



MEMORANDUM

on

the Serbian Draft Criminal Code Criminal Offences against Honour and Reputation

by

**ARTICLE 19
Global Campaign for Free Expression**

**London
November 2004**

I. Introduction

This Memorandum examines provisions relating to defamation in the draft “Criminal Offences against Honour and Reputation” (draft Law), produced by a Serbian government working group and intended to replace the defamation provisions in the current Criminal Code. The analysis is based on a translation of the draft Law.¹

Our view is that criminal defamation provisions are deeply problematic from the point of view of the international law of freedom of expression. Because they provide for penalties for expression, which are in general vastly disproportionate to the harm caused by even genuinely defamatory expression, such provisions are subject to very considerable abuse. In particular, experience shows that they are employed time and again to shut down expression of which the powerful in politics and commerce merely disapprove.

¹ ARTICLE 19 accepts no responsibility for errors or inaccuracies in the analysis below attributable to misleading or mistaken translation.

The proposed provisions of the draft Law do nothing to allay these general concerns. Both “insults” and allegedly defamatory expressive acts are subject to considerable criminal penalties, enhanced in the event that they are transmitted through the mass media or otherwise made public. Insults need not even be false to attract liability. Critical remarks about the country or foreign countries, their flags or anthems, or even their coats of arms, could result in imprisonment. Comments about the personal lives of all, even of politicians and other public figures, even if in the public interest, may be made only at one’s peril. In short, the envisaged regime may be used as an effective tool for stifling public debate on issues of clear public interest, including the role and activities that Serbia itself plays in the region and the world.

These abstract concerns are confirmed dramatically by the actual situation on the ground in Serbia with respect to the existing criminal defamation regime. According to the government’s official figures, there were a total of 1263 convictions for defamation (under current Article 92) and insult (under current Article 93) in 2000, and 1439 convictions in 2001.² A survey by the Independent Association of Journalists (NUNS), published in March 2003, identified 173 ongoing defamation cases initiated against journalists since October 2000, the majority of them criminal cases.³ NUNS concluded that the large number of cases – many brought by politicians, public officials and high profile businessmen – represented a new means of “punishing the media” in the post-censorship period. Many of the cases documented in the survey have been brought by high-ranking officials in the Socialist Party of Serbia (SPS) and local government officials, including several serving and former mayors. A persistent theme is that the impugned articles allege corruption and/or involvement in organised crime. The NUNS survey reveals that the same plaintiffs often bring multiple cases and many of the defendants are the subject of several outstanding cases. According to the legal counsel of *Blic News*, as of February 2003, over seventy charges had been filed against the weekly magazine, with damages requested amounting to 250 million dinars (approximately 4 million USD). In June 2002, it was reported that journalists from the Kragujevac weekly *Nezavisna Svetlost* were regularly being sued for libel by prominent local individuals and had had to appear in court twenty times in February 2002.⁴

The aggressive, politically motivated use of defamation laws shows no sign of abating, even though Serbia and Montenegro’s own recent report to the UN Human Rights Committee acknowledges: “In order to fully implement European standards in the media in Montenegro, it is indispensable that [the offence of criminal defamation] be deleted from the Criminal Code and treated like a form of civil-legal responsibility”.⁵

This Memorandum analyses the provisions of the draft Law against the international law of freedom of expression, as well as best practice in the area. In addition to relying on

² Initial Report to the UN Human Rights Committee, Serbia and Montenegro, UN Doc. CCPR/C/SEMO/2003/1, 24 July 2003, p.151

³ “Lawsuits against Journalists in Serbia for defamation, soul injuries and honour and reputation blemish 2001-2003”, a survey by Independent Journalist Association of Serbia, March 2003.

⁴ ANEM, 1-7 June.

⁵ Note 2, p. 186.

international instruments and decisions by international tribunals, the analysis refers to ARTICLE 19's *Defining Defamation (ARTICLE 19 Principles)*, a set of principles based on best practices in defamation legislation.⁶

This Memorandum first outlines the international and constitutional obligations of Serbia and Montenegro relating to freedom of expression.

II. International and Constitutional Obligations

II.A General Protection for Freedom of Expression

Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. Article 19 of the *Universal Declaration on Human Rights* (UDHR), a United Nations General Assembly resolution,⁷ guarantees the right to freedom of expression in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.

It is universally recognised that this Article has attained the status of customary international law and as such is legally binding on Serbia.

The *International Covenant on Civil and Political Rights* (ICCPR),⁸ which was ratified by Serbia and Montenegro in 1992, elaborates on many rights included in the UDHR. Article 19 guarantees the right to freedom of expression in terms very similar to those found at Article 19 of the UDHR:

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Serbia and Montenegro is also a member of the Council of Europe⁹ and ratified the *European Convention on Human Rights* (ECHR)¹⁰ earlier this year. Consequently,

⁶ (London: ARTICLE 19, 2000). Available at: <http://www.article19.org/docimages/714.htm>. The principles have been endorsed by, among others, all three special international mandates dealing with freedom of expression – the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organisation for Security and Cooperation in Europe Representative on Freedom of the Media and the Organisation of American States Special Rapporteur on Freedom of Expression. See their Joint Declaration of 30 November 2000.

⁷ UN General Assembly Resolution 217A(III), adopted 10 December 1948.

⁸ UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.

⁹ As of 25 January 2001.

Serbia's domestic legal system and practice, in particular, must conform to the provisions of that Convention and are subject to the jurisdiction of the European Court of Human Rights (ECHR), which is charged with the Convention's interpretation and application.

Article 10 of the European Convention guarantees the right to free expression in the following terms:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.¹¹

It is to be emphasised that the guarantee of freedom of expression applies to all forms of expression, not only those that reflect majority viewpoints and perspectives. As stated repeatedly by the ECHR:

Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man ... it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'.¹²

II.B Restrictions on Freedom of Expression

Despite its importance to effective democratic governance, the right to freedom of expression is not absolute and may be subject to restrictions. However, any restriction on this right must meet a strict three-part test. This test, which has been confirmed by both the Human Rights Committee¹³ and the ECHR,¹⁴ requires that any restriction must be (1) provided by law, (2) for the purpose of safeguarding a legitimate interest, and (3) necessary to secure this interest.

Three points should be made here. First, as the ECHR has specified, a law must be accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct" if it is to count as provided by law.¹⁵ Second, the legitimate aims in pursuit of which restrictions on expression may be permissible are *exhaustively* listed in Article 19(3) of the ICCPR and Article 10(2) of the ECHR. Such aims, for the purposes of the European Convention are: national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the

¹⁰ Adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953

¹¹ Article 13 of the American Convention on Human Rights and Article 9 of the African Charter on Human and Peoples' Rights, in force as of 1978 and 1986, respectively, also protect freedom of expression.

¹² *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737, para. 49. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.

¹³ For example, in *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997.

¹⁴ For example, in *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90.

¹⁵ *The Sunday Times v. United Kingdom*, 26 April 1979, Application No.13166/87, 2 EHRR 245, para. 49.

reputation or the rights of others, the prevention of the disclosure of information received in confidence, and maintaining the authority and impartiality of the judiciary.

Third, for a restriction to qualify as necessary for the securing of one of these aims, there must be a “pressing social need” for the restriction. The reasons given by the State to justify the restriction must be “relevant and sufficient” and the restriction must be “proportionate to the aim pursued”.¹⁶ Of particular relevance to the analysis below, the ECHR has on numerous occasions cautioned that *penalties* which are disproportionate to the harm caused by particular expressive acts are *not* necessary to achieve legitimate aims and their imposition, consequently, will violate the guarantee of freedom of expression in their own right.¹⁷

II.C Freedom of Expression and the Media

The ECHR has repeatedly stressed “the pre-eminent role of the press in a state governed by the rule of law”.¹⁸ It has stated:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate, which is at the very core of the concept of a democratic society.¹⁹

It has also held that penalties against the press for publishing information and opinions concerning matters of public interest are likely to violate Article 10 of the European Convention except in narrow circumstances, owing to the likelihood that they would deter journalists “from contributing to public discussion of issues affecting the life of the community”.²⁰

The UN Human Rights Committee has also stressed the point that a free media is essential in the political process:

[T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a

¹⁶ *Lingens v. Austria*, 8 July 1986, Application No.9815/82, 8 EHRR 407, paras. 39-40.

¹⁷ See, for example, *ibid.*, para. 44, noting with respect to a considerable fine imposed on the applicant for defamation:

In the context of political debate, such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in performing its task as purveyor of information and public watchdog.

A member of the Human Rights Committee has made a similar suggestion, remarking in a concurring opinion: “The scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. It must not exceed that needed to protect that value. And, as the Committee stated in its General Comment 10, the restriction must not put the very right itself in jeopardy”. *Robert Faurisson v. France*, 8 November 1986, Communication No. 550/1993, Concurring Opinion of Elizabeth Evatt and David Kretzmer, para. 8).

¹⁸ *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63

¹⁹ *Castells v. Spain*, 23 April 1992, Application No. 11798/85, para. 43.

²⁰ *Lingens*, note 16.

free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.²¹

Finally, the Inter-American Court of Human Rights has stated: “It is the mass media that make the exercise of freedom of expression a reality.”²²

II.D Constitutional Obligations

The Constitution of Serbia and Montenegro (formerly the Federal Republic of Yugoslavia) contains various provisions guaranteeing aspects of freedom of expression. Article 35 guarantees the right to “public expression of opinion”. Article 36 guarantees press freedom; at the same time, it recognises the right of citizens “to express and publish their opinions in the mass media”. Article 44 goes even further, providing:

Citizens shall have the right to publicly criticise the work of government and other agencies and organisations and officials...Citizens may not be called to account or bear any other consequences for opinions expressed in the course of public criticism...unless they have thereby committed a criminal offence.

Finally, the Constitution makes specific reference to the obligations of Serbia and Montenegro under international law. Article 10 recognises and guarantees “the rights and freedoms of man and the citizen recognised under international law” and Article 16 provides that “[i]nternational treaties which have been ratified...shall be a constituent part of the internal legal order”.

III. Analysis of the Draft Law

III.A Criminal Defamation is Inherently Problematic

Before we move to a detailed analysis of the various criminal provisions of the draft Law, we reiterate that criminal defamation provisions in general, regardless of their particular differences or nuances, are highly problematic from the point of view of freedom of expression. While international law does, as we have indicated, recognise that freedom of expression may be limited to protect individual reputations, we emphasise that defamation laws, like all restrictions, must be proportionate to the harm done and not go beyond what is necessary in the particular circumstances. Criminal defamation provisions tend to breach the guarantee of freedom of expression both because less restrictive means, such as the civil law, are adequate to redress the harm and because the sanctions such provisions envisage are not proportionate to any harm done by expressive acts.

Numerous international statements attest to this fact. The UN Human Rights Committee, the body with responsibility for overseeing implementation of the ICCPR, has repeatedly expressed concern about the possibility of custodial sanctions for defamation.²³ Every

²¹ UN Human Rights Committee General Comment 25, issued 12 July 1996.

²² *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34.

²³ For example in relation to Iceland and Jordan (1994), Tunisia and Morocco (1995), Mauritius (1996), Iraq (1997), Zimbabwe (1998), and Cameroon, Mexico, Morocco, Norway and Romania (1999), Kyrgyzstan (2000), Azerbaijan, Guatemala and Croatia (2001), and Slovakia (2003).

year, the Commission on Human Rights, in its resolution on freedom of expression, notes its concern with “the abuse of legal provisions on criminal libel”.²⁴ The UN Special Rapporteur on Freedom of Opinion and Expression has asserted that imprisonment is not a legitimate sanction for defamation²⁵ and, in concert with the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, has called on States to repeal all criminal defamation laws in favour of civil defamation laws.²⁶

The *ARTICLE 19 Principles*, reflecting this international tendency, call for the complete repeal of criminal defamation laws. At the same time, in recognition of the fact that many countries still have such laws in place, Principle 4(b) sets out a number of conditions to which any remaining criminal defamation laws should conform, including that prison sentences, suspended or otherwise, should never be imposed for defamation.

Based on the foregoing, our principal recommendation is that the defamation provisions already existing in the Criminal Code be repealed and that they not be replaced with the provisions of the draft Law. Instead, defamation should be an exclusively civil matter. If the draft Law’s provisions are retained, however, they should be amended so as to minimise the potential for abuse or unwarranted restrictions on freedom of expression in practice, in line with our detailed comments below. An essential element of this should be the removal of the possibility of imprisonment for defamation.

Recommendations:

- The existing criminal defamation regime should be repealed in its entirety and the draft Law provisions should not be enacted into law.
- In the event that the existing criminal defamation law is not repealed, and the draft Law is adopted to replace the existing criminal defamation provisions, the available penalties for which it provides should be reduced considerably to ensure that they are strictly proportional to the harm done. In particular, in view of the extreme and always-disproportionate nature of imprisonment for defamation, all provisions for prison sentences for defamation should be removed.

III.B Criminal Insult

Article 170 of the draft Law creates and governs the law of criminal “insult”. Article 170(1) provides that “anyone who insults another person shall be punished by a fine or a sentence of imprisonment not exceeding three months”. Article 170(2) increases the maximum prison sentence for insult to as much as six months in the event that the insult is “performed through the press, radio, television or similar instruments or at a public gathering”. Article 170(3) provides that, where an insulted person “returns” an insult, “the court may punish both parties or punish one party and release the other”.

²⁴ See, for example, Resolution 2000/38, 20 April 2000, para. 3.

²⁵ *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1999/64, 29 January 1999, para. 28.

²⁶ See their Joint Declarations of November 1999, November 2000 and December 2002. See *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 52 and *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2001/64, 26 January 2001.

Finally, Article 170(4) provides for a limited range of exemptions from (or perhaps, defences to) liability for insult.²⁷ In particular, statements (i) “given within a serious critique in a scientific, literary or artistic work”,²⁸ (ii) by a person in the performance of official duties, (iii) by a journalist in his or her professional capacity, (iv) by a person engaged in “political activity”, or (v) by a person in defence of a right or to protect justifiable interests”, are not “punishable” *provided that* “the manner in which the statement has been given or other circumstances indicate” that the statement was not made with the intent to “discredit” any person. As we read this provision, the exception or defence has two elements: the expressive act must (1) have been made by one of the persons and/or for one of the purposes listed, and (2) not have been made with the intent to discredit.

Analysis

Article 170(1) is, at least in translation, overbroad and is therefore subject to grave abuse. First, the term “insult” is undefined and no criteria for its application are provided. For example, the term might be understood only in an objective sense, such that an expression would be found to be insulting only if an ordinary and reasonable person would understand it in this way. However, there is nothing on the face of the article, which mandates this relatively narrow reading. As a result, the article is compatible with an expression’s being an insult so long as the object of the remark finds it insulting, no matter how unreasonably or foolishly. In a political and legal culture where valid criticisms of others, particularly political or other public figures, are generally disapproved of, a wide reading of the term “insult”, even on an objective basis, could work to imperil such criticism altogether.

Second, the term “insult” appears to apply to a wide range of expression, including both statements of fact and statements of opinion. Certainly, it is not explicitly restricted to statements of fact. In our view, opinions should not attract any liability in defamation law. As *Defining Defamation* states:

- a) No one should be liable under defamation law for the expression of an opinion.
- b) An opinion is defined as a statement which either:
 - i. does not contain a factual connotation which could be proved to be false; or
 - ii. cannot reasonably be interpreted as stating actual facts given all the circumstances, including the language used (such as rhetoric, hyperbole, satire or jest).²⁹

Even if opinions are not absolutely protected, there is strong support internationally for the proposition that they should receive substantially heightened protection, particularly where they are made in the context of a public discussion. In practice, the European Court

²⁷ We discuss this ambiguity – namely whether this is an exemption or defence – below.

²⁸ We assume that the restriction to “serious critiques” applies only to scientific, literary or artistic work (both in this subarticle and in Article 176), rather than applying to all the other person and activity categories listed in this subarticle, although our translation is not perfectly clear on this point. We recommend, in the event that there is any ambiguity on this point in the original, that it be resolved in favour of this interpretation.

²⁹ Note 6, Principle 10.

of Human Rights allows a considerable degree of leeway to statements of opinion. For example, in the case of *Dichand and others v. Austria*, the applicants had published an article alleging that a national politician who also practiced as a lawyer had proposed legislation in parliament in order to serve the needs of his private clients. The applicants were convicted of defamation by the domestic court and appealed to the European Court. The Court first stressed that the statement constituted a value judgment rather than a factual allegation. Furthermore, whilst acknowledging the absence of hard proof for the allegations, as well as the strong language used, the Court stressed that the discussion was on a matter of important public concern.³⁰ It recalled that:

It is true that the applications, on a slim factual basis, published harsh criticism in strong, polemical language. However, it must be remembered that the right to freedom of expression also protects information or ideas that offend, shock, or disturb.³¹

In the case of *Unabhängige Initiative Informationsvielfalt v. Austria*, the Court expressed its concern that domestic courts had required journalists to supply factual proof beyond a reasonable doubt to support value judgements expressed by them, stating: “The degree of precision for establishing the well-foundedness of a criminal charge by a competent court can hardly be compared to that which ought to be observed by a journalist when expressing his opinion on a matter of public concern, in particular when expressing his opinion in the form of any value judgment.”³² In a recent decision, the Court explained that value judgments need not be accompanied by the facts upon which the judgement is based, holding: “The necessity of a link between a value judgment and its supporting facts may vary from case to case in accordance with the specific circumstances.”³³ For example, where certain facts were widely known among the general public there was no need for a journalist basing an opinion on those facts to refer to them explicitly. Furthermore, value judgements may be based on rumours or stories circulating among the general public; they need not be supported by hard, scientific facts.³⁴

Articles 35, 36 and 44 of the Constitution of Serbia and Montenegro are proof of the degree to which the right to hold and express opinions is held dear in Serbia and Montenegro itself. Even if the draft Law is literally in compliance with these constitutional provisions (Article 44, at least specifically excepts from its coverage criminal law provisions), it is fair to say that the idea of criminal liability for the expression of opinions is hardly consistent with the spirit of these constitutional commitments. Based on these facts, we strongly recommend that Article 170(1) should expressly exclude from liability any expression of opinion.

Third, we welcome the evident intention behind the exemptions or defences provided in Article 170(4); it appears to us that this responds to an acknowledgment of the drafters that a wide variety of expression is sufficiently important that it should be protected from

³⁰ *Dichand and others v. Austria*, 26 February 2002, Application No. 29271/95, para. 51.

³¹ *Ibid.*, para. 52.

³² 26 February 2002, Application No. 28525/95, para. 46.

³³ *Feldek v. Slovakia*, 12 July 2001, Application No. 29032/95, para. 86.

³⁴ *Thorgeirson v. Iceland*, note 18.

the chill, which the threat of criminal liability for insult would inevitably cast. For example, while the increased penalties provided for in Article 170(2) are initially troubling, potentially applying to mass media which publish materials critical of government or others, even if in the public interest, it would appear that the exception in 170(4) would exempt from liability some of the work of journalists.

At the same time, we have a number of concerns with Article 170(4), which we do not believe goes far enough. In particular, there are serious problems with the attempt to capture by list and example a class of expressive acts which merit special protection. Specifically, Article 170(4) provides a list of persons and activities which are deemed sufficiently important – as we prefer to put it, sufficiently likely to be in the public interest – to merit protection from the dangers of the criminal insult regime. The problem here is that the list, as with any list, is only partial and misses out other persons and activities, which should receive similar protection. For example, professional journalists are protected, but not writers working for non-governmental organisations publishing information relating to important policy issues in the country, even though this type of work should also benefit from protection. Expressions relating to “political activity” are protected but that term is not defined, leaving it open to law enforcement and unsympathetic private parties to deem critical activities of which they disapprove, potentially including the example of an NGO, noted above.

These problems result, as already suggested, from the effort to provide an exhaustive list of persons and their activities which merit special protection from the reach of the criminal insult laws. The fundamental problem here is that it may simply be too difficult a task to create such a list, one which captures all and only the activities and persons appropriately protected from the law of criminal insult. That is why, in our view, a more generalised approach is preferred, according to which statements would be exempted from the reach of the insult laws as long as they are in the public interest, or on matters of public concern, as long as they are not made with the intent to discredit any person. Failing this general approach, we would at least recommend that the reach of Article 170(4) be extended considerably.

These considerations apply equally to Articles 172(4) and 176, both of which closely parallel Article 170(4).

The *ARTICLE 19 Principles* approach this issue from two different angles, consistent with best international practice in this area. First, they provide for a defence of reasonable publication. This provides protection to those who have acted reasonably in publishing a statement on a matter of public concern,³⁵ while allowing plaintiffs to sue only those persons who have not acted reasonably. As the European Court of Human Rights has noted, for the media, acting in accordance with accepted professional standards should normally satisfy the reasonableness test.³⁶ This establishes a more appropriate balance

³⁵ We prefer this term to the more commonly used one based on the idea of ‘public interest’ but the ambit is essentially the same.

³⁶ See *Bladet Tromsø and Stensaas v. Norway*, note 18, para 65. See also *Defining Defamation*, note 6, Principle 9.

between the right to freedom of expression and reputations. We note that Article 171 contains a form of protection that is very similar to the reasonableness defence.

Second, they provide for non-liability under defamation law for a range of categories of expression, including:

- i. any statement made in the course of proceedings at legislative bodies, including by elected members both in open debate and in committees, and by witnesses called upon to give evidence to legislative committees;
- ii. any statement made in the course of proceedings at local authorities, by members of those authorities;
- iii. any statement made in the course of any stage of judicial proceedings (including interlocutory and pre-trial processes) by anyone directly involved in that proceeding (including judges, parties, witnesses, counsel and members of the jury) as long as the statement is in some way connected to that proceeding;
- iv. any statement made before a body with a formal mandate to investigate or inquire into human rights abuses, including a truth commission;
- v. any document ordered to be published by a legislative body;
- vi. a fair and accurate report of the material described in points (i) – (v) above; and
- vii. a fair and accurate report of material where the official status of that material justifies the dissemination of that report, such as official documentation issued by a public inquiry, a foreign court or legislature or an international organisation.³⁷

The Article 170(4) rule partly covers these two rules but it is clearly more limited in nature.

We note that Articles 172(4) and 176 contain similar protections, based on lists of preferred persons and activities, and are therefore subject to the same difficulties just noted; accordingly, our recommendation for emendations of Article 170(4) applies in full force to these provisions.

Recommendations:

- “Insult” should be defined in Article 170(1) to include only those expressive acts where ordinary and reasonable persons would find that the reputations or honour of the persons referred to in the acts were in fact denigrated.
- Expressions of opinion should be expressly excluded from the reach of Article 170. At a minimum, the law should provide for a higher standard of protection for opinions.
- Serious consideration should be given to replacing the list of persons and activities in Article 170(4) and also Articles 172(4) and 176, by general protection for all statements in the public interest or on matters of public concern. At a minimum, the list of exceptions should be considerably broadened.
- Consideration should be given to adding to the protection provided by Article 170(4) a rule providing for absolute protection for the statements noted above.

³⁷ *ARTICLE 19 Principles*, note 6, Principle 11.

III.C Defamation

Article 171 of the draft Law relates to defamation. Article 171(1) creates an offence, punishable by fine or imprisonment for up to three months, for the speaking or transmitting of information about a person which (1) is untrue and (2) “*may*” harm such person’s honour or reputation (emphasis supplied).

This Article has *two* penalty enhancement provisions. The first one, at Article 171(2), which mirrors Article 170(2), increases the potential imprisonment for defamatory acts to as much as one year, in the event that the act was “performed through the press, radio, television or similar instruments or at a public gathering”. In addition, Article 171(3) provides for imprisonment for as much as three years in the event that the saying or transmitting of false information “led to grave consequences to the injured party”.

Article 171(4) provides for a defence to Article 171 liability where the “culprit” had “founded reasons to believe in the truthfulness of” the information uttered or transmitted. It expressly goes on to provide that such “culprit” may, notwithstanding this defence, be held liable under Article 170 for insult.

Analysis

We welcome the fact that Article 171(1) defines defamation in terms of false information and that, therefore, true statements are not actionable under this provision. Notwithstanding this positive feature, however, Article 171(1) suffers from a number of flaws. First, all that is required, as a condition of potential liability, is that an expressive act “may harm” the person referred to. By terms, therefore, even if an expressive act does not actually harm the person, liability may ensue. This may simply be a question of translation, but in our view a minimum requirement of succeeding in a defamation action should be a showing that harm has in fact resulted. This is precisely the quality that renders a statement defamatory.

Indeed, a better approach, if these criminal defamation provisions are to be retained, would be to redraft Article 171(1) to require that *any harm be substantial* in order to be actionable, and to remove Article 171(3), referring to ‘significant harm’ altogether. Only grave harm to reputation could possibly justify the use of the criminal law; it is quite inconceivable that a minor harm could not be redressed by civil defamation law, or, where applicable, by according a right of correction or reply to the aggrieved party. The same is true of Article 172(1), which also only posits a ‘may harm’ standard, albeit linked to private information.

Next, we assume that Article 171(3), even though it does not specifically so indicate, applies only to harm which flows from the damage to the plaintiff’s honour or reputation. We recommend that this point be made explicit. This same point applies to Article 172(3).

Article 171(2) poses a unique and delicate problem. We acknowledge, on the one hand, that the degree of harm potentially caused by a defamatory expressive act may be proportional to the reach of the information and that statutory acknowledgement of such

fact may be appropriate. On the other hand, the question of redressing the harm done by a defamatory statement is a very complex matter and cannot be reduced simply to the means by which the statements were disseminated. For example, a biography is hardly a ‘similar instrument’ to the mass media and yet a defamatory statement contained in a biography could do immense harm.

We recommend, as a minimum, that the draft Law acknowledge that the question of redressing harm from defamation is a complex matter involving a number of factors. We further recommend that Article 171(3) require courts, when considering the penalty to be handed down under this provision, explicitly to take into account the potential negative effect the penalty may have on the freedom of the press.

We note the defence of “reasonable publication”,³⁸ in Article 171(4), whereby any expressive act which was based on “founded reasons to believe” that the expression was true is exempted from liability. We welcome this provision, provided that the concept of “founded reasons” does not impose too high a standard of proof on the defendant. Not being defined however, leaves open the possibility that courts will interpret this very strictly. For example, a reason may be deemed not to fall within the scope of this provision unless truth has been shown “beyond a reasonable doubt”. In contrast, for this defence to be genuinely and appropriately protective of freedom of expression, we recommend that the draft Law specify that a reason will be founded as long as it was reasonable in all the circumstances for the person to have believed the statement in question.

At the same time, Article 171(4) is quite problematic in failing to except from liability (or to provide as a defence) expressive acts performed without intent to discredit. Article 171, after all, is a *criminal* provision, and it is well-recognised that, in general, criminal offences should condition liability on the possession of relevant intent. Indeed, the drafters appear to recognise this in the context of expression-related harms, having provided such an element in Articles 170(4) and 176. It is, we believe, quite anomalous that the element of the offence or defence is left out of the present article: there is nothing in the intrinsic nature of this offence, which would merit different treatment in this regard. We therefore recommend strongly that the intent element be added to Article 171(4). An exactly similar consideration counsels the addition of an intent element to the crime of disclosing private and family information in Article 172.

Recommendations:

- Articles 171(1) should be rewritten to require proof of actual and significant harm to a person’s honour or reputation.
- Accordingly, Article 171(3) should be removed. In the event that Article 171(1) does not incorporate a significant harm test, Article 171(3) should be retained but it should be clarified that the harm in question must flow from the harm to honour or reputation.
- Article 171(2) should provide that courts must take into account, when handing

³⁸ See *ARTICLE 19 Principles*, note 6, Principle 9 and commentary, for a detailed discussion of this defence.

down penalties under this provision, the potential negative effect such penalty may have on the freedom of the press, and should tailor the penalty accordingly.

- Article 171(4) should be amended to provide that an allegedly defamatory expressive act will not be punishable if it was not committed with an intent to discredit.

III.D Disclosure of Private and Family Information

Article 172 relates to a more specific type of alleged defamation. Article 172(1) renders punishable by fine or imprisonment for as much as six months the spreading or transmission of personal information or information about “family life” if such spreading or transmission “may harm his/her honour or reputation”. We assume, by the syntax of this provision, that the information must be private information about *such person* or about *his or her family*. This provision does *not* limit liability to expressive acts, which are false.

Article 172 also has two penalty enhancement provisions. Article 172(2) is exactly like Article 171(2) in increasing the potential prison sentence to as much as one year where the act performed is transmitted on radio, television or similar medium, or at a public gathering. Article 172(3) increases the potential prison sentence to as much as three years in the event that the expressive act “led to or could have led to grave consequences for the injured party”.

Article 172(4) provides a defence (or exemption) to these offences. Like Article 170(4), it provides a list of “favoured” persons and activities who may not be liable for this offence. Unlike Article 170(4), however, this provision does not hinge on intent but rather on whether or not the listed persons or activities show their statements to be true or that they had “founded reasons” for believing them to be true. Article 172(5), however, precludes a showing of truth as a means of defence, except in the cases provided for in Article 172(4) We assume this also precludes a showing of “founded reasons” for believing the statements are true.

Analysis

Personal privacy, of course, is protected by both Article 17 of the ICCPR and Article 10 of the European Convention. Yet, Article 172 does not advance the cause of privacy *in particular*, while posing a potential threat to freedom of expression, and we therefore recommend its removal.

We note that Article 172 is simply a special case of defamation, where the statements in question relate to private matters. As a result, all of the general principles governing defamation law should apply. There is, in particular, no warrant for arguing special defamation rules simply because the context is a statement relating to private life. We recognise that it may be legitimate to enact special rules regarding statements on private life, regardless of whether or not these are defamatory, and that violation of privacy is recognised internationally to be harmful in its own right. The problem here, however, is that the harm being prevented by is harm *to honour or reputation*. As such, general principles relating to defamation clearly come into play. Where a statement represents

both defamation and an invasion of privacy, the individual in question may, of course, choose their remedy. But simply adding privacy to a rule essentially based on defamation law cannot justify waiving principles which otherwise apply generally in the defamation context.

Once this is recognised, Article 172 becomes wholly redundant of Articles 170 and 171 and it should, therefore, be removed from the draft Law.

If Article 172 is to be retained, notwithstanding that it is redundant, the fact that it is a defamation provision entails a number of consequences. First, it is not, as regards statements of fact, restricted to *untrue* statements, as we believe defamatory statements should be. Indeed, given the drafters' general recognition that *defamation harm* in relation to statements on matters of fact requires falsity, it is impossible to see how the condition of untruthfulness should drop out of the picture where the harm to honour reputation relates to personal information. Once this is recognised, Article 172(5) obviously needs to be removed.

Indeed, if the article is retained, we would recommend that its substantive provisions mirror exactly the substantive provisions we recommend for Article 171, at least in its application to statements of fact. To reiterate, this would include imposing an intent requirement, a falsity requirement and defences not just for the truth of the challenged expressive act but also for "founded reasons to believe the truthfulness" of the expression.

Recommendations:

- Ideally, Article 172 should be removed from the draft Law, as being redundant.
- In the event that Article 172 is retained:
 - No one should be liable where the statement in question was true or made in the reasonable belief that it was true.
 - The expression of opinions should be explicitly excluded from the reach of this article.
 - It should apply only where significant harm to a person's honour or reputation has been established.
 - Courts should, in assessing any penalty, explicitly take into account, in the assessment; of the effect such penalty will have on the freedom of expression.
 - No liability should ensue in the absence of an intention to cause harm.

III.E Dishonouring Certain Inanimate Objects and Groups

Articles 173-176 make it a crime to expose certain persons and objects to ridicule or mockery. Each of Articles 173-175 imposes potential fines and imprisonment of three months for breach of their respective offences. The Article 173 offence is exposing to ridicule Serbia and Montenegro, any of its member States, its flag, its coat of arms or its anthem; the Article 174 offence is exposing to ridicule "the nation, [or any] national or ethnic group"; and the Article 175 offence is exposing to ridicule any foreign country, or its flag, coat of arms or anthem, or any international organisation (specifically including

the United Nations and the International Red Cross) of which Serbia and Montenegro is a member.

Article 176 provides for a defence to any of the offences in Articles 173-175; in effect, the defence mixes elements of the defences contained in Articles 170(4) and 172(4). No liability will ensue or expressive acts, which are included in a list of “favoured” activities or persons and which were not done with intent, are true or were believed by the actor, with founded reasons, to be true.

Analysis

All of these articles provide “protection” to certain inanimate or abstract objects: countries, the nation, flags, coats of arms and anthems. Such protections, in our view, are entirely inappropriate.

There are a number of problems with this. First, none of the entities or things “protected” by these provisions – *certainly* not flags or coats of arms or anthems, and not, properly speaking, countries or international organisations either – have reputations or feelings or anything of the sort. Second, and perhaps more fundamentally, it is vitally important in a democracy that open criticism of government and public bodies, and of those objects which are symbolically representative of these things (flags, coats of arms and anthems, for example) be facilitated. It is equally important to recognise that governments and the other entities “protected” by these provisions possess ample means to defend themselves, and certainly do not stand in need of the incarceration of their critics. Accordingly, we recommend that Articles 173 and 175 be removed in their entirety from the draft Law.

This has been recognised by a number of national courts. In *Derbyshire County Council v. Times Newspapers Ltd.*, the House of Lords ruled that the common law does not allow a local authority to maintain an action for damages for libel. As an elected body, it “should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech.”³⁹ The Indian Supreme Court followed *Derbyshire*’s lead in *Rajgopal v. State of Tamil Nadu*, finding that “the Government, local authority and other organs and institutions exercising governmental power” cannot bring a defamation suit.⁴⁰ A similar position has been taken in the United States, Zimbabwe and South Africa.⁴¹ While the European Court of Human Rights has not entirely ruled out defamation suits by governments, it appears to have limited such suits to situations which threaten public order, implying governments cannot sue in defamation simply to protect their honour.⁴²

Article 174 poses unique problems. We acknowledge, as we could not in the case of countries and their symbolic representatives, that ethnic groups may indeed be ridiculed

³⁹ [1993] 1 All ER 1011, p. 1017.

⁴⁰ (1994) 6 Supreme Court Cases 632, p. 650.

⁴¹ In *City of Chicago v. Tribune Co.*, 307 Ill 595 (1923), p. 601, the Illinois Supreme Court ruled a city could not sue a newspaper for defamation. It said, “no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.”

⁴² *Castells v. Spain*, 23 April 1992, 14 EHRR 445, para. 46.

or mocked, and that such ridiculing or mocking may cause harm, which needs to be addressed. We are informed, however, that there already exist constitutional and criminal provisions prohibiting the incitement to racial or ethnic hostility or hatred and racial or ethnic insults.⁴³ These provisions are surely adequate responses to this problem, and mirror the approach taken to resolving this problem in other democracies. It is quite unclear what added benefit Article 174 could provide.

Recommendations:

- Articles 173, 174 and 175 should be removed from the draft Law.

III.F Public Officials

The draft Law fails to include any provisions relating to public officials or other public figures. As such, it fails to take into sufficient account the fact that such persons are the legitimate focus of critical comment and investigation. Specifically, it is well-established that political figures, due to the fact that the public has a legitimate and profound interest in the manner in which they are fulfilling their public duties, are obliged to tolerate more criticism and scrutiny than are private individuals. As the ECHR has insisted: “The limits of acceptable criticism are ... wider as regards a politician as such than as regards a private individual”.⁴⁴

Given this, we recommend that the draft Law make it more difficult for public officials and figures to take advantage of its provisions to shut down or silence critical commentary. In particular, defendants should be permitted to benefit from the imposition of a higher burden of proof for such complainants, that liability will not attach unless it is proven that the statement in question was false, and that it was uttered or transmitted with knowledge of its falsity and with the intent to discredit the public official.

Recommendation:

- The draft Law should take into account the need for higher standards for defamation in relation to public officials, at least in relation to their official activities, in accordance with the above.

III.G Defamation Complaints

Article 177(1) provides that prosecutions for violations of Articles 170-172 “shall be undertaken upon a private complaint”. Article 177(2) restricts the right to bring a private complaint to certain close relatives in the event that the offending statement related to a deceased person. Finally, prosecutions for violations of Article 175 (relating to exposing to mockery certain foreign bodies) require, pursuant to Article 177(3), “the approval of the Republic Prosecutor”.

Analysis

⁴³ See Article 50 of the Constitution of the Federal Republic of Yugoslavia, and Articles 134 and 154 of the Criminal Code of Yugoslavia.

⁴⁴ *Lingens*, note 16, at para. 42.

We are informed that the effect of Article 177(1) is to prohibit the prosecutor from bringing actions under any of the enumerated articles unless a “private complaint” is made and that a private complaint may only be made by a physical individual or a legal person. We are further informed that public bodies are not legal persons and therefore may not bring actions under the enumerated articles.

We welcome these restrictions on the right to bring actions under Articles 170-172; our view, apparently shared by the drafters (at least with respect to criminal defamation), is that public bodies should never be allowed to bring defamation actions. It is also positive that prosecutors, who are not in the position in the first instance of determining if any alleged insult or defamatory statement has actually resulted in harm, are not permitted to bring actions under these provisions.

We question, however, the need for or propriety of Article 177(2). As we note in our comments to Principle 2 of the *ARTICLE 19 Principles*, reputations and honour are personal to a person, and as such cannot plausibly be said to survive a person’s death. Our view, therefore, is that deceased persons cannot suffer harm to their honour or reputation, and that consequently any imposition of a penalty for negative remarks about a deceased person would necessarily violate the principle of proportionality. Accordingly, we recommend that Article 177(2) be removed from the draft Law.

Finally, we have already indicated our disagreement with the inclusion of Articles 173, 174 and 175 in the draft Law. Our concerns with these provisions are not allayed by vesting power in the prosecutor to bring actions under them.

Recommendation:

- Article 177(2) should be removed from the draft Law.