

SANCTIONING THE VIOLATION OF DECISIONS ON THE PROHIBITION OF STATING FAKE NEWS AND THE SPREAD OF PANIC RELATED TO THE COVID-19 VIRUS IN BOSNIA AND HERZEGOVINA – PROBLEM OF APPLICATION AND PROVING IN MISDEMEANOR PROCEEDINGS

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Abstract: The author deals with the sanctioning for violating decisions on the prohibition of stating false news and spreading panic related to the COVID-19 virus, adopted by the authorities in Bosnia and Herzegovina (BiH). In this regard, the author first points out the shortcomings of these decisions both in terms of nomotechnics and in terms of non-compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHRFF). Through a review of several misdemeanour proceedings in which these decisions were applied, the author tends to point out how the poor formulation of the provisions of these decisions created problems for the police in their application. The author wants to address the problem of proving the offences of stating and dissemination of fake news and spreading panic in misdemeanour proceedings in BiH, which is caused by inadequate regulation as well as the lack of adequate training of police officers related to providing of evidence for spreading fake news.

Keywords: fake news, causing panic, COVID-19, misdemeanours, sanctions, proving

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INTRODUCTION

Since the beginning of the crisis with the COVID-19 virus at the level of BiH various levels of government have issued decisions, decrees and orders banning the stating or transmission of false news that are unfounded in the Constitution of BiH, entity constitutions and the Brcko District Statute, and in direct conflict with the ECHRFF and the case law of the European Court of Human Rights (ECHR) when it comes to freedom of opinion and expression. The formulations used in these decisions, orders, or ordinances are too general and too broad, which creates space for abuse and arbitrary restriction of freedom of opinion and expression, especially when it comes to online interactions. Based on the analysis of the texts of the provisions of these decisions, which are presented below, we can see that no precise criteria have been set for what is meant by terms used such as fake news, claims, panic or serious disturbance of public order or peace. What should be pointed out here is that in some cantonal Laws on Public Order and Peace at the level of the Federation of BiH there are misdemeanours concerning the dissemination of false news and in the part related to the meaning of terms in these laws definitions of false news are given. However, at the level of the Republic of Srpska and the Brcko District of BiH, where such decisions have been made by the state authorities, the same has not been done. Regarding the quality of the provisions prescribed by these acts, they should be accessible and predictable, i.e. precise enough to give citizens the opportunity to anticipate what will be considered, in this case, a misdemeanour, so that they can align their behaviour with it (Išerić, 2020:32). Also, it should be noted here that at the level of the Federation of BiH there was an initiative of the Federal Ministry of Interior to enact a decree with legal force introducing a ban on stating or transmitting false news or allegations, with more or less the same formulation as in Republic of Srpska, but this decree was not adopted.

In a number of cases in which the police issued misdemeanour warrants, i.e. submitted a request to initiate misdemeanour proceedings acting on these decisions, these were posts on social networks, which have absolutely nothing to do with spreading panic or disturbing public order or disturbing the work of authorities organs. We note that criticisms of the authorities enjoy protection within the meaning of Article 10 paragraph 2 of the ECHRFF. In this regard, in the next part of the paper, the provisions of these decisions will be presented first, while after that, individual cases will be presented in which they were applied, i.e. when citizens were sanctioned for violating them in which the misdemeanour liability is not proven beyond a reasonable doubt. The cases presented in this paper were collected during the research for the requirements of the "Study of mapping institutional human rights violations in BiH", which was made within the project "Contribution of the academic community to human rights in BiH", conducted by the University of Business Engineering and Management Banja Luka and the Association for Democratic Initiatives (ADI) Sarajevo, with the financial support of the European Union, in the period from January 2021 to December 2022.

DECISION ON PROHIBITION OF CAUSING PANIC AND RIOTS DURING THE EMERGENCY SITUATION AND DECREE ON PROHIBITION OF CAUSING PANIC AND RIOTS DURING THE STATE OF EMERGENCY OF THE GOVERNMENT OF THE REPUBLIC OF SRPSKA

At the proposal of the Ministry of Internal Affairs of the Republic of Srpska, on March 19, the Government of the Republic of Srpska adopted the Decision on the Prohibition of Panic and Riots during the Emergency Situations (Decision), and then, Decree with legal force on the prohibition of causing panic and disorder during a state of emergency (Official Gazette of Republic of Srpska, No. 32/2020 (Decree).



Item 2 of the Decision stipulates that: *“During the emergency situation referred to in item I of this Decision, it is prohibited to present or transmit false news or allegations that cause panic or seriously disturb public order or peace or significantly hinder the implementation of decisions and measures of state bodies and organizations exercising public authority (paragraph 1). The prohibition referred to in paragraph 1 of this item shall also apply to actions committed through the media, social networks or other similar means (paragraph 2).”* Item III of this decision prescribes sanctions for acting contrary to the prohibition from item 2 of this decision in a way that will be punished with: *„a fine in the amount of 1000 KM to 3000 KM for a natural person who acts contrary to the above provision, or a fine in the amount of 3000 KM up to 9000 KM for a legal entity, and 1000 KM up to 3000 KM for a responsible person in the legal entity who acts contrary to the above provision“.* Item IV of this decision obliges the Ministry of Internal Affairs of the Republic of Srpska to implement it.

Article 1 of the Decree stipulates that: *“This decree with legal force prescribes the prohibition of disturbing public order and peace by causing panic and disorder during the state of emergency for the Republic of Srpska and misdemeanour sanctions imposed on the perpetrators of misdemeanours.”* Also, Article 2 of the Regulation stipulates that: *“It is prohibited to present or transmit false news or allegations that cause panic or seriously disturb public order or peace or prevent or significantly impede the implementation of decisions and measures of state bodies, other institutions and organizations engaged in public powers (paragraph 1). The prohibition referred to in paragraph 1 of this Article shall also apply to actions committed through the media, social networks or other similar means (paragraph 2).”* Article 3 of this Regulation prescribes the same sanctions as item 2 of the Decision. Apart from slight linguistic differences, there are no significant differences in the content of the Decision and the Decree. The biggest difference is that the Regulation has a greater legal significance compared to the Decision which was thus withdrawn (Halilović & Džihana, 2020:4).

The adoption of the said Regulation led to the reaction from a number of international and domestic human rights organizations, who commented on the regulation and stated that such a regulation could lead to censorship and self-censorship, as well as arbitrary and disproportionate penalties, which could violate media freedom and the basic human right to freedom of expression. The authorities of the Republic of Srpska first limited the application of the Decree only to cases that come upon the application of citizens and excluded the application *ex officio* of the Ministry of Internal Affairs of the Republic of Srpska. On April 16, 2020, at the proposal of the Ministry of Internal Affairs of the Republic of Srpska, the Government of the Republic of Srpska adopted the Proposal of the Decree with legal force on termination of the Decree with legal force on banning panic and riots during the state of emergency, after which it was sent to the President of the Republic of Srpska for adoption. The published statement of the Ministry of Internal Affairs of the Republic of Srpska pointed out that the Decree on Prohibition is being withdrawn because *“citizens complied with the measures and instructions of the competent authorities”* and that they *“informed themselves about the epidemiological situation through official notifications from the competent institutions”*. It was also announced that *“in accordance with this, the Ministry of Internal Affairs of the Republic of Srpska will withdraw all misdemeanour warrants previously issued in accordance with the Decree with legal force on the prohibition of causing panic and riots during a state of emergency, as well as the Decision on prohibition of causing panic and riots during the emergency situation on the territory of the Republic of Srpska, which was put out of force by the Government of the Republic of Srpska on April 3, 2020”* (<https://mup.vladars.net/lat/index.php?vijest=23281&vrsta=novosti>, accessed on May 05, 2021).



ORDER ON PROHIBITING PUBLIC DISCLOSURE AND TRANSMISSION OF FALSE INFORMATION REGARDING THE CORONA VIRUS OF THE CRISIS STAFF OF THE BRČKO DISTRICT OF BOSNIA AND HERZEGOVINA

On March 21, 2020, the Crisis Staff of the Brčko District of BiH issued an Order on prohibiting the public disclosure and transmission of false information regarding the corona virus (Official Gazette of the Brčko District of BiH, No. 15/2020). Article 1 of the said Order stipulates: “all representatives and employees of public institutions of the Brčko District of Bosnia and Herzegovina, as well as all citizens of the Brčko District of Bosnia and Herzegovina, shall be prohibited from publicly presenting and transmitting false news and information related to the corona epidemic viruses and which can cause fear and panic in the population or otherwise negatively affect the implementation of measures to protect the population from the epidemic. Article 2 of the said Order stipulates that: “*public disclosure and transmission of false information referred to in Article 1 of this Order means the release of such information through the media, social networks, as well as any other means of disseminating such information*”. Article 3 of the mentioned Order stipulates that: “*acting contrary to this order will be considered a violation in terms of Article 10 of the Law on Public Order and Peace of the Brčko District of BiH (Official Gazette of the Brčko District of BiH, No. 32/2009 and 14/2010 - corr.), and criminal charges will be processed in terms of Article 222 of the Criminal Code of the Brčko District of Bosnia and Herzegovina (Official Gazette of the Brčko District of BiH, No. 19/2020 - consolidated text), and in the case of official actions to be performed by the competent authorities, then in terms of Article 363 paragraph (2) of the Criminal Code of the Brčko District of Bosnia and Herzegovina*”. Analyzing the content of the above provisions, it should be noted that, unlike the Order of the Government of the Republic of Srpska, the Order of the Crisis Staff of the Brčko District of BiH prescribes that violation of the Order is treated as a violation of public order and peace, but also as a criminal offense, provisions similar to the Republic of Srpska Order.

ANALYSIS OF THE SANCTIONING OF VIOLATIONS OF THE DECISION AND THE DECREE IN THE REPUBLIC OF SRPSKA

- 1) In the procedure against one person where the Police of the Republic of Srpska issued a misdemeanor order against the defendant for violating the Decision. The misdemeanor order was issued because of her statement given to a media house in which she talks about health problems in Republic of Srpska, that there are not enough ventilators, beds or intensive care services, and for claims that Republic of Srpska is unprepared for the upcoming crisis. The person was accused of spreading false news and was ordered to pay a fine in the amount of 1000 KM. In this case, it is an opinion criticizing the work of the authorities which enjoying protection in terms of Article 10 of the ECHRFF and Article II3 (h) of the Constitution of Bosnia and Herzegovina (Annex IV of the General Framework Agreement for Peace in Bosnia and Herzegovina and “Official Gazette of BiH”, No. 25/2009 - Amendment I), and therefore there was no basis for misdemeanor sanctioning.
- 2) In the procedure against one person where the Police of the Republic of Srpska in March 2020 issued a misdemeanor warrant for violating the Decision because he posted the following text on his Instagram profile: “*You will kill us with the media and depression, not with the CORONA, stop talking anymore about that! Having three main TV news per day is too much! You brag that there is no virus in our city, in order to raise it above other cities in RS ..., and here you are hiding that one person has*”



been tested and infected and has been in house quarantine for 7 days now. Since you do that, we don't need such fake media, you do everything politically, not for people's health! If it was for our health, we would have closed everything for 28 days a long time ago and finished with that! I am now appealing to our citizens to dispel depression and to stop talking about it more! Their goal is to destroy our economy and dull our brains, not to protect us ... Because I repeat, there is silence in our municipality (city) about positive tests!" The defendant was sentenced to a fine in the amount of 1000 KM. In this case, too, it is an opinion criticizing the work of authorities which enjoying protection in terms of Article 10 of the ECHRFF and Article II3 (h) of the Constitution of Bosnia and Herzegovina.

3) In the procedure against four persons in whom the Police of the Republic of Srpska, in April 2020, issued misdemeanour orders for violation of Article 2, paragraph 2 of the Decree. Namely, the defendants were charged with misdemeanour warrants for committing the aforementioned misdemeanour by: *"publishing false claims on their Facebook profiles in public groups XX that caused panic among citizens during the state of emergency, thus violating the Decree."* The defendants were fined 1000 KM each with the mentioned misdemeanour orders. Taking into account the way in which the factual description of the misdemeanour was given, we can say that it is incomplete and does not reflect the essence of this misdemeanour, because there are no alleged allegations based on whose analysis it could be determined whether they are false and lead to panic among citizens. Also, it is not stated in what way the claims of the defendants caused panic among the citizens. Accordingly, we are of the opinion that the misdemeanour orders conceived in this way imposed a penalty for something which according to what is stated in the factual description does not reflect all the elements of this misdemeanour.

4) In the procedure against one person in which the Republic of Srpska Police issued a misdemeanour order in March 2020 for violating paragraph 1 item 2 of the Decision. Namely, the defendant was charged with the misdemeanour order that he committed the aforementioned misdemeanour by: published the text: *"People, let us become aware and drive this out of power. Whoever stays in this CIRCUS state should be publicly shot. This is a mouldy state, etc."* The mentioned misdemeanour order imposed a fine of 1000 KM on the defendant. In the given case, the defendant expressed his opinion criticizing the government. Also, values such as "reputation/honour of the country or government", "reputation/honour of the nation", "state or other official symbols", "reputation / authority of public authorities" (except courts) are not provided for in paragraph 2 of 10 of the ECHRFF and, therefore, they do not constitute legitimate aims justifying a restriction on freedom of expression. Accordingly, we are of the opinion that in this case, by punishing this person for the given violation, a violation of his right to freedom of expression was committed.

5) In proceedings against three persons where the Police of the Republic of Srpska issued misdemeanour warrants with a fine of 1000 KM each for violating the Decision. One person was punished for posting a comment on social networks with a photo of several people gathering at a time when all public gatherings in Republic of Srpska were banned due to the epidemiological situation. The other person was punished because, after he was previously issued a misdemeanour order, he repeated the misdemeanour by publishing a text commenting on the work of the institutions of the Republic of Srpska and rudely insulting the representatives of state bodies. A third person was fined because he posted a photo on Facebook where he was drinking beer with the comment *"Where is that CORONA so I can breathe it?"* As in previous cases, this case is an opinion criticizing the work of authorities enjoying protection in terms of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article II3 (h) of the Constitution of Bosnia and Herzegovina, and by which the rights of others are not endangered nor public order and peace are disturbed, and therefore there are no grounds for misdemeanour punishment.



ANALYSIS OF THE SANCTIONING OF VIOLATIONS OF THE ORDER ON THE PROHIBITION OF PUBLIC DISCLOSURE AND TRANSMISSION OF FALSE INFORMATION RELATED TO THE CORONA VIRUS OF THE CRISIS STAFF OF THE BRČKO DISTRICT OF BOSNIA AND HERZEGOVINA

1) The procedure against one person in which the Police of the Brčko District of BiH in March 2020 submitted a request to initiate misdemeanour proceedings for a misdemeanour punishable under Article 10 of the Law on Public Order and Peace of the Brčko District of BiH, in connection with the Order. Namely, the defendant was charged with initiating misdemeanour proceedings by committing the aforementioned misdemeanour in such a way that: "In March 2020, in the area of the Brčko District of BiH, he violated public order and peace by exposing or transmitting false news, rumours or allegations. After the article published on the eBrčko portal entitled "Brčko: Ten people did not respect the curfew, the Chief of Police of the Brčko District of BiH GP at the conference", was registered on the social network Facebook as "A. A.", commented news with the following words: *"It's not that it's 10 but 110, and that's up to you, but you are ashamed to admit that you are incapable of performing a curfew. In our environment is like there is no curfew, I have never seen you come in order to check it or maybe I may not have understood maybe the curfew is only in the city and not in rural areas and it's all up to you"* and thus publicly presented and transmitted false news and information that are in any way related to the corona virus epidemic and that can cause fear and panic or otherwise adversely affect the implementation of measures to protect the population from the epidemic.

First of all, we emphasize that, in our opinion, only the adoption of such a provision, which criminalizes punishment for presenting and transmitting false news in a too broad and imprecise is contrary to Article 10 of the ECHRFF. Also, we are of the opinion that in the specific case the application of such a disputable provision further violated the right of this person to freedom of opinion and expression under Article II3 (h) of the Constitution of Bosnia and Herzegovina and Article 10 of the ECHRFF, for the factual situation described in request for misdemeanour proceedings does not constitute an act of the being of the aforesaid offense. Namely, Article 10 of the Law on Public Order and Peace of the Brčko District of BiH stipulates that this violation is committed by: "who presents or transmits false news, rumours or allegations that may cause harassment of citizens or endanger public order and peace". Based on the analysis of the factual description from the misdemeanour order, we can see that the action attributed to the defendant does not meet the elements of the essence of this misdemeanour, i.e. that the legal description of the violation does not correspond to the factual description. First, the breach of public order and peace is not a feature of the nature of this offense, and it is stated in the factual description. From the analysis of the legal text, we can see that the existence of this violation does not require that public order and peace be disturbed, but that it is news, rumours or allegations that may cause a threat to public order and peace. Due to this, the factual description itself is unreasonable and contradictory, because at the beginning of the factual description it is said that he violated public order and peace, but the part in which the violation of public order and peace is reflected is missing, while the last part of the factual description says that the content presented by the defendant could cause fear and panic among the population. Also, the factual description states that in this way he publicly presented and transmitted false news and information that are in any way related to the corona virus epidemic and that can cause fear and panic among the population or otherwise negatively affect the implementation of measures to protect the population from the epidemic. From the aspect of the nature of this offense, false news, rumours or allegations should be such that they may cause disturbance to citizens or endanger public order and peace. In this regard, the question arises as to whether the information provided by the defendant in the form of comments on the published news could cause such consequences. Also, as already pointed out in this paper, when evaluating the presentation



of untrue information, it is very important to take into account the purpose of presenting the same, so that it can be claimed that it is false news (news that aims to cause harm). In this case, the defendant expressed his opinion and his views, which primarily reflect the criticism of the work of state bodies. In this regard, we recall the case law of the ECHR, according to which it is not possible to prove whether someone's opinion, which represents the views or personal assessments of an event or situation, is true or not, and this basic segment of the right to freedom of expression enjoys the highest degree of protection and protection not only opinions that are favourably received or considered offensive or unresponsive, but also those that may offend, shock or disturb, which is a precondition for pluralism, tolerance, free-thinking, and which are essential for democratic society.

2) The procedure against one person in which the Police of the Brčko District of BiH, in March 2020, filed a request to initiate misdemeanour proceedings for a misdemeanour punishable under Article 10 of the Law on Public Order and Peace of the Brčko District of BiH, in connection with the Order. Namely, the defendant was charged for the aforementioned misdemeanour committed in the way that: "on a certain day in March 2020, in the area of the Brčko District of BiH, he violated public order and peace by presenting or transmitting false news, rumours or allegations on the occasion, he sent a message via the Viber application: *"Friends and relatives. Apologies for writing so late. Unfortunately, a case of corona virus has been confirmed in Bijela. 7 people arrived, 4 people were tested and all were positive. It would be good if someone had information who came to write everything. And spread further, please, until you see what and how in the morning"*, and in that way he spread false information about the infection of a certain number of people with corona virus from the area of Bijela, Brčko District of BiH, which caused anxiety among the citizens.

As in previous cases, the request to initiate misdemeanour proceedings was filed on the basis of the disputed order, which is in itself contrary to Article 10 of the ECHRFF. In addition, the factual description itself is contradictory and confusing in the sense of stating "disturbed public order and peace", because it is a consequence that is not foreseen in the essence of this violation. Then, in the last part of the factual description, it is stated that he caused the citizens to be disturbed by the actions he is charged with. The incrimination of the violation from Article 10 of the Law on Public Order and Peace of the Brčko District of BiH does not require that the harassment of citizens occurred by presenting false news, but the element of the nature of this violation is the possibility of harassment of citizens. However, if it has already been stated that the harassment occurred, it is not clear from the factual description what it is reflected in, as well as the causal link between the defendant's actions and the alleged harassment of citizens. We note once again that from the aspect of fake news, it is very important to take into account the intention of the person who places the news. Of course, intent is not prescribed as an element of the nature of this offense, but it is logical that in the actions of the defendant, in such situations it is monitored, otherwise there will be no difference between false news, which has malicious intent and false news that has no malicious intent (Katsirea, 2019:175). In a given case, the defendant places certain facts and asks for feedback. We remind you that the right to freedom of expression, in addition to the right to have one's own opinion, includes the freedom to receive and communicate information. Here we should also take into account the fact that during the crisis with COVID-19, the authorities were very briefly informed about the cases of infection by the authorities, which certainly had an impact on the appearance of such content. Finally, the defendant is charged with having committed the act via the Viber application, but the factual description does not show how many people the message reached, as well as whether it could have caused public harassment or disturbance of public order. All in all, the factual description does not reflect all the elements of the misdemeanour from Article 10 of the Law on Public Order and Peace of the Brčko District of BiH, and the procedure was initiated in connection with the disputed Order, which is why we believe that to be violation of the right to freedom of opinion.



CONCLUSION

Based on everything mentioned above, we can conclude that through the adoption of the Decision on the Prohibition of Panic and Disorder during the Emergency Situation in the Republic of Srpska, the Decree on the Prohibition of Panic and Disorder During the State of Emergency of the Government of the Republic of Srpska and the Order on the Prohibition of Public Disclosure and Transmission of False Information corona virus of the Crisis Staff of the Brčko District of BiH represent interference with the right to freedom of opinion and expression in BiH. The provisions of these acts sanctioning the presentation and dissemination of false news in connection with COVID-19 are given too broadly, without explaining the meaning, which significantly jeopardizes the right to predictability of the norm. Due to this state of affairs, there were problems in the application of these acts, in the way that they punished persons, i.e. initiated misdemeanour proceedings against them for the opinions expressed that enjoy the protection of the ECHRFF, or for the stated opinions that do not materialize these misdemeanours. In this regard, in order to prevent the unjustified punishment for spreading fake news through social networks in the future similar situations, we propose that provision makers should offer a much more precise definition of the meaning of fake news, on the one hand, and to organize specialized training for police officers on the other, to better understand the practice of the ECHR, as well as better providing establishing the factual status of such violations and providing evidence.

REFERENCES

1. Constitution of Bosnia and Herzegovina, (Annex IV of the General Framework Agreement for Peace in Bosnia and Herzegovina and Official Gazette of BiH, No. 25/2009 - Amendment I).
2. Criminal Code of the Brčko District of Bosnia and Herzegovina (Official Gazette of the Brčko District of BiH, No. 19/2020 - consolidated text)
3. Decree with legal force on the prohibition of causing panic and disorder during a state of emergency (Official Gazette of Republic of Srpska, No. 32, April 6, 2020).
4. Halilović, M. & Džihana, A. (2020). *Ograničavanje prava na slobodu izražavanja u BiH u toku trajanja pandemije COVID-19*.
5. <https://mup.vladars.net/lat/index.php?vijest=23281&vrsta=novosti>, Accessed on May 05, 2021.
6. Išerić, H. (2020). Koronavirus u pravnom poretku BiH: kratka dijagnoza bolesti, *Sveske za javno pravo*, br. 39, god. 11, Fondacija Centar za javno pravo, Sarajevo, 21-43.
7. Katsirea, I. (2019). "Fake news" reconsidering the value of untruthful expression in the face of regulatory uncertainty, *Journal of Media Law*, 10 (2), Taylor & Francis, 159-188.
8. Law on Public Order and Peace of the Brčko District of Bosnia and Herzegovina (Official Gazette of the Brčko District of BiH, No. 32/2009 and 14/2010 - corr.).
9. Order on prohibiting public disclosure and transmission of false information related to the corona virus (Official Gazette of the Brčko District of BiH, No. 15/2020).

