SOME THOUGHTS ABOUT THE AGREEMENT BETWEEN CONSTITUTIONAL NORMS AND WILL OF SOCIETY FOR WHOM THESE ARE ADOPTED

Maria ORLOV*

Abstract

The rule of law system in any state, all the time, underwent a continuing process of modernisation and adjustment, so that to regulate social relations to fully comply with the will and aspirations of the nation. It is known that the perfect harmony cannot be reached provided that various and dynamic, as well as relatively egoistic interests of members of a society.

The lawmaker, as exponent and representative of society, has the duty to keep this balance between the legal norms that he adopts and the will of those who enabled him with the power of representation and function of legislative creation. The efficiency to exercise this duty depends on the professional performance that the members of the parliament have and their capacity to feel society's needs and aspirations, so that the adopted legal norms could ensure a smooth development of social life. When one speaks about the adoption or amendment of constitutional norms, about their agreement with the other legal norms and general will of society, an important role in this process is up to the Constitutional Court.

In this context, further on shall be analysed some examples from the practice of the Constitutional Court of the Republic of Moldova in order to get an idea of the role it has in regulating constitutional crises.

Key Words: *Legislative process / constitutional justice / supremacy / review / interpretation / notification / will of society*

JEL Clasification: *[K10]*

1. Introduction

Republic of Moldova, as an independent state, is presently passing through a period of adaptation and implementation of principles of democratic governance. Though, the traces of the authoritarian soviet regime may still be traced by nostalgic actions of a part of the population, nevertheless, the human history shows us that no government can replicate similarly twenty-five years later, since its replacement.

The change of the ruling regime is not a simple and quick process. Newly-created democratic institutions need time in order to acquire the necessary experience and to overcome obstacles that the opposition and conservative forces put and society shall understand and accept this change. In this context, well-known professors in public law of the inter-war period highlighted the following: „It is a known law that ideas usually develop slower than actions", and „nations as

* Associate Professor, Ph. D., Institute of Legal and Political Research of the Academy of Sciences of Moldavia President of Institute of Administrative Sciences of Moldavia.

individuals have no imagination", so that firstly „a generation has to die that a high society could make its mind what a group and its functions are and another generation to come in order this group to be accepted". But, the authors also say „from age to age, the genius of a nation leads to the appearance of elite spirits, which, by their great personality, may oblige human society to review its principles".[1]

In a modern society, any review of fundamental principles must be stipulated in the Constitution. For their part, the constitutional provisions, as a basic source of the national legislation, must comply perfectly with people's aspirations and their flexibility shall ensure an agreement between the action and ideas, in order not to generate political and social crises and, moreover, revolutions and violent subversions.

Over the past 15 years, Moldova has passed through a period of deep political and social crisis, to which subsequently added the economic crisis. Lately, the state authorities and institutions have been taking efforts to re-establish their functionality and to overcome this difficult situation. To this effect, a special role has been played by the Constitutional Court, which, by the interpretation provided to some constitutional norms and even its own decisions, managed to temper spirits, to solve some problems and to satisfy certain demands of civil society.

2. Dilemma regarding the name of the state language

A situation that put on fire our society and fed up more intrigues and political disputes over the past two decades, since the Constitution was adopted, namely in 1994[2], specifies to the name of the state language the term „Moldavian language". After many public debates and researches carried out by specialists in the field, they got to the conclusion that the latter is similar to the „Romanian language". However, the lawmaker did not consider necessary to revise the mentioned constitutional norm. As a result, society split up into two: some considering as state language the Moldavian one (that complies with the name of the newly-created independent state), and the others – the Romanian one (that for centuries has been spoken in this Romanian area).

This situation cannot be analysed just as a simple divergence of ideas, it rather becomes a serious problem for the new developing generation, who studies at school „the Romanian language", whereas the high political class (state officials), in their speeches and official documents use the term the „Moldavian language".

---

[1] P. Negulescu, R. Boila, G. Alexianu, *Annotated Administrative Code, Part I*, in the Explanation Note to this volume, Printed by the Institute of Graphical Arts „Vremea", Bucharest, 1930, Anachronistic edition, Printing House Tipo Moldavia, Iasi, 2013, by reference to F. Delaisi, - *Les contradictions du monde moderne,* 1927, p. 17.

[2] Constitution of Republic of Moldavia, www.justice.md.

In order to put end to disputes to this effect continuing for over two decades, a group of MPs notified the Constitutional Court about the interpretation of the respective constitutional requirement. In our opinion, the Court proved courage and competence, solving this dilemma by its Decision no. 36 of 05.12.2013, *on the interpretation of Article 13, paragraph (1) of the Constitution in relationship to Preamble to the Constitution and Declaration of Independence of the Republic of Moldova*.

The reasoning of this Decision was based on the fact that the Declaration of Independence (of 1991) operates with the term „*Romanian language*", when one speaks about the state language of the Republic of Moldova (as newly-established state). At the same time, the „Declaration of Independence laid the basis for the adoption of the Constitution in 1994", so that, „no legal act regardless of its force, including the Fundamental Law, may counter against the text of the Declaration of Independence". Respectively, where the constituent lawmaker has admitted certain contradictions in the Fundamental Law against the text of Declaration of Independence, „the genuine text of the Declaration of Independence shall prevail". Based on these arguments, the Constitutional Court considered that clause referring to the *Romanian language,* as the state language of the Republic of Moldova, established in the Declaration of Independence, shall prevail against the clause referring to the *Moldavian language,* stipulated to article 13 of the Constitution.

Reference to the „Romanian language" as the state language, considers the Court, is in fact a subject namely stated in the text of Declaration of Independence, which is the establishing document of the Republic of Moldova. Regardless of glottonyms used in the legislation till the proclamation of independence, the Declaration of Independence included a clear difference, expressly choosing the term of *„Romanian language"* (CCD no. 36 of 05.12.2013, § 108)[3].

The principle value of the Declaration of Independence derives *from the general popular consensus that legitimated it* (being adopted by the National Great Assembly) and *from its defining content for the newly-created state*. This provides the Declaration of Independence, according to the constitutional order in Moldova, with a transversal function compared to other constitutional clauses (similar to the general principles of the rule of law state, fundamental rights and freedoms, justice and political pluralism etc.), it being the core of the system of constitutionality.

The interpretation of constitutional requirements made by the Constitutional Court has an official and mandatory nature, and the Decision by which a constitutional text is interpreted becomes in fact a law and shall be implemented directly, without any other condition related to form. Thus, it is not a dilemma

[3] www.cc.md.

anymore the issue regarding the state language of the Republic of Moldavia, and the state's institutions must comply with the decisions of the Constitutional Court.

3. Political crisis generated by changing the procedure of electing the President of Moldova

Initially, once the independence was proclaimed (1991), the Moldavian President was elected by universal suffrage, by the nation. By the modification made in the Constitution to this effect, by the Law no. 1115/2000, the competence to elect the head of state was provided to the Parliament. Due to lack of experience and political maturity, the Parliament fulfilled very difficultly this mission. As a result, namely the Parliament was dissolved for three times on the ground that it did not managed to elect the head of state. This seriously damaged both the image of the legislative power and the institution of president. Over the past time, civil society and some political forces demanded more insistently to return to the universal suffrage of electing the President.

Namely the Parliament has the competence to solve this issue. But, due to the political crisis that Moldova is going through, it is impossible to obtain a majority of 2/3 of votes of MPs in order to make this modification in the Constitution.

For its part, based on its legal competences, the Constitutional Court speaks out for only the constitutionality of normative acts and not for circumstances in fact. But this time, the Court was forced, by interpretation from the Constitution, to give a solution in order to overcome the political crisis, namely a situation in fact generated by an obvious contradiction between society's interests and constitutional norms revised by the above-mentioned law.

Upon the notification of a group of MPs, the Court has checked the compliance of some provisions of the Law no. 1115/2000 on the modification of articles 78 and 85 paragraph (4) of the Constitution, based on articles nr. 135 paragraph (1) letter c) and no. 142 paragraph (1) of the Constitution, as well as the principle of the rule of law state described in the Preamble and in article 1 paragraph (3) of the Constitution.

It is worth to be mentioned that by the Law no.1115-XIV of 5 July 2000, the Parliament reviewed the Constitution of Moldova, by amending article 78. Once this constitutional review made, the President was to be elected by the Parliament, with the vote of 3/5 of deputies. Due to the rush this Law on revising the Constitution was voted, more mistakes were made, especially procedural ones. The authors of the notification mentioned insisted to receive an answer from the Constitutional Court.

Namely, these issues read as follows:

- Where certain amendments to a draft law on revising the Constitution by MPs were accepted in second reading, it is necessary repeatedly the opinion of the Constitutional Court?

- Lack of such an opinion may be considered as a violation of the procedure of adopting a constitutional draft law?

- Where the Constitutional Court repeatedly approves a draft law on the review of the Constitution, significantly amended by the Parliament in second reading, is this bill to pass through all procedures set out in art. 143 paragraph (1) of the Constitution?

The main issue was: shall the Parliament be able to amend the draft law on review of the Constitution already approved by the Constitutional Court and shall it be obliged to request a new approval where the bill was significantly amended by the Parliament in second reading.

In this context, we shall mention that Moldova's Constitution is part of the category of rigid constitutions. Therefore, the review and modification of constitutional norms have a complex nature and a competence divided between the Parliament and Constitutional Court.

Thus, article 141 (2) of the Constitution stipulates that constitutional draft laws shall be presented to the Parliament *„only together with the opinion of the Constitutional Court"***,** adopted with the vote of at least 4 judges out of 6. This competence is set out in article 135 paragraph (1) letter c) of the Constitution, under which, the Constitutional Court *„speaks out for initiatives on review of the Constitution"*.

In this respect, such an approval on the initial bill on review of the Constitution existed. But, this draft law was significantly modified, so that the Court considered it as a new bill – a new proposal to amend or complete the Constitution, which must be accompanied by a new approval appropriate to the reformulated text, adopted with full repeating of procedure set out in the Constitution.[4]

It is also worth to be mentioned that immediately after the adoption of the Law no.1115/2000 on review of the Constitution, the Constitutional Court was notified about its non-constitutionality, but the respective notification was rejected.[5] This has led to a new question, namely: is it possible to notify the Court again on an issue that has been already examined?

[4] Art.141-143 of the Constitution of the Republic of Moldova, www.justice.md.

[5] P. 93 and the next ones due to motivation to the Decision of the Constitutional Court No. 7 of 04.03.2016 on the control of constitutionality of some provisions of the Law no. 1115-XIV of 5 July 2000 on amendment and completion of the Constitution of the Republic of Moldavia (process to elect the President) (Notification no. 48b/2015) Published on: 18.03.2016 in the Official Journal No. 59-67 art No: 10, Date of entry into force: 04.03.2016, www.cc.md.

In this respect, the Court considered that, even if acts of the Constitutional Court are final and cannot be appealed, nevertheless, as regards their effect, a difference between various types of acts delivered shall be made. Thus, the Decisions of the Constitutional Court on admission of background notifications have *erga omnes* effects and only in the future, by non-affecting the legal security that citizens have the right to expect from a law, which apply to them. And, on the contrary, decisions by which a notification is rejected, including where the process is ceased, have just *inter partes litigantes* effects, which shows that the constitutional contentious is further opened on, due to a possible development of condition of constitutionality that subsequently shall impose a solution to admit the notification initially rejected.[6] Due to the fact that the condition of constitutionality develops, once the social and economic, political and moral conditions of society changed, reasons that initially justified the rejection of a notification might be possible not to exist anymore, where new ones may determine its admission later.

Moreover, in this situation, the contested provisions proved to be in practice a source of instability and institutional obstructions. Even if theoretically the constitutional modifications regarding the procedure to elect the President were to ensure the good functioning of constitutional bodies, in practice, they lead to multiple dissolutions and snap elections, and to plurality of offices, namely that of President by the Parliament Speaker for an interim period longer that the Constitution specifies.

This was the reason why the respective regulations were subject to repeated notifications on non-constitutionality. In this respect, the Court decided that it is competent to examine this notification and, based on article 6 para. (2) of the Code of constitutional jurisdiction[7], to speak out for both the control of constitutionality and the interpretation of constitutional norms invoked in the notification.

For the purposes of reasoning and underpinning its decision, the Court mentioned that opinions on modification of the Constitution are meant to protect the fundamental values from some abusive practices by political, social and institutional actors. Therefore, their ignoring or exceeding (substitution) shall implicitly result in nullity of the respective constitutional amendments. In this respect, the Court highlighted that the 2000 constitutional reform generated an imperfect system of governance, with a high potential of conflict between the state's authorities, all these being a direct consequence of ignoring of the Constitutional Court's approval by the Parliament[8]. *Besides*, the adoption of such

[6] Ibidem p. 30-32.

[7] Cod of constitutional jurisdiction, adopted by the Law No. 502 of 16.06.1995, Published on 28.09.1995 in the Official Journal No. 53-54 art No: 597 www.justice.md.

[8] P. 207 out from the motivation to the Decision of the Constitutional Court No. 7 of 04.03.2016, www.cc.md.

modifications without the approval of the Constitutional Court as to the final version of the law on constitutional review counters against the constitutional principle of rule of law state, set out in the Preamble and article 1 paragraph (3) of the Constitution.

On the basis of a range of grounded reasons, the Constitutional Court declared as unconstitutional the amendments to the fundamental law, adopted by the law on Constitution review no.1115/2000 regarding the process of election of the Moldavian President. And as title for interpretation, it highlighted that:

- once the Constitutional Court's opinion delivered, no changes to the text of the draft law on review of the Constitution are accepted, and *ignoring or exceeding its content may serve as ground for voiding modifications operated that way;*
- where MPs' amendments to a draft law on review of the Constitution accepted by the Parliament in second reading, it is needed the repeated approval by the Constitutional Court;
- where the Constitutional Court repeatedly approves a draft law on Constitution review, significantly amended by the Parliament in second reading, this bill is to pass through all procedures set out in article 143 paragraph (1) of the Constitution.

This decision of the Constitutional Court represents a precedent that obviously contributed to re-establish the political balance and functionality of the state institutions from Moldova.

4. Conclusions

Decisions of the Constitutional Court analysed in this paper have been widely tackled both by political actors and representatives of civil society. Opinions divided into supporters and critics of these decisions. The latter invoked as a main argument – exceeding of competences by the Constitutional Court when adopting the mentioned decisions.

In our opinion, in this deep constitutional crisis, the Court is obliged to take decisions to unblock the situation and to ensure the functionality of the state's institutions. If this goal is to be reached, it shall mean that the constitutional justice achieved its mission and society will have some breathing time to think over the democratic instruments, to modernise the present government. By the rulings mentioned in this paper, the Court managed to fulfill its obligation.

Thus, as regards to the first situation related to the state language of the Republic of Moldova, the Court's decision obliges to uniformly use the term of Romanian language all over Moldova, by all public institutions and authorities. So, it contributed to temper a social conflict generated by the imperfection of constitutional norms.

As regards the second situation, related to the process of the election of the President, the decision of the Constitutional Court to re-establish the procedure of

election of the president by citizens put an end to the series of protests, to which tens of thousands of people participated. Thus, the constitutional requirements were complied with the will of the majority of members of society. Besides, this decision has been already executed. Therefore, the Parliament ruled that the President should be elected by people on 30 October 2016.

All these are small steps, but very important for the development of democracy and principles of the rule of law state in Moldova.

Bibliography:

1. Constitution of the Republic of Moldavia, www.justice.md.
2. Cod of constitutional jurisdiction, adopted by the Law No. 502 of 16.06.1995, Published on 28.09.1995 in the Official Journal No. 53-54 art No. 597 www.justice.md.
3. Decision of the Constitutional Court No. 7 of 04.03.2016 on the control of constitutionality of some provisions of the Law no. 1115-XIV of 5 July 2000 on amendment and completion of the Constitution of the Republic of Moldavia (process to elect the President) (Notification no. 48b/2015) Published on: 18.03.2016 in the Official Journal No. 59-67 art No: 10, Date of entry into force: 04.03.2016, www.cc.md.
4. Negulescu, P., Boila, R., Alexianu, G., 2013 *Codul administrativ adnotat, Part I*, Printed by the Institute of Graphical Arts „Vremea", Bucharest, 1930, Anachronistic edition, Iasi: Printing House TipoMoldova.