

Criminal offenses against honor and reputation in the light of the amendment of the Criminal code of the Republic of Srpska

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The issue of (de)criminalization of behavior that injures, that is, endangers honor and reputation is one of the most important in modern criminal law. The demand for decriminalization arises from the norms of international law and it rests on the postulate of the right to freedom of thought and expression. However, the right of a person to protect his honor and reputation, which is the basis of criminalization, is also inviolable. Because of that, it is not easy to find a balance in the exercise of these rights. Their being in contradiction creates the danger of undermining one right by excessive protection of another. It is a common understanding that modern criminal legislation is moving in the direction of decriminalization of such behaviors. Our legislator opted for the opposite solution. This is not a solution that has not been represented in the criminal legislation of the Republic of Srpska, because criminal offenses against honor and reputation existed until 2002 when they were decriminalized. In the article is apostrophized protection of honor and reputation in the light of the latest amendment to the Criminal Code of the Republic of Srpska.

KEYWORDS: honor and reputation, criminal offense, human rights.

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Introduction

An amendment of the Criminal Code of the Republic of Srpska entered into force in August 2023.¹ Thus, in less than five years, the legislator changed the Criminal Code four times. However, the adoption of the latest amendments was observed with special attention, not so much for the reason that they gave rise to an intervention in the special part of the Code, but because it was embodied (inter alia) in the form of criminal offenses against honor and reputation. Criminalizing these behaviors again, the legislator, as it is pointed out, made a radical turn compared to the last twenty years. However, it seems appropriate to ask the question of to what extent this solution abandons the “existing trend” of decriminalization of incriminations that protect honor and reputation (which can be found at the basis of criticism), due to the fact that the European states under German legal-civilizational influence, which also served as a model in the creation of criminal law in our region, in the composition of their criminal legislations include defamation, as well as insult, as criminal offenses (Ristivojević, 2012: 81).² It is important to point out that, although allocated from the criminal legislation, certain forms of legal protection of these values in the Republic of Srpska already exist. Thus, the protection against defamation, as a consequence of the previous decriminalization, was moved to the area of civil law.³ An insult, i.e. insulting, on the other hand, remained in the domain of misdemeanor law and represents a violation in the area of Public peace and order.⁴ Unlike the above, other incriminations from the chapter of criminal offenses against honor and reputation were decriminalized.

The basic question that arises when considering this issue relates to the balance of the postulate of the right to freedom of expression and opinion with the natural right of every human being to protect his dignity, honor, and reputation, as well as the protection of his family life and privacy. These colliding values represent a constitutional category. On the one hand, freedom of thought and determination, conscience and belief, as well as public expression of opinion (Art. 25) and freedom of the press and other means of public information

¹ Law on Amendments to the Criminal Code of the Republic of Srpska, Official Gazette of the RS, No.73/23.

² In addition to the above is also the understanding that civil law protection, as the only other way of providing protection of honor and reputation, cannot replace criminal law protection (Stojanović, Delić, 2015: 61).

³ Law on protection from defamation, Official Gazette of the RS, No. 37/2001.

⁴ Article 8 of the Law on Public Order and Peace prescribes Insulting: “Whoever, by rudely insulting another person on a political, religious or national basis or by other reckless behavior causes feelings of physical danger or anxiety among citizens, shall be fined from 200 to 800 KM”, Law on public order and peace, Official Gazette of RS, No. 11/2015.

(Art. 26 paragraph 1) are guaranteed.⁵ On the other hand, Art. 13 of the Constitution provides for human dignity, physical and spiritual integrity, human privacy, and personal and family life as protected values. As both values are inviolable, protected by the highest legal act in the country as well as by international acts, the so-called “forms” of acceptable restrictions on freedom of expression (with the aim of protecting honor and reputation), especially of a criminal law nature, represent a great challenge for every legislator.

About honor and reputation as protected values

As a physical and spiritual-moral being, a person has the right to enjoy his own sense of existence. This satisfaction exists only if it is not disturbed by external factors; among other things, by the behavior of another person. This interference, which is still frequent today, can lead to harm of one’s honor and reputation,⁶ whereby the injustice consists in a negative impact on the reputation or “good name” (McGonagle, 2016: 14). And these are the refined, discreet and “most subtle” legal goods at one’s disposal (Herceg Pakšić, 2021: 802; Post, 1986: 699),⁷ which follow a person from birth and not only until death, but the reputation of the deceased continues to exist even after (Mrvić-Petrović, 2013: 43-44). In connection with their conceptual definition, there are two understandings: factual and normative. The first understanding determines these categories in terms of a social-psychological phenomenon and exudes subjectivism (personal feeling and understanding of one’s own value), which is its negative characteristic, so in connection with it, according to the second, more acceptable understanding, honor is defined as the subjective right of every person to a personal sense of value, and reputation as recognition of human dignity by others in society (Bojanić, 2010: 627–628).

The right to reputation and honor,⁸ which is in the basis of legal (criminal law) protection (if applicable)⁹ in the sense of one of the basic human rights, is protected by international legal acts.

⁵ Constitution of the Republic of Srpska, Official Gazette of the RS, No. 21/92 - revised text, 28/94, 8/96, 13/96, 15/96, 16/96, 21/96, 21/02, 26/02, 30/02, 31/02, 69/02, 31/03, 98/03, 115/05 and 117/05.

⁶ The protection of honor and reputation was also provided in the Law of the Twelve Tables. In the medieval period in England and Europe, these values were traditionally protected by secular and spiritual authority (Van Vechten, 1903: 547 et seq.).

⁷ In connection with that, the Bible states that “it is better to choose a good name than great wealth” (Post, 1986:699).

⁸ It is rightly pointed out that criminal law should not protect either internal or external honor per se, but a person’s right to honor, i.e. the right to respect of personality which acts erga omnes (Stojanović, Delić, 2015: 62).

⁹ In the literature of comparative law, provisions that protect the honor and reputation of others belong to the so-called defamation law. Defamation is most often used to describe true or false facts or opinions that harm the reputation of others or insult them (Herceg-Pakšić, 2021: 800; Borbotko, 2020: 60).

Regularly mentioned as the most important acts are the Universal Declaration of Human Rights (Art. 12),¹⁰ the International Covenant on Civil and Political Rights (Art. 17),¹¹ the European Convention on Human Rights and Fundamental Freedoms (Art. 10),¹² and the Resolution of the Council of Europe on the decriminalization of defamation since 2007.¹³ In the essence of the provisions of the first two acts, there is a general prohibition of arbitrary interference into private life, family, home, or correspondence of another, i.e. the right to legal protection against interference or attack on a person's honor and reputation is regulated. ECHR (Art. 10) as well as ICCPR (Art. 19) prescribe restrictions on the use of freedom of expression, among other things, for the sake of "*protecting the reputation and rights of others*", i.e. "*respecting the rights and reputation of other persons*", which is followed by the provision of the Resolution emphasizes that freedom of expression is not unlimited and that "*it may prove necessary for the state to intervene in a democratic society, provided that there is a solid legal basis and that it is done in the public interest in accordance with Art. 10 para. 2 ECHR*". These "anti-defamation laws", as indicated in the Resolution, should be applied with the greatest restraint because they can seriously impair freedom of expression (although it is appropriate to ask how freedom of expression is impaired in this way, for the reason that this right does not include telling falsehoods that insult someone's honor and reputation) (Stojanović, Delić, 2015: 61). It is evident that it is not stated that "laws against defamation" cannot also be of a criminal law nature, but that these provisions should be precisely the *ultima ratio* in the protection of social values.¹⁴ This implies that the conditions for the application of criminal law provisions are set more strictly and that due to the manifestation of social and ethical reproach that is in the merits of the application of criminal law sanctions, more severe

¹⁰ General Declaration on Human Rights, adopted and proclaimed by the General Assembly of the United Nations (December 10, 1948) (Resolution No. 217 /III/), https://www.ombudsmen.gov.ba/documents/obmudsmen_doc2013041003050667cro.pdf, accessed on 12.05. 2023.

¹¹ International Covenant on Civil and Political Rights adopted and proclaimed by the General Assembly of the United Nations (December 16, 1966) (Resolution No. 2200 A / XXI/), <http://www.mhrr.gov.ba/pdf/medunarodnipakt%20b.pdf>, accessed on 05/12/2023.

¹² Law on the Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette of Serbia and Montenegro - International Treaties, No. 9/2003, 5/2005 and 7/2005, 12/2010 and 10/2015).

¹³ Council of Europe, Towards decriminalisation of defamation (Resolution 1577/2007), <https://pace.coe.int>, accessed on 08.05. 2023.

¹⁴ At this point, it is appropriate to single out the position of the United Nations Human Rights Committee, which states in its commentary that "*signatory states should consider decriminalization of defamation and, in any case, the application of the criminal law should be considered only in the most serious cases*", whereby full satisfaction of justice in such cases should include adequate compensation, appropriate measures of satisfaction, etc. (Human Rights Committee, General comment No. 34, United Nations: Geneva 11-29 July 2011, available at <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>, accessed on 21.08.2023), which represents a kind of answer to the question of whether the legal protection of honor and reputation can be provided by norms in the field of misdemeanor and civil law, or whether it requires criminal law intervention.

consequences may occur for the perpetrator of the criminal act.¹⁵ Finally, in support of the above, there is a part of the Resolution that refers, inter alia, to the provision of guarantees that there is no abuse of criminal prosecution for defamation, as well as that the independence of the prosecutor should be protected in all cases. It is visible (and in accordance with the above mentioned attitude) that it indirectly refers to criminal law protection.

Criminal law protection of honor and reputation in the Republic of Srpska

As it was pointed out, a set of criminal offenses that protect honor and reputation, after decriminalization in 2001, found its place again in our criminal legislation. It is important to point out that the protection of honor and reputation existed even then, but in the context of (illegal) behavior that could be qualified as “general”, the violation/endangerment of these values did not have the sign of criminal law. This means that there were violations/threats to honor and reputation in the sense of “special” criminal offenses (e.g. criminal offenses against the constitutional order, criminal offenses against the judiciary, or criminal offenses against public order and peace).¹⁶ The displacement of defamation into the domain of civil law, accompanied by its non-definition, opened up space for a wide interpretation, while *Insult*, which remained in the criminal law area (misdemeanor law), was additionally specified, thus limiting the protection of these values. Finally, it came to criminal law protection. All this indicates that in the Republic of Srpska, there is currently a rather complex criminal law and civil law protection of honor and reputation.

¹⁵ In contrast to the above, civil law sanctions remain in the domain of the private relationship between the perpetrator and the victim, so the mentioned socio-ethical reproach is absent.

¹⁶ The action of the basic form of the criminal offense of Injuring the reputation of the Republic of Srpska and its nations is designated as “*public exposure to mockery, contempt or gross disparagement*”, while in one of the more severe forms, the qualifying circumstance is the content of mockery or gross disparagement in the sense that “... *it was carried out in a way to label Republic of Srpska as an aggressor or genocidal creation or its nations as aggressor or genocidal...*”, see Art. 280a para.1 and 2 CC RS. We can also take as an example (now amended) criminal offense related to Injuring the reputation of the court (and the participants in the proceedings) from Art. 340 CC of the RS: “*who in the court proceedings exposes the court to contempt...*”. Also see *e.c.* and Art. 369 of the Criminal Code of the RS (Violation of a grave or a deceased person) where, among other things, the basic form of the criminal offense is sanctioned as “...*gross injury to a grave or other place... ..gross injury to the memorial of the deceased...*”, while a more serious form exists if it was “*done in a particularly offensive manner or out of hatred...*”, Criminal Code of the Republic of Srpska, Official Gazette of the RS, No. 64/2017, 104/2018, 15/2021, 89/2021 and 73/23.

Thus, Chapter XVIIa of the Criminal Code of the Republic of Srpska is related to crimes against honor and reputation.¹⁷ In this group are regulated the incriminations of Defamation (Art. 208a), Disclosure of personal and family circumstances (Art. 208b), and Public exposure to humiliation due to belonging to a certain race, religion, or nationality (Art. 208v). In addition to the above, the legislator supplemented this chapter with norms related to the Exclusion of illegality in criminal offenses against honor and reputation (Art. 208g), Prosecution for criminal offenses against honor and reputation (Art. 208d), and finally, with a provision regulating sanctions and referring to Public announcement of verdicts for criminal offenses against honor and reputation (Art. 208đ). It is noted that, unlike the draft of the amendment, the criminal offense of Insult was omitted from the amendment of the Law.¹⁸

*The essence of Criminal offenses against honor and reputation
(Chapter XVIIa CC RS)*

The criminal acts of Defamation and Disclosure of personal and family circumstances appear in their basic and qualified forms, in contrast to Public exposure to humiliation due to belonging to a certain race, religion, or nationality. The most attention was attracted by the criminalization of defamation (Art. 208a), which is the basic criminal offense under this chapter. The criminal offense consists of a basic and two more serious forms. The basic form is defined as stating or conveying something untrue about another person that can harm his honor and reputation, knowing that what is being stated or conveyed is untrue. The act of commission is set alternatively, as stating and conveying. Stating means communicating something to another person in the sense of personal knowledge or belief acquired based on personal perception or the basis of the statement of a third party. Conveying means saying something about another person in the

¹⁷ With regard to these protected values, changes were also made (see fn 17) in the chapter on Criminal Offenses against the Judiciary, in Art. 340, which is now entitled as Injury to the reputation of the court and participants in the proceedings.

¹⁸ The legislator decided that the offense of Insult should remain in the domain of misdemeanor law, and not to exist as a criminal offense, as regulated by the Draft Law on Amendments to the Criminal Code. Considering the fact that the nature of the criminal offense of insult in the Draft was formulated more extensively than the homonymous misdemeanor, i.e. that the grounds for establishing misdemeanor liability are more stringent, the legislator acted in the only possible way by deleting the provision! Thus it is disabled, for something what can be qualified as a more serious form of insult (which in this case would be a provision of misdemeanor law: “Whoever, by rudely insulting another person on a political, religious or national basis or by other reckless behavior, causes a feeling of physical danger or anxiety among citizens ...”), that the perpetrator could be punished more leniently (fine in the amount of 200 to 800 BAM), in contrast to the basic form of the criminal offense that was regulated in the Draft (“Whoever insults another...”), for which the punishment was prescribes in in the amount of 5000 to 20000 BAM.

sense of someone else's knowledge or belief, that is, just conveying the statement of a third person (Bojanić, 2003: 11). This crime can be committed verbally, i.e. on oral and written, gestural and symbolic way (Ristivojević, 2012: 181; McGonale, 2016: 14), with the fact that is necessary for its existence to state/convey the negative content to a third party (not to the injured party).¹⁹ In contrast to the act of commission, which can be defined without much difficulty,²⁰ the essence of the criminal offense includes terms such as “something”, “untrue”, “which can harm” (the so-called defamatory factual judgment) and this is precisely where the vagueness can be read, i.e. broad conception of incrimination. This “something” represents a factual judgment that should be distinguished both from a fact and from a value judgment. Unlike a fact that is always true, a factual judgment is an assertion that is always untrue in the context of this incrimination (Badrov, 2007: 66; Bojanić, 2003: 11). Whether a certain factual claim is true or not is determined by comparing it with the fact and by finding a coincidence in at least essential features in order to be considered true (Badrov, 2007: 66; Bojanić, 2003: 11).²¹ As well as for the fact, it is emphasized for the value judgment that it is not the subject of defamation (Lazarević, 1999: 233; Badrov, 2007: 66; Bojanić, 2003: 11). A negative value judgment can become a characteristic of this incrimination only if it is combined with a concrete fact, that is, a present or past event. Thus, if someone is said to be immoral, it is a value judgment, but if it is said in connection to certain content, in reality, the conclusion could be drawn that it is defamation.²² Finally, the phrase “which can harm” leads to the conclusion that the occurrence of a consequence in the form of an injury is not necessary for the establishment of this form of a criminal offense, but, due to the “eligibility”²³ of what is stated/conveyed, only its possibility is sufficient. That is why it is a delict of abstract endangerment. Speaking of the subjective element, we are talking about intent.²⁴

¹⁹ If the negative content was not known by a third party, the act would not exist, and if it was communicated only to the person to whom it refers, under certain conditions it would be a misdemeanor (Defamation). It is emphasized that defamation is socially dangerous precisely because of the public speaking of the content of the statement (Algburi&Igaab, 2021: 31).

²⁰ It is important to note the difference between one form of act of commission (verbal expression) and “verbal delict” as a term that was used in criminal law during the time of the former Socialist Federal Republic of Yugoslavia, related to Article 133 of the Criminal Code of the SFRY (Ristivojević, 2012: 181 - 182).

²¹ In this regard, there is no criminal offense of defamation if the content of the statement basically matches the factual situation, and deviations refer to some sporadic, in that particular case irrelevant circumstances (Lazarević, 1999: 234).

²² It is rightly stated that the biggest problem is that factual assertions and value judgments can almost never be completely separated because every factual assertion has a value judgment within it and *vice versa* (Bojanić, 2003: 12).

²³ When assessing suitability, the most acceptable is objective-subjective criterion, where relevant norms and understandings are those that apply in a certain environment, but also the character of the passive subject (degree of his sensitivity, etc.) (Stojanović, 2009: 428).

²⁴ In contrast to the provisions of criminal law, the Law on Protection from Defamation also provides for liability for negligence (Art. 5, para. 2), which makes it stricter in that segment compared to the criminal legislation.

Awareness in the case of defamation should include knowledge that the factual assertions, that are made, are untrue and may harm the honor and reputation of the person for whom they are stated/conveyed. There are understandings that the perpetrator must be aware of all the characteristics of the criminal offense (even the qualifying ones) and that he wants to commit it, i.e. that defamation can only be committed with direct intent (Novoselec, 2016: 466), although (in this case) in the end, the understanding according to which “indirect intent” is sufficient in relation to certain characteristics of the criminal offense (e.g. the circumstance that the perpetrator is not unsure if anyone will find out about his statement, but he accepts this possibility). Since no specific intent to defame (so-called *dolus coloratus*) is required (Lazarević, 1999: 235; Stojanović, 20096: 429), it can be said that this criminal offense will also exist in cases of acting with possible intent (which cannot be excluded in, e.g., a case of indifference or uncertainty regarding certain circumstances related to the criminal offense).

By criminalizing disclosure of personal and family circumstances (Art. 208b), the legislator provided criminal protection to a special segment of an individual’s honor and reputation, namely the honor and reputation related to the family. In the case of this criminal act, the act of commission is marked as stating/conveying, as it is also regulated in the criminal offense of defamation. However, in contrast to defamation, in this case is required only knowledge that the facts that are the subject of stating/conveying are from the domain of personal and family life, without mentioning their (un)truthfulness. Therefore, the intimate sphere of citizens is protected through this incrimination from the presentation of both true and false information from the sphere of their private life, which can harm that person, by which the legislator made the sphere of personal and family life practically inviolable. It can be seen that the object of protection is placed in two ways; in terms of data protection both from personal and family life. The first mentioned data is related to a specific person (lifestyle, habits, relationships with other people and towards oneself..), while family life refers to the relationships that an individual has in the family with parents, children, spouse/extramarital partner, and other family members (Badrov, 2007: 68). As previously mentioned, this incrimination differs from the act of defamation in the fact that presented information may be true, while in the case of false factual assertions, it would be a special form of defamation, provided that fraudulent behavior is established. It is important to point out that what is stated/conveyed must be of such a nature that it can be appropriate (Badrov, 2007: 68), i.e., in a specific situation, it can harm the honor and reputation of the person against whom the statement is given/conveyed. In the essence of this criminal offense, there is also the wording that what is being stated/conveyed from family life “does not and cannot represent facts that are of legitimate interest”. Thus, if the content that is the subject of stating/conveying is a fact that is of legitimate interest or can represent such a fact, there will be an exculpatory ground that will

rule out the existence of a criminal offense.²⁵ In other words, it is about weighing the so-called “protection of legitimate interests” and protection of honor and reputation and refers to various cases in which, in the performance of certain activities, this segment of the right to honor and reputation is encroached upon.²⁶

The more serious forms of these crimes are identical. The qualifying circumstance is the way, that is, the means of their commission. They will exist if the basic form of the criminal offense was committed through the press, radio, television, computer network or other forms of communication, at a public meeting or in another way, due to which it became available to a larger number of persons (Art. 208a para. 2 and Art. 208b para. 2). Therefore, the appropriateness of the way of stating or conveying content that can harm honor and reputation, and which is such that the content can be accessible to a large number of people, is of importance. The most serious form of these criminal acts is based on the fact that what is being stated/conveyed has led or could have led to severe consequences for the injured party (Art. 208a para. 3 and Art. 208b para. 3). The first condition that needs to be fulfilled relates to the content of what is being stated/conveyed, these are factual assertions that are objectively capable of causing serious consequences for the injured party. The vagueness of the phrase “serious consequences” for the injured party is immediately noticeable. As the statement/conveyance of negative content necessarily creates a negative image of the injured party, the conclusion is imposed that in the context of the most serious form of these criminal acts (caused by the nature of the content), these are consequences that, in terms of their quality and quantity, not only go beyond the usual negative image that is created and opinion that exists about the injured party, but also affects his other assets,²⁷ and as a consequence, severe consequences occur or may occur.

Finally, the criminal offense of Public exposure to humiliation due to belonging to a certain race, religion, or nationality (Art. 208c) is also a novelty. The criminal-political justification of incriminating such behaviors rests on opposing the “negative image” of the members of these groups as well as the groups themselves.²⁸

²⁵ For this criminal offense, the legislator also provided a provision that stipulates that the truth or falsity of what is stated or conveyed from personal or family life doesn't have to be proven (paragraph 4), which is justified because the nature of the content (in that context) is irrelevant for the existence of incrimination.

²⁶ The provision called “protection of legitimate interests” is present in German criminal law (Art. 193 CC) and applies to offensive content and gossip.

²⁷ Some of the consequences include termination of employment, divorce or abandonment of a spouse, failure at a competition, dismissal from office (Lazarević, 1999: 236). In this regard, the severity of the consequences can be graded, e.g. the termination of the employment and the absence of the expected advancement where, in the last mentioned case, the opinion on whether it is a serious consequence depends on the assessment and evaluation of the court (Stojanović, 2009: 430).

²⁸ This type of incrimination is also called “indirect” defamation, which is based on the identification of an individual with a certain group, and is connected with the idea of protecting the inherent human dignity of groups, that is, persons (Van Noorloos, 2014: 352-353).

In this way, it contributes to their protection from violence and discrimination that may arise as a result of negative perceptions about the group, prevents a psychologically negative impact on group members (loss of self-esteem and sense of self-worth), and indirectly provides protection for public order and peace.²⁹ A criminal offense is committed by anyone who publicly exposes to humiliation or contempt a person or group because of belonging to a certain race, skin color, religion, nationality, or because of ethnic origin, sexual orientation, or gender identity. The act of commission is defined as exposure to humiliation or contempt, which implies a wide range of activities. The object of protection in this criminal offense is (as already stated) limited; it is a person or group who belong to a certain race, who have a certain skin color, who are of a certain nationality, religion or ethnic origin, or a certain sexual orientation or gender identity. It is obvious that the existence of this criminal offense requires “public exposure” to humiliation or contempt, which implies that the activities should be carried out in a public place, i.e. a place that is accessible to an (in)determinate number of persons. The perpetrator of the criminal act should, inter alia, be aware of this fact and that he has the intention to expose a certain category of persons to humiliation or contempt. It is not required that this resulted in a more severe consequence for the victim/s so that the criminal offense does not have its qualified forms.

Exclusion of illegality in criminal offenses against honor and reputation

Article 208g provides grounds for the exclusion of illegality in relation to the criminal offenses of Defamation and Disclosure of personal and family circumstances. It is stipulated that there are no such criminal offenses if it is an offensive expression or presentation of something untrue in a scientific, professional, literary, or artistic work, in the performance of a duty prescribed by law, a journalistic profession, political or other public or social activity or defense of the right if from the way of expression or from other circumstances, it follows that it was not done with the intention of disparagement or if the person proves the truth of his claim or that he had a well-founded reason to believe in the truth of what he stated or conveyed. It is a question of grounds which, interestingly, are identical for both criminal offenses, and from which certain ambiguities also arise.

It can be seen that there are two grounds for the exclusion of illegality. The first, a complex one, refers to the fact that the offensive expression or conveyance of something untrue was done in a scientific, professional,

²⁹ These were the reasons for criminalizing defamation of religion and beliefs in the criminal legislation of the Netherlands (Van Noorloos, 2014: 353 – 354).

literary, or artistic work, in the performance of a duty prescribed by law, a journalistic profession, political or other public or social activity or by the defense of some right (objective condition) if (subjective condition) from the way of expression or from other circumstances it follows that it was not done with the intention of disparagement. Therefore, the fulfillment of one objective and one subjective condition is required in order for the element of illegality to be excluded. What follows from the basis formulated in this way is that (among other things) something untrue can be stated/ conveyed if it is founded that there was no intention to disparage. There are views that in such cases i.e. in the area of freedom of expression in a scientific, literary, or artistic work, *“advantage is on the side of the general interest...”*, because *“... it is in the general interest to enable creative freedom and freedom of journalistic expression”* (Bojanić, 2003: 21). The second ground for the exclusion of illegality is based on proving the truthfulness of the statement of the one who states/conveys something or the existence of a well-founded reason for the person to believe in the truth of what he/she stated/conveyed.³⁰ In theory, these formulations are also known as *“proof of truth”* and *“proof of good faith”*. In this regard, if the accused would prove that what he was stating/conveying was true, the essence of the criminal offense in question would not have been realized, and if there was a well-founded reason to believe in the truth of the content, he would be acting in an “irreparable” mistake of fact, which would exclude premeditated action. It seems that these grounds are not applicable concerning the individual criminal offenses to which they relate. Thus, the (un)truthfulness of the content is not relevant to the existence of the criminal offense referred to in Article 208b. Objections can also be made regarding the criminal offense of defamation. Here, in view of the subjective element present in the criminal offense in question, which implies knowledge that what is being stated/conveyed is not true, we do not see how it could be proved, for example, truthfulness of content.³¹

³⁰ The Serbian legislator, in relation to the criminal offense Disclosure of personal and family circumstances (Art. 172), provided that the perpetrator will not be punished in cases where it was done in the performance of official duties, a journalist’s profession, in defense of some right or in the protection of legitimate interests, if he proves the truth of his claim or if he proves that he had a well-founded reason to believe in the truth of what he stated or conveyed, see Criminal Code of the Republic of Serbia, Official Gazette of the RS, No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019. In contrast to culpability, the Croatian legislator provides the exclusion of illegality. It is important to point out that the grounds for excluding illegality or criminality are not unified for all criminal offenses against honor and reputation in these criminal legislations.

³¹ In the Croatian criminal legislation, at one time, as a basis for abolishing the provision on the exclusion of illegality with regard to the criminal offense of defamation, it was stated that the exclusion of illegality also represents the right to such behavior and, in connection with that, also consciously stating/conveying untrue content (Bojanić, 2003:10).

This ground for exclusion of illegality is suitable, for example, in the case of a lighter form of defamation, the so-called “gossip” where the perpetrator does not know whether what is being stated/conveyed is true or not (Novoselec, 2003: 304 - 305; Bojanić, 2003: 18 et seq.), which criminal offense does not exist in our criminal legislation.

Prosecution of crimes against honor and reputation

Prosecution of the criminal offenses of Defamation and Disclosure of personal and family circumstances is a provision that is procedural in nature. It is prescribed that the prosecution of these criminal offenses should be based on a motion (Art. 208d para. 1). Hence, it was not possible to prosecute without a prior motion from the injured party,³² which is primarily a feature of criminal offenses that are considered lighter. In addition to the above, in the case of criminal offenses against honor and reputation, one reason is additionally expressed, namely that they primarily affect the injured party (e.g. the defamed person, and not the wider circle of people).³³ The injured party makes a proposal if he is alive, and if this was done against a deceased person, the prosecution will be undertaken at the proposal of a spouse or a person who lived with the deceased in a permanent extramarital union, relatives in the direct line, adoptive parents, adoptees, brothers or sisters of the deceased person (Art. 208d para. 2).

Criminal sanctions

There are two criminal sanctions for crimes against honor and reputation. In addition to a fine as the only penalty, a special measure of public judgment for criminal offenses against honor and reputation. By prescribing a fine, the legislator remained in the domain of compliance with international standards that govern this area, which do not recommend prescribing a prison sentence for

³² The proposal is submitted to the competent prosecutor (within three months from the day when the injured party, i.e. one of the aforementioned persons became aware of the criminal offense and the perpetrator of the criminal offense, see Article 46g of the Law on Criminal Procedure of the Republic of Srpska, Official Gazette of the RS, No. 53/2012, 91/217, 66/2018, 15/2021 and 73/23.

³³ Rightfully also Milan Škulić, see Škulić, M. (2023, March 26) Freedom of speech should not be a license to tell lies, available at: <https://www.politika.rs/sr/clanak/544795/sloboda-govor-lazi>, accessed on 23.08. 2023.

these crimes.³⁴ Fine is determined according to the system of fines in a fixed amount which is primary in our criminal legislation (Art. 49 para. 1).³⁵ It is interesting to note that the legislator has prescribed identical fines for the criminal offenses of Defamation and Exposure of personal and family circumstances (for the basic form from 1,000 BAM to 3,000 BAM, for more serious form from 2,000 BAM to 5,000 BAM and for the most serious form from 3,000 BAM to 6,000 BAM), while for criminal offense under art. 208v), a fine in the amount of 2,000 BAM to 6,000 BAM is provided for. It is a step forward in public thinking to notice that proposals made at public discussions related to the ranges of fines that can be imposed are validated (which were Draconian before that),³⁶ so it can be pointed out that fines are now proportional to the severity of the criminal offense committed. Thus, the inconsistency reflected in the fact that prosecution of criminal offences that can be qualified as felonies, must be motioned first.

Prescribing a fine necessarily raises the question of its substitution for a prison sentence and, in connection with that, the indirect possibility of applying this penalty for criminal offenses against honor and reputation. According to the current legal solution, this is possible. Namely, it is provided that the court will first order the enforcement of a fine that has not been paid (in whole or in part) within a certain period (maximum 1 year), and if the fine is not collected even through enforcement within one year, the court will decide to replace a fine with a prison sentence in such way that every 100 BAM is replaced by one day of imprisonment, with the fact that the imprisonment in this case can last no longer than 2 years (Art. 50 para. 2).

³⁴ The UN Human Rights Committee in its General Comment No. 34 in connection with Art. 19 of the International Covenant on Civil and Political Rights stated, among other things, that with regard to the criminal offense of defamation "...a prison sentence is never an appropriate punishment..."; see Human Rights Committee, General comment No. 34, United Nations: Geneva 11-29 July 2011, <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>, accessed on 21.08.2023. In the German criminal legislation, a fine or a prison sentence of up to 2 years is provided for the basic form of defamation, and for qualified defamation a fine or a prison sentence of up to 5 years (Art. 187), <https://dejure.org/gesetze/StGB/187.html>, accessed on 24.08.2023.

³⁵ In addition to the above, the Criminal Code of the Republic of Srpska in the same provision provides for the possibility of imposing a fine according to the system of daily amounts.

³⁶ In the Draft Law on Amendments to the Criminal Code of the Republic of Srpska, the following fines were prescribed for the criminal offense of Defamation: for the basic form from 8,000 BAM to 30,000 BAM, for the more serious form from 15,000 BAM to 80,000 BAM, and for the most serious form from 20,000 BAM to 100,000 BAM, for the criminal offense Disclosure of personal and family circumstances for the basic form from 10,000 BAM to 40,000 BAM, for the more serious form from 20,000 BAM to 100,000 BAM, while for the most serious form of this criminal offense, a fine in the amount of 25,000 BAM to 120,000 BAM was prescribed. A fine in the amount of 20,000 BAM to 100,000 BAM was prescribed for the criminal offense of Public exposure to humiliation due to belonging to a certain race, religion or nationality. Criticism of fines in these amounts, based on the preservation of the existence of potential perpetrators of criminal offenses, seems justified. The prevention that would be achieved by adopting such solutions would probably lead to self-censorship as a materialization of the fear of threatened punishments.

Public judgment, in the context of criminal offenses against honor and reputation, is a traditional measure that is imposed in cases of a more serious kind, i.e. if the criminal offense was committed through the press, radio, television, computer system, or computer network or other means of public information or communication, and it is imposed cumulatively with a fine. It is noted that the legal provision stipulates that the verdict will be published at the expense of the perpetrator of the criminal offense (Art. 208đ, para. 1). The aporia that appears in connection with this measure is immediately visible. Namely, it is interesting that in the criminal legislation of the Republic of Srpska, the publication of the verdict is a security measure for legal entities (Art. 116),³⁷ so if it is a security measure aimed at this category of perpetrators of criminal offenses, for its imposing it is necessary to determine the connection of the individual perpetrator of a criminal offense with a legal entity in terms of the ground of liability of a legal entity (e.g. facilitating the execution of a criminal offence, failure to supervise the legality of work, etc.).³⁸ In that case, it is a security measure for this category of perpetrators of criminal acts. However, if it is about the responsibility of only an individual person (e.g. a legal person has been led into an irrevocable mistake), it turns out that, in the context of these incriminations, the emphasis is on a special measure aimed at the individual as the perpetrator of the criminal offense, which is not a security measure because it is not provided for as such in the Criminal Code. In this regard, it could be said that the Public announcement of the verdict has a dual nature depending on who appears as the perpetrator of the criminal act. The legislator prescribed that the manner of publishing the verdict was left to the court; and the court will always determine, whenever possible, that it will be in the same means of public information or communication in which the criminal offense was committed, in the same format and duration in relation to the act of execution (Art. 208đ, para. 2). The significance of the measure formulated in this way stems from the fact that its application achieves justice for the victim of a criminal offense against honor and reputation (it is not desirable the presented/conveyed content that injures the honor and reputation of the injured party to be published, for example, on the front page of a newspaper, and content of a rehabilitative nature, e.g., on the fifth page, regardless of whether it is a denial or a conviction).

³⁷ In Serbian criminal legislation, the public announcement of the verdict is also a security measure that can be imposed for any person upon conviction for (inter alia) a criminal offense committed through means of public information (Art. 89 para. 1 of the Criminal Code of Serbia).

³⁸ A legal person is responsible for a criminal offense committed by the perpetrator on behalf of, for the account of, or for the benefit of a legal person: when the features of the committed criminal offense result from the decision, order or approval of the management or supervisory bodies of the legal person, or when the management or supervisory bodies of the legal person influenced the perpetrator or enabled him to commit a criminal offense, when a legal entity disposes of illegally obtained property benefits or uses objects resulted from a criminal offense or when the management or supervisory bodies of the legal entity failed to supervise the legality of the work of the employee (Art. 105).

Conclusion

It is visible that the legislator in the Republic of Srpska, through the amendment of the Criminal Code, decided, *inter alia*, to intervene in the area of honor and reputation protection, which, in accordance with expectations (this is an area that is largely open to criticism), produced appropriate reactions, with plenty of pro and contra arguments. Consequently, in the Republic of Srpska, the legal protection of honor and reputation is partially parallel. These values are protected by the norms of both civil and criminal (including misdemeanor law) law. In this regard, the legislator decided that Insult remains in the domain of misdemeanor law (Insult) (which is perhaps the most appropriate solution considering the essence of incrimination from the Draft Law on Amendments to the Criminal Code), while at this moment Defamation is present as a criminal offense and as a civil tort. When it comes to civil law protection, which is considered adequate according to certain modern understandings, it is noted that in this area protection of honor and reputation is also provided regarding negligent behavior, which makes it more severe than in criminal law. In terms of criminal protection, the substance of criminal offenses is formulated in the usual way, while the sanctions of the criminal legislation of the Republic of Srpska are not set in the ranges that would qualify them as draconian. Nevertheless, it is important to point out that, although the only punishment for these criminal acts is fine and considering the prescribed possibility of replacing it with a prison sentence, the prison sentence can also be applied to the perpetrators of these criminal offences.

Finally, it should be pointed out that, in contrast to the undertaking of criminal prosecution (which is carried out according to the proposal), the grounds for the exclusion of illegality in these criminal offences could still be arranged in a slightly different way. Considering the fact that, when the incriminations are analyzed in more detail, they refer to two quite different criminal offences, it is not the most appropriate solution to make them uniform. This is due to the fact that some of them (as seen) can hardly be applied in terms of the incriminations to which they refer. Therefore, it would be more appropriate if the grounds for exclusion of illegality refer to a specific criminal offense, which would avoid difficulties in their application.

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Krivična djela protiv časti i ugleda u svjetlu novele Krivičnog zakonika Republike Srpske

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Pitanje (de)kriminalizacije ponašanja kojima se povređuju, odnosno ugrožavaju čast i ugled jedno je od značajnijih u savremenom krivičnom pravu. Zahtjev za dekriminalizacijom proizilazi iz normi međunarodnog prava, a počiva na postulatu prava na slobodu misli i izražavanja. Međutim, nepovredivo je i pravo čovjeka na zaštitu časti i ugleda, a koje predstavlja osnov kriminalizacije. Zbog toga i nije jednostavno pronaći balans u ostvarenju ovih prava. Ona su suprotstavljena iz čega proizilazi opasnost da pretjerano pružanje zaštite jednom od njih narušava ono drugo. Uobičajeno je shvatanje da se savremena krivična zakonodavstva kreću u pravcu dekriminalizacije ovakvih ponašanja. Naš zakonodavac se opredijelio za suprotno rješenje. Pri tome se ne radi o rješenju koje do sada nije bilo zastupljeno u krivičnom zakonodavstvu Republike Srpske, jer su krivična djela protiv časti i ugleda postojala do 2002. godine i njihove dekriminalizacije. U članku se apostrofira zaštita časti i ugleda u svjetlu posljednje novele Krivičnog zakonika Republike Srpske.

KLJUČNE RIJEČI: čast i ugled, krivično djelo, ljudska prava.

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