Strasbourg, 29 October 2004

Opinion 315/2004

Restricted
CDL(2004)104
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

Amendments to the Constitution of Moldova – Introduction of the individual complaint to the Constitutional Court

Comments by Mr G. Nolte (Substitute member, Germany)

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The initiative to introduce a constitutional complaint procedure in Moldova is to be welcomed. Such a procedure could enable the Moldovan judiciary to better deal with cases that might otherwise be brought to the European Court of Human Rights in Strasbourg. As far as cases will nevertheless brought to the European Court the last instance judgment of the Constitutional Court last instance is likely to be better reasoned which in turn would result in a lower number of judgments by the European Court which find against the State of Moldova.

To a certain extent, the Moldovan draft amendment can be compared to the German experience. The German constitution, the *Grundgesetz*, originally (in 1949) did also not contain a constitutional complaints procedure. This procedure was first introduced by simple legislation. After its success in practice the constitutional complaints procedure was finally introduced into the *Grundgesetz* in 1969.

The establishment of the constitutional complaints procedure in Germany into the *Grundgesetz*, however, was not connected with a changing of the composition of the German Constitutional Court. The same is true for the original introduction of the constitutional complaints procedure on the basis of simple legislation. It is here that the draft amendment of Article 136 of the Constitution of Moldova raises a question.

This draft amendment provides for the adding of one further judge to the Constitutional Court. This judge is to be appointed by the President. The changing of the composition of a Constitutional Court and the procedure for appointing judges to the Constitutional Court are among the most important and sensitive questions of constitutional adjudication and for the preservation of a credible system of the rule of constitutional law. It is necessary to ensure both the independence of the judges of the Constitutional Court *and* to involve different state organs and political forces into the appointment process so that the judges are seen as being more than the instrument of one or the other political force. This is the reason why the German Law on the Constitutional Court (the *Bundesverfassungsgerichtsgesetz*) provides for a procedure of electing the judges by a two-third majority in either the Parliament (*Bundestag*) or the Federal Diet (*Bundesrat*). This requirement is designed to ensure the agreement of the major opposition party to any candidate for the position of a judge at the Constitutional Court. The German experience with this rule is very satisfactory. Much of the general respect which the German Constitutional Court enjoys is due to the broad-based appointment procedure for judges.

The Moldovan draft amendment does not provide for a direct participation of opposition elements in the nominating procedure. This is regrettable. As long as the President of Moldova was still directly elected by the people his (former) power to nominate two judges to the Constitutional Court meant that at least different political forces had a say in the process of appointing Constitutional Court judges. This is the reason why the Commission has said in its earlier opinion CDL-Inf (2001) 003:

> "According to the new Art. 136 (2), the Government has the right to appoint two judges of the Constitutional Court. Under the system established by the Constitution of 1994, the President's right to appoint two judges was of a different nature because his legitimacy as Head of State was based on his election through direct universal elections. Under the current system the appointment of two judges by the Government risks compromising the principle of judicial independence." (at para. 25)

The current system is indeed heavily tilted in favour of the government and the political force which supports the Government in Parliament. Article 136 (2) of the Moldovan Constitution

currently provides that "Two judges are appointed by the Parliament, two by the Government and two by the Higher Council of Magistrates". Since Moldova has a parliamentary system and since the government and the majority in parliament usually do not oppose each other this means that one and the same political force may have the opportunity to appoint four of the six judges. Therefore, it may be more balanced if one or more additional judge(s) would be nominated by the Higher Council of Magistrates. It should, however, also be recognized, that the appointment of the seventh judge by the President is better, from the point of view of separation of powers and the involvement of the opposition, than an appointment by the Government itself or by the Parliament (if Parliament acts on the basis of a simple majority). This is because the President of Moldova is elected by a qualified majority in Parliament (three-fifth) and any candidate for the Presidency will therefore, as a general rule, need some support by opposition parties be elected. This requirement of a qualified majority makes the President somewhat independent from the government of the day. Thereby at least some pluralism into the composition of the Constitutional Court is ensured (although not as much as it would be if the President were directly elected by the people).

The question of who should have the power to appoint an additional judge would not arise if the purpose of the introduction of an additional judge could be attained by other means. The stated purpose of having an additional judge is the likely increase of the workload of Constitutional Court by the introduction of the constitutional complaints procedure. The constitutional complaints procedure will indeed in all likelihood result in more cases for the Moldovan Constitutional Court. This is confirmed by the experience in Germany, Spain and in other countries which have such a procedure. Germany, however, has not tried to solve the problem of the rising caseload by adding judges, but by giving the German Constitutional Court the power to create "Chambers" (of three judges each) *within* the Court. Such Chambers can deal more efficiently and more quickly with individual cases (many of which can be dismissed summarily) than the plenary of the Court. It is advised that the Moldovan authorities consider such a possibility when they deliberate over the implementing legislation.

A technical remark concerning the proposed wording of Article 135.1 d): the words "provenant d'une loi, d'un acte administrative, d'un arret ou une omission des autorités publique" appear to be unnecessarily detailed and therefore risk to have unintended limiting effects where the contrary intention seems to be present. For example, when the draft mentions "omission des autorités publiques" it can be expected that positive/active *factual* "actes publiques" (such as the beating of a person by a police officer) would also be covered. However, the draft only talks of "d'un acte administratif" which may be understood as meaning a legal decision, not a factual act. In order to avoid ambiguities like this it is recommended that the draft merely speak of "provenant d'un acte d'une autorité publique". It should be made clear, however, that the term "acte d'une autorité publique" means any act by a public authority, including parliamentary legislation.

The conclusion is that the proposed amendment concerning the addition of a further judge to the Constitutional Court and the nominating procedure could be better, from a comparative point of view, but that it could also be worse:

- It is preferable if the amendment would provide for the possibility of creating Chambers (of three judges each) within the Constitutional Court. Such Chambers would be better able to deal with the possible increase of the caseload of the Court. One additional judge, however, may also already be an improvement, depending on the internal distribution of responsibilities among the judges.

- It would be preferable if the amendment would provide an appointment procedure which would ensure the participation of elements of the opposition, as it is the case in Germany. However, giving the President the power to appoint the seventh judge is better (given his election by a qualified majority in parliament), than if the government of the day, or a simple parliamentary majority (which can be expected to regularly support the Government), would possess the appointing power.