



BRIEFING NOTE
on
**Proposed amendments to the Bulgarian Penal Code on the
Unauthorised Disclosure of State Secrets**

by
ARTICLE 19
Global Campaign for Free Expression

London
October 2003

I. Introduction

This Briefing Note examines proposed amendments to the 1968 Penal Code of Bulgaria dealing with the unauthorised disclosure of State secrets. A translation of the amendments was forwarded to us by the Bulgarian Access to Information Programme.¹ The amendments are currently under consideration by the Bulgarian Parliament.

The amendments propose to replace two existing provisions in the Penal Code. Under the first new provision, a public official who imparts or allows to be imparted information classified as an “official secret” will be liable to up to three years imprisonment or forced labour. Non-State employees who leak “official secrets” that they have come across in the course of their work are liable to the same penalty. The second new provision relates to information classified as “state secret”, the unauthorised disclosure of which will be punishable by penalties ranging from three to fifteen years imprisonment, depending on the circumstances and consequences of the disclosure. The amendments are closely linked to the existing Bulgarian Law for the Protection of Classified Information,² a draft

¹ “Access to Information Programme” Foundation: <<http://www.aip-bg.org/>>.

² Law for the Protection of the Classified Information, Prom. SG. 45/30, April 2002, corr SG. 5.17 January 2003: <http://faculty.maxwell.syr.edu/asroberts/foi/library/secrecylaws/BG_class_info_law.pdf>.

of which we commented on in October 2001.³ This provides the definitions for what constitutes a “state secret” and what constitutes an “official secret”.

In this Memorandum, we first briefly set out the pertinent international and constitutional standards for the protection of freedom of expression in Bulgaria, focusing on the interplay between national security and freedom of expression and information. Then, we comment on the proposed amendments. Where appropriate, we refer readers to our analysis of the Law for the Protection of Classified Information.

II. International and Constitutional Obligations

II.1. The Guarantee of Freedom of Expression

The right to freedom of expression and information enjoys strong international protection, through both international treaties and customary international law. Bulgaria is a party to two major international treaties that guarantee the right to freedom of expression, namely the *European Convention on Human Rights* (ECHR),⁴ which it ratified 7 May 1992, and the *International Covenant on Civil and Political Rights* (ICCPR),⁵ which it ratified in 1974.

Under international law, freedom of expression is acknowledged as a key right. In its very first session, in 1946, the United Nations General Assembly adopted Resolution 59(I)⁶ which states:

Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.

As this Resolution acknowledges, it is only in societies where the free flow of information and ideas is permitted that democracy can flourish. In addition, freedom of expression is essential if human rights violations are to be exposed and challenged.

The European Court of Human Rights, elaborating on the importance of the right to freedom of expression as protected under the ECHR, has similarly held:

Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to [legitimate restrictions] it 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”.⁷

³ Available at: <<http://www.article19.org/docimages/1686.doc>>.

⁴ E.T.S. No. 5, adopted 4 November 1950, entered into force 3 September 1953

⁵ Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976.

⁶ 14 December 1946.

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

In a democratic society, the media must be free to report on politically sensitive and even divisive issues, for which it needs wide access to information. As the European Court as held:

It is ... incumbent upon the press to impart information and ideas on political issues, including divisive ones ... Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders.⁸

Statements of this nature now abound in the case law of the European Court and in cases decided by constitutional and human rights courts around the world.

The Bulgarian constitution protects the right to freedom of expression through several different provisions, including Article 39, which states:

- (1) Everyone shall be entitled to express an opinion or to publicise it through words, written and oral, sound or image, or in any other way.
- (2) This right shall not be used to the detriment of the rights and reputation of others, or for the incitement of a forcible change of the constitutionally established order, the perpetration of a crime, or the incitement of enmity or violence against anyone.

Article 40 of the Constitution provides special protection for freedom of the media while the right to freedom of information is explicitly protected by Article 41, which states:

- (1) Everyone shall be entitled to seek, obtain and disseminate information. This right shall not be exercised to the detriment of the rights and reputation of others, or to the detriment of national security, public order, public health and morality.
- (2) Citizens shall be entitled to obtain information from state bodies and agencies on any matter of legitimate interest to them which is not a state or official secret and does not affect the rights of others.

II.2. Restrictions on Freedom of Expression

The right to freedom of expression is not absolute. Both international law and most national constitutions recognise that freedom of expression may be restricted. However, any limitations must remain within strictly defined parameters. These parameters are spelled out in Article 10(2) of the ECHR, which recognises that freedom of expression may, in certain prescribed circumstances, be limited:

The exercise of these freedoms, 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.

⁸ *Erdogdu and Ince v. Turkey*, 8 July 1999, Application Nos. 25067/94 and 25068/94, para 48.

It follows that restrictions must meet a strict three-part test, requiring any interference to be: (1) prescribed by law; (2) pursue one of the legitimate aims, as listed, and; (3) be necessary in a democratic society.⁹ The European Court has elaborated that the requirement that an interference is ‘prescribed by law’ will be fulfilled only where the law is accessible and “formulated with sufficient precision to enable the citizen to regulate his conduct.”¹⁰ Second, the interference must pursue a legitimate aim. These are the aims listed in Article 10(2) of the ECHR. Third, the restriction must be necessary to secure one of those aims. The word “necessary” means that there must be a “pressing social need” for the restriction.¹¹ 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.”¹²

This three-part test presents a high standard which any interference must overcome. The European Court has stated that any limitation on freedom of expression must be “narrowly interpreted and the necessity for any restrictions must be convincingly established.”¹³

II.3. Freedom of Expression and National Security

Over the years, the interface between freedom of expression and information has been the subject of intense scrutiny, both by courts and by international bodies and decision makers. The most authoritative and all-encompassing statement of principles relating to national security restrictions for reasons of secrecy is provided by the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*.¹⁴ The *Johannesburg Principles* were elaborated by a group of recognised experts in this field and are based on international law, standards for the protection of human rights, evolving State practice, and the general principles of law recognised by the community of nations. They outline the prevailing standards for withholding information in the name of national security.¹⁵

The *Johannesburg Principles* recognise that the right to seek, receive and impart information may, at times, be restricted on specific grounds, including the protection of national security. However, national security cannot be a catchall for limiting access to information. A number of the *Johannesburg Principles* are relevant to the issue of secrecy laws, including the following:

⁹ See, for example, *Handyside v. the United Kingdom*, 7 December 1976, Application No. 5493/72.

¹⁰ *The Sunday Times v. United Kingdom*, 26 April 1979, Application No.13166/87, para. 49.

¹¹ *Handyside v. the United Kingdom*, note 9, para. 48.

¹² *Lingens v. Austria*, 8 July 1986, Application No.9815/82, paras. 39-40.

¹³ See, for example, *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

¹⁴ Adopted October 1995. Available at: < <http://www.article19.org/docimages/511.htm>>.

¹⁵ The *Johannesburg Principles* have been endorsed by the UN Special Rapporteur on Freedom of Expression. See UN Doc E/CN.4/1996/39, 1996, para. 154. They are also frequently referred to in reports of the UN Commission on Human Rights. See, for example, UN Doc. E/CN.4/1996/53, 1996, Preamble. They have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

Principle 2: Legitimate National Security Interest

(a) A restriction sought to be justified on the ground 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, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.

(b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 16: Information Obtained Through Public Service

No person may be subjected to any detriment on national security grounds for disclosing information that he or she learned by virtue of government service if the public interest in knowing the information outweighs the harm from disclosure.

The European Court of Human Rights has on several occasions had to deal with cases in which Member States have sought to justify restrictions on freedom of expression or other human rights by reference to national security considerations. It has warned that laws that restrict freedom of expression on national security grounds must lay down clear and precise definitions, so as to safeguard against abuse.¹⁶ It has also called for strict scrutiny of all national security-related laws. In the *Spycatcher* case, the UK government had tried to stop publication of the memoirs of a former secret service employee. The Court famously stated:

The dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned...¹⁷

In the same case, the Court also emphasised that, even in relation to matters touching on national security,

...it is nevertheless incumbent on [the press] to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such

¹⁶ See, for example, *Klass v. FRG*, Application No. 5029/71, 6 September 1978.

¹⁷ *The Observer and Guardian v. the United Kingdom*, 26 November 1991, Application No. 13585/88, para. 60.

information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog".¹⁸

The European Court has issued repeated warnings against excessive use of national security laws, in many cases finding violations of fundamental human rights. In a recent case involving Romania, involving data that had been gathered on the applicant by the security services, the Court noted that it had "doubts as to the relevance to national security of the information".¹⁹ It went on to find a violation of the applicant's rights.

The Court has warned against the use of national security laws even in situations of armed internal conflict. While stressing that it would not condone the use of the media as a mouthpiece for advocates of violence, it has said that States "cannot, with reference to the protection of territorial integrity or national security or the prevention of crime or disorder, restrict the right of the public to be informed by bringing the weight of the criminal law to bear on the media."²⁰

III. Analysis of the Proposed Amendments

III.1. The Proposed Amendments

The proposed amendments will replace two existing prohibitions in the Bulgarian Criminal Code on the release of State or official secrets with new provisions, extending their scope and providing for tougher sentences. The second amendment would also penalise the unauthorised release of "foreign classified information," which is not covered in the current Criminal Code.

A new Article 284 is proposed in the Penal Code, which would read:

- (1) An official person who imparts or allows in detriment to the state, enterprise, organization or private person classified information that constitute official secret, which was provided to him or became known by him in the course of his office, shall be punished by deprivation of liberty up to 3 years or compulsory labor.
- (2) The penalty for action as provided in the above paragraph shall be imposed as well on a person who is not an official, works for state establishment, enterprise or public organization and became knowing classified information that constitute official secret in the course of his job.

The second new article, Article 357, would read:

- (1) One who imparts, changes or gives in breach of the established rules classified information consisting state secret or foreign classified information, which were entrusted on him or became known by him in the course of his office or job, shall be punished by deprivation of liberty up to 6 years.
- (2) When as a result of that action followed endangering of the sovereignty, independence or territorial integrity of the Republic of Bulgaria or of its foreign politics and international relations, linked to the national security, or followed damages in the area of national security, defense, foreign politics or the protection of

¹⁸ *Ibid.*, at para. 59.

¹⁹ *Rotaru v. Romania*, 4 May 2000, Application No. 28341/95, para. 53.

²⁰ *Erdogdu and Ince v. Turkey*, 8 July 1999, Application Nos. 25067/94 and 25068/94, para. 54.

- the constitutionally established order, the penalty shall be deprivation of liberty from 3 up to 15 years.
- (3) With the same penalty provided under para.1 is punished one who imparts or gives classified information, constituting state secret, or foreign classified information, knowing that this could cause endangering of the sovereignty, independence or territorial integrity of the Republic of Bulgaria or of its foreign politics and international relations, linked to the national security, or followed damages in the area of national security, defense, foreign politics or the protection of the constitutionally established order.

III.2. Analysis

From a freedom of expression and information perspective, these amendments raise two key issues. First, the definitions of “state secret”, “official secret” and “foreign classified information” are highly problematic, allowing for the classification of an extremely wide range of materials. Second, both amendments omit to introduce a ‘public interest override’, allowing for the disclosure of material, even if it is harmful, when it is in the public interest to do so. There is no protection for whistleblowers and the catch-all nature of the drafting could impact adversely on the ability of the media to engage in critical reporting of national security or defence-related issues.

III.2.1. Definitions

The two new amendments relate to the unauthorised disclosure of “state secrets”, “official secrets” or “foreign classified information”. Articles 25-27 of the Law for the Protection of Classified Information²¹ provide definitions of these terms:

- 25) State secret shall be the information, determined in the list of appendix No 1, the unregulated access to which would create danger or would damage the interests of the Republic of Bulgaria, connected with the national security, the defence, the foreign policy or the protection of the constitutionally established order.
- 26) (1) Official secret shall be the information, created or preserved by the state bodies or the bodies of the local government, which is not state secret, the unregulated access to which would influence unfavourably the interests of the state or would hamper other legally protected interest.
(2) The information, subject to classification as official secret, shall be determined with a law.
- 27) Foreign classified information shall be the classified information, conceded by another state or international organisation by force of international agreement, to which the Republic of Bulgaria is a party.

Appendix 1 to the law lists 64 separate categories of documents subject to classification as a “state secret”, many of which were also among the list of 107 items included in the draft on which we commented in October 2001. In that Memorandum, we stated:

It is no exaggeration to say that the ... items listed in this document are sufficiently broad to cover practically any document a public body might hold. The approach taken here may again be contrasted with that of the United States, where there is a

²¹ Note 2.

very short list of categories (only seven items). There are a number of specific problems with the items on this list.

(...)

Many of the items in Schedule 1 are absurdly broad. Restrictions on freedom of expression must be necessary, which implies that they do not go beyond what is required to achieve the legitimate aim. Excessively broad restrictions fail to meet this standard. A few items serve to illustrate this problem (the list here is by no means comprehensive).

No. 10 Summarised data on the imports and exports of weaponry, combat material and munitions for the needs of the armed forces.

At least some information concerning the procurement and/or sale of arms, munitions and other military hardware should be made available to the public and the media. Otherwise, military spending and sales would provide fertile grounds for corruption.

No. 72 Data concerning staff issues at the security services and public order services, except for the data contained in the Law on the Budget.

The public is entitled to know how the security services and public order services, which include the police, are organised and staffed. This provision would, for example, allow the authorities to withhold information about the overall number of police officers employed.

No. 96 Research particularly essential to the interests of the national economy and assigned by ministries and other State authorities.

Again, this is a matter of public spending where in many, if not most, cases there will be no warrant at all for withholding this information from the public. Often, such research must be made public if it is to have any positive impact on the economy. This provision would include, for example, research on better farming methods, which obviously needs to be widely disseminated.

None of these issues have been addressed in the final draft adopted in 2002. We also commented on the vague wording of several of the list items, which have been amended in the final draft, and the repetitive and circular way of defining State secrets, many of which have not been addressed. To give one example, item No. 13 of List II includes among the items to be graded as “state secret” all “classified information, exchanged between the Republic of Bulgaria and international organisations or States, marked with secrecy grading for security.” The Bulgarian officials could take advantage of this and render secret practically any document simply by sharing it with other States.

The definition of “official secret” is similarly problematic. In our October 2001 Memorandum, we commented:

For an official secret, the body only needs to consider that unauthorised access would lead to an “adverse effect”, hardly a stringent standard. Furthermore, the categories of legitimate interests are not set out in law and, for organisational entities, it is the body which holds the information which is to set out these categories. In practice, this effectively allows these bodies to classify at will.

Article 26 of the final text of the law defines “official secrets” as those documents “the unregulated access to which would influence unfavourably the interests of the state or would hamper other legally protected interest.” It is hard to see how this sets a higher standard than the “adverse effect” standard we criticized in our October 2001 Memorandum;²² it certainly does not reach the standard of “necessary in a democratic society” required under the ECHR.

Finally, the definition of “foreign classified information” effectively subjects the Bulgarian information regime to the information disclosure standards of third countries, regardless of whether or not they meet international or constitutional standards. This is unacceptable, particularly in cases where third countries or international organisations over-classify documents. It is also unpredictable, to the extent that most people in Bulgaria will not be aware of the classification regulations in other countries that Bulgaria has relations with, and open to abuse by allowing government departments to ‘hide behind’ the restrictive information disclosure policies of organisations such as NATO.

Recommendations:

- The list of “state secrets” appended to Schedule 1 of the Law for the Protection of Classified Information should be amended significantly to reduce the number of items on that list and to remove all repetitive and/or circular definitions.
- The definition of “official secret” needs to be amended to strengthen the harm test and to provide a list of legitimate interests in pursuit of which a document may be classified as such.
- The definition of “foreign classified information” should be amended to include a stipulation that those documents that could not be classified under domestic law shall not be treated as classified foreign information.

III.2.2. Public Interest Override

Both new amendments provide for an absolute offence of disclosure, without providing any defences beyond those we presume may be provided by ordinary criminal law.²³ In particular, the amendments fail to provide for disclosure in the public interest.

As has been emphasised both by the European Court of Human Rights²⁴ and the *Johannesburg Principles*,²⁵ the media are under a duty to publish material which it is in the public interest to be disclosed, even if it is formally classified as a “state secret” or “official secret”, and even if its release might adversely impact on, say, military interests or foreign policy. A journalist may well come into the possession of documents that disclose illegal plotting within the security services to assassinate a foreign head of State,²⁶ or documents that disclose vast corruption within an international organisation of

²² In fact, the standard set in the final text is arguably lower, but this may well be a translation issue.

²³ For example, a defence of duress.

²⁴ See, for example, the Court’s remarks in *The Observer and Guardian v. the United Kingdom*, note 17, para. 59(b).

²⁵ Note 14, Principles 15 and 16.

²⁶ One example of this occurred in the UK when a former member of that country’s security services made

which Bulgaria is a member.²⁷ Even though the publication of such stories would initially bring the organisations hypothetically involved into disrepute, it would also lead to the introduction of measures to reform them and thus be in the public interest. However, new Article 284(2) and the proposed new Article 357(3) would both inhibit the publication of such stories by rendering their author criminally liable, risking a penalty of up to six years imprisonment.

Protection for disclosure in the public interest should not only extend to the media. Those who, in the course of their employment, come across classified material that discloses wrongdoing should also benefit from protection if they decide, in good faith, to release it.²⁸ Protection for so-called ‘whistleblowers’ is a vital element in freedom of information and encourages good administrative practices at all levels of the civil service.

Recommendations:

- The amendments should include a public interest override, allowing for the publication of material which it is in the public interest to disclose.

allegations of a plot within MI6 to assassinate Colonel Khadafi of Libya.

²⁷ The latter may well occur after Bulgaria’s entry into the European Union, where reports over the last few years have uncovered major fraud within several of its institutions.

²⁸ *Ibid.*