Memorandum
on the
Republic of Serbia Public Information Law

By

ARTICLE 19
The International Centre Against Censorship

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On 20 October 1998, the Serbian Parliament enacted a draconian and repressive new law to regulate the mass media in the Republic of Serbia, despite widespread protests from journalists, media groups and freedom of expression organisations.

The new law appears to be contrary to the Constitutional guarantees of freedom of expression contained in both the Federal Constitution and the Constitution of the Republic of Serbia, and breaches the treaty obligations of the Federal Republic of Yugoslavia under the International Covenant on Civil and Political Rights.

ARTICLE 19 urges the government of the Republic of Serbia to repeal the Public Information Law or else amend it to ensure that it complies with Yugoslavia's obligations under international law. The following are our major concerns.

Serbia's Obligations to Protect Freedom of Expression

The Federal Republic of Yugoslavia, as the successor state to the former Socialist Federal Republic of Yugoslavia, is a party to the International Covenant on Civil and Political Rights and is bound under international law to observe its provisions. Article 19 of the Covenant states:

> 1. *Everyone shall have the right to hold opinions without interference.*
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> 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.*

The Republic of Serbia is a constituent republic of the Federal Republic of Yugoslavia and must therefore observe and comply with the international obligations of the Federal Republic. Article 115 of the Federal Constitution proclaims that all laws of the constituent republics must conform to the Federal Constitution. The 1992 Constitution of the Federal Republic of Yugoslavia

guarantees freedom of expression and of the press in Articles 35, 36, 38, 39, 44, and 45, while due process rights are protected by Articles 26-29. The Constitution of the Republic of Serbia itself contains provisions guaranteeing freedom of expression, freedom of the press (Articles 45 and 46) and protecting due process rights (Articles 22-24).

Freedom of expression has been recognised by the international community as:

> A fundamental human right and…the touchstone of all the freedoms to which the UN is consecrated.[1]

International jurisprudence has consistently emphasised the special role of a free press in a State governed by the rule of law. For example, the European Court of Human Rights 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.[2]

As one of the most fundamental rights recognised by the international community, a genuine commitment to freedom of the press necessitates a high threshold of tolerance in relation to all kinds of publications and broadcasts. The guarantee implies at least a press able to criticise the government without fear, as well as a citizenry freely able to receive and, as the European Court of Human Rights has stipulated in an authoritative judgement, impart:

> Not only …'ideas' that are favourably received or regarded as inoffensive…but also those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society.[3]

Restrictions on the media, whether in the form of prior censorship or post-publication penalties, are illegitimate except in the most narrowly drawn circumstances. Article 19 of the International Covenant on Civil and Political Rights is clear and specific on the question of restrictions:

> 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:*

[1] United Nations General Assembly Resolution 59(I), 14 December 1946.
[2] *Castells v Spain,* (1992), Series A, No. 236 , para. 43.
[3] *Handyside v United Kingdom,* (1976), Series A , No.24, para.49.

(a) For the 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.

The test, which has been specifically endorsed by the UN Human Rights Committee,[4] requires that any restriction be "provided by law", and be "necessary" for the purpose of safeguarding one of the interests listed in Article 19(3). The test of "necessity" demands that a "pressing social need" be demonstrated, and that restrictions may be justified by reference to reasons which are "relevant and sufficient".[5] In addition, measures must be proportionate to the aim pursued and must not go beyond what is strictly required to satisfy the aim.

Illegitimate Content Restrictions

Articles 42 to 50 of the Public Information Law set up a wide-ranging censorship regime for both the press and the broadcast media. The provisions appear to enable both prior censorship of the media and post-publication sanctions. According to Article 42 the courts may prevent publications or broadcasts which "call for the forced overthrow of the constitutional order, jeopardise the territorial integrity of the Republic of Serbia and the Federal Republic of Yugoslavia, violate guaranteed freedoms and rights of man and the citizen, or stir national, racial or religious intolerance and hatred". The law also provides for a highly expedited process to implement this censorship regime.[6]

Although international law does not absolutely prohibit prior censorship regimes, they are acceptable only in the most limited and narrowly drawn circumstances. According to the European Court of Human Rights:

> The dangers inherent in prior restraints are such that they call for the *most careful scrutiny*…This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest [emphasis added].[7]

Similarly, the possibility of even temporary closure of a media outlet following allegedly offensive publications is a severe penalty which should be invoked only in the most pressing circumstances.

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[4] For example, see *Mukong v Cameroon*, No.458/1991, VIEWS adopted 21 July 1994, 49 GAOR Supp. No.40, UN Doc. A/49/40, para.9.7.

[5] See, for example, *Sunday Times* v *United Kingdom*, (1979), Series A, No.30, para.62, (European Court of Human Rights).

[6] See below.

[7] *The Observer and Guardian v United Kingdom*, (1991), Series A , No.216, para.60.

Article 42 merely repeats the wording of provisions justifying restrictions on freedom of expression and the press contained in both Article 38 of the Federal Constitution and Article 46 of the Serbian Constitution. On their face, these restrictions appear to pursue legitimate aims, although their practical application presents particular difficulties. It is a well established principle of international law that even apparently legitimate restrictions on expression must be narrowly interpreted.[8] The restrictions contained in Article 42 of the Public Information Law could only be legitimately invoked to silence a publication if, following a narrow interpretation, it were clearly established that there was a “pressing social need” to do so and that the imposition of either prior censorship or of post-publication sanctions was a proportionate response to the threat posed by a particular publication.[9] In the context of the international guarantee of freedom of expression, it would be extremely difficult to demonstrate the proportionality of such action, except in the most extreme circumstances. The invocation of Article 42 in any but such circumstances would be illegitimate under international law.

The dangers of an over-broad interpretation of the provision have already been demonstrated. On 24 October 1998 the Editor of the Serbian weekly newspaper “Evropljanin” was prosecuted and the paper closed after publishing information purportedly calling for the “violent disruption of the constitutional order”. According to the “Request to Initiate Proceedings” in that case :

> Page 18 contains, once again under the title “Yugoslavia” , a photograph of armed men in an aggressive, warlike posture accompanied by the following text:” Outcome: This is how it happened in Romania”. *This represents an outright call for civil war in Yugoslavia and violent disruption of the constitutional order*” [emphasis added].

While Article 20 of the ICCPR does require the prohibition of propaganda for war, this must not be interpreted so as to restrict public debate and political discussion in relation to any on-going or potential conflict. Characterising the mere publication of a photograph which uses satire to make a political point as a “violent disruption of the constitutional order” is clearly an illegitimate application of these provisions on their face. It cannot be regarded as one of the extreme circumstances in which international law would sanction the application of a censorship regime such as that established in Articles 42-50 of the Law. Closures and prosecutions such as these, carried out under the auspices of Article 42, are illegitimate from the perspective of international law.

Articles 4 and 30 of the Public Information Law require the press and broadcast media to publish “truthful” information only. According to Article 30, the author, editor, publisher or broadcaster are personally responsible for the truthfulness of their publications.

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[8] *Ibid.*

[9] A long line of cases in the European Court of Human Rights, as well as in various national courts have established and elaborated upon the principle of proportionality. See for example: *Handyside v United Kingdom, op.cit.* and *The Sunday Times v United Kingdom, op.cit.*

Professional journalists will obviously strive to publish accurate information, but they should not be penalised simply for failing to reach this goal in the context of a given article. There are at least two reasons for this. First, news is a "perishable commodity" and it must be expected that even the most experienced journalists may sometimes make mistakes due to the need to publish news in a timely fashion. Second, the question of what is true involves a degree of subjective interpretation. As the Canadian Supreme Court has noted, criminalizing "false news":

> Makes possible convictions for virtually any statement which does not accord with currently accepted 'truths', and…could be used (or abused) in a circular fashion essentially to permit the prosecution of unpopular ideas.[10]

It is clear that international law requires a very high threshold of tolerance for media reporting, even where it is not entirely accurate. The European Commission of Human Rights has recently stated:

> Freedom of the press would be extremely limited if it were considered to apply only to information which could be proved to be true. The working conditions of journalists and editors would be seriously impaired if they were limited to publishing such information…The extent of a journalist's obligation to verify the veracity of a statement considered for dissemination must depend on the particular circumstances of each case. The limits of permissible criticism or other statements are narrower in relation to a private citizen than in relation to politicians or governments.[11]

Article 4 is open to overreaching application in relation to journalists who criticise the government and do not conform to the "official" view of "truthful" reporting. It is therefore unacceptable from the perspective of international law.

Of great concern to ARTICLE 19 are the fines imposed by Articles 67 and 69 for breaches of Articles 42 and 4. The fines are levied against founders, publishers and editors, and are not only potentially ruinous but higher than other misdemeanour fines in the Serbian legal system. The highest fine in the current general Law on Misdemeanours is 10,000 dinars for a legal entity and 1,000 for an individual.[12] By contrast, Article 67 imposes a maximum fine of 800,000 dinars (approximately $US 80,000) on founders and publishers and 400,000 on editors and other individuals, while Article 69 imposes similar fines of between 50,000 and 300,000 dinars.

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[10] *R v Zundel* [1992] 2 S.C.R. 731 at 769.
[11] *Tromso v Norway,* Application No.21980/93, Report adopted 9 July 1998, para.80.
[12] Information taken from *The ANEM Legal Service Preliminary Analysis of the Government of Serbia's Draft Law on Public Information*.

Like all restrictions on freedom of expression, sanctions must meet the "proportionality" requirement, in particular in relation to the harm done. The fines contemplated, which include the possible confiscation of personal assets, are clearly excessive and hence breach the requirement of proportionality. Prosecution under these Articles would represent a direct blow against the free media, and would engender fear and self-censorship on the part of journalists and others wishing to avoid the extraordinary penalties.

The "chilling effect" of these provisions cannot be overestimated and is already being felt. The Editor-in-Chief of the Serbian weekly "Evropljanin"[13], Mr Slavko Curuvija, was personally fined the maximum 800,000 dinars, while the total fines imposed upon him and others within his "Dnevi Telegraf" media outlet amounted to 2.4 million dinars. Since these prosecutions a number of other media outlets have decided to self-censor their publications or to cease publication altogether in order to avoid similar consequences.[14]

Continuing this theme of restrictions on the content of media publications and broadcasts, Article 27 of the Public Information Law forbids the broadcasting or re-broadcasting of foreign programmes of "a political-propaganda nature" in Serbian or any of the recognised national minority languages. Harsh fines of between 50,000 and 500,000 dinars are imposed for breach of this vaguely worded provision under Article 68.

Article 19 of the ICCPR protects freedom of expression "regardless of frontiers". The reason is clear; citizens of every country have the right to receive information from a variety of sources, including from the foreign media. As a result, restrictions on foreign broadcasts must also conform to the strict three-part test established under Article 19(3) of the ICCPR. Article 27 of the Law fails all three elements of the test.

First, the "provided by law" element requires that laws restricting freedom of expression be accessible and of sufficient clarity that those subject to them may reasonably foresee their effects and condition their behaviour accordingly.[15] The phrase "of a political-propaganda nature" is so vague and subjective that it cannot be regarded as fulfilling this requirement. It is clearly open to misuse by any government wishing to restrict unfavourable foreign broadcasts by declaring them to be of a "political-propaganda" nature. Second, Article 27 does not serve any of the legitimate aims listed in Article 19 of the ICCPR. This article prohibits all political programmes broadcast by international stations, including such reputable channels as the BBC World Service and Deutsche Welle. In the vast majority of cases, no claim can be advanced that these programmes harm the rights and reputations of others or adversely affect any of the other legitimate interests in Article 19(3). Finally, even if the other elements of the test were met, the blanket ban established by Article 27 is quite clearly unnecessary. Article 27 effectively outlaws international broadcasters and, given the censorship of the local media,

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[13] For details, see above.

[14] See information at the following site: http://www.mediacenter.opennet.org.

[15] See for example *The Sunday Times v United Kingdom, op.cit.* Interpreting a similar provision in the European Convention on Human Rights and Fundamental Freedoms.

significantly diminishes the public's access to independent information and opinions.

Recommendations:

ARTICLE 19 calls on the Serbian Government to:

- Repeal or else amend Article 42 so as to ensure that its provisions are not interpreted in an overbroad manner and that it is not used as a vehicle either for prior censorship or for the closure of media outlets.
- Repeal Articles 4, 30 and 69 which impose the requirement to report "truthfully" and severe sanctions for failure to do so.
- Amend Article 67 by reducing the disproportionate and harsh fines to a level that would be acceptable under international law.
- Repeal Article 27 which imposes restrictions on the broadcast of foreign news programmes.

Due Process Concerns

Articles 42-50 and 72 set up nothing less than draconian judicial procedures to deal with the various prohibitions established in the information law. Given the criminal nature of the sanctions, these fall well below the minimum due process requirements of the ICCPR and do not accord with the constitutional guarantees in both the Serbian and the Federal Constitutions.[16]

Under Articles 42-50 the court must determine whether to issue a temporary order within 6 hours of receiving the petition. Within three days of receiving the petition the court must conduct a full hearing of the merits. The hearing may take place in the absence of the parties if either of them fail to appear. Either party may appeal from this decision. If the temporary order is overturned the injured party may claim compensatory damages. The case of a person charged with breaches of Articles 4 or 42, for example, for allegedly publishing an "untruth" or "jeopardising the territorial integrity of the Republic of Serbia", must be heard within 24 hours. The court summons in such a case is deemed to have been delivered if it is merely given to an "employee found in the business premises", "nailed to the door" or "made through the public information system". If for any reason the accused or his representative do not appear at the hearing, the case will be determined in their absence. Most significantly, the accused has the burden of proof and must establish that the prosecutor's assertions about the information are false. If he does not attend, this will clearly be impossible. Finally, any appeal from the initial decision will not postpone execution of the fine, including possible confiscation of property to satisfy it.

[16] See Articles 26 and 27 of the Federal Constitution and Articles 22-24 of the Serbian Constitution.

These procedures fall well short of the standards established under international law. Articles 42-50 establish a highly expedited procedure to implement a censorship regime, while Article 72 establishes a procedure for determining liability to pay significant punitive fines. These fines can be compulsorily acquired, including by the forced sale of chattels and real estate of individuals, if payment is not received within 24 hours of the decision. However such matters are classified in Serbian law, there can be no doubt that, due to the severe consequences, they are to be regarded as "criminal charges" for the purposes of Article 14 of the ICCPR.[17] As such, a person accused of breaches of any of these provisions is entitled to the minimum guarantees established in the ICCPR as follows:

> *2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*
>
> *3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*
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> > *…(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his choosing.*
> >
> > *…(d) To be tried in his presence and to defend himself in person or through legal assistance of his own choosing…*

The most important of these guarantees is the presumption that a person charged with a criminal offence will be assumed innocent until proven guilty. Article 72 effectively reverses this established principle. Rather than the State having to prove all the elements of the alleged offence, it will be presumed, for example, that the information is false, does "jeopardise the territorial integrity of the Republic of Serbia" or "calls for the forced overthrow of the constitutional order". In effect, this is a presumption of guilt which the accused must overcome. This problem is significantly compounded by the requirement that hearings under Article 72 must take place within 24 hours, thus precluding the accused from having an adequate period of time to prepare his defence. Also, given the conditions under which a summons is deemed to have been served, it is quite possible that an accused will know nothing of the accusation and therefore fail to appear at the hearing; in such cases the law provides for a finding of guilt.

The institution of such a "fast-track" judicial procedure to punish and restrict the activities of citizens, including the abandonment of previously fundamental due process protections, represents a clear and outrageous breach of Yugoslavia's obligations under Article 14 of the ICCPR. It is also contrary to the protections proclaimed in both the Serbian and the Federal Constitutions. In its application to the media it represents a response out of all proportion to

[17] See *Engel v Netherlands,* (1976), Series A, No. 22, para.91. Interpreting the meaning of a "criminal charge" in Article 6 of the European Convention on Human Rights and Fundamental Freedoms.

any potentially legitimate aim under Article 19(3) of the ICCPR and could never be regarded as acceptable. The only possible aim of such a clearly illegitimate procedure is to control and undermine the media, to instil fear into individual journalists and other members of the press and to "chill" expression within Serbia.

Recommendations:

ARTICLE 19 urges the government of Serbia to:

- Repeal Articles 42-50 and 72 or else amend them to ensure that those accused of breaching the various prohibitions in the Law are afforded the minimum due process guarantees required by international law and the Federal and Serbian Constitutions.

Excessive Privacy restrictions

Articles 55-60 establish a restrictive regime in relation to publication, broadcasts and reproductions of written records, visual likenesses, or sound recordings "of a personal nature". Such information may not be broadcast or reproduced without the consent of the "the person whose words, likeness or voice it contains, if it is possible to determine who the person is as a result of publicising".

Article 17 of the ICCPR forbids "arbitrary or unlawful interference with…privacy". The primary purpose of this protection is to require restraint on the part of public authorities in relation to the private lives of its citizens. It is possible that the right also includes a positive obligation to ensure that individuals are not subjected to intrusive activities by other individuals, but this is necessarily limited, particularly given the legitimate demands of freedom of expression and of the press.[18] The European Commission of Human Rights has recently rejected as manifestly unfounded a case in which it was argued that the State is required to protect individuals against press intrusion.[19] In any case, Article 17 is limited to the protection of genuinely "private" or "personal" matters. It does not provide any general right of secrecy, and hence does not mandate restrictions, for example, on taking of photographs or film in public places, even where such photographs include images of individuals.[20]

While it is legitimate to protect the personal affairs and genuinely private lives of members of the general public, Article 55 of the law must not be interpreted so as to allow public figures such as politicians and members of the

[18] See General Comment 16(32) of the UN Human Rights Committee on Article 17 of the ICCPR.
[19] *Earl Spencer & Countess Spencer v United Kingdom,* Application Nos.28851/95 and 28852/95, Decision as to Admissibility, 16 January 1998.
[20] See, for example, *Friedl v Austria,* (1994), Series A , No.305-B, Commission Report, para. 48, in which the European Commission of Human Rights found that being photographed by the police in the course of a political demonstration did not interfere with the applicant's right to privacy. See also *Costello-Roberts v UK,* (1993), Series A , No. 247-C, Commission Report, para. 49.

government to resist scrutiny, investigation and criticism from the media, or to veto reproductions of their own images, words or actions in the press and the broadcast media. The danger of the provisions in Articles 55-60 of the Public Information Law is that the phrase "of a personal nature" could significantly hinder media reporting on matters of public interest. It would often be effectively impossible to gain the consent of every individual whose image, words or voice was included, for example, in a broadcast of a demonstration or public meeting. Prominent public figures could effectively veto media reports by authorising only those broadcasts or quotations which they regarded as favourable, withholding consent for critical or negative programmes. President Milosevic, for example, could select which media outlets might broadcast or reproduce an important speech, even if it had been given in public.

Recommendations:

ARTICLE 19 urges the Serbian government to:

- Repeal Articles 55-60 or else amend them to ensure that any provisions protecting privacy are limited in scope to cover only genuinely "personal" matters and that the reproduction of images, words or writing does not depend upon the consent of the person concerned.