Statement

on

Constitutional Reform in Armenia

Focus on Freedom of Expression

London
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1. INTRODUCTION

On 1 September 2005, the National Assembly of Armenia passed a set of amendments to the Armenian Constitution. Among the many amendments adopted, one is one of specific relevance to the protection of the right to freedom of expression. New Article 83(2) establishes an independent regulatory commission for the media, half of whose members are to be appointed by the President, and the other half by the National Assembly.

While we welcome the clear intent of the Armenian National Assembly to improve the constitution protection for the right to freedom of expression, we are concerned that the decision to allow the President to nominate half of the members of the media regulator will that body's independence. We therefore urge that a further amendment be brought to ensure that the full membership of the regulatory body is appointed by the National Assembly, in an open and transparent process that includes civil society. We also urge the National Assembly to adopt two other proposals that have been jointly put forward by the Yerevan Press Club, the Journalists Union of Armenia, Internews Armenia, the Committee to Protect Freedom of Expression, the Investigative Journalists Association, TEAM Research Centre and Asparez Journalist's Club of Gyumri:

1. that an amendment be brought to establish an independent supervisory body for the national public service broadcaster; and
2. that an amendment be brought to declare all forms of censorship unconstitutional.

Section 2 of this note elaborates on these three recommendations.

2. CONSTITUTIONAL AMENDMENTS

2.1. Prohibition of censorship

No person or media outlet should have to ask the permission of a State body before publishing. This means that no media – be it a newspaper, television programme or any other form of publication – should be required to submit to a State censorship body prior to dissemination. There should also be no interference by the State with the editorial independence of any media outlet. These are fundamental tenets of international law that are reflected in many constitutions as well as in international human rights treaties. Article 13(2) of the ACHR, for example, states:

> The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship.

The European Court of Human Rights, although it has refused to rule out prior restraint altogether, for example in the context of providing ratings for films, has said that "the dangers inherent in prior restraints are such that they call for the most careful scrutiny".[1] Although it has not addressed the issue directly, it is clear from its case law that the European Court would not contemplate a system of prior censorship of the media.

[1] *Observer and Guardian v. the United Kingdom*, 24 October 1991, Application No. 13585/88, para. 60.

The prohibition of censorship is so central to the concept of freedom of expression that it has been enshrined in the national constitutions of numerous countries around the world, such as Germany, Austria, Switzerland, Portugal, Colombia, Thailand, the Netherlands, Latvia, Belgium, Japan, Italy, Russia, Poland and Denmark.[2]

Censorship is traditionally understood as prior interference or prior scrutiny by a State body. However, as we understand it, the proposal made by the NGO coalition would prohibit any kind of undue interference, including threats and other forms of pressure. It is thus to be understood as a broad constitutional guarantee for editorial independence, protecting the media from any undue economic or political interference, along the lines of the guarantee found in the constitution of Portugal.[3] Such a provision, included in the constitution rather than in 'ordinary' legislation, can make an important contribution to protecting the independence of the media.

2.2. Independence of Media Regulatory Bodies

In order to protect the right to freedom of expression, it is imperative that the media be permitted to operate independently from government control. This helps safeguard the media's role as public watchdog and the public's access to a wide range of opinions, especially on matters of public interest. It follows that any bodies with regulatory powers over the media should be fully independent and be protected against political interference.

The need for regulatory bodies to be independent enjoys strong protection under international law. In a Joint Declaration of 2003, the UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media and OAS Special Rapporteur on Freedom of Expression stated:

> All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.[4]

The Committee of Ministers of the Council of Europe has adopted a Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector, which states in a pre-ambular paragraph:

> [T]o guarantee the existence of a wide range of independent and autonomous media in the broadcasting sector…specially appointed independent regulatory authorities for the broadcasting sector, with expert knowledge in the area, have an important role to play within the framework of the law.[5]

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[2] Article 5 of the German Constitution; Article 13(2) of the Austrian Basic Law; Article 17 of the Swiss Constitution; Article 38 of the Constitution of Portugal; Article 39 of the Thai Constitution; Article 7(1) and (2) of the Constitution of the Netherlands; Article 100 of the Latvian Constitution; Article 25 of the Belgian Constitution; Article 21 of the Japanese Constitution; Article 21 of the Italian Constitution; Article 29 of the Russian Constitution; Article 54 of the Polish Constitution; Article 77 of the Danish Constitution.

[3] See Article 38 of the Portuguese Constitution;

[4] Joint Declaration of 18 December 2003. Available at: http://www.unhchr.ch/huricane/huricane.nsf/view01/93442AABD81C5C84C1256E000056B89C?opendocument See also the Declaration of Principles on Freedom of Expression adopted by the African Commission on Human and Peoples' Rights at its 32nd Session, 17-23 October 2002, which includes a similar principle.

[5] Recommendation No. R(2000) 23, adopted 20 December 2000.

The Recommendation goes on to note that Member States should set up independent regulatory authorities. Its guidelines provide that Member States should devise a legislative framework to ensure the unimpeded functioning of regulatory authorities and which clearly affirms and protects their independence.[6] The Recommendation further provides that this framework should guarantee that members of regulatory bodies are appointed in a democratic and transparent manner.[7] The guiding principle regarding rules of appointment is that they should be "defined so as to protect them against any interference, in particular by political forces or economic interests."[8]

ARTICLE 19's own *Principles on Broadcast Regulation and Freedom of Expression*,[9] a set of guidelines developed on the basis of international practice, comparative constitutional law and best practice in countries around the world, recommends the following:

> 13.1 Members of the governing bodies (boards) of public entities which exercise powers in the areas of broadcast and/or telecommunications regulation should be appointed in a manner which minimises the risk of political or commercial interference. The process for appointing members should be set out clearly in law. Members should serve in their individual capacity and exercise their functions at all times in the public interest.
>
> 13.2 The process for appointing members should be open and democratic, should not be dominated by any particular political party or commercial interest, and should allow for public participation and consultation. Only individuals who have relevant expertise and/or experience should be eligible for appointment. Membership overall should be required to be reasonably representative of society as a whole.[10]

In recognition of the important of protecting the independence of media regulatory bodies, a number of recent constitutions include explicit guarantees for the independence of media regulatory bodies. The recently adopted South African Constitution is often given as an example; Article 192 guarantees the independence of the broadcast regulator in the following terms:

> National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.

Thailand's constitution includes a similar provision, in Section 40:

> There shall be an independent regulatory body having the duty to distribute the frequencies under paragraph one and supervise radio or television broadcasting and telecommunication businesses as provided by law.

It may be noted that neither of these constitutions include specific detail on the method of appointment, stressing instead that the body must be independent. In each of these countries, subsequent legislation is required to address the various ways in which the independence of these bodies can be guaranteed, including through the appointments procedure. This allows a focused debate on this important issue, rather than it becoming one of many issues debated in

[6] *Ibid.*, Guideline 1.
[7] *Ibid.*, Guideline 5.
[8] *Ibid.*, Guideline 3.
[9] London, April 2002.
[10] *Ibid.*, Principle 13.

the context of constitutional reform. This may be preferable to prescribing a method that has the real potential of politicising the regulator, such as the provision that has been adopted by the Armenian National Assembly in Second Reading.

2.3. Independence of the Boards of Public Service Broadcasters

The same underlying reasons for protecting the independence of regulatory bodies also apply to public service broadcasters. In order for these broadcasters to carry out their functions and serve the public interest, rather than the interests of the government, it is crucial that their governing boards are protected from any form of political or other interference.

Within Europe, the Committee of Ministers of the council of Europe has strongly recommended that the independence of public service broadcasters should receive strong protection in law.[11] Recommendation (1996)10 on the guarantee of the independence of public service broadcasting states, among other things:

"The legal framework governing public service broadcasting organisations should clearly stipulate their editorial independence and institutional autonomy".[12]

The Recommendation includes

The same principle finds support in national case law. For example, the Supreme Court of Ghana has noted: "[T]he state-owned media are national assets: they belong to the entire community, not to the abstraction known as the state; nor to the government in office, or to its party. If such national assets were to become the mouth-piece of any one or combination of the parties vying for power, democracy would be no more than a sham."[13]

[11] Recommendation No. R(96)10 of the Committee of Ministers of the Council of Europe to member states on the guarantee of the independence of public service broadcasting, adopted 11 September 1996.
[12] Principle 1.
[13] *New Patriotic Party v. Ghana Broadcasting Corp.*, 30 November 1993, Writ No. 1/93, p. 17.