

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**OPINION ON THE DRAFT LAW
ON THE CONSTITUTIONAL COURT OF MOLDOVA
AND CORRESPONDING CONSTITUTIONAL AMENDMENTS**

**Closing Speech at the Seminar
on the Competencies of the Constitutional Court
and its Role in Society (Chisinau, 17-18 June 2002)**

**by Mr V. Puskas,
Chairman of the Constitutional Court of Moldova**

1. At the level of the competent state authorities (the Parliament, Government, the President of the republic) and not lastly, at the level of the Constitutional Court, there exists a precise motivation in the sense of performing certain amendments to the legal basis on the Constitutional Court activity.

Such tendencies have been also expressed by the participants at this seminar. The legislative basis of the Constitutional Court in the participants opinion concerning the competence of the Constitutional Court, its role in the society, the nature of acts subject to the constitutional control, the manners of appealing the Court, the relationships between the Constitutional Court and the other law courts, the mechanisms of independence of the Court judges, as well as the mechanisms of enforcing the Courts acts and other important issues have to be improved in the new Law on the Constitutional Court.

Such an opinion is also supported by the results of the survey reports lodged with the Court by the Presidency on behalf of 15 national institutions. The draft law has been subject to expertise by the specialists from Romania, Hungary, Germany. We also received the survey reports from the international experts from Slovakia and Italy the participants at the seminar.

The draft law has been also subject to expertise by the American Bar Association (ABA). We can underline that the working group took into consideration the achievements of the specialists which have been working over the issue in question in 1998-2000.

All the draft laws which are in present under discussion have not been finalized yet. This workshop can also be considered a kind of expert examination.

2. The participants at the seminar have unanimously acknowledged the up-to-date nature of this issue, the necessity to discuss it in public and to carry on an exchange of views.

The law became qualitative in case when at its working out can take part not only a person, or a group of persons, but the whole human potential of the society, taking into consideration the practice of other states.

The Constitutional Court cannot in any way be placed above the other state bodies, but its role cannot be diminished. The Court has to be a stabilizing factor in the society, a balance between the power branches, a state body the potential of which entails to be fully carried out act at the enhance of the state governed by the rule of law, the safeguard of the Constitution supremacy in the state and to accomplish other tasks assigned to it by the legislator.

3. Despite a great number of new proposals on the draft laws, no one from among the participants at the seminar doubts the conception of these draft laws. To this end, there can be drawn the sole conclusion - it is necessary to improve the legislative framework for the Constitutional Court organisation and operation.

The debates have been focussed on three issues during the workshop.

1. The problems which exist in the present day legislation

- Most speakers have drawn the attention on the fact that the powers themselves of the Constitutional Court make up variances within the constitutional jurisdiction enforcement (as for instance: the subsequent control of the international treaties, the interpretation of the Constitution, the settlement of the exceptions of non constitutionality raised only by the Supreme Court of Justice and others)

- It is necessary to specify the place of the Constitutional Court, acknowledging this institution as a sole body of constitutional jurisdiction, determining its place within the state authorities, and especially within the judiciary. The majority of participants support the idea of preserving its present day place;
- The valid legislation does not delimit the subjects entitled to notify the Constitutional Court and the determination of their powers, as according to the Constitutional Court role in the state;
- The legislation in force contains a vague regulation on the status of the Constitutional Court judge, beginning with the conditions of its appointment, to the safeguard of the independence of the judge;
- The notion and the status of the Assistant-Judge are not provided by the legislation of the other states;
- The competence on ascertaining the circumstances that justify the dissolution of the Parliament is not a legal issue and has to be excluded from the Constitutional Court powers;
- The adoption of the advisory opinions with a simple majority of votes;
- The valid legislation does not practically contain a mechanism of enforcing the Constitutional Court judgements and a regulation on their legal consequences.

There also exist other issues to be solved: how can the Constitutional Court exercise the competence of safeguarding the citizens responsibility towards the state; how can be insured the budgetary independence of the Court; to introduce the principle of transparency and others.

2. The issues tackled by the participants on the draft laws

The powers of the Court provided for in Art. 135 of the Constitution in the new wording and Art. 5 of the Draft Law on the Constitutional Court raised the most discussions.

- In the part of the constitutionality review of the normative acts, there have been submitted proposals to enlist the authorities subjects of the normative acts: the Parliament, the President of the republic, the Government, as well as the acts passed by local public authorities which run counter to the Constitution, including the acts of the authorities of special status.

The working group mentioned only the normative acts of the central public authorities, which are already specified by the Constitution: the Parliament, the President of the republic, the Government and the body of special status.

There have been not introduced the normative acts of the other subjects on the reason that the Republic of Moldova is not a federal, but a unitary state.

There have been taken into consideration the regulations of the law on the administrative jurisdiction. But during the workshop there have been brought new arguments in the light of which, this competence will be additionally discussed.

- In the part of the exceptions of non constitutionality of the normative acts raised by natural persons and courts of law, there have been expressed diverse opinions, such as: to set forth these regulations in two separate points, to exclude the constitutional complaints or to preserve them, to introduce the complaints of both the citizens and their associations, to preserve the present form of control.

The working group comprised these provisions into a single point, on the ground that in both cases the exception of non-constitutionality is raised.

Following the submission of the petitions, both of natural persons and law courts, it is carried out a concrete and not abstract review of constitutionality.

The working group introduced the natural persons as subjects entitled to address the Court, pursuing the aim of democratisation the constitutional review.

In the opinion of the working group, the state is under the obligation to undertake the necessary measures for a complete settlement of the constitutional litigations, within the state, by the national law courts.

But the arguments brought forward at the seminar require an additional consideration of these powers.

It is worth mentioning the other two proposed powers. The idea of checking up the testimonies on property and the incomes of certain high ranking public officials is taken from the draft law lodged in Parliament by the Government on 29 October 2001 on the testimony and control over the fortune of the state high ranking officials, judges, prosecutors, public officers and other ruling officers.

The draft at issue has been passed in the first reading. The subsequent examination of this draft will be carried out in the second reading.

As concerning the provisions on the dismissal of the judges of the Supreme Court of Justice, the Prosecutor General and the members of the Court of Audit, the working group has taken into consideration the practice of the constitutional courts from other states, within the competence of which, alongside with other guarantees, it is introduced another one the dismissal from office in case of violation of the Constitution, which can be established only by the Constitutional Court.

There have been expressed the other suggestions referred to the Court competence:

- in the part concerning the interpretation of the Constitution, the Court should not produce new legal norms, thus, being not infringed in this concern the Parliament powers;
- to re-examine the prerogative on the withdrawal of the member of Parliament immunity and the cessation of its mandate, thus, asserting that this is within the Parliament competence;
- to specify the attribution concerning the circumstances which have as a subject the constitutionality of a party;
- to endow the Court with the right to exercise the constitutional review *ex officio*;
- to specify which international treaties are subject to *a priori* review and other issues related to the powers.

There have been raised the other issues related to the content of the law, such as:

- the ascertaining of new conditions for the selection of judges, their appointment at office, the cessation of their mandates, the pay wages;
- to make certain specifications concerning the status of the Assistant-Magistrate, introducing either the notion of the Assistant-Justice or the Scientific Counsellor, by ruling out the conditions of assimilation and establishing the status appropriate to this category;
- the specification of the subjects entitled to appeal the Court (the granting of the right to address the Court to a member of the Parliament, to all territorial-administrative units, the deprivation of this right the Superior Council of Magistrates, the specification of the Prosecutor General, as a subject entitled to notify the Court, other issues);
- to improve the mechanism of the constitutional complaints admissibility, the mechanism of addressees, the change of the reports purposes, to increase the sanctions for not observing the procedure of the constitutional jurisdiction etc.

3. We can mention an array of proposals expressed during the seminar which exceed the legislation in force and the regulations provided for by the draft law

In this framework, there have been submitted the following:

- the granting of the right to address the Constitutional Court to local public authorities and the Government representatives in the territory;
- to introduce the principle of rotation of the judges and the appointment at the vacant positions only before the expiration of the vacant mandate;
- the exercise of the constitutionality review by the Court *ex officio*;
- the adoption of normative acts following the pronouncement of the Constitutional Court judgements on the interpretation of the Constitution and others.

But, perhaps in the lack of time some issues have been left aside, to which the working group is in search of answers, such as:

- 1) Who may appoint at office the seventh judge? It is more easier to propose judges at the office, but the practice is different.
- 2) In case of introducing the constitutional complaint, which will be the role and the duties of the Secretariat? What will be the mechanism of the complaints admissibility?
- 3) The necessity of providing the special procedures. Which will be the role of these procedures and the desired effects?
- 4) The determination of the limits of competence of the Constitutional Court at the case examination.
- 5) How can be viewed the Ombudsman, as a subject of general competence or as a subject of special competence? Generally speaking, the issue on the competence of subjects has been too little discussed.
- 6) It has not been spoken about the effect of nullity of the Constitutional Court act and when this effect can be considered valid, from the moment of the judgement adoption or pronouncement. The reparation of damages depends on this regulation. We would like that the Venice Commission would deliver its opinion on this issue.

I would also emphasise two more very essential aspects:

1) In which part of the draft law should be placed the chapter on the guarantees for the exercise of the judges mandate? In this chapter the issues on the financing of the Constitutional Court, the pay wages, allowances, indemnities of the judge and other forms of insurance are regulated.

2) By what normative acts should be regulated the Court activity? Some participants support the idea that the Court activity should be regulated as in present, by two laws: a material one, in which the issues on the material and financial guarantees should be enlisted at the end, and the processual law, in which the provisions of legal procedure should be provided for.

The other participants submitted the other proposals, but the working group will take the final decision in this concern.

I would emphasise that such a two-law structure which governs the Constitutional Court activity is not wide spread. One can hardly mention the state which has similar regulations.

In most countries the Constitutional Court pursues its activity according to a material law, an internal regulation on the conduct of procedure passed by the Court, and a special law which regulates the guarantees for the exercise of judges mandate, namely, the issues regarding the financing, pay wages, state indemnities and others.

Honoured audience!

In our opinion the workshop was carried on in a creative and agreeable frame of mind, in which there took place rather hot debates, but constructive and correct enough.

There have been expressed very important proposals and it is the task of the working group to systematise and place them appropriately in the draft laws. This will take place following the delivery of the official opinion of the Venice Commission, the sessions of which will be held on 5-6 July this year.

The draft laws will be finalised and submitted to the subjects with the legislative initiative, after receiving all the opinions.

I would like to express my sincere greetings to all the participants at this seminar for the constructive discussions and to wish all the best to the resigned judges of the Constitutional Court, its first President - Mr. P. Barbalat, the international experts: C. Bulai, J. Klucka, C. Pinelli, I. Kudrevtsev and the organisers of this workshop - Mr. R. Durr, representative of the Venice Commission and Mr. M.Cotorobai, justice of the Constitutional court.

I would also like to bring the most cordial greetings to the interpreters and the Constitutional Court personnel for their work.