COMMENTS

On

THE DRAFT LAW ON FREEDOM OF INFORMATION OF THE REPUBLIC OF SERBIA

By

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Global Campaign for Free Expression

1. INTRODUCTION

These Comments are based on a draft of the Law on Freedom of Information (FOI) of the Republic of Serbia received by ARTICLE 19 in May 2001, and prepared by the Group for Legal Issues of the Media Center Belgrade. ARTICLE 19 welcomes the initiative shown by the Media Center in drafting this legislation. At the same time, we are concerned that the draft law fails adequately to address what should be the core objective of freedom of information legislation, to provide an enforceable right to access information held by public authorities, not only for journalists but for everyone. We are also concerned that the draft places undue burdens on the media, and establishes a number of excessive restrictions on both media content and operations. Overall, ARTICLE 19 considers that the law should be largely redrafted, so that it focuses exclusively on freedom of information, including the right to access information held by public bodies, rather than on media regulation.

A progressive freedom of information regime, secured by effective legislation, is a fundamental underpinning of open government and democracy. The free flow of information, particularly a right of access to information held by public authorities, provides for accountability and defends against corruption. It also ensures an informed public, capable of sound, healthy choices, including in matters commercial, personal and political. Freedom of information is also a prerequisite to sustainable economic and social development. Modern economies thrive on transparency, on open access to a wide range of commercial information that facilitates rational economic choices and effective allocation of resources. Sustainable social and political development also requires transparency, the building between governments and the people they serve of windows, not walls. Confidence in one's government encourages economic and social investment, and access to information is foundational

to the building of confidence. In the public sector, government institutions whose practices most engender confidence are the ones that best survive turmoil; in the private sector, access to information fuels responsible resource management, sound economic investment and salient social initiatives, all of which complement good government.

Despite this, it is often the case that governments prefer to conduct their affairs in secret. In Swahili, one of the words for government translates as "fierce secret." Even democratic governments would often prefer to hide their business from the critical eye of the press and public. However, it is a central tenet of democracy and accountability that information held by public bodies is not the property of any one government, or its officials, but is a public asset held by the State on behalf of the people. Effective legislation is therefore required to check the tendency of governments to operate in secret.

The overall premise of the draft Law on Freedom of Information – that citizens have a right to public information – is an admirable one. However, the draft law seeks to guarantee that right primarily through the media, and by placing burdens on the media, along with a few corresponding obligations on public actors to disclose information to the media. There are no provisions for disclosure directly to the public. Under international law, and based on experience in other countries, it is clear that the public's right to know should be secured by requiring public actors to operate more openly, rather than by placing burdens on the media.

A key aspect of freedom of information is the individual right to access information held by public bodies, upon request. Effective exercise of this right depends on clear procedural mechanisms, including an independent administrative oversight body to review any refusals to provide information. In addition, international standards require public bodies to publish key categories of information as a matter of course, and at regular intervals. It is the State's responsibility to give citizens and the media alike access to information, creating an environment that fosters maximum disclosure of public information. One of our concerns with the present draft law is that although its title refers to freedom of information, it lacks these key aspects of an effective openness regime. Adoption of this law would likely hinder the future passage of more comprehensive freedom of information legislation, in line with international standards.

The first part of this Comment provides an overview of international standards relating to freedom of expression and information, as well as the guarantees set out in the Serbian Constitution. The main body of the analysis is broken into three parts. The first part elaborates on the public's right to know, setting out key principles to which freedom of information legislation should conform, in particular in granting an individual right to access information held by public authorities. Unfortunately the draft Freedom of Information Law fails to establish such a right. This part is based on ARTICLE 19's standard-setting work in this area, *The Public's Right to Know: Principles on Freedom of Information Legislation*. The second part of this Comment analyses the approach taken by the draft Law on Freedom of Information in seeking to promote freedom of information. It proposes more concrete legal obligations for public actors, as well as a reduction in such obligations for the media. Third, this

Comment analyses some of the more troubling restrictions the draft law seeks to place on the media, journalists and journalists associations.

2. INTERNATIONAL AND CONSTITUTIONAL STANDARDS

2.A Guarantees of Freedom of Expression and Information

Article 19 of the Universal Declaration on Human Rights (UDHR),[1] binding on all States as a matter of customary international law, sets out the fundamental right to freedom of expression in the following terms:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.

The International Covenant on Civil and Political Rights (ICCPR), a formally binding legal treaty ratified by over 145 States, guarantees the right to freedom of opinion and expression at Article 19, in terms very similar to the UDHR.[2] Guarantees of freedom of expression are found in all three of the major regional human rights systems: at Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[3] at Article 13 of the American Convention on Human Rights,[4] and at Article 9 of the African Charter on Human and Peoples' Rights.[5] Serbia is not yet party to the ICCPR or ECHR, and is therefore not formally bound by them. However, as a State in transition, Serbia should seek to comply with their provisions.

These international guarantees find their counterparts in Articles 45, 46 and 48 of the Constitution of the Republic of Serbia, which provide protection for freedom of expression and of the media as follows:

> **Article 45.**
> The freedom of conscience, thought and public expression of opinion shall be guaranteed.
>
> **Article 46.**
> The freedom of press and other public information media shall be guaranteed.
>
> Citizens shall have the right to express and make public their opinions in the public information media.
>
> Publication of newspapers and dissemination of information by other means shall be accessible to everyone without seeking permission, subject to registration with the competent agency.

[1] UN General Assembly Resolution 217A(III) of 10 December 1948.
[2] UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.
[3] Adopted 4 November 1950, in force 3 September 1953.
[4] Adopted 22 November 1969, in force 18 July 1978.
[5] Adopted 26 June 1981, in force 21 October 1986.

> The right to correction of published incorrect information which violates someone's right or interest, as well as the right to compensation for any moral and property damage arising therefrom, shall be guaranteed.
>
> The censorship of press and other public information media shall be prohibited. No one may obstruct the distribution of the press and dissemination of other information, except when the competent court of law finds by its decision that they call for the forcible overthrow of the order established by the Constitution, violation of the territorial integrity and independence of the Republic of Serbia, violation of guaranteed freedoms and rights of man and citizen, or incite and foment national, racial or religious intolerance and hatred.
>
> The public information media which are financed from public funds shall be bound to provide the general public with timely and impartial information.
>
> **Article 48**
>
> A citizen has the right to publicly criticize the work of State and other agencies and organizations, as well as of the high-ranking officials, to submit requests, petitions and proposals, and to receive an answer to these should he so desire.
>
> A citizen may not be indicted nor suffer any other ill effects for his opinions presented in public criticism or in a submitted request, petition or proposal, except when thereby committing a criminal offence.

International law goes beyond simply requiring States to refrain from interfering with the free flow of information and ideas. It also places an obligation on States to take positive steps to ensure that key rights, including freedom of expression and access to information, are respected. Pursuant to Article 2 of the ICCPR, States must "adopt such legislative or other measures as may be necessary to give effect to the rights recognized by the Covenant." This means that States must create an environment in which a diverse, vigorous and independent media can flourish, thereby satisfying the public's right to know.

Freedom of information is a core element of the international guarantee of freedom of expression, and includes the right to receive, access, request and publish information and ideas. There is little doubt as to the importance of freedom of information. The United Nations General Assembly, at its very first session in 1946, adopted Resolution 59(I), which stated:

> Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the UN is consecrated.[6]

The right to freedom of information as an aspect of freedom of expression has been recognised by the UN. The UN Special Rapporteur on Freedom of Opinion and Expression has provided extensive commentary on this right in his annual reports to the UN Commission on Human Rights. In 1997, he stated: "The Special Rapporteur, therefore, underscores once again that the tendency of many Governments to withhold information from the people at large … is to be strongly checked."[7] His commentary on this subject was welcomed by the UN Commission on Human Rights, which called on the Special Rapporteur to "develop further his commentary on the right to seek and receive information and to expand on his observations and recommendations arising

[6] Adopted 14 December 1946.
[7] Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1997/31, 4 February 1997.

from communications."[8] In his 1998 Annual Report, the Special Rapporteur declared that freedom of information includes the right to access information held by the State:

> [T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems…."[9]

Once again, his views were welcomed by the Commission on Human Rights.[10]

The European Court of Human Rights has stopped short of interpreting Article 10 of the ECHR as including a right to access information held by public authorities, but it has required public authorities to release information, based on the right to family life.[11]

In recognition of the key importance of freedom of information, and the need to secure it through legislation, laws giving individuals a right to access information held by public authorities have been adopted in almost all mature democracies. In addition, many newly democratic countries – including Albania, Bulgaria, Bosnia-Herzegovina, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Moldova, Russia, Slovakia and Ukraine – have recently adopted freedom of information laws, with many other countries in transition currently in the process of adopting them.

2.B Permissible Restrictions on Freedom of Expression and Information

The rights to free expression and access to information under international law are not absolute. International law, as well as most national constitutions, recognises that rights of access and expression may, in narrowly prescribed circumstances, be restricted. Article 10(2) of the European Convention on Human Rights provides:

> 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.[12]

It is, however, a maxim of international jurisprudence that all restrictions on freedom of expression must be given narrow interpretation due to the central role of this right in a democratic society. In particular, any exceptions to the right to access information must meet a strict three-part test, as follows:

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[8] Resolution 1997/27, 11 April 1997, para. 12(d).
[9] Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, 28 January 1998, para. 14.
[10] Resolution 1998/42, 17 April 1998, para. 2.
[11] See *Leander* v. *Sweden*, 26 March 1987, 9 EHRR 433; *Gaskin* v. *United Kingdom*, 7 July 1989, 12 EHRR 36; *Guerra and Ors.* v. *Italy*, 19 February 1998.
[12] Article 19(3) of the ICCPR provides for similar, narrowly drawn, restrictions.

(1) the information must threaten harm to a *legitimate aim* provided for by law;
(2) disclosure must pose a real and substantial threat of *harm* to that aim; and
(3) the *harm* to the legitimate aim must outweigh any *public interest* served by having the information disclosed.

This test establishes a presumption that the vast majority of information held by public authorities is subject to disclosure, either upon request or pursuant to a positive obligation on those public authorities to publish the information.

3. ANALYSIS OF THE DRAFT LAW ON FREEDOM OF INFORMATION

3.A Key Principles Regarding Freedom of Information

For both journalists and others, access to information can only be ensured in practice if it is guaranteed in law. Information that is most valuable to the media will often be precisely that information the State has the most incentive to withhold. The media can only serve as a public watchdog and check on official corruption when it is free to investigate the activities of the State, not when information held by public authorities is provided on a discretionary basis. However, not only the media but everyone has the right to access information held by public authorities. As noted above, ARTICLE 19 recommends the law be largely redrafted, so that it focuses exclusively on freedom of information, including the right to access information held by public bodies, as detailed below.

The draft law does include very general obligations on State actors to provide information directly to the public, for example at Articles 2 and 3. However, these obligations are so general and vague that it is hard to see how they could be legally enforced against a specific official body or actor. In any case, the sanction for breach, under Article 128, is publication of a statement of violation, hardly an effective remedy against an official actor. Indeed, it is clear that the law is primarily concerned with media responsibility, a conclusion which is reinforced by the fact that only media owners may be subject to penal sanctions under the law.

Furthermore, these provisions are fundamentally undermined by the failure of the draft law to establish an independent body to oversee implementation or any implementation procedures. Experience in other countries shows that official openness is unlikely in the absence of a specific implementing body or at least clear procedures for enforcing the right to information. The draft Law on Freedom of Information fails to establish any such mechanisms or procedures, and therefore needs to be fundamentally reworked if it is to provide for effective access to official information and for open government.

ARTICLE 19 has published a key standard-setting work on the right to freedom of information under international law, *The Public's Right to Know: Principles on*

Freedom of Information Legislation.[13] This publication, which has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression,[14] among others, sets out nine key principles which should underpin freedom of information legislation. The following is a synopsis of the main elements of these nine principles.

NINE PRINCIPLES UNDERPINNING FREEDOM OF INFORMATION LEGISLATION

PRINCIPLE 1: MAXIMUM DISCLOSURE – FOI legislation should be guided by the principle of maximum disclosure, which involves a presumption that all information held by public bodies is subject to disclosure, and that exceptions apply only in very limited circumstances. Exercising the right to access information should not require undue effort, and the onus should be on the public authority to justify any denials.

PRINCIPLE 2: OBLIGATION TO PUBLISH – Freedom of information requires public bodies to do more than accede to requests for information. They must also actively publish and disseminate key categories of information of significant public interest. These categories include operational information, costs, information on complaints, procedures for public input, and the content of decisions affecting the public.

PRINCIPLE 3: PROMOTION OF OPEN GOVERNMENT – FOI legislation needs to make provision for informing the public about their access rights and promoting a culture of openness within the government. At minimum, the law should make provisions for public education and dissemination of information regarding the right to access information, the scope of information available, and the manner in which rights can be exercised. As well, to overcome the culture of secrecy in government, the law should require training for public employees, and encourage the adoption of internal codes on access and openness.

PRINCIPLE 4: LIMITED SCOPE OF EXCEPTIONS – Requests for information should be met unless the public body shows that the information falls within a narrow category of exceptions, in line with a three-part test:

- The information must relate to a *legitimate aim* listed in the law;
- Disclosure must threaten *substantial harm* to that aim; and
- The harm must be *greater than* the public interest in disclosure.

Restrictions that protect government from embarrassment or exposure of wrongdoing can never be justified.

PRINCIPLE 5: PROCESS TO FACILITATE ACCESS – All requests for information should be processed quickly and fairly by individuals within the public bodies responsible for handling requests and complying with the law. In the case of denial, a procedure for appeal to an independent administrative body, and from there to the courts, should be established.

PRINCIPLE 6: COSTS – The cost of access to information should never be so high that it deters requests. Public interest requests should be subject to lower fees, while higher fees may be charged for commercial requests.

[13] (1999, London, ARTICLE 19).
[14] Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 43.

PRINCIPLE 7: OPEN MEETINGS – FOI legislation should establish the presumption that all meetings of governing bodies are open to the public so that the public is aware of what the authorities are doing, and is able to participate in decision-making processes. Meetings may be closed, but only where this can be justified and adequate reasons are provided. To facilitate attendance, adequate notice of meetings should be provided.

PRINCIPLE 8: DISCLOSURE TAKES PRECEDENCE – Other legislation should be interpreted in a manner that renders them consistent with the disclosure requirements of FOI legislation. In particular, in case of a conflict between the FOI law and a secrecy law, the former should prevail.

PRINCIPLE 9: PROTECTION FOR WHISTLEBLOWERS – FOI legislation should include provisions protecting individuals from legal, administrative or employment-related sanctions for releasing information on wrongdoing.

Recommendation:

- The draft law should be substantially revised to provide for an enforceable right to access information held by public authorities, in line with the principles set out above.

3.B Access to Information Under the Draft Law

The draft Law on Freedom of Information conceives of public access to official information primarily through the media. It provides for limited media access, but not generally public access, to a variety of official bodies and functions. The draft appears to place a legal obligation on the media to satisfy the public's right to information. Such an obligation would breach international guarantees of freedom of expression and, in any case, is unlikely to be of practical use to citizens. In addition, the obligations on public actors are limited in relation to official documents and meetings, and in some cases access is subject to excessively broad exceptions.

The draft law's introductory section, titled "General Provisions: Rights guaranteed by the Law," is indicative of these overarching problems. Article 1 reads:

> The present Law regulates citizens' right to public information as a natural right to free expression of a variety of views and ideas, as well as journalists' rights and duties.
>
> The right to public information implies citizens' right to seek, receive and impart information, views and ideas.
>
> The media carries out the task of public information.

The nature of the media's responsibilities are elaborated clearly in Article 4, as follows:

> Every citizen shall be entitled to be accurately, timely and comprehensively informed about all significant developments and ideas by the media.

> The media shall be obliged to accurately, timely and comprehensively inform citizens about all significant developments and ideas.

These provisions are backed up by several general liability provisions – including Articles 7, 67-71, 125 and 127 – which give individuals a right to take direct action against various media actors.

No one would disagree that the media as a whole has a professional and social responsibility to inform the public and be a watchdog of government, a role frequently noted by the European Court of Human Rights.[15] However, this is very different from imposing specific legal obligations on the media to inform. There are serious problems with this approach, as the obligation to inform is extremely general and vague. It is open to abuse by the authorities and other powerful actors, who might use it against media which are critical of them. It is of some significance, for example, that superior courts around the world and the UN Human Rights Committee have rejected the idea that the media may be legally responsible for publishing inaccurate news.[16]

At the same time, it is most unlikely that these provisions could be used in a legitimate fashion to actually promote the public's right to know. A particular media outlet can hardly be liable because it fails to cover a particular event, even if that event is deemed to be of public interest. Liability of this sort would totally undermine editorial freedom and actually reduce diversity, as all media would feel obliged to cover the same set of key events and issues.

The way to ensure a free flow of information to the public via the media is by creating an environment in which the media can flourish and by promoting professional standards through training and self-regulation, not by imposing vague, overbroad legal obligations on the media.

The general obligation on the media to inform the public is given specific effect in Articles 84 and 85, which are both criminal in nature, and attract penal sanctions pursuant to Article 132. The former requires the media to publicise press releases of the President, Government, Speaker and Ministries. This provision not only reflects the problems noted above, but is directly open to abuse as it effectively grants various government actors free and mandatory access to the media. There is no justification for requiring media organizations to carry news hand-picked by the State. Media outlets choose among the day's stories, running those that are most newsworthy and of interest to their readers/viewers. Article 88, which requires the media to publicise court decisions, is less insidious but may also be abused (for example, through underpayment, or biased allocation of court decisions), and is unnecessary. Promoting a free and pluralistic media will best ensure coverage of major political news and court rulings without the need for heavy-handed State oversight.

The obligation to inform is also given specific effect in Article 90, which requires the media, upon request, to publicise information about the outcome of criminal proceedings according to the rules relating to the right of reply. As with court

[15] See, for example, *Thorgeir Thorgeirson v. Iceland*, Judgment of 25 June 1992, Application No. 13778/88, 14 EHRR 843, para. 63.
[16] See below, under Restrictions on Content.

decisions, this could be abused. More generally, it imposes an excessive burden on the media, taking into account the large number of criminal proceedings, and undermines editorial independence. Indeed, it could reduce pluralism if an excessive proportion of media energy was forced into reporting on criminal proceedings.

The draft law does place a number of openness obligations on public actors, in the part entitled "Access to Information". While these are to be commended, many are excessively qualified. ARTICLE 19 has the following concerns with these provisions:

- Article 48 requires State bodies to hold press conferences "regularly or when necessary" and to issue press releases. The term necessary as a qualification of the obligation to hold press conferences significantly undermines the practical impact of this provision, since necessity is likely to be defined by the relevant State body. Article 48 also gives journalists a right to examine official documents, "except classified ones". Again, this provision gives State bodies unfettered power to determine which documents shall be disclosed, since any document can be withheld simply by making it classified. Article 10, prohibiting disclosure of classified material, is dealt with below.

- Articles 49, 51, and 52 together require State spokespersons, MPs, deputies, public services, cultural institutions and local authorities to inform journalists about their work, "except at ill time." It is unclear what "ill time" refers to. If it means in inconvenient time, it would largely undermine these provisions, ceding a large measure of discretion to the relevant authorities to decide whether or not to provide information. If it has some other meaning, such as during an emergency, it is probably highly subjective, once again granting excessive discretion to the relevant actor to decide whether or not to release information.

- Article 54 provides for journalists' access to sessions of the Serbian Legislature and its committees, and sessions of provincial, city and municipal assemblies. However, access can be denied if necessary to protect an "official, state or military secret", terms that are not defined. Although there are times when the need for secrecy does necessitate media exclusion, our experience shows that official views about when secrecy is necessary are often at odds with popular or legal conceptions. As a result, the law should clearly and narrowly define legitimate secrecy standards, to prevent official abuse.

- Article 56 provides for equal treatment by various public bodies of registered media outlets. Article 57 provides an exception to this whenever "domestic or foreign, technical or organizational" reasons require limitations, in which case attendance may be restricted to those media outlets that provide "the largest audiences with the relevant information." Restrictions based on technical limitations, such as space, are recognised as legitimate, but we question whether the approach chosen is conducive to promoting media pluralism in Serbia. In particular, we are concerned that the "largest audience" standard may effectively privilege large conglomerates and State-owned media.

- Article 58 gives public officials the right to refuse to grant interviews, and to select those journalists to whom they will give interviews. It is hard to see why this provision has been included, but if it is retained, it should at least provide for

non-discrimination with respect to granting interviews. Article 58 also allows officials to require journalists to submit articles for their authorisation before publication. In most countries, this is dealt with informally, as an element of the professional relationship between the media and officials, whereby the latter can refuse a subsequent interview if the former fails to respect mutually agreed boundaries. This law goes to far, making a journalist legally liable for what should be a professional and/or relational matter.

Recommendations:

- The parts of those Articles which place a positive legal obligation on the media to directly satisfy the public's right to information, including Articles 1, 3, 4, 6 and 7, should be deleted.
- Articles 84 and 85, requiring the media to carry press releases and court rulings, should be deleted.
- Those parts of Article 90 which require the media to report on criminal proceedings should be deleted.
- Article 48 should be reworked to include criteria for when a State body may refuse to hold a press conference. The part of Article 48 dealing with access to documents should be replaced by a full freedom of information law, as suggested above.
- The qualification in favour of "ill time" in Articles 49, 51 and 52 should be deleted.
- The grounds upon which access to meetings may be refused in Article 54 should be clearly and narrowly defined.
- Further consideration should be given to assessing whether the criteria for restricting access to limited capacity events in Article 57 should be revised.
- Article 58 should either be deleted or reworked to provide only that the granting of interviews shall be non-discriminatory.

3.C Restrictions on the Media in the Draft Law

The draft Law on Freedom of Information places a number of very onerous restrictions on the media. Key among these are restrictions on media content, registration of journalists and media outlets, detailed prescriptions about internal media matters, an overly broad right of reply, standing rights to inspect media records and oppressive rules on personal liability. Many of these restrictions breach freedom of expression standards, or are otherwise inadvisable. It is hard to understand their inclusion in legislation which is designed to promote the free flow of information and ideas. The following are ARTICLE 19's main concerns in this area.

3.C.I Restrictions on the Content of What May be Published or Broadcast

- Article 9 provides broad protection for privacy, although in the case of persons holding public offices, it does provide that privacy can be restricted when the information includes facts the public has a right to know. This is rather more narrow than a common standard, whereby the right to privacy may be overridden

whenever the public interest in disclosure outweighs the privacy interest. In addition, rules on privacy should be contained in laws of general application, not media specific laws.

- Article 10 provides that any information which is classified as a "business, state, military or official secret shall not be publicized". This is an extreme restriction on media freedom, which effectively allows officials to prevent dissemination of information simply by classifying it. Although Article 10 does provide that classified information may be disclosed where it is obvious that the classification is not warranted, this is woefully insufficient. Freedom of information means that the government can only refuse to release information where to do so would cause serious harm to a legitimate interest and where withholding is in the overall public interest. The standard set out in the draft law falls well short of this standard.

- Article 86 prohibits hate speech, defined to include information or ideas which "might stir up intolerance". It is clearly legitimate, even required, to ban hate speech. At the same time, excessively broad and/or vague hate speech provisions may be subject to abuse, including against minorities. For example, the Turkish authorities regularly abuse hate speech laws to prevent Kurds from promoting their culture. Article 86 is much broader in scope, and far less clearly defined, than Article 20 of the ICCPR, which prohibits advocacy of hatred "that constitutes incitement to discrimination, hostility or violence". Article 86 also goes beyond the restriction permitted by Article 46 of the Constitution, which refers to incitement to intolerance and hatred. In addition, prohibitions on hate speech should be contained in laws of general application, not media specific laws.

- Article 88 requires the media to take "circumstantial care" in assessing the accuracy of information, or the possible illegality of a value judgement. The former is a professional obligation but it is now quite clear that prohibitions on publishing false or inaccurate news are not legitimate outside of specific contexts, such as defamation law.[17] The Supreme Court of Zimbabwe recently held that a false news provision breached the constitutional guarantee of freedom of expression even though it provided a defence of having taken reasonable measures to assess accuracy.[18] ARTICLE 19 is of the view that prohibiting a value judgement could be legitimate only in the rarest circumstances. Regardless of this, there is no need to extend the circumstances in which value judgements are illegal through imposing an obligation of "circumstantial care".

Recommendations:
- Article 9 should be amended to include a full public interest defence.
- Article 10 should be amended to make it clear that public authorities can only classify information where necessary in a democratic society to protect a legitimate public interest.

[17] See *Chavunduka & Choto v. Minister of Home Affairs & Attorney General*, 22 May 2000, Judgment No. S.C. 36/2000, Civil Application No. 156/99 (Supreme Court of Zimbabwe), *Hector v. Attorney-General of Antigua and Barbuda*, [1990] 2 AC 312 (Privy Council), and *R v Zundel* (1992), 10 CRR (2d) 193 (Supreme Court of Canada). The UN Human Rights Committee has also expressed concerns about false news provisions. See, for example, *Concluding Observations of the Human Rights Committee: Uruguay*, UN Doc. CCPR/C/79/Add.90, 4 August 1998.
[18] *Chavunduka & Choto v. Minister of Home Affairs & Attorney General*, *Ibid.*

- Article 86 should be amended to bring it into line with the standards set out at Article 20 of the ICCPR and Article 46 of the Constitution.
- Article 88 should be deleted.
- Consideration should be given to removing Articles 9 and 86 from this law, and including them rather in laws of general application.

3.C.II Registration of Journalists and the Media

- Articles 60 and 61 define a journalist for purposes of the law, and require them to obtain identification cards. These provisions place unacceptable limitations on who is considered to be a journalist, excluding, for example, freelance journalists. Furthermore, they provide for State involvement in the issuing of identification cards, something that cannot be justified and which comes dangerously close to registering journalists. It is for journalists themselves to decide whether to create their own associations, to define conditions for membership and to issue cards, if they so wish. There is no warrant for State involvement in these activities.

- Articles 26 through 40 require all media organizations, domestic and foreign, to register with the Media Register. These extremely detailed provisions on registration appear to establish a technical registration system, with no administrative power to refuse registration. However, some provisions do suggest the discretion to refuse to register media organisations. Article 37, for example, provides that registration can be denied if the applicant does not fit the definition of a media outlet or has "not met other conditions." These "other conditions" are not defined. It is now well established that any discretionary power to refuse to register media outlets is contrary to the guarantee of freedom of expression. Although technical registration is not a formal breach of those guarantees, ARTICLE 19 seriously questions the need for registration of any sort, although we recognise that it is provided for in Article 46 of the Constitution. We note that many countries do not require the media to register, and that this causes no problems.

Recommendations:
- Articles 60 and 61, defining a journalist and requiring media outlets to issue identification cards, should be deleted from the draft law.
- Consideration should be given to deleting the requirement to register from the draft law. Alternately, it should be made perfectly clear that the process does not envisage any discretion to refuse registration other than on purely technical grounds.

3.C.III Internal Matters of Media Organisation

In many areas, the draft law sets out detailed provisions regarding matters which in most countries are simply left to the actors involved, or which should be left to professional bodies, or self-regulation. To this extent, the law is overly prescriptive. Examples of this include:

- Article 11 requires media owners to facilitate good relations between their staff and the public and Article 12 provides that media owners shall not refuse to co-operate with foreign media. These are not matters that should be required by law, but are rather for owners to pursue at their discretion, in order to promote the success and professionalism of their media outlet.
- 18 provides that the media shall be distributed appropriately. This is unnecessary and is a matter for each media outlet to decide.
- Article 63 prohibits using "dishonourable or otherwise impermissible" means of gathering information, including secret recording. This is a matter of professionalism or self-regulation. In particular, there are times when secret recording is legitimate, and serves the public's right to know, such as when it exposes high-level corruption that could not otherwise have been documented.
- Articles 72-75 provide for detailed rules on the role and rights of editors, Articles 76-78 provide for editor-journalist relations, and Articles 79-81 provide for special employment rights. Media outlets should be free to decide on their own internal organisation, including the role of editors, and the relationship between editors and other staff. It is unclear why these special employment rights, over and above those provided for in general employment law, should apply to media workers.
- Articles 121-123 set out a number of obligations for journalists associations. It should be up to journalists to determine the purpose and functions of their associations, as part of their right to freedom of association.

Recommendations:
- Article 18 should be deleted, as should the part of Article 63 which limits the manner in which journalists may gather information.
- Serious consideration should be given to deleting Articles 72-81, as well as Articles 121-123.

3.C.IV Rights of Reply and Correction

Articles 104 to 119 set out very detailed provisions regarding the rights of reply and correction, including where the media replies to a reply or correction, thereby starting a polemic. ARTICLE 19 questions whether it is necessary to include such detailed provisions on this matter. More importantly, we are concerned that the right of reply as set out in Article 104 is excessively broad, inasmuch as it allows for a reply where any interest of the claimant has been impaired. This might include, for example, criticism of a politician who subsequently failed to be elected. As it stands, the right of reply might well have a chilling effect on freedom of expression, making media outlets reluctant to air their views. Furthermore, these provisions go well beyond the constitutional requirement of a right of correction, which is limited to incorrect information. A right of reply should arise only in limited circumstances. In ARTICLE 19's view, it should be limited to circumstances where the individual claims that a legal right has been breached. Redress for less serious media issues should be dealt with through self-regulatory mechanisms and/or professional development. Furthermore, the draft law requires media outlets to carry replies regardless of their accuracy or legality.

Recommendations:

- A right of reply, as set out in Article 104, should arise only where the individual claims that a legal right has been breached.
- Consideration should be given to reducing and simplifying the provisions on reply and correction.
- Media outlets should not be required to carry replies which are inaccurate or illegal.

3.C.V Right to Inspect

Article 83 provides that a media owner shall allow inspection of his or her media outlet's records upon the request of a court or a body in charge of internal affairs. Serbian law presumably sets out general conditions under which the authorities may search for evidence held by private parties. The media should not be under special obligations to provide information to courts or official bodies. If anything, the guarantee of freedom of expression, and the media's role in informing the public, mean that it should receive relatively strong protection against searches.

Recommendation:

- Article 83 should be deleted or amended to protect the media against unwarranted searches.

3.C.VI Liability

Articles 67 through 71 impose personal liability on media owners, managing editors, distributors, journalists and sources under civil and penal law. It is unclear what they are liable for and, for this reason alone, it would be far preferable for the relevant civil and penal laws to provide directly for liability, rather than doing so through a general and undefined provision in the Law on Freedom of Information. This is particularly true in the case of penal law, where some form of intent or malice should be explicitly required. Article 70 appears to go even further, making journalists liable if they are the author of any article or feature that has produced "harmful effects". This concept is not defined and cannot, therefore, meet the standard of necessity required for restrictions on freedom of expression. Similarly, Article 7 provides that owners, sources, editors-in-chief and journalists shall be responsible for "damage" inflicted by their publication, without defining this term or the circumstances in which it might be engaged. Articles 7 and 70 effectively override the protection afforded to journalists under Article 5, which provides that a journalist "shall bear no consequences whatsoever for a view he/she publicizes in the process of performing his/her professional task". It may be noted that Article 127 already provides generally for liability for various actors under the law, and this should be sufficient. However, the draft should make it clear that Article 127 only provides for liability for breach of the Law on Freedom of Information.

Recommendations:

- Articles 7 and 67 to 71 should be deleted. Instead, the relevant civil and penal laws should provide directly for any liability.

- Article 127 should be amended to provide for liability only for breach of the provisions of the Law on Freedom of Information.