

Decision Enacting the Law on Protection Against Defamation of the Federation of Bosnia and Herzegovina

In the exercise of the powers vested in the High Representative by Article V of Annex 10 (Agreement on Civilian Implementation of the Peace Settlement) to the General Framework Agreement for Peace in Bosnia and Herzegovina, according to which the High Representative is the final authority in theatre regarding interpretation of the said Agreement on the Civilian Implementation of the Peace Settlement; and considering in particular Article II.1.(d) of the last said Agreement, according to the terms of which the High Representative shall “Facilitate, as the High Representative judges necessary, the resolution of any difficulties arising in connection with civilian implementation”;

Recalling paragraph XI.2 of the Conclusions of the Peace Implementation Conference held in Bonn on 9 and 10 December 1997, in which the Peace Implementation Council welcomed the High Representative’s intention to use his final authority in theatre regarding interpretation of the Agreement on the Civilian Implementation of the Peace Settlement in order to facilitate the resolution of any difficulties as aforesaid “by making binding decisions, as he judges necessary” on certain issues including (under sub-paragraph (c) thereof) “measures to ensure implementation of the Peace Agreement throughout Bosnia and Herzegovina and its Entities”;

Noting that since its inception, the Peace Implementation Council has consistently acknowledged that freedom of

expression is an essential step in developing democratic institutions and serves as a cornerstone of democracy;

Recalling that the Peace Implementation Council in the Madrid Declaration of December 1998 noted the need for coordination in the creation of a supportive legal framework required to allow journalists to work professionally, independently and with security and supported the efforts by the High Representative and the Organisation for Security and Cooperation in Europe to protect and promote media freedom;

Bearing in mind that consistent with the exhortations of the Peace Implementation Council and as a result of the failure of both State and Entity officials to adopt appropriate legislation to protect journalists' freedom of expression and movement, the High Representative issued the Decision on Freedom of Information and Decriminalising of Libel and Defamation (O.G. Bosnia and Herzegovina No 14/99);

Further bearing in mind that the said Decision suspended, in the Entities' criminal codes, the sanction of imprisonment for defamation, libel and slander and required both Entities to adopt the necessary legislation to create civil remedies therefor in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms and further required both Entities to repeal the relevant criminal provisions once the civil legislation was adopted;

Noting that the Peace Implementation Council in the Annex to its Declaration of May 2000 demanded that the authorities of Bosnia and Herzegovina act promptly to adopt legislation that supports the public's right to access and impart information, namely, Freedom of Access to Information and Defamation laws;

Recalling that subsequent to the said Decision, a joint working group consisting of national and international experts jointly led by the Organisation for Security and Cooperation in Europe and the Office of the High Representative, created

draft laws for both Entities on protection against defamation;

Recalling that the resulting draft legislation was discussed and adopted by the Republika Srpska National Assembly in July 2001 (O.G. Republika Srpska No 37/01) but that despite having progressed through the Parliament of the Federation of Bosnia and Herzegovina to the proposed law stage, the draft legislation was not adopted;

Noting that several meetings over the last ten (10) months between members of the Government of the Federation of Bosnia and Herzegovina, the Federation Ombudsman, the Office of the High Representative and the Organisation for Security and Cooperation in Europe regarding revitalising the legislative process on the draft law resulted in the Government adopting the said Law;

Further noting that the Parliament of the Federation of Bosnia and Herzegovina failed to adopt the legislation as adopted and forwarded to it by the Government;

Recalling that both the above referenced Ombudsman and the Coordination of the Associations of Journalists in Bosnia and Herzegovina publicly called for the adoption of the draft law in the Federation of Bosnia and Herzegovina;

Considering the unacceptable legal discrepancy between the Entities with regard to the criminality of defamation and the resulting discrimination against residents of the Federation of Bosnia and Herzegovina;

Acknowledging the recent efforts of the Entities to establish equality through constitutional amendments and noting that it is unacceptable to allow residents of the Federation of Bosnia and Herzegovina to be disadvantaged in relation to the residents of Republika Srpska;

Having taken into account and considered the totality of the matters aforesaid, the High Representative hereby issues the

following:

DECISION

Enacting the Law on Protection Against Defamation of the Federation of Bosnia and Herzegovina.

The Law on Protection Against Defamation of the Federation of Bosnia and Herzegovina as hereinafter set out and which forms an integral part of the Decision herein is hereby enacted.

The said Law shall enter into force pursuant to Article 17 thereof but on an interim basis, until such time as the Parliament of the Federation of Bosnia and Herzegovina adopts the same in due form, without amendment and with no conditions attached.

This Decision shall come into force forthwith and shall be published without delay in the Official Gazette of the Federation of Bosnia and Herzegovina.

Sarajevo, 1 November 2002

*Paddy Ashdown
High Representative*

LAW ON PROTECTION AGAINST DEFAMATION OF THE FEDERATION OF BOSNIA AND HERZEGOVINA

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Article 1

Purpose of the Law

This Law regulates civil liability for harm caused to the reputation of a natural or legal person by the making or disseminating of an expression of false fact identifying that legal or natural person to a third person.

Article 2

Principles Ensured by the Law

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

a) the right to freedom of expression, as guaranteed by the Constitution of the Federation of Bosnia and Herzegovina and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette of Bosnia and Herzegovina, number 6/99), which constitutes one of the essential foundations of a democratic society, in particular where matters of political and public concern are involved;

b) the right to freedom of expression as it protects both the

contents of an expression as well as the manner in which it is made, and is not only applicable to expressions that are received as favorable or inoffensive but also to those that might offend, shock or disturb;

c) the essential role of media in the democratic process as public watchdogs and transmitters of information to the public.

Article 3

Interpretation

This Law shall be interpreted so as to ensure that the application of its provisions maximizes the principle of the freedom of expression.

Article 4

Definitions

The terms used in this Law have the following meanings:

a) expression – any statement, especially any oral, written, audio, visual or electronic material regardless of its content, form or manner of making or dissemination;

b) public authority – body, or in other words a legal person, in the Federation of Bosnia and Herzegovina (hereinafter Federation) as follows:

- body of legislative authority,
- body of executive authority,
- body of judicial authority,
- administrative body,
- legal body with a public competency established by law,

– legal person which is owned or controlled by Federation, canton, municipality or town or whose work is controlled by a public authority;

c) public official – any person who is employed by a public authority;

d) defamation – the act of harming the reputation of a natural or legal person by making or disseminating an expression of false fact identifying that natural or legal person to a third person.

Article 5

Scope of the Law

1. This Law applies to any request for compensation of harm for defamation, regardless of how the request is characterized.

2. Public authorities are barred from filing a request for compensation of harm for defamation.

3. Public officials may file a request for compensation of harm for defamation privately and exclusively in their personal capacity.

Article 6

Liability for Defamation

1. Any person who causes harm to the reputation of a natural or legal person by making or disseminating an expression of false fact identifying that legal or natural person to a third person is liable for defamation.

2. For defamation made through media outlets the following are jointly responsible: author, editor, or publisher of the expression or someone who otherwise exercised control over its contents.

3. A person referred to in paragraphs 1 and 2 of this Article (hereinafter: a person who allegedly caused harm) is responsible for the harm if they willfully or negligently made or disseminated the expression of false fact.

4. Where the expression of false fact relates to a matter of political or public concern, a person who allegedly caused harm is responsible for the harm caused in making or disseminating the expression if he or she knew that the expression was false or acted in reckless disregard of its veracity.

5. The standard of responsibility in paragraph 4 of this Article also applies where the injured person is or was a public official or is a candidate for public office, and exercises or appears to the public to exercise substantial influence over a matter of political or public concern.

6. Where the expression of false fact identifies a deceased person, the first-degree heir of that person may bring a request under this Law, under the condition that the expression caused harm to the reputation of the heir.

Article 7

Exemptions from Liability

1. There shall be no liability for defamation where:

a) by the expression an opinion was made, or if the expression is substantially true and only false in insignificant elements;

b) the person who allegedly caused the harm was under a statutory obligation to make or disseminate the expression, or made or disseminated the expression in the course of legislative, judicial or administrative proceedings;

c) the making or dissemination of the expression was reasonable.

2. In making such a determination for reasonableness as determined by paragraph 1(c) of this Article, the court shall take into account all circumstances of the case particularly:

- the manner, form and time of the making or dissemination of the expression,
- the nature and degree of harm caused,
- good faith and adherence to generally-accepted professional standards by the person who allegedly caused the harm,
- consent by the allegedly injured person,
- the likelihood that the harm would have occurred had the expression not been made or disseminated,
- whether the expression constitutes a fair and accurate report of the expressions of others, and
- whether the expression concerns a matter of the allegedly injured person's private life, or involves a matter of political or public concern.

Article 8

Obligation to Mitigate Harm

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.

Protection of Confidential Sources

Article 9

1. A journalist, and any other natural person regularly or professionally engaged in the journalistic activity of seeking, receiving or imparting information to the public, who

has obtained information from a confidential source has the right not to disclose the identity of that source. This right includes the right not to disclose any document or fact which may reveal the identity of the source particularly any oral, written, audio, visual or electronic material. Under no circumstances shall the right not to disclose the identity of a confidential source be limited in proceedings under this Law.

2. The right not to disclose the identity of a confidential source is extended to any other natural person involved in proceedings under this Law who, as a result of his or her professional relationship with a journalist or other person referred to in paragraph 1 of this Article, acquires knowledge of the identity of a confidential source of information.

Article 10

Compensation

1. Compensation shall be proportional to the harm caused and shall be awarded solely with the purpose of redressing the harm. In making a determination of compensation, the court is obliged to have regard for all of the circumstances of the case particularly any measures undertaken by the 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;
- whether the person who allegedly caused the harm gained any monetary profit by making or disseminating the expression; and
- whether the amount of damages awarded would likely result in severe financial distress or bankruptcy for the person who allegedly caused the harm.

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

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

Article 11

Amicable Settlement

As soon as the court estimates that the conditions have been met, the court shall examine whether the parties can reach an amicable settlement.

Limitation Periods

Article 12

1. The limitation period for filing a request for compensation of harm under this Law is three (3) months from the date that the allegedly injured person knew or should have known of the expression of false fact and the identity of the person who allegedly caused the harm, and shall in any event not exceed one (1) year from the date that the expression was made to a third person.

2. Should the allegedly injured person die after the commencement but before the disposal of the proceedings, his

or her first-degree heir may continue the proceedings on behalf of the deceased if the heir files a request to the court, within three (3) months from the date of the death of the allegedly injured person, that he or she wishes to continue the proceedings.

Article 13

Competent Court

For requests for compensation of harm caused by defamation made in media, the Cantonal Courts shall be competent.

Article 14

Efficacy of the Court Protection

1. Procedures in the disputes for compensation of damage caused by defamation made in media pursuant to this Law shall be considered urgent.

2. The competent court shall initiate the proceedings for the compensation of harm caused by defamation in media within thirty (30) days from the day the request was received.

Article 15

Relationship of this Law with other Laws

With regard to the issues that are not regulated by this Law, the adequate provisions of the law that regulates obligations, the Code of Civil Procedure ("Official Gazette of the Federation of BiH", number 42/98 and 3/99), and the law by which the executive procedure is regulated in the Federation of Bosnia and Herzegovina shall be applied.

Article 16

Transitional Provisions

1. Any criminal proceedings commenced under Chapter XX,

Criminal Offences Against Honour and Reputation (Articles 213 through 220) of the Criminal Code of the Federation of Bosnia and Herzegovina prior to the entry into force of this Law shall be dismissed.

2. Upon the entry into force of this Law, any criminal sanction for legally valid verdicts issued pursuant to the above referenced articles of the Criminal Code of the Federation of Bosnia and Herzegovina shall not be executed.

3. An allegedly injured person shall have a right to, within three (3) months from the day of the dismissal of the criminal proceedings referred to in paragraph 1 of this Article or from the day of the dismissal of the execution of the sanctions referred to in paragraph 2 of this Article, file a request for compensation of harm under this Law, if such a request satisfies the requirements prescribed by this Law.

4. Civil procedure that relates to the matter regulated by this Law that has been commenced and not disposed in a legally valid manner upon the date of the entry into force of this Law shall be continued in accordance with the law that was in force at the time when the proceeding was commenced if it is not detrimental to defendant.

Article 17

Entry Into Force and Publication

This Law shall enter into force one (1) day after its publication in the Official Gazette of the Federation of Bosnia and Herzegovina.