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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**Draft opinion on the proposal to amend the Constitution
of the Republic of Moldova**

**Comments by
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More than one-third of the members of the Moldavian Parliament initiated the amendment of the constitution. The aim of the amendment is to introduce the constitutional complaint procedure. As a consequence, the number of the judges of the Constitutional Court would be raised from six to seven.

Mr. Ion Vasilati, the Vice-President of the Constitutional Court asked the Venice Commission to make comments on the proposal.

The introduction of constitutional complaint to the competences of the Constitutional Court of Moldavia is an amendment of great importance. The possibility of individual complaint is a distinctive feature of the competence of a Constitutional Court, and that has been missing so far from the competences of the Moldavian Constitutional Court. Moreover, the access of individuals to the Constitutional Court lacks from the present system of constitutional justice in Moldova.

The Venice Commission in its opinion on the draft constitutional amendments with regard to the Constitutional Court of Turkey [CDL-AD(2004)024, paras. 26-47] has recently outlined generally and in a comparative perspective the role and importance of individual complaint.

The above-mentioned opinion summed up the international tendencies regarding individual complaint in the following way:

“1. The institutions of Verfassungsbeschwerde in Germany and recurso de amparó in Spain are the most well-known examples of constitutional complaint. Other European countries have also established some procedures for the adjudication of constitutional complaint (among others Russia, Czech Republic, Slovakia, Slovenia, Macedonia, Croatia, Portugal, Hungary, etc.).

2. Recent tendencies in constitutional adjudication can rightly be described as a path from the review of the constitutionality of laws to the review of the application of laws. This means a shift from the review of legislature to the review of the judiciary.”

The proposed Moldavian constitutional provision is similar to the regulations usual in the European countries.

The constitutional complaint according to the proposal is

- a) a legal remedy of subsidiary character,
- b) it can be invoked on account of violation of basic rights and liberties,
- c) against violations resulting from a law, an administrative act, a judicial decision, or the omission of public authorities,
- d) by any person who pretends to be victim of the violation of basic rights and liberties.

Ad a) The constitutional complaint – as in other countries - can be submitted after exhausting other legal remedies (*‘après l’épuisement des voies de recours’*).

Ad b) The range of the basic rights and liberties on which a constitutional complaint can be founded embraces the fundamental rights enlisted in Title Two of the Constitution, and those regulated by international treaties of which the Republic of Moldova is a party. Originally – in Germany or Spain - constitutional complaint was introduced for protection against violations of basic rights and liberties contained *in the constitution*. Recently, a new trend has emerged in

different countries. The fundamental rights enlisted in international treaties may also serve as a ground for constitutional complaint. That is the case in the proposed amendment of the constitution of the Republic of Turkey. In the case of Turkey the constitutional rights and freedoms regulated in the European Convention on Human Rights would be protected by this institution. This idea originates in a practical consideration. The expectations suppose that the introduction of constitutional complaint will result in a considerable decrease in the number of cases brought before the European Court of Human Rights. Thus the Constitutional Court would give by way of constitutional complaint a domestic remedy for the violation of basic rights in individual cases. That would supposedly reduce the number of files brought before the ECHR by citizens of Moldova.

However, this consideration raises the question of the rank of international treaties in the Moldavian legal system. Article 4 of the Constitution of Moldova declares:

“(1) Constitutional provisions for human rights and freedoms shall be understood and implemented in accordance with the Universal Declaration of Human Rights, and with other conventions and treaties endorsed by the Republic of Moldova.

(2) Wherever disagreements appear between conventions and treaties signed by the Republic of Moldova and her own national laws, priority shall be given to international regulations.”

Moreover, in the case of all international treaties, in the case of contradiction between an international treaty and the Constitution, the latter should be revised (Article 8 of the Constitution).

Ad c) A constitutional complaint can be filed against violations resulting from a law, an administrative act, a judicial decision, or the omission of public authorities. This definition aims at to cover extensively the possible cases of violations of the rights of individuals.

Ad d) The regulation that makes possible that a constitutional complaint might be filed by any person who pretends to be victim of the violation of basic rights and liberties, is appropriate again. However, it seems important to note that the introduction of individual complaint would fundamentally change the present system of constitutional justice in Moldova. Currently individuals have no access to the Constitutional Court. Under Article 25 of Law N° 317-XIII on the Constitutional Court (13 December 1994) only the following persons are entitled to refer matters to the Constitutional Court: the President of the Republic; the Government; the Minister for Justice; the Supreme Court of Justice; the Court of Audit; the Prosecutor General; Members of Parliament; parliamentary groups; the Parliamentary Advocate; and in special cases the National Assembly of Gagauzia. The opening up of individual access to the Constitutional Court will necessarily change the procedure of the Court, the workload will immensely increase, and the Court has to deal with this new situation. A Constitutional Court, where so far only political actors could initiate a procedure, will become a real “citizens’ court”.

Article II of the proposal obliges the Government to submit to the legislator within three months the necessary amendments to the laws that are effected by the amendment of the constitution. The proposed changes in the constitutional justice could be evaluated in their entirety only after the elaboration of the provisions of the related laws.

In order to manage the possibly increasing workload, the proposal raises the number of the judges of the Constitutional Court from six to seven. Presently – under Article 136 of the Constitution - the Constitutional Court is composed of 6 judges, who are appointed for a 6-year

mandate. Two judges are appointed by the Parliament, two by the Government and two by the Higher Council of Magistrates. The seventh judge according the proposal would be elected by the President of the Republic. This is a good solution because it diversifies the appointment procedure in such a way that the seven judges are appointed by four different authorities. It is not known for the rapporteur the procedure by which the Parliament elects the two judges, and whether the opposition may influence that. But even in case the majority decides on the election of the judges, by assigning to the President an appointment, the appointment of the judges emerges at least from three independent sources. The President of the Republic is elected by the votes of the three fifths of the members of the Parliament, and this requires a larger consensus than the simple majority of the votes.

To sum up, the proposed amendment to introduce constitutional complaint is a very important change. It is modelled on solutions already known in other European countries and it meets European standards. The possibility of individual complaint would definitely serve the better and more effective protection of fundamental rights.