



COMMENT

on the

**Decision of the Supreme Economic Court of the Republic of
Belarus: Case 1-9/2002 of 13 June 2002**

by

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**London
August 2002**

1. INTRODUCTION

This Comment by ARTICLE 19, Global Campaign for Free Expression, provides an analysis of the 13 June 2002 decision by the Supreme Economic Court of the Republic of Belarus in relation to international law, and in particular the guarantee of freedom of expression. In its decision, the Supreme Economic Court rejected the appeal by the private newspaper *Narodnaya Volya* against a 21 March 2002 warning by the Ministry of Information for breach of Articles 5 and 32 of the Law ‘On Press and Other Mass Media’ (the Law on Press).

The warning was a response to *Narodnaya Volya* issue No. 51 of 20 March 2002, in which the newspaper re-published an article by A. Pankratova taken from the website of Radio Liberty entitled “Big Laundry. The Austrian press confirms the private nature of Lukashenka’s latest visit”. The article contained, among other things, references to alleged involvement in the arms trade by the Belarusian government, implicating the

president. The Ministry of Information warning claimed that the article was a breach of the Law on Press as it misled the citizens of Belarus by publishing false information and it defamed the president.¹ The warning also noted that citizens of Belarus have the right to receive timely and truthful information through the media about the work of governmental bodies and NGOs, about political, economic and international life, and about the environment.

In its lawsuit, *Narodnaya Volya* invoked Article 47 of the Law on Press, protecting newspapers from liability where they disseminate information which is a word-for-word reproduction of material carried by other media outlets.

The ruling of the Supreme Economic Court, while formally re-affirming the right to free speech, focused on media obligations. It added a national security element to the Ministry of Information warning, stating that the article in question threatened national security, based on Article 6.2.1 of the Order of the President of Belarus of 17 July 2001 “On the Confirmation of the Concept of National Security for the Republic of Belarus”. It then explicitly upheld the warning pursuant to Article 5 of the Law on Press, on the basis that Article 47 does not apply to information concerning the president, given that the Belarusian Constitution specifically protects the president against defamation.² As a result, the Court rejected *Narodnaya Volya*’s appeal and the warning remains in force.

The warning represents a clear breach of the right to freedom of expression as guaranteed under international law. In ARTICLE 19’s view, the decision by the Supreme Economic Court fails to take into account the importance of freedom of expression and the extent to which it is protected as a fundamental human right. This Comment analyses ARTICLE 19’s main concerns regarding the warning and Court decision, based on international standards regarding freedom of expression.

2. COMMENTS

a) Defamation of the President

Article 5 of the Law on Press states:

It is forbidden to use mass-media for:

... the dissemination of information which denigrates the honour and dignity of the President of the Republic of Belarus or the heads of government bodies....

¹ Articles 5 and 32 both forbid the dissemination of information which degrades the honour and dignity of the president. Article 32 also prohibits the dissemination of false information about the work of governmental bodies.

² Article 79 of the constitution states the president enjoys immunity from the law and that his honour and dignity are protected.

Article 32 reiterates this protection for the president, which also finds expression in the constitution.

This special protection for the president and other political figures against defamation is clearly contrary to the right to freedom of expression for a number of reasons. First, it is now very well established that public figures should tolerate a *higher* degree of criticism than ordinary citizens. The European Court of Human Rights³ in its landmark 1986 judgment in *Lingens v. Austria* stated that:

[Politicians] knowingly and inevitably lay [themselves] open to close scrutiny of [their] every word and deed by both journalists and the public at large ... and [they] must consequently display a greater degree of tolerance [than ordinary members of the public]... [while politicians are entitled to protection of their reputation,] the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.⁴

This is particularly true for the president, given the tremendous influence he or she has on public affairs.

Second, the information in question – namely whether the government of Belarus has been involved in arms sales – is clearly information of the greatest public interest, which needs to be investigated and exposed. People have a right to know about the actions undertaken by their elected representatives and the media has a crucial role in ensuring accountability by exposing the cases of wrongdoing and mal-administration. The European Court of Human Rights has made it clear that information and ideas relating to matters of public interest deserve the highest protection:

Although [the press] must not overstep various bounds set, *inter alia*, for the prevention of disorder and the protection of the reputation of others, it is nevertheless incumbent on it to impart information and ideas on political questions and on other matters of public interest.⁵

Third, defamation provisions are only legitimate where sufficient defences are available to the defendant. One defence which has been recognised as necessary to ensure appropriate respect for freedom of expression is what might be called the “reasonable publication” defence. This defence, which applies even where a statement of fact on a matter of public concern has been shown to be false, is established if it is found to be reasonable for a person in the position of the defendant to have disseminated the information in the manner and form he or she did. In assessing this, a court of law should take into consideration the importance of freedom of expression in a democratic society. An increasing number of national courts are recognising the reasonableness defence – also known as the ‘good faith’ or ‘due diligence’ defence –, acknowledging the harshness of traditional rules by which liability was imposed for the dissemination of information

³ Although Belarus is not a party to the European Convention of Human Rights, interpretation by the Court of Article 10, on freedom of expression, is generally considered to be persuasive as an indication of the scope of Article 19 of the International Covenant on Civil and Political Rights, which Belarus has ratified.

⁴ 8 July 1986, Application No. 9815/82, para. 42.

⁵ *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 65.

which did not correspond to the truth and/or which the defendant could not prove to be true. This defence is based on the public interest in receiving information in a timely fashion and is of particular relevance for the media.

b) False News Provisions

In its warning, the Ministry of Information found a breach of Article 32 of the Law on Press regarding the dissemination of false information and specifically stated that *Narodnaya Volya* had misled its readers. It also noted that the public has a right to receive truthful and timely information.

The use of legal measures to prohibit the dissemination of false information cannot be justified as a legitimate restriction on freedom of expression. National courts and international human right bodies around the world have held that false news provisions violate the right to freedom of expression.⁶ The most serious problem with banning false news is that it is simply not possible for journalists and editors, whose role as public watchdogs puts them under an obligation to publish information of public interest in a timely manner, to verify in advance every factual allegation. In relation to timeliness, the European Court of Human Rights has stated:

[N]ews is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.”⁷

Similarly, the European Commission of Human Rights has stated, in a case involving statements which had been found to be false and defamatory:

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.⁸

False news provisions also have an unacceptable “chilling effect” on freedom of expression. For example, the Supreme Court of Canada, in a case striking down a false news provision, stated:

⁶ The UN Human Rights Committee and the UN Special Rapporteur on Freedom of Opinion and Expression have repeatedly expressed concern about national false news provisions. In respect of the former see: *Annual General Assembly Report of the Human Rights Committee*, UN Doc. A/50/40, 3 October 1995, para. 89; *Annual General Assembly Report of the Human Rights Committee*, UN Doc. A/51/40, 16 September 1996, para. 154; *Concluding Observations of the Human Rights Committee: Uruguay*, UN Doc. CCPR/C/79/Add.90, 4 August 1998, para. 10; and *Concluding Observations of the Human Rights Committee: Armenia*, UN Doc. CCPR/C/79/Add.100, 19 November 1998, para. 20. In relation to the Special Rapporteur on Freedom of Opinion and Expression see: *Annual Report to the UN Commission on Human Rights, Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, para. 99 and *Annual Report to the UN Commission on Human Rights, Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, para. 205.

⁷ *The Observer and Guardian v. United Kingdom*, 26 November 1991, Application No. 13585/88, para. 60.

⁸ *Tromsø and Stensås v. Norway*, 9 July 1998, Application. No. 21980/93, para. 80.

The danger is magnified because the prohibition affects not only those caught and prosecuted, but those who may refrain from saying what they would like to because of the fear they will be caught. Thus worthy minority groups or individuals may be inhibited from saying what they desire to say for fear that they might be prosecuted.⁹

The invalidity of provisions banning false news does not mean that the media is free to print false information at will. Defamation law may provide for redress for harm to reputations in such circumstances, and professional and self-regulatory systems should also deal with this problem.

c) Reproduction of the Statements of Others

The newspaper, in its defence, invoked Article 47 of the Law on Press, which states:

The editorial office, the (chief) editor or journalist are exempt from liability to prosecution for the dissemination of information which does not correspond to reality, denigrates the honour and dignity of citizens or organisations, breaches the rights and lawful interests of citizens or constitutes an abuse of freedom of mass information and/or of the rights of journalists if [the information]:

...is a word-for-word reproduction of information and materials, or fragments thereof, disseminated by another mass-medium....

Greater protection for freedom of expression applies to the repetition of statements of others in certain circumstances. For example, the European Court has stated that a person should not be held liable for publishing allegations, especially regarding matters of serious public concern, that are based on public opinion, “rumours”, “stories” or the statements of others, so long as the nature of the factual support for the allegations is stated.¹⁰ The reporting of allegations enables the public to be informed of the possibility of a wrongdoing and to call for an investigation. These considerations clearly apply to the *Narodnaya Volya* case.

d) National Security

The decision by the Supreme Economic Court refers to Article 6.2.1 of the Presidential Order of 17 July 2001 “On the Confirmation of the Concept of National Security for the Republic of Belarus”. This Order states that one of the basic threats to national security in the sphere of information is:

[T]he dissemination of false or deliberately distorted information aimed at the destruction of social harmony, spiritual or moral values of society or incitement to national or religious hatred or social enmity.

⁹ *R. v. Zundel*, [1992] 2 SCR 731, p. 772.

¹⁰ *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88. In this case the applicant had reported what was being said about police brutality in Iceland.

The right to freedom of expression may be subjected to restrictions which are necessary to protect national security. However, such restrictions must be as narrow as possible in scope and set out very clearly in law. They must, in particular, satisfy the three-part test established at Article 10 of the European Convention on Human Rights for restrictions on freedom of expression. Among other things, this requires any restriction to be ‘necessary in a democratic society’ to protect national security, a high standard for any restriction to satisfy.

A restriction on grounds of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country’s existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force (such as an external military threat or incitement to violent overthrow of the government).¹¹ The government should also be in a position to demonstrate that:

- 1) the expression is intended to incite imminent violence;
- 2) it is likely to incite such violence; and
- 3) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.¹²

These standards are clearly not met in relation to the information contained in the article published in *Narodnaya Volya*, where the restrictions imposed effectively limit the peaceful exercise of the right to freedom of expression by preventing criticism of the government and public officials.¹³ The provision in question, Article 6.2.1, is excessively vague, and hence open to abuse. Furthermore, the allegations in no way threaten national security. Indeed, ARTICLE 19 cannot understand why a link was made between the article in question and national security.

e) Sanctions

A warning under the Law on Press is a serious matter for the newspaper concerned, as the accumulation of two or more warnings within the space of one year can lead to court proceedings for the closure of the outlet, the most serious sanction that may be applied to a newspaper. As a result, the threat or imposition of a warning leads to a substantial ‘chilling effect’ on the work of the media.

Under international law, the rule of proportionality applies not only to the substance of restrictions on freedom of expression but also to sanctions.¹⁴ Where other less intrusive sanctions are sufficient to deal with breach of a legitimate law restricting freedom of expression, these should be employed rather than more draconian measures. Given the

¹¹ Principle 2, *The Johannesburg Principles. National Security, Freedom of Expression and Access to Information*, ARTICLE 19, London: November 1996.

¹² *Ibid.*, Principle 6.

¹³ See *ibid.*, Principle 7.

¹⁴ See *Tolstoy Miloslavsky v. United Kingdom*, 13 July 1995, Application No. 18139/91 (European Court of Human Rights).

potential implications of a warning in Belarus, the penalty in this case was disproportionate. The ruling by the Supreme Economic Court failed to invalidate the warning and, instead, confirmed a widespread tendency to punish the media for any criticism of public officials, particularly the president.

3. CONCLUSION AND RECOMMENDATIONS

ARTICLE 19 believes that the warning imposed upon *Narodnaya Volya* represents an unjustifiable restriction on freedom of expression. We are disappointed that the Supreme Economic Court failed to recognise this and invalidate the warning. We call on the relevant authorities in Belarus to take the appropriate steps to invalidate the warning against *Narodnaya Volya*.

We also call for the following measures to be taken to ensure compliance with Belarus' obligations under international law:

- All restrictions on the right to freedom of expression should be reviewed to ensure that they satisfy the three-part test for such restrictions under international law.
- Article 79 of the Constitution should be amended so that the president is not afforded special protection for his honour and dignity.
- Articles 5 and 32 of the Law on Press should be amended so that the president and other high-ranking officials are not afforded special protection against defamation or criticism.
- The law should recognise the importance of the free flow of information, particularly on matters of public interest, and ensure that statements of this nature are adequately protected against legal liability.
- The law should establish a defence of reasonable publication, as described above.
- The false news provision in Article 32 should be deleted.
- The law should recognise certain exceptions to liability for repetition of the statements of others, as described above.
- Article 6.2.1 of the Presidential Order of 17 July 2001 "On the Confirmation of the Concept of National Security for the Republic of Belarus" should be deleted and restrictions on freedom of expression for reasons of national security should be imposed only as necessary to protect a genuine national security interest.
- When imposing sanctions for breach of a restriction on freedom of expression, courts should take into account the potential 'chilling effect' of the sanction, respecting the proportionality rule.