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(VENICE COMMISSION)

Draft Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction of the individual complaint to the Constitutional Court)

on the basis of comments by
Mr G. Nolte (Substitute member, Germany)
Mr P. Paczolay (Substitute Member, Hungary)

1. By letter dated 5 October 2004, the Vice-President of the Constitutional Court of Moldova, Mr. Ion Vasilati, asked the Venice Commission to make comments on the draft Law to Modify and Complete the Constitution of Moldova (CDL(2004)105 – hereinafter the draft), which was supported by more than one-third of the members of the Parliament of Moldova. By letter of 12 November 2004 the Permanent Representative of Moldova to the Council of Europe, Mr. Tulbure, also requested an opinion on the draft. The aim of the amendment is to introduce the constitutional complaint procedure. As a consequence, the number of the judges of the Constitutional Court would be raised from six to seven.

2. Article II of the draft obliges the Government to submit to the legislator within three months the necessary amendments to the laws that are affected by the amendment of the Constitution. The Venice Commission is prepared to assist the authorities of Moldova in this respect, especially as the effects of the constitutional changes can only be evaluated in their entirety together with the corresponding changes in the legislation on the Constitutional Court.

3. This opinion was adopted by the Venice Commission at its … Plenary Session (Venice, …).

Constitutional complaint

4. The introduction of constitutional complaint to the competences of the Constitutional Court of Moldova is an amendment of great importance. So far, individuals had no access to the Constitutional Court of Moldova.

5. In its opinion on the draft constitutional amendments with regard to the Constitutional Court of Turkey [CDL-AD(2004)024, paras. 26-47], the Venice Commission has recently outlined generally and in a comparative perspective the role and importance of the individual complaint:

> *"6. The institutions of Verfassungsbeschwerde in Germany and recurso de amparó in Spain are the most well-known examples of constitutional complaint. Other European countries have also established some procedures for the adjudication of constitutional complaint (among others Russia, Czech Republic, Slovakia, Slovenia, 'the Former Yugoslav Republic of Macedonia', Croatia, Portugal, Hungary, etc.).*
>
> *7. Recent tendencies in constitutional adjudication can rightly be described as a path from the review of the constitutionality of laws to the review of the application of laws. This means a shift from the review of legislature to the review of the judiciary."*

8. The constitutional complaint according to the draft is similar to the regulations in other European countries in respect to the following criteria:

> a) a legal remedy of subsidiary character,
> b) it can be invoked on account of violation of basic rights and liberties,
> c) it can be invoked against violations resulting from a law, an administrative act, a judicial decision, or the omission of public authorities,
> d) it can be invoked by any person who pretends to be victim of the violation of basic rights and liberties.

9. Ad a) The constitutional complaint – as in other countries - can be submitted only after exhausting other legal remedies (*'aprés l'épuisement des voies de recours'*).

10. Ad b) The range of the basic rights and liberties on which a constitutional complaint can be founded embraces the fundamental rights enlisted in title two of the Constitution, and those regulated by international treaties to which Moldova is a party. In Germany or Spain - constitutional complaint was introduced as a protection against violations of basic rights and liberties contained *in the constitution*. Recently, a new trend has emerged in different countries to provide for fundamental rights enlisted in international treaties as grounds for constitutional complaints.

11. Indeed, Article 4 of the Constitution of Moldova provides for an elevated rank for human rights treaties:

> *"(1) Constitutional provisions for human rights and freedoms shall be understood and implemented in accordance with the Universal Declaration of Human Rights, and with other conventions and treaties endorsed by the Republic of Moldova.*
>
> *(2) Wherever disagreements appear between conventions and treaties signed by the Republic of Moldova and her own national laws, priority shall be given to international regulations."*

12. Moreover, in respect of all international treaties, in the case of contradiction between an international treaty and the Constitution, the latter should be revised (Article 8 of the Constitution).

13. Ad c) A constitutional complaint can be filed against violations directly resulting from a law, an administrative act, a judicial decision, or failure to act by public authorities. The draft intends to extensively cover possible cases of human rights violations.

14. However, 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 have to 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 clear that the term "acte d'une autorité publique" means any act by a public authority, including parliamentary legislation.

15. Ad d) It is to be welcomed that the draft provides that a constitutional complaint might be filed by any person who pretends to be victim of the violation of basic rights and liberties. It is important to note that the introduction of the individual complaint will fundamentally change the present system of constitutional justice in Moldova as currently individuals have no access to the Constitutional Court. The opening of individual access to the Constitutional Court will necessarily bring about changes to the procedure of the Court and the workload will increase immensely. The Constitutional Court, which was hitherto only accessible to political actors, will become a court for everyone.

Changes in the composition of the Court

16. In order to manage the increasing workload, the proposal raises the number of the judges of the Constitutional Court from six to seven. Presently – under Article 136 of the Constitution - the Constitutional Court is composed of 6 judges, who are appointed for a 6-year mandate. Two judges are appointed by the Parliament, two by the Government and two by the Higher Council of Magistrates. The seventh judge, according the proposal, would be elected by the President of the Republic. In principle, the diversification of the appointment procedure by including different authorities in this process is a positive feature.

17. 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, for example, the German Law on the Constitutional Court (the *Bundesverfassungsgerichtsgesetz*) provides for a procedure of electing the judges by a two-third majority in Parliament. This requirement is designed to ensure the agreement of the 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.

18. It would be advisable if the draft would provide for the inclusion of a broad political spectrum in the nominating procedure. So far, neither the Constitution nor the Law on the Constitutional Court provide for a qualified majority for the appointment of the two judges elected by Parliament.

19. 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 an independent political force had a say in the process of appointing Constitutional Court judges. This is the reason why the Commission had pointed out in its Opinion in the Constitutional Reform in the Republic of Moldova (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)

20. The current system is somewhat unbalanced in favour of the government and the political force which supports the Government in Parliament. 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 would have been 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 Govern-

ment itself or by the Parliament, which 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 therefore, depending on the composition of Parliament, a candidate for the Presidency may need some support by opposition parties to be elected. This requirement of a qualified majority makes the President more independent from the government of the day. Thereby some pluralism into the composition of the Constitutional Court is ensured and the appointment of the judges emerges from diverse sources (although not as much as it would be if the President were directly elected by the people).

21. A remedy for this problem could be to provide for a qualified majority for the election of the two judges appointed by Parliament in order to counterbalance the influence of the executive power.

Inner organisation of the Court

22. The stated purpose of having one 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 substantially more cases for the Constitutional Court. This is confirmed by the experience in Germany, Spain and in other countries which have such a procedure. Germany tried to solve the problem of the rising caseload 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 recommended that the Moldovan authorities consider such a possibility when they deliberate over the implementing legislation.

Conclusion

23. The initiative to introduce a constitutional complaint procedure in Moldova is to be welcomed. The draft constitutional amendments are modelled on solutions already known in other European countries and it meets European standards. The possibility of individual complaint would definitely serve the better and more effective protection of fundamental rights.

24. The amendments allow for a solution of cases that might otherwise be brought to the European Court of Human Rights. As far as cases will nevertheless be brought to the European Court of Human Rights, judgments of the Constitutional Court are likely to be better reasoned and in turn would result in a lower number of judgments by the Strasbourg Court which find against Moldova.

25. It would be preferable if the amendment would provide for an appointment procedure which would seek the participation of a broad political spectrum, especially by providing for a qualified majority for the election of two judges by Parliament.

26. The amendments or the law implementing these amendments could provide for the possibility of creating chambers (e.g. of three judges each) within the Constitutional Court. Such Chambers would be better able to deal with the increase of the caseload of the Court.