

Memorandum

by

ARTICLE 19, Global Campaign for Free Expression

on the

Draft Macedonian Law on Public Information of 12 May 2000

London, July 2000

Introduction

In May 2000, the Macedonian authorities produced a draft Law on Public Information, with a view to replacing a number of repressive and outdated laws still in force from the period when Macedonia was still part of Yugoslavia. The draft law guarantees media freedom and access of the media to public information, as well as establishing a system of registration and a number of other obligations on the media. The draft law represents a significant improvement over past laws and practices and, if passed, would largely bring Macedonia's law in this area into line with international standards. However, the draft still includes a number of features which are in breach of international standards in this area and other features which, while not necessarily formally in breach of international law, are unnecessary or could be improved.

This Memorandum outlines Macedonia's obligations to promote and protect freedom of expression under international law. It describes the limited scope of restrictions on freedom of expression which international law permits, along with the test against which any restriction must be judged. It then goes on to assess the new draft Law on Public Information against these standards, highlighting some of ARTICLE 19's concerns and key recommendations.

International and Constitutional Obligations

Macedonia has binding obligations under international law to respect freedom of expression. Macedonia is a Party to the International Covenant on Civil and Political Rights (ICCPR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), both legally binding international treaties between States. Article 10 of the ECHR guarantees freedom of expression in the following terms:

- (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
- (2) 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 reputations or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

These guarantees are backed up by guarantees in the Constitution of the Republic of Macedonia. The Constitution effectively imports international guarantees into national law through Article 8 which provides that basic rights and freedom recognised under international law are fundamental values of the constitutional order. The Constitution also directly guarantees freedom of expression and of information at Article 16 in the following terms:

- (1) The freedom of personal conviction, conscience, thought and public expression of thought is guaranteed.
- (2) The freedom of speech, public address, public information and the establishment of institutions for public information is guaranteed.
- (3) Free access to information and the freedom of reception and transmission of information are guaranteed.
- (4) The right of reply via the mass media is guaranteed.
- (5) The right to a correction in the mass media is guaranteed.
- (6) The right to protect a source of information in the mass media is guaranteed.
- (7) Censorship is prohibited.

International bodies and courts have made it very clear that freedom of expression and information is one of the most important human rights. In its very first session in 1946 the United Nations General Assembly adopted Resolution 59(I) which stated:

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 notes, freedom of expression is both fundamentally important in its own right and also key to the fulfilment of all other rights. 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 violations of human rights are to be exposed and challenged.

This has repeatedly been affirmed by both the UN Human Rights Committee – the treaty-monitoring body established under the ICCPR – and the European Court of Human Rights. The following quotation of the European Court now features in almost all its cases involving freedom of expression:

[F]reedom of expression constitutes one of the essential foundations of society, one of the basic conditions for its progress and for the development of every man ... it is applicable not only to “information” or “ideas” that are favourably received ... but also to those which offend, shock or disturb the State or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society”.¹

International jurisprudence has also consistently emphasised the special role of the free media in a State governed by the rule of law. For example, the European Court of Human Rights has stated:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.²

Indeed, the European Court of Human Rights has referred to “the pre-eminent role of the press in a State governed by the rule of law.”³ This finds support in statements by other international judicial bodies, including the Inter-American Court of Human Rights which has stated: “It is the mass media that make the exercise of freedom of expression a reality.”⁴

The media as a whole merit special protection under freedom of expression in part because of their role in making public “information and ideas on matters of public interest. Not only does [the press] have the task of imparting such 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’.”⁵ Inherent in the comments noted above is the need to promote pluralism within, and to ensure equal access of all to, the media. As the European Court of Human Rights stated: “[Imparting] information and ideas of general interest ... cannot be successfully accomplished unless it is grounded in the principle of pluralism.”⁶ The Inter-American Court has held that freedom of expression requires that “the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media.”⁷

Freedom of expression is not, however, absolute. Every system of international and domestic rights recognises carefully drawn and limited restrictions on freedom of expression to take into account the values of individual dignity and democracy. As is clear from Article 19(3) of the ICCPR, international law also permits limited restrictions on the right to freedom of expression and information in order to protect various private and public interests. Such restrictions must, however, meet a strict three-part test. This

¹ *Handyside v. United Kingdom*, 7 December 1976, 1 EHRR 737, para. 49.

² *Castells v. Spain*, 23 April 1992, 14 EHRR 445, para. 43.

³ *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, 14 EHRR 843, para. 63.

⁴ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34.

⁵ European Court of Human Rights, *Thorgeirson*, note 3, para. 63.

⁶ *Informationsverein Lentia and Others v. Austria*, 24 November 1993, 17 EHRR 93, para. 38.

⁷ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 4, para. 34.

test, which has repeatedly been reaffirmed by the European Court of Human Rights,⁸ requires that any restriction must a) be prescribed by law, b) for the purpose of safeguarding one of the legitimate interests listed in Article 10(2) and c) be necessary in a democratic society to achieve this goal.

The third part of this test means that even measures which seek to protect a legitimate interest must meet the requisite standard established by the term “necessity”. Although absolute necessity is not required, a “pressing social need” must be demonstrated, the restriction must be proportionate to the legitimate aim pursued, and the reasons given to justify the restriction must be relevant and sufficient.⁹ In other words, the government, in protecting legitimate interests, must restrict freedom of expression as little as possible. Vague or broadly defined restrictions, even if they satisfy the “prescribed by law” criterion, will generally be unacceptable because they go beyond what is strictly required to protect the legitimate interest.

As one of the most fundamental rights recognised by the international community, a genuine commitment to freedom of expression and of the media necessitates a high threshold of tolerance in relation to all kinds of publications and broadcasts. The guarantee implies at least a media able to criticise the government and public figures without fear, as well as a citizenry freely able to receive and impart information and ideas of all kinds. Any media law should be drafted with these considerations uppermost in mind.

Specific Comments

Ethical Matters

Article 4 of the draft law requires the “subjects of public information” (which includes both journalists and media enterprises) to perform publishing and other informational activities in a professional, timely, efficient manner and in accordance with the rules and ethics of the profession. This is bolstered by Article 12 which provides that subjects of public information are responsible for the accuracy of published information and by Article 14 which provides that they shall publish accurate, complete and timely information. Article 10 also imposes an obligation on subjects of public information to protect their sources.

All of the obligations set out above are far better dealt with as a matter of professional self-regulation and in some cases they breach international guarantees. It is clearly unacceptable to make it a legal requirement to observe professional and ethical rules, as Article 4 appears to do. Indeed, this effectively transforms ‘ethical’ obligations into legal ones.

ARTICLE 19 considers that the imposition of obligations to publish accurate, timely and/or complete information, in an efficient matter, breach the international guarantee

⁸ See, for example, *Dalban v. Romania*, 28 September 1999, Application no. 28114/95, paras. 46-7.

⁹ *Sunday Times v. United Kingdom*, 26 April 1979, 2 EHRR 245, para. 62. These standards have been reiterated in a large number of cases.

of freedom of expression. There would seem to be no legitimate public interest in imposing a legal obligation on the media to operate in a timely or complete fashion and courts in several countries have recognised that a prohibition on publishing false news, on its own, is incompatible with freedom of expression.

It is worth noting that as regards broadcasters, several of the provisions noted above have parallels in the Decree Proclaiming the Law on Broadcasting Activity of 1997. This effectively places the broadcast media under a double onus which is unfair and may lead to anomalous results.

Article 17 provides that journalists shall have an identification card issued by the competent government authorities. ARTICLE 19 recognises that identification cards may serve legitimate purposes, particularly in helping journalists gain admittance to limited access events, such as press briefings or court cases. At the same time, there are clearly dangers inherent in requiring journalists to hold cards issued by government authorities. Everyone has the right to freedom of expression, including by being a journalist, and any restrictions on this right, including via identification cards, are unacceptable. In many countries, this problem is avoided where established journalists' associations issue press cards which can then be relied upon by authorities to grant preferential access to certain events.

Recommendations

- Any content restrictions in the draft law should not duplicate restrictions already imposed on broadcasters by other laws.
- The professional and ethical obligations, including in relation to protection of sources, imposed by Articles 4, 10, 12 and 14 of the draft law should be removed.
- The obligations in Articles 4, 12 and 14 to publish in an efficient, accurate, timely and complete manner should be removed from the law.
- Journalists should be left to develop a system of identification cards in a self-regulatory manner through their professional associations rather than having them issued by government bodies.

Freedom of Information

Articles 7 and 8 of the draft law provide for a general right of the media to access information held by public authorities. Exceptions to this right are provided for in both Article 7 – which allows such exceptions where the information may hinder certain State activities – and Article 8 – which limits access where it could harm any of the legitimate interests.

There is no need for two provisions dealing with exceptions to the right of access and one of them should be dropped. The law should clearly set out a presumption in favour of access, which should be able to be overridden only where disclosure is likely to cause substantial harm to a legitimate interest. This is clearly not the test

provided for in either Article 7 or Article 8. In addition, the list of legitimate interests found in Article 8, while formally unobjectionable as it is essentially identical to the list of legitimate aims listed in Article 10(2) of the European Convention, is not particularly helpful. For example, protection of morals is not an exception found in most laws dealing with freedom of information and the term ‘protection of the rights of others’ is so broad that it might easily be abused. Laws dealing specifically with freedom of information tend to list specific reasons for overriding the general right to access, such as privacy, commercial confidentiality and so on.

ARTICLE 19 notes that the right to access information held by public authorities is not limited to the media or media workers but is a right held by everyone. Furthermore, full implementation of this right requires the establishment of an administrative structure to facilitate access and to provide authoritative and independent interpretation of the scope of exceptions. As a result, full implementation of this right is possible only through the adoption of separate, comprehensive legislation guaranteeing freedom of information for everyone.

Recommendations

- The exceptions provided for in Article 7 should be removed from the draft law.
- Article 8 should establish a clear presumption in favour of access which may be overridden only where this is likely to cause substantial harm to a legitimate interest.
- The list of exceptions in Article 8 should be tailored to the specific needs of access to information rather than simply repeating the list of legitimate aims in Article 10(2) of the European Convention.
- The authorities should introduce comprehensive legislation dealing specifically with the right to freedom of information and to access information held by public authorities.

Obligation to Publish

Article 15 of the draft law imposes an obligation on subjects of public information to publish, free of charge, communications issued by public authorities relating to natural disasters, epidemics and other events that endanger life, health or property, or State security.

ARTICLE 19 has two concerns with Article 15. First, it requires the media to carry communications issued by public authorities. Although there are some conditions on this, they are not entirely clear – State security, for example, is a term that has historically been open to over-inclusive interpretation by authorities – and in any case it is clearly dangerous to require all media to carry messages drafted by public authorities. Even if it were legitimate to require the media to cover such matters (see below) there would seem to be no reason why the media should have to actually carry communications issued by public authorities.

Second, ARTICLE 19 recognises that it is clearly in the public interest that this sort of information be published, and in many countries public broadcasters are under an obligation to provide coverage of such matters. It is, however, quite another matter to impose a legal obligation on all media to cover such matters, and free of charge. Such obligations are not imposed in many States and yet emergencies and other such incidents receive full, perhaps even excessive, media coverage. In addition, an obligation of this sort could be open to abuse, for example where it was regularly flouted by the media but was only imposed on media which were critical of the government. ARTICLE 19 thus considers Article 15 to be unnecessary and to provide for the possibility of government interference.

Recommendations

- Article 15 should be removed from the draft law.

Registration Requirement

Articles 21 to 23 of the draft law deal with registration of the mass media. These provisions require all mass media – defined to include posters, leaflets, photographs and so on – to register but require the responsible minister to register them within 15 days if all requisite information has been provided. This is a true ‘technical registration’ system and such systems are generally considered not to breach the guarantee of freedom of expression. However, they undoubtedly do pose an obstacle of sorts for the media and provide government with an opportunity to interfere. Furthermore, many countries do perfectly well without them. For these reasons, ARTICLE 19 recommends that Macedonia remove these provisions entirely from the draft law.

More specifically, Article 21 at present would require everyone who produced a poster, leaflet or photograph to register as a mass media outlet. This is clearly oppressive and could not be justified as a restriction on freedom of expression. Only large-scale media should have to register in this way. Furthermore, the Decree Proclaiming the Law on Broadcasting Activity of 1997 already requires broadcasters to obtain licenses before beginning operations. There would appear to be no legitimate reason to impose a further obligation on them to register.

Recommendations

- Ideally, the provisions on registration should be removed from the draft law.
- If this is not done, they should apply only to large-scale print media.

The Right of Reply and Correction

Articles 25 to 30 of the draft law deal with the right of reply and correction. Broadly speaking, these provisions provide for a right of correction in relation to factually incorrect material and a right of reply for material which causes harm to one's reputation or other interests. A reply and/or correction must be published on the same page as the original material but may be refused if it does not refer to the original information, a similar response has already been published or a court proceeding regarding substantially the same matter is pending.

ARTICLE 19 is of the view that a right of reply should be available only where an individual's legal rights, including under defamation law, have been harmed. It is unclear whether the term "interests" in the draft law refers to legal interests and this should be clarified. Furthermore, the right should not be available where publication of the original material is justified by a legitimate public interest, consistent with Section 2 of Resolution (74) 26 on the Right of Reply, adopted by the Committee of Ministers of the Council of Europe in July 1974.

Article 26 of the draft law requires the reply/correction to be published on the same page as the original article. This is unnecessarily rigid and, where the original material was on the front page, may impose an unreasonable burden on the mass media outlet. ARTICLE 19 would recommend instead that the law simply require the reply/correction to be given due prominence, taking into account the original piece.

Article 27 of the draft law sets the circumstances in which the editor-in-chief may refuse to publish a reply/correction. ARTICLE 19 is of the view that the following circumstances should be added to the list: where the reply/correction includes illegal or abusive material, where the reply/correction exceeds the length of the original material, where the reply/correction includes material that does not relate to the original material or is being used for ends other than those for which the right exists.

The Decree Proclaiming the Law on Broadcasting Activity of 1997 already provides for a right of reply/correction for the broadcast media. This right should not be duplicated in the draft law.

Recommendations

- Article 25 should be clarified to make it clear that an individual can only claim a right of reply where his or her legal rights have been infringed.
- No-one should be able to claim a right of reply/correction where publication of the original material was in the public interest.
- Article 26 should be amended so that a reply/correction should only be required to be given due prominence, taking into account the original material, and not necessarily be required to be published on the same page.
- The grounds for refusing a right of reply/correction in Article 27 should be expanded to include those listed above.
- The right of reply/correction in the draft law should apply only to the print media.

