

Normative, legal and institutional framework



The influence of the Council of Europe and other European institutions on the media law system in post-Soviet states



Andrei Richter

MOSCOW STATE UNIVERSITY, RUSSIA

ABSTRACT: In the post-Soviet states of today globalization is taking place predominantly to the West's values for human rights and fundamental freedoms. This process is being driven by such international organizations as the European Union, Council of Europe and OSCE, which operate here primarily as human-rights protectors. These organizations have exerted significant pressure on the authorities in the countries in this study, especially Azerbaijan, Armenia, Estonia, Georgia, Latvia, Lithuania, Moldova and Ukraine. The media reforms that international bodies are influencing in these countries are generally leading towards a more robust model for independent journalism. The concept of freedom of mass information is reviving, state broadcasters are being turned into public-service, and other changes are taking place.

KEYWORDS: media law, Council of Europe, post-Soviet countries, Russia, journalism, public broadcasting, OSCE, PACE



INTRODUCTION

The external environment and especially the pan-European and other international organizations working to harmonize legislation and law-enforcement practice for mass information have been a crucial factor in developing the structural and functional features of media law in post-Soviet countries.

The Baltic (Estonia, Latvia and Lithuania) and Caucasus (Armenia, Azerbaijan and Georgia) countries and also Moldova, Russia and Ukraine joined the Council of Europe shortly after the USSR had collapsed in 1991. At about the same time all post-Soviet states also joined the United Nations, the Organization for Security and Cooperation in Europe (OSCE) and other international associations. In mid-1990s the three Baltic states joined NATO and became members of the European Union. The changes that post-Soviet countries made to their laws just before or after joining the Council of Europe are the most important outcome of Europe's influence on regulation of the media in this region. Their constitutions and media laws had in-

cluded internationally-accepted notions of freedom of the press and expression from the outset, but documents and rulings by European bodies subsequently had a visible and definite influence on CIS members' national legislations.

IMPACT OF EUROPEAN CONVENTION AND COURT OF HUMAN RIGHTS

The Council of Europe's impact on media law showed when European post-Soviet states incorporated article 10 of the Human Rights Convention into their own legislations. Specifically, its provisions were transplanted into article 24 of Georgia's constitution (1995), article 3 of Azerbaijan's Constitutional Law "On regulation of the exercise of human rights and freedoms" (2002), article 4 ("Freedom of expression and limits on openness") of Moldova's press statute (1994) and article 3 ("Main principles of public information") of Lithuania's public information statute (1996). It is worth pointing out that the provisions that they took from part 2 of article 10 on limitations of the freedom of expression differ significantly from the provisions in earlier post-Soviet media laws that forbade abuses of freedom of mass information and had in turn been taken from the USSR press statute of 1990.

Another sign of the Council of Europe's influence was that national laws were guided by judgments of the European Court of Human Rights (ECHR) – the Council's principal judicial authority. Two specific trends can be identified here, leading mostly towards greater protection for journalists and the media against defamation cases.

The first flagged up the need in such cases to differentiate between fact and opinion. This draws especially from the ECHR's ruling on *Lingens v. Austria* (1986): that a careful distinction should be made between facts and value judgments; the former can be proven but the same cannot always be said of the latter. A requirement to prove a value judgment is impossible to fulfil and therefore infringes on the freedom of expression that is the fundamental part of the law guaranteed by the Convention's article 10.

A ruling by the Plenum of the Russian Supreme Court in 2005 says effectively the same thing: "in accordance with article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms and with article 29 of the Constitution of the Russian Federation, which guarantee to all the right to freedom of thought and speech and also to freedom of mass information, and with the position of the European Court of Human Rights, when considering actions for defamation courts should draw a distinction between assertion of facts of which the accuracy may be verified and of value judgments, opinions and convictions that are not subject to protection in law under article 152 of the Russian Federation Civil Code, since [they] are an expression of the defendant's subjective opinion and views and cannot be tested for veracity" (Plenum..., 2005).

Similarly, Georgia's 2004 Statute "On freedom of speech and expression" states that "freedom of expression of opinion shall be protected by absolute privilege",

meaning that there is full and unconditional exemption from legal liability (including for derogatory statements) (article 4).

The second is that in defamation cases the level of public interest and the status of a public figure should be taken into account. In its judgment on *Lingens v. Austria* the Court *inter alia* said that “freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.” It continued: “The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt article 10 para. 2 enables the reputation of others – that is to say, of all individuals – to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues” (*Lingens v. Austria*, 1986).

This judgment and the United States Supreme Court’s similar opinion in the celebrated case of *New York Times Co. v. Sullivan* (1963) were auspiciously received by the legal systems of several post-Soviet countries. The first was Ukraine in its Statute “On state support for the mass media and social protection for journalists” (1997), which said: “In its consideration of an action for infliction of moral (non-property) damage between a journalist or medium of mass information as defendant and political party, electoral bloc or person(s) in office as plaintiff, a court shall be entitled to award compensation for moral (non-property) damage only in the presence of actual malice on the part of the journalist or officers of the medium of mass information. The court shall take into account use by the plaintiff of available out-of-court and especially pre-trial opportunities to refute inaccurate information, defend its good name and standing in business, and in general to resolve the dispute. Mindful of these circumstances, the court shall be entitled to make no award for moral damage.”

“Actual malice by a journalist and/or officer of a medium of mass information shall mean their attitude to dissemination of information in the knowledge that it is false and with foresight of its harmful consequences” (article 17).

Georgia’s Statute “On freedom of speech and expression” (2004) also names actual malice as a key factor if a journalist is to be penalized for reports that disparage a public figure: “A person shall bear civil and legal liability for defamation of a public figure should the plaintiff prove in court [...] that the defendant knowingly asserted falsehood as fact or through clear and substantial negligence caused the issue of reports that were in large measure inaccurate” (article 14). The statute also deals with so-called “public interest”, meaning the public’s desire for information about

matters relevant to governance of the state (as opposed to idle curiosity). If a report is not “in large measure” accurate but is a dispassionate and rigorous account of a matter of public interest, a defendant can be fully or conditionally excused liability (article 15).

The Russian Supreme Court’s ruling mentioned above also says that “courts should be mindful that in accordance with articles 3 and 4 of the Declaration on Freedom of Political Debate in the Media, adopted on 12 February 2004 at the 872nd Meeting of the Council of Europe Committee of Ministers, political figures appealing to the confidence of the public agree to subject themselves to public debate and criticism in the media. Officials of the state may be subjected to criticism in the media over the way in which they carry out their duties, in so far as this is necessary for ensuring the transparent and responsible exercise of their functions.”

As we discuss the *creation* of legal standards under the influence of ECHR judgments, we should also mention the appearance in Georgia of a special system for *interpreting* the law on mass information. This system is openly based on the European Human Rights Convention and ECHR case law (article 2 of the Statute “On freedom of speech and expression” and article 3 of the Statute “On broadcasting”).

Moldova’s legislation has in turn applied European standards to the process of creating journalistic ethics as well. The Audiovisual Code enjoins the Broadcasting Coordinating Council (regulating body) to draw up a code of ethics with provisions that are exhaustive, detailed and comply with these standards (article 40). The aim here is apparently to bring this future code of ethics into line with the Parliamentary Assembly of the Council of Europe’s 1993 resolution on the ethics of journalism.

COMMITMENTS UPON ADMITTANCE TO THE COUNCIL OF EUROPE

As a result of their negotiations to join the Council of Europe, the Baltic and Caucasus states and also Moldova, Russia and Ukraine gave a number of undertakings that were set out in special memoranda. They did this pursuant to article 3 of the Statute of the Council of Europe, which requires each member to accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realization of the aim of the Council (*Statute...*, 1949).

We find two opposing approaches to these undertakings on freedom of speech and expression. The memoranda for Armenia, Azerbaijan and Georgia record the need for various reforms to media laws and structures. But when Estonia, Latvia, Lithuania, Moldova, Russia and Ukraine joined the Council of Europe this apparently did not apply because there is nothing about media reforms in their undertakings. Worth noting is the precise timeline of the Council of Europe’s two approaches to guaranteeing freedom of mass information. There are no such undertakings in

the memoranda adopted in 1993–1996 (for Moldova, Russia, Ukraine and the Baltic countries), but they do appear in the memoranda of 1999–2000 (for the Caucasus countries).

What is the substance of these commitments? Three of the approximately 30 obligations for Azerbaijan, set out in the year 2000, concerned the work of the media and journalists. Baku promised to the Council of Europe that it would, firstly, make amendments to its media law (the memorandum did not say exactly which but there seems to have been an understanding between the Azeri government and the Council) within two years; secondly, that it would “transform the national television station into a public-service broadcaster managed by an independent body;” and thirdly, that it would “furnish guarantees of freedom of expression and of independence for the media and journalists and specifically exclude the possibility of official pressure aimed at restricting the media’s freedom.”

Azerbaijan’s media statute was indeed reviewed in 2001, when a public-service and independently-run television station was created in 2005 from the state broadcaster’s second channel. In 2006 Baku exceeded its promises by setting up a public-service radio station as well. The wording of the third commitment was too vague to assess how far it has been kept.

On the same day that the Azerbaijan memorandum was adopted (28 June 2000), the same kind of document was issued for Armenia. The authorities in Yerevan gave similar undertakings: firstly, to pass a new media law within a year, and secondly, to “transform the national television station into a public-service broadcaster managed by an independent body.” The new media law was actually passed only in 2003 but the state broadcaster was already public-service by the end of the year 2000.

As for Georgia, its memorandum in 1999 contained only one demand relative to freedom of mass information: a new broadcasting law within a year. This was passed only at the end of 2004.

We should note that in the mid-1990s the situation with media freedom in, for example, Ukraine, was of no less concern to the international community than that in Georgia or Azerbaijan. The Council of Europe made no complaint about Latvia’s media statute which had been in force since 1990. But this law was very similar to Armenia’s 1991 Statute “On the press and other media of mass information,” of which urgent revision was demanded. Russia’s state TV was no less strictly controlled than Georgia’s in the 1990s, yet Tbilisi was told to make its state television public-service and Moscow was not. So we can assume that either the overall success in harmonizing the laws and standards of the post-Soviet countries already in the Council of Europe, or stronger positions of the Council *vis-à-vis* the Caucasus states inspired the organization in the late 1990s to broaden its demands regarding mass information and journalism.

These commitments had to be kept according to specific schedules that as a rule were negotiated not just with the authorities in each candidate country; local public organizations were also involved. For example, in Azerbaijan’s case there were three

parties to the process – Council of Europe experts, the *Yeni Nesil* (New Generation) journalists' association and the presidential administration. According to the timetable that they agreed, Azerbaijan would within two years pass new laws on the mass media and broadcasting, establish public-service television, pass a new law on freedom of information and revise its law on state secrets (Not to transform..., 2002). Armenia's Statute "On mass information" also had to be passed to a deadline set by the Council of Europe (Navasardyan, 2003).

As post-Soviet countries are admitted into the Council of Europe, they receive financial aid to carry out the necessary reforms to harmonize their standards. There is also plenty of expert advice available, which in the context of this study was and is provided by the Council of Europe's Media Division and the Venice Commission (European Commission for Democracy through Law). Each draft law mentioned in the memoranda should be scrutinized and endorsed by these bodies, and endorsement by western European experts amounts to a stamp of quality for a draft law's passage through parliament. For example, Armenian Deputy Justice Minister Ashot Abovyan described the just-signed Statute "On mass information" (2004) as fully complying with democratic standards: it had, after all, been expertly evaluated by the Council of Europe, Hamburg University and the international organization Article 19 (Parliament..., 2004).

MONITORING BY THE PARLIAMENTARY ASSEMBLY

The Council of Europe monitors compliance on an ongoing basis, and failure to keep promises has on several occasions provoked special resolutions from the Parliamentary Assembly of the Council of Europe (PACE). As of 2007, since the Caucasus countries joined the Council of Europe PACE had passed four resolutions about Azerbaijan and its compliance with obligations on freedom of mass information, six about Armenia and three about Georgia. The resolutions did praise these countries' authorities for their efforts to keep their promises but were mostly critical for departures from courses of action agreed with the Council of Europe.

For example, one of them censured Azerbaijan for failing to provide a copy of its draft law on public-service television (Resolution No 1358 in 2004) to (west) European experts for agreement. This led to the president of the state vetoing the law after its passage through parliament. The same year, a new law more in line with Council of Europe standards was drafted and passed.

Armenia also came in for censure, because under its constitution members of the National Commission for Television and Radio – the "independent supervisory body" – were appointed solely by the president (Resolution No 1458 in 2005). The constitution was reworded the same year so that half of the Commission's members would be elected by the National Assembly and the other half by presidential appointment.

PACE called on Georgia to accelerate the passage of a broadcasting law “with the aim of guaranteeing independence, pluralism and objectivity” of television and radio companies and taking on board expert input from the Council of Europe (Resolution No 1257, 2001). As said earlier, this law was passed in 2004.

Although other post-Soviet states did not have to give specific undertakings for greater democracy in the media, PACE did pass a number of resolutions and recommendations urging greater freedoms and more protection for journalists and also changes to national legislations on the media to bring them more into line with European standards. These documents were based on the duties that all states assume when joining the Council of Europe, namely to observe democratic pluralism, respect the rule of law and uphold the human rights and fundamental freedoms of citizens within their jurisdictions. As of 2007 five had been passed in relation to Moldova, three for Russia and eleven (!) for Ukraine.

For example, in Resolution No 1280 (2002), *Functioning of democratic institutions in Moldova*, PACE observed that “the scale of the protest movement by journalists and staff of Teleradio Moldova underlines the need to carry out reforms quickly, so as to fully guarantee freedom of expression and promote a public broadcasting service.” It urged the authorities “to end the practice of censorship of television programmes and to afford all opposition political parties, both inside and outside parliament, generous access to discussion programmes.” In this resolution, PACE also “asks the Moldovan Government and Parliament to embark without delay on work to transform Teleradio Moldova into an independent public corporation.” And it “expects” Moldova’s political forces to pursue genuine, constructive dialogue and to agree on a compromise which should include “the revision of radio and television legislation and amendment of the status of Teleradio Moldova to make it an independent public corporation: an immediate start of work by the relevant parliamentary committee; the possible resumption of consideration of the draft legislation examined by the previous legislature; and assistance of Council of Europe experts in defining the public service status of the Moldovan radio and television corporation. This work should be completed by the end of the current parliamentary session, on 31 July 2002.” The Assembly also called on Moldova’s government and parliament to do this without delay and to cooperate fully with the Council of Europe and its bodies and, in particular, “to submit for Council of Europe expert appraisal the future bills for the reform of broadcasting and transform the state company Teleradio Moldova into an independent public service corporation” (*Functioning...*, 2002).

So PACE not only called on Moldova to make essential changes to its media laws but also laid down a timetable. When the dates in Resolution No 1280 (2002) were missed, Resolution No 1303 was passed on 26 September 2002 with a new deadline of 1 December that year for the Statute “On the Teleradio-Moldova public national broadcasting company” to be revised. The Moldovan parliament went part-way towards achieving this and amended the statute in March 2003 (*Belarus...*, 2003, p. 55).

It is worth noting that PACE's calls and recommendations for Moldova, Russia and Ukraine have on the whole been less successful than those for the Caucasus states. The Audiovisual Code that Moldova passed in 2006 only partially heeded the Council of Europe's expert evaluation. PACE urged Russia to establish a public-service TV station and an independent licensing body and to abolish the federal and regional authorities' control of state broadcasters, but none of this has been done.

The previous Ukrainian administration's stubborn reluctance to comply with resolutions led PACE to talk of starting the procedure for suspending Kiev from the Council of Europe in 1999 and 2001. But the current president, Viktor Yushchenko, has proclaimed a push for integration into Europe and is far more attentive to Strasbourg's recommendations. In June 2006 he issued Decree No 493 to establish a National Commission on Freedom of Speech and Development of the Media, whose main functions are "to draw up proposals for performance by Ukraine of its commitments to PACE and the OSCE and for achievement of the European Union's Copenhagen criteria for ensuring stability, democracy and freedom of speech in the media." The Commission also has the job of drafting proposals for privatizing state and municipally-owned media, creating public-service TV, rolling out digital broadcasting, advancing Ukraine's presence on the Internet, and better training for journalists.

Other top officials in Ukraine agree with this pro-Europe line. Supreme Council (parliament) speaker met with Renate Wohlwend and Hanne Severinsen, co-rapporteurs of Council of Europe's Monitoring Committee, on 9 October 2006 and told them that "draft laws concerning Ukraine's European aspirations have been included into parliament's long-term plan." Severinsen replied that public-service broadcasting would help to promote freedom of speech in Ukraine. "The Council of Europe would be pleased to assist Ukraine in the technical aspects of establishing it," she said, and stressed that "We do not view monitoring as a punishment but rather a dialogue to promote change for the better" (Moroz..., 2006).

Despite their promises, the Ukrainian authorities have yet to take such important steps as establishing public-service television, fully investigating the murder of journalist Georgiy Gongadze and ratifying the European Convention on Transfrontier Television. PACE's recommendations were only partially heeded when amending the Statute "On state support for the mass media and social protection for journalists," and privatization of state and municipally-owned media has been begun (but not taken to the stage of passing the requisite law). The practice of issuing "temnyky" [official instructions to the media] has ended.

A separate issue is the Council of Europe's pressure on Belarus which has still not been allowed to join because of, *inter alia*, its infringements of freedom of mass information. PACE even put Belarus's special guest (candidate member) status on hold in 1997, and between 2000 and 2004 it passed three resolutions and recommendations on attacks on media freedom in "Europe's last dictatorship" in the con-

text of the European Human Rights Convention. In addition to widespread persecution of journalists in Belarus, these documents condemn:

- the existence and practice of the procedure for media registration;
- the existence and practice of official cautions and verbal reprimands to editorial offices from the Ministry of Information, as a breach of the principle of separation of executive and judiciary;
- management of state broadcasting by presidential decree and the lack of action to reform it into public-service broadcasting;
- the authorities' failure to keep their promise to submit a draft media law to PACE for expert evaluation;
- the lack of legal measures to enforce a constitutional prohibition of "monopolization of the mass media by the state;"
- discrimination by printers and distributors against private and foreign publications.

In despair of extracting any concessions from Belarus, one PACE recommendation urged Council of Europe member-states to "create objective and impartial television and radio broadcasts and print and online publications specially tailored to the Belarus public."

Finally, we should also mention a number of general resolutions and recommendations by PACE not directed at any particular post-Soviet country and also declarations and recommendations by the Council of Europe's Committee of Ministers – the decision-making body sitting in Strasbourg and comprising the foreign ministers or their deputy permanent representatives of the 46 countries. These documents contain similar requests directed at all members.

TUTOR OF DEMOCRACY

In the opinion of Boris Navasardyan, president of the Yerevan Press Club, "the Council of Europe serves today as the main tutor of democracy." Its constant attention to freedom of mass information issues has become a factor of no small consequence for progress in legislation (Navasardyan, 2003, p. 3). "Were it not for the commitments assumed before the Council of Europe," he believes, "the passing of a broadcasting law and a new media law could have been put off indefinitely. The European experts who scrutinize draft laws to a great extent ensure that the new 'rules of the game' conform as closely as possible to contemporary international parameters. It goes without saying that the approaches reflected in expert opinions are closer to journalists' than officials' notions of regulatory law for the media. More precisely: thanks to the Council of Europe and also a number of other international organizations and their involvement in the legislative process, the positions of the journalistic community and state officialdom are converging and there is scope for collaboration and compromise" (Not to transform..., 2002, p. 12).

But at the same time Navasardyan believes that the Council of Europe's effectiveness is diminished by the way that its representatives avoid direct opinions on draft laws until the experts have drawn up their official commentaries. It takes months to translate the drafts, then have them scrutinized and then have the commentaries translated back; by the time these reach MPs in the relevant country they are already out of date because the law has either been passed already or deliberations are continuing on a draft law that by now has undergone substantial alterations. PACE has come to a similar conclusion (see cl. 3.2, Resolution No 1721, 2005).

A further obstacle is a rule which Strasbourg and a country being "tutored" (to use Navasardyan's word) obey to the letter: Council of Europe expert commentaries on laws and draft laws are withheld from the public until the country's authorities allow their release. So the dialogue takes place solely between senior parliamentary (or government) figures and the Council of Europe, and any other stake-holders are officially excluded. This "conspiratorial" approach allows senior officials to manipulate Strasbourg's evaluations and paint the negative as positive. Certain pan-European policies sometimes fail to take root locally, which can play into the hands of home-grown supporters of press controls. For example, the Council of Europe recommends procedures for ensuring financial transparency in the media, because the public is entitled to know of potential political and other influences. But given the specific circumstances of Armenia and its shadow economy the requirement that the media publish annual accounts, which was inserted into the draft Statute "On mass information" and subsequently passed, will not work; it could even be used to put pressure on opposition media (Navasardyan, 2003, p. 3).

One cannot help noticing that in some countries the Council of Europe's activities cause ill-concealed official irritation. In this context there was an interesting exchange at a round table discussion on "Legal aspects influencing media freedom in Azerbaijan" in October 2004. Mats Lindberg, the Council of Europe Secretary General's special representative to Baku, spoke of the need to bring Azerbaijan's media laws into line with European standards, to which presidential administration official Ali Hasanov replied that the requisite legal framework was already in place for the media to operate freely. For example, the practice of arresting journalists for what they report had been ended and there were no press controls. "We recognize the right of journalists to obtain information, but information cannot be entrusted to irresponsible journalists," he said, complaining that the Council of Europe wanted Azerbaijan to acknowledge the rights of journalists but would not tackle the question of their responsibility (OSCE..., 2004).

CONCLUSION

It seems that in the post-Soviet states of today globalization is taking place predominantly to the West's values for human rights and fundamental freedoms. This process is being driven by such international organizations as the European Union,

Council of Europe and OSCE, which operate here primarily as human-rights protectors. For CIS member-states in Europe the main lever for western influence on media law and freedom of mass information has been the Council of Europe, and for the rest – the OSCE.

We can conclude that these organizations have exerted significant pressure on the authorities in the countries in this study, especially Azerbaijan, Armenia, Estonia, Georgia, Latvia, Lithuania, Moldova and Ukraine. These international organizations have a truly asymmetrical relationship with the post-Soviet countries; they stand by their own requirements and ensuing interests and either formally or informally push authorities or publics into changing their political behaviours, standards and rules by means of dialogue, persuasion, threats or other means. But this trend is countered by another. In a relationship of equals the influencer can be affected by the influenced and in turn amend its own behaviour. In the region under study this is proven by post-Soviet states' smooth accession to various international bodies, from the CIS and OSCE to the Council of Europe, European Union, NATO and WTO. Had these organizations not given some ground, it would be difficult to explain the attraction of their integration policies to post-Soviet leaderships.

The media reforms that international bodies are influencing in these countries are generally leading towards a more robust model for independent journalism. The concept of freedom of mass information is reviving, state broadcasters are being turned into public-service, and other changes are taking place.

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