

**NATIONAL REPORT OF THE REPUBLIC OF MOLDOVA**  
**for**  
*the 2<sup>ND</sup> Congress of the World Conference on Constitutional Justice*  
**to be presented by Mr. Dumitru PULBERE, President of the Constitutional**  
**Court of the Republic of Moldova**  
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**I. “SEPARATION OF POWERS AND INDEPENDENCE OF CONSTITUTIONAL COURTS AND EQUIVALENT BODIES”**

**I. Independence of the Constitutional Court as an institution**

- *The Statute of the Constitutional Court or a function of constitutional review of the Supreme Court provides more stability to the Court and strengthens its independence:*

Since 15 years an autonomous and independent body of constitutional jurisdiction successfully activates in the Republic of Moldova. The Court performs an official activity for the protection and affirmation of Constitution’s supremacy and principles of state governed by law. Just to this effect, Article 134 paragraph (1) of the Constitution gives the definition of the Constitutional court as the sole authority of constitutional judicature in the republic of Moldova.

In Title V “Constitutional Court”, the Constitution clearly defines the characteristic principles of the Constitutional Court: functionality – exercise of constitutional justice; status – sole authority of constitutional judicature; basic principles of activity – autonomy from another public authority and subordination to the Constitution. The Constitution also defines the structure, powers of the Court, autonomy of judges, appointment qualifications, incompatibility of the office of judge with holding any other remunerated position and legal power of decisions of the Constitutional Court.

The powers of the Constitutional court are regulated in other articles of the Constitution, as well: Article 62 (Validation of Members’ Mandates in Parliament), Article 79 (Mandate Validation and Taking of the Oath by the President of the Republic of Moldova), Article 88 letter i) (Suspension by the President of the Republic of those Acts of Government that run against the legislation), Article 141 para. (2) (Submission to the Parliament of constitutional law projects).

One of the typical features of the Constitutional Court’s status consists of the fact that it is not part of judiciary instances’ system of common law and it does not constitute for them a superior body. Upon settlement of cases, the Constitutional Court is guided by Constitution. It does not examine the cases which are within the competence of judiciary instances of common law or of other organs. It needs to be mentioned that the Constitutional Court has the mission to resolve exclusively the issues of law, a fact that excludes its involvement into politics. The judges of the Court cannot be members of any party or a political movement.

It is very important to note that the judges of the Constitutional Court are independent while exercising their mandate and obey only the Constitution. Upon consideration of cases any influence upon them is excluded. The judges of the Court cannot be legally held responsible for voting or expressed opinions during their mandate. Besides that, the Law on the Constitutional Court foresees that the judges are irremovable and their term of office may be suspended or withdrawn only in cases provided for by the law.

Being absolutely independent from any public authority, the Constitutional Court performs its activity based upon the principles of independence, legality and publicity.

In conformity with the Law on the Constitution Court and the Code of Constitutional Jurisdiction, the Constitutional Court examines the cases according to the rules imposed by the constitutional procedure and not by court proceedings.

Separation of state powers is an issue that deserves special attention but the Constitutional Court is obliged, in accordance with Article 134 of the Supreme Law, to ensure the implementation of the principle of State powers in the state, the one enshrined in Article 6 of the Constitution of the Republic of Moldova.

Broadly speaking, the Constitutional court is called to maintain the balance of power branches, not to admit any abuses and contrary interactions of power branches and concurrently to stimulate their cooperation in exercising their prerogatives according to the Constitution.

In its decisions rendered throughout fifteen years, the Court consistently promoted the constitutional principle of separation of powers as a basic principle for state's organizing, the Court persistently pronouncing itself against exceeding their duties by legislative and executive powers and mutual interferences, as well as against arrogating by them of powers peculiar to the judicial power.

- *The established autonomy allows the court to organize itself and to elaborate its internal regulation without subordinating that one to control by other powers:*

In accordance with Article 6 of the Law on the Constitutional Court, the Secretariat shall be set up within the Constitutional Court which has the task to ensure the Court's activity. The Regulation of the Court's Secretariat, its organization chart and personnel establishment shall be approved at the staff meeting by the Plenum of the Constitutional Court. Only the Plenum of the Constitutional Court may submit amendments or completions to the personnel establishment and the Regulation of the Court's Secretariat.

- *The financial autonomy resulting from separation of powers allows it to develop and execute its budget*

In conformity with Article 37 of the Law on the Constitutional Court, the Court has its own budget that is an integral part of the state budget.

In the years of 2002 and 2008 the Parliament introduced a number of amendments to the legislation in view of consolidating Constitutional Court's independence and making its activities more efficient.

By its Decision № 1092-XV of 30 May 2002 the Parliament emphasized in the budgetary classification, foreseen by the Decision of the Parliament № 969-XIII of 24 July 1996, in a distinct compartment the budget of the Constitutional Court, separating the budget of the judicial authority.

Article 37 para. (2) of the Law on the Constitutional Court was modified by the Law № 213-XVI of 23 October 2008 that reads that the Budget of the Constitutional Court shall be approved by the Parliament at the proposal of the Constitutional Court's Plenum and included into the state budget.

- *Administrative autonomy, in particular, regarding appointment and management of careers of the Court's staff, permits integral performance of its powers and avoidance of interferences from outside.*

The staff of the Constitutional Court formally acts within the Secretariat set up on the basis of Article 6 of the Law on the Constitutional Court which has the task to ensure necessary conditions for exercising constitutional jurisdiction.

The Secretariat of the Constitutional Court has a special role in the activity of the Constitutional Court. Obviously in order to meet the wide spectrum of demands, the Secretariat counts upon its qualified personnel. Actually, in the Secretariat there are 43 persons with higher education from various fields: law, philology, journalism, international relations, accountancy, bibliography, informatics etc.

The employees of the Secretariat, except technical and administrative staff, have the status of public servants which falls under incidence of the Law on Public Function and Status of Public Servant.

Occupancy of public functions in the public service of the Republic of Moldova is being done on the basis of the Recruitment and Selection System foreseen by the Law № 158-XVI of 4

July 2008 on Public Function and Status of Public Servant and the Regulation on filling a public function vacancy through competition.

Both the Law on Public Function and Status of Public Servant, as well as the Regulation on filling a public function vacancy through competition contain compulsory standards on ensuring equal possibilities for candidates with regard to filling a public function vacancy through competition regardless of race, sex, age, religion, affiliation or non-affiliation to one of parties etc. The mentioned normative acts provide for employment in public service only on the basis of merit, open and objective competition.

In accordance with the provisions of Article 28 from the Law № 158/2008, occupancy of a vacant public function shall be done by one of the following modalities: competition, promotion or transfer.

The way, in which *promotion* occurs, is stated in Article 45 of the Law № 158/2008. According to the provisions of the above-mentioned article, a public servant may be promoted to a higher public function when he /she has obtained after professional performances assessment the mark “very good” at the last 2 assessments or the mark “good” at the latest 3 assessments.

In conformity with Article 48 of the Law № 158/2008 *transfer* may occur within the same unity /subdivision, between internal units /subdivisions of public authority or between two public authorities. Article 48 provides for also that public authorities may make vacancy announcements of public functions which can be filled by transfer upon request. In the situation when two or more public servants ask for filling a public function by transfer upon request, the public servant is favoured who has a closer / more relevant experience to that one requested by the vacant function.

As a rule, the *competition* for filling a public function shall be organized after applying modalities of filling a vacant public function through promotion or transfer.

- *Disciplinary independence in the case when a judge does not exert his obligations, a disciplinary sanction is established by the Court.*

The Law on the Constitutional Court establishes a number of guarantees for the judges in order to fulfil their duties, the main being independence, immovability, immunity.

According to Article 13 para. (2) from the Law on the Constitutional Court, the judges shall not be held legally responsible for their votes and opinions expressed during the exercise of their mandate.

With regard to disciplinary responsibility, it is regulated relatively in a detailed manner by the Constitutional Jurisdiction Code (articles 83-84) comprised in Chapter 14 “Disciplinary responsibility of judges”.

Article 84 of the Code regulates disciplinary proceedings for the judges of the Constitutional Court which shall be merely initiated following a complaint drawn up in written form by the competent authorities in charge of nomination of judges to the Constitutional Court.

Upon receipt of a complaint, the President of the Court appoints a panel of disciplinary proceedings composed of two judges. If the complaint concerns the President of the Constitutional Court, the panel of disciplinary proceedings shall be appointed by the Constitutional Court, summoned by the judge who performs the functions of the President of the Court in the absence of the latter. One of those two judges shall be nominated as chairman of the panel of disciplinary proceedings.

In case the panel of disciplinary proceedings ascertains that the complaint is groundless, then the case shall be classified by a decision of the President of the Court or of the Court.

In case the panel of disciplinary proceedings ascertains that the complaint is well-grounded, then it will prepare a report which is supposed to be forwarded for consideration to the Constitutional Court.

The hearing before the Constitutional Court of the defendant is compulsory.

The Constitutional Court may impose upon the judges depending upon the gravity of breach the following disciplinary sanctions: a) warning; b) reprimand; c) withdrawal of the judge’s mandate of the Constitutional Court.

The sanctions are applied by a decision adopted with the vote of the majority of judges of the Constitutional Court. The decision of the Court is final and cannot be appealed.

## **II. INDEPENDENCE OF CONSTITUTIONAL JUDGES**

Independence of constitutional judges is a guarantee of independence of the Constitutional Court in general. The observance of this principle needs to be overseen permanently. However, the key personage in a constitutional jurisdiction authority proves to be the judge.

The independence of the Constitutional Court is stipulated in the Constitution of the Republic of Moldova, Article 143, para. (2) according to which “The Constitutional Court is independent of any other public authority and obeys only the Constitution”. The guarantees of judges’ independence may be found also in articles 137, 139 of the Constitution as well as in the Law on the Constitutional Court and the Constitutional Jurisdiction Code. Judicial independence is ensured by unanimity, immovability and incompatibility. This principle has to be examined in relation to other fundamental principles such as collegiality, legality, publicity and equality.

Besides the Constitution, the Law on the Constitutional Court (№ 317-XIII dated 13.12.1994) establishes the status of the Constitutional Court’s judge (Chapter II, articles 11-22) but the Law on the judge’s status (№ 544-XIII dated 20.07.1995) – that one of the judges from the instances of common law which the constitutional judges are assimilated to.

- **The constitutional judge who was appointed and /or elected by or among those three powers, is obliged to respect the attitude of “ingratitude” toward the authority that appointed him/her in order to protect its independence;**

### **Normative framework:**

#### **Article 136 of the Constitution: Structure (Constitutional Court)**

(2) Two judges are appointed by the Parliament, two by the Government and two by the Higher Council of Magistrates.

#### **Article 137 of the Constitution: Independence**

For the duration of their mandate the judges of the Constitutional are irremovable, independent and obey only the Constitution.

#### **Law on the Constitutional Court:**

##### **Article 6. Structure**

1. The Constitutional Court shall consist of six judges, appointed for a term of office of six years.
2. Two judges shall be appointed by the Parliament, two- by the President of the Republic of Moldova and the other two by the Superior Council of Magistracy.
3. The Constitutional Court shall also include the Secretariat, which has the task to ensure the Court’s activity.
4. An Advisory-Scientific Board shall operate within the Constitutional Court.

#### **Law on the Constitutional Court:**

##### **Article 14. Immovability**

1. The judge of the Constitutional Court shall be irremovable during the term of office.
2. The mandate of the judge of the Constitutional Court shall be suspended and withdrawn only in cases provided for by the present law.

3. In case of the exclusion *de jure* of the mandate, the judge shall be dismissed from office, under the conditions foreseen by the present law.
4. The judge of the Constitutional Court may resign from office at his/her own initiative.

**Law on the Constitutional Court:  
Article 17. Obligations**

The judge of the Constitutional Court shall be under an obligation:

- a. to perform his/her prerogatives unbiased and respecting the Constitution;
- b. to keep the secrecy of deliberations and of the votes, and not to take a public stand or give consultations on matters within the Constitutional Court competence;
- c. to express the affirmative or negative vote, while adopting the rulings of the Constitutional Court;
- d. to inform the President of the Constitutional Court of any activity incompatible with the exercised powers;
- e. to forbid the use of the performed function for purpose of any kind of propaganda;
- f. to refrain from any activity contrary to the status of judge;
- g. to submit under conditions of law the declaration on incomes and property.

[Article 17 completed by the Law № 136-XV dated 06.05.2004, in force since 11.06.2004]

**Argumentation:**

Independence and impartiality of constitutional judges is put into practice due to the following guarantees of the judge: immovability, inviolability, incompatibility, interdictions and both material and social guarantees, stated in the constitutional text and organic normative acts. According to Article 8, para. (2) of the Code *“The judges of the Constitutional Court shall examine the case-files under the conditions that preclude any influence from outside”*<sup>1</sup>, because the quality of realized constitutional justice depends upon the way they are performing their duties.

For instance, the legislation of the Republic of Moldova<sup>2</sup> specifies the need to meet the following conditions for the position of judge of the Constitutional Court:<sup>1</sup>possession of the citizenship of the Republic of Moldova with outstanding legal education, high professional competence and a length of service of at least fifteen years in legal field, as well as within higher legal education institutions or scientific activity in law, prior consent of the candidate, expressed in written form to be appointed judge of the Court (which shall also contain the candidate’s pledge to resign from incompatible functions with that of judge of the Constitutional Court or to suspend the activity within the political party or other political organization in case he /she is member of these) and not exceed the age limit of 70 years old.

It can be noted that the legislation does not remind anything about place of residence of the candidate, the language he /she must possess that may create divergence in practice.

Judge’s mandate shall cease in accordance in the cases foreseen by Article 18 of the Law on the Constitutional Court when the vacancy of respective office is declared, namely, in certain cases:

- a. mandate expiration;
- b. resignation;

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<sup>1</sup> Constitutional Jurisdiction Code Nr. 502-XIII dated 16.06.1995 with subsequent amendments published in the “Official Monitor (Gazette) of the Republic of Moldova”, Nr. 53-54 of 28 September 1995;

<sup>2</sup> Law Nr. 317-XIII dated 13 December 1994 on the Constitutional Court with subsequent amendments published in the “Official Monitor (Gazette) of the Republic of Moldova” Nr. 8 of 7 February 1995, Article 11.

- c. mandate withdrawal;
- d. demise.

In conformity with the initial concept of the authors of Constitution, in order to grant independence to the Constitutional Court and to ensure the balance of state powers, it has been regulated that the judges of the Constitutional Court be appointed each two by every of those three powers. It is a procedure, which under the aspect of equivalent division between powers concerning the number of judges appointed by those three powers, is more seldom in constitutional systems. Nevertheless, this procedure is understood in wider circles as judges' gratitude toward the power which appointed him /her.

Due to these reasons, it is necessary that paragraph (2) of Article 136 of the Constitution be interpreted together with Article 137 of the Constitution. Thus, the mandate of judges ceases because of *natural* cause – demise, resignation upon his /her own initiative, mandate expiration, as well as forcible causes – withdrawal of the judge's mandate occurs according to Article 19 of the organic Law<sup>2</sup> in case of:

- a. a long and uninterrupted incapacity (more than 4 months) to fulfil the functional duties due to health reasons;
- b. an infringement of the oath and office duties;
- c. the conviction delivered by a law court for committing an offence;
- d. an incompatibility;

The legislation of the Republic of Moldova includes guarantees that do not allow the bodies which appointed the judges to the Constitutional Court to dismiss them or to suspend the activity of the latter. In this way, according to Article 19 of the Law on the Constitutional Court the mandate of a judge may be withdrawn not by the appointing authority but by the Plenum of the Constitutional Court. A contrary situation, it means participation of the same authority at mandate withdrawal procedure applied to constitutional judges would considerably affect the independence of the Court. Respectively, cases of mandate expiration, demise, and resignation shall be declared upon ordinances of the president of the Court. In the same way, it needs to be mentioned that in the event of the mandate cessation as a result of unforeseen reasons provided by law, the President of the Constitutional Court shall notify the competent authority, within three days at the most from the date of the vacancy assertion, soliciting to appoint a new judge within 15 days from the date of notification (a term stated in Article 20 of the organic Law). There is a *gap* in this regulation – time interval of 18 days, due to objective reasons, may be a term of a long duration in which a constitutional judge may be absent because another one has not yet been elected. It would be better for the judge of the Court (whose mandate expired) to exert his function until the appointment of a successor to this function, as it is the case of the majority of constitutional courts from other states given the fact that it concerns jurisdictional protection of the Constitution and guarantee of the principle of separation of powers.

It is the right of the authority which nominates the judge to re-appoint the same person for the second mandate in accordance with para. (2) Article 5 of the Law on the Constitutional Court.

- ***Professional qualifications, which put the constitutional judge above any temptation for promotion, can represent sound guarantees of independence;***
- **Normative framework:**

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<sup>2</sup> Law nr. 317-XIII dated 13 December 1994 on the Constitutional Court with subsequent amendments, published in the "Official Monitor (Gazette) of the Republic of Moldova", nr. 8 of February 7<sup>th</sup> 1995.

## **Constitution: Article 138**

### **Appointment conditions**

The judges of the Constitutional Court must possess outstanding judicial knowledge, high professional competence and a length of service of at least 15 years in legal field, didactic or scientific activity in law.

## **Law on the Constitutional Court**

### **Article 21. Qualification degree, salary, indemnities and pensions**

- (1) The judges of the Constitutional Court, specialists of a high legal education and professional competence, shall benefit for life, from the moment of his/her appointment for this position, by the superior qualification degree of the judges.
- (2) The President of the Constitutional Court shall be assimilated with the position of the President of the Supreme Court of Justice regarding the indemnities and pension.
- (3) The judges of the Constitutional Court shall be assimilated with the position of the Vice-President of the Supreme Court of Justice regarding the indemnities and pension.
- (4) The payment of salaries to the President of the Constitutional Court and to the judges of the Constitutional Court is made under the ways, conditions and scales foreseen by the Law Nr. 355-XVI dated 23 December 2005 concerning wage system in the public sector from the budgetary means of the Constitutional Court.
- (5) In case the judge of the Constitutional Court has resigned the office, having reached the ceiling age for this position or due to a long and constant incapacity (more than 4 months) to exercise the office due to health reasons, he/she shall be entitled to a dismissal indemnity equal to the average annual salary of the position. The Constitutional Court shall have the right to grant to the resigned judge a dismissal indemnity amounting to 3 monthly salaries of the position at the most.
- (6) The manner of pension insurance of the judge of the Constitutional Court shall be fixed under the law.

*[Article 21 amended by Law nr. 447-XVI dated 28.12.2006, in force since 13.04.2007]*

*[Article 21 amended by Law nr. 1221-XIII dated 26.06.1997]*

### **Reasoning:**

The function of constitutional judge is truly the highest position among the functions to which a jurist can pretend within his /her speciality domain. Taking this into consideration the Constitution stipulates that to this function should be appointed lawyers of “high professional competence”.

Following the stated condition, they enjoy for lifetime the superior degree of qualification for judges; without being necessary to be attested. This regulation is truly a guarantee of independence for the constitutional judge that does not depend upon any person at the moment of the need to be attested.

At the same time conferring for a lifetime of the superior degree of qualification presupposes high responsibility of the constitutional judge, which is left at his /her discretion to self-improvement compared to other judges that are obliged to these actions (improvement / training).

- **Age criterion for occupying the function of judge may determine the independence in judge’s behaviour.**

- **Normative framework:**

## **Law on the Constitutional Court:**

### **Article 11. Appointment**

- (1) The judge of the Constitutional Court may be any person who possesses the citizenship of the Republic of Moldova, has residence within the state, outstanding legal education, high professional competence and a length of service of at least fifteen years in legal field, as well as within higher legal education institutions or scientific activity in law.
- (2) The age limit for holding the office of the Constitutional Court judge shall be 70 years old.
- (3) The appointment shall occur only with the prior consent of the candidate, expressed in written form. In case the candidate holds an office incompatible with that of judge of the Constitutional Court, or he/she is a member of a political party, or another social-political organisation, the consent shall contain the candidate's pledge to resign on the day of taking the oath from the previous office and to suspend the activity within the political party or other social - political organisation.

*[Article 11 amended by Law nr. 127-XVIII dated 23.12.2009, in force since 31.12.2009]*

*[Article 11 amended by Law nr. 273-XVI dated 07.12.2007, in force since 13.05.2008]*

*[Article 11 amended by Law nr. 1332-XV dated 26.0.2002]*

### **Reasoning:**

The age criterion for appointment may essentially determine independent behaviour of the judge, at a certain age a person with respective qualifications cannot be influenced any more. This one is owed by the level of professionalism acquired throughout his /her activity.

In the Republic of Moldova, the Constitution did not foresee for constitutional judges a limit for exercising their functions but an appointment ceiling of 70 years old. Along with this obligation of a length of service of 15 years, a fact that allows to take up this function also for persons ranging from 38 to 70 years old.

- **Material guarantees, namely, a salary corresponding to function's importance, do they place the constitutional judge beyond any possible temptations?**
- **Normative framework:**

## **Law on the Constitutional Court:**

### **Article 21. Qualification degree, salary, indemnities and pensions**

- (1) The judges of the Constitutional Court, specialists of a high legal education and professional competence, shall benefit for life, from the moment of his/her appointment for this position, by the superior qualification degree of the judges.
- (2) The President of the Constitutional Court shall be assimilated with the position of the President of the Supreme Court of Justice regarding the indemnities and pension.
- (3) The judges of the Constitutional Court shall be assimilated with the position of the Vice-President of the Supreme Court of Justice regarding the indemnities and pension.

### **Reasoning:**

A salary corresponding to function's importance place the constitutional judge beyond any possible temptations as a result of the fact that financial reward represents the primordial goal targeted by any person while performing a human activity.



In the Republic of Moldova, as it is stated in the Law on the Constitutional Court and in conformity with the Law on remuneration in the budgetary system, the reward is provided equivalently. In this way, the salary of the President of the Constitutional Court is equivalent to the salary of the President of the Supreme Court of Justice but the salary of the constitutional judge is equivalent to the salary of the Vice President of the Supreme Court of Justice. Thus, the salary of a judge of the Constitutional Court is higher than that one of a judge of the Supreme Court of Justice.

Concurrently, it is noteworthy that the remuneration of the judges of the Constitutional Court of the Republic of Moldova, compared to the judges of other states and taking into consideration the actual economic situation, is a symbolic one but acceptable taking into account the current conditions.

- **Does the non-repeating character of the duration mandate and /or the mandate term of the constitutional judge until retirement age (or for lifetime as it is in the USA) constitute a guarantor for the independence of function?**

**Normative framework:**

**Law on the Constitutional Court:**

#### **Article 5. Mandate length**

- (1) The term of office of the Constitutional Court shall not be limited.
- (2) The judge of the Constitutional Court may hold this position within the term of two mandates.

#### **Article 6. Structure**

- (1) The Constitutional Court shall consist of six judges, appointed for a term of office of six years.

**Reasoning:**

It is the right of the appointing authority to nominate the same person for the second term of office in accordance with para. (2) of Article 5 of the Law on the Constitutional Court.

With regard to several proposals to revise the Constitution, it is actually suggested to fix a unique term of office with a longer duration.

The ideal variant for guaranteeing independence to the constitutional judge would be the appointment of the judge for a longer term of office without the possibility to extend it for another term of office. Appointment for lifetime of the judge is a good measure but a risky one in the situation when the selection system or the appointing authority fails with the decision. Given the above-mentioned, a middle and optimal variant would be the appointment of judges for a single 9-year term of office, as it is currently the case of other countries (their number should not be even because it is difficult to reach a parity of votes, so let it be 7 judges, ideally, would be 9 judges).

- **The incompatibility of the office of constitutional judge with other functions, in particular, with parliamentary, governmental positions and belonging to a political party derives from the principle of separation of powers. This needs to be perceived by constitutional judges as an obligation to abstain from any action that would compromise judge's independence;**

- **Normative framework:**

## **Constitution of the Republic of Moldova**

### **Article 139. Incompatibilities**

The office of the Constitutional Court judge shall be incompatible with holding of any other remunerated public or private position, except for education and research activity.

## **Law on the Constitutional Court**

### **Article 13. Independence**

1. The judges of the Constitutional Court shall be independent while performing their mandate and shall abide only by the Constitution.
2. The judges of the Constitutional Court shall not be held legally responsible for their votes and opinions expressed during the exercise of their mandate.

## **Constitutional Jurisdiction Code**

### **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.

## **Law on the Constitutional Court**

### **Article 15. Incompatibilities**

The position of the judge of the Constitutional Court is incompatible with any other public or private remunerated stand, except for the didactic and academic activities.

### **Reasoning:**

In accordance with the Constitution, the judges of the Constitutional Court are independent during exercise of their mandate and obey only the Constitution. International practice shows that in a state of law judges' independence is not a privilege accorded to them but a guarantee for citizens. If we refer to the status of judge of the Constitutional Court who cumulates rights and liabilities of a person appointed to the respective position including concurrently guarantees and incompatibilities meant to ensure application of rights and fulfilment of obligations by him /her, it could be mentioned that their status is different to the status of other judges by the specific nature of constitutional jurisdiction. Thus, it is noteworthy that all judiciary instances have a sole status and are differentiated merely through their competences and empowerments. Particularities of legal status of certain categories of judges are enshrined in different normative acts. The Law on the Constitutional Court (nr. 317-XIII dated 13.12.1994) determines the status of judges of the Constitutional Court (Chapter II, articles 11-22) and the Law on the status of judges (nr. 544-XIII dated 20.07.1995) – that one of the judges from instances of common law (representing the third power in state according to the principle of separation of powers in state).

The Constitution of the Republic of Moldova and the Law on the Constitutional Court consecrate the independence of the Court toward any other public authority, it obeying only the Constitution and the provisions of its organic law: the independence of the Court implies also independence of its judges, the judges of course obey in their activity only the Supreme Law of the state, the organic law of functioning and the Constitutional Jurisdiction Code. The law states that the judges of the Court cannot be held legally responsible for the expressed votes or enunciated opinions.

As far as **incompatibility** is concerned, Article 15 of the Organic (organizing) Law provides for that the position of the judge of the Court is incompatible with any other public or private remunerated stand, except for the didactic and academic activities<sup>3</sup>. The given norm is one of the guarantors for judge's independence that protects him /her from service dependence (implicit and financial ones) towards other institutions or enterprises in which they could be employed. The judge of the Court must also suspend his /her activity in a party or other public authority in case of his /her membership there<sup>4</sup>. Here, taking note of Article 135, para. (1), letter h) of the Constitution, the judges of the Constitutional Court decide over matters dealing with the constitutionality of a political party, his /her affiliation to a party would complicate things by transforming jurisdictional debate into a very hot political one.

Respective restrictions under whose limits the constitutional judges exercise their mandate and which represents, in fact, the chapter of *incompatibilities* are foreseen in order to guarantee the independence of judges.

- **Which are the criteria and limits in the context of reserved obligation of the judge?**
- **Normative framework:**

#### **Law on the Constitutional Court:**

##### **Article 27. Voting**

1. The acts of the Court shall be adopted by the majority of the judges' votes.
2. In case that for the adoption of the judgment on the constitutionality of the normative act or international treaty the votes' parity is recorded, the normative act at issue or the international treaty shall be presumed constitutional and the case shall be ceased. In other cases of parity of votes, the judgment, decision or advisory opinion shall not be considered as adopted and the examination of the case is to be suspended excepting the cases provided for in Article 4, paragraph (1), letters d), e), f) and h) when the consideration of the case is adjourned.
3. The voting shall have an open character. Upon the decision of the Constitutional Court plenum, some acts may be submitted to a secret vote.
4. The judge shall not be entitled to shirk or to refrain from voting.
5. Upon request, the judge's separate dissenting opinion shall be attached to the adopted act.  
[Article 27 amended by law nr. 213-XVI dated 23.10.2008, in force since 14.11.2008]  
[Article 27 amended by Law nr. 1570-XV dated 20.12.2002, in force since 15.01.2003]

#### **Constitutional Jurisdiction Code:**

##### **Article 67. Dissenting opinion of the judge**

- (1) The judge of the Constitutional Court who has disagreed with the delivered judgment or the issued advisory opinion may express in written form his/her dissenting opinion.
- (2) Upon the judge's request, his/her dissenting opinion shall be attached to the adopted act.

#### **Reasoning:**

The judge may pronounce himself /herself "in favour" or "against" or abstain, either not participate in the voting of a decision. This right which was largely interpreted is limited for the

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<sup>3</sup> Law nr. 317-XIII dated 13 December 1994 on the Constitutional Court with subsequent amendments, published in the "Official Monitor (Gazette) of the Republic of Moldova", nr. 8 of February 7<sup>th</sup> 1995

<sup>4</sup> Presidential Decree nr. 201 dated 27 July 1990 on state power, published in the News (Veștile), nr. 8 of 1990

judge. The judge, both from judiciary instances of common law and of constitutional review, is not entitled to evade from voting or settlement of litigation.

Article 17, letter c) of the Law “On the Constitutional Court” nr. 317-XIII of 13 December 1994 compels the judge of the Constitutional Court “upon adoption of the acts of Constitutional Court’s acts to express himself /herself affirmatively or negatively”. According to Article 26, paragraph (1) of the same law, the Constitutional Court adopts decisions, resolutions and issues opinions. In this way, regardless of the type of adopted act, the judge is obliged to pronounce himself /herself “in favour” or “against” the act

Collective or majority view of the Court is being formed out of individual opinions of judges.

▪ **Does the immunity of the judge, whether complete or limited to the actions committed in the course of exercising jurisdictional office, consolidate the independence of judges?**

▪ **Normative framework:**

### **Law on the Constitutional Court:**

#### **Article 16. 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 sent to trial for criminal or petty offences, unless preliminary approved by the Constitutional Court.
- (2) The legal competence for the administrative offences and misdemeanours committed by the judges of the Constitutional Court shall belong to the Supreme Court of Justice.
- (3) The initiation of the criminal proceedings and the request for the consent of suing at law shall fall under the competence of the Prosecutor General.
- (4) The judge of the Constitutional Court shall be legally suspended from office from the date of endorsing the consent of suing at law. In case of a final sentence, the judge mandate shall be withdrawn, under the terms of the present law.

### **Constitutional Jurisdiction Code:**

#### **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.

## Law on the Constitutional Court:

### Article 13. Independence

- (1) The judges of the Constitutional Court shall be independent while performing their mandate and shall abide only by the Constitution.
- (2) The judges of the Constitutional Court shall not be held legally responsible for their votes and opinions expressed during the exercise of their mandate.

### Reasoning:

Besides immovability, another type of protection of the office of constitutional judge and guarantee of independence and impartiality to him /her constitute judge's **immunity** (inviolability). Granting of immunity for the duration of the mandate means that:

- 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<sup>5</sup>, Article 16, para. (1); 4, Article 10, para. (1);
- 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<sup>6</sup>, Article 10, para.(2);
- The decision-making factor which has undertaken the restraint of the Constitutional Court judge caught in a flagrant felony shall immediately notify the Court within 24 hours<sup>7</sup>, Article 10, para. (3);
- The legal competence for the administrative offences and misdemeanours committed by the judges of the Constitutional Court shall belong to the Supreme Court of Justice<sup>8</sup>, Article 16, para. (2);
- The initiation of the criminal proceedings and the request for the consent of suing at law shall fall under the competence of the Prosecutor General<sup>9</sup>, Article 16, para. (3);
- The judge of the Constitutional Court shall be legally suspended from office from the date of endorsing the consent of suing at law. In case of a final sentence, the judge mandate shall be withdrawn, under the terms of the present law, Article 16, para. (4);
- The establishment of sanctions on judges of the Constitutional Court for the disciplinary infringements and the procedure of their application, as well as the withdrawal of the mandates shall be carried out under the present Code<sup>10</sup>, Article 10, para. (4).

Inviolability concerns judge's acts or deeds which are alien to his /her mandate and aim as goal to prevent unfounded and arbitrary legal prosecution of the judge, precluding him /her from fulfilling his/her mandate.

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<sup>5</sup> Law nr.317-XIII dated 13 December 1994 on the Constitutional Court with subsequent amendments, published in the "Official Monitor (Gazette) of the Republic of Moldova, nr. 8 of February 7<sup>th</sup> 1995

<sup>6</sup> Constitutional Jurisdiction Code nr. 502-XIII dated 16.06.1995 with subsequent amendments, published in the "Official Monitor (Gazette) of the Republic of Moldova, nr. 53-54 of September 28<sup>th</sup> 1995

<sup>7</sup> Constitutional Jurisdiction Code nr. 502-XIII dated 16.06.1995 with subsequent amendments, published in the "Official Monitor (Gazette) of the Republic of Moldova, nr. 53-54 of September 28<sup>th</sup> 1995

<sup>8</sup> Law nr.317-XIII dated 13 December 1994 on the Constitutional Court with subsequent amendments, published in the "Official Monitor (Gazette) of the Republic of Moldova, nr. 8 of February 7<sup>th</sup> 1995

<sup>9</sup> Idem.

<sup>10</sup> Constitutional Jurisdiction Code nr. 502-XIII dated 16.06.1995 with subsequent amendments, published in the "Official Monitor (Gazette) of the Republic of Moldova, nr. 53-54 of September 28<sup>th</sup> 1995

Hence, **immunity is one of the most important conditions of guaranteeing independence to the constitutional judge** and the Court, in this regard, appears as a protecting environment for the judge. It's the Court, as well, who decides over disciplinary regime of judges in order to avoid certain pressures from other bodies, determining proper disciplinary sanctions (warning, reprimand, withdrawal of mandate). Those three powers have only the right to appoint judges to the Constitutional Court and that's all. In rest, they cannot interfere in any way in the activity of the Court and, respectively, of judges. Special status of the judges of the Constitutional Court, guaranteed by law, does not allow these to be judged otherwise than following a special procedure, a more official one (with the consent of the Constitutional Court), which is different from judging other judges. This status also confers quite a high authority to the constitutional judge. So, Article 21 of the Organic Law<sup>11</sup> stipulates that the President of the Constitutional Court is assimilated with the President of the Supreme Court of Justice as far as the salary, indemnities and pension are concerned, but the judges of the Constitutional Court – with the Vice President of the Supreme Court in salary, indemnities and pension. Once again, it needs to be outlined that the immunity is not a privilege but a special procedure for protecting constitutional judge's mandate against abusive or groundless acts or deeds. The procedure of mandate's termination, immunity, incompatibility, conditions for appointing a judge and other nuances regarding exercise of constitutional judge's office differ from state to state.

For instance, in some countries the Constitutional Court decides over immunity of the constitutional judge as it occurs in Georgia, Italy, Bulgaria, Slovakia and the Republic of Moldova.

Based on the undertaken analysis, we could firmly conclude that in a democratic and independent state as the Republic of Moldova, constitutional justice must be accomplished by independent, impartial and immovable constitutional judges. Their independence is not a privilege rendered to them and in no way does not consist of the independence to commit violations of law. Their independence arises from the independence of the Constitutional Court from any other public authority, the legislation in the field specifying that: the Court obeys only the Constitution and its Organic Law, as well as the constitutional judges do so while exercising their functions; the Court has the sole right to decide over her competences; its judges cannot be held legally responsible for the opinions and votes expressed upon adoption of solutions; determination of disciplinary sanctions for the judges of the Court upon whose application decides only the Constitutional Court etc.

### III. FUNCTIONING PROCEDURE OF COURTS

- *Does the compulsory complaint lodged by a parliamentary minority, ordinary instances or directly by citizens allow the judge to pronounce himself /herself on some texts, whose constitutionality is not questioned by the political majority?*

The Constitutional Court solves only the issues related to its competence. The Constitutional Court exercises jurisdiction following an appeal submitted by the established subjects stated in the Law on the Constitutional Law in Article 25 as well as in Article 38 of the Constitutional Jurisdiction Code. The right to petition the Constitutional Court shall have:

- President of the Republic of Moldova;
- Government;
- Minister of Justice;
- Supreme Court of Justice;
- Economic Court;

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<sup>11</sup> Constitutional Jurisdiction Code nr. 502-XIII dated 16.06.1995 with subsequent amendments, published in the "Official Monitor (Gazette) of the Republic of Moldova, nr. 53-54 of September 28<sup>th</sup> 1995

- Prosecutor General;
- Member of the Parliament;
- Parliamentary fraction;
- Ombudsman;
- People's Assembly of Gagauzia (Gagauz-Yeri).

Following these provisions, we could draw the conclusion that if an appeal meets the conditions foreseen by Article 38 of the Constitutional Jurisdiction Code and it is submitted by a subject entitled by law with such a right, the President of the Court orders transmission of the petition for preliminary consideration. Preliminary consideration of the petition is being accomplished by the judges of the Constitutional Court or by Judge Assistant. The outcome of preliminary examination is legalized by an opinion, after which the President of the Constitutional Court forwards the materials to the session of the Court. Upon preliminary consideration, the Constitutional Court is guided by the Constitution, the Law on the Constitutional Court and the Constitutional Jurisdiction Code. It does not examine the cases which are in the competence of judiciary instances of common law or other bodies. The Constitutional Court has a mission to solve issues of law, a fact that excludes its involvement into politics.

In accordance with Article 27 of the Constitutional Jurisdiction Code the judge who he has been acted as a decision-making factor at the adoption of the appealed act, except for the cases of elaboration and adoption of the Constitution or has delivered in public his opinion on the constitutionality of the contested act may not take part at the case examination and shall be challenged.

The provisions of Article 17, letter b) from the Law on the Constitutional Court, the judge of the Constitutional Court shall be under an obligation to keep the secrecy of deliberations and of the votes, and not to take a public stand or give consultations on matters within the Constitutional Court competence.

- ***Does the nature (content) of an appeal, before or after promulgation of laws (or in both cases), influence the relationships of the Court with other powers and what would be the effects upon Constitution's supremacy?***

One of the basic functions of the Constitutional Court constitutes the constitutional review of normative acts by which is ensured Constitution's supremacy.

Each normative act is subject to constitutionality review through the prism of the provisions of Article 7 of the Constitution that stipulates that the Constitution of the Republic of Moldova shall be the Supreme Law of the State and no law or any other legal act, which contravenes the provisions of the Constitution, shall have legal force.

Constitutionality review of normative acts presupposes an operation of comparison of one performed activity with another conduct model. In case of ensuring supremacy of the Constitution, the review consists of reporting of elaboration forms and content of different ordinary or organic laws to the relevant provisions of the Constitution.

According to the legislation, the Court exercises constitutionality review *a posteriori* of normative acts. The advantages of this type of review consist in ensuring plenitude of vocation and obligation of the Constitutional Court to guarantee supremacy of Constitution, in the process of law enforcement being relevant the unconstitutionality flaws.

Unlike *a priori* review, *a posteriori* is a more profound one, having terms for consideration and predetermined procedures for each category of normative acts subjected to constitutionality review, and is a concrete and jurisdictional control related to a law enforcement act.

The function of guaranteeing Constitution's supremacy is accomplished through constitutional review of laws, therefore, it is natural for the Constitutional Court to ensure conformity of all normative acts of law with the provisions of the Fundamental Law, a basic

condition needed for achieving the objectives of the state of law, ensuring of legality and order of law on the entire territory of the country.

In its decisions concerning independence of all branches of power, the Court consistently promotes the constitutional principle of separation of powers as the main principle of organizing the state, constantly pronouncing itself against exceeding of their duties by powers and mutual interference, against arrogation by the Legislative and the Executive of the judiciary attributions, as well as on legal guarantees of its independence.

- ***Does the verbal and contradictory character of procedures aim, in your opinion, the increase of transparency and, finally, independence of the Court?***

In conformity with the provisions of Constitutional jurisdiction Code and the Law on the Constitutional Court, the sessions of the Court are public, excepting the cases when publicity may harm state security and public order. For this reason, the session of the Plenum of the Constitutional Court unfolds orally through word of mouth.

Verbal session regards oral form which procedural acts of parties must fulfil, it means: settlement of requests, explanation to parties, concluding address of parties, etc.

Orality makes possible understanding of the subject of the case by those assisting at the session without being participants to the process, *id est* the public.

Constitutional jurisdiction is exercised according to the principle of equality of parties and other participants to the process before the Constitution and the Constitutional Court.

Article 12 of the Constitutional Jurisdiction Code reads: “The Constitutional Court shall directly examine the explanations of the parts, conclusions of the experts; it shall also read out the evidences and other official documents referred to the challenged case. The written evidences handed in to all judges of the Constitutional Court and the participants in the proceedings may not be delivered in public, if their summary has been orally exposed during the session. Upon appeal of a judge or one of the parts, the Constitutional Court shall decide upon a complete or partial hearing of the written evidences”.

The debates during the sessions of the Constitutional Court are public, excepting the cases when publicity may harm state’s security and public order. In addition to the participants, at the secret examination in session other persons may assist, as well, invited according to the decision of the Constitutional Court. Examining the case in secret session, the procedure of constitutional jurisdiction shall be followed.

The oral character of session does not exclude the written form, the works of Court’s session being recoded in the minutes. The rulings of the Constitutional Court are pronounced publicly, after the date, time and agenda of the sessions being announced publicly.

Lack of orality would lead to tightening of the application of publicity principle for sessions.

Orality is both a consequence of publicity and contradictory nature of sessions, too.

Efficient and operative contradictory nature cannot be realized than in oral forms with regard to applied acts during the session. The contradictory nature implies the prerequisite for the participants with contrary interests to have the possibility to express their own points of view, to present lawful arguments aimed at support of requests, addresses.

- ***Does the possibility to review or not review the constitutionality of a text ultra petita (over what was claimed) or after withdrawal of the appeal resemble more with a self-appeal or is an element of Court’s independence?***

In conformity with Article 6 of the Constitutional Jurisdiction Code which foresees the ambit of competences it is stipulated that “exercising the constitutionality review of the claimed act, the Constitutional Court may deliver a judgment with regard to other normative acts the constitutionality of which depends, entirely or partially, on the constitutionality of the contested act”. From the respective provisions we conclude that in the process of consideration appears the



need for constitutionality verification of other acts, as well, that are tangent to the contested act, the Constitutional Court has the right also to verify the legality of these acts.

If the appeal contravenes to the requirements of Article 39 (Pattern and content of the appeal), the President of the Constitutional Court receives the appeal suggesting to the subject liquidation of shortcomings or its rejection. The appeal may be withdrawn by its subject at any stage of examination of the case. If the Constitutional Court passes a decision concerning a normative act (partially or as a whole), a repeated appeal is not admitted. If the subject withdraws the appeal, a repeated appeal shall be admitted only after 9 months.

In accordance with Article 60 of the Constitutional Jurisdiction Code, the Constitutional Court shall order the suspension of the proceedings, if the appeal has been withdrawn.

***- Where are the limits of the Constitutional Court in its capacity of “negative legislator” according to Kelsen and what is the “margin of assessment”?***

In Kelsen’s opinion, the role of the Constitutional Court is that of a “negative legislator”. It will declare unconstitutional, consequently, inapplicable certain dispositions of a law subjected to its review but will not substitute instead the removed dispositions with other new ones.

In conformity with Article 135 of the Constitution, Article 4 of the Law on the Constitutional Court, as well as Article 4 of the Constitutional Jurisdiction Code, the competence in the field of the Court is expressly stipulated.

While exercising the constitutional jurisdiction, the Constitutional Court shall:

- a) carry out, upon appeal, the constitutionality review of laws, regulations and decisions of the Parliament; the decrees of the President of the Republic of Moldova; the decision and ordinances of the Government, as well as the international treaties the Republic of Moldova is a party to;
- b) give the interpretation of the Constitution;
- c) pronounce itself upon the initiatives aimed at revising the Constitution;
- d) confirm the results of the republican referenda;
- e) confirm the results of elections of the Parliament and the President of the Republic of Moldova, validate the mandates of the Parliament's members and of the President of the Republic of Moldova;
- f) ascertain the circumstances which justify the dissolution of the Parliament, the dismissal from office of the President of the Republic of Moldova, the interim office of the President, the impossibility of the President of the Republic of Moldova to fully exercise his/her powers for more than 60 days;
- g) settle the pleas of unconstitutionality of the judicial acts, having been claimed by the Supreme Court of Justice;
- h) decide on the issues dealing with the constitutionality of a political party.

***- Do the dissenting opinions represent guarantees for independence of constitutional judges according to practice?***

The provisions of Article 17, letter c) of the Law on the Constitutional Court require the judge “to express the affirmative or negative vote, while adopting the rulings of the Constitutional Court. Article 67 of the Constitutional Jurisdiction Code provides for the judge of the Constitutional Court who has disagreed with the delivered judgment or the issued advisory opinion that he /she may express in written form his/her dissenting opinion. Based on these provisions, the notion of “dissenting opinion” may be explained as judge’s disagreement with the ruling adopted by the majority of judges who participated in the session of the Court. Dissenting opinion should contain facts, arguments and conclusions with regard to the subject of appeal or the substance of the pronounced ruling. The dissenting opinion contributes to ensuring of

independence and equality of constitutional judges, increase of society's confidence in the solution offered by the Court, improvement of legislation, self-control of the Court and a more convincing substantiation of its conclusions in the future, a deeper knowledge of the society about constitutional provisions.

Ensuring the guarantee of independence for the judges of the Constitutional Court is foreseen in Article 13 para. (2) of the Law on the Constitutional Court that reads: "The judges of the Constitutional Court shall not be held legally responsible for their votes and opinions expressed during the exercise of their mandate".

- ***Does the nondisclosure in some systems of the name of the judge-rapporteur, who instruments the case and secret deliberation with the prohibition of access to archives, protect the constitutional judges from external pressures?***

After the Constitutional Court has decided on the receipt for consideration of the complaint and its inclusion into the agenda, the President of the Constitutional Court appoints a judge as rapporteur, determines the deadline for examination and presentation of the report.

Adopting the decision of the Constitutional Court to accept for consideration the complaint and to include it into the agenda, the judge-rapporteur undertakes the following steps: studies possible written objections of another party on the complaint; requests the materials referring to the case from the respective organs, solicits the expertise, forwards the copies of the complaint /petition to another party, etc.

All the actions of the judge-rapporteur in preparing the case for examination are undertaken in the name of the Court. The demands of the judge-rapporteur are compulsory.

After preparing the case for examination but not later than 10 days before the session of the Constitutional Court, the judge-rapporteur is obliged: to inform the judges and the participants in the process about the place, date and the time of the session; to transmit the copies of the complaint to judges and parties; to submit the materials of the case to the participants of the process at their request.

In legal cases on solving exceptions of unconstitutionality of legal acts questioned by the Supreme Court of Justice which result from concrete criminal or civil cases, the persons that are parties within respective cases are enabled familiarize themselves with all materials of the dossier.

Upon the decision of the Constitutional Court, the materials of the dossier may be submitted to other participants of the lawsuit, as well as to the President of the Republic of Moldova, Chairman of the Parliament, Prime Minister, President of the Constitutional Court, President of the Supreme Court of Justice, Prosecutor-General.

The judges of the Constitutional Court deliberate in the counsel room. Deliberation is secret. The judges of the Constitutional Court do not have the right to disclose the content of deliberation. The Chairman of the session offers the possibility to the judges of the Constitutional Court to express themselves freely on the examined matter. During the debate the judges can clarify their positions. After the end of deliberation, the Chairman of the session puts for voting the proposals of the judge-rapporteur and of other judges, draft documents of the Constitutional Court (Article 55 of the Constitutional Jurisdiction Code).

The access to the archives of the Court or to case materials shall be allowed only upon decision of the Constitutional Court.