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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON EVENTS IN MOLDOVA RELATING TO A DEMONSTRATION ON 25 JANUARY 2004

by

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THE REQUEST

1. The Secretary General of the Council of Europe has requested the opinion of the Venice Commission concerning the compatibility of the recent action taken by the Moldovan authorities against demonstrators in Chisinau on the basis of Article 358 of the Penal code of Moldova with Council of Europe standards.

THE FACTS

2. The actions in question relate to a public demonstration which took place in the square outside the National Assembly building in Chisinau on 25 January 2004.

3. On 20 January 2004 an order was made by the Deputy Mayor of Chisinau prohibiting the holding of this meeting. The order recited certain provisions of the laws of Moldova on the organisation and holding of meetings and of the law on local public administration and recorded that he had taken account of the request of 3 December 2003 from the PPCD (Christian Democratic Popular Party). The writer has not seen the latter document but assumes it was a request to authorise the meeting.

4. The operative part of the Deputy Mayor's order, having referred to the PPCD's intention to protest against a number of matters, including the functioning of democratic institutions in Moldova and the respect for human rights there, as well as the social and political situation and the Transdniestria referendum, all of which are, of course, legitimate questions for political debate, went on to recite that the Mayoralty of Chisinau had convincing evidence that at the meeting there would be acts of incitement to war of aggression, national hatred and public violence.

5. The PPCD sought an order from the administrative disputes division of the Court of Appeal quashing the order of the Mayoralty. The Court ruled against the PPCD in its decision dated 23 January 2004.

6. In its decision the Court of Appeal referred to the PPCD's arguments that, firstly, the Deputy Mayor had made his order without hearing the organisers of the meeting, and secondly, that the ban infringed their rights to freedom of expression and freedom of assembly. The court rejected the PPCD's arguments. The court first referred to the applicable provisions of the Law on public assemblies (Law 560-XIII) which were used to justify the ban. These are Articles 7 and 8, which provide:

7. Meetings must take place peacefully, without weapons of any kind, in order to ensuring the protections of the participants and of the environment, without interfering with the normal use of the public highways, or of the movement of traffic, or the operation of commercial businesses, without descending into acts of violence which would endanger public order, the life or bodily integrity of persons, or their goods.

8. Meetings are prohibited in the course of which any of the following actions take place:
   a) protests against or defamation of the state or the people;
   b) incitement to wars of aggression, or to national, racial or religious hatred;
   c) incitement to discrimination, territorial separatism, or public violence;
   d) an attack on the constitutional order.

9. The Court of Appeal then went on to say that, having examined the arguments, and having studied the leaflets signed by the PPCD which were prepared for the meeting of 25 January 2004 and which carried the slogans "Down with the dictatorial VORONIN government" and "Down with PUTIN's Russian government of occupation" the Court considered that these acts called on the citizens to support the PPCD in an attack on the Moldovan constitutional government elected in a constitutional manner and at the same time to incite hatred against the Russian people. The court furthermore took account of the fact that the PPCD had previously broken the law by burning the Russian Federation flag and the portrait of President Putin of Russia and had uttered slogans which incited hatred against the Russian people.

10. Despite the ban imposed by the Deputy Mayor and the rejection by the Court of Appeal of the PPCD's application to annul that ban the demonstration duly went ahead on 25 January 2004. It is alleged that a number of deputies of the PPCD took part in the banned meeting. It is understood that subsequently deputies were charged with criminal offences arising out of their participation in the meeting in respect of which the parliament has voted to lift their immunity. The writer is not aware of the precise charges which have been brought or against whom they have been laid.

11. The PPCD have appealed to the Supreme Court against the judgment of the Court of Appeal. At the time of writing the appeal has yet to be heard. The appeal includes the following grounds:
    a) The procedures followed by the Deputy Mayor are argued not to be in conformity with the Moldovan Law on Local and Public Administration in that the decision was taken without holding a public hearing at which the organisers could put forward their point of view.
    b) It is contested that the leaflets were signed by the PPCD, or that it was ever proved that they were so signed or that they were distributed by the PPCD.
    c) It is disputed that the slogans referred to amounted to an attack on the constitutional order of Moldova. One should not confuse the constitutional order and functioning of the State with a particular regime. The constitutional order includes the form of the State, the method of government and the type of democracy but does not refer to a particular government on which everyone is free to express a view. Everyone is free to criticise the quality of government and to support an alternative.
    d) Similarly, the Putin government is not the Russian people and to attack it is not to incite to hatred against Russians as a people.
    e) The PPCD referred to the status of the Russian Federation as *de facto* occupier of Transdniestria.
    f) The PPCD argued that under Article 68 of the Civil Code individual members are not responsible for the activities of the party as a whole or vice versa.
    g) The law on public assemblies contains no provision permitting the banning of meetings because of past conduct. Notwithstanding this the PPCD disputes that it did previously misbehave. It organised many meetings all of which were peaceful and respected democratic norms.
    h) Finally, the PPCD asks the Supreme Court to hold that the Court of Appeal's decision violates its right to freedom of expression and freedom of assembly.

LEGAL ISSUES

12. It is necessary for the Commission firstly to take account of the fact that there are proceedings pending in the Supreme Court of Moldova as well as in the criminal and administrative courts. It is possible that when these domestic avenues of recourse have been exhausted these events may become the subject of an application to the European Court of Human Rights. It is no part of the Commission's function to seek to prejudge any of these proceedings.

13. What is, however, appropriate, is for the Commission to consider the applicable provisions of the law of Moldova in the light of the events described above.

14. The most fundamental question raised by these events is whether the law of Moldova adequately respects the rights to freedom of expression and freedom of peaceful assembly guaranteed in Articles 10 and 11 of the European Convention on Human Rights.

15. The European Court of Human Rights has frequently referred to the central importance of freedom of expression in a democratic society. In the language of the court in the case of *Hertel v Switzerland*, 25 August 1998, at para46:

> "The Court reiterates the fundamental principles under its case-law, as most recently set out in the judgments of *Zana v Turkey* (25 November 1997, *Reports of Judgments and Decisions* 1997-VII, pp. 2547-48, para 51) and *Grigoriades v Greece* (*Reports I 1997-VII,* p. 2589, para 44):
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> (i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, 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. Such are the demands of pluralism tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions which – as the Court has already said above – must, however, be construed strictly, and the need for any restrictions must be established convincingly (see the following judgments: *Handyside v. the United Kingdom*, 7 December 19076, Series A no. 24, p. 23, para 49*; Lingens v. Austria*, 8 July 1986, Series A no. 103, p. 26, para 41; and *Jersild v Denmark*, 23 September 1994, Series A no. 298, p. 26, para 37.
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> (ii) The adjective "necessary", within the meaning of Article 10 para 2, implies the existence of "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10."

16. The European Court of Human Rights has noted that although Article 11 is *lex specialis* with respect to assemblies and public demonstrations, it will have regard to Article 10 when interpreting Article 11 – see, e.g. *McFeely et al v UK*, no. 8317/78, 20 DR 44, at p.

96, (1980); *Djavit v Turkey*, no. 20652/92, 20 February 2003, at para 39. The court has had occasion to apply similar principles to those applicable under Article 10 to the right to freedom of peaceful assembly and association in Article 11 and has done so with particular reference to political parties. In the case of *United Communist Party of Turkey and Others v Turkey* (133/1996/752/951) the Court in its judgment of 30 January 1998 stated that in view of the importance of democracy in the Convention system there could be no doubt that political parties came within the scope of Article 11.(para 25). The court reiterated that notwithstanding the autonomous role and particular sphere of application of Article 11 that Article must also be considered in the light of Article 10. The protection of opinions and the freedom to express them was one of the objectives of the freedoms of assembly and association enshrined in Aricle 11 (para 42). The Court continued (at para 43):

"That applies all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy. As the court has said many times, there can be no democracy without pluralism. It is for that reason that freedom of expression enshrined in Article 10 is applicable, subject to paragraph 2, 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."

Recalling that interference with the exercise of the rights enshrined in Articles 8, 9, 10 and 11 of the Convention must be assessed by the yardstick of what is "necessary in a democratic society", the Court had the following to say:

"Consequently, the exceptions set out in Article 11 are, where political parties are concerned, to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association. In determining whether a necessity within the meaning of Article 11 para 2exists, the Contracting States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts. The court has already held that such scrutiny was necessary in a case concerning a Member of Parliament who had been convicted of proffering insults; such scrutiny is all the more necessary where an entire political party is dissolved and its leaders banned from carrying on any similar activity in the future." (para 46)

17. These principles were reiterated by the court in its judgment of 8 December 1997 in the case of *Freedom and Democracy Party (ÖZVEP) v Turkey (Application no. 23885/94)*.

18. In *Djavit*[1] the court had the following to say concerning the general principles applicable to the right to freedom of assembly (at para 56):

"The Court observes at the outset that the right to freedom of assembly is a fundamental right in a democratic society. Thus, it should not be interpreted restrictively (see *G. v the Federal Republic of Germany*, no 13079/87, Commission decision of 6 March 1989, DR 60, p. 256; *Rassemblement jurassien v Switzerland*, no. 8191/78, p. 93, op. cit.; *Milan*

[1] para 12, *supra*

Rai, Gill Almond and "NEGOTIATE Now" v. the United Kingdom, no. 25522/94, Commission decision of 6 April 1995, DR 81-A, p. 146). As such this right covers both private meetings and meetings in public thoroughfares as well as static meetings and public processions; in addition, it can be exercised by individuals and those organising the assembly (*Rassemblement jurassien v. Switzerland*, op. cit., p. 119, and *Christians Against Racism and Fascism v. the United Kingdom*, no. 8440/78.

19. The principal laws of Moldova which govern the right to freedom of peaceful assembly and the right to freedom of expression at such assemblies are contained in Law 560-XIII of 21 July 1995 on the organisation and holding of assemblies, as amended. These laws have been the subject of two previous opinions of the Commission. The first is a comment on the law as originally promulgated by Mr. Nicolas Muñiz (CDL (95) 37). The second is an opinion by Mr. Georg Nolte on the 2002 amendments to the law which opinion was endorsed by the Venice Commission (CDL-AD (2002) 27). Both these opinions were highly critical of the law in numerous respects and it is unnecessary to repeat those criticisms in full. However, there are a number of points dealt with in these opinions which have now arisen in a concrete fashion in this particular case which will be referred to below.

20. The provisions of Articles 7 and 8 of Law 560-VII which constituted the legal basis for the order banning the meeting have already been set out in paragraph 6 above. In addition, Articles 347 and 358 of the Penal Code are relevant. Article 347 makes it a criminal offence to desecrate or profane the national symbols of Moldova (its flag, national emblem or anthem) or those of another state. Article 358 makes punishable organisation of or active participation in a group which seriously disturbs public order where this is accompanied by a clear refusal to follow the lawful instructions of the authorities or where disturbance is caused to the normal activities of transportation, businesses, or of other institutions or bodies. It also makes punishable incitement of minors to commit certain public order offences.

21. These legal texts are likely to be the subject of detailed analysis in the forthcoming litigation in Moldova. As with all legal texts, they contain provisions which are open to a broad or to a narrow interpretation. No doubt the courts in Moldova will be careful to interpret the provisions in a manner which is consistent with the principles of the European Convention if it is open to them to do so. Nevertheless viewed literally and not in the light of the Convention they appear to be capable of being interpreted in such a way as would go beyond the very limited margin of discretion which is open to States in a democratic society to limit freedom of expression or freedom of assembly, particularly where political parties are concerned.

22. For example, on a very literal and narrow reading Article 7 of Law 560-XIII could be used to prevent any meeting on a public highway. Furthermore, any sizable open-air demonstration is likely to have some disruptive effect on traffic or on business life. These features of the law were adversely criticised in Mr. Nicolas Muñiz's opinion. It is obvious that such a text ought to be read incorporating a rule of proportionality, which will not allow it to be used to set rights of expression and assembly at nought. Similarly, Article 358 of the Penal Code, read literally, could be used to criminalise meetings which disrupt traffic or commerce. It is worth noting that a number of these provisions were criticised in the previous opinions of the Venice Commission. In Mr. Nolte's opinion the criticisms of the law include the following passage:

"The concept of "environment" is too imprecise and should be deleted or interpreted very restrictively. The term "normal usage of public streets" should not obscure the fact that Article 11 of the European Convention on Human Rights requires that there can be no preference for normal traffic in all situations over political demonstrations but that the public authorities must also enable political demonstrations to take place by diverting traffic through other streets."[2]

Article 11 of the European Convention on Human Rights requires that there can be no absolute preference for normal traffic in all situations over political demonstrations but that the public authorities must also enable political demonstrations to take place by diverting traffic through other streets."[3]

23. The opinion of Mr. Nicolas Muñiz (CDL (95) 37) on the draft law was highly critical. While it would appear that the text he criticised (which the writer has not seen) differs in some respects from the current texts, many of his criticisms – some of a fundamental nature – of the then Articles 6 and 7 continue to be valid in respect of the current text. Among the aspects of the draft which he criticised but when nonetheless survive in the current text are the following which I paraphrase:

a) Article 7 (which at the time of drafting was Article 6) was unduly restrictive. The only conditions justifying prohibitions of meetings should relate to those which would lead to violent disturbances or endanger life, or cause injury to persons or property.
b) By definition demonstrations interfere with the normal use of highways. If this provision was to be interpreted literally it would be next to impossible to organise public demonstrations.
c) The provisions in Article 8 rendering meetings unlawful amount to considerable restriction on the right to hold meetings. Such restrictions ought to be confined to meetings held by persons who are armed, who use violence, or who have the purpose of committing a crime.
d) The prohibition on attacking the constitutional order is too wide – it is legitimate to hold a meeting which seeks to change the constitutional order, but a strict reading of the provision would exclude such meetings.
e) The fist clause of Article 8 is very dangerous. Not only is it vague but on a strict reading tends to exclude all forms of protest since the purpose of protest meetings is normally to protest against the actions of the authorities.

24. The latter point appears to be one of great importance. The prohibition of a meeting which involves "contestation … de l'Etat" would appear to prohibit even peaceful protest or protest advocating change in the structure or order of the state by exclusively peaceful means. Such a prohibition is unacceptably wide.

25. A further concern arises because large meetings can attract fringe elements who use a meeting for their own ends, to attract support, and sometimes to foment trouble. It is always possible for *agents provocateurs* to be active in such a situation. It is important not to penalise the responsible organisers of a meeting for the activities of every fringe

[2] Opinion on the Law on Assemblies of the Republic of Moldova, Mr. Georg Nolte, para 17

[3] Opinion on the Law on Assemblies of the Republic of Moldova, Mr. Georg Nolte, para 21

group. At the same time, if a meeting cannot take place without serious disorder, even if this is not directly the fault of the organisers, it may be reasonable to prevent its taking place.

26. In the context of the potential incompatibility of the Moldovan provisions with the Convention, it may be worth noting that the Court in *Djavit*, *supra*, stated that: "The Court reiterates that one of the requirements flowing from the expression "prescribed by law" is the foreseeability of the measure concerned. A rule cannot be regarded as law unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with the appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see for example, *Rekvényi v. Hugary* {GC}, no. 5390/94, ECHR 1999-II, 34)." (at para 65) It would appear to follow that even if the Moldovan courts were to interpret the current law in a manner consistent with the Convention rather than in a literal manner that law should nonetheless be modified.

27. The PPCD raise an interesting issue when they make a distinction between attacks on the constitutional order (which may be prohibited where such attacks involve a denial of human rights or are to be brought about by unacceptable means) and political attacks on a particular government, which are permissible and which should be the object of freedom of expression to protect. While context is important, it is difficult to see that in itself a slogan such as "Down with X" can be regarded as an attack on the constitutional order unless violent or unlawful means are envisaged in order to accomplish X's downfall. In any event, while the distinction between attacks on the constitutional order and attacks on particular governments appears to be part of the domestic Moldovan law, so far as the Convention is concerned a citizen ought to be free to use words to make either form of attack and to hold a meeting for that purpose provided that he or she does so in a peaceful manner.

28. While there is at least one jurisdiction in which flag-burning has been held to be a constitutionally protected means of expression [US Supreme Court – *Texas v Johnson* 491 US 397 (1989)], the burning or profaning of symbols of state is likely to be a highly charged symbolic act that may be likely in fact significantly to increase the risk of unlawful violence. It is therefore suggested that prohibition of such acts is not disproportionate.

29. Without in any sense prejudging the approach of the courts in Moldova to the issues now before them, it would be useful to examine again the laws relating to meetings to exclude possible interpretations which would conflict with the European Convention on Human Rights and to ensure respect for the proportionality principle. In this context it is necessary to reiterate the previous criticisms of this law made by the Commission.

30. The Supreme Court will have to rule on whether the Deputy Mayor's decision was made in accordance with the applicable laws on local and public administration. Again without trespassing on its jurisdiction it would seem desirable that where a person or organisation, including a political party, applies for permission to hold a meeting or a demonstration certain minimum standards should apply to any decision not to permit

this. There is no case law of the European Court of Human Rights setting such standards[4]. At a minimum in this writer's opinion the law should require the following:

a) That the decision is taken by a person independent of the political process.
b) That the decision is taken in accordance with stated criteria.
c) Such criteria should be confined to the likelihood of violence or serious disturbance. Where appropriate the option of permitting the demonstration subject to conditioning or restriction as an alternative to banning it should be considered.
d) That the applicant has an opportunity to be heard and to answer any objections to the application.
e) That reasons for opposing or refusing the application are given.
f) That the applicant has a right to appeal the decision. As the Commission previously stated "a broad general requirement of authorisation can only be compatible with European standards if effective judicial review is available (Nolte opinion, para 26).

It is by no means clear that all of the above criteria were required by the applicable law but it certainly appears that not all of them were followed in practice[5].

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[4] On the procedural point of how bans on demonstrations should be imposed or effected, van Dijk & van Hoof observe:

…Especially for assemblies of a public character … they may be subjected to a system of permits. No case-law of the Court exists establishing the standard of scrutiny in this respect. Which, for instance, are the requirements that have to be met by the national authorities when imposing a system of permits? In any case, if the adjective 'peaceful' [in Article 11(1)] allows for the use of a standard which does not need to be covered by the restrictions of the second paragraph, such a system of permits and its application may then only relate to that peaceful character and must not affect the right of assembly as such. The latter, for instance, is the case if the prohibition has a general character or concerns a very wide category of assemblies. . . . " (footnotes omitted): P. van Dijk & G.J.H. van Hoof et al, Theory and Practice of the European Convention on Human Rights, 3rd ed, 1998, pp. 588-589. This observation was made in 1998, but appears to remain valid. It might be worth noting that while no detailed analysis has emerged in the caselaw of the Court on the procedural implications of Article11, the more transparent and representative of the views of interested parties the procedure, the less likely that there would be a violation of the Convention.

Cameron makes the general comment in relation to permits and Article 11: ". . . a state may make the right to demonstrate subject to prior permission so long as permits are refused only on the basis of the (reasonable) likelihood of violence on the part of the demonstrators, not with regard to the substance of the demonstration" (footnotes omitted): I. Cameron, National Security and the European Convention on Human Rights, 2000, p. 402].

[5] A comparative example of a similar scenario to that existing in the law of Moldova is the decision of the Supreme Court of Zambia in Mulundika v People [1996] 2 LRC 175 (excerpted in H. Tomlinson & V. Shukla, Interpreting Convention Rights: Essential Human Rights Cases of the Commonwealth, 2001, pp. 390-391), in which the Supreme Court of Zambia struck down as unconstitutional s. 5(4) of the Public Order Act of Zambia, which provided that a permit to convene an assembly or a public meeting or to form a procession in a public place would be issued only if the regulating officer was satisfied that the proposed gathering was unlikely to cause or lead to a breach of the peace. The Supreme Court (in a 3-1 decision) held that there was a lack of adequate guidelines in s. 5(4) and that the effect of the section was to leave an uncontrolled and unfettered subjective discretion to a regulating officer: there were no guidelines as to the exercise of the discretion; there was no procedural safeguard for an aggrieved unsuccessful applicant; the drafting of the provision itself, which stated that a permit would be issued only if the regulating officer was satisfied that a breach of the peace was unlikely, was a clear recipe for arbitrariness and abuse; and its broad terms rendered all meetings an processions illegal without prior permits".

31. The procedures for authorisation were previously criticised by the Commission. In particular Mr. Nolte's opinion pointed out that the time limits did not necessarily leave time for an effective legal appeal before the time fixed for an assembly had elapsed (para 10 and 26). The fact that in the instant case the Court of Appeal in fact gave a ruling before the time fixed for the meeting does not invalidate those criticisms.

CONCLUSION

32. The law of Moldova in relation to the holding and prohibition of meetings appears in many respects to impose restrictions which cannot be justified under the European Convention on Human Rights. The law has already been the subject of critical comment by the Commission on two occasions. It is necessary that the law be clearly subject to the Convention rights to freedom of expression and freedom of peaceful assembly as well as the right to fair procedures where any restriction on these rights is in contemplation, and that the law should be applied in accordance with the principle of proportionality. Even if the courts of Moldova can interpret the law in a broad sense so as to conform with the Convention the text of the law should nonetheless be amended to make its scope clear.