

THE INTERFERENCE CONCERNING THE CONSTITUTIONAL COURT'S STATUTE OF
UNIQUE AUTHORITY OF CONSTITUTIONAL JURISDICTION
IN THE REPUBLIC OF MOLDOVA

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The Constitution did not define the place of Constitutional Court of the Republic of Moldova among all three powers of the state. It seems that the Constitutional Court doesn't administer the justice, it being excluded by the Constituent from the courts. In this study we analysed some deviation from the constitutional principle of the Constitutional Court status as the sole authority of constitutional jurisdiction. We concluded that these deviations are not in the spirit of the Constitution and the Constitutional Court is a jurisdictional court among judiciary authorities with a special status due to its obligation to oversee guaranteeing the supremacy of the Constitution.

Key words: *Constitutional Court, sole authority of constitutional jurisdiction, the judicial power, specialized courts.*

The competence or jurisdiction of the Constitutional Court is a subject of disputes between constitutionalists, as long as the Supreme Law itself has conferred to this public authority through Article 134 par. (1) a special status, that of sole authority of constitutional jurisdiction. Further, we will try to analyse this status of the Constitutional Court in terms of national legislation, aimed to develop the norms of Constitution in the limits set by the Basic Law.

Some Western doctrinaire as Louis Favoreu¹⁰⁵, considers that the Constitutional Court is a jurisdiction created specifically and exclusively to practice the constitutional litigation, which is situated outside the ordinary judicial apparatus and independent of it, as well as from other public powers. A supreme court or a supreme tribunal, or a constitutional chamber of the Supreme Court, may be constitutional jurisdictions, but are not constitutional courts. This opinion we support, is valid for the Republic of Moldova in the situation when the Constitution did not define the place of Constitutional Court of the Republic of Moldova among all three powers of the state.

In the system of German law, if the place of the Constitutional Court, among the state's powers is expressly regulated within judiciary power through article 92 of the Constitution from 1949¹⁰⁶, in the view of the German Professor A. Blankenageli, the Constitutional Court is the last supreme court that occurs when the other authorities are not capable to take a decision, otherwise there is not necessary a Court. Through its decisions, the Constitutional Court outlines the boundaries of the constitutional field. The Constitutional Court is an institution with specific functions and procedures that distinguish it from other institutions of law¹⁰⁷.

The Constitution of the Republic of Moldova from July 29, 1994 has devoted to the Constitutional Court a distinctly title, and namely the V Title. Under this title, formally, the Constitutional Court is neither part of the legislative authority (Title III, Chapter IV) nor of the executive authorities (Title III, Chapters V -VII) nor of the judicial authorities (Title III, Chapter IX). We have focused on the formal aspect of this statement, because on material plan we have another opinion.

The Judicial courts, as national institutions that constitute the justice act, can be divided into two types:
a) Judicial Courts of common law; and

¹⁰⁵ FAVOREU, L. ș.a., *Droit constitutionell*, 18 edition, Paris: Dalloz, 2016, p.35.

¹⁰⁶ Constitution of Germany from May 23, 1949. In: <https://constitutii.wordpress.com/2013/02/01/legea-fundamentala-pentru-republica-federala-germania/> (Vizitated: 14.04.2016)

¹⁰⁷ BLANKENAGEL, A., *Den Verfassungsstaat nachdenken*. Berlin : Duncker & Humblot, 2014.

b) Specialized Courts in some jurisdictions.

The Constitution through article 115 par. (2) has stated the possibility of forming of specialized courts, which can be of different jurisdictions. Thus, in the Republic of Moldova are formed and expressly recognized by law the courts specialized in the military and commercial fields. Along with this, we believe that the constitution through article 134, has recognized to the Constitutional Court the status of a court specializing in matters of constitutional jurisdiction. Moreover, if the military and commercial jurisdiction may be exercised and by other courts, as well as by specialized colleges of Appeal Courts and of the Supreme Court, then the constitutional jurisdiction in accordance with article 134 par. (1) of the Constitution can be exercised only by the Constitutional Court.

Concerning the place of the Constitutional Court from the Republic of Moldova within the state power, considering the specific mode of regulating through article 115 of the Constitution of the courts that administer the justice, is created the impression that the Constitutional Court doesn't administer the justice, it being excluded by the Constituent from the courts. This impression is supported by a lawyer who does not see the place of the Constitutional Court in the process of justice administration in the Republic of Moldova.

This view, although it was not exposed in the literature of specialty, results from the official view of the Supreme Court of Justice from 2004 concerning draft law of amending the Constitution, through that was try to establish in Moldova the constitutional appeal (or, as it is named by some authors, individual). Thus, according to this view, the establishment of a new "national appeal" would mean "interference of authority of constitutional jurisdiction in the administration of justice"¹⁰⁸.

As we can see, the institution of a procedure of control to constitutionality of acts and actions of the courts was treated by the judges of the supreme court of common law as interference in the administration of justice. With this view we disagree, due to the fact that, in our view, in a State of law has no right to exist any public act, which would be in contradiction with the Supreme Law, including the acts the justice is pronounced through. This maximum has a foundation even more pronounced if we take into account that in the Republic of Moldova all documents of legislative and executive powers are subject and prone to constitutional review, except those issued by the judiciary. At least, it seems strange that the Supreme Court of Justice is considered more important than Parliament, as the Supreme Representative Body.

Analysing the legal nature of the Constitutional Court of the Republic of Moldova, we will opiate from the beginning that this is a Court of Law, having the name of "court" composed as other courts of judges, who enjoy the same status as the other judges, but, who administer a specialized justice – constitutional justice. Moreover, according to Article 140 of the Constitution, the acts of Constitutional Court, as acts of the Supreme Court of Justice have the name of decisions and are final and irrevocable.

Along with this, taking into account that the constitutional litigation is superior to administrative litigation, the formation mode of the Constitutional Court is different from that of ordinary courts, and some attributions are at the margins of politics, of course, the status of the Constitutional Court has its peculiarities. This last statement, however, does not contradict the previous one, because the Supreme Court also has a special status and a special law regulating its status differently than that of judges and courts of appeal. This, however, does not exclude the Supreme Court of Justice from the courts that pronounce the act of justice.

Studying some acts of the Supreme Court of Justice, concerning the status of the Constitutional Court and its relations with ordinary courts, since the beginning of the formation of the Constitutional Court, which did not exist in our system until the adoption of the Constitution in 1994, can be tracked and other acts of neglect of the last status of sole authority of constitutional jurisdiction. For example, this is observed from the Decision of the Plenum of the Supreme Court of the Republic of Moldova, No. 2 of January 30, 1996, where in the point 2 to the courts is recommended among others:

¹⁰⁸ The notification of Constitutional Court no.1 of 16.12.2004 on law project for completion of art.135 and amendment of art.136 from the Constitution of the Republic of Moldova //Official Monitor 241/32, 27.12.2004

„In accordance with Article 7, the Constitution is the Supreme Law and any other law or other legal act that contravenes to the provisions of the Constitution has no legal power. Proceeding from this constitutional provision, the courts administer justice, must assess the content of the law, or of other legal act that regulates the legal dispute reports. Moreover, where necessary, apply the Constitution as a legal normative act with direct action.

The court judging the cause, directly apply the Constitution in the cases:

- a) if the provisions of the Constitution, that follow to be applied does not contain information relating to the adoption of a special law that would regulate the application of these provisions of the Constitution;
- b) if the court determines that the law which was adopted before the entry into force of the Constitution – on August 27, 1994 contravenes to its provisions”¹⁰⁹.

We believe that through the first (lit.a), and the second situation (lit.b), the Plenum of the Supreme Court from that period, and now of the Supreme Court of Justice (because this Decision is in force) recommends to the courts to exercise the control of constitutionality of laws, contrary to the provisions of article 134 of the Constitution, which allows only to the Constitutional Court to exercise such control.

The first situation, on a superficial appreciation, is not referring to a constitutional review. Along with this, lit.a), in conjunction with the previous sentence "will appreciate the content of the law or of other legal act that regulates the legal dispute reports", allows us to deduce that if the court "considers the content of the law" and detects that a legal report is not regulated, and "the Constitution's provisions, that follow to be applied do not contain information relating to the adoption of a special law," then the court takes the attributions of a legislator and directly applies the Constitution by regulation of the legal dispute report in accordance with it. By this action, the court will exceed its jurisdiction and will violate the Constitution.

The situation is even worse if the court already will "appreciate the content ... of another legal act". From the general theory of law we know that in the case when the law, as an act of primary regulation, does not regulate a legal relationship, the acts subordinated to law cannot regulate this legal relationship, the contrary proceedings being nominated in constitutional law as a conflict of competence. In civil law, such an act would exceed the conditions of validity of the legal act, being considered absolute null, as act that does not correspond to the law in the light of Article 220 of the Civil Code¹¹⁰. The court in this case should take action from the office by an exception of illegality through administrative litigation procedure in accordance with Article 13 of the Law on administrative litigation¹¹¹ and declare this rule or act as illegal one.

For situations described in the previous two paragraphs, the courts have the legal rules under national law, which prescribes the obligation of applying the analogy of laws or, if unable, of the analogy law system under Article 5 of the Civil Code and article 12 of the Civil Procedure Code¹¹². We mention that in our Roman-Germanic legal system the courts cannot regulate the legal relations by issuing a legal precedent, this being possible only in the Anglo-Saxon system. Another application of exposed legal norms should result in substituting of the court to the Parliament or the Constitutional Court. We believe, that the court would substitute to the Constitutional Court if it would casual interpret the Constitution and would apply it directly to the legal dispute, action contrary to Article 134 para. (1) of the Constitution.

In this context, it is deserve to get to the reader's attention to the fact that there is jurisprudence of the constitutional courts of other states, in accordance with that, in cases where there are omissions in the legislation, they cannot be completed by decisions of courts, but declared as unconstitutional, thereby

¹⁰⁹ Decision of the Plenum of Supreme Court of the Republic of Moldova, *Concerning the practice of application by the Courts of some provisions of the Constitution of the Republic of Moldova*, no.2 of 30.01.1996. In: "Reports of Explanatory Decisions", Chisinau, 2002, page 9

¹¹⁰ Law no.1107 of 06.06.2002 of Civil Code. First Book – General Disposals (art.1-283) // *Official Monitor* 82-86/661, 22.06.2002

¹¹¹ Law no.793 of 10.02.2000 Law od admin istrative litigation // *Official Monitor* 57-58/375, 18.05.2000

¹¹² Law no.225 of 30.05.2003 Civil Procedure Code of the Republic of Moldova // *Official Monitor* 111-115/451, 12.06.2003

requiring from parliament to regulate the omitted legal relationship. At present, on the role of the Constitutional Court already is a referral, in which is required to recognize these legislative omissions as unconstitutional one¹¹³.

When applying the provisions of subparagraph b) of p. 2 from the Decision of the Plenum of Supreme Court of Justice, the courts should allow an action contrary to article 134 para. (1) of the Constitution, concerning the status of the Constitutional Court of sole authority of constitutional jurisdiction. We mention that this explanation of the Plenum is supported by the art. 4 line (2) of the Constitutional Jurisdiction Code, which prescribes to the Constitutional Court: "(2) is subject to the constitutionality control only the normative acts adopted after the entry into force of the Constitution of the Republic of Moldova on August 27, 1994."¹¹⁴.

We believe that the last norm was temporary one, necessary for one year from the entry into force of the Constitution of the Republic of Moldova on August 27, 1994. This conclusion derived from Article II, paragraph (2) of Title VII of the Constitution, in accordance with which "(2) the Standing Committees of Parliament, the Government, within one year from the entry into force of this Constitution, shall examine the compliance of legislation with the Constitution and will present to the Parliament these proposals". After this period (from August 27, 1995), it is presumed that all laws and other normative acts correspond to the Constitution and thus enter fully into force the article 134 par. (1) of the Constitution, which states that "(1) the Constitutional Court is sole body of constitutional jurisdiction in the Republic of Moldova".

Thus, both cited provisions of art. 4, par. (2) of the Code of Constitutional Jurisdiction and lit. b) of p. 2 of the Decision of the Plenum of the Supreme Court of Justice are unconstitutional. This finding can be solved by intimation to the Constitutional Court, except for the last (Plenary Decision), which cannot be examined by the Constitutional Court on the constitutionality.

Taking into account that the Decisions of Plenum of the Supreme Court of Justice have a character of recommendation, we hope that these recommendations have not been applied by the courts any time. Along with this, some moments talk about otherwise. This is because the recommendation of p. 2 of the Decision of Plenum of the Supreme Court of Justice was amended in 2008 and from the practice of legislating we know, that the rules that do not usually are applied, are not amended during time.

Interference in the quality of the Constitutional Court of unique authority of constitutional jurisdiction, which was applied until 2016, we believe it was that of the rejection of unconstitutionality exceptions by the Supreme Court of Justice. We do not have statistics of these rejections, but we can do a statistics on the number of exceptions submitted to the Constitutional Court after the adoption of the Decision of the Constitutional Court No. 2 of 02.09.2016 for the interpretation of Article 135 par. (1) lit. a) and g) of the Constitution of the Republic of Moldova (exception of unconstitutionality)¹¹⁵. Thus, if during the whole year of 2015 to the Constitutional Court have been raised by the Supreme Court 5 exceptions, then only during the period 09.02.2016-09.05.2016 (3 months) by courts were raised 32 exceptions of unconstitutionality.

We believe that this statistic is an eloquent demonstration of the fact that the Supreme Court of Justice, during previous years, has stopped this important procedure for the protection of human rights. Along with this, we believe that any rejection of the exception of unconstitutionality is a genuine constitutional control equated with declaring of the act as constitutional.

¹¹³ See: <http://www.constcourt.md/ccdocview.php?tip=sesizari&docid=417&l=ro>

¹¹⁴ Law no.502 of 16.06.95 Code of Constitutional Jurisdiction // *Official Monitor* 53-54/597, 28.09.1995

¹¹⁵ Decision of Constitutional Court no.2 of 09.02.2016 for interpretation of the article 135 line(1) lit.a) and g) from the Constitution of the Republic of Moldova (exception of unconstitutionality) (referral no.55b/2015) // *Official Monitor* 55-58/9, 11.03.2016