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THE RULE OF LAW AND CONSTITUTIONAL JUSTICE IN THE MODERN WORLD

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Replies to the questionnaire by the Republic of Moldova

I. The different concepts of the rule of law

1. What are the relevant sources of law (e.g. the Constitution, case-law, etc.) which establish the principle of the rule of law in the legal system of your country?

The Republic of Moldova is a state governed by the rule of law and this idea is regulated both in the Preamble of the Constitution of the Republic of Moldova, which provides the following: “*CONSIDERING rule of law, civic peace, democracy, human dignity, fundamental human rights and freedoms, the free development of human personality, justice and political pluralism as supreme values*”; as well as in Art. 1 para. (3) of the Supreme Law, according to which: “*Governed by the rule of law, the Republic of Moldova is a democratic State in which the dignity of people, their rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values that shall be guaranteed.*”

The ‘hard law’ of the Republic of Moldova does not further define the concept of rule of law; however the practical application of this principle has evolved in light of the case-law of the Constitutional Court of the Republic of Moldova. Thus, in its jurisprudence, the instance of constitutional jurisdiction stated that the rule of law does not mean just a formal legality which ensures regularity and coherence in instituting and enforcing democratic order in the country, it is rather a justice based on recognition and full acceptance of human personality.¹

2. How is the principle of the rule of law interpreted in your country? Are there different concepts of the rule of law: formal, substantive or other?

As it has been stated earlier, the principle of rule of law is applied in practice based on the guidelines and doctrine elaborated by the Constitutional Court. Thus, based on the court interpretation, the rule of law is grounded on the principle of legality that results from the provisions of art.1 para.(3) of the Constitution which stipulates that the Republic of Moldova is a rule of law and democratic state, and the foundation of institutional mechanism for the organisation and operation of the state is the principle of separation of powers. Observing the principle of legality

¹ Judgement of the Constitutional Court No.43 of 27.07.1999 on constitutional review of some provisions of the Law No.430-XIII of 19 April 1995 ‘On the status of the Councillor in the local council’ and of the Electoral Code.

ensures simultaneously the observance of other principles due to the fact that legality is the condition of existence and the method to achieve all constitutional principles.²

The Court underlined that the rule of law is based on justice, and not on appropriateness. Without denouncing categorically the importance and impact of appropriateness, it shall be mentioned that it has to be applied only within the law. Justice is served only based on the law.³ The notion of ‘rule of law’ signifies the subordination of the state to the law. No one – either an individual, an entity or a public authority – can be above the law.⁴

The significance of the rule of law implies a guarantee of an efficient democracy and political pluralism, including ensuring the freedom of opinion and expression, right to association in political parties and in other social and political organisations that are indispensable part of human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights, enshrined and guaranteed by the Constitution of the Republic of Moldova.⁵

The rule of law was the culminant point of the constitution-based political system. It means that the policy should be circumscribed to a legal norm which sets the limits of the action. Due to intrinsic link between the state and the law, the evolution of public power is accompanied by the evolution of legal system.

The Court recognised that the rule of law is a mechanism, which functionality implies the institution of a climate of order, where the recognition and enjoyment of the rights of an individual cannot be conceived absolutely and discretionally, but only in correlation with the observance of the rights of others and of the society, in general.⁶

The challenges of the rule of law means insurance of legality, legal security and interdiction of any arbitrariness, access to justice by independent and impartial courts, including judicial review of the administrative acts, observance of human rights, non-discrimination and equality before the law.⁷

The rule of law implies that social and state system is based on fundamental norms and principles of the law. An essential feature of the rule of law is a very rigid subordination of all, including of state institutions, clear, predictable and pre-set norms of the law.⁸

² Judgement of Constitutional Court No.3 of 09.02.2012 *on constitutional review of some provisions of Law No.163 of 22 July 2011 on amending and supplementing some legislative acts, complaint No.30a/2011* (refers to specialised courts).

³ Judgement of the Constitutional Court No.30 of 10.11.1997 *on the constitutionality of the Government Decision No.155 of 24 February 1997 on the company “Centrul de Moda S.A”*.

⁴ Judgement of the Constitutional Court No.23 of 21.07.1997 *on the constitutionality of Presidential Decrees No.116-II and No.117-II of 7 April 1997*.

⁵ Opinion of the Constitutional Court No.1 of 03.04.2008 *on the draft law amending art.81 para. (1) of the Constitution of the Republic of Moldova*.

⁶ Judgement of Constitutional Court No.7 of 18.05.2013 *on constitutional review of some provisions of Law No.64-XII of 31 May 1990 on the Government, in the edition of Laws No.107 and No.110 of 3 May 2013, and of President Decrees No.634-VII and No.635-VII of 16 May 2013 and Government Decision No. 364 of 16 May 2013*.

⁷ Judgement of Constitutional Court No.4 of 22.04.2013 *on constitutional review of the Presidential Decrees No. 534-VII of 8 March 2013 on the dismissal of the Government, in the part related to keeping in position the Prime-minister-dismissed via censorship motion (for corruption allegations) as of 8 March 2013 up to the formation of the new Government and No. 584-VII of 10 April 2013 on appointing the candidate for the position of the Prime-minister*.

⁸ Judgement of Constitutional Court No.7 of 24.05.2012 *on constitutional review of some provisions of Law No. 1234-XIV of 22.09.200 on the procedure to elect the President of the Republic of Moldova, complaint No.1a/2012* (refers to the election procedure of the President of the Republic of Moldova).

Hence, in the retrospective of constitutional jurisprudence, the rule of law concept covers: a) a concept of public freedoms; b) a concept about democracy; c) a concept of the role of the state in the public order.

3. Are there specific fields of law in which your Court ensures respect for the rule of law (e.g. criminal law, electoral law, etc.)?

The Constitutional Court carries out its jurisdictional activity mainly by performing the functions attributed to it by the constitutional provisions (among which control of constitutionality of normative acts of central and local public administration, interpretation of the constitution and the delivery of opinions on the draft laws amending the Constitution are most frequently implied). Therefore the Court elaborates its doctrine in relation to the subject that has been challenged before it; however this doctrine is widely used in any other relevant cases and situations, irrespective of the field of law where it has initially been elaborated.

The jurisprudence of the Constitutional Court is rich in examples of Court's interpretation and appreciation of the principle of rule of law and its reiteration within the process of subsequent analysis. A prominent example of this approach is the interpretation the Court gave to the rule of law in relation to the **fight against corruption**: corruption undermines democracy and the rule of law, leads to violations of human rights, undermines the economy and erodes the quality of life. Therefore, the fight against corruption is an integral component of ensuring respect for the rule of law.⁹ This interpretation has been reiterated in the Court Judgment no. 22 of 05.09.2013¹⁰, Court Judgment no. 6 of 16.04.2015,¹¹ as well as in other court acts.

4. Is there case-law on the content of the principle of the rule of law? What are the core elements of this principle according to the case-law? Please provide relevant examples from case-law.

Based on the case-law developed by the Constitutional Court of the Republic of Moldova, the following should be included among the constitutive elements of the rule of law: new concept on the state genesis and its role in civil society; capitalisation of the reasoning and mechanisms of the principle of separation of powers; establishment and enhancement of a real and authentic democracy; institutionalisation and guarantee of human rights and freedoms of citizens; coherent legal order observing the exigencies of the rule of law.

The rule of law elements elucidated in the constitutional jurisprudence of the CCM are based on the primacy of the law; social status; principle of legality in a state based on rule of law when appointing persons of public dignity; international obligations in the context of state's sovereignty; fight against corruption.

⁹ Judgement of Constitutional Court No.4 of 22.04.2013 *on constitutional review of the Presidential Decrees No. 534-VII of 8 March 2013 on the dismissal of the Government, in the part related to keeping in position the Prime-minister-dismissed via censorship motion (for corruption allegations) as of 8 March 2013 up to the formation of the new Government and No. 584-VII of 10 April 2013 on appointing the candidate for the position of the Prime-minister.*

¹⁰ Judgement of Constitutional Court No.22 of 09.04.2013 *on the control of constitutionality of some provisions on judge's immunity*

¹¹ Judgement of Constitutional Court No. 6 of 16.04.2015 *on constitutional review of some provisions of the Criminal Code and Criminal Procedure Code (extended confiscation and illicit enrichment)*

In its case-law the Court stated that the rule of law is most prominent in light of the principle of legality and primacy of the law; this imposes the obligation to observe the laws, and this obligation refers to the supreme legislative forum of the state, as well.¹²

The Court mentioned that the legality, as main principle of the rule of law, assumes the conformity of the norm or legal act with the superior norms that establish procedural conditions to enact the legal norm. The legal behaviour refers both, to the law-making activity of the Parliament as well as to the establishment of internal norms for organisation and functioning thereof, which are directly linked with the law-making process. The importance of the principle of legality implies the observance of the law; this exigency exists for individuals as well as for public and private authorities. The extent to which the legality refers to the acts of public agents, the exigency is that they have to act within their powers.¹³

In a different order of mind the Court underlined importance of the rule of law in fighting corruption and stated that that corruption is a threat to the values of rule of law, democracy and human rights, undermines the principles of sound administration, equity and social justice, distorts the competition, slows down the economic development and endangers the stability of democratic institutions and moral foundation of the society. Hence, it is important to ensure some legal, adequate and efficient means, compatible with the continuous process of modernization and technology, so the criminal phenomenon of the corruption could be controlled and reduced.¹⁴

5. Has the concept of the rule of law changed over time in case-law in your country? If so, please describe these changes referring to examples.

The rule of law concept has not been subject to modifications during the evolution of the constitutional case-law; however the content of this principle has been supplemented on various occasions. In the most recent period, the values of the rule of law were developed implicitly through the responsibility of persons holding public functions and those who carry out activities in pursue of public interest.¹⁵ Hence, ‘trust in governmental institutions’ motivates the citizens to involve more in public life. The level of public confidence in the institutions has effects on economic development of the society. Strengthening the trust in the Parliament, President and Government as fundamental institutions of the state that symbolize democracy is in direct connection with effective observance of the rule of law. In accordance with the fundamental principle of the rule of law, the persons in public positions should prove high level of integrity.¹⁶

¹² Judgement of Constitutional Court No. 22 of 16.07.2015 *on the constitutionality of Parliament Decision No. 140 of 3 July 2015 on appointing the People’s Advocate for the rights of the child*

¹³ Judgement No.30 of 08.12.2015 *on the constitutionality of Parliament Decision No. 224 of 3 December 2015 on the abrogation of Parliament Decisions on appointing the Directors of the Board of the National Energy Regulatory Agency.*

¹⁴ Judgement No.7 of 16.04.2015 *on constitutionality control of some provisions of the Law No. 325 of 23 December 2013 on professional integrity testing.*

¹⁵ Judgement No.7 of 16.04.2015 *on constitutional review of some provisions of Law No. 325 of 23 December 2013 on professional integrity testing.*

¹⁶ Judgement No.7 of 16.04.2015 *on constitutional review of some provisions of Law No. 325 of 23 December 2013 on professional integrity testing.*

6. Does international law have an impact on the interpretation of the principle of the rule of law in your country?

Both aspects of international law, *hard law* as well as *soft law*, have progressively influenced the evolution of concept of rule of law in the constitutional jurisprudence of the Republic of Moldova. The observance of voluntarily undertaken international commitments is a legal tradition and not a constitutional principle, and is an inseparable part of the rule of law. The unanimously recognised norms and principles of international law are executory for the Republic of Moldova to the extent it expressed its consent to be bound by the respective international acts.

For instance, having examined the provisions of the EU-RM Association Agreement, the Court noted that it promotes political association and economic integration between the Republic of Moldova and European Union based on common values, as well as observance and promotion of principles of sovereignty and territorial integrity, inviolability of borders and independency of the Republic of Moldova, democracy, observance of human rights and freedoms. The Court considered necessary to mention that the orientation of the Republic of Moldova towards European area of democratic values is inseparable from other international commitments that result from the membership status in international organisations.¹⁷

The Court also noted that the fight against corruption was declared as national objective in a wide range of different international commitments and national documents, as, for example, the Criminal Law Convention on Corruption (concluded in Strasbourg on 27 January 1999 and ratified by the Republic of Moldova on 14 January 2004 by Law No. 428 of 30 October 2003). The Court encouraged and welcomed all the efforts undertaken by competent authorities in fighting this phenomenon, and at the same time, considered important to note that these efforts should not undermine the constitutional order, endanger the stability of democratic institutions and violate human rights and fundamental freedoms.

Moreover, the Court has decided that the application of Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 8 November 1990 and of Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 16 May 2005 is limited only to actions that result from crime, and consequently, fall under the incidence of criminal procedure norms. Legislative and other measures, mandatory for the states - parties to these conventions, are "considered necessary to permit the confiscation of instruments and proceeds from crime or goods, which value correspond to these proceeds". The objectives of the conventions represent mutual cooperation and data exchange between parties, promotion of a common criminal policy, counteracting the criminality and annihilation of financial flows resulting from crimes, protection of the society from such types of crimes. The measures developed by the states based on the conventions should allow people affected by such measures to exercise effective remedies to protect their rights.¹⁸

¹⁷Judgement of Constitutional Court No. 24 of 09.10.2014 *on the constitutionality of the Association Agreement between the Republic of Moldova, on the one hand, and the European Union and the European Atomic Energy Community and its Member States, on the other hand and of the Law No.112 of 2 July 2014 on its ratification* (the EU- RM Association Agreement).

¹⁸Judgement of Constitutional Court No. 27 of 25.11.2010 *on constitutionality control of some provisions of the Law No.1104-XV of 06.06.2002 'On the Centre for Fighting Economic Crimes and Corruption' and of the Law No.190-XVI of 26.07.2007 'On prevention and fighting money laundering and financing of terrorism'*.

In a different order of mind, but in the same context of internationally recognised values the Court decided that following the international and European standards that request institution of appropriate mechanisms to ensure the protection of the rights of children by appointing qualified professionals, the subject of professional skills, education, supervision and responsibility of specialists imply adequate and permanent professional training in the field of the rights of the children.

The mechanism for the protection of the rights of the child by appointing a People's Advocate that is professional in the field should have a strictly formal character for the sake of a response to international requirements, and should imply efficiency so as to meet the requirements and needs for the protection of child's rights. Consequently, the appointment of a person who does not meet the legal requirements for the position of the People's Advocate undermines the principles of democracy and rule of law. The promotion of a person who does not meet necessary requirements of experience and notoriety in this important position to ensure the observance of human rights may compromise the principle of legality, equality, impartiality and democracy, which lays the basis of the activity of the People's Advocate. This situation may lead to the inefficiency of the institution of the People's Advocate.¹⁹

II. New challenges to the rule of law

7. Are there major threats to the rule of law at the national level or have there been such threats in your country (e.g. economic crises)?

The principle establishing the observance of the supremacy of the Constitution is a characteristic of the rule of law. The material superiority of the Constitution results from the fact that it is the one that establishes and organises the competences, therefore any act against the Constitution is an illegal act. The extent to which the principle of the supremacy of the Constitution is applied and observed in a state determines also the quality of the rule of law in that state.

Given the appreciation of the rule of law as a combination of the most important values and principles that lay the basis of a harmonious development of the state in a democratic manner, any influence that further may negatively influence any principle or element of the state's development is a threat to the rule of law. Such threats do arise in the Republic of Moldova every time the legislature adopts norms that contradict the Constitution. The Constitutional Court is called to settle the differences that undermine the values of the rule of law.

This function is carried out more carefully within the review of constitutionality of laws and other normative acts adopted by the Legislative and the Executive, due to the fact that governance by law is the only way to achieve the principle of the rule of law. In this sense, any normative act should comply with constitutional principles and norms, as well as with legislative exigencies meant to ensure clarity, predictability and accessibility of the act. The law has to regulate unitarily, to ensure a legal and logical link between its provisions, and in case of certain legal institutions having a more complex structure, to foresee the elements that differentiate their particularities.

¹⁹ Judgement No.22 of 16.07.2015 on the constitutionality of Parliament Decision No. 140 of 3 July 2015 on appointing the People's Advocate for the rights of the child

The constitutional provisions do not have a declarative character; however these norms are mandatory for the Parliament which is obliged to legalize the creation of corresponding mechanisms to implement the constitutional principles and values, without which it is impossible to conceive the existence of the rule of law provided in the preamble, as well as in art. 1 para. (3) of the Constitution of the Republic of Moldova.

On the other side, given that, when ensuring the stability of political system and democratic institutions the rule of law is an essential condition, the purpose of the infra-constitutional provisions cannot be other than to guarantee the practical application of the principles enshrined in the supreme law.

8. Have international events and developments had a repercussion on the interpretation of the rule of law in your country (e.g. migration, terrorism)?

The Constitutional Court of Moldova starting from the very moment of its creation has developed a comprehensive doctrine on the constitutional principle of the rule of law. Although at the beginning this doctrine covered more general aspects in which the Court was asked to deliver a solution, over the years this interpretative doctrine narrowed and now it addresses a wide range of domains. This evolution to a great extent is due to the valuable and comprehensive input by the international organisations on the development of the constitutional law and constitutional practice throughout the world.

In particular, the Court has accepted and subsequently reiterated the conclusions stated by the Venice Commission in its Report on the Rule of law (CDL-AD (2011) 003 rev, Strasbourg, 4 April 2011) that developing the essence of the rule of law means ensuring legality, legal certainty, prohibition of arbitrariness, access to justice before independent and impartial courts, including judicial review of administrative acts, respect for human rights, non-discrimination and equality before the law.²⁰

9. Has your Court dealt with the collisions between national and international legal norms? Have there been cases of different interpretation of a certain right or freedom by your Court compared to regional / international courts (e.g. the African, Inter-American or European Courts) or international bodies (notably, the UN Human Rights Committee)? Are there related difficulties in implementing decisions of such courts / bodies? What is the essence of these difficulties? Please provide examples.

If analysing national constitutional provisions from the point of view of their relation with international law there may be observed the special importance of international legal instruments, including European legal framework, for the regulation of domestic legal relations.

Notably, according to the provisions of Article 4 para.(1) of the Constitution of the Republic of Moldova, the constitutional provisions of human rights and freedoms are interpreted and applied in

²⁰ The provisions of the *Venice Commission Report on the Rule of Law (CDL-AD (2011) 003 rev of 4 April* were cited in the Judgment of the Constitutional no. 20 of 04.06.2014 *on the control of constitutionality of certain provisions of the Rules of the Parliament, adopted by the Law no. 797-XIII on 2 April 1996*, Judgement of the Constitutional Court No. 22 of 16.07.2015 *on constitutional review of the Parliament's Decision no. 140 of 3 July 2015 on the appointment of the People's Advocate for the rights of the child.*

conformity with the Universal Declaration of Human Rights and conventions to which the Republic of Moldova is a party. This provision has legal consequences, assuming first of all that law-enforcement agencies, including the Constitutional Court and the courts, within their competences, have the right to apply in the examination process some specific norms of the international law in the cases foreseen by the legislation.

Article 4 para. (2) of the Constitution refers to the correlation between the norms of international law and domestic provisions on fundamental human rights, providing priority, in case of disagreement, to the international provisions. This constitutional norm expresses the attachment to the international regulations, and at the same time, tests the receptivity towards their possible and predictable dynamics.

Thus the constitutional norms empower the international conventional provisions *in the field of human rights* with a separate status, being placed in the hierarchy of normative acts at a level similar to the Supreme Law and having primacy over domestic provisions, in case of divergence.

Also, in the spirit of constitutional text, the Constitutional Court possesses the necessary instruments to enrich the set of guarantees and means to protect human rights and fundamental freedoms through its acts delivered following the examination of constitutional disputes, consequently, the national constitutional case-law is ‘an efficient and dynamic agent’ of the assimilation and implementation of international law provisions.

It should be noted that the case-law of the European Court of Human Rights and provisions of the European Convention are of particular relevance for the Constitutional Court and direct the solutions adopted by the latter; moreover, in certain circumstances they have an essential role and direct the examination of constitutional litigation. This is valid in particular when the constitutional litigation refers in essence to the issue of guaranteeing or observing a constitutional right enshrined both in the Constitution of the Republic of Moldova and in the European Convention.

The case-law of the Constitutional Court in its greater part is formed of judgements that resolved complaints related to the violation of human rights, inter alia *right to property, principles of equality and non-discrimination, right to defence, free access to justice, fair trial in a reasonable period, freedom of assembly and meeting*.

Subsequently, in its judgements, the Constitutional Court has delivered its opinion on the extents of fundamental freedoms and human rights where it grounded its reasoning both on the national constitutional norms as well as on the provisions of the European Convention and the case-law of the Strasbourg Court. At the same time, it is necessary to mention that the reference to the case-law of the European Court, which stipulates a minimum level of protection, contributes to a higher level of protection of human rights and fundamental freedoms by the Constitutional Court through the judgements delivered.

For instance, the Constitutional Court concluded that the international case-law [...] is mandatory for the Republic of Moldova, as a state that adhered to the European Convention or the obligation to comply with the provisions of the European Convention results from article 46 §1 of

the Convention, according to which: ‘The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.’²¹

Practical application of these principles is materialised by the competence provided to the Constitutional Court by art. 72 of the Constitutional Jurisdiction Code No. 502 of 16 June 1995, to review its previous decisions when, inter alia, new circumstances have arisen, unknown until now, if these circumstances have the power to change essentially the judgement. Such review of the judgement is carried out by observing the procedure of constitutional jurisdiction.

For instance, the Judgement of the Constitutional Court No. 31 of 11.12.2014 on review of Judgement of the Constitutional Court No. 9 of 26 May 2009 on constitutionality review of some provisions of Law No.273-XVI of 7 December 2007 on amending and supplementing some legislative acts and of Law No.76-XVI of 10 April 2008 on amending and supplementing the Electoral Code No.1381-XIII of 21 November 1997 (interdiction to hold public positions by people with multiple citizenships). Grounds for revision of the Judgement of the Constitutional Court No. 9 of 26 May 2009 was the decision of the European Court of Human Rights in the case *Tanase vs. Moldova*.

In this case, on 18 November 2008, the European Court of Human Rights established the violation of conventional provisions by the authorities of the Republic of Moldova, by adopting the Law No. 273-XVI of 7 December 2007, and namely, violation of the right of the petitioner to be elected in the Parliament, a right guaranteed by Article 3 of the Protocol No. 1 to the Convention. The provisions of the law imposed restrictions in holding certain public positions for persons with additional citizenship besides that of the Republic of Moldova.

The Government of the Republic of Moldova requested the re-examination of the case by the Great Chamber invoking the fact that the purpose of interference was legal and democratic. During legal proceedings before the Great Chamber, the Constitutional Court of the Republic of Moldova delivered on 26 May 2009 the Judgement No. 9 of 26 May 2009 declaring constitutional the Law No. 273 of 7 December 2007 and Law No.76-XVI of 10 April 2008 on amending and supplementing the Electoral Code No.1381-XIII of 21 November 1997, considering that it had the legal purpose of protecting national security and consolidate the statehood of the Republic of Moldova.

The Great Chamber of the European Court maintained by its decision of 10 March 2010, the solution given by the Chamber and considered that the petitioner was directly affected by the provisions of the domestic law, because if elected he had to choose between becoming a member of Parliament or keep the second citizenship. In the light of described facts and based on specific historical and political context of the Republic of Moldova, the European Court has established that the Law that prohibited the members of Parliament with many citizenship to hold the position of a Deputy in the Parliament was disproportionate and violated article 3 of the Protocol No. 1 to the Convention.

Thus, given the conclusions of the European Court in the case *Tanase vs. Moldova*, based on art. 4 of the Constitution and art. 72 of the Constitutional Jurisdiction Code, the Court considered

²¹ Judgement of the Constitutional Court no. 10 of 16 April 2010 *on the review of the Judgment of the Constitutional Court no.16 of 28.05.1998 on the interpretation of Art. 20 of the Constitution in the wording of Judgment no.39 of 09.07.2001*

necessary to revise its own case-law and namely, the Judgement of the Constitutional Court No. 9 of 26 May 2009 and declared unconstitutional the legal provisions that prohibited persons in public positions to hold multiple citizenship.

III. The law and the state

10. What is the impact of the case-law of your Court on guaranteeing that state powers act within the constitutional limits of their authority?

Based on the principle of the rule of law, the state is not just an instrument to promote and organise collective security, but it is also a guarantor of fundamental human rights, so that the objective is focused on the protection of individual before the state power, on avoiding the abuse of power on behalf of state authorities. The essential element of the constitutional jurisprudence regarding the power is the concept of power based on the idea to limit the state power by law. As a result, in order not to be arbitrary and discretionary, the measure taken by a state authority has to be in accordance with the law, and adequate for the suggested legitimate purpose.

For instance, in its case-law, the Court stated that the principle of the rule of law being enshrined in the Preamble of the Constitution refers to the Constitution in its integrity. This principle fundamentals the existence of an adequate protection against the arbitrary on behalf of public power.²²

Moreover, the Court to a great extent relied on the principle of the rule of law while examining the following issues:

- ***Transparency of Parliament activity***

The parliamentary autonomy cannot be exercised discretionally, abusive, or in violation of the constitutional duties of the Parliament or of the imperative norms on the Parliamentary procedure.

Hence, the citizens have the right to follow closely the activity of the Members of the Parliament they have elected, ensuring they observe strict principles of behaviour and maintain balanced relations with the representatives of groups of interests. The citizens are also entitled to have the highest expectations regarding the behaviour standards and efficiency of the Members of the Parliament. Last but not least, the citizens are entitled to access documents of the Parliament within the limits provided by the law. In fact, all transparency instruments have the objective to allow the citizens to supervise the activities and the legislative activity of the Parliament.

In this context, the constitutional principle of transparency of parliamentary activity implies the right to information of every citizen about the activity of all Members of Parliament. Hence, it is necessary to prove transparency in the Parliament activity, including the votes expressed by every Member of Parliament in part.²³

²²Judgement of Constitutional Court No.4 of 22.04.2013 *on the constitutionality of the President Decree No. 534-VII of 8 March 2013 on the dismissal of the Government, in the part related to keeping in position the Prime-minister-dismissed via censorship motion (for corruption allegations) as of 8 March 2013 up to the formation of the new Government and No. 584-VII of 10 April 2013 on appointing the candidate for the position of the Prime-minister.*

²³Judgement of Constitutional Court No.27 of 17 November 2015 *on constitutionality control of the Parliament Decision No. 172 of 15 October 2015 on removing the parliamentary immunity of the Deputy Vladimir Filat*

- ***Setting limits for Parliament functionality***

The constitutional court, by interpreting the constitutional norms, *gave its opinion on the elements of parliamentary mandate and established some functioning limits of the Parliament.*

In the logic of free representation, the Constitutional Court underlined that the Parliament mandate is irrevocable: the electoral cannot stop it prematurely and white dismissal is forbidden.

These characteristics confer the deputy with a special protection regime against the pressures of the voter and the party that supported the MP in the Parliament. Once elected, the deputy becomes the representative of the entire nation, and the content of his/her mandate is determined by the interests of the represented people and not only of the voters. The deputy is free to adopt attitudes that according to his/her conscience serve the public best interests. The mandate irrevocability is a mean to protect the freedom and independence of the deputy.

At the same time, as for the parliamentary immunity, the Constitutional Court established that the exigencies of law primacy impose on the parliamentary immunity not to be able to function unless through reporting to legitimacy of related goals and namely, to maintain the integrity of the Parliament and protection of opposition. Taking into account its rationale to be a useless extension and without critical spirit of the parliamentary immunity to matters that have nothing to do with the respective public function only affects the public trust in the parliamentary democracy system.

Hence, in its case-law, the Court noted that in the case of conviction for crimes committed with intention and/or sentencing to prison (freedom deprivation) by definitive and irrevocable court decision, irrespective of the fact if it took place before or after mandate validation, the Member of Parliament is in an ineligibility situation being incompatible with the position of a Member of the Parliament, his/her mandate legally ceasing.²⁴

- ***Legal regime of incompatibility of the MP position***

The Court stated that the mandate of the parliamentarian needs an enhanced concentration of efforts, which makes this position incompatible with any other state or private position. The Court mentioned that the constitutional principle of separation of powers in the state, as well as ensuring independence in exercising the mandate of parliamentarian have imposed the need to regulate the incompatibilities as a legal instrument to protect the parliamentarian's mandate. The Court reminded that the institution of incompatibilities represents a guarantee of objectivity and credibility that has to characterise a public function in a democratic society in a rule of law.

The Court observed that the person who was elected in the position of MP and is in a situation of incompatibility until the expiry of the term stipulated by law for ceasing the situation of incompatibility will opt either for deputy mandate or the function that generates the incompatibility thus being obliged to leave one of these positions.

The Court noted that the incompatibility is one of the reasons that may lead to the termination of the MP mandate either by resignation of the parliamentarian or by law *and* if the incompatibility continues to exist at the expiry of the deadline stipulated in the law, in case of

²⁴Judgement of Constitutional Court No.2 of 20.01.2015 *on the interpretation of articles 1, 69 and 70 of the Constitution* (immunity and ceasing the mandate of deputy).

inaction of the MP in a situation of incompatibility, the MP is considered dismissed by law from the position of MP.²⁵

- ***Keeping the Prime-minister dismissed for corruption in the position***

The Constitutional Court had a very important role in diagnosing the aspect of democratic legitimacy in exercising executive power. In this sense, the Constitutional Court intervened by verifying the constitutionality of keeping the Prime-minister dismissed for corruption based on a motion of no confidence, a fact that influenced the rationale on the constitutionality of assigning a candidate for the position of the Prime minister.

In this case the Court mentioned, as a principle, that the rule of law is not a declarative fiction. The functioning of the rule of law should be done through practical actions. To observe the principle of constitutionality of the rule of law and by taking into account the general interest of the citizens, it is imperative to take necessary measures to ensure rapid application of suspension or dismissal of ministers and other dignitaries of high level whose integrity is reasonably questioned.

The Court considered that keeping a Prime-minister dismissed for reprehensible acts is a defiance of the principle of rule of law and of principles regarding the integrity, and endangers the stability of democratic institutions. In the opinion of the Court, it is inadmissible for a decision of the Parliament that expressed the vote of no confidence for the Government governed by its Prime-minister for corruption to be disregarded and ignored, at least, as long as not proven otherwise and suspicions are not dismissed. A Prime-minister who tolerated ministers suspected of corruption within the Government, who are under criminal investigation, show a defiance of the principles of rule of law and show a lack of integrity, becoming, hence, incompatible with the position held.

In a veritable democracy, the normality consists in immediate resignation of persons who lost public trust, without going through dismissal.

In conclusion, the Court considered that the Prime-minister of a Government dismissed by a motion of no confidence for corruption suspicions is incompatible with the position and is in definitive impossibility to continue to exercise the mandate.²⁶

- ***Mandate of a resigning Government***

As for the mandate of a resigning Government, the Constitutional Court of the Republic of Moldova established that according to constitutional provisions, the Government as exponent of executive power is the joint development of the legislator as supreme representative authority. Hence, with only the mandate granted by the Parliament, the Government may exercise the executive power duties which in the last instance are limited to the execution of laws adopted by the same Parliament.

²⁵ Judgement No.21 of 24.06.2015 on the interpretation of articles 69 para. (2), 70 para (1), 99 and 100 of the Constitution of the Republic of Moldova

²⁶ Judgement of Constitutional Court No.4 of 22.04.2013 *on the constitutionality of the President Decree No. 534-VII of 8 March 2013 on the dismissal of the Government, in the part related to keeping in position the Prime-minister-dismissed via censorship motion (for corruption allegations) as of 8 March 2013 up to the formation of the new Government and No. 584-VII of 10 April 2013 on appointing the candidate for the position of the Prime-minister.*

In this context, a resigning Government continues to administrate public affairs while waiting for the new Government, which has to be plenipotentiary. This means that the resigning Government exercises only a limited part of the power: it ‘manages/administrates’ and does not ‘govern’. The administration of public affairs refers to daily, current decisions of the Government which are necessary for uninterrupted functioning of public service. This activity is limited to the fact that while waiting for the finalization of negotiations on the new Government, a total lack of executive power is avoided, which is operative and vital for the needs of the society.

The Government that administrates public affairs cannot assume important political initiatives *a fortiori* with regard to some matters that caused difficulties before its resignation or that had determined in the end this resignation. The decisions that would further employ the political line of the future government are especially excluded.

Granting excessive duties to the resigning Government is an obvious danger for the democracy.²⁷

- ***Interaction of legislature with the judicial power***

The Court states in its case-law that although the Constitution stipulates cooperation between the three powers, it does not imply the subordination of the judiciary to the legislature or assigning competences to deliver justice by the later. Or, the presence of legislative power in the legal spectrum is necessarily manifested by laws that stipulates the organisation and functioning of legal system, on one hand, and the adoption of legislative acts that have to be applied to restore and maintain the rule of law, on the other hand.²⁸

11. Do the decisions of your Court have binding force on other courts? Do other / ordinary courts follow / respect the case-law of your Court in all cases? Are there conflicts between your Court and other (supreme) courts?

The decisions delivered by the instance of constitutional jurisdiction, by which it has ensured the supremacy of the Constitution are final, incontestable for anyone and binding.

The judgment of the Constitutional Court is a generally binding legal finding, based on the elucidation of the essence of the constitutional problem, following an official interpretation of the relevant rules of the Constitution and after an explanation of the essence of their content, as referred to the challenged norms.

Given this effect of the Constitutional Court judgments and actions taken in order to make the constitutional justice more efficient, it is obvious that by highlighting the content of constitutional norms and development of rules derived from their interpretation, the acts of the Constitutional Court are guiding the evolution of the whole legal system, as well as the interpretation and enforcement of the law. It is solely this position that really ensures the realization of the principle of supremacy of the Constitution.

The judgments and official acts of the Constitutional Court are binding on all subjects of legal relations. Judgments, by which a constitutional provision is interpreted, have the power of a law and

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²⁸ Judgement No.20 of 04.06.2014 on constitutionality review of some provisions of the Parliament Regulation adopted by Law No. 797-XIII of 2 April 1996

are binding, by considerations underpinning it, for all constitutional bodies of the Republic of Moldova. This is applied directly, without any other condition of the form.

The acts delivered by the instance of constitutional jurisdiction are effective within the limits provided by the Constitution and by the law, as related to the competence of the Court, and their legal force cannot be challenged by anyone.

Concerning the public authorities involved in the procedures under analysis, in addition to their obligation to respect the legal norms applicable to these proceedings and the case-law of the Constitutional Court in this regard, they have the obligation to act with a due respect for the principle of constitutional loyalty, which brings into discussion, among others, the relationship between the form and the substance in applying the Constitution.

Respect of the principle of separation of powers involves not only the fact that none of the branches of power can intervene in the powers of other branches, but also that none of these branches will neglect the tasks that are required to be performed in a specific area - particularly when such requirement is stated in the Supreme Law or imposed by a ruling of the Constitutional Court, which, under article 134 of the Constitution, ensures the principle of separation of state powers.

Therefore, respecting the Constitutional Court judgments is a necessary and essential condition for the good functioning of the public authorities of the state and for the assertion of the rule of law. A decision on unconstitutionality is part of the normative legal order, given this effect the unconstitutional provision ceases to exist for the future.

The judgments of the Constitutional Court are equally binding on the ordinary courts in the process of carrying out justice. Moreover, these acts constitute basis for a judicial review of a final and irrevocable court judgment.

It has been accepted that a final and binding judgment enjoys the principle of *res judicata* and thus a dispute that has been settled cannot as a principle be an object of a new trial on the same merits and between the same parties. Moreover, the Constitutional Court of the Republic of Moldova stressed the need to find a certain "median hypothesis" that would bring together both requirements: the principle of *res judicata* on the one hand and the need to deliver a legal and grounded court judgment, on the other hand. Any derogation from the principle of *res judicata* is justified only when it is necessary due to substantial and compelling circumstances. The national legislation thus identifies a certain median hypothesis that would ensure the right to a fair trial and the principle of legal certainty. In this regard, our civil procedure and criminal procedure laws provided for the opportunity to review a judgment if the court "applied a law that was declared by the Constitutional Court as unconstitutional".

Establishing rules on procedural means, which allow the retraction of a final and conclusive judgment rendered by a court in violation of constitutional principles, should not infringe the right to a fair trial and the principle of legal certainty. A judgment, although final and irrevocable, cannot be considered legal, as long as it is based on a normative act contrary to the Fundamental Law.

The principle of legal certainty cannot entail any advancement of the rights and freedoms using unconstitutional norms. The possibility to review a judgment, rendered in violation of the Constitution, is the only way to counter the effects of a law that is contrary to the constitutional principles guaranteeing fundamental rights and freedoms.

Finally, the right to a fair trial implies *eo ipso* the presumption of conformity of the normative acts, interpreted and applied by the court in the process of carrying out justice, with constitutional norms and international law.

Non-retroactivity of the decisions of the instance of constitutional jurisdiction cannot prevail in situations when the court judgments are delivered based on legal the provisions, which are contrary to fundamental rights and freedoms and, consequently, are declared unconstitutional.

12. Has your Court developed/contributed to standards for law-making and for the application of law? (e.g. by developing concepts like to independence, impartiality, acting in accordance with the law, *non bis in idem*, *nulla poena sine lege*, etc.).

Despite the fact that the Constitution of the Republic of Moldova regulates the issues related to legislation and legislative process in a number of articles, however all the norms related to the quality and clarity of laws are further detailed in the subsequent legislation. An important source of law in this respect is the jurisprudence of the Constitutional Court.

In particular, in the process of constitutional review of normative acts under the aspect of their *accessibility and clarity* the Court relies on the provision to art. 23 (2) of the Constitution under which the state shall make accessible all the laws and normative acts adopted by the relevant authorities. In this respect the Court noted that despite the fact that Art. 23 refers explicitly only to the criteria of accessibility and clarity of the laws, following the jurisprudence of the European Court of Human Rights, it is necessary that the legal regulations adopted by public authorities are sufficiently precise, foreseeable and to comply with the principle of specific regulation. The Court noted that the requirements set forth by the provisions of art. 23 (2) of the Constitution, as well as the obligation of the state to secure each person's right to know his/her rights and to make accessible the normative acts include also the principles developed by the European Court and the ECHR case-law to ensure precision, foreseeability of the law and the principle of specificity.²⁹

According to Article 3 para.(2) of the Law no. 780-XV of 27 December 2001 on the legislative acts, the law shall comply with the conditions of legality, accessibility, certainty foreseeability, predictability [...]. These requirements represent the criteria which the legislator has imposed and which are mandatory for the adoption of any normative act, that shall be respected in order to ensure systematization, unification and coordination of the legislation, as well as the contents and the legal form that shall be appropriate for each normative act. In this way the proper respect of these requirements contributes to the creation of a legislation that complies with the principle of certainty of legal relations, being sufficiently clear and foreseeable.³⁰

The Court indicated that any law shall regulate in a unitary manner, it shall ensure the legal and logical link between its provisions, and in case of certain legal institutions with a more complex structure the law shall provide the elements that distinguish the peculiarities thereof.³¹ The Court also stated that the laws which are meant to organise the social life and to provide basis for

²⁹ Judgment of the Constitutional Court no. 12 of 04.06.2013 *on the control of constitutionality of certain provisions referring to the prohibition of communist symbols and promotion of totalitarian ideologies*

³⁰ Judgment of the Constitutional Court no. 19 of 18.12.2012 *on the control of constitutionality of certain provisions of article 18 of the Law no. 113 of 17 June 2010 on bailiffs*

³¹ Judgment of the Constitutional Court no. 13 of 15.05.2015 *on the control of constitutionality of the Law no. 261 of 01.11.2013 on the Order of medical Practitioners of the Republic of Moldova*

harmonious relations in the society should contain general unanimously recognised legal principles and to comply with these principles, so that the applicable legal system and the protected legal interests can function in an adequate manner and to correspond to the objective realities of the society.³²

As an example of particular interpretation of constitutional provisions related to the law-making process may serve the appreciation of the Constitutional Court related to the institution of *assumption of responsibility* by the Government. According to art. 106¹ of the Constitution, the Government may assume responsibility before the Parliament upon a programme, a statement of general policy or a draft law. The Government shall be dismissed if a motion of non-confidence, brought before within 3 days following the date of presentation of the programme, of statement of general policy or of the draft law, has been passed under Article 106. If the Government has not been dismissed pursuant to the aforementioned provisions, the lodged draft law is considered to be adopted, and the programme or the statement of general policy becomes mandatory for the Government.

The Parliament is the sole legislative authority, even when the Government assumes the responsibility. The provisions of Article 106¹ of the Constitution regulates expressly an exception from the rule instituted through constitutional provisions. The Court held that assuming the responsibility by the Government with regard to a draft law represents an indirect legislative way to adopt a law. The procedure of assuming responsibility by the Government is *in extremis*; when it refers to a draft law, the object of regulation should consist of clearly stipulated provisions only in one field. This procedure is determined by the urgency of adoption of measures contained in the law on which the Government had assumed the responsibility, by the need for the regulation concerned to be adopted with maximum celerity, by the importance of the regulated area and by immediate enforcement of the law concerned. At the same time, the procedure of assuming the responsibility by the Government before the Parliament does not exclude and cannot be used to exclude the Parliament's control by initiating a motion of no confidence. In this regard, the Court noted that a political debate on Government's dismissal by expressing no confidence could take place under the provisions of article 106 of the Constitution only in the plenary session of the Parliament.³³

Referring to the practical application of the legal principles the Court has elaborated comprehensive doctrine on various issues in the process of constitutional control of normative acts submitted for consideration.

13. Do you have case-law relating to respect for the rule of law by private actors exercising public functions?

Having acknowledged that quality and clarity of the law is one of the elements of the principle of the rule of law, the Constitutional Court of the Republic of Moldova has invoked these bases on

³² Judgment of the Constitutional Court no. 7 of 17.02.1998 *on the control of constitutionality of certain articles of the Law no. 39-XIII of 7 April 1994 on the status of the Member of Parliament as amended by the Law no. 1215-XIII of 25 June 1997 amending the Law on the status of the Member of Parliament*

³³ Judgement of the Constitutional Court No. 11 of 13.05.2015 *on constitutional review of some Government Decisions on assuming the responsibility for some draft laws and laws adopted based on the procedure of responsibility assumption*, Judgement of the Constitutional Court No. 28 of 22.12.2011 *on constitutional review of the Law no. 184 of 27 August 2011 amending and suppling certain legislative acts*

several occasions while examining the constitutionality of the challenged acts.

While examining the activity of private persons carrying out public functions (lawyers, notaries, bailiffs, etc.) in the process of control of constitutionality, the Court sought to examine, in particular, the compliance of the challenged provisions regulating the activity of these persons with the rule of law principle. The most substantial arguments in this respect the Court had invoked in its Judgment No.19 of 18 December 2012 on the control of constitutionality of some provisions of Article 18 of the Law No.113 of 17 June 2010 on bailiffs, referral No.34a/2012 referring to the right of the Minister of Justice to suspend the license of bailiffs until the application of disciplinary sanctions.

In this Judgment the Court held that given the provisions of the Law on bailiffs, suspension of bailiff's activity for "serious violation of law" before the application of disciplinary sanction does not allow accurate determination of situations where suspension of bailiff activity may occur. The Court emphasized that the legislative failed to specify the violations that shall be considered "serious" in legal terms. Similarly, the Court noted that in from the wording of the challenged provisions it is unclear whether the minister of justice orders the suspension of the license for serious violation of law and only afterwards shall notify the Disciplinary Board or the suspension is ordered after the initiation of disciplinary proceedings by the Disciplinary Board.

The Court considered that the challenged provisions breach the requirement of foreseeability of a normative act and found that, in terms of accessibility, clarity and predictability of the law, these provisions may generate situations of uncertainty, and this fact contradicts Article 23 para. (2) of the Constitution (Right of every person to know his/her rights). The Court held that suspending the bailiff license for serious violations of law, which has as immediate effect stopping the bailiff's activity, is disproportionately severe compared to the aim pursued, due to the fact that it is applied by the Minister of Justice in the absence of a comprehensive review of the professional body authorized under the law to exercise the relevant power and thus makes possible any eventual arbitrary actions by the minister of justice who is a political factor responsible for promoting policies.

The Court held that, given the uncertainty and imprecision of the phrase "serious violation of law", despite the margin of appreciation enjoyed by the state in the regulation of the bailiff activity, since the examination of disciplinary violations committed by the bailiff is subject to the competence of a Disciplinary Board exercising under law the relevant power, and the enforcement acts issued by the bailiff may be appealed in court, the suspension of bailiff activity by the minister of justice for serious violation of law without prior examination of the violation based on public work done by he/she and to whom the state delegated it, does not ensure a fair balance between the aim pursued and the individual burden, the way the provision is exposed makes possible an abusive application, which is not necessary in a democratic society.

14. Are public officials accountable for their actions, both in law and in practice? Are there problems with the scope of immunity for some officials, e.g. by preventing an effective fight against corruption? Do you have case-law related to the accountability of public officials for their actions?

According to the Constitution of the Republic of Moldova and the subsequent legislation, the

principle of accountability and integrity is at the core of any public position and therefore is inherent to any public official. In this respect the Constitutional Court of the Republic of Moldova in its case law³⁴ elaborated the doctrine on the integrity standards of persons holding leading positions in the state.

Thus the Court stated, as a principle, that any political mandate has to be based on high standards of integrity. Additionally, in case that it is found that this condition is not fulfilled, ignoring these findings and the appointing in/ holding leading positions of individuals having cast doubt on their integrity implies a disrespect for the rule of law state.

The Court held that, in a genuine democracy, normality resides in the immediate resignation of the individuals that have lost their public trust, with no need of being dismissed. Such situations, in which people are being removed from exercising governmental act for reasons of corruption, subsequently being again appointed in top positions of the state (at short periods of time, without there being proved the groundlessness of the accusations that determined the dismissal) are not only reprehensible, but even inadmissible.

In this context, the Court has decided that it is contrary to the principles of the rule of law the appointment as high ranking officials individuals on which there is cast doubt regarding their integrity or who have been dismissed for reasons of corruption. As a matter of principle, the rule of law is not a fiction, with only a declarative nature. The functioning of the rule of law has to be shown in practical actions. In order for the constitutional principle of the rule of law to be respected and taking in consideration the common interest of the citizens, it is imperative to take the necessary measures for assuring the quick application of the suspension or dismissal of the ministers and other high ranking officials that are subject to reasonable doubts in matters of integrity.

The Court also underlined that according to the fundamental value of the rule of law, persons holding public offices must prove that they correspond to high standards of integrity. The values enshrined in the Constitution of the Republic of Moldova in Article 1 para. (3) providing that Republic of Moldova is a democratic State in which the dignity of people, their rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values that shall be guaranteed, implicitly provide for the responsibility of those holding public offices who exercise their functions in order to achieve the public interest.³⁵

IV. The law and the individual

15. Is there individual access to your Court (direct / indirect) against general acts / individual acts? Please briefly explain the modalities / procedures.

The Constitution of the Republic of Moldova does not provide direct individual access to the

³⁴ Judgement of Constitutional Court No.4 of 22.04.2013 *on the constitutionality of the President Decree No. 534-VII of 8 March 2013 on the dismissal of the Government, in the part related to keeping in position the Prime-minister-dismissed via censorship motion (for corruption allegations) as of 8 March 2013 up to the formation of the new Government and No. 584-VII of 10 April 2013 on appointing the candidate for the position of the Prime-minister.*

³⁵ Judgment of the Constitutional Court No.7 of 16.04.2015 *on constitutional review of certain provisions of the Law no. 325 of 23 December 2013 on professional integrity testing*

Constitutional Court. According to art.25 the Law on the Constitutional Court,³⁶ only a definite number of subjects are entitled to submit complaints (*inter alia* Members of Parliament, Minister of Justice, the Ombudsman, the Supreme Court of Justice, local public authorities, etc.) on the control of constitutionality of normative acts, the interpretation of the constitutional provisions, confirmation of the results of elections and referenda, etc.

Concurrently, the Constitution and the law provides for the competence of the Constitutional Court to resolve the exceptions of unconstitutionality of normative acts, upon referral by the Supreme Court of Justice. Given the very nature of this competence, that resides in controlling the conformity of the provisions of a legal act raised by the judge or the parties to trial in a court of law. The original proceedings of examining the exceptions of constitutionality provided that only the Supreme Court of Justice was entitled to submit this type of complaints. However, over the years it has been stated that this instrument was not applied to its full extent, partly due to the fact that only one court was entitled to use it.

As a consequence, the Constitutional Court interpreted³⁷ the provisions of the Constitution in the meaning that the courts of all level are provided the access to the Constitutional Court in order to perform the control of constitutionality of a norm applicable to a concrete case that is under trial in a court of justice of any level. This competence of the Court may be appreciated as the concrete control of constitutionality as well as an **indirect access of citizens** to the instance of constitutional jurisdiction.

The Court ruled that while the right to raise the exception of unconstitutionality belongs to all judges of all levels courts of law, and given the formal role of the Supreme Court and its lack of jurisdiction to rule on exceptions of unconstitutionality raised by courts hierarchically inferior, the constitutional provisions cannot be interpreted as restricting the right of other trial courts to apply before the court of constitutional jurisdiction.

The Court also held that in case there is an uncertainty regarding the constitutionality of laws, decisions of the Parliament, Presidential decrees, decisions and orders of the Government, to be applied in any pending proceedings, the court of law is compelled to notify the Constitutional Court. The complaint on the constitutionality review of certain provisions to be applied in proceedings shall be submitted directly to the Constitutional Court by the judges/panels of judges of the Supreme Court, courts of appeal and ordinary courts, before which the case is pending.

16. Has your Court developed case-law concerning access to ordinary/lower courts (e.g. preconditions, including, costs, representation by a lawyer, time limits)?

The relationship between the Constitutional Court and the ordinary courts is characterized firstly by the nature of the legal system of the Republic of Moldova, which at a greater extent is similar to those existing in a large number of states using the continental legal system, where the instance of constitutional review has a special place among other state authorities, being placed outside the judiciary.

³⁶ http://constcourt.md/public/files/file/Actele%20Curtii/acte_en/Law_on_CC_EN.pdf

³⁷ Judgment of the Constitutional Court no. 2 of 09.02.2016 *on the interpretation of Article 135.1.g of the Constitution*

In a particularly big number of its judgments³⁸, the Constitutional Court of the Republic of Moldova recognized as unconstitutional certain provisions that negatively influenced the judiciary, namely the *independence of judges*. Proper functioning of judicial authorities is one of the most important factors within the mechanism for the protection of human rights and fundamental freedoms. Effective and comprehensive judicial protection may be ensured only under the conditions of real independence of the judiciary – namely of the judge as an exponent of the judicial power.

The principle of independence of the judiciary is the main pillar supporting the judiciary as a plenipotentiary power in the architecture of the state power. The principle of separation and collaboration of state powers entails the necessity to take adequate measures, with a view to ensure the balance thereof. Given these reasons, the principle of independence of judges represents not only constitutional base, but rather a measure to control the respect of the rights and capacities of the judicial power, within the actions taken to maintain the balance of state powers.

The Constitutional Court of the Republic of Moldova, through its jurisprudence, has outlined that the independence of the judiciary is a mandatory condition for the existence of the rule of law and a fundamental guarantee of a fair trial.

Concurrently, relating to the issue of accessibility of ordinary courts the Court assessed the matter related to the representation within the courts. In particular, the Court ruled that *the legal provisions requiring that only lawyers may represent the persons in the courts are constitutional*. The Court noted that legal representation contributes significantly to achieving the fundamental right of defense, stated in the Constitution. A person's right to seek justice in court is a prerequisite *sine qua non* in ensuring the effective exercise of his/her rights and freedoms and the right to defense is a fundamental, guaranteed right, which may be exercised by any person in an independent and free manner.

An important role in protecting human rights and freedoms is played by the lawyer. As the exponent of a profession governed by ethical and professional conduct standards, the lawyer can provide quality legal services. In guaranteeing everyone's right to defense and to qualified legal assistance, the state promotes policies to ensure this guarantee, by establishing levers by which the qualified legal assistance in courts is provided by lawyers. The Constitution (Art. 26 para. (3)) provides that any time during the trial the parties are entitled to access to lawyers, meaning a person qualified as a lawyer under the conditions stipulated by the law. This provision is a strong warranty, which prevents the provision of legal assistance activities by unqualified persons, who are not subject to professional control. The provisions which exclude the right of other legal professionals to provide services for representation in court do not restrict the citizen's right, conferred by Article 26 para. (2) of the Constitution, to respond independently through legitimate means to the violation of rights and freedoms and to choose the manner and means of representation, established by law.

³⁸ Judgment of the Constitutional Court no. 22 of 05.09.2013 *on the control of constitutionality of some provisions on judge's immunity*

Judgment of the Constitutional Court no. 26 of 11.11.2014 *on the control of constitutionality of certain provisions on the immunity of the judge*

Judgment of the Constitutional Court no. 25 of 06.11.2014 *on the control of constitutionality of certain provisions of Law no.146 of 17 July 2014 on the amendment and competition of certain legislative acts (remuneration of public servants within courts and of judges)*

Although in reality, the non-lawyers representing the individuals and businesses perform lawyer specific tasks in civil cases, their activity is not subject to ethical and professional requirements, a fact which undermines the state's positive obligation to provide qualified legal assistance in court proceedings.

Referring to the issue of application by the ordinary courts of the judgments delivered by the Constitutional Court in the process of carrying out justice it may be mentioned that the decisions delivered by the instance of constitutional jurisdiction, by which it has ensured the supremacy of the Constitution are final, incontestable and binding for anyone and have the effects *ex nunc*.

Given this effect of the Constitutional Court judgments and actions taken in order to make the constitutional justice more efficient, it is obvious that by highlighting the content of constitutional norms and development of rules derived from their interpretation, the acts of the Constitutional Court are guiding the evolution of the whole legal system, as well as the interpretation and enforcement of the law. It is solely this position that really ensures the realization of the principle of supremacy of the Constitution.

17. Has your Court developed case-law on other individual rights related to the rule of law?

The Constitution of the Republic of Moldova equally protects both collective and individual rights of its citizens as well as of the people residing on the territory of the state. While performing its competence as instance of constitutional review, the Constitutional Court has examined, under certain aspects, the extent in which the principle of the rule of law is applied while determining the degree of infringement by state authorities of fundamental individual rights.

Thus, for instance, while examining the issue of *professional integrity testing* of civil servants (including state officers and judges)³⁹, the Court reiterated the arguments expressed by the European Court for Human Rights and mentioned that the measures and systems meant to conduct any surveillance over individuals must contain certain safeguards established by law and applicable when the activity of the bodies authorized to survey is reviewed. The procedures for the review must observe as much as possible the values of democratic society, especially the rule of law, which is expressly referred to in Preamble to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The rule of law implies that any interference by the executive authorities with an individual's rights should be subject to an effective control which should be effectively ensured by the judiciary, which offers the best guarantees of independence, impartiality and proper procedure.

Another case when the Court was called to review the degree of *protection of the individual right under the principle of non bis in idem*⁴⁰ related to the control of constitutionality of the legal provisions allowing prosecution bodies to resume criminal prosecution against a person whenever new or recently discovered facts or a fundamental fault committed in the previous proceeding affected the delivered judgment. As a principle, the Court stressed out that once the criminal

³⁹ Judgment of the Constitutional Court No.7 of 16.04.2015 on constitutional review of certain provisions of the Law no. 325 of 23 December 2013 on professional integrity testing

⁴⁰ Judgement of the Constitutional Court No.12 of 14 May 2015 on exception of constitutionality of Art. 287 para.(1) of the Code of Criminal Procedure (resumption of the criminal prosecution)

prosecution is terminated, no further actions are taken or the criminal case is ceased, the person should have the certainty and belief that he/she will not be suspected and criminally prosecuted again. The Court reiterated the arguments of the European Court for human Rights and mentioned that the weaknesses of the authorities cannot be imputable to the defendants and should not put them in a disadvantageous situation. The Court held that the omissions or errors of the authorities must serve to the benefit of the suspect, culprit, and the accused person. In other words, the risk of any errors committed by the prosecution body or even by a court should be borne by the State and the correction thereof should not be the responsibility of the person.

The individual right to *family life of military personnel* was disputed before the Court under the aspect of granting the parental leave to military males. The challenged law directly provided that military men were not legally entitled to a child care leave aged under three years, as compared to military men, given their status as military people in charge of national security. Following the reasoning of the ECtHR the Court noted that there must be a reasonable relationship of proportionality between the restrictions imposed and the lawful aim to protect national security. These restrictions are acceptable provided there is a real threat to the operational effectiveness of the armed forces and allegations of the existence of this risk must be “supported by examples”. The Court recognized that, given the importance of the army to protect national security, restrictions on the right to child care leave could be justified, provided they are not discriminatory. The Court may achieve the lawful aim of protection of the national security otherwise than by limiting the right to child care leave for military men and the deprivation of military men of the same rights. Excluding military men from exercising the right to child care leave, this provision imposes a restriction, which applies automatically to all military men, regardless of their position in the army, the availability of substitute or their personal situation.

18. Is the rule of law used as a general concept in the absence of specific fundamental rights or guarantees in the text of the Constitution in your country?

The text of the Constitution of the Republic of Moldova is quite comprehensive and explicitly provides the norms regulating the rights and fundamental freedoms of the persons, obligations of the state, public authorities and the judiciary, etc. Therefore the Constitutional Court greatly relies on these provisions while examining an alleged unconstitutionality of a particular legal provision. However, the Court experienced cases when in the process of adjudication it relied on the application of general principles, *inter alia* the principle of legality, rule of law, proportionality due to the lack of substantive constitutional provisions.

Thus the Court delivered judgements in some situations regarding the revocation of persons from public dignity positions, although their institution is not enshrined in the Constitution. An example is the situation when the Director General of the Board of Directors of National Energy Regulatory Agency was dismissed, or when the People’s Advocate for the Rights of the child was appointed. The Court examined the respective Decisions of the Parliament in the light of art. 1 of the Constitution that guarantees the rule of law, implicitly in the light of guaranteed principle of legality.

Starting from the fact that the Constitution vests the Parliament with the function to choose and appoint state officials, in the cases stipulated by the law, the Parliament has the obligation to act by

observing the principle of constitutional loyalty, a principle that discusses among other the relation between the form and the merits in the application of the Constitution.

In this sense, the Court mentioned that the express provision in a special law of conditions to dismiss the officials results from the reason to ensure the independency of respective persons towards the public authority having decided on the selection or appointment thereof. Hence, even if the state has a legitimate interest in requesting a special trust and loyalty from these persons, this does not justify the omission of public authorities to observe the legal dismissal procedure. Moreover, the Court stated that appointing or maintaining in the management position of persons whose integrity is questioned represents a defiance of the rule of law, as the principle of the rule of law has a constitutional value and this value should be fully observed.⁴¹

⁴¹ Judgement of Constitutional Court No.4 of 22.04.2013 *on the constitutionality of the President Decree No. 534-VII of 8 March 2013 on the dismissal of the Government, in the part related to keeping in position the Prime-minister-dismissed via censorship motion (for corruption allegations) as of 8 March 2013 up to the formation of the new Government and No. 584-VII of 10 April 2013 on appointing the candidate for the position of the Prime-minister.*