MEMORANDUM

On the

DRAFT CZECH PRESS LAW

BY

ARTICLE 19
The International Centre Against Censorship

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Introduction

A Draft Press Law, designed to replace the Czechoslovak Press Law of 1966 and later amendments, is currently before the Czech Parliament. ARTICLE 19, The International Centre Against Censorship, is concerned that if the Draft Law is enacted in its current form, it will place the Czech Republic in breach of its obligations under international law to respect the guarantee of freedom of expression and will be a retrograde step in the development of democracy and media freedom in the Czech Republic.

The following are our major concerns.

The Czech Republic's Obligations to respect Freedom of Expression Under International Law.

The Czech Republic is a party to both the European Convention on Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights. Both of these international human rights treaties protect freedom of expression in similar terms. Article 10 of the European Convention states:

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.

The overriding importance of freedom of expression as a human right has been widely recognised, both for its own sake and as an essential

underpinning of democracy and means of safeguarding other human rights. At its very first session in 1946 the United Nations General Assembly declared it:

> A fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.[1]

The European Court of Human Rights has also recognised the key role of 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".[2]

International jurisprudence has also consistently emphasised the special role of a free press 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.[3]

As one of the most fundamental rights recognised by the international community, a genuine commitment to freedom of the press necessitates a high threshold of tolerance in relation to all kinds of publications. The guarantee implies at least a press 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 press law should be drafted with these considerations uppermost in mind.

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 of democracy. Under international human rights law, Czech laws which restrict freedom of expression must comply with the provisions of Article 19(3) of the ICCPR and Article 10(2) of the ECHR. Article 10(2) is in the following terms:

> 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.

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[1] Resolution 59(1), 14 December 1946.
[2] *Handyside v. United Kingdom*, 7 December 1976, 1 EHRR 737, para. 49.
[3] *Castells v Spain,* (1992), Series A, No. 236 , para. 43.

Article 19(3) of the ICCPR is in similar terms. Accordingly, restrictions on freedom of expression must meet a strict three-part test.[4] First, the interference must be provided for by law. This implies that the law is accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct."[5] Second, the interference must pursue one of the legitimate aims listed in Article 10(2); this list is exclusive. Third, the interference must be necessary to secure that aim. This implies that it serves a pressing social need, that the reasons given to justify it are relevant and sufficient and that the interference is proportionate to the legitimate aim pursued.[6] This is a strict test, presenting a high standard which any interference must overcome.

Content Restrictions

Article 6 of the draft law imposes content restrictions on publishers, forbidding the publication of "hate speech" and pornography.

While it is true that States have an obligation to stop the circulation of certain types of "hate speech"[7] and may legitimately limit the availability of pornography, it is inappropriate to include such restrictions specifically in a law regulating the press. Laws against hate speech and pornography, if they are to exist at all, should apply equally to all citizens of the Czech Republic. To include them within the press law is to suggest that the press have special obligations in relation to these matters. This is not the case. Article 6 should be removed.

The Right of Correction and Reply

Articles 12-18 of the draft press law regulate the rights of correction, reply and associated matters.

Although regarded by many, particularly within the common law tradition, as an unacceptable burden on the freedom of the press,[8] the right of correction or reply is accepted as an aspect of the right to freedom of expression in many civil law and continental European democracies. It is the subject of a resolution of the Committee of Ministers of the Council of Europe [9] and is specifically protected by at least one international human rights treaty.[10] While it remains controversial, the purpose of such a provision is to provide

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[4] See, for example, *The Sunday Times v. United Kingdom*, 26 April 1979, No. 30, 2 EHRR 245, paras. 45.
[5] *The Sunday Times*, *op cit*., para. 49.
[6] See the ECHR case, *Lingens v. Austria*, 8 July 1986, 8 EHRR 407, paras. 39-40.
[7] See, for example, Article 20 of the International Covenant on Civil and Political Rights.
[8] See, for example, *Miami Herald Publishing Co. v Tornillo*, (1978) 418 U.S. 241, (United States Supreme Court).
[9] Resolution (74) 26 on the Right of Reply. Adopted by the Committee of Ministers on 2 July 1974 at the 233rd meeting of the Ministers' Deputies. See also the advisory opinion of the Inter-American Court of Human Rights, *Enforceability of the Right to Reply or Correction,* 7 HRLJ 238 (1986).
[10] See Article 14 of the Inter-American Convention on Human Rights, 1969.

individuals with an opportunity to correct what they consider to be inaccurate facts published about them and to respond to potentially defamatory assertions made against them in the press. In this way individuals are able to assert their rights to reputation and privacy and to participate effectively in public debate which directly concerns them. Such provisions should, therefore, reflect these aims and should not seek to provide for a general right of members of the public to access the media whenever they feel aggrieved. In the context of the international guarantee of freedom of expression, it is vital that such provisions do not provide a remedy which goes beyond what is permitted under properly construed defamation or privacy regimes.

In these circumstances, rights to correction and reply should only be exercisable where the aggrieved party regards the facts, including the facts upon which any opinion may be based, as inaccurate. They should not be exercisable where the aggrieved party merely objects to an opinion based on true facts. Since none can legitimately be required to prove the truth of such an opinion in defamation proceedings, it is not permissible to provide an extra remedy to an aggrieved person by way of the right of reply. Article 13(1), which allows for a reply even to true facts, should be amended accordingly.

Given the interests underlying these rights, only individuals and private bodies should have standing to apply for replies to potentially defamatory allegations. State bodies, which should have no standing to sue for defamation, have no legitimate interest in exercising rights of reply. Such bodies should accept even the harshest criticism, since such criticism is the lifeblood of democracy, is at the very core of freedom of expression and merits the highest level of protection. This restriction to the right of reply should be clearly spelt out in the legislation.

While the rights to a correction and an additional report in articles 12 and 14 are appropriately phrased, both articles (as well as article 13(3) in relation to the right to reply) preserve the right for the next of kin in the case of death of the affected party. This is inappropriate. Only the person directly concerned has any legitimate interest in defending their reputation and only he or she can be in a definitive position to know the accuracy or otherwise of disputed facts. Any rights to reply to potentially incorrect or defamatory allegations must therefore lapse upon death. Articles 12(3), 13(3) and 14(3) should be amended accordingly.

Even where the rights to correction and reply may be legitimately exercised, the burden placed upon the press organ printing the reply or correction should, like all burdens upon freedom of expression, be minimised. There is, therefore, no justification for requiring the editor of the press organ to accept the aggrieved party's wording of the correction or reply. While the aggrieved party may wish to draft the wording, the editor should have the final say about the actual text provided that the substantive correction or reply is published. Article 15(1) should be clarified to reflect this requirement.

Similarly, there is no justification for forbidding comment on the reply or correction in the same edition in which it is published. While it is to be hoped

that professional journalists will not enter into a petty tit-for-tat argument when printing replies or corrections, a blanket ban on comment is disproportionate and unnecessary. Article 16(5) should be deleted.

Inappropriate Judicial Protection

Article 21(1) appears to provide that any person can institute proceedings against a publisher for breach of the content restrictions contained in Article 6(2). This can result in a fine against the publisher of up to 3,000,000 CZK (approximately $US86, 000).

Leaving aside the legitimacy of Article 6(2) itself, it is totally inappropriate and dangerous to allow any private individual to institute proceedings against a publisher for printing "hate speech" or pornography. The obligation to restrict hate speech rests upon the State and must be exercised only when absolutely necessary to prevent direct incitement to violence hatred or discrimination. To allow any private person to instigate proceedings whenever they feel that the provision has been breached is to leave the press open to unjustified attack and could lead to the chilling of expression as publishers seek to avoid costly legal proceedings which should never have been brought in the first place. Similarly in relation to pornography, the State may impose restrictions only where necessary and proportionate. It is not for private individuals to decide when a publication is pornographic and illegal and to institute proceedings.

If Article 6(2) is to remain in the draft law (see above), Article 21(1) must be amended to ensure that, while members of the public can lodge a complaint with the appropriate authorities if they believe that illegitimate hate speech or pornography has been published, it is up to the authorities to decide whether or not to launch proceedings against a publisher, taking full account of the requirements of international law in relation to freedom of expression and hate speech.

Disproportionate Punishments

Article 21(2) empowers a court to suspend publication or circulation of a periodical following repeated violations of Article 6(2).

Since Article 6 of the draft law is unnecessary and ought to be removed it follows, therefore, that penalties relating to it should also be removed. In any case, the suspension of a press organ is an extremely severe penalty which may only be justified in the most pressing and urgent circumstances. Suspension would only be legitimate where absolutely necessary to prevent direct incitement to violence, hatred or discrimination on national, racial or religious grounds. Except where it fulfilled these criteria, suspension following the publication of pornography or of matters contravening the constitution would rarely if ever be justified. Application of the sanction following repeated minor breaches of Article 6(2), not amounting to illegal incitement, would be disproportionate, illegitimate and impossible to justify in a democratic society. Article 21(2) should be deleted or amended to narrow the scope of the courts' power to order suspension of press organs, in line with these considerations.

Articles 20 and 21 provide heavy monetary penalties, ranging from 100,000 CZK (approximately $US3000) to 300,000 CZK (approximately $US9000), for failure to supply registration information, for failure to deliver the various free copies required and for repeated failure to comply with any of the other legal requirements in the draft law. While it is acceptable to provide for fines for failure to comply with legitimate legal requirements, like all restrictions on freedom of expression, sanctions must be proportionate to the harm done. The amounts provided for here are excessive and therefore, disproportionate. The levying of such fines, even where they represent a legitimate sanction for illegitimate expression, could cause severe financial hardship and even the closure of press outlets. Again, this is a serious matter which should be avoided in all but the most extreme and pressing situations.

Articles 20 and 21 should be amended to reduce the fines to more reasonable levels.

Protection of Sources

Article 19 establishes the right of journalists and others to protect their sources of confidential information except in the circumstances set out in paragraph 3.

Protection of sources is a vital component of freedom of expression and of the press. It ensures the free, frank, safe and confidential flow of information to journalists and the public and allows the press to play its role as the "watchdog" of government.[11] As such, the right of non-disclosure of sources should benefit from the greatest legal protection possible.

The test for overriding the right of non-disclosure in paragraph 3 of Article 19 is too weak. A disclosure order should only be made by a court of law, on the basis of a clear statutory provision, where the public interest in disclosure significantly outweighs the harm to freedom of expression from disclosure. Only two interests are of sufficient public importance to support a claim for disclosure; the right of a person to defend himself against a criminal charge and the interests of society in investigating or avoiding serious criminal offences. Even where one of these interests is clearly engaged, disclosure should only be ordered where it is absolutely necessary in all the circumstances and where the information could not be obtained elsewhere. It would not, for example, be legitimate to order disclosure of sources in a minor criminal trial as opposed to a murder trial, particularly if the information was not vital to resolution of the case.

Article 19(3) should be strengthened to reflect these requirements.

[11] See *Goodwin v United Kingdom*, 27/3/96, 22 EHRR 123 (European Court of Human Rights).

Free Copies

Article 11 provides for the compulsory delivery of free copies of publications to a variety of libraries and public bodies.

While it may be acceptable to require a free copy to be sent to the national library, a requirement to send copies to ten separate libraries is excessive. Also, there is no justification for requiring copies to be sent to the Ministry of Culture or the Public Prosecutor and provision to the latter may contribute to a climate of fear and thus further "chill" expression within the Czech Press.

Article 11 should be amended accordingly.

Summary of Recommendations

- Remove Article 6 to ensure that the press is not regarded as having special obligations in relation to hate speech or pornography.
- Amend Article 13(1) to allow a right of reply only where the aggrieved party disputes the facts alleged and not where an opinion is expressed based on true facts.
- Clarify Article 13 to ensure that State bodies do not have standing to exercise the right to reply.
- Amend Articles 12-14 to ensure that the rights to correction and reply do not survive the death of the aggrieved party.
- Clarify Article 15(1) to ensure that the editor of the press organ has the final say as to the wording of a correction or reply.
- Remove Article 16(5) to ensure that here is no blanket ban on commenting on corrections or replies in the edition in which the correction or reply is published.
- Remove or amend Article 21(1) to ensure that only the State may instigate proceedings against a publisher for breach of hate speech or pornography restrictions.
- Remove or amend Article 21(2) to ensure that press organs may not be subject to suspension orders except in circumstances sanctioned by international law.
- Amend Articles 20 and 21 to reduce fines to proportionate levels.
- Amend Article 19(3) to provide stronger protection for journalists' sources.
- Amend Article 11 to reduce the number of free copies which must be provided to libraries and to remove the requirement of provision of copies to government departments and the public prosecutor.