The Representative
on Freedom of the Media

ARTICLE 19
GLOBAL CAMPAIGN FOR FREE EXPRESSION

Statement

on

Albanian draft Law on Freedom of the Press

by

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The Global Campaign For Free Expression

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Introduction

ARTICLE 19 understands that a draft law on Freedom of the Press is currently under consideration in Albania. Although ARTICLE 19 generally views the introduction of press laws with caution – they can be a tool for governments to abuse rather than protect the right to freedom of expression and information – we also understand the motivation behind this law given the highly unregulated media climate that has existed since the 1997 Press Law replaced the 1993 one. We accept that in order to improve the generally poor standards of journalism and to provide guidance to media owners and editors-in-chief, a clearer framework may be necessary.

However, we do not regard the current draft Law as an appropriate or effective way to approach this issue. It goes far too far in providing for legal regulation of the press – self-regulation would be preferable to deal with many of the issues covered – and in so doing represents a serious threat to media freedom in Albania. We welcome certain provisions in the law including the explicit protection of freedom and pluralism of the press (Article 11), the role of the media in informing the public (Article 12), the right to access and disseminate information (Article 14), protection of sources (Article 16) and the prohibition of prior censorship (Article 26).

However, many other provisions serve to undermine such protections and would take media freedom in Albania backwards rather than forwards. We are providing the following comments in the hope that the law can be seriously amended to provide legal protection of the right to freedom of expression and information, in line with Albania's commitments as a party to the European Convention on Human Rights and the International Covenant on Civil and Political Rights, and to protect the rights of journalists rather than limit them.

A particular concern is that many provisions of the law place a heavy burden on journalists to be responsible for what is printed. In reality in Albania it is the owners and editors that take many of the key decisions leaving journalists unable to exert significant influence. When considering measures to raise journalistic standards, a broader approach than simply legal regulation is needed including recognition of the fact that the problems of professionalism in Albania do not only come from the journalists themselves.

Mandatory Licensing of Journalists

The most worrying part of this law is the establishment at Article 32 of a Journalists' Order to which "all professional journalists of written and electronic media" must become members. The law forbids publishers from employing journalists who are not registered with the Order and requires that a Journalists' Registry be established to which all professional journalists must be registered. Registration is obtained by fulfilling various conditions including that a person has accrued more than 12 months' work experience, that they have not been criminally prosecuted for at least three years prior to the date of registration with the Order and that they are recommended by a member of the Order with working experience of no less than 5 years as a journalist.

It is clear that such a provision derives from an attempt to raise journalistic standards and to professionalise the media in Albania. This is, in itself, a legitimate and laudable aim. However, to regulate membership of the journalistic profession and the activities of journalists by law infringes basic principle that the practice of journalism is a matter for self-regulation and should under no circumstances be regulated by government.[1]

The state, with its own interests to protect, is not in a position to decide independently and impartially on who should and should not work as a journalist. Such a provision, particularly in a country in which democracy is still in the process of establishing itself, simply provides opportunities for the state to abuse its powers and to refuse membership of the Order to those journalists who criticise the authorities. This in turn will have a direct impact on everyone's right to freedom of expression and information and on the public's right to know. Such a provision also entirely fails to address the issue of the professionalism of media owners and editors.

ARTICLE 19 does not accept the legitimacy of establishing such an Order by law and believes that this whole concept should be dropped from the law. As a consequence, we will not pass comment on the rest of the provisions which cover the functioning of the Order – e.g. the establishment, organisational structure and discipline of the Order except to state that many of these provisions (Articles 32-62) infringe international and comparative law and standards and should be removed.

Journalistic Ethics

We will, however, comment on the fact that various organs of the Journalistic Order are mandated to oversee registered journalists' adherence to the "principles and rules of the journalist's ethics and legal acts in force" and to judge and discipline those that break them. In common with licensing of journalists, ethics are universally accepted as an area for self-regulation only and adherence to such standards should not be a matter for legal regulation. Courts of law are blunt instruments – the standards of proof they require may be appropriate in a legal setting but they are too black and white for issues of journalistic ethics. To judge whether a journalist has been "impartial" or "objective" is often purely subjective and should not, therefore, be left to legal regulation.

Where there is a problem of journalistic standards, it is clear that measures are required to improve professionalism. In any country, when journalists do not act responsibly – as is the case in Albania – they are encouraging the possibility of governmental regulation. But this is not a solution. First of all owners, editors and journalists have to recognise the need to be professional and to understand what this means; secondly, media outlets have to establish standards and codes which they require their staff to adhere to; and thirdly, some kind of press council, established by the profession itself and with voluntary

[1] The Inter-American Court of Human Rights issued an advisory opinion in 1985 stating that "the compulsory licensing of journalists does not comply with the requirements of Article 13(2) of the [American] Convention [on Human Rights] because the establishment of a law that protects the freedom and independence of anyone who practices journalism is perfectly conceivable without the necessity of restricting that practice only to a limited group of the community" (para 72).

membership should hear complaints against the media whilst at the same time defending freedom of speech.

False News Provisions

Article 13 of the law places an obligation on the press to print the truth and to ensure that information is adequately checked. This is understandable in a media climate where much of the information that is published is not checked properly and consequently much of it is incorrect. However, the use of legal measures to criminalise the distribution of false information (false news provisions) is neither legitimate under international law, nor positive for the free flow of information.

False news provisions have been struck down by three national courts and are regarded with suspicion by most modern democracies. They are perceived as yet another tool to filter and reduce the information that is made available to the public. Indeed, in the interest of disseminating timely news, even the best journalists make mistakes and the time spent fulfilling too stringent requirements of accuracy would certainly deprive the audience of much information that is of public interest. In addition, the penalties recommended to be imposed for disinformation are a powerful deterrent for journalists, severely limiting their freedom to expose cases of corruption and maladministration.

If false information is published about someone and *if* it damages their reputation, then well-framed defamation laws can deal with this. If there has been no damage to their reputation, then there is no need for any kind of legal remedy. In addition, the possibility of using a well drafted right to reply (see below) to correct inaccuracies means that there are at least two means that comply with international law by which the publication of false information can be rectified.

Right to Reply

Articles 19-25 of the draft law establish the right of reply and set out a complicated process by which this right can be exercised. It covers both incorrect facts as well as opinions.

A mandatory right of reply is a highly disputed area of media law – in the US it is seen as unconstitutional on the grounds that it represents an interference with editorial independence. In many Western European democracies, the right of reply is provided by law – and works to a varying extent. Advocates of media freedom, including ARTICLE 19, generally suggest that a right of reply should be voluntary rather than prescribed by law. In any case, certain conditions should apply – not all of which are met by the provisions of the draft Albanian law.

a. A reply should only be in response to incorrect facts, not to comment on opinions that the reader/viewer does not like. Article 19 of this text permits a right of reply for opinions which is not acceptable.
b. The text should receive similar prominence to the original article (not necessarily exactly the same prominence - if the "offending" article was the main article on page 1, it would not be reasonable to expect a reply to go in the same place. It

might however be on page 2 with a prominent note on page 1 directing readers to it).

c. It should be proportionate in length to the original article.
d. It should be restricted to addressing the incorrect or misleading facts in the original text - not be taken as an opportunity to introduce new issues or comment on other correct facts.
e. The publication should not be prevented from commenting on the reply. Article 21(3) of this draft law prevents publishers and editors-in-chief from "making their own comments on the correction of inaccuracies". Providing they do not publish further inaccuracies – or infringe the law in other ways – there is no reason at all why they should not be free to make whatever comment they wish in their publication. Such a restriction is a limitation on editorial freedom.

Orthography

Article 9 provides that "In all press publications, use of the unified orthographic norm shall be binding". This provision infringes international law and basic media freedom standards. In addition, it implicitly precludes the use of minority languages which is discriminatory against minorities in Albania. No democratic country has such legal provisions – not even France which is particularly protective of its language – and they serve no useful purpose. Languages evolve over time – new words are introduced into all languages and other words are lost – and there is no reason to stop this process. Two of the three conditions set out by the European Court jurisprudence for a legitimate restriction to freedom of expression are that it must be "necessary in a democratic society" and that it must serve one of the aims outlined in Article 10(2) of the European Convention on Human Rights (ECHR). The use of non-standard orthography represents absolutely no threat to any of the interests outlined in Article 10(2) of the ECHR and is, under no circumstances, necessary in a democratic society.

There is no reason why linguistic standards should not be established and encouraged; however, legal sanction for abuse of such standards is totally unnecessary and has no place in a democratic society.

Compulsory Publication during States of Emergency

Article 18(2) provides that in a state of emergency, "central state and executive bodies" can have decrees or orders publicised without payment in the daily press or other media.

There is simply no justification for legally obliging media to disseminate official information. Publicly-funded media should be under a general duty to provide comprehensive news services to the whole population but this is quite different from disseminating official information. The key problem with this obligation is that officials can use it to ensure that the public media serve their interests, and effectively operate as a mouthpiece of government, rather than serve the interests of the public as a whole. A number of official bodies, including the Committee of Ministers of the Council of Europe, have stressed the need for public broadcasters to be fully independent of

government.[2] A key aspect of independence from government is editorial independence which includes the power to make editorial choices free of government or official interference based on the public interest. An obligation to disseminate official information clearly breaches this right.

In the case of private media, there should be no obligation at all – legal or moral – to carry any statements emanating from official sources during emergencies. Is it likely that all the mass media *will* carry full coverage of public disasters and other dangers, in part because this will always attract good viewer and listener ratings and in part because it is clearly the only responsible thing to do. To establish it as a legal obligation on broadcasters is not only unnecessary but also provides the authorities with another possible avenue for harassment and interference with media freedom.

Prior Censorship

Although on the one hand the law states that prior censorship is prohibited except in extreme circumstances, the circumstances it outlines are too broad to meet with international standards.

Article 27 states that materials can be seized prior to distribution if they "encourage the commission" of a range of criminal offences, including provoking war, calling for the population to arm, disseminating false information which strikes panic, calling for the instigation of hate or quarrel among nationalities, races and religions or calling for national hatred.

The broad language used here is of great concern and infringes international law which requires that prior censorship should only be used in the narrowest of circumstances. Materials which could be construed to "encourage" a call for "national hatred" or the "instigation of hate or quarrel among nationalities, races and religions" for example could be very widely interpreted and is, therefore, open to abuse.

Article 13(2) of the Inter-American Convention on Human Rights expressly prohibits all prior restraint. The European Court of Human Rights has indicated that it regards even specific instances of prior censorship with great suspicion. In *Observer and Guardian v. the United Kingdom*, the European Court held that an injunction against publication of a book, purportedly for reasons of national security, breached the guarantee of freedom of expression. National courts have also noted the dangers inherent in any system of prior restraint.[3]

Definitions

The definition of journalist given in Article 3 is too narrow and should be broadened. There is no reason why journalism should limited to those who "exclusively" and "in a continuous manner" exercise the profession – there might be many people who have

[2] Recommendation No. R(96)10 on the Guarantee of the Independence of Public Service Broadcasting.

[3] The United States Supreme Court, for example, has stated that any system of prior restraints bears a heavy presumption against its constitutional validity. See *New York Times Co. v. United States*, 403 U.S. 713 (1971).

more than one job and therefore could not be said to be "exclusively" working in journalism and the phrase "in a continuous manner" clearly excludes all those who have a break from journalism for any time.

Registration requirements

Whilst the registration of the print media is acceptable as a purely administrative matter (in the same way that any company must provide certain basic information to the authorities), this information should only be given to an administrative body and registration should be automatic upon the submission of the relevant documents. It is concerning that Article 5 of this draft requires publishers to register with the courts. Article 5(3) mentions the "court decision" which further implies that registration is not automatic but that the court must consider the case – although this is not explicitly stated anywhere. This provision must be amended since it is unacceptable under international law for the state to decide who can and cannot publish – the European Convention on Human Rights does not permit licensing of print media outlets. If registration is to be automatic, then there is no need to register with the courts and registration should be to an administrative body which should automatically grant the right to publish.