



STATEMENT

on the Moldova draft Law on Freedom of Press

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Global Campaign for Free Expression

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1. Introduction

ARTICLE 19, Global Campaign for Free Expression, has been informed that a draft law on Freedom of the Press (the draft Law) is currently being considered by the Moldovan government. If adopted, this draft law would replace the 1994 Press Law, on which we commented in an open letter to the Moldovan Minister of Justice in January 2002.¹

ARTICLE 19 generally views the introduction of press laws with suspicion. They are often excessively regulatory and can be a tool for governments to abuse rather than protect the right to freedom of expression and information. However, although the 1994 Press Law was an example of excessive regulation of the press sector, it did have certain positive features. For example, it affirmed the right of journalists not to disclose their sources, it protected journalists from official harassment and it clearly stated that international human rights treaties take precedence over contradictory national laws. In our January 2002 open letter, we urged the minister to build on these positive features and revise the cumbersome regulations featured in the 1994 Press Law.

ARTICLE 19 is concerned that the latest draft of the Law on Freedom of the Press is not an improvement on the 1994 Press Law. With its harsh sanctions, including the possibility of a media outlet's activities being terminated, and a range of excessive

¹ Available at <http://www.article19.org/docimages/1264.doc>.

prohibitions on the content of what may be published, the draft law fails to comply with international standards guaranteeing freedom of expression and information.

The draft Law does have some positive features, such as the prohibition on censorship at Article 1(2) and on a State monopoly over public information at Article 1(4), as well as the sanctions for public officials hindering legitimate journalistic activities (Article 32). However, the main thrust of the draft Law seems to be the tight regulation of the journalistic profession, rather than the guarantee and protection of the exercise of the right to freedom of expression. For example, numerous articles in the draft Law are devoted to detailed and onerous registration requirements and a considerable number of other provisions are concerned with such issues as regulating the internal organisation of media outlets and setting out rules relating to breach of the law.

Moreover, the draft Law extends to all publications, from national newspapers to small-scale newsletters and pamphlets, as long as they are published at least once a year. This excessively regulatory approach is at odds with the ongoing process of bringing Moldovan legislation in line with the *European Convention on Human Rights* (ECHR).²

We urge the Moldovan government to take advantage of the process of amending the Press Law to ensure that it is brought fully into compliance with the ECHR and other international human rights treaties binding on Moldova. To facilitate this, we highlight below ARTICLE 19's main concerns in relation to the draft Law.

2. Content Rules

The draft Law contains a number of rules relating to the content of what may be published including both restrictions on content and a few 'must-carry' rules, requiring the media to carry certain information. In our view, any such rules should be in laws of general application, rather than media-specific legislation, such as the draft Law. To repeat content restrictions in media-specific laws is unnecessary and gives the media a double warning of what is prohibited, producing a chilling effect on freedom of expression. For example, the draft Law contains restrictions on incitement to hatred and on publishing pornography. To the extent that these restrictions are legitimate (see below), they are applicable to all forms of dissemination, not just the press, and should therefore be found in laws of general application.

(a) Truthful Information

Several provisions in the draft Law focus on the obligation to provide truthful or accurate information. Pursuant to Article 1(1), all people are guaranteed the right to free expression of opinions and ideas and to truthful information through the media. Article 1(5) states that the mass media "shall incur liability for the truthfulness and accuracy of the published information according to the law."

It is unclear whether Article 1(1) imposes a general obligation on the media to provide

² E.T.S. No. 5, adopted 4 November 1950, entered into force 3 September 1953.

the public with truthful information. A positive obligation of this sort is completely unwarranted and could easily be abused as its scope is extremely subjective. It is also illegitimate to impose liability of the media for inaccurate information. Although journalists should strive to be professional at all times, this should be the subject of ethical self-regulatory rules rather than legal proscriptions. It is simply not possible to ensure the veracity of all information published and even the very best journalists make mistakes. On the other hand, self-regulatory professional rules should require journalists to strive to be accurate. A legal requirement of accuracy is incompatible with the right to freedom of expression guaranteed under Article 10 of the ECHR.

(b) Defamation

Several provisions in the draft Law deal with defamation. Article 4(2) prohibits defamation of the State while Article 4(4) contains a general prohibition on defamation of individuals. Article 34 sets out circumstances where liability will not ensue for defamatory material, while Article 35 provides for moral compensation for defamatory material.

Defamation of the State is widely regarded as an illegitimate restriction on freedom of expression and offences of this sort have been rejected by senior courts, including the UK House of Lords.³ As a public entity, the State, like other public bodies, does not have a reputation of its own. It is also essential that the public be in a position to criticise the State and elected representatives, without which there can be no genuine political debate. Furthermore, the defamation provisions overall not only duplicate the general rules on defamation but they are seriously inadequate for this complex area of law. For example, they fail to provide for defences of truth or reasonable publication, recognised around the world. While the defences in Article 34 are welcome, they are nowhere near sufficient. What is needed is a fully developed law on defamation, consistent with international standards.⁴

(c) Other Restrictions

Article 4 contains a number of other restrictions on the content of what may be published. The opening paragraph of Article 4 guarantees the right to publish, subject to restrictions which must represent “necessary measures 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, morals, reputation or for the protection of the rights of others, for the prevention of disclosing confidential information or for the safeguarding the authority and impartiality of the judicial power.” This is consistent with international guarantees, apart from the fact that it authorises restrictions on freedom of expression in a media-specific law.

However, many of the specific restrictions are not legitimate. Many are excessively vague, so that they may be abused to restrict speech in a manner that was not originally intended. For example, Article 4 prohibits a ‘call to war of aggression’, ‘other manifestations jeopardising the constitutional regime’ and publishing

³ See *Derbyshire County Council v. Times Newspapers Ltd* [1993] 1 All ER 1011 (HL).

⁴ For a detailed set of standards on defamation see *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (London: ARTICLE 19, July 2000).

‘pornographic materials’. These terms are insufficiently clear to meet the test for restrictions on freedom of expression.

In other cases, the prohibitions are either illegitimate in themselves or fail to provide for important safeguards for freedom of expression. For example, the article prohibits the publication of the content of telephone conversations, material interfering with private life and information about an individual’s state of health. While most countries do recognise a general restriction on freedom of expression to protect privacy, this needs to be limited so that the media may publish information in the overall public interest. For example, if the president or a senior political figure were gravely ill, the public have a right to know about this.

(d) ‘Must-carry’ Requirements

Article 21 provides that publications must publish, free of charge, certain court judgements. Article 5(7) allows the founder to require publications to publish press releases and other information, in accordance with the statute.

Must-carry requirements of the sort found in Article 21 are not legitimate. They are excessively vague – for example, surely not all registered publications have to carry the judgements? – and do not correspond to a social need, since a vibrant, pluralistic media will cover all information of public interest without a requirement of this sort. They are open to abuse since officials may apply them selectively to critical media.

The obligation to carry information provided by the founder is not legitimate where the founder is the State. Any State media must operate in the public interest, not as a mouthpiece of government, and to require them to carry certain government information seriously undermines their editorial independence. It is unnecessary to have this provision in a law as regards private founders, who may provide for it in the statute if they so wish.

(e) Protection of Sources

Article 22 provides that journalists may not reveal confidential sources of information. While it is recognised that journalists have a right not to reveal their sources, it is not appropriate for them to be required by law not to reveal sources. This is a matter of ethics, not legal regulation.

Recommendations:

- All content restrictions should be removed from the draft Law.
- If content restrictions are kept in the draft law, they should conform to the following:
 - the media should not be under a legal obligation to provide the public with truthful information on events of public interest;
 - journalists should not incur legal liability for publishing inaccurate information;
 - the provisions on defamation of the State should be removed from the draft Law;
 - the defamation provisions should be completely re-worked to ensure they are in line with international standards; and
 - the content restrictions in Article 4 should be substantially re-worked so that they are clear and narrow, and conform to international standards.
- The ‘must-carry’ requirements in Articles 5(7) and 21 should be removed from the draft Law.
- Journalists should not be required by law not to reveal their sources; instead they should benefit from a right not to do so.

3. Registration Requirement

Article 6 of the draft Law requires periodicals and news agencies to be registered and makes it illegal to operate such an enterprise without registration. The registration application is to be considered by “the State Registration Chamber, if the publication or the press agency practices economic activity” or by “the Ministry of Justice if the publication or press agency practices non-profitable activities.” Articles 9 and 10 list numerous documents that have to be submitted for registration. Article 12 details the cases in which the registration bodies might refuse registration, including where the goals are illegal or encroach upon certain “principles of the state” or where the name infringes upon “public morals, national and religious feelings”.

Under international law, *licensing* requirements for the print media cannot be justified as a legitimate restriction on freedom of expression since they significantly fetter the free flow of information, they do not pursue any legitimate aim recognised under international law and there is no practical rationale for them, unlike for broadcasting where limited frequency availability justifies licensing.

On the other hand, *technical registration* requirements do not, *per se*, breach the guarantee of freedom of expression as long as they meet the following conditions:

- there is no discretion to refuse registration, once the requisite information has been provided;
- the system does not impose substantive conditions upon the print media;
- the system is not excessively onerous; and
- the system is administered by a body which is independent of government.

However, registration of the print media is unnecessary and may be abused, and, as a result, is not required in many countries. ARTICLE 19 therefore recommends that the print media not be required to register. As the UN Human Rights Committee has

noted: “Effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression.”⁵

In any case, the registration system established under the draft Law fails to meet the minimum conditions noted above and, as a result, breaches the right to freedom of expression.

First, the system imposes substantive conditions upon the press by requiring that the title of the mass media and their goals not constitute various abuses of freedom of speech. Restrictions of this sort, to the extent that they are legitimate, should be imposed through laws of general application, not the registration process. The illegitimacy of this provision is compounded by the fact that some of the “abuses” listed are themselves illegitimate restrictions on the right to freedom of expression, particular given that they are excessively vague.

Second, the system is excessively onerous in terms of the information required to be provided and in terms of its application to all publications, even those which come out once a year. In a 2000 ruling, the UN Human Rights Committee considered provisions in a law in Belarus which required publishers to register with the authorities. The Committee held that the legal requirement that an author register his leaflet, which had a circulation of just 200 copies, was disproportionately onerous, exerted a chilling effect on freedom of expression, and could not be justified in a democratic society.⁶ In particular, the Committee stated:

[P]ublishers of periodicals...are required to include certain publication data, including index and registration numbers which, according to the author, can only be obtained from the administrative authorities. In the view of the Committee, by imposing these requirements on a leaflet with a print run as low as 200, the State party has established such obstacles as to restrict the author’s freedom to impart information.⁷

The provisions in the draft Law are even more onerous than those found in the Belarusian law since no minimum print run is provided for.

Third, the system is not administered by a body which is independent of government. As noted above, registration is either with the State Registration Chamber or the Ministry of Justice. The fact that decisions concerning registration are made by State bodies creates the possibility of abuse of power for political reasons. It is crucial that bodies making decisions regarding registration and licences are protected against interference, particularly of a political or commercial nature, and enjoy complete independence from public authority.

⁵ General Comment 10(1) in Report of the Human Rights Committee (1983) 38 GAOR, Supp. No. 40, UN Doc. A/38/40.

⁶ *Laptsevitch v. Belarus*, 20 March 2000, Communication No. 780/1997, paras. 8.1-8.5.

⁷ *Ibid.*, para. 8.1

Recommendations:

- The imposition of a registration system on the print media should be re-considered.
- If registration provisions are retained, they should conform to the following:
 - registration should be automatic upon submission of the relevant information; in particular, no one should be refused registration on vague and subjective grounds such as public morals or national and religious feelings;
 - far more limited information should be required to be submitted for registration, such as the name of the publication and basic personal details of the publisher; and
 - the bodies responsible for overseeing the registration system should be independent of government.

4. Excessive Prescription

A number of articles in the draft Law set out in some detail rules regarding the internal workings of periodicals and news agencies. Article 11 lists a long number of issues that the statute must regulate. Articles 13 and 14 prescribe in great detail the way in which periodicals and news agencies should be run. They provide, among other things, that a bilateral contract has to be concluded between the founder and the editor-in-chief, along with details of what it should cover, who should be responsible for the orientation of the publication and how various senior employees are to be hired and fired. Article 19 provide that the founder shall be responsible for organising distribution, and Article 20 places final responsibility for signing off on the publication with the editor.

While there are some positive elements to this – for example, the attempt to minimise attempts by founders to interfere with editorial independence – in general these provisions place unnecessary obligations on the media and might be abused. It is for media outlets themselves to determine how they wish to be organised, and who should be responsible for orientation, hiring and distribution and the like.

Recommendation:

- Articles 11, 13, 14, 17, 19 and 20 should be removed from the draft Law.

5. Cessation/termination of Activities

Article 18 establishes that periodicals and news agencies might be ordered to cease their activity by a decision of a court of law, “upon the request of the registration body or of the law enforcement and control bodies.” Ground for cessation of activities can be, in addition to a decision of the founder, “repeated violation during a year by the editorial staff of the requirements mentioned in art. 4 of the present law” and failure to publish within one year. A media outlet would then have only ten days to appeal the decision.

ARTICLE 19 is of the view that an explicit power to close a media outlet, even through a court order, cannot be justified. The closure of a media outlet is a disproportionate response to any violation and would have an intimidating effect on all media. Repeated sanctions should be dealt with through fines and, where

appropriate, the general criminal law.

The problems with these provisions are highlighted by the fact that breach of Article 4 may lead to termination. It has already been noted that many of the content rules in Article 4 are not even legitimate as restrictions on freedom of expression, so can hardly be an appropriate basis for termination of a media outlet's activities. Furthermore, bodies which are not independent, such as the registration bodies under the draft Law as it currently stands, should not be able to initiate proceedings which could lead to such a serious sanction as revocation.

Recommendation:

- Article 18, providing for suspension or termination of a publication's activities, should be removed from the draft law.

6. *Rights and Duties of Journalists*

Chapter IV (Articles 24 to 27) of the draft Law lists a number of rights and duties of journalists, including in relation to accreditation. Under Article 25, journalists may obtain and disseminate information, have meetings with officials, make audio recordings, attend demonstrations and rallies and so on. Furthermore, journalists' notes may not be confiscated and journalists' honour and dignity shall be protected. These are positive protections for journalists' rights.

However, Article 25(4) states that "the journalist's duties shall flow from the current legislation, present law and professional ethics". Ethics are a matter of self-regulation, which should not be included in a law. To do might result in a situation where a journalist could be prosecuted for having violated principles of journalistic ethics.

Article 26(5) provides for the removal of accreditation for, among other things, disseminating untrue information slandering the accrediting body. As has already been noted, public bodies and the State do not have reputations as such. Furthermore, the potential for abuse of this provision is obvious. Journalists can almost expect to have their accreditation revoked if they are critical of the accrediting body, even though the criticism may be perfectly legitimate.

Recommendations:

- Ethical obligations should not be backed up by legal provisions.
- Accreditation should not be subject to revocation for slandering the organisation the journalist has been accredited to, or for minor breaches of accreditation rules.