

MEMORANDUM

on

The Law on Television and Radio Broadcasting

in the

Republic of Armenia

by

**ARTICLE 19
Global Campaign for Free Expression**

London

February 2001

INTRODUCTION

ARTICLE 19, Global Campaign for Free Expression, has been asked to comment on *The Law of the Republic of Armenia "on Television and Radio Broadcasting"*. The version we are commenting on is dated 9 October 2000.

ARTICLE 19 welcomes the law and regards it as a positive step to advance freedom of expression in Armenia. The draft has many of the key elements needed in an effective broadcasting law, including provisions protecting the right of broadcasters to select, produce and broadcast programs; forbidding censorship; guaranteeing the independence of both private and public broadcasters; establishing an independent broadcast regulator; providing for diversity and pluralism in broadcasting; and establishing a clear process for granting licences to private broadcasters.

There are, however, areas in which the law could be amended in order to safeguard freedom of expression and bring Armenian legislation into line with international law and, in particular, its new obligations as a signatory to the European Convention on Human Rights. ARTICLE 19 is particularly concerned that law gives the President sole power to appoint the members of the governing Council of the public broadcaster and of the National Commission of Television and Radio; and that it requires that at least 65% of the programmes carried by private broadcasters are nationally-produced. The following analysis deals with these and some of ARTICLE 19's other concerns.

INTERNATIONAL AND CONSTITUTIONAL OBLIGATIONS

Armenia is a party to the International Covenant on Civil and Political Rights (ICCPR) and on 25 January 2001 became a Member State of the Council of Europe and signed the European Convention on Human Rights (ECHR) with a view to ratification. Article 19 of the ICCPR and Article 10 of the ECHR protect freedom of expression in similar terms. Article 10(1) of the ECHR states:

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 licensing of broadcasting, television or cinema enterprises.

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 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 notes, freedom of expression, including freedom of information, is both fundamentally important in its own right and also key to the fulfillment 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. The role of broadcasting - as the most powerful medium in most countries of the world - in promoting a free flow of information and ideas cannot be doubted.

The importance of freedom of expression in a democracy has been stressed by a number of international courts. For example, the European Court of Human Rights has stated, in a quotation which now features in almost all its cases involving freedom of expression:

[F]reedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.¹

This has repeatedly been affirmed by both the UN Human Rights Committee and the Inter-American Court of Human Rights which stated:

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. ... [I]t can be said that a society that is not well informed is not a society that is truly free.²

International law does permit some restrictions on the right to freedom of expression and information in order to protect various private and public

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

² *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. 70.

interests. The parameters of such restrictions are provided for in both Article 19 of the ICCPR and Article 10 of the ECHR. Article 10(2) of the ECHR states:

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 and impartiality of the judiciary.

Thus, a restriction on the right to freedom of expression must meet a strict three-part test. This test, which has been confirmed by both the Human Rights Committee³ and the European Court of Human Rights,⁴ requires that any restriction must a) be provided by law, b) be for the purpose of safeguarding a legitimate public interest and c) be necessary to secure this interest.

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.⁵ 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 “provided by law” criterion, will generally be unacceptable because they go beyond what is strictly required to protect the legitimate interest.

It is quite clear that the guarantee of freedom of expression includes broadcasting. Several cases at the European Court of Human Rights have focused on broadcasting rights, and it has never been suggested that these were not included in the guarantee of freedom of expression.⁶ This has also been confirmed by national courts.⁷

International law also requires States to take positive measures to ensure that rights, including freedom of expression, are respected. Article 2 of the ICCPR places an obligation on States to “adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant.” The European Court of Human Rights has also recognised the need in some circumstances for positive measures, to give effect to rights, stating: “Genuine effective exercise of this freedom does not depend merely on the State’s duty

³ For example, in *Mukong v. Cameroon*, No. 458/1991, views adopted 21 July 1994, 49 GAOR Supp. No. 40, UN Doc. A/49/40, para. 9.7.

⁴ *Goodwin v. United Kingdom*, 27 March 1996, 22 EHRR 123, paras. 28-37.

⁵ *Sunday Times v. United Kingdom*, 26 April 1979, 2 EHRR 245, para. 62. These standards have been reiterated in a large number of cases.

⁶ See, for example, *Groppera Radio AG & Ors v. Switzerland*, 28 March 1990, 12 EHRR 321, *Informationsverein Lentia and others v. Austria*, 24 November 1993, 17 EHRR 93 and *Radio ABC v. Austria*, 20 October 1997.

⁷ See, for example, the Ghanaian case, *New Patriotic Party v. Ghana Broadcasting Corp.*, 30 November 1993, Writ No. 1/93, p. 17.

not to interfere, but may require positive measures of protection even in the sphere of relations between individuals.”⁸

An important aspect of States’ positive obligations to promote freedom of expression and of the media 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.”⁹ 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.”¹⁰ In effect, governments are under an obligation to create an environment in which a diverse, independent media can flourish, thereby satisfying the public’s right to know.

The overriding importance of international human rights guarantees is formally recognised in the Constitution of Armenia. Article 4 provides: “The state guarantees the protection of human rights and freedoms based on the Constitution and the laws, in accordance with the principles and norms of international human rights law.” Freedom of expression is explicitly protected in Article 24 which states:

Everyone is entitled to assert his or her opinion. No one shall be forced to retract or change his or her opinion. Everyone is entitled to freedom of speech, including freedom to seek, receive and disseminate information and ideas through any medium of information, regardless of state borders.

Freedom of expression “may only be restricted by law, if necessary for the protection of state and public security, public order, public health and morality, and the rights, freedoms, honour and reputation of others” (Article 44).

ANALYSIS OF THE LAW

Independence of Regulatory Bodies

Under international and comparative law, it is well established that bodies with regulatory or administrative powers over both public service and private broadcasters should be independent from political interference. This is derived from the guarantee of freedom of expression and from general principles of government accountability to the public. It is also derived from the State’s obligation to promote pluralism within and universal access to broadcasting. The importance of independence is also reflected in international treaties, such as the European Convention on Transfrontier Television, which states in its Preamble that Member States “[reaffirm] their

⁸ *Ozgur Gundem v. Turkey*, 16 March 2000, Application No. 23144/93, para. 43.

⁹ Note 6 above, *Informationsverein Lentia and Others v. Austria*, para. 38.

¹⁰ Note 1 above, para. 34.

commitment to the principles of the free flow of information and ideas and the independence of broadcasters.”¹¹

For public service broadcasters, an important aspect of independence is that editorial policy, decision-making in relation to programming content and the utilisation of their budget should be free from interference by government or other vested interests. As a 1996 Recommendation of the Committee of Ministers of the Council of Europe stated: “The legal framework governing public service broadcasting organisations should clearly stipulate their editorial independence and institutional autonomy....”¹² At the same time, public service broadcasters, like all public institutions, must be accountable to the public both for their expenditure of public funds and for fulfilling their broadcasting mandate in the public interest. An accepted means of achieving this delicate balance between independence and accountability is by ensuring that governing councils of public broadcasters are appointed in a manner which insulates them from unwarranted interference. As the 1996 Committee of Ministers Recommendation stated: “The rules governing the status of the boards of management of public service broadcasting organisations, especially their membership, should be defined in a manner which avoids placing the boards at risk of any political or other interference.”

In the private broadcast sector, a key element of independence is that licences should be awarded based on objective criteria which serve the overall public interest, and not on the basis of political favouritism or other illegitimate considerations. This is possible only if the body responsible for granting such licences is independent of political control. In 2000, the Committee of Ministers of the Council of Europe recommended that Member States establish “independent regulatory authorities for the broadcasting sector” and “include provisions in their legislation... which enable them to fulfill their missions in an... independent... manner.”¹³

The lack of independent regulation has been held by national courts to contravene the right to freedom of expression. For example, in 1997 the Supreme Court of Sri Lanka considered a draft broadcasting bill which gave the Minister substantial power over appointments to the Board of Directors of the regulatory authority. The Court held that the bill was incompatible with the constitutional guarantee of freedom of expression, reasoning in part that “[t]he authority lacks the independence required of a body entrusted with the regulation of the electronic media, which, it is acknowledged on all hands, is the most potent means of influencing thought.”¹⁴

¹¹ 5 May 1989, European Treaty Series, No. 132.

¹² Recommendation No. R(96) 10, *The Guarantee of the Independence of Public Service Broadcasting*, adopted by the Committee of Ministers of the Council of Europe, 11 September 1996.

¹³ Recommendation No. R (2000) 23, *The Independence and Functions of Regulatory Authorities for the Broadcasting Sector*, adopted by the Committee of Ministers of the Council of Europe, 20 December 2000.

¹⁴ *Athokorale and Ors. v. Attorney-General*, 5 May 1997, Supreme Court, S.D. No. 1/97-15/97, p. 23.

The Armenian Broadcasting Law includes provisions guaranteeing the independence of private broadcasters, the public broadcaster and the broadcast regulator. Article 19 prohibits state officials from interfering in the functioning of television and radio companies, except as provided for in the Constitution; Articles 29-36 provide for the establishment of an independent Council, which will regulate public service broadcasting; and Articles 37-46 provide for the establishment an independent National Commission, with regulatory responsibilities in relation to private broadcasting. The independence of the Council and National Commission are guaranteed by the appointment of qualified members for fixed terms, who can only be dismissed for narrow reasons.

However, one serious problem with the framework for both the Council and the National Commission is that the President has sole power to appoint members (Articles 29 and 39). As the 1996 Committee of Ministers Recommendation stated:

These rules [about appointments] should, in particular, guarantee that the members of the supervisory bodies:

- are appointed in an open and pluralistic manner;
- represent collectively the interests of society in general;

The independence of governing bodies, and the openness of the process, cannot be guaranteed where the President has sole authority to appoint. Rather, a multi-party body, such as an all-Party committee of Parliament, should have some role in the process (for example, in relation to nominations) and the public should also be guaranteed an opportunity to provide input and comment. These guarantees are perhaps particularly important in countries which are in transition to democracy, such as Armenia, where the checks and balances on the exercise of political power are still being developed and formalised, and the potential for abuse of power in appointments and dismissals is a serious possibility.

Recommendations

- The appointment provisions in Articles 29 and 39 should be amended to ensure that the independence of the Council and National Commission are effectively guaranteed both in law and in practice
- The President should not have the power simply to appoint members of these bodies on his or her own. There should be a requirement that the appointments process is open, that the public have an opportunity to be heard and that decision-making is not restricted to one party or political viewpoint

Content Restrictions

Local Production Requirements

Under international law, the legitimacy of some minimum broadcast time for locally-produced works is widely recognised. This is a reflection of the principle that diversity of information is an essential aspect of freedom of expression and that national audiences have a right to access locally-produced material over the airwaves. Where local production is not protected in this way, there is a danger that there will be less and less national production over time as the local production sector is unable to compete with established foreign production. This would be to the detriment of the public, who have a right to receive information and ideas from a diversity of sources, including national voices. In recognition of this, Article 10(1) of the European Convention on Transfrontier Television and the Directive establishes a minimum European content requirement:

Each transmitting Party shall ensure, *where practicable and by appropriate means*, that broadcasters *reserve for European works a majority proportion* of their transmission time, excluding the time appointed for news, sports events, games, advertising and teletext services. This proportion, having regard to the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public, *should be achieved progressively, on the basis of suitable criteria*. [Emphasis added]

Thus, there is a requirement that at least 50% of broadcasting time is reserved for European works, which would include national production by the Member State, but there is also a clear recognition that such a reservation should only be implemented "where practicable" and that it "should be achieved progressively on the basis of suitable criteria."

Under Article 9 of the Armenian Broadcasting Law, nationally-produced programmes on any channel cannot be less than 65% of the overall airtime, unless stipulated otherwise by the law and excluding the direct broadcast of important information, educational, cultural, sport and other events. The transitional provisions of the law provide that the local content requirements shall be achieved progressively, namely at least 25% by 2001, 35% by 2002, 45% by 2003, 55% by 2004 and finally 65% by 2005.

The exclusion categories and the transitional provisions reflect some effort to ensure that local content requirement is "practicable" and "achieved progressively on the basis of suitable criteria." At the same time, ARTICLE 19 believes that these local content requirements are unreasonably high and will actually harm, rather than promote, local production. In a country which will always have a relatively limited market for its local productions, due to the small size of the Armenian-speaking market across the world, it will inevitably be difficult for local production to compete economically with foreign productions. It will, therefore, be difficult for many existing broadcasters to meet these very strict requirements, and even more difficult for new players to enter the broadcasting field. The resulting effect may well be a *less* diverse, competitive broadcasting sector which can only be to the detriment of Armenian content, particularly given the rapid pace of technological development, such as access to global broadcasting through the Internet.

The requirement of at least 65% *local* content, not even 50% *European* content as set out in the Transfrontier Television Convention, is far stricter than the European norm. Many European countries which are governed by the Convention and have relatively developed and diverse broadcasting sectors, have lower requirements. In Hungary, for example, a 1996 law required that Hungarian produced programmes comprise at least 15% of radio and television broadcasting time, with a transition to at least 20% of television broadcasting time by 1 January 1999.¹⁵ The experience of other countries suggests that local production cannot increase at the rapid rate set out in the Armenian Law, and that some broadcasters will be driven out of business as a result.

In addition, the excessive requirement for local production for private broadcasters is emphasised by Article 28 of the law which requires the public broadcaster to carry two thirds (or 67%) local production. Despite the fact that it receives public funding and has a specific mandate to promote national interests, the public broadcaster must only reach just 2% more local production than the ultimate percentage private broadcasters must reach.

We are, therefore, of the view that these very stringent requirements are not “practicable” in the sense of the word used by the Transfrontier Television Convention

In any case, a more layered and complex approach is warranted, in recognition that different areas of production have varying strengths and weaknesses. The ability of music radio to carry local material depends to some extent on the strength in Armenia of that form of music (classical, jazz, pop, etc.) and it is much easier to produce local talk shows than feature films. The expectation that all broadcasters will achieve the same level of local production is unrealistic. One approach is to set different levels for different types of programming. This is done, for example, in South Africa where different percentages are set both for different types of broadcasting (television and radio), and within each type (for example, within television for drama, current affairs, documentary, informal knowledge building, and children’s programming). For example, the requirement for local production of talk shows is significantly higher than that for feature films.¹⁶

Recommendations

- Article 9 should be brought into line with established European standards.
- The minimum percentage for locally produced programming should be reduced to a level, and achieved over a period, which is realistic and takes into account the varying strengths of different areas of production.
- As it does for existing broadcasters, the law should give broadcasters who are to be licensed in the future a reasonable period of time to bring their locally produced content up to the required standard.

¹⁵ Act No.1 of 1996 on Radio and Television Services.

¹⁶ The Independent Broadcasting Authority Local Television Content Regulations, 1997; The Independent Broadcasting Authority of South African Music Regulations, 1997.

Programming Content

Restrictions on the content of what may be broadcast or published are, like all restrictions on freedom of expression, subject to the three-part test for such restrictions, noted above.¹⁷ Each particular content restriction must meet this test and, in particular, must be shown to be necessary to protect a legitimate interest.

Article 24 of the Armenian Broadcasting Law reads as follows:

It is forbidden to use the television and radio programs for the following:

- (a) For the campaign of the coup d'etat or forcible change of the Constitution;
- (b) Ethnic, religious or racial discrimination;
- (c) To publicize state or other secrets protected by law;
- (d) To advocate war;
- (e) To advocate criminal or other activities prohibited by law;
- (f) To spread prostitution materials;
- (g) Horror movies and programmes damaging the education of teenagers;
- (h) Libel violating other people's rights.

Exclusions are historical documentaries. Programmes with erotic features can be aired from 24:00 p.m. to 6:00 a.m. Exclusion are coded programmes.

Many of these prohibitions – in particular those found in (a), (b), (c), (d), (e) and (h) are matters which are normally covered in laws of general application, in particular the criminal law. It is not only unnecessary to repeat them in a broadcasting law, to do so effectively gives broadcasters a “double warning” about what is illegal, and may have a chilling effect on media freedom. In addition, some of the prohibitions in Article 24, most notably “horror moves and programmes damaging the education of teenagers” and “programmes with erotic features” are excessively vague. As such, they fail to give broadcasters sufficient notice of what exactly is prohibited and may have a chilling effect on their programming decisions.

Recommendations

- Those prohibitions in Article 24 which are already found in other laws, and in particular in the criminal law, should be removed
- Any remaining prohibitions in Article 24 should be amended so as to provide a clear indication of what sorts of programming are being prohibited. Vague or excessively broad expressions should be avoided.

¹⁷ See **International and Constitutional Obligations.**

Minority Language Programming

Article 28 of the Broadcasting Law provides for pluralism in Public Television and Radio, including by requiring a program policy which presents “different points of view” and considers “the interests of ethnic minorities, different social groups and different regions of Armenia.” In addition, Public Television and Radio may provide airtime for ethnic minorities in their own languages, but the airtime of such programmes may not exceed one hour per week for television and one hour per day for radio.

Explicit provision for minority language programming by public broadcasters is a positive feature of the law. However, the imposition of a maximum quota is inflexible and could be interpreted in a negative way. A better approach would be to provide for minimum airtime for minority language programming. This will allow the public broadcaster to manage airtime for different minority languages (which presumably are not represented in equal numbers) and increase airtime as appropriate.

Recommendation

- Article 28 should be amended to reflect a minimum, rather than maximum, quota of airtime for minority language programming

Founders of Broadcasting Companies

Article 17 excludes several groups from founding television and broadcasting companies, including representatives of the government or local municipalities, members of the broadcasting regulators, political parties, religious organizations, prisoners, those denied the right to work, and citizens below the age of 18.

While there may be justifiable reasons for preventing some of those listed in Article 17 from founding broadcasting companies, it is difficult to see what legitimate public interest is being safeguarded by excluding religious organizations. In fact, religious broadcasters can make a contribution to pluralism in broadcasting, depending on what is already available on the airwaves. A better approach than a complete ban on religious broadcasters, would be to allow the National Commission to consider the merits of licence applications, including from religious organisations on their individual merits, on the basis of statutory criteria, such as those set out at Article 50 of the Broadcasting Law.

Recommendation

- Religious groups should not be subject to the prohibitions in Article 17

Limiting Concentration of Media Ownership

It is clear that excessive concentration of media ownership can pose a threat to pluralism and that it may be necessary to counteract concentration tendencies. Article 20 of the Armenian Broadcasting Act provides that each physical or legal entity can be licensed for only one television or radio company. The objective of Article 20, to prevent excessive concentration of media ownership, is legitimate but the specific approach is too restrictive and lacks nuance. There is, for example, an enormous difference between owning two national television stations and owning two provincial radio stations. Indeed, one national television station has far more reach and presumably more influence than the two provincial radios. Article 20 as it stands may act as a brake on the emergence of medium and small size companies, to the detriment of the public interest and pluralism. In other countries measures such as market share or overall value have been used. In any case, the National Commission should have some flexibility in this area.

Recommendations

- Article 20 should either be removed or replaced by a provision based on a more accurate measurement of the real influence of a broadcaster
- The National Commission should have some flexibility within the licensing process to address problems of excessive concentration

Mandatory Broadcasts

Article 12 of the Broadcasting Law requires broadcasters to provide the President, or anyone authorised by him or her, with airtime for official statements on the military situation, natural disasters or other extraordinary situations. It is certainly of the greatest importance that the public be informed about these events, but ARTICLE 19 does not consider that this provision is necessary to achieve this goal. The Public Television and Radio Company has a general obligation to ensure that the public are informed about matters of public concern (Article 28) and this surely includes providing information about the events listed in Article 12. At the same time, these events will always be of great public interest, so the vast majority of other broadcasters will naturally cover them, and this certainly happens in other countries. At the same time there is a very real risk that the requirement in Article 12 could be abused for political advantage.

Recommendation

- Article 12 should be removed from the Broadcasting Law