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Fathaigh, R.Ó. ; Voorhoof, D.

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Activist's conviction for hooliganism over 'obscene' protest violated Article 10 ECHR

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□ January 23, 2019 □ Guest Blogger □ Freedom of Expression, *Mătășaru v. the Republic of Moldova*

This blog post was written by Ronan Ó Fathaigh and Dirk Voorhoof

On 15 January 2019, the European Court's Second Section unanimously found that an anti-corruption activist's conviction for staging an "obscene" demonstration outside a prosecutor's office, targeting a number of public officials, violated the activist's freedom of expression. The Court in *Mătășaru v. the Republic of Moldova* took the Moldovan courts to task for holding that Article 10 of the European Convention was not applicable to the activist's protest, with the European Court reiterating that "expressive conduct" which shocks, offends or disturbs is fully protected under Article 10's guarantee of freedom of expression.

Facts

The applicant in the case was Anatol Mătășaru, a 49-year-old resident of the Moldovan capital Chișinău. The case began in late January 2013, when Mătășaru demonstrated outside the Prosecutor General's Office in Chișinău to protest against the 'corruption and the control exercised by politicians over the Prosecutor General's Office'. The protest involved erecting two large wooden sculptures of the

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stairs of the Prosecutor General's Office, the first being a large penis with a picture of a public official attached to its head; while the second was a large vulva with pictures of several officials from the prosecutor's office in the middle (see [here](#) and [here](#)). The protest lasted an hour before police officers intervened, arresting Mătăsararu and seizing the sculptures.

Mătăsararu was charged with hooliganism under Article 287 of the Moldovan Criminal Code, defined as 'deliberate actions grossly violating public order, involving violence or threats of violence or resistance to authorities' representatives or to other persons who suppress such actions as well as actions that by their content are distinguished by an excessive cynicism or impudence'. Two years later, Mătăsararu was convicted of hooliganism by the Râșcani District Court, and received a two-year prison sentence, suspended for three years. The District Court held that Mătăsararu's actions had been "immoral" and exposed "obscene" sculptures in a public place where 'they could be seen by anyone, including by children'. The District Court also held 'assimilating public officials with genitals went beyond the acceptable limits of criticism', and was 'not an act protected under Article 10 [of the ECHR]'. Mătăsararu's conviction and sentence were upheld by both the Chișinău Court of Appeal and Moldova's Supreme Court of Justice.

Judgment

Mătăsararu made an application to the European Court, claiming his conviction was a violation of his right to freedom of expression under Article 10. Mătăsararu submitted that his conviction was not 'prescribed by law', arguing the Criminal Code's Article 287 on the offence of hooliganism was 'not applicable to the particular circumstances of his case'. However, the Court, while noting the Moldovan courts had 'failed to explain in a satisfactory manner why they opted for the criminal sanction provided for by Article 287', held it was 'unnecessary' to decide the issue given the Court's later findings. Thus, the main question for the European Court was whether the conviction had been 'necessary in a democratic society'.

The Court first reiterated that Article 10 protects 'expressive conduct', including

expressive conduct which offends, shocks or disturbs the State or 'any section of the population'. The Court referred to its previous case law on expressive conduct where it had found the following: displaying dirty laundry near the Hungarian parliament was a form of 'political expression' (*Tatár and Fáber v. Hungary*); pouring paint on statues of Atatürk was an 'expressive act' performed as a protest against the political regime (*Murat Vural v. Turkey*); detaching a ribbon from a wreath laid by the Ukrainian President at a monument was a form of 'political expression' (*Shvydka v. Ukraine*); and the Pussy Riot punk band attempting to perform from the altar of a Moscow cathedral was a form of 'artistic and political expression' (*Maria Alekhina and Others v. Russia*) (see our [post](#)).

The Court then examined Mătășaru's protest, and noted that he had been found guilty of hooliganism because during his protest he had exposed public sculptures of an obscene nature and because he had attached to them pictures of a politician and several senior prosecutors, thus 'offending [the politician and senior prosecutors] and infringing their right to dignity'. Applying its Article 10 principles, the Court held that it 'cannot agree' with the Moldovan courts' ruling that Article 10 of the Convention was 'inapplicable to the applicant's conduct'. The Court noted that the Moldovan courts did not conduct a 'proper balancing exercise' under Article 10 of the different interests involved, and imposed a 'very heavy sanction' on the applicant in the form of a suspended prison sentence. The Court then applied its unanimous Grand Chamber judgment in *Cumpănă and Mazăre v. Romania*, holding that the circumstances of Mătășaru's protest 'present no justification whatsoever for the imposition of a prison sentence'. This was because a prison sentence, even if suspended, by its very nature, not only has negative repercussions on the applicant, but may also have a 'serious chilling effect' on other persons and discourage them from exercising their freedom of expression.

The Court concluded that although the interference with freedom of expression 'may have been justified by the concern to restore the balance between the various competing interests at stake', the criminal sanction imposed was 'manifestly disproportionate in its nature and severity to the legitimate aim pursued by the domestic authorities'. Thus, the Court unanimously held that the Moldovan courts went beyond what would have amounted to a 'necessary' restriction on the

applicant's freedom of expression, therefore in violation of Article 10.

Comment

The unanimous judgment in *Mătășaru* is a strong reaffirmation that domestic courts may not impose prison sentences, even if suspended, on peaceful protestors engaging in expressive conduct (including artistic and satirical expression) on matters of public interest. The Court was categorical on this point, holding that there was *no justification whatsoever* for a suspended prison sentence. This amplifies the Court's case law that a peaceful demonstration should not, 'in principle', be made subject to the 'threat of a penal sanction' (see, e.g., [Pekaslan and Others v. Turkey](#), [Taranenko v. Russia](#), [Primov v. Russia](#), [Nemtsov v. Russia](#), [Frumkin v. Russia](#), and [Yilmaz Yıldız and Others v. Turkey](#)) (and our [post on Novikova v. Russia](#)).

Mătășaru is particularly important and timely, given the controversial [Sinkova v. Ukraine](#) judgment last year from the Court's Fourth Section (see our [post](#)). By a 4-3 vote, the *Sinkova* majority held that a protestor's arrest, three-month pre-trial detention, conviction and suspended two-year prison sentence, for staging a performance-art protest at a war memorial did not violate Article 10. The judgment prompted a rigorous dissent, which highlighted 'inconsistency' with the Court's prior case law on the imposition of suspended prison sentences, and issued a stark warning of a 'real risk of eroding the right of individuals to voice their opinions and protest through peaceful, albeit controversial, means'.

This warning prompted over 22 international and national organisations involved in freedom of expression and freedom of peaceful assembly to support a request for a referral of *Sinkova* to the 17-judge Grand Chamber of the Court (see [here](#)). A five-judge Panel of the Grand Chamber however rejected the request for a referral. Of note, the Court in *Mătășaru* nowhere mentioned, nor even cited, the *Sinkova* judgment. Indeed, *Sinkova* has not been applied in a Court judgment to date, and the *Mătășaru* judgment leads to *Sinkova* becoming a disapproved and lone aberration in the case law on the imposition of suspended prison sentences for peaceful protest and participation in matters of public debate.

While *Mătășaru* is a welcome judgment, one point needs to be teased out relating

to the Court's statement in the second-last paragraph: that the interference with freedom of expression 'may have been justified by the concern to restore the balance between the various competing interests at stake'. The Court seemed to be leaving open the suggestion that there existed certain interests which outweighed the applicant's freedom of expression. But while the Court did not explore the point fully, a brief mention of the relevant case law would have been relevant and informative.

The Court has already dealt with the distinct issue of public officials seeking to prohibit their depiction in an 'obscene' manner. The leading judgment is *Vereinigung Bildender Künstler v. Austria*, concerning an injunction preventing further depiction of a politician where a photo of his face was placed on a painted naked body, 'gripping the ejaculating penis' of another public official, while 'being touched by two other' public officials and 'ejaculating on Mother Teresa'. The Court found a violation of Article 10, as the politician's 'personal interests' did not outweigh the right to engage in satirical expression on a matter of public interest, and targeting a public official. The Court applied the principle that satire is a form of 'artistic expression and social commentary', and by its 'inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate'. Further, the expression at issue could not be 'understood to address details' of the politician's private life, but rather his 'public standing as a politician', and public officials must 'display a wider tolerance in respect of criticism'. Of course, it must be recognised that the Court takes a different approach to 'obscene' expression relating to non-public officials (*Palomo Sánchez and Others v. Spain*) and religion (see, e.g., *Otto-Preminger-Institut v. Austria*, *Wingrove v. the United Kingdom*, *I.A. v. Turkey*, and *E.S. v. Austria*; to some extent, *contra* in *Aydın Tatlav v. Turkey*, and see also *Akdaş v. Turkey*).

But the expressive conduct in *Mătăsaru* was political expression targeting an elected official, and a number of public officials, in their official capacity, and on a matter of public interest. Indeed, on the public interest element, the Court has confirmed in other judgments concerning Moldova and anti-corruption policy (*Guja v. Moldova*, and *Guja v. Moldova (No. 2)*), the 'strong public interest' on the issue of 'separation of powers' and 'improper conduct' by high-ranking politicians and involving the Prosecutor General's Office. In this regard, the Court

has long held that there is 'little scope' for restrictions on expression on matters of public interest, and domestic authorities have a 'particularly narrow' margin of appreciation (*Morice v. France*). It must be remembered that *Mătăsaru* involved criminal proceedings for hooliganism, and not administrative proceedings, nor civil proceedings by the public officials targeted. This would be difficult to square with the Court's principle that the 'dominant position which those in power occupy' makes it 'necessary for them to display restraint in resorting to criminal proceedings', and only in 'certain grave cases – for instance in the case of speech inciting to violence'. There was no suggestion that the expressive conduct in *Mătăsaru* was anything other than entirely peaceful.

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