

Nikolai Mihailovich Kiseev
The judge of the Constitutional court of Republic Moldova (retired)

The report

**The constitutional jurisdiction in Republic of Moldova:
lessons, problems and prospects**

From work experience of the judge of the mentioned court

On December 13, 1994 the first Law of Republic of Moldova №317-XIII « About the Constitutional court » was accepted by Parliament and on January 25, 1995 the President promulgated it.

Constitutional court of RM is founded by the Constitution of the Republic of Moldova adopted on July 29, 1994.

For the first time the independent body of the constitutional jurisdiction has appeared in the Republic of Moldova, which by the fact of its existence has given the civilised legal outlines to the state mechanism.

The constitutional justice as the form of the constitutional control – is a new institute in our statehood. In the country it does not have the historical past and, nevertheless, the idea of the constitutional justice has entered in the conciseness of justice of our society, without meeting a significant resistance. If there were disputes, they were concentrated on the possibility to build the constitutional jurisdiction. Whether it should be the American model when this function is carried out by general Judicial system, whether it should be the chamber of the constitutional control of the Supreme court, as in republic Estonia, whether the Constitutional court.

I am glad, that has won the model of independent Constitutional court and even gladder to that fact that today it has high enough prestige in public opinion. Today it is already serious and respectable institute of authority in Republic Moldova. You can trust it, you can consider with it, it is simply impossible to imagine the life of our state and a society without it.

At the same time I would like to pay attention on the fact that in the world state-legal practice of protection of the Constitution are used both the constitutional

supervision, and the constitutional control. Pursuing, finally, the uniform purposes of protection of constitutional building, of the rights and freedoms of a person and of a citizen, maintenance of leadership of the Constitution, the constitutional supervision and the constitutional control play different role in the statement of the constitutional legality. If the decision of bodies of the constitutional supervision promotes the sanction of the constitutional dispute, as a rule, only by the decision of parliament and these bodies are the bodies of parliament, in this case the decisions of bodies of the constitutional control have a final character. These bodies take an independent place in the system of the government and are independent of other state bodies in realisation of their powers.

In this context I would like to state and support the thesis that the constitutional control over Republic Moldova – is an independent sphere of state-imperious activity. It is carried out not only by the Constitutional court, but also other state bodies. According to article 77 of the Constitution the President of Republic Moldova - is the head of the state and at the same time is the guarantor of the sovereignty of national safety. In the text of the oath of the President it is spoken about the protection and observance of the Constitution as a duty of the head of the state (part 2, art. 79. Constitution RM).

Participation of the Parliament, of the Government of Republic Moldova, of the Supreme appellate court and other judicial instances, of the authorities of local public management in realisation of the constitutional control is doubtless.

However the leading position in system of institutes of the constitutional control over Republic of Moldova occupies the constitutional control. It means an official activity of specially authorised body on realisation of the powers by special procedures - the constitutional jurisdiction. In this sense the word-combination « body of the constitutional jurisdiction » is used in an art. 1 of the Law № 317-XIII from December, 13, 1994 « About the Constitutional court » for definition of the Constitutional court as unique body of the constitutional jurisdiction in Republic of Moldova and its submission only to Constitution.

Today it is possible to hear that Constitutional court of RM has been created when it had to be created and when the necessary conditions have ripened. According to my opinion (I am speaking about my personal position as of the judge of its first structure) so-named "child", in my opinion, was "prematurely born".

On February 21, 1995 6 judges of the Constitutional court have taken the oath to Parliament and the President of Republic Moldova and have entered a post. Except the Law on the Constitutional court there were no necessary conditions: no building (a place of its presence), neither the code of the constitutional jurisdiction, nor a seal and any other symbolic of authority. For the second day a session of the court have been called. I conducted it, as the eldest on age among all judges. A chairman has been selected and the chief accountant of court has been employed. The first steps of the

Constitutional court have been carried out with this stuff and in these conditions. In my opinion the difficult conditions in which the Constitutional court have found itself, promoted very fast the strengthening of this body and the comprehension of its crucial role in a high place and values in the system of the government and in hierarchy of the state bodies.

The constitutional court of Republic of Moldova already has made an extremely serious application for its independence and place in hierarchy of authority by virtue of the Constitution by its first decisions. In particular by its decision regarding to a well known Decree of the President of Republic Moldova Mircea Snegur about clearing of a post of Minister of Defence Mr Creanga

And in this context I can publicly give due to the first Chairman of Constitutional court RM - to Paul Andreevich Barbalat. I am proud for the honour to know him and to work under his supervision. I can testify that his professionalism and human qualities were in such a harmony, which allowed him to carry out the duty crucially both as to the head, and as to the citizen in the statement of leadership of the Constitution in our country.

Undoubtedly, Constitutional court plays the special role in becoming and strengthening of the constitutional justice. But I think that in its history everything that is valuable, that concerns to the constitutional justice, will be connected, by all means, with the first stuff of the Constitutional court, as well as with its first chairman Mr.P.A.Barbalat.

Some lessons and questions concerning the theory and practice of the constitutional justice

The history of the Constitutional court in Republic of Moldova, probably, is still too short (ten years) and is emotionally sated in order to draw deep conclusions and impartial estimations. However, looking at the results through the prism of time, it is impossible to forget all the difficulties, mistakes and the missed opportunities without which the passed way would not be full. According to this I can tell only from my point of view at these problems, my personal sight of the author of the report.

First of all, I want to mention the following problem.

The main contradiction which the Constitutional court has faced at the first stage of its activity, was the contradiction between a strategic rate which has been preferred by the society, and deep transformations which have captured both economic, social and legal spheres of a public and state life. And in these conditions it was especially hard for Constitutional court to work, it was necessary to overcome this situation, to overcome also the ambitions of supervising officials.

Perhaps, these circumstances aggravated by the acuteness and the importance of public expectations (add here the order of execution of formation of the first stuff of the Constitutional court) have predetermined the extreme distinctions of legal and

world outlooks of judges on a number of examined cases. The compromise that is quite justified and expedient in a policy, diplomacy or public life, as a way of the resolution of conflicts, is not allowable in the decision of the Constitutional court. Here is required the precise and certain estimation of the fact, an unequivocal interpretation of norms of the Law for all judges.

These sign positions are not eliminated from activity of the Constitutional court and nowadays. The most amazing and disturbing is that the Constitutional court nowadays quite often in literal sense perceives the formulations of examined acts containing completely not legal, and more likely propaganda lexicon. Sometimes it is eliminated from an estimation of a lot of « not convenient » positions and from research of actual circumstances rather essential to the legal analysis. As contrary to requirements of a cumulative estimation of statutory acts sometimes Constitutional Court dismembers them on separate positions, and it does not allow revealing their normative applicability.

Most frequently documents examined by the Constitutional court are the documents about checking of constitutionality of normative legal acts. As a result of such an examination can be the recognition of the statutory act or its separate positions as not the constitutional. In accordance with part (1) art. 28 of the Law on the Constitutional Court it attracts loss of validity for them, but in practice of the first stuff of court the recognition of the certain positions of the statutory act not constitutional not always meant direct literal exception of this position. A characteristic example in this respect is the Decision of the Constitutional court №36 from December, 10, 1998 about the control of constitutionality of the Decree of the President of Republic Moldova №146 from May, 10, 1995 « About assignment of city hall of municipality Chisinau ». In a motivation part of the decision the court has specified, that the Decree of the President №146 from May 10, 1995 « About assignment of city hall of municipality Chisinau » both under the name, and under the contents contradicts an item 2 part (1), art. 38, 109, 112 and 113 of the Constitution.

The constitution has not given the President the right to form bodies of local public management or to appoint mayors of the cities (municipalities) and villages (communes) and advisers of regional city municipal and rural (municipal) councils. Hence, the President, having appointed by his decrees the mayor of the municipality Chisinau, his assistants, the secretary and the members of city hall, has exceeded his powers established by the Constitution.

From the constitutional-legal point of view it is not convincing the reference in a preamble of the Decree of the President that it is issued according to art. 57 part (3) of the Law on local elections. Position of the law, according to which an executive body led by a mayor, in case that he has not been elected as a result of repeated voting, at the moment of the edition of the Decree had no validity. It contradicted to art.109 part (1) of the Constitution, providing main principles of local public

management. According to art. 7 of the Constitution any law or other legal act contradicting to positions of the Constitution have no validity.

Thus, the edition of the Decree of the President of Republic Moldova №146 from May 10, 1995 was obviously illegal, as the opportunity of its edition is not stipulated by the Constitution.

At the same time art. 2 of the Decree also do not correspond to the Constitution, establishing that before the expiry of the term stipulated by art. 7 of the Law on local public management, the city hall of municipality Chisinau carries out also powers of municipal council, as the establishment of a legal status of municipal council does not concern to powers of the President.

Use of concept « city hall of municipality » is not justified from constitutional-legal positions in the heading of the Decree « About assignment of city hall of municipality of Chisinau », as the Constitution does not provide presence of similar body in system of bodies of local public management.

Taking into consideration, that according to art. 122 of the Code about elections, Parliament have to adopt the decision about date of carrying out of the next general local elections, the Constitutional court considers possible the present decision not to be executed immediately.

Proceeding from this, the Constitutional Court in item 1 of resolute part of the decision has recognised unconstitutional the Decree of the President of Republic Moldova №146 from May 10, 1995 « About assignment of city hall of the municipality of Chisinau ». In item 2 it has been established, that the present decision is final, can't be appealed, has no return force, acts only in the future, and enters in force after five months from the moment of declaration.

Certainly, such legal position of the Constitutional court is difficult to attribute to the norms of the Constitutional law. In fact it means the creation of new norm that is inadmissible. The decision of the Constitutional court about checking of constitutionality of normative legal acts has a concrete character, with other words it cancels the concrete statutory act, instead of establish limits of action of the cancelled concrete statutory act.

Further. I want to pay your attention to some legal aspects of activity of the Constitutional court which, in my opinion, it is necessary to improve even by making amendments into a law in force about the Constitutional court or to adopt the new law on the Constitutional court. I consider that it is necessary to adopt the new law but to preserve maximum of reasonable statutes of the Law working nowadays. Why I do I think that it is necessary to preserve these statutes? I shall explain it beginning from the circumstances of the international plan.

You know, how many preliminary conditions repeatedly have been put in connection with the introduction of Republic Moldova into the Council of Europe.

But thus the Constitutional court did not appear anywhere. Its organisation and activity have not caused any doubts in the numerous commissions and this means the recognition of the fact that the Constitutional court corresponds to the European model of the constitutional justice. Fast, unconditional and unanimous acceptance of our Court in Conference of the European constitutional courts also testifies to this. I have presented our Court in Brussels and can witness it.

At the same time you also know, that both these international organisations demand very high standards as criterion of membership. Our model of the constitutional justice was highly appreciated. That is why I believe that everything, that is positive in the acting law about the Constitutional court, it is necessary to keep. But the life, practice of realisation of the present law testify about the necessity of introducing of some essential changes in the structure and organisation of activity of the Constitutional court in order to increase its efficiency.

In fact the law working nowadays does not give even definition of the Constitutional court. It seems that in the new law it is necessary to determine more precisely the basic characteristics of the Constitutional court: its functional applicability – realisation of the constitutional control, the status – body of the constitutional jurisdiction, basic principles of activity - independent realisation of state-imperious activity and submission only to Constitution, the remedial form - the constitutional legal proceedings. In this way I imagine in the new law the formulation of concept of the legal nature of the Constitutional court. In the project of the new law prepared by the first staff of Court, we have tried also to formulate that the Constitutional court –is the supreme body. And there was a dispute – does the supreme mean that it is a body on protection of the Constitution or it doesn't. Opponents of this definition firmly assured, that definition "supreme" could be used only regarding to that body under which there are some other bodies. And as far as bodies of the judicial constitutional control do not form any hierarchy, this concept "supreme" is inapplicable to the Constitutional court.

I couldn't and cannot agree with this position. I am deeply convinced that it is supreme by virtue of its place of hierarchy of authority according to the Constitution. It is supreme by virtue of its competence. It is supreme even by virtue of that this body, being a court, at the same time is one of the supreme constitutional bodies of the government. It exists and operates alongside with the head of the state, parliament, and the government. But in some respects it stands even above all these bodies, as the Constitutional court – is an unique body which according to the Constitution has the right to disqualify normative legal acts of the head of the state, of the parliament and of the government. In other words, the Constitutional court, being a court, at the same time is one of the supreme bodies of the government of Republic of Moldova.

The constitutional court can do a lot, but not everything.

I would like to state some theses on a thorny question - about some illusions which displays it is possible to meet both in public opinion, and in activity of the state bodies and officials. The question is in an opinion, that the Constitutional court, the constitutional justice can and should solve all arisen problems or even the majority of them. Moreover, in some cases we are forgetting a sacramental question – « where do cops look? », and there has appeared a new question: « where does the Constitutional Court look? ». Deification of such illusion became a new bill about the Constitutional court, submitted by the present structure of court (V.Pushkash's project). In particular, in this bill there are offers to give in powers of the Constitutional court the possibility to carry out the control over assignment of the state officials, over the maintenance of declarations given by them in tax inspection, etc.

I would like to warn - it is not necessary to think, that the Constitutional court, the constitutional justice can and should solve all arisen questions, problems or even the majority of them.

The constitutional court can do a lot, but not everything and main idea is that it shouldn't solve everything.

The constitutional court – is a child of time, the society in which takes place the qualitative transformations. Taking into account this argument about granting to the Constitutional court of powers on control of the maintenance of declarations given by the state officials in tax inspection hasn't any legal basis, and from the human point of view it horrifies with gloomy prospect and unpredictability.

It seems to me, that subjects - the state bodies – that have the right of address in the Constitutional court, and in public consciousness, it is necessary to develop the correct attitude to the possibilities and impossibilities of solving the different problems by the Constitutional court.

First of all, it should not substitute the legislator.

The constitutional court is called to solve disputable legal questions, but not the political conflicts that in the basis are outside the legal frameworks.

Policy and the constitutional justice.

The international experience has shown that this problem has got a special urgency in the new independent states, especial during an irreconcilable opposition of legislative and executive authority. It was especially brightly showed on an experience of the Constitutional court of the Russian Federation during the first period of its activity in 1992 – 1993. As it was marked in the scientific literature and mass media, the main lack has consisted in its gradual slipping from a position of the right in political sphere, its gradual transformation from body of the constitutional control into the instrument of a policy. Sharp political strike in the Russian society during this

period, a constant and expanding opposition of the President and Parliament of the Russian Federation, especially at the seventh Congress of People's Deputies of the Russian Federation, was reflected in process of politization of the Constitutional court. This step of the Constitutional court of the Russian Federation has brightly come to light in its hasty and independent reaction to the reference of the President of Russian Federation B.N.Eltin to people on TV on March 20, 1993. In a consequence, on October, 7, 1993 the President of the Russian Federation had been issued the Decree №1612 « About the Constitutional court of the Russian Federation » in which was ascertained the impossibility of activity of Court henceforth, till the acceptance of the new Constitution of the Russian Federation.

I remind our country, especially at the end of 1995 – first half of 1996 when deputy's addresses in the Constitutional court were accompanied by TV, banners, almost with orchestras. They were not interested in the content of these addresses as in the political sensation concerning a situation specified in them. Subsequently, that is typical, authors of the reference and their supporters did not recollect about the reference. These are not unique attempts to use the Constitutional court as arena of political strike. And as a matter of fact it was necessary constantly to the Constitutional court to face with a question: what it was – really an essential legal problem or a political situation on advantage though this situation also has a certain legal aspect? The constitutional court has expressed its attitude to this problem, having specified in one of the definitions that the court should refrain from disposal of legal proceeding in which aspects of political expediency, as a matter of fact, prevail.

Nevertheless, quite often differentiation happens to be enough complex. Certainly, the Constitutional court during consideration of a new affair cannot avoid the analysis of its political aspect for that objective reason, that the Constitution has its own political-legal contents. In fact the Constitution personifies the political, social, economic and other norms expressed in the form of legal establishments. As a matter of fact it is abundantly clear, that in the constitutional principles about the bases of the constitutional building of the country, about division of authorities, on the rights and freedoms of the person and the citizen the deep political content is incorporated.

Hence, the Constitutional court cannot be fenced off the problems of politics, as politics is incorporated in the Constitution. I want to remind that political function of bodies of the constitutional control in the western countries, in the western democracies can't be doubted. Other business, that decisions and the conclusions of body of the constitutional control should have especially legal substantiation, in other words, in its decision should be provided the leadership of the right, instead of political expediency. Here we can't have the ready recipes, but there is a conventional principle of political restraint which is perceived and repeatedly confirmed by the world practice of the constitutional justice.

The constitutional court is responsible of being outside of a policy, not to pass a side of the right. It depends on personal qualities of judges, their life experience, wisdom, conscience and even courage. This is my belief.

About constitutional – legal precedents.

This problem - about « precedent value » decisions of the Constitutional court – has got nowadays-actual practical meaning. Unfortunately, in our Law « About the Constitutional court » this question has not found the direct answer. There are disputable statements and in the literature.

I shall explain this problem on an example of the Decision №6 from February 18, 2003 under the reference of the deputies of Parliament Jury Roshka, Vlad Kubrjakov and Stefan Secareanu. The Constitutional Court has recognised constitutional positions of an art.10 part (1) and part (2), an art. 13 part (1) and part (3) of the Law №461-XV from July, 30, 2001 « About the market of mineral oil » in edition of the Law №930-XV from March, 22, 2002, item 3 the second part, item 4 sub items a), b) of the Decision of the Government №1027 from October, 1, 2001 « About some measures on performance of the Law « About the market of mineral oil » in edition of Decisions of the Government №1322 from November, 29, 2001 and №435 from April, 10, 2002.

During consideration of the given affair it has been established by Court, that separate positions of the Law on the market of mineral oil have not found reflection in the statutory acts providing powers and the budget of National agency on regulation in energetic power (further – NARE).

In its decision the Constitutional court has emphasised, that NARE – is a permanent body of public board with the status of the legal person, not submitting to other state or private bodies. It has been created by the Decision of the Government №767 from August, 11, 1997 according to the positions of the report of the Power charter on power efficiency and the adjacent ecological aspects, signed in Lisbon on December, 17, 1994 (has come into force for Republic of Moldova in June, 20, 1996), and positions of laws on the electric power and about gas. It has been created in order to increase the efficiency of functioning, maintenance and promotion of a competition in electric and heat power sectors and sector of natural gas.

In art. 6 of Law №136-XIV « About gas » and №137-XIV « About the electric power », accepted on September 17, 1998, are listed basic functions of NARE in the areas adjustable by the given laws. They have been stated and in Regulations about NARE, authorised by the Decision of the Government №574 from June 21, 1999, accepted in the performance of positions of the above-stated laws.

Powers of NARE are fixed in articles 6 – 8 of the Law №461-XV from July 30, 2001 « About the market of mineral oil ». It carries out a uniform state policy on the

market of mineral oil by licensing, regulating and controlling of the activity of the participants of this market.

However the given powers have not found the reflection in regulations about NARE in spite of the fact that according to the article 27 of the Law « About the market of mineral oil » the Government has been obliged in three-monthly term to bring statutory acts into accord with the present law.

At the same time have not been brought the changes in item 22 of Regulations about NARE providing it budget, though the article 10 of the Law « About the market of mineral oil » establishes, that expenses for the activity which is carried out by agency in the market of mineral oil, are covered due to a raised adjustable payment. It is established at a sufficient level on the basis of the licenses of calculations of volumes of imported basic kinds of mineral oil submitted by owners and the liquefied gas.

Necessity of modification for item 22 of regulations about NARE is caused also by the fact that the Law №461-XV « About the market of mineral oil » does not provide the order of definition of the size and structure of adjustable payments.

That fact, that the given statutory acts have not been harmonised with the Law « About the market of mineral oil », complicates their application.

In the decision of the Constitutional court the stated circumstances were ascertained, however the representatives of the Government participating in consideration of these affairs, and in a consequence the Government have pretend, that they have not noticed it. Today there is a problem - whether the given decision of the Constitutional court, which has included in its motivation part the presence of blanks in the legislation, is necessarily for the Government?

In my opinion, it is necessary and in this part. Let us consider the resulted example more widely. The problem of world meaning of the decisions of the Constitutional court, a problem of precedents, in my opinion, has a basic value for us, especially in connection with process of formation of uniform constitutional space in the country, not speaking already about its sense.

It is used to say that our right does not know a principle of precedent. I am convinced that among participants sitting today there are lot of lawyers who speak to the death and are ready to assert cleanliness whether Roman-German, whether continental legal system which does not know precedents.

Let's leave in aside questions, who is right and who is wrong. In this case the question is not about the precedent in its true sense of word as duties of subordinate court to follow decisions of the higher by consideration of similar affairs, but about obligatory force of decisions of the Constitutional court.

Certainly, it would be good to have on this account a precise norm in the law on the Constitutional court that is extremely necessary, as the named problem is closely connected to revision of the general jurisdiction of the decisions in courts which are based on the unconstitutional norm recognised by the Constitutional court.

The constitutional court by itself has not the right to cancel the decision on concrete affairs in which the law is applied but recognised by it as unconstitutional. That is why in the Law « About the Constitutional court » the special form should be formulated – the instruction that the decisions based on norms, recognised unconstitutional, are subject to revision in the cases established by laws.

The question becomes not simple for constitutional practice of applicability of law because in the remedial legislation (article 449 Civil Procedural Code, article 453 Criminal Procedural Code of RM) it is fixed, that decisions of the Constitutional court on illegality of norm form the basis for revision of an affair. In the law « About the Constitutional court » such direct indication is absent, is not established also the order of execution of the decision of the Constitutional court in these cases.

Criteria of constitutionality of legal acts.

The level of the constitutional legality in the country, according to the report of the Constitutional court on realisation of the constitutional jurisdiction in 2003, continues to cause serious concern. For the last year 40 references have been given to court about the control of constitutionality: 17 laws, 3 decisions of Parliament, 13 decisions of the Government and 2 references of interpretation of the Constitution. Positions of 4 rules of law have been recognised as not corresponding to the Constitution. 6 definitions about phase-out are born. 16 references were not accepted to consideration.

One of principal causes of refusal in acceptance of references to consideration – is a non-observance of technical-legal rules of the drawing up stipulated by article 39 of the Code of the constitutional jurisdiction. According to this code the reference should contain an object and circumstances on which the applicant founds the requirements; a statement of lawful norms with reduction of arguments according to which the challenged norm contradicts the Constitution; discrepancy under the form and the contents to the procedural requirements of the constitutional jurisdiction; absence of a causal relationship between challenged positions and the constitutional norms on the basis of which arguments have been formulated.

In this sense the Court has recognised as an example the reference of a group of deputies of Parliament about the control of constitutionality of item 45 of the Appendix over passage of military service by ordinary structure, sergeants and officers of the Armed forces, authorised by the Decision of the Government of Republic of Moldova №925 from December 21, 1994 which has been rejected. The given reference was accepted to consideration after reduction conformity with

requirements of the Code of the constitutional jurisdiction and simultaneously added with inquiry about control of constitutionality of an article 27 part (6) of the Law №1245-XV from July 18, 2002 « About preparing of citizens for protection of their Motherland ».

Subject of some references, as has been recognised by Court, are the questions which are not concerning to the competence of the Constitutional court.

The life testifies that in Republic of Moldova prompt development of the legislation is not accompanied by effective realisation of laws and other acts. Though the legislative base of the country, according to the statement of the vice-speaker of Parliament V.Mishin, develops dynamically, and the majority of documents pass the international examination, and are co-ordinated with the European legal institutes, the problem of amendments in the current legislation still remains.

In my opinion, the main position of the Constitution is not carried out to the full. It is expressed in non-observance of a principle about leadership of the Constitution. It is necessary to recognise also, that positions of the Constitution in legal system are realised insufficiently, that complicates formation of proper correlation between it and legal acts and generates numerous deviations and infringements of the constitutional norms.

That's why a paramount value gets a question on maintenance of conformity of all legal acts of the Constitution. But it is found out, however that the formula « conformity of the Constitution » is not quite clear, more over the criteria on which it is possible to estimate a degree of such conformity. Comparison of legal acts and of the constitutional norms is complicated from the point of view of correctness and volume of regulation of economic, social, political relations, their equation, definitions of a measure of preservation of " the constitutional standard » and a measure of « development or concrete definitions of the constitutional positions». This conformity is multiple-valued in the sense that is not reduced to simple comparisons of those or other rules of law. Conformity of the Constitution means the acting and adopting of acts on the basis of the ideas of constitutionalism reflected in the Constitution.

The similar understanding of formulas of " the constitutional conformity » allows to estimate flexibly the volume of the constitutional regulation, not reducing it to the rigid or closed ways and opening an open space for multivariate contact of norms of the Constitution with acts and norms of the current legislation.

The concept of the constitutional conformity, as well as the treatment of criteria of constitutionality of legal acts can be acquired that they are useful and necessary only for the Constitutional court. It is true, as the Constitutional court serves as the main guarantor of the constitutional legality. But it is true also that similar formula and criteria are necessary for all subjects of law creation and law applicability.

Everybody should know them. Otherwise the amount of the constitutional infringements will not be possible to reduce.

Application of the specified formula and criteria of the constitutional conformity is so essential to be not from time to time, not only at last stages of law applicability when we are facing already with mistakes and infringements. They should be used from the first stage of law creation and to a final stage of realisation of acts and of estimation of their efficiency.

Object of the analysis of legal acts from the point of view of their constitutionality can be:

- a) The legal act as a whole;
- б) A structural part of the legal act;
- в) Article or articles of the legal act;
- г) The rule of law;
- д) Articles and norms of the examined act and the adjacent with it parallel or unitary acts.

About the last case it is necessary to have special conversation. Practice of activity of the Constitutional court for 2003 has elicited the numerous facts of discrepancy of the effectuated changes and additions in some normative-legal acts with positions of other statutory acts containing the same positions which were a subject of the constitutional control. In this respect is characteristic the example of the constitutional procedure which has been faced by the Constitutional court last year.

At removal of definition about the control of constitutionality of the Decision of the Government №891 from July 17, 2003 has been established the equality of voices, as the number of judges – 6. As a result, according to article 66 part (5) Code of the constitutional jurisdiction, the challenged statutory act is considered constitutional and examination of case stops. At the same time the article 60 of the Code of the constitutional jurisdiction does not provide the similar basis (equality of voices) for phase-out on case.

This is a "price" for deviation from the strict established parity of all kinds of legal acts or their separate positions among themselves. Article 60 of the Code also was forgotten.

Similar "forgetfulness" of prepared and adopted statutory acts reduces a degree of cleanliness and uniformity of our legislation and complicates realisation and comprehension of its norms for the applicators of law. Here it is necessary to change all preparing and adopting « legal circuit ».

About mutual relations between the Constitutional court and courts of the general jurisdiction.

The important feature of the legal nature of Constitutional court of RM is that it is not included into judicial system of the country, it is not a component of judicial authority. Chapter IX section of III of Constitution which is called « Judicial authority » testifies about it.

Section V of Constitution of RM is devoted to the constitutional court. Its power is regulated by item 135 of the Constitution in a difference from the courts of the general jurisdiction.

Undoubtedly, the Constitutional court by its decisions pursues the policy stipulated in the Constitution and in the Law « About the Constitutional court ».

The constitutional court should protect the Constitution in force. It doesn't have any other ability from the technique-legal point of view. But the protection of the Constitution – is not a street with one-way traffic. Someone aspires to break the Constitution – the Constitutional court should become a wall and not give a possibility to make this. But the Constitutional court can affect essentially the qualitative and quantitative characteristics of constitutional-legal regulation, as well as the law applicable practice.

In this connection there is a disputable question about the role of courts of the general jurisdiction, including the Supreme appellate court, in the estimation of constitutionality of laws in formal sense of a word.

So, Plenum of the Supreme appellate court has generated its position in the well-known decision about direct application of the Constitution in the general legal proceedings. If we agree with that interpretation which is given in the specified decision of Plenum, all courts of the general jurisdiction, having found out the law contradicting to the Constitution, have the right to disqualify this law. There is, however, an opened question about how is essential the estimation of the law which is contradicting to the Constitution, outside that concrete action of proceeding where this law should be applied by court of the general jurisdiction, and whether it can be recognised obligatory for the other courts. The orientation given by Plenum of the Supreme appellate court on this account essentially reduces opportunities of judicial protection against the unconstitutional law outside the considered affair, or in judicial system as a whole.

The decision of concrete court, on concrete business in which it is recognised that any law contradicting to the Constitution, cannot be applied at the sanction of the given affair, does not solve a problem of existence, continuation of action of this law in legal system. For the decision of the court of the general jurisdiction concerning non-use of this law, is not obligatory for other courts.

The judgement given by the general court on one business cannot remove the law from its legal space; the court of the general jurisdiction does not possess such competence. It is attributed to the jurisdiction of the Constitutional court. All other courts according to the Constitution are obliged to submit to the law, providing thus equality of citizens before the law and court. The judicial system does not achieve this purpose if in each separate process any court has the right to postpone law aside, not taking into consideration the question on its further destiny.

Obviously, in this question the decision can be only the one – last word belongs to the Constitutional court. One more difficulty of unconstitutional acts is connected with the reference of various judicial instances in the Constitutional court.

The current legislation on this question has established the following procedure.

According to part (3) article 7 Criminal procedure code of RM from 2003, in the situation when during proceeding the court has established, that an applied norm of the legal act getting under the control of constitutionality, contradicts positions of the Constitution, examination of an affair stops. A corresponding representation is transferred in the Supreme appellate court, which addresses in the Constitutional court.

In a little bit other legal aspect this procedure is formulated in Procedure Code of RM. So, part (2) art.12 establishes that the Constitution of Republic Moldova possesses the supreme validity and direct action in all territory of the country. Judicial instance hasn't the right to apply laws and other statutory acts, which are contradicting to the Constitution. The judicial instance addresses in the Supreme appellate court with representation about inquiry in the Constitutional court in case If during the examination of an affair by judicial instance it is established that the norm subject to application contradicts positions of the Constitution and the control of constitutionality of the statutory act concerns to the competence of the Constitutional court. The supreme appellate court examines representation. In case of its validity addresses with inquiry in the Constitutional court according to positions of the Code of the constitutional jurisdiction. This action does not distributed to cases when the subordinate judicial instance suggests to resolve unusual cases of illegality concerning acts which according to the current legislation are not subject to the control of constitutionality. In this case the Supreme appellate court has the right to reject representation about the reference as inadmissible.

The literal text of articles from Criminal procedure code and Code of the constitutional jurisdiction, mentioned above, testifies the obvious various approach of the legislator to procedure of the reference in the Constitutional court with inquiry about constitutionality of the law.

Logic of norm part (2) art. 12 Code of the constitutional jurisdiction consist in the following: the Supreme appellate court examines representation and in case of its validity addresses with inquiry in the Constitutional court.

Logic of norm part (3) art. 7 Code of the constitutional jurisdiction: the judicial instance directs representation to the Supreme judicial instance, which addresses in the Constitutional court.

Except the marked discrepancy of these norms both contain, first of all, regulations about admissibility of references: the basis of inquiry in the Constitutional court is the opinion, judgement, the point of view of the Supreme appellate court. Other judicial instances are deprived of this right, though all of them on the basis of the right examine and resolve concrete affairs within the framework of appropriate legal procedure and from this point of view any of them – is a judicial authority.

Power to make an inquiry about constitutionality of the law should be given to any judicial instance and in the case of examination of any affair – civil, criminal, and administrative. The similar institute is known, for example, in the legislation of Germany.

The constitutional court – the main subject of interpretation of the Constitution.

The principal law of the state legally makes the Constitutional court the main subject of interpretation of the Constitution.

What circumstances influence to this:

1. The constitutional court is created with the special purpose to limit all other bodies in any expansion or limiting of frameworks of the norms established by the legislation. In opinion of German constitutionalist K.Shtark, « in dependence how the constitution is interpreted, it limits the legislator; free political process of lawmaking finds borders » (« State law of Germany », Publishers J.Izenzee and P.Kirrhof, That IIM, 1994 p. 315-316). An opportunity, border and even a duty of the legislator become object of justice with creation of the Constitutional court and the legislator thus is not free any more in how to understand the Constitution; he can be connected by its interpretation proceeding from the Constitutional court.

Acts of the Constitutional court about interpretation of the Constitution connect more executive - administrative bodies with all subjects, which apply law. However, in any case this coherence is caused by an establishment and implementing of a principle of division of authorities. With a view of realisation of this principle the Constitutional court becomes the main subject of interpretation of the Constitution.

2. The constitutional court is allocated with such powers, which always to some extent demand interpretation of the Constitution. Volume of such powers, their breadth and depth – is the certificate of a basic role of the given body in interpretation

of the Constitution. So, according to article 93 of the Principal law of Germany, the Federal Constitutional court makes up the decision:

1) concerning interpretation of the Principal law in case of occurrence of the questions at issue concerning volume of the rights and duties of the Supreme federal body and other subjects which are allocated with their own rights by the principal law or the rules of work of the Supreme body;

2) in case of disagreements or doubts concerning conformity in the formal semantic and substantial attitude of the federal or land right to positions of the Principal law, or conformity of the land right to other federal rights in case of inquiry from the side of the federal government, the land government or one third of members of the Bundestag.

3) in case of disagreements on a question of the rights and duties of federation and the lands, in particular, at execution of the federal right by the lands and at execution of function of supervision from the side of federation.

4) in case of other public – legal disputes between federation and the lands, between the lands or inside one land in case if this question cannot be solved by other judicial instances;

4a) under the constitutional complaints from the persons asserting, that the government restrains them in one of fundamental laws;

4 б) to the constitutional complaints of communities or associations because of infringement by the law of their rights on self-management (article) 28). If the question is land laws complaints are examined by Federal Constitutional Court only in those cases if the complaint is not sent to land Constitutional court.

5) in all other cases stipulated by the Principal law (see: Staats – und Verwaltungsorganisation in Deutschland. Munchen 1993, p. 233 – 234)

As we see, not only the first, but also all other powers of Federal Constitutional Court of Germany cannot be carried out without interpretation of the rights and duties in view of the constitutional norms. Sometimes formulations of articles, in which powers of the Constitutional Court are fixed, directly do not fix duties on interpretation of the Constitution. But such duty follows from an essence of disputes and the constitutional position of participants.

The constitutional Court is a unique body on interpretation of the Principal law, as a rule, which is textually authorised by the Constitution. We see it by the example of the Constitution of Germany, the Constitution of the Russian Federation, the Constitution of the Hungarian Republic, etc. The question is an exclusive prerogative of the Constitutional court to take out special acts of normative interpretation of the constitutional norms, obligatory for bodies of the government and local self-

management, the enterprises, establishments, the organisations, officials, citizens and their associations.

According to the Constitution of Russia the right of the Constitutional court to give interpretation of the Constitution is not limited in material - legal sense. The court can give interpretation to any section, any chapter and any norm of the Principal law, including norms of the chapter « Bases of constitutional building ». Moreover, these most important norms fixing bases of constitutional building of the Russian Federation, can be object of the prime interpretation given by the Constitutional court.

The law on Constitutional court of RM – item b) art. 4 – does not open the content of its activity on interpretation of the Constitution. It does not contain definition of concept of interpretation of the Constitution, does not fix any kinds of this activity.

Interpretation of the Constitution – is a special process. Remedial feature will be that the decision in this case becomes result of analytical activity of Court. On affairs about interpretation of the Constitution the Constitutional court takes out acts of official normative interpretation of a constitutional law.

So, interpretation by the Constitutional court will consist in overcoming (within the framework of the procedures established by the law and on the basis of use of all receptions and ways known in science) uncertainty of understanding of the Principal law or rules of law with a view of maintenance of the constitutional legality and maintenance of the appropriate constitutional law and order.

About some conditions of functioning of the constitutional justice in the states of the East Europe and the countries CIS

The constitutional control over the considered states develops under the script set by special socio-political circumstances. First, the constitutional courts play the important role in bases of democratic institutes though they have insignificant democratic and legal experience. There is essential distinction between post communistic and West-European constitutional justice: the last was formed in deeply democratic environment. In this connection political and psychological loading on the constitutional judges of the post Soviet states grows, there are non-standard relations with « branches of authority », there is non-conventional portfolio.

Second, the constitutional courts operate within the framework of the constitutions, essentially distinguished under the contents, the purposes and style from constitutions of traditional democracies.

I want to pay your attention to some aspects of activity in the considered states.

1. The public opinion highly appreciates the contribution of the constitutional courts to protection of the civil rights and freedom and formatting of a civil society. According to the researches that were carried out, the trust of citizens of Slovakia to the Constitutional court is higher, than to parliament, to the president and the government (just as the Federal Constitutional Court of Germany has the greatest respect among all state institutions). The Hungarian Constitutional Court has deserved respect of a society by its independent decisions.

2. The constitutional courts keep or expand the powers, consolidate the status. The constitutional commission of Poland has decided that all decisions of the constitutional Tribunal are obligatory, final and enters in force in day of their announcement. The commission also has expressed for the benefit of the constitutional complaint and investment of the Tribunal with the right to check up constitutionality of programs and activity of political parties.

3. The constitutional courts could resist to political temptations at the sanction of political ticklish affairs about de communisation, lustration, restitution and privatisation. It is especially fair concerning the constitutional courts of Hungary, Albania which have developed analytical erudition during interpretation of the constitutional positions.

4. « The Portfolio » of bodies of the constitutional justice differed with a variety and was always full. The constitutional court of Hungary protected hidden principles of human deserving, social and economic rights, and the right for a life. It caused some doubts about financial and the tax policy of the Government directed on reduction of budgetary expenditures. The court developed the concept of well-being (social) rights, but has expressed against the theory of prior rights of former proprietors of the nationalised property (though consistently protected restitution).

The constitutional court of the Czechoslovakia, which has existed only for eight months, has brought its contribution to the sanction of federal problems.

In a consequence the Constitutional court of the Czech Republic repeatedly accepted to consideration the complaint to infringements of the social rights. As distinct from the Constitutional court of Hungary it did not aspire to revival of " basement collective consciousness » of deprived groups of the population and practised the market approach to social problems. For example, it has rejected the petition of opposition for prohibition of work at night time for pregnant women and mothers that have children in the age till 1 year, having motivated its decision with the right on a choice to work.

The constitutional Tribunal of Poland addressed to consideration the questions exciting all the inhabitants of the country without exception: has protected the right of the woman on privacy (abortions) and a principle of secular education (teaching religion in comprehensive schools).

Feature of the Bulgarian constitutional justice is that the constitutional control was initiated mainly by parliament. It played stabilising role, softening a retaliatory anti communistic rate and resolving conflicts inside the legislative Assembly.

Constitutional justice of the post-communistic states has faced numerous problems. Confrontation with legislative and executive authorities weakened creative potential of justice. The parliament of Hungary even discussed an opportunity of revision of decisions of the Constitutional court. The bill about reduction of the size of wages for judges and deprivations of their right on pension in case of resignation after expiry of the term of powers has been submitted in Parliament of Bulgaria. The Sejm of Poland repeatedly refused to ratify decisions of the Constitutional Tribunal. In Slovakia Chairman of the Constitutional court has been deprived the automobile and the bodyguard after acceptance of the decision that was not convenient for the Government.

From time to time courts took out inconsistent decisions which were dictated by logic of development of political processes (the decision about de communisation of Bulgaria, about restitution of Albania) or showed excessive care, especially in Poland where the tribunal started to function during the socialist period.

Bodies of the constitutional control do not feel like sufficiently independent. One of certificates of this was acceptance of the Code of honour of the judge in the Constitutional court in Belarus.

From experience of the constitutional courts of other countries the following data present some interest. In Austria, for example, Constitutional court can decide that the complaint suspends the act. In Germany and Spain courts have the right to accept provisional measures for protection or restrictions of constitutional laws of the claimant. For example, the Federal Constitutional court of Germany in 1982 has suspended carrying out of population census on the base that biographical questions break inviolability of a private life.

Achievements of the constitutional courts in sphere of protection of the rights of citizens are most appreciable. Albania, Hungary, Slovenia, Slovakia, Croatia have provided in the legislation the right of citizens on the reference in the constitutional courts practically from the very beginning of establishment of the constitutional justice. Many states of the Western Europe (Belgium, France) need some decades for this. In Italy there is no institute of the constitutional complaint. In Spain citizens cannot appeal against the act of parliament. In Germany, Spain and Austria a condition for the constitutional complaint is a lack of other measures of the right protection. In the majority of the post communistic states this rule does not operate (except Slovakia and Hungary). In Bulgaria, Poland, Belarus, as well as in our country, the institute of the constitutional complaint is not stipulated.