COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 22 May 2002
<cdl\doc\2002\071-e>

Restricted
CDL (2002) 71
English only

Opinion No. 200/2002

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

MOLDOVA

Draft Law on the Constitutional Court and corresponding amendments to the Constitution

Comments by

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The following comments are based on the Drafts of a new CC Act and the respective amendments of the Constitution of the Republic of Moldova and the explanatory notes prepared by the Working group headed by the President of the CC of Moldova.

1. General remarks

Comprising all the substantive and procedural rules on the Constitutional Court (CC) in a single law can be a good idea. The Draft contains the organisation of the Court, the status of the Judges, the competences and the detailed rules of procedure for each competence. However, the complex regulation does not require that all thinkable rules about the CC be in the same Act. On the contrary: the structure, the functioning and all the rules, which are important for the citizens and those entitled to turn to the CC are at place in a CC Act. The inner organisation, the working discipline, the bureau etc. should better be regulated in a separate law. Even the Court could make the respective rules. The in-depth regulation of the privileges of the Judges is certainly not a proper subject for a CC Act.

As to the new competences and rules see the comments on the respective Articles.

2. The Draft of the CC Act

Art. 1 (2) While defining the aims and general responsibilities of the CC it is advisable to declare the most important competence of the CC, which is a *sine qua non* of being a constitutional court: the power to review the constitutionality of the Acts of Parliament and other normative acts (government decrees etc.) and in case of unconstitutionality, to annul them.

Art. 4. The title of the article is obviously erroneous, must be brought in line with the new content of the article: the competences of the CC.

The text must be identical with the respective Article of the Constitution. The recent wording of the Draft differs from the Constitution. Instead of *advisory opinion* the Draft uses the word *statement,* concerning the organisation and procedure of referenda the Constitution mandates the Court to give an *advisory opinion*, while according to the CC Act the Court shall *verify* the observance of the rules etc. This is not a linguistic problem. It must be clarified, which words are correct and what is exactly meant by advisory opinion, statement etc.

(2) I ask whether it is necessary to give such a negative rule. It is understandable that regarding the changes in the competences of the CC the competence that is not any more within the scope of the powers of the Court (not normative acts of the “central public authorities”) is separately listed. However, one could give an opinion on this paragraph only in the possession of the exact meaning of the terms used and being familiar with the system of administrative jurisdiction in Moldova. The control of the acts of the Executive can be divided between the CC and the administrative courts provided that there remain no acts without judicial review.

Art. 6. regulates the competence of the CC regarding its inner matters. The issues listed in this Article are, however, of very different significance. Election of the President and Vice-

President and the dismissal of judges of the CC are essential elements of the independence of the Court. Employees, interior affairs might be regulated separately.

(d) An Act of Parliament should rather determine the salary and other benefits of the judges.

(h) To the annual report see Art. 11.

Art. 7. (2) This is a very sound rule. A strict restriction to the *petitum* would contradict to the function of the CC.

(3) The rule seems to be obvious, but perhaps not necessary. A strict interpretation may hinder the Court's work. (It is similarly obvious that extra-legal factors can be considered in determining for instance the proportionality of a restriction.)

Art. 9. (3) The role of the "assistant judges" is not clear. Clerks who may have a prestigious position as civil servants everywhere assist the Judges of the CC. They may be recruited even from among ordinary judges. But once appointed to the CC they cannot maintain the status of a (ordinary) judge. It would contradict to the independence and the character of the CC as a constitutional organ *sui generis*. Moreover, the name of these clerks as assistant judge is disturbing and creates the impression as if the "assistant judge" would share in some respect the powers of a CC Judge.

(5) If there is a "Scientific-Consultative Council within the Constitutional Court", its status should be clarified. Is it consulted in the course of the normal work of the CC? Then it can consist only of the "clerks". If also external experts are participating in it, they cannot have an insight into the internal work of the court, into the preparation of the cases. As regards concrete cases, experts may be appointed in the given procedure. Shall the Council express its view to selected theoretical problems?

Art. 10. This Article would be better placed within the chapter on Procedure.

Art. 11. Reporting to the Parliament, the Government the High Council of Magistrates and to the President of the Republic contradicts to the status and independence of the CC. (Such a report is at place in case of an ombudsman, who is a parliamentary commissioner.)
The CC communicates with other constitutional organs and with the authorities as with the general public through its judgements and decisions, which are to be published in the Official Gazette. Of course the CC may use press releases etc. in order to inform the public on its work. But the duty stated in (3) is not necessary.

Art. 12. (1) The conditions for appointment of a CC Judge seem to exclude practicing lawyers or judges. (In the present wording the 15 years work experience relates to a university position.) The appointment by the different branches is (among others) aimed at promoting people at least from the judiciary to the seat of a CC Judge.
The provisions of Art. 25 seem to support the view that former ordinary judges can be appointed to the CC as a Judge.

What is meant by "high legal education" as a condition? Is it a university law degree? The 50 years as minimum age seems to be high.

(2) If four authorities have seats in the CC what is the reason for a "contest commission" consisting of all of them? If a "place of the Government" is vacant, is it not the business of the Government to search for candidates for "his" seat?

(7) I see no provision on the election (in the Parliament and High Council of Magistrates) or appointment (by the Government) of the candidate. Who represents the Parliament in the nominations procedure? What majority (simple/qualified) is necessary to the "appointment"? Detailed provisions are necessary on these subjects, which ensure that the parliamentary minority also has influence on the nomination and appointment.

Art 15. (is not understandable for me.)

Art. 22. Personal decisions within the CC – as the election of the President, suspension or dismissal of Judges – are usually taken by qualified majority of the Judges. I should like to propose the same for the Draft.

Art. 25. (2) The expiration of the mandate is no entitlement to resignation, but the obligatory end.

Art 26 and 27 providing for the salaries and benefits are too detailed and in this form do not fit into the law on the CC. It would be better to refer to another law or statute regulating the problem. The plenty of privileges can be judged on only in the knowledge of the local conditions. Nevertheless, some provisions are not understandable. The Judge receives the apartment or house from the State as his/her private property after ten years work as a judge. How are the ten years counted when the mandate lasts only nine years? (15 (?) years salary as life insurance?)

Art. 31. The rule for the required majority for the dismissal of the President (5 votes) should apply also for the election.

Art. 40. According to this article the assistant judge has the same status as the clerks (*wissenschaftliche Mitarbeiter*) in other CCs. They can prepare drafts of opinions for the Judge according to the advice and wishes of the latter. Nevertheless, the responsibility for the opinion rests solely with the Judge. So it seems to be strange that the clerk participates in the deliberation, gives explanations etc. Practically, the clerk takes part in the discussion of the case even if Art 88. (9) declares that s/he shall not. All this is against the status and responsibilities of the CC Judge. Moreover, it may have the negative effect that the Judge does not prepare him/herself for the discussion, but relies on his/her assistant.

Art. 49. The regulation suggests that in case of the withdrawal of the notification the CC's procedure ends. It should be considered that under certain conditions the CC continues the case and takes decision. Such a condition may be that the review of the given law is of public interest. In the case of an abstract norm control the public interest on the decision can be assumed. But also reaching decision in a concrete norm control case may be in the interest of the public. According to its established practice the German *Bundesverfassungsgericht* decides upon the continuation of the procedure if the person who made the motion died or withdrew the motion. The Commission and the European Court of Human Rights have always continued the procedure if they considered it necessary for the public interest. Now Art. 37 of the 11th Protocol to the European Convention of Human Rights provides for the same.

Art 50. The regulation of the *res judicata* is not exact enough. It may occur that the CC has already decided on the constitutionality of the normative act, but the notification raises another aspect of possible unconstitutionality of the same act that was not yet examined in the former case. Repetition of a notification may be excluded if the notification submits the same grounds of unconstitutionality that have already been decided upon.

Art. 52-53. The admissibility procedure is unclear. If the clerk prepares an advisory note on the admissibility of the notification (52/2) and this note will be examined and decided upon by the plenary of the CC (3), how is it possible, that in case of a proposed rejection according to 53, the claimant may appeal to the Plenum?
Will the advisory note be communicated to the claimant? I do not think that an "assistant judge" could take decisions in matters of the CC. How can he/she submit an appeal? Do go all the advisory notes to the plenary? Or in case of obligatory rejections (as listed in Art. 53) shall the Plenum consider the admissibility only upon appeal? What are the other cases (beyond those in Art. 53) when a notification can be rejected? Is it at discretion of the CC? It would be surely unconstitutional.
Why is the Plenum burdened with decisions upon admissibility? This would be better a case for a three-judges panel.

Art 56. What are the rules of assignation of a case to the rapporteur? Is it at the discretion of the President? Are there settled rules for it? The latter would be the better solution.

I miss from among the duties of the rapporteur judge that he/she shall prepare a draft opinion for the judgement. It is the judge who is responsible for it even if s/he uses the assistance of his/her assistant. Art. 88. (9) mentions the assistant judge as the person who prepared the draft. I think the Judge of the CC has the right to write the opinion personally and this should be presumed by the Act on the CC. According to (3) the Judge only supervises the preparation on a report on the case.

Art. 57. The 3 days that remain for the Judges for the study of draft opinions (2) are hardly enough for the preparation and for eventual forming an own, dissenting or concurring opinion. It is suggested that the Judges shall have at least 10 days before the session. During this time they may write notes on the cases, which will be send to the Colleagues and the rapporteur can prepare himself for answering the objections.

Art. 84. e) What does it mean that the trial is interrupted when the exception of non-constitutionality of the challenged act was solved? In face of the presumption of constitutionality of all legal norms, the court or other authority cannot restrain from apply the challenged act. (They can suspend the procedure.) What is then the "solution"? In Art. 86. a judgement of the CC solves the exception of non-constitutionality. Shall the trial be interrupted if it turns out that the problem has already been decided?

Art. 88. (9) See the comments on Art. 40.

Art. 89. The possibility of attaching a concurring opinion should also be provided for. It would be not unnecessary to give rules on presenting the dissenting opinion (at least of a draft) to the Plenum. The written arguments may positively influence the debate in the plenary. If the dissenting Judge cannot convince the majority, s/he can attach and publish his

points. The same should apply for the reasoning to the judgement, which the majority does not share.

Art. 93. The Article says that the judgement of the CC is final and binding *erga omnes.* The second sentence of (1) is, however, unclear. Only legal norms, which have been declared null and void by the CC, shall not be applied. Will the sentence say that no legislation or administrative decision is possible that contradicts to an interpretation of the Constitution? Even if the "State has no power" to adopt such acts, they will not be ineffective automatically but only upon a following judgement of the CC.

(2) Non-constitutional laws shall be ineffective not "from the moment on when the respective judgement was adopted", but from the day of the publication of the judgement in the Official Gazette, where the respective law had been published.
The same applies to Art 140 (1) of the Draft Amendment of the Constitution.

(3) As to the consequences for the legal relationships of annulling a law, which were based on the respective law, the usual solution is that already closed legal relationships remain unchanged. It is also usual that criminal sentences based on the unconstitutional law will be revised within a certain time limit. For the sake of legal certainty this main rules should be inserted into the Draft.

Art. 100-102. Without doubt the enforcement of the judgements of the CC is a serious problem and also an indicator of the actual situation of the constitutionality and the constitutional culture in the given Sate. The provisions in these Articles are very vague. They give unspecified powers to the CC and refer to unspecified legal regulations.

100 (2) It is not without serious risk to give entitlement to recover damages to everybody who claims to have suffered damage as a consequence of a piece of legislation. If in a process on abstract norm control a law is annulled hundred thousands of claims may be brought before the courts. Was it really intended by the Authors of the Draft? The "terms of the law" that will regulate the damages shall be very restrictive.

Art. 101. and 102. How will the CC control the enforcement of her judgements? Although some new CCs experiment with sanctions for non-obeying the judgements or some CC-Acts foresee a respective legislation, I do not think that sanctions would be appropriate. The most important judgement of a CC, the annulment of a legal norm is self-executory. If other decisions have to be executed by other organs of the State, it is a matter of the state of constitutionality that decisions of a CC are followed.

Art. 104. The "Address" has common treats with the institution "unconstitutional omission to legislate" of the Hungarian law, or in some respect with the German *Unvereinbarkeit mit der Verfassung.* Instead of the mere addressing an authority and its duty to inform the Court about the measures taken, it would be more effective to give the CC the power to oblige the lawmaker to pass the lacking statute or decree within a deadline specified by the CC. As the Hungarian experience shows within such a competence the Court can also make suggestions as to the constitutional way of filling the gap or of completing an existing norm, that is the Court may determine the content of the law to be passed.
In case of introducing an institution of "unconstitutional omission" the question arises who will have the right to initiate the process. I am not sure that the CC as a body of judicial character could start the process *ex officio*. (The Hungarian CC posses this right but never

utilized it by itself. On the other side it happened frequently that the Court extended norm control cases to the investigation whether in the given field the legislator had failed to pass a regulation necessary to the implementation of a constitutional right.)

Art 109-110. An *erga omnes* binding interpretation of constitutional provisions is surely an important and useful competence of a CC. It is essential that the CC Act provide for the obligatory character of the interpretative judgement of the CC. This eliminates all the well-known problems concerning the compatibility of the judicial function with an advisory role. The judicial function of the CC may nevertheless be endangered if the Court gets involved into the political process. Even if it is ensured that the Court delivered the final decision, notifications on the interpretation of the Constitution might shift too much political responsibility to the Court. Therefore the admissibility of the notification could be bound on more precise conditions. According to Art. 109 (1) d) a notification is admitted in any case of necessity. Therefore a)-c) contain only examples. It is suggested to require the existence of a *concrete problem of constitutional law* instead of a pending case before a court or other authority. This concrete problem would embrace also problems that were identified while making a law or preparing a treaty. On the other side this requirement would narrow down the use the CC for legitimising undetermined political acts. At present the text of b) does not exclude such a misuse.

The competence of eliminating contradictions between constitutional provisions invests powers into the CC, which are to be handled with the greatest self-restraint in order not to overstep the boundary between interpreting and writing the constitution. I am in favour of giving the CC the right to eliminate contradictions from the constitution – but only to the extent till this is possible by the way of interpretation.

The interpretation by the CC of the constitution is binding for everybody. This means that the judgement is like a legal norm, more precisely, like a constitutional law. Consequently the constitutional problem stated in the notification must be formulated in a manner that it can be answered by a rule, which is applicable in all relevant future cases. This is another side of the requirement of the concrete problem: the latter means the concreteness of the legal problem but not, that the CC is used for the decision of a concrete political problem. The judgement gives always a generalized answer. With other words: the so-called “abstract interpretation of the constitution” is not abstract regarding the case and the problem that moved those entitled to notification, to call upon the CC. It is abstract as regards the *result* of the interpretation: the general norm declared in the judgement.

Art. 113-114. The constitutional control of draft amendments to the Constitution seems to be aimed at ensuring its coherence. In this respect the criteria of the examination of the draft amendment are decisive. Art. 113 awakens the impression that the actual structure, coherence and consistency of the provisions of the Constitution shall be maintained. I don’t know whether “the review limits” in (1) mean that the Constitution of Moldova entails unalterable provisions (like the German *Ewigkeitsklausel*). If yes, they may be yardstick of all amendments. But as regards the other constitutional provisions in force I do not think that the constituent power can be hindered to change them, as it will. And the CC cannot be placed above the constituent power. The CC can point to all the inconsistencies, which result from the introduction of a new provision and can give advice how to create a new, coherent system. In this sense the power of the CC is limited to postponing the constitutional amendment until a new harmony within the Constitution is secured. One can read the last

sentence of (4) as the key provision, which supports this restrictive interpretation of the institution of the control of draft amendments.

Art. 119. Is it not an incorrect translation that also normative acts “to be enacted” can be challenged by the exception of non-constitutionality? Shall it be red as “to be applied”?

Art. 120-122. The proposed regulation is very complicated. The certification by the court or authority, the information of the authority about the notification, and also the damages (122 (3)) could be avoided if the court or the authority before which the case is pending is obliged to submit the exception to the CC upon request of the party. According to Art 118 (2) this is the case concerning the courts. The regulation should be extended to all authorities. Instead of the suspension of the case at the discretion of the court or authority, the suspension should be obligatory. The procedure could be continued only regarding the parts of the case (if any), which are not touched by the challenged legal norm. The final decision could, of course, be taken only after the judgement of the CC was passed.

Budapest, April 06, 2002.

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