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**“The Role of Constitutional Courts
in Strengthening the Independence
of the Judicial Power:
Doctrinal Approaches and Contemporary
Challenges”**

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REPORT

**“THE ROLE OF THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF MOLDOVA
IN STRENGTHENING THE INDEPENDENCE OF JUDICIAL POWER”**

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Considering the speed of changes in social, economic and political fields, an overwhelming role lies with the Constitutional Court in ensuring and maintaining a legal framework anchored in constitutional values, observing the requirements of the principle of legal certainty and pursuing the goal of "the quality of regulations".¹

When it comes to the well-functioning of state power, the role of Constitutional Courts is essential and defining, representing a true pillar of the state and democracy, guaranteeing equality before the law, fundamental freedoms and human rights. At the same time, Constitutional Courts contribute to the proper functioning of public authorities within the constitutional relations involving the checks and balances principle. **In a democratic state, the principle of judicial independence is a substantial one.**

Judicial independence is directly related to the "normative construction" of the state, which protects it against any influence from the political and economic environment. Moreover, it is important to point out that the principle of independence has evolved, moving on from Montesquieu's concept of "independence of judges" to the "independence of justice", so that nowadays independence is recognised by the entire system and state power. In this regard, judicial independence is classified in two categories: *institutional* and *individual*.²

Under the Constitution of Moldova, judges sitting in the courts of law are independent, impartial and irremovable. Given that judges are the only ones that exercise judicial power, the principle of judicial independence is the cornerstone of the maintenance of this power, enjoying full rights in a state's architecture. The principle of separation and cooperation of powers involves maintaining their balance. Therefore, the principle of judicial independence is not only a constitutional basis, but also a measure of keeping under control the observance of rights and competences of the judiciary, in order to maintain a balance between state powers.

Given that the Constitutional Court's role in the institutional edifice of the state is a major one, the Court acting as the guarantor of Constitution's supremacy, manifests itself as a true arbiter in resolving conflicting institutional situations which concern the legislative, executive and judicial powers.

Thus, in a relatively large number of judgments, the Constitutional Court of Moldova declared unconstitutional provisions affecting the judiciary, and the judicial independence implicitly. The Constitutional Court of Moldova underscored that judicial independence is a pre-requisite for the rule of law and a fundamental guarantee of a fair trial.

The principle of independence of judges implies that they must adopt decisions and act freely with no restrictions and without being subjected to influences, pressures, threats or unlawful, direct or indirect interferences, whoever is making them and regardless of their reasons. The judge, as holder of judicial office, must be able to exercise his/her duties with full independence, against all constraints and forces of social, economic and political nature, and even in relation to other judges and the judicial administration.

The Constitutional Court of Moldova, in its vast jurisprudence, exercised constitutional reviews of legal provisions *on the immunity of judges, disciplinary liability of judges and judicial financial system.*

¹ Serge Lasvignes. Sécurité juridique et qualité de la réglementation: quelques considérations pratiques // Les Cahiers du Conseil Constitutionnel, n.11, 2001, p. 112.

² Abimbola Olowofoyeku. *Suing judges: a study of Judicial Immunity*// Clarendon press: Oxford, 2003, p. 194.

- ***Immunity of judges***

In view of ensuring the independence of judges, under the legislation of Moldova, criminal prosecution against a judge may be initiated only by the Prosecutor General, with the consent of the Superior Council of Magistracy.

At the same time, following the legislative amendments of 2013, there has been set aside the requirement to obtain the consent of the Superior Council of Magistracy to initiate criminal prosecution by the Prosecutor General, against judges who committed such crimes as *passive corruption, influence peddling, money laundering and illicit enrichment*.

The purpose of these amendments was to fight corruption within the judiciary, ensuring transparency of public institutions' work and to increase the confidence of litigants in the judiciary, which is a fundamental component of the rule of law.

Undertaking a constitutional review of these provisions, the Constitutional Court held that the good reputation of the judge is a condition of public confidence in the judiciary and its efficiency, as without it the quality of justice and the full implementation of constitutional and legal provisions governing its administration cannot be conceived. Corruption does not undermine the confidence in judges only, but also the act of justice as such.

The Court held that immunity should not obstruct the main functions and duties of the judiciary, nor to hinder the operation of democratic principles of the rule of law. It noted that the independence of judges does not preclude them from assuming responsibility. The Court found that the constituent assembly by holding that "*judges sitting in the courts of law are independent, impartial and irremovable,*" has established the independence of the judge in order to preclude any influence from other authorities. However, this safeguard cannot be construed as to determine the lack of responsibility of the judge.

There shall be stressed that **guarantees granted to the judges against criminal prosecution are not a practice in Europe**. Judges of most East European countries enjoy immunity. In countries where judges enjoy additional guarantees against criminal prosecution, **the level of guarantees granted by law was dependent, to the greatest extent, on the discretion of the legislator**. Subsequently, granting immunity against criminal prosecution, reducing or extending immunity is **an option of the legislator, not an imperative of constitutional law**.

- ***Disciplinary liability of the judges***

In its case-law the Constitutional Court of Moldova pointed out to the fact that *no judge may be held liable under disciplinary rule for the mere fact of interpreting uninformed the legislation*. This infringes the right of the judge to think freely and administer the law in a different manner.

In order for the assumption of responsibility of a judge to be implied, the existence of a judicial error which would prejudice fundamental human rights and freedoms is not suffice. However, it may become imputable to a judge when there is a failure to fulfil in good-faith his/her duties or as a result of gross negligence.

In this context, judges enjoy immunity in fulfilling their duties. Repealing or modifying a judgment is not a *determining ground* for sanctioning a judge.

The Constitutional Court of Moldova noted that holding a judge liable under disciplinary rule on the ground of a European Court for Human Rights decision condemning Moldova, without proving that the law has been infringed by the judge **deliberately or due to gross negligence**, amounts to an inadmissible interference in the principle of independence, impartiality and immovability of the judge.

- ***Judicial financial system***

a) *Salary of judges*

Remuneration of judges, which comprises any means of material or social support, represents a basic component of the independence of a judge, serving as a counterbalance to restrictions, prohibitions and responsibilities imposed on them by society. It is exactly the maintenance of this equilibrium which ensures the confidence of litigants in the independence and impartiality of judges.

The Constitutional Court of Moldova showed in its case-law, that establishing a salary payment policy, including that referring to judges, falls into the competence of legislature and of the Government. At the same time, when delivering a solution on remuneration, constitutional principles shall be observed. Therefore, in principle, salary cuts shall be undertaken only under the conditions of an economic and financial crisis, which is objectively existent and officially recognised, in case of a fair salary cut of all or majority of employees paid from public budget, in line with the principle of solidarity.

b) *Salary of the staff of law-courts*

Referring to the salary of the staff of law-courts, the Constitutional Court of Moldova held that the independence of judicial power cannot be ensured with no institutional and structural independence. The Court held that the administration of justice was achieved with the involvement of several supporting components, subsequent to judges who directly represent this power.

In this regard, the Court noted that in order to ensure an equivalent judiciary by status with the other two branches of the state power, an equivalent treatment must be maintained for the supporting components of this power, including creating conditions for providing skilled and competitive staff.

The quality and outcome of justice are directly proportionate not only to professional competences of the judge, but also to the competences of the assisting staff. Given this, there is needed an investment and a stimulation, proportional to the tasks performed by the staff of the law-courts, based on their job description assigned to them, in line with the law.

The Court noted that the discrepancy between the salaries of the employees who contribute to the administration of justice, compared to that of the staff assisting the legislative and executive powers, amounts to discrimination and, subsequently, a disbalance of state powers.

Conclusion

The state mechanism of fundamental human rights and freedoms includes a component of great importance – the well-functioning of judicial authorities. An effective and full judicial protection may be achieved only under the condition of a genuine independence of judicial authority, particularly that of the judge – representative of judicial power.

The constitutional status of a judge does not amount to his/her personal privilege. On the contrary, it is a public good designed to ensure the efficient protection of the rights of every member of society. Subsequently, it is namely the independence of justice which shall be the framework of ensuring this protection.