ROMANIA

An Analysis of Media Law and Practice

July 1997

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ARTICLE 19

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1 INTRODUCTION

When the people of Bucharest took to the streets in the lead-up to the overthrow of president Nicolae Ceau_escu in late 1989, they quickly seized the state radio and television stations. The state TV building became the opposition headquarters and a major rallying point as leaders and ordinary people went live on air for the very first time to put over their demands and speak out against the totalitarian regime.

Nearly seven years on, the independent media has grown rapidly. Many new national and local newspapers have sprung up, representing a spectrum of viewpoints. Hundreds of titles can now be found on the news-stands, though the leading dailies continue to have small circulations and a state monopoly still controls the distribution and printing of newspapers. More than 50 private television and 100 radio stations have also emerged. Many homes are now wired for cable services giving access to private and foreign broadcasts. However, the Romanian Television Company (TVR) and the Romanian Radio Company remain the only national broadcasters capable of reaching the large rural audience.

This unprecedented growth went hand in hand with changes in media law and the setting up of new regulatory bodies during the presidency of Ion Iliescu from 1990 to November 1996. In 1991 the country's new Constitution was adopted. It makes provision for freedom of expression, access to information and the autonomy of state-owned broadcast media. New laws regulating private and public broadcasting followed and a National Audio-Visual Council was set up to issue private broadcasting licences. Nevertheless, Romanian law still fails to safeguard media freedom. For example, the updated 1996 Penal Code, whilst going some way towards improving the previous code, retains restrictive provisions, including jail terms for those convicted of libel and slander. In many cases, the country's law remains at variance with that contained within the European Convention on Human Rights and various other international treaties to which Romania is a party.

Much still needs to be done if Romania is to nurture its young democracy and guarantee media freedom. The prospects for such change appear to have improved greatly following the November 1996 election victory of President Emil Constantinescu and the pro-democratic coalition whose senior partners are the Romanian Democratic Convention (CDR) and the Union of Social Democrats (USD). The new president has called for "a permanent changeover to democracy."

The purpose of this report, which is intended as a resource primarily for Romanian journalists and legislators, is to contribute constructively to the new political agenda. Based on a critical examination of the current legal framework, the report puts forward specific recommendations on how Romanian law related to freedom of expression can be changed to conform with international standards, particularly those of the European Convention on Human Rights.

SUMMARY OF RECOMMENDATIONS

It is widely recognized that freedom of expression, and media freedom in

particular, lies at the heart of a democratic system of government. The European Court, for example, has frequently reaffirmed the critical role of the media in both keeping the public informed and acting as a watchdog of government. The recommendations contained in this report, if implemented, will allow the Romanian media to fulfil these critical functions. Following is a summary of the key recommendations:

•the Romanian government and courts should bring Romania's legislation and legal practice into full conformity with the country's international obligations regarding freedom of expression;

•the restrictions on freedom of expression allowed by the Constitution should be amended so as to accord with the specific limitations permitted by the European Convention on Human Rights;

•defamation should not lead to criminal liability;

... /...

•liability for insult, offence against authority, outrage and defamation of the nation should be abolished;

•general restrictions on freedom of expression should be subject to a public interest defence;

•journalists should not be compelled to reveal their sources except in the most limited and clearly defined circumstances;

•appointments to the National Audio-Visual Council (CNA) should be made in such a way as to guarantee the Council's independence;

•the content of broadcasts should be immune from CNA regulation, as required by international standards on freedom of expression;

•the editorial and operational independence of both public and private broadcasters should be guaranteed;

•rules regarding media coverage of elections should avoid content regulation and focus on ensuring accuracy, balance, non-discrimination, impartiality

and fair access to the media;

•the government should take positive steps to create an economic environment in which a pluralistic and free media can flourish;

•no law specifically dealing with the press is necessary as laws of general application provide sufficient protection to the public;

•the public's right of access to information should be provided for by law and an administrative structure established to put this into practice;

... /...

•governmental and other bodies should be permitted to withhold information from the public only in very limited and clearly defined circumstances;

•the government and parliament should take positive steps to ensure that information is readily accessible to the public;

•judicial hearings should be open to the public except in limited circumstances justified by the public interest;

•all administrative decisions, particularly those relating to the National Audio-Visual Council and restricting access to information, should be reviewable by the courts.

2ROMANIA'S OBLIGATIONS UNDER INTERNATIONAL LAW

This section sets out the key international human rights treaties and other instruments that bind the Romanian government to uphold freedom of expression and the other rights necessary to ensure a free and pluralistic media. It also outlines the positive duties related to international law for which governments, including the Romanian government, are advised to legislate.

Romania is legally and morally bound by a number of important international human

rights treaties, various covenants and other instruments which uphold the right to freedom of expression. These include the Universal Declaration of Human Rights (UDHR), unanimously adopted by the UN General Assembly in 1948, which although not an international treaty, is binding upon Romania to the extent that it reflects customary law. Article 19 of the UDHR states:

> Everyone has the right to freedom of opinion and expression: this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

In 1974, Romania ratified the International Covenant on Civil and Political Rights (ICCPR), Article 19 of which also guarantees the right to freedom of expression.

Article 20(1) of Romania's Constitution[1] states that: "constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the UDHR, with other covenants and other treaties to which Romania is party." Although not an international treaty, the UDHR is binding upon Romania to the extent that it reflects customary law.

As a participating state in the Organization on Security and Co-operation in Europe (OSCE), Romania is bound by the provisions set out in the Helsinki Final Act (1975) and the concluding documents adopted at subsequent meetings. Under the "Information" section of the Vienna Concluding Document (1989), participating states committed themselves to: "make further efforts to facilitate the freer and wider dissemination of information of all kinds, to encourage co-operation in the field of information and to improve the working conditions for journalists", and to "ensure that individuals can freely choose their sources of information."

The participating states also undertook the obligation of developing their "laws, regulations and policies in the field of civil, political ... rights and fundamental freedoms and put them into practice in order to guarantee the effective exercise of these rights and freedoms."

The "right of the media to collect, report and disseminate information, news and opinions" was reaffirmed at the 1991 Moscow Meeting of the Conference on the Human Dimension.

The 1993 Association Agreement with the European Union provides for the Romanian government to respect human rights and ensure that adequate mechanisms exist to enforce European standards.

Also in 1993 Romania signed the European Convention on Human Rights (ECHR), when it became a member of the Council of Europe.

Article 10 of the ECHR reads:

> 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.
>
> 2. 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

[1] The Constitution of Romania was adopted in the Constituent Assembly Session of 21 November 1991 and entered into force pursuant to its approval by the national referendum of 8 December 1991.

> 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 and impartiality of the judiciary.

Romania has accepted the jurisdiction of the European Court of Human Rights and the right of individuals to petition the Court when their rights are alleged to have been violated by national authorities and domestic remedies have been exhausted.

But this right does not diminish the state's obligation under international law to create effective remedies at the national level. Such measures are necessary in order to guarantee the media a timely and just remedy when there has been a violation. Indeed, when recommending that Romania be admitted as a member of the Council of Europe, the Parliamentary Assembly of the Council of Europe called "the attention of the Romanian authorities to the necessity of ... guaranteeing the real independence of the media ... ."[2]

Other treaty provisions buttress the right to freedom of expression. For instance, both the ECHR and the ICCPR prohibit discrimination in the enjoyment of their rights and freedoms. In addition, Article 2 of the ICCPR requires states to both "respect and ensure" and "to give effect to" the rights set forth; the ECHR imposes a similar obligation on states in Article 1. These treaties have been interpreted to impose positive duties on governments to prevent interference not solely from public authorities but from private individuals or groups as well.

2.1 Media Freedom: a Positive Obligation

The free flow of information and ideas is the oxygen of a democratic and representative society. The European Court has stated: "freedom of expression ... constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment."[3]

The protection of the European Convention covers not only information and ideas that are "favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb, [because] such are the demands of pluralism, tolerance and broadmindedness without which there is no `democratic society.'"[4] The protection of offending, shocking or disturbing ideas requires special attention in newly emerging democracies which have experienced the suppression of diverse and opposing viewpoints during recent periods of dictatorship.

Media freedom is recognized as crucial to developing an informed citizenry in a democracy. The European Court has stated that "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."[5]

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[2] See Parliamentary Assembly Opinion No. 176/1993.

[3] *Lingens v. Austria* — for details of all cases, see List of Cases, p. 62.

[4] Ibid.

[5] *Castells v. Spain*.

The European Court has also recognized the public's right to be informed: "not only does it [the press] have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of `public watchdog.'"[6]

The broadcast media is also recognized as having a vital role to play in applying these principles. The European Court has stated that "it is commonly acknowledged that the audio-visual media have often a much more immediate and powerful effect than the print media ... . The audio-visual media are able to convey meanings through images which the print media are not able to impart."[7]

Nevertheless, the strong public impact enjoyed by the broadcast media does not allow state authorities or international bodies "to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. ... Article 10 of the ECHR protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed."[8]

Governments also have positive duties to ensure the legal, economic and practical means that enable the media to fulfil their protected functions. For example, the ICCPR states in Article 2 that member states must:

(1) adopt such legislative or other measures as may be necessary to give effect to the rights protected by the treaty, and
(2) to remedy violations of those rights.

2.2 Restrictions and Extensions

The exercise of the right to freedom of expression and information can be restricted under international law, in order to protect various personal and public interests, such as the rights of others, or national security.

However, the extent to which restrictions are permissible is limited. The Universal Declaration of Human Rights (Article 19), the ICCPR (Article 19(3)) and the ECHR (Article 10(2)) subject restrictions to a three-part legitimacy test. Restrictions must:

1. be provided by law;
2. have a legitimate purpose expressly enumerated in the text of the treaties;
3. be shown to be necessary.

Moreover, the ECHR expands the third requirement, indicating that a restriction must be necessary *in a democratic society* to promote the legitimate aim (Article 10(2)). The ICCPR treats the right to hold opinions without interference as an absolute right, although the ECHR provides for possible limitations on the exercise of all components of the right to freedom of expression.

The European Court seeks to give expression a preferred status over other state interests. So, under the burden of asserting "relevant and sufficient" grounds for interfering with freedom of expression, the Court requires national authorities to demonstrate a "pressing social need"

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[6] *The Sunday Times v. United Kingdom, II.*

[7] *Jersild v. Denmark.*

[8] Ibid.

and the proportionality of the restriction with respect to other legitimate aims.[9]

Political speech, another essential feature of a democratic society, has a privileged position both with respect to daily matters of public concern and elections, resulting in a narrower interpretation of the restrictions. It is significant that many of the most important freedom of expression cases before the European Court have involved media freedoms and political speech. Nor is the high degree of protection enjoyed by political speech restricted to matters of pure politics. The Court has stated, in a case involving press freedom on an issue of police misconduct, that "there is no warrant in its case-law for distinguishing between political discussion and discussion of other matters of public concern."[10]

Recommendations on International Obligations

- The Romanian government should publish the texts of international human rights treaties binding on it and disseminate them as widely as possible;
- courts should take Romania's international obligations into account when deciding cases, in particular by striking down laws which are inconsistent with guarantees of freedom of expression.

3 CONSTITUTIONAL PROVISIONS

This section outlines the freedoms and rights relating to the media and the judiciary that have been written in to Romania's new Constitution, adopted in 1991. It goes on to examine how some provisions related to media freedom in the Constitution violate international law and are at odds with accepted practice in other countries.

3.1 The Legal Framework

The international standards discussed in section 2 are incorporated into Romanian law by the 1991 Romanian Constitution. Article 1(3) of the Constitution provides that "Romania is a democratic and social State governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values and shall be guaranteed."

Most importantly, the legal principle *pacta sunt servanda* (treaties create legally binding

[9] *Sunday Times v. UK*.
[10] *Thorgeirson v. Iceland*.

obligations that States should observe), expressed by the 1969 Vienna Convention on the Law of Treaties, is articulated by Article 11(1) of the Romanian Constitution, which states that "the State pledges to fulfil as such and in good faith its obligations as deriving from the treaties it is a party to."

The Constitution also establishes the principle of the direct applicability of the international norms by providing in Article 11(2) that the "treaties ratified by Parliament, ... , are part of the national law," therefore allowing the national courts to apply international norms in domestic cases.

Within the human rights field, the Constitution goes further, giving priority to international law, by stating in Article 20(2) that "where any inconsistencies exist between the covenants and treaties on fundamental human rights Romania is a party to, and internal laws, the international regulations shall take precedence."

It follows that all international provisions guaranteeing freedom of expression and information are incorporated into the Romanian domestic legal system and prevail over the national legislation in case of a conflict of law.

The procedure for determining the constitutionality of any law or statute is governed by Articles 144 and 145 of the Constitution. According to these provisions, the Constitutional Court decides questions of constitutionality. Individuals who consider a statute or certain legal provisions to be unconstitutional must first raise the issue in an ordinary court proceeding. At its discretion, the ordinary court may suspend the trial and send the case to the Constitutional Court, which issues a binding decision.

The independence of the judiciary is guaranteed in Article 123, which reads "judges shall be independent and subject only to the law." There are constitutional and other legal guarantees of the independence of the judiciary, such as life appointment (with the exception of Supreme Court judges) and immovability. Only an independent and impartial judiciary can effectively guarantee the protection of individual rights and freedoms against the potential excesses of both the executive and legislative branches.

But a number of shortcomings continue to impair the independence of the courts. Examples include the still powerful role of prosecutors and the Minister of Justice's role in supervising judges. Various governmental practices also appear to signal interference with the judiciary. For example, former President Ion Iliescu failed to appoint judges to tribunals and lower courts within the time limit set by the law on the judiciary, affecting the validity of the judgments issued after the legal expiry date.

Nevertheless, the constitutional guarantees oblige the government to put in place mechanisms which guarantee the judiciary's independence, including strong protection for tenure and wage increments. Senior judges are also in a position to challenge laws and practices inconsistent with international and constitutional guarantees, including those that directly affect the judiciary.

3.2 Rights and Freedoms

Title II of the Constitution is devoted to fundamental rights and freedoms. There are provisions guaranteeing all the civil and political rights set forth in international treaties on human rights, including the freedoms of expression, conscience and religious belief.

The right to freedom of expression is constitutionally provided for by two different sets of provisions, namely "freedom of expression" (Article 30) and "the right to information" (Article 31).

Article 30 deals with freedom of expression. The exercise of this right is guaranteed in

paragraphs 1-4:

(1) Freedom of expression of thoughts, opinions, or beliefs, and freedom of any creation, by words, in writing, in pictures, by sounds or other means of communication in public are inviolable;

(2) Any censorship shall be prohibited;

(3) Freedom of the press also involves the free setting up of publications;

(4) No publication may be suppressed.

Restrictions are imposed by the subsequent paragraphs of Article 30:

(5) The law may impose upon the mass media the obligation to make public their financing source;

(6) Freedom of expression shall not be prejudicial to the dignity, honor, privacy of person, and the right to one's own image;

(7) Any defamation of the country and the nation, any instigation to a war of aggression, to national, racial, class or religious hatred, any incitement to discrimination, territorial separatism, or public violence, as well as any obscene conduct contrary to morality shall be prohibited by law;

(8) Civil liability for any information or creation made public falls upon the publisher or producer, the author, the producer of the artistic performance, the owner of the copying facilities, radio or television station, under the terms laid down by law. Indictable offenses of the press shall be established by law.

Paragraphs 6, 7 and 8 of Article 30 subject the right to freedom of expression to broad and severe content-based restrictions. The imperative legal wording of these provisions creates a hierarchy of values and restraints on speech. Consequently, the discretion to apply the proportionality principle and to balance conflicting values in specific cases is taken away from the courts. This is of particular concern given that the notion of protecting expression in the name of the public interest, especially in the press, is not yet part of the legal culture.

By restricting the right to freedom of expression without acknowledging the strict requirements for limiting rights imposed by the three-part test described above, these constitutional provisions violate international norms on freedom of expression. For example, Article 30(8) seems to impose liability on the publisher or author even where a defamatory statement has merely been reported, as in an interview. It is clearly unreasonable to expect media outlets to `vet' interviews for possible defamatory material. The European Court has held that this would have a chilling effect on freedom of expression.[11]

Moreover, some of the grounds for prohibiting expression enumerated by paragraph 7 of Article 30, in particular "defamation of the country and the nation", are not supported by international law. They violate international human rights treaties which prohibit restrictions on

[11] Note 7 above.

grounds other than those enumerated by the treaty itself (for example those found in Article 10(2) of the ECHR).

Further general restrictions exist on the exercise of rights and freedoms in the Romanian Constitution. Article 49(1) reads: "The exercise of certain rights and freedoms may be restricted only by law, and only if absolutely unavoidable, as the case may be, for: the defence of national security, public order, health or morals, of the citizens' rights and freedoms; as required for conducting a criminal investigation; for the prevention of the consequences of a natural calamity or extremely grave disaster." Article 49(2) states, with regard to the limitations allowed by the first paragraph, that "the restriction shall be proportional to the extent of the situation that determined it and may not infringe upon the existence of the respective right or freedom."

These general derogation provisions go far beyond those allowed under international human rights treaties. Although treaties do allow for general derogations, these are allowed only in "time of war or other public emergency threatening the life of the nation" (Article 15 of the ECHR). Article 4 of the ICCPR is almost identical. It is clear that Article 49(1), which allows restrictions for such things as "conducting a criminal investigation" and "public morals" gives unacceptably broad powers to the government to interfere with the enjoyment of Constitutional rights.

Article 31 of the Constitution deals with the right to information and reads:

(1) A person's right of access to any information of public interest cannot be restricted;

(2) The public authorities, according to their competence, shall be bound to provide accurate information to citizens about public affairs and matters of personal interest;

(3) The right to information shall not be prejudicial to the protection of the young or to national security;

(4) Public and private media shall be bound to provide correct information to the public opinion;

(5) Public radio and television services shall be autonomous. They must guarantee for any important social and political group the exercise of the right to be on the air. The organization of these services and the parliamentary control over their activity shall be regulated by an organic law.

However, no further legislation was adopted in order to give effect to these provisions. The absence of an adequate administrative or judicial procedure to ensure access to information is a violation of Article 21 of the Constitution, which provides that "every person is entitled to bring cases before the courts for the defense of his legitimate rights, liberties and interests."

Recommendations on the Constitution

- The content-based restrictions contained in paragraphs 6 and 7 of Article 30 of the Constitution should be revoked as they are inconsistent with international law guarantees on the right to freedom of expression;

- the restrictions on freedom of expression permitted by the Constitution should be narrowly interpreted so as to allow restrictions only where they are provided by law, where the objective is of sufficient importance to warrant a restriction under international law, where no other means of achieving the objective are available and where the restriction is "necessary in a democratic society" (and remains in place only for as long as it continues to be necessary);

- the general derogation clause of the Constitution, Article 49, should be amended to allow restrictions on rights only where there is a threat to the life of the nation as provided for by international human rights treaties such as the European Convention on Human Rights.

4 GENERAL CRIMINAL CONTENT RESTRICTIONS

This section outlines the relevant provisions of the Penal Code and shows how recent amendments impact on the work of journalists. Case studies of convicted journalists are also provided, illustrating new crimes and punishments which severely inhibit the reporting of matters of public concern. The section also examines the law related to national security, hate speech and propaganda. In many cases, the report points to laws so vaguely worded as to render them susceptible to government interference.

4.1 The Penal Code

Romania's Penal Code was adopted by the Communist regime in 1968 and came into force in the following year. After 1990 it was repeatedly amended, though in piecemeal fashion. However, a major revision in the form of Law No. 140, which increased the punishments for most crimes, as well as introducing new ones, was adopted in November 1996, shortly before the most recent parliamentary and presidential elections.

Although the preamble of the revised Code states that the aim is to adapt Romanian legislation to European standards, the creation of new crimes limiting freedom of expression and the failure to abolish those already infringing internationally guaranteed rights raises some important concerns.

Under the Penal Code, the dignity and reputation of senior politicians and civil servants, state authority, official symbols and abstract notions such as "country", "nation", and

"international relations of the country", are strongly protected by criminal law.

Indeed, under Romanian law all types of defamation are considered to be criminal offences. This means that defendants not only face the State with its substantial resources as plaintiff but also that penalties are potentially much higher and include imprisonment. This is contrary to the general practice in Western Europe and North America, and does not meet with European standards.

In Romania, civil damages for harm resulting from a defamatory act may be claimed by the victim and ordered by the courts but only after criminal culpability has been established. Usually, civil damages are ordered by the same criminal court that decided on the criminal guilt.

Article 64 of the Penal Code provides the "supplementary punishment" of prohibiting individuals convicted of a crime while pursuing their profession from continuing to practise that profession. Some convictions have banned journalists from practising their profession, though in practice sentences have been overturned before such bans have come into force. Clearly, the likely effect is to promote self-censorship.

Proceedings to issue injunctions restraining publication are not provided by the criminal law or by any other law, and therefore have never been ordered.

Nor is the seizure of newspapers regulated by any specific provision. But general rules providing for the seizure of objects used by a perpetrator of a criminal offence[12] may cover the seizure of newspapers as well. However, such a procedure has not been used. Law No. 41 of 1992, the Law on Radio and Television Broadcasting provides for the seizure of technical equipment.

4.2 Criminal Defamation and Related Offences

4.2.1 Insult

Article 205 of the Penal Code provides that intentionally insulting a person constitutes a crime and is subject to a fine or up to two years' imprisonment. The 1996 amendments to the Penal Code (see 4.1 above) increased the upper limit of the jail term from three months to two years. Criminal proceedings for insult are initiated by the complainant directly, without prosecutorial action.

But speech should not be punished merely because it is offensive. As the European Court has repeatedly stated, freedom of expression "is applicable not only to `information' and `ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb",[13] because "such are the demands of the pluralism, tolerance and broadmindedness without which there is no `democratic society'".[14]

Although the crime of insult still exists on the statute books in some Western European countries, such as the Netherlands, Austria and Germany, those legal systems also provide the possibility of a civil suit as an alternative remedy. Moreover, the enforcement of the criminal law in those few countries of Western Europe where insult can be a crime is limited by democratic traditions as well as constitutional protections for media freedom. As a result, even those found criminally culpable for insult are subject only to extremely modest fines. In Sweden, the United States of America and other countries, opinions or value judgements about

[12] Article 118 of the Penal Code.

[13] *Handyside v. UK*.

[14] Note 3 above.

a person are not considered libellous. In 1994 the Inter-American Commission on Human Rights issued a report which concluded that criminal insult laws were incompatible with international guarantees of freedom of expression. A settlement recently negotiated by the Inter-American Commission led to Argentina repealing its insult laws.

In Romania the crime of insult represents a serious threat to media freedom. In early July 1996, for example, Radu Mazare, editor of the daily *Telegraf* at the Black Sea port of Constanta, and reporter Constantin Cumpana, were found guilty under Article 205 for having "insulted" two civil servants, alleging that the local officials were involved in corruption. They were both sentenced to seven months' imprisonment, ordered to pay fines and were banned from working as journalists for one year. Prior to their imprisonment, the General Prosecutor stepped in to suspend the jail sentences, and outgoing President Iliescu issued individual amnesty orders in November 1996.

4.2.2 Calumny

Calumny is defined in Article 206 of the Penal Code as the "public statement or accusation regarding a certain fact" which, "if true, would expose that person to criminal, administrative, or disciplinary punishment, or to public contempt." The penalty is a fine or between three months' and three years' imprisonment. The article applies equally to oral and written expression. Criminal proceedings for calumny are initiated by the complainant directly, without prosecutorial action.

The Penal Code of 1996 raises the upper limit of the jail term from one to three years. The possible fine was also increased from a range of 25,000 lei to 100,000 lei to a range of 350,000 lei to 30,000,000 lei. The figure of 30,000,000 lei (approximately US $3,000-$4,000) represents 50 to 100 times the average journalist's monthly salary.

While truth is a defence, for factually false statements there is no requirement of malicious intent. As a result, Article 206 punishes not only the dissemination of information known to be false, but also statements made in good faith if the perpetrator cannot prove their truthfulness.

International standards recognize that only malicious defamation through knowingly publishing false information should be an offence. In Germany, for example, the publication of an untrue fact which severely diminishes another's reputation is a crime if the person who published the statement knew it was false or showed malicious disregard for its truth.[15] A similar standard prevails in the United States, but subjects the offender exclusively to civil liability.

There are many cases in Romania involving journalists convicted under Article 206. Courts generally order fines rather than imprisonment, and when they opt for the latter penalty it is usually suspended. Nevertheless, even suspended sentences have a strongly intimidating effect because, according to criminal procedure, a second conviction for an offence committed within two years after the running of the suspended sentence would automatically result in imprisonment.

Calumny Cases

In March 1997, Corneliu Stefan, Sabin Orcan and one other journalist with *Opinia* in Buzau were sentenced to one-year prison terms for calumny by a Buzau court for an article about a

[15] German Criminal Code, Section 187.

prosecutor. The journalists were also ordered to pay moral damages of 140,000,000 lei (about US $17,000.) An appeal has been lodged and as of early 1997 was still pending.

Stefan Tudoras, a journalist with *Cuget Romanesc* in Brasov, was convicted of calumny on 3 October 1996. He was fined 100,000 lei (the maximum then in force) for publishing a story with information and critical commentary about the mayor of the small town of Sacale, who had allegedly issued an illegal building permit. An appeal to the Brasov Tribunal was still pending as of early 1997.

Adina Anghelescu and Valerian Stan, journalists with *Barricada* in Bucharest, were convicted of calumny on 13 September 1995 and ordered to pay fines of 25,000 lei. They had published, under the headlines "Questions for Our Peace" and "Answer to a General," a story relating to the alleged improper activity of an army officer. An appeal was lodged with the Bucharest Municipal Tribunal.

Cosmin Stamatov, a journalist with *Ziua* in Bucharest, was convicted of calumny in 1995. He was given a suspended sentence of three months' imprisonment for a story alleging official corruption. He was ordered to pay moral damages of 25,000,000 lei, about 250 times the average journalist's monthly wage in 1995.

4.2.3 Proof of Truth

Article 207 of the Penal Code provides that insult or calumny shall not be punished if the accused proves the truthfulness of his or her statements. The "proof of truth" is "admissible only if the statement or accusation was made to defend a legitimate interest." Neither the good faith of the journalist nor the public interest can be brought into evidence in insult and calumny cases. The text has not been amended since 1969.

As clearly specified in the text, the "proof of truth" covers both facts ("calumny") and opinions ("insult"). The European Court has stated, "... a careful distinction needs to be made between facts and value judgements. The existence of facts can be demonstrated, whereas the truth of value judgements is not susceptible of proof. ... As regards value judgements this requirement [the proof of truth] is impossible of fulfilment and it infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 of the Convention."[16]

Even with respect to the crime of calumny, the "proof of truth" is a restrictive measure. Most Western European countries provide for good faith and public interest defences in defamation cases. In the Netherlands, for example, under Criminal Code Section 261(3), journalists do not need to prove the truth of their assertions; it is sufficient that they assumed the accuracy of their statements in good faith and that they made them in the public's interest. In Sweden, it is enough to prove that the responsible editor had reasonable grounds to believe that the information was truthful, or that the publication is justified because the public interest in the information overrides the interest in protecting the person concerned.

The "legitimate interest" requirement of Romanian law refers to the personal interest of the author of the statement. The notion of a "legitimate interest," however, is not consistent with the practice of journalism in a modern democracy. Indeed, journalistic ethics discourage journalists from reporting on matters in which they have a personal (hence "legitimate") interest. And any potential limitation on expression defined by as vague a term as "legitimate interest" conflicts with international guarantees of freedom of expression. Fortunately, in practice the courts do not apply the "legitimate interest" limitation and allow journalists the proof of truth

[16] Note 3 above.

defence.

4.2.4 Insult and Defamation of Officials

The 1996 Amendments to the Penal Code left the texts of Articles 238(1) and 239(1) unmodified, except for increasing the upper limit of the penalties. Article 238(1) now provides a penalty of up to five years' imprisonment for any insulting statement publicly addressed to a "person serving an important state or public function," if related to his official capacity, and if it "would prejudice the state's authority." The crime is called "offence against authority." There is no provision for a fine as an alternative penalty. Criminal investigations are initiated *ex officio*.

The special protection accorded to high officials by Article 238 is further strengthened by two procedural rules. The State, through the office of the prosecutor, acts *ex officio*, considering itself injured when the honour of a political figure has been attacked.

The other rule is that the law yields no opportunity for a "proof of truth" defence to an Article 238 case, again demonstrating that culpability is a foregone conclusion, with the State subjectively determining that an "offence against authority" has taken place.

Article 239(1) of the Penal Code prohibits any insult or defamation against a civil servant in relation to his or her official duties if "perpetrated directly or by means of direct communication" subject to a penalty of up to four years' imprisonment. The name given to this crime is "outrage."

Article 239(4) provides a higher sentence — up to seven years' imprisonment — if the crime is perpetrated against a judge, prosecutor, gendarme or member of the military. There is no provision of a fine as an alternative penalty. The text is generally considered to apply equally to private communication or communication through the media. Criminal investigations are initiated *ex officio*.

Despite these restrictions the media in Romania, as well as individuals, have frequently expressed highly critical opinions about political figures without suffering the consequence of a criminal prosecution. Nevertheless, there have been a number of cases in which action was taken against journalists who publicly used what were deemed to be insulting words by those in government.

Cases

In October 1996, two journalists received prison sentences for "insulting the authority" of the then head of state. In May 1995, the paper alleged that President Iliescu had been recruited by the ex-Soviet KGB while a student in Moscow in the early 1950s. Other reports also held Iliescu morally responsible for more than 1,000 deaths during the December 1989 uprising which toppled the Ceau_escu regime. Sorin Rosca Stanescu, managing editor of the daily *Ziua*, received a one-year jail term and a reporter on the paper, Tana Ardeleanu, was sentenced to 14 months' imprisonment. The court also stripped the journalists of their right to practise their profession. However, neither journalist was imprisoned and in March 1997 the sentences were quashed on appeal.

In a separate case, journalist Radu Mazare was prosecuted in 1995 under the same charge for placing a dog behind the nameplate for the Constanta Chief of Police during a televised round-table debate on police activity. The Police Chief had previously declined the invitation to participate in the TV programme; the case is currently pending.

The Mazare case involves a particular form of "insult," namely satire or parody, which should be strongly protected as free expression, especially when aimed at criticizing public

officials.

In the United States, the Supreme Court has vigorously defended the right of publications to engage in even biting satire as a form of political or social commentary. The Court has noted that public officials in a democracy must tolerate "vehement, caustic, and sometimes unpleasantly sharp attacks."

In various cases, the US Supreme Court has held that "rhetorical hyperbole," "vigorous epithet" or "lusty and imaginative expression[s] of contempt" used in a "loose, figurative sense" are not libellous because they can never be objectively false.[17] Protection of such speech "provides assurance that public debate will not suffer for lack of `imaginative expression' or the `rhetorical hyperbole' which has traditionally added much to the discourse of our nation."

In a 1996 case in Zalau, journalist Varga Viorel published an article claiming that some judges and prosecutors were fulfilling their duties improperly; the article was worded in strong language and considered defamatory by those who were the object of criticism. The prosecutor overseeing the case interpreted the law to require that the journalist should not be indicted with the crime of "outrage," arguing that "direct communication" refers exclusively to direct verbal communication or communication by letter, fax or phone, and not to communication through the media. This interpretation strains the language of the provisions but as it limits the harmful impact of Article 239(1) and (4) it is to be encouraged until the law can be properly amended.

Limits of Criticism

The European Court has held that the limits of acceptable criticism are "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."[18]

The European Court has further indicated that the prosecution of journalists who criticize politicians or government officials is an interference with free expression that is never "justified in a democratic society."[19] The Court has held that "freedom of expression is an essential element for the formulation of political opinion."[20] For this reason, the Court has afforded a particularly high degree of protection to speech of a political character and has held that the appropriate response of the criticized government is to engage its opponent in further debate rather than to impose criminal sanctions.[21]

Likewise, ARTICLE 19's 1995 *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* provide, under Principle 7, that "no one may be punished for criticizing or insulting ... the government, its agencies, or public officials ... unless the criticism or insult was intended and likely to incite imminent violence."

4.2.5 Public Defamation

The 1996 Amendments to the Penal Code have also inserted Article 236.1 (so numbered because it was inserted between the old Articles 236 and 237) making "public acts committed

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[17] See, for example, *Greenbelt Coop. Publishing Ass'n, Inc. v. Bresler* and *Old Dominion Letter Carriers v. Austin*.

[18] Note 3 above.

[19] Note 5 above.

[20] Ibid.

[21] Ibid.

with the obvious intention to defame the country or the Romanian nation" a crime. This crime is entitled "defamation of the country and the nation" and was drawn up by the National Unity Party, an extreme nationalist party. Criminal investigations are initiated *ex officio*.

In an open letter to the Romanian government in December 1996, Amnesty International pointed out that the formulation of this provision is vague and ambiguous. Its implementation could result in the prosecution of persons solely for having exercised their universally recognized right to freedom of expression.

To date, no one has been prosecuted under Article 236.1 and given its vague wording, it is difficult to see how the law enforcement agencies could apply it. But once again the presence of such a law builds a climate inimical to freedom of expression.

The wording of the crime raises a host of important questions: who or what should be considered a victim (an aggrieved party) of this crime since "country" and "nation" are abstract notions? Would national minorities be covered by the term "nation"? What kind of expression about the country or nation should be considered defamatory? Are political leaders meant to personify the country and the nation?

This provision is impossible to justify under the limited restrictions to freedom of expression allowed under Article 10 of the ECHR, or under Principle 7 of the *Johannesburg Principles*. General criminal provisions designed to maintain the peace are sufficient to cover such situations.

Article 236(1) (i.e. Paragraph 1 of Article 236 as distinguished from Article 236.1 discussed above) of the Penal Code also prohibits any act of disrespect towards state symbols with a penalty of between six months' and three years' imprisonment. Article 236(2) imposes a penalty of up to one year or a fine for any contempt of symbols used by public authorities. Criminal investigations are initiated *ex officio*. This provision was not amended by the 1996 Law.

Although many countries have similar provisions, they are seldom invoked. Indeed, the German Constitutional Court has held that attacks against national symbols, such as against the flag and anthem, even if harsh and satirical, must be tolerated in view of the constitutional protection of speech, press and arts. The United States Supreme Court has declared in a case where flags were burned while protesting government policies, that "punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering".[22]

Recommendations on Defamation

- ARTICLE 19 recommends an urgent and thorough review of the entire Penal Code to ensure that it is brought into line with European standards in all areas, including freedom of expression and information;

- liability for defamatory statements should be shifted from criminal law to civil law, reflecting the practice in most Western European countries;

[22] *United States v. Eichman*.

... /...

•liability for the following should be abolished immediately as contrary to European human rights jurisprudence and offensive to guarantees of freedom of expression: insult, offence against authority, outrage and defamation of the nation;

•if criminal liability is maintained, or as an intermediate step, ARTICLE 19 recommends that:

— criminal proceedings should not be initiated whenever there is a complaint; prosecutorial discretion must be exercised to ensure that only cases which reflect a public interest are filed;

— speech relating to public officials, politicians and general political activity should be subject to liability only where reckless or malicious in addition to false; this high standard relative to ordinary defamation is in accordance with the jurisprudence under the European Convention on Human Rights;

— the offence of disrespect towards State symbols should be made subject to an exception in favour of political expression;

— malicious intent should be an additional requirement for proof of calumny; the onus should be on the State to prove the falseness of the statement;

— the "legitimate interest" limitation on the "proof of truth" defence should be abolished and the defence supplemented with good faith and public interest defences; the defendant should have the opportunity to invoke these defences at his or her discretion;

— penalties for content-related offences should be reduced and in all cases restricted to reasonable and proportionate fines; in particular, fines should not be so large as to have a chilling effect on freedom of expression.

4.3 Security-Related Offences

4.3.1 Transmission of False Information

Article 168(1) of the Penal Code prohibits any "communication or dissemination, by any possible means, of false news, facts or information or forged documents, if this could impair security of the state or its international relations." The penalty is a prison term of between one and five years. This crime, called "Transmission of False Information", was also created under

the 1996 Amendments to the Penal Code. Criminal investigations under the provision are initiated *ex officio* without having to wait for a complaint.

The vague and ambiguous wording of the crime could easily result in the prosecution of persons solely for having exercised their universally recognized right to freedom of expression. Although news might be based on false facts, it is not clear what "false news" or "false information" could mean. Since the broad wording of the crime appears to imply that it would cover not just facts, but also analysis, there is a dangerous possibility that value judgements would necessarily be involved in interpreting the crime's applicability.

Moreover, the crime contains no bad faith element, so that even a journalist acting in good faith could be punished under this text. Nor is there allowance for the possibility that information which might jeopardize the security of the State or its international relations should nonetheless be disseminated in the name of the "public interest." Indeed, criticism of matters such as foreign policy is one of the areas in which the media play an especially important public watchdog role.

The text does not require any actual harm to the security of the State nor its international relations. The mere possibility that these two abstract values might be endangered is enough to trigger liability under Article 168(1). The ambiguity of the crime's elements puts unrestrained discretion into the hands of the state prosecutor, who initiates proceedings *ex officio*.

This text has not yet been applied in practice. To date no one has been investigated or convicted under this charge. Some parliamentary groups from the ruling majority have declared their intention of revoking this provision.

4.3.2 Revealing State Secrets

Article 169(4) of the Penal Code punishes anyone who possesses or reveals "documents or information which constitute state secrets or any documents or information ..." if doing so might endanger national security. The text has not been modified by the 1996 Amendments. Criminal investigations are initiated *ex officio*.

Article 169(1) of the Penal Code punishes civil servants possessing (outside of their official duties) or revealing "documents or information which constitute state secrets or any documents or information ..." if doing so might endanger national security, subject to a penalty of up to 15 years' imprisonment. Article 169(4) provides a penalty of up to seven years' imprisonment for the same deed perpetrated by any individual, including a journalist.

The criminal provisions noted must be interpreted in accordance with Law No. 51/1991 on national security. Article 2 of this law provides a very broad area of activities which are considered threats to national security, and Article 12 states that "no one may reveal the secret activities related to national security on the basis of the right of free access to information ... and the right to freedom of expression." Article 12 effectively provides an absolute restriction on access to information held by the security services as well as many other categories of information. There are no legal provisions or other public regulations which define or list classified documents and information (see Section 6, Access to Information).

Recommendations on Security Offences

- These provisions should be made subject to an actual showing that national security or other fundamental State interests have been or are likely to be compromised; the State should bear the onus of proving this;

- a general public interest defence should be available for these offences.

4.4 Other Content Restrictions

4.4.1 Propaganda and a Totalitarian State

Article 166.1(1) of the Penal Code prohibits any "propaganda aimed to establish a totalitarian state" if perpetrated "in public" and "by any means," punishable by up to five years' imprisonment. Article 166.1(2) defines propaganda, in general, as "the systematic dissemination of or apology for ideas, opinions or theories with the intent of convincing others and gaining supporters." Criminal investigations are initiated *ex officio*.

Although governments are generally entitled under international law to restrain expression when necessary to protect national security and public order, the expression alone cannot be the basis for punishment. The speaker must have previous knowledge of clear and present danger, and there must be more than a vague chance of a violation of public order.

This notion was well expressed in *Abrams v. United States*, in which US Supreme Court Justice Holmes introduced the "clear and present danger" test, by holding: "It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion ... Congress certainly cannot forbid all effort to change the mind of the country."

The US Supreme Court in the *Brandenburg* case held that speech advocating the use of force or crime may only be proscribed where two conditions are satisfied:

i) the advocacy must be "directed to inciting or producing imminent lawless action,"
ii) the advocacy must also be "likely to incite or produce such action."
The first condition incorporates the "clear and present danger" test, and the distinction between advocacy of unlawful action and advocacy of abstract doctrine.

Article 166.1 of the Romanian Penal Code does not make any reference to imminent danger. In fact, there is no element requiring danger at all, not even a vague and future one.

Thus, mere expression is punishable under this provision. Moreover, by defining "propaganda" as dissemination of ideas intended to convince others, this article threatens freedom of expression. What is the aim of any political expression, if not to share ideas with others and to create followers? The text is clearly punishing any speech even if no harm is foreseen. Good faith speech, the promotion of abstract doctrine, and the mere expression of ideas are considered crimes and sanctioned with imprisonment if simply advocating an undefined "totalitarian state."

This further 1996 amendment has not been applied so far in practice. To date no one has been prosecuted or convicted under this crime. Once again, it is difficult to predict how the judicial authorities will interpret and apply this general and vague wording.

4.4.2 Hate Speech

Article 317 of the Penal Law prohibits "nationalist-chauvinist propaganda, the incitement to racial or national hate," with up to five years' imprisonment and no alternative fine penalty. Complaints from groups or individuals as aggrieved parties are not required by the text; criminal investigations are initiated *ex officio*. Article 317 of the Penal Law punishes people for merely saying these things; it does not require any danger of an immediate breach of the peace or of a demonstrated harm.

The US Supreme Court has held that even words which "by their very utterance inflict injury" are protected as free speech; it is only where such words also pose a "clear and present danger" to the peace that they may be proscribed. The Supreme Court reversed the conviction of a speaker who made a race-baiting speech, reasoning that speech which "stirs ... to anger" or "invites dispute" is protected, holding that "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger".[23]

It must be observed that under international law, propaganda of racist views is prohibited. Such a prohibition is contained in international instruments such as the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention on the Elimination of All Forms of Racial Discrimination.

Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination requires signatory states to "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof; ..."

Article 20(2) of the ICCPR states, "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." The requirement that advocacy of national hatred must "incite" to discrimination, hostility or violence" in order to be punishable is an important limitation. It indicates a requirement under international law, at least for expression of national hatred, that there be some objective manifestation (discrimination, hostility or violence) resulting from or intended to result from the expression before it can be punished.

Article 317 of the Penal Law, in outlawing "nationalist-chauvinist propaganda" and

[23] *Terminiello v. Chicago*.

"incitement to national and racial hatred," arguably goes further than international law allows. Incitement to hatred, unlike incitement to discrimination, hostility or violence, is an abstract concept which is difficult to measure objectively. Furthermore, "nationalist" propaganda has taken on a broad meaning in Romania, referring to a wide range of commentary, including important minority issues.

In addition, journalists interviewing persons disseminating discriminatory statements might also be liable to prosecution due to the broadness of the text. In a case involving a television journalist sentenced for aiding and abetting the dissemination of racist statements, the European Court of Human Rights held that "the punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest".[24]

Recommendations on Other Restrictions

- ARTICLE 19 recommends that Article 166.1 of the Penal Code prohibiting the promotion of a totalitarian State be abolished;
- if, taking account of Romania's recent history, it is decided to retain Article 166.1, it should be amended so as to apply only where the State has shown actual harm or a clear and present danger of harm;
- ARTICLE 19 recommends that "incitement to hatred" be interpreted to require proof of the existence either of actual harm or of a clear and present danger thereof.

5 THE MEDIA

This section charts the hectic growth of the independent media following the fall of the Ceau_escu regime. It also focuses on the 1992 Law on Radio and Television Broadcasting and the 1994 Public Television and Radio Law and examines the regulatory bodies, including the National Audio-Visual Council, set up under that law. Other issues examined include editorial independence, a code of ethics, hate speech and the protection of sources.

5.1 The Birth of an Independent Media

Following the release of Ceau_escu's stranglehold in 1989, the country's media burst onto the air and into print. Numerous radio and TV stations sprang into operation to compete with state radio and television which had previously been the country's sole broadcasters. In the early days the private broadcast media was unregulated and operated in a rather chaotic and amateurish

[24] Note 7 above.

fashion. Still, along with the many new press titles, it represented a reaching out for the long-suppressed freedoms of expression, speech and opinion.

Between 1990 and 1992, private broadcasting being a complete novelty was not subject to any specific laws or regulations. In early 1992, Parliament adopted Law No. 48 on Radio and Television Broadcasting which came into force in May of the same year. For the first time both private and public broadcasters came under regulatory legislation. The Law also created the National Audio-Visual Council whose primary task is the issuing of licences. With all of its inherent limitations, the new law on broadcasting was nonetheless an important step in setting up the legal framework for a growing independent broadcasting media.

Further reforms were made to the public broadcast sector in 1994 when Parliament adopted Law No. 41 on the reorganization and the functioning of state radio and television (hereafter "Public Television and Radio Law.") The law changed some specific provisions of Law No. 48 applying to the two public broadcasting services.

By September 1996, there were 53 private television stations and 110 radio stations broadcasting. Today many households are wired for cable services giving access to private and foreign broadcasts.

On the news-stands there are several hundred daily and weekly newspapers representing a spectrum of views. There are also seven news agencies, one of which is state-owned. But despite this growth, the Romanian Television Company and Romanian Radio Company remain the only broadcasters capable of reaching out to the large rural audience.

5.2 The Broadcast Media

5.2.1 The National Audio-Visual Council

Sections IV and V of the Law on Radio and Television Broadcasting set up the National Audio-Visual Council. The main source of inspiration for Romanian legislators was the French system, with its Conseil Supérieur de l'Audiovisuel (Higher Audio-visual Council), although the Romanian body was bestowed with fewer powers than its French counterpart.

The Romanian Council is defined as an "autonomous administrative authority." (Article 11). There are few legal or constitutional provisions concerning the role and the powers of such a body. The 1991 Constitution states simply that "other specialized agencies may be organized in subordination to the Government or Ministries, or as autonomous administrative authorities" (Article 115(2)). Thus, the Constitution grants an extremely wide latitude to the legislature in creating such "authorities" and in establishing their respective role, specific functions, structure and powers.

Although part of the central administration, the Council is not subordinated to the government. According to Article 34 of the Law, the Council "shall exercise its attributions under the control of the Parliament."

a) Structure

Article 25(1) of the Law on Radio and Television Broadcasting provides for appointments to the 11-member Council to be made as follows:

a) the President of Romania – two members;
b) the Parliament of Romania – the Senate and the Chamber of Deputies – three

members each;

c) the government of Romania – three specialist members, of which one must be in telecommunications, one in radio broadcasting and one in television.

The duration of the term for Council members is four years, with the exception of five founding members who were appointed for two years each. Council members are eligible for unlimited term renewals. The members elect a President from among themselves by secret ballot for a single term.

The most recent appointments to the Council were made in July 1996, barely four months before the November general elections, which dramatically changed the country's political picture. The newly elected Parliament and President now face the delicate problem of depoliticizing the Council, with rather limited legal procedures to guide them.

It appears that the intention of the legislature was to establish a balance of power, dividing the number of seats among the government, the President and the Parliament. However, for the last four years, none of the candidates proposed by the parliamentary opposition have been nominated. Since the law lacks specific rules for the parliamentary proceedings or for the division of seats between the majority and the opposition, the Standing Bureaus of both Chambers decided to use a standard voting procedure, i.e., a simple majority of fifty per cent plus one. As a result, the Parliament's ruling majority has been able to consistently vote in its candidates, and the presidential and governmental nominations are not subject to parliamentary approval. So, prior to the 1996 elections, persons supported by the ruling majority have occupied all 11 seats.

There are two legal provisions intended to prevent political interference in the nomination process. First, Article 25(2) states that "the members of the Council shall be warrantor of the public interest in the audio-visual domain of radio and television, and they shall not represent the authority by which they had been appointed." Second, Article 28(2) reads that "the members of the Council and of the technical personnel cannot be members of political parties or of other political formations." There are, however, no sanctions should these provisions be infringed. Moreover, the Council's members may be dismissed at the sole discretion of the appointing authority if there is a violation of the Law on Radio and Television Broadcasting or in case of criminal conduct. Such an arrangement compromises the independence of Council members from those who appointed them because the appointing authority alone determines whether there has been an infringement of the law.

The law does not provide for any procedure allowing individuals or non-governmental organizations (NGOs) to lodge complaints with the Council. The Council decisions are subject to the ordinary judicial review of administrative acts, but only if the plaintiff can show personal and direct harm. The administrative court does not have the power to annul the decision, but only to rule on its implementation with respect to the plaintiff.

According to Article 33, the Council must submit to the Parliament an annual report on its activity. The 1996 report has been completed but not put in front of the committees for culture, arts and mass media of both chambers. Meanwhile, the 1994 and 1995 reports have been considered by the committees, but not debated in plenary. Furthermore, there is no legal requirement to make annual reports public, even though the Council's expenses are entirely paid out of the state budget.

Amending the Law on Radio and Television Broadcasting is one of the stated priorities of the government's new legislative agenda; and the establishing of procedures for nominating the Council's members is part of the intended changes.

Recommendations on the Council's Structure

•To ensure the political independence of the Council, the law should require both that membership be representative of society as a whole and that appointees are individuals of acknowledged integrity and independence, have the capacity to ensure that decision-making reflects the public interest, and are generally held in high esteem;

•broadcasters should be able to appoint one member to the Council;

•only the Parliament (and neither the government nor the President) should be able to dismiss Council members; the current broad grounds for dismissal should be significantly narrowed and fair procedures, including a right of appeal to the courts, should be established;

•an administrative or judicial procedure should be established with the following powers: to review appointments to the Council; to entertain complaints from the public; to impose sanctions on the Council; and to hear appeals from Council decisions;

•all Council reports, relating both to activities and finances, should be made public.

b) Powers

The legal provisions of the Council's powers are widely considered by broadcasting professionals to lack precision and therefore open the door to misinterpretation and abuse. The powers granted to the Council are similar to those of any ministry or governmental agency. But, unlike a government agency, the Council is an autonomous body, subject only to parliamentary control, which is exercised through questions and motions in plenary sessions or hearings in the permanent committees. There are no clear and specific responsibilities provided for the members of the Council nor for the body itself.

The Council's role in guaranteeing freedom of expression and plurality of opinion is not clearly stated. There are no specific procedures established in the law to ensure that these principles are observed; nor are there sanctions should they be violated.

According to the law, the Council has the following powers:

- to issue broadcasting licences, according to the rules and procedures described in the law;
- to grant decisions of authorization, according to the provisions of the law;

- to supervise observance of the obligations incumbent upon holders of broadcast licences;
- to apply administrative sanctions and to notify the prosecutorial bodies in cases of criminal offences described by law;
- to establish compulsory norms in the fields of transmission of information on calamities and cases of state necessity, advertising, programming, granting the right of reply, sponsorship, settling disputes, "as well as norms referring to other aspects connected with the application of the present law." (Article 32(1)).

The broadness of this last provision gives grounds for concern. The Council has consistently interpreted this as granting it the power to issue compulsory rules on any aspect related to broadcasting. In practice, this effectively allows the Council itself to make law.

An example is provided in Decision No. 3, issued in January 1995, on ownership. Adding to the anti-monopoly regulations established by law, the Council declared in Decision No. 3/1995 that: if 49% of a company's shares are sold to outsiders, the new shareholders must let the Council know "their attitude toward the company's obligations."

After heated discussions during a session of a parliamentary committee called to confront the Council on this controversial issue, the Council agreed to reconsider some of the provisions. In July 1995, it issued another decision (No. 100/1995) instituting even more restrictive rules: if 49% of the shares of a company are sold to outsiders, the company loses its broadcasting licence. Both decisions, whether reasonable or not, overstepped the regulating power of the Council.

Recommendations on the Powers of the Council

- The Council's powers must be clearly and narrowly defined; the general power of the Council to issue compulsory rules on "other aspects connected with the application of the present law" (Article 32(1)) should be replaced by specific and narrow powers which do not undermine freedom of expression; in particular, Council powers over broadcasters should be restricted to technical matters and not extend to content regulation;

- clauses noting the Council's role in guaranteeing freedom of expression and promoting pluralism, and its duty to be impartial and non-discriminatory, should be added to the Broadcasting Law.

5.3 Law and the Public Broadcasting System

The Public Television and Radio Law, No. 41 of 1994, was issued to give effect to the Constitutional provisions regarding public broadcasting. Article 31(5) of the Constitution declares: "public radio and television services shall be autonomous. They must guarantee for any important social and political group the exercise of the right to be on the air. The organization of these services and the parliamentary control over their activity shall be regulated by an organic law ... ."

Law No. 41 only changed specific provisions of the 1992 Law on Radio and Television Broadcasting regarding the two public broadcasting services — it did not abrogate the 1992 Law.

The radio and television companies are organized, according to the 1994 law, as "autonomous public services of national interest, with editorial independence." (Article 1).

But the "national interest" to which the law refers in Article 1 appears superfluous since, ordinarily, there should not be any distinction between the "national interest" and the "public interest." Some media analysts say that in the Iliescu period the two public broadcast services acted as promoters of an image of Romania that is consistent with the interests of the President and the government, and which is claimed by them to represent the "national interest." This view is consistent with the prevailing interpretation of Article 5, which reads: "Programmes broadcast by the Public Radio and Television Companies shall not lead, by any reason, to the defamation of the country or of the nation".

The notion of public service is also rather vague within the existing legal framework. The law states some principles regarding the duties of the two public services.

Article 3(1) declares that "the Radio and Television Public Companies have the duty to ensure pluralism, free expression of ideas and opinions, free dissemination of information, and the correct information of the public."

Article 4 states that they "are under the obligation to offer an objective and impartial image on the economic, social and political issues of the domestic and international life, and to ensure the correct informing of citizens about public affairs . ..."

The two public broadcasting services must submit to Parliament, every year or whenever asked, reports on the previous year's activity as well as forecasts for the current year. A budget for the public services must also be presented to Parliament and published. The reports are discussed by the committees for culture, arts and mass media and the committees for budget and finance of both Chambers, which then submit their joint report to Parliament.

However, there are no legal provisions establishing whether all these documents must be approved by a vote of Parliament or whether a negative report from the permanent committees will bear any consequences for the management of the public broadcasting services.

Recommendations on the Public Broadcasting System

- The reference in the governing legislation to "national interest" should be replaced by the notion of "public interest".

5.3.1 Editorial Independence

Private Broadcasters

Both the Constitution and the law grant autonomy to broadcasters. According to Article 1(3) of the Law on Radio and Television Broadcasting, "censorship of any kind is prohibited." Further, Article 1(4) states that "the selection, in good faith, of audio-visual information by persons bearing the responsibility for its contents shall not constitute grounds for censorship, and it may be exercised under the conditions of the present law."

Notwithstanding the above, the Council has adopted guidelines that permit it to interfere with editorial independence.[25] Relying upon legal provisions granting the power to issue norms on any and all aspects relating to broadcasting, the Council has issued compulsory rules relating to the issuing of licences, and the criteria for selection.

One of the compulsory requirements for a licence application is the submission of a "schedule of programmes" in advance to the Council. Once the broadcasting licence is issued (referring specifically to this "schedule"), the licensee may not diverge from the approved schedule. Although the licensee is free to change the content of the programmes, they may not alter the format of the programmes, the schedule, or the basic editorial conception. Any changes in the programming, transmission hours or schedule is subject to the Council's prior approval.

Recently, the public television service tried to snub these rules by changing its schedule of programmes without asking for the prior approval of the Council. The Council rebuked the Romanian Television Company and ordered them stay on the approved schedule.

Public Broadcasters

Editorial independence for public broadcasters is guaranteed by Article 1 of the Public Television and Radio Law as well as Articles 8(1) and 8(2), which read:

The activity of the public services is autonomous and editorially independent;

The autonomy and the editorial independence of the Public Radio and Television Services are guaranteed by law, and their programmes are protected against any influence or pressure from the public authorities, as well as against the influence of any political party. ...

In addition, Article 14 states that, "Within the news, the information shall be objectively disseminated and honestly commented upon, without any influence on behalf of the public authorities or of any private or public legal entity." Yet it is commonly accepted that public television has been a powerful tool of the ruling party.

Part of the problem is that editorial independence depends on financial independence. The two public services are permanently and heavily subsidized by the State budget, on the basis of governmental proposals and parliamentary approval. The companies benefit from exemptions of customs duties for imported equipment, which are granted by the government on a case-by-case basis.

According to unofficial figures, the current public television service's debts to the government have risen to 20 billion lei (more than US$2 million, or half of the total subsidy

[25] The editorial independence of public broadcasting services is further discussed under Law No. 41/1994 on public television and radio.

granted to the service in 1996). The television service has repeatedly asked the government to write off its debts, demonstrating its financial dependence on the executive.

Recommendations on Editorial Independence

- The editorial and operational independence of all broadcasting services should be clearly guaranteed by law;
- the public broadcasting system should be guaranteed adequate funding, free of conditions, to enable it to function independently;
- the public broadcasting services should be subject to obligations of impartiality and balance and the "public interest" principle should be applied to decision-making.

5.3.2 Electoral Campaigns

According to Article 32(2), the Council "establishes the duration and the conditions of presentation of programmes intended for electoral campaigning." The Council issued decisions prior to elections in both 1992 and in 1996 under this provision.

In January 1996, the Council issued Decision No. 2/1996 on the duration and conditions of presentation of programmes on the local elections. Some of the most disputed provisions were:

- During programmes, the candidates may express their opinions but may not ... use any flag, or knowingly use in the background the national flag or the national anthem, monuments or buildings representative of the national historical heritage ...

- The audio or video recordings used during the electoral campaign may not exceed 30 per cent of the duration of each `long' programme [durations of long, medium and short programmes were established by the same decision].

- Cable operators are not allowed to produce or transmit electoral programmes except the programmes retransmitted according to an `A' licence [the `A' licence is for simultaneous retransmission only].

In order to understand the significance of these provisions, it should be noted:

- Almost all political parties use the national flag or anthem, in one way or another, within their official symbols.

- The headquarters of several political parties are located in buildings of historical value.

- The 30 per cent limitation on "long" programmes results in a requirement that 70 per cent of such programmes be live, creating immense logistical and technical difficulties for covering local campaigns on a national basis.

- Many cable operators hold `B' and `C' licences, rather than only the `A' licence, resulting in a content-based restriction on the broadcasts of many cable operators.

Once published, the Decision raised protests from the opposition parties, private broadcasters and cable operators. The Committee for Culture, Arts and Mass Media of the Chamber of Deputies scheduled a meeting with the Council, which adhered to its position, invoking a similar decision of the French Higher Audio-visual Council. Cable operators have appealed to the administrative court and proceedings are still pending.

Since the Council refused to change these provisions (with the exception of the first one quoted, for which it invoked a "typing error"), a group of deputies proposed amendments to the law on local elections. These amendments, aimed to partially eliminate the restrictions imposed by the Council, were adopted by Law No. 25/1996. Under this law, the Council should have rescinded the above-mentioned Decision in relation to the local election campaign. Nevertheless, some of its provisions were reiterated by the Council in its Decision No. 88 of September 1996 which regulated the general election campaign of November 1996.

Recommendations on Election Coverage

- Council Decision No. 2/1996 should be repealed;

- the Council should not interfere with the content of party political broadcasts; laws of general application provide sufficient protection to the public against any possible abuse of freedom of expression by political parties;

- Council regulations applicable to broadcasters during elections should be restricted to ensuring their accuracy, balance, impartiality and fair access;

- all political parties should be granted access to the broadcast media on a fair and non-discriminatory basis.

5.3.3 Criminal Provisions of the Law on Radio and Television Broadcasting

The 1992 Law on Radio and Television Broadcasting enshrines in law the severe restrictions on freedom of expression provided by Articles 30(6) and 30(7) of the 1991 Romanian Constitution.

In accordance with Article 39 of the Law, any programming and broadcasting which:

- is prejudicial to the dignity, honour, private life and one's public image is punishable by up to five years' imprisonment;
- defames the country and the nation, instigates to wars of aggression, national, racial, class or religious hatred, or incites to discrimination, territorial separatism or public violence is punishable by up to seven years' imprisonment;
- disseminates secret information or other information prejudicial to the national security is punishable by up to ten years' imprisonment;
- contains obscene manifestations, contrary to morals, is punishable by up to two years' imprisonment or a fine.

Criminal prosecutions are initiated by a notification from the National Audio-Visual Council, which is entitled and obliged by law to suspend the offending party's broadcasting authorization until the final settlement of the case. If the Council requires, the prosecutor may order the sequestering of technical equipment during the investigation. Since the adoption of the law, no one has been prosecuted under these criminal provisions.

These provisions, intended to increase the penalties for crimes prohibited elsewhere when they are perpetrated through broadcasting means, bring an unjustified burden onto radio and television journalists, who are more severely punished than their counterparts in the print media. There are no grounds to justify such a difference of treatment nor the existence of these provisions, which are otherwise redundant with existence of the Penal Code.

Recommendation on Broadcasters' Criminal Liability

- ARTICLE 19 strongly recommends that Article 39 of the Law on Radio and Television Broadcasting be abrogated in its entirety.

5.3.4 Transparency

According to Article 32(3) of the Law on Radio and Television Broadcasting, "debates

concerning the assignment of broadcasting licences shall be public, and the decisions adopted, together with their motivation, shall be published in the *Monitorul Oficial* of Romania."[26] In addition, Article 32(4) reads: "the frequencies available for public radio and television broadcasts shall also be published."

But, in practice, the proceedings of the Council are less than transparent. This is because the Council:

- does not publicize the dates of its meetings;
- has ruled that public access to its deliberations is limited to media representatives and special guests;
- decisions on accepting or rejecting a licence application are published only after very long delays;
- does not publish the grounds for its decision, even though the law explicitly states that arguments supporting the determination are part of the decision and subject to publication.

Recommendation on Transparency

- The Council should adopt clear procedures providing for timely publication of its decisions in written form and ensuring public notification of and free access to its meetings.

5.4 The Print Media

5.4.1 Registration Requirements

There are no specific registration requirements for the print media since no press law exists. Print media companies are registered according to the general requirements of commercial law. The procedures are slightly complicated and sometimes long. However, there has been nothing in law or practice to prevent newspapers and other sections of the print media from registering and operating. Fees for registration are set at reasonable rates. Nor are there special taxes required in the registration process, which would constitute a limitation on the circulation of information or discrimination against certain publications.

Registration requirements are allowed under the European Convention but are present only in a few Western European countries, such as Spain and the United Kingdom. However, there is no discretion to refuse a registration, which is considered a source of information about the ownership of a newspaper rather than a means of control or censorship.

[26] The Official Gazette of Romania, a government publication.

In countries such as Austria, Germany and Norway, there are no requirements to register. The Netherlands' Supreme Court has ruled that all forms of administrative licensing requirements affecting the dissemination of print matter are unconstitutional. There are also no compulsory licensing requirements for journalists in Romania, in accordance with international standards. The Inter-American Court of Human Rights has stated in this respect that compulsory licensing for journalists constitutes prior censorship and violates freedom of expression and information.

5.4.2 Economic Obstacles

Two issues may be considered as having an adverse economic impact on the print media. Firstly, there is only one factory producing newsprint, and it is state-owned. There have been some shortages of newsprint, resulting from modernization activities which temporarily shut down the plant for short periods of time. These shortages did not cause the cessation of any publications, but they did raise costs since newspapers were forced to rely on more expensive imported newsprint. In addition, as the only domestic producer of newsprint, the state can use its monopoly power to set the price. Secondly, the state newspaper distributor, Rodipet, remains the only large firm capable of delivering newspapers and magazines on a national basis, including to smaller cities and towns and rural areas. Some publications undertook their own distribution using private means, but have difficulty covering the rural areas where a large number of Romanians live. Reportedly, Rodipet has not ensured an equal distribution of independent newspapers, resulting in an unequal coverage of rural areas.

Recommendations on the Removal of Economic Obstacles

- The Romanian government should take positive steps to fulfil its obligation to create an environment in which media freedom, diversity and pluralism are facilitated;

- where state monopoly or market-domination exists, as in the areas of newsprint and distribution, the government must ensure that goods and services are provided free of discrimination; in particular, the pro-government or public media should not be granted special benefits.

5.4.3 Need for a Press Law?

For the last five years, journalists, politicians and lawyers have discussed the question of adopting a press law in Romania. Several legislative initiatives have been publicly discussed.

Journalists from the independent media and the former democratic opposition in Parliament have opposed the idea of adopting a press law, expressing concerns mainly about the risk that such a law would restrain the press. These are legitimate concerns considering the

extreme restrictions on the freedom of expression provided in the 1991 Constitution.

A law aimed at providing guarantees for press freedom has also been suggested. However, the advantages of such a course of action were outweighed by the fear that restrictions would prevail because of the parliamentary majority at that time. At present, a press law does not fall within the stated priorities of the new government.

Recommendations on a Press Law

- ARTICLE 19 encourages the government to maintain the *status quo* by not enacting a press law; the guarantees of freedom of expression under international law and in the Constitution already protect the press from unwarranted interferences;

- if, however, a press law is enacted then it should explicitly state that its overriding objective is to promote freedom of expression; the law should not require compulsory licensing for journalists, discrimination should be prohibited, any newspaper registration requirement should be a formality and the law should contain no content restrictions.

5.5 General Media Issues

5.5.1 Right of Reply

The National Audio-Visual Council has jurisdiction over the right of reply in both public and private sector radio and television. But difficulties exist in applying this right. This largely stems from the wording of the different laws which apply.

Under the 1994 Law No. 41 on Public Television and Radio the right of reply may be granted to those whose allegations have been proved false or inaccurate, while the 1992 Law No. 48 on Radio and Television Broadcasting says that any person who feels harmed may ask for a reply. Both laws carry equal weight, however it is Law No. 41, because it is the most recent, that is generally applied. Many observers say this limits the right of reply in both private and public broadcasting, and that the legal provisions of both laws need to be urgently harmonized.

One recent case illustrates the need for such legislation. A politician claimed a right of reply under the 1992 Law following allegations made against him in a programme on state

television. But the television service refused under the 1994 Law. Then the Council approached the Committee for Culture, Arts and Mass Media for advice. In response the Committee stated that this was the work of the Council.

A correction may be demanded within seven days and the right of reply may be exercized within the next six days (after the correction was refused). Yet the law does not provide any time limit for the radio and television services to give a correction or right of reply. In the case of a complaint being refused a correction or reply, they can then take their case to the administrative courts under the procedure for judicial review of administrative acts.

According to the provisions of Article 32(1), the Council has the power to issue compulsory rules regarding sponsorship, publicity and the right of reply. Should these norms be violated sanctions are provided in Articles 35-37 of the law (public reproach, fine, temporary suspension of the authorization, shortening of the duration of the authorization or licence, withdrawal of the authorization or licence).

There is no comparable right of reply and correction under Romanian law regarding the print media. A practice has nevertheless developed, but the discretion in publishing a correction or a reply remains with the newspaper, and there is no procedure to appeal.

In most European countries, such as Germany, Austria and Norway, the rights of reply and correction are legally guaranteed and procedural rules are provided for their enforcement, including means of appeal. In contrast, the US Supreme Court has ruled that laws which grant a right of reply violate the First Amendment of the US Constitution. However, editors are free to grant replies at their own discretion.

Recommendations on the Right of Reply

- Both public and private broadcast media should be governed by the same set of provisions regulating proceedings, time limits and responsibilities regarding the right of reply and correction; Council decisions should be subject to judicial review. Specifically, Laws No. 41 and No. 48 should be harmonized, by abrogating the provisions in Law No. 41;

- no legally binding right of correction or reply should apply to the print media; instead, this matter should be governed by a voluntary code of ethics.

5.5.2 Protection of Sources

Confidentiality of sources is guaranteed by the Public Television and Radio Law in its Article 14(12-14). The only beneficiaries of these provisions are the journalists employed on a permanent basis with public radio and television services. Freelances and part-timers are

excluded. Moreover, the protection of sources is limited.

Article 14(13) declares that, under exceptional circumstances and in the public interest, the sources must be revealed following a court injunction or a prosecutor's order. It follows that in any criminal or civilian case, any prosecutor may issue such an order. At the moment, the judiciary tend to view the "public interest" as requiring judicial bodies to find the truth regardless of the circumstances. This means, unfortunately, that the "public interest" is interpreted in practice to dictate that sources are revealed. These legal provisions thus provide little security to journalists and their sources.

All other journalists may be ordered by criminal investigative bodies or civil courts to disclose their sources. In practice, journalists have invoked the right to protect sources when they were ordered by investigative bodies to reveal them. In such cases the responsible authorities, for example the judge, has generally refrained from initiating perjury or contempt proceedings. Under Romanian law, perjury applies to any witness who refuses to reveal all the information he or she knows in a specific case, whether civil or criminal. On the other hand, journalists have been forced to reveal sources in defamation cases, where they have invoked the "proof of truth" defence. In this case sources are revealed not at the behest of the court but by the journalist, to avoid a criminal conviction.

Yet protection of journalistic sources is one of the basic conditions for media freedom. This right has been repeatedly affirmed in several international documents on journalistic freedom, such as the 1994 Resolution on the Confidentiality of Journalists' Sources, adopted by the European Parliament, and the 1994 Resolution on Journalistic Freedoms and Human Rights, adopted at the 4th European Ministerial Conference on Mass Media Policy.

European Practice

Prevailing practice in European countries is that journalists rarely divulge information that could compromise their sources, courts rarely compel disclosure, and even more rarely do courts enforce a disclosure order through imprisonment.

In the case of *Goodwin v. United Kingdom*, the European Court of Human Rights found in 1996 that an order requiring the applicant to reveal his source and the fine imposed upon him for having refused to do so violated Article 10 of the European Convention on Human Rights. In ruling on this case, the Court stated: "Protection of journalistic sources is one of the basic conditions for press freedom ... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected."

In a number of European states the mass media is afforded greater protection of freedom of expression than are private individuals because they are seen to play an instrumental, and crucial, role in safeguarding the right of the public to information and ideas of public interest.

Austria, France and Germany afford the strongest legal protections to the confidentiality of sources (and other information communicated in confidence to journalists). This protection is premised on the assessment that the public interest is served where people feel confident to disclose matters of public interest to the press, even when that information includes evidence of their own wrongdoing. Identifying and possibly convicting a particular wrongdoer is of secondary importance.

Austria and France recently enacted laws to entitle journalists to refuse to testify or answer questions concerning the source of confidential information gathered in the course of their journalistic activities. These laws codified a right which previously had been widely respected in practice. The press laws of most states in Germany provide similar protection.

German federal law entitles journalists (along with other professionals) to protect information confided to them because of their profession. Similar provisions apply in Norway and the Netherlands.

Recommendations on Protection of Sources

- ARTICLE 19 strongly recommends that uniform legislation be adopted to guarantee the protection of all journalistic sources; there is no legitimate reason to distinguish between full-time and part-time, public and private, or print and broadcast journalists in this respect;

- searches of media enterprises should be permitted only in the context of a criminal investigation of the enterprise itself and should be accompanied by all of the protections that normally apply to searches;

- any exceptions to the protection of sources should be narrowly drawn, strictly construed and subject to a general requirement of public interest; relevant criteria in interpreting public interest in confidentiality of sources should be established by law and take into account the important role of the media in providing information and in acting as a watchdog over government.

5.5.3 Code of Ethics

The Public Television and Radio Law requires public radio and television services to adopt statutes, including a code of ethics. In its session of 12 September, 1994, the Chamber of Deputies adopted Decision No. 25 on the Resolutions of the Parliamentary Assembly of the Council of Europe on journalistic ethics (Resolutions No. 1003/1993 and No. 1215/1993). The Chamber of Deputies recommended that all journalists and media companies observe and apply the ethical principles stated in the resolutions. But this was not backed by the Senate and the Decision does not create any legal obligation for journalists.

Recommendation on a Code of Ethics

- ARTICLE 19 recommends the adoption of a code of ethics, modelled on the

Council of Europe Code of Ethics, to govern the activities of public broadcasters.

6 ACCESS TO INFORMATION

This final section looks at current laws covering classified information and shows how catch-all phrases such as "state secret" block information and government accountability. ARTICLE 19 also warns that a new bill on classified information is severely flawed; it recommends that only information which poses a real risk of endangering national security should be classified. The section also looks at access to court hearings and parliamentary information.

6.1 The Right to Information

Freedom of information is an essential element of the right to freedom of expression. The 1946 Resolution of the United Nations states: "Freedom of information is a fundamental right and is the touchstone of all freedoms to which the United Nations is consecrated." Article 19 of the ICCPR guarantees the right "to seek, receive and impart information and ideas ... regardless of frontiers. ..." The European Court of Human Rights has further clarified that the right to receive information "basically prohibits a government from restricting a person from receiving information that others may wish or be willing to impart to him."[27]

In Article 31 of Romania's 1991 Constitution, the government's duty to provide access to information is affirmed in terms that are more precise and stronger than the relevant international guarantees. Article 31(1) states: "A person's right to access to any information of public interest cannot be restricted." Article 31(2) states: "The public authorities, according to their competence, shall be bound to provide for correct information of the citizens in public affairs and matters of personal interest."

As well as these provisions, Article 31 also provides that both the state-owned and private media must supply correct information to the public and that public radio and television must be autonomous and provide access to "important social and political groups." Article 31(3) indicates exceptions to the right of information, stating that it shall not be "prejudicial to the protection of the young or to national security."

But to date no legal procedure has been established to give effect to the constitutional guarantees of access to information. Draft legislation was proposed by the Romanian Helsinki Committee (APADOR-CH) and introduced in Parliament in 1995. However, as of early 1997, the proposed legislation had not been discussed by the legislators.

In principle, the procedure for judicial review of administrative acts created by Law No. 20/1990 provides a remedy when access to information has been denied. But under this law there are exceptions which effectively exclude jurisdiction over many instances in which access to information is denied. For example, initiating an action requires presentation of evidence

[27] *Leander v. Sweden*.

about an administrative act. And if a request for information has simply gone unanswered by administrative authorities, grounds for jurisdiction may be lacking.

Article 2 of Law No. 29/1990 prohibits legal action against:

acts concerning the relationship between Parliament and the President ... and the government;

[...] administrative acts concerning the internal and external security of the State, as well as those concerning the interpretation and enforcement of international acts Romania is a party to;

emergency measures taken by bodies of the Executive to avoid or eliminate the effects of events comprising a public danger ... ; [...] acts of administration performed by the State in its capacity as a legal person and for the management of its patrimony; administrative acts adopted in the exercise of hierarchical control prerogatives.

The current lack of regulation on access to information is inconsistent with the 1982 Declaration of the Committee of Ministers of the Council of Europe on open information in the public sector, including access to information. Equally, the Romanian government has not complied with the 1981 Recommendation of the Committee of Ministers of the Council of Europe on the right of access to information held by the public authorities. The Council of Europe Recommendation:

affirms everyone's right to obtain information held by the public authorities;

provides for the State's duty to adopt effective and appropriate means to ensure access to information on the basis of equality, within a reasonable time and regardless of a specific interest in the matter;

subjects the limitations on access to information to the three-part test (see p. 8)(restrictions must be provided by law or practice, be necessary in a democratic society and aimed to protect legitimate public interests having due regard to the specific interest of the individual in information concerning him personally); and

establishes the duty of reasoning the refusal and subjects any refusal of information to review on request.

6.2 Classified Information

Current law on access to classified information includes the Penal Code (see p. 14 and Section 4.3.2). Criminal liability relating to state secrets is also the subject of a bill entitled, Law on the Protection of State Secrets, drafted in 1993 by a group of senators belonging to the Social Democracy Party of Romania (the former ruling party). The bill has been passed by the Senate and is now with the lower chamber.

The bill is alarmingly similar to the 1971 Law on the Protection of State Secrets which contains excessively restrictive provisions, though it has not been applied since the post-1990

political changes. The proposed bill, after listing the data, information and documents to be considered "state secrets", provides that the executive may establish "other categories of state secrets" without providing any limiting criteria, in effect granting the discretion to invent new categories of classified information at any time.

The bill would impose drastic limitations on access to information and restore to the Romanian Intelligence Service the responsibility for the circulation of information. The proposed definition of "state secret" is extremely broad, covering "information, data, documents, objects or activities whose disclosure, transmission, theft, destruction, alteration or, as the case may be, loss, can jeopardize the national security or the defence of the country or can damage Romania's political, economic, technical-scientific or other interests." In addition, a catch-all category, "other interests" is provided for, rendering the definition so vague that it inevitably would be subject to arbitrary interpretation and enforcement.

Since the laws regulating the Romanian Intelligence Service define its function as counteracting activities which constitute "threats to national security," it is inappropriate to bestow upon the same body the power to coordinate and control access to information about a much wider range of activities which can "damage Romania's political, economic, technical-scientific or other interests."

The bill also criminalizes the dissemination of "work secrets," providing no definition other than that they consist of data which, though not a state secret, must not be made public. The bill makes no reference to the "public interest" as a basis for access to information held by state authorities. Nor does it allow for any judicial review of the denial of information by intelligence agencies or the executive.

Archive Information

Law No. 14/1992 on the Romanian Intelligence Service provides that all documents, information and data belonging to the Romanian Intelligence Service shall not be made public for 40 years starting from the date they enter the archives. The law makes no distinctions regarding the content or subject matter of the information. The law also provides that information from the archives of the notorious *Securitate*, the communist era predecessor of the Romanian Intelligence Service, must not be made public prior to 40 years from 1992.

In April 1996, the Romanian Parliament rapidly passed Law No. 16/1996 on National Archives without public debate. The law provides still more sweeping provisions for keeping archive material secret. In "Annex 6," the law provides that, without exception, researchers are not entitled to have access to state-controlled medical documents or to documents related to national security or national integrity for 100 years from when they enter the archives. The same law prohibits access to documents related to crime for 90 years and to documents related to foreign policy for 50 years. There are no exceptions provided by the law, which effectively allows government officials to ban access to documents in the above-named, broad categories for their lifetime simply by sending them to the archives.

The current Romanian laws on "state secrets" and archival information violate international standards on access to information. In democratic countries, although restrictions on freedom of expression and information are allowed in the interest of protecting national security, such an interest may be invoked only when the threat is to a state's territorial or national integrity and not merely to a given government.

Classification and Expiry: European Examples

The example of the Netherlands illustrates an appropriate practice. The country's Penal Code penalizes the disclosure of official secrets (i.e., data whose secrecy is ordered in the interest of

the State and its allies), and the Minister of Home Affairs has issued internal regulations that provide a strict procedure for determining what may be considered a state secret. The regulations limit which officials may make such determinations, and each ministry must draw up lists of data which are secret, and declare an expiry date for the classification.

In any given case, the Dutch courts may examine the classification, and decide whether an official secret is truly at stake. In other words, the fact that a document is labelled "secret" is not in itself sufficient to determine that it is an official secret as a matter of law. The Netherlands Supreme Court has also ruled that a publication may not be punished or prevented from being published simply on the grounds that it *might* endanger the nation's safety. Rather, the government must establish concretely that, based on experience, it is reasonable to assume that, under the given circumstances, the feared consequences *would* occur.[i]

In Germany, "state secrets" are limited by the Penal Code to those data which must be kept secret from foreign powers to avert serious damage to external security. Administrative regulations may classify certain data, but the courts have the power to decide whether the information was legitimately classified. Courts may also rule on the refusal of public authorities to disclose information declared as a "state secret." The German law also provides a defence of good faith in circumstances where the disclosure of secret information was necessary to stop unlawful activity.

In addition, the German Constitutional Court has affirmed that journalists should not be prosecuted for publishing non-secret information, even if it is pieced together so as to present an overall picture which might threaten national security. In one case, *Der Spiegel* had published an article challenging the effectiveness of German and NATO military defence forces. The Court argued that an essential function of the press is to collect pieces of information, to arrange them and to draw conclusions.[28]

Other Principles

ARTICLE 19's 1995 *Johannesburg Principles* have established general principles regarding acceptable limits on access to information on the basis of national security interests.

Principle 12 provides that a "state may not categorically deny access to all information related to national security, but must designate in law only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest."

Principle 15 prohibits punishment "on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure."

Recommendations on Classified Information

- ARTICLE 19 strongly recommends that the law on national security, the law on the Romanian Intelligence Service, and Article 169 of the Penal Code

[28] 20 FCC 162 (1966) (*Der Spiegel* Case).

should be amended to reflect the following principles:

i) the government should only be permitted to classify specific and narrow categories of information which need to be withheld for the protection of legitimate national security interests; broad and ambiguous expressions such as "state secret" and "other documents and information" should be avoided;

... /...

ii) not all information "relating to national security" may be classified; classification should be restricted to information whose disclosure poses a real risk of endangering national security;

iii) the government should be required to maintain lists of classified documents; these lists should normally be accessible to the public, only where a legitimate security interest in the list itself is established may the list be classified;

iv) an administrative structure should be established for receiving and deciding upon requests for access to information; this body should be independent of government and have the power to order any government body to release information; all procedures should be affordable, accessible, simple and quick;

v) the "public interest" in the information should be a primary consideration in all decisions on requests for information;

vi) authorities should be required to reply in writing to requests for information within a certain time period, and in cases where information is denied, specify their reasons;

vii) broad judicial review should be available for all decisions regarding access to information;

viii) the disclosure of information should be punished only in the limited circumstances provided for in the recommendations under Section 4.3.2; in particular, liability should only ensue in the context of actual or likely harm to legitimate state interests.

6.3 Access to Parliamentary Documents

Article 65 of the 1991 Constitution provides that parliamentary sessions are made public. Both chambers of the Parliament have issued rules on public access to its sessions. The media and NGOs have no difficulty in obtaining accreditation and attending debates, but as the Romanian Helsinki Committee reported, obtaining copies of bills and other documents has proved difficult.

Recommendation on Parliamentary Information

•ARTICLE 19 recommends that both parliamentary chambers adopt rules and implement procedures that ensure simple, rapid and complete access to legislative information. These measures should include the following:

i) gaining access to parliamentary sessions and documents should be a mere formality; procedures should be simple, free and immediate;

ii) the weekly schedules of Parliament and its Committees should be widely disseminated, including through the press;

iii) an information service available to the general public should be created in order to facilitate timely access to parliamentary documents, including bills, committee reports, verbatim transcripts, voting records and promulgated laws.

6.4 Access to Governmental Information

The Press Office of the government was created in 1992, with the declared aim of making known the activity of the government. Weekly press conferences, press statements, and daily briefings for accredited journalists disseminate information on government activities. Although none of the ministerial laws regulate access to information, almost all ministries have press offices intended to supply the media and the public with information.

On the other hand, legislation regulating local administration does provide rules on public access to information. Law No. 69/1991 provides that the agendas of the local and regional councils be circulated to the media, and that the working sessions are public, except when councillors decide to hold closed meetings. (The law does not establish any criteria for determining when a meeting can be closed.) A denial of a request for documents or information may be appealed against in the administrative courts.

Access to environmental information is regulated separately. Law No. 137/1995 on environmental protection provides for general access to information on the quality of the environment, but does not specify the bodies obliged to supply such information, referring generally to the central state bodies having activities in the environmental field. There is no express provision for judicial review of a refusal to provide information, although arguably general rules on judicial review of administrative acts would apply.

Recommendations on Access to Governmental Information

- ARTICLE 19 recommends the adoption of a clear and complete set of regulations establishing a simple procedure for requesting governmental documents and information to replace the current *ad hoc* system;

- the government is under a positive duty to make information publicly available, which it should discharge by publishing and disseminating all documentation produced by state bodies likely to be of public interest.

6.5 Access to Court Hearings

The public nature of court sessions constitutes an important feature of a democratic society. Public hearings are one of the requirements for a fair trial, as guaranteed by Article 6 of the European Convention. As the European Court of Human Rights has frequently stated, justice must not only be done, but also be seen to be done.

In Romania, the public nature of court proceedings is guaranteed by Article 126 of the 1991 Constitution and provided by the procedural norms of both the civil and criminal codes. In civil cases, the court may rule that the proceedings be secret if this is necessary to protect the public order and morals, or the interests of the parties. In criminal cases, the court may declare the proceedings secret if publicity may prejudice "certain state interests", morals, or private life. The sentence shall always be pronounced in public proceedings.

There are no legal provisions obliging, or preventing, the courts to supply information to the media. No rules have been adopted on broadcasting court proceedings. In practice, any request to broadcast or request information on a pending case is submitted to the president of the court who decides at his own discretion. Significantly, the decision rests with the president of the court, rather than with the chair of the particular panel of judges entrusted with the case.

International law firmly supports the right to a public trial. Under the European Convention, the public has a right to attend hearings, and the media arguably have special rights

of access. The European Court has recognized the public's right to information about judicial matters, even if they are still under judicial consideration. The European Court has stated: "There is a general recognition of the fact that the courts cannot operate in a vacuum. While they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialized journals, in the general press or amongst the public at large . ... it is incumbent on them [the media] to impart information and ideas concerning matters that come before the courts just as in other areas of public interest."

Recommendations on Access to Court Hearings

- In principle, all judicial and quasi-judicial proceedings should be open to the public and the media; information about cases should be widely disseminated in advance of actual hearings;

- in a limited number of cases, the presiding judge or judges may limit access or disclosure but only where and to the extent that the public interest demands it;

- decisions restricting access to hearings should be open to appeal at the behest of anyone interested in gaining access to the hearing

- all court decisions, including with respect to sentencing, should be available to the public; decisions by higher courts, and in cases where there is a significant public interest, should be published in widely available report series.

LIST OF CASES

European Court of Human Rights

Castells v. Spain, 23 April 1992, No. 236, 14 EHRR 445

Goodwin v. United Kingdom, 27 March 1996, 22 EHRR 123

Handyside v. UK, 7 December 1976, No. 24, 1 EHRR 737

Jersild v. Denmark, 23 September 1994, No. 298, 19 EHRR 1

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Brandenburg v. Ohio, 395 US 444 (1969)

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