Media, Social Media and Freedom of Speech Protection in Romanian Legislation

Dan Valeriu Voinea
University of Craiova

Abstract

In the present article we will analyze the current provisions in Romanian legislation regarding the protection of both the freedom of speech and the right to privacy, and the way they affect media and most recently social media.

The recent changes brought by the advance of modern communication methods, the switch from one-to-many communication to many-to-many has rendered some provisions of Romanian law obsolete or impossible to uphold, while others still apply. The focus of concern has partially shifted away from the censorship of the government torwards the censorship made possbile to the internet gatekeepers. "In recent years, concerns about the role of Internet intermediaries have continued to grow" (Yoo, 2010), since we have no true decentralized way of sending infromation via the internet – and all information is passed through said gatekeepers – be they your internet provider, Twitter, Facebook or Google.

Keywords: mass media, social media, freedom of speech, Romanian constitution

Introduction

The role of mass media in the Romanian society has been undergoing fundemental changes in the past twenty six years, changes that have been mimicking the advance of the fundamental democratic institutions. Important advances have been made in the protection of free speech in Romanian legislation, with significant protections being offered both in the Romanian Constitution and the New Civil Code. There is an inherent underlying battle between the right to privacy and the right to free speech, which can be observed in the provisions and protections provided by the Romanian law.

The structural changes in the media landscape generated by the advance of social media, that have empowered both the media and citizens have introduced some significant gatekeepers. Has the Romanian legislation been able to stay current with the constant expansion of the Internet as the main communication medium?

The Romanian legislation holds no provisions regarding internet neutrality, but there are provisions in the European Legislation. A 2014 proposal defined "net neutrality" as meaning "the principle according to which all internet traffic is treated equally, without discrimination, restriction or

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interference, independently of its sender, recipient, type, content, device, service or application." (Amendment 237, European Single Market for Electronic Communications Report, 2014).

Provisions of the Romanian Constitution

There are several significant provisions regarding the right to privacy and the protection of freedom of speech in the Romanian Constitution.

Article 26 states that "(1) The public authorities shall respect and protect the intimate, family and private life. (2) Any natural person has the right to freely dispose of himself unless by this he infringes on the rights and freedoms of others, on public order or morals.", thus explicitly granting every citizen of Romania the right to private life and intimacy, a right that can not be disregarded in any other provisions of Romanian law. The second paragraph is an expression of an important principle regarding the freedom of individuals – that each of our freedoms ends when we begin to affect the freedom of any other individual. The Romanian Constitution also limits the freedoms when "public order or morals" are infringed, without providing a clear definition of public order and public morals. Thus, the lawmaker draws more limits on the freedom if inviduals, empowering the public "morals" and "public order".

Article 30, paragraph 1 states that "freedom of expression of thoughts, opinions, or beliefs, and freedom of any creation, by words, in writing, in pictures, by sounds or other means of communication in public are inviolable.". Through this, the lawmaker grants every individual total and inviolable freedom of expression, without fear that the government will retaliate or censor said information. This doesn't mean that the government or individuals are unable to impose limitations – from simple examples like classified information and non disclosure agreements to debateable libel or slander.

The second paragraph explicitly outlaws censorship: "any censorship shall be prohibited.", noting that the Constitution does not just ban governmental censorship, but any kind of censorship. Under an extended interpretation of this paragraph, gatekeepers might also be in violation when censoring their users.

The third paragraph explicitly grants freedom to the press, but without defining what the "press" means. It states that "freedom of the press also involves the free setting up of publications", any kind of publications, from a radio station to a newspaper or a simple online media blog. Could a journalists Facebook page be considered a publication?

Paragraph four states that "no publication shall be suppressed.", thus offering an extra degree of protection to publications, especially from the government but also from outside sources – the suppersor is not defined and can be interpreted as any third party. Thus, both the formation and existance of publications is protected through the Romanian constitution.

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In the fifth paragraph we find the first obligation of the mass media – the Constitution grants that "the law may impose upon the mass media the obligation to make public their financing source.", thus, without forcing publications to reveal their financin source, it permits such actions in further law. Such provisions exist for radio and television media in Romanian law and are monitored by the National Council of the Audiovisual. Print and online media are so far not bound by this provision, but any media law could implement such a change, bringing a layer of transparency of media entities and interests. In case of a hostile government, such provisions could be used to pressure media owners.

The limits of freedom of expression that are also found in paragraph two of article 26 are detailed in paragraph 6 of article 30 - "freedom of expression shall not be prejudicial to the dignity, honour, privacy of a person, and to the right to one's own image.". Thus, the way the freedom of expression can affect the freedom of others is defined: by prejudicing the dignity, honour or privacy of a person, thus inflicting damage to one's own image. As such concepts are not exactly easy to define and delimit, in a case of libel or insult it is up to the court to determin if any of the persons rights have been infringed.

Further provisions are brought in article 7 related to the protecrtion of the public morals and public interest – "any defamation of the country and the nation, any instigation to a war of aggression, to national, racial, class or religious hatred, any incitement to discrimination, territorial separatism, or public violence, as well as any obscene conduct contrary to morality shall be prohibited by law.". Through this provision the lawmaker establishes a ban on certain categories of speech: that that promotes religious, racial, class or national hatred, incitement to discrimination or public violence. Such provisions, even though they limit freedom of expression, important in protecting minorities and disadvantaged groups, but are extended in the Constitution to conduct contrary to morality, which is, in the author's opinion, very hard to define. Thus, our freedom of expression is limited by morality under this provision of the Romanian Constitution.

The final paragraph of this article, paragraph 8, outlines who is liable in case either of the previous articles are breached: "civil liability for any information or creation made public falls upon the publisher or producer, the author, the producer of the artistic performance, the owner of the copying facilities, radio or television station, under the terms laid down by law. Indictable offences of the press shall be established by law.". Thus, the civil liability is extended not only to the direct author of the as defined agression, but also to publisher, radio or TV station, that are jointly held responsible.

Article 31 is the basis of the right to information, especially public information. The freedom of acess to information sometimes is found in direct conflict with the protection of confidential information and a citizens right to privacy. This conflict is resolved by the lawmaker through the use of "public

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interest", a very important concept in journalism. Paragraph one states that "a person's right of access to any information of public interest shall not be restricted.", meaning that information of public interest is of utmost importance, and should not be restricted. How do we proceed with classified documents that, which revealed, would be of very high public interest? Journalists should be protected by this provision of the Constitution in such cases, but proving public interest is sometimes difficult. In the same way, sometimes an individuals' privacy might be violated for the greater interest of the public, but such cases are rare and must be analyzed individually.

The second paragraph grants more freedom to citizens and the press, while providing an obligation to public entities: "the public authorities, according to their competence, shall be bound to provide correct information to the citizens in public affairs and matters of personal interest." The information provided to the citizens interested should be correct and unaltered, to the best of the abillity of the public authority.

A limitation of this right is defined in the next paragraph, paragraph 3: "the right to information shall not be prejudicial to the measures of protection of young people or national security.". Through this, the lawmaker offerts an extra protection to minors, but also limits the right to information on issues related to "national security". But "national security" is a very broad concept, under which almost anything could be included. One example is the contract between CNANDR and Bechtel regarding the Transilvania Highway, which has been classified as secret under the excuse of national security.

If earlier in this article the lawmaker forces government entities to provide correct information, in paragraph 4 we find similar provisions for the media: "public and private media shall be bound to provide correct information to the public opinion." – thus, all media entities are forced to provide "correct information", to the best of their knowledge.

The last provision of article 31 is the related to the public media – "public radio and television services shall be autonomous. They must guarantee any important social and political group the exercise of the right to broadcasting time. The organization of these services and the parliamentary control over their activity shall be regulated by an organic law.". A framework for the functioning of the public radio and television services is established, guaranteeing their autonomy. That guarantee comes with a price – public media is obligated to offer any "important social and political group" the right to a part of its broadcasting time, through this trying to establish some sort of forced impartiality of public media. The details of this framework are established in organic law we will not analyze in this present paper, but we notice that the public media is not completely independent, since it is defined to be under "parliamentary control".

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Provisions of the New Civil Code

The New Civil Code was adopted in 2009, and entered into force at the 1st of octomber 2011. It is the first significant rewrite of the Romanian civil code since 1865. We will not try to treat all the provisions of the civil code regarding the individuals rights and obligations, but only the most important ones related to free speech and privacy.

The right to freedom of expression is established in article 70 paragraph 1– "any individual is entitled to freedom of expression.", extending the right provided by the Constitution to any individual under the Romanian law, not just citizens of Romania. The limits of this article are defined, according to the second paragraph, by article 75.

The right to private life is defined by article 71. According to paragraph one, "any individual has the right to respect for his private life.", the right to privacy being also protected in the Constitution, as we've previously shown. An explanation and extension of this right is provided in paragraph two of the same article: "no individual shall be subjected to any interference in his private life, personal or family nor the domicile, residence or correspondence, without his consent or without respecting the limits set out in art. 75.". Extra protection is granted by this article to private life, be it either personal or family life, but also to the household of individuals and a individuals' correspondence. Thus, our home and mail are sacred and inviolable. This provision is extremely important in the internet era – email is a modern form of correspondence, and according to the New Civil Code it is protected by this article. Paragraph three states that "it is also prohibited to use in any way correspondence, manuscripts or other personal documents and information in a person's private life without consent or without respecting the limits set out in art. 75." – even if there is a case where we stumble upon private information – an individuals correspondence – we are not allowed to disclose it without the individuals consent. Our journalist deontological codes also share this opinion, but some cases exist where this provision is debateable: when the information is of significant importance to the society and the public interest demands it.

Further provisions of protection are brought by article 252: "any individual is entitled to protection of intrinsic human values such as life, health, physical and mental integrity, dignity, privacy, private life, freedom of conscience, scientific, artistic, literary or technical freedom. " – the right to privacy and a private life is further emphasized by this article, being declared an "intrinsec human value", a value we are we are born with.

In essence, although the law is seen as a powerful means of implementing balance of rights that conflict (freedom of information and freedom of expression on the one hand, the right to privacy and dignity on the other), it is used more as a deterrent or as inducing self-censorship. (Centrul pentru Jurnalism Independent, 2013). A balance is hard to reach, but it must be tried because of the importance of all the previously mentioned rights. And the

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importance is different to each individual: to some, freedome of expression might be essential, while others value the right to privacy above all else.

Social media and journalists

The constant battle between privacy and free speech is highlighted in some examples we will provide onward. The free speech of journalists is protected against the state through Romanian law and international conventions, but usually it is not protected against the owners of their media institutions, and, equally important, self-censorship is sometimes very effective. Journalists have a dual roles – they are both private and public persons, they are opinion makers, but have responsibility for the citizens who they inform. They have to make constant decisions on when and what to speak out, if it is important to maintain objectivity or state their beliefs.

In 2014, a journalist from Digi 24 got fired from his television station after publishing a post on Facebook where he was criticizing the prime minister of Romania, Victor Ponta. (Hotnews.ro, 16 iulie 2014). The journalist considered that his right for freedom of expression granted by article 30 of the Constitution was violated, and that he was posting on his facebook pagea sa private person. The television station argued that journalists are public persons and should be politcally objective in their public life.

Two months later, another Digi 24 got fired for posting on her Facebook page. Ana Iorga Mihail was fired after she posted a correction of a gramatical error made by another Digi 24 employeed on TV. She stated that censorship takes another form in todays age, away from the state and torwards the gatekeepers – this time a television station. (DC News, 2104)

In 2015, a journalist for B1TV, Catalin Prisacariu, was fired and accuse pressure from the Ponta government to his news station. He noted that the station he was working for had recently changed its' political orientation, and even though they justified his dismissal as an economic measure, it was a political decision. (Hotnews, 2015).

Internationally, we find similar cases where journalists who expressed their opinions online in other outlets but they newspaper were sanctioned by their news station:

Marion Ives, who had worked as a journalist with SBS for nearly seven years, was sacked in May 2015 after posting the article that questioned whether the station had breached its charter by not employing enough staff from multicultural background. (Daily Mail, 2015).

A black meteorologist from Shreveport, Louisiana, working at an ABC affiliate, Rhonda Lee, stood up for herself on her station's Facebook page after some racist messages by viewers of the station were left there. Her decision led to her firing in 2012 – all from respoing to some readers commenting about her hair. (The Grio, 2012).

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An investigative reporter from another ABC affiliate based in Huntsville, Alabama - WAAY-TV – was fired after publishing a post to her blog entitled "Confessions of a Red Headed Reporter", where she was talking about her behind the scenes improprieties. (Gawker, 2013).

Bob Eschliman, 41, the former editor-in-chief of the Newton Daily News in Newton, Iowa, filed a suit against his employer after being fired for what he considers "publicly sharing his religious beliefs. (The Blaze, 2014). Eschliman posted a serious of articles on his blog, decrying a homosexual consipracy, which he called *Gaystapo.* The newspaper editor has filed a discrimination complaint with the United States Equal Employment Opportunity Commission against his former employer, claiming that he was wrongfully terminated for penning a personal blog post about homosexuality and the Bible.

We can see that even though the journalists' freedom of expression is protected by the law, the protection is against the government and other entities, not against their media institutions or other stakeholders. Thus, journalists have to be weary when expressing their opinions online: there is an extra degree of responsibility to their media institutions. Even though said institutions should be the promoters of the journalists' freedom of speech, they often follow other interests.

Conclusion

The provisions in the Romanian law regarding the freedom of speech protection are in line with the European Convention of Human Rights, which establishes freedom of expression in article 10, paragraph 1: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.". This right is defined through the relationship with a public authority, not with private entities, where Romanian legislation is lacking. Protection is provided through this article to all countries that have signed the ECHR, including Romania.

The second pargraph defines some limits of this freedom: "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.". Thus, states are allowed to impose laws that limit or restrict freedom of speech, as considered necessary in a democratic society, in the interest of national security (as also seen in the Romanian Constitution), for territorial integrity or public safety. The limits imposed in this article are broad and not absolute – this article of the ECHR does not take public interest into account, which could be argued in a court of law.

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Journalists and citizens alike are well protected by Romanian and European law against abuses of the state, but not against abuses of gatekeepers: their employers, the distributers or owners of media and pontentially monopolistic entities like Facebook, Google or Twitter.

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