



Organization for Security and Co-operation in Europe
Office of the Representative on Freedom of the Media

Analysis of the Draft Law on Freedom of Expression of Moldova

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KEY RECOMMENDATIONS

Purpose of the Draft Law

- The wording of Article 1 of the Draft Law should be revised, stating that the law aims to elaborate on the content of the right to freedom of expression as guaranteed by the Constitution of Moldova and incorporate international principles of freedom of expression.

Definitions

- The list of terms in Article 2 of the Draft Law should be shortened to include only terms with specific legal meaning.
- The definition of public interest in Article 2 of the Draft Law should state that it includes matters relating to all branches of government, and, in particular, matters related to public figures and public officials - politics, public health and safety, law enforcement and the administration of justice, consumer and social interests, the environment, economic interests, the exercise of power, art and culture. However, the definition should exclude purely private matters in which the interest of members of the public, if any, is merely sensational.
- The definition of speech that incites to hatred (hate speech) in Article 2 of the Draft Law should be revised in accordance with Article 20 of the ICCPR and Principle 12 of ARTICLE 19's Camden Principles on Freedom of Expression and Equality. It should state that hate speech is "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."

General characteristics of freedom of expression

- Article 3 para 1 of the Draft Law should specify that the right to freedom of expression includes that "freedom to seek, receive and impart information and ideas *of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*"
- The Draft Law should require that any restriction on the right to freedom of expression must meet a strict three-part test; that is any restriction (1) must be provided by law, (2) must pursue a legitimate aim, and (3) must be necessary to secure this aim.
- Article 3 of the Draft Law should require that state bodies always use the least restrictive means of action when their bodies interfere with the exercise of the right to freedom of expression.
- Paragraph 5 of Article 3 of the Draft Law should be revised to prohibit any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. It should also specifically require, (1) an intention to promote hatred towards a target group as a necessary requisite for hate speech; and (2) that the activity concerned creates an imminent risk of discrimination, hostility or violence against persons belonging to that group.

Freedom of expression in the mass media

- All restrictions on freedom of expression, specified in Articles 4 and 5, should always meet the three-part test for lawfulness.
- Article 6, paragraph 3 should permit the confiscation of the circulation or liquidation of media outlets only as a measure of last resort in response to extremely serious violations of the law, for example, in the case of serious and repeated advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

Defamation

- The definition of defamation in Article 2 should be revised to state that defamation is the dissemination of a substantially false statement that lowers the esteem in which a natural or legal person is held in the community.
- The qualifying statement in Article 7 para 8, requiring that humorous and satirical expression does not mislead the public as to the material facts, should be removed.
- The qualifying statement in Article 9 para 4, limiting acceptable criticism of public officials to what is necessary to ensure transparency and responsible discharge of their public functioning, should be removed.

Insult

- The Draft Law should not make special distinction between value judgments with or without sufficient factual basis. Instead it should explicitly recognise a defence of opinion stating that expression of an opinion (value judgment) is protected as long as it is made in good faith and there is some established or admitted factual basis for it.
- The definition of insult in Article 2 should be refined to ensure that nobody is liable for offensive speech based on true facts; or, at best, no legal responsibility for insult should be possible.

Presumption of innocence

- Article 12 should restrict only statements of public officials on guiltiness of persons accused of crimes.
- Article 12 para 3 of the Draft Law should be removed insofar as no distinction between public officials should be made for the purposes of presumption of innocence.
- Article 12 para 4 of the Draft Law should be removed so that ordinary citizens can freely voice opinion on the guiltiness of persons accused of crimes.

Protection of confidential information and sources

- Article 13 should not give powers of law enforcement bodies to oblige a person to disclose information sources.
- Article 13 should set out that the interest in disclosure is always balanced with the harm to freedom of expression.

- The circumstances which justify the disclosure in Article 13 should be harmonised with Council of Europe Recommendation R (2000) 7.
- Article 13 should set out that the information sources can be disclosed only at the request of an individual or body with a direct, legitimate interest.
- Article 13 should limit the access to disclosed information sources as far as possible, by ensuring that the disclosed information is provided only to those who requested the disclosure.

Miscellaneous: substantive shortfalls

- The Draft Law should afford protection to whistleblowers.
- The Draft Law should grant a special degree of protection to information collected or created for journalistic purposes against search and seizure by the authorities.
- The Draft Law should include a provision stating that the interpretation of the provisions concerning the protection of honour, dignity and public reputation should be carried out in accordance with the European Convention on Human Rights and case-law of the European Court of Human Rights.

Procedural Safeguards for the Right to Freedom of Expression

- Article 20 para 1 letter b) of the Draft Law, enabling interested parties to sue for defamation of deceased, should be removed.
- The percentage of state fees in Article 19 should be increased to further limit the possibilities for claiming excessive pecuniary compensations for moral damages.
- The measures in Article 22 of the Draft Law should be amended to satisfy the three-part test for assessment of the legality of restrictions on the right to freedom of expression.
- The Draft Law should reserve the use of the measures in Article 22 for highly exceptional cases.
- The exemptions from liability in Article 28 should be extended to cover statements made in the course of proceedings at legislative bodies and at local authorities.
- Article 24 of the Draft Law, setting out the burden of proof, should be amended to make it clear that once the defendant establishes that a publication concerned a matter of public interest, the plaintiff must prove malice for the claim to succeed.
- Article 29 of the Draft Law, allowing for corporations to sue for moral damages, should be removed.
- The Draft Law should establish an absolute ceiling for compensation awards for moral damages.

- The Draft Law should explicitly provide that sanctions for expression should be strictly proportionate to the damage.
- The Draft Law should provide for protection against statements in requests, letters or complaints to public authorities made in bad faith.
- The Draft Law should introduce special provision that recognise the defence of 'reasonable dissemination,' enabling not only the media but every person to invoke it.
- The Draft Law should exclude from the scope of liability for defamation persons who are not authors or editors, as well as publishers of statements who did not know and could not know that they were contributing to the dissemination of defamatory statements.
- The Draft Law should give powers to courts to strike out unsubstantiated claims early on in the proceedings in order to prevent malicious plaintiffs from suppressing media criticism by initiating defamation cases with no prospect of success.

I. Introduction

This Memorandum contains ARTICLE 19's analysis of the Draft Law on Freedom of Expression of Republic of Moldova ("Draft Law");¹ that was submitted by the Moldovan Government to the Parliament in 2009. At the time of the release of this Memorandum, the Draft Law awaits a second reading by the Moldovan Parliament.

This Memorandum analyses the Draft Law from the viewpoint of its compatibility with relevant international human rights standards. The Memorandum also examines the Draft Law in the light of international best practices in regard to freedom of expression laws. The Constitution of Moldova recognises the binding character of international human rights law and proclaims its supremacy over domestic law in Article 4. Therefore the Moldovan authorities are obliged to comply with the provisions of the *International Covenant on Civil and Political Rights*² ("ICCPR") and the *European Convention on Human Rights*³ ("European Convention"), against which the Draft Law is analysed.

ARTICLE 19 is an international, non-governmental human rights organisation which works with partner organisations around the world to protect and promote the right to freedom of expression. It has previously provided legal analyses in the area of media law to government and civil society organisations in over 30 countries.⁴ Regarding Moldova, ARTICLE 19 has analysed a number of the freedom of expression and freedom of information-related laws and Draft Laws, including the 1999 and 2000 versions of the Draft Law on freedom of information, the 2003 version of Draft Law on freedom of press, the 2006 version of the Draft Law to promote participation and transparency in the decision making of public authorities, the audiovisual code, the 2008 version of draft state secrets law. ARTICLE 19 has also analysed the defamation provisions in the legislation of Moldova in its 2006 Memorandum concerning the amendments to decriminalise defamation and the 2008 Comment on the Moldovan President's proposal on moral damages for defamation.⁵

The proposed Draft Law is praised for aiming at elaboration of the content of the right to freedom of expression as guaranteed by the Constitution and incorporation in national legislation of general international principles of freedom of expression. Although Moldova abolished criminal defamation in 2004, the domestic law and practice in the area of freedom of expression remain problematic.⁶ The introduction of the present Draft Law would

¹ ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments based on mistaken or misleading translation.

² Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A, (XXI), 16 December 1966, entered into force 3 January 1976. Moldova ratified the Covenant in 1993.

³ Adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953. Moldova ratified the ECHR in 1997.

⁴ These analyses can be found on the ARTICLE 19 website, at <http://www.article19.org/publications/law/legal-analyses.html>.

⁵ The analyses of Moldovan media legislation are posted on the ARTICLE 19 website, at <http://www.article19.org/publications/law/legal-analyses.html>.

⁶ The Association of Independent Press in Moldova has estimated that of the 165 European Court of Human Rights judgments against Moldova as of 1 October 2009 nearly 10% relate to violations of the right to freedom of expression. Cases against Moldova for violations of the right to freedom of expression include: e.g. *Amihalachioaie v. Moldova*, 20 July 2004, Application No. 60115/00; *Busuioc v. Moldova*, 21 March 2005, Application No. 61513/00, *Christian Democratic People's Party v. Moldova*, 14 May 2006, Application no. 28793/02; *Kommersant Moldovy v. Moldova*, 7 January 2007, Application No. 41827/02, *Manole and Others v Moldova*, 17 September 2009, Application no. 13936/02.

therefore represent a significant step forward in the realisation of the right to freedom of expression in Moldova.

At the same time, ARTICLE 19 has serious concerns about the vagueness of some provisions of the Draft Law as international freedom of expression standards are not always correctly reflected in the legal principles of the Draft Law. In particular, the Draft Law fails to ensure that all restrictions on the right to freedom of expression fulfil the necessity requirement of the three-part test and that confiscation of the circulation or liquidation of media outlets are allowed only as a last resort in response to extremely serious violations of the law. The regulation of protection of confidential sources is not in full compliance with Council of Europe Recommendation R (2000)7. The defence of ‘reasonable publication’ cannot be invoked by all citizens. The regime of measures for ensuring legal action is confusing, and the proposed measures can be widely used. Finally, it allows interested persons to sue for defamation of deceased persons.

Section II of the Memorandum summarises the general international principles on freedom of expression and defamation that the analysis draws on, focusing on the jurisprudence of the European Court of Human Rights. The analysis additionally refers to several documents developed by ARTICLE 19 and endorsed by international bodies and other stakeholders. In particular, we refer to *Defining Defamation: Principles on Freedom of Expression and Protection of Reputations* (“Defining Defamation”) as an authoritative standard-setting document, drawing on comparative constitutional and international law jurisprudence. It contains principles which have attained significant international endorsement, including that of the three official mandates on freedom of expression, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression.⁸ In addition, ARTICLE 19 also relies on *The Camden Principles on Freedom of Expression and Equality* (the “Camden Principles”), a progressive interpretation of international law and standards concerning the balance between the rights to freedom of expression and equality prepared by ARTICLE 19 in consultation with high-level inter-governmental officials, civil society representatives and academic experts.⁹

Section III of this Memorandum contains a detailed analysis of the provisions of the Draft Law.

II. International Standards

II.1 Guarantees for freedom of expression

The right to freedom of expression enjoys very strong protection under international law. Article 19 of the *Universal Declaration on Human Rights* (“UDHR”), the flagship human rights document drawn up under the auspices of the United Nations and adopted in 1948, guarantees the right to freedom of expression in the following terms:

⁷ London: ARTICLE 19, 2000.

⁸ See their Joint Declaration of 30 November 2000. Available at:

<http://www.unhchr.ch/hurricane/hurricane.nsf/view01/EFE58839B169CC09C12569AB002D02C0?openDocument>
⁹ ARTICLE 19, *The Camden Principles on Freedom of Expression and Equality* (April, 2009). Available at: <http://www.article19.org/advocacy/campaigns/camden-principles/index.html>.

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.¹⁰

This provision has now passed into what is known as customary international law, the body of law that is considered binding on all States as a matter of international custom.¹¹ The *International Covenant on Civil and Political Rights* (“ICCPR”),¹² elaborates on many of the rights set out in the UDHR, imposing formal legal obligations on State Parties to respect its provisions. Article 19 of the ICCPR guarantees the right to freedom of expression in terms very similar to those found in Article 19 of the UDHR. Freedom of expression is also protected in the three regional human rights systems, Article 10 of the *European Convention on Human Rights* (European Convention)¹³, Article 13 of the *American Convention on Human Rights*¹⁴ and Article 9 of the *African Charter on Human and Peoples’ Rights*.¹⁵

Article 10 (1) of the European Convention, to which the Republic of Moldova is a State party, sets out:

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.

The right to freedom of expression is generally considered to be an extremely important right. Not only is it crucial to individual self-fulfilment and thus of key importance as a right in itself; it is also fundamental to the proper functioning of democracy and to the enforcement of other human rights. Without free expression, democracy cannot function. This has been recognised by international courts and bodies worldwide. It is worth recalling that at its very first session, in 1946, the UN General Assembly adopted Resolution 59(I) which states: “Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.”¹⁶

This has been echoed by other courts and bodies. For example, the UN Human Rights Committee has said:

The right to freedom of expression is of paramount importance in any democratic society.¹⁷

The European Court of Human Rights (“European Court”) has also elaborated on the importance of freedom of expression:

¹⁰ UN General Assembly Resolution 217A(III), adopted 10 December 1948.

¹¹ For judicial opinions on human rights guarantees in customary international law, see *Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain) (Second Phase)*, ICJ Rep. 1970 3 (International Court of Justice); *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice); *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit). For an academic critique, see M.S. McDougal, H.D. Lasswell and L.C. Chen, *Human Rights and World Public Order*, (Yale University Press: 1980), pp. 273-74, 325-27.

¹² UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.

¹³ Adopted 4 November 1950, in force 3 September 1953.

¹⁴ Adopted 22 November 1969, in force 18 July 1978.

¹⁵ Adopted 26 June 1981, in force 21 October 1986.

¹⁶ 14 December 1946. “Freedom of information” is referred to in the broad sense of the free circulation of information and ideas.

¹⁷ *Tae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, para. 10.3.

Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man ... it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'.¹⁸

The guarantee of freedom of expression applies with particular force to the media. The European Court has consistently emphasised the “pre-eminent role of the press in a State governed by the rule of law.”¹⁹ It has further stated:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.²⁰

The European Court has also stated that it is incumbent on the media to impart information and ideas in all areas of public interest:

Whilst the press must not overstep the bounds set [for the protection of the interests set forth in Article 10(2)] ... it is nevertheless incumbent upon it to impart information and ideas of public interest. Not only does it 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”.²¹

II.2 Restrictions on the right to freedom of expression

International law permits limited restrictions on the right to freedom of expression in order to protect various interests, including reputation. The parameters of such restrictions are provided for in Article 10(2) of the European Convention, which states:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.

Any restriction on the right to freedom of expression must meet a strict three-part test. This test, which has been confirmed by both the Human Rights Committee²² and the European Court,²³ requires that any restriction must be (1) provided by law, (2) for the purpose of safeguarding a legitimate interest (including, as noted, protecting the reputations of others, relevant to the comments contained herein), and (3) necessary to secure this interest. In

¹⁸ *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.

¹⁹ *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

²⁰ *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.

²¹ See *Castells v. Spain*, note 20, para. 43; *The Observer and Guardian v. UK*, 26 November 1991, Application No. 13585/88, para. 59; and *The Sunday Times v. UK (II)*, 26 November 1991, Application No. 13166/87, para. 65.

²² For example, in *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997.

²³ For example, in *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90.

particular, in order for a restriction to be deemed necessary, it must restrict freedom of expression as little as possible, it must be carefully designed to achieve the objective in question and it should not be arbitrary, unfair or based on irrational considerations.²⁴ Vague or broadly defined restrictions, even if they satisfy the “provided by law” criterion, are unacceptable because they go beyond what is strictly required to protect the legitimate interest.

III. Analysis of the Draft Law

The Draft Law has two aims. According to Article 1, it seeks to guarantee the exercise of the right to freedom of expression and establish a balance between: 1) the right to freedom of expression and the protection of honour, dignity, and professional reputation, and 2) the right to freedom of expression and the right to respect for private and family life of a person. To this end, the Draft Law elaborates on the content and limitations of the right to freedom of expression and sets out procedural regimes for examination of defamation cases and violations of the right to respect for private and family life.

The Draft Law contains very detailed substantive and procedural norms grouped in two chapters and thirty-four articles. The first chapter includes mainly substantive provisions relating to the various aspects of the right to freedom of expression, the right to honour, dignity and professional reputation, and the right to respect for private and family life. It also sets out the scope of the law, lists definitions of the terms used, and establishes the principle of prohibition of censorship and the right to protection of confidential sources of information. The second chapter consists of procedural norms concerning defamation and privacy-related cases. The norms set out the procedures for examination of complaints both in and out of court, including time limits for legal actions, elements of complaints, court fees, personal competence to sue for defamation and violation of privacy rights, courts’ jurisdiction to examine such complaints, measures to ensure legal actions, exemptions of liability, presumptions in favour of free expression in defamation cases, and reparation and compensation awards. All articles in the Draft Law consist of numerous paragraphs.

IV. Overview of Substantive Regulation

IV.1 Positive features

ARTICLE 19 commends the Draft Law for a number of positive features. The most important of these is a clear respect for international human rights standards and efforts to incorporate these standards into domestic law. Other positive features include the elaboration on the content of the right to freedom of expression, and of rights and privileges implicit to the right to freedom of expression, such as protection of confidential information and sources.

The Draft Law introduces progressive safeguards for freedom of expression. For example, it establishes the principle that public officials must tolerate more criticism than ordinary citizens. Further, requirements are set out to determine the legality of all restrictions on the

²⁴ See *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).

right to freedom of expression. Censorship in mass media is prohibited. In addition the Draft Law contains safeguards for the right to private and family life, introducing strong protection for publications on matters in the public interest.

At the same time, a number of provisions unnecessarily restrict the right to freedom of expression. The following paragraphs will elaborate upon these general recommendations.

IV.2 Problematic areas

IV.3

IV.3.1 Purpose of the law

Overview

According to Article 1, the Draft Law aims to promote and safeguard the exercise of the right to freedom of expression and to establish a balance between the right to freedom of expression, the right to protection of honour, dignity, and professional reputation, and the right to respect for private and family life.

There are two provisions which directly relate to the balance between the right to freedom of expression, the right to protection of honour, dignity, and professional reputation, and the right to respect for private and family life. According to paragraph 2 of Article 7 a person may have his/her rights restored if the information disseminated about him/her is false and defamatory. According to paragraph 4 of Article 10, read in conjunction with paragraph 3 of the same Article, the balance between the right to freedom of expression and the right to respect for privacy depends on the balance between the interest of the public in knowing certain private information and the interest of a citizen to keep that information away from the public.

Analysis

The wording of Article 1 of the Draft Law is problematic. It is not correct to say that the Draft Law attempts to guarantee rights. International treaties and national Constitutions guarantee rights including the right to freedom of expression. By contrast, the purpose of laws – such as the Draft Law – should be to elaborate on the provisions found in the constitutions and international treaties.

Further, the judiciary, rather than the legislature, has the power to determine the balance between rights because that balance should be weighed in the context of the particular circumstances in which an impugned statement was made. Establishing that balance in a law is impossible because the legislators cannot foresee all of the possible circumstances involving conflicts of these rights and, thus, cannot offer appropriate regulation thereof.

Taking into account that only two out of thirty-four provisions in the Draft Law directly relate to the balance between the right to freedom of expression, the right to protection of honour, dignity, and professional reputation, and the right to respect for private and family life, it would be an exaggeration to claim that the Draft Law seeks to establish the balance between these rights. Therefore, it is more accurate to say that the Draft Law seeks to incorporate the general international principles of freedom of expression.

Finally, mindful of Article 12, which sets out the right to the presumption of innocence for criminal or administrative offence, it is incorrect to maintain that the Draft Law relates only to

the balance between the three rights specified in Article 1. The existence of Article 12 means that the Draft Law regulates also the balance between the right to freedom of expression and the right to fair trial.

The wording of Article 1 should be revised to state that the law aims to elaborate on the content of the right to freedom of expression as guaranteed by the Constitution, while also incorporating international principles of freedom of expression.

Recommendations:

- The wording of Article 1 should be revised to state that the law seeks to elaborate on the content of the right to freedom of expression as guaranteed by the Constitution of Moldova, while also incorporating international principles of freedom of expression.

IV.3.2 Definitions

Overview

Article 2 of the Draft Law lists twenty-three definitions of key terms. These include defamation, dissemination, information, fact, value judgment, value judgment without sufficient factual basis, insult, censorship, data on the private and family life, public interest, public authority, public official, public figure, public authority document, public authority's communiqué, mass media, journalist investigation, impugned statement, retraction, reply, excuse, a speech which incite to hatred, and conventional unit.

In this section, we provide comments on two definitions – definition of public interest (in Article 2 letter j) and definition of hate speech in Article 2 letter v). Public interest' is defined as "society's interest (and not the individuals' sheer curiosity) either in the events related to the exercise of public power in a democratic state, or in problems that would normally raise the interest of the society or of a part of it." Speech which incites to hatred ("hate speech) is defined as "any form of expression which provokes, spreads, promotes or justifies the racial hatred, xenophobia, anti-Semitism or any other forms of hate based on intolerance."

Analysis

Many terms included in the list in Article 2 are self-explanatory and do not need legal definitions. These include 'fact', 'journalistic investigation', 'reply', 'excuse', 'public authority document', 'impugned statement'. The provision of legal definitions of these ordinary terms makes the text of the law more complicated. Therefore it is advisable that only terms that have specific legal meaning be included in Article 2.

Public interest

It is commendable that the Draft Law includes a definition of 'public interest'. At the same time, the definition is confusing and tautological, defining the public interest as "the social interest ... in the problems which normally raise the interest of the society or a part of it".

Further, even though the definition commendably covers a broad area of interests - which is in line with the best practices for the protection of freedom of expression²⁵ - it remains unclear whether interests in public officials' lives fall within the scope of the term. The US Supreme Court has indicated that the public interest extends to virtually all activities of these individuals, including those that fall in the private sphere:

[A]nything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these [401 U.S. 265, 274] characteristics may also affect the official's private character.²⁶

This position is followed by the European Court which has ruled that the 'public interest' extends to all matters of public concern and, in particular, that "there is no warrant ... for distinguishing ... between political discussion and discussion of other matters of public concern."²⁷ For the purpose of clarity and to avoid undue restriction of this concept, we recommend that the Draft Law revise the definition of public interest to include matters relating to all branches of government – and, in particular, matters relating to public figures and public officials, such as politics, public health and safety, law enforcement and the administration of justice, consumer and social interests, the environment, economic interests, the exercise of power, and art and culture. However, it does not include purely private matters in which the interest of members of the public, if any, is merely sensational.

Hate speech

In our opinion the definition of "hate speech" should be "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" to properly reflect Article 20 para 2 of the ICCPR. We also believe that the definition of hate speech in Article 2 of the Draft Law can be further improved by elaborating upon key concepts within that definition of hate speech in the *Camden Principles*, in particular Principle 12 which states:

- i. The terms "hatred" and "hostility" refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group
- ii. The term "advocacy" is to be understood as requiring an intention to promote hatred publicly towards the target group.
- iii. The term "incitement" refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.
- iv. The promotion, by different communities, of a positive sense of group identity does not constitute hate speech.

Recommendations:

- The list of terms in Article 2 should be shortened to include only terms with specific legal meaning.

²⁵ Courts have stressed that the concept is to be given a very wide reading and that where there is doubt, decisions should come down on the side of freedom of expression. See, for example, *A v. B* (a company) and *C*, [2002] EWCA Civ 337, 11 March 2002, Court of Appeal (United Kingdom).

²⁶ *Garrison v. Louisiana*, 401 U.S. 265, pp. 273-4.

²⁷ *Thorgeir Thorgeirson v. Iceland*, note 19, para. 64.

- The definition of public interest should be revised to include matters relating to all branches of government – and in particular matters relating to public figures and public officials – politics, public health and safety, law enforcement and the administration of justice, consumer and social interests, the environment, economic interests, the exercise of power, art and culture. However, the definition should exclude purely private matters in which the interest of members of the public, if any, is merely sensational.
- The definition of speech that incites to hatred (hate speech) should be revised in accordance with Article 20 of the ICCPR and Principle 12 of the Camden Principles. It should state that hate speech is “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”

IV.3.3 General characteristics of freedom of expression

Overview

The content and meaning of the right to freedom of expression is elaborated in Chapter 1 of the Draft Law.

Article 3 paras 1 and 2 states that “free expression ... includes the freedom to seek, receive and communicate facts and ideas [and] protects both the content and the form of expressed information, including information which offends, shocks or disturbs.” Article 3 paras 3 and 4 permits restrictions on freedom of expression only when “necessary in a democratic society to protect the national security, territorial integrity or public safety, to defend public order and prevent crimes, to protect health and morals, the reputation or rights of others, to prevent disclosure of confidential information and to maintain the authority and impartiality of the judiciary” and only if they are “proportional with the situation which determined them, by observing the requirement of a fair balance between the protected interest and the freedom of expression.” Article 3 para 5 states that the guarantee of freedom of expression does not extend to cover speech that constitutes incitement to hatred and violence.

Analysis

First, Article 3 para 1 defines freedom of expression as including the freedom to “seek, receive and communicate facts and ideas”. However, consideration must be given to the wording of Article 19 of the ICCPR, which states that the right to freedom of expression includes “freedom to seek, receive and impart information and ideas *of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice*” (italics added). The additional phrases stipulating that ideas of all kinds are protected would make it clear that freedom of expression extends to the expression of any idea or fact. At the same time, the stipulation that freedom of expression includes a choice as to the media used would complement the existing statement in paragraph 2 that freedom of expression protects the form in which the information or idea is expressed. Finally, the phrase “regardless of frontiers” makes it clear that the State may not ban or control international forms of communication, such as the internet or satellite-based communications.

Second, while we welcome Article 3 paras 3 and 4 regarding restrictions, we note that the provisions do not require that all restrictions be based on the law, as required by the three-part test in Article 19 of the ICCPR and Article 10 of the European Convention. Consequently, it

is recommended that the Draft Law requires that any restriction be provided by law. The first condition is a safeguard against arbitrary decisions and means that restrictions must be provided through democratically adopted rules and regulations. Further, a requirement should be added that regulations limiting speech must be clearly and narrowly drafted laws as set out in the Law of Georgia on Freedom of Speech and Expression.²⁸ Finally, Article 3 of the Draft Law should also require that state bodies always use the least restrictive means of action when their bodies interfere with the exercise of the right to freedom of expression. The latter is not the same as requiring that states use “proportional” measures. This would reflect a more sophisticated understanding of the term “necessary”. An alternative way of achieving this would be to define “proportional” as “representing the most effective and least limiting measure.”²⁹

Third, it is problematic that Article 3 para 5 places all speech that incites to hatred and violence outside the scope of legal protection.³⁰ As mentioned above, the right to freedom of expression applies to information and ideas *of any kind* (emphasis added).³¹ The UN Human Rights Committee has interpreted Article 19, paragraph 2 as encompassing “every form of subjective ideas and opinions capable of transmission to others, which are compatible with Article 20 of the ICCPR...”³² Article 20 paragraph 2 of the ICCPR³³ does not require from States to prohibit all negative statements towards national groups, races or religions. It only obliges them to ban such statements as soon as they “constitute incitement to discrimination, hostility or violence”. Allowing a broader restriction of speech the Draft Law is therefore in conflict with the ICCPR. Further, in contrast to Article 4 of *the International Convention on the Elimination of All Forms of Racial Discrimination*,³⁴ which bans racially discriminatory speech, the restriction on speech that constitutes incitement to hatred is broader inasmuch as it covers different kinds of hate speech.

Mindful that offensive speech is often interpreted by some people as inciting to hatred or violence, the restriction in question poses concerns that it is open to abuse. For this reason it is recommended that Article 3 para 5 of the Draft Law is revised to prohibit any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. As we noted above in the comment to Article 2 letter j), the Draft Law would benefit from elaborating on the definitions based on Principle 12 of the *Camden Principles*.

Furthermore, the Draft Law should stipulate that intention to promote hatred publicly should be a requirement for an offence of hate speech and that the absence of intention should be a sufficient defence to a charge of hate speech in itself. In hate speech cases, therefore, it should be for the prosecution to prove such an intention, rather than for the defence to prove the absence of such an intention. The Draft Law makes no reference to such a requirement. In this respect, the drafters may also consult the example of the Law of Georgia on Freedom of Speech and Expression setting out that “an incitement shall cause liability envisaged by law

²⁸ *Ibid*, articles 1(o) and 8(1) of the Georgian Law on Freedom of Speech and Expression.

²⁹ See Article 8, paragraph 1 of the Georgian Law on Freedom of Speech and Expression. http://www.liberty.ge/eng/page.php?genre_id=79§ion_id=2&news_id=1&from=categories.

³⁰ Article 2 (v) defines ‘speech that incites to hatred’ as any form of expression which provokes, spread, promotes or justifies the racial hatred, xenophobia, anti-Semitism or any other form of hate based on intolerance.

³¹ Article 19, paragraph 2 of the ICCPR.

³² *Ballantyne and Davidson v. Canada*, Communication No.359/1989, and *McIntyre v. Canada*, Communication No. 385/1989, UN Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev. 1 5 May 1993, Annex, para. 11.3.

³³ 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”.

³⁴ Ratified by Moldova in 1993.

only when a person commits an intentional action that creates direct and substantial danger of an illegal consequence.”³⁵

Recommendations:

- Paragraph 1 of Article 3 should specify that the right to freedom of expression includes the “freedom to seek, receive and impart information and ideas *of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice*”.
- The Draft Law should set out that any restriction on the right to freedom of expression must meet a strict three-part test: (1) be provided by law, (2) pursue a legitimate aim, and (3) be necessary to secure this aim.
- Article 3 should require that state bodies always use the least restrictive means of action when their bodies interfere with the exercise of the right to freedom of expression.
- Paragraph 5 of Article 3 of the Draft Law should be revised to prohibit any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. It should also specifically require, (1) an intention to promote hatred towards a target group as a necessary requisite for hate speech; and (2) that the activity concerned creates an imminent risk of discrimination, hostility or violence against persons belonging to that group.

IV.3.4 Freedom of expression in the mass media

Overview

Article 4 of the Draft Law guarantees freedom of expression for the media and makes it clear that “freedom of expression of the mass media also includes a certain degree of exaggeration, or even provocation, providing that it does not misinterpret the essence of the facts.” Paragraph 1 of Article 4 specifies that “[n]obody can prohibit or prevent the mass media from disseminating information on issues of public interest, unless it is in compliance with the law.”

Article 5 of the Draft Law guarantees editorial independence of mass media and prohibits all forms of censorship. Any interference in the editorial activity of mass media is prohibited except when provided by law. Public authorities, tasked with the preliminary control of the information which is to be disseminated by mass media, shall not be created. The obligation imposed by the law court, through a final decision, to disseminate or not to disseminate the information, as well as the obligation imposed by law to disseminate a certain piece of information, shall not constitute censorship.

Article 6 of the Draft Law protects the public’s right to receive information, and states that “[t]he seizure of the print run or liquidation of a mass media outlet can take place only if this is necessary in a democratic society for the protection of national security, territorial integrity

³⁵ Article 4 para 2 of the Law of Georgia on Freedom of Speech and Expression.

or public security, or in order to prevent the disclosure of secret information through an irrevocable final court decision.”

Analysis

These provisions are problematic for several reasons.

First, in contradiction with international law, Article 4 para 1 permits restrictions on dissemination of information in the public interest provided that they are set out by law. Both Article 19 of the ICCPR and Article 10 of the European Convention state that restrictions on freedom of expression are not only set out in law but also pursue legitimate interests and are necessary to achieve these interests. While a strong legal argument can be made that this should be read together with paragraphs 3 and 4 of Article 3, and thus import the conditions on restrictions stated in those paragraphs into Article 4, this should be stated explicitly. As currently formulated, a public authority might interpret paragraph 1 of Article 4 as authorising restrictions on the dissemination of information, as long as this is done within the framework of a law. It is recommended that the provision refer back to Article 3 paras 3 and 4, which pose these requirements.

Second, in contradiction with international standards, the journalistic freedom as set out in Article 4 is conditioned upon “the correct interpretation of facts.” No such conditions are envisaged by the ICCPR or the European Convention. Similarly, the European Court emphasised that “[j]ournalistic freedom ... covers possible recourse to a degree of exaggeration, or even provocation” without placing any restriction in connection with the interpretation of the facts.³⁶ It is therefore recommended that the qualifying statement concerning journalistic freedom be removed.

Third, in contradiction with international law, Article 5 para 2 allows interference in the editorial activity of mass media provided that they are set out by law. Interference in editorial activity should meet the three-part test set out by Article 10 para 2 of the European Convention. This means that it should be not only provided by law but also necessary to achieve a legitimate interest.

Fourth, in contradiction with international law, Article 5 para 4 permits obligations to disseminate or not to disseminate information as long as they are imposed by a court or by law. Obligations to disseminate or not information constitute interference with the right to freedom of expression. Therefore, to be lawful under international law such obligations should also be necessary in a democratic society to achieve a legitimate interest.

Finally, the confiscation of the circulation or liquidation of a mass media outlet, as set out by paragraph 3 of Article 6, is an extremely severe measure. The Draft Law should limit the closure of a media outlet only to extreme cases such as serious and repeated advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility, or violence. Violations of public order law should not lead to confiscation of circulation and liquidation of a media outlet. It is also worrisome that an outlet may be closed to “prevent the disclosure of information which represents a state secret.” This would cover a broad range of situations and is open to abuse. Similarly, the term “public security” covers a range of situations and is open to abuse. It is recommended that both be removed or redrafted in narrower terms.

³⁶ See *Dichand and others v. Austria*, 26 February 2002, Application No. 29271/95, para. 39.

Recommendations:

- The Draft Law should consistently require that restrictions on freedom of expression, regardless of their type, always meet the three-part test for lawfulness. This requires that they are not only set out by law but are proportionate and a measure of last resort.
- The confiscation of the circulation or liquidation of media outlets should be allowed only as a measure of last resort in response to extremely serious violations of the law, for example in case of serious and repeated advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

IV.3.5 Defamation

Overview

Article 2 defines ‘defamation’ as dissemination of false and harmful information about another person. The term ‘information’ used in this definition refers to “any factual report, opinion or idea presented as a text, sound and/or image”.

Article 7 of the Draft Law states that every person is entitled to the protection of their honour, dignity and professional reputation. Article 7 para 8 states that the use of humorous and satirical expression will not render a person liable “unless its usage mislead the public as to material facts”.

Article 9 recognises a right to criticise the State, public authorities and public officials. Article 9 para 4 sets out that public officials shall be subject to criticism, and their actions shall be subject to verification by mass media, concerning the way they have fulfilled and are fulfilling their duties, to the extent that this is necessary to ensure transparency and the fulfilment of their duties in a responsible way.

Analysis

The defamation provisions of the Draft Law introduce a number of international standards into Moldovan law. The proposed strong protection for criticism of public institutions and officials is very welcomed. This regulation is in line with the position of the European Court that public officials are required to tolerate more, not less, criticism, in part because of the public interest in open debate about public officials and institutions.³⁷ The European Court has affirmed this principle in several cases.³⁸

³⁷ In its very first defamation case (*Lingens v Austria*), the European Court emphasised:

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 must consequently display a greater degree of tolerance.

³⁸ See, for example, *Lopes Gomez da Silva v. Portugal*, 28 September 2000, Application No. 37698/97, para. 30; *Wabl v. Austria*, 21 March 2000, Application No. 24773/94, para. 42; and *Oberschlick v. Austria*, 23 May 1991, Application No. 11662/85, para. 59.

However, we do believe that there are a number of areas in which the Draft Law should enhance the protection for the right to freedom of expression. The most pertinent of these are discussed in the following paragraphs.

The definition of defamation provided in Article 2 is unclear and incorrect. *First*, it includes the word ‘information’ which is ambiguous. Moreover, in contradiction to the European Court’s position that defamation is committed through statements of facts, the definition of defamation in the Draft Law refers to dissemination of ‘information’ which includes statements of facts, opinions and ideas. *Second*, according to the definition, any harmful information about a person could amount to defamation. Under this definition it is possible to regard as defamation incorrect information about a medicine which can be harmful for one’s health. By contrast, according to its commonly recognised definition, defamation is harmful to one’s reputation, which is the esteem in which a person is held in the community. *Third*, the definition allows for liability to be sought even for minor mistakes of facts which is a harsh and unnecessary restriction on freedom of expression. There is no pressing social need and consequently it is not necessary in a democratic society to hold a person – and especially journalists and the media - responsible for minor mistakes. Cognisant of this principle the Law of Georgia on Freedom of Speech and Expression³⁹ contains a definition of defamatory statement which is exemplary in this regard. It states that the latter is “a statement containing substantially false fact causing damage to a person or his reputation.”⁴⁰ It is recommended that the definition of defamation be revised to state that defamation is a dissemination of a substantially false statement that lowers the esteem in which a natural or legal person is held in the community.

Further, the qualifying statement in Article 7 para 8, requiring that humorous and satirical expression do not mislead the public as to material facts is unclear. Humorous and satirical expression cannot be treated like news reporting. While the latter requires correct reporting of facts, the purpose of the first is not to inform the public but rather to hold up to ridicule public figures and their actions. The qualifying statement unnecessarily restricts humorous and satirical expression and runs counter to democracy for which broadmindedness and tolerance are key norms. Therefore, the qualifying statement in Article 7, paragraph 8 should be removed.

Additionally, the protection granted by Article 9 to criticism of public authorities is weak. It is problematic that heightened protection for criticism is available only for statements that are “necessary to ensure the transparency and responsible discharge of their functions.” The European Court has made it clear that politicians and public figures of a similar status must tolerate greater criticism than ordinary individuals with regard to many of their activities. For example, in *Dichand and Others v. Austria*, the Court held that a politician’s business affairs fell within the realm of activities that should be open to public scrutiny.⁴¹ In politics, it can be difficult to distinguish between purely private activities and activities of a public character. It is recommended, therefore, that the qualifying statement be removed.

³⁹ Law of Georgia on Freedom of Speech and Expression, adopted on June 24, 2004. The text of the Law may be found on the Internet at:

http://www.liberty.ge/eng/page.php?genre_id=79§ion_id=2&news_id=1&from=cat_news

⁴⁰ See *ibid.* Article 1, letter e).

⁴¹ 26 February 2002, Application No. 29271/95.

Recommendations:

- The definition of defamation should be revised to state that defamation is a dissemination of any substantially false statement that lowers the esteem in which a natural or legal person is held in the community.
- The qualifying statement in Article 7, paragraph 8, requiring that humorous and satirical expression do not mislead the public as to the material facts, should be removed.
- The qualifying statement in Article 9 paragraph 4, limiting acceptable criticism of public officials to what is necessary to ensure transparency and responsible discharge of their public functioning, should be removed.

IV.3.6 Insult

The Draft Law provides protection to persons whose right to honour, dignity and professional reputations was infringed by dissemination of value judgments without sufficient factual basis. Article 2 defines value judgment as an opinion and commentary, whose truthfulness cannot be proved. According to Article 7, paragraph 5 persons whose right to honour, dignity and professional reputations were infringed by dissemination of value judgments without sufficient factual basis can request the denial or rectification of the information, or the publication of a reply and the reparation of the moral and material damage caused.

In addition, the Draft Law provides protection to persons whose rights to honour, dignity and professional reputations were infringed by insult. Article 2 defines insult as verbal or non-verbal expression, which deliberately offends the person and which runs counter to the moral norms generally accepted in a democratic society. Insulted persons can request excuses and reparation of the caused moral and material damage.

Analysis

There are several problems in regard to the protection against insult and value judgments with and without sufficient factual basis. *First*, the simultaneous use of defamatory value judgments without sufficient factual basis and insult is confusing inasmuch as these terms are synonymous. *Second*, the definitions of ‘insult’ and ‘value judgement without sufficient factual basis’ are vague. This vagueness makes it possible for the Draft Law to be abused to stifle free and open discussion. *Third*, the definition of ‘value judgement without sufficient factual basis’ is overbroad and makes it possible to restrict opinion based on established facts if the facts were reported in a distorted manner. The Draft Law should not use value judgments with and without sufficient basis. Instead, it should recognise a defence of opinion, stating that expression of an opinion (value judgment) made in good faith is protected as long as there is some established or admitted factual basis for it.

At the same time, mindful of the reluctance of the European Court to allow restrictions of value judgments and opinions, ARTICLE 19 believes that it is reasonable and practical to decide against providing for legal liability for insult. The European Court has repeatedly held that tolerance and broadmindedness are at the heart of democracy, and that the right to freedom of expression protects not just those forms of speech that are broadly considered

acceptable, but exactly those statements that others may find shocking, offensive or disturbing.⁴² Moreover, there are disturbing examples from around the world about the use of insult laws to punish true or unfavourable opinions.

Recommendations:

- The Draft Law should not make a special distinction between value judgments with or without sufficient factual basis. Instead it should explicitly recognise a defence of opinion stating that expression of an opinion (value judgment) is protected as long as it is made in good faith and there is some established or admitted factual basis for it.
- The definition of insult should be refined to ensure that nobody is liable for offensive speech based on true facts; or, at best, no legal responsibility for insult should be possible.

IV.3.7 Presumption of innocence

Overview

Article 12 of the Draft Law, setting out the principle of presumption of innocence for criminal or administrative offences, aims at preventing the undermining of fair trial by prejudicial statements about the guiltiness of a charged person. The provision sets out different limits on statements by public and ordinary persons in this regard. Public authorities and their representatives are obliged to observe the presumption of innocence and to refrain from any comment which would suggest that the person is guilty of committing a felony or an administrative offence.⁴³ Law enforcement bodies are allowed to make public statements on the guiltiness of the accused only when supporting the accusation in court.⁴⁴

By contrast, all other persons, including mass media, have the right to voice their opinion on the person's guiltiness provided that: their expression includes a message that, at the time, the person has not yet been convicted; the expression clearly indicates that these are opinions and not confirmed facts; the facts on which the comments on the guiltiness of a person and his/her role in the judicial proceedings are based are clearly exposed.⁴⁵

Analysis

The inclusion of a provision in the Draft Law laying down the principles concerning statements on the guiltiness of a charged person is to be welcomed even though the purpose of this regulation – preventing the undermining of a fair criminal trial by prejudicial statements made in close connection with those proceedings – falls outside the goals of the Draft Law set out in Article 1.

⁴² E.g. *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world. Another example is the case of *Oberschlick v Austria (no.2)*, in which the applicant had been convicted by domestic courts for referring to a politician as an 'idiot'; the ECtHR held that this conviction violated his right to freedom of expression because he was expressing an opinion.

⁴³ Article 12, para. 2 of the Draft Law.

⁴⁴ Article 12, para. 3 of the Draft Law.

⁴⁵ Article 12, para. 4 of the Draft Law.

Noting that, in practice, public officers are tempted to make and often make statements undermining the right to fair trial, it is appropriate to set out the limits of such expression. In line with the European Convention, the Draft Law correctly differentiates between expressions by public officers and by ordinary persons regarding the guiltiness of accused persons. At the same time, Article 12 suffers from several shortfalls.

First, the above provision sets out narrower limits on expression of opinion than international law. While Article 6 para 2 of the European Convention, establishing the presumption of innocence, relates to statements on one's guiltiness in pending criminal trials, the restrictions in Draft Law also cover comments which would suggest that a person is guilty of committing a felony or an administrative offence. This limitation is too broad because in reality it will restrict even information that a person is arrested in connection with a crime as this information contains a suggestion - no matter how big it is - that the person is implicated in the crime. Mindful that often those arrested are released without criminal charges there is no danger that such information should violate their right to fair trial. In this respect it should be noted that the European Court stresses that Article 6 para 2 of the European Convention cannot prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected.⁴⁶ Therefore the restrictions on public officials' comments that would suggest one's guiltiness are broadly defined and would allow expression to be restricted in cases when this is not necessary in a democratic society.

Further, there is no need to differentiate between public authorities, their representatives and law enforcement bodies. The European Court takes heed of statements made by *public officials* (italics added) setting out and applying the same rule for public authorities and law enforcement bodies.⁴⁷ Consequently, paragraph 3 of the Draft Law should be removed.

In contrast to the European Convention, which guarantees the presumption of innocence by restricting only judicial decisions and statements by public officials,⁴⁸ the Draft Law extends this safeguard by placing requirements on ordinary persons who are voicing their own opinions on the guiltiness of persons accused of crimes. This regulation is not necessary in a democratic society because ordinary persons are not likely to influence judicial proceedings with their opinions.

Article 12 para 4 of the Draft Law should be distinguished from journalistic codes of ethics which require journalists to refrain from referring to suspects as though their guilt is certain.⁴⁹ While journalists and media outlets are free adopt and voluntarily follow professional standards, any attempt of the state authorities to set out such standards and ensure their

⁴⁶ See for example *Alenet de Ribemont v France* Judgment of 7 August 1996, Application No. 15175/89 § 38

⁴⁷ See for example, *Fatullayev v Azerbaijan*, Judgment of 22 April 2010, Application No. 40984/07.

⁴⁸ See the judgment in the case of *Fatullayev v Azerbaijan*, *ibid*, where the ECtHR reiterated its consistent approach the presumption of innocence will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law.

⁴⁹ For example, the Principle 16 of *Honour Codex of Croatian Journalists* states: The assumption of innocence, integrity, dignity and the sensibilities of all parties in a trial must be respected. Similarly the *Ethical Code of the Bulgarian Media* states that the representatives of Bulgarian media respect the 'assumption of innocence' and not describe someone as a criminal prior to their conviction. If they identify a person as being charged with a crime, they also have an obligation to make known the outcome of the trial. These and other ethical codes of journalists can be found on the Internet at: <http://ethicnet.uta.fi/>

implementation would amount to interference with freedom of expression which is unnecessary in a democratic society. Consequently, Article 12 para 4 should be removed.

Recommendations:

- Article 12 should restrict only statements of public officials on guiltiness of persons accused of crimes.
- Paragraph 3 of Article 12 of the Draft Law should be removed insofar as no distinction between public officials should be made for the purposes of presumption of innocence.
- Paragraph 4 of Article 12 of the Draft Law should be removed so that ordinary citizens' can freely voice their own opinions on the guiltiness of persons accused of crimes.

IV.3.8 Protection of confidential information and sources

Overview

Article 13 of the Draft Law guarantees the right to protection of information sources. This right belongs to mass media and any person who carries out a journalistic activity or who collaborates with mass media. Nobody shall be bound to disclose the identity of the source of information in civil and administrative proceedings. Article 13 para 4 sets out that within the criminal proceedings, the law enforcement body or the court has the right to oblige the person to disclose the source of information, if the following conditions are met: 1) the criminal case refers to very serious or exceptionally serious crimes; 2) the disclosure is absolutely necessary for criminal proceedings; and 3) all other possibilities to disclose the source of information have been exhausted.

Analysis

While the legal recognition of the right to protection of information sources is commendable, the standard set out in Article 13 runs counter to international standards and, in particular, the Council of Europe Recommendation No. R(2000)7⁵⁰. *First*, in contrast to this Recommendation, which sets out that the power to order disclosure of a source's identity should be exerted exclusively by courts, the Draft Law makes it possible for law enforcement bodies to also order the disclosure of information. *Second*, Recommendation No. R(2000)7 and the Draft Law adopt different tests for legality of orders of disclosure. While the first requires that the interest in disclosure be always balanced against the harm to freedom of expression and provides for a list of vital interests which would justify disclosure, the Draft Law does not include the requirement to balance the interest with the harm. *Third*, the 1st condition for disclosure under the Draft Law – that the criminal case refers to very serious or exceptionally serious crimes – is unclear. Presumably this provision lists circumstances of which justify forcing somebody to disclose their information sources. By contrast, Council of Europe Recommendation R (2000) 7 sets out that these circumstance are the protection of human life, prevention of major crime or defence of a person accused of having committed a

⁵⁰ The full title of the document is Council of Europe Recommendation No. R (2000) 7 of the Committee of Ministers of Member States on the right to journalists not to disclose their sources of information, adopted 8 March 2008.

major crime. Moreover, the distinction between very serious or exceptionally serious crimes is not explained in the law. Third, the Draft Law does not specify who can request the order to disclose information. By contrast, the Recommendation No. R(2000)7 states that disclosure should only be ordered at the request of an individual or body with a direct, legitimate interest. *Finally*, in order for the extent of a disclosure to be limited as far as possible, the disclosed information should be provided only to the requesters of the order to disclosure.

Recommendations:

- Law enforcement bodies should not have powers to oblige a person to disclose information sources.
- The Draft Law should require that the balance of the interest in disclosure and the harm to freedom of expression be always carried out.
- The circumstances which justify the disclosure in Article 13 should be harmonised with Council of Europe Recommendation R (2000) 7.
- Article 13 should set out that the disclosure of information sources can be ordered only at the request of an individual or body with a direct, legitimate interest.
- Article 13 should limit the access to disclosed information sources as far as possible, by ensuring that the disclosed information is provided only to those who requested the disclosure.

IV.3.9 Miscellaneous: substantive shortfalls

The Draft Law can enhance the protection of the right to freedom if it includes provisions requiring that the interpretation protection of its provisions be made in accordance with international standards, and affording protection to whistleblowers and to information against search and seizure of the authorities.

The protection of individuals who release information on wrongdoings – whistleblowers - provides an important information safety valve, ensuring that key information does indeed reach the public. Such protection should apply even where disclosure would otherwise be in breach of a legal or employment requirement. In some countries, this protection is set out in a separate law rather than being included in the freedom of information law. In the case of *Guja v Moldova*⁵¹, finding that the applicant's right to freedom of expression was violated as a result of his dismissal for informing the press of attempts of high-ranking public officials to put pressure on the prosecutor's office, the European Court observed that Moldovan law did not contain any provision for employees to report irregularities. Accordingly, the suggested provision is appropriate and proposed on time. The drafters may wish to use paragraphs 1 and 2 of Article 12 of the Law of Georgia on Freedom of Speech and Expression as a source of inspiration. It states:

⁵¹ *Guja v Moldova*, Judgment of 12 February 2008, Application no. 14277/04

Article 12: Liability for disclosure of a secret

1. A person shall be liable only for the disclosure of secrets to which they are bound by contract or pursuant to his or her official position the disclosure of which creates a direct and substantial danger to values protected by law.
2. No person shall be liable for the disclosure of a secret if that disclosure aimed to protect a lawful societal interest and the public interest in disclosure outweighs the damage done by the disclosure.

Further international law recognises that information collected and created for journalistic purposes enjoys a special degree of protection from search and seizure by the authorities. This is necessary to safeguard the information sources and prevent chilling effect exerted on journalists and media outlets by such operations. Concerns like these have led several countries to specify a separate procedure in law for the search and seizure of journalistic premises and materials. For example, the French Criminal Procedure Code provides:

Searches of the premises of a press or broadcasting company may be conducted only by a judge or a State prosecutor, who must ensure that the investigations do not endanger the free exercise of the profession of journalism and do not obstruct or cause an unjustified delay to the distribution of information.⁵²

A special provision should be included in the Draft Law granting a special degree of protection from official search and seizure to information collected or created for journalistic purposes.

Finally, the Draft Law has no provision ensuring that the interpretation of its legal provisions is made in accordance with the European Convention and the case law of the European Court.

The case-law of the European Court establishes principles and standards which should guide national judges in the examination of defamation cases. The deviation of domestic case law from the European Convention leads to applications to the European Court and judgments against the government responsible for violations of human rights. Bearing in mind that compensations to victims of violations increase the financial burden of the government, it is recommended that an explicit provision in the Draft Law ensures that the interpretation of the provisions concerning protection of honour, dignity and public reputation and the right to private and family life be carried out in accordance with the guarantees of the European Convention on Human Rights as elaborated in the case-law of the European Court.

Recommendations:

- The Draft Law should afford protection to whistleblowers.
- The Draft Law should grant a special degree of protection to information collected or created for journalistic purposes against search and seizure by the authorities.
- The Draft Law should include a provision setting out that the interpretation of the provisions concerning the protection of honour, dignity and public reputation should be carried out in accordance with the European Convention and case-law of the

⁵² Article 56-2, Criminal Procedure Code.

V. Overview of Procedural Regime

This section analyses in detail the procedural norms in the Draft Law. These norms set out the procedures for examination of defamation cases and for cases on protection of private and family life. It is possible to examine both procedures simultaneously as they are strikingly similar.

V.1 Positive features

As stated in the introduction, the Draft Law includes some progressive procedural provisions, such as:

- The prohibition on the State and its bodies from suing for defamation;⁵³
- The introduction of a procedure for voluntary rectification and compensation for defamation and cases on protection of private and family life;⁵⁴
- The short limitation period for submitting a request for voluntary rectification and compensation (one year) and for filing a defamation suit (30 days from the day of receiving an answer to the request for voluntary rectification or from the day the answer was due).⁵⁵
- The linkage of the state fees for claims for moral and material damages to the value of the action at law;⁵⁶
- The placement of the burden of proof on the plaintiff with respect to the defamatory statements of fact;⁵⁷
- The introduction of a list of presumptions in favour of freedom of expression.⁵⁸
- The introduction of a regime of exemptions from liability for defamation for statements made by the president, the members of parliament, to statements made during judicial proceedings or statements made in the requests, letters or complaints to public authorities⁵⁹ and for defamation for reporting of words of others;⁶⁰
- The limitation of compensation for moral damages caused to a public person only in the cases when the latter has become a victim of bad faith defamation.⁶¹

At the same time, a number of procedural provisions are problematic from the viewpoint of freedom of expression. We elaborate on the procedural shortfall in the following paragraphs.

⁵³ Article 9, para. 2 of the Draft Law.

⁵⁴ Articles 15 and 16 of the Draft Law.

⁵⁵ Article 15, para. 3 and Article 17 of the Draft Law.

⁵⁶ Article 19 of the Draft Law read together with Article 3, paragraph 1, letter (a) of the Law on State Fee.

⁵⁷ Article 24, paragraph 1 of the Draft Law.

⁵⁸ Article 25 of the Draft Law.

⁵⁹ Article 8 of the Draft Law.

⁶⁰ Article 28 of the Draft Law.

⁶¹ Article 29, para. 2 of the Draft Law.

V.2 Problematic areas

V.2.1 *Parties*

Overview

Article 9 para 2 of the Draft Law states that the State bodies, including all executive, legislative and judicial bodies, cannot take legal action for defamation. Paragraph 3 of the same article states that these bodies should not enjoy protection against defamation through administrative or criminal law.

According to Article 20, a plaintiff in defamation proceedings may be an individual whose honour, dignity or professional reputation has been violated, any interested person on behalf of a deceased person (if prior to his/her death the respective person did not initiate a defamation case), and any legal entity whose professional reputation has been violated.

Analysis

While the restriction of the ability of the state and its bodies to sue for defamation is one of the positive features of the Draft Law, the same cannot be said for the provision enabling individuals to sue on behalf of persons who are deceased. The harm from an unwarranted attack on someone's reputation is direct and personal in nature. Unlike property, it is not an interest that can be inherited; any interest surviving relatives may have in the reputation of a deceased person is fundamentally different from that of a living person in their own reputation. Furthermore, a right to sue for defamation for the reputation of deceased persons could easily be abused and might prevent free and open debate about historical persons and events. Consequently, the Draft Law should not enable individuals to sue for defamation on behalf of deceased persons.

Recommendations:

- Article 20, paragraph 1, letter b), enabling interested parties to sue for defamation of deceased, should be removed.

V.2.2 *State fees*

Overview

According to Article 19, plaintiffs should pay two types of state fees to have their claims under the Draft Law examined. The first is fixed in the amount of 5 conventional units (1 unit is equal to 20 Moldovan lei) and applies to legal actions seeking denial, bringing excuses, or granting the right to reply. The second one applies to claims related to the reparation of material and moral damage caused as a result of defamation and amounts to 3% of the value of the action at law.⁶²

Analysis

Making the state fees for claims for moral and material damages dependent on the value of the action at law would deter many plaintiffs from requesting excessive amounts of

⁶² Article 3, paragraph 1, letter (a) of the Law of Moldova on State Fee.

compensations. This will have a positive effect on freedom of expression in view of the chilling effect that excessive claims for compensation awards have on plaintiffs. At the same time, it is recommended that the percentage of state fees be increased to further limit the possibilities for claiming excessive pecuniary compensations for moral damages.

Recommendations:

- The percentage of state fees should be increased to further limit the possibilities for claiming excessive pecuniary compensations for moral damages.

V.2.3 Measures for ensuring legal actions

Overview

Article 22 of the Draft Law sets out measures for ensuring legal action. They can be requested from courts simultaneously with the submission of the request for voluntary rectification or compensation for defamation and for violation of the right to private and family life. Upon the claimant's request, the court can apply the following measures to ensure the action:

- a) interdiction to disseminate the appealed information;
- b) levying a distraint upon the circulation which contains appealed information;
- c) interdiction to destroy audio and TV records.

Analysis

There are several problems concerning the measures set out in Article 22.

First, in comparison with other measures for ensuring legal actions such as attachment on the property, the nature of the measures implies that their purpose is not to ensure that the plaintiff will be able to obtain the requested compensation from the defendant at the end of the court proceedings, but rather to restrict the freedom to disseminate the impugned expression. As such, the three measures set out in Article 22 should be regarded as interim injunctions. *Second*, failing to regard the measures as restrictions on the right to freedom of expression, the Draft Law does not require that they meet the three-part test for assessment of the legality of freedom of expression restrictions. Finally, it is problematic that the Draft Law makes it easy to apply these measures. Noting the need of safeguards against abusive use of the measures in Article 22, it is recommended that the Draft Law include the following safeguards established by Principle 16 of ARTICLE 19's *Defining Defamation* concerning interim measures:

- (b) Interim injunctions, prior to a full hearing of the matter on the merits, should not be applied to prohibit further publication except by court order and in highly exceptional cases where all of the following conditions are met:
 - i. the plaintiff can show that he or she would suffer irreparable damage – which could not be compensated by subsequent remedies – should further publication take place;
 - ii. the plaintiff can demonstrate a virtual certainty of success, including proof:
 - that the statement was unarguably defamatory; and
 - that any potential defences are manifestly unfounded.⁶³

⁶³ *Defining Defamation: Principles on Freedom of Expression and Protection of Reputations*, see *ibid.* note 7.

Recommendations:

- The measures in Article 22 should satisfy the three-part test for assessment of the legality of restrictions on the right to freedom of expression.
- The Draft Law should reserve the use of these measures in Article 22 for highly exceptional cases

V.2.4 Defences

Overview

Article 8 of the Draft Law establishes a regime for exemptions from liability for defamation for statements made by the president, the members of parliament, to statements made in the course of judicial proceedings or for statements made in the requests, letters or complaints to public authorities.

The final paragraph of Article 29 establishes a defence against a defamation charge as such for a mass media outlet, stating that a mass media outlet can be held liable only when it acted in bad faith or in disregard of its professional obligations.

Analysis

While the provision should be welcomed, it is recommended that the exemption is extended to cover statements in the course of proceedings at legislative bodies and at local authorities. It is widely recognised that it is in the public interest that not only elected public officials but everybody is able to speak freely without fear in the course of the proceedings in such bodies.

Further, the exemption from liability for statements made in requests, letters or complaints to public authorities is positive. Nevertheless the Draft Law should provide protection against statements of this type made in bad faith.

Finally, the Draft Law does not contain a fully developed defence of ‘reasonable dissemination’: that persons are not liable for the dissemination of wrong and defamatory facts when they acted in good faith and in accordance with professional ethics and when the dissemination concerned a matter of public interest. While such a defence is explicitly recognised in the privacy provisions of the Draft Law,⁶⁴ the defence is not fully recognised with respect to defamation. The provision in Article 29 does not afford this defence to everybody but to mass media only. It is recommended that a special provision recognises the reasonable publication defence for defamation that will apply to everybody. Together with this, we recommend that Article 24 – on the burden of proof – is amended to make it clear that once the defendant establishes that a publication concerned a matter of public interest, the plaintiff should prove malice for the claim to succeed.

Recommendations:

- The exemptions from liability should be extended to cover statements made in the

⁶⁴ See Article 10, paragraph 3 of the Draft Law.

course of proceedings at legislative bodies and at local authorities.

- The Draft Law should provide for protection against statements in requests, letters or complaints to public authorities made in bad faith.
- A special provision should recognise the defence of ‘reasonable dissemination,’ enabling not only the media but every person to invoke it.
- Article 24, setting out the burden of proof, should be amended to make it clear that once the defendant establishes that a publication concerned a matter of public interest, the plaintiff should prove malice for the claim to succeed.

V.2.5 Remedies/Sanctions

Overview

The remedies for defamation are set out in Articles 26, 27 and 29 of the Draft Law. They include: rectification, publication of reply, compensation for actual and moral damages. If the person obliged to make the rectification refuses the publication of correction it should pay the plaintiff a compensation amounting from 50 to 5000 convention units (1 unit = 50 Moldovan lei).

Article 29 sets out criteria for determining the quantum of the awards for moral damages. Public persons can be granted compensations for moral damages only if they have been victims of bad faith defamation. The moral damage is granted to legal entities only if the dissemination of information has endangered its management.

Article 29 deals with the difficult issue of “moral damages”. Paragraph 1 sets out a non-exhaustive list of factors that a court must take into account when determining the quantum of moral damages, including:

- the nature and severity of physical and psychological suffering caused to the claimant;
- the nature of the information disseminated;
- the scope of the information’s dissemination;
- the personality of the plaintiff;
- the reputation of the defendant;
- the defendant’s degree of guilt;
- the consequences brought about by the dissemination of the defamatory information;
- the material status of both defendant and claimant;
- whether a correction has been published;
- whether the right to reply was granted or a retraction was published before the law suit was filed; and
- any other relevant circumstances.

Article 29 further limits the award of moral damages in a number of circumstances:

- moral damages may be awarded to a public figure only when the defamation was committed in bad faith;
- moral damages may be awarded to a corporation only when the defamation disrupted its management; and

- no moral damages may be awarded to a legal entity that has been liquidated.

The final paragraph of Article 29 establishes a defence against a defamation charge as such for a mass media outlet, stating that a mass media outlet can be held liable only when it acted in bad faith or in disregard of its professional obligations.

Analysis

The set of guidelines for determination of the amount of moral damages is to be welcomed. However, there is no overall limit on moral damages. Article 29 should be further strengthened by imposing an absolute ceiling for compensation awards.

In addition, the regime of sanctions in the Draft Law does not refer to the principle of proportionality, according to which sanctions for expression should be strictly proportionate to the damage. In *Tolstoy Miloslavsky v. United Kingdom*⁶⁵ the European Court held that the imposition of a £1,500,000 damage award could not be justified as ‘necessary in a democratic society’ and therefore constituted a violation of Article 10 of the European Convention. The Court noted:

Under the Convention, an award of damages for defamation must bear a *reasonable relationship of proportionality* to the injury to reputation suffered [italics added].⁶⁶

In accordance with the foregoing, it is recommended that the Draft Law require that sanctions for expression be strictly proportionate to the damage.

Finally, the provision in Article 29 that moral damages may be awarded to a corporation only when the defamation disrupted its management, is vague because it is impossible to foresee how speech can disrupt management of a corporation. The Draft Law is also silent in this respect. This provision should be removed in order to make it impossible for corporations to sue for moral damages. Corporations should be able to take legal action only in relation to defamatory statements made in regards to the quality of a business' product(s) or services.

Recommendations:

- An absolute ceiling for compensation awards for moral damages should be established.
- The Draft Law should explicitly provide that sanctions for expression should be strictly proportionate to the damage.
- Article 29, allowing for corporations to sue for moral damages, should be removed.

V.2.6 *Miscellaneous: procedural shortfalls*

The Draft Law does not impose any limit on the liability for defamation and does not provide effective remedies against abuse of the judicial process by plaintiffs who bring

⁶⁵ 13 July 1995, Application No. 18139/91.

⁶⁶ *Ibid.*, para. 49.

unsubstantiated defamation cases with a view to stifling criticism rather than vindicating their reputation.

The failure of the Draft Law to impose limits on the liability for defamation is worrisome because a large number of people risk being sued for defamation due to their “innocent dissemination” of defamatory statements. For example, internet service providers may be held responsible for dissemination of defamatory statements even though they lack any direct link to them.

It is recommended that the Draft Law exclude from the scope of liability for defamation people who are not authors or editors, as well as publishers of statements who did not know and could not know that they were contributing to the dissemination of defamatory statements. Article 16 of the Law of Georgia on the Freedom of Speech and Expression gives a good example in this respect, stating that “[a] person shall not be imposed a liability if he did not and could not know that he disseminated defamation.”

Further, defendants should have legal means against plaintiffs who bring clearly unsubstantiated defamation cases, without prospect of success, to try to prevent media criticism of their actions. Like any other court action, unsubstantiated defamation cases have a chilling effect on freedom of expression which is deliberately sought by plaintiffs.

A procedural mechanism should be set up to strike out claims early on in the proceedings unless the plaintiff can show some probability of success.

Recommendations:

- The Draft Law should exclude from the scope of liability for defamation people who are not authors or editors, as well as publishers of statements who did not know and could not know that they were contributing to the dissemination of defamatory statements.
- Courts should be able to strike out unsubstantiated claims early on in the proceedings in order to prevent malicious plaintiffs from suppressing media criticism by initiation of defamation cases with no prospect of success.