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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

# MOLDOVA

# MEMORANDUM ON THE DRAFT LAW OF THE CONSTITUTIONAL COURT

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**I.** The Constitutional Court started its activity on February 23, 1995. Its organization and functioning is regulated by the Law no.317-XIII from December 13, 1994 "On the Constitutional Court" and by the Code of Constitutional Jurisdiction no.502-XIII from June 16, 1995.

In the last 6 years, due to the enforcement of a new law that contributed to the improvement of the state legal mechanisms, to the bringing of the national legislation in compliance with the international regulations and standards, to the democratization of the society and to the deepening of the reforms, it has become a stringent need to improve the legal framework related to the organization and functioning of the Constitutional Court.

Therefore, by virtue of the Parliament's Decision from January 28, 1998 "On the Program of bringing in line the Republic of Moldova's legislation with the provisions of the European Convention of Human Rights and Fundamental Freedoms" (O.G. no.16-17, 1998), there have been introduced amendments in the legislation concerning the right of individuals to address to the Constitutional Court.

The new Law on Administrative Jurisdiction no.793-XIV from 10.02.2000 (O.G. no.57-58/376 from 18.05.2000) and its amendments introduced by the Law no.726-XV from 7.12.2001 (O.G. no.152-154/1229 from 13.12.2000) brought along some uneven interpretations of the competence to examine individual administrative acts, administrative acts that do not contain normative regulations and of the acts adopted in view of the laws' enforcement.

On July 5, 2000, by the Law no.1115-XIV (O.G. no.88-90/661 from 28.07.2000), a series of amendments in the Constitution were introduced, related to the status and competence of the President of the state, of the Parliament and of the Government, and which pose the necessity of improving the legislation regarding the activity of the Constitutional Court: *a priori* control of international treaties, legal authority of the Constitutional Court's acts of interpretation and revisal of the Constitution, the procedure of the constitutional review of the amendments to the Constitution, improvement of the mechanism of enforcement of the Constitutional Court's judgements, etc.

At the same time, the experience gathered in the process of enforcing the constitutional jurisdiction provisions genuinely requires the specification and clarification of the actual procedure, as well as the elaboration of a special procedure in order to raise the degree of democracy and efficiency of the Court's activity.

Beginning with 1997, a number of legislative initiatives were submitted to the Parliament, regarding the improvement of the legal framework on the status of judges, broadening of competence, providing of some guarantees for the increase of the Constitutional Court's efficiency, etc.

On February 27, 1998, the Parliament adopted a series of laws, by which amendments were introduced in the Laws no.317-XIII from December 13, 1994 and no.502-XIII from June 16, 1995. However, the adopted laws were not submitted for promulgation.

Considering this tremendous need of improving the laws, the President of the Constitutional Court established on February 10, 2000 a working group comprised of the Constitutional Court's personnel, having set the task to draft laws.

In this period, a group of deputies from the Parliament of the XIV$^{th}$ legislature submitted to the Constitutional Court a draft law, for advisory note, concerning the amendment of art.136 of the Constitution, aiming at the increase of the number of judges of the Constitutional Court up to 9 for a 9 years mandate. On June 11, 2000 the Constitutional Court gave a positive advisory note of this draft law.

There have been drafted two versions of the law on the organization and functioning of the Constitutional Court. But none of these drafts, neither the draft constitutional law, nor the draft organic law, was submitted to the Parliament for examination.

At the initiative of the President of the Parliament (letter DD/c-6 no.169 from 05.06.2001), at the Constitutional Court President's order from June 20, 2001, a new working group was established, comprised of scientists and practitioners, who have studied the draft laws elaborated by the previous working group as well as the constitutional adjudication practice of the Republic of Moldova, and of other 40 countries. The Government presented its proposals to the Court, which were published in mass media and reached the following conclusions.

**1.** The organization and functioning of the Constitutional Court, according to art.72 of the Constitution, need to be regulated in an organic law.

In order to admit the regulation of the Constitutional Court's activity in a substantive law and in a Regulation on the organization and functioning of the Constitutional Court, adopted by the Constitutional Court (such proposals exist), it is necessary to amend art.72 par.(3) let.e) of the Constitution.

The drafters' group believes that both the organization and functioning of the Court should be provided in an organic law.

**2.** The authors have discussed various versions:

a) to introduce in the Law on the Constitutional Court only the amendments that do not imply the amendment of the Constitution;

b) to set a new version of the Law on the Constitutional Court and of the Code of Constitutional Jurisdiction with the specification and clarification of the relevant provisions;

c) to draft two new laws - a procedure and a substantive law and to operate the respective amendments in the Constitution.

The draft does not provide for an absolutely new concept of organization and functioning of the Constitutional Court, but taking into account the need of broadening of the Constitutional Court's competence, democratization and transparency of the Court's activity, deepening and specification of the current procedure, elaboration of new special procedures, improvement of the mechanism of enforcement of the Court's judgements and other important aspects, the authors' group reached the conclusion that it is reasonable to draft a new law, combining both material and procedure regulations of the organization and functioning of the Constitutional Court in a single law and to introduce the appropriate amendments in the Constitution.

The draft law is comprised of 4 titles, 22 chapters and 130 articles, in which it is proposed to introduce the best regulations, that aim at the optimization of the constitutional review and that correspond to the Court's goals and tasks of ensuring a democratic, transparent, accessible and independent constitutional review mechanism.

1) It is suggested to clarify and broaden the competence of the Constitutional Court (art.5 of the draft law);

a) The Court will exercise, upon notification, the constitutional review not of the Parliament's, President's and Government's acts, but only of those with a normative character. These regulations are provided in let.a) par.(1) of art.5;

b) the Court will exercise, upon notification, the constitutional review of the international treaties before their ratification and coming into force. The subsequent review of the treaties in force will be performed only by bringing the exception of unconstitutionality before the Court;

c) the Court will examine the notifications of individuals, claiming the breach of their constitutional rights and freedoms, provided in articles 15-54 of the Constitution, by the normative act that was applied or follows to be applied by a state institution;

d) the Court will examine the exceptions of unconstitutionality brought before the courts in the course of trial;

e) the verification process of the initiative to revise the Constitution will be divided in two phases: first it will be given an opinion on the initiatives of revising the Constitution, as it is done today, and secondly it will be given an opinion on the observance of the constitutional laws' adoption procedure. This issue is dictated by the Constitutional Court's practice. A couple of notifications concerning the verification of the laws on the amendment of the Constitution were rejected due to the lack of such a competence. In our view, the constitutionality of the constitutional laws does not lie with the Constitutional Court's competence, while the verification of the observance of the constitutional laws' adoption procedure may be given to the Court's competence;

f) the competence of the Court related to the organization and performance of the republican referendum in relation with the Election Code's provisions;

g) for the purpose of maintaining the legal stability in the state, observing the deputy's mandate, ensuring the independence of the Supreme Court's of Justice judges, Prosecutor General and Court's of Audit members it is suggested that these disputes are given to the Constitutional Court's competence;

h) for the purpose of state's stability and independence consolidation, increase of the society's trust in the public authorities, it is proposed that the Constitutional Court is given the power of examining the statements of the high officials concerning their property and income at the beginning and end of their mandate. The list of these persons will be established by law.

2) Art.9 regulates the structure of the Constitutional Court.

There are a lot of discussions in the society on the reasonableness of establishing an odd number of judges at the Constitutional Court. This would solve a few problems: currently, if during the second voting ballot the candidates gather the same number of votes, the president is elected by the drawing of lots, while in case the number of judges is odd, the president may be elected by simply gathering the majority of the votes of the Constitutional Court's judges. Also, in case of parity of the votes at the adoption of the Court's acts, the president wouldn't have the right to a double vote.

As a result of some research done in this field, it was found that in different countries the number of judges varies between 3 and 19: in Malta - 3, Estonia - 5, Latvia, Lithuania and Kazahstan - 7, Germany -16, Italy - 15, Russia -19. In Albania, Armenia, Azerbaijan, France, Georgia, Kirgistan, Romania, Slovenia, USA the number of judges is 9.

However, there are countries in which the number of judges of the Constitutional Court is even. For instance: in Austria - 14, Belorussia - 12, Belgium - 12, Bulgaria -12, Germany - 16, Slovakia -10, Spain - 12, Ukraine - 18.

In the states with an even number of judges the president is usually appointed by a central public authority, which forms the Court, situation existing in Moldova, as well, - for instance -, in Bulgaria, Ukraine and in other countries.

In countries with an even number of judges, in case of parity of votes, the normative act subjected to review is presumed as constitutional, and the procedure ends.

The working group considers that the reasonable number of judges for the Republic of Moldova would be 7, the seventh judge being appointed contest-based by the President of the country.

According to the working group's opinion, if the number of judges of the Court grows, the workload of the court will grow as well.

If the Parliament chooses in favor of 7 judges, than the mandate will have to be increased up to 9 years, provided that it is possible to run this office only once.

In different countries the duration of mandate is different - 5 years in Estonia up to appointment for life. The common practice of most countries is that judges may not be reappointed. In Albania the term of office is of 12 years, in the Czech Republic - 10 years, in Germany - 12 years. Thus, the mandate is either longer than in the Republic of Moldova, or are appointed for life - but only for one mandate. The main reason for that is the need of ensuring the independence and impartiality of the judge.

3) In the chapter related to the status of judge (art.12-29) there were introduced provisions to ensure the transparency and publicity of the judge's election. The requirements for the appointment, dismissal and powers of the constitutional judge are being clarified.

Currently, the legislation regulating the organization and functioning of the Constitutional Court, does not provide for the waging, retirement and dismissal of the Constitutional Court's judges. It only contains reference provisions. While such regulations exist in the Law on the status of judge. The Constitutional Court's judges, without being part of the judiciary, are assimilated however to the judges of the Supreme Court of Justice.

Considering the position of the Constitutional Court in the constitutional hierarchy of the public authorities, it is necessary to set its own legislative bases regarding all the issues and to give up on assimilation to other authorities.

4) A separate chapter (art.30-35) is dedicated to the president of the Constitutional Court, regulating the election, duties, right to resignation and revocation from the office.

The same chapter regulates the status of the vice-president.

5) Another important institution is that of the assistant-judge. The new law suggests regulations related to the status of the assistant-judge, his attestation, job-related rights and duties. There it is also provided for the status of the first assistant-judge. This new position in the structure of the Court will, in our opinion, contribute to the improvement of the Court's activity.

It is proposed to keep the status of the assistant-judge at the level of the Court of Appeals judges, acknowledging them by law as magistrates.

6) Chapter VI includes regulations referring to subjects entitled to notification, the requirements of notification, the term of submitting and solution of the notification.

From the current range of subjects entitled to notification it is proposed to exclude the Economic Court, because in 6 years it did not file any notifications. It will keep, however, it's right as any other court of law; the Minister of Justice will be able to notify the Court as any member of the Government, entitled to notify the Court.

It is proposed that instead of the subject entitled to notification "deputies of the Parliament" to introduce "the parliamentary group of at least 5 deputies ".

Such a practice exists in most of the European states: Lithuania and Portugal - 1/5 of the deputies, Romania - 50 deputies or 25 senators, Spain - 50 deputies or 50 senators etc.

In order to increase the credibility of the state authorities, it is hardly acceptable that the position of a deputy to be more correct than the position of 50-60 deputies, regardless the political division of the Parliament.

It is also proposed to introduce as a new subject entitled to notification the High Council of Magistrates in its capacity of self-administration body of the judiciary and of the courts.

It has to be mentioned that due to the introduction of the High Council of Magistrates as a new subject entitled to notification, the Supreme Court of Justice will keep its entitlement to notification only related to the examination of concrete cases.

The right to notification will be grated to the citizens of the Republic of Moldova as well.

Another important regulation is about the term of filing the notification. If we look at the practice of other countries, this term may be of 6 months since the publication of the respective act in the "Official Gazette of the Republic of Moldova", and for the international treaties - 2 months. It has to be mentioned that in case of verification of the exception of unconstitutionality brought forward by the courts and citizens in relation to the examination of a given case, the term for filing the notification is unlimited.

The limitation of the term for filing the notification pursues fixing the errors committed as soon as possible, taking into account the responsibility of the state towards the citizen provided in art.53 of the Constitution and in other normative acts in force (there were cases when normative acts adopted 5-6 years ago were challenged).

7) Due to the fact that the number of notifications will grow eventually, it is proposed to introduce a new chapter - admissibility of the notification that will set a mechanism existing in many other countries of the world. Also in this chapter there will be provided the grounds of rejection of the notification, as well as the right to challenge the note of rejection of the notification before the Plenum of the Constitutional Court.

8) Chapters IX-XVII have been taken from the Code of Constitutional Jurisdiction in force, with some additional clarifications.

However, some provisions of principle have been introduced.

Art.80, for instance, provides for the interruption of the trial, if "at the moment of the case examination the author of the notification has lost his competence as subject entitled to notify the Constitutional Court".

Art.85-99 contain new regulations regarding the broadening of the competence, change of the Court's structure, voting procedure, procedure of the Court's act delivery, effects of the Court's acts and other provisions.

Art.100-102 provide for the mechanism of the Constitutional Court's judgements' enforcement.

Title III is dedicated to special procedures regarding the examination of notifications, interpretation of the Constitution, initiatives to revise the Constitution, international treaties' constitutional review, as well as other important provisions.

For example, in the period of 1995-2000 there had been rejected over 40 notifications, which required the interpretation of constitutional provisions. Most of them were rejected because they did not refer to specific legal-constitutional issues, other of the them did not refer to points of law, and a third group - required the interpretation of provisions that simply did not exist in the Constitution or which could not be interpreted otherwise than provided expressly in the Constitution.

In art.109 the drafters' group indicated the cases when it is and when it is not admissible to examine the notification of the Constitution's interpretation.

In art.113 the scope of the competence in cases having as an object the initiatives to revise the Constitution is indicated. Considering the main objective of the Constitutional Court, that is to guarantee the supremacy of the Constitution, it is proposed to invest the Court with the right to check the compliance of the proposals with the previous interpretations of constitutional provisions given by the Court, and the cohesion of the proposals of revisal with the rest of the constitutional provisions. This advisory opinion will be binding, and the proposals will have to be considered.

In chapter XX (art.115-117) it is proposed to set the *a priori* constitutional review of the international treaties which are to be ratified (approved), while the constitutional review of treaties which are already in force will take place exclusively by raising the exception of unconstitutionality by the citizens or courts.

The special procedure of examining the citizens' complaints is very important.

We specify that the object of notification may only be:

a) the challenged normative act providing for constitutional rights and freedoms;

b) the normative act being applied or following to be applied in a specific case, the examination of which was completed or is initiated before a court of law or another state institution, the ambit of competence of which includes the application of the respective normative act.

Thus, it was envisaged that the notifications are not abstract, but concrete, depending on the character of the dispute.

**II.** Amendments of the Constitution

The following amendments to the Constitution are proposed.

*Article 135. Duties*

Besides the already existing duties, the following are proposed:

- notification of the normative acts adopted by the central public authorities;
- *a priori* constitutional review of the international treaties;
- entitlement of the natural persons to notify the Constitutional Court;
- entitlement of the courts of law to notify the Constitutional Court;
- giving its advisory opinion on the observance of the constitutional laws' adoption procedure, dismissal of justices of the Supreme Court of Justice, Prosecutor General and the Court's of Audit members, levying the immunity of deputies; property and revenue statements of persons running high public offices etc.

*Article 136. Structure*

It is proposed that the Constitutional Court to be comprised of 7 judges, for a 9 years mandate, without the right to be reelected for a second term.

Besides the traditional methods of judges' election in the Constitutional Court - by the Parliament, President and judiciary, there are other ways as well.

For instance, in Italy one judge is appointed by the Court of Audit, in Lithuania 3 judges are appointed by the President of the Supreme Court of Justice, in Turkey one judge is appointed by the High Education Council from university professors.

The working group considers that one judge, in our case the seventh, has to be appointed by the President of the State for the following reasons:

1. In the Republic of Moldova there is a classic system of the Constitutional Court's composition, to which all the state powers contribute.

2. By the amendments from July 5, 2001 that were introduced in the Constitution of the Republic of Moldova, the powers of the President were limited.

The international practice proves that regardless the form of governance - presidential, parliamentary or semi-presidential republic, the president of the state is entrusted with large powers in the formation of the Constitutional Court.

**III.** Financial support

Taking into account the change in the Constitutional Court's competencies which, inevitably will require the increase (grow) of the workload, the Constitutional Court's financing will imply additional expenses in the amount of approximately 401400 lei:

| | |
|---|---|
| Judge | - 1 |
| First-assistant-judge | - 1 |
| Assistant-judge | - 1 |
| Consultants | - 4 |
| Specialists | - 2 |
| Other staff | - 6 |

Currently the Constitutional Court's number of employees is of 52.

## Working group

***Chairman***

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| Victor PUSCAS | President of the Constitutional Court |

***Secretary***

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| Aliona BALABAN | Main legal consultant at the Constitutional Court's Secretariat |

***Members:***

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| Ion CREANGA | Chief Legal Direction for the Relations with Public Authorities of the Parliament's Administrative Staff |
| Vladimir MOCREAC | Chief Chair-Department of the Law Faculty of the Free International University of Moldova, Ph.D. in Law |
| Gheorghe RADU | Chief Legal Direction of the State Chancellery |
| Mihai PETRACHI | Deputy of the Parliament |