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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

MOLDOVA

Draft Law on the Constitutional Court and corresponding amendments to the Constitution

Comments by
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General Remarks.

l.My first remark concerns both drafts (presented at the same time) providing a good opportunity to improve legal regulation of the constitutional court issues in the Republic Moldova after more than five years of the experience gained in this field.With respect of the draft of the constitutional law it seems convenient to be completed on the level of generally recognized *standard scope* of regulations of constitutional issuess or at least on the level of constitutional regulations other constitutional bodies of Moldova (f.e.president Articles 77-8l of the Constitution).Among its „gaps“ one can mention the lack of the list of subjects entitled to bring the case before Constitutional Court (Article l53 para.3 of the Draft of Constitutional Law refers to the „Law on the Constitutional Court“) immunities of constitutional judges,the guarantees of their independence,the termination of their mandates etc.which are regulated wholly or partially only on the level of „ordinary“ law.This level of legal regulation however does not create appropriate legal stability required for the proper administration of the constitutional justice (ordinary law can be changed without any problems).

2.With respect of the draft law on the Constitutional Court in certain parts is too detailed .Some technical aspects of the procedure before constitutional court should be better regulated in its internal regulations or in other laws.Procedure before constitutional court should be generally regulated by law as clearly and precisely as possible but (and on the other hand) it is important for Constitutional Court to have certain autonomy with regard its own procedure and to regulate its certain aspects (in the light of practical experience) in conformity with the principles defined by the law without intervention of the Parliament.Some examples of too detailed and not relevant regulations are mentioned in the professor Solyom comments.

Draft Law on the Constitutional Court.

Since in principle I share the wiews expressed by professor Solyom in its comments on April 6,2OO2 my comments will concentrate predominantly on the next articles of the Draft.

Article 4

Scope of the activity of court.

With respect of Article 4 (a) of the Draft it seems useful to precise expressly the scope of the activity of court.The term „normative acts adopted by the central public authorities“ does not seem to fixe the competence of the constitutional court with the sufficient (and required) accuracy because it refers to the organs of state (central public authorities) and not to the concrete normative acts (the constitutionality of which may be challenged).The same

comment is relevant with regard of Article l35 (l a) of the draft of the Constitutional Law.For the completeness one can mention Article l35 para.l alinea a) of the valid constitution of Moldova precising expressly normative acts constitutionality of which may be reviewed before constitutional court (laws,presidential decrees,orders etc.)

Article 6,Article ll,Article lO5

Reports on the excercise (enforcement) of constitutional jurisdiction.

These articles say on the annual reports on the excercise (enforcement) of constitutional jurisdiction elaborated by the constitutional court and published in Official Gazette (in the form of judgment) and sended to the central state authorities.These articles set up an informative system concernig the results of activity of Constitutional Court during the previous year.It is not necessary to emphasize the necessity of reasonable and well balanced informative policy of each constitutional court towards the public done by appropriate manner (especially for newly established courts).Usual practice of constitutional courts includes publishing the collection of their decisions prepared by the court as its official publication.It could be useful if the law on constitutional court provides for the structure of such publication.Such publication can be accessible not only in central state institutions but also in the courts, law faculties,specialized libraries,attorneys offices etc.The form of the „special“ judgment does not seem appropriate (it is not in conformity in Article 85 para.2 of the draft since the judgments of constitutional court are taken only...after examining the merits of the notification under the competence of the Constitutional Court).

Article lO.

Uniform term for reaction on the requests of court.

This article prescribes uniform term for reaction of public authorities and legal entities on the requests of constitutional court (l5 days).Taking into consideration the specificity of each case,and the content of concrete request it seems reasonable to grant a judge rapporteur a right to determine its own term and in a well founded cases even to lengthen original term.With regard of formulation legal entities : „regardless of their type of property and legal form of organizations“ I do not understand its purpose.

Article l3.

Incompatibility.

According to para.6 Article l3 of the Draft the succesfull candidate for judge of constitutional court must resignate from its position and to suspend its activity within the political party or another social political organization.With respect of latter the draft however does not precise what can be understood under „social political organization“ and this lack of clarity can complicate the whole process of appointment of succesfull candidate for the position of the constitutional judge.

Article 22.

Suspension from office.

According to para.2 of this article: „The judge shall be restored in the office according to the decision of the Constitutional Court after the exhaustion of the reasons of suspension".Provided that the reasons of the suspension of the judge (para l-a)b) lapsed his/her restoration in the office should not be conditioned by decision of constitutional court.Such approach cannot exclude the situation when due to the lack of such decision the judge cannot start its activity although the reasons of his/her suspension has meantime lapsed.

Article 23.

Cessation of mandate.

This article enumerates the reasons for termination of the mandate of the judge (para. l.a)-h).The reason under para l.d) concerning „non observation of the appointment procedure" is linked more with the position of the candidate for the judge than with the mandate of the appointed judge (since the mandate of the judge presupposes previous successful appointment procedure).

Article 25.

Resignation of the judge.

According to para.l5 of this Article the resigned judge is entitled to work in the following fields:didactic,scientitic,creation or justice.Only in such a case his/her allowance and salary „shall be paid...in their entire value".It seems reasonable to clarify the purpose of this formulation taking into consideration various factors included valid constitutional regulation of Moldova (Article 43 of the Constitution: right of every person freely choose his/her work,prohibition of discrimination in enjoying fundamental rights and freedoms etc.)

Article 33.

Resignation of the president and deputy president of constitutional court.

Provided that president and deputy president of the Constitutional Court are entitled to resign anytime (without disclosing the reasons of this act) (para l.Article 35) it seems superfluous the competence of the plenary session to examine this request and to confirm the resignation.(para 2.Article 5).What is a real purpose of this competence? If the plenary session has the right to reject or not to confirm such resignation?

Article 34.

Dismissal from position the president and deputy president of Constitutional Court.

According to para.2 of this Article the initiative for the dismissal of the president and deputy president may be launched by „at least two judges."In my view the initiative for the dismissal should be taken by majority and not by minority of the judges of constitutional court (at least 4).

Article 44.

Subjects entitled to submit the notification.

According the para.l (b-c) of this article the notification to the constitutional court may be submitted by „parliamentaty fraction and parliamentary group comprising at least 5 deputies" and according to letter j) by the „citizens of the republic of Moldova".The question who may be standing to challenge normative acts before constitutional court is sensitive since it concerns the mutual relationship of constitutional court and legislator.Continental legal orders usually restrict this possibility to the relevant central state bodies or significant percentage thereof (the parliamentary minority opposition should have access to the constitutional court).The purpose of this limitation is to restrict the procedure before court only for serious cases in which supremacy of the constitution is actually considered.Taking into consideration the number of the deputies of moldovan parliament (According to Article 6O para.2 of the Constitution the parliament consists of lOl members) the number 5 deputies seems too low.Such „softly" qualified person entitled to bring the case before constitutional court cannot guarantee that the constitutional court shall not be overburden by their notifications (and consequently injects into political battles among relatively small groups of

deputies in the parliament).With respect of parliamentary fraction it needs to be pointed out that draft of the Law does not give its definition lack of which can raise the problem of the practical application of this provision.As regards as the individuals draft does not use uniform terminology (in certain provisions say of the citizens of Moldova-Articles 44 j),Art.57 para.6) in others of the natural persons-Article ll8 para.l a) or simply of the persons (Article ll9 para.l) Taking into consideration the purpose of the notification bring by the individuals (allegation that their „constitutional rights and freedom enshrined under Article l5-54 of the constitution" have been violated by a normative act) together with the fact that moldovan constitution provides fundamental rights and freedoms generaly for every natural person (exempting the rights granted solely for citizens of Moldova) it seems questionable to restrict this right only for the citizens of Moldova.

Article 48.

Mandatory documents attached to the notification.

It does not appear appropriate to ask the person entitled the bring the case before constitutional court to provide the court with challenged normative acts (accesible from Official Gazette) and others details stated in para.l Art.48 (iura novit curia).

Articles 64-65.

The representatives of the parties.

Referring to Article 7 (3) in accordance with the constitutional court shall examine exclusively legal issues it seems appropriate to determine obligatory legal representation of parties before constitutional court.

Article 67-68.

Obligations of experts and interpreters.

It is reasonable for the constitutional court to have power to order appropriate and proportional measures to guarantee the observance of its own procedural rules as well as the obligations of parties and other interested subjects (experts and intepreters).The application of the provisions of Criminal Code in cases when experts and interpretors do not carry out their duties properly in my mind exceeds reasonable proportionality required for such measures.

Article 84.

Interruption of the trial.

This article includes exhaustive list of reasons for interruption of trial (provision a)-g) but it seems to me that some of them (at least under b),c) and f) are reasons for rejecting the notification in initial stage of proceeding before constitutional court (due to lack its admissibility) and not for interruption of „living" trial.

Article 96.

Review of the judgment and advisory opinion.

Re-opening the case upon the discovery of new circumstances is highly unusual for constitutional courts and needs to clarify several questions with respect to it: in which term has the constitutional court this power, what is relationship of „new" judgment of constitutional court with earlier decision,what about *res judicata* objection etc.

Article lOO-lO2.

The enforcement of judgments and advisory opinion.

Generally speaking constitutional courts have not (in principle) their own systems of enforcement of judgments concerning the constitutionality of challenged normative acts due to self-executory effects of their judgments (challenged normative acts become null and void since the day of their publication in Official Gazette).The principle of rule of law requires that constitutional court judgements shall be respected and executed by other state bodies. The only exemption is direct enforceability of decisions concerning the constitutional complaints that should be executed by relevant state or self-administrative body but this is not

the case of Moldova.Articles lOO-lO2 of the draft provides for constitutional court right to determine terms in which the judgments and advisory opinions shall be enforced and the control over their enforcement (Article lO2).Provided that somebody shall not enforce the judgment of the constitutional court according article lO7 a fine amounting up 25 minimal salaries shall be imposed on him (as a form an administrative liability).Taking into consideration *erga omnes* effects of the judgments of constitutional court (Article 93 para.l of the Draft) some questions concerning the effectivity of this system can logically raise.If the constitutional court shall have sufficient capacity to monitor,control and assess the observance of their judgments „on the entire territory"?Who and how long will act on behalf of constitutional court in this field?

Article lO4.
Adress.

This power of constitutional court does not form the part of its judicial competences (Article 4 of the draft) and its result is not an enforceable judgment or advisory opinion.There is therefore doubtful if it is appropriate to have such competence in the present wording (see also the suggestions of prof.Solyom to this Article in his comment).

Article ll5.
Constitutional Control of International Treaties.

Article l35 para.l letter c) of the Draft of the Constitutional Law as well as Articles ll5.para 2. and Article ll7 of the draf of the Law on Constitutional Court say of *á priori* constitutional review of the international treaties „subjected to ratification" and consequently „international treaty or some its provisions declared non-constitutional may not be ratified or approved and may not enter into force in the Republic of Moldova" (Art.ll7 para.2).It should be pointed out that „by means of the exeption of non constitutionality" and according to para.3 Article ll5 of the Draft Law on Constitutional also international treaties entered in force may be subjected to the constitutionality control.Declaring such treaty or a part of its non constitutional „shall bring about its denunciation".The ratified (valid) treaty obviously involve relations with other parties and if constitutional court overturns such treaty this could create international complication and raises international responsibility of state.Article 27.of the Vienna Convention on the Law of Treaties provides clearly that : „A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".A denunciation of an already valid treaty due to its non-conformity with the constitution does not represent (on the other hand) the optimum approach of the state to the valid norms of international law and values enshrined thereof.General tendency is to harmonize legal orders of states (including constitutions) with their international obligations by taking the concrete measures.

Košice May 6th, 2002

Ján Klučka