



STATEMENT

on the draft Law of Ukraine on the Insertion of Changes to Certain Laws of Ukraine as a Result of the Parliamentary Hearings “Society, Mass Media, Authorities: Freedom of Expression and Censorship in Ukraine”

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**London
April 2003**

The draft Law of Ukraine on the Insertion of Changes to Certain Laws of Ukraine as a Result of the Parliamentary Hearings “Society, Mass Media, Authorities: Freedom of Expression and Censorship in Ukraine” (the draft Law) provides for a number of amendments to various media laws. These would: 1) increase transparency of State institutions and the free flow of information in the public interest; 2) protect media outlets from State interference; and 3) protect the publication of value judgements and introduce into defamation law a defence of ‘reasonable publication.’ The adoption of these provisions would, overall, enhance respect for freedom of expression and information in Ukraine.

ARTICLE 19 welcomes the recent adoption by Parliament of its Resolution on “Society, mass media, the authorities: freedom of speech and censorship in Ukraine”,¹ which shows a clear commitment to improving respect for media freedom. We therefore call upon the Ukrainian Parliament to further advance the process towards greater freedom of expression through the adoption of this draft Law. We provide this Statement to aid the

¹ Adopted 16 January 2003.

discussion towards the adoption of the law and to provide recommendations for its further improvement.

a) Provisions on Access to Information

Article 1 of draft Law proposes to incorporate a new Article 212(3) into the Code of Ukraine on Administrative Offence, introducing penalties for the failure by State bodies to provide information to the public upon request, for releasing incomplete information and/or for undue delay in the release of information.

ARTICLE 19 welcomes this proposal. Our research indicates that, in spite of the adoption of the Law on Information in 1992, freedom of information has yet to be truly implemented in the Ukraine. This amendment would constitute a positive first move towards fulfilling the right of access to information. However, we stress that a number of other steps need to be taken to ensure full respect in practice for the right to information. For example, the law should also establish minimum standards regarding the maintenance and preservation of records by public bodies, for example by requiring such bodies to allocate sufficient resources and attention to ensuring that public record-keeping is adequate.² The law should also provide for a number of mechanisms to address the problem of a culture of secrecy within the government, including through requiring freedom of information training for all public employees.³

b) Prohibition of Censorship

Other proposed amendments would add Paragraph 1, on the prohibition of censorship, to Article 45 of the Law on Information. The draft new paragraph, to be added to the existing (undefined) prohibition of censorship, states that:

Censorship is defined as control over the content or pressure in its various illegal forms on mass media or journalists which is exercised by the governmental and local bodies, governmental officials, or other appointed officials in the form of either direct or indirect influence on the mass media managers, founders (co-founders), journalists (arts people) in order to distribute or not to distribute certain information, in particular, not making public the information important for society, prohibition of broadcasting or mentioning of certain persons, prohibition of criticising of authorities or some persons.

ARTICLE 19 welcomes the inclusion in media laws of provisions aimed at limiting interference by the authorities in the work of the media. The need for the authorities to respect the principle of editorial independence is crystallised at Article 10(1) of the *European Convention on Human Rights* (ECHR),⁴ which Ukraine has ratified. Article 10(1) states, in part:

² See *The Public's Right To Know: Principles on Freedom of Information Legislation* (London: ARTICLE 19, June 1999), Principle 1.

³ See *ibid.*, Principle 3.

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

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. [italics added]

However, although we understand the drive to clarify the meaning of ‘censorship’, we are concerned that the definition provided, which appears to be exclusive in nature, providing an exhaustive list of forms of interference, may actually limit the scope of this important concept. The media might be subjected to other, equally pernicious, forms of interference, against which the law would provide no protection.

It would be useful to provide instead an illustrative definition of censorship, providing examples of forms of interference that are unacceptable, as an aid in interpretation and for clarity. To make it clear that these examples are not an exhaustive list, the law should include an expression such as “this includes, *but is not limited to*, the following cases...”.

c) Exemptions from Liability

The proposed amendments, if adopted without change, would add a series of exemptions from liability for publication. The amendments provide that:

- 1) nobody can be sued for the expression of value-judgements;
- 2) nobody can be found liable for publishing information in the public interest, if a court rules that the public’s right to know outweighs other considerations; and
- 3) journalists should benefit from a defence of reasonable publication in defamation cases.

1) Exemption from Liability for the Publication of Value Judgements

The draft Law would add a provision stating that nobody can be held liable for the expression of value-judgements to Article 47 of the Law on Information, on Responsibilities for Breaches of Information Law. ARTICLE 19 welcomes this amendment, which would bring Ukrainian law into line with international standards on freedom of expression. On this point, the European Court of Human Rights stated that:

[A] careful distinction must be made between facts and value-judgements. The existence of facts can be demonstrated, whereas the truth of value-judgements is not susceptible of proof. ...As regards value judgements this requirement [to prove their truth] is impossible of fulfilment and it infringes freedom of opinion itself...⁵

2) Exemptions from Liability for the Publication of Information in the Public Interest

The draft Law would also add a provision stating that nobody can be held liable for the publication of information in the public interest to Article 47. ARTICLE 19 welcomes this amendment, which will likewise bring Ukrainian law into line with international standards in this regard. The protection granted under this amendment should apply to

⁵ *Oberschlick v. Austria*, 23 May 1991, Application No. 11662/85, para.13. See also, *Defining Defamation: Principles of Freedom of Expression and Protection of Reputation* (London: ARTICLE 19, July 2000), Principle 10.

both the initial source of the information – often, an employee of a public body – as well as to journalists publishing the information.⁶

We recommend that a similar ‘public interest override’ should be introduced in the existing Law on Information. As a matter of principle, all individual requests for information from public bodies should be met unless the public body can show that the information meets a strict three-part test, as follows:

- the information must relate to a legitimate aim listed in the law;
- disclosure must threaten to cause substantial harm to that aim; and
- the harm to the aim must be greater than the public interest in release of the information.⁷

The third condition means that even if substantial harm to a legitimate aim can be shown, the information should still be disclosed if the benefits of disclosure outweigh the harm. For example, this would apply where information is private in nature but at the same time exposes high-level corruption in government.

3) Defence of Reasonable Publication

Article 3 of the draft Law proposes to include a new Paragraph 6 in Article 17 of the Law of Ukraine on State Support of Mass Media and Social Security of Journalists, stating:

A journalist and a mass medium are exempt of liability for distribution of [defamatory] information when such information is of importance for society, and a journalist acted honestly verifying this information.

ARTICLE 19 very much welcomes the proposal to add a provision establishing a defence of reasonable publication for defamation. International standards are clear that, even where a statement of fact on a matter of public concern has been shown to be false, defendants should benefit from a defence of reasonable publication. This defence is established if it is reasonable in all the circumstances for a person in the position of the defendant to have disseminated the material in the manner and form he or she did. In determining whether dissemination was reasonable in the circumstances of a particular case, a court shall take into account the importance of freedom of expression with respect to matters of public concern and the right of the public to receive timely information relating to such matters.⁸

Although journalists should strive to achieve the highest professional standards as a matter of journalistic ethics, it is simply impossible for them to check the veracity of all information published. It is in the interest of the public to receive information in a timely fashion, meaning that journalists have to act quickly in their reporting. As the European Court of Human Rights has stated:

⁶ See *The Public’s Right to Know*, Principle 9.

⁷ *The Public’s Right to Know*, Principle 4.

⁸ *Defining Defamation*, Principle 9.

[N]ews is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.”⁹

ARTICLE 19 generally recommends, however, that the rules on defamation be included in laws of general application rather than in media-specific laws.

There are further amendments which should be made to Article 17. It does not specify, for example, that only false statements which lowers the esteem with which one is held within the community may be considered defamatory and attract liability.¹⁰ In particular, nobody should be punished for disseminating true information, regardless of his/her intentions. This should be provided for in the legislation.

d) Public bodies should not sue

Article 2(4) proposes to add a new Paragraph 2 to Article 49, on Compensation for Material and Moral Damage, stating that “governmental and local bodies have no right to file a defence of honour, dignity and business reputation claim, [and] they have no right to demand moral compensation either.”

ARTICLE 19 welcomes this amendment but we recommend that it should apply to all public bodies, including all bodies which form part of the legislative, executive or judicial branches of government or which otherwise perform public functions.¹¹ Superior national courts in a number of countries have limited the ability of public authorities, including elected bodies, State-owned corporations and even political parties, to bring an action for defamation. This is in recognition of the vital importance in a democracy of open criticism of government and public authorities, the limited and public nature of any reputation these bodies have, and the ample means available to public authorities to defend themselves from criticism.

e) Burden of Proof

Article 3 of the draft Law proposes to amend Article 17 of the Law of Ukraine on State Support of Mass Media and Social Security of Journalists, on “liability for an attempt on the journalist's life and health, other actions against him/her and liability against the moral (non-property) damage.” The amended Article 17 would provide that, in cases of infliction of moral damage by a journalist/media outlet on a public official/State body, the *plaintiff* has to prove that the information is false and that it was disseminated with malicious intent.¹² The current law fails to specify where the burden of proof lies.

This amendment, if adopted, would be a positive development. The requirement for journalists to prove in court the truth of the information disseminated generates a

⁹ *The Observer and Guardian v. United Kingdom*, Observer and Guardian v. the United Kingdom, 26 November 1991, Application No. 13585/88.

¹⁰ *Defining Defamation*, Principle 2.

¹¹ *Defining Defamation*, Principle 3.

¹² Ill-intention is defined in the proposed Article 17(5) as the knowledge by the journalist of the inaccuracy of the information before its dissemination.

‘chilling effect’ on their work, which may easily lead to self-censorship. However, we recommend that this provision be extended to all statements of public concern, rather than only those that involve public officials/State bodies.

(f) Fees for submission of defamation claims

Proposed changes to Article 3 of the Law on State Duty would add sub-paragraph f to Paragraph 1, establishing that in defamation cases the plaintiff is to be required to pay a percentage of the amount claimed to instigate proceedings against the media.

Although we appreciate the rationale for the proposal – to deter malicious plaintiffs – we are concerned that the amendment as drafted may impede access to courts, resulting in a violation of Article 6 ECHR (right to a fair trial). We therefore recommend, instead, that the law provide for effective remedies for defendants where plaintiffs bring clearly unsubstantiated cases with a view to exerting a ‘chilling effect’ on freedom of expression, rather than vindicating their reputations.¹³ This might include the right to bring a case for abuse of civil process, including an award of damages for such abuse, and/or the availability of a procedural mechanism to strike out the claim early on in the proceedings unless the plaintiff can show some probability of success.

Conclusions and Recommendations

The amendments proposed by the draft Law represent a timely and important positive step in terms of ensuring respect in practice for the right to freedom of expression in Ukraine. We recommend that Parliament vote in favour of their adoption, subject to our comments. A number of further steps are needed to guarantee the right to freedom of information, including measures to address the culture of secrecy in public bodies, a ‘public interest override’ for exceptions and the introduction of minimum standards of record maintenance. The clarification on censorship is helpful, but the definition provided should not be exclusive but rather illustrative.

As regards defamation, the rule prohibiting government bodies from suing should be extended to also include public or State-owned bodies. Furthermore, the burden of proof should lie with the plaintiff with regard to all statements of public concern, not just those relating to public officials. The law should not require payment of fees for lodging a defamation case, as this might inhibit access to the courts. Finally, the law should make it clear that true statements can never attract liability.

We remain available to provide assistance to Ukrainian Parliament in the process of harmonisation of Ukraine’s media laws with international standards of freedom of expression.

¹³ *Defining Defamation*, Principle 19.