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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

REPUBLIC OF MOLDOVA

DRAFT AMICUS CURIAE BRIEF

ON THE CRIMINAL LIABILITY  
OF CONSTITUTIONAL COURT JUDGES

on the basis of comments by

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Draft - restricted

## I. Introduction

1. On 10 September 2019, Mr Valdimir Țurcan, President of the Constitutional Court of the Republic of Moldova, requested an *amicus curiae* brief from the Venice Commission on the criminal liability of Constitutional Court judges.

2. For the present draft *amicus curiae* brief, Mr Yavus Atar, Ms Monika Hermanns, Mr Suk-Tae Lee and Ms Kateřina Šimáčková acted as rapporteurs.

3. The present draft *amicus curiae* brief was prepared on the basis of the rapporteurs' contributions and on an unofficial English translation of Article 307 of the Criminal Code of the Republic of Moldova<sup>1</sup>; Article 137 of the Constitution of the Republic of Moldova<sup>2</sup>; Articles 13, 14 and 16 of the Law No. 317-XIII on the Constitutional Court of the Republic of Moldova<sup>3</sup> and on Articles 8-10 of the Constitutional Jurisdiction Code of the Republic of Moldova<sup>4</sup>. Errors may occur in this draft *amicus curiae* brief as a result of an incorrect or inaccurate translation.

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<sup>1</sup> Article 307. Issuance by a judge of a sentence, decision, ruling or judgment contrary to the law (1) The wilful issuance by a judge of a decision, sentence, ruling, or court order contrary to the law shall be punished by a fine in the amount of 650 to 1150 conventional units or by imprisonment for up to 5 years, in both cases with the deprivation of the right to hold certain positions or practice certain activities for up to 5 years. (2) The same action: a) involving a charge of a serious, especially serious or exceptionally serious crimes; [Letter b) - excluded by Law No. 277-XVI date 18.12.2008, in force as of 24.05.2009] c) causing severe consequences, shall be punished by imprisonment for 3 to 7 years with the deprivation of the right to hold certain positions or practice certain activities for up to 5 years.

<sup>2</sup>Article 137 Independence - For the tenure of their mandate the judges of the Constitutional Court are irremovable, independent, and abide only by the Constitution.

<sup>3</sup> Article 13 Independence

1. Judges of the Court are independent in performing their duties and they obey only to the Constitution.

2. Judges of the Court cannot be held legally liable for their votes or opinions expressed while performing their duties.

Article 14 Irremovability

1. The judge of the Constitutional Court is irremovable during the term of office.

2. The term of office of a judge of the Court shall be suspended or terminated only in the circumstances provided for by the present Law.

3. If the term of office of a judge is terminated, such judge shall be dismissed under the conditions laid down by the present Law.

4. The judge of the Constitutional Court may resign on his/her own initiative.

Article 16 Immunity

1. The judge of the Constitutional Court cannot be detained, arrested or searched, except for the cases of flagrant offences, nor can he/she be sent to trial for criminal or minor offences without the prior consent of the Constitutional Court.

2. Jurisdiction for minor and administrative offences committed by judges of the Constitutional Court belongs to the Supreme Court of Justice.

3. The initiation of criminal proceedings and requests for consent to prosecute falls under the competence of the Prosecutor General.

4. From the date when the criminal proceedings are instituted against him/her, the judge of the Constitutional Court is legally suspended from office. In case of a final conviction, the judge shall be automatically deprived of his/her office in accordance with the conditions laid down in this Law.

<sup>4</sup> Article 8. Independence

1. The judges of the Constitutional Court shall be independent and in the exercise of their mandates shall be subject only to the Constitution.

2. The judges of the Constitutional Court shall examine the case-files under the conditions that preclude any influence from outside.

3. The judges of the Constitutional Court shall not be held responsible for their votes and opinions expressed in the exercise of their office, as well as after the cessation of their mandates.

Article 9. Immovability

1. The judges of the Constitutional Court shall be irremovable during the term of office.

2. The mandate of the Constitutional Court judge shall be suspended or withdrawn only in cases and manner provided for by the Law on the Constitutional Court.

Article 10. Immunity

4. *This amicus curiae brief was adopted at the Venice Commission ... Plenary Session (Venice, ...).*

## II. Request

5. This request for an *amicus curiae* brief is about an application brought to the Constitutional Court of the Republic of Moldova (hereinafter, the “Constitutional Court”) on 21 August 2019 by the interim General Prosecutor of the Republic of Moldova. In this application, he asked the Constitutional Court to interpret Article 137 of the Constitution in the context of questions regarding the nature and scope of the irremovability and independence of Constitutional Court judges in the light of provisions of the Law on the Constitutional Court and of the Constitutional Jurisdiction Code, mentioned above<sup>5</sup>. In particular, whether the relevant provisions of this Law and of the Code combined with the constitutional nature of the irremovability and independence of Constitutional Court judges could prevent the General Prosecutor from initiating criminal proceedings against a Constitutional Court Judge during or following his or her term of office without prior approval by the Constitutional Court.

6. In this context, the Venice Commission has been requested to answer the following three questions:

- a) *“Is the independence of the constitutional judges guaranteed in a state governed by the rule of law, in the event of holding them liable (i.e. criminal liability, administrative liability etc.) for their votes and opinions and for their actions taken in the exercise of their function?”*
- b) *Do the constitutional judges benefit also from the immunity for their votes and opinions expressed in the exercise of their function after the termination of the mandate?*
- c) *What would be the public authority with the power to ascertain the constitutionality/legality of an act of the Constitutional Court, since the constitutional judges conform themselves only to the Constitution, and their acts are delivered in the name of the Republic of Moldova and are final?”*

## III. General remarks

7. In order to reply to the questions above, the current position on the issue of immunity of public officials in a democratic state governed by the rule of law should be considered as well as the question regarding a judge’s responsibility in the decision-making process.

8. The principle of non-discrimination and equality before the law is, according to the Venice Commission, one of the fundamental principles of the rule of law: *“equality before the law means that each individual is subject to the same laws, with no individual or group having special legal privileges”*<sup>6</sup>. Therefore, immunity granted to Members of Parliament, the President of the Republic or judges is an exception to this principle.

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1. *The judge of the Constitutional Court cannot be apprehended, arrested, searched except for the cases of a flagrant offence, nor can he/she be sent to trial for criminal or petty offences, unless preliminary approved by the Constitutional Court.*

2. *The judge of the Constitutional Court whose identity has not been recognised at the moment of restraint shall be immediately released at the moment his/her identity is determined.*

3. *The decision-making factor which has undertaken the restraint of the Constitutional Court judge caught in a flagrant felony shall immediately notify the Court, whose final decision on the restraint shall be issued within 24 hours.*

4. *The establishment of sanctions on judges of the Constitutional Court for the disciplinary infringements and the procedure of their application, as well as the withdrawal of the mandates shall be carried out under the present code.*

<sup>5</sup> i.e. Articles 13, 14 and 16 of the Law on the Constitutional Court, Articles 8-10 of the Constitutional Jurisdiction Code and Article 307 of the Criminal Code.

<sup>6</sup> Report on the Rule of Law (CDL-AD(2011)003rev), paragraph 65.

9. It is important that when immunity is granted to these officials, it should be *functional immunity* and not *general immunity*, as immunity should always be connected to the role and activities carried out by the institution for which the individual is working, is a member of or represents (*functional immunity*). A person should not be exempted personally from criminal and possibly other liabilities that are not connected with his or her role and professional activity (this would be *general immunity*).

10. To this end, in the *amicus curiae* Brief for the Constitutional Court of the Republic of Moldova on the criminal liability of [ordinary] judges,<sup>7</sup> the Venice Commission referred to the “Council of Europe’s Group of States against Corruption (GRECO) [which] distinguishes two types of immunity: “non-liability immunity”, which refers to non-liability for opinions expressed by parliamentarians or judgments handed down by judges and “inviolability-immunity” or “procedural immunity”, which protects an official from prosecution. In this line of thinking, procedural immunity is intended to provide the means of maintaining the substantive “non-liability immunity”. Only following a special procedure during which the essence of the accusations against a Member of Parliament or a judge is examined, can procedural immunity be lifted and prosecution take place. As concerns judges, GRECO sees non-liability immunity for judges when they perform judicial activities as being a prerequisite of judicial independence, whereas procedural immunity “raises serious problems in respect of an effective fight against corruption.”<sup>8</sup>

11. There is a need to protect judges against the criminalisation of their activities while in office to allow them to be able to carry out their role as independent judges in the constitutional system. As indicated in the *Rule of Law Checklist*, the independence of individual judges<sup>9</sup> is one of the most important principles of the rule of law. Judicial decision-making should, on the one hand, be associated with a high-level of accountability of judges but, on the other, judges should not be punished for their legal opinions expressed in judicial decisions. Doing so would have a deterrent effect on judicial decision-making and undermine the independence of the judiciary. However, this protection should not be based on the privilege of an individual serving as a judge.<sup>10</sup> According to *Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities*, “when not exercising judicial functions, judges are liable under civil, criminal and administrative law in the same way as any other citizen”.<sup>11</sup>

12. Functional immunity is also the type of immunity that applies to the Judges of the European Court of Human Rights. Under Article 6 of the Fourth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe of 1960, immunity is accorded to the Judges of the European Court of Human Rights as follows: “Privileges and immunities are accorded to judges not for the personal benefit of the individuals themselves but in order to safeguard the independent exercise of their functions.”

13. It follows from the above that functional immunity (or non-liability immunity) intends to protect a judge from the criminalisation of his or her legal opinion. It does not provide him or her with impunity for a crime s/he has committed. Immunity protects independent judicial

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<sup>7</sup> Republic of Moldova - *amicus curiae* Brief for the Constitutional Court on the criminal liability of judges ([CDL-AD\(2017\)002](#)), paragraph 17.

<sup>8</sup> Republic of Moldova - *amicus curiae* Brief for the Constitutional Court on the immunity of judges ([CDL-AD\(2013\)008](#)), paragraph 22.

<sup>9</sup> *Rule of Law Checklist* ([CDL-AD\(2011\)003rev](#)), paragraphs 86-88.

<sup>10</sup> Kyrgyzstan: the Constitutional Chamber of the Supreme Court held, in the Case of Sultanov K.K., Nasirov T.J (30.12.2013) that judicial independence and immunity are not privileges for judges, but safeguards against external pressures in their decision-making.

<sup>11</sup> *Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities*, paragraph 71. See also Group of States Against Corruption (GRECO), Immunities of public officials as possible obstacles in the fight against corruption, in Lessons learned from the three Evaluation Rounds (2000-2010) - Thematic Articles, p. 41.

decision-making, which means that a judge cannot be punished for a legal opinion or conclusion reached in the decision-making process. However, a judge may be punished if it is proven that s/he committed a criminal offence, e.g. by ruling in favour of a person from whom he or she had taken a bribe (this is the crime of bribery).

14. As stated in the Venice Commission's *amicus curiae* Brief for the Constitutional Court of the Republic of Moldova on the criminal liability of judges (2017): "*A balance needs to be struck between immunity as a means to protect the judge against undue pressure and abuse from state powers or individuals (immunity), on the one hand, and the fact that a judge is not above the law (accountability), on the other.*"<sup>12</sup> The Venice Commission has also consistently pointed out that judges should not be granted *general immunity*, but *functional immunity* only because, in principle, a judge should only benefit from immunity in the exercise of his or her lawful functions.<sup>13</sup>

15. Nonetheless, it is important to separate a judge's criminal activity resulting in a court decision from the court decision itself, as a judge's criminal activity may consist only in *an act other than the expression of a legal opinion*. For instance, a judge should be punished for corruption if s/he accepts a bribe to decide a case in a certain way (i.e. receiving something of value in exchange for an official act, be it a judgment or judicial decision or other). In this situation, the judge is not punished for his or her legal opinion expressed in the form of a judicial decision, but for having accepted a bribe and then made a judicial decision in compliance with that bribe. These situations, however, should not be seen as exceptions to the rule that there should be no inference of a judge's criminal liability for his or her decision-making process because, in these situations, the judge is punished for the crime committed (accepting a bribe/bribery) and not for the decision rendered (legal opinion expressed).

16. If functional immunity (or non-liability immunity) is applied correctly, it should achieve the desired result of protecting the independence of judges from the negative effect of criminal or administrative sanctions for expressing a legal opinion or rendering a decision on a particular matter (e.g. an opponent of the government, etc.).

17. Other situations might give rise to a judge's disciplinary or civil liability, for instance where the judge is responsible for unjustified delays in the proceedings, which entail the responsibility of the state towards the wronged person. In that case, the state has the possibility of instituting a recourse action against the judge who has caused the unjustified delays ("regression" damages). However, the grounds for the award of compensatory damages should be considered with great caution.<sup>14</sup>

18. Last, but not least, the protection of Constitutional Court judges against the criminalisation of the judicial decision-making process is particularly important because these judges often render decisions in politically sensitive cases. If this type of protection were not available to them and, for example, a political change were to occur in a given country, Constitutional Court judges in that country could easily find themselves criminally liable for their decisions if the newly established government were to disagree with them or if a legislative measure of importance for the new government were to be challenged before the Constitutional Court. If this type of liability for Constitutional Court judges is admitted, it could easily be used to pressurise them in their decision-making process by threatening to criminalise it.

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<sup>12</sup>Republic of Moldova - *amicus curiae* Brief for the Constitutional Court on the criminal liability of judges ([CDL-AD\(2017\)002](#)), paragraph 17. See also *Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia* ([CDL-AD\(2017\)011](#)), paragraph 36-37.

<sup>13</sup> *Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia* ([CDL-AD\(2017\)011](#)), paragraphs 36-37.

<sup>14</sup> *Opinion on Draft amendments to Laws on the Judiciary of Serbia* ([CDL-AD\(2013\)005](#)), paragraphs 18-20.



19. These rules should contribute to the Constitutional Court being seen as an independent and trusted final arbiter in constitutional matters. To that end, the Venice Commission has stated, in a previous opinion,<sup>15</sup> that it is essential in a state governed by the rule of law for constitutional bodies to render decisions within the parameters of their legal authority and responsibility. If this is not done, this can seriously undermine the robustness of the state institutions of the country in line with the Constitution and could irreparably compromise their democratic functioning.<sup>16</sup> It is therefore essential that a Constitutional Court decide within the parameters of its legal authority and responsibility. A Constitutional Court should therefore observe the appropriate rules in the rules of procedure, guarantee fundamental human rights, and respect the separation of powers, democracy and the rule of law. The limits of the powers and responsibilities of a Constitutional Court are laid down in the Constitution itself.

#### IV. Assessment

##### A. Functional immunity of Constitutional Court judges

20. The first question by the Constitutional Court is whether the independence of Constitutional Court judges would still be guaranteed in a state governed by the rule of law, if these judges could be held liable (i.e. criminal liability, administrative liability etc.) for their votes, opinions or for actions taken during the exercise of their functions.

21. As the judiciary, including a Constitutional Court, has the task of deciding matters before it impartially, on the basis of facts and in accordance with the law, the judiciary must not be subject to any improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. The principle of the independence of the judiciary entitles, and requires, the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.<sup>17</sup> Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law.<sup>18</sup>

22. An efficient, independent and impartial judiciary is undoubtedly one of the cornerstones for ensuring the rule of law and the democratic principles of society.<sup>19</sup> As reiterated in previous opinions and reports of the Venice Commission,<sup>20</sup> the independence of the judiciary is an issue that affects all countries, whatever their systems, and is essential for any democratic system and the respect for the separation of powers. It is a fundamental guarantee of the rule of law, democracy and the respect for human rights. It ensures that justice can be done and seen to be done without undue interference by any other branch of power, other bodies inside the judiciary, other judges or by any other actors.<sup>21</sup>

23. An independent judiciary also means that judges are accountable for their work.<sup>22</sup> In this sense, when the key tasks of judges that have been specified in Opinion No. 17 (2014) of the

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<sup>15</sup> Republic of Moldova - *Opinion on the constitutional situation with particular reference to the possibility of dissolving parliament* (CDL-AD(2019)012), paragraph 56.

<sup>16</sup> Ibid.

<sup>17</sup> *Report adopted at the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders* held in Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

<sup>18</sup> *Opinion on Draft amendments to Laws on the Judiciary of Serbia* (CDL-AD(2013)005), paragraph 21.

<sup>19</sup> *Report on the follow-up action by member States to Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities* (CDCJ(2016)2 final), paragraph 1.

<sup>20</sup> See notably the *Opinion on legal certainty and the independence of the judiciary in Bosnia and Herzegovina* (CDL-AD(2012)014), paragraphs 7, 74-81 and the *Report on the Independence of the Judicial System Part I: The Independence of Judges* (CDL-AD(2010)004).

<sup>21</sup> *Opinion on legal certainty and the independence of the judiciary in Bosnia and Herzegovina* (CDL-AD(2012)014), paragraph 74.

<sup>22</sup> *Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia* (CDL-AD(2017)011), paragraph 36.

CCJE are examined, it is clear that they carry out essential duties in every democratic society that respects the rule of law. Namely, judges must protect the rights and freedoms of all persons equally. Judges must take steps to provide efficient and affordable dispute resolution and decide cases in a timely manner, independently and must be bound only by the law. They must give cogent reasons for their decisions and must write in a clear and comprehensible manner.<sup>23</sup>

24. If judicial power is abused and misused, it cannot serve its purpose. Judges who, in the exercise of their functions, commit a crime such as accepting a bribe, cannot claim immunity from criminal proceedings.<sup>24</sup> Furthermore, functional immunity does not exclude criminal prosecution in cases not related to adjudication, because criminal offences may be committed by anyone, including Constitutional Court judges.<sup>25</sup> Judges – like any other person – should be punished for the crimes they have committed, for instance causing a traffic accident due to drink driving.<sup>26</sup>

25. As concerns liability for adjudication itself, as consistently stated in the *amicus curiae* Brief for the Constitutional Court of the Republic of Moldova on the criminal liability of judges (2017) and other Venice Commission opinions on the issue,<sup>27</sup> where judges are subject to criminal liability for the interpretation of a law, the ascertainment of facts or the assessment of evidence, such liability should only be possible in cases of malice and, arguably, gross negligence; judges should not be held liable for judicial mistakes that do not involve bad faith and for differences in the interpretation of the law. This also means that only failures performed intentionally, with deliberate abuse or, arguably, with repeated, serious or gross negligence should give rise to disciplinary actions and penalties, criminal responsibility or civil liability.<sup>28</sup> Therefore, the mere interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil, criminal or disciplinary liability, even in cases of ordinary negligence.<sup>29</sup>

26. Nevertheless, it should also be noted that, although European standards allow for judges to be held criminally liable in the exercise of their judicial functions, the threshold is very high as explained above, and this is reiterated in the explanatory memorandum to Recommendation CM/Rec(2010/12): “*When exercising judicial functions, judges should be held criminally liable only if the fault committed was clearly intentional.*”<sup>30</sup>

27. The above has been formulated for ordinary judges, however, there is no reason why this should not apply to Constitutional Court judges, taking into account the general principles of the law, the principles specified in international documents and the overriding principles emerging

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<sup>23</sup> [Opinion no. 17 \(2014\) on the evaluation of judges' work, the quality of justice and respect for judicial independence](#), paragraph 4.

<sup>24</sup> [Recommendation CM/Rec\(2010\)12 on judges: independence, efficiency and responsibilities](#), paragraph 3; [CCJE Opinion No. 3 on ethics and liability of judges](#), paragraph 52; in the *Report on the independence of the judicial system, Part I (CDL-AD(2010)004)*, paragraph 61, bribery is qualified as “intentional” ruling contrary to the law. This may often be the case, but not always, for instance if a judge acts intentionally in receiving a bribe, but then does not deliberately deliver a ruling contrary to the law.

<sup>25</sup> See Report on the independence of the judicial system, Part I ([CDL-AD\(2010\)004](#)), paragraph 61.

<sup>26</sup> See Republic of Moldova - *amicus curiae* Brief for the Constitutional Court on the immunity of judges ([CDL-AD\(2013\)008](#)), paragraph 22.

<sup>27</sup> Republic of Moldova - *amicus curiae* Brief for the Constitutional Court on the criminal liability of judges ([CDL-AD\(2017\)002](#)); *Joint Opinion on the draft Law on disciplinary liability of Judges of the Republic of Moldova (CDL-AD(2014)006)*; Republic of Moldova - *amicus curiae* Brief for the Constitutional Court on the immunity of judges for the Constitutional Court ([CDL-AD\(2013\)008](#)).

<sup>28</sup> Republic of Moldova - *amicus curiae* Brief for the Constitutional Court on the criminal liability of judges ([CDL-AD\(2017\)002](#)), paragraph 53. See also The CCJE also concluded in *Opinion No. 3 (2002) on criminal liability of judges*, which also covers the principles and procedures governing criminal, civil and disciplinary liability of judges, criminal liability should not be imposed on judges for unintentional failings in the exercise of their function.

<sup>29</sup> Republic of Moldova - *amicus curiae* Brief for the Constitutional Court on the criminal liability of judges ([CDL-AD\(2017\)002](#)), paragraphs, 9-21, 27.

<sup>30</sup> Republic of Moldova - *amicus curiae* Brief for the Constitutional Court on the criminal liability of judges ([CDL-AD\(2017\)002](#)), paragraph 19.



from previous Venice Commission opinions, CCJE opinions and established European standards.

28. While the basic requirements for judicial independence are the same for both ordinary and Constitutional Court judges, the latter must be protected from any attempt of political influence due to their position, which is particularly exposed to criticism and pressure from other state powers. Therefore, Constitutional Court judges need strong guarantees for their independence, as stated in the Venice Commission's Opinion on the Draft Laws amending and supplementing (1) the Law on Constitutional Proceedings and (2) the Law on the Constitutional Court of Kyrgyzstan (2008).<sup>31</sup> To this end, failures performed intentionally by Constitutional Court judges in the exercise of their functions, with deliberate abuse may give rise to disciplinary actions and should only give rise to penalties, criminal responsibility or civil liability in exceptional cases of extreme deviation from principles and standards of the rule of law and constitutionality.

29. As stated in the Report on the follow-up action by member States to Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities,<sup>32</sup> the replies to the relevant questionnaire reveal that many member States of the Council of Europe provide for the criminal liability of judges' interpretation of the law, assessment of facts or weighing of evidence when malice can be established. Thus, criminal liability of ordinary and/or Constitutional Court judges will be compatible with the principle of the independence of judges provided that it is in accordance with the standards set out above.

30. In the Republic of Moldova, these standards are reflected in the legal provisions provided to the Venice Commission (see paragraph 2 above), namely Article 307 of the Criminal Code, Articles 13, 14 and 16 of Law No. 317-XIII on the Constitutional Court and Articles 8-10 of the Constitutional Jurisdiction Code. It should be noted that Article 13 of Law No. 317-XIII on the Constitutional Court<sup>33</sup> seems to go even further, as it stipulates that judges of the Constitutional Court cannot be held legally liable for their votes or opinions expressed while performing their duties. This Article could be interpreted in a manner that excludes any liability of Constitutional Court judges for votes or opinions expressed in the performance of their duties. The judge, of course, remains liable for any crime committed during the decision-making process, for instance, for taking a bribe (material or political) to decide a matter in a certain way. In such cases, the Constitutional Court judge could be punished for an ordinary crime in combination with Article 307 of the Criminal Code. It is for the Constitutional Court of Moldova to determine the scope of Article 13(2) of Law No. 317-XIII. Should Article 13(2) be interpreted as excluding any liability, then Article 16(1) and (3)<sup>34</sup> of Law No. 317-XIII would not apply to offences under Article 307 of the Criminal Code (*Issuance by a judge of a sentence, decision, ruling or judgment contrary to the law*), because criminal proceedings against Constitutional Court judges could under no circumstances, be initiated on these grounds.

31. Article 16(1) of Law No. 317-XIII provides that prior consent of the Constitutional Court is required in order to detain, arrest or search one of its judges except in case of flagrant offences and to send a judge for trial for criminal or minor offences. The request for consent to prosecute, according to Article 16 of Law No. 317-XIII, thus provides for inviolability (procedural immunity). Article 16(3) of this Law provides that: "*The initiation of criminal*

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<sup>31</sup> *Opinion on the Draft Laws amending and supplementing (1) the Law on Constitutional Proceedings and (2) the Law on the Constitutional Court of Kyrgyzstan (CDL-AD(2008)029)*, paragraphs 14, 48.

<sup>32</sup> [CDCJ\(2016\)2 final](#).

<sup>33</sup> *Article 13 Independence: 1. Judges of the Court are independent in performing their duties and they obey only to the Constitution; 2. Judges of the Court cannot be held legally liable for their votes or opinions expressed while performing their duties.*

<sup>34</sup> *Article 16 Immunity: 1. The judge of the Constitutional Court cannot be detained, arrested or searched, except for the cases of flagrant offences, nor can he/she be sent to trial for criminal or minor offences without the prior consent of the Constitutional Court; 3. The initiation of criminal proceedings and requests for consent to prosecute falls under the competence of the Prosecutor General.*

*proceedings and requests for consent to prosecute falls under the competence of the Prosecutor General*” – which means that it is only the Prosecutor General, not lower level prosecutors, who can initiate proceedings and request the lifting of immunity (inviolability) from the Constitutional Court.

32. As far as judges of the Constitutional Court cannot be held legally liable for their votes or opinions expressed while performing their duties, the initiation of criminal proceedings as well as detention and arrest are excluded from the outset. However, it is up to the Constitutional Court to lift this procedural inviolability whenever the act committed is not covered by substantial functional immunity, i.e. the expression of the legal opinion of the judge, unless there is a case of obvious abuse by the prosecution.

33. In conclusion, Constitutional Court judges should be protected by functional immunity, which does not cover ordinary crimes (e.g. bribery; causing a traffic accident by drink driving etc.). Constitutional Court judges should not be held liable for judicial mistakes that do not involve bad faith and for differences in the interpretation of the law. However, failures performed intentionally by Constitutional Court judges in the exercise of their functions, with deliberate abuse may give rise to disciplinary actions and should only give rise to penalties, criminal responsibility or civil liability in exceptional cases of extreme deviation from principles and standards of the rule of law and constitutionality. Although ordinary crimes should be dealt with by the relevant competent court, only the Constitutional Court should decide on the disciplinary liability of its judges in the exercise of their duties. Procedurally, the Constitutional Court judges are protected by inviolability, i.e. prosecution must seek the agreement of the Constitutional Court before it can institute criminal proceedings, but the Constitutional Court is obliged to lift this inviolability unless the case is related to the expression of the legal opinion or there is an obvious abuse on the side of the prosecution.

#### **B. Functional immunity of Constitutional Court judges following the end of their term of office**

34. The second question by the Constitutional Court is whether Constitutional Court judges benefit from immunity for their votes and opinions expressed during the exercise of their functions after the end of their term of office.

35. It follows from the introductory remarks and the answer provided to the first question above that where judges, including Constitutional Court judges, are granted functional immunity (and not general immunity) – they will continue, after the end of their term of office, to benefit from immunity for their votes and opinions expressed while they were exercising their judicial functions. This is necessary to allow the judge to make his or her reasoned decision without fear of prosecution after the end of his or her term of office.

36. Functional immunity is tied to the judge's activity as a judge and is protected. The beneficiary is not the person him or herself, but the independence of the court. This is an important requirement that derives from the very nature and quality of judicial independence, impartiality and transparency.

37. In the Republic of Moldova, this is reflected in Article 8.3 of the Law No. 502-XIII on Constitutional Jurisdiction Code, which sets out that “3. *The judges of the Constitutional Court shall not be held responsible for their votes and opinions expressed in the exercise of their office, as well as after the cessation of their mandates.*”

38. In conclusion, functional immunity for activities carried out by Constitutional Court judges in the exercise of their judicial functions during their term of office continues to apply after their term of office has ended. As for the period during the exercise of the mandate, this does not apply to

ordinary crimes that were committed during the term of office of a Constitutional Court judge, which are not covered by functional immunity in the first place.

### **C. Power to review decisions of the Constitutional Court**

#### **1. Competent body**

39. The third and final question by the Constitutional Court is which public authority could be attributed with the power to ascertain the constitutionality or legality of an act of the Constitutional Court. This question seems to be about which body is competent to decide whether a Constitutional Court judge – in the exercise of his or her judicial functions – intentionally acted contrary to the Constitution resulting in criminal proceedings under Article 307 of the Criminal Code (*Issuance by a judge of a sentence, decision, ruling or judgment contrary to the law*)<sup>35</sup>.

40. There seem to be three possibilities in reply to this question:

41. *The first*, as stated in reply to the second question above, is if a Constitutional Court judge may be held liable under Article 307 of the Criminal Code (which is for the Constitutional Court to decide, taking into account Article 13 of Law No. 317-XIII) the necessity to ascertain the constitutionality or legality of an act by the Constitutional Court already occurs for the prosecution. This results from the fact that the prosecutor and the (ordinary) criminal court must decide whether a ruling is obviously contrary to the law (constitution). However, in this case, failures performed intentionally by Constitutional Court judges in the exercise of their functions, with deliberate abuse, should only give rise to penalties, criminal responsibility or civil liability in exceptional cases of extreme deviation from principles and standards of the rule of law and constitutionality (which then may be assessed by ordinary courts).

42. *The second possibility* is, if Article 13(2) of Law No. 317-XIII is interpreted as excluding any liability of Constitutional Court judges for votes or opinions expressed while performing their duties. In this case, Article 16(1) and (3) of Law No. 317-XIII do not apply to offences under Article 307 of the Criminal Code (*Issuance by a judge of a sentence, decision, ruling or judgment contrary to the law*), because criminal proceedings against Constitutional Court judges may, under no circumstances, be initiated on these grounds (with or without the consent of the Constitutional Court). If that is the case, there is no need to ascertain the constitutionality or legality of an act of the Constitutional Court, except in cases of bribe or similar offences.

43. *The third possibility* is if the Constitutional Court decides that Article 307 of the Criminal Code is applicable in combination with another crime (e.g. taking a bribe). In this case, there could be a presumption of illegality in the Constitutional Court judge's decision-making process. The Constitutional Court would be obliged to lift the inviolability (procedural immunity) of the judge concerned, unless the Court reaches the conclusion that prosecution against the Constitutional Court judge would amount to abuse.

44. It will be for the Constitutional Court to decide which of these possibilities may be applicable, in accordance with the Moldovan Constitution.

#### **2. Fate of the 'tainted' judgment of the Constitutional Court**

45. Since the decision of a Constitutional Court is regarded as final and respecting its decision is in conformity with the constitutional order and in the interest of legal certainty, reviewing a

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<sup>35</sup> This type of provision also exists in other member States of the Venice Commission: it existed notably in Georgia until 2007 and was repealed (Article 336 § 1 of the *Criminal Code* (Delivery of an unlawful judgment or other court decision) and in Ukraine (Article 375 of the *Criminal Code* (Delivery of a knowingly unfair sentence, judgment, ruling or order by a judge (or judges))).

judgment by a Constitutional Court must be an exception. This is where a separation needs to be drawn between the judge's criminal activity (e.g. there could be a video recording of the judge accepting a bribe and promising to take a decision in a given way) from the adopted court decision itself. The judge should be punished for the crime s/he has committed. Functional immunity does not cover ordinary crimes and hence the judge should face criminal responsibility.

46. The question then is what occurs with the judgment itself if a legal opinion or judgment of the Constitutional Court is tainted by a judge having accepted a bribe – can this legal opinion or judgment be revised? A distinction needs to be made between such revision of a judgment in a concrete case from a general change of the case-law, which is not relevant for this *amicus curiae* brief.

47. In general, a judgment enters into legal force and becomes binding on the court itself, which cannot start a new procedure. In some situations, a provision for the reopening of a judgment may be required. This requirement often exists, for instance, for member States of the Council of Europe in response to a judgment by the European Court of Human Rights, which finds that the member State has breached its obligations under the European Convention on Human Rights (ECHR) and the Constitutional Court has rendered a decision contributing to this breach.<sup>36</sup>

48. There are, generally, no legal provisions that allow for the reopening or reviewing of a judgment specifically on the basis of offences (e.g. bribery) committed by a Constitutional Court judge in his or her function leading to a tainted judgment. However, proof that a bribe has been accepted by a Constitutional Court judge (criminal conviction) could provide a new element to reopen a judgment under the applicable general procedural rules. Constitutional court laws often refer to general (mostly civil) procedural codes to be applicable in constitutional proceeding subsidiarily.<sup>37</sup>

49. In summary, it is important that only the Constitutional Court itself be able to revise its judgments if there is proof of a criminal act in adopting it (criminal conviction of a judge). No other public authority can be authorised to do so. If a public authority were to be given the power to review the constitutionality or legality of an act of a Constitutional Court, especially regarding the investigation of Constitutional Court judges for offences carried out in their functions (not for ordinary crimes), the independence of the Constitutional Court would be compromised. International bodies may assess whether a decision of a Constitutional Court of a particular state is in line with the international obligations of that state, but their conclusions cannot directly alter the Constitutional Court's decision or lead to the criminalisation of judges who have taken that decision. Only if these international bodies impose the obligation on a state to compensate an individual for any harm caused to him or her by a decision of the Constitutional Court, should it be possible to infer the obligation of "regression damages" on judges.<sup>38</sup> However, such a procedure would only be possible if it has a legal basis in the country concerned, i.e. if there is legislation that clearly provides for this possibility. For this reason, an internal reexamination procedure of the Constitutional Court would be needed rather than a review procedure by other public authorities such as Parliament or the Supreme Court (which already deals with minor and administrative offences by Constitutional Court judges (Article 16(2) of Law No. 317-XIII)). When

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<sup>36</sup> Bosnia and Herzegovina (Article 68(2) of the *Rules of the Constitutional Court*); Czech Republic (*Act on the Constitutional Court*); Turkey (Article 67(2) of Law 6216 on establishment and rules of procedure of the Constitutional Court). The member States of the Council of Europe have the obligation, under Article 46 ECHR, to abide by the final judgment of the European Court of Human Rights in cases to which they are parties. The Committee of Ministers of the Council of Europe then supervises its execution and, in *Recommendation No. R (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights*, the Committee of Ministers has encouraged member States to, *inter alia*, examine their national legal systems with a view to ensuring that there are adequate possibilities of the re-examination of a case, including reopening proceedings, in instances where the European Court of Human Rights has found a violation of the ECHR ([https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805e2f06](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2f06)).

<sup>37</sup> Austria's *Constitutional Court Act* of 1953, § 35.

<sup>38</sup> See *Opinion on Draft amendments to Laws on the Judiciary of Serbia* (CDL-AD(2013)005), paragraphs 18-20.

there is no such possibility, and if this is warranted in substance, a constitutional amendment may be necessary to overcome a Constitutional Court judgment that was adopted involving a criminal act of one of the court's judges.

50. In conclusion, it is for the Constitutional Court to decide whether Law No. 317-XIII on the Constitutional Court requires the Court's approval for the initiation of criminal proceedings against a judge and which conditions must be met to give its consent (see above). However, as concerns Constitutional Court decisions, they are final and reviewing them should be an exception and carried out by the Constitutional Court itself. To give this task to a public authority would compromise the independence of the Constitutional Court.

## V. Conclusion

51. In an *amicus curiae* brief, the Venice Commission provides the requesting Constitutional Court with European standards and practice on the questions raised in the request so as to facilitate the Court's consideration of the issue(s) at hand. It is, however, for the Constitutional Court to determine the final interpretation of national laws and the Constitution of the country concerned.

52. The three questions addressed to the Venice Commission for this *amicus curiae* brief by the Constitutional Court of the Republic of Moldova with respect to Article 137 of the Constitution of the Republic of Moldova, are:

- a) *“Is the independence of the constitutional judges guaranteed in a state governed by the rule of law, in the event of holding them liable (i.e. criminal liability, administrative liability etc.) for their votes and opinions and for their actions taken in the exercise of their function?”*

53. Constitutional Court judges should only be protected by functional immunity, which does not cover ordinary crimes (e.g. bribery, causing a traffic accident by careless driving when under the influence of drink). Judges should not be held liable for judicial mistakes that do not involve bad faith and for differences in the interpretation of the law.

54. However, for Constitutional Court judges who, unlike ordinary judges, deal with fundamental constitutional questions and politically sensitive issues, failures performed intentionally by Constitutional Court judges in the exercise of their functions, with deliberate abuse may give rise to disciplinary actions and should only give rise to penalties, criminal responsibility or civil liability in exceptional cases of extreme deviation from principles and standards of the rule of law and constitutionality.

55. Although ordinary crimes should be dealt with by the relevant competent court, only the Constitutional Court should decide on the disciplinary liability of its judges in the exercise of their judicial functions.

- b) *Do the constitutional judges benefit also from the immunity for their votes and opinions expressed in the exercise of their function after the termination of the mandate?*

56. Functional immunity for activities carried out by Constitutional Court judges in the exercise of their judicial functions during their term of office continues to apply to these activities after the judge's term of office has ended.

57. This does not apply, however, to ordinary crimes that were committed during the term of office of a Constitutional Court judge, which are not covered by functional immunity.

- c) *What would be the public authority with the power to ascertain the constitutionality/legality of an act of the Constitutional Court, since the constitutional judges conform themselves only to the Constitution, and their acts are delivered in the name of the Republic of Moldova and are final?"*

58. Where a Constitutional Court judge has committed a crime, it is for the Constitutional Court to decide whether Law No. 317-XIII on the Constitutional Court requires the Court's approval for the initiation of criminal proceedings against a judge and which conditions must be met to give its consent.

59. As concerns Constitutional Court decisions or judgments, these are final and reviewing them should be an exception and carried out by the Constitutional Court itself. To give this task to any other public authority would compromise the independence of the Constitutional Court. An internal reexamination (reopening) procedure of the Constitutional Court would be needed rather than a review procedure by other public authorities such as Parliament or the Supreme Court (which already deals with minor and administrative offences by Constitutional Court judges (Article 16(2) of Law No. 317-XIII). When there is no such possibility, and if this is warranted in substance, a constitutional amendment may be necessary to overcome a Constitutional Court judgment that was adopted involving a criminal act of one of the Court's judges.

60. The Venice Commission remains at the disposal of the Constitutional Court or other authorities of the Republic of Moldova for any further assistance they may need.

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