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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

REPUBLIC OF MOLDOVA

DRAFT OPINION

ON THE DRAFT LAW ON THE MODIFICATION OF ARTICLE 42 OF THE CONSTITUTION OF THE REPUBLIC OF MOLDOVA REGARDING THE FREEDOM OF ASSOCIATION

On the basis of comments by

Mr Iain CAMERON (member, Sweden)
Ms Regina KIENER (member, Switzerland)
Ms Hanna SUCHOCKA (Honorary President, former member, Poland)

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I. Introduction

1. By letter of 27 December 2017, the Ministry of Justice of the Republic of Moldova requested an opinion from the Venice Commission on the Draft Law on the Modification of Article 42 of the Constitution of the Republic of Moldova regarding the freedom of association.

2. Mr Iain Cameron (Sweden), Ms Regina Kiener (Switzerland), and Ms Hanna Suchocka (Honorary President, Poland) acted as rapporteurs for this opinion. On 9 February 2018 the rapporteurs held a video-conference with the representatives of the Government of Moldova, Parliament, Constitutional Court, and of the civil society. The rapporteurs are grateful to all the interlocutors in Moldova for their participation in the conference.

3. The present opinion was prepared on the basis of contributions by the rapporteurs and on the basis of translations of the Draft Law made by the Moldovan Government, submitted together with an explanatory memorandum (CDL-REF(2018)007). Inaccuracies may occur in this opinion as a result of translations of the original text into English.

4. This opinion was adopted by the Venice Commission at its … Plenary Session (Venice, … 2018).

II. Analysis

A. The substance of the proposal

5. Currently, the Constitution of the Republic of Moldova does not guarantee freedom of association as such, while the right to the freedom of assembly is guaranteed (Article 40), along with other internationally recognised basic rights and freedoms. In addition, Article 41 guarantees citizens' right to create "parties and other socio-political organizations" and current Article 42 proclaims the right to set up and join trade-unions.

6. It is understood that freedom of association was protected in Moldova essentially with reference to the international human rights treaties, which are part of the legal order of Moldova by virtue of Article 4 of the Constitution.[1] As it has been stated in the explanatory memorandum, the main reason to amend Article 42 was to fill this gap and to give freedom of association a constitutional status.

7. The text of the proposed new Article 42 of the Constitution ("Right to association") reads as follows:

> (1) Everyone has the right to freely associate with other persons, including to form trade unions or patronages, and to join them.
>
> (2) Exercise of the right to free association may be limited only in cases expressly prescribed by law, if such limitation is a necessary measure in a democratic society, to ensure national security, public order, prevention of crime, protection of health, morals or rights and the freedoms of others.

[1] Which reads as follows: "Article 4 - Human Rights and Freedoms: (1) Constitutional provisions on human rights and freedoms shall be interpreted and are enforced in accordance with the Universal Declaration of Human Rights, with the conventions and other treaties to which the Republic of Moldova is a party. (2) Wherever disagreements appear between the conventions and treaties on fundamental human rights to which the Republic of Moldova is a party and its domestic laws, priority shall be given to international regulations.

B. The process of constitutional amendment; position of the Constitutional Court

8. The text of the proposal was published by the Government and submitted to the Constitutional Court (the CC) for an opinion. On 24 January 2017 the CC issued its opinion in which it confirmed that the Government's initiative for revising the Constitution was in line with the relevant provisions of the Constitution. On the substance of the proposal the CC held that the text of para 1 is compatible with the Constitution, but stated that para 2 (containing the list of "legitimate aims" which may justify limitations to the freedom of association) is unnecessary, since there is a general limitation clause in Article 54 of the Constitution which also applies to the right set out in Article 42. As a result, the CC concluded that the proposal may be submitted to Parliament for approval, but that para 2 should be excluded.

9. In May 2017 the text of the proposal, together with the supporting documents, the opinion of the CC and the necessary opinions of the relevant State bodies were published on Parliament's web-site.[2] However, the Government maintained its original proposal; thus, para 2 of new Article 42, containing a specific limitation clause, was kept and submitted to Parliament.

10. The Venice Commission notes that, pursuant to Article 141 of the Moldovan Constitution, the revision of the Constitution may be initiated by the Government (para 1 (c)) and should be accompanied by an opinion of the CC (para 2). The status of such "opinions"[3] of the CC is not entirely clear. In particular, it is not clear whether a negative opinion of the CC may block further process of constitutional amendments, and whether the CC may, as in the present case, give a positive opinion but propose an alternative formula of the new constitutional provision. The Venice Commission also observes that the Moldovan Constitution contains an "eternity clause" (Article 142 para 2) and the question arises what legal effect an opinion of the CC might have if the proposed constitutional amendment is contrary to unamendable provisions of the Constitution.

11. The Venice Commission was not asked to examine those complex questions and interpret the extent of the CC's powers in this filed. However, it takes note of the CC position, and observes that the CC raised an important substantive issue which has to be addressed by the law-maker, irrespectively of whether the CC opinion is binding or merely a recommendation. This issue concerns the interrelation between Article 54 para 2 and new Article 42 para 2, i.e. between the "general" and the "specific" limitation clauses contained in those two provisions.

C. The relation between the general limitation clause (Article 54 para 2) and the specific limitation clause (new Article 42 para 2)

12. Before addressing the question raised by the CC, the Venice Commission notes that para 1 of the proposed Article 42 adds freedom of association to the catalogue of constitutionally protected rights and freedoms. This is a commendable addition to the Constitution.[4] The English translation of the text of para 1 of the new Article 42 is very close to the text of Article 11 para 1 of the European Convention on Human Rights (ECHR); slight differences between those two provisions (for example, the reference to "patronage" in addition to "trade unions') are not critical and, overall, this part of Article 42 is compatible with the European standards.

[2] http://parlament.md/ProcesulLegislativ/Proiectedeactelegislative/tabid/61/LegislativId/3740/language/ro-RO/Default.aspx

[3] "*Avizul*" in Romanian, "*заключение*" in Russian

[4] In para 51 of the OSCE/ODIHR and the Venice Commission Joint Guidelines on Freedom of Association (CDL-AD(2014)046), it is stressed that "it is vital that the role and functioning of associations and the right to freedom of association be effectively facilitated and protected by member states' *constitutions* and other laws" (italics added).

13. By contrast, as noted by the CC, a question arises regarding para 2 of this new article, which partly overlaps with the existing Article 54 para 2 of the Constitution. The legitimate aims listed in Article 42 para 2 and Article 54 para 2 are in part identical, in part different. According to Article 42 para 2, the legitimate aims of any limitation on the freedom of association are as follows: national security, public order, prevention of crime, protection of health, morals or rights and the freedom of others. This list is, generally, much narrower than the one in Article 54 para 2 which speaks of "the defence of national security, territorial integrity, economic welfare of the country, public order aiming at preventing mass riots and crimes, protection of the rights, freedoms and dignity of other persons, prevention of disclosing confidential information or the guarantee of the power and impartiality of justice."

14. The text of para 2 of Article 42 raises three separate questions: first, which of the limitation clauses (general – under Article 54 para 2, or specific – under new Article 42 para 2) reflects the European standards better. The second question is whether it is preferable to have a general or a specific limitation clause, or to keep both. The third question is about the relationship between those two limitation clauses, if they co-exist in the constitutional text (as proposed by the Government).

15. On the first question, the limitation clause under new Article 42 para 2 is quasi identical to the limitation clause in Article 11 para 2 of the ECHR.[5] Furthermore, new Article 42 para 2 requires that limitations should be "necessary in a democratic society". Thus, it incorporates the necessity/proportionality principle central to the European Convention system. This is positive.

16. By contrast, the list of legitimate aims in Article 54 para 2 is larger, and goes beyond what is provided in Article 11 para 2 of the ECHR. This solution is understandable: Article 54 para 2 is a general provision, which applies not only to the freedom of association, but to a vast array of rights, including those not provided in the Convention (for example, social and economic rights).

17. Article 54 para 2 is not incompatible with the ECHR *per se.* It can be accepted, but only as far that the lawmaker develops those constitutional provisions in conformity with the ECHR and other international obligations of the country. Thus, as regards the freedom of association, "economic welfare" should not be invoked by the State to justify restrictions to the freedom of association, since Article 11 para 2 of the ECHR does not consider this aim as legitimate, and even less so as this aim may potentially conflict with the explicit mention of trade unions and patronages in new Article 42 para 1 (although, of course, it is a legitimate aim under other rights in the ECHR, such as Article 8). As far as the lawmaker follows the principle of *interprétation conforme*, the application of Article 54 para 2 does not necessarily come into conflict with the European standards.[6]

18. That being said, Article 54 para 2 may potentially create such a conflict, so the Venice Commission considers preferable the formula used by the new Article 42 para 2. The latter provision excludes any ambiguity with the rights set out in para 1 and is more appropriate to outline, in line with the limitation clause in Article 11 para 2 of the ECHR, the extent of possible limitations by the State on the freedom of association.

[5] Here is the list of legitimate aims under Article 11: "national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others". The proposed para 2 of Article 42 arguably provides even for less restrictions on the freedom of assembly, since it does not speak of "disorder and crime" but only of "crime". Reference to "public order" in Article 42, if compared to "public safety" in Article 11, may be an issue of translation, and even if it not, these notions are very close and "public order" may be easily interpreted in line with the case-law of the ECHR.

[6] As the Venice Commission noted in its Opinion on the Constitution of Finland (CDL-AD(2008)010, para 9), "the constitutional rights catalogue of a liberal democratic state should be interpreted in such a way as to avoid conflicts with the international human rights obligations accepted by the state."

19. On the second question, the Venice Commission observes that catalogues of rights tend either to have a general limitation clause[7] or specific limitation clauses for each right.[8] It is, however, possible to have both a general limitation clause and a specific limitation clause. For example, the Swedish Instrument of Government contains a general limitation clause which must be satisfied before any limitations may be made in a "strong" constitutional right (IG 2:21), as well as specific limitation clauses which apply for the rights of freedom of information and expression (IG 2:23) and freedom of association and assembly (IG 2:24). In Sweden, the two types of limitation clause apply cumulatively, in other words, where a specific limitation clause is applicable, the general clause must also be satisfied.

20. In some areas the Moldovan Constitution is also based on a mixed model: in addition to the general limitation clause contained in Article 54 para 2, some of its human rights provisions contain specific limitation clauses – see, for example, Article 32 on the freedom of expression. Thus, the solution proposed by the Government is not unknown in Moldova. However, the situation in the Republic Moldova is different from that in Sweden, since the general clause of Moldovan Constitution allows for more restrictions on the freedom of association than the specific clause, and not the opposite (like in Sweden).[9] It is thus essential to clarify whether the relationship between the specific and the general limitation clauses is a cumulative or an alternative one.

21. This brings up the third question, concerning the relation between the general and the specific limitation clauses *in casu*. During the dialogue with the rapporteurs the interlocutors on the side of the Moldovan authorities agreed that new Article 42 may be seen as *lex specialis*. However, the *lex specialis* rule in this context might mean two things: either the list contained in Article 42 replaces the list contained in Article 54 para 2, or supplements it with the additional grounds for limitations.

22. The CC, in their opinion, considered that the list contained in Article 54 para 2 should suffice. This is a matter of choice, and may be accepted (see paragraph 17 above). However, as shown above, that might create a conflict with the Convention. If both those provisions are kept in the text, and if those two limitation clauses are seen as cumulative, the result will be the same: the lawmaker will have to ensure that the law does not introduce limitations based on "legitimate aims" mentioned in Article 54 para 2 of the Constitution but absent from Article 11 para 2 of the ECHR.

23. In the opinion of the Venice Commission, it would be more logical to see those two lists not as complementary but as alternative, and clarify that only the specific limitation clause, provided by new Article 42 para 2, applies in cases related to the freedom of association. The wording of the new Article 42 para 2 confirms this reading: it says that the freedom of association may be limited *only* with reference to certain aims (thus excluding other aims). Moreover, this solution does not appear to contradict the "eternity clause" contained in Article 142 para 2 of the Constitution,[10] as follows from para 23 of the CC opinion of 24 January 2017.[11]

24. The last question is whether the proposed amendment to Article 42 para 2 has to be reworded (in order to clarify the relationship with Article 54 para 2), or may be adopted as is.

[7] See, for example, Article 1 of the Canadian Charter of Rights, or Article 53 of the EU Charter of Rights, or Article 29 of the Universal Declaration of Human Rights (UDHR)
[8] See, for example, the ECHR or the International Covenant on Civil and Political Rights, the ICCPR
[9] Except for the reference to "health" and "morals", which are mentioned in the new Article 42 para 2 but not in Article 54 para 2.
[10] Article 142 - Limits of Revision – reads as follows: "... (2) No revision shall be performed if it implies the infringement of fundamental rights and freedoms of citizens or their guarantees. …".
[11] Which concludes that the Draft Law submitted by the Government "respects the limits imposed by Article 142 par 2 in the sense that it does not result in the suppression of rights and fundamental freedoms of citizens or related guarantees.

This depends on the traditions of legal interpretation prevailing in Moldova. The Venice Commission repeats that the current wording of new Article 42 para 2 suggests that the specific limitation clause provided there is an alternative to the general limitation clause contained in para 2 of Article 54. To strengthen this interpretation, the intention of legal drafters may be made clearer during parliamentary debates. In some legal traditions, where courts play very close attention to the legislative history, guidance as to how limitation clauses are to be applied can be placed in the *travaux préparatoires*. The question arises, however, whether this would be sufficient in the Moldovan legal culture.

25. In sum, while the solution proposed by the CC (to rely on the general limitation clause and remove para 2 from new Article 42) is possible,[12] the Venice Commission has a preference for maintaining the specific limitation clause (as in the Government's proposal), while ensuring that it is interpreted systematically as *lex specialis* and as the alternative, to be applied instead of the general one. This second solution has advantages, in that the new wording is more in line with Article 11 of the ECHR.[13]

D. Freedom of association in general and constitutional provisions regulating special types of associations

1. Position of trade-unions

26. The next issue to address is whether the removal of current Article 42 (which guarantees the rights of trade-unions) and replacement of it with a general provision, where trade-unions are only mentioned as bearers of the freedom of association, affects the legal protection provided by the Constitution to the trade-unions in the constitutional order.

27. The mode of regulation of the right to form and join trade-unions at the constitutional level differs in various countries. It depends on the tradition and the role that trade-unions play. In some countries regulations are more detailed, for example in Poland, where the Polish Constitution in Articles 58 and 59 states that the freedom of association shall be guaranteed to everyone and deals specifically with the trade-unions and industrial actions.[14] This solution is rooted in the Polish tradition of *Solidarity* as a trade union and, at the same time, as a strong political movement. That being said, this is just one possible solution, and it is also possible to have no separate article on trade-unions but simply mention them in the general provision on the freedom of association, as in the new Article 42.

28. It is important to ensure, however, that the removal of the current article 42 is not interpreted as a calculated move aimed at lowering the protection given to the trade-unions at the constitutional level. The rapporteurs understood that it was not the intention of the Government, and that the fact that trade-unions will not anymore have their "own" article in the Constitution does not mean that they will be less protected. The Venice Commission notes that trade unions and patronages are mentioned specifically in new Article 42 para 1. In addition, the CC in its opinion did not raise an issue under Article 142 para 2 in this connection, which suggests that the CC does not consider that the removal of the current Article 42 lowers the constitutional protection of trade-unions. Again, this is something which could be made clear

[12] See CDL-AD(2008)010, Opinion on the Constitution of Finland, para 15: "It is not necessary to have specific limitation clauses for each right: a general clause in a Constitution is obviously sufficient."
[13] See a similar recommendation in CDL-AD(2017)013, Georgia - Opinion on the draft revised Constitution, para 69
[14] This provision reads as follows: "1. The freedom of association in trade unions, socio-occupational organizations of farmers, and in employers' organizations shall be ensured. (…) 3. Trade unions shall have the right to organize workers' strikes or other forms of protest subject to limitations specified by statute. For protection of the public interest, statutes may limit or forbid the conduct of strikes by specified categories of employees or in specific fields."

during debates in Parliament, on condition that those debates make part of the legislative history and may be used by the courts in their interpretation of the Constitution.

29. In contrast to the scope of protection under the current Constitution, the new provision not only refers to trade unions, but also to employers' associations ("patronages"). The inclusion of patronages next to the trade unions in the scope of application stresses that trade unions and employers' associations are social partners, and is not unusual among the Council of Europe member states (see for instance Article 28 para 1 of the Swiss Constitution, Article 7 of the Spanish Constitution, or Article 9 of the Romanian Constitution).

2. Political parties

30. A source of concern for the Venice Commission is the relation between Article 41 (which deals with parties and other "socio-political" organisations) and new Article 42. The proposed modification affects only Article 42, while Article 41 remains untouched. According to the explanatory memorandum, this is due to the fact that political parties require specific regulations. This is true, but the situation is more complex. Thus, for example, Article 41 para 4 outlaws parties and other socio-political organisations which by their objectives or activities, are engaged in fighting against political pluralism, the principles of the state governed by the rule of law, sovereignty, independence and territorial integrity of the Republic of Moldova, while para 5 prohibits secret associations, and para 6 prohibits political parties composed of foreigners.

31. The Venice Commission has doubts concerning the coherence between Article 41 paras 4-6, and Article 42 para 2. The grounds listed in paras 4-6 are more specific than the legitimate aims listed in Article 11 para 2 of the Convention and in the new Article 42. Therefore, much will depend on the interpretation given by the legislator and by the courts to the grounds for banning political parties listed currently in Article 41. If these grounds are interpreted in the light of Article 11 para 2 of the ECHR, as developed in the case-law of the European Court of Human Rights (the ECHR), they are permissible. That being said, some of the provisions of Article 41 may be seen as too restrictive, not leaving to the legislator room for an *interprétation conforme*. In particular, it concerns Article 41 para 4, which bans all "secret associations"[15] just because they are secret, irrespectively of whether or not they are pursuing illegitimate aims or are involved in illegitimate activities.[16] The Venice Commission does not want to take a definite stand on this issue and agrees that some secret organisations may represent a danger for the constitutional order,[17] but notes that this limitation clause is formulated in an overly definite manner. Such inflexible limitation clauses may become a source of conflict between national and pan-European legal orders.[18] Furthermore, an absolute ban on participation of non-citizens in political parties may give rise to tensions as well.[19]

32. Therefore, it would be better if a modification to the Constitution would encompass both Articles 41 and 42. It could create more coherent provisions on the freedom of association and relations between different forms of associations and especially on the limitations (restrictions) which can be imposed on this freedom. That being said, the process of constitutional amendment may be lengthy and cumbersome (see Articles 141-143 of the Constitution). So, the Venice Commission understands that the harmonisation of Article 41 and new Article 42 may take some time.

[15] Although para 4 is a part of Article 41, dealing with political parties and alike, this provision speaks of "associations" in general, including those not having a political agenda. If this reading is correct, than para 4 has direct relevance for the new Article 42.
[16] On this see
[17] See, for example, the Court's case-law on the membership in a masonic lodge and public service: *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy*, no. 35972/97, 2 August 2001.
[18] See, for example, the case of *Anchugov and Gladkov v. Russia*, nos. 11157/04 and 15162/05, 4 July 2013.
[19] See CDL-AD(2010)024, Guidelines on political party regulation by OSCE/ODIHR and Venice Commission, para 120.

3. Criminal organisations

33. New Article 42 para 2 provides that freedom of association may be limited *inter alia* in the interests of the prevention of crime. This formula is used by Article 11 para 2 of the ECHR itself. However, the Venice Commission draws the attention of the Moldovan authorities to the fact that the notion of "crime" should not be interpreted solely through the prism of the national legislation. The States, in the exercise of their sovereignty, are free to criminalise the activities they see fit, in line with the applicable standards. However, by extending the notion of "crime" – for example to the dissemination of "unorthodox" views on the society labelled as "extremism" – the State risks denying the freedom of association to those who want to disseminate such views.[20] For the States party to human rights treaties, such as the ECHR, the State's exercise of its sovereign right to criminalise must therefore be seen as limited by the rights of expression, information, association, etc. as well as by the concept of a "democratic society". Thus, while in most cases, criminalisation of conduct will not be problematic, where a criminalisation touches upon the above constitutional and internationally recognised rights and freedoms, such criminalisation need to be justified as "necessary in a democratic society". The current wording of new Article 42 para 2 is compatible with the European standards (so it can be left as it is). However, the Venice Commission draws the attention of the Moldovan authorities to the fact that the notion of "crime" in this context should be interpreted autonomously, in the light of other international obligations of Moldova.

III. Conclusion

34. The Venice Commission praises the initiative of the Government of Moldova to introduce in the Constitution a special article dealing with the freedom of association in general. The proposed text of the new Article 42 is very close to the language used by Article 11 of the European Convention on Human Rights, and can therefore be welcomed. That being said, the following points should be considered by the Moldovan authorities in order to improve the proposal even further:

- If the constitutional legislator decides to keep only the general limitation clause under Article 54 para 2, as suggested by the Constitutional Court, and removes para 2 of Article 42, containing a specific limitation clause for the freedom of association, the former provision should be given an *interprétation conforme*, i.e. such that does not come into conflict with the European and other international standards on the freedom of association;
- If new Article 42 para 2 is kept and co-exists with Article 54 para 2 (which is a preferable solution), the constitutional legislator should make it clear (in the *travaux préparatoires* or otherwise) that the limitation clause in Article 42 para 2 replaces, in the context of the freedom of association, the general limitation clause under Article 54 para 2;
- it is important to clarify that the removal of the current Article 42, dealing with the trade-unions, does not result in the lowering of the level of protection given by the Constitution to trade-unions;
- The constitutional legislator should consider revising, in due course, the text of Article 41 of the Constitution, in order to harmonise it with new Article 42 and with the European and other international standards in the field of political parties' regulations.
- The notion of "crime" in Article 42 paragraph 2 should not be interpreted solely through the prism of the national legislation, but be interpreted autonomously, in the light of relevant international obligations of Moldova.

35. The Venice Commission remains at the disposal of the Moldovan authorities for further assistance in this matter.

[20] CDL-AD(2014)043, Opinion on the Law on non-governmental Organisations (Public Associations and Funds) as amended of the Republic of Azerbaijan, paras 47 et seq.