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# EGMR Nr. 60115/00 - Urteil vom 20. April 2004 (Amihalachioaie v. Moldawien)

**Meinungsfreiheit von Rechtsanwälten bei der öffentlichen Kritik von (Verfassungs-) Gerichten (Bedeutung der Rechtsanwälte für das Justizwesen; Presse; Schutz der Form der Meinungskundgabe; Eingriff; Rechtfertigung; Verhältnismäßigkeit; Anforderungen an den Gesetzesvorbehalt: bereichsbezogene Bestimmtheit; Interessenausgleich; legitimes Ziel; notwendig in einer demokratischen Gesellschaft; dringendes gesellschaftliches Bedürfnis; Sondervoten Loucaides und Thomassen: enge Auslegung der Schranken des Art. 10 II EMRK). Redaktioneller Hinweis.**

**Art. 10 EMRK; Art. 5 Abs. 1 GG**

## Leitsätze des Bearbeiters

**1. Rechtsanwälten steht die Meinungsfreiheit des Art. 10 EMRK zu. Sie dürfen insbesondere auch die Rechtspflege öffentlich kritisieren, solange bestimmte Grenzen gewahrt bleiben. Art. 10 EMRK schützt nicht nur die verbreiteten Ideen und Informationen an sich, sondern auch die Wahl der Form, in der diese vorgetragen werden. Dabei muss ein Ausgleich der betroffenen Interessen vorgenommen werden. Namentlich sind insoweit das öffentliche Interesse an Informationen über Fragen, die sich aus Gerichtsentscheidungen ergeben, die Anforderungen an eine einwandfreie Rechtspflege und das Ansehen der Rechtsanwaltschaft einzubeziehen.**

**2. Obschon den Vertragsstaaten bei der Herbeiführung eines solchen Ausgleichs ein Beurteilungsspielraum zukommt, wird der Ausgleich doch von einer europäischen Überprüfung begleitet, welche sich sowohl auf das nationale Recht, als auch auf die dieses anwendenden Entscheidungen bezieht. Zur Beurteilung derartiger Fälle prüft der EGMR den behaupteten Eingriff im Lichte des gesamten Falles einschließlich der Grundaussage der Äußerungen sowie der Umstände, unter denen sie getroffen worden sind. Hierbei prüft der EGMR, ob für den Eingriff ein dringendes gesellschaftliches Bedürfnis besteht, der Eingriff bei der Verfolgung eines legitimen Ziels verhältnismäßig ist und ob die von den nationalen Stellen zur Rechtfertigung vorgetragenen Gründe stichhaltig und hinreichend sind.**

**3. Eine Verletzung der Meinungsfreiheit liegt danach etwa vor, wenn der Anwalt zwar einen Mangel an Respekt vor dem Verfassungsgericht zeigt und er nur mit einer höhenmäßig niedrigen Buße belegt wird, seine Äußerungen jedoch in einer hitzigen Debatte über ein Thema öffentlichen Interesses getroffen worden sind und weder die Richter persönlich beleidigen, noch schwerwiegend sind.**

## THE FACTS

I. THE CIRCUMSTANCES OF THE CASE 1

8. The applicant is a Moldovan national who was born in 1949 and lives in Chiºinău (Moldova). He is a lawyer and the chairman of the Moldovan Bar Council. 2

9. In 2000 a group composed of members of Parliament and the Moldovan Ombudsman sought a ruling from the Constitutional Court that the Lawyers (Organisation of the Profession) Act (Law no. 395-XIV) was unconstitutional. The Act laid down, *inter alia*, that all lawyers practising in Moldova should be members of the Bar Council, a national association of all lawyers from the local Bars. They argued that compulsory membership of the Bar Council was contrary to the right of freedom of association guaranteed by the Moldovan Constitution. 3

10. After consulting, *inter alia*, the Bar Council, which expressed the view that the Act was consistent with the Constitution, the Constitutional Court held in a decision of 15 February 2000 that the provisions making membership of the Moldovan Bar Council compulsory were unconstitutional. 4

11. The applicant criticised the Constitutional Court's decision in a telephone interview he gave to A.M., a journalist on the *Economiceskoe Obozrenie* ("Economic Analysis") newspaper. 5

12. In the February 2000 edition of the newspaper, A.M. published an article on the debate which the Constitutional Court's decision of 15 February 2000 had sparked off among lawyers. He gave the following account of his telephone interview with the applicant: 6

"... After the Constitutional Court's decision was made public, *Economiceskoe Obozrenie* put a series of questions to the Chairman of the Bar Council, Mr Gheorghe Amihalachioaie. His comments are tinged with emotion, no doubt because they were made in the heat of the moment: 7

'The Constitutional Court's decision will produce total anarchy in the legal profession', said Mr Amihalachioaie. 'You will see what will happen over the course of the next year. From now on, we no longer have a single system for organising the profession or a unitarian State. We have become accustomed to this - it is easier to live and work in chaos. Taxes are not paid, there is no supervision and, consequently, no ethics, no discipline and no responsibility'. 8

In view of this, the question he asks himself is whether the Constitutional Court is constitutional. 'In 1990 the United Nations adopted its Basic Principles on the role of the Bar, which are fully guaranteed by our law. The legal profession is independent the world over. In Moldova it is subordinate to the executive, that is to say the Ministry of Justice. This is a serious breach of fundamental democratic principles. 9

The Constitutional Court did not take into account the judgments of the Strasbourg Court referred to by the Bar Council in its observations. The judges of the Constitutional Court probably do not regard the European Court of Human Rights as an authority. Am I to assume that they have acquired more experience in five years than the Strasbourg judges in fifty We shall certainly be informing the Council of Europe that Moldova does not comply with the case-law or requirements of the European Court of Human Rights.' 10

According to Mr Amihalachioaie, lawyers have always been regarded as being at the forefront of the legal profession: 'Despite everything, even after the Constitutional Court's decision, the body of lawyers remains a force.' ..." 11

13. In a letter of 18 February 2000, the President of the Constitutional Court informed the applicant that his remarks as reported in the *Economiceskoe Obozrenie* newspaper could constitute a lack of regard for the Constitutional Court within the meaning of Article 82 § 1 (e) of the Code of Constitutional Procedure and invited him to submit written observations on this point within ten days. 12

14. On 28 February 2000 the applicant submitted the requested observations. He said that he had only learned of the publication of his remarks from the letter of 18 February 2000 and confirmed having had a long telephone conversation with the journalist A.M. about the decision of 15 February 2000. He stressed, however, that his remarks had been misquoted and largely taken out of context. He added that, had A.M. submitted the article to him prior to publication, he would have checked the presentation of his remarks carefully and, accordingly, assumed full responsibility for them. 13

15. On 6 March 2000 the Constitutional Court issued a final decision pursuant to Articles 81 and 82 of the Code of Constitutional Procedure in which it imposed an administrative fine on the applicant in the sum of 360 Moldovan lei (equivalent to 36 euros). 14

It found that the applicant had made the following comments in the aforementioned interview: "The Constitutional Court's decision will produce total anarchy in the legal profession ... the question he asks himself is whether the Constitutional Court is constitutional. ... the judges of the Constitutional Court [...] do not regard the European Court of Human Rights as an authority." It found that these comments showed a lack of respect on the applicant's part for the Constitutional Court and its decision. 15

16. As the Constitutional Court's decision was final, the applicant paid the sum of 360 lei into the Ministry of Finance's account on 7 July 2000. 16

II. RELEVANT DOMESTIC LAW 17

17. The relevant provisions of the Code of Constitutional Procedure read as follows: 18

Article 81 § 1 19

"In order to protect the dignity of the Constitutional Court judges and the participants in the proceedings, and to secure appropriate conditions for the exercise of constitutional jurisdiction, the Court may take the measures provided for in Article 82." 20

Article 82 21

"1. In order to ensure the proper administration of constitutional justice, the Court may impose an administrative fine of up to twenty-five times the minimum monthly salary on anyone who: 22

(a) makes an unconstitutional statement, regardless of the manner of its expression; 23

(b) interferes with the procedural activity of the Constitutional Court judges; or attempts to influence them by non-procedural methods; 24

(c) refuses without due cause to comply with the orders of the judges of the Court in the prescribed manner or within the time allowed; or fails to comply with a judgment or advisory opinion of the Court; 25

(d) violates the judicial oath; 26

(e) displays a lack of respect for the Constitutional Court by refusing to obey orders of the presiding judge, violating disciplinary rules or committing other acts that show an obvious lack of regard for the Court and its procedure. 27

..." 28

18. Section 4 of the Press Act of 26 October 1994 (Law no. 243-XIII) provides: 29

"Publishers of periodicals ... shall have a discretion as to the documents and information they choose to publish, but shall have regard to the fact that, since it carries with it duties and responsibilities, the exercise of these freedoms is subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." 30

## THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION 31

19. The applicant considered that his conviction constituted an unjustified interference with his right to freedom of expression. He relied on Article 10 of the Convention, which provides: 32

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ... 33

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for maintaining the authority and impartiality of the judiciary." 34

A. The parties' submissions 35

1. The applicant 36

20. The applicant submitted that the interference was not "prescribed by law" or "necessary in a democratic society". 37

21. He argued, firstly, that Article 82 of the Code of Constitutional Procedure did not satisfy the requirement as to the foreseeability of the law, as it failed to identify with sufficient clarity the acts which would give rise to liability to an administrative fine. In particular, it was difficult to determine from the wording of Article 82 whether it covered only acts performed at Constitutional Court hearings or all acts showing a lack of regard for the Constitutional Court or its procedure. 38

22. He also said that he had not expressed any general criticism of the Constitutional Court or its judges, but merely disapproval of its decision, as part of a broad debate on the organisation of the legal profession. Accordingly, he contended that the penalty imposed on him had not been necessary in a democratic society. 39

2. The Government 40

23. The Government accepted that there had been an interference with the applicant's right to freedom of expression, but argued that it satisfied the requirements of paragraph 2 of Article 10 of the Convention. 41

They submitted at the outset that Article 82 of the Code of Constitutional Procedure met the requirement of foreseeability when read in the light of Article 81, which laid down that the Constitutional Court could take measures that encroached upon freedom of expression in order to protect the dignity of its judges and to secure appropriate conditions for the exercise of constitutional jurisdiction. 42

In view of his position and professional experience, the applicant ought to have been aware that the authority of the Constitutional Court had to be respected not only at hearings, but at other times too. 43

24. The Government maintained that the interference was justified by the need to guarantee the authority and impartiality of the judiciary and was necessary in a democratic society as the applicant had gone beyond the bounds of acceptable criticism by making remarks about both the Constitutional Court and its judges that were defamatory and offensive. They stressed that, as a lawyer, the applicant had a duty of discretion towards the judiciary and so enjoyed more limited freedom of expression. 44

B. The Court's assessment 45

1. General principles 46

25. The Court reiterates that a "law" within the meaning of Article 10 § 2 is a norm that is formulated with sufficient precision to enable the citizen to regulate his conduct and to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. However, those norms need not be foreseeable with absolute certainty, even though such certainty is desirable, as the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (*Sunday Times v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, p. 31, § 49; and *Hertel v. Switzerland*, judgment of 25 August 1998, *Reports of Judgments and Decisions* 1998-VI, pp. 2325-2326, § 35). 47

26. The degree of precision depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover, and the number and status of those to whom it is addressed (see *Groppera Radio AG and Others v. Switzerland*, judgment of 28 March 1990, Series A no. 173, p. 26, § 68). 48

27. The Court reiterates that the special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar (see *Casado Coca v. Spain*, judgment of 24 February 1994, Series A no. 285-A, p. 21, § 54). 49

28. However, as the Court has previously had occasion to say, lawyers are entitled to freedom of expression too and to comment in public on the administration of justice, provided that their criticism does not overstep certain bounds. Furthermore, Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed. In that connection, account must be taken of the need to strike the right balance between the various interests involved, which include the public's right to receive information about questions arising from judicial decisions, the requirements of the proper administration of justice and the dignity of the legal profession (*Schöpfer v. Switzerland*, judgment of 20 May 1998, *Reports* 1998-III, pp. 1053-1054, § 33). 50

29. While the Contracting States have a certain margin of appreciation in assessing whether such a need exists, it goes hand in hand with a European supervision, embracing both the law and the decisions applying it (*Sunday Times v. the United Kingdom (no. 2)*, judgment of 26 November 1991, Series A no. 217, pp. 28-29, § 50). 51

30. In performing its supervisory role, the Court has to look at the interference complained of in the light of the case as a whole, including the tenor of the applicant's remarks and the context in which they were made, and determine 52

whether it "corresponds to a pressing social need", was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see *Sunday Times (no. 2)*, ibid.; and *Nikula v. Finland*, no. 31611/96, § 44, ECHR 2002-II).

2. Application of the aforementioned principles to the instant case 53

31. The Court notes that the applicant was convicted for stating in an "interview" given to a newspaper that the decision 54
of the Constitutional Court "[would] produce total anarchy in the legal profession" and that the question therefore arose whether the Constitutional Court was constitutional. He was also convicted for saying that the judges of the Constitutional Court probably "[did] not regard the European Court of Human Rights as an authority".

Such a conviction may be regarded as an interference with the applicant's right to respect for his freedom of 55
expression, as guaranteed by Article 10 of the Convention.

32. The Court finds at the outset that the interference in question was "prescribed by law", within the meaning of the 56
second paragraph of Article 10 of the Convention. In that connection, it notes that the issue between the parties in the instant case is whether Article 82 (e) of the Code of Constitutional Procedure, which sets out the acts for which an administrative penalty may be imposed, should be construed broadly or narrowly.

33. The Court notes that the wording of Article 82 contains a general provision that makes anyone showing an obvious 57
lack of regard towards the Constitutional Court liable to a fine.

Although the acts that give rise to liability are not defined or set out with absolute precision in the legislation, the Court 58
finds that in view of his legal training and professional experience as chairman of the Bar the applicant could reasonably have foreseen that his remarks were liable to fall within the aforementioned provision of the Code of Constitutional Procedure.

34. It further considers that the interference pursued a legitimate aim, as it was justified by the need to maintain both 59
the authority and the impartiality of the judiciary, within the meaning of the second paragraph of Article 10 of the Convention. It must now determine whether that interference was "necessary in a democratic society".

35. The Court notes that the applicant's comments were made on an issue of general interest in the context of a fierce 60
debate among lawyers that had been sparked off by a Constitutional Court decision on the status of the profession that had brought to an end the system whereby lawyers were organised within a single structure, the Moldovan Bar Council, which was an association chaired by the applicant.

36. In that connection, the Court finds that even though the remarks may be regarded as showing a certain lack of 61
regard for the Constitutional Court following its decision, they cannot be described as grave or as insulting of the judges of the Constitutional Court (see, *mutatis mutandis*, *Ska³ka v. Poland*, no. 43425/98, § 34, 27 May 2003; *Perna v. Italy* [GC], no. 48898/99, § 47, ECHR 2003-V; and *Nikula* cited above, §§ 48, 52).

37. Furthermore, since it was the press which reported the applicant's comments some of which the applicant 62
subsequently denied making, the Court finds that it is not possible to hold him responsible for everything that appeared in the published "interview" (see paragraph 14 above).

38. Lastly, although on the face of it the fine of 360 lei (equivalent to EUR 36) imposed on the applicant is a modest 63
sum, it nevertheless has symbolic value and is indicative of the Constitutional Court's desire to inflict severe punishment on the applicant, as it is close to the maximum that could be imposed under the legislation.

39. In the light of these considerations, the Court finds that there was no "pressing social need" to restrict the 64
applicant's freedom of expression and that the national authorities have not furnished "relevant and sufficient" reasons to justify such a restriction. Since the applicant has not gone beyond the bounds of acceptable criticism under Article 10 of the Convention, the interference in issue cannot be regarded as having been "necessary in a democratic society".

40. Consequently, there has been a violation of Article 10 of the Convention. 65

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION 66

… 67

## FOR THESE REASONS, THE COURT

1. *Holds* by six votes to one that there has been a violation of Article 10 of the Convention; 68

2. *Holds* by five votes to two that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant; 69

3. *Dismisses* by five votes to two the remainder of the applicant's claim for just satisfaction. 70

Done in French, and notified in writing on 20 April 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court. 71

… 72

## PARTLY CONCURRING, PARTLY DISSENTING OPINION OF JUDGE LOUCAIDES

I agree with the majority that there has been no violation of Article 10 of the Convention in this case but my approach for so finding is different. In short, I believe that the restriction provided in the relevant law, which was applied in the case of the applicant in the form of an administrative fine in respect of what he said in an interview with regard to judgment of the Constitutional Court, was not directly connected with the permissible relevant legitimate aim, i.e. maintaining the authority of the judiciary, and went beyond what was required for the achievement of that aim. Consequently I find that the legislative restriction in question cannot itself be considered as pursuing such an aim. 73

It is a well-established principle of interpretation of the Convention that restrictions of the rights and freedoms prescribed therein should be construed strictly and narrowly. As observed by the Commission in the *Sunday Times* case (*ECHR*, Series B, volume 28 page 9), strict interpretation in respect of exception clauses in the context of the Convention means: 74

"...that no other criteria than those mentioned in the exception clause itself may be at the basis of any restrictions and these criteria in turn must be understood in such a way that the language is not extended beyond its ordinary meaning". 75

Apart from the interpretation principle in question there are two specific factors in Article 10 itself which control the concept and scope of the permissible aim of the restriction under consideration. Firstly, it is the condition that the restriction must be "necessary in a democratic society" and secondly it is the notion of the term "authority" of the judiciary in respect of which the restriction may be imposed. 76

The question whether a law which restricts any of the rights safeguarded by the Convention does in fact pursue a permissible aim must, in my opinion, always be examined in the context of the requirements of a modern democratic society. It is not sufficient for a law which imposes any such restriction to refer or invoke one of the aims for which the relevant restriction is allowed. The substantive question should always be whether the restriction is actually necessary for that aim taking into account the present-day conditions of democracy. If the restriction goes beyond what is required for the relevant aim or it simply serves that aim incidentally or indirectly it cannot be considered as necessary in a democratic society for the achievement of that aim and should, for that reason, be considered as not covered by the applicable exception clause. 77

In the present case the material part of the law on the basis of which the applicant was punished is as follows: 78

"In order to ensure the proper administration of constitutional justice, the Court may impose an administrative fine of up to twenty-five times the minimum monthly salary on anyone who: ... (e) displays a lack of respect for the Constitutional Court by refusing to obey orders of the presiding judge, violating disciplinary rules or committing other acts that show an obvious lack of regard for the Court..." (emphasis added). 79

However I cannot see how the punishment of anybody for any act expressing "lack of regard" for a court (as compared with the stricter concept of contempt of court) can be necessary in a modern democratic society in order to maintain the authority of the judiciary. This becomes even more evident if we bear in mind the fact that freedom to criticise judicial judgments and the functioning of judiciary in general is nowadays an indispensable element of democracy - all the more so as such criticism serves as a safeguard for the proper control of judicial authority. Such criticism might reasonably be interpreted as lack of "regard" for a court, the term "regard" being so wide that it can cover any possible confrontation with, and challenge or dispute of, any act of judicial authority in the form of mere criticism. 80

It is important to address our mind in this respect to the requirements of a modern democratic society regarding accountability of all State institutions to the people and the corresponding right of the latter to express themselves freely on matters relating to a possible malfunctioning of such institutions. And in a modern democratic society criticism of such institutions, even if it amounts to lack of "regard", is a much more important value than the protection of the prestige of any State institution. It is, I think, useful to recall here the words of a famous British judge, Lord Denning. M.R. when, as far back as 1968, he was referring to an article which strongly criticised a judgment of the court and which was allegedly a contempt of court: 81

"That article is certainly critical of this court. In so far as it referred to the Court of Appeal, it is admittedly erroneous... Let me say at once that we will never use this jurisdiction [of contempt of court] as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself. It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not." 82

Furthermore, the term "authority" means the power or right to enforce obedience (Oxford Dictionary). Again I cannot see how a mere lack of "regard" for a court entails undermining the power or authority of the judiciary to enforce obedience to its judgments or other judicial acts. Such "authority" can be effective in spite of the lack of "regard" shown by those affected by it or any third party. 83

In the circumstances I find that the law in question to the extent that it prohibits in absolute terms acts expressing a lack of regard for the Constitutional Court in order to protect, according to the Government, the authority of the court falls outside the scope of that aim and cannot be considered as pursuing its objectives. This is clearly illustrated by the application of that law in the applicant's case. 84

**PARTLY CONCURRING, PARTLY DISSENTING OPINION OF JUDGE THOMASSEN**

I agree with the majority that Article 10 has been violated in this case but I have so concluded on different grounds. I do not agree, however, with the dismissal by the majority of the applicant's claims under Article 41 of the Convention. 85

The interference with the applicant's freedom of expression was allegedly based on the second paragraph of Article 10 which justifies restrictions on the exercise of this freedom "for maintaining the authority and impartiality of the judiciary". This ground comes close to the anglo-saxon notion of contempt of court which is intended to prevent the authority and the independence of the courts, as well as the rights of parties to proceedings, from being impaired by publications or other such acts (*The Sunday Times v. the United Kingdom*, judgment of 26 April 1979, Series A no. 30, § 55). 86

In the present case Articles 81 and 82 of the Code of Constitutional Procedure gave the Constitutional Court the power to examine, interrogate and take measures of its own motion and by its own authority: "In order to protect the dignity of the Constitutional Court judges and the participants in the proceedings, and to secure appropriate conditions for the exercise of constitutional jurisdiction" (see paragraph 17). 87

Any justification for according such a broad power to a court should be strictly scrutinised in view of the importance of the right of freedom of expression at stake. This means, in my view, that this power in principle could be used only in the context of a court's responsibility to guarantee a fair trial in a pending case which is the very justification of contempt of court sanctions. 88

It cannot reasonably be said that the powers used by the Constitutional Court were to guarantee a fair trial in a pending case. The court began proceedings against the applicant, interrogated him and imposed a penalty on him following delivery of its judgment. These measures did not address the applicant's attitude as a lawyer in proceedings but rather his attitude as a party who commented on a final judgment in his own case. The power justified to guarantee a fair trial in a pending case was used by the Constitutional Court for another aim, namely to restrict the applicant's democratic right to debate publicly the merits of that court's judgment. 89

Moreover, the imposing of the penalty by the Constitutional Court, which had begun the proceedings against the applicant itself and was itself the "victim" of the remarks made by the applicant, could be argued to be in violation of the right to be heard on a criminal charge by an independent and impartial tribunal (see *Kyprianou v. Cyprus*, no. 73797/01, judgment of 27 January 2004). 90

In my view Article 10 § 2 cannot justify this kind of interference with the applicant's right to freedom of expression. It follows from this that, unlike the majority, I cannot consider the measures taken and the reasons given by the Constitutional Court (see paragraph 15 of the judgment) as pursuing the aim of maintaining the authority and impartiality of the judiciary. 91

Assuming that the restrictions on the applicant's right would have been imposed in independent proceedings and assuming that for that reason it could have been accepted that the imposition of the sanction pursued the aim of maintaining the authority and impartiality of the judiciary, the penalty imposed on the applicant could not be seen as necessary in a democratic society. In that respect I would agree with the majority, although I would have reached the same conclusion if the penalty imposed had been a symbolic one (see paragraph 38 of the judgment). 92

I agree with Judge Loucaides in his concurring opinion that the freedom to criticise judicial judgments and the functioning of the judiciary is an indispensable element of democracy. The present case shows the importance of such freedom to criticise. The Constitutional Court had declared unconstitutional a law which provided for the compulsory affiliation of lawyers in Moldova to the Bar Council. Such compulsory affiliation is accepted in the legal systems of many European countries where it is considered as necessary to guarantee the independence of the legal profession. The importance of the independence of lawyers is expressed in Recommendation R (2000) 21 of the Committee of Ministers of the Council of Europe as follows:"(1) Lawyers should be allowed and encouraged to form and join professional local, national and international associations which, either alone or with other bodies, have the task of strengthening professional standards and safeguarding the independence and interests of lawyers. (2) Bar associations or other professional lawyers' associations should be self-governing bodies, independent of the authorities and the public." The preamble of the Recommendation underlines that the importance of lawyers being organised in independent associations is based on the presumption that a proper exercise of lawyers' responsibilities should be ensured and that it is in particular necessary for lawyers to ... find a proper balance between their duties towards the courts and those towards their clients. It cannot be denied that the applicant's criticism of the Constitutional Court's decision concerned an item of general interest and should not have been discouraged in anyway by State organs in a democratic society. 93

Even if the applicant's comments could have been interpreted as a lack of respect or "regard" for the Constitutional Court (see paragraph 36 of the judgment), the general interest in allowing a public debate about the independence of lawyers, as in this case, weighs more heavily than the interests of the judges of the Constitutional Court in being protected against criticism of the kind expressed in the interview with the applicant, a criticism which was, in fact, concise and cannot be considered as constituting a personal attack on the judges (as, for example, in *Barfod v. Denmark*, judgment of 22 February 1989, Series A no. 149; and *Perna v. Italy* [GC], no. 48898/99, judgment of 6 May 2003). That is why, even assuming that the interference pursued a legitimate aim, it could not, on any view, be considered "necessary". 94

In line with my reasoning I cannot agree with the majority that the finding of a violation in itself suffices to compensate for the non-pecuniary or moral damage sustained by the applicant. It was reasonable for the latter to suggest that his conviction seriously impacted on his reputation as a lawyer and as President of the Association of Lawyers who had defended the rights of the defence in general. There was, therefore, justification for awarding him compensation to be assessed on an equitable basis (see, for example, *Nikula v. Finland*, no. 31611/96, judgment of 21 March 2002, ECHR 2002-II). 95

Nor can I agree with the decision to make no award as regards the applicant's costs and expenses, for which he claimed USD 2,000. Even if he was not represented before the Court, he was a lawyer himself and therefore must have lost several working hours in processing his application before the Court. In addition, he claimed, logically in my view, that he incurred certain office expenses (such as secretarial expenses, photocopying and other miscellaneous disbursements). His claim does not strike me as exaggerated but, even if it did, there was no particular reason to award him nothing at all under this head (see *Foley v. United Kingdom*, no. 39197/98, judgment of 22 October 2002). 96

By dismissing the applicant's claims under Article 41 the Court in my opinion did not stress sufficiently the seriousness of the interference with the applicant's rights under Article 10. 97

## DISSENTING OPINION OF JUDGE PAVLOVSCHI

In the present case the majority of the Chamber found a violation of the applicant's rights under Article 10 of the Convention. To my great regret, I cannot agree with this conclusion. 98

I do not call into question the existence of an interference in the present case. The problem, in my opinion, is whether this interference was justified under Article 10 § 2 of the Convention. It is therefore, necessary to examine whether it was "prescribed by law", pursued a legitimate aim and was "necessary in a democratic society", within the meaning of that provision (see *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, pp. 24-25, §§ 34-37). 99

I. Whether the interference was "prescribed by law" 100

Examining the meaning of the notion "prescribed by law", the Court in its *Sunday Times v. the United Kingdom* judgment stated: 101

"In the Court's opinion, the following are two of the requirements that flow from the expression "prescribed by law". Firstly, the law must be adequately accessible: the citizen must be able to have an indication that it is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty; experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice..." (Emphasis added) 102

Applying the above principles to the present case, the following points are to be noted: 103

There is no problem whatsoever as regards the general accessibility of the Code of Constitutional Procedure. This Code is published in the *Monitorul Official*, an official paper where all normative acts are routinely published, and it is generally accessible at different Internet pages, for instance, at the Constitutional Court Internet site "www.ccrm.rol.md" and juridical site "www.docs.md", etc. 104

Concerning the quality of this law, I find it sufficiently clear, because it has been drafted in conformity with all the necessary elements of legislative techniques. 105

Let us look into the relevant provisions of the Code of Constitutional Procedure. 106

Article 81. Securing the exercise of constitutional jurisdiction 107

"1. In order to protect the dignity of the Constitutional Court judges and the participants in the proceedings, and to secure appropriate conditions for the exercise of constitutional jurisdiction, the Court may take the measures provided for in Article 82." 108

Article 82. Liability for breaches of the procedural rules of the Constitutional Court 109

"1. In order to ensure the proper administration of constitutional justice, the Court may impose an administrative fine of up to twenty-five times the minimum monthly salary on anyone who: 110

(a) makes an unconstitutional statement, regardless of the manner of its expression; 111

(b) interferes with the procedural activity of the Constitutional Court judges; or attempts to influence them by non-procedural methods; 112

(c) refuses without due cause to comply with the orders of the judges of the Court in the prescribed manner or within the time allowed; or fails to comply with a judgment or advisory opinion of the Court; 113

(d) violates the judicial oath; 114

(e) displays a lack of respect for the Constitutional Court by refusing to obey orders of the presiding judge, violating disciplinary rules or committing other acts that show an obvious lack of regard for the Court and its procedure. 115

2. The measures for securing appropriate conditions for the exercise of constitutional jurisdiction shall be imposed by decisions of the presiding judge, which shall be registered in the minutes of proceedings or attached to them. 116

3. The fine shall be paid within 15 days of its notification to the offender. If the offender refuses to pay or does not pay within the prescribed terms, the decision of the Constitutional Court shall be enforced ... on the basis of the extract of the minutes of the proceedings or the decision of the presiding judge. ..." 117

So, my conclusions are as follows: 118

1. This law clearly defines a "pressing social need" to protect the dignity of the Constitutional Court judges and to secure the appropriate conditions for their function. 119

2. The law contains the list of acts which the legislator considers illegal, including deeds that show "an obvious lack of regard for the Court and its procedure". 120

3. The law contains measures which could be applied to those who violate its provisions, i.e. "a fine of up to 25 times the minimum salary". 121

This leads me to the conclusion that the provisions of the Code of Constitutional Procedure enable citizens, as stipulated in the aforementioned *Sunday Times* judgement, "...to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail...", because the law provides both the description of punishable actions and their negative consequences. 122

To sum up, I consider that the quality of the legal provisions contained in the Code of Constitutional Procedure was sufficient to allow the conclusion that the applicant was able to foresee, "to a degree that was reasonable in the circumstances" the risks that a lack of regard for the Constitutional Court and its procedure might entail. 123

So, the interference in this particular case was " prescribed by law". 124

II. Whether the interference "pursued a legitimate aim" 125

Neither the applicant nor the Government contest the fact that the fine imposed on the former pursued the legitimate aim of maintaining the authority, independence and impartiality of the judiciary. 126

III. Whether the interference was "necessary in a democratic society". 127

As has been confirmed on many occasions by different international fora, an independent and impartial judiciary is the indispensable tool of every democratic State. It is an essential element of a political system based on the rule of law. It is clear that all such States are not only entitled, but also obliged, to take all necessary measures to protect the dignity of judges in order to maintain the authority of the courts. Moreover, they must ensure that members of the judiciary can function in conditions where they are not exposed to any illegal pressures, including psychological pressure, and can base their decisions on legally relevant arguments, and not on grounds tainted by threats, insults, defamation, calumny or other forms of illegal influence. 128

The inviolability of judges, as a part of their independence, is not a privilege, but a precondition of their objective and impartial professional activities. Since judges are charged with ultimate decisions over life, freedom, rights, duties and the property of citizens, judicial activity must inspire the confidence of the people that it is exercised in a truly free manner. The preservation and increase of public confidence in the judiciary are recognised as public needs, based on the general interests of society. 129

In its "Basic Principles on the Independence of the Judiciary" the General Assembly of the United Nations stated, 130

"The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary... The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason...". 131

The same theme is contained in Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe to Member States "On the Independence, Efficiency and Role of Judges" (adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies), where it is stated: 132

"The independence of judges should be guaranteed pursuant to the provisions of the Convention and constitutional principles, for example by inserting specific provisions in the constitutions or other legislation or incorporating the provisions of this recommendation in internal law... In the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason. The law should provide for sanctions against persons seeking to influence judges in any such manner. Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law... Judges should have sufficient powers and be able to exercise them in order to carry out their duties and maintain their authority and the dignity of the court...". 133

All these provisions underline, without doubt, that the protection of the dignity of courts and judges against undue influence, and the protection of the independence of the judiciary are absolutely necessary in a democratic society. 134

There is no other way for a State to fulfil their obligations but to sanction violations of these principles. This is the inevitable path chosen by the Moldavian legislator, which prohibited, under the threat of fine, actions that show an obvious lack of regard for the Constitutional Court and its procedure. 135

The applicant made three submissions against the Constitutional Court's decision in his case: 136

1. He said that, as a result of this decision, there would be total anarchy in the legal profesion. There is no longer a single system of professional organisation, or a unitarian State. Taxes are not paid. There is no control and, as a result, there are no ethics, discipline, or responsibility. 137

2. He calls into question the very constitutionality of the Constitutional Court. 138

3. He accuses the Constitutional Court of not regarding the European Court of Human Right and its jurisprudence as an authority. 139

In conformity with Recommendation Rec. (2000) 21 of the Committee of Ministers to Member States "On the freedom of exercise of the profession of lawyer" (*adopted by the Committee of Ministers on 25 October 2000 at the 727th meeting of the Ministers' Deputies*), "Lawyers should respect the judiciary and carry out their duties towards the court in a manner consistent with domestic legal and other rules...". 140

The same idea is elaborated in the *Schöpfer v. Switzerland* judgment (*Reports* 1998-III, 20 May 1998): "...The Court reiterates that the special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar". 141

Moreover, the Court has already held that the courts - the guarantors of justice, whose role is fundamental in a State based on the rule of law - must enjoy public confidence (see the *De Haes and Gijsels v. Belgium* judgment of 24 February 1997, *Reports* 1997-I, p. 234, § 37). Given the key role of lawyers, it is legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence therein. 142

Like the *Schöpfer* case, in the present application the impugned statement of the applicant was not a criticism of the reasoning contained in the decision of the Constitutional Court, but rather defamatory accusations against the judges of that court, as well as the court itself, the highest judicial authority of the State. 143

In my opinion, the applicant's defamatory statement neither manifested respect for the judiciary, as required by the abovementioned Recommendation Rec. (2000) 21 of the Committee of Ministers, nor an intention "to contribute to the proper administration of justice, and thus to maintain public confidence therein", as stipulated in the *Schöpfer* judgment. 144

Even a superficial analysis of the applicant's affirmations shows that, in his interview, he tried to compensate for the lack of legal argument by attempting to destroy public confidence in the highest judicial authority and to discredit it by hinting at, on the one hand, the legal "ignorance" of the members of the Constitutional Court who do not respect the authority of the European Court of Human Rights or its jurisprudence and, on the other hand, a neglectful attitude towards professional duties, which provokes legal chaos and disorder in the State, and which, moreover, destroys State unity. 145

I hardly think that the initial intention of the drafters of the European Convention of Human Rights and Fundamental Freedoms was to ensure under Article 10 the international protection of persons who destroy public confidence in the judiciary, who discredit the highest judicial authority of a country or who defame members of the Constitutional Court. 146

So, I have no doubt whatsoever that, by his behaviour, the applicant committed acts that showed an obvious lack of regard for the Constitutional Court and its procedure, and thereby was liable to sanction under the Code of Constitutional Procedure. Such behaviour, by definition, cannot be protected by Article 10 of the Convention. 147

IV Whether the interference was "proportionate to the legitimate aim pursued" 148

Before elaborating on the question of the proportionality of the sanction imposed on the applicant, I think it would be pertinent, in order to avoid any misunderstanding, to say a few words about the term "minimum salary". 149

Unlike many European countries where minimum salaries reflect the level of subsistence, in Moldova a minimum salary represents a certain financial unit used for the calculation of the basic salaries of State employees, as well as the calculation of fines. 150

The term "minimum salary" was introduced by Law no. 1432-XIV of 28 December 2000 "on the determination and reassessment of a minimum salary". It set the minimum salary at 18 MDL (about 1.125 Euros) and section 7 stipulated that, until the new versions of the Criminal Code, Code of Criminal Procedure, Code of Civil Procedure and Code of Administrative Contraventions were passed, in order to calculate fines the sum of MDL 18 would be applied. 151

In accordance with the regulations governing the method of calculation of salaries for those paid from the State budget, this salary should be calculated by multiplying special coefficients, depending on the specific post and the minimum salary. To this basic salary should be added the different supplements provided for by a law. As of 1 April 2001, the Government of Moldova set the minimum salary at MDL 100. However, the sum used for the calculation of fines remained unchanged, at MDL 18. 152

On the question of proportionality, I consider it necessary to mention the following: 153

Proportionality implies that the pursuit of the aims mentioned in Article 10 § 2 has to be weighed against the need for the open discussion of topics of public concern (see, *mutatis mutandis*, the *Lingens v. Austria* judgment of 8 July 1986, Series A no. 103, p. 26, § 42). When striking a fair balance between these interests, the Court cannot overlook the major importance of not discouraging members of the public from voicing their opinions on issues of public concern for fear of criminal or other sanctions (see the *Barfod v. Denmark* judgment of 22 February 1989, Series A no.149, § 29). 154

As already mentioned, the Code of Constitutional Procedure regulates the protection of the dignity of Constitutional Court judges and the provision of appropriate conditions for their activities, breaches of these provisions being sanctioned by a possible maximum fine of up to 25 times the minimum salary, i.e. MDL 450 or about 28.1 euros. 155

A smaller fine of MDL 360 was imposed on the applicant. One may ask if this was too high. Theoretically speaking, this question can be analysed from different points of view: 156

1. from the aspect of Moldavian administrative law in general; 157

2 . from the aspect of the legal provisions governing liability for acts showing a "lack of respect towards the Constitutional Court"; or 158

3. from the aspect of the applicant's financial situation. 159

I will now briefly analyse the proportionality of the sanctions imposed on the applicant from these three view points: 160

The Code of Administrative Contraventions provides different forms of punishment, including short term arrest and fines. As regards fines, Article 26 of the Code stipulates that, in principle, for different types of contravention, citizens are liable to fines of up to 50 times the minimum salary and public officials of up to 300 times the minimum salary. In certain situations, the fine can even reach 3,000 times the minimum salary. Bearing in mind that under domestic law the President of the Bar is a public official, in principle, in certain situations, he could be sanctioned by a fine of up to 300 or even 3,000 times the minimum salary, depending on the nature of the contravention. In this context, therefore, I consider that the sanction in the present case, if not symbolic, was at least not excessive. 161

As regards general legal provisions, the sanctions for acts showing a lack of respect towards the courts are governed by Article 200/7 of the Code of Administrative Contraventions, which envisages a fine of up to 25 times the minimum salary or administrative arrest for up to 15 days. Under the Code of Constitutional Procedure, similar acts committed against the Constitutional Court are punishable by a fine only. So, comparing the general provisions with the sanction in the present case, the latter can in no way be considered to have been a "discouraging" penalty. 162

Bearing in mind the principle of the individualisation of punishments, the most important way to determine whether the sanction imposed on the applicant was proportionate is by comparing the amount of the fine with the applicant's income. Thereby one can assess whether the punishment was of a "discouraging" nature. 163

In my view, this matter is crucial given the following example: a MDL 360 fine for a person who earns, say, MDL 300 per month is quite a severe punishment, but for a person earning MDL 3,000 per month it would be a mild sanction. For this reason, I would have solicited additional information concerning the applicant's income. As the Chamber does not possess this information, I can only compare the level of the present fine with the general figure concerning the general standard of living in Moldova, namely MDL 1,000 per month. It seems unlikely to me that the President of the Bar would be below this level. So, if one compares the amount of the fine imposed on the applicant with the monthly standard of living, one can see that the amount of fine is two and a half times less. This fact demonstrates once again that the penalty in the present case was not excessive and can be considered to have been proportionate. 164

Whichever approach one takes, one is led to the conclusion that the respondent Government, by punishing the applicant for having been disrespectful towards the Constitutional Court, did not exceed the limits of proportionality. 165

To sum up in the light of the above arguments, I do not find any violation of the applicant's rights under Article 10 of the Convention. 166

[Hinweis der Redaktion: Zur Meinungsfreiheit des Rechtsanwalts vgl. auch Gaede JR 2004, 342 ff.] 167