MEMORANDUM
On the
LAW OF THE AZERBAIJAN REPUBLIC ON MASS MEDIA

BY

ARTICLE 19
The International Centre Against Censorship

London
April 2000

Introduction

In December 1999, a Law of the Azerbaijan Republic on Mass Media came into effect. The law provides a regulatory framework for both the print and broadcast media, establishing a number of both protective and regulatory rules for the media. While it represents a significant improvement over past laws and practices, the new law includes a number of features which are in breach of international standards in this area.

This Memorandum outlines the Azerbaijan Republic'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 media law against these standards, highlighting some of the ARTICLE 19's most serious concerns.

Azerbaijan's Obligations to respect Freedom of Expression under International Law

The Azerbaijan Republic has binding obligations under international law to respect freedom of expression. In particular, the Azerbaijan Republic is a Party to the International Covenant on Civil and Political Rights (ICCPR), an international treaty between States, Article 19 of which guarantees freedom of expression in the following terms:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;

> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Azerbaijan is also an applicant for membership of the Council of Europe. Its case is to be considered during summer 2000; one of the conditions of acceptance for membership would be to sign and incorporate into domestic law the European Convention on Human Rights which also includes protection of freedom of expression at Article10.

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]

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

---

[1] *Handyside v. United Kingdom*, 7 December 1976, 1 EHRR 737.49.
[2] *Castells v Spain,* (1992), Series A, No. 236 , para. 43.

expression and information in order to protect various private and public interests. Such restrictions must, however, meet a strict three-part test. This test, which has been confirmed by the Human Rights Committee,[3] requires that any restriction must a) be provided by law, b) for the purpose of safeguarding one of the legitimate interests listed in Article 19(3) and c) be necessary 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.[4] 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.

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 on the Law on the Mass Media

The Law of the Azerbaijan Republic on Mass Media (LMM), which came into effect in December 1999, represents in many ways a significant improvement over previous laws governing the media and also over earlier drafts of the law. There are a number of very positive features, such as the general guarantee of freedom of the mass media, in Article 1, the fact that in case of conflict, international law is superior to national law (Article 5), the prohibition on censorship and other forms of interference, in Article 7, and the fact that those who interfere with media freedom will be held responsible for this (Article 59).

At the same time, the LMM still contains a number of provisions which unacceptably restrict freedom of expression and media freedom. The following comments are not meant to be an extensive analysis of the law but highlight some of the more serious of these provisions. These comments are based on an unofficial translation of the law into English and ARTICLE 19 takes no responsibility for errors based on a lack of clarity in the translation.

---

[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] *Sunday Times v. United Kingdom*, 26 April 1979, Series A, No. 30, 2 EHRR 245, para. 62. These standards have been reiterated in a large number of cases.

1 *Powers Vested in the Executive Authority*

The Law on the Mass Media vests considerable authority in what is described as the appropriate organ of the executive authority, without specifying what this body is and without providing any process by which frequencies can be allocated, licences issued and appeals be made against refusal of a licence. Pursuant to Article 19, in conjunction with Article 43, the relevant executive organ can suspend the activities of a radio or television broadcaster for up to two months for a variety of matters. Article 43 gives the executive organ the power to issue licenses and frequencies to private broadcasters. The same body can, pursuant to Article 27, seize any publication which publishes information which threatens the security or integrity of the State or safety of the country. Where a court determines that such seizure had no legitimate basis, the publication shall be compensated.

The executive organ has considerable powers over the foreign media. It can, under Article 27, ban and/or seize foreign publications which insult the nation's honour, harm national interests, national ethics or the country's security. Foreign publications not registered in Azerbaijan can only be disseminated with the permission of the executive organ, pursuant to Article 52. In addition, Article 53 provides for accreditation of foreign media representatives by the executive organ.

It is well established under international and comparative law that any bodies with regulatory or other powers in relation to the media should be strictly independent of government. This is particularly so where such bodies have extensive powers, as here where they can, for example, suspend broadcasters. The reason is clear. If bodies with powers over the media are not independent, politicians and public officials will be tempted to use their control to interfere with media freedom, in particular by limiting the ability of the media to criticise them.

It remains unclear precisely which executive organ the LMM refers to but the name suggests a body which is part of the executive arm of government and hence is not independent. In any case, it is of some importance that the law include clear guarantees, both formal and structural, of the independence of the body which licenses private broadcasters. This forms an important part of most broadcasting laws but is entirely absent from the LMM.

No regulatory body should have the power to ban or seize publications. This is a form of prior censorship which courts around the world, both national and international, have regarded with the greatest suspicion, particularly where applied, as here, by an administrative body. It might seem that by providing for court-ordered compensation in cases of wrongful seizure, the LMM mitigates the potential harm from publication seizure. In fact, ARTICLE 19 considers this approach to be essentially backwards: rather than compensate afterwards for what was an abuse of freedom of expression, the authorities should have to establish the necessity, before a court, of an action limiting freedom of expression before implementing it.

In addition, the law also does not specify any procedure for application and granting of licences. ARTICLE19 believes that regulations to this effect should be clearly specified, and that the LMM should also establish the broadcasters' right to appeal the decisions taken by the relevant organ.

International law guarantees the right to freedom of expression regardless of frontiers. This means that foreigners and foreign publications also benefit from this right. As a result, the points made above apply equally to foreigners.

Recommendations

- The LMM should set out clearly the structure of any body with regulatory powers over the media, including the foreign media, and should include provisions ensuring, both formally and in practice, the independence of this body.
- The provisions allowing for banning and seizing in Articles 19 and 27 should be repealed.
- The LMM should specify the procedure for obtaining licences. The right of broadcasters to appeal against the body's decision should also be included in the law.

2 Duplication of General Content Restrictions

A number of provisions in the LMM prohibit the publication in the media of certain types of material that are normally found in laws of general application, such as the criminal code. For example, Article 27, noted above, allows for the seizure of any publication which publishes information threatening the security or integrity of the State or safety of the country. Article 10 is much broader, prohibiting the publication of information which reveals State secrets, promotes hate, constitutes defamation or slander, or threatens the integrity or security of the State. Many of these proscriptions are repeated in Article 47, dealing with individual journalists' responsibilities.

To the extent that it is legitimate to prohibit these types of expression, such prohibitions should be found in laws of general application rather than in media-specific laws. It is universally accepted, for example, that States may prohibit defamatory statements but in most countries defamation laws are applicable to all citizens and not specifically to the media. To repeat them in media laws places the media under a double obligation and sends a negative signal that the media are singled out for particular scrutiny. This tends to have a chilling effect on freedom of expression and serves no legitimate State interest.

Recommendations

- The LMM should not repeat restrictions on the content of what may be published that are already provided for in laws of general application. Provisions of this nature should be repealed.

3 Illegitimate Content Restrictions

Several provisions in the LMM contain restrictions on the content of what may be published which go beyond what is allowed under international guarantees of freedom of expression. For example, several articles impose a legal obligation on the media to respect media or journalistic ethics. Article 4 sets out a number of basic principles for the mass media, including a requirement of observance of professional ethics. This obligation is repeated in Article 36 in relation to broadcasters and again in Article 47 in relation to individual journalists. Similarly, several articles, including Articles 4, 10 and 47, place an onus on the media or journalists to provide only truthful, objective or authentic information.

Matters of ethics, by definition, should not be enforced through the law. Ethical questions are closely related to professionalism and it is for professional bodies, composed of journalists, editors, owners and so on, to set and promote observance of ethical standards.

As a matter of professionalism, journalists should always strive to ensure that the information they publish is correct or verifiable. At the same time, even the very best journalists will make mistakes and it is a serious matter to require objectivity or accuracy through a law on the mass media. Prohibiting the publication of incorrect or false news is the sort of broad provision that has historically been used to repress expression critical of government. As the Canadian Supreme Court noted, prohibiting false news, "makes possible conviction for virtually any statement which does not accord with currently accepted 'truths', and … could be used (or abused) in a circular fashion essentially to permit the prosecution of unpopular ideas."[5] It is significant that prohibitions on false news do not serve one of the legitimate aims established under Article 19 of the ICCPR since false news does not, in and of itself, disturb public order, undermine national security or breach the rights of others.

Recommendations

- Articles 4, 10, 36 and 47 should be amended to bring them into line with international standards. In particular, provisions enforcing professional ethics or prohibiting the publication of false or unverified news should be repealed.

4 Right of Reply

Article 44 of the LMM, obliges the mass media to provide a retraction, correction or reply in cases where published information touches on the rights or interests of others, distorts ideas, or slanders or insults persons, the State or the nation.

---

[5] *R. v. Zundel* [1992] 2 S.C.R. 731 (SCC), p. 769.

Courts in many countries have held that laws prohibiting slander or insult against the State or nation are an unjustifiable restriction on freedom of expression. The European Court of Human Rights has also expressed grave reservations about such laws.[6] The State or nation does not have a reputation as such and laws prohibiting slander or insult of these bodies may easily be abused for political purposes. In any case, the authorities have ample means a their disposal to respond to any incorrect or unfounded allegations regarding the State or nation without requiring the media to publish a retraction, correction or reply.

A second problem with Article 44 is that it requires the media to provide effective redress in a very broad range of circumstances. These include any case where published information touches on the rights or interests of others or distorts ideas. Practically everything that is published could be deemed to fall within one or another of these categories. It is legitimate to provide a right of correction for false information. It is also common to provide for a right of reply as an alternative to harsher legal remedies in cases where established rights are breached, usually because the original information was defamatory. This, however, is a much narrower set of circumstances than those established in Article 44.

Recommendations

- Article 44 should be amended to provide only for a right of correction or retraction for false information and for a right of reply only when other, established legal rights have been breached.
- The LMM should not provide for a legal remedy, including a right of correction, retraction or reply, simply because a mass media organisation is deemed to have slandered or insulted the State or nation.

5 Accreditation

Article 50 of the LMM allows State organs and public associations to accredit journalists, according to their own rules, for purposes of providing media coverage of their meetings, consultations and other official functions. These same bodies can remove that accreditation where a journalist violates the rules of accreditation, dishonours the body or spreads false information about the body.

The potential for public bodies abusing this power appears obvious. It gives public bodies the power to effectively sanction or obstruct media coverage of their activities based on their own view of whether a journalist has dishonoured them. To this extent, the LMM almost invites public bodies to exercise informal censorship on journalists through accreditation powers.

In many countries, accreditation of individual journalists is effectively done by professional bodies. This may or may not involve special accreditation to certain bodies where it is necessary, for practical reasons, to limit access,

[6] *Castells v. Spain*, 23 April 1992, No. 236, 14 EHRR 445, para. 46.

such as the courts or Parliament. It is essential, however, that accreditation powers are vested in a body which is independent of the bodies to which accreditation is provided.

Recommendations

- Article 50, dealing with accreditation, should be removed from the LMM. It should be up to professional bodies to make accreditation arrangements directly with public bodies. The law might, however, provide for a general obligation on public bodies to provide appropriate access to the media, including through accreditation.

6 Free Dissemination of Official Information

Article 40 of the LMM obliges the public broadcast media to disseminate official information from all three branches of government immediately and for free. It further obliges all media to broadcast immediately and for free, information about extraordinary circumstances, disasters and emergencies.

There is simply no justification for legally obliging public broadcasters to disseminate official information. They should be under a general duty to provide comprehensive news services to the whole population but this is quite different from disseminating official information. The key problem with this obligation is that officials can use it to ensure that the public media serve their interests, and effectively operate as a mouthpiece of government, rather than serve the interests of the public as a whole. A number of official bodies, including the Committee of Ministers of the Council of Europe, have stressed the need for public broadcasters to be fully independent of government.[7] A key aspect of independence from government is editorial independence which includes the power to make editorial choices free of government or official interference based on the public interest. An obligation to disseminate official information clearly breaches this right.

Is it likely that the mass media will carry full coverage of public disasters and other dangers, in part because this will always attract good viewer and listener ratings and in part because it is clearly the only responsible thing to do. To establish it as a legal obligation on broadcasters is not only unnecessary but also provides the authorities with another possible avenue for harassment and interference with media freedom.

Recommendations

- Article 40 of the LMM, providing for dissemination of official information by the public broadcaster and for mandatory emergency reporting by all broadcasters, should be repealed.

---

[7] Recommendation No. R(96)10 on the *Guarantee of the Independence of Public Service Broadcasting*.

Summary of Recommendations

- The LMM should set out clearly the structure of any body with regulatory powers over the media, including the foreign media, and should include provisions ensuring, both formally and in practice, the independence of this body.
- The provisions allowing for banning and seizing in Articles 19 and 27 should be repealed.
- The LMM should not repeat restrictions on the content of what may be published that are already provided for in laws of general application. Provisions of this nature should be repealed.
- Articles 4, 10, 36 and 47 should be amended to bring them into line with international standards. In particular, provisions enforcing professional ethics or prohibiting the publication of false or unverified news should be repealed.
- Article 44 should be amended to provide only for a right of correction or retraction for false information and for a right of reply only when other, established legal rights have been breached.
- The LMM should not provide for a legal remedy, including a right of correction, retraction or reply, simply because a mass media organisation is deemed to have slandered or insulted the State or nation.
- Article 50, dealing with accreditation, should be removed from the LMM. It should be up to professional bodies to make accreditation arrangements directly with public bodies. The law might, however, provide for a general obligation on public bodies to provide appropriate access to the media, including through accreditation.
- Article 40 of the LMM, providing for dissemination of official information by the public broadcaster and for mandatory emergency reporting by all broadcasters, should be repealed.