Strasbourg, 22 November 2002

CDL-AD (2002) 28
Or. Eng.

Opinion no. 219 / 2002

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION

ON THE DRAFT LAW ON POLITICAL PARTIES AND SOCIO-POLITICAL ORGANISATIONS OF THE REPUBLIC OF MOLDOVA

by
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Endorsed by the Venice Commission
At its 52nd Plenary Session (Venice, 18-19 October 2002)

INTRODUCTION

1. On 4 February 2002, the Secretary General of the Council of Europe, acting under Article 52 of the European Convention on Human Rights, requested an explanation from Moldova concerning the compatibility of the domestic legal framework with European human rights standards.

2. On 3 July 2002, the Ministers' Deputies approved the Targeted Co-operation Programme for Moldova, aimed at assisting in the implementation of commitments undertaken by Moldova.

3. By his letter of 28 August 2002, the Deputy Secretary General requested the Venice Commission to provide a legal expertise of the Draft Law on political parties and socio-political organizations (CDL (2002) 118).

4. The Commission invited Mr Hamilton to prepare an opinion on this issue. His comments (CDL (2002) 119) were endorsed by the Commission at its 52nd Plenary session (Venice, 18 – 19 October 2002).

5. The draft law will replace the existing law No. 718-XII of 17 September 1991 which had been extensively amended and added to in 1993, 1996, twice in 1998, in 1999, and twice in the year 2000.

6. It will be recalled that the existing law has recently been used in controversial circumstances. On 18 January 2002 the Minister for Justice decided to suspend for one month the activities of an opposition political party, the Christian Democratic People's Party, on the grounds that it had violated legislative provisions, notably those of the law on the organization and conduct of public gatherings. The suspension was lifted by the Minister on 8 February 2002. An opinion dated 9 April 2002 prepared for the Venice Commission by Mr. Jaime Nicolas Muniz and Mrs. Ascensión Elvira Perales was unable to conclude that, in the light of the guarantees in the European Convention on Human Rights for freedom of expression and freedom of assembly, there had been a justification for the suspension. The opinion questioned whether it was right that the Minister should have been competent to suspend a political party, and further questioned the fact that the law did not even envisage the possibility of recourse to the courts. Drawing attention to the fact that during an election campaign a political party could be suspended only by the Supreme Court of Justice, the opinion questioned why a different rule should apply at other times. The opinion concluded that it was contrary to freedom of association, and to political freedom in particular, that a type of decision as serious as the suspension of a political party should be within the competence of a political organ rather than the judiciary. Furthermore, there was no express provision for a review of the minister's decision before the courts. In addition, the opinion also considered it questionable whether the decision to suspend the CDPP could be considered proportionate in the light of the jurisprudence of the European Court of Human Rights.

7. As a result of events in Moldova, notably the suspension of the CDPP and the subsequent vote of the Moldovan Parliament to lift the parliamentary immunity of three deputies, the Secretary General of the Council of Europe on 4 February 2002 exercised his powers under Article 52 of the European Convention on Human Rights to request the

Moldovan authorities to furnish an explanation of the manner in which its internal law ensured the effective implementation of all of the provisions of the Convention and additional Protocols.

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

8. Since the major legal issue to be addressed in considering the draft law is that relating to the suspension and prohibition of political parties it may be useful at this stage to recall some key aspects of the jurisprudence of the European Court of Human Rights on this issue.

9. 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(§25). That Article protected not only the right to form an association but also had the effect that its dissolution by a country's authorities must satisfy the requirements of Article 11 paragraph 2 (§.33).

10. 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 as enshrined in Article 11 (§42). The Court continued (at §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."

11. Recalling that interference with the exercise of the rights enshrined in Articles 8, 9, 10 and 11 of the Convention require that interference with the exercise of the rights they enshrine 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 § 2 exists, 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." (§46)

12. These principles were reiterated by the Court in its judgment of 8 December 1999 in the case of Freedom and Democracy Party (ÖZVEP) v Turkey (Application No. 23885/94).

THE VENICE COMMISSION GUIDELINES

13. At its 41st plenary session on 10-11 December 1999 the Venice Commission adopted guidelines on the prohibition and dissolution of political parties and analogous measures. As the matters dealt with in the guidelines are central to the issues raised by the draft Moldovan law I quote them in full:

> "1. States should recognise that everyone has the right to associate freely in political parties. This right shall include freedom to hold political opinions and to receive and impart information without interference by public authority and regardless of frontiers. The requirement to register political parties will not in itself be considered to be in violation of this right.
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> 2. Any limitations to the exercise of the above-mentioned fundamental human rights through the activity of political parties shall be consistent with the relevant provisions of the European Convention for the Protection of Human Rights and other international treaties, in normal times as well as in cases of public emergencies.
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> 3. Prohibition or enforced dissolution of political parties may only be justified in the case of parties which advocate the use of violence or use violence as a political means to overthrow the democratic constitutional order, thereby abolishing the rights and freedoms guaranteed by the constitution. The fact alone that a party advocates a peaceful change of the Constitution should not be sufficient for its prohibition or dissolution.
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> 4. A political party as a whole cannot be held responsible for the individual behaviour of its members not authorised by the party within the framework of political/public and party activities.
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> 5. The prohibition or dissolution of political parties as a particularly far-reaching measure should be used with utmost restraint. Before asking the competent judicial body to prohibit or dissolve a party, governments or other state organs should assess, having regard to the situation of the country concerned, whether the party really represents a danger to the free and democratic political order or to the rights of individuals and whether other, less radical measures could prevent the said danger.
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> 6. Legal measures directed to the prohibition or legally enforced dissolution of political parties shall be a consequence of a judicial finding or unconstitutionality and shall be deemed as of an exceptional nature and governed by the principle of proportionality. Any such measure must be based on sufficient evidence that the party itself and not only individual members pursue political objectives using or preparing to use unconstitutional means.
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> 7. The prohibition or dissolution of a political party should be reserved to the Constitutional court or other appropriate judicial body in a procedure offering all guarantees of due process, openness and a fair trial."

THE DRAFT LAW

14. The draft law is a comprehensive document divided into eight chapters as follows:

I. General provisions
II. Establishment of political parties
III. Registration of political parties
IV. Activity of political parties
V. Funding the activity of political parties
VI. Control of political parties' activity
VII. Suspension and cessation of political parties activities
VIII. Final and transitory provisions

CHAPTER I - GENERAL PROVISIONS

15. The general provisions define political parties as voluntary associations of citizens entitled to vote, constituted on the community of opinions, ideals and objectives, which contribute to defining and expressing the political will of a certain part of the population by legally acquiring, maintaining and influencing state power and participating in its exercise.

16. Parties are to be non-profit associations with legal capacity. They are to enjoy their own statute and political programme, approved by their supreme steering body. Their activities are to be performed in accordance with the principles of lawfulness, transparency, publicity, liberty and independence, voluntary association, equality in rights for members, self-administration and self-management. They are to promote national values and interests, democracy and political pluralism. Activity based on the principle of unconditioned subordination of members to the leader is banned. The principle of equality between men and women is to be promoted in all steering bodies.

17. Parties are to act freely and independently, be equal before the law, and free to establish their own internal structure and choose their objectives, forms and methods of activity.

18. A number of restrictions are envisaged. Parties which by their objectives or activity militate against political pluralism, the principle of the rule of law, or the sovereignty, independence or territorial integrity of Moldova are unconstitutional (Constitution of the Republic of Moldova, Article 41(4)). There is to be a prohibition on establishment or activity of parties which are paramilitary or which aim to change the regime by violence, or to incite to aggression, war, national, racial or religious hatred, to incite to discrimination, to militate for authoritarian and totalitarian leadership methods, to make attempts on inherent human rights, or engage in activities incompatible with the generally acknowledged international law norms. Activity of political parties constituted of foreign citizens and stateless persons is prohibited. Organisation of political parties on confessional criteria is prohibited. By the latter I take it is meant parties confining membership to those of a particular religious faith and the provision does not limit the programme a party may adopt.

19. Article 5(8) provides that the violation of the provisions referred to in the preceding paragraph "shall entail the liquidation of political parties". In the light of such drastic consequences, one would have to be concerned that any such violation must be clearly

established. Clearly, a finding of such a violation is a matter for judicial rather than political determination and such a determination is required under the Venice Commission's guidelines. Chapter VII deals with the suspension and cessation of parties and I will return to this question later.

20. Political parties from foreign states may not act in Moldova, and the steering bodies of parties must have their headquarters in Moldova. The right to free association is guaranteed, as well as the right not to join a party. Restrictions or differentiation in rights based on party membership is prohibited. A request to indicate party membership in official acts is unlawful. Citizens may not be members of two parties at the same time. Parties may, however, associate together for electoral purposes. Parties may join international organisations but may not join foreign organisations "the resolutions of which are imperative".

21. Holders of certain offices and occupations may not engage in political activities. These include judges, prosecutors, investigators, the armed forces and state security forces, the leadership and specialized personnel of the state press and television.

22. Political parties are required to be organized on a territorial principle, and not based in the workplace.

23. On the whole the general provisions strike me as in themselves reasonable and proportionate judged by the measure of what is necessary in a democratic society.

CHAPTER II - ESTABLISHMENT OF POLITICAL PARTIES

24. This chapter prescribes how political parties may be established. There do not appear to be any corresponding provisions in the existing law.

25. In order to establish a political party it will be necessary, first of all, to establish an initiative group to elaborate the drafts of the party statute and programme. At this stage this group will be allowed to impart information and collect applications to join the party. It is to organize meetings of supporters to elect delegates to an establishment congress, which will establish the party, approve its name, programme and statute, and elect steering and control groups. The statute must set out certain matters, including the party's denomination, objectives and means to implement them, the conditions to become and cease to be a member, the rights and obligations of members and the fees payable, provisions concerning the steering and control bodies operation and competence, the procedure to adopt the programme and amend the statute, how election candidates are to be selected, how the party is to be funded and its assets managed and disposed of, and the conditions and procedure for it to cease activity.

26. The competent bodies of the party can decide whether to accept or withdraw membership in accordance with the terms of the statute. Party members must be free to leave at any time. They are to enjoy equal voting rights. The party is required to keep a list of members and at the request of the Minister for Justice to present him with information concerning their numbers.

27. In order to become established a political party must have at least 5,000 supporters (who on establishment become members) and be organized in at least half of the

administrative or territorial units of the country with at least 600 citizens in each unit. If a party's membership at any time falls below those numbers the permanent steering body is required to initiate the procedure to dissolve the party.

28. I would be critical of these arrangements in a number of respects:

1) It seems to me that the procedures which are laid down are unnecessarily prescriptive. A state may be entitled to insist on certain minimum standards of size, organization and democratic standards as a condition of registering a party but it seems to me doubtful that it can be regarded as necessary in a democratic society to prescribe the precise manner in which a political party is to be founded once the party's programme does not represent a danger to the free and democratic order or to the rights of individuals.

2) The proposal would seem to make impossible the organic growth of a party from small beginnings. In Western states there are often a multiplicity of small political parties. They may be too small to be registered where registration requirements are in place, but that does not make their existence unlawful or prevent them from continuing to strive to organize and grow. It seems to me, for example, indefensible to require a party to dissolve itself when its membership falls below a certain threshold. In my view this is contrary to the right of freedom of association and cannot be regarded as necessary in a democratic society. Nor would such a forced dissolution appear to be consistent with the provisions of the European Convention on Human Rights and the Venice Commission's guidelines.

3) The membership thresholds themselves seem to be set very high and to constitute a serious barrier to the creation of new political parties. In addition, the requirements as to organization in more than half of the country will make it impossible to organize regionally based parties. While there may be a case for this in relation to national elections this can hardly be justified at local level. It will also make it impossible for a party to be formed with the intention of representing a minority interest. For example, it would be unlikely that a party seeking to represent the Gagauzian people could meet these criteria. Again, this does not appear to me to be in accordance with the right of freedom of association or to be necessary in a democratic society.

CHAPTER III - REGISTRATION OF POLITICAL PARTIES

29. A political party may carry out its activity only after having been registered. Registration is to be performed by the Ministry of Justice. The provisions relating to registration are very detailed. Registration may be refused where the objectives of the party run counter to the constitution or the law, where there is already registered a party with a similar name, or where at the establishment of the party the provisions of the law have not been observed. The decision on registration must be taken within one month of the application and a refusal must be reasoned and given to the applicants in writing within three days. A rejection may be challenged before a court of law.

30. The application must be supported by detailed documentation including the list of party's supporters. This latter must contain their first and last name, birth year, residence, the series and number of the Identification Act, and their signature (Article 17(6)). The registration documents are to be permanently stored in the Ministry and on request the Ministry is to issue information and copies of documents from the file (Article 25). Presumably this includes the lists of supporters.

31. The provisions of this Chapter appear to me appropriate subject to the following reservations:

1) Notwithstanding the existence of a right of appeal to court against a refusal of registration it would be preferable in my view that some body independent of the political system (perhaps the Ombudsman or a Court of Law) should take the registration decision rather than a Minister who will invariably be a politician from a rival party.

2) Registration should not be refused for some trivial failure to comply with the rules. One of the problems with very detailed provisions is that the more complex they become the easier it is to find some failure to comply fully with them.

3) I would have a concern about the proposal that a list of party supporters would be maintained and accessible generally. In my view this has the potential to be intimidatory and is likely to discourage some people from supporting a political party which in turn may make it more difficult to establish new parties.

CHAPTER IV - ACTIVITY OF POLITICAL PARTIES

32. Article 29 sets out a number of matters which a political party is entitled to do. These include organizing and participating in meetings, demonstrations and other peaceful assemblies, establishing periodicals, publishing, and so forth. It is not clear to me whether it is intended that *only* registered political parties may pursue any of these activities. I think it needs to be made clear that this provision is without prejudice to the right of any group or person who is not a registered political party to exercise their rights of freedom of expression and assembly.

33. Article 31 requires a political party to hold a congress at least once every four years. Article 32 provides for mediation commissions to settle disputes within parties. While the latter provision seems to be permissive rather than mandatory since decisions of the mediation commissions are to be enforceable I wonder if the provision is not intended to be mandatory. Candidates at presidential and parliamentary elections are to be designated by means of a decision taken by the congress. It is not clear to me whether this provision means the congress must actually select them or merely decide how they are to be collected. Parties are to create censors commissions whose functions include approving books of account and the proper performance of legal obligations. These provisions appear to me to be reasonable and justifiable.

CHAPTER V - FUNDING THE ACTIVITY OF POLITICAL PARTIES

34. This chapter contains detailed provisions which are designed to ensure the transparency of political parties funding. All receipt and payment operations are to be by means of bank accounts in Moldova. Parties may not open accounts in foreign banks or outside Moldova. Donations of money or goods from private sources, both of natural persons and legal entities, are permitted, but must be documented. Donations from foreign persons, foreign states, state or public authorities, trade unions, religious organizations and anonymous donations are prohibited. Third parties may not meet the party's debts. The party's funds must be used exclusively for its functions under the statute, and cannot be given to the members. Parties may own buildings but not land. Responsibility for the party's accounts rest with the leader. Annual reports are required.

35. These provisions seem to me clear and comprehensive and generally appropriate. However, the body with responsibility for monitoring them is the Ministry of Justice. For the same reasons already referred to in relation to registration I think the functions should more appropriately be with a body or person independent of the political process rather than a Minister. This is all the more important since under Article 45(6) breach of these rules may entail a decision by the Minister to cancel registration. The latter power seems to me potentially disproportionate and it should be made clear that this power is to be exercised only in serious cases and in cases where the party itself knew of the breach. The latter change is necessary to comply with paragraphs 4 and 6 of the Venice Commission's guidelines. Otherwise a party could be dissolved because of the misbehaviour of a single miscreant individual.

CHAPTER VI - CONTROL OF POLITICAL PARTIES' ACTIVITY

36. Control is to be performed by the Ministry of Justice supervisors, at the disposal of the Minister. They are given extensive powers to require documents, explanations and information. They may "assist" at manifestations organized by parties – I assume this should read "attend".

37. I do not believe that control should be a function of the Minister, who is again empowered to cancel a party's registration where violations are found.

38. Article 50 provides that a party may not promote in state positions persons who contributed to the party in excess of the limit provided (I cannot, however, find any other reference to a limit). Nor may such a person be a candidate at election. These seem to me to be good provisions. To them might usefully be added a provision that contracts are not to be awarded to contributors by the party's representatives in public authorities.

CHAPTER VII SUSPENSION AND CESSATION OF POLITICAL PARTY'S ACTIVITIES

39. Article 51 empowers the Minister for Justice to suspend the activity of a party for 3 months. The suspension is made by a written order indicating the violations justifying the suspension. The draft law provides for the right to challenge the order. If the violations are not removed the suspension term can be extended to 6 months, at which point if the violations continue the decision to register the party is to be cancelled. During the period of

suspension the party may not resort to mass-media, may not make propaganda, participate in elections, or have access to its bank accounts.

40. There are undoubtedly some improvements in the new provisions compared with the situation addressed in the Commission's opinion of April 2002. The right of appeal to a court of law is now expressly provided for. Under Article 51(1) it would appear that suspension may be invoked only where "necessary for removing the violations of the legislation found within the activity of the political party". Under Article 49(7) the Minister has a range of sanctions when a violation is found, and "depending on the severeness of legislation violation," he may warn the offending party, request it to remove the violations, make a request and at the same time suspend, or cancel its registration.

41. However, a number of criticisms may still be made:

1) The power to suspend or cancel registration should lie with a court of law in order to comply with the requirements of the European Convention on Human Rights and the Venice Commission guidelines.

2) If the Minister suspends and an appeal is taken, it is not clear whether the Court may lift the suspension pending the hearing or not. Nor is it clear whether a full appeal on the merits can take place or whether all that is envisaged is a procedural review. Article 51 (7) merely provides that the order "may be challenged" before a court.

3) There is no longer a distinction drawn between suspension during an election period and at other times. However, this means that the Minister can now suspend a party during an election period where formerly only a court of law could do so. This change in the law is most undesirable and it is particularly inappropriate that a politician should take such a decision at the time of an election. In criticising the distinction formerly made it is clear that the Venice Commission believed that this function should at all times be performed by a court.

4) The power of suspension should be available only where a warning or a request to remove the violation would clearly be ineffective.

5) The power to suspend should be available only for the most serious cases. Under the proposal it could be invoked even if a violation was trivial.

6) It seems to me impossible, even where suspension may be justified, to defend all the consequences of a suspension. For example, why should a suspended party not have access to the mass media provided it does not use the media to incite the public to violence or crime? How would denial of access to the media in such a case be compatible with Article 10 of the Convention? Why should a suspended party not use its accounts to pay for its legal defence?

42. Article 52 provides for the forced liquidation of political parties by the Minister following cancellation of the registration. The criticisms already made of the suspension provision apply with equal force to this procedure. In addition, it would seem that

cancellation is not merely available but required where a violation has continued after the 6-month suspension. This could, in theory at any rate, apply in the case of a trivial violation. It should be provided that cancellation is to be applied only in the most serious cases.

43. Article 53 provides that the Constitutional Court may declare parties to be unconstitutional which by their objectives or activities militate against political pluralism, the principles of the rule of law, or the sovereignty and the independence, or territorial integrity of Moldova.

CONCLUSION

44. The draft Moldovan law is a comprehensive and generally clear and well-drafted measure legislating for the regulation of political parties.

42. Unfortunately, in a number of important respects the draft law, in particular in relation to its provisions concerning registration, refusal of registration, suspension of political parties and cancellation of registration, does not adequately guarantee the rights enshrined in Articles 10 and 11 of the European Convention on Human Rights and does not provide for adequate guarantees that any restriction on those rights would be such as could be considered proportionate and necessary in a democratic society. Furthermore, the draft law falls short of the requirements of the European Convention and does not conform to the Venice Commission's guidelines on the prohibition and dissolution of political parties and analogous measures, notably by failing to reserve the decision on prohibition or dissolution to a court of law. Furthermore, the law leaves open the possibility that a party could be suppressed in circumstances not justified by the guidelines.