Strasbourg, 9 July 2002
Opinion no. 210/2002

CDL-AD (2002) 14
Or. English

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINIONS ON THE DRAFT LAW ON MODIFICATION AND AMENDMENT TO THE CONSTITUTION OF THE REPUBLIC OF MOLDOVA

by
Mr J. HAMILTON (Substitute Member, Ireland)
Mr L. LOPEZ GUERRA (Expert, Spain)

endorsed by the Venice Commission
at its 51st Plenary Session
(Venice, 5-6 July 2002)

Opinion by Mr J. Hamilton

1. The opinion of the Venice Commission has been sought in relation to a draft law on modification and amendment to the Constitution of the Republic of Moldova in a letter from the Vice-President of the Parliament of Moldova to the Secretary of the Commission dated 24 May 2002.

2. The proposed amendments relate to parliamentary immunity, the organization of courts of law, the status of and removal of judges, the composition and powers of the Higher Magistrates Council, and the status and powers of the ombudsman.

Parliamentary Immunity

3. The existing provisions concerning immunity for members of Parliament are contained in Articles 70 and 71 of the Constitution which are as follows:

"**Article 70**
Incompatibilities and Immunities

(1) The quality and rights ascribed to members of Parliament are incompatible with the holding of another remunerated position.
(2) Other possible incompatibilities shall be established by organic law.
(3) Except in cases of flagrant infringement of law members of Parliament may not be detained for questioning, put under arrest, searched or put on trial without Parliament's assent, after prior hearing of the member in question.

Article 71
Independence of Opinion

Members of Parliament may not be prosecuted or tried by law for their votes or opinions expressed in the exercise of their mandate."

4. The proposed amendments would delete the words "and Immunities" from the title of Article 70, would delete paragraph (3) of Article 70, and would insert the word "political" before "opinions" in Article 71.

5. The effect of these changes would be to delete the constitutional guarantee of parliamentary immunity under which members of Parliament may not be detained for questioning, put under arrest, searched or put on trial without the assent of Parliament after first hearing the member of Parliament.

6. The background to this proposal would appear to be the current situation of political crisis in Moldova which has been described in some detail in the Council of Europe's Report of 23 April 2002 on the functioning of democratic institutions in Moldova (Doc. 9418). This crisis has involved "almost daily" rallies in the capital, Chisinau, organised by the Christian Democrat People's Party, which are "vigorously anti-communist and nationalist in tone" and are considered by the authorities to be illegal, contrary to public order and a threat to public safety. This has led to a Government response which the Council of Europe's rapporteurs considered "manifestly disproportionate" and which

included the suspension of the CDPP for one month in January 2002. The Parliament has on two separate occasions voted to lift the parliamentary immunity of a number of deputies from the CDPP.

7. The Venice Commission, in its opinion of 31 March 2000 on the Constitutional Referendum in Ukraine, emphasized the importance of the principle of parliamentary immunity which that referendum proposal had sought to limit. The Commission described parliamentary immunity as "an important safeguard for the independence of Parliament. Parliamentary immunity is an achievement of the 19th century, and the independence it is designed to safeguard still is pertinent, particularly in a new democracy."

8. These observations hold equally true in respect of Moldova. If the present proposal is accepted it will represent a serious diminution in the independence of Parliament and its members. Furthermore, the existing constitutional provision does not confer an absolute immunity, but one which is qualified and may be lifted, and which indeed has been lifted on a number of occasions. Nevertheless, the necessity to seek parliamentary approval to lift immunity, even in a situation where the ruling Communist Party has an overall majority, would appear capable of providing some safeguard for the independence of members of Parliament, since, according to the Council of Europe's report, the Parliament, when asked in March 2002 to lift the immunity of eight opposition members, agreed only to do so in the case of two, found the evidence insufficient to lift immunity in three other cases, and deferred consideration of the remaining three. (Doc. 9418, paras 35 – 41). It further appears from the report that the current arrangements are to some extent subject to supervision and control by the courts. It remains to be seen whether there would be any continuing role for the courts if the amendment which is now proposed were accepted.

9. It is not clear what is the intention behind the proposal to add the word "political" in Article 71. The existing provision seems intended to safeguard the right to freedom of expression within Parliament – the use of the term "expressed in the exercise of their mandate" would appear to protect parliamentary utterances as distinct from what is said outside parliament. It is a fundamental attribute of the independence of Parliament that members of Parliament should not be answerable to any outside body, even a court of law, for what is said there. For this reason, I think that any attempt to qualify a member's freedom to express opinions in Parliament or to subject it to possible criminal sanctions would be a step backward from democratic principles.

The organization of courts of law

10. The existing Article 115 of the Constitution deals with courts of law and provides as follows:-

> (1) Justice shall be administered by the Supreme Court of Justice, the Court of Appeal, by tribunals and the courts of law.
> (2) To hear certain categories of cases special courts may be set up under the law.
> (3) It is forbidden to set up courts of exception.
> (4) The structure of the courts of law, their areas of competence and the corresponding judicial procedures shall be established by organic law.

11. It is proposed to replace paragraph (1) of Article 115 with the following:

> "Justice shall be administered by the Supreme Court of Justice and courts of law of different levels."

12. Constitutions vary considerably in the amount of detail they contain regarding the judicial system. It is, however, usual for a constitution to set out in general terms the structure and jurisdiction of at least the most important courts, leaving the detail to be filled in by legislation. Apart from the Constitutional Court, which is the subject of a separate chapter in the Constitution, Title V, the existing judicial system of Moldova has four levels of court, only two of which, the Supreme Court of Justice and the Court of Appeal, are referred to in the Constitution.

13. It is now intended to reduce the number of levels of court from four to three, through the abolition of the Court of Appeal, and the proposal is designed to facilitate this. Three levels of court seem appropriate in the circumstances of Moldova and I see no reason to object to such a reform. However, the text of Article 115 will then say very little about the actual organization of courts. The only court with a constitutional basis will be the Supreme Court of Justice. It would seem desirable, for example, that the Article could set out in general terms what the different levels of court should be and what sort of jurisdiction each would have, so that the system of courts in Moldova would have a constitutional basis.

The Status of and the Appointment and Removal of Judges

14. The existing provisions on the status of judges are in Article 116 of the Constitution which provides as follows:

> (1) Judges sitting in the courts of law are independent, impartial and irremovable under the law.
> (2) The judges of the courts of law are appointed by the President of the Republic of Moldova following the proposal submitted by the Higher Council of Magistrates. Judges who passed the judicature entry test are appointed in their position for an initial term of 5 years. On the expiry of the 5-year term the judges shall be appointed for a term of office that expires when they reach the age limit.
> (3) The President and the Judges of the High Court of Justice shall be appointed by the Parliament following a proposal submitted by the Higher Council of Magistrates. They must possess previous work experience in the courts of law of no less than 15 years.
> (4) Judges may be promoted or transferred at their own consent only.
> (5) Judges may be punished as provided for under the rule of law.
> (6) The office of judge is incompatible with holding any other public or private remunerated position, except in the area of teaching or scientific research.

15. It is proposed to replace paragraphs (2), (3) and (4) with the following provisions:

> (3) "Judges of the courts of law are appointed, advanced in position, transferred and removed by the Parliament of the Republic of Moldova according to the law, following the proposal submitted by the Higher Magistrates' Council.

(4) Age limit for judge activity is established by law.
(5) Chairmen and deputy chairmen of the courts of law are appointed by the Parliament at the Higher Magistrates' Council proposal, for four year term of office."

16. The effect of the proposed changes appears to be as follows:

(1) Appointment of judges will now be a matter for the Parliament rather than the President, but still following the proposal of the Higher Magistrates' Council. Since Moldova is a parliamentary rather than a presidential republic, it is not clear what difference this will mean in practice.
(2) The Parliament will now have a role in the advancement in position, transfer and removal of judges. It is not, however, clear from the text what exactly that role is. The provision of Article 116 (1) whereby judges are "irremovable under the law" remains, so on the face of it there appears to be a contradiction.
(3) The respective roles of the Parliament and the Higher Magistrates Council are not clear from the constitutional text. Presumably this will be dealt with in an organic law. The council according to Article 123, "performs the appointments, transfer, remove, promotion of judges, as well as the disciplinary actions against them". Does this mean the Parliament's role in these matters is purely formal or can it disagree with or overrule the Council? These matters should be regulated in the Constitution.
(4) The provisions relating to the necessary qualification of High Court judges are being removed. This will now be regulated by law. Again, I think it would be preferable that this remain a matter of constitutional law.
(5) The provision that judges may be promoted or transferred at their own consent only is being removed. The existing provision is a safeguard for judicial independence and its removal would be a retrograde step.

17. On the whole, the proposed amendments do not clarify the uncertainties in the existing text, which are many. The tendency of the amendments again represents a shift away from regulation in the Constitution towards regulation by law. It would be preferable that matters of such fundamental importance be clearly provided for in the Constitution and be subject to the control of the Constitutional Court.

The Higher Magistrates' Council

18. Articles 122 and 123 at present provide as follows:

"**Article 122**
Composition

(1) The Higher Magistrates' Council is composed of 11 magistrates whose mandate is valid for 5 years.
(2) The following belong by the right to the Higher Magistrates' Court (sic) the Minister of Justice, the President of the Supreme Court of Justice, the President of the Court of Appeal, the President of the Court of Business Audit, the Prosecutor General.

(3) Furthermore, the reunited colleges of the Supreme Court of Justice select by secret ballot three more magistrates, and another three are selected by Parliament from amongst accredited university professors.

Article 123
Powers

The Higher Magistrates' Council in accordance with regulations established in the organization of the judiciary performs the appointments, transfers, promotions of judges, as well as the disciplinary actions against them."

19. The proposal would replace the two Articles with the following text:

"**Article 122**
Composition

(1) The Higher Magistrates' Council is composed of magistrates and titular professors whose mandate is valid for 4 years.
(2) The following belongs by right to the Higher Magistrates' Council: the Chairman of the Supreme Court of Justice, the Minister of Justice and the Prosecutor General.

Article 123
Powers

(1) The Higher Magistrates' Council performs the appointments, transfer, remove, promotion of judges, as well as the disciplinary actions against them.
(2) The organization and functioning of the Higher Magistrates' Council is established by law."

20. The Higher Magistrates' Council, as already seen in the discussion above concerning the status and appointment and removal of judges, is a key institution, even though the Constitution does not specify as clearly as it might its precise powers vis-à-vis other organs of government.

21. The changes proposed appear to have the following effect:

(1) The total number of members of Council will no longer be specified in the Constitution.
(2) The Minister for Justice, President of the Supreme Court and Prosecutor General will continue to belong *ex officio* to the Council. The President of the Court of Appeal and the President of the Court of Audit will cease to be *ex officio* members.
(3) The provision under which the judges themselves and the Parliament each elect three members is being abolished.
(4) The composition of the Council will in future be fixed by law. Apart from the three *ex officio* members, the Parliament will be free to provide for any method of appointment of the others, so long as they are magistrates and titular professors, and will be able to fix their numbers.

(5) At present, at least six of the 11 members either are judges of higher jurisdictions or are elected by senior judges. After the reorganization, it will be possible for the Parliament to secure a majority of the Council elected by themselves.
(6) The Council will now have functions referring to the removal of judges. There is no reference to removal in the existing Article 123. This provision appears to contradict Article 116 (1) which provides that judges are irremovable under the law.
(7) At present, the Council's powers are to be performed "in accordance with regulations established in the organization of the judiciary." Under the proposal, their organization and functioning will be "established by law", i.e., by a law made by the Parliament.
(8) An effect of shifting provisions out of the Constitution and leaving them to be dealt with by law is to deprive the Constitutional Court of jurisdiction over them.

22. It seems clear that the changes proposed in relation to the Higher Magistrates Council would represent a decisive shift away from control by the judiciary over its own affairs towards control by Parliament, and thereby constitute a potential threat to judicial independence of a serious nature.

Ombudsman

23. The final amendment proposed is to insert a provision relating to the Ombudsman as follows:-

"**Title V/1**
Ombudsman

Article 140/1
Status and Powers

(1) Ombudsman is an independent state institution that contributes to the observance of the basic human rights and freedoms.
(2) Ombudsman is elected by ballot based on the majority of votes cast by members.
(3) Ombudsman submits to the Parliament an annual report on his activity.
(4) The organization, areas of competence and manner of activity exerting of the ombudsman is established by the organic law".

24. The insertion of a provision in the Constitution dealing with the Ombudsman is to be welcomed. Unfortunately, the provision is silent as to the necessary qualifications for the post, his or her term of Office, removability or powers, leaving all these matters to be regulated by organic law.

* * *

Opinion by Mr L. Lopez Guerra

Art. 70

Content of the proposed reform:

a) From the article title the words " and immunities" are excluded;
b) Paragraph (3) is excluded

Comments:

The two amending clauses concerning the article title, as well as suppressing paragraph 3 have the same objective: the elimination of the immunities of members of Parliament, vis-à-vis the executive, as well as vis-à-vis the judicial powers.

As such, the proposed reform must be evaluated negatively. Parliamentary immunities are not personal privileges to benefit the members of Parliament, but rather guarantees of their independence and their ability to perform their representative functions, without encroachment or hindrance from other authorities of the State.

Certainly, immunities vis-à-vis the judicial powers may be, and have been subject to criticism, and they have been interpreted in a restrictive way by Constitutional Courts. However, in new democracies, in the initial stages of constitutional development, the presence of such immunities must be considered very advisable, in order to avoid undue interference by the judicial organs in parliamentary affairs, particularly when the independence of the judiciary is still being consolidated.

Immunities vis-à-vis the executive power, referring to detention, arrest, questioning, seizures, or any other interference of the police or security forces in the personal freedom of members of parliament (apart from cases of flagrancy) are a sine qua non requisite to guarantee the independence of the representatives of the people in the performance of their functions.

The proposed reform radically suppresses both types of parliamentary prerogatives, leaving the members of parliament potentially subject to undue prosecution before the courts as well as to harassment by executive agents. It goes against the established constitutional practice of parliamentary democracies, and it seems particularly dangerous in a new democracy.

Art. 71

Content of the proposed reform:

The inviolability of members of parliament for their expressions is reduced to "political" opinions

Comments

The result of the proposed reform would be to reduce the scope of the inviolability (immunity) of members of parliament concerning the opinions expressed in the exercise of their mandate. Such immunity would be reduced to opinions of a "political" nature.

It must be taken into account that parliamentary prerogatives are only justified as guarantees of the independence of the parliamentary representatives; as a result, these prerogatives must not be considered as personal, unlimited privileges. Concerning the expression of opinions by members of Parliament, the protection of their independence cannot cover those expressions unrelated to their representative functions, which could be considered as detrimental or harmful to public order or private interests (i.e., slander or personal insults directed at individuals). Accordingly, in some Constitutions, certain limits have been imposed on the immunity of members of parliament with regard to comments made during the exercise of their mandates (for instance, in art. 46.1 of the German Fundamental Law).

However, the terms of the proposed reform must be considered too vague, and thus conducive to legal uncertainty as to the actual extension of the freedom of expression of the members of parliament. The meaning of the term "political" is very imprecise; furthermore, very often, in order to perform their duties, members of parliament must refer to non-political issues. It would therefore be advisable to rephrase the amendment, providing members of parliament with immunity for those opinions expressed in the exercise of their mandates, which refer to the performance of the representatives' functions.

Art. 115

Content of the proposed reform

The mention to the Court of Appeals is suppressed.

Comments

No objections raised. It seems advisable to leave it to the legislator to determine the structure of the Court system. The new proposed version allows greater flexibility in designing the Courts' hierarchy.

Art. 116

Content of the proposed reform (general overview)

The appointment of judges, as well as of members of the High Court of Justice is transferred from the President of the Republic to Parliament (paragraphs 2 and 4).
Several constitutional mandates concerning appointment and guarantee of tenure of judges are suppressed (paragraph 2)
The term of the Chairpersons and deputy chairpersons of the courts of law is fixed at four years.

Comments

As long as the appointment of judges derives from a proposal submitted by the Higher Council of Magistrates, it seems of no particular importance whether the formal appointment belongs to Parliament or to the President of the Republic. (Although it may be said that

formal appointment by the President of the Republic confers an aura of impartiality lacking in the appointment by vote of the members of Parliament.)

However, stronger criticism must be directed to the proposed reforms contained in the new paragraphs 2 and 4.

According to new paragraph 2, several constitutional provisions guaranteeing the professional capacity and impartiality of judges have been eliminated. Concerning the professional ability of judges, among others, the need for an entry exam prior to the proposal by the Higher Council has been eliminated. In relation to the impartiality of judges a negative aspect of the proposed reform, which should be underscored, is the fact that the strongly guaranteed tenure of judges (appointment until the legal age limit) has been eliminated. Likewise the appointement of chairpersons and deputy chairpersons has been reduced to a four-year term. Additionally, the provision that "judges may be promoted or transferred at their own consent" has been deleted from the constitutional text.

Certainly, although the elimination from the Constitution of requisites for determining the professional capacity of judges (initial exam, initial appointment for a period of five years, the requisite of 15 years of experience to be appointed judge of the High Court) will undoubtedly have a negative effect on the quality of justice, it cannot be considered as contrary *per se* to the principles of the rule of law. In contrast, the elimination of the guarantees of independence of the judiciary related to tenure and irremovability, such as they are now present in the Constitution of Moldova, as well as in most of the European Constitutions, must be considered as a serious threat to the rule of law. Tenure and irremovability of judges are, and must be, commonly considered as the ultimate guarantees of the independence of the Courts, preventing the other powers of the State from removing or transferring (or threatening to do so) those judges which are considered hostile or who refuse to yield external pressure or instructions with regard to concerning cases under their jurisdiction.

Art. 122

Content of the proposed reform

The former three paragraphs of the article are reduced to two. The constitutional reference to the number of members of the Higher Magistrates Council has been eliminated. The mandate of the members of the Higher Magistrates Council has been reduced from five to four years. The constitutional reference to the election of the members of the Council by judicial and parliamentary authorities has been eliminated. The members of the Council by right have been reduced to the Minister of Justice, the General Prosecutor and the Chairman of the Supreme Court.

Comments

Two aspects of the proposed reform must be evaluated negatively:

a) The elimination of any reference in the Constitution to the number of members of the Council and to the way in which they are selected means the legislator will free to choose any system of selection. According to the present constitutional regulation,

three members are elected by the Supreme Court, and three by Parliament; of the remaining five members, three are the Presidents of the High Courts (Supreme Court, Court of Appeals and Court of Business Audit) plus the Minister of Justice and the General Prosecutor. In the new proposed version, the composition of the Council would be open to the discretion of Parliament, even one allowing for the possibility of influencing the Council, on the part of social or political powers. Furthermore, the lack of constitutional constraints would mean that the parliamentary majority could change the system of selection at will at any time.

b) In other respects, the reduction of the number of *ex officio* judicial members of the Council, together with the "deconstitutionalisation" of this organ described above, contributes to a negative evaluation of the proposal, since it reduces the Council's appearance of impartiality.

Art. 123

The proposed reform of article 123 does not present any special problem from the point of view of respect for the rule of law. In any case, the introduction of a new explicit power of the Council, the power to remove judges, which is not expressly included in the present text of the Constitution, should be underscored. This is not a complete innovation, however, since this power could probably be logically derived from the now existing powers of appointment and disciplinary action. However, the condition for the removal of judges as exception from Article 116.1 should be set forth explicitely in the text of the Constitution.

Art. 140

The introduction of the Ombudsman, not previously contemplated in the Constitution, must be considered as a positive part of the proposed constitutional reform.