest level of protection, which is especially valid for a public debate during election campaigns.” In this case, the Court pointed to media reporting in times of elections being crucial for any democratic society, and that supervision of public over the

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ *Bowman v. United Kingdom* (141/1996/762/959), 19 February 1998, (accessed on 25 March 2016), available at: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>

government's activities is especially significant at this time. Moreover, "the government should not use its dominant position to approach the measures which limit freedom of expression, especially when it comes to criminal proceedings."⁵²

The European Court also dealt with cases which required a greater protection for the statements referring to issues of **public interest**. The important case here is *Tromsø and Stensaas v. Norway*.⁵³ In this case the Court reflected on journalists respecting professional standards and acting "with good intentions in order to get correct and reliable information in accordance with the ethics of journalism." Journalists criticized the technique of seal hunting on one ship but they did published the opinion of the other side, too, that is, of the seal hunters and its goal was to present the issue of public interest to the public. The Court concluded that some statements may had been harsh and that they were partially untrue but that it was important to determine "whether in one specific case journalists acted in good faith with a goal to provide public with correct and reliable information in accordance with the code of ethics of journalists."⁵⁴ The concept of correct and reliable information also came into question here, because the Court mentioned that "journalists cannot be asked to verify the information to the same level as other persons, because in this way they would most often not be able to do their job well," but they still must "make big efforts and to be professional when establishing the facts relevant for a disputable statement."⁵⁵ In other similar cases, too, it has been acknowledged that journalists cannot spend the equal amount

⁵² Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p86

⁵³ *Tromsø and Stensaas vs. Norway* (21980/93) 20 May 1999, (accessed on 25 March 2016), available at:<http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/2422ec00f1ace923c1256681002b47f1/887a2420f72746ebc1256783003c2213?OpenDocument>.

⁵⁴ *Tromsø and Stensaas vs. Norway* (21980/93), 20 May 1999, (accessed on 25 March 2016), available at: <http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/2422ec00f1ace923c1256681002b47f1/887a2420f72746ebc1256783003c2213?OpenDocument>.

⁵⁵ Srdić Mladen, *Defamation in Court Practice*, in Halilović, Mehmed and Džihana Amer, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.169

of time for verification of facts as some state investigation bodies because “news has an expiration date and if it is published with delay, even with a small delay, it can be deprived of every value and interest to a significant extent.”⁵⁶

One of the cases dealing with matters of public interest was the one of *Thorgeir Thorgeirson v. Iceland*.⁵⁷ In this case, the newspapers published two articles referring to the brutality of police. In this case, the European Court decided that “whilst the press must not overstep the bounds set, it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them.”⁵⁸ The Court held a same opinion when it came to the matter of public health in the case of *Bergens Tidende and Others v. Norway*.⁵⁹ The newspaper published several articles related to the work of a plastic surgeon and dissatisfied patients. The Court concluded that the articles “concerned an important aspect of human health and as such raised serious issues affecting the public interest.”⁶⁰ In addition to this, the issue of the source came up, too, and “news reporting based on interviews constitutes one of the most important means whereby the press is able to play its vital role of “public watchdog.”⁶¹ Similarly, in a judgment from 2013, *Youth Initiative for Human Rights v. Serbia*, the European Court of Human Rights referred to the significant role of non-governmental organizations in terms of public interest, and stated that: “when a non-governmental

⁵⁶ *Sunday Times v. United Kingdom* (13166/87), 1991, (accessed on 25 March 2016), available at:

<http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>

⁵⁷ *Thorgeir Thorgeirson v. Iceland*, 27 January and 28 May 1992, (accessed on 25 March 2016), available at:

http://www.iidh.ed.cr/comunidades/libertadexpresion/docs/le_europeo/thorgeir%20thorgeirson%20v.%20iceland.htm

⁵⁸ *Lingens v. Austria* (9815/82), 8 July 1986, (accessed on 25 March 2016), available at:

<http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>

⁵⁹ *Bergens Tidende and Others V. Norway*, Application no. 26132/95, 2 May 2000. (accessed on 25 March 2016), available at:

http://www.iidh.ed.cr/comunidades/libertadexpresion/docs/le_europeo/bergens%20tidende.htm

⁶⁰ *Bergens Tidende and Others V. Norway*, Application no. 26132/95, 2 May 2000. (accessed on 25 March 2016), available at:

http://www.iidh.ed.cr/comunidades/libertadexpresion/docs/le_europeo/bergens%20tidende.htm

⁶¹ *Ibid.*

organization is involved in matters of public interest, such as the present applicant, it is exercising a role as a public watchdog of similar importance to that of the press.”⁶²

3.3.2 COMPENSATIONS

The European Court also determines the level of proportionality of adjudged measure and “unreasonably severe sanctions or too high compensations for the damage, even in the case of statements proved to be defamatory, will represent a violation of guaranteeing of freedom of expression.”⁶³ The Court has particularly emphasized that measure in the form of imprisonment in the case of defamation can be too severe and that it can cause a chilling effect regarding the exercise of freedom of expression. However, in exceptional cases of extremely harsh statements which jeopardize rights of others or national security and so “the Court reminds that conducting criminal punitive measures against someone who enjoys the right to freedom of expression can be compatible to Article 10...only in exceptional circumstances, especially when other basic rights are seriously violated.”⁶⁴ The Court made a similar conclusion when deciding on *Bodrožić and Vujin v. Serbia*: “Resorting to persecution against journalists for alleged insults which triggered off the questions of public debates, as it is in this case, should be considered as adequate only in exceptional circumstances which include the most serious attack on the rights.”⁶⁵ But the Court still reiterates that in case there are measures other than imprisonments available, then using the latter may represent the

⁶² Voorhoof, Dirk, *The Right to Freedom of Expression and Information under the European Human Rights System: Towards a more Transparent Democratic Society*, EUI Working Paper RSCAS 2014/12, p.3

⁶³ Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p. 57

⁶⁴ *Gavrilović v. Moldova* (ECHR 2009/6 25464/05) 15 December 2009, (accessed on 25 March 2016), available at: <http://www.ncbi.nlm.nih.gov/pubmed/20443444>

⁶⁵ *Bodrožić and Vujin v. Serbia* (38435/95) 23 June 2009, (accessed on 25 March 2016), available at: <http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/2422ec00f1ace923c1256681002b47f1/94821f99c573f9b9c12575e10032310e?OpenDocument>

violation of Article 10. Another case from Serbia came before the European Court of Human Rights regarding the criminal sentence: **Lepojić v. Serbia**⁶⁶. In this case, domestic courts found Zoran Lepojić guilty because of statements in text titled “A Despotic Mayor”: “Therefore, Petar Jončić... in his ‘JUL euphoria’, in line with the slogan “money talks” and for his own existential needs, [P.J.] has continued with his near-insane spending of the money belonging to the citizens of the Municipality on ... sponsorships ... [and] ... gala luncheons”⁶⁷ Domestic court stated that the mayor had a good reputation and had it been different, the citizens would not have elected him for a mayor and that he was leading a successful company, “and that all this shows that the harm that the plaintiff suffered is a lot more important than it would have been in the case of any other regular citizen.”⁶⁸ When this case came before the European Court, it decided that there was a violation of the right to freedom of expression because this right also encompasses statements that may offend, disturb or shock. The European Court therefore concluded that "the applicant had clearly written the impugned article in the course of an ongoing election campaign and in his capacity as a politician, notwithstanding the Government’s submission concerning the specifics of his signature. The target of the applicant’s criticism was the Mayor, himself a public figure, and the word ‘sumanuto’ was obviously not used to describe the latter’s mental state but rather to explain the manner in which he had allegedly been spending the money of the local taxpayers." In addition to this, the Court mentioned: “In view of the above and especially bearing in mind the seriousness of the criminal sanctions involved, as well as the domestic courts’ dubious reasoning to the effect that the honor, reputation and dignity of the Mayor ‘had more significance than ... [the honor, reputation and dignity] ... of an ordinary citizen’, the Court finds that the interference in question was not necessary in a

⁶⁶ *Lepojić v. Serbia* (13909/05), 6 November 2007, (accessed on 25 March 2016), available at: <http://www.5rb.com/case/Lepojic-v-Serbia>

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

democratic society. Accordingly, there has been a violation of Article 10 of the Convention.”⁶⁹

The alternative measures are primarily including adjudging compensations for defamatory statements, but which still need to be proportional to damage caused in terms of their amounts. The case of **Tolstoy Miloslavsky v. United Kingdom**⁷⁰ is an example of such drastic measure when it comes to the amount of compensation. In this case, domestic courts concluded that the article in question was defamatory regarding the allegations about the warden of a private school and accusations of past war crimes, and the compensation to be paid was 1,500,000 GBP. Such an enormous amount was, according to the European Court, a violation of the right to freedom of expression "... it does not mean that the jury was free to make any award it saw fit since, under the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered. The jury had been directed not to punish the applicant but only to award an amount that would compensate the non-pecuniary damage to Lord Aldington [victim]." Moreover, " the scope of judicial control, at the trial and on appeal, at the time of the applicant's case did not offer adequate and effective safeguards against a disproportionately large award," and "having regard to the size of the award in the applicant's case in conjunction with the lack of adequate and effective safeguards at the relevant time against a

⁶⁹ *Lepojić v. Serbia* (13909/05), 6 November 2007, (accessed on 25 March 2016), available at: <http://www.5rb.com/case/Lepojic-v-Serbia>

⁷⁰ *Tolstoy Miloslavsky v. United Kingdom* (18139/91), 13 July 1995, (accessed on 25 March 2016), available at: <http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/1d4d0dd240bfec7ec12568490035df05/8b6bd2df00f0abb1c1256640004c2d62?OpenDocument>

disproportionally large award, the Court finds that there has been a violation of the applicant's rights under Article 10 of the Convention."⁷¹

The issue of a high compensation also appeared in the case of **Steel and Morris v. UK**.⁷²

The applicants before the European Court were members of Greenpeace in London, which during the eighties lead a campaign against McDonald's and distributed a leaflet titled 'What's wrong with McDonald's?' After McDonald's brought a lawsuit for defamation against them, the defense stated that the statements in the leaflet were substantially true and that they were a fair comment. The court proceedings in this case took 313 days and it was the longest trial in English history, also called 'The McLibel Case'.⁷³ The courts adjudged a compensation of 40,000 GBP. The defendants claimed that they were not involved in the production of leaflet but that they were active only during the campaign. In the end, the European Court concluded that: "The lack of procedural fairness and equality which has already been established by the Court, caused the violation of Article 10. Beside this, according to the Convention, the compensation for damage due to defamation has to be reasonably proportional to the harm caused to one's reputation. It is true that no steps were taken to enforce the damages award against either applicant, the fact remains that the substantial sums awarded against them have remained enforceable. In these circumstances, the Court finds that the award of damages in the present case was disproportional to the legitimate aim served hence there was a violation of Article 10."⁷⁴

⁷¹ *Tolstoy Miloslavsky v. United Kingdom* (18139/91), 13 July 1995, (accessed on 25 March 2016), available at: <http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/1d4d0dd240bfec7ec12568490035df05/8b6bd2df00f0abb1c1256640004c2d62?OpenDocument>

⁷² *Steel and Morris v. United Kingdom* (68416/01), 15 February 2005, (accessed on 25 March 2016), available at: http://www.uniset.ca/other/cs5/echr_mcdonalds.html

⁷³ BBC, *McLibel: Longest case in English history*, 15 February 2005, (accessed on 25 March 2016), available at: http://news.bbc.co.uk/2/hi/uk_news/4266741.stm

⁷⁴ *Steel and Morris v. United Kingdom* (68416/01), 15 February 2005, (accessed on 25 March 2016), available at: http://www.uniset.ca/other/cs5/echr_mcdonalds.html

3.4 COUNCIL OF EUROPE AND EUROPEAN COURT DEALING WITH ONLINE MEDIA

The Council of Europe addressed the emerging issues of new technology on several occasions in order to protect the right to freedom of expression in online environment, too, and “as a guiding principle, it has been established that communication happening on the Web should not be subject to any stricter content rules or restrictions than any other medium.”⁷⁵ Moreover, “state interventions into the right to freedom of expression and media freedoms in particular should be guided by similar general regulatory principles irrespective whether or not professional media outlets, intermediaries or individual users are involved.”⁷⁶ In this way the Internet is acknowledged not to be a new platform which requires a tougher or a completely new regulation, but a platform which provides a new ways of enjoying freedom of expression. The Council of Europe therefore states that the changes must be taken into account when it comes to media policy as well as the nature of the Internet “embracing a notion of media which is appropriate for such a fluid and multi-dimensional reality,” and “the response should be graduated and differentiated according to the part that media services play in content production and dissemination processes.”⁷⁷ The main challenge is to adapt to the new environment and apply and understand the existing legislative provisions to these new media activities and thus be flexible in order to follow the fast rhythm of changes, and hence ensure the protection of freedom of expression. The

⁷⁵ *Declaration on freedom of communication on the Internet*, adopted by the Committee of Ministers on 28 May 2003.

⁷⁶ Irion, K., Cavaliere, P., and Pavli, D. 2015. *Comparative study of best European practices of online content regulation. Law and policy of online content regulation, in particular defamation online, in the light of Albanian legislative proposals*. Study commissioned by the Council of Europe, Amsterdam/ Edinburgh/ Tirana, 2015, p.14

⁷⁷ *Recommendation of the Committee of Ministers to member states on a new notion of media*, CM/Rec(2011)7, adopted by the Committee of Ministers on 21 September 2011, para. 6

position of the Council of Europe is that “each actor whose services are identified as media or as an intermediary or auxiliary activity benefit from both the appropriate form (differentiated) and the appropriate level (graduated) of protection and that responsibility is also delimited in conformity with Art 10 of the ECHR and other relevant CoE standards.”⁷⁸

3.4.1 WHAT IS MEDIA?

With the expansion of the technology also came the evolution of the classic term of “journalism” and “journalist”. It is impossible to avoid the term “citizen journalism” which describes the private individuals doing what reporters do – report information. That information can have various forms from text, picture, video, and podcast to report of city council on a blog. The term “journalist” means any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication⁷⁹. Mass communication therefore includes new technologies, too, and the role of offline and so online media still encompasses: “truthfulness and accuracy of information, good faith or public interest; a sharp difference in the assessment of content from that of opinion, with the latter enjoying greater freedom, and a right to partake in satire and even exaggeration”⁸⁰ Since the new media are often said to have “a much more immediate and powerful effect”⁸¹ than e.g. print media, the challenge at

⁷⁸ Ibid. para. 7

⁷⁹ Council of Europe Committee of Ministers (COM), *Recommendation No. R (2000) 7 of the COM to member states on the right of journalists not to disclose their sources of information*, Appendix to Recommendation No. R (2000) 7

⁸⁰ Council of Europe Committee of Ministers (COM), *Recommendation of the Committee of Ministers to member states on a new notion of media*, CM/Rec(2011)7, adopted by the Committee of Ministers on 21 September 2011, para.67

⁸¹ *Freedom of Expression, the Media and Journalists: Case-law of the European Court of Human Rights*, Tarlach McGonagle & Francisco Javier Cabrera Blázquez (Eds), European Audiovisual Observatory, Strasbourg 2013, p.116

this point became the distinction between media and intermediaries, and thus there are several indicators in the Recommendation⁸² that aim at clarifying this issue:

- self-categorization as a media outlet, membership in professional media organizations, working methods analogue to those typical of media organizations, and, in the new media environment, the capacity and the availability of technical means (e.g. platform or bandwidth) to disseminate content to large audiences online

- editorial control on the disseminated content, which can take various forms including those typical of some online platforms such as ex-post moderation of UGC or predetermined internal procedures to comply with peer review and take down requests, when the ultimate decision, despite of the active involvement of users stay within the relevant organisation with ultimate decisions taken according to an internally defined process and having regard to specified criteria

- compliance with professional, ethical and deontological standards, while conversely expecting to benefit from widely common legal privileges attached to the legal professions

The difference between a media outlet and an intermediary lies in these indicators and whether a means of communication fulfils them or not. Based on this, and unlike media outlets, intermediaries do not have control over the content posted by their users, which has been acknowledged on several occasions, but which was disputable in some cases, too.

3.4.2 RIGHT TO FREEDOM OF EXPRESSION AND THE RIGHT TO HONOR AND REPUTATION

⁸² Council of Europe Committee of Ministers (COM), *Recommendation of the Committee of Ministers to member states on a new notion of media*, CM/Rec(2011)7, adopted by the Committee of Ministers on 21 September 2011, para.16-22

It was mentioned above that restrictions imposed on freedom of speech are to be taken narrowly, but achieving balance between the right to freedom of expression and the right to honor and reputation has become quite a task in the light of new technologies. But the practice of the European Court of Human Rights has so far shown that “the balance is most likely to tip on the side of freedom of expression when the nature of the speech is of relevance to the public interest, as stressed at last in the Declaration on freedom of political debate in the media.”⁸³ But the practice regarding achieving the balance varies across member states and “this has led to substantial variations in the stringency of defamation law or case law, for example different degrees of attributed damages and procedural costs, varying definitions of first publication and the related statute of limitations or the reversal of the burden of proof in some jurisdictions.”⁸⁴ So legislations in most countries aim to be in line with the standards of the court and prevent freedom of speech becoming jeopardized.⁸⁵ The European Court of Human Rights in these circumstances also reflects on the state intervention and limitations of freedom of speech when it comes to rights of others and assesses the nature and the content of speech in question. For example, in the case of *Węgrzynowski and Smolczewski v. Poland*, the Court dealt with a request for removal of an online newspaper article and approached balancing the right to reputation and the right to freedom of expression. The Court determined that there was no need for a complete removal of an article but that “a rectification or an additional comment on the website would

⁸³ *Declaration on freedom of political debate in the media* adopted by the Committee of Ministers on 12 February 2004. Cf. para. I: “Pluralist democracy and freedom of political debate require that the public is informed about matters of public concern, which includes the right of the media to disseminate negative information and critical opinions concerning political figures and public officials, as well as the right of the public to receive them.”

⁸⁴ Steering Committee on the Media and New Communication Services, ‘Draft declaration of the Committee of Ministers on the desirability of international standards dealing with forum shopping in respect of defamation, “libel tourism”, to ensure freedom of expression’, CDMC(2011)018 Rev 8, 2012, p. 2

⁸⁵ *Recommendation 1589* (2003), adopted by the Parliamentary Assembly of the Council of Europe on 28 January 2003.

have been a sufficient and adequate remedy.”⁸⁶ More precisely, regardless of the fact it may be easier to resolve possible defamation issues by a quick removal from a website, in general, the role of media is to contribute to public debate online and offline and offer an insight into the activities of public figures so as to keep the public informed.

3.4.3 LIABILITY OF PROFESSIONAL JOURNALISTS IN THE CASE OF USER-GENERATED CONTENT AND LIABILITY OF INTERNET SERVICE PROVIDERS

The importance of new technologies for freedom of expression is primarily reflected in possibilities for citizen participation and hearing the voice of wide audience. But at this point we must pose a question of how to distinguish between the voice of citizens and the voice of media on these new platforms and if there should be a distinction in the first place. Social networks, blogs, forums, newsletters and other new means of communication in terms of defamation cases imposed the questions of – who is the author; who is liable? The courts find themselves before many uncertainties regarding this matter. The Recommendation on a new notion of media by the Committee of Ministers provided the abovementioned indicators for professional media and its position is that professional journalists still have a bigger liability than e.g. citizen journalists, and that they have the same duties and responsibilities as in traditional media-acting in good faith, respect of professional ethics, etc. This is how “the professional standards apply irrespectively of whether a journalist is disseminating content through professional means (e.g. the newspaper they work for) or a personal, non-professional outlet (e.g. the journalist’s personal Twitter account).”⁸⁷ The difference between professional journalists and other actors in the Internet arena is therefore particularly important because not same sanctions can be imposed on those who work in the

⁸⁶ Voorhoof, Dirk, *The Right to Freedom of Expression and Information under the European Human Rights System: Towards a more Transparent Democratic Society*, EUI Working Paper RSCAS 2014/12, p.7

⁸⁷ *Fatullayev v. Azerbaijan*, application no. 40984/07, 22 April 2010, (accessed on 26 March 2016), available at: www.oas.org

field of journalism irrespective of the platform on which they operate and on those who simply post messages on forums, social networks, etc.

In a case before the European Court of Human Rights, *Pravoye Delo and Shtekel v. Ukraine*, “a local newspaper had republished an allegedly defamatory letter originally found on a news website and was then convicted before the local courts. The lack in the national law of sufficiently specific provisions to grant the right to republish libel from the Internet, as it is instead the case in regards of other media, had deprived the defendants of the corresponding defense.”⁸⁸ When the case came before the European Court, it was concluded that the journalists respected professional standards and that the lack of legal provisions regarding the Internet in this case harmed the enjoyment of freedom of expression, “especially since the lack of explicit provisions made it difficult for the media operators to foresee the possibility of receiving penalties as consequences of their behavior.”⁸⁹

The question of Internet Service Providers (ISPs) has become particularly intriguing regarding liability for defamatory or any other disputable content online. The parallel drawn in these cases is most often the one between publishers and ISPs, because we can wonder if the same liability can be attributed to ISPs as it is to publishers. But even though national legislatures often pose these questions, “ISPs could only be assimilated to publishers in case they retain a significant degree of editorial control on the published content; central to question on the liability of ISPs is thus the degree of editorial control they retain on the content uploaded onto the platforms they operate.”⁹⁰ The true question hence is: is there any control or not, that is, are ISPs active or passive in this regard? The tendency of the Council

⁸⁸ *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, application no. 33014/05, 5 May 2011, (accessed on 26 March 2016), available at: hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001

⁸⁹ *Ibid.*

⁹⁰ Irion, K., Cavaliere, P., and Pavli, D. 2015. *Comparative study of best European practices of online content regulation. Law and policy of online content regulation, in particular defamation online, in the light of Albanian legislative proposals*. Study commissioned by the Council of Europe, Amsterdam/ Edinburgh/ Tirana, 2015, p.26

of Europe regarding this matter is to attribute a limited degree of liability to ISPs. On the other hand, when discussing the issue of comments containing severe statements (i.e. hate speech), the European Court may require a portal in question to monitor the content, but “this does not suggest that a similar request could be considered lawful if any less significant breach of a third party’s fundamental right was at stake.”⁹¹ The tasks assigned to ISPs hence must be assessed carefully and on a case-to-case basis.

⁹¹ *Delfi AS v. Estonia*, application no. 64569/09, 18 March 2015. Para 158, (accessed on 26 March 2016), available at: <http://www.5rb.com/case/delfi-v-estonia/>

3.5 ONLINE CONTENT REGULATION

The Council of Europe and the European Union institutions approached the issue of online media in the way to ensure freedom of expression in them without attributing more control over the Internet content. Their efforts in enabling the enjoyment of freedom of expression on the Internet focused on advocacy that state intervention in online sphere should not differ from the one exercised in offline sphere and “freedom of expression, information and communication...should not be subject to restrictions other than those provided for in Article 10 of the ECHR, simply because communication is carried in digital form.”⁹² When dealing with online sphere, the states should respect the right to freedom of expression of all actors, take into account all circumstances and roles when deciding on possible measures of limitation, and, as the more recent initiative state “promote frameworks for self- and co-regulation by private sector...(as well as).. interoperable technical standards in the digital environment, including those for digital broadcasting, that allow citizens the widest possible access to content.”⁹³

An important case here is *Delfi v Estonia*⁹⁴ because of the issue of discussing whether there was an active role of the website when it comes to enabling third-party comments. More specifically, Delfi is one of the largest news portals in Estonia which enables its visitors to comment on texts but with a policy to limit any unlawful content, based on a notice and take down system. The story in question referred to ice bridges, and some of the comments

⁹² Voorhoof, Dirk, *European Media Law Collection fo Materials 2015-2016*, (accessed on 26 March 2016), available at: <http://www.mijnwetboek.be/en/producten/European-Media-Law-2015-2016>

⁹³ Ibid.

⁹⁴ *Delfi AS v. Estonia*, application no. 64569/09, 18 March 2015. Para 158, (accessed on 26 March 2016), available at: <http://www.5rb.com/case/delfi-v-estonia/>

posted by users contained offensive statements. When the lawsuit for comments was brought, it was requested that Delfi removes about 20 comments, which it did, and to pay damages, which it did not. Delfi based its defense on insisting they were a neutral intermediary and that they are not liable for the content posted. When the case came before the European Court, it was concluded that: “while the Court acknowledges that important benefits can be derived from the Internet in the exercise of freedom of expression, it is also mindful that liability for defamatory or other types of unlawful speech must, in principle, be retained and constitute an effective remedy for violations of personality rights.”⁹⁵ However, the the Grand Chamber noted that “Delfi cannot be said to have wholly neglected its duty to avoid causing harm to third parties, but the automatic word-based filter failed to select and remove odious hate speech and speech inciting violence posted by readers and thus limited its ability to expeditiously remove the offending comments.”⁹⁶ But the main conclusion was also that this rule cannot apply to other forms of communication on the Internet such as forums, social networks, etc. and a clear distinction is made between a professional news portal and e.g a platform which does not contribute to the content in any way. But on the other hand “there are severe doubts however if this limitation of the impact of the judgment is a pertinent one, reserving the (traditional) high level of freedom of expression and information only for social media, personal blogs and “hobby” (§ 116). It is indeed hard to imagine how this “damage control” will help.”⁹⁷

Most recent case of liability for online comments is the one as of 2 February 2016, when European Court of Human Rights decided on intermediary liability in *Magyar*

⁹⁵ *Delfi AS v. Estonia*, application no. 64569/09, 18 March 2015. Para 158, (accessed on 26 March 2016), available at: <http://www.5rb.com/case/delfi-v-estonia/>

⁹⁶ Voorhoof, Dirk, *Delfi AS v. Estonia: Grand Chamber confirms liability of online news portal for offensive comments posted by its readers*, (accessed on 26 March 2016), available at: <http://strasbourgoobservers.com/2015/06/18/delfi-as-v-estonia-grand-chamber-confirms-liability-of-online-news-portal-for-offensive-comments-posted-by-its-readers/>

⁹⁷ *Ibid.*

Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary (Application No. 22947/13)([2016] ECHR 135). In this case there were two operators of website: Magyar Tartalomszolgáltatók Egyesülete (MTE), a self-regulatory body of content service providers in Hungary, and Index.hu Zrt, the operator of a major Hungarian online news portal. The comments on both were allowed, but there was also a disclaimer stating that the authors of the comments were responsible for any posted content. In 2010, users commented on both websites on the story on real estate management by using problematic language, and after the real estate company brought a lawsuit, the websites removed the comments that allegedly offended the plaintiff. Ultimately, the Hungarian Supreme Court stated that the applicants could not be treated as “intermediaries” and “the mere fact that the comments were published on the Applicants’ website domains was enough to impose liability for infringement of the real estate company’s personality rights caused by those comments.”⁹⁸ When the case came before the European Court of Human Rights it was concluded that the applicants “could foresee, to a reasonable degree, the consequences of their activities under the domestic laws. In doing so, the Court placed considerable emphasis on the fact that the Applicants were a self-regulatory body and a media publisher running “a large internet news portal for an economic purpose”.⁹⁹ This part is especially important because it considers the actions taken by the websites, the nature of the websites and the nature of the comments and “this judgment will not completely allay news websites’ concerns, following *Delfi v. Estonia*, as to the added litigation risks that may accompany their enabling of user comments.... (however) what constitutes “clearly unlawful comments” is still up for debate.”¹⁰⁰

⁹⁸ McCully, Jonathan, *Case Law, Strasbourg: Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary, Intermediary liability (again)*, 7 February 2016, (accessed 27 March 2016), available at: <https://inform.wordpress.com/2016/02/07/case-law-strasbourg-magyar-tartalomszolgáltatok-egyesulete-and-index-hu-zrt-v-hungary-intermediary-liability-again-jonathan-mccully/>

⁹⁹ Ibid.

¹⁰⁰ Ibid.

At this point it is important to notice the differences between the European Court of Justice (ECJ) and European Court of Human Rights (ECtHR). The European Court of Justice focuses on European Union (EU) law and EU member states, whereas the European Court of Human Rights bases its decisions on European Convention on Human Rights and focuses on the 47 member states of the Council of Europe. In terms of human rights protection when it comes to the two courts, there are two significant legal documents: the Charter of Fundamental Rights of the EU and the already mentioned European Convention of Human Rights. It is important to state that when the Charter refers to rights which harmonize with the ECHR, "the meaning and scope of those rights shall be the same"¹⁰¹. However, "while the ECJ can be seen as an integrative agent, striving for further EU harmonization, the ECtHR's mandate is that of providing minimum human rights standards protection, beyond which wider scope is left for pluralism and national sovereignty within the EU."¹⁰² With regard to the national sovereignty and national legislation, ECJ can invoke the priority of the EU legislation and the need of changing actual laws, while on the other hand, the ECtHR does not have such power to urge states of the same. Therefore, "ECtHR ruling will result in a "more gradual (and perhaps less politically costly) implementation" of the decision than in the case of an adverse ECJ ruling."¹⁰³ Furthermore, another difference between the two courts can "be explained, at least in part, by the economic background of the EU compared to the human rights background of the ECHR. But the Court of Justice's mandate is clearly broader in that the European Union has meanwhile transcended the stage

¹⁰¹ European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, Article 52(3)

¹⁰² Imbarlina, Elizabeth, *The Roles and Relationship between the Two European Courts in Post-Lisbon EU Human Rights Protection*, 12 September 2013, (accessed on 27 March 2016), available at: <http://www.jurist.org/datetime/2013/09/elena-butti-lisbon-treaty.php>

¹⁰³ Ibid.

of market integration.”¹⁰⁴ But the two courts still take into account each other’s judgments when it comes to human rights, even though “the case law of the ECJ shows that where fundamental rights come into conflict with the economic Treaty freedoms, the economic freedoms may sometimes prevail over fundamental rights,” but the overall acknowledgement is that “fundamental rights in Europe need to be adjudicated in a ‘multi-layered’ or pluralist fashion and can no longer – also for the EU itself – be considered as a mere afterthought.”¹⁰⁵

Overall, what changed in exercise of the human right to freedom of expression is the number of platforms for this exercise because “the internet has now become one of the principal means of exercising the right to freedom of expression and information.”¹⁰⁶ Accordingly, the number of actors which may be liable for problematic content increased, too. An interesting case before the Court of Justice of the European Union is *Google Spain SL, Google Inc. v AEPD, Mario Costeja González*.¹⁰⁷ In this case, the Spanish newspaper *La Vanguardia* published two announcements, made on the order of the Spanish Ministry of Labour and Social Affairs, in their print edition and online, that there was a forced sale of properties due to social security debts. One of the owners of these properties contacted *La Vanguardia* and made a complaint that the announcement was shown in Google search when his name was typed, asking them to remove the content in question as years passed and it was not relevant anymore, but the newspaper refused to do so. The applicant turned to the Spanish Data Protection Agency (AEPD) regarding the removal of

¹⁰⁴ Vries, S.A., *Editorial EU and ECHR: Conflict or Harmony?*. *Utrecht Law Review*. 9(1), 2013, pp.78-79, (accessed on 27 March 2016), available at: <http://doi.org/10.18352/ulr.214>

¹⁰⁵ Vries, S.A., *Editorial EU and ECHR: Conflict or Harmony?*. *Utrecht Law Review*. 9(1), 2013, pp.78-79, (accessed on 27 March 2016), available at: <http://doi.org/10.18352/ulr.214>

¹⁰⁶ Voorhoof, Dirk, *The Right to Freedom of Expression and Information under the European Human Rights System: Towards a more Transparent Democratic Society*, EUI Working Paper RSCAS 2014/12, p.3

¹⁰⁷ *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, 13 May 2014, (accessed on 27 March 2016), available at: http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&docid=152065

disputable data from Google's search engine results, too. The opinion of the AEPD was that the data was obtained legally and that there should be no data removal from La Vanguardia, but it requested Google to remove the data from the search results. Following this request, "Google Spain and Google Inc. then brought two actions before the Audiencia Nacional (National High Court, Spain), claiming that the AEPD's decision should be annulled" and "the Spanish court referred a series of questions to the Court of Justice."¹⁰⁸ One of the basic issues here was dealing with the fact that Google Spain was observed as a "commercial representative" of Google and that therefore "it has taken responsibility for the processing of personal data relating to its Spanish advertising customers,"¹⁰⁹ thus the importance of this decision is also found in the responsibility placed on Google in a EU state and not of Google Inc. This case also triggered off a debate regarding the 'right to be forgotten' as the court among other concluded "that search engines have an obligation "to delete links to websites which publish "inadequate, irrelevant or no longer relevant" data."¹¹⁰ Moreover, the OSCE Media Freedom Representative stated that such decision "might negatively affect access to information and create content and liability regimes that differ among different areas of the world, thus fragmenting the Internet and damaging its universality."¹¹¹

But these being exceptional cases which do not set the standard regarding the liability of search engines and ISPs, it is still acknowledged that freedom of expression remains under the protection of human rights instruments at the European regional level and in legislations of individual countries. However, it is not necessary to introduce new, stricter provisions related to the Internet, but more attention is needed when balancing freedom of expression

¹⁰⁸ Akdeniz, Yaman, *Media Freedom on the Internet: An OSCE Guidebook*, commissioned by the Office of the OSCE Representative on Freedom of the Media, March 2016, p.91

¹⁰⁹ Ibid.

¹¹⁰ *Communiqué by OSCE Representative on Freedom of the Media on ruling of the European Union Court of Justice*, 16 May 2014, (accessed on 27 March 2016), available at: <http://www.osce.org/fom/118632>

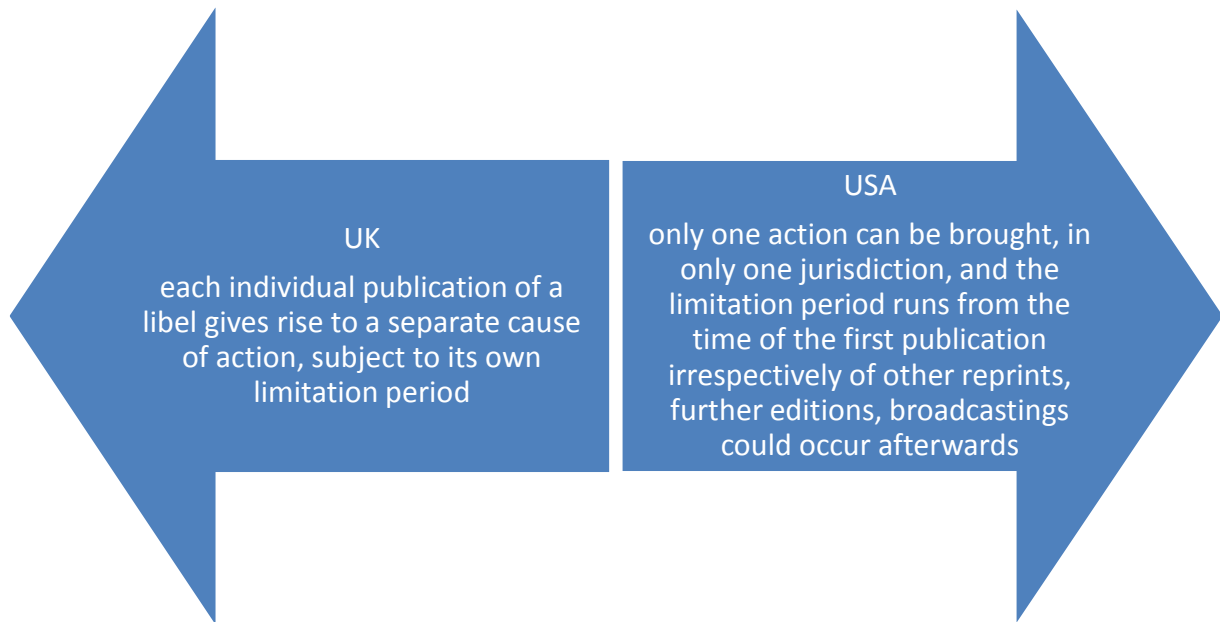
¹¹¹ Ibid.

exercised online and e.g. the rights of others. This is how “the CoE bodies have repeatedly stressed the need for national authorities to end the current state of fragmentation of defamation laws and called for more attention to be paid to the ECtHR standards to be incorporated into national laws,” and “the EU institutions concert with the policy approach and the EU acquis has made some particular inroads to the regulatory governance of online content in addition to stressing the relevance of the ECtHR standards to become applied at the national level across the European Union.”¹¹²

3.5.1 ONLINE CONTENT BLURRING TRADITIONAL LIMITS OF TIME AND SPACE

Another challenge that Internet set before legislators is the fact that it is available everywhere, thus the place of publication is a matter to deal with, and that disputable content may be available for years or that it may appear after e.g. a newspaper opens an archives section on their website. There are also options of downloading content and then posting it somewhere else again, accessing the content from different devices, etc. Here we speak about ‘multiple publication rule’ which has been adopted in some European countries (e.g. the Great Britain), and it should be mentioned that this is opposed to the ‘single publication rule’ which is used in the USA.

¹¹² Irion, K., Cavaliere, P., and Pavli, D. 2015. *Comparative study of best European practices of online content regulation. Law and policy of online content regulation, in particular defamation online, in the light of Albanian legislative proposals*. Study commissioned by the Council of Europe, Amsterdam/ Edinburgh/ Tirana, 2015, p.16



Picture 1: UK vs. USA – rules on number of publications

The problem with the multiple publication rule is that a defendant can be sued years after the content in question was published. For example, in the case of *Times v. United Kingdom*¹¹³, the newspaper had two articles in its internet archive after a defamation lawsuit was brought regarding their print edition. Another lawsuit was brought regarding the internet publication. The defendants lost the case before domestic courts and had to add a preface to both articles containing a warning to archive users that the article was subject to High Court litigation. When the applicants turned to the European Court of Human Rights, this Court found there was no violation of their right to freedom of expression. It was concluded that “the press provide a valuable role by maintaining archives and the limitation period in libel actions is intended to ensure that claimants act quickly. However, the domestic court had not suggested that the articles be removed altogether, and the obligation to attach notice to archive material where the newspaper is on notice that a libel action has

¹¹³ *Times Newspapers Ltd (Nos. 1 and 2) v The United Kingdom*, applications 3002/03 and 23676/03, 10 March 2009, (accessed on 27 March 2016), available at: <http://www.5rb.com/case/times-newspapers-ltd-nos-1-and-2-v-the-united-kingdom/>

been initiated in respect of that same article is not a disproportionate interference Art 10. On the facts, the ceaseless liability issue did not arise but libel proceedings brought against a newspaper after a significant lapse of time may, in the absence of exceptional circumstances, give rise to a disproportionate interference with press freedom under Art 10.”¹¹⁴ The basic conclusion was that it is unreasonable to expect that media remove all the archives and that there are ways in which media outlets do not have to be liable for the content of the archives, but that the statement of warning before articles in question would suffice in this case.

3.5.2 JURISDICTION

As mentioned above, it is not only the concept of time that is problematic to legislators, it is also the concept of place, because with the nature of the Internet, certain content can be available all over the world and we reach the questions of where defamation happened and which jurisdiction is in charge. When the Internet brought these issues, it was acknowledged that all circumstances must be taken into account, as well as all criteria necessary for exerting jurisdiction in terms of online content. What emerges at this point is the concept of ‘libel tourism’, when plaintiffs choose a country of legislation based on their belief that their chances of winning a case are higher there. Regarding the abovementioned case of *Times v. United Kingdom*, the Steering Committee on Media and Communication Services, stated that “libel tourism is an issue of growing concern for Council of Europe member states as it challenges a number of essential rights protected by the Convention such as Art. 10 (Freedom of expression), Art. 6 (Right to a fair trial) and Art. 8 (Right to respect for private and family life)⁸⁰” and thus “the prevention of libel tourism should be part of the reform of

¹¹⁴ *Times Newspapers Ltd (Nos. 1 and 2) v The United Kingdom*, applications 3002/03 and 23676/03, 10 March 2009, (accessed on 27 March 2016), available at: <http://www.5rb.com/case/times-newspapers-ltd-nos-1-and-2-v-the-united-kingdom/>

the legislation on libel/defamation in member states in order to ensure better protection of the freedom of expression and information within a system that strikes a balance between competing human rights.”¹¹⁵

3.6 EUROPEAN UNION

Freedom of expression is also mentioned in the Charter of Fundamental Rights of the EU.

Article 11¹¹⁶ of the Charter says the following:

1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.*
2. *The freedom and pluralism of the media shall be respected.*

Article 52¹¹⁷ of the Charter refers to limitations of freedom of expression:

Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.

3.6.1 EU POLICY APPROACH

¹¹⁵ Steering Committee on the Media and New Communication Services, ‘Draft declaration of the Committee of Ministers on the desirability of international standards dealing with forum shopping in respect of defamation, “libel tourism”, to ensure freedom of expression’, CDMC(2011)018Rev 8, 2012, p. 4

¹¹⁶ European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, Article 11

¹¹⁷ *Ibid.* Article 52

Report on the EU Charter on Standard settings for media freedom across the EU⁹³ provides standards regarding the protection and strengthening of freedom of expression because the European Union institutions, too, advocate the openness and participation in the online environment, the importance of investigative reporting, and the issue of self-regulation as well. This is why the Report emphasizes that “the independence, impartiality and transparency of self- and co-regulatory bodies should be carefully monitored and implemented; furthermore, independence should be insured from both State and commercial influences.”¹¹⁸ According to the Report, a greater independence in journalism may be achieved through codes of ethics and codes of conduct, while national legislators are to stick to “strict application of European Court of Human Rights case-law in this area.”¹¹⁹ The Report also insists on decriminalization of defamation in order to avoid chilling effects and there is a particular focus regarding new technologies available for exercise of freedom of expression and a minimum state intervention in this respect.

EU Human Rights Guidelines on Freedom of Expression Online and Offline¹²⁰ approaches the changes and shifts that came with digital age. It urges national authorities to have legal safeguards that include professional journalists as well as ““citizen journalists”, bloggers, social media activists and human rights defenders, who use new media to reach a mass audience” and “media actors, NGOs and social media personalities.”¹²¹ These Guidelines also reflect on the very nature of new technologies and their contribution to public debates in a democratic society and that any censorship and self-censorship are detrimental to

¹¹⁸ *Report on the EU Charter: standard settings for media freedom across the EU* (2011/2246(INI)), A7-0117/2013, adopted by the plenary sitting of the European Parliament on 25 March 2013. Para 9

¹¹⁹ *Ibid.* Para 20

¹²⁰ *EU Human Rights Guidelines on Freedom of Expression Online and Offline*, adopted at the Foreign Affairs Council meeting in Brussels, 12 May 2014

¹²¹ *Ibid.* Para. 31

enjoyment of freedom of expression, thus these measures should be avoided. The Annex to the Guidelines¹²² includes recommendations such as:

- Restrictions on freedom of expression must be provided by law, and abide by international human rights law and strict tests of necessity and proportionality, in order to avoid inconsistent and abusive application of legislation which in turn could spark media's self-censorship;
- Taking advantage of defamation laws as a tool to censor criticism amounts to a misuse of such laws, in particular when they entail imprisonment or severe criminal or civil sanctions;
- Interference on Internet usage, such as blocking, slowing down, degrading or discriminating against specific content or applications by operators, including when requested by law, should always be avoided;

3.6.2 DIRECTIVES

The EU institutions, too, approached the issue of ISPs and their liability for content. According to the **E-Commerce Directive** intermediaries are exempted from liability for any disputable content posted by a third party because “the service consists of operating and giving access to a communication network to transmit or store made available by third parties,” because “the nature of the service provided is merely of technical, automatic and passive nature” and “as a result of this the ISP has neither knowledge of nor control over the information which is transmitted or stored.”¹²³ The ISPs here are thus treated as mere conduit and their role is primarily technical, that is, they are not liable for the content

¹²² *EU Human Rights Guidelines on Freedom of Expression Online and Offline*, adopted at the Foreign Affairs Council meeting in Brussels, 12 May 2014

¹²³ *Directive 2000/31/EC* of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (*Directive on electronic commerce*) Rec. 42

because they do not produce the content nor do they make any alterations to it. Therefore, there is no obligation of ISPs to supervise the content they transmit but “state authorities have a choice to provide for such measures to request ISPs to communicate information about alleged wrongdoing, and information concerning the identity of alleged wrongdoers, to the competent authorities on their request.”¹²⁴ The Court of Justice of the European Union (CJEU) has also discussed these issues and stated that “activities such as optimizing the visual display of the content stored in their facilities amounts to taking an active role in the storage and delivery of the content, excludes the possibility of unawareness and thus makes the ISP liable under Art 14(1).”¹²⁵ The focus is again on the question whether the provider knew or was informed or controlled the disputable content in any way.

The **Audiovisual Media Services Directive**¹²⁶ provides an adequate legal framework for the new digital environment and introduces on-demand audiovisual media services, which particularly refer to the Internet. According to the Directive, there is a level which encompasses all audiovisual media services and the levels of specific provisions for traditional linear and on-demand audiovisual media services.¹²⁷ Furthermore, the Directive refers to the right of reply regarding traditional broadcasters which should be ensured by national authorities, but which also covers the online world. This is how the Directive takes into account the very nature of online sphere, which offers an easy and rather quick way of offering a reply. Furthermore, the Directive places information duties on both ISPs and

¹²⁴ *Directive 2000/31/EC* of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (*Directive on electronic commerce*) Rec. 42

¹²⁵ *L'Oréal SA and Others v eBay International AG and Others*, Court of Justice of the European Union, C-324/09, 12 July 2011, para. 107-124, (accessed on 30 March 2016), available at: <http://curia.europa.eu/juris/liste.jsf?num=C-324/09>

¹²⁶ *Directive 2010/13/EU* of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (*Audiovisual Media Services Directive*)

¹²⁷ The European Broadcasting Union, *Audiovisual Media Services Directive*, (accessed on 30 March 2016), available at: <http://www3.ebu.ch/member-support/advocacy-policy-development/audiovisual-media-services-directive>

providers of audiovisual media services, because the main goal is to offer the users all types of information and in this Directive the users are mainly observed as consumers.

3.7 CRIMINAL V. CIVIL DEFAMATION

When discussing the international approach to media regulation, it is necessary to introduce the concepts of criminal and civil defamation which will be discussed throughout the thesis through examples. The basic difference between criminal and civil defamation is that in the first case, a person can be criminally prosecuted and it entails punishments of deprivation of liberty and/or economic fines and a criminal record, while in the second case there can be lawsuits for compensations. The freedom of expression advocates are more and more insisting on abolishing criminal defamation because “it is a disproportionate punishment and has a harsh effect on freedom of expression.”¹²⁸ Being fined or imprisoned has a damaging effect on exercising the right to freedom of expression and after their sentences, journalists or any other citizens may be reluctant to express themselves from fear of committing the crime again. However, “this is not to say that defamation should not be discouraged; but in accordance with the necessity test, the means used to discourage it should be carefully targeted, to prevent the dampening of legitimate criticism.”¹²⁹

OSCE Parliamentary Assembly urged for abolishing the criminal defamation and along with the UN, OSCE and OAS Special Mandates claimed that: “Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.”¹³⁰ The

¹²⁸ Article 19, *Criminal defamation*, (accessed on 30 March 2016), available at: <https://www.article19.org/pages/en/criminal-defamation.html>

¹²⁹ Ibid.

¹³⁰ *Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression*, (accessed on 30 March 2016), available at: <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=87&lID=1>

international organizations thus regularly insist on using more moderate sanctions for defamatory statements or that, in other words, states should approach different means which could have less chilling effect. This is how “prison sentences, suspended prison sentences, suspension of the right to express oneself through any particular form of media, or to practice journalism or any other profession, excessive fines and other harsh criminal penalties should never be available as a sanction for breach of defamation laws, no matter how egregious or blatant the defamatory statement.”¹³¹ Also, the Resolution of Council of Europe Parliamentary Assembly – Towards decriminalization of defamation Resolution 1577 (2007) – states that countries are to “define the concept of defamation more precisely in their legislation so as to avoid an arbitrary application of the law.”¹³²

However, despite these urges, there are no international legally binding acts which prescribe decriminalization of defamation and so criminal defamation still exists in many European countries, thus freedom of expression is often curtailed. It is the recommendation of the European Commission High Level Group on Media Freedom and Pluralism, too, that defamation is decriminalized and that national laws include provisions which do not suffocate freedom of expression. But it also must be mentioned that despite decriminalization of defamation, there were high compensations in some countries which may bring an equally damaging chilling effect as criminal penalties. In the EU, Croatia, Cyprus, Ireland, Romania and the UK decriminalized defamation¹³³. Moreover, in some

¹³¹ Article 19, *Criminal defamation*, (accessed on 30 March 2016), available at: <https://www.article19.org/pages/en/criminal-defamation.html>

¹³² The Council of Europe, *Resolution 1577 (2007), Towards decriminalization of defamation* 4 October 2007, (accessed on 30 March 2016), available at: <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/eres1577.htm>

¹³³ Voorhoof, Dirk, *The Right to Freedom of Expression and Information under the European Human Rights System: Towards a more Transparent Democratic Society*, EUI Working Paper RSCAS 2014/12, p. 4-5

countries even an insult is a criminal offense, as well as the insult to national symbols.¹³⁴ The European states that decriminalized defamation and insult are among other: Ireland, Great Britain, Bosnia and Herzegovina, Romania (insult decriminalized), Estonia, Georgia, Ukraine, Cyprus. On the other hand, imprisonments still exist in Moldova (seven years for defamation), Slovakia (five years for defamation), Turkey (four years for defamation), or in Poland (up to ten years for a public insult of Polish nation, the Republic of Poland and its political system and the highest state organs).

¹³⁴ Voorhoof, Dirk, *The Right to Freedom of Expression and Information under the European Human Rights System: Towards a more Transparent Democratic Society*, EUI Working Paper RSCAS 2014/12, p. 4-5

4. MEDIA LANDSCAPE IN BOSNIA AND HERZEGOVINA

It was the international community that shaped the media landscape in Bosnia and Herzegovina after the war that ended in 1995 (more in chapter 4). Initially, the focus was set on clearing the media content of nationalism and hate speech that was one of the triggers of the war in the first place, and thus the legislative framework and policies were oriented on these issues. But after the international community started lowering its support and leaving B-H, the media sector fell into the hands of political elites which opposed the initiatives of the international community in the first place, and therefore “without adequate policy responses to tackle major weaknesses in the media sector, the state of the media system in Bosnia and Herzegovina, even after an extensive international involvement, is now “a colossal tragedy”.”¹³⁵ The reasons for a problematic situation of media sector can be found in troubles with funding, which made media outlets prone to seeking help and revenues from the authorities, thus giving up their independence in return. It is precisely the aspect of funding that turned out to be devastating for media outlets because not only media owners turned to political elites for a help, the advertisers did the same, and this is how the political interference has become intertwined with journalism as a profession and journalists often follow the ideologies of those who fund them, and turn against those that are affiliated with different political parties. This is why B-H is a unique example where defamation lawsuits are most often brought by media owners belonging to different political parties or simply by competitor-media outlets. In addition, it is most often at the time of elections when most disputable articles appear and when the courts receive most defamation lawsuits. In order to explain this, it is necessary to reflect on the very **organization of the state**, on the

¹³⁵ MC Online, *Report from the conference on international media support*, Analitika, Sarajevo, 27 September 2013. In: Petković, Brankica, Sandra Bašić Hrvatinić, Sanela Hodžić, *The importance of media integrity: Reclaiming public service values in media and journalism*, Mediacy Sarajevo, 2014, p.79

organization of judiciary system, the clashes between **international community and domestic political elites**, identify **most prominent media outlets**, and problematic issues of **media ownership** in Bosnia and Herzegovina.

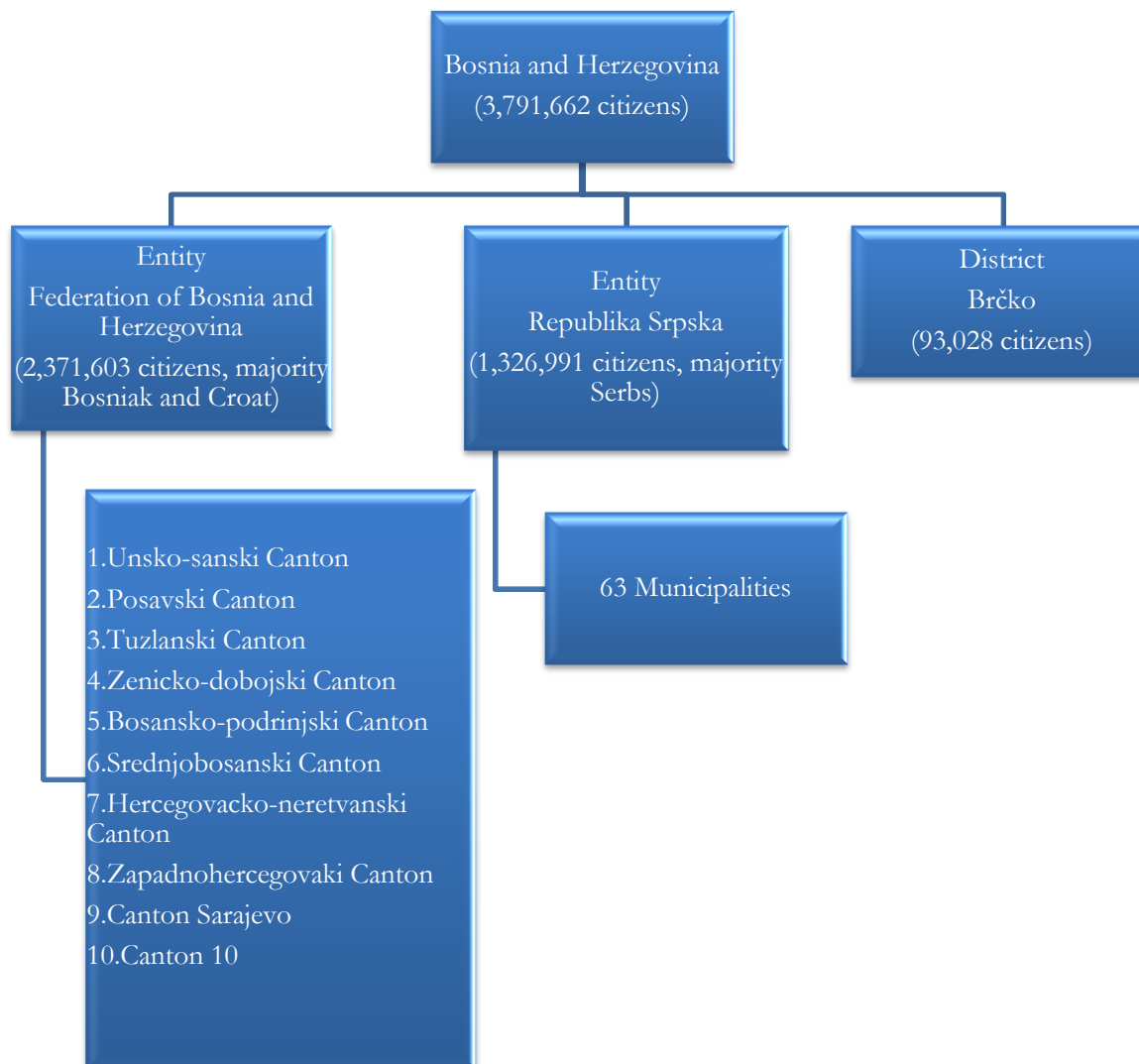
4.1. ORGANIZATION OF BOSNIA AND HERZEGOVINA

Bosnia and Herzegovina is one of the six former republics of the Socialist Federal Republic of Yugoslavia (SFRY). After the dissolution of SFRY, and after the war that lasted between 1992 and 1995, the Dayton Peace Agreement (DPA) was signed and set the foundations for the new structure of the country.

4.1.1 STATE ORGANIZATION

The attempt to establish a new and democratic country came across numerous challenges resulting from the war and primarily deep divisions that it left. According to the DPA, the new structure has become rather complex and it followed the ethnic lines the proof of which lies in the most recent register of citizens conducted in 2013¹³⁶:

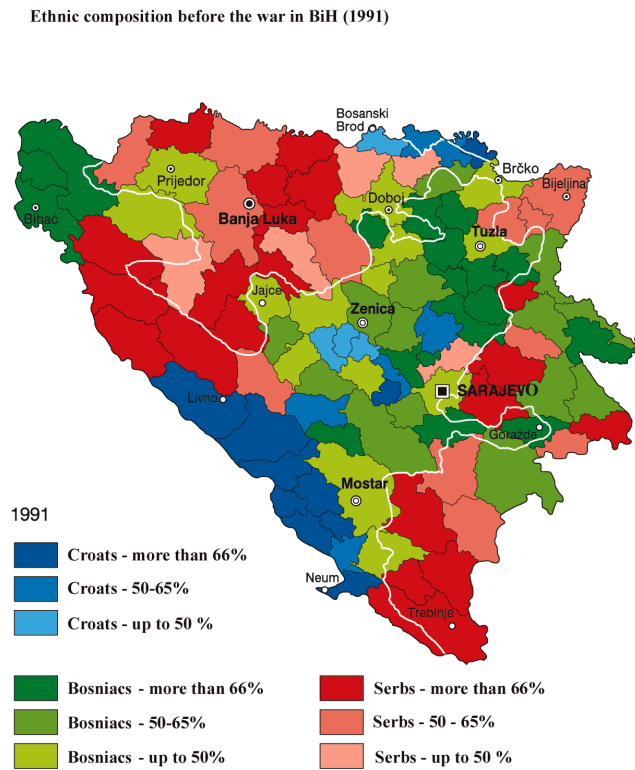
¹³⁶ Institute for Statistics, Federation of Bosnia and Herzegovina, available at: <http://www.fzs.ba/popis.htm>



Picture 2: Geographic divisions in Bosnia and Herzegovina

Bosnia and Herzegovina consists of two entities and one district: **Federation of Bosnia and Herzegovina—FB-H, Republika Srpska—RS and District Brcko**. The Federation is divided into **cantons**, while Republika Srpska is divided into **municipalities**. The DPA acknowledged **Bosniaks, Croats and Serbs** as constituent peoples and introduced the category of **Others** – which includes national minorities, people from mixed marriages, etc. The official languages are Bosnian, Serbian and Croatian, while Cyrillic and Latin script are used, too. The latest register of population has still not come out with exact data of

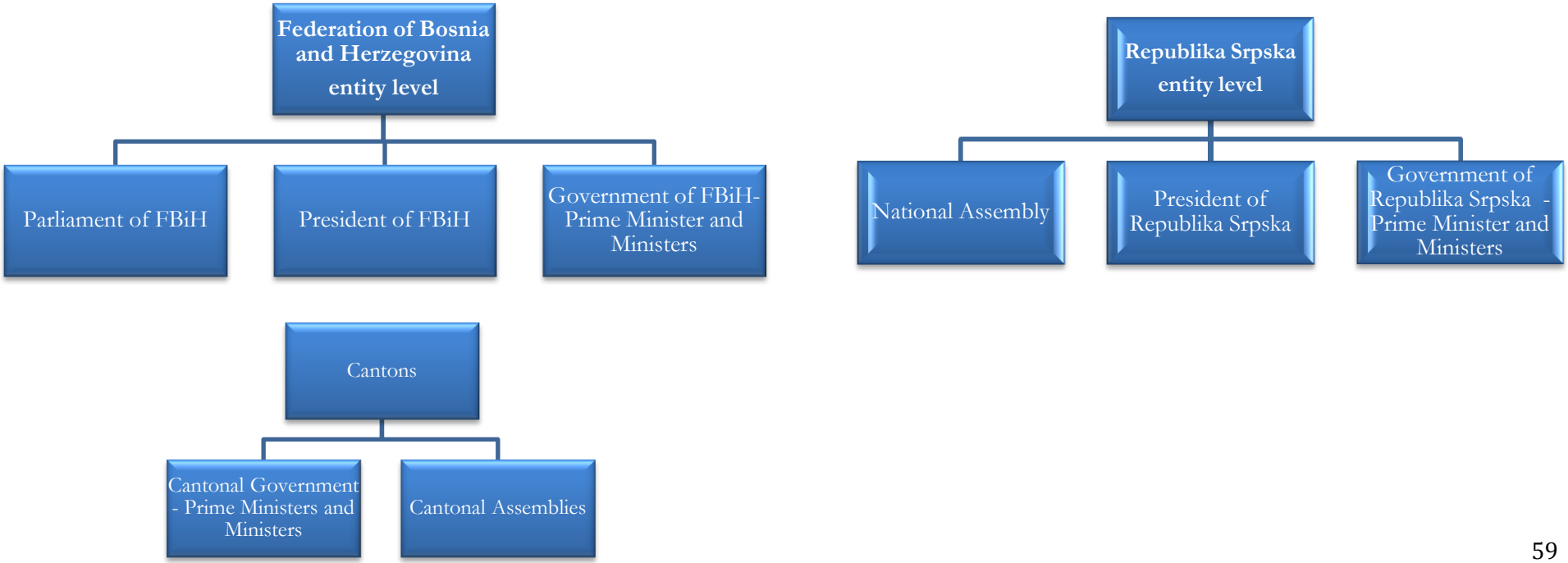
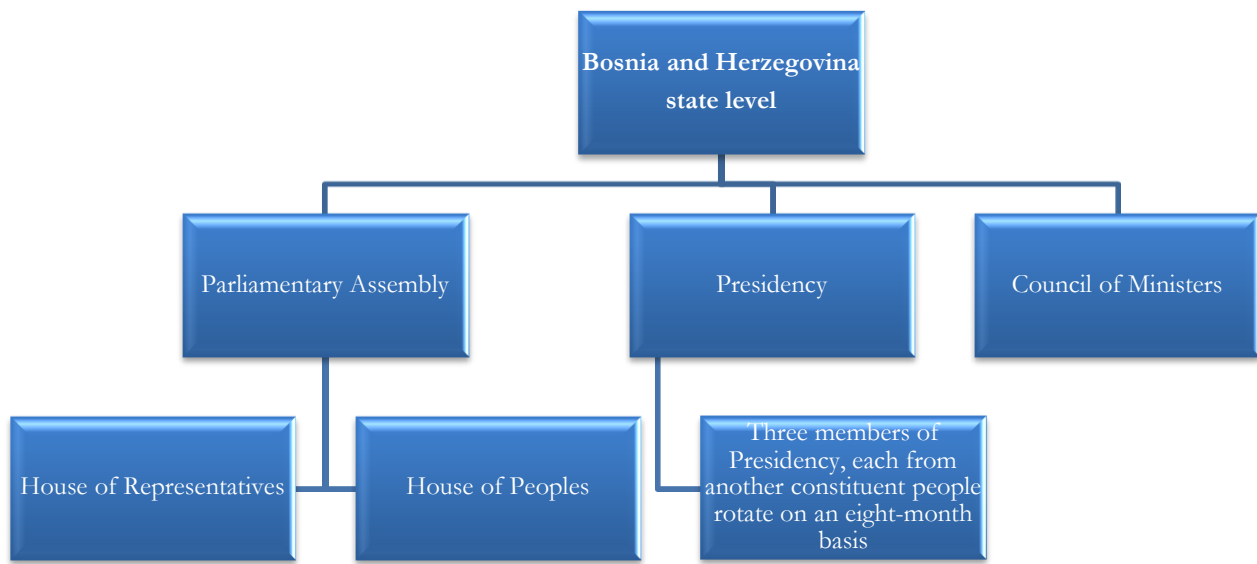
distribution of different ethnicities, thus the map below will present the ethnic structure before the war.¹³⁷



Picture 3: ethnic structure in Bosnia and Herzegovina 1991

Following the divisions along ethnic lines that are the remnants of the war, the new structure of the country has become extremely complex with numerous bodies of authority and a vast administration at all levels:

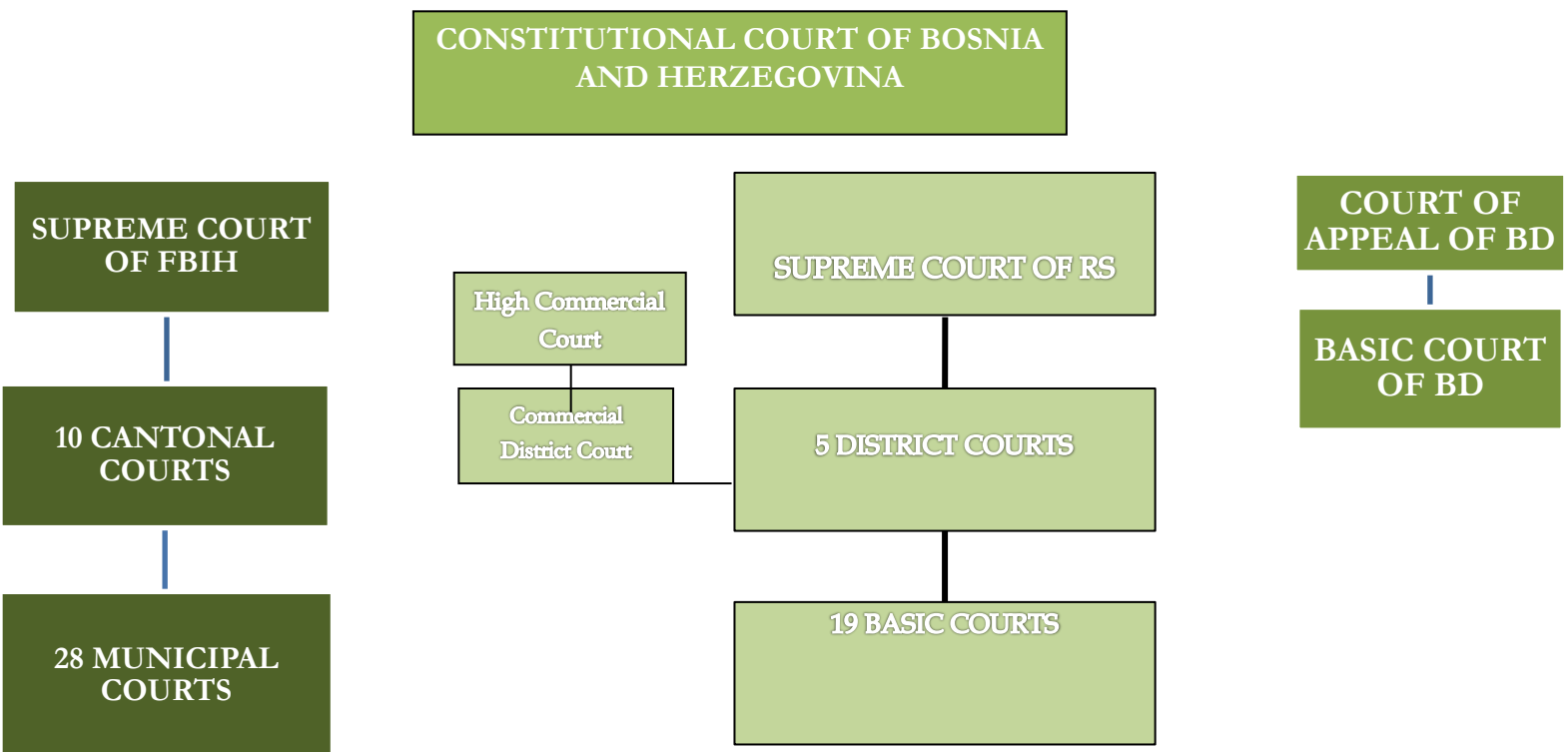
¹³⁷ *Ethnic composition before the war in Bosnia (1991)*, available at <https://en.wikipedia.org/wiki/Bosniaks>



Picture 4: Authorities in Bosnia and Herzegovina

4.1.2 JUDICIARY SYSTEM

In Bosnia and Herzegovina there are three levels of rule regarding the judicature in the country: the level at the Federation of Bosnia and Herzegovina (FB-H), Republika Srpska (RS) and Brčko District of Bosnia and Herzegovina (BD). This division follows the previously mentioned division of the country and thus the systems are as following:



Picture 5: Judicature in Bosnia and Herzegovina

4.2. INTERNATIONAL COMMUNITY VS. DOMESTIC POLITICAL ELITES

It is almost a fact that media reform helps in building a future democratic state. Therefore, after the adoption of necessary legislative framework and newly established media after the war were initially supposed to ensure their programming to be free from political influence and thus, objective, as one of the basic requirements of any democratic society.

Even years after the war ended, in the media of Bosnia and Herzegovina, there was “lack of professionalism, poor quality of investigative reporting, even outright media illiteracy, low salaries and lack of social protection for most journalists.”¹³⁸ The disappointment with situation in media is visible in statements of both management of media outlets and of those who have invested in them so as to ensure freedom of expression, and the claim around which both groups agree is that “we are exactly where we were when the war started fifteen years ago.”¹³⁹ The media in Bosnia and Herzegovina after war were characterized by rather negative aspects of selection of news, a great extent of sensationalism in reporting, and a noticeable unwillingness of certain political parties to support the peace reflected in the production of some media.¹⁴⁰ Pointing to an evident impact that politics has on the work of media there were experts claiming “that the presence of the non-accountable law-making international community in Bosnia and Herzegovina also takes accountability away from Bosnian politicians, thus stimulating all political actors to simply engage in the game of “faking democracy” instead of genuine democratization.”¹⁴¹ However, as one of the examples for biased production was the nationalist propaganda of SRT (Serbian Radio-Television Pale), the intervention of international community was necessary and therefore,

¹³⁸ Hodžić, Aida, A. “Democratizing Media, Welcoming Big Brother: Media in Bosnia and Herzegovina.” in *Finding the Right Place on the Map: Central and Eastern European Media Change in a Global Perspective*. Edited by Karol Jakubowicz and Miklós Sükösd. Bristol: Intellect Books, 2008, p. 146

¹³⁹ Ibid.

¹⁴⁰ Jusić, Tarik and L. Kendall Palmer. “The Media and Power-Sharing: Towards an Analytical Framework for Understanding Media Policies in Post-Conflict Societies. Public Broadcasting in Bosnia and Herzegovina.” *Global Media Journal—Polish Edition* No 1 (4). 2008, p.112

¹⁴¹ *Supra note 138*.

the Office of the High Representative in 1997 “requested NATO/SFOR peacekeeping troops to seize control of the SRT transmitters; removed politicians from its board of directors; re-drafted the editorial charter of the network; and appointed an international supervisor to oversee the transformation of the SRT.”¹⁴² Therefore, the example of media having an extremely negative role during the war, reflected in spreading nationalism, “demonstrates how those in power, faced with the opportunity or need for propaganda, use electronic media to play on memories, sometimes to contrast the painful present with a glorious past, sometimes to create or reinterpret a past to justify aggressiveness in the present, often to change perceptions of the present through manipulation of a sense of history.”¹⁴³ Shortly after Dayton Peace Agreement was signed, the tendency of international community was, among other, to remove strongly nationalist parties from controlling the media. At the time, Serbian and Croat sides tried very hard to save their party-control over the media and thus prolong their influence on programming. Therefore, it can be said that the development of the media system has been heavily influenced by the struggle between local political parties and the international community. This is why the establishment of the public service is in a constant crisis reflecting “intense inter-ethnic tensions and the complex paths of redefinition of ethnic group identities, combined with the daunting task of intensified EU integration processes.”¹⁴⁴

Political struggles are the consequence of a territorial division of the country as well as the weak central government because the power mostly lies separately in each of the entities.

¹⁴² Jusić, Tarik and L. Kendall Palmer, “The Media and Power-Sharing: Towards an Analytical Framework for Understanding Media Policies in Post-Conflict Societies. Public Broadcasting in Bosnia and Herzegovina.” *Global Media Journal—Polish Edition* No 1 (4), 2008, p.125

¹⁴³ Price, Monroe, E. “Bosnia-Herzegovina and post-conflict media restructuring.” In *Media reform: Democratizing the media, democratizing the state*. Edited by Monroe E. Price, Beata Rozumilowicz and Stefaan G. Verhulst. London and New York: Routledge, 2004, p. 92

¹⁴⁴ Džihana Amer and Tarik Jusić, “Bosnia and Herzegovina” in Bašić-Hrvatini, Sandra, Mark Thompson and Tarik Jusić, eds. *Divided They Fall: Public Service Broadcasting in Multiethnic States*. Sarajevo, Mediacentar Sarajevo, 2008, p. 85

Namely, this kind of political system makes it difficult to introduce any kind of reform and thus the reform of the media as well. Because of the constant interference of the politics, the ethnic boundaries can be claimed to have become even stronger and those that do not follow the ethnic politics are excluded while those whose national identity is undecided are marginalized.¹⁴⁵ This confirms the fact that the problems occur in media just as in many others fields and thus the crisis in media “has become a metaphor of the wider political crisis” and that “it is closely linked to the broader issue of constitutional change.”¹⁴⁶

The aim of transformation of the media is the elimination of political pressures “breaking down communication blockades, coverage of the entire B-H, balanced information, and spreading trust among people”¹⁴⁷ in order to “find a balance between the diametrically opposed political and ethnic views.”¹⁴⁸ And so “even if the media are not the presenting cause of the conflict, they remain a powerful influence (...). The media reflect societies and are thus an indication of conflict if nothing else. How stories are reported, ownership of media, the legislative environment, the role of government, and visual images are all related to conflict.”¹⁴⁹ Generally, it can be said that the media can be a serious problem in an attempt of democratization of the society if one media outlet has far more power than others causing a low level of diversity, disabling the citizens to access the media, having unqualified personnel and thus unprofessional and biased reporting.¹⁵⁰

¹⁴⁵ Džihana Amer and Tarik Jusić, “Bosnia and Herzegovina” in Bašić-Hrvatini, Sandra, Mark Thompson and Tarik Jusić, eds. *Divided They Fall: Public Service Broadcasting in Multiethnic States*. Sarajevo, Mediacentar Sarajevo, 2008, p. 85

¹⁴⁶ Ibid.

¹⁴⁷ Marko, Davor. “Television of Bosnia-Herzegovina (BHT) and Independent Television Hayat: Significant Consistency in Content of Primetime News Programs on Public and Commercial TV Stations”. in *Indicator of Public Interest*. Sarajevo: Mediaplan Institute, 2007, p. 6

¹⁴⁸ Ibid, p. 7

¹⁴⁹ Ellis, Donald G. (2006), *Transforming Conflict – Communication and Ethnopolitical Conflict*, Rowman & Littlefield Publishers. In Jusić, Tarik and L. Kendall Palmer. “The Media and Power-Sharing: Towards an Analytical Framework for Understanding Media Policies in Post-Conflict Societies. Public Broadcasting in Bosnia and Herzegovina”. *Global Media Journal—Polish Edition* No 1 (4), 2008, p. 113

¹⁵⁰ Ellis, Donald G. (2006), *Transforming Conflict – Communication and Ethnopolitical Conflict*,

It was precisely the situation after Dayton Peace Agreement was signed, when the media was marked by strong political control of three nationalist political parties. This situation was even more complicated because there were also commercial media in question, as well as the media from neighboring countries, particularly from Serbia and Croatia which became available through cable TV. In addition, it can be said that there are a few media sub-systems “simultaneously existing at different levels and territorial areas which continue to be defined by both the ethnocentric nature of the media and by the ethnic character of the audience.”¹⁵¹

4.3. MEDIA AND POLITICAL ELITES

The media landscape in Bosnia and Herzegovina is characterized by a big number of outlets. The Communications Regulatory Agency – CRA, a regulatory body in B-H in charge of the electronic media, specifically of their content, licensing, awarding frequencies, etc. (more in chapter 5.3) produced a report in 2015, stating that there are 183 electronic media outlets - 140 radio stations, and 43 television stations. This shows the decrease of number of electronic media when compared to 2000, when their overall number was 281 (210 radio stations, and 71 television stations). The **public broadcasting system** consists of three public broadcasters and the Corporation, which has not been established yet and which was intended to coordinate the three distinct PSBs and manage the equipment and the transmission network, and be in charge of sales and advertising. The three public broadcasters are:

- **Radio-Television of Bosnia and Herzegovina (BHT)**

Rowman & Littlefield Publishers. In Jusić, Tarik and L. Kendall Palmer. “The Media and Power-Sharing: Towards an Analytical Framework for Understanding Media Policies in Post-Conflict Societies. Public Broadcasting in Bosnia and Herzegovina”. *Global Media Journal—Polish Edition* No 1 (4), 2008, p. 113

¹⁵¹ Jusić, Tarik and L. Kendall Palmer. “The Media and Power-Sharing: Towards an Analytical Framework for Understanding Media Policies in Post-Conflict Societies. Public Broadcasting in Bosnia and Herzegovina”. *Global Media Journal—Polish Edition* No 1 (4), 2008, p.123

- **Radio-Television of the Federation of Bosnia and Herzegovina (RTVFB-H, or, Federal TV), and**
- **Radio-Television of Republika Srpska (RTRS)**

In addition to these broadcasters, there are also **publicly owned televisions** in different cities in the country. They are under the category of ‘public enterprise’, meaning that they are mostly or fully financed from public funds and which thus have obligations towards their audience in terms of offering informative, educational and cultural programs, serving all citizens. Specifically, the CRA defines public radio and TV as: “each radio and/or TV station the licence for which was issued to a municipal, cantonal, entity or state agency or organization regardless of other criteria; or which is supported or controlled by such agency to the extent of 51% or more. This support or control are defined as 1) each radio and/or TV station which receives 51% or more of its budget through the following sources either separately or in a combination: a) municipal, cantonal, entity or state governmental agency or organization; b) organization owned by any municipal, cantonal, entity or state governmental agency; c) political party; etc.”¹⁵² According to the data of the CRA to the category of public televisions belong the following 12 outlets:

- **Television Živinice**
- **Television Bugojno**
- **Television Cazin**
- **Television BPK Goražde (Bosansko-podrinjski Canton)**
- **Television of Tuzlanski Canton**
- **Television Unsko-sanski Canton**

¹⁵² Communications Regulatory Agency, *Rule 01/1999 – Definition and obligations of public broadcasting*, (accessed on 30 March 2016), available at: <http://bhric.ba/dokumenti/BHS%206a%20RAK%20uredba%20o%20obavezama%20javnog%20emitovanja.pdf>

- **Television Visoko**
- **Television Vogošća**
- **Television Zenica**
- **Television Sarajevo Canton**
- **Television Rudo**
- **Television Prijedor**

Most of these televisions have at some point seen the pressures of domestic political forces which used the media as the way to spread their own ideas, in spite of the fact that since the end of the war the international community has invested massive sums of money in developing independent media.¹⁵³ The international community invested a lot of money to create a democratic environment in the country through media, especially radio and television. However “the infection of media with warmongering speech and the distrust were too great for the big results to be achieved in a short time.”¹⁵⁴ Hence, even though the international community made a great effort in trying to establish the free and functional media landscape, this has not been accomplished due to arguing related to the political scene of the country. Political elites are the most responsible ones for the difficult state of the media in the country thus the entire media system remains prone to being misused and undergoing political pressures as a great number of media outlets belong primarily to local governments or to people closely related to ruling political options. Consequently, a big number of media outlets has a “lack of editorial standards, the lack of regulatory and

¹⁵³ Open Society Foundations, “TV across Europe: regulation, policy and independence (2005) -Bosnia-Herzegovina”, (accessed on 30 March 2016), available at: http://www.mediapolicy.org/tv-across-europe/the-2005-television-across-europe-reports/television-across-europe-2005-2006-individual-country-reports-and-translations/media_bos1.pdf/view?searchterm=bosnia

¹⁵⁴ Marko, Davor. “Television of Bosnia-Herzegovina (BHT) and Independent Television Hayat: Significant Consistency in Content of Primetime News Programs on Public and Commercial TV Stations”, in *Indicator of Public Interest*. Sarajevo: Mediaplan Institute, 2007, p. 6

enforcement mechanisms and capacities and legal confusion.”¹⁵⁵ Additionally, instead of acting together and instead of any kind of cooperation, these fragmented and separated media outlets are seen more as competition to each other. For example, national divisions and political influences are seen even in public broadcasters which should, in line with international standards, be in fact objective and impartial and thus “public television programs are not yet accepted by a big part of the population of Bosnia-Herzegovina and this is especially pronounced in the case of the Croat people.”¹⁵⁶

The examples of strong interference of politics into the media content are closely related to the revenues and this is why politicians tried very strongly to obstruct initiatives of introducing media laws. For example, one of the questions was the revenue of RTVFB-H, because according to the present situation of laws it is the strongest part of public broadcasting system, whereas BHTV remains on the same. Namely, RTVFB-H “is the most commercial part of the System and marketing revenue makes up 40 percent of its total revenues.”¹⁵⁷ This state brings into question its purpose as public broadcaster because it may in fact lessen the content of public interest. On the other hand, even though Serb political parties insist on full implementation of the latest legislative framework, “RS representatives first of all refer to implementation of distribution of marketing revenue which would favor RTRS, but they do not ask in what way RTRS provides equality of all three constituent peoples, although there are numerous indicators, visible to everyone, that determine it to a

¹⁵⁵ Džihana Amer and Tarik Jusić, *Bosnia and Herzegovina* in Bašić-Hrvatini, Sandra, Mark Thompson and Tarik Jusić, eds. *Divided They Fall: Public Service Broadcasting in Multiethnic States*, Sarajevo, Mediacentar Sarajevo, 2008, p. 91

¹⁵⁶ Džihana, Amer, “Reform on Hold”, (accessed on 30 March 2016), available at: http://www.soros.org.ba/images_vijesti/stipendisti_2008/amer_dzihana_final_policy_brief_en.pdf.

¹⁵⁷ Džihana, Amer, “The Public Broadcasting System in B-H: Between Ethnic Exclusivity and Long Term Sustainability”, (accessed on 30 March 2016), available at: http://www.soros.org.ba/images_vijesti/stipendisti_2008/amer_dzihana_final_policy_study_en.pdf

big extent as a Serb ethnic broadcaster.”¹⁵⁸ In fact, it is evident that there is no equal treatment of constituent peoples on RTRS which is reflected both in programming and the structure of personnel and particularly management which most often reflects the affiliations with ruling political parties thus undermining the respect of freedom of expression.

There are numerous examples of the interference of politics into the media such as the fact that in 2007, Milorad Dodik, then the Prime Minister of the Republic of Srpska “instructed the members of his government to boycott BHT because of its alleged discriminatory treatment of RS on joint public airwaves, and forced the resignation of BHT’s general manager, Mr Drago Marić.”¹⁵⁹ Moreover, the government of the Republic of Srpska prevented the journalists of BHT to attend its press conferences, as “journalists of BHT1 found themselves barred from entering the building where the RS President was holding a press conference.”¹⁶⁰ Moreover, this year, the same situation happened with RTVFB-H because the ministers of the Republic of Srpska were supposed to boycott this television, too.

Similarly, the influence of politics today can be seen in the fact that Croat side focuses mainly on the parts of Bosnia and Herzegovina where they make the majority of population and where the strongest media influence is the one of Croatian Radio and Television, the public broadcaster from neighboring Croatia. Even the managers of entities’ public news agencies, Srna and Fena, have political affiliations and thus “the credentials of the editor-in-

¹⁵⁸ Džihana, Amer, “The Public Broadcasting System in B-H: Between Ethnic Exclusivity and Long Term Sustainability”, (accessed on 30 March 2016), available at: http://www.soros.org.ba/images_vijesti/stipendisti_2008/amer_dzihana_final_policy_study_en.pdf

¹⁵⁹ Hodžić, Aida, A. “Democratizing Media, Welcoming Big Brother: Media in Bosnia and Herzegovina.” in *Finding the Right Place on the Map: Central and Eastern European Media Change in a Global Perspective*. Edited by Karol Jakubowicz and Miklós Sükösd. Bristol: Intellect Books, 2008, p. 146

¹⁶⁰ Supra nota 158

chief of Srna were severely criticized, since they were seen as an indicator of the primacy of political criteria over professionalism.”¹⁶¹

Therefore, by having the politics constantly interfering into the work of media, the OSCE in Bosnia and Herzegovina established a Media Experts Commission (more in chapter 4) which “issued a set of rules and regulations, charging the media with duties including “providing true and accurate information,” “refraining from broadcasting incendiary programming,” and running OSCE and international election-related statements and advertisements.”¹⁶² However, in spite of the efforts to change the situation, “the party-controlled television stations remained the most influential media outlets and the main source of news for all of Bosnia’s ethnic groups,” whereas “other, internationally sponsored, efforts to break a tradition of dependence on official programming were not sufficiently successful.”¹⁶³ Because of this, it could be said that programming of all media in spite of numerous efforts to change the situation can still present certain jeopardy for both peace-keeping and the reconciliation among three constituent peoples.

4.3.1 MEDIA AND POLITICAL AFFILIATIONS

The role of public figures in the media of Bosnia and Herzegovina in general prevented the outlets to have “adequate operating conditions involving the independency of media from the political and economic centers of power, supportive market conditions, as well as consistent solidarity within the professional community.”¹⁶⁴ In this manner, “the political

¹⁶¹ Hodžić, Sanela, *Bosnia and Herzegovina in Media Integrity Matters: Reclaiming public service values in media and journalism*, Peace Institute, Institute for Contemporary Social and Political Studies, 2014, p. 130

¹⁶² Ibid. p. 96

¹⁶³ Price, Monroe, E. “Bosnia-Herzegovina and post-conflict media restructuring”. In *Media reform: Democratizing the media, democratizing the state*. Edited by Monroe E. Price, Beata Rozumilowicz and Stefaan G. Verhulst. London and New York: Routledge, 2004, p. 96

¹⁶⁴ McQuail, *Mass Communication Theory*, SAGE Publications, 2000, p. 167

affiliations of media, socio-economic status and pressures on journalists”¹⁶⁵ brought the freedom of expression in danger and direct connections between managements and political elites undermined the professionalism of media, because a great number of media outlets are believed to have affiliations with the authorities and political parties and that because of this they sometimes serve their interests.

The 12 public televisions in B-H mentioned above were established by cantonal and municipal governments making these outlets financially dependent on these governments, and their managements are, again, appointed according to political lines. The structure of the management of public service broadcasters illustrates the divisions of the country, too, and so the managing structure of PSB consists of System Board with 12 members (3 Bosniaks, 3 Croats, 3 Serbs, and 3 representatives of other ethnicities), coming from the Managing Boards of three broadcasters: RTVFB-H, RTRS, and BHT. The System Board is in charge of the coordination of activities, proposing license fee policies, coordination between these three broadcasters, adopting programming codes of conduct, dealing with questions of languages, tradition, and culture of constituent peoples and minorities.¹⁶⁶

However, this structure was challenged by the Croat representatives who pointed at the structure of the System Board and prevented the Law on RTVFB-H be adopted while claiming that due to the fact that the minimum of 7 members need to be present for the decision making, and due to the fact that decisions are made by simple majority, it means

¹⁶⁵ McQuail, *Mass Communication Theory*, SAGE Publications, 2000, p. 167

¹⁶⁶ Jusić, Tarik and L. Kendall Palmer. “The Media and Power-Sharing: Towards an Analytical Framework for Understanding Media Policies in Post-Conflict Societies. Public Broadcasting in Bosnia and Herzegovina”. *Global Media Journal—Polish Edition* No 1 (4), 2008, p.130

that only 4 members of the System Board can make decisions highly important for the three constituent peoples.¹⁶⁷

One example of problematic appointment is the one of the executive director of TVSA in January 2012 – “a candidate proposed by the SDA party, and dismissed in April 2013, again on political grounds” and “frequent changes of the government during 2013 led to frequent changes of cantonal television managers, not allowing them to achieve any meaningful results.”¹⁶⁸ As the management and political parties change, the journalists are expected to follow the motives of their supervisors/funders and can be punished if they report otherwise thus “in 2013, for example, journalists of RTV Goražde were deprived of their salaries for several months.”¹⁶⁹

It is not public televisions that gave the problems regarding political interference, the same happens with private media and “the appointment procedure for an editor-in-chief comes down to the appointment by the owner ... without even considering the opinion of team members ... the law hasn’t limited the rights of owners to appoint editors in chief and the owners absolutely utilize their rights.”¹⁷⁰ Such instrumentalization of media is not only obvious in censorship that journalists may suffer, but more often in self-censorship, as being deprived of salaries or of a job entirely, causes a chilling effect. The ways in which political control is exercised over media outlets are therefore: “censorship based on financial and political interests of the media and its affiliates; disregard for or the marginalization of certain statements; overburdening journalists so that they cannot investigate certain stories;

¹⁶⁷ Jusić, Tarik and L. Kendall Palmer. “The Media and Power-Sharing: Towards an Analytical Framework for Understanding Media Policies in Post-Conflict Societies. Public Broadcasting in Bosnia and Herzegovina”. *Global Media Journal—Polish Edition* No 1 (4), 2008, p.130

¹⁶⁸ Hodžić, Sanela, *Bosnia and Herzegovina in Media Integrity Matters: Reclaiming public service values in media and journalism*, Peace Institute, Institute for Contemporary Social and Political Studies, 2014, p. 159

¹⁶⁹ Ibid.

¹⁷⁰ Radmila Žigić, Radio Pan, in Hodžić, Sanela, *Bosnia and Herzegovina in Media Integrity Matters: Reclaiming public service values in media and journalism*, Peace Institute, Institute for Contemporary Social and Political Studies, 2014, p. 160

the marginalization of the “sensitive” stories or journalists failing to comply with these particular interests.”¹⁷¹

Journalists and editors have so far been dismissed from their positions on several occasions. For example, the editor-in-chief of the news program on FTV, Duška Jurišić was dismissed in 2010, and the management of this broadcaster has never revealed why she lost this position which only contributed to the claims that there were political pressures that caused it.¹⁷² Similarly, “the former executive director of the programming and production department of TVSA, Mirza Sulejmanović, stated that he held the post for 15 months, but the fact that the local government failed to conduct the regular vacancy procedure during this time, enabled his easy removal in accordance with the intentions of governing parties.”¹⁷³

But generally, not many journalists report the cases of political pressures or their consequences, mainly due to the fear of losing their jobs and hence accept the lack of professionalism in reporting and giving up their freedom of expression in return for salaries. Those that do hold onto their role as public watchdogs are very often exposed to pressures, threats and assaults, and “Free Media Help Line registers around 40 different kinds of pressures and infringements of media freedom per year, involving more than a dozen of threats and several physical attacks.”¹⁷⁴ For example, the employees of radio Studio N, Livno, “were in 2000 labelled foreign mercenaries and betrayers of the Croatian people in a pamphlet that was distributed in the local community” and “it was an open call for lynch”¹⁷⁵

¹⁷¹ Hodžić, Sanela, *Bosnia and Herzegovina in Media Integrity Matters: Reclaiming public service values in media and journalism*, Peace Institute, Institute for Contemporary Social and Political Studies, 2014, p. 160

¹⁷² Ibid.

¹⁷³ Ibid. p. 161

¹⁷⁴ Ibid. p. 162

¹⁷⁵ Ibid.

On all these occasions, the authorities failed to protect freedom of expression and the independence of journalists, moreover, they were those that imposed pressures on journalism. For example, in 2013, the Government of Republika Srpska refused “to have any contact with journalists of BN television in retaliation for critical reporting against them; the Mayor of the Bihać municipality called public institutions and companies to boycott RTV of the Una-Sana Canton; political actors/public officials have also been involved in verbal attacks on media and journalists, with several cases occurring in 2013 alone.”¹⁷⁶

By observing such examples, it does not come as a surprise that defamation laws in B-H are used to put pressure over the media outlets that do not “follow the rules” and “court proceedings are time and money consuming and therefore likely to discourage investigative journalism and critique.”¹⁷⁷

Moreover, the journalists are often explicitly told what they can and cannot report about and it basically comes down to criticizing political opponents of their managements and affiliated political parties or to avoid certain topics entirely if they are not in favor of their advertisers. This is especially pronounced in print media which on several occasions showed refrained from reporting about certain topics, and turned to criticizing political opponents of their owners most often. For example, Dnevni avaz criticized political party SDA, the affiliated public company BH Telecom and the rival daily – Oslobođenje, whereas Oslobođenje could not criticize president Gaddafi during the war in Libya, as it would have been against the business interests of Oslobođenje. In addition, there are indications that even corruption is present when it comes to refraining from publishing some stories. Specifically, Željko Raljić from Respekt magazine claimed that he was “offered a payment not to publish the issue of

¹⁷⁶ Hodžić, Sanela, *Bosnia and Herzegovina in Media Integrity Matters: Reclaiming public service values in media and journalism*, Peace Institute, Institute for Contemporary Social and Political Studies, 2014, p.162

¹⁷⁷ Ibid.

Respekt focused on the property of the Minister of Industry, Energy and Mining of Republika Srpska.”¹⁷⁸

4.4 MEDIA OWNERSHIP

The independence of media in general is essential for citizens to receive fair and accurate information. In other words: “Freedom of the Media (...) implies that the public has a right to a free media system, which provides overall balanced, full and varied information. The underlying idea is that a free system of this kind is an essential prerequisite for a functioning democracy.”¹⁷⁹ However, with the emergence of new technologies and the beginning of digital era, the diversity of content producers set certain challenges in media system, too. But “despite the explosion of media and communications technology, the new competitive media landscape has shown a tendency towards greater concentration of ownership of the media in fewer and fewer hands.”¹⁸⁰ Laws on competition thus got a bigger role as their goal became accommodating these changes and preserving a competitive market process, as well as to ensure a democratic communications order.¹⁸¹ In theory, “a pluralistic media is seen to meet the demands of democracy by providing citizens with a broad range of information and opinions; to represent minorities giving them the opportunity to maintain their separate existence in a larger society; to reduce the event of social conflict by increasing understanding between conflicting groups or interests; to contribute to overall cultural variety; to facilitate social and cultural change, particularly when it provides access to weak or

¹⁷⁸ Željko Raljić from Respekt magazine, in Hodžić, Sanela, *Bosnia and Herzegovina in Media Integrity Matters: Reclaiming public service values*

in media and journalism, Peace Institute, Institute for Contemporary Social and Political Studies, 2014, p. 148

¹⁷⁹ OSCE Representative on Freedom of the Media, *The Impact of Media Concentration on Professional Journalism*, Vienna: OSCE, 2003, p.15 (Bruck, A. Peter, *Media Diversity in Europe: Report to the Council of Europe (Strasbourg, December 2002)*)

¹⁸⁰ Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p. 303

¹⁸¹ Ariño, Mónica, *Competition Law and Pluralism in European Digital Broadcasting: Addressing the Gaps*, Communications and Strategies, no.54, 2nd quarter, (2004): p. 97

marginal social groups.”¹⁸² But such a broad definition does not help regulators and relevant stakeholders in approaching media concentration issues because there can still be mergers, acquisitions, take-overs, and cross-ownership.¹⁸³ In this way, there can also be one dominant opinion which will prevail in media system, and so even if the number of media outlets in one country is quite high, without adequately regulated ownership, it may not guarantee diversity. Therefore, it is precisely the question of media ownership in Bosnia and Herzegovina that has a weak, not to say insufficient, legal and self-regulatory framework and institutions.¹⁸⁴ Thus this aspect of media sector is particularly prone to being misused and closely connected with the type of defamatory lawsuits coming before courts in B-H. Media owners are often affiliated with political elites, or they represent these elites themselves, as some of media owners established their own parties, too.

¹⁸² Harcourt, Alison and Stefan Verhulst, *Support for Regulation and Transparency of Media Ownership and Concentration – Russia*, Study of European Approaches to Media Ownership, (accessed on 30 March 2016), available at: http://www.medialaw.ru/e_pages/publications/e-conc.htm

¹⁸³ The Commission has issued the *Notice on the concept of concentration under Council Regulation on the control of concentration between undertakings* (1989 EC Merger Regulation). This Notice serves as a guideline as to how the Commission interprets the term ‘concentration’ under the EC Merger Regulation. See: *Commission Notice on the concept of concentration under Council Regulation (EEC) No 4064/89 on the control of concentration between undertakings*, Official Journal C 66/5, entered into force 2 March 1998 (98/C 66/02). (accessed on 30 March 2016), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1998:066:0005:0013:EN:PDF>

¹⁸⁴ Jusić, Tarik, “Bosnia and Herzegovina,” in *Media Ownership and its Impact on Media Independence and Pluralism*, p.62, (accessed on 30 March 2016), available at: http://www2.cji.ro/userfiles/file/documente/04_Ownership_BIH.pdf

	PRIVATE	PUBLIC	OTHER/NOTES
TELEVISION STATIONS	32 PRIVATE TV OUTLETS (63 percent of all TV)	12 PUBLIC TV STATIONS (27 percent of all TV stations)	3 PSB (RTRS, RTVFBiH, BHRT)
RADIO STATIONS	78 PRIVATE RADIO STATIONS (56 percent of radio stations)	62 PUBLIC RADIO STATIONS (44 percent of all radio stations)	3 PSB (RTRS, RTVFBiH, BHRT) 3 NON-PROFIT RADIO STATIONS (Radio Marija, Radio Otvorena mreža and Radio Active Naša djeca).
DAILIES	9 PRIVATE DAILIES (Dnevni avaz, EuroBlic, Oslobođenje, Press RS, Nezavisne, Večernji list, Dnevni list and Glas Srpske)	N/A	DAILIES ARE CONSIDERED TO BE HIGHLY INFLUENCED BY POLITICAL STRUCTURES.
MAGAZINES	OVER 104. Approx. 10 with some socio-political content.	A SMALL PART OF THE PERIODICALS IS PUBLISHED BY LOCAL AUTHORITIES (EXACT NUMBER N/A)	N/A
NEWS AGENCIES	TWO PRIVATE (Onasa, Nina)	TWO (Fena, Srna)	ONE AGENCY OWNED BY THE STATE OF TURKEY (Anadolu) TWO FOUNDED BY RELIGIOUS COMMUNITIES (MINA and KTA).
ONLINE MEDIA	ROUGH ESTIMATE: 80. ⁴⁵	N/A	SOME ONLINE MEDIA ARE CONSIDERED TO BE CONTROLLED BY POLITICAL PARTIES.

Picture 6: Media ownership in Bosnia and Herzegovina¹⁸⁵

More precisely, the competition in terms of media ownership in Bosnia and Herzegovina is entrusted to the B-H Council of Competition, founded in 2004, which is in charge of the implementation of the 2001 Act on Competition.¹⁸⁶ Similar role belongs to the Communications Regulatory Agency (CRA), which, among its other duties, also focuses on regulation of media concentration issues in B-H (see chapter 5.3 for more detail).¹⁸⁷

Specifically, the Act on Competition aims at creating a free market in Bosnia and Herzegovina in terms of competition, all in line with the standards of the EC Antitrust provisions, and attempting to prevent the misuse of one dominant position in media market. The Act on Competition “ensures the effective and transparent application of the

¹⁸⁵ Hodžić, Sanela, *Bosnia and Herzegovina in Media Integrity Matters: Reclaiming public service values in media and journalism*, Peace Institute, Institute for Contemporary Social and Political Studies, 2014

¹⁸⁶ *BiH Council of Competition*, (accessed on 30 March 2016), available at: <http://www.bihkonk.gov.ba/en/index.html>,

¹⁸⁷ *Decision of the High Representative to establish the CRA*, (accessed on 30 March 2016), available at: <http://www.rak.ba/eng/index.php?uid=1272017637>

proceedings and in general, reduced level of the state intervention in this field.”¹⁸⁸ On the other hand, the CRA regulates the concentration and focuses its activities on media pluralism and free competition and the protection of pluralism as a result of a boom in media communications.¹⁸⁹

The CRA produced the rule on Concentration and Cross-ownership Over Electronic and Print Media¹⁹⁰ as an integral part of the B-H Law on Communications, which stipulates that media owners are only allowed a limited share of 10 per cent of ownership, “that private persons or legal entities cannot own two or more radio or TV stations that reach the same audience.”¹⁹¹ On the other hand, one or more private person or legal entity owning print media can also own an electronic media outlet.¹⁹² However, “concentration of ownership has been completely unregulated since 2006, when the Rules on Media Concentration and Ownership of Electronic and Print Media (adopted in 2004) expired,” while adequate solutions to approach this problem are missing when it comes to institutions in charge, and “the implementation of the Law on Competition (relevant for all business sectors) is questionable, given that the Council of Competition responds to specific complaints but does not act strategically in this sense.”¹⁹³

¹⁸⁸ *Act on Competition (Sarajevo, 29 June, 2005), Official Gazette BiH No. 48/05, entered into force 27 July 2005.*

¹⁸⁹ *Ibid.*

¹⁹⁰ Translated title: *Rule No. 21/2003 Concentration and Cross-ownership Over Electronic and Print Media*, (accessed on 30 March 2016), available at:

http://www.rak.ba/bih/download.php?name=pravilo_21/2003_o_medijskoj_koncentraciji_i_vlasnistvu_nad_elektronskim_i_stampanim_medijima_&file=1270642082.pdf&folder

¹⁹¹ Translated title: *Rule No. 21/2003 Concentration and Cross-ownership Over Electronic and Print Media*, (accessed on 30 March 2016), available at:

http://www.rak.ba/bih/download.php?name=pravilo_21/2003_o_medijskoj_koncentraciji_i_vlasnistvu_nad_elektronskim_i_stampanim_medijima_&file=1270642082.pdf&folder

¹⁹² Translated title: *Rule No. 21/2003 Concentration and Cross-ownership Over Electronic and Print Media*, (accessed on 30 March 2016), available at:

http://www.rak.ba/bih/download.php?name=pravilo_21/2003_o_medijskoj_koncentraciji_i_vlasnistvu_nad_elektronskim_i_stampanim_medijima_&file=1270642082.pdf&folder

¹⁹³ Hodžić, Sanela, *Bosnia and Herzegovina in Media Integrity Matters: Reclaiming public service values in media and journalism*, Peace Institute, Institute for Contemporary Social and Political Studies, 2014, p. 123

In Bosnia and Herzegovina it is “cantonal and municipal authorities are still the founders and direct financiers of 27.3 percent of TV stations (12 out of 44) and 44.3 percent of radio broadcasters (62 out of 140).”¹⁹⁴ Moreover, “the extent to which these local public media function in the public interest is doubtful, given that no guarantees of their editorial independence are provided and they are most likely the mouthpieces for local authorities.”¹⁹⁵

4.4.1 WHO ARE THE OWNERS

Media outlets are obligated to register but there in fact are 15 registries in the country and they can be accessed only if a person who wishes to see them pays court fees, whereas the online registry of businesses is available only in the Federation and the CRA’s website does not publish the information on ownership, only the one on editors and directors. It is not a rare speculation that even if the CRA has the data on media ownership, businesses very often hide their actual owners - possibly with Pink TV and OBN due to “legal restrictions on foreign ownership” or they “cover up conflict of interests (the case of Dnevni avaz).”¹⁹⁶ Newly emerged online media are not an exception to the gloomy issue of media ownership in B-H, and the same occurs even with the agencies in charge of measuring the audience share.¹⁹⁷

In general, the economic crisis in the country “fragmented along entity and ethnic lines, sources of revenues are scarce and accordingly, media have little possibility to be

¹⁹⁴ Hadžović, E. *Monkeys on public broadcasters*, 3 July 2013, (accessed on 30 March 2016), available at: <http://www.media.ba/bs/magazin-medijska-politika-regulativa/majmuni-na-javnom-servisu>

¹⁹⁵ Ibid.

¹⁹⁶ Hodžić, Sanela, *Bosnia and Herzegovina in Media Integrity Matters: Reclaiming public service values in media and journalism*, Peace Institute, Institute for Contemporary Social and Political Studies, 2014, pp.398-401

¹⁹⁷ The ownership of a new company Audience Measurement, owned by Nmam Media Audience Measurement Limited, a company from Cyprus not found in registries of businesses.

independent from the centers of political and economic power.”¹⁹⁸ Public broadcasters in B-H consist of 12 TV broadcasters and 62 public radio broadcasters but their viewership is rather small, apart from those of the three public service broadcasters discussed above. However, what all public televisions have in common is their financial dependence on public authorities and consequently their lack of editorial independence.

Private media are competitors to the public ones in terms of their coverage and viewership. The biggest competition lies in: Pink BH, OBN, RTV BN and Hayat TV, and the radio stations with most listeners are mainly Radio Kalman, Radio Stari Grad (RSG) and Radio BN. Even though these media outlets are not funded by the local authorities, their owners are closely related to political elites and moreover, these owners have several types of media outlets in their possession. For example, Željko Mitrović, both Serbian and Bosnian citizen who was close to Slobodan Milosevic, “is the owner of Pink Media Group, “the largest private commercial broadcaster of entertainment programs and the largest media group for South East Europe.” Besides Pink BH, in 2013 the company launched around 100 channels, which are made available online and in part through cable distributors in B-H.”¹⁹⁹ On the other hand, the owner of OBN is a businessman from Croatia, Ivan Čaleta, while another example is the problematic ownership of Bobar radio, because Gavriilo Bobar, “the owner of Bobar Group (including the Bobar Bank, the insurance company and other companies) is known for his political affiliations with SNSD. He was a member of the SNSD party and an official of the National Assembly of RS in 2011.”²⁰⁰ The political polarization of media outlets in Republika Srpska is particularly obvious because the two TV stations with the biggest audience are under the strong influence by the government and the ruling SNSD

¹⁹⁸ Hodžić, Sanela, *Bosnia and Herzegovina in Media Integrity Matters: Reclaiming public service values in media and journalism*, Peace Institute, Institute for Contemporary Social and Political Studies, 2014, p. 128

¹⁹⁹ PINK BH, source: <http://www.pink.co.ba/kompanija/onama/>.

²⁰⁰ *Supra note 198*, p. 132

(public broadcaster RTRS) or by the major opposition party, Serbian Democratic Party (SDS), thus it is critical of the authorities but biased towards their party of affiliation. Specifically, “due to the critical stance towards SNSD, several incidents involving BN were interpreted as a form of political pressure, involving police inspection in 2010, verbal confrontations, and recently, on 17 October 2013, the instructions to SNSD members to refrain from contact with BN’s journalists.”²⁰¹

The ownership of TV outlets in the Federation of Bosnia and Herzegovina has seen more than only two political parties. This is how “the hidden owner of TV1 is speculated to be Sanela Jenkins, a businesswoman who was an advisor to Haris Silajdžić, the leader of the Party for B-H, during his term in office as a member of the Presidency of B-H.... (and)... suspicions about political affiliations with the Party for B-H were strengthened by the fact that TV1 started to broadcast in 2010, preceding the general election campaign.”²⁰²

Although the circulation of print media has been decreasing over the years, the biggest questions regarding media ownership are raised precisely in this type of media.

²⁰¹ *SNS prohibited Alternative TV*, *Dnevni avaz*, 2 October 2010, in Hodžić, Sanela, *Bosnia and Herzegovina in Media Integrity Matters: Reclaiming public service values in media and journalism*, Peace Institute, Institute for Contemporary Social and Political Studies, 2014, p. 132

²⁰² Hodžić, Sanela, *Bosnia and Herzegovina in Media Integrity Matters: Reclaiming public service values in media and journalism*, Peace Institute, Institute for Contemporary Social and Political Studies, 2014, p. 132

Fahrudin Radončić, the owner of daily, Dnevni avaz, has been closely connected with political elites and the content of the newspapers changed as he left the Party for Democratic Action (SDA) and started his own party, the Union for Better Future (SBB). Moreover, Radončić was the Minister of Security of B-H from 2012 till 2014, and during that time defamatory lawsuits concerning him piled up before the cantonal court in Sarajevo.

MEDIA OWNER	MEDIA OWNERSHIP (NOMINAL, HIDDEN, OR OTHERWISE CONNECTED)	OTHER OWNERSHIP
FAHRUDIN RADONČIĆ	AVAZ ROTO PRESS (founded by Avaz Ltd) TV ALFA (founded by Avaz roto press) PRINTING HOUSE GIK OKO LTD. (majority of ownership by Avaz) HOLDS SHARES IN THE PUBLISHING HOUSE PROSPERITET LTD. AVIO TRANS LTD. AERO SERVICES, TRUISM AND TRADE (owned by Avaz roto press) HIS SISTER RAZIJA FEHRATOVIĆ OWNS A PRINTING HOUSE FEHRATOVIĆ	AVAZ LTD. REAL-ESTATE hospitality and commerce (official owner Azra Radončić)
THE SELIMOVIĆ FAMILY	DAILY OSLOBOĐENJE (majority capital of Sarajevska pivara and Klas shared capital company) WEEKLY BH DANI (published by Oslobođenje Ltd.) UNIONINVESTPLASTIKA (partly a printing house)	MUJO SELIMOVIĆ: MIMS LTD. domestic and foreign trade NAPRIJED INVEST LTD. funds management EAM CONSULTING LTD. research, development and technological services and trade (majority capital MIMS) ENERGONOVA LTD. (approx. 33 percent of MIMS capital) THE FAMILY IS CONNECTED WITH DOZENS OF DIFFERENT BUSINESSES, INCLUDING COMPANIES SARAJEVSKA PIVARA, KLAS, SPRIND, MERKUR, UNIONINVEST PLASTIKA ETC.
ŽELJKO KOPANJA	NIGD DNN <i>Nezavisne novine</i> <i>Glas Srpske</i> Glas Srpski - Grafika	GLAS SRPSKI - TRGOVINA
GAVRILO BOBAR	BOBAR RADIO (indirectly, owned by Bobar Group, owned by Gavriilo Bobar)	BOBAR GROUP: Bobar Bank, Bobar insurance company, etc. ⁷⁵

Picture 7: Owners of media outlets in Bosnia and Herzegovina²⁰³

²⁰³ Hodžić, Sanela, *Bosnia and Herzegovina in Media Integrity Matters: Reclaiming public service values in media and journalism*, Peace Institute, Institute for Contemporary Social and Political Studies, 2014

Dailies in Republika Srpska, Nezavisne novine and Glas Srpske and Radio Nes, Banja Luka, are owned by company NIGD DNN Ltd., owned by Željko Kopanja and Nataša Kopanja. Kopanja has always been closely connected with the current president of the RS and his ruling party, SNSD, and managed to “secure extra profit for these media through partial government funding, and also contributed to some appointments within these media... (because)... the editor-in-chief of Nezavisne novine is the daughter of the Serb member of the Presidency of B-H ... of course, it would be illusory to expect that she has an equally professional stance towards each member of Presidency... [and] towards this party in which her father holds one of the pivotal positions.”²⁰⁴

On the other hand, the owners of the two biggest dailies in the Federation of B-H, Dnevni avaz and Oslobođenje, have been in constant “media wars” for years, which will be seen further on when discussing defamatory lawsuits between these two owners. When he became the Minister, Fahrudin Radončić transferred the ownership of the newspapers to his ex-wife Azra Radončić and so “possible accusations about conflict of interest (the Law on Conflict of Interest in Government Institutions of B-H, Article 4) were thus formally avoided, but suspicions that Radončić still has the major influence on the editorial policy of Dnevni avaz persist”²⁰⁵ and it is particularly visible in open criticism addressed at the SDA party. More specifically, “content analysis of articles published during the pre-election period in 2010 indicates that Dnevni avaz reported more extensively and favourably about Radončić (in 68 percent of cases) and SBB (in 57 percent of cases), while being mostly negative towards the competing SDA (79 percent) and SB-H (84 percent of cases).”²⁰⁶ The

²⁰⁴ Suzana Mijatović, a journalist for Slobodna Bosna, in Hodžić, Sanela, *Bosnia and Herzegovina in Media Integrity Matters: Reclaiming public service values in media and journalism*, Peace Institute, Institute for Contemporary Social and Political Studies, 2014, p.133

²⁰⁵ Hodžić, Sanela, *Bosnia and Herzegovina in Media Integrity Matters: Reclaiming public service values in media and journalism*, Peace Institute, Institute for Contemporary Social and Political Studies, 2014, p.133

²⁰⁶ Ibid. p. 58

other major daily newspaper, *Odlobodjenje*, belongs to the Selimovic family, with close connections to the SDA party and also the owners of weekly magazine *Dani*.²⁰⁷

²⁰⁷ Jovanović, Nebojša, *What are we silent about when we are silent about Dani*, 17 November 2010, (accessed on 4 April 2016), available at: <http://www.media.ba/en/menadzment-novinarstvo/o-cemu-sutimo-kad-sutimo-o-danima>

5. REGULATION OF TRADITIONAL MEDIA IN BOSNIA AND HERZEGOVINA

This chapter will reflect on the legislative framework regarding traditional media, and particularly on the role of international community in establishing **regulatory bodies, passing media laws, political obstructions to these initiatives and the problems in the application of these laws.**

In order to provide a detailed explanation of legislative framework, it is first necessary to point at the attempts of the international community to re-establish the media landscape after the war, and the actions taken by the Office of High Representative (OHR), the Organization for Security and Cooperation in Europe (OSCE), the European Union (EU) and the Council of Europe (COE).

Their engagement was crucial for establishing the **regulatory body** for electronic media – the Communications Regulatory Agency (CRA) which had a significant role in minimizing hate speech in media after the violent conflicts ended (more in subchapter 4.1). In addition to this body, there is also a self-regulatory body – the Press Council of B-H. The Press Council has become the self-regulatory body for both print and online media, which relies on the Press Code and involves a Complaint Commission deciding on violations of the Code (more in subchapter 5.4). But even these regulators admitted that “hardly any policy measures were taken to improve the structural conditions of the media environment“ and that “media policy in Bosnia and Herzegovina is now practically non-existent”²⁰⁸ while “policy initiatives in recent years have been scarce and in general not informed by relevant studies, ignorant of the actual interest of the public and ostensibly guided by the political interests of those in power.”²⁰⁹ Other actors engaged in the regulation of media have had only minor impact and this is how the Institution of the Ombudsman for Human Rights of B-H which can

²⁰⁸ Helena Mandić of the Communication Regulatory Agency, interview, September 2015

²⁰⁹ Hodžić, Sanela, *Bosnia and Herzegovina in Media Integrity Matters: Reclaiming public service values in media and journalism*, Peace Institute, Institute for Contemporary Social and Political Studies, 2014, p. 121

react to violations of media freedoms. The impact of the civil society was very low as well, and there is only one journalist association which has proven to be more active when it comes to defending freedom of expression – BH Journalists. On the other hand, the Council of Ministers of B-H which is in charge of adopting and developing media policies did not take concrete steps to help the media landscape of Bosnia and Herzegovina, and there are even concerns that in future they may only “introduce changes that will weaken the powers of CRA and enable more political interference in the media sector.”²¹⁰

The important role of international community is also reflected in tailoring the **legislative framework** for media in B-H because it was this engagement that made the laws of B-H in line with international standards and ensuring the enjoyment of freedom of expression. The Law on Communications, the Law on Public Broadcasting System, the Laws on Protection against Defamation, the Freedom of Access to Information Acts, etc., have been created in order to provide legislative framework which respects freedom of expression, however, domestic political options kept slowing the legislative processes down.

Therefore, media reform has certainly been one of the most problematic parts in the democratization of Bosnia and Herzegovina. While the role of the international community was stronger, the scale of the Worldwide Press Freedom Index showed that in 2006, Bosnia and Herzegovina came as the 19th along with Denmark or New Zealand, which was actually a higher position than the one held by France, Italy, or the neighboring Croatia and Serbia.²¹¹ But in 2013, Bosnia and Herzegovina ranked 68th country out of 179 countries for freedom of the press. This score shows that the freedom of media in the country has decreased since 2006, and the reasons for

²¹⁰ Ibid. p. 124

²¹¹ Hodžić, Aida, A. “Democratizing Media, Welcoming Big Brother: Media in Bosnia and Herzegovina.” in *Finding the Right Place on the Map: Central and Eastern European Media Change in a Global Perspective*. Edited by Karol Jakubowicz and Miklós Sükösd. Bristol: Intellect Books, 2008, p.146

this decline may lie in the difficult **political situation** and the general influence of politics, which has plagued the media in B-H over the last few years. Therefore, after the extensive engagement of international community, the media sector in B-H was shaped however, political interference in media sector made the instrumentalization of media even stronger and what became obvious was “control of the media by outside actors – parties, politicians, social groups or movements, or economic actors seeking political influence – who use them to intervene in the world of politics.”²¹²

Hence, a paradox can be noticed in such situation, because the regulatory framework for the entire media system could be seen as a good example in the whole of the region.²¹³ Therefore, the most important achievements of the international community were: the establishment of the CRA as an institutional guarantor of the regulated broadcasting market, the establishment of public broadcasting service, the adoption of the Freedom of Information Act and finally decriminalization of defamation.

5.1 FIRST STEPS TOWARDS LEGISLATION

The war which ended in 1995, left Bosnia and Herzegovina deeply divided on almost every issue, and so the issue of adopting **legislation**, too. The legislative environment was rather chaotic and relied either on the legislation from the previous regime of Socialist Federal Republic of Yugoslavia or taken from the newly established Republic of Croatia and Federal Republic of Yugoslavia. Until 1997, “the authorities in Bosnia-Herzegovina were unable to agree on the character of media legislation, and who has jurisdiction in passing media legislation.”²¹⁴ It was therefore the task of the

²¹² Hallin, Daniel C. and Paolo Mancini, *Comparing Media Systems*, Cambridge University Press, The Edinburgh Building, Cambridge CB2 2RU, UK, 2004, p. 37.

²¹³ Ibid.

²¹⁴ Udovičić, Zoran, Tarik Jusić, Mehmed Halilović, Radenko Udovičić and Media Plan Institute Research Team, *The media at a turning point: a media landscape of Bosnia and Herzegovina*, 2001, p.32

international community to consolidate the legislative environment and take the first steps of recovery and reform in this aspect.

The first body which was a part of media reform was Media Election Commission (MEC), which was a part of **OSCE mission in Bosnia and Herzegovina**, and then followed the independent regulatory body: Media Experts Commission in 1997. At that time, there was also the **Institution of Ombudsmen for Human Rights** in the Federation of Bosnia and Herzegovina with a special assistant on media which was in charge of the protection of freedom of media, etc.²¹⁵ However, any introduction of international practices and any initiative towards ensuring a consolidated media landscape were obstructed by “the incompetent and mutually confronted authorities, which were doing all they could to prevent the passing of regulations consistent with contemporary European standards and in accordance with the new constitutional organization of the state.”²¹⁶

The intervention of international community in media of Bosnia and Herzegovina was also reflected in establishing the bodies of regulation which were supposed to ensure the functional media landscape in the country.

²¹⁵ Ibid.

²¹⁶ Ibid.

Year	Title	Content
December 1995	London meeting	OHR called on to actively engage in media reform.
April 1996	Broadcast Media Statement	Need to create “independent TV network” for the whole country mentioned.
May 1997	Sintra Declaration	Extensive powers given to OHR, including power “to curtail or suspend” any media network or program found to undermine the peace agreement.
December 1997	Bonn Declaration	OHR powers extended to include: <ul style="list-style-type: none"> - power to remove public officials who obstruct the peace from their public office; - power to impose laws when BIH legislatures fail to do so; - power to act in respect to the media.
June 1998	Luxemburg Declaration	Called for the creation of a single PSB system and prompted OHR to oversee complete transformation of existing public broadcasters.
December 1998	Madrid Declaration	The Madrid Declaration called, <i>inter alia</i> , for: <ul style="list-style-type: none"> - the reform of state-controlled broadcasters and the establishment of an independent PSB system for the whole country; - continued support to the independent regulator for broadcasting; - the introduction of a legislative framework on hate speech, libel and defamation; - the establishment of a self-regulatory mechanism for the press; - donor governments to continue supporting OBN and FERN

Figure 1: Peace Implementation Council decisions and declarations relevant for media reforms²¹⁷

But in 1997, the Peace Implementation Council adopted a declaration that made the **Office of the High Representative** the leading institution in media reform and enabled it to “shape and suspend any media network whose program is in constant and drastic violation of the letter or spirit of the peace agreement (OHR, 1998a).”²¹⁸ The Office of the High Representative (OHR) has thus become

²¹⁷ Jusić, Tarik, and Nidžara Ahmetašević, *Media Reforms through Intervention: International Media Assistance in Bosnia and Herzegovina*, Analitika, 2013, p.23

²¹⁸ Udovičić, Zoran, Tarik Jusić, Mehmed Halilović, Radenko Udovičić and Media Plan Institute Research Team, *The media at a turning point: a media landscape of Bosnia and Herzegovina*, 2001, p.33

in charge of the implementation of the General Framework Agreement for Peace in Bosnia and Herzegovina (i.e. Dayton Peace Agreement) signed in 1995 and therefore ending the three-year war in the country. The Office of the High Representative was established in order to recover the country after the war through reforms, constant cooperation with the international community and be engaged in democratization process of B-H, and at first the Office was comprised of primarily foreign staff, while local employees started to be a part of the OHR in 2002.²¹⁹

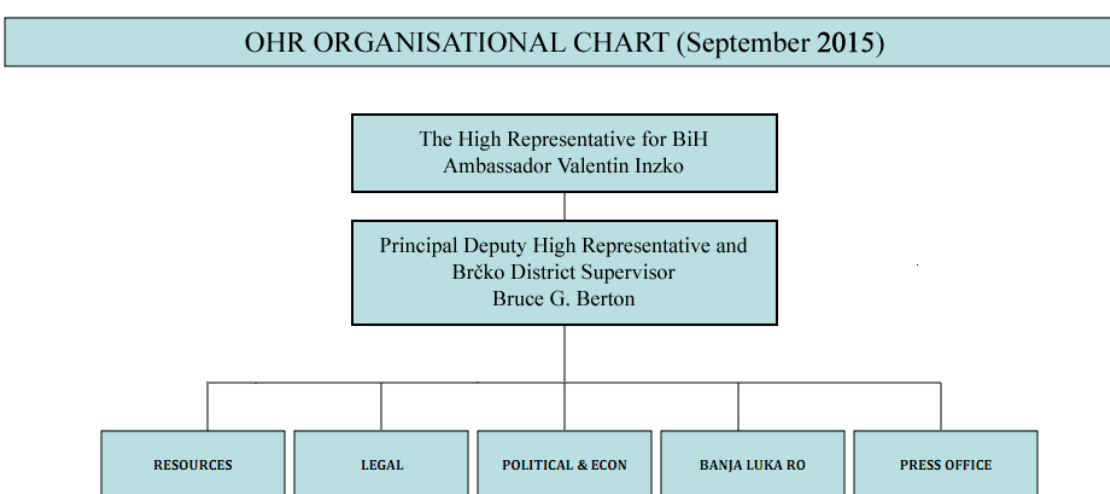


Figure 2: Organizational Chart of the Office of High Representative²²⁰

Between 1998 and 2002, the High Representative passed 17 decisions making groundbreaking changes to the media landscape in Bosnia and Herzegovina, and some of them are the following²²¹:

- Decision on the establishment of the Independent Media Commission (IMC) (1998), and
- Decision on the appointment of members of the Council IMC (1998),

²¹⁹ OHR website, available at: www.ohr.int

²²⁰ Ibid.

²²¹ Ibid.

- Decisions on the restructuring of the Public Broadcasting System in B-H and on freedom of information and decriminalization of libel and defamation (30. 7. 1999.),
- Decision amending the Law on Radio-Television of the RS (1999),
- Decision on the implementation of the Law on Radio-Television of the Federation (199.),
- Second Decision on restructuring the Public Broadcasting System in B-H (2000),
- Decision Combining the Competencies of the Independent Media Commission and the Telecommunications Regulatory Agency (2001), and later Decision appointing new members to the Council of the Communications Regulatory Agency (CRA) (CRA) of 29. 11. 2001.
- Decision Imposing the Law on Radio-Television of Republika Srpska (24. 5. 2002.),
- Decision Imposing the Law on Radio-Television of the Federation of Bosnia and Herzegovina of 24. 5. 2002.,
- Decision Imposing the Law on the Basis of the Public Broadcasting System and on the Public Broadcasting Service of Bosnia and Herzegovina of 23. 5. 2002.

5.2 INDEPENDENT MEDIA COMMISSION

The **Independent Media Commission (IMC)** was a regulatory body which was to contribute to the overall democratization of the country after the war ended in 1995. The goal of the IMC was to regulate the conducts of broadcasters. So soon after the war there still was “inflammatory and extremely biased reporting, which had speeded up the disintegration of the former Yugoslavia, (and

which) continued with unyielding intensity.”²²² The international community perceived the situation in B-H as one lacking public participation, and particularly in independent judiciary, stating that “political environment in B-H.... is not able to protect the judiciary from organized crime”.²²³ The corruption was widely spread, there was “lawlessness, the lack of respect for institutional authority, and the prevalence of mafia-style "gangsterism"” and so international actors had to react to all the corruption thus “OHR's Anti-fraud Unit, on the instructions of the Peace Implementation Council, have developed an Anti-Corruption Strategy to combat it.”²²⁴

In such a lawless atmosphere, it was necessary to establish a strong body which would regulate the media landscape and it was acknowledged that the role of international actors in these bodies “should go beyond mere consulting....the institutions must be designed and developed in such a way that they are able to operate without improper political interference, and to attract and retain Bosnian and international technical expertise.”²²⁵ The need for such body was first acknowledged at the Bonn Peace Implementation Conference (PIC) in 1997, and at the meeting held the following year in Luxembourg it was decided that there would be the Independent Media Commission with a crucial role in media reform, conveying international practices in B-H media landscape and establishing legal basis for media “ to regulate broadcast outlets in Bosnia and has the power to close radio and television stations and punish - financially and otherwise - newspapers that it decides are engaged in "poisonous propaganda" ..”²²⁶

Therefore, the Office of the High Representative founded the IMC on 11 June 1998, with a starting date of August 1, 1998, but it was not specified what its structure should be, how exactly it should

²²² Udovičić, Zoran, Tarik Jusić, Mehmed Halilović, Radenko Udovičić and Media Plan Institute Research Team, *The media at a turning point: a media landscape of Bosnia and Herzegovina*, 2001, p.45

²²³ *White Paper*, Cited in *Rule Over Law: Obstacles to the Development of an Independent Judiciary in Bosnia and Herzegovina*, ICG Report (Law Project), 5 July 1999, p.6

²²⁴ Ibid.

²²⁵ *Taking on the Commanding Heights*, European Stability Initiative (ESI Bosnia Project) report, 3 May 2000.

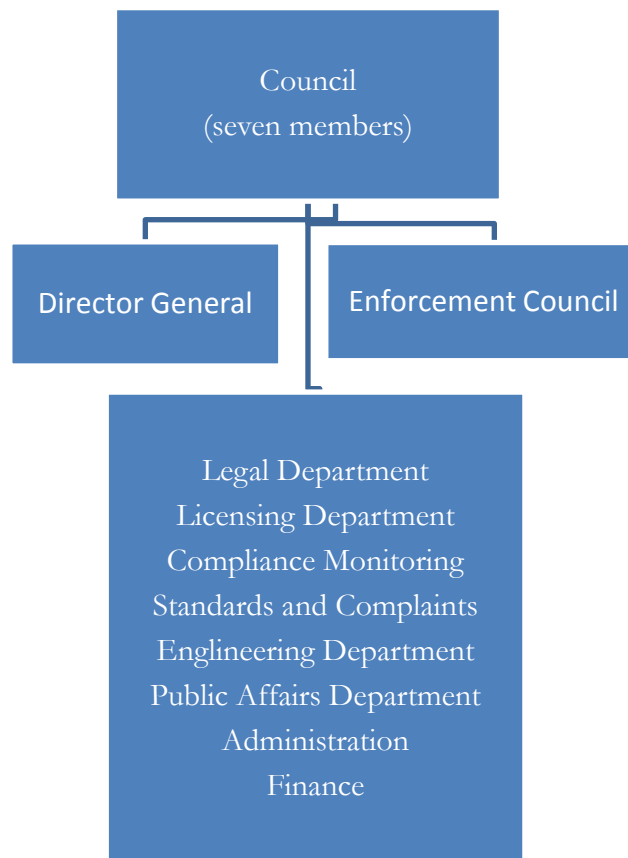
²²⁶ “Bosnia 1997 Review” in *World Press Freedom Review*, 1998

operate and which rules it should follow. Another crucial problematic part of media reform and the establishment of the IMC was that there was no solid legislative framework according to which the IMC could operate, and it was necessary to ensure the means of enforcing the IMC's authority and create "detailed rules for the procedure for handling cases as well as a system of transparency in all decision-making."²²⁷ The IMC was expected to remove political influence from the media and contribute to the reconstruction of media outlets. However, "due to a lack of political will on the part of local authorities to regulate the state of anarchy in media legislation and bring it into harmony with the Dayton Agreement, the IMC in time became the key expert body on which the international community relied in the process of media reconstruction.... (and it) was a substitute both for legislators and self-regulation."²²⁸ At first, there were only foreign citizens in the management structure of the IMC, but the idea was to gradually establish an independent institution comprising of local experts, and so "in 1999 a B-H citizen was appointed to the position of the Chief of Legal Department" while "the first local General Director was appointed in October 2003 while three Council members held their positions until the first complete local Council was appointed in April 2005."²²⁹

²²⁷ Metcalf Nyman, Katrin and Krister Thelin, *Media and the Rule of Law: The Importance of Media Regulation for the Peace Process in Bosnia and Herzegovina*, p. 587

²²⁸ Udovičić, Zoran, Tarik Jusić, Mehmed Halilović, Radenko Udovičić and Media Plan Institute Research Team, *The media at a turning point: a media landscape of Bosnia and Herzegovina*, 2001, p.46

²²⁹ Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.252



Picture 8: Structure of the Independent Media Commission

The performance of the IMC therefore referred to creating the mechanisms for regulating the media environment. Moreover, the IMC “lent its expertise and services to the undertakings that are meant to providing the barest of legal frameworks only until such time as indigenous bodies take up the slack. Thus, the IMC Legal Department has offered its expertise to the OHR working group on libel and slander legislation.”²³⁰ In addition to this, the IMC became engaged in regulation of the press, too, and particularly in the establishment of the Press Council and the Press Code, by advising and assisting the six associations of journalists that aimed at creating a self-regulatory body. The IMC

²³⁰ Independent Media Commission, *White Paper: Media and Democratization in Bosnia and Herzegovina*, 2000, p.10

along with OSCE, IREX ProMedia and representatives from journalist association held a meeting where it was agreed that the Press Council will be established and the B-H Press Code was adopted.²³¹ IMC's important role in media reform is seen in passing Broadcasting Code of Practice²³², the Code on Media Rules for Elections²³³, Code on Advertising and Sponsorship²³⁴, Rule 1/1999 – Definitions and Obligations of Public Broadcasting²³⁵, Rule 2/1999 – Compliance with Copyright Obligations²³⁶, and Rule 3/1999 – Broadcast License Fees²³⁷.

The issue of license fees was particularly challenging and in 2000, there were 268 electronic media outlets using about 700 transmitters²³⁸, which was a very high number compared to other countries and outlets-population ratio. These outlets worked with or, very often without any licenses OSCE, OHR and IMC “granted temporary broadcast licenses to selected stations and began implementing measures to curb piracy...(and)..these actions caused many small broadcasters to go out of business.”²³⁹ These licenses were valid for six months and “constituted an inventory of broadcasters (status, transmitter power and other technical modalities)” and only later did it come the “issuance of long-term licenses (2-5 years)...more demanding and complex, in particularly with regard to programming criteria.”²⁴⁰ Specifically, the IMC called for “fair reporting, without inflammatory language, and programming that does not insult national and religious feeling or the fundamental moral and ethical postulates of society in Bosnia-Herzegovina.”²⁴¹ As the role of the media during

²³¹ Independent Media Commission, *White Paper: Media and Democratization in Bosnia and Herzegovina*, 2000, p.10

²³² 1999, *Broadcasting Code of Practice*, defining the rules and standards regarding program content

²³³ 1999, *Code on Media Rules for Elections*

²³⁴ 2000, *Code on Advertising and Sponsorship* referring to both public and private broadcasters and advertisements and sponsorship of their programs.

²³⁵ *Rule 1/1999 – Definitions and Obligations of Public Broadcasting*

²³⁶ *Rule 2/1999 – Compliance with Copyright Obligations*

²³⁷ *Rule 3/1999 – Broadcast Licence Fees*

²³⁸ IREX, *Bosnia and Herzegovina*, 2000, p.67, (accessed on 4 April 2016), available at: <https://www.irex.org/sites/default/files/09-Bosnia%20and%20Herzegovina.pdf>

²³⁹ *Ibid.*

²⁴⁰ Udovičić, Zoran, Tarik Jusić, Mehmed Halilović, Radenko Udovičić and Media Plan Institute Research Team, *The media at a turning point: a media landscape of Bosnia and Herzegovina*, 2001, p.47

²⁴¹ *Broadcast Code of Practice*, in Udovičić, Zoran, Tarik Jusić, Mehmed Halilović, Radenko Udovičić and Media Plan Institute Research Team, *The media at a turning point: a media landscape of Bosnia and Herzegovina*, 2001, p.48

the war was enormous, there was also the tendency to prevent broadcasting hate speech from showing up again. Moreover, it can be said that “much has been written about the role of the news media in conflict and war, but very little about their role in peace”.²⁴² The challenge was therefore to introduce the licenses because they were non-existent in the previous regime as broadcasters were owned by the state. During the licensing process “the database of all RTV stations was created and all of them received licenses for broadcasting on their frequencies (changes of technical parameters occurred only in the cases when serious technical disturbance occurred).”²⁴³ One of the initial problems was that the authorities of Republika Srpska required that electronic outlets in this entity pay licenses to them, too, and with the requirement of license fees at the state level it made these outlets pay a double fee.²⁴⁴ Furthermore, when the IMC started issuing long-term licenses, applying stricter criteria, which about 30% of electronic outlets were not expected to meet, and also drew a line between public and commercial outlets at this point. Specifically, the IMC treated as a public broadcaster the outlet that “receives 51 percent of its operating support from government institutions and agencies at any level of government, or an organization which itself is owned 51 percent or more by a government agency,” meaning that these outlets may be funded by political parties, Federal Republic of Yugoslavia, Croatia or any country which was not a “donor-country member of the Peace Implementation Council,” making the outlets which did achieve the standards of public interest but were funded by the international community (TV OBN and FERN) in fact commercial TV outlets.²⁴⁵

²⁴² Wolfsfeld, Gadi, *Media and the Path to Peace*, Cambridge University Press, 2004. in Jusić, Tarik and L. Kendall Palmer, “The Media and Power-Sharing: Towards an Analytical Framework for Understanding Media Policies in Post-Conflict Societies. Public Broadcasting in Bosnia and Herzegovina.” *Global Media Journal—Polish Edition* No 1 (4). 2008, p.111

²⁴³ Mandić, Helena, “Regulation of Broadcasting in BiH”, in Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.251

²⁴⁴ Udovičić, Zoran, Tarik Jusić, Mehmed Halilović, Radenko Udovičić and Media Plan Institute Research Team, *The media at a turning point: a media landscape of Bosnia and Herzegovina*, 2001, p.47

²⁴⁵ Udovičić, Zoran, Tarik Jusić, Mehmed Halilović, Radenko Udovičić and Media Plan Institute Research Team, *The media at a turning point: a media landscape of Bosnia and Herzegovina*, 2001, p. 48

After the procedure of long-term licensing ended, 183 media outlets met the required criteria: 42 TV stations (16 public and 26 private) and 141 radio stations (62 public and 79 private).²⁴⁶ Based on the way in which this process was handled – competitive, aiming at quality broadcasting - “it was said to be successful, transparent, non-discriminatory and open, introducing order among electronic media due to very clear rules and especially due to the fact that the process was conducted in an efficient and transparent manner.”²⁴⁷

Regarding the programming, the IMC had to deal with rather serious violations due to a post-war atmosphere and “texts and programs were still full of political discrimination, based on intolerance and stereotypes from war and pre-war years.”²⁴⁸ Between 1998 and 2001 the Department for Monitoring and Complaints of the IMC received a total of 473 complaints regarding program standards, and particularly to hate speech.²⁴⁹ One example is the case of Radio Sveti Georgije which broadcasted on May 8, 2001, an interview with a painter Aleksandar Sopot on the events that occurred after the foundation of Ferhadija Mosque in Banjaluka was laid down, and using statements which could be treated as hate speech. It was “determined that there was no editorial control whatsoever; not only did the program speak badly about religious beliefs, but it also caused a significant risk of public riots” and “the station was sanctioned and its license was suspended for 90 days.”²⁵⁰

Nonetheless, since it was necessary to develop regulatory mechanisms at a state level faster, on March 2, 2001, the Office of the High Representative brought the Decision²⁵¹ which **merged** the authorizations of the Independent Media Commission and the Telecommunications Regulatory

²⁴⁶ Mandić, Helena, “Regulation of Broadcasting in BiH”, in Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.252

²⁴⁷ Ibid.

²⁴⁸ Ibid. p.267

²⁴⁹ *Communications Regulatory Agency*, at: www.rak.ba

²⁵⁰ Mandić, Helena, “Regulation of Broadcasting in BiH”, in Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.268

²⁵¹ *Office of the High Representative in Bosnia and Herzegovina*, at www.ohr.int

Agency, thus creating an independent body in charge of regulation of telecommunication and electronic media in Bosnia and Herzegovina: **the Communications Regulatory Agency**.

5.3 COMMUNICATION REGULATORY AGENCY

The CRA has become “the core integrative mechanism for the whole broadcasting sector - a robust and independent regulator with broad powers” which ‘has proved to be the right approach to regulating the chaotic broadcasting scene after the war – downsizing the market to a more realistic number of broadcasters and eliminating the language of hatred and propaganda from the programs.’²⁵² Therefore the duties of CRA include “drafting and ensuring implementation of rules on broadcasting; issuing licenses and ensuring compliance of broadcasters to license obligations and provisions.”²⁵³

The primary reasons for establishing the CRA were, among other: “avoiding double or conflicting regulatory authorities at all level of government in B-H; the key role of telecommunications in economic development of any country; the assumption that opening the market of telecommunications towards the competition brings benefits to both consumers and business sector; the fact that the trend in communications industry towards the convergence of technology and the way of transmission requires clear and comprehensive regulatory approach; the opinion that the unique regulator will enable a quick and efficient reaction to economic and business conditions.”²⁵⁴

The OHR Decision defined the structure of the CRA, too, and thus it was prescribed that it should

²⁵² Jusić, Tarik and L. Kendall Palmer. “The Media and Power-Sharing: Towards an Analytical Framework for Understanding Media Policies in Post-Conflict Societies. Public Broadcasting in Bosnia and Herzegovina.” *Global Media Journal—Polish Edition* No 1 (4). 2008, p.128.

²⁵³ Ibid.

²⁵⁴ Mandić, Helena, “Regulation of Broadcasting in BiH”, in Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.253

have two sectors: for broadcasting and for telecommunications, that its activities should engage international consultants and that the CRA is managed by the Director General.

The activities of the CRA contributed to stabilizing media sector in B-H and it “was a key factor that contributed to the significant improvement in the overall quality of radio and TV programs in the country – the journalistic standards in broadcasting improved, the hate speech and war-mongering propaganda was eliminated, and the access to airwaves was granted to voices and organizations from across the political spectrum.”²⁵⁵ But in spite of these successful initiatives, the CRA did not remain immune to clashes with local political elites particularly coming from Republika Srpska authorities, opposed forming state-level institutions in order to have a stronger entity authority. Other authorities resisted the activities of the CRA as well, and some media outlets close to political parties did so, too, resulting in “legal documents being changed frequently due to short-term political and other interests, often resulting in conflicting legal arrangements, legal uncertainty, and regulatory chaos.”²⁵⁶ Dunja Mijatovic, the former director of broadcasting at the CRA agreed that “pressures were continuous, and laws were changed or introduced overnight to place the agency under political control.”²⁵⁷ It is especially the appointment of the CRA Director General and the members of the Council that have been disputable because even though the mandates expired in 2007, the authorities have not approached solving these issues since. Most recently, there has been an acting director in 2015, but in 2016 the call for applications opened again and there are two candidates who applied, while the actual selection is yet to come.²⁵⁸ The financial independence of the CRA remains questionable as well, because political and economic pressures “aim to reduce the credibility of the

²⁵⁵ Irion, Kristina and Tarik Jusić, *International Assistance and Media Democratization in the Western Balkans: A Cross-National Comparison* *International Media Assistance in the Western Balkans*, Analitika, 2013, p. 20

²⁵⁶ Jusić, Tarik, and Nidžara Ahmetašević, *Media Reforms through Intervention: International Media Assistance in Bosnia and Herzegovina*, Analitika, 2013, p.34

²⁵⁷ Dunja Mijatovic, interview for a Phd study by Nidžara Ahmetašević, in Jusić, Tarik, and Nidžara Ahmetašević, *Media Reforms through Intervention: International Media Assistance in Bosnia and Herzegovina*, Analitika, 2013, p.34

²⁵⁸ Doznajemo.com, *Predrag Kovač and Marijo Pejić are the only candidates for the Director of the Communications Regulatory Agency*, 29 February 2016, (accessed on 4 April 2016), available at: <http://doznajemo.com/2016/02/29/predrag-kovac-i-marijo-pejic-jedini-kandidati-za-direktora-regulatorne-agencije-za-komunikacije-bih-rak/>

agency” and make political parties exercise their control over the agency and its decision-making processes, thus “the guarantees of freedom from political control and manipulation have not been working in practice.”²⁵⁹

5.3.1 THE LAW ON COMMUNICATIONS

The CRA’s independence is guaranteed by the Law on Communications, passed in 2002²⁶⁰ stating that: “Recalling that the implementation of this Law and its objectives require a politically independent Communications Regulatory Agency that relies on the exceptional expertise and competence of the members of the Council of the Agency and the General Director, it is therefore necessary to ensure that the members of the Council of the Agency and the General Director are exclusively appointed on considerations based on their integrity, knowledge and professional merit”.

The law also specified the relation between the CRA and the Council of Ministers, stating the tasks and the authority of the CRA and citing in Article 3 that: “the Council of Ministers’ duties include producing and adopting policies in line with existing laws and determining the presentation of Bosnia and Herzegovina on international forums in the field of communications.”²⁶¹ The same article identified the goals of both bodies, while Article 4 of the Law divided the regulatory principles of broadcasting and telecommunications²⁶²:

1. The regulatory principles of broadcasting shall include:

²⁵⁹ Hodžić, Sanela, *Bosnia and Herzegovina in Media Integrity Matters: Reclaiming public service values in media and journalism*, Peace Institute, Institute for Contemporary Social and Political Studies, 2014, p. 8

²⁶⁰ *Communication Law* (Sarajevo, 2 September 2003), Official Gazette of B-H No.31/03, entered into force 21 October 2003

²⁶¹ Article 3, *Communication Law* (Sarajevo, 2 September 2003), Official Gazette of B-H No.31/03, entered into force 21 October 2003

²⁶² Article 4, *Communication Law* (Sarajevo, 2 September 2003), Official Gazette of B-H No.31/03, entered into force 21 October 2003

- a) The protection of freedom of expression and diversity of opinion while respecting generally accepted standards of decency, non-discrimination, fairness, accuracy, and impartiality;
- b) The development of professional and viable commercial and public broadcasters with the intention of striking an appropriate balance between the two;
- c) That broadcasters shall be separate from political control and manipulation, so as to strengthen democratic principles and the foundations of a market economy;
- d) That licences shall be awarded on the basis of a process by which appropriate professional standards of programme content, technical operation and financing are ensured;
- e) That broadcast advertising shall be regulated so as to be consistent with best European practice.

2. The regulatory principles of telecommunications shall include:

- a) That all users shall have access to telecommunications services on a transparent, objective and non-discriminatory basis which can be provided by a telecommunications operator for a reasonable return;
- b) That any user of telecommunications services shall have unrestricted access by means of that service to any other such user;
- c) That the interests of all users of telecommunications services shall be protected in respect of the availability of such services, their quality and the prices charged for them

The Law places a great importance on the independence of the CRA and thus Article 36 explicitly stipulates that: “The Council of Ministers, ministers or any other person cannot interfere in decision making process of the Agency in any way in individual cases” and through provisions regulating the process of election of General Director and the Council of the Agency.

The Law also specifies the actions that the CRA may take in case of violations in its Article 46, and thus possible measures can be²⁶³:

- a) Oral and written warnings;
- b) Inspection of licensed facilities;
- c) Concrete demands for action or cessation, to be complied with within a specified time limit;
- d) Assessment of a financial penalty not to exceed 150,000 KM in case of deliberate or negligent violation of individual provisions of the Law or of conditions specified in the license or in the codes of practice and rules of the Agency. The level of the financial imposition shall be commensurate with the gravity of the infringement and, where applicable, with the gross financial benefits derived from the infringement. In case of repeated violations, the financial imposition may not exceed 300,000 KM. The Agency shall devise a schedule of infractions and resulting penalties, which shall be adopted by the Council of Ministers.
- e) Orders to interrupt broadcasting or the provision of telecommunications services for a period not exceeding three months;
- f) Revocation of a license.

5.3.2 FINANCING OF THE CRA

The Law on Communications in its Article 40 also approached the funding of the CRA. It is stipulated that the CRA is funded by license fees and donations. The budget of the CRA is a reviewed by the Supreme Audit Institution and by an independent auditor, while the CRA also

²⁶³ Article 46, *Communication Law* (Sarajevo, 2 September 2003), Official Gazette of B-H No.31/03, *entered into force* 21 October 2003

submits annual financial reports to the Council of Ministers. The CRA also submits a proposed budget for each upcoming year to the Council of Ministers which is in charge of its approval and possible alterations.

The CRA is also funded from the state-budget, meaning that it also needs to respect laws other than the Law on Communication in terms of financial issues and so when the Law on Ministries and Other Bodies of Administration²⁶⁴ was adopted, it stated that the CRA is a ‘stand-alone’ administration body, meaning that it does not belong to any ministry “or any other body while the Law makes it succumb to numerous influences of executive rule which additionally endangers its independence having in mind that this is an independent regulator the activities of which are regulated by special legal acts.”²⁶⁵

5.3.3 STRUCTURE OF THE CRA

As mentioned before, the main bodies of the CRA are the General Director and the Council of the CRA. The seven Council members²⁶⁶ elect the president and the vice-president of the Council and they meet at least four times a year. The members of the Council are elected based on a list created by the Council itself, and the list must contain at least twice as many members as the Council has. It is the Council of Ministers that chooses the candidates from the extended list and then it is the Parliament that “accepts or rejects proposed candidates within 30 days, and in the case of rejection, the Council of Ministers has to offer an alternative candidate from the list put together by the

²⁶⁴ *Law on Ministries and Other Bodies of Administration*, Official Gazette of BiH 103/09.

²⁶⁵ Mandić, Helena, “Regulation of Broadcasting in BiH”, in Halilović, Mehmed and Džihana Amer, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.260

²⁶⁶ *Communications Regulatory Agency*, available at: <http://rak.ba/eng/index.php?uid=1272016139>

Council of the Agency”²⁶⁷ It is important to notice the provision of the Law on Communications stating that: “officials on legislative or executive positions at all levels of the government or members of bodies of political parties cannot be candidates for membership in the Council of the Agency. Moreover, the members of the Council have to report every interest they have in telecommunications or broadcasters operators and they are exempted in cases of a conflict of interest.”²⁶⁸ Even though the legal basis for the election of members of the Council can be assessed as rather adequate, the lack of certain specific provisions made the appointment of the Council members submitted in 2009 very long, and the new Council was established only in 2013.

The similar prolonging happened with appointment of the General Director of the CRA, although Article 40²⁶⁹ of the Law on Communications offers provisions that specify the process of appointment. The open call for applications is intended to all qualified experts and managers, and after the Council of the CRA makes the initial selection and submits a proposal, it is again the Council of Ministers that is involved in the process by approving the nominated candidate. The Council therefore made its proposal for a new General Director in 2007, but until today (January 2016) the General Director was not appointed.

Apart from these two main bodies, the CRA consists of the following sections²⁷⁰:

²⁶⁷ Mandić, Helena, “Regulation of Broadcasting in BiH”, in Halilović, Mehmed and Džihana Amer, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.257

²⁶⁸ Ibid. p.258

²⁶⁹ *Communication Law* (Sarajevo, 2 September 2003), Official Gazette of B-H No.31/03, *entered into force* 21 October 2003

²⁷⁰ *Communications Regulatory Agency*, available at: <http://rak.ba/eng/index.php?uid=1272016139>



Figure 3: structure of the Communications Regulatory Agency

5.3.4 CODES

The Communications Regulatory Agency at first adopted two important documents regulating electronic media in Bosnia and Herzegovina: **Code on Broadcasting Radio-Television**

Program²⁷¹ and the **Code on Advertising and Sponsorship in Programs of RTV Stations**. The first Code placed a great emphasis on: “encouraging, representing and promoting ethnic, national or religious intolerance and violence, protection of children and minors from possibly inappropriate contents broadcasted at inappropriate hours” and ensures “the right to freedom of expression stipulated by the European Convention of Human Rights and in the Constitution of Bosnia and Herzegovina, while respecting the general standards of decency, non-discrimination, fairness, and accuracy.”²⁷² The Code on Advertising and Sponsorship in Programs of RTV Stations was created in line with the European standards found in the Convention on Trans-frontier Television, and according to this Code, the advertisements within the program schedule may not be higher than 15%.

In 2011, the CRA adopted the **Code on Audiovisual and Radio Media Services**²⁷³ which is a substitute for the two previously mentioned codes and which set the “basic principles of programme content of audiovisual media services and radio media services in Bosnia and Herzegovina in accordance with the Constitution of Bosnia and Herzegovina, Law on Communications, EU Audiovisual Media Services Directive and other applicable domestic and international legal documents.” The CRA evoked Article 4²⁷⁴ of this Code on several recent occasions. During protests in Bosnia and Herzegovina in 2014 and insisted that “the owners of licenses to respect the Code for audiovisual media services and radio media services, particularly in relation to information that appeared in public, which indicate reportedly increased possibility of an outbreak of armed conflict

²⁷¹ All documents available in Official Gazette of B-H No.98/11 and at the website of the Agency <http://www.rak.ba/bih/index.php?uid=1324649058> (accessed on 30 March 2016).

²⁷² Mandić, Helena, “Regulation of Broadcasting in BiH, in Halilović”, Mehmed and Džihana Amer, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.261

²⁷³ *Communications Regulatory Agency*, available at: <http://rak.ba/eng/index.php?uid=1272016139>

²⁷⁴ Article 4, paragraph 8 of the Code: *Audiovisual and radio media services shall not include material which carries a clear and immediate risk of causing harmful effects, including, but not limited to death, injury, damage to property or other types of violence, or the diversion of police, medical services or other forces of public order from their normal duties.*

in Bosnia and Herzegovina.”²⁷⁵ In 2015, the CRA used the Code to refer to the programming schedule of reality shows, thus in December 2015, the CRA adopted the proposed amendments of the Code in order for reality shows to be broadcast only after midnight.

5.3.5 LICENCING

One of the primary duties of the CRA is also licensing for audiovisual media services and licenses for distribution of radio and TV programs. Rule 33/2008²⁷⁶ adopted by the CRA was crucial for regulation of licensing, because it aimed at introducing European licensing standards and focusing on digitalization process in the country. The goal of passing rules regarding licensing was “to ensure access to communicational services on a transparent, objective and non-discriminatory basis, to protect the interests of all users of services, and to make the quality level of services closer to the general standards in the European Union.”²⁷⁷

The CRA took crucial steps in compliance with the European regulatory framework and amended several rules, such as: “Code on Broadcasting RTV Programs, Code on Advertising and Sponsorship, Rule 42/2009 on licenses for terrestrial radio-diffusion of RTV programs, Rule 36/2008 on the way of licensing and conditions of licenses for distribution of RTV programs and

²⁷⁵ Communications Regulatory Agency, “CRA appeals to compliance with the code for audiovisual media services and radio media services”, 11 February 2014, (accessed on 5 April 2016), available at: <http://rak.ba/eng/aktuelnost.php?uid=1394449122>

²⁷⁶ *Communications Regulatory Agency website-section on broadcasting*, (accessed on 5 April 2016), available at: <http://www.rak.ba/bih/index.php?uid=1269867979>

²⁷⁷ *Ibid.*

Rule 41/2009 on public stations”²⁷⁸. The changed rules aimed at adapting the B-H environment in these aspects to the fast-pacing technological development in other countries, “to encourage competition among service providers, to enable a greater flexibility in financing audiovisual contents, to provide a high level of protection of consumers and to create equal conditions for all service providers no matter which technology they use to distribute their services.”²⁷⁹

5.3.6 ACTIVITIES OF THE CRA

When it comes to the activities of the CRA in terms of programing, it was after the actions taken by the IMC that the CRA dealt with much less hate-speech cases, compared to the period immediately after the war. Thus “as opposed to the 1998-2001 period, in 2002 there was only one case of violation of the hate-speech provision, whereas in 2003, there were no such violations.... Between 2004 and 2010, there were 13 cases of violation of hate-speech provisions.”²⁸⁰ As the number of hate-speech cases decreased, violations started to refer to decency and civility (38 violations between 2002 and 2010)²⁸¹, protection of children and minors, copyright, etc. The CRA developed a complaint system regarding the programing and so they consider every complaint coming from a legal or natural person and then submit a request to media outlet in question to send the copy of the program to the CRA so that the CRA can analyze and comment it. When there are cases of particular importance to public interest or those that most severely violate the Codes, the General Director can require an “expert opinion from a consulting committee consisting of experts in

²⁷⁸ *Communications Regulatory Agency website – news section*, (accessed on 5 April 2016), available at: <http://www.rak.ba/bih/aktuelnost.php?uid=1303198557>

²⁷⁹ Mandić, Helena, “Regulation of Broadcasting in BiH”, in Halilović, Mehmed and Džihana Amer, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.264

²⁸⁰ *Ibid.* p.268

²⁸¹ *Ibid.* p.269

different fields (law, journalism, literature, technical science, etc.)”.²⁸² When the CRA makes its decision, this decision is announced both to the media outlet in question and to the public. The Council of the CRA can receive a form of an appeal from the outlet in question and at this point the CRA refers to the Law on Managing Procedures.

5.4 THE PRESS COUNCIL

The idea behind self-regulation is the protections of the rights of journalists, their right to have independence and impartiality and “to be judged for their professional mistakes by their colleagues and not the authorities.”²⁸³ The primary aim of introducing self-regulation in Bosnia and Herzegovina was thus to ensure the standards for accuracy, professional ethics, protection of privacy, protecting freedom of expression, and the pluralism of ideas and opinions.

The engagement of OSCE and OHR fostered the establishment of the Press Council, in 2000, the first body of that kind in the region, and drafted the Press Code, thus “more room for self-regulation was left to the press than to broadcasters, which is consistent with the basic strategy in the field of media regulation implemented by the international community.”²⁸⁴ In this way, the Press Code has become “the first common document passed by journalist associations in Bosnia-Herzegovina after the war, and the Press Council is the first nation-wide multiethnic institution

²⁸² Mandić, Helena, “Regulation of Broadcasting in BiH”, in Halilović, Mehmed and Džihana Amer, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.265

²⁸³ Zlatev, Ognian, *Media accountability systems (MAS) and their application in South East Europe and Turkey*, in *Professional Journalism and Self-regulation – New Media, Old Dilemma in SEE and Turkey*, Paris: UNESCO, 2011, pp.17-39.

²⁸⁴ Udovičić, Zoran, Tarik Jusić, Mehmed Halilović, Radenko Udovičić and Media Plan Institute Research Team, *The media at a turning point: a media landscape of Bosnia and Herzegovina*, 2001, p.42

established by agreement of interested organizations.”²⁸⁵ The Press Council (PC) is a non-governmental organization, operating as the self-regulatory mechanism for print and, more recently, online media, “but its reach is limited especially because the self-regulatory system is not yet widely accepted by media organizations.”²⁸⁶

This self-regulatory body was in fact organized according to the Press Complaints Commission in the United Kingdom and its role is twofold: “to increase professional standards through self-regulation in line with the Press Code, and to act as a complaints mediator that resolves disputes between citizens and the press.”²⁸⁷ Regarding the second task belonging to the PC, it needs to be mentioned that it does not have the power to fine media or punish them, it approaches “disputes by the means of the right of reply and the publishing of retraction, apology and denial.”²⁸⁸ Furthermore, the structure of the Press Council was determined as follows: “six journalists (press representatives from across Bosnia-Herzegovina), six public workers (representatives of the public from across Bosnia-Herzegovina), and a chairman who is a foreigner (the first chairman is at the same time the president of the British Press Complaints Commission).”²⁸⁹

Realizing the importance of the Press Council, numerous donors offered help to this body but there still was a lack of strategic planning of the activities, thus reforms were needed and after overcoming numerous challenges, the PC managed to gain “relevance and recognition in the media sector and among the public, especially during the first several years, while its impact on journalistic practices

²⁸⁵ Udovičić, Zoran, Tarik Jusić, Mehmed Halilović, Radenko Udovičić and Media Plan Institute Research Team, *The media at a turning point: a media landscape of Bosnia and Herzegovina*, 2001, p.43

²⁸⁶ Hodžić, Sanela, *Bosnia and Herzegovina in Media Integrity Matters: Reclaiming public service values in media and journalism*, Peace Institute, Institute for Contemporary Social and Political Studies, 2014, p. 26

²⁸⁷ Jusić, Tarik, and Nidžara Ahmetašević, *Media Reforms through Intervention: International Media Assistance in Bosnia and Herzegovina*, Analitika, 2013, p.48

²⁸⁸ Ibid.

²⁸⁹ *Supra note 285*, p. 44

has thus far been limited.”²⁹⁰ The reason for the latter is that media outlets and publishers are still unclear about the role of the PC and “the media outlets have not seen that reduced litigation costs would be a reason to support such an association as an efficient investment.”²⁹¹

5.4.1 PRESS CODE

The Press Code is the basis of self-regulation in Bosnia and Herzegovina. It was adopted on 29 April 1999 by all Journalists' Associations in B-H, amended in February 2005 and August 2006, as well as in June 2011, by the Press Council of B-H and all Journalists' Associations in B-H. The Code consists of the basic principles of the Memorandum of Understanding which was signed by the Independent Union of Professional Journalists of B-H, the Association of Journalists of B-H, the Independent Union of Journalists from Republika Srpska, the Association of Journalists of Republika Srpska and the Union of Professional Journalists of Federation B-H. Its purpose is “to establish the foundation of a system of self-regulation in print and online media, which shall be considered morally binding for reporters, editors, owners and publishers of print and online media.”²⁹²

The Press Code states that: “Journalists and their publications have an obligation to the public to maintain high ethical standards at all times and under all circumstances. It is the duty of journalists and publishers to respect the needs of citizens for useful, timely and relevant information and to defend the principles of freedom of information and the right to fair comment and critical

²⁹⁰ Johnson, “Model Interventions,” pp. 122-123. in Jusić, Tarik, and Nidžara Ahmetašević, *Media Reforms through Intervention: International Media Assistance in Bosnia and Herzegovina*, Analitika, 2013, p.49

²⁹¹ Rhodes, *Ten Years of Media Support to the Balkans – An Assessment*, pp. 34-35 258, in Jusić, Tarik, and Nidžara Ahmetašević, *Media Reforms through Intervention: International Media Assistance in Bosnia and Herzegovina*, Analitika, 2013, p.49

²⁹² Press Code of B-H, Sarajevo, 29 April 1999, (accessed on 5 April 2016), available at: http://www.vzs.ba/index.php?option=com_content&view=article&id=218&Itemid=9&lang=bs

journalism.”²⁹³ In line with international self-regulatory practices and documents, the Press Code mentions: “ the obligation of the media not to incite or inflame hatred, discrimination or intolerance; establishes the fundamental ethical principles of factual and fair reporting, distinguishing clearly between comment, conjecture and fact, protection of children and minors, protection of the accused, and the right of citizens to privacy.”²⁹⁴

The general provisions of the Press Code state that “journalists and editors are obligated to follow high norms of ethics in their work, respect the needs of citizens for timely, useful and relevant information, as well as defend freedom of expression and the right to critical journalism.”²⁹⁵ Article 2 specifies editorial responsibility when it comes to respecting the truth and the right of the public to know the truth, Article 5 states that “journalists have the professional obligation to promptly correct any published information that is found to be inaccurate. The apology and/or correction shall be published with due emphasis.”²⁹⁶ Further on, Article 6 urges journalists to make a distinction between comment, a conjecture and a fact, while Article 7 provides an opportunity for a reply “to relevant persons if the editor determines that such a step contributes to accuracy and impartiality.”²⁹⁷

The Press Code was amended in 2011, when online media became included in the system of self-regulation, realizing the growing influence of online media and the increase of visitorship. The goal of this merger was to address the problem of hate-speech comments online, for the education of

²⁹³ *Press Code of B-H*, Sarajevo, 29 April 1999, (accessed on 5 April 2016), available at: http://www.vzs.ba/index.php?option=com_content&view=article&id=218&Itemid=9&lang=bs

²⁹⁴ Udovičić, Zoran, Tarik Jusić, Mehmed Halilović, Radenko Udovičić and Media Plan Institute Research Team, *The media at a turning point: a media landscape of Bosnia and Herzegovina*, 2001, p.43

²⁹⁵ Ibrahimbegović-Tihak, Vanja, “Rules and codes of professional ethics of Journalism” in Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.286

²⁹⁶ *Article 5, Press Code of B-H*, Sarajevo, 29 April 1999, (accessed on 5 April 2016), available at: <http://www.vzs.ba/index>

²⁹⁷ *Ibid. Article 7*

journalists in the new media, to acknowledge the importance of online media which had become a common source for the news in traditional media, and thus raise ethical standards.²⁹⁸

5.4.2 COMPLAINT COMMISSION AND THE PRACTICE

The importance of this self-regulatory body is also reflected in its accessibility for citizens who can make a complaint regarding the content in print or online media. For this purpose, the Press Council has the Complaint Commission that decides on complaints submitted to this institution. The official website of the Press Council offers instructions on how to make a complaint and it has seen a number of cases when the citizens, journalists and others used this system, and for instance, between 2001 and 2009 there were 229 complaints submitted to the Press Council.²⁹⁹ The Complaints Commission determines whether there was a violation of the Press Code or not and there particularly were cases of violations regarding privacy.

The Press Council reported³⁰⁰ that most violations of the Code refer to Article 9 (privacy), and to the violation of Article 4 (discrimination) because of a particular political situation in the country.³⁰¹ For example, in 2010, many daily newspapers “published a story stating that the Minister of Security of B-H was accused of sexually abusing of a girl whose identity was revealed (as published in *Nezavisne*

²⁹⁸ Šutalo, Milan, Deutsche Welle, “Online media of Bosnia and Herzegovina included in the Press Council”, 3 January 2011, (accessed on 5 April 2016), available at: <http://www.dw.com/bs/bosanskohercegova%C4%8Dki-online-mediji-u-vije%C4%87u-za-tisak/a-14748669>

²⁹⁹ Džihana, Amer, “While fighting for independence, media have forgotten about their responsibility”, 'Novi pogledi' (New perspectives), 2010, No.17, Sarajevo.

³⁰⁰ Press Council of B-H, *Report No.2 on continuous monitoring of print media: April-May 2004*, (accessed on 5 April 2016), available at: <http://www.media.ba/mcsonline/bs/tekst/izvjestaj-vijeca-za-stampu-bih-o-krsenju-kodeksa-za-stampu-u-2004-godini>

³⁰¹ Out of 108 cases of discrimination, 102 cases refer to ‘Glas Srpske’, out of which 67 were on the topic of foreign affairs, more specifically, Kosovo.

novine, Dnevni avaz, Glas Srpske and 'SAN').³⁰² The Complaints Commission thus places a great emphasis when it comes to privacy and protection of children and minors, all in line with Article 11 of the Press Code: "When treating children and minors, journalists have the obligation to be extremely careful, respecting ethical norms and the Convention on Children's Rights, starting with the child's interest. Journalists are obligated to protect the child's identity in procedures not involving the public."³⁰³ The Press Council also clearly distinguishes public curiosity and public interest, "emphasizing that journalists should not publish everything they find, but should adhere to the principle that journalistic curiosity should not harm any person."³⁰⁴

When it comes to defamatory cases before the Press Council, even the very system of filing a defamatory lawsuit before turning to court, makes the person who find himself/herself injured by a certain statement obligated, although rather ambiguously, to exhaust all other sources, therefore Article 8 of the Law on Protection against Defamation of Federation of B-H states that: "An allegedly injured person shall undertake all necessary measures to mitigate any harm caused by the expression of false fact and in particular requesting a correction of that expression from the person who allegedly caused the harm." The citizens of B-H thus have the option first to turn to the self-regulatory body and this is how the body which can process defamation on internet first is the Press Council in B-H. Moreover, court practice shows that publishing a correction has to be taken into account when determining the amount of non-pecuniary damage, because in case a correction is published, the amount of damage will be smaller since the damage was diminished in a certain

³⁰² *Nezavisne novine*, complaint of Organization "Zdravo da ste", regarding text "Ahmetović under investigation because of pedophyila", 16 March 2010, complaint 398/10.; *Dnevni avaz*, complaint of Organization "Zdravo da ste", regarding text "Sex affair: Ahmetović is a victim of the author of a phony list of terrorists", 17 March 2010, complaint 399/10., etc. in Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012

³⁰³ *Article 11, Press Code of B-H*, Sarajevo, 29 April 1999, (accessed on 5 April 2016), available at: http://www.vzs.ba/index.php?option=com_content&view=article&id=218&Itemid=9&lang=bs

³⁰⁴ Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.224

manner. But if there is no correction, then the amount will be bigger because this shows the lack of acting with bona fide and that the defendant does not wish to diminish the damage. Similarly, if no request for correction is submitted, the damage should be treated as smaller since the plaintiff did not use all remedies in order to lessen the damage. This is how when it comes to complaints related to defamatory statements, citizens have turned to the self-regulatory body and in several instances there were corrections published in online media, but there were cases which proceeded to court and some cases even went directly to courts.

In practice, in 2011, the Press Council received 48 complaints to the content in online media (out of 129 complaints in total), in 2012, out of 199 complaints in total, there were 71 complaints referring to online media, while till August 2013, there were 61 complaints to online media (out of 114 in total) showing that the number of complaints was decreasing over the years. But in general, “editors and journalists are placed in a difficult position if their adherence to professional standards and the Press Code is in contradiction with the interests of political or business patrons” thus media sector in B-H comes across “significant doubts regarding the efficiency of self-regulation. Their concern is that professional norms are likely to be a secondary consideration, slipping behind the political and economic interests of the centers of power on which media depend heavily.”³⁰⁵

5.5 MEDIA LAWS

In 1989, during the Socialist Federal Republic of Yugoslavia, the Constitution of Socialist Republic of Bosnia and Herzegovina stated that “informing ensures compliant collection, processing, expressing and exchange of data, facts and information important for life, work, development and decision-making in all aspects of social life, as well as the availability of the data, facts and

³⁰⁵ IReX, *Media Sustainability Index 2012*, pp. 21-22. In Jusić, Tarik, and Nidžara Ahmetašević, *Media Reforms through Intervention: International Media Assistance in Bosnia and Herzegovina*, Analitika, 2013, p.50

information in the way determined by the law.”³⁰⁶ The media outlets in the country operated in a rather uniform manner, and the oldest electronic outlets in B-H was Radio Sarajevo, which started to broadcast the program in 1945. The number of radio outlets grew over the years, reaching 49 shortly before the war, while there was only one state public television: TV Sarajevo and two daily newspapers: *Oslobođenje* and *Večernje novine*.³⁰⁷ The war that started in 1992 brought divisions based on ethnicity, and so the media landscape followed and went in that direction. Now there were many towns and cities which had their own media outlets and the number constantly grew. News agencies were established at this point, too, but again on national lines.³⁰⁸ The first steps of media integration started with the end of the war and Dayton Peace Agreement. Although Dayton Peace Agreement does not focus explicitly on media, but on the overall ending of the war, it still ensured the involvement of the international community in media landscape recovery as mentioned in subchapter 4.1. The goal was to encourage the process of reconciliation, and democratization through media as well, and so, for example, Annex 3 of Dayton Peace Agreement refers to the Elections based on which the international organizations involved, created a set of rules regarding media reporting in times of elections.

But it was a general agreement among international actors that B-H needed modern media laws in line with international standards and thus there was a great effort placed particularly on the regulation of electronic media. This was primarily because the waves on which TV and radio operate are treated as public commodity, because there is a scarcity issue, thus “the alleged limited character of frequencies is used as the strongest argument in favor of regulation; and last, it is presumed that the broadcasting media are much more influential than the print media.”³⁰⁹ However, almost 20

³⁰⁶ *Article 81, Constitution of Federal Republic of Bosnia and Herzegovina*, Official Gazette of FR BiH, Sarajevo, 1989.: 80

³⁰⁷ Sapunar, Marko and Zoran Tomić, *Democracy, public and media*, 2004, pp.4-5

³⁰⁸ *Ibid.* p.8

³⁰⁹ Udovičić, Zoran, Tarik Jusić, Mehmed Halilović, Radenko Udovičić and Media Plan Institute Research Team, *The media at a turning point: a media landscape of Bosnia and Herzegovina*, 2001, p.52

years after the first steps of passing media laws based on these arguments, we find ourselves in a digital age where the Internet's influence increasingly prevails over traditional media, thus the first two arguments used above are rather inapplicable and all this requires "radical modification and redefinition of the way in which the broadcasting media are regulated."³¹⁰

5.5.1 FIRST STEPS

Law reforms are the starting point and thus, the crucial aspect of establishing a successful media system in one country. Realizing the important role of media during the war, its part in encouraging nationalism and causing conflicts, as well as acknowledging the fact that having free and sustainable media is one of key things regarding the establishment of democracy, international community had to make an effort to establish the conditions for having free, fair and professional media in Bosnia and Herzegovina, and it "found it necessary to develop a system of media regulation that was clear, transparent, and available to all the actors in the region."³¹¹

Since Dayton Peace Agreement only touched upon the issue of media, in 1998, the Peace Implementation Council, the role of which is to supervise the implementation of DPA, issued a declaration in Madrid enabled entities and municipalities to have the control over the state media. This declaration gave more power to the High Representative, regarding e.g. the reform of state-run broadcasters into public service broadcasters.³¹² However, the basics for the protection of freedom of expression are found in Article 2, paragraph 3 of the Constitution of Bosnia-Herzegovina, Annex 4 of the General Framework Agreement on Peace in Bosnia and Herzegovina, and so point (g) of the Constitution ensures "freedom of thought, conscience and religion" and, in point (h), ensures

³¹⁰ New Digital Platforms for Audiovisual Services and Their Impact on the Licensing of Broadcasters, Strasbourg Conference, September 13, 2000

³¹¹ Price, Monroe Edwin. *Media and sovereignty : the global information revolution and its challenge to state power.*. Massachusetts Institute of Technology, 2002, p. 188

³¹² Džihana Amer and Tarik Jusić, "Bosnia and Herzegovina" in Bašić-Hrvatini, Sandra, Mark Thompson and Tarik Jusić, eds. *Divided They Fall: Public Service Broadcasting in Multiethnic States*. Sarajevo, Mediacentar Sarajevo, 2008, p.39

“freedom of expression.” The same Article also states that: “Rights and freedoms envisioned by the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall be directly applied in Bosnia-Herzegovina. These acts have precedence over all other laws.”³¹³ However, it is not specified how exactly the field of public information should be regulated, thus this field remained divided between the two entities (and cantons in the Federation of Bosnia and Herzegovina) at the time in terms of jurisdiction. But due to 14 constitutions (state-level, entity-level, at the level of Brcko District, and ten for each of ten cantons in the Federation of B-H), “legislative framework for realization of free work of media and the right to freedom of expression represents a very complex network of institutions, norms, and practices.”³¹⁴

For example, the constitutions of the entities – the Federation of Bosnia and Herzegovina, and Republika Srpska offer the protection of freedom of expression in the following articles:

- The Constitution of Federation of B-H, Chapter II, Article 1, refers to the protection of fundamental freedoms including “freedom of speech and press and freedom of opinion, conscience and belief...”³¹⁵
- The Constitution of Republika Srpska, Part II, Article 25 contains “freedom of thought and orientation, conscience and conviction, as well as of public expression of opinion shall be guaranteed.” Article 26 states that “Freedom of press and other media of communication shall be guaranteed. Free establishment of newspaper and publishing houses, publishing of newspapers and public information by other media in accordance with law shall be guaranteed. Censorship of press and other public information media shall be forbidden. Public information media shall be obliged to inform the public on time, truthfully and

³¹³ *Constitution of Bosnia-Herzegovina*, Article II

³¹⁴ Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.36

³¹⁵ *Constitution of Federation of B-H*, Chapter II, Article 1

impartially. The right to correction of incorrect information shall be guaranteed to anyone whose right or legally determined interest has been violated, as well as the right to a compensation for damage arising therefrom.”³¹⁶

High authorizations given to the international community are “manifested in the function of the High Representative that encourages and imposes legally binding solutions referring to the right to information.”³¹⁷ But the complex structure of the country, the lack of coordination and efficiency, have proven to be obstacles for introduction and application of laws protecting the right to freedom of expression and the right to receive information. As previously mentioned, after the war, the field of information in B-H somewhat followed the steps of the previous system thus carrying with it the demands of a centralized state with great authorizations of control, or from neighboring countries- Croatia and Federal Republic of Yugoslavia, but “these laws were accepted without taking into account whether they were adequate for regulating the social context for which they were intended.”³¹⁸ This problem became explicit in practice due to the specificity of the right to information which, according to Article 10 of the European Convention³¹⁹ requires the involvement of domestic courts in interpretation of legislative provisions and “the European Court uses the term “field of discretion of the court” and thus justifies specific solutions of the domestic legal system by a specific culture and specific environment in which they are realized.”³²⁰ This is how the laws on information are not applied in an adequate way because the modern and internationally-based media

³¹⁶ *Constitution of Republika Srpska*, Part II

³¹⁷ Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.101

³¹⁸ *Ibid.* p.102

³¹⁹ European Convention on Human Rights occupies a special position in domestic legal system of BiH; the Convention and its protocols contain human rights and freedoms which are directly applied while respecting their priority over all other laws. The *Constitution of B-H*, OHR – Office of the High Representative, (accessed on 5 April 2016), available at: http://www.ccbh.ba/public/down/USTAV_BOSNE_I_HERCEGOVINE_bos.pdf

³²⁰ *Supra note 317*, p.103

laws were “not an expression of legal tradition, legal culture or realistic needs either; they were a reception of standards of democratic society at an enviable level of development which Bosnia and Herzegovina could not reach at that time.”³²¹

5.5.2 LAWS ON PUBLIC INFORMATION

The laws on public information of both entities and cantons, created under the international supervision are examples of the unsuccessful transplant-method which did not take into account the nature of this post-communist and post-conflict country, thus they remain rather ineffective at all levels. These laws proclaim “the freedom of information and the ban of censorship.... (prescribe) the way of establishing mass media and their organization and cancellation and stipulate the obligation of registration.”³²² Just like most other laws, these, too are divided along entity and cantonal lines and they contain certain differences in their approach regarding public information.

In Republika Srpska there is the Law on Public Information³²³ which stipulates the freedom of information, “prescribes the way of establishing mass media and their organization and cancellation and stipulates the obligation of registration....regulates restrictions on the right to information based on the ban on dissemination of information and distribution of press that advocates a violent overthrow of the system and a violation of territorial integrity and sovereignty of Republika Srpska, violation of guaranteed freedoms and rights of citizens, causes hatred or encourages national, racial

³²¹ Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.101

³²² Nadazdin-Defterdarevic, Mirjana, “Laws on Public information in BiH” in Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.104

³²³ *Law on Public Information of RS* (Banja Luka, 21 April 1997), Official Gazette of RS No.10/97, entered into force in 1997

or religious intolerance.”³²⁴ The problematic part of this Law, however, is that it does not offer the protection of journalistic sources.

On the other hand the Constitution of FB-H³²⁵ gave the authorization referring to “making policy concerning radio and television facilities, including decisions concerning regulation and provision thereof,”³²⁶ to cantons, unless there is a need for transferring this authorization to the level of the Federation due to particular circumstances.

Therefore, in the Federation of B-H, there are laws on public information in the following cantons: Posavski canton³²⁷, Zapadnohercegovački canton³²⁸, Sarajevo canton³²⁹, Unsko-sanski canton³³⁰, Zeničko-dobojski canton³³¹, Tuzlanski canton³³² Goraždanski canton,³³³ while two cantons of a mixed national structure did not regulate this field: Hercegovačko-neretvanski canton and the Srednjobosanski canton. The laws are rather similar, but based on the ethnic divisions of the country, we can notice similarities of laws of cantons with a majority of Croat population with the relevant laws in Croatia. But even among these laws there are differences and so e.g. the Law in Posavski canton states that editor in chief cannot have immunity or that a media outlet must be registered within 90 days of start of its work.³³⁴ On the other hand, the cantons with the Bosniak majority did not follow a joined pattern regarding the creation of the laws on public information but

³²⁴ Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.105

³²⁵ *The Constitution of Federation of BiH* (Sarajevo, 30 March 1994), Official Gazette of FBiH No. 1/94, entered into force 30 March 1994

³²⁶ Ibid.

³²⁷ *Law on Public Information*, Official Gazette of the Posavina Canton No. 3/98, entered into force in 1998.

³²⁸ *Law on Public Information*, (26 May 1998), Official Gazette of the Zapadnohercegovački Canton, No. 7/98, entered into force in 1998.

³²⁹ *Law on Media*, Sarajevo Canton, Official Gazette of Sarajevo Canton,13/98.

³³⁰ *Law on Public Information* (12 June 1998), Official Gazette of USK, No.8/98, entered into force 15 July 1998.

³³¹ *Law on Public Information*, Official Gazette of ZDK, No. 13/98.

³³² *Law on Public Information of Tuzla Canton* (Tuzla, 2 November 2000), Official Gazette of Tuzla Canton 15/00, entered into force in 2000.

³³³ *Cantonal regulations – similarities and differences I and II*, Media news, No. 24 and 25, Series I, 25 January and 8 February 1999.

³³⁴ *Article 17 of the Law on Public Information*, Official Gazette of the Herzegbosanski Canton, No. 5/98.

they do rely on similar laws in “Croatia and Slovenia and that they rely heavily on solutions contained in the proposal on public and commercial radio-television prepared by the European Media Institute in Dusseldorf at the request of the OHR.”³³⁵ In general, the laws protect the enjoyment of the freedom of expression, and for example, the Law of Sarajevo Canton “stipulates that the freedom of public expression includes freedom of expressing thoughts, gathering, researching, publishing and disseminating information and ideas regardless of the media through which enables it.”³³⁶ There is also an interesting provision in the Law of Unsko-sanski canton, which does not distinguish between the protection of privacy of regular citizens and public figures.³³⁷ The laws thus differ in some aspects and again they illustrate the overall division of the country and the lack of coordination among different bodies of jurisdiction.

The adoption of new legislation thus came across numerous difficulties, primarily the “resistance from these vested interests, interlocked with pressures from Bosnia’s powerful nationalist parties which treated entity media as their own parlors.”³³⁸ These clashes were primarily the result of the power given to the international community by Dayton Peace Agreement and the fact “that regulations passed by international peace implementing agencies in Bosnia-Herzegovina had precedence over all local regulations,” and that “the international community became almost the only legislator in the media field”³³⁹ making local experts and organizations rather passive in this process. The creation of media legislation based on international standards and a strong position of the international community in this aspect, neglected the fact that eventually it would be the local authorities who would “bear ultimate responsibility for the functioning of the regulatory framework,

³³⁵ Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p. 106

³³⁶ Ibid.p.107

³³⁷ *Law on Public Information* (12 June 1998), Official Gazette of USK, No.8/98, entered into force 15 July 1998

³³⁸ Hodžić, Aida, “A.Democratizing Media, Welcoming Big Brother: Media in Bosnia and Herzegovina.” in *Finding the Right Place on the Map: Central and Eastern European Media Change in a Global Perspective*. Edited by Karol Jakubowicz and Miklós Sükösd. Bristol: Intellect Books,2008, p.152

³³⁹ Udovičić, Zoran, Tarik Jusić, Mehmed Halilović, Radenko Udovičić and Media Plan Institute Research Team, *The media at a turning point: a media landscape of Bosnia and Herzegovina*, 2001, p.33

not only due to the fact that the international factors will not remain in this country forever”³⁴⁰ which may be the root of the troubles found in the practice and implementation of media legislation later on.

5.5.3 LAWS ON PUBLIC SERVICE BROADCASTING

The first serious steps in establishing public service broadcaster were made when the Office of High Representative drafted a memorandum referring to the transformation of RTVB-H into the public service of the Federation of Bosnia and Herzegovina. Therefore, the Peace Implementation Council began to insist on the establishment of a state-wide public service broadcaster and it made an initiative to draft a new legislation, which would enable public service to be independent both politically and financially. However, this initiative faced many objections and pressures from local politicians, which significantly slowed down the reform of public service. At this point, it was unquestionable that the Office of High Representative had to make a series of decisions in order to establish the public service broadcaster.

Firstly, in 1999, the second High Representative in B-H, Carlos Westendorp made the decision about the restructuring of the Public Service Broadcasting of Bosnia and Herzegovina (BHT), and the establishing of entity Public Service Broadcaster for the Federation B-H. Moreover, the OHR requested the National Assembly of the Republic of Srpska to establish a public broadcaster on the level of this entity, for that entity. However, facing numerous obstructions, the OHR made the "Second Decision on Restructuring the Public Broadcasting System in Bosnia & Herzegovina" which would establish two new public corporations: the Public Broadcasting Service of B-H, and the

³⁴⁰ Udovičić, Zoran, Tarik Jusić, Mehmed Halilović, Radenko Udovičić and Media Plan Institute Research Team, *The media at a turning point: a media landscape of Bosnia and Herzegovina*, 2001, p.33

Radio Television of the Federation of B-H. But, at this point, the authorities of both entities did not implement these decisions.³⁴¹

Another decision concerned engaging foreign media experts into the reform of public service. This is how John Shearer, an expert from BBC, became OHR's Broadcasting agent in the period between 2000 and 2003, made a plan according to which there would be two televisions and radio broadcasters in each of two entities. These entity broadcasters were established in 2001. Also, the plan envisioned the existence of one public service broadcaster which would operate on a state level. Finally, the idea of this plan was to have a corporation for public broadcasting as well, the activities of which would include technical coordination of the three broadcasters, programming, advertising and funding.³⁴²

The legislation from October 2005, which is in accordance with the abovementioned plan envisions the B-H Public Broadcasting System consisting of four parts: entity televisions - RTRS, RTVFB-H and the state-wide broadcaster – BHT, as well as the component is the Corporation of Public Broadcasting Services in B-H bringing the previously mentioned components together. With regard to this, the full legislative framework stipulates the adoption of four laws: the Law on the Public Service Broadcasting System in B-H (or System Law 2005), Law on the Public Service Broadcasting of B-H (or BHT Law 2005) in the Assembly of Bosnia-Herzegovina, and Law on the Public Service Broadcasting of FB-H (or RTVFB-H Law) and Law on the Public Service Broadcasting of RS (or RTRS Law 2006) in the entity assemblies.³⁴³

³⁴¹ Džihana Amer and Tarik Jusić, "Bosnia and Herzegovina" in Bašić-Hrvatini, Sandra, Mark Thompson and Tarik Jusić, eds. *Divided They Fall: Public Service Broadcasting in Multiethnic States*. Sarajevo, Mediacentar Sarajevo, 2008, p.91

³⁴² Hodžić, Aida, A. "Democratizing Media, Welcoming Big Brother: Media in Bosnia and Herzegovina." in *Finding the Right Place on the Map: Central and Eastern European Media Change in a Global Perspective*. Edited by Karol Jakubowicz and Miklós Sükösd. Bristol: Intellect Books, 2008, p.152

³⁴³ Džihana, Amer. "The Public Broadcasting System in B-H: Between Ethnic Exclusivity and Long Term Sustainability", (accessed on 5 April 2016), available at: http://www.soros.org.ba/images_vijesti/stipendisti_2008/amer_dzihana_final_policy_study_en.pdf

Therefore, after suffering various obstructions and facing the reluctance of local political parties, at this point, the establishment of public service broadcaster in Bosnia and Herzegovina has definitely begun, and its components have become the following:

- Public Broadcasting Service of Bosnia & Herzegovina (PSB B&H), the public broadcaster of B-H, comprising one television channel (BHT) and one radio channel (BH Radio 1).
- Radio-Television of the Federation of Bosnia & Herzegovina (RTFB-H), the public broadcaster of the Federation of Bosnia & Herzegovina entity, consisting of one TV channel (FTV) and two radio channels (Radio FB-H and Radio 202).
- Radio-Television of the Republic of Srpska (RTRS), the public broadcaster of the Republic of Srpska entity, consisting of one TV channel and one radio channel.³⁴⁴

However, after the abovementioned laws were imposed and broadcasters established, Bosnia-Herzegovina and its public service broadcaster came across many pressures regarding the reform of this field. Namely, the international community insisted very hard on new legislative framework to be adopted with a role to “further strengthen the PSB System and its components, and guarantee their independence, functionality and sustainability, as a precondition for ratifying the Stabilization and Association Agreement between B-H and the EU.”³⁴⁵ But even after a few years, the adoption of new legal framework was not going any faster.

Namely, one of the problems was that Croat side did not support these laws at state level. In fact, they started the procedure regarding the protection of vital national interests which ultimately came to the Constitutional Court of Bosnia and Herzegovina, too. Their request to the Court “basically

³⁴⁴ Džihana Amer and Tarik Jusić, *Bosnia and Herzegovina* in Bašić-Hrvatini, Sandra, Mark Thompson and Tarik Jusić, eds. *Divided They Fall: Public Service Broadcasting in Multiethnic States*. Sarajevo, Mediacentar Sarajevo, 2008. p.93

³⁴⁵ Jusić, Tarik and L. Kendall Palmer. The Media and Power-Sharing: Towards an Analytical Framework for Understanding Media Policies in Post-Conflict Societies. *Public Broadcasting in Bosnia and Herzegovina*. *Global Media Journal—Polish Edition* No 1 (4), 2008, p.125

alleged that the proposed law places Croats in Bosnia Herzegovina, that is to say their culture and tradition heritage, in a discriminatory position in relation to the other two peoples, because Croats are prevented from having a radio-television channel in their own language, while the other two peoples practically have that.”³⁴⁶ Moreover, in this appeal, Croat side claimed that the other two channels (RTV FB-H and RTV RS) had their programming mostly in Bosnian and Serbian languages and that “Croats in Bosnia-Herzegovina cannot be satisfied with occasional news shows and other special occasion shows, on Catholic holidays, most often in poor Croatian language.”³⁴⁷ In spite of these objections made by Croat side, although without voting of Croat judges, the Constitutional Court concluded that national interests of Croats in Bosnia and Herzegovina will not be endangered by its implementation.

Furthermore, in 2006, the Law on RTRS was passed by the National Assembly of the Republic of Srpska. At the level of Federation, Croat side objected again, but this time it turned to the Constitutional Court of Federation which had different conclusions than the state court. Namely, by decision of two Croat judges this law was stated to be destructive for national interests of Croats in Bosnia and Herzegovina since certain solutions of the law do not guarantee that this side will not be discriminated in exercising equal rights defined by the Constitution of the Federation of Bosnia and Herzegovina, hence the draft law was sent back to the FB-H Government for revision.³⁴⁸

The adoption of legislation needed for successful establishment of a sustainable public service broadcaster was thus held back for years due to unstable political situation, or better, due to constant

³⁴⁶ Džihana, Amer. “The Public Broadcasting System in B-H: Between Ethnic Exclusivity and Long Term Sustainability”, (accessed on 5 April 2016), available at: http://www.soros.org.ba/images_vijesti/stipendisti_2008/amer_dzihana_final_policy_study_en.pdf

³⁴⁷ Constitutional Court of B-H, (2005), *The decision of the Constitutional Court of B-H in case no. U-10/05*, (accessed on 5 April 2016), available at: <http://www.ccbh.ba/bos/odluke/index.php?src=2#>

³⁴⁸ Constitutional Court of FB-H, (2006) *Decision of the Council for the Protection of Vital National Interests of the Constitutional Court of the Federation of Bosnia and Herzegovina, deciding on a request of the Croat Caucus in the Federation Parliament*, Decision no:U-11/06, dated 19 July 2006, (accessed on 5 April 2016), available at: www.ustavnisudfbih.ba.

political pressures on legislative system of Bosnia and Herzegovina. Moreover, the international community had a rather inconsistent approach to this issue so that it “often gave up on the principles it stood for which are related to ‘best international practice,’ (HR Decision, 1999) in favor of achieving compromise primarily with political forces from the Republic of Srpska, which reluctantly gave support to the creation of a single public broadcasting system.”³⁴⁹ Other sides too were not quite keen on accepting certain provisions of the legislation. Namely, the article in question was Article 9 of PSB Law from 2002, which stipulates the creation of a joint Transmission Corporation. Moreover, “the existing legal frameworks and proposed organizational structure failed to provide for efficient cooperation among the three broadcasters, which act as competitors rather than partners.”³⁵⁰ As media commentator Dušan Babić observed: “The consequence of poor coordination and cooperation was the irrational use of resources, staff surplus, high business costs and a lack of competitiveness in relation to commercial RTV network.”³⁵¹

Generally, it can be claimed that the regulatory framework and several institutions had a major role in the elimination of language of hatred and of “radical outbidding in content of public broadcasters.”³⁵² All problems which were cited inevitably come from the inability and the reluctance of political elites to agree upon solutions and political issues such as the one about the number and nature of TV channels in the public broadcasting system became a matter of judiciary.

5.5.4 FREEDOM OF ACCESS TO INFORMATION ACT

³⁴⁹ Constitutional Court of FB-H, (2006) *Decision of the Council for the Protection of Vital National Interests of the Constitutional Court of the Federation of Bosnia and Herzegovina, deciding on a request of the Croat Caucus in the Federation Parliament*, Decision no:U-11/06, dated 19 July 2006, (accessed on 5 April 2016), available at: www.ustavnisudfbih.ba.

³⁵⁰ Džihana Amer and Tarik Jusić, “Bosnia and Herzegovina” in Bašić-Hrvatini, Sandra, Mark Thompson and Tarik Jusić, eds. *Divided They Fall: Public Service Broadcasting in Multiethnic States*. Sarajevo, Mediacentar Sarajevo, 2008, p. 94

³⁵¹ Babić, Dušan. “Javna radio-televizija BiH: Stari problem novog zakona” *Puls demokratije*, 2007, (accessed on 5 April 2016), available at: <http://www.pulsdemokratije.net/index.php?id=268&l=bs>.

³⁵² Jusić, Tarik and L. Kendall Palmer. “The Media and Power-Sharing: Towards an Analytical Framework for Understanding Media Policies in Post-Conflict Societies. Public Broadcasting in Bosnia and Herzegovina.” *Global Media Journal—Polish Edition* No 1 (4), 2008, p.128

There are three Freedom of Access to Information Acts in Bosnia and Herzegovina³⁵³: FoAIA of B-H, FoAIA of the Federation of Bosnia and Herzegovina and FoAIA of Republika Srpska and they enable the public to access the information in possession of public authorities “to the greatest extent possible consistent with the public interest.” These acts stipulate that all pieces of information are public as well as that on some occasions a piece of information does not have to be disclosed. Thus these acts contain provisions which are in line with democratic standards and which contribute to development of every democratic society. Specifically “FoAIA enables access to information for every person, regardless of his or her citizenship, nationality, ethnicity, or place of residence” and even “legal entities, such as enterprises and institutions, can request the access to information consistent with these acts” while “journalists and media outlets do not have more or less rights compared with other requesters.”³⁵⁴ There is a period of 15 day stipulated for public authorities to provide the requested data, but the practice is rather different and it often takes even three months to receive the information, again showing the complicated implementation.

Even though the exemptions regarding disclosure of information are permitted only under special conditions (e.g. when it comes to national security, defense, public security, questions of monetary policy, prevention of crime, etc.) these exemptions are often taken as a rule by the institutions. However, the major problem regarding these laws is their lack of compliance with other laws such as Law on Protection of Secret Data of B-H,³⁵⁵ the Law on Intelligence and Security Agency of Bosnia and Herzegovina,³⁵⁶ the Law on Criminal Procedure of FBiH,³⁵⁷ the Law on Tax Administration of

³⁵³ *Freedom of Access to Information Act of Bosnia and Herzegovina* (October 2000, Sarajevo). Official Gazette of BiH, No. 28/00. Entered into force on 17 November 2000.

³⁵⁴ Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p. 113

³⁵⁵ *Law on Protection of Secret Data of BiH* (July 2005, Sarajevo). Official Gazette of BiH, No. 54/05 . Entered into force in 2005.

³⁵⁶ *Law on Intelligence and Security Agency of BiH* (2004, Sarajevo), Official Gazette of BiH, No. 12/04, Entered into force in 2004.

³⁵⁷ *Law on Criminal Procedure of FBiH* (August, 2003, Sarajevo). Official Gazette of FBiH, No. 35/03, 37/03 and 56/03. Entered into force on 1 August 2003.

FB-H, and the Law on Tax Administration of FB-H,³⁵⁸ laws on labor and securities market (at entity levels), and cantonal laws on employment in FB-H. In fact “when deciding that some information is not to be published, public bodies based their decisions on the abovementioned laws and not on FoAIA,” and hence “these laws were identified through the actions of Ombudsperson of Federation of B-H, because public organs referred to them in cases of decisions on non-publishing information instead of referring to FoAIA.”³⁵⁹

But generally, the three laws show differences in their provisions, too, such as those related to the form of a written response of public organs (letter-notice-cognizance) and related to sanctions. The Act of B-H and The Act of FB-H do not offer specific provisions that deal with appeals in the case when requests are repudiated, whereas the Act of RS does not envisage an appeal. Furthermore, FoAIA of Bosnia and Herzegovina “made it obligatory for public organs to notify requesters of their right to access the information or of the exemption of publishing” but “as a notice or official letter is not a managing document, it is not binding and does not provide a possibility of appeal in cases when requesters are denied access to information.”³⁶⁰ Since the amendments made in 2006,³⁶¹ public authorities at the level of B-H have been obligated to provide acknowledgements instead.

Finally, the laws do not explicitly stipulate sanctions, and give this possibility by provision stating that “in the case of violation of this law, sanctions established by criminal code, laws on violations and laws in the field of management ought to be applied...”³⁶² Other problems regarding these laws can be found in the lack of monitoring system for their application, and the lack of court practice in this respect, and “the underdevelopment of communication capacities of public institutions or slow

³⁵⁸ *Law on Tax Administration of FBiH* (2002 and 2004, Sarajevo). Official Gazette of FBiH, No. 33/02 and 28/04, entered into force in 2004, <http://www.pufbih.ba/hr/zakon-o-poreznoj-upravi>

³⁵⁹ Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.117

³⁶⁰ Ibid. p.122

³⁶¹ *Law on modifications and amendments of Freedom of Access to Information Act in B-H* (2006, Sarajevo). Official Gazette No. 45/06. Entered into force in 2006.

³⁶² *Supra note, 359*, p.123

procedures when requesting information are a limiting factor when it comes to access to information.”³⁶³ But perhaps the most discouraging part of the application is that public authorities do not refrain from publishing the names of those who requested the information, which is not a legal requirement, making the citizens feel uneasy when they need or want to request the information.

Finally, again we come to the political pressures and their influence to the work of journalists because public authorities often prevented journalists critical of their work to access the information. For example, the “instructions” of then Prime Minister of Republika Srpska ³⁶⁴ prohibited governmental institutions and officials to have any communication with Federal Television as well as with some media outlets in RS, while “working bodies of the B-H Parliament have similar policies, as they decided to deny non-governmental organizations access to information regarding the salaries of members of the parliament; just as in the case of every other denial of access to information of public interest, the B-H Parliament motivated their action by quoting other laws.”³⁶⁵

5.5.5 DEFAMATION LAWS

As the international community acted on introduction of media legislation in B-H, and placed a great importance on enjoyment of freedom of expression in the country, it also created laws on protection against defamation which respect this right. **The regulation of defamation belongs to civil law and** states that: "the right to freedom of expression, as it protects both the contents of an expression and the manner in which it is made, is not only applicable to expressions that are

³⁶³ Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.124

³⁶⁴ Halilović, Mehmed, *Dodik's instructions: Stop FTV*, *Mediacentar Online*, 29 March 2010, (accessed on 5 April 2016), available at: <http://www.media.ba/mcsonline/bs/tekst/dodikove-instrukcije-zaustavite-ftv>,

³⁶⁵ *Supra note 363*, p.125

received as favorable or inoffensive but also to those that might offend, shock or disturb" and "this Law shall be interpreted so as to ensure that the application of its provisions maximizes the principle of the freedom of expression."³⁶⁶

5.5.6 DECRIMINALIZATION OF DEFAMATION

It was the Office of the High Representative to Bosnia and Herzegovina that started the process of regulation of this aspect related to media. The Decision on Freedom of Information and Decriminalization of Libel and Defamation passed in 1999, required that both entities, under the guidance of the Office of the High Representative, adopt the necessary legislation to create civil remedies for defamation, libel and slander in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms.³⁶⁷ This decision was explained by stating that having criminal proceedings for defamation may cause a chilling effect on media in the country and at the time defamation was contained in the Penal Code of Bosnia and Herzegovina, relying on legislation from the communist regime in this aspect, which stipulated imprisonment between three months and three years for defamatory statements.³⁶⁸ Moreover, the Code also stated that “impairing the reputation of the state and its symbols, as well as its constituent peoples and others who live in Bosnia-Herzegovina” is a “grave criminal act.”³⁶⁹ The Criminal Code also reflected on the position of public figures and defamation, stating that defamation “committed against a state body or official or military person regarding their official work...” shall be undertaken – ex officio.³⁷⁰

³⁶⁶ *Law on Protection against Defamation of RS* (Banja Luka, July 2001), Official Gazette of RS No. 37/01, entered into force on 1 August 2001; *Law on Protection against Defamation of FB-H* (Sarajevo, 2002), Official Gazette of FB-H No. 59/02, entered into force in 2002; *Law on Protection against Defamation of Brčko District B-H* (Brčko, 2003), Official Gazette of Brčko District of B-H No.14/03, entered into force in 2003.

³⁶⁷ Decision of the High Representative, July 30, 1999 *Decision on restructuring Public Broadcasting System in Bosnia and Herzegovina and on the freedom of information and on abolishing penalties for defamation and insult*, (accessed on 5 April 2016), available at: http://www.ohr.int/decisions/mediadec/default.asp?content_id=31174,

³⁶⁸ *Penal Code of the Federation of Bosnia-Herzegovina*, Official Gazette FBiH, 43/98.

³⁶⁹ *Ibid. Article 218*

³⁷⁰ *Ibid. Article 219*

At the same time, the Federation of Bosnia and Herzegovina had a legal provision for bringing a lawsuit for compensation of pecuniary and non-pecuniary damages regarding violation of reputation and honor, but there were very few cases of these civil lawsuits, as there was an opportunity to start criminal proceeding instead and so plaintiffs used it more often.³⁷¹

Before the Municipal Court in Sarajevo thus came 64 defamation cases between 1997 and 1999 and “only one of the new cases ended in a first-instance verdict with the pronouncing of a three-month suspended sentence with one year of probation to the editor in chief of the weekly “Slobodna Bosna.”³⁷² In fact, until the decriminalization of defamation, and between 1998 and 2001 most cases before the Court were regarding that weekly magazine, and its editor in chief (13), the editor in chief of another weekly magazine “Dani” (5) and in it was public figures and officials who brought the lawsuits in most cases.³⁷³ As mentioned, plaintiffs also mainly used criminal proceedings in these cases and in 1999 there were just two cases when there was a civil lawsuit. However, the outcomes of these two proceedings were rather high: Vecernje novine, a daily newspaper had to pay the plaintiff 20,000 KM, and Croat Radio Orasje and its editor in chief had to pay almost 10,000 KM.³⁷⁴

When the High Representative made the previously mentioned Decision, it abolished the imprisonment but it did not immediately take a ‘criminal act’ label from defamation, which is why criminal proceedings for defamation continued in spite of the initial idea behind the decision.³⁷⁵ This is how in the years that followed the Decision there were no crucial changes in treatment of defamation before the courts in B-H. For example, a “court in Sarajevo in mid-October of 2000

³⁷¹ Udovičić, Zoran, Tarik Jusić, Mehmed Halilović, Radenko Udovičić and Media Plan Institute Research Team, *The media at a turning point: a media landscape of Bosnia and Herzegovina*, 2001, p.39.

³⁷² Ibid. p.38

³⁷³ *Special Report on Freedom of Information and Legal Regulation of Libel and Defamation in the Federation of Bosnia-Herzegovina*, Institution of the Ombudsmen, MH01/99, December 22, 1999, in Udovičić, Zoran, Tarik Jusić, Mehmed Halilović, Radenko Udovičić and Media Plan Institute Research Team, *The media at a turning point: a media landscape of Bosnia and Herzegovina*, 2001, p.39

³⁷⁴ *Supra note 371*

³⁷⁵ *Supra note 371*

passed judgment against two journalists, sentencing them for the criminal act of libel with a three-month suspended sentence with one year of probation.”³⁷⁶

This happened in spite of the fact that the Office of the High Representative urged the authorities of both the Federation of B-H and Republika Srpska to “adopt the necessary legislation to create civil remedies for defamation, libel and slander in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms.....no later than 30 December, 1999.”³⁷⁷

But since there were no action in this regard, at the end of 1999 the OHR established an advisory group on legal regulation of defamation, including the representatives of the governments of both entities, local and international experts, and representatives of the OHR, OSCE and IMC.³⁷⁸

The attempts to regulate this field continued by passing a Draft Law on compensation of damage caused by libel and defamation in the Federation of B-H, but the Ombudsmen of the Federation stated that it “does not constitute a good foundation for establishing balance in encouraging freedom of expression and freedom of the press and at the same time protecting the honor and reputation of any citizen of this country.”³⁷⁹ The issue of the amount of compensations was particularly intriguing because they were rather high: 2,000 to 10,000 KM for journalists and 20,000 to 100,000 KM for publishers, and assessed as potentially causing chilling effect.³⁸⁰ Instead of these high amounts of compensation, the Ombudsmen suggested only symbolic 1KM fines for journalists

³⁷⁶ Udovičić, Zoran, Tarik Jusić, Mehmed Halilović, Radenko Udovičić and Media Plan Institute Research Team, *The media at a turning point: a media landscape of Bosnia and Herzegovina*, 2001, p.40.

³⁷⁷ Ibid.

³⁷⁸ Ibid.

³⁷⁹ *Special Report on Freedom of Information and Legal Regulation of Libel and Defamation in the Federation of Bosnia-Herzegovina*, Institution of the Federation Ombudsmen, December 22, 1999, In Udovičić, Zoran, Tarik Jusić, Mehmed Halilović, Radenko Udovičić and Media Plan Institute Research Team, *The media at a turning point: a media landscape of Bosnia and Herzegovina*, 2001, p.40

³⁸⁰ Ibid. p. 41.

and ultimately the “High Representative and the head of the OSCE called on the Federation Prime Minister to revoke the Draft Law.”³⁸¹

All initiatives taken by the international community came from the acknowledgement that in order to have the full respect of freedom of expression, statements should not be an object of criminal law, because in this way journalists and others may enter criminal records for their expressions which then in turn causes the chilling effect. The goal was to ensure the enjoyment of freedom of expression and therefore contribute to the democratization of the entire country.

Ultimately, the three defamation laws in Bosnia and Herzegovina were adopted:

- **Law on Protection against Defamation of the Federation of B-H** published in Official Gazette of the Federation of B-H, Number: 59/02, entered into force one day after it was published.
- **Law on Protection against Defamation of Republika Srpska**, published in Official Gazette of Republika Srpska, Number: 37/01, entered into force eight days after it was published.
- **Law on Protection against Defamation of Brčko District of Bosnia and Herzegovina**, published in Official Gazette of Brčko District of B-H, No. 14/03, entered into force in 2003.

By decriminalization of defamation, the legislative framework for media in B-H became even advanced than those in some neighboring countries even though “the Resolution of Council of Europe Parliamentary Assembly - Towards decriminalization of defamation Resolution 1577 (2007)

³⁸¹ *Special Report on Freedom of Information and Legal Regulation of Libel and Defamation in the Federation of Bosnia-Herzegovina, Institution of the Federation Ombudsmen*, December 22, 1999, In Udovičić, Zoran, Tarik Jusić, Mehmed Halilović, Radenko Udovičić and Media Plan Institute Research Team, *The media at a turning point: a media landscape of Bosnia and Herzegovina*, 2001, p.41

- explicitly says that the states should “define the concept of defamation more precisely in their legislation so as to avoid an arbitrary application of the law.”³⁸²

5.5.7 MAIN FEATURES OF NEW LAWS

The laws in B-H thus became modernized in their wording and the main features of defamation laws therefore became the following: abolished criminal liability and protection of state officials and national symbols; introduction of civil liability and compensations instead of fines and imprisonment; focus on assessing each specific situation in order to reach the balance between damage caused and the amount of compensation; full protection of journalistic sources; injured person is obligated to take ‘all necessary measures to diminish the damage... and particularly to make a request for publishing a correction’; excluded insult, which can still be the subject of a procedure before court but on the basis of the Law on Obligatory Relations. etc.

The laws on protection against defamation state that each of them “is interpreted in such manner that the application of its provisions largely ensures the principle of freedom of expression.”³⁸³ Therefore, there is the emphasis on the protection of freedom of expression but the media are also urged to perform their tasks professionally and without any malice. Unless they do so and if journalists “intentionally or carelessly express or disseminate false facts”³⁸⁴, “cause damage to the

³⁸² Resolution of Council of Europe Parliamentary Assembly - *Towards decriminalization of defamation* Resolution 1577 (2007)

³⁸³ *Law on Protection against Defamation of RS* (Banja Luka, July 2001), Official Gazette of RS No. 37/01, entered into force on 1 August 2001; *Law on Protection against Defamation of FB-H* (Sarajevo, 2002), Official Gazette of FB-H No. 59/02, entered into force in 2002; *Law on Protection against Defamation of Brčko District B-H* (Brčko, 2003), Official Gazette of Brčko District of B-H No.14/03, entered into force in 2003.

³⁸⁴ *Ibid.*

reputation of legal or natural person by stating or disseminating something false,”³⁸⁵ they would have to fact the actions that come after.

The laws offer the defense for media if they do publish defamatory statements but if they still respect professional standards and act in good faith, thus placing an additional importance to professional codes such as the Press Code and the relevant rules of the Communications Regulatory Agency.³⁸⁶ The laws agree on the necessary elements for a defamation to occur: existence/publishing false information; identifying the injured person; damage to legal or natural person; dissemination to third persons and intention or carelessness.

There are slight differences among the three laws and so, for example, defamatory cases are considered urgent by the Law on Protection against Defamation in the Federation of B-H while the Law of RS does not stipulate this urgency. There are terminological differences, too, and so the Law on Protection against Defamation of FB-H mentions “false facts,”³⁸⁷ which is a contradiction in itself, while the Law of RS states “expressing something false,”³⁸⁸ which is more acceptable. The laws differ in definitions of who can be liable as an author, publisher, or editor, too. According to the Law of FB-H “every person ... who makes or disseminates an expression” can be liable, and the Law of RS refers to “every person in business.” There were debates in the Press Council, gathering journalists, judges and media experts insisting that there should be a separate definition for a

³⁸⁵ *Law on Protection against Defamation of RS* (Banja Luka, July 2001), Official Gazette of Republika Srpska No. 28/94, entered into force on 1 August 2001, Article 5, paragraph 1

³⁸⁶ *Code on Broadcasting Radio and Television Programs*, Communications Regulatory Agency (Sarajevo, January 2008), Official Gazette of B-H No. 20/08, entered into force on 11 March 2008.

³⁸⁷ *Law on Protection against Defamation of FBiH* (Sarajevo, 2002), Official Gazette of FB-H No. 59/02, entered into force in 2002

³⁸⁸ *Law on Protection against Defamation of RS* (Banja Luka, July 2001), Official Gazette of RS No. 37/01, entered into force on 1 August 2001.

journalist and an author because a journalist is every person who states his/her own or disseminates other's information, while an author is every natural or legal entity who provided the information.

6. PRACTICE REGARDING DEFAMATION IN BOSNIA AND HERZEGOVINA

In Bosnia and Herzegovina, defamation is defined in the Law on Protection against Defamation of RS as "stating or disseminating something false which can harm the reputation of one person,"³⁸⁹ and in the Law of the Federation as "the act of harming the reputation of a private or legal entity by making or disseminating an expression of false fact identifying that private or legal entity to a third person."³⁹⁰ More specifically, "stating or disseminating can only include statements which refer to a certain event, objective states, actions, occurrences and similar, for which it can be objectively determined and assessed whether it is true or false; value judgments cannot be considered defamation"³⁹¹ and defamation also excludes "statements about possible and future events cannot form the basis for a valid legal claim."³⁹²

The focus of the laws on protection against defamation was set on protecting freedom of expression and public interest, too, but when their application began, it did not make the number of lawsuits coming before the courts lower, it in fact made it higher. More specifically, "the expectations of journalists were too high (less lawsuits and minimum compensation)...(while)... public figures also had great expectations, but for a completely opposite reason, because they used court procedures to protect their own reputation, dignity and privacy (maximum compensation)."³⁹³ Due to the lack of experience in the field, it took courts two years starting from the adoption of the laws to pass first judgments and over these two years, there were almost 300 lawsuits brought before cantonal courts

³⁸⁹ *Law on Protection against Defamation of RS* (Banja Luka, July 2001), Official Gazette of RS No. 37/01, entered into force on 1 August 2001.

³⁹⁰ *Law on Protection against Defamation of FBiH* (Sarajevo, 2002), Official Gazette of FB-H No. 59/02, entered into force in 2002

³⁹¹ Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.141

³⁹² *Ibid.* p.142

³⁹³ Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.135

in the Federation of Bosnia and Herzegovina and before county courts in Republika Srpska, hence “if we compare this number to the total of media outlets, both electronic and print, it turns out that every media was sued at least once, as well as one in ten journalists.”³⁹⁴

At this point, it became visible that most lawsuits were brought by public officials and owners of media outlets, particularly of print media and there appeared mutual lawsuits between daily newspapers Dnevni Avaz and Oslobođenje, as well as weekly magazines Slobodna Bosna, Dani, etc.. It is particularly the first two newspapers that pressed most lawsuits against each other which is “**a practice specific to Bosnia and Herzegovina and very unusual for countries in the region.**”³⁹⁵

Moreover, the compensations requested by the owners of these two newspapers were at first very high - from 20,000 to 200,000 KM, while there were also those amounting to millions. Over the years, the courts established their practice limited the amounts between one and five thousand KM, or rarely between ten or fifteen and twenty thousand KM.

In Bosnia and Herzegovina, it is most often young journalists that are sued for defamation and it is mostly topics related to crimes. This is how defamatory statements most often contain words such as “criminal”, “thief”, “war criminals”, etc.³⁹⁶ For this reason, media experts in B-H often pose three questions to journalists as a sort of a test to check whether their statements are defamatory: “Did I do everything I could to get the other side of the story? Are there elements of defamation in my story? If there are, do I have defense/evidence for each of the statements harming one’s reputation?”³⁹⁷ And only if the answers are positive, the story can be published.

³⁹⁴ Halilović, Mehmed, *How the new Law on Protection against Defamation is applied in B-H: journalists are sued by politicians but also by – journalists!*, *Media Online*, 24 August 2004, (accessed on 5 April 2016), available at: <http://www.mediaonline.ba/ba/pdf.asp?ID=324&n=KAKO%20SE%20U%20BIH>

³⁹⁵ *Supra note 393*, p.134

³⁹⁶ Halilović, Mehmed, *Myths, misconceptions and traps*, (accessed on 5 April 2016), available at: <http://analiziraj.ba/2015/08/25/mitovi-zablude-i-zamke/>

³⁹⁷ Halilović, Mehmed, *Myths, misconceptions and traps*, (accessed on 5 April 2016), available at: <http://analiziraj.ba/2015/08/25/mitovi-zablude-i-zamke/>

In general, the courts in B-H faced challenges and dilemmas regarding defamation and the application of new laws, and even though there were a few cases of defamation that did not include media, this analysis focuses on the cases which did so, and assess how the courts respected international standards of protection of freedom of expression and how they achieved balance between the right to freedom of expression and the right to honor and reputation.

6.1.SPECIFIC ISSUES IN THE PRACTICE

In the time when defamation was not decriminalized, there were no records of journalists being imprisoned, in worst case scenarios they were on a parole and most often there were fines.³⁹⁸ But the main problem then, as well as now, was a great number of lawsuits, and if one media outlet is/was sued several times a year, it could/can reach a big amount of money in total, which is devastating for media outlets in bad financial situations. Today, to some, it seems even more acceptable to be on a parole and not pay anything, than deal with numerous compensations which may reach tens of thousands of KM.³⁹⁹ But still, the problem before decriminalization was that in case the plaintiff won in criminal proceedings, he/she could ask for a fine in civil proceedings, too-thus criminal proceedings decided whether there was defamation or not, and civil proceedings determined the amount of money to be paid, this is how journalists and editors could have big expenses which would bring them to the edge of existence. But when the new defamation laws were passed and when there were no criminal proceedings at all, it seemed that this would encourage freedom of expression in Bosnia and Herzegovina.

³⁹⁸ Ibid.

³⁹⁹ Ibid.

6.1.1 DISTINGUISHING BETWEEN FACTS AND VALUE JUDGMENTS

The laws on protection against defamation bring a distinction between facts and value judgments, thus making opinions protected, in line with the international standards and best practices. Article 7 of the Law on Protection against Defamation of Federation states: 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.⁴⁰⁰ Article 6 of the Law on Protection against Defamation of RS contains provision stating that: “the following cases will not be treated as liable for defamation: a) if there is the expression of opinion or if the expression is substantially true;”⁴⁰¹

The laws thus acknowledge the importance of distinguishing between facts and value judgements, and also protect opinions which may offend, shock and disturb.. They also reflects upon false facts which may have been published in good faith and in line with professional standards in which case “media will not be considered responsible if the journalist or publication have a legitimate goal, when the matter is regarding public interest or and when reasonable efforts are made to confirm the facts.”⁴⁰² The practice in B-H attempted to follow international standards in this respect (especially the practice of the European Court) because it is the international practice that was relied on while drafting and passing the laws on protection against defamation in B-H.

The distinction between facts and value judgments was therefore the subject of cases before the courts in B-H, but courts at different levels showed different positions regarding this issue. The

⁴⁰⁰ *Law on Protection against Defamation of FB-H* (Sarajevo, 2003), Official Gazette of FB-H No. 19/03, entered into force in 2002

⁴⁰¹ *Law on Protection against Defamation of RS* (Banja Luka, July 2001), Official Gazette of RS No. 28/94, entered into force on 1 August 2001.

⁴⁰² Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.142

Cantonal Court in Sarajevo dealt with a case containing a statement “A.D. prefers military staff unlike I.A. who prefers police officers. However, both of them bring benefits to the owner R. who sometimes allows them to swim in the pool (together) for free”, and “thanks to the strong connections of the plaintiff in the Federal Ministry of Defense, R. can be sure that his premises will remain untouched, although they were built on a fallout shelter....” The Cantonal Court concluded that: “some expressions in the article in question could be treated as a defamation” and that the second statement “represents a factual statement which can be proven true or false. Such expression cannot be considered only as 'opinion' or 'satire'.”⁴⁰³ On the other hand, the Constitutional Court of B-H concluded otherwise: “the expressions from the disputable text entirely represent value judgments, that is, the opinion of applicants on plaintiffs and relations in daily newspapers for which they work.....If the opposite was considered, it could be rightly asked how it is even possible to prove factually that someone prefers military or police staff Such statements cannot be proven because they do not contain the minimum of facts which could be verified by objective evidence.”⁴⁰⁴

Furthermore, the Cantonal Court in Sarajevo discussed statements regarding daily newspaper *Dnevni avaz*, which was said to be “anti-journalistic, the biggest tumor in our journalism, that the new Bosniak mafia was dictating its work, that it was terrorizing the public with its headlines, that it was using lies, constructions, harangues, and similar, and that they were the Al-Kaida of the media.”⁴⁰⁵ In this case, the Court decided that these were all value judgments given in a metaphorical manner and that “the readers of expressions in question could not have taken them literally and hence they could not have supposed that the defendants were the members of a terrorist organization such as Al-Kaida and that they were actually terrorizing the public, because the

⁴⁰³ *Cantonal Court in Sarajevo Decision No. P-45/03*

⁴⁰⁴ *Decision on the merits*, applicants: Senad Avdić, Danka Savić and Adnan Buturović, Constitutional Court of Bosnia and Herzegovina (No. AP 787/04), 20 December 2005, (accessed on 5 April 2016), available at: <http://www.ccbh.ba/bos/odluke/index.php?src=2>,

⁴⁰⁵ *Judgment No. P- 75/03* of the Cantonal Court in Sarajevo

exaggeration in this expression is obvious.”⁴⁰⁶ The Supreme Court of B-H made a similar judgment when distinguishing between facts and opinions and stated that: “opinions or value judgments, that is, a general opinion about someone, even if it reaches a third person, is not an act of defamation in the sense of the article which was quoted, nor is it important to know what subjective feeling of the harmed person was caused by such opinion. If it was the other way round, different interpretations of the provisions of the Law on Protection against Defamation would question the main principle of freedom of expression and opinion which is guaranteed by Article 10 of the Convention on the Protection of Human Rights and Fundamental Freedom.”⁴⁰⁷

On the other hand, the Banja Luka Basic Court in 2003 dealt with a case where defendants insisted they expressed their opinion in disputable article on smuggling across the border which would have not been possible without the permission coming from the authorities. However, the Court concluded that this was the violation of the plaintiff’s right to honor and reputation which were harmed and as he “was the president of National Assembly of RS, he was exposed to the judgments of public because of his position.”⁴⁰⁸ The defendants therefore had to pay the compensation of 5,000 KM, and this judgment was confirmed by the Constitutional Court of B-H:⁴⁰⁹ “The expression in question was not a statement of value judgment which cannot be proven, instead it was written and published as a statement of fact in the context of organized crime.”

6.1.2 DISSEMINATION OF EXPRESSIONS

⁴⁰⁶ *Judgment No. P- 75/03* of the Cantonal Court in Sarajevo

⁴⁰⁷ *Č.P. v. the Federation of Bosnia and Herzegovina, Canton 10 Livno and Municipality of Drvar* (the Supreme Court of FB-H Gž – 125/05) 29 September 2005.

⁴⁰⁸ *Banja Luka Basic Court Decision No. P-1415/02*

⁴⁰⁹ *Decision on merits*, applicant ‘Dnevne Nezavisne novine - Banja Luka’, Constitutional Court of Bosnia and Herzegovina (No. AP 1819/07), 11 November 2009, (accessed on 5 April 2016), available at: <http://www.ccbh.ba/bos/odluke/index.php?src=2>,

The laws on protection against defamation also reflect on the dissemination of information and state that there is a liability for disseminated content as well. The courts do take into account all the circumstances of a particular case when it comes to dissemination of defamatory statements and how journalists use their right to disseminate information right when they take it from another media, that is, whether they publish it further in a critical or non-critical manner. The injured party may “choose whether they will sue all media that published this expression or only some of them,” and, “these persons can justifiably state that the damage was caused to them mostly when the information was repeated in another media (dissemination of expression) and not when the original statement was published.”⁴¹⁰ The reasons for this can be found in the fact that an injured person can assess which media outlet caused a bigger damage to their honor and reputation – was it in an outlet with bigger viewership/readership or was it the outlet in their hometown, etc.?

More precisely, Article 10, paragraph 3 of the Law on Protection against Defamation of FBiH states among other that: “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 his or her reputation and that the allegedly injured person will suffer irreparable harm as a result of further dissemination of the expression.”⁴¹¹ In terms of temporary measures, it was the Cantonal Court in Sarajevo which brought such measure regarding stating false information about a politician in daily newspaper *Dnevni avaz*, while it also prohibited one weekly magazine to state false information

⁴¹⁰ Srdić, Mladen, “Defamation in court practice in Bosnia and Herzegovina”, in Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.165

⁴¹¹ *Article 10, paragraph 3 of the Law on Protection against Defamation of FBiH*

about the owner of Dnevni avaz.⁴¹² The court practice has so far shown to be inclined towards bringing “temporary court measure on the prohibition of stating or disseminating false expressions can be imposed only if the injured person can certainly prove that this statement caused unreparable damage.”⁴¹³

When it comes to dissemination, the courts also decide on the way and form in which an expression was disseminated and in which type of media program or column it happened, e.g. was it disseminated satirically or ironically. There was a case before the Cantonal Court in Sarajevo when a sued media outlet claimed that they were using satire regarding a public figure, but the court decided that they were guilty of defamation and required to pay a compensation of 5,000 KM because: “the procedure established that the authors of the article did not mean well, nor did they take into account the principle of the protection of privacy of the plaintiff.”⁴¹⁴ When the same case came before the Supreme Court, it acknowledged that humor in this case: “represents claiming some facts which, according to this Court, can harm the reputation of the plaintiff as a natural person who is a public figure with influence on the public while doing his job.... It is undisputable that the article in question entirely represents a type of literature, that is, satire or humor, but it also contains the elements of defamation hence material law was correctly applied when the defendants were proven to be liable for defamation and when they were charged to pay the compensation for non-pecuniary damage.”⁴¹⁵ Another case ended in a similar way when the Constitutional Court of Bosnia and Herzegovina, decided that: “the expressions in question do not contain the elements of satirical or

⁴¹² Srdić, Mladen, “Defamation in court practice in Bosnia and Herzegovina”, in Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.177

⁴¹³ Ibid.

⁴¹⁴ *Judgment of Sarajevo Cantonal Court No. P-39/02*, 8 November 2004.

⁴¹⁵ *Judgment of the Supreme Court of FBiH No. GŽ – 21/05*, 12 April 2005.

humorous criticism at the expense of the plaintiff, but that they exclusively contain facts which were not verified by the defendants by making reasonable efforts...”⁴¹⁶

6.1.3 IDENTIFICATION

The practice in B-H has so far shown that the identification of defamed person refers not only to the explicit name and last name of a person, but that it is sufficient for the circumstances to show to whom a disputable statement refers. One of the basic problems that courts came across was dealing with names that are rather common in the country. One of such cases is the judgment of Sarajevo Cantonal Court, when Dušan Lukić, filed a lawsuit based on the article Dušan Lukić committed in war crimes in Doboј, but the court dismissed the claim as there was not enough proof of identification of Dusan Lukić⁴¹⁷: In this specific case, this Court considers that there is no such element in this disputable expression. Namely, the person mentioned as a member of the management of SDS, in the statement of a witness which was delivered in this article, is named only as "Dušan Lukić". There are no other attributes given to this name, such as profession, name of the father or address. It is a fact that name Dušan and last name Lukić are very common in Bosnia and Herzegovina. In this procedure, it was not possible to establish that there was only one Dušan Lukić in Doboј and that it was precisely the person who made charges at the time of the events described in the testimony and published in the article. Having in mind the abovementioned, the opinion of this Court is that the conditions stipulated by the Law on Protection against Defamation were not fulfilled and hence the expression in question cannot be treated as defamation.

⁴¹⁶ «*Pres-sing*» d.o.o. *Sarajevo et al.* in Official Gazette of B-H No. 60/05, (accessed on 5 April 2016), available at:<http://www.ccbh.ba/bos/odluke/index.php?src=2>

⁴¹⁷ *Judgment of Sarajevo Cantonal Court*, No. P-117/03

In this manner, the courts showed their compliance with international standards, as well as when they approached cases such as the ones when journalists of daily, Dnevni avaz, filed a lawsuit and when it came to identification of a group. The Cantonal Court in Sarajevo dismissed the claim in the case of statements referring to daily newspaper Dnevni avaz as 'a criminal media organization', that their 'lies are used to serve the political goals of the high representative,' that they are connected with Bosniak mafia and that they are the 'Al-Kaida of media'. The Court provided the following elaboration⁴¹⁸: "The statements do not contain any names of the plaintiffs. According to the practice of European Court of Human Rights, individuals in a group can be authorized to make charges for defamation on the condition of proving that they are personally identified and directly affected. This Court considers that the public, that is, the readers of Dnevni avaz had no reason to identify all journalists of Dnevni avaz with expressions given by the defendant." The Supreme Court of the Federation, confirmed both judgments given in this subchapter.

6.1.4 INSULT

As mentioned before, defamation and insult were both included in the Penal Code, and when defamation was decriminalized, and when new laws were passed, insult became the subject of the Law on Obligatory Relations⁴¹⁹. Courts in B-H refer to this Law when deciding on the amount of compensation regarding violations of honor and reputation. Specifically, it is Article 200 of the Law that refers to adjudging compensations for harming non-pecuniary goods. This Law states that the after court proceedings there can be a pecuniary or non-pecuniary compensation for emotional distress suffered based on all the circumstances of a case. However, the Law contains only a

⁴¹⁸ *Judgment No. P - 75/03*, Sarajevo Cantonal Court

⁴¹⁹ *Law on Obligatory Relations* (Official Gazette of SFRJ, Number: 29/78, 39/85 and 57/89, Official Gazette of RB-H, Number: 2/92, 13/93 and 13/94) and Official Gazette of Republika Srpska, Number: 17/93 and 3/96

provision regarding a person's honor and reputation thus there is no clear difference between defamation and an insult insult is a gratuitous disqualification whereas defemation consists of the attribution of false facts.

Therefore, when in certain cases courts decided that there was no defamation but instead there is an insult which harmed a person's honor and reputation, they turned to the Law on Obligatory Relations and its relevant provisions. One example of this case came before the Constitutional Court of B-H. In this case, a newspaper published allegedly an insulting text about a public figure and was obligated to pay the compensation even after they made an appeal. The position of the Constitutional Court was that the newspaper, regardless of the public interest contained in the text: "cannot use snubbing the plaintiff as a defense, nor can it use disrespect and humiliation of her dignity which attacks and harms her honor and reputation which caused her emotional distress that she is not obligated to tolerate no matter which position she occupied in the Municipality Court... the Law on Obligatory Relations stipulates that for emotional distress suffered because of the violation of reputation and honor, the court can pass the sentence of a fair compensation for non-pecuniary damage, if it considers that the circumstances of the case justify this... Also, considering all the circumstances of this case, by challenging judgments, the courts decided that there is 'an urgent social need' requiring a concrete boundaries in the realization of freedom of expression."⁴²⁰

6.1.5 COMPENSATIONS

⁴²⁰ *Decision on merits*, applicant: "Press-sing" d.o.o. Sarajevo and Senad Avdić" (AP 1064/05) 14 March 2006, (accessed on 5 April 2016), available at: <http://www.ccbh.ba/bos/odluke/index.php?src=2#>

The amount of compensations has particularly varied when it came to defamation cases in B-H. Determining the proportionality of compensation has stabilized over the years and so although “the Constitutional Court of B-H emphasized that every individual is characterized by the category of reputation, which is an integral and inseparable part of his/her personality” it acknowledged the fact that “it is very important for the decision imposing the compensation not to have a punishing nature in relation to the person who expressed a statement that caused damage to another person.”⁴²¹

It is the Law on Obligatory Relations⁴²² that is used to determine the amount of compensation for damage, and so Article 200 of the Law states: “When deciding on the request for the compensation for immaterial damage, as well as on its amount, the Court will take into account the importance of violated goods and the goal to which this compensation serves, but also the fact that it is not contributing to tendencies which are not connected to its nature and social purpose.” Laws on Protection against Defamation clearly prescribe the proportionality of compensation and that all circumstances of a particular case must be taken into consideration when determining the amount of compensation. In addition to this, “what also needs to be taken into account are the measures taken by the defendant in order to mitigate consequences such as: publishing a retraction and taking back false facts or apologizing, the fact that this person gained material benefits by expressing or disseminating the statement, as well as the fact that the amount of the imposed compensation could cause great material difficulties or insolvency of this party.”⁴²³

The requests for high amount of compensations were high at the beginning of the application of the defamation laws, and e.g. the owners of daily newspapers Dnevni Avaz and Oslobođenje were at first very high - from 20,000 to 200,000 KM, while there were also those amounting to millions.

⁴²¹ Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.152

⁴²² *Law on Obligatory Relations*, Official Gazette of SFRY No. 29/78, 39/85 and 57/89 and Official Gazette of RB-H No. 2/92, 13/93 and 13/93 and Official gazette of Republika Srpska No: 17/93 and 3/96

⁴²³ *Supra note*, p.155

However, the courts did not adjudge such enormous amounts and over the years, the courts established their practice limited “the amounts between one and five thousand KM, or rarely between ten or fifteen and twenty thousand KM” as well as the costs of the court which have become a little bit more “proportional to the requested amount of compensation.”⁴²⁴

The average compensation for damages in Bosnia and Herzegovina is now about 5,000KM, but for journalists this amount is too high – based on their average salaries and the average salary in the country, public figures keep claiming that this is too little: “The objections that the amount of non-pecuniary damage is too large are not valid because the goal of compensation for non-pecuniary damage is for the plaintiff to be provided with the satisfaction which would compensate for the non-pecuniary goods of which he/she was deprived, that is, to provide such satisfaction which this person would have had, had there not been the harmful event”.⁴²⁵ But even though the practice has become more or less consolidated, it is still rather questionable in some cases, how non-pecuniary damage was determined and whether this was done rather arbitrarily. This is how there are opinions that “an opinion related to the circumstances of emotional distress should be given by an expert neuro-psychiatrist...(but)...others believe that it is sufficient to hear the plaintiff as a party in a procedure and possibly a witness, determining the existence and level of non-pecuniary damage caused in this way.”⁴²⁶

It is acknowledged that the high compensations may even be a result of state’s interference into the exercise of the right to freedom of expression, and thus it often happens that there are complaints regarding the amount of compensation. On the other hand, in some cases, the plaintiffs were not “able to submit the evidence regarding the circumstances of the amount of damage, since they

⁴²⁴ Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.156

⁴²⁵ *Decision on merits*, applicants: Radio-Television of the Federation of Bosnia and Herzegovina and Bakir Hadžiomerović (the Supreme Court of the Federation of Bosnia and Herzegovina: GŽ- 91/04) 26 October 2004.

⁴²⁶ *Supra note*, p.159

established that the damage was certainly caused, the courts of first instance freely assessed its amount” and “the existence of damage is assessed according to adopted social norms and measures, and not according to how much the person to whom the defamation referred is hurt subjectively.”⁴²⁷

On several occasions, the Constitutional Court of B-H adopted the appeal against courts of lower instances in terms of high compensations awarded based on Article 127 of the Law on Legal Proceedings, which provides courts with authorizations to assess the amount of damage. The Constitutional Court stated that the courts: arbitrarily concluded that damage occurred and the applicant was liable, which caused the violation of the right of applicant to fair trial...in this case of compensation, in order to protect the goal, or in this case the plaintiffs right to 'truth', they did not fulfill the necessary condition for examination of the principle of proportionality between the means and the goal. This condition must be fulfilled when it comes to allowed interference into the right to freedom of expression.⁴²⁸ The Constitutional Court of B-H also acknowledged the existence of defamation in another case, but again turned to the amount of compensation awarded: “the compensation for non-pecuniary damage is one of the kinds of satisfaction given to the person who suffered the damage of violation of non-pecuniary goods. The assess of the compensation for non-pecuniary damage is a very delicate and complicated procedure because there is no general measure considering a very different morally-psychological constitution of each individual as well as considering other circumstances in which the damage occurred and harmed the non-pecuniary goods of the plaintiff...However, even though while estimating the amount of compensation for non-pecuniary damage, courts have the right to discretion of the court. This discretion of the court is not absolute which is expressed in Article 200 of the Law on Obligatory Relations according to

⁴²⁷ Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.157

⁴²⁸ *Decision on merits and permission*, applicants: «Pres-Sing» d.o.o. Sarajevo (Constitutional Court of Bosnia and Herzegovina: AP 1289/05), 9 November 2006, (accessed on 5 April 2016), available at: http://www.ccbh.ba/bos/odluke/povuci_html.php?pid=54194

which «the court assesses the significance of damaged goods and the goal of the compensation» by taking into account the circumstances of the concrete case.»⁴²⁹

At this point it is necessary to reflect on the Law on Obligatory Relations⁴³⁰ which is used to determine the compensation in defamation cases. Article 200 of the Law states that: “the Court shall, if it establishes that the circumstances of the case, and especially the severity of pains and fears and the time they last are justifiable, impose a fair fine independently from the compensation for material damage as well as if this was absent. When deciding on the request for the compensation for immaterial damage, as well as on its amount, the Court will take into account the importance of violated goods and the goal to which this compensation serves, but also the fact that it is not contributing to tendencies which are not connected to its nature and social purpose”. There is a distinction made between pecuniary and non-pecuniary damage, the latter being connected with harm caused to a person’s honor and reputation and the emotional distress it brought. Also, legal entities are excluded from this type of damage because they can suffer only pecuniary damage and cannot suffer emotional distress. Public debates among experts stated that the harm to a legal entity may be caused only if the public loses the trust in the company in question. But the Supreme Court of the Federation of B-H stated: Article 6 of the Law on Protection against Defamation of FB-H in point 1, quite clearly states that every person who caused damage to the reputation of a natural or legal entity by expressing or disseminating false facts while identifying this natural or legal entity to a third person, is responsible for defamation. It is not disputable that the first plaintiff is a legal entity. Furthermore, this means that even the reputation of a legal entity can be harmed. It is certainly not about emotional distress, but it is about the compensation for defamation. This is imposed both on

⁴²⁹ *Decision on merits*, applicant: Sarajevska Pivara (Constitutional Court of Bosnia and Herzegovina: AP 1454/06). 17 November 2008, (accessed on 7 April 2016), available at: http://www.ccbh.ba/bos/odluke/povuci_pdf.php?pid=171357 (accessed 12 January 2012).

⁴³⁰ *Law on Obligatory Relations*, Official Gazette of SFRY No. 29/78, 39/85 and 57/89 and Official Gazette of RB-H No. 2/92, 13/93 and 13/93 and Official gazette of Republika Srpska No: 17/93 and 3/96,

legal and on natural persons because the basis is the compensation, that is, the damage is caused by defamation.⁴³¹

The Law on Obligatory Relations also prescribes that a person causing damage may pay for publishing the judgment or a correction or take back what was said which would “achieve the purpose of compensation to the plaintiff whereas publishing the entire judgment, having in mind its volume does not fulfill the purpose and it is not necessary.”⁴³² For example, the Cantonal Court in Sarajevo ordered the first and the second defendant in one case to pay for the publication of the introduction and statement of the judgment in newspapers *Oslobođenje*, *Dani*, *San* and *Dnevni avaz*.⁴³³ Another example of challenges that come with adjudging compensation was the one of Duska Jurisic, a TV journalist. She was a plaintiff in the case against journalists and the editor of *Dnevni avaz* which lasted for several years and received compensation of 1,000 KM, but she was obligated to pay the expenses of the court which amounted to 1,200. Specifically, in 2009 and 2010, *Dnevni avaz* published a series of texts which suggested that Duska Jurisic, a journalist on the Federal Television, was corrupted and the Municipal Court in Sarajevo decided that it harmed her honor and reputation. Duska Jurisic was mentioned in other editions of the same company owning *Dnevni Avaz* (Express magazine) and a victim in conflict within Federal Television. The statements published in all these editions were often racist and nationalist.⁴³⁴ In general, in Bosnia and Herzegovina, public figures are often too ambitious in this respect and request for high compensations in order to “teach journalists a lesson” and earn something, too.⁴³⁵ Specifically, public figures asked for hundreds of thousands of KM, and in the case of *Lijanovic v. Oslobođenje* three million KM. But the practice has not seen a higher compensation than 20,000 KM.

⁴³¹ *Supreme Court of the Federation of Bosnia and Herzegovina: GŽ-22/05*, 13 March 2005.

⁴³² *Judgment of Sarajevo Cantonal Court*, No. 131/03, 22 November 2004.

⁴³³ *Judgment of Sarajevo Cantonal Court*. No. P: 169/03 April 2004.

⁴³⁴ Halilović, Mehmed, *Double standards of court in Sarajevo*, (accessed on 7 April 2016), available at: <http://analiziraj.ba/2015/07/28/dvostruki-arsini-sarajevskog-suda/>

⁴³⁵ *Ibid.*

When courts decide on the amount of compensation, they are expected to take into account all circumstances of a case and especially if all measures were taken to mitigate the consequences such as a retraction or an apology. However, the practice can be rather different, and even in the abovementioned case, Dnevni avaz was in fact protected from falling into a difficult financial situation. Therefore, the practice is “small people get small compensations, while big people get big ones.”⁴³⁶ The biggest compensations were given to Zlatko Lagumdžija, Milorad Dodik, etc. A weekly magazine Slobodna Bosna saw their accounts blocked due to charges made for defamation lawsuits.⁴³⁷

6.1.6 LIABILITY

The Law on Protection against Defamation of FB-H states that every person causing damage to natural person or legal entity by expressing or disseminating false facts when identifying this natural or legal entity to a third person is liable for defamation and “that the author, editor, publisher and the person who supervised the content with such expression in some other way are all liable for defamation expressed in the mass media.”

On the other hand, the Law on Protection against Defamation of Republika Srpska ⁴³⁸ states “that there is a liability for defamation if a person capable of work causes damage to the reputation of another natural or legal entity by identifying this person to a third person if they caused damage as authors, editors or publishers of the expression or as persons who, in some other way, efficiently controlled the content, just as the legal entity that published the expression.”

⁴³⁶ Halilović, Mehmed, *Double standards of court in Sarajevo*, (accessed on 7 April 2016), available at: <http://analiziraj.ba/2015/07/28/dvostruki-arsini-sarajevskog-suda/>

⁴³⁷ Ibid.

⁴³⁸ *Law on Protection against Defamation of RS (Banja Luka, July 2001)*, *Official Gazette of RS No. 37/01*, entered into force on 1 August 2001

Therefore there are minor differences between the laws in defining to whom the liability refers and the concept of ‘author’ is disputable here. For example, the County Court in Banja Luka dealt with a case when defamation occurred in letters sent to a dean of one faculty and to OHR which were then published in media and on this occasion the court decided that “the defendant, even though she wrote the letters containing statements that could represent defamation, was in fact not the author in the sense of Article 5 of the Law of RS, because this expression was given in the media and she is not the author, the editor, nor the publisher.”⁴³⁹

At this point, it is important to mention the question of an interview and who can be liable in this case, because it is one of the dilemmas that domestic courts are facing – is it the editor, journalist, interviewee or someone else? Some debaters believe that this is especially problematic in live programs because in this case the editor has a very little control of what an interviewed person can say. For example, the Supreme Court of the Federation of B-H in one case concluded that: “the gravity of the defendant’s act (causing damage to the reputation of the plaintiff by defamation) is assessed only on the basis of what the published article quoted as his statement, and the rest, the tone of the title, subtitle and other parts of the content could not be attributed to the gravity of the defendant’s defamation (having in mind the provisions of Article 2, paragraph 6 of the Law on Protection against Defamation).”⁴⁴⁰ But the same Court stated otherwise in another case related to newspapers: “As the defendant is not the author in this case he 'was not passively legitimized in the subject when the expression appeared in the mass media,”⁴⁴¹ thus he was not considered liable for damage suffered by the plaintiff.”⁴⁴²

⁴³⁹ *Case 71 0 P 033381 09 Gž* in 2009,

⁴⁴⁰ *Supreme Court of Federation of BiH, Number GŽ-132/04*

⁴⁴¹ *Judgment of the Supreme Court of FB-H, No. GŽ-155/05, 22 December 2005.*

⁴⁴² *GŽ-155/05* the Supreme Court of FB-H

Related to this, the laws on protection of defamation of both entities also give the examples of when there is an exemption from liability. Therefore, the laws state that there is no defamation if: there is the expression of opinion or if the expression is substantially true; the person who allegedly caused damage was obligated by Law to state or disseminate the expression or to state or disseminate the expression during legal, court or administrative proceedings; stating or disseminating the expression was reasonable. In this way, both laws state that limitations of freedom of expression should be applied restrictively, but their interpretation is rather wide. There have been broad interpretations of the provisions stating that there is no liability for statements expressed in a parliament and during court proceedings, because they should be protecting “democratic political debate as well as the fairness and efficiency of procedures before courts,” but “there are still dilemmas related to what formulation can statements during administrative procedures contain.”⁴⁴³

In this regard, it is especially important to mention the treatment of word ‘a criminal’ in Bosnia and Herzegovina, a qualification which very often appears in local media, even though some people called this way have not been convicted by a court, thus we can wonder about the issue of presumption of innocence. On the other hand, there are cases when such statement can be used ‘reasonably’ when directly applying the laws on protection against defamation and here we speak about “the cases where there are criminal proceedings against the person at whom the statement is directed, meaning that there is a certain level of doubt whether this person is in fact liable.”⁴⁴⁴ On one occasion, the Cantonal Court in Sarajevo stopped the proceedings for defamation until the end of criminal proceedings regarding war crimes.⁴⁴⁵ Qualifications of some persons as ‘war criminals’ are quite common in media in Bosnia and Herzegovina which triggered debates on this issue. This is how “one side believes that it is atrocious to call someone a war criminal if this person was not

⁴⁴³ Srdić, Mladen, “Defamation in court practice in Bosnia and Herzegovina”, in Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.167

⁴⁴⁴ Ibid, p.172

⁴⁴⁵ *Ruling of Sarajevo Cantonal Court No. P-39/03, 14 October 2004*

convicted, the other side emphasizes that in that case not even Hitler can be treated as a war criminal and that no one can prevent them from calling the individuals these names (in our country, of course, these are most often Radovan Karadžić and Ratko Mladić).”⁴⁴⁶ Still, there are more of those who believe that there could be a tolerance related to calling someone a ‘war criminal’ and not a ‘person suspected of war crimes’ when referring to some people, because there is sufficient factual basis and reasonable assumption to do so.

6.2 PUBLIC FIGURES

The issue of preserving freedom of expression on the Internet in Bosnia and Herzegovina was on several occasions the topic of the OSCE Media Representative who voiced the concerns about political figures bringing too many defamation lawsuits. The Representative stated that: “Politicians must have a higher tolerance for critical speech and should in general refrain from such actions,” and that “in most of these cases there is not even an attempt to use the self-regulatory mechanisms to address such grievances.”⁴⁴⁷

The reasons of numerous lawsuits that public figures bring against journalists vary from attempting to “present themselves better than they are, attempting to discipline journalists or rarely with a real reason when they are defamed.”⁴⁴⁸ On number of occasions the courts managed to resist pressures coming from political elites and act according to defamation laws, and one of such examples is the one of Basic Court in Banjaluka in case No. P-2033/01. In this case, a political figure brought a lawsuit against company *Nezavisne novine* which criticized the plaintiff’s behavior regarding his

⁴⁴⁶ Srdić, Mladen, “Defamation in court practice in Bosnia and Herzegovina”, in Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.173

⁴⁴⁷ OSCE, OSCE media freedom representative concludes official visit to Bosnia and Herzegovina with safety of journalists and digitalization high on the agenda, 3 July 2015, (accessed on 3 April 2016), available at: <http://www.osce.org/fom/170026>

⁴⁴⁸ Halilović, Mehmed, *Dodik vs. Bosić: who is a thief and who is a pathological liar?* (accessed on 3 April 2016), available at: <http://analiziraj.ba/2015/04/15/dodik-protiv-bosica-ko-je-lopov-a-ko-patoloski-lazov/>

position in the Government of Republika Srpska with titles such as: “K. Is deceiving the public,” “OSCE follows the road, K. Follows the forest”. However, the Court concluded that there was no misuse of the right to freedom of expression “because the limitations of acceptable criticism are wider when it comes to a politician than to a private person”, and the plaintiff in this case was a public figure who willingly exposed himself to a public supervision. Moreover, the Court cited that: “the context of the content of these two articles and information they published, limitations of freedom found in paragraph 2, Article 10 of the Convention would make journalists reluctant to publicly discuss the issues related to the community, and sanctions demanded by the plaintiff could impose limitations on the press when fulfilling its tasks of an information provider and keeping its eyes open.”⁴⁴⁹ It was the Cantonal Court in Sarajevo that passed a judgment that even officials in smaller communities, and not necessarily in the government, must show a higher level of tolerance in cases when they are criticized. In case No. P – 19/04 regarding the president of local community in a small town Glogova in eastern Bosnia, it was decided that the president had a responsibility over humanitarian aid which was a matter of public interest in this community. Specifically, “it is undisputable that the plaintiff is the president of LC Glogova which is not a high political function, but it is still in a small community as the one in village of Glogova, hence it can be a significant public function.”⁴⁵⁰

On the other hand, there were also cases when courts adjudged a high amount of compensation for defamatory statement. The Cantonal Court in Sarajevo dealt with case No. P- 41/04 where the statements referred to the plaintiff being close to the Party of Democratic Action (SDA – Stranka demokratske akcije) in his ideological perspective. The Court decided that these were “value judgments, that is, the opinion of the author on political activities of the plaintiff, thus this

⁴⁴⁹ Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.89

⁴⁵⁰ Halilović, Mehmed and Amer Džihana, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.90

expression is protected by positive legal provisions and paragraph 1, Article 10 of European Convention on Protection of Human Rights and Fundamental Freedoms."⁴⁵¹ But the article in question also stated that the plaintiff was "a war profiteer and criminal" and the Court concluded that "the abovementioned qualifications referring to the plaintiff cannot be seen as an opinion, idea or attitude regarding political activities of the plaintiff, instead these are factual statements which were proven to be false and defamatory as these expressions harm the reputation of the plaintiff." The Court assessed the compensation for these statements is to be 6,000KM because they harmed his honor and reputation. The case then came before the Supreme Court of the Federation of B-H, and ultimately before the Constitutional Court - No. AP 1881/05⁴⁵² but this Court too concluded that "there was no honest intention of the applicants and there were no reasonable efforts made in order to confirm the expressed facts" nor did they "do anything to verify with the plaintiff the data which was intended to be published."

In general, journalists and editors are very often sued by politicians and public figures, and there were various reactions related to the high number of defamation lawsuits. For example, the self-regulatory body, Press Council stated that the state of media in B-H is rather "alarming"⁴⁵³ because the number of lawsuits in e.g. Cantonal Court in Sarajevo reached 700 as of December 2014, that there were at least 100 lawsuits brought against daily newspaper *Oslobođenje*, and at least 50 against weekly magazine *Slobodna Bosna*. The Press Council did not reflect on the result of these lawsuits, but on the fact that the number is rather high in general and that this may cause a chilling effect in media and pressures on journalists. The Press Council also emphasizes that the mediation before

⁴⁵¹ *Judgment of Sarajevo Cantonal Court* (P-41/04) 10 March 2005.

⁴⁵² *Decision on appeal*, applicants: Amarildo Gutić et al. Constitutional Court of Bosnia and Herzegovina (AP 1881/05), 20 October 2006, (accessed on 3 April 2016), available at: http://www.ustavisud.ba/bos/odluke/povuci_html.php?pid=53442 (accessed on 22 March 2012).

⁴⁵³ *Slobodna Bosna, Alarming state in B-H media: lawsuits against freedom of expression*, (accessed on 3 April 2016), available at: http://www.slobodna-bosna.ba/vijest/18112/alarmanтно_stanje_u_bh_medijima_sudskim_tuzbama_protiv_slobode_govora.html

lawsuit is very rarely used, that is, that plaintiffs do not turn to the self-regulatory body, which they could do, according to defamation laws. In this way, the media in B-H are faced with numerous expenses, and as many of them are in difficult financial positions as it is, lawsuits are only an additional burden to them. Moreover, defamation proceedings are a great expense for courts themselves, too, because the proceedings cost about 15,000 KM.⁴⁵⁴ In addition to this, the Press Council questions the principle of assessing the level of emotional distress before courts which requires more experts to be brought before the court, too, and not to easily approach this issue. Finally, the self-regulatory body mentions that the application of defamation laws does not follow the goals set when the laws were passed and that more focus on the practice of the European Court is needed.

The journalistic association BH Journalists (BH Novinari) agreed with the assessment of the Press Council and stated that the inadequate application of defamation laws violates the right to criticize public officials, the right not to disclose journalistic sources, etc.⁴⁵⁵ BH Journalists also pointed to the lack of appropriate statistics at courts in Bosnia and Herzegovina because defamation lawsuits are included in one group with all other civil proceedings such as damages made to one's property, etc. One journalist, Suzana Mijatović, states that "judgments are mainly passed in favor of politicians and powerful figures."⁴⁵⁶ She also mentioned the case when her employer, a weekly magazine Slobodna Bosna had to pay compensation for defamation made in an interview criticizing a former Ombudsmen, Vitomir Popovic, who decided not to sue the interviewee but the magazine and the Basic Court in Banjaluka adjudged the compensation to be paid. In this way, the journalist

⁴⁵⁴ Slobodna Bosna, *Alarming state in B-H media: lawsuits against freedom of expression*, (accessed on 3 April 2016), available at: http://www.slobodna-bosna.ba/vijest/18112/alarmanтно_stanje_u_bh_medijima_sudskim_tuzbama_protiv_slobode_govora.html

⁴⁵⁵ BH Journalists, *Misuse of defamation laws*, (accessed on 3 April 2016), available at: http://www.bhnovinari.ba/index.php?option=com_content&view=article&id=687%3Azloupotreba-zakona-o-zatitiod-klevete&catid=63%3Adogaaji&Itemid=241&lang=bs

⁴⁵⁶ Ibid.

says “the censorship is introduced for the interviewed people, too.”⁴⁵⁷ Another case mentioned by BH Journalists is the one of Cantonal Court in Sarajevo passing a judgment in favor of several political figures by claiming that “only an explicitly given source can be relevant.”⁴⁵⁸

Political figures also very often bring lawsuits against other political figures and one of such examples is the case of Nikola Spric, a former member of the Council of Ministers of B-H, suing Kemal Causevic, a former president of Indirect Taxation Authority, and News Agency Patria. The problematic part here is that Causevic currently has the status of a suspect in criminal proceedings, and the Agency published documents related to the investigation, which could be theoretically solved by evoking public interest. However, the Penal Codes in B-H (all four of them: at state level, at the level of both entities and at the level of Brcko District) state that publishing secret documents is illegal and that publishing documents acquired illegally is a criminal act, too.⁴⁵⁹ In this way, the Agency may be forced to reveal its source for the documents which is not in line with international standards.

Related to political pressures and revelation of sources, it must be mentioned that in late 2014, there was a raid against Klix.ba – online news portal, which was assessed as a clear attack on media freedom and journalists’ right to protect sources. On several occasions, OSCE Representative on Freedom of the Media Dunja Mijatović insisted that the authorities in Bosnia and Herzegovina “do their utmost to stop persecuting journalists and to respect their right to protect their sources, following a raid by the police on the offices of Klix.ba in Sarajevo and subsequent detention of key

⁴⁵⁷ BH Journalists, *Misuse of defamation laws*, (accessed on 3 April 2016), available at: http://www.bhnovinari.ba/index.php?option=com_content&view=article&id=687%3A%3A%3Azloupotreba-zakona-o-zatitiod-klevete&catid=63%3AAdogaji&Itemid=241&lang=bs

⁴⁵⁸ Ibid.

⁴⁵⁹ Halilović, Mehmed, *Čaušević, Špirić and Patria*, (accessed on 3 April 2016), available at: <http://analiziraj.ba/2015/03/25/causevic-spiric-i-patria/>

staff.”⁴⁶⁰ In this case, the Cantonal Court in Sarajevo issued a court order and police raided the offices of the portal, asked the staff to leave premises and then seized computers, documents, notes and other items from the offices, which was perceived as an intrusion into the right of journalists to inform the public about public interest issues.⁴⁶¹ Moreover, the editor in chief, two directors and one journalist were detained and questioned and OSCE stated that “interrogation and pressure on members of the media to reveal their sources is simply unacceptable.”⁴⁶² Similarly, the OSCE Media representative pointed at the pressures exercised on journalists to reveal their sources⁴⁶³ in the case when the Interior Ministry of Republika Srpska (RS) questioned journalists from Klix.ba regarding the identification of the source for audio recording they published and which contained the Prime Minister of Republika Srpska mentioning bribing members of certain political parties all in order to get parliamentary majority.

The attacks on journalists in B-H, but in a different form, were also noticed when political party SNSD posted on their official website information that “a number of “false non-governmental organizations” and media outlets are engaged by foreign countries for “stimulating disturbances and undermining of the constitutional order.” The media outlets listed are BUKA, The Srpska Times, frontal.ba, frontal.rs, and abc.ba.”⁴⁶⁴ OSCE Representative on Freedom of the Media reacted to these quotes and claimed it is a danger to the safety of journalists and that it brings a chilling effect to the entire media landscape in the country.⁴⁶⁵

⁴⁶⁰ Mijatović, Dunja, OSCE Media Representative, *Raid against Klix.ba a clear attack on media freedom and journalists’ right to protect sources in Bosnia and Herzegovina, says Mijatović*, (accessed on 3 April 2016), available at: <http://www.osce.org/fom/133056>

⁴⁶¹ Ibid.

⁴⁶² Ibid.

⁴⁶³ Mijatović, Dunja, OSCE Media Representative, *Journalists’ protection of sources must be safeguarded, OSCE Representative says following probe in Bosnia and Herzegovina*, (accessed on 3 April 2016), available at: <http://www.osce.org/fom/129941>

⁴⁶⁴ Mijatović, Dunja, OSCE Media Representative, *Labelling media “foreign agents” by politicians in Bosnia and Herzegovina unacceptable, says OSCE media freedom representative*, (accessed on 3 April 2016), available at: <http://www.osce.org/fom/115926>

⁴⁶⁵ Ibid.

The struggles between the authorities and journalists are also seen in the example of the Municipal Court in Travnik (Central Bosnia Canton)⁴⁶⁶ and its injunction prohibiting the Federal TV from reporting about two police officers from the Interior Ministry of the Central Bosnia Canton, who pressed charges against FTV for their reports on allegations of illegal drug trafficking.⁴⁶⁷ It was again the OSCE Media Representative who indicated that this was “yet another case that gives cause for concern about how media and journalists are treated in Bosnia and Herzegovina.”

The degree to which political figures misuse the legislation has most recently been noticed in the case when ‘a public figure decided to sue himself.’ This example from B-H may be rather unique, because Milorad Dodik, the president of entity of Republika Srpska decided to file a lawsuit as a private person, against the president of entity of Republika Srpska regarding all public accusations on his alleged connection with various criminal activities.⁴⁶⁸ The goal of this was, according to Milorad Dodik himself, to stop inventing different criminal activities. From a legal point of view, this situation would seem rather confusing because should there be court proceedings then who would sit on which side, would the same person have two lawyers on opposing sides, who would win the case and pay compensation if it comes to that? The conclusion in media community in B-H was that “a citizen, M.D. in this case wishes to prove that the president M.D. has a clean slate and that he should be protected from imaginary criminal activities.”⁴⁶⁹ The president stated that he “trusts the institutions” and that such case could stabilize them within the entity lines, thus also degrading the state-level institutions.⁴⁷⁰ At this point it should also be mentioned that as a private

⁴⁶⁶ Halilović, Mehmed, *Defamation, court order and FTV*, (accessed on 3 April 2016), available at:

<http://analiziraj.ba/2015/03/11/kleveta-sudska-zabrana-i-ftv/>

⁴⁶⁷ Mijatović, Dunja, OSCE Media Representative, *Raid against Klix.ba a clear attack on media freedom and journalists’ right to protect sources in Bosnia and Herzegovina, says Mijatović*, (accessed on 3 April 2016), available at:

<http://www.osce.org/fom/133056>

⁴⁶⁸ RTRS, *Dodik: I sued myself to stop harangue and imagining affairs*, (accessed on 3 April 2016), available at:<http://lat.rtrs.info/vijesti/vijest.php?id=174241>

⁴⁶⁹ Halilović, Mehmed, *Political and judicial maneuverism*, (accessed on 3 April 2016), available at: [Analiziraj.ba](http://analiziraj.ba/2015/11/20/politicki-i-pravosudni-egzibicionizam-jazavac-pred-sudom-drugi-put/)
<http://analiziraj.ba/2015/11/20/politicki-i-pravosudni-egzibicionizam-jazavac-pred-sudom-drugi-put/>

⁴⁷⁰ Ibid.

person, Milorad Dodik brought numerous defamation lawsuits against journalists, but has not appeared before any court, instead it was his lawyers who proved the level of his emotional distress. These proceedings were brought before the Basic Court in Banjaluka and Milorad Dodik won in all cases, while three cases which were dealt with in Sarajevo were lost. However, this was still not the only case when a person sued himself/herself, and they were always public figures using the lawsuits (without proceedings actually being held) to “attract the attention of media,” but “making a mockery out of judiciary in B-H.”⁴⁷¹

This is how it could be assumed that the application of defamation laws in Bosnia and Herzegovina primarily focuses on adjudging compensations and not fulfilling the basic aim of the laws – protection of one’s honor and reputation and the protection of professional journalism.⁴⁷² Related to the latter, it must be mentioned that with a great number of media outlets operating in B-H, the question to ask is-do journalists follow professional standards? The conclusion can be that some of them do, and here we particularly speak about the Center for Investigative Reporting (Centar za istraživačko novinarstvo-CIN), the stories of which produced concrete results and changed things in the country for better. It is worth mentioning that CIN had only one defamation lawsuit brought against them over the ten years of their work in B-H, and this lawsuit was not adopted by the court. The story in question contained pure facts that had gone through a thorough verification, and it did not contain any comments.⁴⁷³

6.3 INTERNET AND DEFAMATION

⁴⁷¹ Halilović, Mehmed, *Political and judicial maneuverism*, (accessed on 3 April 2016), available at: <http://analiziraj.ba/2015/11/20/politicki-i-pravosudni-egzibicionizam-jazavac-pred-sudom-drugi-put/>

⁴⁷² Halilović, Mehmed, *Defamation, court order and FTV*, (accessed on 3 April 2016), available at: <http://analiziraj.ba/2015/03/11/kleveta-sudska-zabrana-i-ftv/>

⁴⁷³ Center for Investigative Reporting, *Food you eat can make you disgusted*, (accessed on 13 April 2016), available at: <http://www.cin.ba/hrana-koju-jedete-moze-vam-prisjesti/>

The application of laws on protection against defamation in Bosnia and Herzegovina became a great challenge more recently, when online media started to take over the primary position as news sources. Some of the crucial problems in the application to online defamatory statements are: identification – because laws do not specify enough who a potential defendant can be; three months for filing a lawsuit – which was not a hot issue for traditional media, but as information spreads very quickly nowadays, defamed persons can notice disputable statements too late to bring a lawsuit.

When it comes to identification and liability, when defamation occurs in an online media outlet then a lawsuit is brought against the owner of a domain.⁴⁷⁴ But both courts and parties in question are unclear about who the defendant should be and who exactly is the author, editor, publisher or someone else who controls the content. More recently, it has also become problematic how blogs or newsletters should be treated, and especially what should be done with social networks. When it comes to online media, laws at the moment “offer a very wide scope of people liable to be sued for defamation but the scope is extremely narrow when it comes to protection of freedom of speech, meaning that almost anyone can be a defendant but very few have the defense at his/her disposal.”⁴⁷⁵ Another problem is the fact that laws stipulate the objective deadline for filing a lawsuit – “one year from the date that the expression was made to a third person, whereas the subjective one is three months from the date that the allegedly injured person knew or should have known of defamatory statement.”⁴⁷⁶ But the very nature of online media makes it possible for a defamatory statement to remain in online media even if the injured person is not aware of it.

The hot issue in Bosnia and Herzegovina has most recently been the adoption of a new law: the Law on Public Peace and Order in Republika Srpska in 2015. The president of Republika Srpska stated

⁴⁷⁴ Amela Methadžović, a lawyer, interview conducted in October 2014

⁴⁷⁵ Internews in BiH, *Defamatory statements online in Federation of Bosnia and Herzegovina*, (accessed on 13 April 2016), available at: <http://internews.ba/sites/default/files/resursi/Defamatory%20statements%20online%20in%20FBiH.pdf>

⁴⁷⁶ Senad Pećanin, a journalist and a lawyer, interview conducted in October 2014

that there were no limitations put on freedom of speech in this entity but no form of communication should be misused either.⁴⁷⁷ In the public in B-H it is not disputable that hate speech, pedophilia and similar criminal activities are condemned, but with this law there are no restrictions on including social networks and regular citizens expressing themselves, too.⁴⁷⁸ This is why the general impression in B-H public is that the Law was passed in order to keep an eye on all those who criticize the government.⁴⁷⁹

In a multicultural society which has, in addition, faced violent conflicts and which is hence still trying to recover, the full respect of freedom of expression on all platforms and adequate implementation of relevant laws is still a big challenge. This is precisely the situation with Bosnia and Herzegovina, a formerly socialist state, which in its transition had to make important decisions that would guarantee the right to freedom of expression to be enjoyed and be in line with international standards. However, numerous obstacles kept slowing this process down.

These obstacles are reflected firstly in the very adoption of necessary legislation which is affected by political pressures, just as it is the case with the content of most media outlets (even public service programming), as they cannot be said to be independent to a great extent. The similar situation in other post-communist neighboring countries makes this project relevant outside the borders of Bosnia and Herzegovina, because the spill-over of practices is a likely option when it comes to the regulation of the Internet.

Specifically, when it comes to the RS's Law on Public Peace and Order, it is particularly worrisome to include social media within the definition of a "public space." While such legislation is not unfamiliar to the west (the United Kingdom's Guidelines on Social Media Prosecutions), the

⁴⁷⁷ Halilović, Mehmed, *Big brother in your home*, (accessed on 13 April 2016), available at: <http://analiziraj.ba/2015/02/11/veliki-brat-u-vasoj-kuci/>

⁴⁷⁸ Ibid.

⁴⁷⁹ Ibid.

interpretation of this legal trend is deeply concerning: it gives power to the police and magistrate judges to interpret the law and sanction any social media action as they see fit.

This is problematic, as the law does not include concrete standards for the definition of social media, it does not explain what constitutes “offensive” or “indecent” material, nor denies that citizens can be prosecuted outside of Republika Srpska.

There is also concern that an expansion of the measure into the Federation of Bosnia and Herzegovina (FB-H) is the next step. This is a textbook chilling effect law, and has the potential to severely hamper freedom of expression in Bosnia and Herzegovina. It comes after an alarming trend of pressures on media in Bosnia and Herzegovina over the past several years that seem to be gaining momentum. The 2014 Media Sustainability Index (MSI) shows a substantial decrease in media freedom over the last five years –from 2.81 in 2009 to 1.66 in 2014. According to data of Reporters without Borders, since 2006 to present, freedom of the press in the country has plummeted from 19th to 66th place.

Such Law, therefore, directly and without a doubt contravenes the provisions of the UDHR and the right to freedom of speech and expression of people detained has been heavily violated. The right of users to correspondence without interference, enshrined in Article 12 of UDHR is thus violated even on the Internet, the most widely used tool of correspondence. In general, interference in any manner in any means of communication is the hallmark of oppressive regimes, while national security cannot be used as an excuse as it is too broad a term and is being used for purposes unrelated to national security.

Furthermore, the new law is also void due to overreach. Specifying such a broad radius will inevitably lead to innocent citizens being penalized for doing nothing wrong. Less onerous ways of preventing violence, riots or any other form of possible threat to national security must be found.

The actions taken do not serve a legitimate aim since national security or public order cannot be considered as satisfied aims. Moreover, democratic societies should be void of such arbitrary provisions because they violate the freedom of expression of Internet users, which has been commonly recognized under international law⁴⁸⁰. The government must be able to “establish that the expression poses a serious threat to national security”⁴⁸¹ and the restriction constitutes the “least restrictive means”⁴⁸² available. “Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public’s right to know.”⁴⁸³

The Government does not state any explicit reason for detaining users of social networks. Doing this does not serve to protect the “rights and reputation of others ... national security, public order, public health or morals.”⁴⁸⁴ it is clear in this instance there was no threat to national security as “... local or relatively isolated threats to law and order” cannot be considered as such.⁴⁸⁵ Furthermore, there is no proven causal link between any incidence of violence and posts on social networks. Such a link must be established first in order for the aim of protecting public order to be viable.⁴⁸⁶

The contents of the posts on social networks the authors of which were detained, do not intend or seem likely to incite riot or any threat to national security, and there is no proven, only speculative

⁴⁸⁰ *European Convention on Human Rights* (adopted 4 November 1950, entered into force 3 September 1953) (ECHR) art 8, art 10; *International Covenant on Civil and Political Rights* (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) , art 19; *Communication Decency Act (CDA) 1996*; *Federal Statutory Immunity – section 230*; *Universal Declaration on Human Rights*(adopted 10 December 1948 UNGA Res 217 A(III)), art 19; *African Charter on Human and People's Rights (ACHPR)* (adopted 27 June 1981, entered into force 21 October 1986) , art 9; *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, UN Doc E/CN.4/1996/39 (1996), art 19.

⁴⁸¹ *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, U.N. Doc. E/CN.4/1996/39 (1996), Principle 1.3(a).

⁴⁸² *Ibid.* Principle 1.3 (b).

⁴⁸³ *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, U.N. Doc. E/CN.4/1996/39 (1996), Principle 17.

⁴⁸⁴ *International Covenant on Civil and Political Rights* (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976)

⁴⁸⁵ *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, cl I(B)(30).

⁴⁸⁶ *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, cl I(C)(54).

link between posts and possible threats to public order. One of the most important cases of this kind was the one of a journalist, Danijel Senkic, also a representative of an NGO 'Front'. On his Facebook wall, Senkic spoke about the authorities in B-H when they arrested Bosniak returnees in Republika Srpska, and called their activities a terror, some police officers criminals and Bosniak politicians mute observers. The status was, among other, as follows: 'The police in Zvornik terrorizes Bosniak population and their politicians stay silent or vaguely oppose. And so, as a Vlah, pardon me, I wish to say a few words...' ⁴⁸⁷ The status continues with reference to the father of one police officer and murder he committed during the war between 1992 and 1995, and states that even now he terrorizes the population in a nearby village, protected by his son. The danger of this status lies in the fact that even though there are two entities in Bosnia and Herzegovina : the Federation of Bosnia and Herzegovina, and Republika Srpska, and even though the disputable Law was passed in one entity, its provisions have spread to the population in the other entity because Senkic lives in Tuzla, a city in FB-H. ⁴⁸⁸ In this way, the authorities did not put focus on verification of information regarding war crimes, but on prosecuting a person who speaks on their Facebook wall. Danijel Senkic was under interrogation at the police station in Tuzla, and had it been Republika Srpska, he could have been detained for 24 hours. ⁴⁸⁹ Experts agree that the only way in which it would have been possible for Danijel Senkic to come before court would be for defamation at best, and only had it been the father of the policeman himself. ⁴⁹⁰ Another important case to mention is the one of detaining a Facebook user, Sanel Menzil, from Kotor Varos, even though he deleted the comment he made by himself. Menzil criticized the decision of proclaiming the Mourning Day in FB-H when

⁴⁸⁷ *Danijel Senkic's post on Facebook*, (accessed on 13 April 2016), available at:

<https://www.facebook.com/danijel.senkic.3/posts/10206446620113660?fref=nf>

⁴⁸⁸ Nap.ba, *Dodik's dictatorship in FBiH, too: a person from Tuzla interrogated by the police because his status on Facebook*, (accessed on 13 April 2016), available at: <http://www.nap.ba/new/vijest.php?id=13080>

⁴⁸⁹ Halilović, Mehmed, *Prosecuting those who give bad news*, (accessed on 13 April 2016), available at: <http://analiziraj.ba/2015/07/02/progon-glasnika-losih-vijesti/>

⁴⁹⁰ Halilović, Mehmed, *Prosecuting those who give bad news*, (accessed on 13 April 2016), available at: <http://analiziraj.ba/2015/07/02/progon-glasnika-losih-vijesti/>

there was an attack on a police station in Zvornik, while also stating that the day of genocide in Srebrenica is not a Mourning Day in RS.⁴⁹¹ But this vaguely worded legislation, the scope of which is unclear and which came across strong objections made by the civil society, media, OSCE, Human Rights Watch and other organizations, was still passed.⁴⁹²

6.4 RETRACTIONS

The Law on Protection against Defamation of FBiH in its Article 8 states that: “An allegedly injured person shall undertake all necessary measures to mitigate any harm caused by the expression of false fact and in particular requesting a correction of that expression from the person who allegedly caused the harm.”⁴⁹³ Related to this, Article 10 asks courts to take into account all circumstances “of the case particularly any measures undertaken by the person who allegedly caused the harm to mitigate the harm, such as: the issuance of a correction and retraction of expression of false fact or issuance of an apology.”⁴⁹⁴

But even though courts do take into account professional behaviors and good faith of journalists, it sometimes happen that apologies and retractions are in fact in the form of a mockery and the lack of sincerity in these apologies may contribute to judgment to be worse for journalists and compensation higher, than it could have been if they had provided a true apology. For example, in the case before the Cantonal Court in Sarajevo⁴⁹⁵ “damages could not be diminished because the

⁴⁹¹ Klix.ba, *Sanel Menzil from Kotor Varoš arrested because of his Facebook comments on the attack in Zvornik*, (accessed on 13 April 2016), available at: <http://www.klix.ba/vijesti/bih/zbog-facebook-komentara-o-napadu-u-zvorniku-uhapsen-sanel-menzil-iz-kotor-varosi/150501025>

⁴⁹² Katana, Gordana, *Law on Public Peace and Order of RS: who is scared of public speaking?* (accessed on 13 April 2016), available at: <http://www.oslobodjenje.ba/vijesti/bih-eu/zakon-o-javnom-redu-i-miru-republike-srpske-ko-se-boji-javne-rijeci>

⁴⁹³ *Law on Protection against Defamation of FBiH* (Sarajevo, 2003), Official Gazette of FBiH No. 19/03, entered into force in 2003

⁴⁹⁴ *Ibid.*

⁴⁹⁵ *Case No.P79-04 of the Sarajevo Cantonal Court*

apology of defendants was insincere and accompanied by ironic comments in the request for retraction⁴⁹⁶: “We're sorry, Mile Stojić! If you need any more details, we will continue: Mile, we're sorry we published a caricature of you as a Dracula, we're sorry we tried to present you as a natzy, a Bosniak-hater, a favorite of Franjo Tuđman, we apologize for insulting you and your physical appearance and health condition. There, this is what the lawyer asked us to do. If Mile Stojić feels better after we apologized, we will be happy to see that we did a good deed.”

But usually, courts also take into account whether there even was a request for correction, “and make this amount smaller because the plaintiff did not do everything in order to lessen the damage, as obligated by the law.”⁴⁹⁷ Another case regarding retraction was before the Cantonal Court in Sarajevo when the media outlet in question did not publish a retraction even though the plaintiff requested a retraction and an apology, therefore the compensation was higher in this case⁴⁹⁸ The courts thus assess the amount of compensation based on whether there was an attempt to mitigate the consequences of a statement. But in Bosnia and Herzegovina, it very often happens that especially when the plaintiff is a public figure, the step of asking for a retraction is skipped, although even turning to the Press Council could be one of the steps that may mitigate the harm and which would be a faster and cheaper process.

6.5 DEFAMATION BEFORE PRESS COUNCIL

In Bosnia and Herzegovina, it very often happens that especially when the plaintiff is a public figure, the step of asking for a retraction is skipped, although even turning to the Press Council could be

⁴⁹⁶ Halilović, Mehmed and Džihana Amer, *Media law in Bosnia and Herzegovina*, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p.182

⁴⁹⁷ Ibid. p.181

⁴⁹⁸ *Cantonal Court case No. P-127/03*

one of the steps that may mitigate the harm. The citizens of B-H can approach the self-regulatory body and its Press Code clearly states in its Article 5 on Accuracy and Fair Reporting:

“Journalists shall always report truthfully and accurately about the outcome of an action undertaken as a result of defamation they were involved in. Journalist shall report only on the basis of facts, the origin of which is known to the journalists. In reporting and commenting controversy, journalists shall make an effort to hear and represent all sides in a conflict. If one side in a controversy refuses to make itself available to the journalist, the publication may legitimately note this refusal in its reporting.”⁴⁹⁹

Therefore, the Press Code goes in favor of accurate reporting and hearing both sides, that is, of acting professionally, but there is still a question of how many cases refer to violation of this Article after all. When it comes to complaints related to defamatory statements, citizens have turned to the self-regulatory body and in several instances there were corrections published in media, but there were many more cases which proceeded to court and some cases even went directly to courts. But the proceedings at the Press Council are much easier and free of charge unlike filing a lawsuit but most citizens only lately became familiar with what their options are in this case.

In practice, in 2010, there was only one media outlet to which a complaint referred, while in 2015, there were 122 complaints made regarding the content of online media. Traditional media held the priority when it comes to complaints submitted to the Press Council till 2013 – 69% of all complaints referred to the content in daily and weekly newspapers over the first three years used in this analysis, and only in 2014 online media became the primary subject in this regard. This is how the percentages changed between 2013 and 2015, and in the last three years 70% of complaint were made regarding the content in online media, but including the websites of traditional media outlets.

⁴⁹⁹ Press Code of B-H, Sarajevo, 29 April 1999, (accessed on 5 April 2016), available at: http://www.vzs.ba/index.php?option=com_content&view=article&id=218&Itemid=9&lang=bs

This increase shows the shift in the news consumption, and so in 2015 the ratio between different types of media outlets was e.g. 4:1 when it comes to online media and daily newspaper.

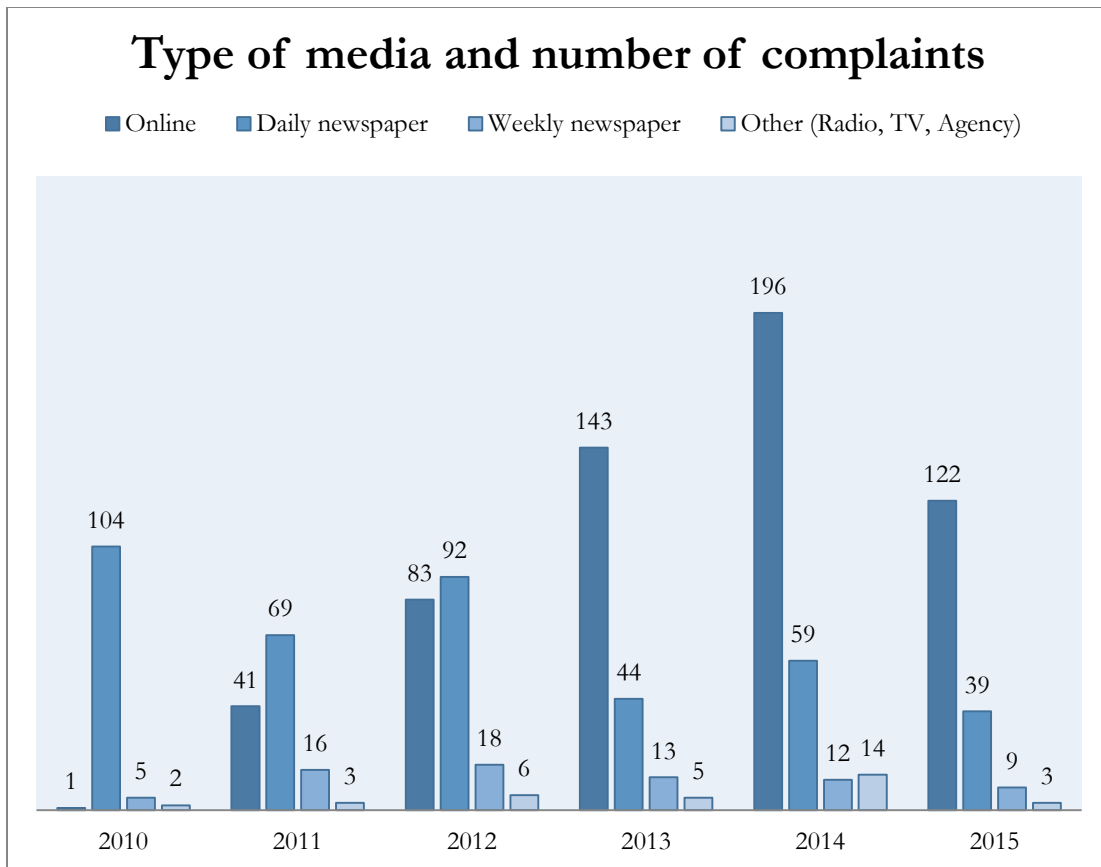


Figure 4: Overview of complaints 2010 - 2015

The data clearly shows that the number of complaints referring to online media has been increasing and that the self-regulatory body aims at solving the disputes regarding online media, too. The number of complaints referring to platforms out of the Press Council's jurisdiction has been very low and the numbers of complaints regarding daily and weekly newspapers have been in a constant drop. This proves that online media are increasingly present in decisions of the Press Council, but the topics of cases shed a different light on these decisions. Namely, based on violated articles, most complaints refer to hate speech or some type of discrimination, protection of children and not as much to defamation (more in the following subchapters).

The practice in terms of defamation still shows that the injured person is more likely to skip turning to the self-regulatory body and go directly to court, that is, **even though traditional media does not have the priority in news consumptions anymore, the method of approaching problematic content remains traditional-filing a lawsuit, especially when we observe the approach of public figures.** More specifically, even though the Article 8 of the Law on Protection against Defamation of Federation of B-H requires all other ways of solving a defamation issue to be exhausted, this happens very rarely.

6.5.1 CONTENT OF COMPLAINTS

The opportunity to submit a complaint to the Press Council has been rising over years, meaning that citizens of B-H do approach the self-regulatory body, and possibly the numbers could rise in future, too. In 2010, the Press Council received 112 complaints, while most complaints were received in 2014 – 281, thus the number doubled and more. In 2015, there were less complaints – 173, but in this year, the Press Council introduced a new category which refers only to comments. This is how in 2015 there were 22 complaints submitted only with regard to comments on websites. In this way, the self-regulatory body acknowledged the importance of online media and their rise in terms of news consumption, thus they felt that it was necessary to approach this issue separately.

The complaints referring to comments dealt mostly with hate speech and inappropriate content, in which case the Press Council reacted and there were 15 cases of some type of removal. Out of this number there were 13 cases in which only disputable comments were removed or comments coming from a certain profile, while in two cases all comments below a text were removed. In two cases, the Complaints Commission assessed the content of comments and determined that they did not contain hate speech or any disputable content. In one case, the Commission did not have the

authorization to react because the complaint referred to the content on social networks. On the other hand, on four occasions, the profiles of certain users were banned. Most complaints referred to website Klix.ba, and the reason for this is the fact that Klix.ba is the news website with most visitors in Bosnia and Herzegovina⁵⁰⁰, as well as that, unlike some other websites, it offers the possibility of commenting. This website provides the option to its users to rate comments themselves and to report disturbing comments and only in exceptional cases does it prevent users from commenting in total.

When it comes to complaints submitted to all media outlets in the period between 2010 and 2015, the content of complaints varied over years. Overall, most complaints contained a request to publish a retraction, apology or a correction (43%) and this category is closely related to the one of way of publishing a retraction, that is, the inappropriate way in which a media outlet did this, and which is related to the insincere or unprofessional publishing of a retraction. In this example we can see that the citizens also approached media outlets themselves, hence they took all actions necessary to mitigate the consequences of a harmful content, and only when the retraction was not published adequately did they turn to the Press Council. There were also cases of asking for a removal of certain content, but these cases are registered for the first time in 2013, thus the same year when the increase in the use of online media began, and the same year saw the increase of complaints regarding copyright issues, as well as those on videos and photographs used on websites, and the fact that some websites do not have the impressum. One of the good examples of media correcting a possibly defamatory content is website titled Analiziraj.ba which serves as a platform for analyzing primetime news. The website published a short text titled “It was my mistake, not the mistake of a journalist” containing an apology and acting professionally which is rather rare in the media of Bosnia and Herzegovina. Mistakes do occur in media, and although journalists do not like admitting

⁵⁰⁰ Alexa.com, *Klix.ba site overview*, (accessed on 5 April 2016), available at: <http://www.alexa.com/siteinfo/klix.ba>

them, doing so is a proof of professional behavior especially and it was the Press Council of Finland that provided detailed instructions related to corrections in online media, stating that stories should be corrected and that it should be emphasized that there was a mistake in a previously published article.

Over the years, there was also a significant number of complaints the content of which was unspecified in the available data of Press Council, but based on the trends observed over the years and titles of articles complaint, it can be assumed that a great percentage may refer to privacy or complaints on unprofessional reporting about tragedies. The fact that in 2015 there were no complaints specifically referring to discrimination, hate speech or incitement can be explained by introducing the second set of data referring to comments (discussed above) thus it can be concluded that the professionalism of media grew and that it was the comments that were problematic in this respect. But as seen above, the self-regulation approached this issue rather efficiently and took into account the changes that came with the emergence of new technologies.

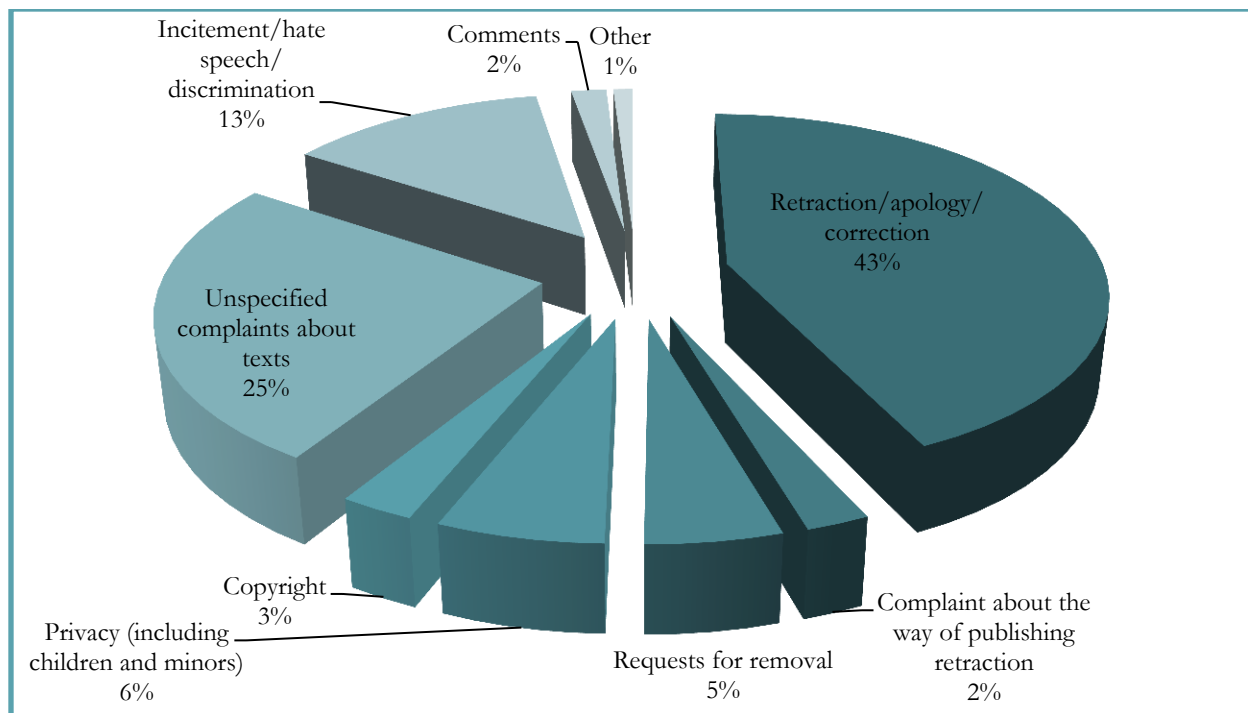


Figure 5: Content of complaints before the Press Council 2010-2015

As the self-regulation model has been gaining momentum in Bosnia and Herzegovina, and as the number of different platforms and means of expression grew, the Press Council had to keep in mind these new issues when deciding on complaints, too. In the majority of cases (34%), the Press Council and editors of media outlets agreed that retraction, correction or an apology was to be published, whereas in 26% it decided that there was some type of violation of article of the Press Code. But the percentage of violations has been lowering over the years, and so e.g. in 2013 there were 80 cases of violation and only 26 in 2015. On the other hand, in 14% of complaints it was concluded that no article of the Press Code was violated, and most removals of disputable content occurred in 2014 – 36. There were also cases when citizens submitted a complaint without being familiar with authorizations of the Press Council, thus there were those referring to the content on television or in radio, the content on social networks, and even the content of a poster distributed in Sarajevo.

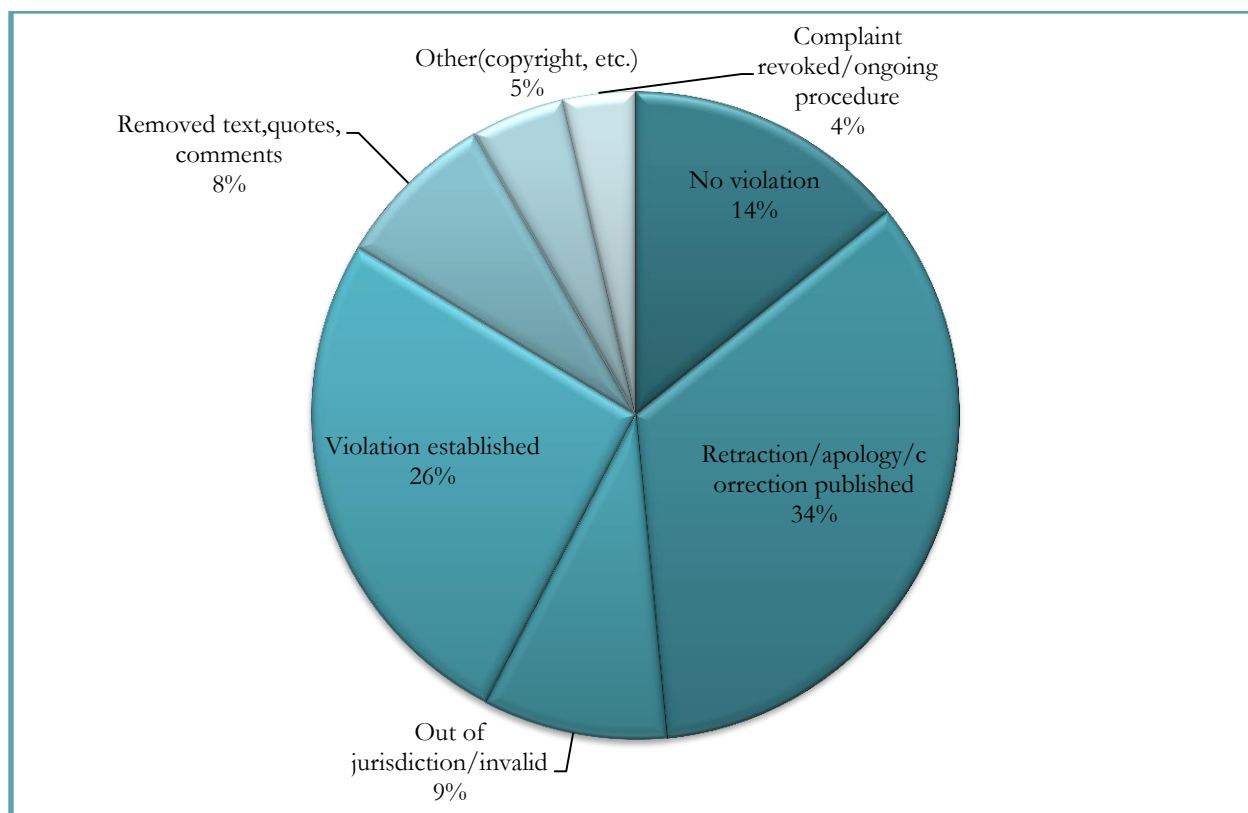


Figure 6: Decisions on complaints, 2010-2015

Even more specifically, in cases when violation was established, the Commission concluded that it was particular articles that were violated, and in most cases certain content violated several articles. The article that is related to defamatory statements is Article 5 - Accuracy and Fair Reporting. This article states that:

- Journalists shall not publish inaccurate or misleading material in the form of pictures, texts or other materials.
- Journalists have the professional obligation to promptly correct any published information that is found to be inaccurate. The apology and/or correction shall be published with due emphasis.

- Journalists shall always report truthfully and accurately about the outcome of an action undertaken as a result of defamation they were involved in.
- Journalist shall report only on the basis of facts, the origin of which is known to the journalists.
- In reporting and commenting controversy, journalists shall make an effort to hear and represent all sides in a conflict. If one side in a controversy refuses to make itself available to the journalist, the publication may legitimately note this refusal in its reporting.⁵⁰¹

This article was violated in 16% of all complaints, and most cases refer to year 2013, when there were 57 of such cases. This article usually also involved the violation of Article 2- Editorial Responsibility, which stipulates that: “It is the highest responsibility of reporters and editors to ensure, in all their work, respect for factual truth and the right of the public to know the truth. Journalists shall at all times perform their work in the spirit of fairness, honesty and civility when collecting information, reporting and presenting opinions.”⁵⁰² Closely related to defamation cases is also Article 7-Right to Reply, which was violated in 14% of cases. On the other hand, the article with most violations was Article 4 – Discrimination, followed by Article 3-Incitement.

⁵⁰¹ Press Code of B-H, Sarajevo, 29 April 1999, (accessed on 5 April 2016), available at: http://www.vzs.ba/index.php?option=com_content&view=article&id=218&Itemid=9&lang=bs

⁵⁰² Ibid.

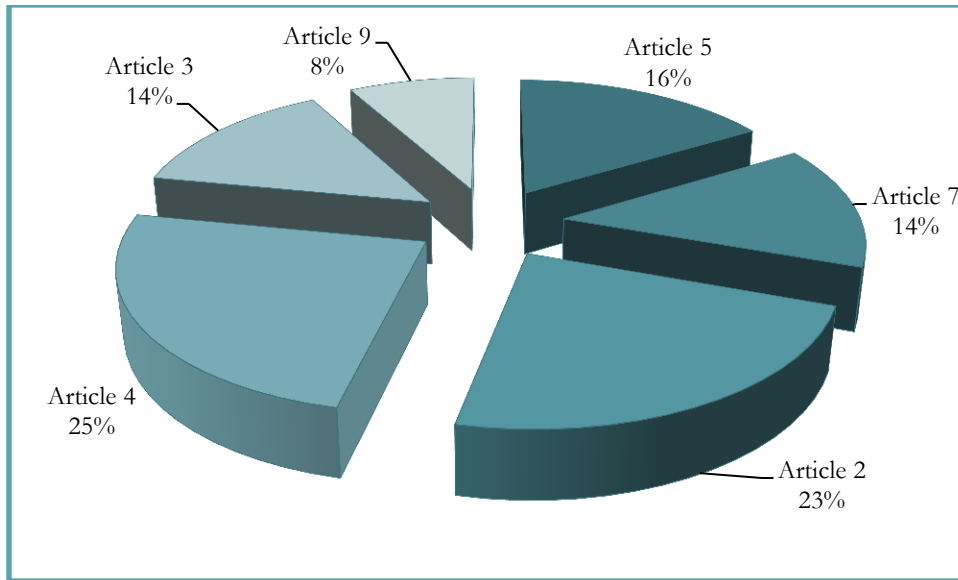


Figure 7: Violation of articles of Press Code, 2010-2015

The parties involved in complaints submitted to the Press Council follow a certain pattern, as well. As mentioned before, online media took the leading position in news consumption based on the type of complaints, and their type varies from strictly-locally oriented media to the ones with a high visitorship. Most complaints to online media occurred in 2013 and 2015 (to Saff.ba and Avaz.ba respectively) while in other years most complaints dealt with reporting of Dnevni avaz – a daily.

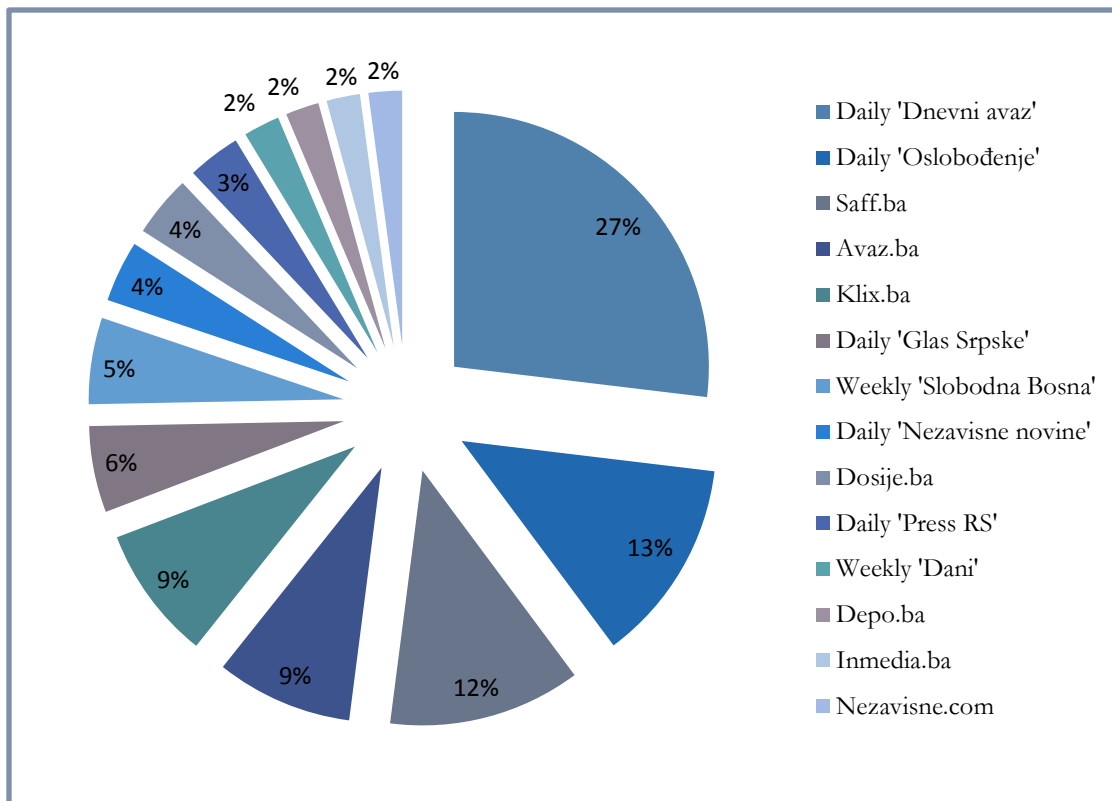


Figure 8: Media outlets with most complaints between 2010 and 2015

But the trend of increasing use of online media can also be seen in the fact that in 2015, out of 12 media outlets with most complaints, eight were online media; in 2014, seven out of nine media outlets were online; and in 2013, there were eight online media outlets out of 12 in total. On the other hand, between 2010 and 2012, there were only two online media outlets complained of when it comes to the ranking of outlets with most complaints. In this case, it is worth mentioning that in 2010, the Press Council did not have online media under its jurisdiction anyway, however, the citizens even today submit complaints regarding the media that are not under the jurisdiction of the Press Council, which is why the number of complaints regarding online media can be treated as rising after all.

2015		2014		2013		2012		2011		2010	
Avaz.ba	14	Daily 'Dnevni avaz'	33	Saff.ba	47	Daily 'Dnevni avaz'	24	Daily 'Dnevni avaz'	27	Daily 'Dnevni avaz'	35
Klix.ba, Daily 'Dnevni avaz'	9	Klix.ba	23	Daily 'Dnevni avaz'	24	Daily 'Press RS'	11	Dosije.ba, Daily 'Oslobođenje'	16	Daily 'Oslobođenje'	19
Daily 'Oslobođenje'	7	Avaz.ba	22	Klix.ba	13	Daily 'Oslobođenje'	9	Daily 'Press RS'	8	Daily 'Glas Srpske'	13
Nezavisne.com, Pravdabl.com, Daily 'Nezavisne novine'	6	Saff.ba	18	Avaz.ba	9	Weekly 'Slobodna Bosna'	8	Weekly 'Slobodna Bosna'	7	Daily 'Nezavisne novine'	9
Glassrpske.com, Hms.ba, Daily 'Glas Srpske'	5	Daily 'Oslobođenje'	15	Daily 'Oslobođenje'	7	Daily 'Glas Srpske', Weekly 'San'	6	Depo.ba, Daily 'Dnevni list', Daily 'Glas Srpske'	4	Weekly 'Dani'	7
Rtvbn.com, Saff.ba	4	Nezavisne.com	6	Dosije.ba, Inmedia.ba	6	Dnevniavaz.ba, Poskok.info	4			Weekly 'Express'	5
		Depo.ba, Ljubuski-vijesnik.com, Otisak.ba	4	24sata.info, Weekly 'Slobodna Bosna'	5					Weekly 'San', Weekly 'Slobodna Bosna'	4
				Depo.ba, Novinar.me, Daily 'Nezavisne novine'	4						

Figure 9: Media outlets with most complaints by year

When it comes to the profile of those submitting complaints, it can be noticed that not many public figures turn to the Press Council. Even if there are public figures who complained, they cannot be observed as high-profile ones. Most often here we observe members of local boards of political parties (e.g. municipal boards), and potential candidates to these boards, or rarely mayors of smaller towns and cities. In the list of people/institutions with most complaints submitted (six or more

complaints), 21% goes to political figures, and in 67% of cases they complained about the content published in online media. However, there were also complaints submitted by people who own their own business but that are also closely connected with certain political parties and they also followed the trend of complaining about the content of online media, more than the one of traditional media (about 80% of complaints referred to online media).

On the other hand, a number of public institutions submitted a complaint to the Press Council. In the list of people/institutions with most complaints, the second place belongs to the Ministry of Defense of Bosnia and Herzegovina (24 complaints in total), followed by the Prosecution of Bosnia and Herzegovina (15 complaints). Among the top complainants are also: Motorways of the Federation of B-H, Mine Action Center, National Park 'Una' and Public Relations Office of the Parliament of B-H. In this way, we may conclude that even if political figures refrain from turning to the Press Council, they still may be present through the complaints submitted by public institutions.

It is, however, encouraging to notice that the most complaints come from ordinary citizens (34%), meaning that the society in Bosnia and Herzegovina gradually starts to use the options offered by the self-regulatory body. There is also a certain percentage of non-governmental organizations which submit a complaint especially regarding discrimination issues, while so far there is a small percentage of journalists who react to writings of their colleagues in other media outlets.

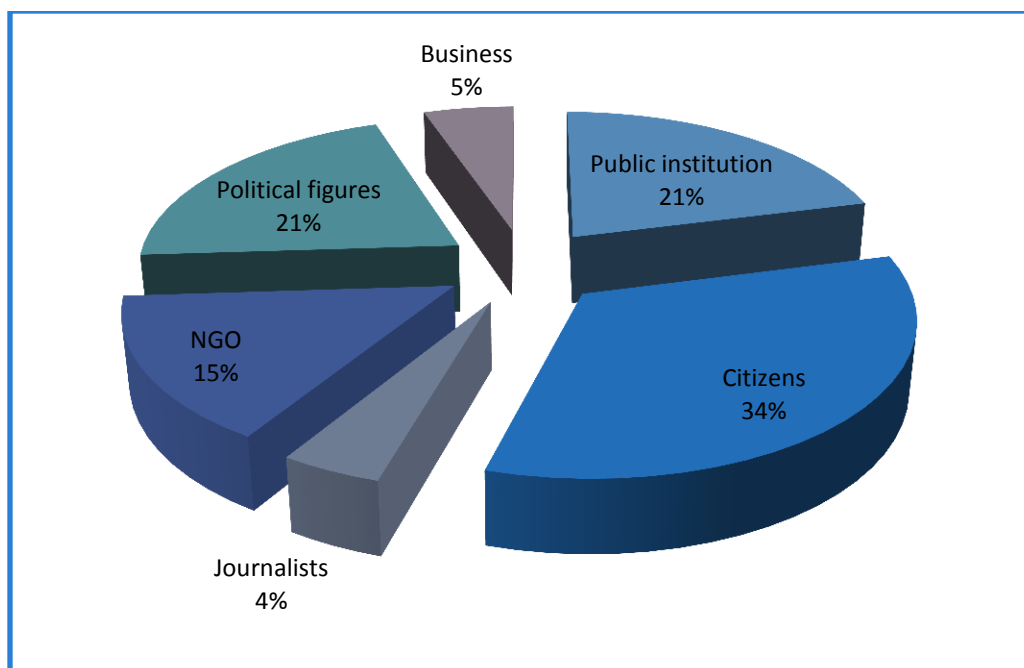


Figure 10: Profile of top complainants 2010-2015

6.6 MUNICIPAL COURT IN SARAJEVO

In Bosnia and Herzegovina, most lawsuits for defamation come before the Municipal Court in Sarajevo, as the court of first instance. Between 2010 and 2015, there were 814 lawsuits for defamation made before this court, which is a rather high number when comparing it to the population of Sarajevo (about 300,000 citizens). If this number of lawsuits is compared to the one in other countries with bigger population, then the comparison can be assessed as quite striking: e.g. 878⁵⁰³ defamation lawsuits in London (8.6 million citizens⁵⁰⁴). The numbers have been varying over years hence reaching both 52 defamation lawsuits in 2015, and 386 in 2010 (meaning that there was more than one lawsuit brought each day), while the highest number of these lawsuits was brought in 2009 – 468.

⁵⁰³ Inform.wordpress.com, *Judicial Statistics: 2014, Defamation claims increase by 60%, the highest number since 2009*, (accessed on 15 April 2016), available at: <https://inform.wordpress.com/2015/06/09/judicial-statistics-2014-defamation-claims-increase-by-60-the-highest-figure-since-2009/>

⁵⁰⁴ Smith, Duncan, *London's population high: Top metropolis facts*, (accessed on 15 April 2016), available at: <http://www.bbc.com/news/uk-england-london-31056626>

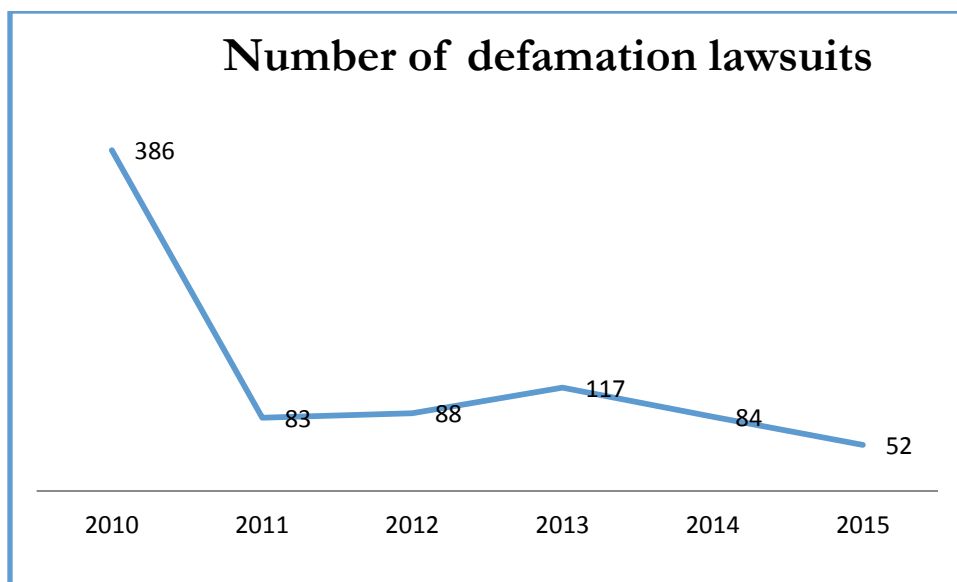


Figure 11: Defamation lawsuits before the Municipal Court in Sarajevo 2010-2015

But at this point, it is important to emphasize that the decrease of lawsuits is not a result of a greater professionalism of journalists, or of public figures showing a higher level of tolerance to criticism, it is more likely that this occurs due to the fact that the court practice has been rather slow and that lawsuits brought years ago are still not processed. Article 14 of the Law on protection against Defamation in the Federation of B-H states: “Procedures in the disputes for compensation of damage caused by defamation made in media pursuant to this Law shall be considered urgent.” But in spite of the fact that defamation proceedings are to be treated as urgent and the court is expected to act 30 days after they receive a lawsuit, the length of proceedings has turned out to be rather questionable. Some proceedings have so far lasted for several years and there were almost no cases which were completed within several months, although there were cases when this time was shorter

but the plaintiffs were high profile people.⁵⁰⁵ The usual time span for dealing with defamation cases is two to five years.

Moreover, a big number of lawsuits is eventually revoked as well, meaning that public figures most often use filing a lawsuit only as a form of ‘intimidation’ over journalists and not as much as pursuing the protection of their honor and reputation. For example, in 2010 only, about 77% of lawsuits were revoked. Out of this percentage, 60% of lawsuits referred to daily newspaper Dnevni avaz, thus 164 lawsuits against this newspaper were revoked, out of the initial number of 193 filed against Dnevni avaz in 2010. On the other hand, the owner of Dnevni avaz, Fahrudin Radončić revoked only three lawsuits, out of 47 that he filed in the same year. There are two questions that this data raises, the first one being whether the fact that the general elections were held this year influenced the high number of lawsuits, and the second one is: could there be any pressures exercised on plaintiffs in order for them to revoke their lawsuits? The second issue can be raised also due to the allegations made by the Association of BH Journalists, which in February 2010 claimed that they are under constant pressures coming from Dnevni avaz and its owner-Fahrudin Radončić.⁵⁰⁶ The official announcement of this Association stated that: “members of the Managing Board of the Association, members of the Executive Board and the Secretariat are being insulted based on their ethnicity and gender, disturbed, called criminals and servants of ‘mob bosses’, all with a goal to prevent the Association from conducting its activities, and prevent its reactions to non-professional and non-ethical articles in editions of Dnevni avaz.”⁵⁰⁷ The Association assessed these events as clear political pressures and in the same year, there were 43 registered incidents regarding

⁵⁰⁵ Halilović, Mehmed, *Double standards of court in Sarajevo*, (accessed on 15 April 2016), available at: <http://analiziraj.ba/2015/07/28/dvostruki-arsini-sarajevskog-suda/>

⁵⁰⁶ BH Journalists, *Open letter regarding Radončić's pressures on the Association of BH Journalists*, (accessed on 15 April 2016), available at: http://www.bhnovinari.ba/index.php?option=com_content&view=article&id=218%3Aotvoreno-pismo-povodom-radonievih-pritisaka-na-udruenje-bh-novinari&catid=63%3Adogaaji&Itemid=241&lang=bs

⁵⁰⁷ Ibid.

journalists performing their tasks – threats, frightening, harassment, getting fired, etc.⁵⁰⁸ **If we take into account the high number of lawsuits revoked against Dnevni avaz, the allegations of the Association of BH Journalists, and the fact that the pre-election campaign has already started at the time when most revoked lawsuits were made (February-April 2010), we may wonder whether there were actual pressures that caused this? This question is particularly intriguing regarding the current events because Fahrudin Radončić was arrested on January 25, 2016, for alleged disturbance of the work of judiciary in certain criminal cases.**⁵⁰⁹

In 2010, the requests for compensations reached highest amounts, too, which can as well be perceived as a form of intimidation of either political opponents (Fahrudin Radončić⁵¹⁰ vs. Sulejman Tihic⁵¹¹), or rival newspapers (Mujo Selimović vs. Avaz Roto Press⁵¹²), or other media outlets in general.

⁵⁰⁸ Klix.ba, *BH Journalists call upon media to confront pressures*, (accessed on 15 April 2016), available at: <http://www.klix.ba/vijesti/bih/bh-novinari-pozivaju-medije-da-se-suprotstave-pritiscima/100502049>

⁵⁰⁹ Klix.ba, *Why was Radoncic arrested*, (accessed on 15 April 2016), available at: <http://www.klix.ba/vijesti/bih/zasto-je-uhapsen-radoncic-sef-trazi-da-zastitis-i-kejmendija/160125100>

⁵¹⁰ President of political party Savez za bolju budućnost, SBB, (Union for Better Future)

⁵¹¹ Former president of political party Stranka demokratske akcije, SDA, (Party of Democratic Action)

⁵¹² Owner of daily newspaper Oslobođenje vs. owner of daily newspaper Dnevni avaz

Plaintiff	Amount requested
FAHRUDIN RADONČIĆ	820,000.00
FAHRUDIN RADONČIĆ	50,000.00
FRANO PARLAIN	20,000.00
LJILJANA ĐERZIĆ	20,000.00
SAFET ORUČEVIĆ	20,000.00
FAHRUDIN RADONČIĆ	20,000.00
MUJO SELIMOVIĆ	15,000.00
JUSUF MUŠINBEGOVIĆ	15,000.00
NEDŽAD AJNADŽIĆ	15,000.00
NEVEN ANĐELIĆ	11,000.00
FAHRUDIN RADONČIĆ	10,000.00
FAHRUDIN RADONČIĆ	10,000.00
FAHRUDIN RADONČIĆ	10,000.00
ENVER KAZAZ	10,000.00
FAHRUDIN RADONČIĆ	10,000.00
MUSTAFA CERIĆ	10,000.00

Figure 12: Highest compensation requests in 2010

When it comes to lawsuits brought against online content, the Municipal Court in Sarajevo came across several cases of this kind so far. There have been lawsuits brought because of the content posted in online editions of traditional media (Dnevni avaz, Oslobođenje, Federal TV), content of forums (Klix.ba), content of blogs (Sanja Vlaisavljević), etc.

A case before the Court, *Nevad Kahteran vs. Samir Arnautović and Damir Marić* referred to the content posted on forum on Klix.ba, Vijesti.ba, Depo.ba, the content in weekly magazine Dani, the video on Alfa TV. The authors of the content were claimed to “have harmed the honor and reputation of the plaintiff, since the information they spread reached various institutions, the ministries of education, the University of Sarajevo, etc.”⁵¹³ This lawsuit provided a list of media outlets which disseminated the disputable content regarding the “obstruction of scientific papers”

⁵¹³ *Nevad Kahteran vs. Samir Arnautović and Damir Marić*, Municipal Court in Sarajevo, Lawsuit No. 65 0 P 204081 11 P

because the plaintiff was a professor at the Faculty of Philosophy in Sarajevo. The Court decided that the texts/videos contained value judgments and the plaintiff lost the case and had to pay the court expenses. Another case referring to online content was the one of Fahrudin Radončić vs. Biz Media D.O.O (the domain owner of 24sata.info). This case referred to text titled “Exclusive: we publish an integral version of report made by financial police about crime in B-H”. The same parties were also involved in the lawsuit referring to several texts: “Clash: Radončić defends Dodik from Gregorijan” and “5,000 numbers of Avaz: Radončić holds the bat”. The owner of the domain has been sued on eight occasions so far, but as seen in example above, the practice is most often to sue the actual author of the content, and provide a list of platforms/media outlets which disseminated the content.

When it comes to the profile of the plaintiffs, it is evident that these are primarily high-profile political figures. It is important to notice that only one plaintiff has been registered before the Press Council – Nedžad Ajnadžić, meaning that he attempted to minimize the damage caused by an article in Dnevni avaz in 2010, and only after that did he proceed with his case to the Court. Overall, the plaintiffs with most lawsuits brought between 2010 and 2015 are: Fahrudin Radončić with 154 lawsuits (the owner of Dnevni avaz, the president of political party SBB and the former minister of security), Mujo and Hilmo Selimović with 20 and 18 lawsuits respectively (owners of daily Oslobođenje), Edin Mulahasanović with 12 lawsuits (Director of the Tobacco Factory in Sarajevo), Sefer Halilović with 10 lawsuits (former general and commanding officer of the Army of the Republic of B-H, and president of political party Bosanskohercegovačka patriotska stranka), and with five lawsuits each: Zaim Backović (a high official of political party Bosanskohercegovačka patriotska stranka), Jerko Ivanković Lijanović (a former Federal minister, and a businessman), Senad Pandžić (an official at the PR Office of the Government of the Federation of B-H) and Damir

Čardžić (Vice-president of political party Narodna stranka Radom za boljitak). Among the top ten plaintiffs, there is only one non-political figure: Dragana Mirković-Bijelić, a singer, with 10 lawsuits.

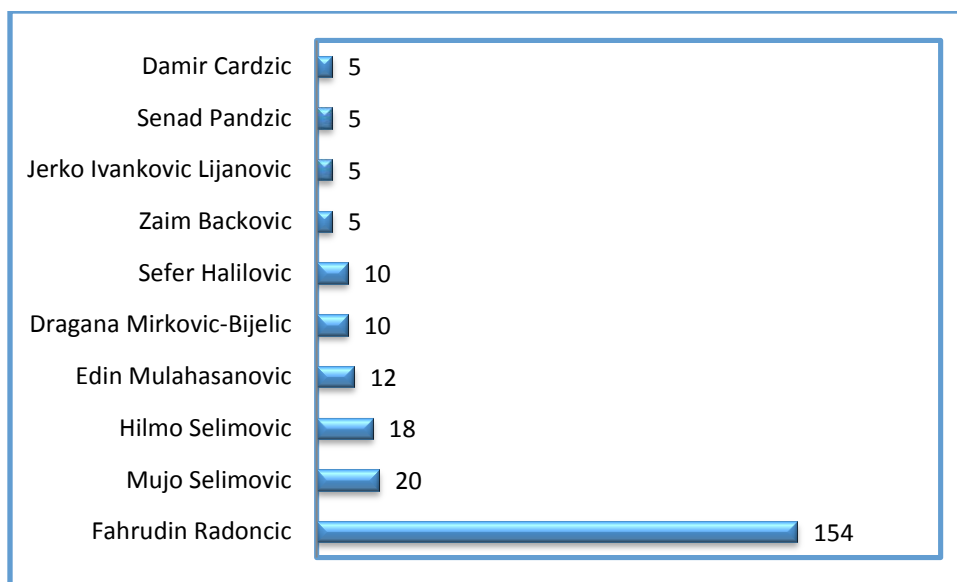


Figure 13: Plaintiffs with most lawsuits brought before the Municipal Court in Sarajevo

Observing these numbers, it is rather obvious that there is a dominance of certain public figure when it comes to bringing defamation lawsuits. The 19% of all lawsuits between 2010 and 2015 goes to Fahrudin Radončić, and the similar situation occurs if we observe the list of defendants against which most lawsuits were brought. In this list 24% goes to Fahrudin Radončić, and then follow the lawsuits brought against the former president of Independent Unions in B-H, Edhem Biber, then daily Dnevni avaz, daily Oslobođenje, etc. It is rather striking to see that out of the total number of lawsuits between 2010 and 2015, 66% of all cases include daily newspapers Dnevni avaz and Oslobođenje or their owners, mostly acting against each other (all lawsuits brought by the owners of Oslobođenje are against Dnevni avaz or its owner), which may show a constant and growing rivalry between these parties.

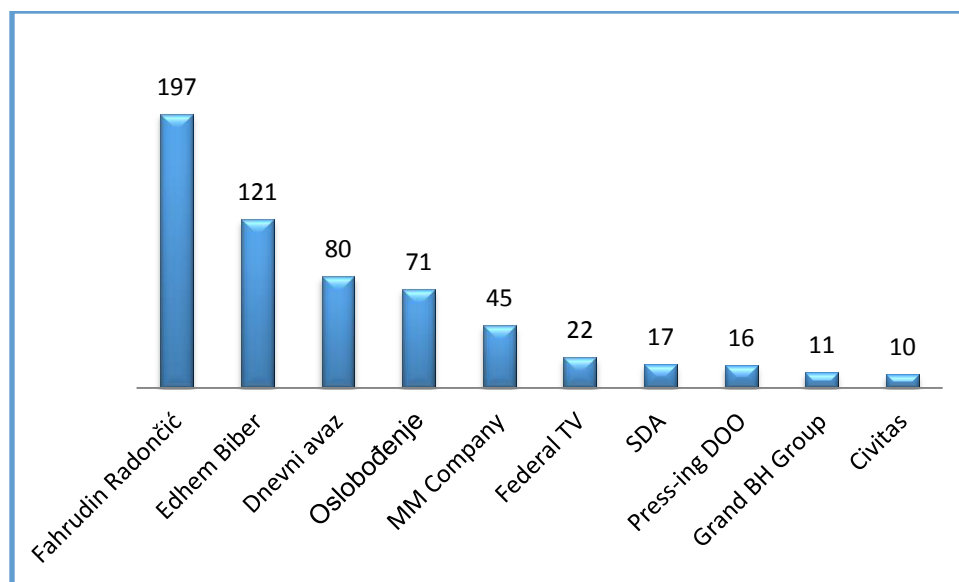


Figure 14: Defendants against which there were most lawsuits brought

6.7 BASIC COURT IN BANJALUKA

The Basic Court in Banjaluka dealt with 33 defamation cases between 2010 and 2015. The trend before this Court is that there were no such dramatic differences in the number of lawsuits as before the Municipal Court in Sarajevo. That is, there were no plaintiffs that brought more than two lawsuits, and only one of them has been registered before the Press Council – Sinisa Dodik, however he turned to the Press Council in 2015, while the lawsuit was brought in 2011 for an entirely different content. On the other hand, it is interesting to notice the trend regarding defendants because 39% are clear political opponents to the current regime in this entity. For example, BN TV is affiliated with political party SDS whereas the public broadcaster of the entity of Republika Srpska-RTRS is affiliated with the ruling party SNSD.⁵¹⁴ But most lawsuits were brought against a blogger-Slobodan Vaskovic, who is also a former journalist on Federal TV.

⁵¹⁴ Katana, Gordana, *RTRS and BNTV-presidential against professional journalism*, (accessed on 15 April 2016), available at: <http://analiziraj.ba/2015/05/20/rtrs-i-bntv-predsjednicko-protiv-profesionalnog-novinarstva/>

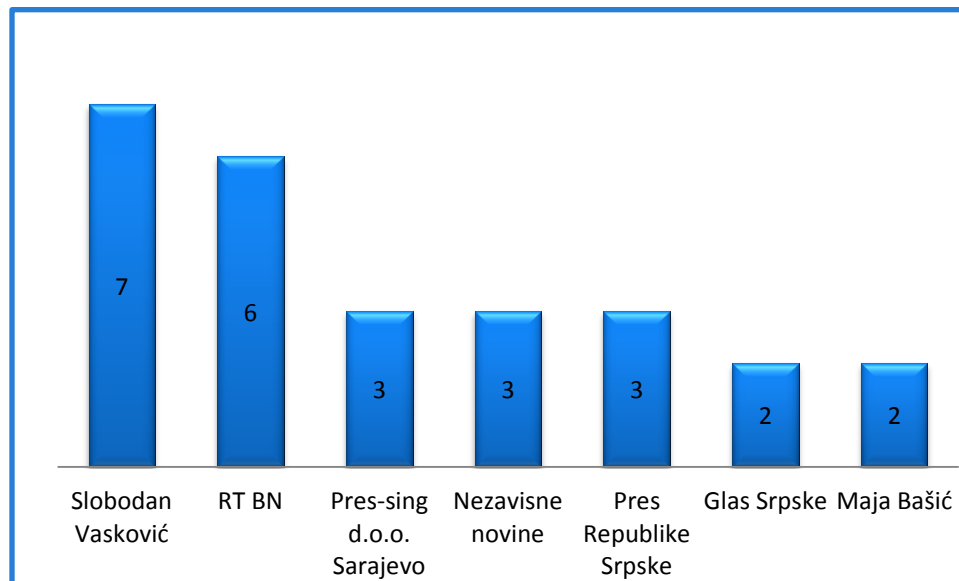


Figure 15: Defendants against which there were most lawsuits brought

This Court has on at least three occasions brought entirely different judgments than the Municipal Court in Sarajevo regarding the same cases. These cases refer to the program on Federal TV “60 minutes” and it was Milorad Dodik who pressed charges against journalists Bakir Hadziomerovic and Slobodan Vaskovic. At first, the charges were pressed before the Municipal Court in Sarajevo where the plaintiff lost, and then they were pressed again before the Basic Court in Banjaluka where the plaintiff won.⁵¹⁵ It is important to notice that these three cases which were in the center of a great public debate regarding judiciary, were not included in either list provided by courts for this research.

The president of Republika Srpska has often brought lawsuits not only against other political figures, but against journalists, too, and on one occasion even Transparency International. In fact, there were

⁵¹⁵ Vasković, Slobodan, *Justice for Vasković: County Court dismissed the judgment of the Basic Court regarding Vasković defaming Čada*, (accessed on 15 April 2016), available at: <http://slobodanvaskovic.blogspot.ba/2012/12/pravda-za-vaskovica-okruzni-sud-ukinuo.html>

also several incidents when he insulted journalists, when he “banned them from press conferences, cursed, wished them to have a heart attacks, etc.”⁵¹⁶ On the other hand, no journalists pressed charges against Dodik. Some of the lawsuits he brought were directed against Federal TV, a journalist (and later on a member of political party SDP) Bakir Hadžiomerović and blogger Slobodan Vasković. One of the first lawsuits he brought was against political program “60 minutes” on Federal TV and asked for 50,000 KM as compensation for emotional distress. These charges were pressed before the Municipal Court in Sarajevo, which Dodik lost, and then before the Basic Court in Banjaluka he pressed charges for the same case and won the case. The problematic statement made by this court was that “since Dodik is on such a high position, the damage caused to him is much bigger” thus in a way protecting a prominent public figure in spite of the general standard that public figures must show a greater level of tolerance. As mentioned before, there were no journalists or public figures that brought lawsuits against the president of Republika Srpska for his expressions and actions.

OSCE Representative on Freedom of the Media Dunja Mijatović on once occasion expressed her concern about a damage of about 2,500 EUR awarded against a journalist, Ljiljana Kovacevic, for defaming the president of Republika Srpska, Milorad Dodik. Specifically, the Representative stated that “No journalist should be held liable for reporting on the activities of prosecutors and the judiciary. Politicians must stop pursuing civil defamation lawsuits against journalists and must display a higher degree of tolerance than ordinary citizens.”⁵¹⁷ Another concern expressed at roughly the same time was the one referring to the ruling party SNSD deciding to ban any contact with media outlets critical of their work, such as BNTV. This decision was assessed as following: “These kinds

⁵¹⁶ Halilović, Mehmed, *Dodik vs. Bosić: who is a thief and who is a pathological liar?* (accessed on 15 April 2016), available at: <http://analiziraj.ba/2015/04/15/dodik-protiv-bosica-ko-je-lopov-a-ko-patoloski-lazov/>

⁵¹⁷ OSCE Media Freedom Representative, *OSCE representative concerned about recent negative media freedom developments in Bosnia and Herzegovina*, (accessed on 15 April 2016), available at: <http://www.osce.org/fom/107222>

of decisions are unacceptable in a democratic society. Politicians must remain accountable to the public. Journalists must be able to report on and engage in important debates.”⁵¹⁸

The most recent case of defamation, mentioned above, Milorad Dodik vs. Mladen Botic was omitted from the list as well. However, sometimes political figures bring lawsuits against other political figures, and so one of the major recent cases is the one of Milorad Dodik against Mladen Botic (the leader of the oppositional party in the entity of Republika Srpska). The decision of the Basic Court in Banjaluka was that Botic is to pay 6,000 KM to Dodik for causing emotional distress by saying that “Dodik stole millions of KM”. In addition to this compensation, Botic is to pay 2,400 KM of court expenses. In this case, the defendant claimed that “the court stated that there was no theft of any kind because there is no court judgment related to this criminal activity.”⁵¹⁹ The interesting aspect of the case is that when the court expert was deciding on the level of emotional distress, the plaintiff did not appear before the court, which is common for all defamation proceedings when Milorad Dodik was the plaintiff. Moreover, he did not submit any other medical document which may have proved the level of emotional distress.

It is precisely the main defendant, Slobodan Vaskovic, that has spoken up about possible problematic issues in this Court. On one occasion, he claimed on his blog that the president of the Basic Court, Milan Tegeltija: “provides ‘certificates of honor and reputation’ to all those who feel ‘emotional distress’ because of media reporting about them...Only in Tegeltija’s court can Stanislav Čađo win a case despite the fact he has not provided a single piece of evidence that anyone has written/said/stated something about him; only in Tegeltija’s court can journalists lose their cases

⁵¹⁸ OSCE Media Freedom Representative, *OSCE representative concerned about recent negative media freedom developments in Bosnia and Herzegovina*, (accessed on 15 April 2016), available at: <http://www.osce.org/fom/107222>

⁵¹⁹ Novosti RS, *Botic to pay for defamation*, (accessed on 15 April 2016), available at: http://www.novosti.rs/vesti/naslovna/republika_srpska/aktuelno.655.html:587270-Botic-placa-zbog-klevete

due to texts which contained references to the exact same Basic Court, etc....”⁵²⁰ It is worth mentioning that Slobodan Vaskovic indeed publishes court decisions on his blog. However, as we are observing the position of public figures in terms of online defamation, at this point it is crucial to notice that this particular blogger is often the object of an attack before this court.

⁵²⁰ Vasković, Slobodan, *Milan Tegeltija – a tavern singer, the first “boldy” among judges, servant of tycoons, and ragtags*, (accessed on 15 April 2016), available at: <http://slobodanvaskovic.blogspot.ba/2014/03/milan-tegeltija-kafanski-pjevac-prvi.html>

7. CONCLUSION

The thesis first discussed the media landscape in Bosnia and Herzegovina, largely shaped by the international community after the war between 1992 and 1995. The basic characteristics of this landscape shortly after the war were hate speech in media and remains of nationalism which is why it was necessary for the international community to tackle these issues first. But as the international community was withdrawing from the country over the years, the thesis identified the consequences of this withdrawal seen in political structures in B-H ceasing the power over the media. Moreover, the media outlets in the country found themselves in troubles regarding financing, problems in terms of media ownership, lack of coordination among outlets from different parts of the country, affiliations to political parties, etc. In order to explain the intertwining between politics and media, the thesis explained the organization of the state, organization of judiciary system, and specified the aspects of clashes between international community and domestic political elites.

Further on, the thesis offered chapters on the legislative framework regarding traditional media, and activities taken by the international community in establishing regulatory bodies, passing media laws, political obstructions to these initiatives and the problems in the application of these laws. Specifically, the main actors here were Office of High Representative (OHR), the Organization for Security and Cooperation in Europe (OSCE), the European Union (EU) and the Council of Europe (COE). Some of the most important results of these actors were: the establishment of the regulatory body for electronic media – the Communications Regulatory Agency (CRA) and the self-regulatory body – the Press Council of B-H. It is especially these two bodies that have had a significant

influence on reshaping media landscape in Bosnia and Herzegovina. The international community also created the legislative framework for media in B-H in line with international standards and providing the guarantee for enjoyment of freedom of expression. The most important laws created were: the Law on Communications, the Law on Public Broadcasting System, the Laws on Protection against Defamation, the Freedom of Access to Information Acts, etc.

Specifically, the CRA is the regulatory body dealing with electronic media and which drafts and ensures the implementation of rules on broadcasting; issues licenses and ensures compliance of broadcasters to license obligations and provisions.⁵²¹ But this body came across several obstacles in its performance mainly because its independence was in question. More precisely, due to disagreements regarding the election of Director General, this institution has been operating without the Director General since 2007. It was the political pressures that obstructed the credibility of the Agency and as they control certain media outlets, even media outlets disobeyed the rules and regulations of the CRA and e.g. used digital signal even before the digitalization of media in B-H was fully approved. On the other hand, the self-regulatory body, the Press Council in B-H has not seen such problems so far, its main concern to this day remains the fact that many journalists and most citizens are not familiar with its work. This self-regulatory body deals with protections of the rights of journalists, ensuring accuracy in reporting, respect of professional ethics, and the pluralism of ideas and opinions. The Press Council also includes the Complaints Commission which approaches the complaints which can be made through the website of the Press Council and decides on whether there was a violation of the Press Code – the document on which the self-regulatory body bases its activities. The body changed its scope of work in 2011 and included online media, too.

⁵²¹ Jusić, Tarik and L. Kendall Palmer. "The Media and Power-Sharing: Towards an Analytical Framework for Understanding Media Policies in Post-Conflict Societies. Public Broadcasting in Bosnia and Herzegovina." *Global Media Journal—Polish Edition* No 1 (4). 2008, p.128.

Furthermore, the thesis approached the introduction of modern media laws by the international community. A number of laws before the activities of the international community relied heavily on the legislation of the previous, communist system, and only after these activities did they become in line with international standards. The most important issue in terms of media laws was among other the decriminalization of defamation in 1999 thus defamation was transferred from criminal into civil law. Specifically, three defamation laws were passed, two at entity levels and one at the level of Brcko District: Law on Protection against Defamation of the Federation of B-H, Law on Protection against Defamation of Republika Srpska, and Law on Protection against Defamation of Brčko District of Bosnia and Herzegovina. But even though the main goal was to prevent journalists from being imprisoned, fined and registered in criminal records, it remained questionable whether chilling effect was reduced in practice. The compensations remained rather high and several media outlets were sued several times a year which made their already shaky financial situation even worse, while numerous lawsuits directed at individual journalists created a form of chilling effect, too. In fact, as soon as defamation was decriminalized, the number of lawsuits increased significantly and remains rather high even today. Most lawsuits are brought by major public officials and owners of media outlets, particularly of print media and there appear mutual lawsuits between daily newspapers Dnevni Avaz and Oslobođenje, which press most lawsuits against each other and often ask high compensations varying from 20,000 to 200,000 KM. In addition to this, the ‘defamatory words’ most often cited in a lawsuit belong to the topic of crimes and thus we find words such as “criminal”, “thief”, “war criminals”, etc. In most these cases, the chance of turning to the self-regulatory body and make a complaint is very often skipped. Namely, the high profile public figures do not approach the Press Council even though this could be assessed as an attempt to mitigate consequences of alleged defamation. Article 8 of the Law on Protection against Defamation of Federation of B-H requires all other ways of solving a defamation issue to be exhausted, this

happens very rarely and thus most often public figures go straight to court, which is why the number of lawsuits before courts is higher than the number of complaints made before the Press Council for the research period between 2010 and 2015. This is how it can be concluded that even though new media inevitably take over the priority in terms of news consumption over traditional media, there still are traditional ways of dealing with media content that is found problematic by the injured people.

The research also noticed the trend of increasing number of complaints referring to online media when it comes to Press Council cases: only one in 2010 and 122 in 2015. In 2013, 69% of all complaints referred to daily and weekly newspapers and then in 2014 online media became the primary subject in this respect, which also shows the change in the news consumption. When it comes to the articles of the Press Code which the Complaints Commission found were violated, they mainly referred to hate speech or some type of discrimination, protection of children, etc. On the other hand, when discussing the lawsuits before the Municipal Court in Sarajevo, between 2010 and 2015, there were 814 lawsuits for defamation, which is a rather high number. The research showed that numbers varied over years hence reaching both 52 defamation lawsuits in 2015, and 386 in 2010. In the other entity, Republika Srpska, the Basic Court in Banjaluka saw 33 defamation cases between 2010 and 2015, but there were no plaintiffs that brought more than two lawsuits. However, it is worth noticing that 39% of defendants were clear political opponents to the current regime in this entity as well as that most lawsuits were brought against a blogger-Slobodan Vaskovic, meaning that online media content found its way before courts, too.

Therefore, in Bosnia and Herzegovina, it has been noticed that it is especially political figures that bring most defamation lawsuits before courts, either against journalists or against their political opponents. The number of lawsuits has been identified as rather high for a country of about 3-4 million people, but the number of media outlets both online and offline is very big, too. Media

ownership issues are closely related to these numbers because even though numerous media outlets could mean a greater pluralism in the country, with unregulated media ownership, one person can own several types of media outlets. In the same way, as some owners are closely related to political parties (or even as they have political parties of their own), the media reporting sometimes tends to be affiliated with the interests of these parties. As a result, political figures very often bring lawsuits against media or persons which represent their political opponents, which is why a great number of cases refers to more or less same people. In addition to this, political figures often ask for high compensations and exercise a form of a pressure on media by the very fact they brought them before court. At the same time, political figures do not exhaust all other remedies of minimizing damages which they could do based on defamation laws. Instead of asking for a retraction or apology, and instead of turning to the self-regulatory body, they go directly to court which could be interpreted as a form of intimidation, particularly because in the focus of the lawsuits is not only an apology or retraction, but the amount of compensation. When it comes to online cases, the courts in Bosnia and Herzegovina have still not seen that many lawsuits referring to exclusively online media in terms of defamation, but the Press Council has. In fact, the research has found that trends have significantly shifted in this respect and that most complaints refer to online content. Regarding public figures, it is mostly low-profile politicians that turn to the self-regulatory body when dealing with defamation, while high-profile politicians stick to turning to courts directly thus they are using traditional methods of dealing with defamation primarily in traditional media, again, because the owners of these media outlets are most often their opponents. However, the courts in Bosnia and Herzegovina have had cases of bloggers before them, but due to rather long proceedings these cases have not seen their epilogue yet.

Generally, on a global level, the thesis noticed a wish to find a proper balance between enabling more freedom of speech and keeping platforms and new news providers safe, too. It has been

identified that there is a need for policies and global standards which are implementable – meaning that sometimes there are standards that seem good on paper but they are difficult to be implemented, which is why rules and regulations must be drafted with a particular care and with their feasibility in mind.⁵²² It can be said that this is precisely the case with Bosnia and Herzegovina, because the defamation laws are well-tailored and they do follow international standards, but their interpretation in the country may differ from what was initially intended.

The theoretical part was completed with extensive online research, access to international universities' libraries and participation in relevant workshops and conferences. With a greater insight into international literature and exchange of opinions and experiences in other countries, the theory has set the key concepts for the thesis: explanation of the concept of defamation and its development; analysis of the shifts in consumers' needs in terms of news sources (a shift from traditional media to online media as primary sources of information and users' presence on social networks); analysis of the current trends in Bosnia and Herzegovina regarding media landscape; global trends, experiences and challenges in other countries. Furthermore, the theoretical part offers the insight into the country-setting and its background, which is crucial for understanding the cases of defamation in B-H. This part also includes the overview of defamation laws in B-H: Law on Protection against Defamation of Federation of B-H, of RS and of Brcko District, with a note that the Law of Brcko District does not differ from the one of FB-H nor are there many cases before the court in the District, thus, the focus is primarily on the entity Laws.

It was the data collection that was the most time consuming part of research. Based on the Freedom of Access to Information Acts of FB-H and of RS the courts provided an insight into defamation cases between 2010 and 2015. The thesis focused on the two biggest courts in B-H in terms of

⁵²² Llanso (2012) in M.I. Franklin, *Digital dilemmas: power, resistance and the Internet*, p.148

number of cases: Sarajevo and Banjaluka (as each is the biggest city in their respective entities). Since there are three constituent peoples in B-H: Bosniaks, Serbs and Croats, the defamation cases analyzed will not be focused on only one nationality because Bosniaks and Croats are the majority in the Federation while Serbs are the majority in Republika Srpska. In this way, no constitutional people is excluded and the two biggest courts in terms of defamation cases are covered. However, the limitations of the thesis lie in the fact that the courts were reluctant to share all the data regarding defamation, either due to the complicated system of archiving or due to the fact that they do not reveal the cases involving certain high-profile figures. Specifically, the courts did not provide all the cases involving the president of Republika Srpska, even though in media there has been much talk about this person filing lawsuits for defamation.

This complex topic has not so far been the topic of many researches or analyses possibly because media outlets are often reluctant to report about these issues related to public figures and because media law in B-H in general has been a rather neglected field and it is yet to gain momentum as a field of research. Therefore, this thesis focused on identifying relevant and specific data to assess the trends regarding the online sphere, and analyzed them in order to open new questions, thus it contributes with its analysis to the overall research on media law in B-H which is rather insufficient, and possibly offers recommendations for ensuring the respect of freedom of expression in this country in a better way.

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