

## Comments to the proposed amendments of the Serbian Criminal Code

### ARTICLE 19

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1. ARTICLE 19 is an international human rights organisation which works around the world to protect and promote the right to freedom of expression and information (freedom of expression). With an international office in London and seven regional offices, including the Europe and Central Asia regional programme, ARTICLE 19 monitors threats to freedom of expression in different regions of the world, develops long-term strategies to address them and advocates for the implementation of the highest standards of freedom of expression nationally and globally. ARTICLE 19 has extensive expertise in the area of safety of journalists. Since 2000, ARTICLE 19 has been active in specifying international standards on protection of journalists and advocating for improved standards to tackle impunity at the United Nations and national levels. ARTICLE 19's legal expertise has contributed to the development of progressive jurisprudence of regional and national courts in the area of protection of journalists and impunity, in particular in cases at the European Court of Human Rights, the Inter-American Court of Human Rights and the African Commission on Human and People's Rights. We are therefore well-placed to comment on proposals aimed at modifying legislative provisions with a view to address issues related to the safety of journalists in Serbia.
2. The proposal to amend various criminal offences came to ARTICLE 19's attention as a result of the work we undertake with partners in Serbia under the Media Freedom Rapid Response (MFRR) consortium.<sup>1</sup> We understand that the proposed amendments were commissioned by the Standing Working Group for Safety of Journalists in Serbia and that consultations on this proposal were led by the Ministry of Justice. Furthermore, we were informed that the aim of these amendments is to respond to various forms of online abuse and threats journalists face and to address the prosecutorial obstacles to initiate investigations *ex officio*.
3. ARTICLE 19 welcomes that the explanatory and general comments of the proposed amendments explicitly recognise the principle of criminal law as *ultima ratio*; under international freedom of expression standards, criminal sanctions should only be used exceptionally and as a last resort, while any restrictions on freedom of expression should be formulated with sufficient clarity, pursue legitimate aim and be necessary in a democratic society.<sup>2</sup> We also appreciate efforts to shore up the protection for journalists in the country.

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<sup>1</sup> The Media Freedom Rapid Response (MFRR) tracks, monitors and responds to violations of press and media freedom in EU Member States and Candidate Countries. This project provides legal and practical support, public advocacy and information to protect journalists and media workers. The MFRR is organised by a consortium led by the European Centre for Press and Media Freedom (ECPMF) including ARTICLE 19, the European Federation of Journalists (EFJ), Free Press Unlimited (FPU), the Institute for Applied Informatics at the University of Leipzig (InfAI), International Press Institute (IPI) and CCI/Osservatorio Balcani e Caucaso Transeuropa (OBCT). The project is co-funded by the European Commission. [www.mfrr.eu](http://www.mfrr.eu)

<sup>2</sup> See UN Human Rights Committee, *General Comment No. 34 on the right to freedom of expression*, 12 September 2011, paras 22-25. See European Court, *The Sunday Times v UK*, App. No. 6538/74, 26 April 1979, para 49; European Court, *The Observer & Guardian v the UK*, App. No. 13585/88, 26 November 1991, para 59.

4. At the same time, ARTICLE 19 notes that, while well intentioned, the proposal fails to contemplate the implications of the amendments on the exercise of the right to freedom of expression. The issue is whether the amendment is what is actually needed in response, or whether there are other more appropriate and effective measures to improve the safety of journalists and improvement of their working conditions. Such measures may include: the implementation of the State's international legal obligations; enhanced resources and training for law enforcement officers, prosecutors and the judiciary; and legal reform of criminal defamation laws. In ARTICLE 19's opinion such measures are better methods of protecting journalists than that which is currently presented by the Amendment. Furthermore, the protection of journalists necessarily requires the full protection of journalists' human rights as human rights for all, in particular their freedom of expression, upon which the exercise of their profession and a healthy democracy depends.

### General comments

5. ARTICLE 19 recalls that under international human rights law, the scope of the right to freedom of expression extends to the expression of opinions and ideas that others may find deeply offensive,<sup>3</sup> and that this may sometimes encompass abusive, stigmatising and discriminatory expression. This broad scope of protection should not, however, translate into inaction of authorities. On the contrary, States should take effective action to prevent attacks on journalists and others in retaliation for exercising their right to freedom of expression, including where this involves political speech.
6. Second, States are obliged to provide protection to those who are at risk of such attacks, investigate such attacks when they do occur and prosecute those responsible, so as to end the culture of impunity for such attacks.<sup>4</sup> The objective of protection under criminal law should be an individual's physical integrity at risk or attacked as a result of exercising their freedom of expression, rather than protecting individuals against expressions. Cases that justify criminal responses include death threats, killings, harassment, abduction, intimidation, arbitrary detention, among others that meet the requirements of international freedom of expression standards.<sup>5</sup>
7. The proposal to amend the Criminal Code fails to meet the international freedom of expression standards mentioned above. It does not distinguish criticism and offensive expressions that do not warrant criminal liability from attacks and threats that journalists face as a result of their journalistic activities. The latter in fact require prosecutorial action to protect journalists at risk.

### Comments to amendments of Article 149

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<sup>3</sup> General Comment 34, *op.cit.*, para 11. See also European Court, *Handyside v. United Kingdom*, *op.cit.*

<sup>4</sup> 2021 Joint Declaration on Politicians and Public Officials and Freedom of Expression, 2.a.ii.

<sup>5</sup> See Joint Declaration on Crimes Against Freedom of Expression, The UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, 2012; See General Comment No. 24, *op. cit.*, para 23.

8. Article 149 establishes that “(1) whoever, without authorization, prevents or hinders the printing, recording, sale or distribution of books, magazines, newspapers, audio and video cassettes or other similar printed or recorded materials, or prevents or hinders without authorization the broadcasting of a radio or television program, shall be sentenced with a fine or imprisonment of up to one year.” The proposed amendments add subsection (2) to establish that “[t]he penalty referred to in paragraph 1 of this Article shall also be imposed on anyone who, without authorization, prevents or hinders the publication of information of public importance through the media outlets, or who, due to publishing of such information or opinion, substantially endangers the peace of mind of the person who published the information or opinion by rude insults or maltreatment, insolence or ruthlessness.”
9. ARTICLE 19 is concerned about the proposed amendment for the following key reasons:
  - First, a number of terms in the proposal are extremely vague, in violation of the requirement of legality for restrictions on the right to freedom of expression
  - Second, it penalises expression of opinions that get an absolute protection under international freedom of expression standards
  - Third, it provides criminal sanction for “insult” and similar concepts that are not permissible under international freedom of expression standards.

#### ***Vague terminology***

10. Under international freedom of expression standards, restrictions on the right to freedom of expression are only permitted if they are set out in law. This implies not only that the restrictions are set in legislation but that the relevant law meets certain requirements of clarity and accessibility. Laws that grant authorities excessively broad discretionary powers to limit expression fail to meet this requirement. This is the case of the proposed amendment that does not clarify key terms, including “public importance,” “insolence” or ruthlessness.
11. We understand that the ultimate aim of the proposed amendment to Article 149 is to protect “mental peacefulness” of certain individuals from “rude insults or maltreatment, insolence or ruthlessness.” While the author of the proposal warns about the potential broad interpretation of these concepts, the proposal justifies them under the assumption that if verbal and physical assaults remain unsanctioned, they can lead to refraining from publishing information in order to avoid compromising physical and mental integrity of the publishing entity. ARTICLE 19, however, notes that disturbances to “mental peacefulness” of journalists resulting from mere offensive verbal attacks will hardly meet the severity threshold, unless they are tied to other risks and contextual factors, such as patterns of previous attacks and the likelihood of escalating and creating a serious danger to the integrity of the person exercising their right to freedom of expression. Unfortunately, this association and additional criminal elements are indiscernible from the text of the proposed amendments.

#### ***Protection of opinions***

12. ARTICLE 19 notes that statements of opinion and value judgments are different from statements of fact and this should be recognised by domestic legislation. While factual statements may be considered in the light of their truth, value judgment and opinions may not be investigated in the same manner.

13. It is well established under European and international law that opinions are entitled to enhanced protection under the guarantee of the right to freedom of expression. Although human rights law does not go so far as to provide absolute protection to statements of opinion, requiring at least some basis in fact, in practice considerable leeway is allowed. Courts around the world, international and national, regularly distinguish between opinions and statements of fact, allowing far greater latitude in relation to the former. Courts have interpreted the term “opinion” very liberally and allowed the defence of opinion to be defeated only where it is clear that the defendant did not actually hold the views expressed.<sup>6</sup> Further, in some cases of expression of opinions, strong words and harsh criticism are perhaps even to be expected, especially in matters of public controversy or public interest.<sup>7</sup>
14. ARTICLE 19 takes the view that statements of opinion should never attract liability; at a minimum, such statements should benefit from enhanced protection in defamation laws.

### **Protection against insults**

15. ARTICLE 19 understands that Article 170 establishes the offence of insults and that these amendments contemplate the severe form of insults in order to make an insult against a journalist a criminal offence prosecuted *ex officio*, instead of under private action. The proposal also ascertains that domestic case law has interpreted the concepts of “maltreatment, insolence or ruthlessness.”
16. ARTICLE 19 has not seen how these concepts have been interpreted by courts and whether this interpretation means that the test of legality (clarity of legislation) has been met. However, we point out that under international freedom of expression standards, States can only protect people from *false* statements of *fact* that cause damage to their *reputation*. It is not legitimate to protect subjective feelings or a subjective understanding of one’s own sense of honour.<sup>8</sup> For these reasons, while we advocate for defamation to be regarded within civil law, we argue for repeal for any laws providing protection to “insult” or similar concepts. To put it simply, criticism and unpopular opinions about journalists and the media are protected speech; as compared to threats that can lead to harm to physical safety of journalists.
17. In view of the foregoing, ARTICLE 19 strongly suggests the Working Group reconsiders the proposed amendments. Instead, it should review other preventive, protective and investigatory measures that focus on the prosecutorial barriers to investigate threats, harassment and others forms of serious attacks against journalists. We believe that existing non-expressive based offences can be reviewed to identify the structural issues impeding *ex officio* investigation and requiring procedural and investigatory action carried out by journalists and the media to seek accountability (private action).

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<sup>6</sup> For example, in *Sokolowski v Poland*, the European Court had to consider a statement to the effect that a local municipal councillor was “tak[ing] away” money from the local townspeople by electing himself to a paid position on a local election committee. Finding that the statement constituted protected expression of opinion rather than a factual assertion, the Court held that “a serious of accusation of theft cannot...be justifiably read into such a statement. See *Sokolowski v. Poland*, 29 March 2005, App. No. 75955/01, para 48

<sup>7</sup> *Thorgeirson v. Iceland*, App. No. 13778/88, 25 June 1992, paras 14-15.

<sup>8</sup> See e.g. ARTICLE 19, [Defining Defamation: Principles on Freedom of Expression and Protection of Reputation](#), 2017.

### Conclusions

18. ARTICLE 19 recognises that journalists are increasingly becoming targets of coordinated and uncoordinated online attacks in Serbia, and that various forms of online harassment have the potential to escalate to the detriment of the physical integrity of individuals. However, the proposed amendments are extremely broad, based on problematic concepts and can ultimately lead to sanctions against journalists. For instance, we can imagine that it could be used against those who criticise actions of politicians (e.g. if a politician publishes something on his/her blog or website and is met with criticism).
19. We fully understand the motivations behind this proposal. However, the issue is whether legislation of the kind that is currently being proposed is what is actually needed in response, or whether there are other more appropriate and effective measures to improve the safety of journalists and improvement of their working conditions in the country. While abuse and harassment, online and offline, can have a chilling effect on the exercise of journalistic freedom of expression and on public debate, we believe that legislation should always be strictly in line with the necessity and proportionality requirements of international human rights standards. These should also be accompanied by other measures, including enhanced resources and training for law enforcement officers, prosecutors and the judiciary and abolishing the criminalisation of insult in Article 170 of the Criminal Code. In ARTICLE 19's opinion such measures are better methods of protecting journalists than that which is currently presented by the amendment. Furthermore, the protection of journalists necessarily requires the full protection of journalists' human rights as human rights for all, in particular their freedom of expression, upon which the exercise of their profession and a healthy democracy depends.



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