

ARTICLE 19

Analysis of the Decree Proclaiming the Law on Broadcasting Activity Macedonia, April 1997

and the

Proposal for an Enactment of the Law on Public Media Macedonia, March 1997

Broadly speaking, the Decree Proclaiming the Law on Broadcasting Activity (Broadcasting Law) and the Proposal for an Enactment of the Law on Public Media (Public Media Law) conform to the standards required under international guarantees of freedom of expression. The regulatory body established under the Broadcasting Law, the Broadcasting Council, is formally independent of government (see Article 23) and the stipulations regarding appointments, tenure and procedure (Articles 23 - 30) should help to ensure actual independence. Although some of the content restrictions established by both the Broadcasting and Public Media Laws go beyond the acceptable, such problems could be cured by amending these laws; the restrictions do not seem to have been motivated by a desire on the part of government to control broadcasters. A number of specific problems are noted below.

There is a certain overlap in terms of the respective coverage of these two laws inasmuch as both cover the broadcast media. It is therefore important that they establish the same set of standards where they both deal with the same issue (as is the case in a number of cases, such as advertising standards and publication of urgent announcements). This is not always the case and an effort should be made to standardise the laws in this respect. Where non-standardisation may have a negative impact on freedom of expression, this is noted below.

I General Guarantees Of Freedom Of Expression

Article 4 of the Broadcasting Law declares that broadcasting serves to promote freedom of opinion and expression and, although the translation is somewhat unclear, this Article appears to guarantee freedom of expression within the broadcast media sector. There are, however, two problems with this provision. First, it makes this general guarantee of freedom of expression subject to conformity with this and other laws. This is contrary to the whole thrust of human rights that by definition supersede mere legislation. Inconsistencies should be resolved in favour of freedom of expression and not the other way around.

The second problem with Article 4 is that it fails to refer to international guarantees of freedom of expression. Macedonia is a party to the European Convention on Human Rights and Article 4 should refer to these international obligations, ideally making the rest of the Broadcasting Law subject to them. Similarly, the Public Media Law should include an article stating that the overall goal of the law is to promote freedom of expression and refer to Macedonia's international obligations in this respect.

II Regulatory Structures and Requirements

As noted above, the Broadcasting Law generally guarantees the independence of the Broadcast Council. Article 23 provides that Council members are chosen by the Parliament. It also suggests that membership may be revoked by the Parliament but this is qualified by Article 29 which sets strict conditions on the revocation of membership. Article 23 should make it clear that revocation of membership in the Council is subject to the conditions set out in Article 29.

A number of articles of the Broadcasting Law give the government and its ministries a role in enforcing or applying the law. For example, Article 19 allows the government to revoke a concession in certain situations and Articles 82 and 84 of this law provide for supervision by various government ministries, upon proposal by the Council. The Broadcasting Law should be applied exclusively by the independent Council, without government involvement. It should also be possible to appeal Council decisions to the courts.

A number of articles in the Public Media Law refer to the competent agency (for example, Articles 6,8,11,31,39,42 and 45-50). According to Article 58 of the Public Media Law, this agency is the Secretariat for Information of the Government of the Republic of Macedonia, a government body. This is quite unacceptable as it makes possible direct government involvement in the operations of the media with an attendant possibility of abuse. The body responsible for implementing this law should be independent of the government; since an independent Broadcasting Council is created under the Broadcasting Law, it might be given responsibility for this.

The precise division of power under the Broadcasting Law between the government and the Broadcast Council is unclear. A number of articles provide that certain benefits are provided by the government, "upon the proposal" of the Council. For example, Article 13 of the Broadcasting Law provides that private broadcasters get concessions from the government upon the proposal of the Council and Article 14 provides that a competition for concessions is announced by the government, again upon the proposal of the Council. Article 84, on the other hand, provides that Ministries undertake measures against broadcasters in breach of the law, "directly and upon proposal" from the Council. Article 89 provides that the government shall make a decision regarding the allotment of concessions within a month of receiving a proposal from the Council. If the correct interpretation of these provisions is that the government makes the final decision regarding concessions, then this is clearly contrary to the guarantee of freedom of expression, represents an unjustifiable interference by government in the activities of the broadcast media and makes a mockery of the provisions guaranteeing the independence of the Council. If, on the other hand, the government simply approves the proposals of the Council, it is not clear what the point of this final step is and it should be removed from the process.

Another point of confusion in the Broadcasting Law is whether the Council **must** propose or issue a concession once the conditions of the law have been met or whether concessions should be issued only to those broadcasters which best fulfil the relevant conditions. The former is implied by Articles 9 and 16, which use the term "shall" regarding the issuance of concessions to public local and other broadcasters respectively. On the other hand, Article 13 of this law suggests that only those broadcasters which "offer better conditions for performing" broadcast activities should be given concessions. If the former is the case, the possibility of more broadcasters than frequencies obviously arises.

Article 15 of the Broadcasting Law sets out the information broadcasters must submit in applying for a concession, which includes a detailed work plan. This is unacceptable since it is unrelated to the conditions for the grant of a concession set out in Articles 13 and 14 of this law, has no other justification and could result in approval being based on content rather than operational capacity, as envisaged by the law and required under international law.

Article 37 of the Broadcasting Law imposes a number of requirements on broadcasters regarding the minimum number of hours they must broadcast each day (for example, national radio broadcasters must provide at least 18 hours of programming each day). An analogous restriction is found at Article 18 of the Broadcasting Law which requires national broadcasters to reach at least 70% of the population. While it is legitimate to require that those occupying scarce frequencies to make full use of them, the validity of specific restrictions depends on local capacity. If broadcasters would find it difficult to comply with these restrictions and the development of a robust private broadcasting sector would therefore be inhibited, the restrictions should be relaxed or phased in. Similarly, Article 41 of the Broadcasting Law requires individual broadcasters to produce a minimum of 40% of all programmes they broadcast, although this requirement is phased in over three years. Again, where the effect of this is to inhibit the development of a robust private broadcasting sector, the requirement should be relaxed or phased in more gradually.

The concession which broadcasters are required to obtain before they may be registered according to Article 6(3) of the Public Media Law, is presumably the same concession as would be obtained under the Broadcast Law. Article 6(3) should refer specifically to the Broadcast Law rather than the Law on Concessions and the Law on Telecommunications as is presently the case.

Article 12 of the Broadcasting Law requires local private broadcasters to both gain approval from the Council and obtain a permit under the Law on Telecommunications. The validity of this provision depends on the conditions for obtaining permits under the Law on Telecommunications, but it seems unduly onerous to require small local broadcasters to meet two sets of conditions before they may begin broadcasting. It would be preferable to incorporate all the conditions into the Broadcasting Law and only require such broadcasters to apply to one body, presumably the Council, for a permit.

Article 7 of the Public Media Law requires the competent agency to register a public medium within 15 days of receiving an application with the information listed in Article 6. Registration of this sort is acceptable only if it is a purely technical exercise for purposes of obtaining information. It should, therefore, be made explicit in Article 7 that the competent agency does not have any discretion to refuse registration, once the appropriate information has been received. Similarly, registration for foreign media, established in Article 42 of the Public Media Law, should be automatic once the appropriate information has been provided. In this case, the appeal procedure provided for in that article would be unnecessary.

Article 3(5) of the Public Media Law requires those who provide public information to submit annual data, "including the seat" and so on to the competent agency. Requiring data on an annual basis places an onerous burden on publishers and serves no legitimate purpose. It is sufficient if the data is filed at the time of registration and amended if and when it changes. In addition, the precise data should be specified in the law and should not be an open list, as implied by the term "including".

III Monopolies

Articles 10, 11 and 17 of the Broadcasting Law establish stringent standards regarding monopolies and cross-media ownership, for example restricting legal bodies to founding one broadcasting company and being the co-founder, to a maximum of 25%, of the capital of a second. No cross-ownership between the press and broadcast sectors is allowed. The same rules are extended to the press by Articles 32 and 33 of the Public Media Law. These restrictions are very severe, particularly for a relatively underdeveloped broadcast sector such as is found in Macedonia. Restrictions based on the industry as a whole, for example restricting ownership in broadcasting to 15% of the market, would be more appropriate in these circumstances, particularly given the restrictions on foreign ownership noted below.

IV Restrictions Concerning Foreigners

A foreign entity is restricted by Article 10 of the Broadcasting Law to a maximum ownership of 25% of a single broadcast enterprise. Total foreign ownership may not amount to more than 49% of any given broadcast enterprise. The same rules are extended to the press by Article 3 of the Public Media Law. These are very strict restrictions, particularly given the potential of foreign capital to help establish a vibrant private media in Macedonia,⁰ and should be relaxed accordingly.

Accreditation of foreign correspondents is dependent on their having stay permits for the Republic of Macedonia by Articles 41 and 48(5) of the Public Media Law. It is thus open to the authorities to prevent a foreign correspondent from operating inside Macedonia by refusing them a stay permit. Such permits should be granted on an automatic basis for journalists, absent legitimate reasons for refusal, under the relevant legislation.

V Content Restrictions

The Broadcasting Law contains a number of restrictions on the content of what may be broadcast, some of which are unreasonable restrictions on freedom of expression. In particular, a number of the restrictions are excessively vague and/or over-broad. Given the possibility this creates for abuse and the importance of freedom of expression, it is incumbent upon the government to draft these clauses more carefully, narrowing the scope of the restrictions and clarifying precisely what is being prohibited.

A number of articles of the Broadcasting Law (for example Articles 8, 31 and 33) require broadcasters to provide "true" or "objective" information. While accurate reporting is certainly a goal to which broadcasters should aspire, there will be circumstances in which the need for timely news makes it impossible to absolutely confirm its accuracy. In such circumstances, it is sufficient if journalists have made a reasonable effort to be accurate and have not acted in bad faith. Provisions like these, which establish an absolute obligation of truth, impose an excessive burden on journalists and should be amended accordingly.

Both Articles 8 and 31 of the Broadcasting Law impose an obligation on broadcasters to preserve and nurture national identity and culture, and promote tolerance. Article 31 even

goes so far as to impose an obligation to promote international understanding and cooperation, and the protection of the environment. Similarly, Article 9 of the Public Media Law requires the public media to protect "human personality and dignity". While these are undoubtedly worthy goals which many journalists would wish to promote, it is not appropriate to impose them as legal obligations. They are susceptible of such broad interpretation as to almost invite abuse. In addition, it is the responsibility of the government, rather than private broadcasters, to promote these values.

Articles 8 and 35 of the Broadcasting Law and Article 10 of the Public Media Law prohibit inflaming or stirring up national, racial or religious intolerance. Certain forms of hate speech may be prohibited but these formulations go beyond what is permitted under international law, in particular by referring to intolerance. The prohibition on programmes which could have a damaging influence upon the physical, spiritual or moral development of children, found at Article 35 of the Broadcast Law, is also vague and over-broad. Practically any programme could have such an effect on at least some children.

Article 9 of the Public Media Law establishes a number of principles which govern the public media, including a requirement of respect for codes of journalist ethics. Any such codes should be established by journalists themselves through an independent professional body and should not be enforced by the government.

Article 11 of the Public Media Law requires public media to carry, without charge, announcements concerning natural disasters, epidemics and so on, including events which endanger the "safety of the State". It is quite unclear what this means; this term should be clarified to prevent any possibility of abuse. The obligation at Article 36 of the Broadcasting Law, which requires broadcasters to carry announcements only in case of a natural disaster or epidemic is preferable. In any case, these two provisions should be standardised.

Article 43 of the Broadcasting Law allows the re-broadcast of foreign programmes only with the prior consent of the Broadcasting Council. This is clearly unacceptable, open to abuse and serves no legitimate purpose, particularly in light of the stringent requirements contained in this same law, in Article 41 regarding local production (see above) and in Articles 45 and 46 on language (see below).

Articles 45 and 46 of the Broadcasting Law, which require that almost all programmes be broadcast only in Macedonia or other national languages, are unreasonable. They impose excessive language restrictions since the Macedonian language may be promoted and protected by far less stringent requirements.

Articles 49 and 50 of the Broadcasting Law set very broad restrictions on the content of advertisements, for example, prohibiting ads which might be against the interests of buyers or children. Similarly, Article 26 of the Public Media Law prohibits advertisements which could be damaging to children's health, or spiritual and physical development. It is clear that commercial speech is protected by international guarantees of freedom of expression. These restrictions are over-broad and susceptible of wide interpretation since almost any ad might be deemed contrary to buyers' interests.

VI Registration of Journalists

Articles 30 and 31 set up a compulsory registration scheme for journalists. It is well established under international human rights law that such registration offends the guarantee of freedom of expression; anyone should be able to work as a journalist without conditions. Article 31, which makes the right to work as a journalist dependent on authorization by the competent agency (as noted above, a government body) should be repealed. Article 30, which mandates the Association of Journalists of Macedonia to issue identification cards, should be retained only if the Association is a democratic, independent and non-discriminatory organisation. In any case, the right to work as a journalist should not be made dependent on the possession of such an identification card.

VII Government Activities

Article 7 of the Broadcasting Law attributes responsibility for creating the general conditions for the development of broadcasting to the government. While the government should do all it can to promote a vibrant, pluralistic broadcasting sector, this obligation should in no way serve as a license for government interference in specific broadcasting outlets.

Article 3, paragraphs 6 and 7 of the Public Media Law allow the government to found broadcasting companies. While state-funded broadcasters are clearly acceptable under international law, this is so only if they conform to the standards of genuine public service broadcasters, which includes a requirement of independence from the government.

VIII Election Broadcasting

Article 44 of the Broadcasting Law obliges broadcasters to provide political parties with an opportunity to promote their political programmes "under equal conditions"; such access should be made subject to a requirement of non-discrimination. Such programmes should be exempted from the requirement in Article 61 of this law that information programmes should not be sponsored.

IX The Right Of Response And Correction

Article 62 of the Broadcasting Law gives anyone who "has been offended by a factual situation or presentation" in a programme a right of response. Article 63 of this Law gives everyone the right to demand a correction of information presented in a programme that "violates the dignity and honor, as well as the rights and interests." Similarly, Article 12 of the Public Media Law gives "anyone whose right or interest have been damaged" [sic] a right of response. The reasons which trigger these rights are far too broad. For example, a religious person may take offense at a programme which paints religion in a fair but negative light. The right of response should be triggered only when someone has been defamed or their legal rights otherwise infringed by a programme. Similarly, a correction is only warranted when the information presented was factually false; information which is insulting but true should not mandate a correction.

Article 16 of the Public Media Law requires broadcasters to keep recordings and allows anyone the right to inspect them to determine whether he or she is in a position to demand a right of response. The costs associated with such inspection should be borne by the individual,

at least unless and until he or she has established that a response is due.

Article 18(6) of the Public Media Law allows editors to refuse to publish responses that are impolite or offensive. While responses should be accurate and proportionate, these requirements are both vague and subjective and should be amended accordingly.

Article 19 of the Public Media Law allows individuals whose responses have not been published to appeal such decisions to the courts. This article should establish a time limit within which such actions must be brought.

X Access To Information

Access to information is governed by Article 64 of the Broadcasting Law and Articles 20-21 of the Public Media Law. The former is very general, providing simply that broadcasters should be given access to information by various public bodies. The latter gives a bit more detail regarding access to information, providing that the relevant public authority is responsible for regulating this issue and that information may only be refused for a limited number of reasons. These articles, in conjunction with Article 94 of the Broadcasting Law and Article 60 of the Public Media Law, repeal the provisions from the Law on Providing Public Information relating to the media.

While these provisions are encouraging, they do not go far enough. The government should enact a full-fledged Access to Information Act, establishing an independent authority to which individuals whose requests for information have been refused may appeal. This authority should have the power to assess the information directly and to compel disclosure where appropriate. The Act should establish a strong presumption that all information should be released upon request and the exceptions to this rule, as listed in Article 21 of the Public Media Law, should be strictly construed.

XI The Tax System

The amount of the mandatory broadcast tax, set at 2.5% of the average monthly salary over the last 3 months, is both complicated and onerous. A set tax, perhaps pegged to inflation, would be preferable. The rate should take into account the economic situation in the country and the overall standard of living of the poorer sections of society. No one should be prevented from owning a radio or television because they cannot afford the broadcast tax. Article 78 of the Broadcasting Law gives ultimate responsibility for decisions regarding the allocation of these tax funds to the government. These decisions, like others relating to the media, should be made by an independent body, for example the Broadcasting Council, and not by a political body like the government. Definite and precise criteria regarding tax allocation should be included in the Act so as to minimise the potential for political interference.

XII Penal Clauses

Both Articles 85 and 86 of the Broadcasting Law allow for suspension of broadcasting concessions for breach of a variety of provisions in the Broadcasting Law. Similarly, Article

52 of the Public Media Law allows for suspension. Suspension is the most serious punishment that can be imposed on a broadcasting entity and should, if permitted at all, be reserved only for extreme situations. This implies that it may only be applied in the context of a pattern of repeated and flagrant breaches of the Broadcasting Law. In the vast majority, if not in all cases, fines should be sufficient to guarantee respect for the law.

Article 85 of the Broadcasting Law and Article 52 of the Public Media Law allow for the seizure of communications equipment for economic violations. This cannot be justified under any circumstances and should be repealed. Similarly, Article 51 of the Public Media Law provides that publications containing information which breaches the restrictions in Article 10 of that law (which include a prohibition on information calling for violent destruction of the constitutional system, stirring up hatred or intolerance, or seriously offending public morals) should be confiscated without compensation. This is prior restraint which is an unacceptable restraint on freedom of expression, particularly given that promulgating such information is no doubt covered by general criminal law rules.

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