

ROMANIA

@Criminal law reform on the wrong track

"Constitutional provisions on the rights and freedoms of citizens shall be interpreted and applied in accordance with the Universal Declaration on Human Rights and with other treaties and pacts to which Romania is a party.

If there is disagreement between the pacts and treaties on fundamental human rights to which Romania is a party and domestic laws, then international regulations will have priority."

Constitution of Romania, Article 20

BACKGROUND

The process of legislative reforms in Romania, following the major political changes in December 1989, was dynamic with the Romanian Parliament adopting, during this period, over 250 new acts. This process had also affected the Romanian Penal Code although it has not been radically reformed. The most significant amendment to the Penal Code took place in January 1990 when the death penalty was abolished and replaced by life imprisonment.

Some of the provisions of the Penal Code still in force, however, impose arbitrary and excessive restrictions on the right to free expression, assembly and association with others and the right to privacy and are contrary to international treaties ratified or signed by Romania.

Protecting state authority with unnecessary and excessive restrictions on the right to free expression, certain provisions of Articles 238 and 239 criminalize defamation of "a person engaged in an important state or public activity". Article 238, paragraph 1, punishes with six months' to three years' imprisonment anyone who "casts slurs upon the honour or publicly threatens" a person in such a position. Article 239, paragraph 1, states: "Insult, libel, slander or threats made directly or by direct means of communication against a functionary whose duties involve the exercise of state authority, and who is performing his duties, or such insults made with regard to acts accomplished during the performance of his duties are punishable by three months' to two years' imprisonment". Amnesty International is concerned that the provisions of these articles violate the right to freedom of expression set out in Article 19 of the International Covenant on Civil and Political Rights (ICCPR). Amnesty International considers that other provisions of the Penal Code and other existing laws in Romania are quite sufficient to protect the honour and personal integrity of

¹ Article 160 of the Romanian Penal Code which is referred to in Article 238, paragraph 1.

individuals or legitimate interests of the state such as national security, territorial integrity or public safety.

Recently a journalist was arrested under Article 238, paragraph 1, for writing a satirical article. On 14 February 1994 Nicolae Andrei, a journalist in Craiova, was charged under Article 238 and imprisoned for an article published in *Conflict*, a local magazine. He was released on bail on 18 February pending trial. Amnesty International urged the Romanian authorities to stop all criminal proceedings against Nicolae Andrei and to initiate legislative revision of Articles 238 and 239. If reimprisoned Nicolae Andrei would be considered by Amnesty International as a prisoner of conscience.

Another provision of the Penal Code which contradicts international treaties ratified by Romania is Article 200, which allows for the arrest, prosecution and imprisonment of consenting adults engaging in homosexual acts in private. Paragraph 1 of this article states that "sexual intercourse between persons of the same sex is punishable by one to five years' imprisonment". Paragraph 4 of the same article states that "propositioning or enticing an individual to an act provided for in paragraph 1 is punishable by one to five years' imprisonment". Article 204 criminalizes all attempts to commit acts provided for in Article 200.

During 1993 Amnesty International expressing its concern to the Romanian authorities about Article 200, paragraphs 1 and 4, on several occasions and called for the release of prisoners who were charged or convicted under this law. Amnesty International considers individuals imprisoned solely because of their practice of consensual homosexual acts between adults in private to be among those persecuted because of their homosexuality and to be prisoners of conscience. During 1993 Amnesty International learned of five men imprisoned in Romania under Article 200 whom it considered to be prisoners of conscience.

Amnesty International urged the Romanian Government to reform the Romanian Penal Code and to ensure that the proposed legislation governing sexual offences did not permit the imprisonment of people solely because of their homosexuality.

The Committee on Legal Affairs and Human Rights and the Political Affairs Committee of the Council of Europe's Parliamentary Assembly, reviewing Romania's application for membership also expressed concern that certain provisions of Article 200 represented a violation of the right to privacy and were incompatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms.

On 28 September 1993 the Parliamentary Assembly, recommending Romania for membership of the Council of Europe, also noted that the Romanian authorities should be encouraged to :

"...continue the efforts they have started to make in order to implement the principles of the rule of law, the respect for minorities, the independence of the judiciary and to take measures which have been called for in the reports of the Political Affairs Committee and the Committee on Legal Affairs and Human Rights in accordance with the requirements established by the Council of Europe."²

The Parliamentary Assembly also stated its expectation that Romania would shortly change its legislation in such a way that Article 200 of the Penal Code would no longer consider as a criminal offence homosexual acts in private between consenting adults.³

At the same time the Juridical Commission of the Romanian Senate⁴ started to review the revisions to the Romanian Penal Code. On 11 November 1993, the first debate in the Senate on this act had to be adjourned amid remarks which are illustrative of attitudes to homosexuality still prevalent in Romania. In one such intervention, Senator Dragomir Popescu of the ruling Party of Social Democracy (PSD) reportedly said: "I cannot agree with the misuse of bodily organs which have well-established functions." Others reportedly said that legalising homosexual rights "would ruin the reputation of Romanian men as lovers".

On 2 February 1994 the Senate adopted the Draft Law for the Revision of the Penal Code (further in this text referred to as the Draft Law) with 75 votes for, 25 against and five abstentions. The Draft Law has now been forwarded for adoption to the Chamber of Deputies.

Amnesty International is concerned that some proposed provisions of the Draft Law will contravene international human rights treaties ratified or signed by Romania. On 16 February Amnesty International wrote to Adrian Nastase, President of the Chamber of Deputies, expressing its concern about a number of these provisions urging the members of the Chamber of Deputies to reject the proposed Draft Law.

DRAFT LAW ON ARTICLE 200

Amnesty International is concerned that the Draft Law amending Article 200 of the Penal Code, does not fulfil international human rights standards ratified by Romania which

² Opinion No. 176 (1993) on the application by Romania for membership of the Council of Europe adopted by the Parliamentary Assembly on 28 September 1993.

³Point 7 of the Opinion No. 176 (1993)

⁴The session were convened on 15, 22, 23 and 29 September 1993.

the organization urged the government to consider in revising this legislation. Paragraph 1 of this article states the following:

"Sexual relations between persons of the same sex, if they cause public scandal, are punishable by one to five years' imprisonment."

The proposed formulation which criminalizes homosexual acts modifies the law in force by incorporating a legal standard - public scandal. This legal standard is very broad and could lead to varying and contradictory judicial interpretation. Amnesty International is concerned that "causing public scandal" could be interpreted to allow the prosecution in Romania of adults solely because of consensual homosexual acts in private, which are not criminal if carried out in similar circumstances by heterosexuals.

This would be considered by Amnesty International to be a violation of the non-discrimination principle provided in Article 26 of the International Covenant on Civil and Political Rights (ICCPR), which has been ratified by Romania. The principle guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Amnesty International would also consider the prosecution of adults for practising homosexual acts in private to be an arbitrary interference in people's privacy, in violation of ICCPR Article 17 which states that no one shall be subjected to arbitrary and unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Furthermore, Amnesty International would consider the proposed Draft Law on the revision of Article 200, paragraph 1, to be contrary to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which was signed by Romania in November 1993.⁵ Article 8 of the Convention states that "everyone has the right to respect for his private and family life, his home and his correspondence". The European Court of Human Rights has held that the right to privacy includes the right to establish and develop emotional and sexual relationships with other human beings, including homosexual relationships. In Dudgeon v. United Kingdom (22 October 1981, Series A, No. 45) and Norris v. Ireland (26 October 1988, Series A, No. 142), the European Court held that the prohibition in Northern Ireland and Ireland, respectively, of homosexual acts between consenting adults over the age of 21 constituted an unjustifiable interference with the right to respect for private life under Article 8 of ECHR.

⁵ Romania is expected to bring its legislation into line with the ECHR in preparation for ratifying the ECHR. From the date of ratification Romania will be legally bound to comply with every provision in the ECHR.

The Court reviewed whether any justification existed for "...interference by a public authority with the exercise of this right [to privacy]..." - as stipulated in Article 8, paragraph 2 of the Convention. The Court acknowledged that some degree of regulation of male homosexual conduct by means of criminal law could be justified as "necessary in a democratic society", to preserve public order and decency and to protect the citizen from what is offensive or injurious. The Court suggested that the necessity for some degree of control might even extend to consensual acts committed in private in order to protect those who are especially vulnerable by reason, for example, of their youth.

With regard to the prohibition of private consensual homosexual acts involving males over the age of 21, however, the Court decided that the law in question violated Article 8 because it was not "necessary in a democratic society", even though it was accepted that societies in northern Ireland and Ireland were more conservative in sexual matters than the rest of Europe. The Court said that:

"...such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved...In particular, the moral attitudes toward male homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards cannot, without more, warrant interfering with the applicant's private life to such an extent. 'Decriminalization' does not imply approval...To sum up, the restriction imposed on Mr. Dudgeon under Northern Ireland law, by reason of its breadth and absolute character, is, quite apart from the severity of the possible penalties provided for, disproportionate to the aims sought to be achieved." (See ECHR Dudgeon judgment, paragraphs 60 - 61; see mutatis mutandis, ECHR Norris judgment, paragraph 46.)

Paragraph 5 of the proposed Draft Law on the revision of Article 200 states:

"Enticing or seducing a person to practise acts contained in the above paragraphs as well as propaganda, associations or other forms of proselytizing carried out with the same aim are punishable by one to five years' imprisonment."

Amnesty International considers that the formulation of this provision is vague and ambiguous and that its implementation could result in the prosecution of persons solely for having exercised their universally recognized right to free expression and the right to free assembly and association with others. Thus such a provision would not conform to Articles

19 (the right to freedom of expression), 21 (the right of peaceful assembly) and 22 (the right to freedom of association with others) of ICCPR and Articles 10 (the right to freedom of expression) and 11 (the right to freedom of assembly and association with others) of ECHR. Hence, Amnesty International is concerned that the enforcement of the proposed paragraph 5 could lead to the imprisonment of people who would be considered prisoners of conscience.

Amnesty International also notes that the Draft Law modifying Article 200 in paragraphs 2, 3 and 4, punishing homosexual acts with minors, homosexual rape and all such acts which result in serious bodily injury, death or suicide, prescribes as maximum punishment longer prison terms than when such crimes are committed by heterosexuals.

DRAFT LAW ON ARTICLE 239

Amending the criminalization of outrage, the Draft Law states the following:

Article 239 - Outrage

Insult, slander or other attack committed directly or by means of communications against a public official whose duties involve the exercise of state authority and who is performing his duties or such insults made with regard to acts accomplished during the performance of his duties are punishable by three months' to three years' imprisonment.⁶

If an act provided for in paragraph 1 is committed in conditions of Article 205, paragraph 3, or Article 206, paragraph 2, the punishment is six months' to four years' imprisonment.

...

If acts contained in previous paragraphs are committed against a member of the Parliament, the Government, a magistrate, a justice of the Constitutional Court or a member of the Administrative Court (Cur_ii de Conturi), or against a police officer, a gendarme or other military, the special maximum penalty may be increased by three years.⁷

⁶ These provisions are virtually the same as Article 239, paragraph 1, now in force but the maximum penalty has been increased from two to three years' imprisonment. Other paragraphs quoted here are entirely new to the law in force.

⁷The Draft Law states:

Article 205 - Insult

Attacking the honour or reputation of a person through words, gestures or other means or by expressions of mockery is punishable by one month's to one year's imprisonment or a fine.

Amnesty International is concerned that the proposed draft for different forms of criminal defamation might lead to contravention of the right to freedom of expression warranted by Article 19 of the ICCPR and Article 10 of the ECHR. In view of the draft provisions of Article 239, paragraph 2, (relative to the provisions of Article 205, paragraph 3, and Article 206, paragraph 2), this could not only particularly affect the right of journalists in Romania to freedom of expression and their right to impart information and ideas without interference by public authority, but also the right of other Romanians to receive such information and ideas.

Both Article 19 of the ICCPR and Article 10 of the ECHR, which protect the right to freedom of expression, acknowledge that the exercise of that right "carries with it special duties and responsibilities" and may therefore be subjected to restrictions. Article 19 of the ICCPR specifies that such restrictions may only be imposed if they are necessary to respect the rights or reputations of others or for the protection of national security or public order, or other issues affecting the community as a whole. Article 10 of the ECHR provides for only those restrictions, necessary in a democratic society: "in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, 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".

As regards the need to protect the rights or reputations of public officials is concerned, anyone who considers him/herself defamed can resort to other criminal or civil actions, which anyone, regardless of status or function, can resort to in order to protect his or her reputation.

As far as the protection of national security or public order or other issues affecting the community as a whole are concerned, there are other provisions in the Penal Code which sufficiently protect these legitimate state interests and social values. For example, the Penal Code attaches penalties to the following acts: treason by transmission of secrets (Article 157), assault which endangers state security (Article 160), propaganda of fascist character (Article

Similar penalty is applicable in cases of attribution to a person of a defect, illness or infirmity which, even if real, should not be relevant.

If an act contained in paragraphs 1 and 2 is committed in newsprint or by audio-visual means it is punishable by three months' to two years' imprisonment or fine.

Article 206 - Slander

The public affirmation or imputation of a specific act to a person which, if real, would expose that person to a penal, administrative or disciplinary sanction or to public contempt is punishable by three months to two years' imprisonment or by a fine.

If the act is committed in newsprint or by audio-visual means it is punishable by six months' to three years' imprisonment or by fine.

166), act impairing state interests (Article 168), disclosure of secrets endangering state security (Article 169). The Penal Code also contains numerous provisions concerning offences against authority, offences which threaten the activities of state organizations and offences against the defence capacity of Romania.

Amnesty International considers that the above-mentioned as well as other provisions of the Penal Code offer sufficient protection to state officials and other representatives of state authority and that the proposed Article 239 paragraphs 1, 2 and 4 imposes unnecessary and excessive restrictions on the right to freedom of expression.

DRAFT LAW ON ARTICLES 236 AND 168

For the same reasons as stated above, Amnesty International is also concerned with the following Draft Law provisions:

Article 236 - Defamation of the state or nation

Defamation committed, by any possible means, in public, of the country or of the Romanian nations is punishable by one to five years' imprisonment.

Article 168 - Communication of false news

Communication or dissemination, by any possible means, of false news, facts or information or forged documents, if committed with the intent to impair the security of the Romanian state or its international relations is punishable by one to five years' imprisonment.

Amnesty International considers that these provisions might also violate the right to freedom of expression set out in international human rights standards which Romania is legally bound to observe. As already mentioned above, both the ICCPR and ECHR do permit limited restrictions on the right to freedom of expression, but only within strictly defined circumstances. Even if there are legitimate interests which the proposed Articles 236 and 168 seek to protect they are so broad that they would threaten the very basis of freedom of expression in Romania. In the words of the United Nations Human Rights Committee, commenting on Article 19 of the ICCPR, "When a State Party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself".

RECOMMENDATIONS

Amnesty International urges members of the Chamber of Deputies to reject the proposed Draft Law.

Amnesty International also calls on the Romanian Parliament to abolish Article 200, paragraphs 1 and 4 of the Penal Code.

Amnesty International calls on the Romanian Parliament to revise Article 238, paragraph 1, and Article 239, paragraph 1, in such a way so as not to allow for the prosecution of persons who have exercised their right to free expression without resorting to or advocating the use of violence.

Amnesty International also urges the Romanian Parliament to ensure that future penal laws do not place at risk the rights to freedom of conscience, freedom of expression and the right to information, guaranteed by the Romanian Constitution in Articles 29, 30 and 31 respectively, and that the adopted laws conform to all international human rights treaties which Romania has ratified. This, we understand, is also a requirement of Article 20 of the Romanian Constitution.

The Council of Europe - particularly the Parliamentary Assembly and the Committee of Ministers - should ensure that Romania implements the reforms recommended by the Parliamentary Assembly to bring Romanian law and practice into line with the ECHR. In particular, the CLAHR and PAC of the Parliamentary Assembly should ensure rigorous and continuing scrutiny of the human rights situation in Romania with clear recommendations concerning the criminalization of homosexual acts and restrictions on freedom of expression. This is especially the duty of the Committee of Ministers, collectively, to take whatever political action is needed to ensure compliance. The Council's program of co-operation and assistance to Romania is a vital method of building strong institutions and respect for the highest human rights standards. But such a program is not a substitute for regular and rigorous scrutiny of a country's record, particularly if there are still outstanding human rights concerns at the time of admission.