

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the rights to freedom of peaceful assembly and of association

Ref.: OL BIH 1/2023
(Please use this reference in your reply)

10 March 2023

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and Special Rapporteur on the rights to freedom of peaceful assembly and of association, pursuant to Human Rights Council resolutions 43/4 and 50/17.

We are writing regarding the proposed draft amendments to the criminal code of Republika Srpska on “criminal offences against honour and reputation”, which were announced by the Minister of Justice of Republika Srpska, Mr. Milos Bukejlovic, on 2 March 2023 and were published on 3 March 2023.

Bosnia and Herzegovina set a good example in the region by decriminalizing defamation 20 years ago. The criminalization of defamation could have a negative impact on the human rights situation in the country, in particular on free and inclusive political discourse, the right to seek, receive and impart information, and press freedom. The adoption of the amendments would constitute a major retrogression in the legal framework for the protection of freedom of expression in Bosnia and Herzegovina. The proposed amendments also would go against a global trend of decriminalizing defamation, including in the European region where several EU or candidate member states have abandoned criminal defamation or have taken steps towards abandoning it. We therefore urge Your Excellency’s Government to carefully reconsider the amendments and to ensure that the freedom of expression in Bosnia and Herzegovina is upheld.

International legal framework

Before raising specific issues in relation to the proposed amendments to the criminal code, we would like to set out the international framework covering freedom of expression. Article 19 of the International Covenant on Civil and Political Rights (ICCPR),¹ provides that “*everyone shall have the right to hold opinions without interference*” and that “*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.*” This right includes not only the exchange of information that is favourable, but also that which may criticize, shock, or offend. (See general comment no. 34, para. 7 of the Human Rights Committee).

Restrictions on the right to freedom of expression must be compatible with the requirements set out in article 19(3), that is, they must be provided by law, pursue a legitimate aim, and be necessary and proportionate (a) For respect of the rights or

¹ Ratified by Bosnia and Herzegovina on 1 September 1993.

reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals. The State has the burden of proof to demonstrate that any such restrictions are compatible with the Covenant. The Human Rights Committee recalled that the relation between right and restriction and between norm and exception must not be reversed.

As defamation laws restrict the right to freedom of expression, they are subject to the narrow requirements of article 19(3). Under the article 19(3) requirement of legality, it is insufficient that restrictions on freedom of expression are formally enacted as domestic laws or regulations. Restrictions must also be sufficiently clear, accessible and predictable. The article 19(3) requirement of necessity implies an assessment of the proportionality of restrictions, with the aim of ensuring that restrictions “target a specific objective and do not unduly intrude upon the rights of targeted persons.” The ensuing interference with third parties’ rights must also be limited and “justified in light of the interest supported by the intrusion.” The restrictions must be “the least intrusive instrument among those which might achieve the desired result.”

The Human Rights Committee has underscored that defamation laws must “not serve, in practice, to stifle freedom of expression”, and that States should consider decriminalizing defamation. The Committee underlined the importance of crafting defamation laws with care, in order to ensure full compliance with article 19(3). This includes avoiding excessive punitive measures as well as including valid defences, including the public interest in the subject matter and the defence of truth. The Committee also stressed that the application of the criminal law should only be countenanced in the most serious of cases and that imprisonment is never an appropriate penalty.

State practice shows that criminal defamation laws are often used against journalists, political opponents, human rights defenders and others who are critical of government officials and policies. In effect the prosecutorial power of the State is used to silence legitimate political criticism. Defamation laws should never be used to prevent criticism of public figures.

In a report to the Human Rights Council on “Disinformation and freedom of opinion and expression”, we affirmed that “*Criminal law should be used only in very exceptional and most egregious circumstances of incitement to violence, hatred or discrimination. Criminal libel laws are a legacy of the colonial past and have no place in modern democratic societies. They should be repealed.*”² Similarly, in a report to the Human Rights Council on “Reinforcing media freedom and the safety of journalists in the digital age”, we affirmed that “*States should repeal criminal defamation and seditious libel laws and laws criminalizing the criticism of State institutions and officials. Criminalization of speech (other than in the most egregious cases of incitement to violence and hatred) is disproportionate, gags journalism and damages democratic discourse and public participation.*”³

We also wish to recall the United Nations General Assembly Resolution 76/173, on the Safety of Journalists and the Issue of Impunity, adopted in 2021 and supported by Bosnia and Herzegovina. The resolution urges Governments to ensure that

² A/HRC/47/25, para. 89.

³ A/HRC/50/29, para 111.

defamation laws are not misused to censor and interfere with journalists' work and, "where necessary, to revise and repeal such laws, in compliance with States' obligations under international human rights law".

Article 20(2) of the ICCPR prescribes that *'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'*. It has a high threshold as it requires the fulfilment of three components: a) advocacy of hatred; b) advocacy which constitutes incitement and c) incitement likely to result in discrimination, hostility or violence.⁴

Issues to review

In relation to the draft amendments to the criminal code of Republika Srpska on "criminal offences against honour and reputation", we wish to raise the following matters.

Vague and overly broad terms and definitions

First of all, we notice the use of vague and imprecise terms and definitions in the proposed articles in the draft amendments:

Article 208a (1) criminalizes the *'insult'* of another person. As the term "insult" is highly subjective and open to widely varying interpretations, there is a risk that the article may be interpreted in an arbitrary manner. Because of the vague and overly broad nature of this article, it may preclude political cartoons or satire of political figures which are permissible forms of expression. The Human Rights Committee has expressly noted that the mere fact that the expression is considered to be insulting to a public figure is not sufficient to justify restriction or penalties. Offensive speech is not by itself unlawful under international law.

Article 208a (2) contains an extenuating circumstance in relation to the offence of "insult", namely that the Court can exempt the perpetrator from penalties in case "*the perpetrator was provoked by the "unworthy behaviour" of the offended party (...)*". Yet, a clear definition of what constitutes *'unworthy behaviour'* is lacking and the formulation is highly subjective, open to multiple interpretations. Not only is this clause unclear, the amendment itself does not provide journalists with a defence against defamation to claim that the information was provided in *'good faith'* or in the *'public interest'*. As such, the provision could have an adverse effect on press freedom by encouraging journalists to self-censor.

Article 208c (1) criminalizes the "carrying away **anything** from the personal or family life of a person **which may harm** his honour or reputation". As article 208c (4) prescribes that the truth or falsity of what is presented or transmitted from the personal or of a person's family life cannot be proven, except in the cases referred to in article 208d of this Code, and as paragraph (1) of the same article prescribes that the act exists if the personal or family life of a person may have been harmed, this provision implies a subjective assessment (perception of harm to honour and reputation) as the determining criteria of the criminal act. While article 17 of the ICCPR provides that

⁴ A/67/357, para 43

nobody shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation, the proposed provision fails to provide reasonable exceptions, such as disclosure in the public interest.

The draft amendments acknowledge in article 208e an exclusion of illegality in certain circumstances, *where the offensive expression was part of scientific, professional, literary, or artistic work, or in the performance of a duty prescribed by law, the journalist calling, political or other public or social activity or the defence of a right*. However, according to this article such exceptions are only applied if it can be established that the expression was not done with the intention of disparagement. In many cases, the absence of such intent would be difficult to establish and would thus depend on the subjective judgement of the court. Furthermore, it is not entirely clear who would be protected by this provision, because the law does not stipulate who qualifies as a “journalist”, “artist”, “academic” etc. Furthermore, as far as the offensive expression concerns public figures, “disparagement” being a subjective term, some degree of it should be tolerated.

The proposed amendment of article 340(1) prescribes *“that whoever exposes the court, judge, public prosecutor or lawyer to contempt in the proceedings before the court, or who commits the act in a written submission to the court, shall be punished by a fine or a prison sentence of up to one year.”* Article 340(2) adds to that the aggravating circumstance that in case the act was *‘committed in a **particularly inappropriate manner** or if the offensive expression was of such significance that it led or could have led to more serious adverse consequences for the injured party, it shall be fined or imprisoned for up to two years.* “The term” a particularly inappropriate manner` is ambiguous and could open doors to an arbitrary application of the aggravating circumstance. Furthermore, considering that the purpose of contempt of court is to ensure the integrity of the judicial process, adverse consequences should be in relation to the “adverse consequences on the integrity of the judicial process” and not on “the injured party”. As such, the provision as currently drafted would defeat its purpose.

Proposed article 208d would be inconsistent with international human rights standards and unnecessary in light of article 359

The proposed amendment of article 208d criminalizes the *“public scorning or despising of a person or a group because of belonging to a certain race, skin, colour, religion, nationality or because of ethnic origin, sexual orientation or gender identity”*. This amendment goes much further than article 20(2) of ICCPR and risks impinging on legitimate speech. The latter prohibits advocacy of national, racial or religious hatred only when it constitutes incitement and when that incitement is likely to cause discrimination, hostility or violence. Art. 208d requires much less (“scorning or despising”) and there is no requirement that the expression amounts to incitement to violence, discrimination or hostility. As such, the draft amendment appears not to be consistent with IHRL. Furthermore, we note that the obligation under article 20(2) ICCPR is already covered by article 359 of the Criminal code of Republika Srpska, which criminalizes publicly inciting violence and hatred on a variety of grounds, and therefore we question the necessity of introducing this offence.

Disproportionately severe punishments

In addition to the use of vague and overly broad definitions, the severe punishments foreseen under the proposed amendments, with penalties for insults ranging between 8000 KM (4352 USD) up to 50.000 KM (27.204 USD) could have a chilling effect on the freedom of expression. Articles 208a(2), 208b(2) and 208c(2) also introduce an aggravating circumstance if *the act was committed through the press, radio, television or through social networks or at a **public gathering or otherwise**, for which it has become available to a larger number of persons*. This could lead to an elevation of the fine up to 50.000 KM (25.482 USD), 80.000 KM (40.771 USD) or 100.000 KM (50.964 USD) respectively.

Not only are these fines disproportionately high, but the aggravating circumstance risks to be arbitrarily applied due to the overly broad terms used to describe the types of dissemination that fall within the scope of this provision, including ***public gatherings or otherwise***, without any clarity or limitation on the nature or size of public gatherings or indicating what `other ways` might constitute.

The imposition of prison sentences on the basis of draft amendment of article 340 allows for up to two years imprisonment. In that regard we wish to echo the statement of the Human Rights Committee pointing out that imprisonment can never be an appropriate penalty for defamation.

Principle of subsidiarity

As a result of the vague and overly broad definitions, there is a risk that the articles contained in the proposed amendments may be applied to a broad range of behaviours that could be addressed with less intrusive measures, including through the use of other legal frameworks such as civil law. As stated above, the Human Rights Committee has advised against the use of criminal defamation laws and stresses that criminal laws should only be used in the most serious cases, and that imprisonment is never an appropriate penalty. When it comes to regulating speech, the presumption is in favour of freedom of expression, and therefore, when restricting speech, the least intrusive measure should be chosen. Criminal prosecution under overly broad and vague grounds with heavy penalties clearly breaches this requirement.

Article 4 of the Criminal Code of Republika Srpska recognizes the principle of subsidiarity, stating that “*criminal offences and criminal sanctions shall be prescribed only for those unlawful acts by which the human rights and freedoms and other individual and general values of the society established by the constitution and International Law have thus been violated or jeopardized insomuch that their protection could not be achieved without using the benefit of criminal justice compulsion.*”

We further note that defamation is already covered by civil law in Bosnia and Herzegovina, including in Republika Srpska, under the Act on protection against defamation. We also understand that there are currently around 300 of such civil law cases pending before Courts in Bosnia and Herzegovina. The offences prescribed in the amendments, including articles 208a, 208b and 208c, are not of such nature that they merit a response based on criminal law, especially where the behaviour is already

covered in existing civil laws. As noted, the more serious offences that would constitute incitement to violence and hatred are already sufficiently covered by the existing prohibition of incitement to violence and hatred under article 359 of the Criminal Code of Republika Srpska.

The fact that similar behaviour becomes sanctionable under different legal regimes also risks violating the internationally established principle of *ne bis in idem* (double jeopardy). The European Court for Human Rights established that a person cannot be punished twice (in accordance with two different laws) for the same offense.⁵

Lack of transparency in the consultation process

Comments by civil society organizations to the draft amendments to the Criminal Code of Republika Srpska seem to have not been transparently circulated. We have been informed that two different versions of the draft amendments were posted, one in February, although nobody seemed to have seen such a draft and while the authorities were stating that there was no draft; and another draft on 3 March. It however appears that the first version did not include a chapter on criminal offences against honour and reputation. In the explanatory note of the draft amendments, published on 3 March 2023, the Ministry of Justice indicate that no comments and suggestions were received by the given deadline of seven days following the publication of the draft in February. While both versions were published on the official website of the RS Government, no steps appear to be taken to actively disseminate the proposal or to inform the public by other means.

Concluding observations

In light of the above, we request your Excellency's Government to withdraw the proposed amendments to the criminal code of Republika Srpska, and to refrain from criminalizing expression through the criminal law system.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned analysis of the draft amendments to the criminal code of Republika Srpska.
2. Please provide your observations on how the envisaged amendments guarantee the freedom of expression in Bosnia and Herzegovina in full compliance with its international obligations under article 19 ICCPR.
3. Please explain how the Government has ensured sufficient public consultation prior to submitting the amendments to Parliament.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government

⁵ Including in the recent ECtHR case of *Muslija v. Bosnia and Herzegovina*

will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

We stand ready to provide Your Excellency's Government with any technical advice it may require in ensuring that the Regulation is fully compliant with international human rights obligations.

Please accept, Excellency, the assurances of our highest consideration.

Irene Khan

Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

Clement Nyaletsossi Voule

Special Rapporteur on the rights to freedom of peaceful assembly and of association