

# **MEMORANDUM**

On the

**DRAFT MASS MEDIA LAW**

Of the

**SLOVAK REPUBLIC**

**BY**

**ARTICLE 19**

**The International Centre Against Censorship**

**London**

**August 1999**

## **Introduction**

ARTICLE 19, The International Centre Against Censorship, has been asked to comment upon a draft mass media law which has been prepared by the Slovak Syndicate of Journalists.

ARTICLE 19 welcomes the draft and regards it as an extremely positive contribution to the advancement of freedom of expression, and specifically the freedom of the media, in the Slovak Republic.

ARTICLE 19 particularly welcomes the references to the European Convention of Human Rights throughout the draft law, including use of the wording found in Article 10 of the Convention. The absence of content restrictions, government controls over the practice of journalism or the day-to-day functioning of the media, as well as strong protection for journalists' confidential sources and the specific acceptance of reduced privacy protection for public figures performing their public duties are all to be warmly applauded. Limitations on the scope of the right to reply and the provision for in-house codes of practice to protect editors from undue influence by owners or trade unions are also to be welcomed.

The following analysis sets out the obligations which international law imposes upon Slovakia in relation to freedom of expression in general and

then suggests a number of changes to the Draft Media Law to ensure that it genuinely reflects the highest standards of freedom of expression.

### **The Slovak Republic's Obligations to respect Freedom of Expression Under International Law and the Constitution**

The Slovak 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.<sup>1</sup>

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".<sup>2</sup>

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.<sup>3</sup>

Freedom of expression is also protected by Article 26 of the Constitution of the Slovak Republic which states:

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<sup>1</sup> Resolution 59(1), 14 December 1946.

<sup>2</sup> *Handyside v. United Kingdom*, 7 December 1976, 1 EHRR 737.49.

<sup>3</sup> *Castells v Spain*, (1992), Series A, No. 236, para. 43.

- (1) Freedom of expression and the right to information shall be guaranteed.
- (2) Every person has the right to express his or her opinion in words, writing, print, images and any other means, and also to seek, receive and disseminate ideas and information both nationally and internationally. No approval process shall be required for publication of the press. Radio and television companies may be required to seek permission from governmental authorities to set up private businesses. Further details shall be provided by law.
- (3) Censorship shall be prohibited...

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. Under international human rights law, Slovak 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.

Article 19(3) of the ICCPR and Article 26(4) of the Slovak Constitution are in similar terms. Accordingly, restrictions on freedom of expression must meet a strict three-part test.<sup>4</sup> 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.”<sup>5</sup> 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.<sup>6</sup> This is a strict test, presenting a high standard which any interference must overcome.

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.

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<sup>4</sup> See, for example, *The Sunday Times v. United Kingdom*, 26 April 1979, No. 30, 2 EHRR 245, paras. 45.

<sup>5</sup> *The Sunday Times*, *op cit.*, para. 49.

<sup>6</sup> See the ECHR case, *Lingens v. Austria*, 8 July 1986, 8 EHRR 407, paras. 39-40.

## **Specific Comments on the Draft Media Law**

In most respects the draft law is fully consistent with Slovakia's international obligations in relation to freedom of expression. Some provisions, however, are inappropriate, require clarification or could benefit from further safeguards.

### Right to Information

Article 3 of the draft law establishes the right of mass media representatives to access official information.

While access to official information is a fundamentally important aspect of the right to freedom of expression and is guaranteed by Article 26(5) of the Slovak Constitution, it is unfortunate and inappropriate to restrict such access to members of the media. There are two reasons for this.

Firstly, as an aspect of the right to freedom of expression, the right to access official information belongs to all those within the territory of the Slovak Republic. A proper general access to information law should be enacted to guarantee such a right. Since the media could take advantage of such a right there should be no reason to provide for a special access regime within the media bill.

The provision is also inappropriate because of the relationship it inadvertently creates between the media and the holders of official information. It is vital that the media in general develop sufficiently independently of the State to enable journalists and others within the media to act as the "watchdog" of government. If the release of official information is only possible through the media there is a danger that the media itself could become associated with the dissemination of official information and journalists could see this, either consciously or unconsciously, as part of their role. Such a situation must be avoided.

Clearly, a regime for access to official information can be extremely important in the conduct of investigative journalism and such a regime should be introduced. The provision as it stands, however, is inappropriate and should be removed.

### Confidentiality of Personal Data

Article 5 of the Draft Media Bill restricts the publication of personal data although it does limit this protection for public figures carrying out their official duties.

While it is certainly legitimate to protect the legitimately private affairs of private individuals, there may be situations in which the release of such information is in the public interest. For this reason it is inappropriate to establish a blanket ban on the release of such information. A public interest override test should be inserted into the section to allow for the release of legitimately personal information where the public interest in its release is

greater than interest of the individual concerned in keeping the information private.

#### Right to Excusable Mistake

Article 7 appears to require media practitioners to verify any information from confidential sources in order to avoid liability for publishing incorrect or misleading information.

While ARTICLE 19 welcomes the move away from the currently strict liability of journalists for the publication of incorrect information, the Article remains problematic.

While proper verification of information before publication is, of course, a fundamental requirement of professional journalistic practice, it is more appropriately dealt with through professional codes of ethics. Most significantly, the imposition of sanctions upon a media practitioner for publishing so-called “incorrect” or “misleading” information, which the Article appears to contemplate, is unacceptable from the perspective of the international guarantee of freedom of expression. News is a perishable commodity and journalists and others cannot be expected to guarantee the accuracy of the information they publish in all circumstances. Moreover, to require the publication of only “correct” information may lead to the imposition of officially sanctioned “truth” and could have a significantly chilling effect on the freedom of expression of media practitioners.

The provision should be removed from the draft Bill.

#### Right of Correction

Articles 11 to 14 establish the right of correction for factual information published about a person, which that person regards as inaccurate or misleading.

While ideally rights of correction and reply should be dealt with through voluntary codes of practice, the provisions in the draft law are well within the requirements of international law and accord with the practice in a number of European States. Only Article 12(2), forbidding comment on a published correction in the same issue, is inappropriate.

While it is to be hoped that journalists will not enter into a petty tit-for-tat argument when printing replies or corrections, this matter is best dealt with through self-regulation. Media outlets should be free to make whatever comments they wish about a correction and a blanket ban on such comment is unnecessary.

## Anti-Monopoly Measures

Article 17 establishes certain restrictions on ownership and control of media outlets to avoid media monopolies and to ensure diversity of content throughout the media.

While it is certainly true that the Slovak republic has an obligation to ensure an environment where the widest diversity of opinions and information content is available to its citizens both through the media and otherwise, it is by no means clear that this goal is effectively achieved through blanket bans on cross-media ownership and control. The provisions in Article 17 take no account of the relative influence of any publication or broadcasting station and are rigid in an area where flexibility in the public interest is required.

In these circumstances ARTICLE 19 suggests the establishment of an independent body with the power to regulate cross-media ownership in the public interest, taking into account both the public's right to diversity of content and the need of commercial media operators to remain financially viable. Such a body should be completely independent of government, established via cross-party and public consensus with strict safeguards of propriety and expertise for its members.

### **Summary of Recommendations**

- Remove Article 3 on access to official information and establish a proper, general access regime for all within the Slovak Republic.
- Amend Article 5 to establish a test enabling the publication of personal information where the public interest demands.
- Remove Article 7 on the Right to Excusable Mistake and ensure that no liability attaches to a media practitioner for the publication of so-called "false" or "misleading" information.
- Amend Article 12(2) to allow media outlets to comment upon factual corrections.
- Remove Article 17 and establish an independent body with the power to regulate cross-media ownership in the public interest.