

THE PROBLEMS AND THE SOLUTIONS OF HISTORICAL, POLITICAL AND JURIDICAL APPRECIATION OF COMMUNIST TOTALITARIAN REGIME AND SYMBOLIC (SICKLE AND HAMMER)

ПРОБЛЕМЫ И РЕШЕНИЯ ИСТОРИЧЕСКОЙ, ПОЛИТИЧЕСКОЙ И ЮРИДИЧЕСКОЙ ОЦЕНКИ ТОТАЛИТАРНОГО КОММУНИСТИЧЕСКОГО РЕЖИМА И СИМВОЛИКИ (СЕРП И МОЛОТ)

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РЕЗЮМЕ

12 июля 2012, Парламент утвердил решение об исторической, политической и юридической оценки тоталитарного коммунистического режима и символики (серп и молот).

Позже, 19 июля 2012, был представлен, в качестве законодательной инициативы, закон об изменениях и дополнениях некоторых законодательных актов (закон о политических партиях, закон о свободе слова и закон об общественных символах).

В данном случае, законопроект предлагает установить запрет на использование символики тоталитарных режимов: нацизма, сталинизма и коммунизма для политических партий (предложение дополнить ст. 4 Закона о политических партиях № 294-XVI от 21.12.2007), запрет на использование данных символов в качестве корпоративных символов юридических лиц (статья 6 Закона об общественных символах № 86 от 28 июля 2011), а также запрет на пропаганду тоталитарной идеологии нацизма, сталинизма и коммунизма (статья 3 Закона о свободе слова № 64 от 23 апреля 2010).

Ранее, 28 июня 2010 был предложен проект решения с тем же названием (об исторической, политической и юридической оценке тоталитарного коммунистического режима РМ), но данный проект содержал больше положений, которые не внесены в окончательное издание.

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On July the 12th, 2012, the Parliament approved the decision on historical, political and juridical appreciation of communist totalitarian regime and symbolic (sickle and hammer). Later on July the 19th, 2012, it was moved forward as a legislative initiative the Law on amendment and completion of some legislative acts (*the Law on political parties, the Law on freedom of speech and the Law on public symbols*).

In our case, the draft law proposes to establish in legislation the prohibition of totalitarian regime symbols' use: Nazi, Stalinist and Communist for political parties (the proposal to complete the 4th art. of Law on political parties nr. 294-XVI from December the 21st, 2007), the prohibition to use these symbols as corporate symbols of juridical persons (the 6th article of Law on public symbols nr. 86 from July 28th, 2011), as well as the prohibition of Nazi, Stalinist and Communist totalitarian ideology's propagation (the 3rd article of Law on freedom of speech nr. 64 from April the 23rd, 2010).

Previously, on June the 28th, 2010 it was proposed a draft decision with the same title (*on historical, political and juridical appreciation of totalitarian communist regime from RM*), but the project contained a number of law's provisions which weren't included in the final editorial, among which:

Are declared criminals the persons in positions of responsibility in Moldavian SSR and of the Communists Party of Moldavian SSR who decided and organized crimes against the population of the Republic of Moldova and the actions of all persons who contributed to these crimes (art. 3); it is prohibited to use the term "communist" and its derivatives in the names of political parties, socio-political organizations, and institutions and enterprises; (art. 4); it is prohibited to use and propagate the symbol of totalitarian communist regime "sickle and hammer", along with the Nazi symbols for political purposes; (art. 5); It is prohibited to promote the totalitarian ideologies, along with the Communist and Nazi ones (art. 6); The victims of totalitarian communist regime in MASSR and MSSR are politically rehabilitated, citizens of the Republic of Moldova who were convicted and/or persecuted in the Soviet period for ideological, political, national, religious reasons, etc. (art. 7)

Also, in the draft decision of June 28th, 2010 the RM Government had certain attributions for the implementation of provisions, among which:

c) develop and promote the draft law on lustration; e) within three months from the entry into force of this Decision will reorganize the Archive of Socio-Political Organizations in Republic of Moldova by separating the Archive Fund related to the totalitarian communist regime and create the Archive of Totalitarian Communist Regime in Republic of Moldova; f) ensure the transmission to Archive of Totalitarian Communist Regime in Republic of Moldova of all archive funds from the Banks of the Ministry of Internal Affairs, Ministry of Foreign Affairs and European Integration, Intelligence and Security Service of the Republic of Moldova, of funds from the archive of the Office of the Prosecutor General and other funds that reflect the essence of the totalitarian communist regime; g) ensure the financing for the elaboration and publication of a history textbook of the communist totalitarian regime and the introduction in the pre-university education system of a course of totalitarianism history; h) together with the Academy of Sciences of Moldova will create up to January 1st, 2011 in the Institute of History, State and Law, the Center for the Study of Communist Totalitarian Regime, with supplementation of researchers units and will provide funds for its work; i) ensure the dismantling of all V.I. Lenin's monuments in Republic of Moldova and the symbols of "sickle and hammer" on all buildings; j) make the necessary efforts for the capitalization and implementation of conclusions and recommendations of the Commission for the study and appreciation of the Communist Totalitarian Regime in Republic of Moldova.

The authors of the decision on the appreciation of historical, legal and political totalitarian communist regime and symbolic (sickle and hammer)² motivated the necessity of adoption, by the provisions of Resolution no. 1096 (1996) of the Parliamentary Assembly of the Council of Europe on measures for the elimination of the heritage of the former communist totalitarian systems, Resolution. 1481 (2006) of the Parliamentary Assembly of the Council of Europe on the need for international condemnation of crimes of totalitarian communist regimes, of the European Parliament's Resolution no. 0213 (2009) on the European conscience and the totalitarianism, of Presidential Decree no. 165-V of January 14th, 2010 on the establishment of the Commission for the study and appreciation of the Communist Totalitarian Regime in the Republic of Moldova etc.

In the briefing notes of the aforementioned normative acts it is motivated the necessity to demonstrate the historical culpability and condemnation of totalitarian communist regime.

The authors of the draft law believe that Moldova has a double liability of condemnation of the totalitarian regimes - as a country that had suffered from the cruelest totalitarian regimes, resulting in enormous losses of human lives - and secondly - as part of the international community, which means the alignment to the consolidated initiatives of prohibiting and preventing such schemes in future.

At the moment both the crimes of totalitarian communist regime and its symbol are not outlawed, for the reason that this fact will come into force as of October 1st, 2012.

At the plenary session of the Venice Commission of June 12th – 13th 1998, it was adopted the report on prohibition of political parties. During this meeting, it was analyzed the legislative framework regulating the activity of political parties in 41 states³.

It is relevant to note that most of the states have taken similar standards regarding the prohibition of political parties (eg the political parties, who threaten the independence and sovereignty of the state, instigate to hate based on race, gender, ethnicity, religion etc. ., secret or military associations, organizations funded by other countries, etc. are prohibited).

Only in restricted cases, the legislator specifies the categories of political parties that re unconstitutional (the case of Poland⁴ which prohibits the parties that promote communist or Nazi ideology; Portugal prohibits fascist parties; German Federative Republic⁵, Austria, Belgium, Greece, etc. prohibit the organizations that pursue similar goals as the National Socialist organization, etc.

ECHR Practice

An eloquent example form the ECHR practice is the refusal to register the Communist Party (Nepeceriști-people who were not members of the Romanian Communist Party (PCN)) and Ungureanu versus Romania.⁶ The claimants complained that the Romanian courts refused the registration of the claimants' party. The Court agreed that the states can prohibit political parties that are incompatible with the principles of democracy, but PCN had no political activity contrary to it. The Court also found that the program and statute insists on respect for national

²Parliament's Decision No. 191 on the appreciation of the historical, legal and political totalitarian communist regime of Moldavian Soviet Socialist Republic. In: Official Gazette of 31.08.2012, no. 181-184.

³ Albania, Argentina, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Japan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovakia, Spain, Slovenia, Sweden, Switzerland, Turkey, Ukraine, Uruguay (see document [CDL-PP\(98\)2](#))

⁴ The Constitutional of The Republic of Poland from 2.04.1997 [online] <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>

⁵ Basic law for the Federal Republic of Germany art. 21 [online] <https://www.btg-bestellservice.de/pdf/80201000.pdf>

⁶ The refusal to register the party – Communists Party (Nepeceriști) and Ungureanu versus Romania [online] <http://jurisprudenta.cedo.com/Refuz-inregistrare-partid-Partidul-Comunistilor-Nepeceristi-si-Ungureanu-versus-Romania.html>

sovereignty, territorial integrity and respect for the constitutional order and does not contain any passages that incite to violence or any form of rejection of democratic principles or to the dictatorship of the proletariat. PCN program and statute is distinguished from the abuses of the former communist party before 1989.⁷

In the case Bozgan, the claimant faced the same refusal when requested the registration of an association called “Anti-Mafia National Guard”. The analysis conducted on the reasons that caused the refusal of the registration, and, in both cases, the Court considered that the refusal was not justified by an “imperious social need”.⁸

Thus, the Republic of Moldova risks being condemned to ECHR for the interference in the right of association.

Analysis of national legislation.

Analyzing the draft *decision of June 28th, 2010 on the historical, legal and political totalitarian communist regime in Republic of Moldova* (unexamined) we can deduce the following objectives:

1. The Republic of Moldova has joined international forums (Council of Europe) who proposed the condemnation of the totalitarian regimes and the criminal liability of persons with responsible positions in the Moldavian SSR and of Communist Party of MSSR who contributed to these crimes.
2. It was proposed to prohibit the term “communist” and its derivatives in the names of political parties and socio-political organizations.
3. It was prohibited to use and propagate the symbol of totalitarian communist regime “sickle and hammer”, along with the Nazi symbols for political purposes. In this context it is prohibited to promote totalitarian ideologies, along with the Communist and Nazi ones.
4. It was decided to politically rehabilitate the victims of totalitarian communist regime in MASSR and MSSR, citizens of the Republic of Moldova who were convicted and/or persecuted in the Soviet period for ideological, political, national, religious reasons, etc.

But, the Parliament’s decision⁹ adopted in the final edition was resumed only to the condemnation of totalitarian communist regime and prohibition symbols “sickle and hammer” which completely distorted the meaning of the present normative act.

Although initially it was intended to exclude the communist ideology (including symbols “sickle and hammer”), and respectively the term “communist” in the names of political parties and socio-political organizations, subsequently the local legislator gave up this initiative. The draft decision would have determined CPRM parliamentary party to change the name, statute and political program or to be removed from the register of political parties (by liquidation).

The Parliament’s Decision no. 191 imposed to CPRM parliamentary party only the renunciation to symbol “sickle and hammer”.

In our opinion, the local legislator ignored the ECHR practice, the Venice Commission reports (of 1998-2004) and has misinterpreted the provisions of Resolution no. 1096 (1996) and no. 1481 (2006) of PACE and European Parliament’s resolution no. 0213 (2009), as these international acts with optional character recommend as follows:

- a. *the criminal acts committed by individuals during the communist totalitarian regime should be prosecuted and punished under the standard Criminal Code.*

⁷ *Ibidem*

⁸ Human Rights Handbook p. 22. online <http://www.drepturicivile.Ro/manual-DO-proof.pdf>

⁹ Parliament’s Decision No. 191 on the appreciation of the historical, legal and political totalitarian communist regime of Moldavian Soviet Socialist Republic. In: Official Gazette of 31.08.2012, no. 181-184.

Where the criminal code provides for a series of limitations for some crimes, the punishment may be extended because it is only about a procedural issue and not about the substance. The adoption and the application of some retroactive punitive laws are not, however, permitted. On the other hand, it is allowed the judgment and the punishment of any person for any omission act which, at the time when it was committed did not constitute a criminal offense under national law, but which was considered of criminal nature according to the general principles of law recognized by national legislation. Moreover, where a person acted openly violating the human rights, the motivation that he/she acted under orders does not exclude any illegality or individual guilt.

b. *the judgment of the perpetrators should be considered along with the rehabilitation of the persons condemned for “crimes” which in a civilized society do not constitute criminal acts and those who have been wrongly convicted.* There will be offered material compensation for the victims of totalitarian justice (...).

c. *open access to secret services files for their public examination in some former communist countries.* It advises all concerned countries to enable the affected persons to examine at request the individual files compiled by the former secret services (...).

d. for persons who have not committed offenses that can be investigated under Article 7 but who held senior positions in the former communist totalitarian regimes and supported them, the Assembly notes the need to introduce administrative measures, such as *lustration and de-communicization laws* in some states. These measures aim at excluding certain persons from exercising governmental power if they cannot be trusted to exercise it in accordance with democratic principles, because they assumed no commitment or attachment to them in the past and have no interest or motives to pass to them now (...). So it is proposed to be adopted the lustration law in post-communist states.

The PACE Resolution no. 1096 mentions that *the best guarantee for the elimination of former communist totalitarian systems represents the deep political, legal and economic reforms in those countries, reforms that will lead to the construction of a genuine democratic political mentality and culture. Therefore, the Assembly calls on all consolidated democracies to intensify their aid and assistance to emerging democracies in Europe, in particular to support the development of civil society* (...). The Parliamentary Assembly of the Council of Europe recommended that Member States remove the heritage of former communist totalitarian state systems by restructuring the old legal and institutional systems, a process that should be based on the principles:

i. demilitarization, in order to ensure the elimination of militarization of the main civil institutions such as military administration of prisons or troops of Ministry of Interior, which are typical of the Communist military systems;

ii. decentralization, especially at local and regional levels and within the state institutions;

iii. de-monopolization and privatization, which are central elements for the building of a market economy and of a pluralist society;

iv. de-bureaucratization, which should reduce the communist totalitarian over-regulation and transfer the power from bureaucrats to citizens.

Also in the PACE Resolution no. 1481 it is mentioned that *despite the crimes of the totalitarian communist regimes, some European communist parties have contributed to the*

realization of democracy (...). In addition, it invites all communist or post-communist parties in its member states which have not done it yet, to revalue the history of communism and their own past, to keep on a net distance from the crimes committed by the totalitarian communist regimes and condemn them unequivocally.

From the above we can conclude that the local legislative provisions approach selectively that problem by fragmentary adopting some legislative acts such as the condemnation of totalitarian communist regimes, declassifying archives, rehabilitation of victims of communist regimes etc. and ignore the major coercive measures such as the adoption of the lustration law, prosecution of criminal acts committed by individuals during the communist totalitarian regime etc.

We also want to mention that the EC resolutions recommend the condemnation of communist regimes, but do not expressly stipulate the prohibition of actual communist parties' symbols or the dissolution of political parties which took the name and symbol "sickle and hammer" but comply with the principles of constitutional democracy and the rule of law!!!

In this context, we believe that the local legislator should adopt the lustration law and investigate the criminal acts committed by individuals during the communist totalitarian regime.

As regards the prohibition of "sickle and hammer" symbols or the "communist" term in the denomination of political parties and socio-political organizations, we think that it is necessary to address to Constitutional Court of the Republic of Moldova to establish the constitutionality of CPRM political party and/or its symbols. Where the Constitutional Court declares unconstitutional the CPRM symbols, the legislator would have reasons to prohibit the symbol "sickle and hammer".¹⁰ Otherwise, the prohibition of certain attributes of the political party (symbol) and the maintenance of others (statute, program name) creates contradictions and differences of legal norms interpretation, presumes CPRM political party as a constitutional political formation and therefore the prohibition of some attributes would be an interference with the right of association.

Conclusions

1. According to the statute, the Communists Party of the Republic of Moldova (CPRM) has in its composition citizens of the country on voluntary principles - followers of communist ideology. It claims to be the rightful successor, heir of the ideas and traditions of the Communists Party of Moldova.¹¹

2. We are in solidarity with the promoters of condemnation of the totalitarian regimes (including the communist and fascist regimes), but we believe that this decision does not fall within the competence of the legislator, but rather should be delegated to the Constitutional Court of the Republic of Moldova. However, we should distinguish the illegal actions committed by CPSU in the period of the Soviet communist regime from the activity of the current parliamentary party - CPRM.

3. In our opinion, the Communists Party of the Republic of Moldova fragmentary took the communist ideology and political program in order to obtain the support of the local electorate, but does not pursue anti-State extremist goals. In those circumstances, the prohibition and the forced dissolution of the Communists Party or of its symbols are not justified and do not contain impetuous arguments.

¹⁰ Law no. 317-XIII of the Constitutional Court of December 13th, 1994. In the Official Gazette of the Republic of Moldova no. 8/86 of 07/02/1995.

¹¹ The Statute of the Communists Party of the Republic of Moldova [online] <http://www.e-democracy.md/files/parties/pcrm-statute-2008-ro.pdf>(visited on 07.07.12)

4. ECHR practice assumes that if a political party declare some radical purposes, in the absence of violent actions in this regard, the declaration is not sufficient for its prohibition or dissolution.

5. The prohibition of CPRM and of its symbols can be justified only if the mentioned political party would instigate to violence or would ignore the restrictions expressly stipulated in the Constitution of the Republic of Moldova.¹²

In these circumstances, we believe that the local political parties must accept the pluralism of ideas and ideologies and work on positions of electoral and parliamentary competition and not fight each other.

In this context, we make the following proposals and recommendations::

1. To adopt the lustration law.
2. To investigate criminal acts committed by individuals during the communist totalitarian regime.
3. To expressly include in the Law nr. 294 of 21.12.2007 on political parties the prohibition of political parties that have taken similar methods of communist or Nazi political parties/social- political organizations.
4. To expressly include the criminal liability of political parties that have taken similar methods as communist or Nazi political parties/social-political organizations.

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¹² Constitution of the Republic of Moldova. In: Official Gazette of the Republic of Moldova no.1, 12.08.1994. art. 41 par. 4) 5)6).