



NOTE

On

**Amendments to Law No. 8410 of 30 September 1998
on Public and Private Radio and Television
in the Republic of Albania**

by

**ARTICLE 19
Global Campaign for Free Expression**

**London
April 2004**

**Commissioned by the Representative on Freedom of the Media of the
Organisation for Security and Cooperation in Europe**



I. Introduction

ARTICLE 19 has been asked to analyse a proposed amendment (Amendment) to the law “On Public and Private Radio and Television in the Republic of Albania” (Law) against international standards on the right to freedom of expression. The analysis is based on an unofficial translation of both the Amendment and the existing Law.¹

¹ We received the Amendment through the Office of the Representative on the Freedom of the Media of the Organisation for Security and Cooperation in Europe (OSCE), who also provided the translation.

The Amendment would add a further, and extremely wide-ranging, restriction on what may be broadcast in Albania. It would prohibit the broadcast of ‘macabre’ images that might harm ‘the personalities of the victims’, that might cause panic or that might ‘trouble the psychological state of the viewers’. Because of the breadth of this restriction, we believe that the Amendment, if adopted, would constitute a violation of the right to freedom of expression as enshrined in the *European Convention on Human Rights* (ECHR).² The Amendment’s prohibitions would also, in all likelihood, violate the Albanian Constitution’s freedom of expression protections, which, as we noted in a previous Memorandum,³ effectively mirror the guarantees of these international instruments.

II. Analysis of the Amendment

A. The Amendment

The Amendment is proposed to be added to Article 38 of the existing Law, which already contains problematically broad restrictions on the broadcast of various kinds of content. In particular, the Amendment would prohibit the broadcast of “macabre images that harm the personality of the victim or the families, as well as those that cause panic and trouble the psychological state of the viewers”.

B. Analysis

Effectively, the amendment would prohibit the broadcast of three different categories of material: “macabre images” that would harm the personality of victims and families; “macabre images” that might cause panic; and “macabre images” that might “trouble” viewers’ psychological state.

Our concerns with the amendment are essentially two-fold: that it uses extremely vague language to restrict freedom of expression, and that it lacks a public interest override to allow the broadcast of material which, while it may fall within a prohibited category, it is in the public interest to broadcast. This means that the amendment fails to clear two of the three ‘hurdles’ erected by Article 10(2) ECHR: that a restriction on the right to freedom of expression should be stated in clear legal terms, and that it should be ‘necessary in a democratic society’. Article 10(2) states:

The exercise of [the right to freedom of expression], since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority or impartiality of the judiciary.

ARTICLE 19 does not accept responsibility for errors in the analysis arising from any inaccuracies in the translation.

² Adopted 4 November 1950, in force 3 September 1953. Albania ratified the ECHR on 2 October 1996.

³ See July 2003 Memorandum on Draft Amendments to Law No. 8410 “On Public and Private Radio and Television in the Republic of Albania”.

International jurisprudence makes it clear that this test presents a high standard which any interference must overcome. Recalling the fundamental importance of freedom of expression in any democratic society, the European Court of Human Rights has stated:

Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.⁴

We elaborate on our concerns in the following paragraphs. However, as a preliminary matter, we express our concern at the apparent haste with which the Amendment has been introduced and will be voted upon in Parliament. If adopted, the Amendment would pose a significant restriction on the right to freedom of expression of all broadcasters in Albania – moreover, in its current draft, it would constitute a violation of international standards, as elaborated below. If there are real concerns within Albanian society regarding the broadcast of ‘macabre’ images, we believe that this is a matter that ought to be consulted on widely before any legislative measures are taken. Such consultation should take in the views of the public at large as well as broadcasters. ARTICLE 19’s *Principles on Broadcast Regulation and Freedom of Expression*, a standard-setting document that reflects best international practice in the field, states:

Any content rules should be developed in close consultation with broadcasters and other interested parties, and should be finalised only after public consultation.⁵

On this ground alone, we recommend that the Amendment be withdrawn.

1. The use of vague language

The first part of the ‘test’ established by Article 10(2) ECHR requires any interference with the right to freedom of expression to be “prescribed by law”. Elaborating on the meaning of this, the European Court of Human Rights has stated:

[O]ne of the requirements flowing from the expression “prescribed by law” is the foreseeability of the measure concerned. A norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.⁶

This means that the use of excessively vague terms in legislation that restricts the right to freedom of expression constitutes a violation of that right.

The Amendment prohibits the broadcast of “macabre images” under certain conditions; however, it does not define the term “macabre”. According to a standard English definition, this term means “grim” or “gruesome”,⁷ and we will assume that the meaning of the Albanian term is roughly the same. Nor does the Amendment specify the standard

⁴ See, for example, *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

⁵ *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*, London, April 2002, Principle 23.

⁶ *Gaweda v. Poland*, 14 March 2002, Application no. 26229/95, para. 39.

⁷ *The Concise Oxford Dictionary*, Clarendon Press, Oxford (1990), p. 710.

by which an image is to be judged to be “macabre”. In light of the subjectivity of the critical terms in which the rest of the Amendment is cast (see below), the strong possibility exists that the Amendment could be understood to classify any image as “macabre” as long as any “victim” or any family member of the “victim”, or as long as any person who is caused “panic” or other psychological trouble by the image, believes that the image is grim or gruesome. Obviously, therefore, this has the potential for classifying just about any image as “macabre”. This means that, in a real case, it will be extremely difficult for a broadcaster to decide whether a given image is “macabre”, and whether, over and above that, it might for example “trouble” the psychological state of viewers or cause a particular viewer to “panic”. As such, we do not believe that the Amendment has been worded in sufficiently clear and unambiguous terms to be considered to be “prescribed by law” within the meaning of Article 10(2) ECHR.

2. ‘Necessary in a democratic society’

The third test under Article 10(2) requires that an interference with the right to freedom of expression must be “necessary in a democratic society”. The European Court has explained that the word “necessary” means that 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.”⁸

Assessing restrictions in cases before it, the European Court has repeatedly emphasised that the right to freedom of expression is a key human right, and that it should not be lightly interfered with. The Court has specifically referred to the special importance of the right to freedom of expression for the media, including the broadcast media. Referring to the key function of the media in a democratic society, it has stated, repeatedly:

The press plays an essential role in a democratic society. ... [I]ts duty is ... to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest [footnote deleted]. In addition, the court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.⁹

Furthermore, the Court has repeatedly emphasised that, in order to play its role as imparter of information of public interest, the media cannot be under a general duty only to convey information which is inoffensive or benign:

[The right to freedom of expression] 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 that pluralism, tolerance and broadmindedness without which there is no “democratic society”.¹⁰

Applying these general principles to the Amendment proposed, we note the following.

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

⁹ *Fressoz and Roire v. France*, 21 January 1999, Application No. 29183/95 (European Court of Human Rights), para. 45.

¹⁰ *Handyside v. the United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.

First, with regard to the prohibition of broadcasting images that “harm the personality of the victim or the families” or that might “trouble the psychological state of the viewers”, the Amendment fails to impose any restriction whatsoever on the nature or extent of the harm or ‘trouble’ to which it refers.¹¹ By terms, therefore, it would appear to apply whenever an image which a particular viewer finds to be grim or gruesome is disturbing to him or her, regardless of how unusually sensitive, or unreasonable, or suspicious or fearful such viewer is. In effect, the provision could be read as prohibiting the display of any serious image whatsoever as long as it would be disturbing in any way to any possible viewer. For example, a person who had been detained and abused by the authorities as a result of his political activities might have developed a very strong aversion to viewing information about conditions in the criminal justice system. Such a person might well be ‘troubled’ psychologically when viewing grim images relating to official abuse of prisoners. Given this possibility, the National Council of Radio-Television would appear to be well within its rights in taking advantage of this situation to prohibit broadcast of such images, despite their being of high public interest. Similar objections apply to the prohibition of broadcasting “macabre” images of a victim of a crime. Bearing in mind the uncertainty of what might be considered “macabre”, a broadcaster may legitimately wonder if, under the Amendment, it may be prohibited from showing images of the aftermath of a terrorist attack in which a victim is identifiable, regardless of the newsworthiness of such images.

This leads to the second problem: the absolute nature of the prohibition. Clearly, much information which “offends, shocks or disturbs”, in the European Court’s formulation, will also be information of great public interest, which the public therefore has a right to receive. Any blanket restriction on the broadcast of such “offensive” or “shocking” information is therefore in clear violation of international law. Yet, the Amendment’s first prohibition, in practice, will prohibit precisely the broadcast of images which may offend or shock, i.e., which cause “psychological trouble”, “panic” or which “harm the personality” of, “victims”, regardless of the public interest or newsworthiness of the image. This will render it virtually impossible for a broadcaster to report on such events as the aftermath of the hypothetical terrorist attack referred to above, or on a natural disaster, such as an earthquake. Images of such events could easily be interpreted as “macabre” and could cause a form of panic or be in some way psychologically troubling, yet it is clearly in the public interest that they be reported in the media.

We note, also, that this is a problem not only with the proposed amendment but with all existing prohibitions stated in Article 38 of the Law: relating to privacy, for example, state secrets or national security. There will be numerous occasions when material may fall within these categories but would still be in the public interest to report on, for example because they disclose corruption or mismanagement of public funds within the military.

¹¹ We note that the “harm”, being thus unrestricted, may include damage to a victim’s reputation or honour. To that extent, the provision duplicates general defamation provisions in Albanian law and would therefore have no place in a law specifically devoted to the broadcast media.

Third, the penalties imposed by the existing Law, which would be applicable to the Amendment were it to be included in Article 38, are potentially severe, including the imposition of very heavy fines and even the revocation of licenses (see Article 137/3 and 137/4). Additionally, Articles 45 and 137/4 refer to the possibility that the violation of some of the Law's prohibitions may be subject to criminal penalties. We are informed that criminal sanctions exist for violations of Article 38(1) and (2): while the Amendment does not specify that violations of its restrictions will be subject to the same criminal sanctions, the possibility remains that they might be. The existence of such severe sanctions, coupled with the nearly unlimited scope of the Amendment, raises the very real possibility that broadcasters will simply refrain from broadcasting any serious images that might have the remotest chance of disturbing any viewer, regardless of how important – in terms of newsworthiness, artistic merit, or in some other way – the image was. In light of the media's responsibility to disseminate information of public importance, the chilling effect of the Amendment would constitute a serious violation of the right to freedom of expression, as guaranteed internationally as well as in Albania's Constitution.

For all these reasons, we strongly urge that the Amendment not be adopted as part of the Law. If there are real concerns regarding, for example, the glorifying of violence on Albanian television, this is a matter that should be consulted on widely before any legislative measures are introduced. Any measure finally proposed for adoption should be narrowly worded and allow for the transmission of material where this is in the public interest. We would refer to the Council of Europe's Recommendation R(97)19 on the portrayal of violence in the electronic media¹² as a starting point for such considerations.

Recommendation:

- The Amendment should not be enacted as part of the Law.
- If there are real concerns regarding, for example, the glorifying of violence on Albanian television, this is a matter that should be consulted on widely before any legislative measures are introduced. Any measure finally proposed for adoption should be narrowly worded and allow for the transmission of material where this is in the public interest.

¹² Adopted by the Committee of Ministers on 30 October 1997.