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**Constitutional Courts as Democratic Consolidators:
Insights from Moldova after 25 Years**

REPORT BY

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Nowadays constitutional courts are called to respond to a number of important challenges, especially when they face a growing number of limitations of human rights that are imposed by the states in order to ensure a better national security, fight against terrorism and fight against corruption.

It is a well-known fact that the fundamental role of a constitutional court is not limited to solving legal conflicts of constitutional nature, but mainly to *promote and protect the human rights as fundamental values, to secure the democratic principles and values, to ensure and to implement the rule of law*. However, it is impossible to ensure this fundamental goal without an independent Constitutional Court. Failing to ensure the independence of Constitutional Courts, democracy and the rule of law, the human rights will remain mere statements lacking any content.

The Constitutional Courts have emerged on the European continent following the two world wars that took place in Europe in the last century. The Constitutional Court of Moldova, similar to the Constitutional Court of Bulgaria, was instituted during the third wave of creation of constitutional courts in Europe – after the crash of the communist regime and disappearance of the Soviet Empire.

Creation of Constitutional Courts was preceded by brutal social experiments based on severe violation of human rights. Entire nations have experienced military occupation, organised famine, unjust convictions, and mass deportation, arbitrary nationalisations and total lack of any elements of political pluralism.

This common past of the European countries allows us to understand how important freedom, democracy, and human rights are. We understand better than other nations that the renunciation to totalitarian past does not resume to only the abolition of communist or nazi rhetoric, but consists in principal, in the development of different fundamental systems where the **person is the supreme value, and the key role of the State is to deliver justice**.

To this aim, one of the first steps taken by our countries following the proclamation of their independence was to adopt democratic constitutions, or to restore previous democratic constitutions, that would guarantee human rights and fundamental freedoms and protect citizens from abuses of the State.

The fight for democracy is a daily fight. The Constitutional Justice has to stop the abusive political will irrespective of its source – President, Government, and Parliament – even if consequently, the Constitutional Courts become the most exposed institutions in the state.

Modern societies face the danger of terrorism and different threats to national security. It is sufficient to remember recent attacks in Paris, Brussels and Istanbul Airport. This dictates a separated agenda for politicians and determines them often to solve these problems through restrictive methods, crossing the red line of human rights and fundamental freedoms, promising the society that they would **make order**. In this case, the Constitutional Courts are those who have the mission to say that this is not a remedy to enhance the security and eliminate terrorist threats. The Constitutional Courts are those that should declare that those who renounce to rights and freedoms in favour of security will end up to understand that they lost both.

We are aware that terrorism and different threats to national security undermine the functionality of a State, and the fight against these phenomena is not just an issue related to good governance, but is a matter that ensures State's survival. However, the fight terrorism and different threats to national security, as important as it is, should not generate the

limitation of fundamental rights. The right to a fair trial is an indispensable value of the rule of law, and the attempt to ignore the human rights by invoking the need to construct a state based on the rule of law is equally wrong and dangerous.

The State has created the law, and the law is limiting the State, and this rule should not be violated without compromising both the notion of state as well as the notion of law. **The basis of democratic states is the law. The essence of law is freedom, since it is only freedom that defines the conditions that allow people to live together as free individuals.** For this reason, a key role in this process is played by the Constitutional Courts, which are called to remove the legal acts in contradiction with the Constitution.

Over the past decades, the constitutional justice in our countries has addressed an enormous range of legal and factual issues. **The constitutional justice is a unique and powerful instrument for promoting civilized values and democratic progress in such a way as to improve the lives of people.**

Those who claim that the fight for security justifies violation of the Constitution, empty the notion of rule of law, compromising the legitimacy of this fight. The role of Constitutional Courts of our states is not to admit the substitution of the rule of law with a police state.

Throughout the greatest part of the European continent there are functioning democratic systems. Nevertheless, even the countries where the democratic government it is considered to be safe and sound from time to time face anti-democratic derailments.

Today, the Constitutional Courts of our states are facing multiple challenges. I want to mention just a few examples from the case law of the Constitutional Court of the Republic of Moldova.

The hallmark of the soviet regime was the violation of human rights. Thus, the architects of the 1994 Constitution of the independent Republic of Moldova strove to ensure that human rights would be fully protected. Chapter 2 was entitled "Fundamental Rights, Liberties and Duties" and, in content, was comparable in many respects to the standard international documents on human rights, in particular the United Nations' Universal Declaration on Human Rights and the Council of Europe's Convention on Human Rights and Fundamental Freedoms.

In some important respects, however, the Constitution went further than the standard international documents on human rights. Indeed, Chapter 2 also protects the right to respect for one's dignity, the right to demonstrate and present petitions, the right of access to information held by the state, the right of arrested persons to be charged or released within 72 hours, the right to fair labor practices and the right to a healthy environment. Special mention is also made of children's rights.

The Moldovan Constitution has a general limitation clause, following the format of the European Convention, which allows the rights conferred to be taken away if factors such as public order, morality or the economy so dictate.

To help ensure that Chapter 2 was really effective, however, further constitutional provisions encouraged all courts when interpreting Chapter 2 also to regard relevant international human rights law and the European Court's case law.

The Constitution of 1994 has adopted the European model of constitutional jurisdiction based on Hans Kelsen' concept and individuals do not have direct access to the Constitutional Court.

Under the Constitution, the Constitutional Court obtained exclusive power to strike down any law on the grounds that it violated constitutional provisions, including provisions concerning fundamental rights.

A Constitutional Court only exists through the jurisprudence it creates. In the 22 years of its existence, the Constitutional Court of Moldova has generated a great deal of jurisprudence, depending on one hand of the pulse of public life at a certain stage, and on the other hand, of the value of judges at different stages and of their attitude towards democracy and freedom as fundamental values of Western civilisation.

Between 1995-2001, the jurisprudence of the Court was marked by an admirable judicial activism. The modest jurisprudence from 2001-2010 reflects a decade of stagnation in the institution's development ("decorative constitutionalism"), when the Court annually adopted 20 to 30 decisions, most of which related to the Court's functional competence. After 2011, the Court has returned to an adequate judicial activism without which a Constitutional Court can not fulfill its mission.

The 2011-2017 case-law reflects those fundamental changes that have occurred in the work of the Court. The way in which judgments were drafted and reasoned was reformulated, according to the ECHR model. According to EU experts, the CCM judgments are motivated even *in extenso*. The Court has never departed from the case-law of the European Court of Justice, it is in line with relevant international soft law, and its decisions are fully in line with existing EU standards.

The jurisprudence of the Constitutional Court reflects the fact that the Court has never hesitated to give practical effect to general principles such as "democracy" and "rule of law". At the same time, the Court has always pursued the aim of adopting solutions with practical impact (useful effect), not only for authorities, but also for ordinary citizens.

The CCM jurisprudence reflects the development of mechanisms for the protection of fundamental rights and freedoms, through the interpretation of the supreme law, and not by a classical legislative method. For instance, the possibility of controlling the constitutionality of the acts adopted by Parliament even before their publication in the Official Gazette (a priori control) has been opened exclusively on the interpretation of the Constitution. By the same procedure, the mechanism of the exception of unconstitutionality (referral to the CC by ordinary courts) has been unblocked, so that all the judges can act in case of necessity at the Constitutional Court.

By Judgment no. 2 of 9 February 2016 the CCM has provided a new interpretation of Article 135.1.g of the Constitution and, in fact, extended the *ratione personae* constitutional jurisdiction beyond the list of qualified persons with the right to initiate the constitutional procedure. Following, in only one year the CCM received twice more applications from ordinary courts than in 20 years.

We have extensive jurisprudence useful to lawmakers and political actors, concerning the principles of national independence, institutional architecture, relations between state powers, resolution of constitutional legal conflicts between different state authorities, neutrality and the right of the state to defend itself against aggression, the fight against corruption and the rule of law. I will briefly refer to only a few of them.

1. National security

- Neutrality status and the occupied territory

On 2nd of May 2017, the Constitutional Court of Moldova delivered the judgment on the interpretation of Article 11 of the Constitution (Application 37b/2014¹) on permanent neutrality of Moldova.

The Court stated that the neutrality of the Republic of Moldova is closely related to its historical background; the military occupation of its Eastern area was a determinant factor in proclaiming its neutrality in the Constitution. From a historical and constitutional point of view, neutrality has never been a goal in itself, but rather an instrument among many others that would allow the Republic of Moldova to meet its true objectives, among which the withdrawal of foreign troops from its territory, consolidation of its independence and restoration of its territorial integrity.

According to Article 11 of the Constitution, there are two distinctive characteristics of the permanent neutrality instrument of the Republic of Moldova. First, permanent neutrality means that the Republic of Moldova commits itself to stay neutral in any present or future conflict, irrespective of the identity of the belligerents, location and its onset. Second, the neutrality of the Republic of Moldova means that the Republic of Moldova does not admit the stationing of foreign military troops on its territory. This, however, does not impede the Republic of Moldova to make use of all its means to defend itself militarily against any aggressor and to prevent any act that is incompatible with its neutrality, which may be committed by the belligerents on its territory.

Article 11 of the Constitution stipulates that the "Republic of Moldova proclaims its permanent neutrality". Although the second paragraph of the article specifies that the "Republic of Moldova does not admit the stationing of any foreign military troops on its territory", since the Soviet occupation of the present territory of the Republic of Moldova (1944-1991) until now, in the Eastern part of the country there are still stationed occupation troops of the Russian Federation. Practically, the Soviet/Russian occupation has never stopped in the Eastern part of the country, although the independence of the Republic of Moldova has been proclaimed. The Russian Federation has recognised it, but withdrew its army only from the western part of the Moldovan territory (11% of the territory of the Republic of Moldova is still under occupation).

The Court stressed the fact that the Russian Federation did not withdraw its occupation troops from the Eastern region of the country, but on the contrary, has consolidated its military presence in the Transnistrian region of the Republic of Moldova, this constitutes a **violation of constitutional provisions regarding the independence, sovereignty, territorial integrity and permanent neutrality of the Republic of Moldova, as well as of international law.**

The Court mentioned that neutrality and independence are interdependent: the independence is both what neutrality seeks to protect and, given the state has to make decisions freely, it is a *sine qua non* condition of neutrality. To show credibility, a permanently neutral state has to prove a sufficient degree of real independence from other states. Only then will it be able to resist pressures during crisis and meet its obligations as neutral state.

The Court noted that inasmuch the Republic of Moldova remains under military occupation, the more relative are rendered its independence and autonomy, which are required by the status of neutrality.

¹Judgment no.14 of 02.05.2017 on the interpretation of article 11 of the Constitution

The security of the Republic of Moldova should be ensured considering the geopolitical factors that exercise their influence in the South-Eastern European region and directly on the State.

Ensuring security and national defense means that the national interest may not be sacrificed in favor of another state, group of states or international organisations and in case of attacks against the components of its security, the State may keep them, including with the support of national and international armed forces.

The Court noted that the **Constitution is not a suicide pact**. Hence, if there is **any threat against fundamental constitutional values, such as national independence, the territorial integrity or the security of the state, the authorities of the Republic of Moldova are under the obligation to take all the necessary measures, including military to defend itself efficiently**.

Moreover, under the conditions of more and more obvious independent limited capacities of defense, an increased international cooperation, both bilateral and multilateral, is imperative.

It is obvious that neutrality does not constitute an obstacle in the defense policy of the Republic of Moldova. A too narrow interpretation, limiting very much the defense possibilities, would be a handicap for our country and its citizens. The purpose of neutrality is to enhance the security of the country and not to limit its defense capacity.

Moreover, neutrality cannot be applied to the aggressor, as **the state cannot abstain when it is aggressed**. Neutrality creates special rights and obligations, which as a rule, do not exist during peace times and which end with the conclusion of hostilities or when the war starts between a neutral state and one of the belligerents. The neutral state **enjoys the right to legitimate defense** (individual and collective) against an armed attack targeting the sovereignty and territorial integrity of the state.

The Court ruled that stationing of any military troops or bases on the territory of the Republic of Moldova, managed and controlled by foreign states, is unconstitutional.

Article 11 of the Constitution should be seen as an instrument of protection, not as an obstacle in protecting the independence, democracy and other constitutional values of the Republic of Moldova.

Moreover, the participation of the Republic of Moldova in collective security systems, such as the United Nations security system, peacekeeping operations, humanitarian operations, etc., which would impose collective sanctions against aggressors and international law offenders, is not in contradiction with the neutrality status.

2. Human rights

- Free access to justice. Judicial control of acts related to national security

The court noted that the administrative court as a legal entity aims to counter the abuse and excess of power by public authorities, to defend human rights within the law, to regulate the activities of public authorities, to ensure the rule of law (JCC no. 5 of 11.02.2014², § 53).

The court also noted that art. 4 of the law on administrative court provides the list of acts exempted from judicial control, and letter e) of the concerned article exempts the administrative acts concerning: national security of the republic of Moldova, application of

² Judgment no.5 of 11.02.2014 on the control of constitutionality of article 4 letter e) of law no.793- xiv of 10 February 2000 on the administrative court

curfew, emergency measures taken by public authorities to fight natural calamities, fires, epidemics, epizooties, and other similar phenomena (JCC no. 5 of 11.02.2014, § 54).

The court held that the issuance of administrative acts related to the national security of the republic of Moldova is determined by exceptional circumstances that could endanger state security and public order, these being issued with the aim to discover, prevent and remove the domestic or external threats that may cause damage to the social, economic and political legality, equilibrium and stability of the state that are necessary for the existence and development of the national state - a sovereign, unitary, independent and indivisible state, to the maintenance of legal order as well as of the climate for the unhampered exercise of the fundamental rights, freedoms and duties of the citizens, in accordance with the democratic principles and rules provided by the constitution (JCC no. 5 of 11.02.2014, § 55).

The court emphasised that the legality of administrative acts issued in exceptional circumstances has certain peculiarities, operating the so-called "crisis legality". thus, the court accepts that, in case of exceptional circumstances which threaten the very existence of the state, public authorities can take the necessary measures to cope with such circumstances, even if doing so violates the law, due to the fact that safety of the public interest is the supreme law (*salus rei publicae suprema lex*) (JCC no. 5 of 11.02.2014, § 65).

The court held that the acts issued in exceptional circumstances are considered legal when these are aimed at protecting the public interest, and the means used are suitable for this purpose, even if the issue of such acts do not comply entirely with certain legal regulations that usually discipline the public administration activity (JCC no. 5 of 11.02.2014, § 66).

However, the court noted that the acts issued in exceptional circumstances have to meet **minimum requirements of legality** (principle of legality), which protect the public interest (JCC no. 5 of 11.02.2014, § 67).

The court held that the legality of such acts has to be assessed by the court in terms of their purpose, to wit the protection of the public interest, sanctioning the abuse of power by the public authorities (JCC no. 5 of 11.02.2014, § 68).

The court accepted that during the control by the court of the legality of such acts, the legislator may establish certain special procedural rules (JCC no. 5 of 11.02.2014, § 69).

The court also held that the court should determine whether certain conditions have been cumulatively met, namely: existence of exceptional situation; existence of exceptional situation on the date the acts was issued; competence of the authority to issue the act; obvious impossibility of public administration to issue the act under normal conditions; purpose of issuing the act is the protection of a public interest (JCC no. 5 of 11.02.2014, § 70).

The court held that, although derogatory rules may be established in the particular context concerning the national security measures, however, the legal framework shall provide protection against arbitrary interferences of the public power on the rights and fundamental freedoms. otherwise, if in the light of legal provisions, the discretion of public authorities was devoid of any control, the law could essentially violate the preeminence of law (JCC no. 5 of 11.02.2014, § 73).

I have mentioned only some challenges of the Constitutional Court of Moldova in the field of security.

We are living in a period when the state and society is challenged by critical situations, especially in the field of human rights. In many European countries the political elites try to

review the approach of human rights. There is a temptation to limit the human rights on security and other reasons.

In this context I want to mention the statement of former UN Secretary-General Kofi Annan. He stressed that **“We will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights”**.

I am convinced that only free, vigorous and vibrant Constitutional Courts can give voice to the supremacy of human rights and meaning to democracy.

With these words, I would like to conclude by saying that the mission of constitutional judges is to ensure that the **values of the rule of law, democracy and respect for human rights are never emptied of their content** in our states, and the Constitutional Courts should enjoy the necessary independence to fulfill their fundamental mission.