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**Opinion No. 967 / 2019**

Engl. only

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

**REPUBLIC OF MOLDOVA**

**JUDGMENT\***

**BY THE CONSTITUTIONAL COURT OF THE REPUBLIC OF MOLDOVA**

**ON THE INTERPRETATION**

**OF ARTICLE 137 OF THE CONSTITUTION**  
**(criminal liability of constitutional judges)**

**(Application no. 153b/2019)**

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\* Translation provided by the Constitutional Court of the Republic of Moldova.

## CHIȘINĂU

26 March 2020

In the name of the Republic of Moldova,  
The Constitutional Court composed of:

Mr. Vladimir ȚURCAN, President,  
Mr. Eduard ABABEI,  
Ms. Domnica MANOLE,  
Mr. Nicolae ROȘCA,  
Ms. Liuba ȘOVA,  
Mr. Serghei ȚURCAN, judges,  
and Mr. Dumitru Avornic, judicial assistant,

Considering the application registered on 21 August 2019,  
Examining the said application in private,  
Considering the case-files,  
Having deliberated in private,

Delivers the following judgment:

## PROCEDURE

1. The case originated in an application lodged with the Constitutional Court on 21 August 2019 by Mr. Dumitru Robu, Interim General Prosecutor on the date of submission, pursuant to Articles 135 para. (1) b) of the Constitution, 25 g) of the Law on the Constitutional Court and 38 para. (1) g) of the Code of Constitutional Jurisdiction on the interpretation of Article 137 of the Constitution of the Republic of Moldova. Article 137 of the Constitution provides that judges of the Constitutional Court are irremovable for the tenure of their mandate, independent and abide only by the Constitution.

2. The author of the application requests the Constitutional Court to explain the following issues, by interpreting Article 137 of the Constitution:

„1) What is the essence, nature and scope of the legal effects that derive from the notions defined in the said norm, such as irremovability and independence, in correlation with Articles 13, 14 and 16 of Law no. 317 of 13 December 1994 on the Constitutional Court and Articles 8, 9 and 10 of the Code of Constitutional Jurisdiction, adopted by Law no. 502 of 16 June 1995?

2) Does the initiation of criminal proceedings against a Constitutional Court judge during the exercise of his or her mandate, as well as after its cessation and/or lifting by the General prosecutor without prior approval from the Constitutional Court restrict the judicial power of the notions of irremovability and independence, combined with the norms specified in the special laws indicated above?

3) Does the legal spirit of the notions of irremovability and independence, in conjunction with the other aforementioned rules, allow the initiation of criminal liability of Constitutional Court judges pursuant to Article 307 of the Criminal Code?

4) Does the legal nature of the notions of irremovability and independence, correlated with the norms of the special laws emphasized in the previous points, also affect the cessation and/or the lifting of the mandate of the Constitutional Court judge?”

3. By the decision of the Constitutional Court of 5 December 2019, the application was declared admissible, without prejudging the merits of the case.

4. On 10 September 2019, the Constitutional Court had sent a letter to the European Commission for Democracy through Law of the Council of Europe (hereinafter – “the Venice Commission”), in order to present a brief on the aspects mentioned in the application. At its 121<sup>st</sup> Plenary Session, on 6-7 December 2019, the Venice Commission adopted the *amicus curiae* Brief no. 967/2019 on the criminal liability of Constitutional Court judges (CDL-AD(2019)028).

5. In the examination process of the application, the Constitutional Court requested the opinions of the Parliament, President of the Republic of Moldova, Government, Supreme Court of Justice, Superior Council of Magistracy, Institute for Judicial, Political and Sociological Research, Law Faculty of Moldova State University, Law Faculty of the Free International University of Moldova, Moldovan Bar Association, Legal Resources Center, Institute for Criminal Reform, Association for Participatory Democracy “ADEPT”, Institute for Development and Social Initiative “Viitorul” and the Center for Analysis and Prevention of Corruption.

6. On 4 February 2020, the meeting of the Scientific Advisory Board of the Constitutional Court took place, during which the subject of criminal liability of constitutional judges for the decisions adopted was discussed.

7. At the public hearing of the Court, in which the operative part of the judgement was read, Mr. Radu Radu, the representative of the Parliament, and Mr. Radu Foltea, the representative of the Government.

#### RELEVANT LEGISLATION

#### 8. Relevant provisions of the Constitution:

##### Article 134 Statute

“(1) The Constitutional court is the sole authority of constitutional jurisdiction in the Republic of Moldova.

(2) The Constitutional Court is independent of any other public authority and shall abide only by the Constitution.

(3) The Constitutional Court guarantees the supremacy of the Constitution, ascertains the enforcement of the principle of separation of the State powers into the legislative, executive and judiciary, and it guarantees the responsibility of the State towards the citizen and of the citizen towards the State.”

##### Article 137 Independence

„For the tenure of their mandate the judges of the Constitutional Court are irremovable, independent, and abide only by the Constitution.”

#### 9. Relevant provisions of Law no. 317 of 13 December 1994 on the Constitutional Court:

##### 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.”

10. Relevant provisions of the Code of Constitutional Jurisdiction, adopted by Law no. 502 of 16 June 1995:

### 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

#### Irremovability

- „(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

- „(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 recognized 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.”

11. Relevant provisions of the Criminal Code, adopted by Law no. 985 of 18 April 2002:

#### Article 307

##### Issuing a Sentence, Decision, Ruling or Judgment Contrary to the Law

„(1) The willful issuance by a judge of a sentence, decision, ruling, or judgment contrary to the law

shall be punished by a fine in the amount of 300 to 800 conventional units or by imprisonment for up to 5 years, in both cases with the deprivation of the right to hold certain positions or to practice certain activities for up to 5 years.

(2) The same action:

a) involving serious, especially serious or exceptionally serious crimes;

[Letter c) declared unconstitutional by Judgement of the Constitutional Court no. 24 of 17 October 2019]

shall be punished by imprisonment for 3 to 7 years with the deprivation of the right to hold certain positions or to practice certain activities for up to 5 years.”

#### THE LAW

##### A. ADMISSIBILITY

12. In its decision of 5 December 2019, the Court held that, under Article 135 para. (1) b) of the Constitution, the application on the interpretation of the Constitution falls within its *ratione materiae* jurisdiction.

13. Furthermore, under Article 25 f) of Law on the Constitutional Court, the General Prosecutor has the competence to notify the Constitutional Court.

14. The Court holds that the provisions of Article 137 of the Constitution were not subject to an interpretative judgement of the Constitutional Court.

##### B. THE MERITS

###### A. The author's submission

15. The author of the application mentions that the function of judge of the Constitutional Court itself cannot constitute an objective criterion of differentiation in the field of inviolability. The constitutional status of this public function and the independence it enjoys cannot be invoked as objective and reasonable criteria to justify the creation of a privileged legal regime. Thus, the author considers that constitutional judges may be held criminally liable for the acts performed in bad faith in the exercise of their judicial functions.

16. At the same time, the author of the application mentions that Law no. 317 of 13 December 1994 on the Constitutional Court and the Code of Constitutional Jurisdiction regulate differently the extent of the immunity of constitutional judges. As a result, the author requests the Court to interpret Article 137 of the Constitution to explain whether the votes and opinions expressed by constitutional judges are protected by immunity only during their term of office or if they continue to enjoy immunity even after the expiry of their mandate.

17. The author considers it unclear whether the functional immunity of constitutional judges is absolute or relative in the case of bad faith. The procedure for prosecuting constitutional judges in the exercise of their function and after the cessation and/or lifting of their mandate is unclear, in particular the issues related to the initiation of criminal proceedings, restriction of private life rights, freedom of movement, as well as prosecution. Finally, it is unclear the extent to which constitutional judges can be held criminally liable for sentences, decisions or judgements contrary to the law, under Article 307 of the Criminal Code.

## **B. The authorities' and requested organizations' submissions**

18. In their presented opinion, the Parliament mentions that votes and opinions expressed by constitutional judges are protected by immunity during their term of office, as well as after its expiration. In this context, Parliament considers that the prior consent of the Court is necessary if the General Prosecutor requests the initiation of criminal proceedings in connection with decisions knowingly made by the judge during his or her term of office, no matter if it had ended or not. With regard to the possibility of prosecuting constitutional judges under Article 307 of the Criminal Code, the Parliament noted that the criminal rule in question could and should be applied to constitutional judges.

19. In its written opinion, the President of the Republic of Moldova mentioned that Article 137 of the Constitution establishes that Constitutional Court judges are irremovable for the tenure of their mandate, independent and abide only by the Constitution. Thus, the President notes that the status of the Constitutional Court judges differs from the status of other judges, by the specific nature of constitutional jurisdiction. The immunity of the constitutional judge is the most important condition for guaranteeing his or her independence. The guarantees regarding the immunity of the constitutional judge are established for the tenure of his or her mandate, as well as after its expiration.

20. With regard to the prosecution of the constitutional judge under Article 307 of the Criminal Code, the President noted that based on the request made by the General Prosecutor, only the Court may establish whether a decision is contrary to the law. Constitutional judges do not benefit from absolute immunity, they may be held criminally liable if the decisions are against the law and if it is proven that the deed was committed intentionally and in bad faith.

21. In their opinion, the Institute for Legal, Political and Sociological Research mentioned that votes and opinions expressed by constitutional judges are protected by immunity both for the tenure of their mandate and after its expiry. The prior consent of the Constitutional Court is not required to initiate criminal proceedings. At the same time, the Institute mentions that judges should benefit from immunity only in the exercise of their legal functions, and if they commit offences in the exercise of their functions, they should not enjoy immunity from criminal liability. Finally, the Institute considers that it is not possible to engage the criminal liability of constitutional judges under Article 307 of the Criminal Code.

22. In the opinion presented by the Institute for Criminal Reforms it is mentioned that the prior consent procedure is a tool that ensures the avoidance of eventual abuses regarding the constitutional judges and ensures their independence. Therefore, the prior consent of the Court is required for the initiation of criminal proceedings.

23. With regard to the possibility of prosecuting constitutional judges under Article 307 of the Criminal Code, the Institute refers to Decision of the Constitutional Court no. 12 of 28 March 2017, in which the Court established that Article 307 of the Code may be applied only to judges within tribunals, the Courts of Appeal and the Supreme Court of Justice. In this context, the

Institute notes that the decisions of the Court are final acts, cannot be appealed and have an *erga omnes* effect. Therefore, the prosecution of constitutional judges under Article 307 of the Criminal Code is an extensive interpretation, by analogy and unfavorable of criminal law, contrary to Article 7 of the European Convention on Human Rights. The Institute mentions that Article 307 of the Criminal Code is part of the chapter on offences against justice, but the Constitutional Court is not part of the judiciary.

24. Regarding the protection of votes and opinions expressed by constitutional judges through immunity only during their term of office or after its expiry, the Institute noted that the decisions of the Court have *ex nunc* effect, *i.e.* they apply only for the future, therefore the application should be examined only under the aspect of the immunity of judges whose term of office has not ended. Finally, the Institute notes that votes and opinions expressed by constitutional judges during their term of office are protected by immunity for the entire period of their life.

25. In the opinion presented by the Faculty of Law of the Free International University of Moldova the following is mentioned. With respect to the first question addressed by the author of the application, the Faculty mentions that the text of the Constitution should not be interpreted in the light of the provisions laws that have a lower legal force. With regard to the second question, it is mentioned that, since criminal proceedings may be initiated in respect of ordinary judges only with the prior consent of the Superior Council of Magistracy, naturally, the same rule should be applied to constitutional judges. With regard to the third question, the Faculty of Law considers that constitutional judges cannot be held criminally liable under Article 307 of the Criminal Code, because the Constitutional Court is not part of the judiciary. Moreover, the generic legal object of the offence provided for in Article 307 of the Criminal Code are the social relations related to the administration of justice and the activities that contribute to the administration of justice. With regard to the fourth question addressed by the author, it is mentioned that the guarantee to not be held liable for decisions given within the limits of the mandate of constitutional judge is intangible and cannot be interpreted.

26. In the opinion presented by the Center for Analysis and Prevention of Corruption it is mentioned that only Constitutional Court judges enjoy the guarantee of prior approval by the Court in case of detention, arrest, searching, referral to criminal or contraventional trial. The Center also considers that Article 307 of the Criminal Code may be applied to constitutional judges since in Judgement no. 12 of 28 March 2017 the Court established that ordinary judges may be held criminally liable for committing the offence in question.

27. In the opinion of the Center for Legal Resources, it is stated that prior consent of the Court is required for the initiation of criminal proceedings against constitutional judges. The procedure in question must be followed regardless of whether the judge's term of office has ended or not. As part of the prior consent, the Court must verify whether there are appearances of abuse by the prosecutors. Prior consent is a guarantee that reduces the risk of abuse and arbitrary actions. With regard to the possibility of applying Article 307 of the Criminal Code, the Center considers that this criminal norm may be applied to constitutional judges under the conditions established by Judgement of the Constitutional Court no. 12 of 28 March 2017, § 92, *i.e.* if the criminal norm is interpreted restrictively and if there is undisputable evidence that proves the intention of the judge in the issuing of a judicial act contrary to the law. The Center also considers that, in the procedure of prior approval for the initiation of criminal proceedings, the Court should verify whether other alternative measures to criminal proceedings (*e.g.* disciplinary sanctions) are not more appropriate.

### **C. The Court's assessment**

28. The role of the Constitutional Court as guarantor of the supremacy of the Constitution is to ensure the achievement of the principle of separation of the State powers into legislative, executive and judiciary and to guarantee the responsibility of the State towards the citizen and of the citizen towards the State. This role is expressly provided by Article 134 para. (3) of the

Constitution, and in order to achieve this goal, the Constitutional Court is established as the sole authority of constitutional jurisdiction in the Republic of Moldova [Article 134 para. (1)], being independent of any other public authority and abiding only by the Constitution [Article 134 para. (2)].

29. The Court notes that an important component of the state is constitutional justice, administered by the Constitutional Court, a public political and jurisdictional authority that falls outside the scope of legislative, executive or judicial power, its role being to ensure the supremacy of the Constitution as a fundamental law of a Law-governed state. Within the good organization of the state authority, **the role of the constitutional courts is an essential and defining one**, representing a true pillar of support for the state and democracy, guaranteeing equality before the law, fundamental freedoms and human rights. At the same time, the constitutional courts contribute to the proper functioning of public authorities within the constitutional relations of separation, balance, collaboration and mutual control of state powers (JCC no. 6 of 16 May 2013, §§ 63, 64).

30. The Court reiterates **that the exercise of any kind of pressure upon Constitutional Court judges, before the adoption of a decision, as well as an act of revenge for the solutions adopted, is inadmissible, being incompatible with the respect for the rule of law, the authority of the Court and the supremacy of the Constitution** (JCC no. 18 of 2 June 2014, § 101).

31. For these reasons, the judges of the Constitutional Court must be protected from any 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** (see *amicus curiae* Brief of the Venice Commission no. 967/2019 on the criminal liability of Constitutional Court judges, adopted at its 121<sup>st</sup> Plenary Session, on 6-7 December 2019, CDL-AD(2019)028, § 28).

32. The application inevitably requires an analysis of the issue of the independence of constitutional judges. The independence of constitutional judges is, in fact, equivalent to the independence of the Constitutional Court, and the independence of the Constitutional Court is a value enjoyed by the entire democratic society.

33. Failure to respect the principle of independence of the Constitutional Court is not only a source of internal political and legal instability. It can lead to the international condemnations of the state. In this respect, the European Court of Human Rights does not hesitate to suggest that judicial proceedings may fall within the scope of Article 6 § 1 of the European Convention on Human Rights, Article that requires independence of the tribunal adjudicating a dispute, even when the dispute takes place before a Constitutional Court. It matters less whether a constitutional court has been notified on the basis of an application for a preliminary ruling or on the basis of a constitutional appeal lodged against judicial decisions. The same is true, in theory, where the Constitutional Court examines an appeal lodged directly against a law if the domestic law provides for such a procedure (see *Voggenreiter v. Germany*, 8 January 2004, §§ 30-33).

34. The Court emphasizes that, aside from the task of protecting the fundamental rights guaranteed by the Constitution, it must ensure that public authorities in various branches of state power remain within the limits prescribed by the Constitution and it is, sometimes, required to resolve conflicts that arise between them. The Court's task is, in this respect, a special one for maintaining the democratic regime. The Venice Commission recalls the importance of the constitutional courts in the practical implementation of democracy, the rule of law and the protection of human rights. By interpreting the constitutional text, the constitutional courts prevent the arbitrariness of the authorities, offering the best possible interpretation of the Constitution (see, to this effect, the Brief on the constitutional situation in Ukraine, Venice, 17-18 December 2010, CDL-AD(2010)044, § 52).

35. The Court notes that the independence of the Constitutional Court is one of the core values of the democratic system, and its existence is essential for the realization of all other values of the system. The foundation of its independence consists in objectivity and neutrality,



which are the first principles of the ruling of the Constitutional Court. Constitutional judges resolve cases before the Court according to the Constitution, they must be free in their thinking and conscience, without fear and without prejudice, they must act impartially, with a sense of justice and conscience, without any pressure or incentive, according to their beliefs and their own interpretation of the facts (see, to that effect, JCC no. 22 of 5 September 2013, §§ 52, 54; JCC no. 18 of 2 June 2014, § 44).

36. In the opinion of the Venice Commission, in a state governed by the rule of law, the principle of judicial independence comes with several guarantees, which are vital for institutional and individual judicial independence and without which the effective and impartial functioning of the courts would be impossible (*amicus curiae* Brief for the Constitutional Court of the Republic of Moldova on the right of recourse of the state against judges, Venice, 10-11 June 2016, CDL-AD(2016)015, § 47).

37. It is essential to ensure that judges can engage in the proper exercise of their functions without their independence being compromised through fear of the initiation of prosecution or civil action by an aggrieved party, including state authorities (Joint Opinion of the Venice Commission and the OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, Venice, 13-14 June 2014, CDL-AD(2014)018, § 37).

38. The Court notes that the independence of constitutional judges contributes to correct decisions. Their independence allows them to exercise their role of protecting human rights and the rule of law. Therefore, beyond protecting constitutional judges, the independence of the Constitutional Court contributes to the protection of the entire democratic society.

39. When ruling and rendering jurisdictional acts, constitutional judges must not depend on any person or governmental authority, or on their financial or economic influence. They remain only subjects of the authority of the Constitution. The independence of constitutional judges is the basis for guaranteeing public confidence in the Constitutional Court, including the fact that the adjudication by the Court takes place in a fair, neutral manner, with equal treatment of the parties and no personal interest in the outcome of the case. As such, the independence of constitutional judges is one of the core values of democracy: we cannot talk about a political regime that functions properly where the public does not trust the solutions that the Constitutional Court renders.

40. Inherently, a tension arises between the principle of independence of constitutional judges and the principle of their liability. There are several approaches that balance the two competing principles. Some absolutize the independence of judges, others absolutize their responsibility, and a third category seeks the abstract optimization of the two competing principles.

41. According to the Venice Commission, the principle of non-discrimination and equality before the law is 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" (Report on the rule of law, Venice, 25-26 March 2011, CDL-AD (2011)003rev, § 65). The immunity granted to Members of Parliament, the President of the Republic or judges (including constitutional judges) for their opinions and votes shall be an exception to this principle.

42. The independence of constitutional judges is strengthened by granting immunity from criminal liability for their opinions and votes in the exercise of their term of office. The concept of judicial immunity is of particular importance, especially where constitutional justice and justice in general may face the effects of political and social change.

43. Immunity should always be connected to the role and activities carried out by the institution in which the individual is working, is a member of or represents. This type of immunity is functional, not general. There must be no exemption from liability not connected to the person's role and professional activity (this being general immunity) (see *amicus curiae* Brief of the Venice Commission no. 967/2019 on the criminal liability of Constitutional Court judges, CDL-AD (2019)028, § 9).

44. The Court notes, for example, that the Council of Europe Group of States against Corruption (GRECO) distinguishes two types of immunity: "non-liability immunity", which refers to the absence of liability for opinions expressed by parliamentarians or for decisions rendered by judges, and "inviolability-immunity" or "procedural immunity", which protects an official from prosecution. In this regard, procedural immunity aims to provide substantial means of maintaining "non-liability immunity". Only as a result of a special procedure, in which the essence of the allegations against a Member of Parliament or a judge is examined, may procedural immunity be lifted and criminal proceedings may be instituted. With regard to judges, GRECO considers that "non-liability immunity" for judges, when exercising judicial activity, is a precondition for the independence of judges, while procedural immunity "raises serious issues regarding the effective fight against corruption" (*Immunities of civil servants as possible obstacles in the fight against corruption, in Lessons learned from three evaluation rounds (2000-2010) - thematic articles, p. 31-32*).

45. According to the Venice Commission, 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 (see *amicus curiae* Brief of the Venice Commission no. 967/2019 on the criminal liability of Constitutional Court judges, CDL-AD (2019)028, § 11).

46. Therefore, functional immunity ("non-liability immunity") intends to protect a judge from the criminalization of his or her legal opinion. The beneficiary is not the person him or herself, but the independence of the court. It is an important requirement that derives from the very nature and quality of judicial independence, impartiality and transparency. **Functional immunity does not provide a judge with impunity for a crime he or she has committed. Immunity protects independent judicial decision-making, which means that a judge cannot be punished for a legal opinion or the conclusion reached in the decision-making process.** However, a judge may be punished if it is proven that he or she committed an offence, e.g. by ruling in favor of a person from whom he or she had taken a bribe (this is the crime of bribery) (*amicus curiae* Brief of the Venice Commission no. 967/2019 on the criminal liability of Constitutional Court judges, CDL-AD(2019)028, §§ 13, 36).

47. 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.** A judge should be punished for corruption if he or she 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** (see *amicus Curiae* Brief of the Venice Commission no. 967/2019 on the criminal liability of Constitutional Court judges, CDL-AD(2019)028, § 15).

48. As for any other person – a criminal accusation can lead to permanent damage to the reputation of a judge and an arrest can completely ruin the reputation. A criminal accusation or even the simple threat of it could be used to by the prosecutor's office to exert pressure on a judge. Given that in Eastern Europe the position of judges is often weak as compared to that of prosecutors, false charges or even the threat of charges of passive corruption or trafficking of influence could be used as a tool to make judges compliant with the wishes of other authorities (see *amicus Curiae* Brief of the Venice Commission no. 698/2012 on the immunity of judges for the Constitutional Court of Moldova, Venice, 8-9 March 2013, CDL-AD(2013)008, §§ 25, 47, 52).

49. The protection of Constitutional Court judges against the criminalization 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 pressurize them in their decision-making process by threatening to criminalize it** (*amicus curiae* Brief of the Venice Commission no. 967/2019 on the criminal liability of Constitutional Court judges, CDL-AD(2019)028, § 18).

50. With regard to the present case and for the purposes of this judgment, the Court considers that, for the sake of clarity in the interpretation of Article 137 of the Constitution, the questions of the author of the application should be concretized as follows:

*(1) Can constitutional judges be held legally liable for votes and opinions expressed in the exercise of their functions?*

*(2) Can constitutional judges be held criminally liable for committing offences not related to the exercise of their functions?*

*(3) What is the procedure for holding constitutional judges criminally liable?*

*(4) Can constitutional judges benefit from functional immunity for votes and opinions expressed in the exercise of their functions following the end of their term of office?*

**(1) With regard to the possibility to hold constitutional judges legally liable for votes and opinions expressed in the exercise of their functions**

51. In order to ensure the efficient functioning of the authority of constitutional jurisdiction, the Constitutor ruled that both the Constitutional Court and the constitutional judges are independent and abide only by the Constitution. The Court reiterates that the principle of independence of judges means that judges must take decisions freely and act without restriction and without being subject to illegal, direct or indirect influences, pressures, threats or interventions, regardless of where they come from and for what reason (JCC no. 22 of 5 September 2013, § 54).

52. The Venice Commission has 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**. If functional 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 (see *amicus curiae* Brief of the Venice Commission no. 967/2019 on the criminal liability of Constitutional Court judges, CDL-AD (2019)028, §§ 14, 16).

53. Article 13 para. (2) of Law no. 317 on the Constitutional Court, which develops the constitutional provisions, establishes that the judges of the Constitutional Court cannot be held legally liable for their votes or opinions expressed while exercising their constitutional duties. **In the eyes of the Venice Commission, this article can be interpreted in a manner that excludes any liability of Constitutional Court judges for votes or opinions expressed in the performance of their duties** (*amicus curiae* Brief of the Venice Commission no. 967/2019 on the criminal liability of Constitutional Court judges, CDL-AD (2019)028, § 30).

54. The Court considers that this solution chosen by the legislator is in line with the spirit of the Constitution. In its case law, the Court held that the meaning of the rule contained in Article 72 para. (3) c) of the Constitution, to regulate the organization and functioning of the Constitutional Court, is to allow the legislator to increase and extend the functionality and mechanisms of the Court of constitutional jurisdiction (JCC no. 6 of 16 May 2013, § 57).

55. The democratic system in the Republic of Moldova is not a fully consolidated system. In particular, political instabilities and the fragility of institutions with jurisdiction to initiate criminal or contraventional proceedings may pose risks of prosecuting Constitutional Court judges, to pressure them in the decision-making process.

56. The Court holds that, under Article 71 of the Constitution, a Member of Parliament may not be persecuted or prosecuted for votes or opinions expressed in the exercise of his or her term of office. In its case law, the Court has established that the independence of the opinions of the Member of Parliament, established as a legal guarantee of its activity, is absolute and perpetual. A Member of Parliament may not be held legally liable for votes or opinions expressed in the exercise of his or her term of office even after its cessation (point 1 of the operative part of JCC no. 8 of 16 February 1999). According to Article 81 para. (2) of the Constitution, the President of the Republic of Moldova enjoys immunity and cannot be held legally liable for the opinions expressed in the exercise of his or her term of office. Thus, as in the case of the Members of Parliament and the President of the Republic, **constitutional judges also may not be held legally liable for votes or opinions expressed in the exercise of constitutional justice**. This conclusion reflects an *a fortiori* reasoning, given that constitutional judges often censor, through their jurisdictional acts, laws and decisions adopted by Parliament, decrees issued by the President of the Republic of Moldova or decisions and ordinances of the Government.

57. Therefore, within the meaning of Article 137 of the Constitution, **constitutional judges must be protected by functional immunity**. Constitutional judges shall not be held liable for votes and opinions expressed and for the legal actions taken in the exercise of their function. This solution is, in the socio-political conditions of the Republic of Moldova, a balanced approach on the tension between the principle of independence of constitutional judges and the principle of their liability. Legal liability may be incidental only in respect of violations not related to the exercise of the function of constitutional judge.

58. Thus, from the perspective of Article 137 of the Constitution, which excludes the liability of constitutional judges for votes or opinions expressed in the exercise of their duties, the Court reiterates the conclusions of Judgement no. 12 of 28 March 2017, where it was retained that **Article 307 of the Criminal Code is applicable only in the case of ordinary judges**: judges of tribunals, judges of the Courts of Appeal and judges of the Supreme Court of Justice.

59. In the opinion of the Venice Commission, if the interpretation of the Constitution excludes any liability of constitutional judges for votes or opinions expressed while performing their duties, criminal proceedings applicable to the offence punishable under Article 307 of the Criminal Code cannot be initiated against constitutional judges under any circumstances (see *amicus curiae* Brief of the Venice Commission no. 967/2019 on the criminal liability of Constitutional Court judges, CDL-AD(2019)028, § 42).

60. The Court notes that the status of constitutional judges differs from the status of ordinary judges by the specific nature of constitutional jurisdiction (see *supra* §§ 28 and 29). The main feature of the constitutional jurisdiction and the main difference of the Constitutional Court from the courts of general jurisdiction is that, according to the Constitution, the Court is not part of the judiciary, it is not a body of justice or a component part of the judicial authority (JCC no. 19 of 29 April 1999, § 4).

61. The Court notes that decisions of ordinary courts may be subject to appeal, in accordance with the provisions of Article 119 of the Constitution: "The parties involved in a trial and the competent state bodies may lodge appeals against sentences delivered by the courts of law, under the terms of law." Appeals are procedural means, through which the interested parties have the possibility to request and obtain the quashing of unfounded or illegal court decisions. Thus, the way in which the judicial control performed by the courts of appeal and second appeal is regulated creates conditions for the reparation of the errors committed by the first instance (JCC no. 16 of 25 June 2013, §§ 47-48).

62. At the same time, in accordance with the provisions of Article 140 para. (2) of the Constitution, "The judgments of the Constitutional Court are final and cannot be appealed". The

Court reiterates that regardless of the nature of the Court's decisions, they produce the effects that the Constitution and the law confer, in relation to the power exercised by the Court, their legal force cannot be challenged or confirmed by anyone (JCC no. 33 of 10 October 2013, § 49, JCC no. 5 of 25 February 2020, § 140).

63. Thus, **the acts of the Constitutional Court cannot be subject to any control carried out by a hierarchically superior court that could verify their constitutional character**, given the fact that **there is no such authority in the constitutional order**.

64. In the opinion of the Venice Commission, it is important that only the Constitutional Court be able to revise its judgments. No other public authority can be authorized to do so. If a public authority were to be given the power to review the constitutionality or legality of an act of the 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** (see *amicus curiae* Brief of the Venice Commission no. 967/2019 on the criminal liability of Constitutional Court judges, CDL-AD(2019)028, §§ 49, 50, 59).

65. Thus, the Court emphasizes that **the functional immunity of the constitutional judge is the fundamental condition for guaranteeing his or her independence**.

**(2) With regard to the possibility of holding constitutional judges criminally liable for committing offences not related to the exercise of their functions?**

66. The Court reiterates the need to establish a balance between immunity, as a means of protecting the independence of the judge against excessive pressure and abuse by state powers (immunity), on the one hand, and the fact that the judge is not above the law (liability), on the other hand (see *mutatis mutandis* JCC no. 12 of 28 March 2017, § 62).

67. The Court emphasizes that **constitutional judges remain, of course, liable for any offence committed outside the decision-making process**. For example, they can be held liable for bribery (material or political) in order to resolve a case in a certain way. However, in such situations, constitutional judges may only be punished for the actual crime of bribery.

68. According to Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe on judges: independence, efficiency and responsibilities of 17 November 2010, § 71, "when not exercising judicial functions, judges are liable under civil, criminal and administrative law in the same way as any other citizen".

69. Thus, **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 (*amicus curiae* Brief of the Venice Commission no. 967/2019 on the criminal liability of Constitutional Court judges, CDL-AD(2019)028, § 24).

70. The Court notes that **functional immunity does not cover ordinary offences** and that the constitutional judge can, therefore, be criminally liable for committing them.

**(3) With regard to the procedure for holding constitutional judges criminally liable**

71. According to the Venice Commission, the justification for procedural immunity for judges - where it exists - cannot be to protect the judge from criminal prosecution, but only from false accusations that are levelled against a judge in order to exert pressure on him or her. In all other cases, **procedural immunity has to be lifted by the competent organ within the judicial system** (*amicus curiae* Brief no. 698/2012 for the Constitutional Court of the Republic of Moldova on the immunity of judges, Venice, 8-9 March 2013, CDL-AD(2013)008, § 23).

72. Given the condition that constitutional judges must have the fundamental guarantees for their independence and respect for their authority, it is necessary to establish, in accordance with constitutional principles, the body empowered to give consent to the criminal prosecution of constitutional judges.

73. In comparative terms with the criminal liability of the ordinary judge, the Court notes that, according to Article 19 para. (4) of Law no. 544 of 20 July 1995 on the status of judge, criminal proceedings against a judge may be initiated only by the General Prosecutor or his first Deputy, and in his absence, by a Deputy, based on the order issued by the General Prosecutor, with the consent of the Superior Council of Magistracy, under the conditions of the Code of Criminal Procedure. If the judge commits offences specified in Articles 243, 324, 326 and 330<sup>2</sup> of the Criminal Code of the Republic of Moldova, as well as in case of flagrant offences, the consent of the Superior Council of Magistracy to initiate criminal proceedings is not necessary.

74. According to Article 123 para. (2) of the Constitution, the procedure of organization and functioning of the Superior Council of Magistrates is laid down by organic law. Law no. 947 of July 19, 1996 on the Superior Council of Magistracy, which develops the constitutional provisions, establishes in Article 1 para. (1) that the Superior Council of Magistracy is an independent body, formed for the organization and functioning of the judicial system, and is the guarantor of the independence of the judiciary.

75. The Court notes that the independence of the judiciary implies a special status for judges, which must be protected against the subjectivity of the competent criminal prosecution bodies, which could affect their credibility. For this reason, the legislator established a distinct and rigorous procedure for holding the judge to criminal liability, the decisive role being assigned in this process to the Superior Council of Magistracy, as guarantor of the independence of justice (JCC no. 12 of 28 March 2017, § 78). The lifting of immunity by the Superior Council of Magistracy alone, which is in large part composed of judges elected by their peers, reduces the dependence of the judiciary on political organs (*amicus curiae* Brief no. 698/2012 for the Constitutional Court of the Republic of Moldova on the immunity of judges, Venice, 8-9 March 2013, CDL-AD(2013)008, § 49).

76. Just as the Constitution does not establish an authority to express its consent for the initiation of criminal proceedings against constitutional judges and given the constitutional status of the Constitutional Court as an authority independent of any other public authority, that abides only by the Constitution, it is necessary that the consent to initiate criminal proceedings against a constitutional judge be expressed by the plenum of the Constitutional Court.

77. In the opinion of the Venice Commission, **it is up to the Constitutional Court to lift the procedural inviolability of the constitutional judge** whenever the act committed is not covered by substantial functional immunity, i.e. **prosecution must seek the agreement of the Constitutional Court before it can institute criminal proceedings** (see *amicus curiae* Brief of the Venice Commission no. 967/2019 on the criminal liability of Constitutional Court judges, CDL-AD(2019)028, §§ 32, 33).

78. The Court notes that the prior approval procedure is an instrument that ensures the prevention of possible abuses of constitutional judges and their independence. In this sense, **in order to start a criminal proceeding, the prior approval of the plenary of the Court at the request of the General Prosecutor is necessary.**

79. In its case law, the Court held that the approval of the Superior Council of Magistracy in cases of initiation of criminal proceedings, detention on remand, forced bringing, searching of the judge, is a guarantee that reduces the risk of abuse, arbitrary actions and false accusations against the judge by interested persons and is a legal guarantee of strengthening the constitutional principles on the independence of judges. At the same time, the General Prosecutor has to argue and prove (*onus probandi*) the existence of the conditions or circumstances provided by the Code of Criminal Procedure for ordering, as the case may be, the initiation of criminal proceedings against the judge, as well as the detention, forced bringing, arrest or searching of the judge. It is also the task of the Superior Council of Magistracy to verify the compliance with these requirements (see JCC no. 22 of 5 September 2013, §107; JCC no. 23 of 27 June 2017, §§ 61, 62, 69).

80. In this context, **in order to strengthen the constitutional principle of independence of the Constitutional Court**, the Court notes that constitutional judges may be searched, in case

of flagrant offence, without the prior approval of the Constitutional Court, however detention, arrest and referral to contraventional or criminal trial may be done only with the prior approval of the plenum of the Constitutional Court.

**(4) With regard to the functional immunity of constitutional judges following the end of their term of office**

81. The Court reiterates that the Constitution, as well as the Law on the Constitutional Court regulates important principles and guarantees of independence and neutrality of Constitutional Court judges, capable to allow them to adjudicate objectively. In this respect, Constitutional Court judges cannot be held liable for votes and opinions expressed in the exercise of their functions, including after the end of their term of office (see JCC nr. 18 of 2 June 2014, § 56).

82. In the opinion of the Venice Commission, 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** (*amicus curiae* Brief of the Venice Commission no. 967/2019 on the criminal liability of Constitutional Court judges, CDL-AD(2019)028, § 56).

83. The Court emphasizes that his solution stems from the need 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. **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 (see *amicus curiae* Brief of the Venice Commission no. 967/2019 on the criminal liability of Constitutional Court judges, CDL-AD(2019)028, §§ 35, 36).

84. Regarding the benefit of the immunity of judges for votes and opinions expressed in the exercise of their functions after the end of their term of office, the Constitution imposes the solution made by the legislator by Article 8 para. (3) of the Code of Constitutional Jurisdiction, which establishes that Constitutional Court judges cannot be legally liable for votes and opinions expressed in the exercise of their functions, **including after the end of their term of office.**

For these reasons, pursuant to Articles 135 para. (1) b) and 140 of the Constitution, 26 of the Law on the Constitutional Court, 6, 61, 62 b) and 68 of the Code of Constitutional Jurisdiction, the Constitutional Court

**HOLDS:**

1. Under Article 137 of the Constitution, Constitutional Court judges enjoy functional immunity, which means that constitutional judges cannot be legally liable for votes and opinions expressed in the exercise of their functions.

2. Under Article 137 of the Constitution, Constitutional Court judges cannot be criminally liable for offences committed in cases not related to the realization of constitutional justice.

3. Under Article 137 of the Constitution, for the initiation of criminal proceedings against a Constitutional Court judge, the prior consent of the plenum of the Constitutional Court is necessary.

4. Under Article 137 of the Constitution, the Constitutional Court judge cannot not be searched, with the exception of flagrant offences, detained, arrested, referred to criminal or contraventional trial without the prior consent of the plenum of the Constitutional Court.

5. Under Article 137 of the Constitution, Constitutional Court judges also benefit from functional immunity for votes and opinions expressed after the end of their term of office.

6. This judgment is final, cannot be appealed, enters into force on the date of adoption and shall be published in the Official Journal of the Republic of Moldova.

**President**

**Vladimir ȚURCAN**

*Chișinău, 26 March 2020*

*JCC nr. 9*

*Case no. 153b/2019*