Strasbourg, 28 May 2002
<cdl\2002\doc\073-e>

Restricted
CDL (2002) 73
Engl. only

Opinion N° 200/2002.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

MOLDOVA

Comments on the Draft Law on the Constitutional Court and on the Amendment of the Constitution of the Republic of Moldova

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I shall distinguish my comments to the Amendment of the Constitution (I) from those to the Draft Law on the Constitutional Court (II). In fact, many of my comments on the second subject are strictly connected with some observation to the Amendment of the Constitution

(I)

1) The Title of Art. 135 been changed from “Powers” into “Duties”. The previous Title is more usual in the common language of constitutional provisions concerning the tasks and competences of a Constitutional Court.

2) Article 135 a) and Article 4 a) of the Draft. The *Memorandum* justifies the changing of the previous formulation “laws, Parliament resolutions, decrees of the President of the Republic of Moldova, Government resolutions and others, as well as international treaties endorsed by the Republic of Moldova” into “normative acts adopted by the central public authorities” with the need to refer only to normative acts of central authorities. There is certainly such a need, since those acts are not necessarily normative. But, as both Professor Solyom and Professor Klucka have pointed out, the reference to “normative acts” seems to vague. The question might be settled by distinguishing single acts which are always normative and acts which are not always normative: “laws, international treaties endorsed by the Republic of Moldova, as well as Parliament and Government acts and decrees of the President of the Republic to the extent that they have normative force”.

3) For what concerns Article 135 b), it is worth considering that interpretation of the Constitution is always a Constitutional Court’s task, irrespective of the different powers which the Court is bound to exercise. Since Article 135 b) seems to refer itself to advisory opinions, a provision such as “give its advisory opinion concerning the interpretation of the Constitution” might appear more accurate than “interpret the Constitution”.

4) Article 135 e). My alternative suggestions are the following:

4a) The interpretation of giving advice “on initiative to revise the Constitution” depends on what “the Constitution” means. On literal grounds, it means any provision of the text called “Constitution” in a certain constitutional order. Obviously enough, if we follow that meaning, any revision contrasts with the provision which it intends to override. In that case, the advisory opinion of the Court will certainly contrast the initiative.

If, instead, “Constitution” means “fundamental principles of the Constitution”, that is to say, the core of principles defining the constitutional order (human rights, democracy, separation of powers), then the advisory opinion of the Court might differ in correspondence with the single initiative occurring in the case.

Therefore, Article 135 e) should be clarified as follows: “give its advisory opinion on the correspondence of initiatives to revise the Constitution with the fundamental principles of the Constitution”.

4b) A more radical solution would be the elimination of Article 135 e). It is worth considering that in many countries judicial scrutinies on the constitutionality of constitutional provisions are often provided with respect to: a) observance of the constitutional procedures which Parliament and other organs have to follow; b) observance of fundamental principles of the Constitution on substantial grounds. Nevertheless, judicial scrutinies on the constitutionality

of constitutional provisions are usually provided after the approval of the revision of the Constitution. Why it is this so? Because there is fear that giving the Court the opportunity to express itself on the constitutionality of initiatives of revision means that the Court is above the constituent power, as Professor Solyom has already noticed (see his comment about Article 113 of the Draft Law). Suppression of Article 135 e) would not create damages, and would be in line with the general trends of constitutional justice in many other countries.

5) The task of finding "the circumstances justifying the dissolution of the Parliament" (Article 135 h)) involves directly the Court in the political process. Inquiring into the circumstances justifying the dissolution of Parliament is not a "legal issue" in the sense of Article 7 (3) of the Law on the Constitutional Court: "The Constitutional Court shall examine exclusively legal issues".

Moreover, that task might create serious conflicts between the Court and the President of the Republic. Let us imagine that the President does not agree with the Court's advisory opinion (which, according to Article 94 of the Law on the Constitutional Court, is binding) stating, for example, that circumstances justifying the dissolution are insufficient. What would happen in such a case? If the President's decision prevails, the prestige of the Court might be endangered. If the Court's advisory opinion prevails, this would mean that the will of judges has prevailed over the President's will in the accomplishment of a task which is constitutionally devoted to the President.

6) Article 135 j) leaves too room to discretionary power of the Government, which, according to Article 44, (2), d), of the Law on the Constitutional Court, is the only authority entitled to submit such a case before the Court. Article 135 j) of the Constitution should have to be amended in order to specify *when* issues of political parties constitutionality might occur: for example, parties whose clear attitudes reveal the intention of altering or destroying the fundamental principles of liberal democracy (see Article 21 of the German Constitution).

7) Article 140. Usually the *dies a quo* for the enforcement of the decisions of Constitutional Court is not the adoption of the decision but the day after the publication of the decision. Article 140 should better be framed as follows: "Normative acts declared unconstitutional become nul and void from the day after the publication of the Constitutional Court's decision on the Official Gazette".

Accordingly, Article 93 (2) of the Draft Law on the Constitutional Court should better be framed as follows: "Normative declared unconstitutional shall be null and may not be applied from the day after the publication of the Constitutional Court's decision on the Official Gazette".

(II)

General remark

According to Article 72 of the Moldovan Constitution, an organic law will regulate "the organization and functioning of the Constitutional Court". These are certainly broad terms, but usually, in the practise of most States, such terms are intended to be referred only to the key issues concerning the organization and functioning of Constitutional Courts, as status of judges, access to the Court, the main features of procedure before the Court, the kind of decision it can take, and the principles of its internal organization.

As both Professor Solyom and Professor Klucka have already noticed, the remaining issues are usually left aside from the organic law. This occurs for three main reasons. First because, on constitutional grounds, those issues are certainly much less important than issues of the first kind. Second, because any constitutional authority knows better than Parliament which rules can fit better for its internal organization and functioning, and can adjust them properly to the situations which may differ from time to time. And, third, because there is a specific need to leave a certain degree of autonomous regulation of such issues to the Constitutional Court.

If that is so, my opinion is that issues concerning salaries of judges, assistant judges, personnel, tasks of judge rapporteur, Court expenses, power symbols (corresponding to Articles 27-29, Chapter V and VI, Articles 56-59, Articles 69-70, Chapters XV and XXII) should be left to the Court's own regulation as already provided from Article 6.

Specific remarks

1) Art. 12 and Art. 14 (3). According to these provisions, the age to hold the position of constitutional judge is between 50 and 70. This seems a very short period, both for the choice of constitutional judges and for holding with efficacy the charge of constitutional judge.

2) Art. 31 (1) does not consider the possibility of the election of a judge whose mandate ends before the expiring of the three years term provided for the Presidency of the Court, nor it considers the possibility of a re-election to the Presidency.

Art. 31 (1) could be amended in the following way:
"(1) The President of the Constitutional Court is elected for a term of 3 years and can be re-elected, unless, in any case, the mandate of judge of the Constitutional Court expires before that term.
(2) The President of the Constitutional Court is elected by secret suffrage with the majority of votes of the Court's judges.

3) Art. 44 (1) b) and ("Parliamentary fraction") and c) ("A parliamentary group comprising at least 5 deputies") might involve directly the Court into partisan disputes. My suggestion is to leave aside those points.

4) Art. 44 (1) j) ("Citizens of the Republic of Moldova and their associations") is a too vague formulation. How many citizens should submit notifications to the Constitutional Court? In order to avoid to overcharge the Court, it could be wise to fix a minimum number of citizens.

5) Article 45 is not clear both in (1) and in (2). For what concerns (1), it seems strange to fix a 6 months term in the case of international treaties which have *still to be ratified*. For what concerns (2), it seems strange to say that there is no time limitation for the exceptions of unconstitutionality brought before the court *in the course of trial*.

6) Article 49 and 50. Here I partake entirely Professor Solyom's comment.

7) Article 88 (7). I understand why the majority requested for such opinions and judgements is higher than the usual majority. But what happens if the majority of two thirds is not

reached? This seems a great danger for the good functioning of the Court. It looks more prudent to provide an ordinary majority also for these opinions and judgements.

8) Article 93 (2). See my proposal to Article 140 of the Amendment of the Constitution.

9) Article 96 runs counter to Article 135 (3) of the Amendment of the Constitution, according to which "The Constitutional Court shall perform its activity at the initiative of subjects provided by the Law on the Constitutional Court".

Among these subjects, there cannot be the Court itself. If the Court is given the power to review its own judgements whenever new circumstances appear or there is a changing of the provisions upon which the Court has founded a previous judgement, this can alter heavily the Court's role in the constitutional system.

10) Article 104. By stating that, while ascertaining some legislative deficiency in the case herein mentioned, the Court gives an address to the respective bodies, which shall inform the Court about the result of the address, Article 104 presupposes that, in the meanwhile, the judgement is suspended. If this is so, the suspension should have to be expressly mentioned. My opinion, at any rate, is that such a provision would give to Parliament the opportunity of delaying the constitutional process. The solution envisaged from Professor Solyom in line with the Hungarian and German experience seems more proper.

11) Chapter XIX. Following the radical suggestion exposed at (I), 4b), that is to say, suppression of Article 135 e) of the Amendment of the Constitution, this should be true also for Chapter XIX of the Law on the Constitutional Court.

Following the less radical suggestion exposed at (I), 4a), that is to say, maintenance of Article 135 e) with the correction "give its advisory opinion on the correspondence of initiatives to revise the Constitution with the fundamental principles of the Constitution", Chapter XIX would be maintained. Nevertheless, in that case, it is worth noticing that Article 113 (4), stating that "In case that the advisory opinion of the Constitutional Court is negative or in case that it points out the breach of other fundamental provisions and of constitutional matter uniformity, the Parliament *may not* examine the proposed draft law", provides an exception to the general rule of Article 94, according to which "The advisory opinions of the Constitutional Court shall be binding".