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(VENICE COMMISSION)

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

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

on the basis of comments by

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Introduction

1. By letter dated 5 April 2002, the Permanent Representative of Moldova to the Council of Europe, Ambassador Gordas, transmitted a letter from the Minister of Foreign Affairs of Moldova, Mr Dudau, requesting the Venice Commission to give an opinion on the Draft Law on the Constitutional Court (CDL (2002) 58) and corresponding amendments of the Constitution (CDL (2002) 57), explanatory memorandum CDL (2002) 56). The Venice Commission established a working group on this issue composed of Messrs Klucka, Pinelli and Solyom. Their comments have become documents CDL (2002) 70, 73 and 71 respectively).

2. On 17-18 June 2002, the Commission organised, in co-operation with the Constitutional Court of Moldova a seminar on the "Competencies of the Constitutional Court and its Role in Society" in Chisinau. During this seminar – in which Messrs Klucka and Pinelli took part -, the drafts and the comments by the Commission's rapporteurs were discussed.

3. The present opinion is based on the rapporteurs' comments and on the results of the seminar. It was adopted by the Commission at its 51st Plenary Session (Venice, 5-6 July 2002).

I. General remarks

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

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

II. Amendments to the Constitution

Article 135

6. The Title of Art. 135 has been changed from "Powers" into "Duties". The previous title seems to be more appropriate with respect to the jurisdiction of a constitutional court.

7. With respect to Article 135.1.a (and Article 4.a of the Draft Law), the Memorandum justifies the changing of the previous formulation "laws, Parliament resolutions, decrees of the President of the Republic of Moldova, Government resolutions and others, as well as international treaties endorsed by the Republic of Moldova" into "normative acts adopted by the central public authorities" with the need to refer only to normative acts of central authorities. There may be such a need, since these acts are not necessarily normative but the

reference to "normative acts" seems too vague. The question might be settled by distinguishing acts which are normative from those which are not normative: "laws, international treaties endorsed by the Republic of Moldova, as well as Parliament and Government acts and decrees of the President of the Republic to the extent that they have normative force".

8. As concerns Article 135.1.b, it is worth considering that the interpretation of the Constitution is always a Constitutional Court's task, irrespective of the different powers which the Court is bound to exercise. Since Article 135.1.b seems to refer to binding rather than advisory opinions, a provision such as "give its universally binding opinion concerning the interpretation of the Constitution" might appear more appropriate than "interpret the Constitution".

9. Article 135.1.c of the Draft Constitutional Amendments as well as Articles 115.2 and Article 117 of the draft of the Law on Constitutional Court provide for *à priori* constitutional review of international treaties „subject to ratification" and consequently „international treaty or some its provisions declared non-constitutional may not be ratified or approved and may not enter into force in the Republic of Moldova" (Article 117.2). It should be pointed out that „by means of the exception of non constitutionality" and according to Article 115.3 of Draft Law also international treaties entered in force may be subject to the constitutionality control. Declaring such treaty or a part of its non-constitutional „shall bring about its denunciation". The ratified (valid) treaties obviously involve relations with other parties and if the Constitutional Court overturns such a treaty this could create international complications and result in the responsibility of the state in public international law. Article 27.of the Vienna Convention on the Law of Treaties provides clearly that: „A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". A denunciation of an already valid treaty due to its non-conformity with the Constitution does not represent the optimum approach of the state to the valid norms of international law and values enshrined thereof. The general tendency is to rather harmonize legal orders of states (including constitutions) with their international obligations.

10. Article 135.1.e raises the following problem: the interpretation of giving advice "on initiative to revise the Constitution" depends on what "the Constitution" means in this context. On literal grounds, it means any provision of the text called "Constitution" in a certain constitutional order. If we follow that assumption, an amendment of the Constitution is likely to contradict the provision which it intends to override. In that case, the advisory opinion of the Court as to the constitutionality of the amendment will necessarily be negative. If, instead, "Constitution" means "fundamental principles of the Constitution", that is to say, the core of principles defining the constitutional order (human rights, democracy, separation of powers etc.), then the advisory opinion of the Court might well be positive as long as the amendment does not infringe upon these principles. Article 113 of the Draft Law seems also to imply that structure, coherence and consistency of the provisions of the Constitution shall be maintained. Therefore, Article 135.1.e should rather be formulated as follows: "give its advisory opinion on the coherence of initiatives to revise the Constitution and their correspondence with the fundamental principles of the Constitution".

11. A more radical solution would be the elimination of Article 135.1.e. In other countries, judicial review of the constitutionality of constitutional provisions is often limited to the observance of the constitutional procedures which Parliament and other organs have to follow or the observance of fundamental principles of the Constitution on substantial grounds.

Moreover, judicial review of the constitutionality of constitutional provisions are usually provided for following the approval of the revision of the Constitution because CC should not be placed above the constituent power. Article 113.4 of the Draft Law indeed supports a restrictive interpretation of the institution of the control of draft amendments.

12. The task of finding "the circumstances justifying the dissolution of the Parliament" (Article 135.1.h) involves the Court in the political process. Inquiring into the circumstances justifying the dissolution of Parliament is not a "legal issue" in the sense of Article 7.3 of the Draft Law ("The Constitutional Court shall examine exclusively legal issues".). This task might create serious conflicts between the Court and the President of the Republic if the President does not agree with the Court's advisory opinion (which, according to Article 94 of the Law on the CC, is binding).

13. Article 135.1.j leaves too much room for the discretionary power of the Government, which, according to Article 44.2.d of the Draft Law, is the only authority entitled to submit such a case before the Court. Article 135.1.j of the Constitution should be amended in order to specify the criteria on the prohibition and dissolution of political parties, e.g. parties whose clear attitudes reveal the intention of altering or destroying the fundamental principles of liberal democracy (see also the Venice Commissions' report on the Suppression of Political Parties CDL-INF (2000)1).

14. The list of subjects entitled to bring a case before the Constitutional Court should be provided for directly in the Constitution and not be left to the Law on the Constitutional Court (as set out in Article 135.3). The same is true for other fundamental questions relating to the Constitutional Court as immunities of the constitutional judges, guarantees of their independence, the termination of their mandates etc. Such issues require a constitutional rather than only statutory regulation.

Article 140

15. Usually the *dies a quo* for the enforcement of the decisions of CC is not the adoption of the decision but the day after the publication of the decision. Article 140 should rather be formulated as follows: "Normative acts declared unconstitutional become null and void from the day following the publication of the Constitutional Court's decision on the Official Gazette". The same is true for Article 93.2 of the Draft Law which could read as follows: "Normative acts declared unconstitutional by the Constitutional Court shall be null and may not be applied from the day after the publication of the Court's decision on the Official Gazette".

III. Comments relating to specific Articles of the Draft Law on the Constitutional Court

Article 1

16. While defining the aims and general responsibilities of the Constitutional Court it is advisable to declare the most important competence of the Constitutional Court, which is a *sine qua non* of being a constitutional court: the power to review the constitutionality of the Acts of Parliament and other normative acts (government decrees etc.) and in case of unconstitutionality, to annul them.

Article 5

17. The wording in Article 5.1 of the Draft Law should be identical with the respective Article of the Constitution. Instead of advisory opinion (Art. 135.1.e, f) the Draft uses the word statement, concerning the organisation and procedure of referenda the Constitution mandates the Court to give an advisory opinion, while according to the Constitutional Court Act the Court shall *verify* the observance of the rules etc (Art 6.1.i). This is probably not only a linguistic problem. It must be clarified, which words are correct and what is exactly meant by advisory opinion, statement etc. (see also the comment relating to Article 135.1.b of the Draft Constitutional Amendment above).

18. As to the term „normative acts adopted by the central public authorities" see paragraph the comment related to Article 135.1.a of the Draft Amendment to the Constitution

19. It is doubtful whether the exclusionary rule in Article 5.2 is necessary. In order to assess the scope of this article the Commission would need further information the system of administrative justice in Moldova. In any case, it has to be ensured that executive acts which are not within the scope of review by the Constitutional Court can be reviewed by the administrative courts.

Article 6

20. This article regulates the competence of the Constitutional Court regarding its inner matters. The issues listed in this Article are, however, of very different significance. The election of the President and Vice-President and the dismissal of judges of the Constitutional Court are essential elements of the independence of the Court. Employees, internal affairs etc. might be regulated separately.

21. The salary and other benefits of the judges should be determined by an Act of Parliament rather than by the Court itself.

22. Concerning the annual report see Article 11 below.

Article 7

23. Asking the Court "establish for itself the ambit of competence" is a very sound rule. A strict restriction to the *petitum* would contradict to the function of the Constitutional Court.

24. The rule In Article 7.3 seems to be obvious, but perhaps not necessary. A strict interpretation may hinder the Court's work. (It is similarly obvious that extra-legal factors can be considered in determining for instance the proportionality of a restriction.)

Article 9

25. The role of the "assistant judges" is not clear (Article 9.3). Clerks who may have a prestigious position as civil servants everywhere assist the Judges of the Constitutional Court. They may be recruited even from among ordinary judges. But once appointed to the Constitutional Court they should not maintain the status of a (ordinary) judge. This would contradict to the independence and the character of the Constitutional Court as a constitutional organ *sui generis*. Moreover, the name of these clerks as assistant judge is

disturbing and creates the impression as if the "assistant judge" would share in some respect the powers of a Constitutional Court Judge (see also the remark relating to Article 40 below).

26. If there is a "Scientific-Consultative Council within the Constitutional Court", its status should be clarified. Is it consulted in the course of the normal work of the Constitutional Court? Then it can consist only of the "clerks". If also external experts are participating in it, they cannot have an insight into the internal work of the court, into the preparation of the cases. As regards concrete cases, experts may be appointed in the given procedure. Shall the Council express its view to selected theoretical problems?

Article 10

27. This article establishes a uniform term (15 days) for the reaction of public authorities and legal entities to requests by the Constitutional Court. Taking into consideration the specificity of each case, and the substance of a concrete request it seems reasonable to grant a judge rapporteur the right to set an appropriate deadline. What does the clause "legal entities regardless of their type of property and legal form of organizations" mean. Does this include also legal persons in private law? Anyway, this Article would better be placed within the chapter on procedure.

Article 11

28. The duty stated in Article 11.3 is not necessary. Reporting to the Parliament, the Government the High Council of Magistrates and to the President of the Republic infringes upon the status and independence of the Constitutional Court (such a report is appropriate in the case of an ombudsman, who is a parliamentary commissioner). The Constitutional Court communicates with other constitutional organs and with the authorities as with the general public through its judgements and decisions, which are to be published in the Official Gazette. In addition, constitutional courts usually also publish the collection of their decisions as another form of official publication. It might be useful if the law on the constitutional court provides for the structure of such a publication for which a wide distribution among the legal profession should be sought. In any case, the form of the „special" judgment does not seem appropriate because this is not in conformity in Article 85.2 of the Draft Law since the judgments of constitutional court are taken only...after "… examining the merits of the notification under the competence of the Constitutional Court …").

Article 12

29. What is meant by "high legal education" in Article 14.1 as a condition? Is it a university law degree?

30. According to Article 12 and Article 14.3 the age to hold the position of constitutional judge is between 50 and 70. This seems a very short period, both for the choice of constitutional judges and for holding with efficacy the charge of constitutional judge.

31. If four authorities have the right to appoint judges of the Constitutional Court, what is the reason for establishing a "contest commission" (Article 14.2) consisting of all of them? If e.g. a seat to be filled in respect of the Government is vacant, it seems to be the business of the Government to search for candidates for "its" seat. The contest commission could even have

the result of blocking nominations when members of the commission do not agree to the nominations made by the other powers.

32. In Article 12.7 there are provisions on the election (in Parliament and in the High Council of Magistrates) or appointment (by the Government) of the candidate. Who represents the Parliament in the nominations procedure? What majority (simple/qualified) is necessary to the "appointment"? Detailed provisions are necessary on these subjects, which ensure that the parliamentary minority also has influence on the nomination and appointment.

Article 13

33. According to Article 13.6 of the Draft the successful candidate for judge of the Constitutional Court must resign from its position and suspend his or her activity within political parties or another social political organisation. The draft should specify what can be understood under „social political organisation".

Article 15

34. The quality of a lawyer does not depend on a qualification degree delivered by state authorities or even directly by virtue of law but from his or her training and previous experience. It is suggested to delete this Article.

Article 22

35. Decisions within the Constitutional Court concerning personnel issues – such as the election of the President and the suspension or dismissal of Judges – are usually taken by qualified majority of the Judges. It is suggested that this applies also here.

36. According to Article 22.2: „The judge shall be restored in the office according to the decision of the Constitutional Court after the exhaustion of the reasons of suspension". Provided that the reasons of the suspension of the judge (Article 22.1.a and b) lapsed, his or her restoration in the office should not be conditioned by decision of the Constitutional Court. Such an approach cannot exclude the situation when due to the lack of such a decision the judge cannot start its activity although the reasons of his or her suspension do no longer exist.

Article 25

37. The expiration of the mandate (Article 25.2) is no entitlement to resignation, but the obligatory end of the function.

38. According to Article 25.15, the resigned judge is entitled to work only in the following fields: didactic, scientific, creation or justice. Only in such a case his or her allowance and salary „shall be paid...in their entire value". It seems necessary to clarify the purpose of this clause taking into consideration the right of every person freely choose his or her work (Article 43 of the Constitution), the prohibition of discrimination in enjoying fundamental rights and freedoms, etc.

Articles 27 to 29

39. These Articles, providing for the salaries and benefits, are too detailed and in this form do not fit into the law on the Constitutional Court. It would be better to refer to another law or statute regulating the issue. The necessity for these privileges could only be assessed in the knowledge of the local conditions.

40. Nevertheless, some provisions are not understandable. The Judge receives the apartment or house from the State as his or her private property after ten years work as a judge (Article 28.12). How are the ten years counted when the mandate lasts only nine years? There are also doubts as to 15 years salary as life insurance (Article 29)

Article 31

41. The rule for the required majority for the dismissal of the President (5 votes) should apply also for the election.

42. Article 31.1 does not consider the possibility of the election of a judge whose mandate ends before the expiring of the three years term provided for the Presidency of the Court, nor it does consider the possibility of a re-election to the Presidency. Consequently, Article 31.1 could be amended in the following way:
"(1) The President of the Constitutional Court is elected for a term of 3 years and can be re-elected, unless, in any case, the mandate of judge of the Constitutional Court expires before that term.
(2) The President of the Constitutional Court is elected by secret suffrage with the majority of votes of the Court’s judges."

Article 33 - Resignation of the president and deputy president of constitutional court

43. Provided that the President and Deputy President of the Constitutional Court are entitled to resign at any time without disclosing the reasons of this act (Article 35.1), the competence of the plenary session to examine this request and to confirm the resignation seems superfluous. (Article 33.2). Should the plenary session have the right to reject or not to confirm such a resignation?

Article 34 - Dismissal from the position the president and deputy president of Constitutional Court

44. According to Article 34.2, the initiative for the dismissal of the president and deputy president may be launched by „at least two judges“. The initiative for the dismissal should however rather be taken by majority and not by minority of the judges of constitutional court (at least 4).

Article 40

45. According to this article the assistant judge has the same status as the legal assistants (clerks) in other constitutional courts. They can prepare drafts of opinions for the Judge according to the advice and wishes of the latter. Nevertheless, the responsibility for the opinion rests solely with the Judge. So it seems to be strange that the clerk participates in the deliberation, gives explanations etc. Practically, the clerk takes part in the discussion of the

case even if Article 88.9 stipulates that he or she shall not. All this is against the status and responsibilities of the Constitutional Court Judge. Moreover, it may have the negative effect that the Judge does not prepare him/herself for the discussion, but relies on his or her assistant (see also the remark relating to Article 9 above).

Article 44 - subjects entitled to submit the notification

46. According the Article 44.1.b-c the notification (appeal) to the Constitutional Court may be submitted by „parliamentary fraction and parliamentary group comprising at least 5 deputies“ and according to letter j by the „citizens of the republic of Moldova“. The question who may be standing to challenge normative acts before constitutional court is sensitive since it concerns the mutual relationship of constitutional court and legislator. Continental legal orders usually restrict this possibility to the relevant central state bodies or significant percentage thereof (a parliamentary minority opposition should have access to the Constitutional Court). The purpose of this limitation is to restrict the procedure before the Court only for serious cases in which supremacy of the constitution is actually at stake. Taking into consideration the number of the deputies of the Parliament of Moldova (According to Article 60.2 of the Constitution the Parliament consists of 101 members) the number 5 deputies seems too low. Such a low threshold can lead to an overburdening of the Constitutional Court.

47. As regards individuals, the Draft should use uniform terminology: in certain provisions the Draft refers to citizens - Articles 44.1.j, Article 56.6) in others to natural persons - Article 118.1.a or simply of the persons (Article 119.1l) Taking into consideration the purpose of the notification bring by the individuals (allegation that their „constitutional rights and freedom enshrined under Article l5-54 of the Constitution“ have been violated by a normative act) together with the fact that – with the exception some political rights - the Constitution of Moldova provides fundamental rights and freedoms for every person, the right to appeal to the Court ("notification") should be granted to everyone including legal persons (which also enjoy fundamental rights like the right to property).

Article 45

48. The purpose of the six month rule seems to be to guarantee legal stability. The exception of unconstitutionality (individual access) benefits from an unlimited deadline. This is reasonable because the unconstitutionality of a normative act may be discovered in a concrete case even years after the adoption of the act. Nevertheless it seems strange to fix a 6 months term also in the case of international treaties which have still to be ratified.

Article 48 - Mandatory documents attached to the notification

49. It does not appear appropriate to ask the person entitled the bring the case before Constitutional Court to provide the Court with the challenged normative acts (which is anyway accessible in the Official Gazette) and others documents relating to the powers of the Court stated in Article 48.1 (*iura novit curia*).

Article 49

50. The regulation suggests that in case of the withdrawal of the notification the Constitutional Court's procedure ends. It should be considered that under certain conditions

the Constitutional Court continues the case and takes a decision. Such a condition may be that the review of the given law is of public interest. In the case of an abstract norm control the public interest on the decision can be assumed. But also reaching decision in a concrete norm control case may be in the interest of the public. According to its established practice the German *Bundesverfassungsgericht* decides upon the continuation of the procedure if the person who made the motion died or withdrew the motion. The Commission and the European Court of Human Rights have always continued the procedure if they considered it necessary for the public interest. Article 37 the European Convention of Human Rights provides for the same.

Article 50

51. The regulation of the *res judicata* rule is not precise enough. It may occur that the Constitutional Court has already decided on the constitutionality of the normative act, but the notification raises another aspect of possible unconstitutionality of the same act that was not yet examined in the former case. Repetition of a notification may be excluded if the notification submits the same grounds of unconstitutionality that have already been decided upon.

Article 52-53

52. The admissibility procedure is unclear. If the clerk (assistant judge) prepares an advisory note on the admissibility of the notification (Article 52.2) and this note will be examined and decided upon by the plenary of the Constitutional Court (Article 52.3), how is it possible, that in case of a proposed rejection according to Article 53.2, the claimant may again appeal to the Plenum? The Plenum should not be burdened with decisions upon admissibility This would be better a case for a three-judges panel.

53. Will the advisory note be communicated to the claimant? It seems that an “assistant judge” cannot take decisions in matters of the Constitutional Court. Do go all the advisory notes to the plenary? In case of obligatory rejections (as listed in Article 53) shall the Plenum consider the admissibility only upon appeal? What are the other cases (beyond those in Article 53) when a notification can be rejected (e.g. manifestly unfounded cases)? Is this at discretion of the Constitutional Court? This might be unconstitutional.

Article 56

54. What are the rules of assignment of a case to the rapporteur? Is this at the discretion of the President? Will there be objective rules for it, maybe in the internal regulations? The latter would be the better solution.

55. The duties of the rapporteur judge should contain the obligation that he or she shall prepare a draft opinion for the judgement. It is the judge who is responsible for it even if he or she uses the assistance of his or her assistant. Article 88.9 mentions the assistant judge as the person who prepared the draft. I think the Judge of the Constitutional Court has the right to write the opinion personally and this should be presumed by the Act on the Constitutional Court. According to Article 56.3 the Judge only supervises the preparation on a report on the case.

Article 57

56. The 3 days that remain for the Judges for the study of draft opinions (2) are hardly enough for the preparation and for eventual forming an own, dissenting or concurring opinion. It is suggested that the Judges shall have at least 10 days before the session. During this time they may write notes on the cases, which will be send to their colleagues and the rapporteur can prepare him or herself for answering the objections.

Articles 64-65 - The representatives of the parties

57. With regard to Article 7.3 of the Draft Law according to which the Constitutional Court shall examine exclusively legal issues, it seems appropriate to require obligatory legal representation of parties before Constitutional Court.

Article 67-68 - Obligations of experts and interpreters

58. It is reasonable for the Constitutional Court to have power to order appropriate and proportional measures to guarantee the observance of its own procedural rules as well as the obligations of parties and other interested subjects (experts and interpreters). The application of the provisions of Criminal Code in cases when experts and interpreters do not carry out their duties properly seems to exceed reasonable proportionality required for such measures.

Article 84 - Interruption of the trial

59. This article includes an exhaustive list of reasons for interruption of trial (provisions a to g) but it seems that some of them (at least under b, c and f) are rather reasons for rejecting the notification in initial stage of proceedings before the Constitutional Court (due to lack its admissibility) and not for interruption of a „living“ (already ongoing) trial.

60. What does it mean in Article 84.e that the trial is interrupted when the exception of non-constitutionality of the challenged act was solved?

Article 88

61. The reasons why the majority requested for opinions and judgements are higher than the usual majority can be understood (Article 88.7). But what happens if the majority of two thirds is not reached? This seems a great danger for the good functioning of the Court. It looks more prudent to provide an ordinary majority also for these opinions and judgements.

62. Concerning the role of the assistant judges see the comments on Articles 40 and 52.

Article 89

The possibility of attaching a concurring opinion should also be provided for. It would be useful to give rules on how to present the dissenting opinion (at least of a draft) to the Plenum. The written arguments may positively influence the debate in the plenary. If the dissenting Judge cannot convince the majority, he or she can attach and publish these points. The same should apply for the reasoning to the judgement, which the majority does not share.

Article 93

63. The Article says that the judgement of the Constitutional Court is final and binding *erga omnes*. The second sentence of the first paragraph is, however, unclear. Only legal norms, which have been declared null and void by the Constitutional Court, shall not be applied. Will the sentence say that no legislation or administrative decision is possible that contradicts to an interpretation of the Constitution? Even if the “State has no power” to adopt such acts, they will not be ineffective automatically but only upon a following judgement of the Constitutional Court.

64. Concerning the entry into force of decisions (Article 93.2), see also the comment relating to Article 140.1 of the Draft Amendment of the Constitution above.

65. As to the consequences for the legal relationships of annulling a law, which were based on the respective law, the usual solution is that already closed legal relationships remain unchanged. It is also usual that criminal sentences based on the unconstitutional law will be revised within a certain time limit. These principles should be inserted into the Draft.

Article 96 - Review of the judgment and advisory opinion

66. Re-opening the case upon the discovery of new circumstances is highly unusual for constitutional courts. Article 96 runs also counter to Article 135.3 of the Amendment of the Constitution, according to which “The Constitutional Court shall perform its activity at the initiative of subjects provided by the Law on the Constitutional Court”. Among these subjects, there cannot be the Court itself. If the Court is given the power to review its own judgements whenever new circumstances appear or there is a changing of the provisions upon which the Court has founded a previous judgement, this can endanger the Court’s role in the constitutional system. In addition, several questions need to be clarified: what are the terms of this possibility, what is the relationship of the „new“ judgment of the Constitutional Court with earlier decision, what about *res judicata* objections etc.

Article 100

67. Without doubt the enforcement of the judgements of the Constitutional Court is a serious problem and also an indicator of the actual situation of the constitutionality and the constitutional culture in the given Sate. However, the provisions in these Articles are too vague. They give unspecified powers to the Constitutional Court and refer to unspecified legal regulations.

68. It is not without serious risk to give entitlement to recover damages to everybody who claims to have suffered damage as a consequence of a piece of legislation (Article 100.2). If in a process on abstract norm control a law is annulled hundred thousands of claims may be brought before the courts. Was it really intended by the Authors of the Draft? The “terms of the law” that will regulate the damages shall be very restrictive.

Articles 100-102 - The enforcement of judgments and advisory opinion

69. Generally speaking constitutional courts have not (in principle) their own systems of enforcement of judgments concerning the constitutionality of challenged normative acts due to self-executing effects of their judgments (challenged normative acts become null and void

since the day of their publication in Official Gazette). The principle of the rule of law requires that constitutional court judgements shall be respected and executed by other state bodies. If other decisions have to be executed by other organs of the State, it is a matter of the state of constitutionality that decisions of a Constitutional Court are followed.

70. Articles 100-102 of the Draft Law provide for the Constitutional Court right to set the terms in which the judgments and advisory opinions shall be enforced and the control over their enforcement (Article 102). Provided that somebody shall not enforce the judgment of the Constitutional Court according article 107 a fine amounting up 25 minimal salaries shall be imposed on him (as a form of administrative liability). Taking into consideration *erga omnes* effects of the judgments of constitutional court (Article 93.l of the Draft Law) some questions concerning the effectiveness of this system can raise. If the Constitutional Court shall have sufficient capacity to monitor, control and assess the observance of their judgments „on the entire territory“? Who and how long will act on behalf of constitutional court in this field?

Article 104

71. This power of constitutional court does not form the part of its judicial competences (Article 4 of the Draft Law) and its result is not an enforceable judgment or advisory opinion. The current wording of such a competence seems inappropriate. The “Address” has however common threats with the institution “unconstitutional omission to legislate” of the Hungarian law, or in some respect with the German *Unvereinbarkeit mit der Verfassung*. Instead of the mere addressing an authority and its duty to inform the Court about the measures taken, it would be more effective to give the Constitutional Court the power to oblige the lawmaker to pass the lacking statute or decree within a deadline specified by the Constitutional Court. As the Hungarian experience shows within such a competence the Court can also make suggestions as to the constitutional way of filling the gap or of completing an existing norm, that is the Court may determine the content of the law to be passed.

72. In case of introducing an institution of “unconstitutional omission” the question arises who will have the right to initiate the process. The Constitutional Court as a body of judicial character should probably not start the process *ex officio*. (The Hungarian Constitutional Court posses this right but never used it. On the other side, it happened frequently that the Court extended norm control cases to the investigation whether in the given field the legislator had failed to pass a regulation necessary to the implementation of a constitutional right.)

Article 105

73. Concerning reports on the exercise of constitutional jurisdiction see the commentary relating to Article 11 above.

Articles 109-110

74. An *erga omnes* binding interpretation of constitutional provisions is surely an important and useful competence of a Constitutional Court. It is essential that the Constitutional Court Act provide for the obligatory character of the interpretative judgement of the Constitutional Court. This eliminates all the well-known problems concerning the compatibility of the judicial function with an advisory role. The judicial function of the Constitutional Court may

nevertheless be endangered if the Court gets involved into the political process. Even if it is ensured that the Court delivered the final decision, notifications on the interpretation of the Constitution might shift too much political responsibility to the Court. Therefore the admissibility of the notification could be bound on more restrictive conditions. According to Article 109.1.d a notification is admitted in any case of necessity. Therefore a)-c) contain only examples. It is suggested to require the existence of a *concrete problem of constitutional law* instead of a pending case before a court or other authority. This concrete problem would embrace also problems that were identified while making a law or preparing a treaty. On the other side this requirement would narrow down the use the Constitutional Court for legitimising undetermined political acts. At present the text of b) does not exclude such a misuse.

75. The competence of eliminating contradictions between constitutional provisions invests powers into the Constitutional Court, which are to be handled with the greatest self-restraint in order not to overstep the boundary between interpreting and writing the Constitution. It is possible to give the Constitutional Court the right to eliminate contradictions from the constitution – but only to the extent till this is possible by the way of interpretation.

76. The interpretation by the Constitutional Court of the Constitution is binding for everybody. This means that the judgement is like a legal norm, more precisely, like a constitutional law. Consequently, the constitutional problem stated in the notification must be formulated in a manner that it can be answered by a rule, which is applicable in all relevant future cases. This is another side of the requirement of the concrete problem: the latter means the concreteness of the legal problem but not, that the Constitutional Court is used for the decision of a concrete political problem. The judgement gives always a generalized answer. With other words: the so-called "abstract interpretation of the constitution" is not abstract regarding the case and the problem that moved those entitled to notification, to call upon the Constitutional Court. It is abstract as regards the *result* of the interpretation: the general norm declared in the judgement.

Articles 111-114

77. Following the radical suggestion exposed concerning the suppression of Article 135.1.e of the Draft Amendment of the Constitution, this should be true also for Chapter XIX of the Law on the CC. Following the less radical suggestion exposed above, that is to say, maintenance of Article 135.1.e with the correction "give its advisory opinion on the correspondence of initiatives to revise the Constitution with the fundamental principles of the Constitution", Chapter XIX would be maintained. Nevertheless, in that case, it is worth noticing that Article 113.4, stating that "In case that the advisory opinion of the Constitutional Court is negative or in case that it points out the breach of other fundamental provisions and of constitutional matter uniformity, the Parliament may not examine the proposed draft law", provides an exception to the general rule of Article 94, according to which "The advisory opinions of the Constitutional Court shall be binding".

Article 119

78. Is it not an incorrect translation that also normative acts "to be enacted" can be challenged by the exception of non-constitutionality? Shall it be read as "to be applied"?

Articles 120-122

79. The proposed regulation is very complicated. The certification by the court or authority, the information of the authority about the notification, and also the damages (Article 122.3) could be avoided if the court or the authority before which the case is pending is obliged to submit the exception to the Constitutional Court upon request of the party. According to Art 118.2 this is the case concerning the courts. The regulation should be extended to all authorities. Instead of the suspension of the case at the discretion of the court or authority, the suspension should be obligatory. The procedure could be continued only regarding the parts of the case (if any), which are not touched by the challenged legal norm. The final decision could, of course, be taken only after the judgement of the Constitutional Court was passed.

IV. Conclusions

80. While the draft constitutes a good basis for discussion, several issues ought to be addressed by the drafters, *inter alia*: The draft results in a shift away from constitutional guarantees for constitutional justice to a regulation on the level of ordinary law. Issues like the list of subjects which can appeal to the Constitutional Court, or immunities of the Judges of the Court should be regulated in the Constitution. On the other hand, the draft includes too many procedural details which should rather be dealt with in the internal rules of procedure of the Court than on the level of law. Otherwise, an intervention by Parliament – with the risk of political interference in the activities of the Court - would be necessary in order to change even minor details in the Court's procedure.

81. Some powers like verifying the circumstances justifying the dissolution of the Parliament or opinions on constitutional amendments risked to draw the Court in to politics and should be taken out of the draft. The provisions on the introduction on an individual appeal should be set out in a clearer form, especially as concerns the effects of decisions in these cases and procedure to be followed (decisions to be taken by chambers and not only by the Plenary of the Court).