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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

REMARKS ON THE PROJECT OF REVISION OF THE CONSTITUTION OF THE REPUBLIC OF MOLDOVA

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1. The project of constitutional reform that has been presented by the President of the Republic to parliament aims at the strengthening of the constitutional position of the executive. The innovations that are sought after are four:

(i) The government gets the power to establish priority for the parliamentary discussion of the governmental projects of legislation, or of other projects laid before parliament which it is interested in, as well as the adoption of an urgent procedure for the parliamentary discussion thereof (art. 74 of the Constitution).

(ii) The government may engage its own responsibility before parliament by the way of the presentation of a political programme, a declaration of general political importance or – most importance of all – a project of legislation, which shall be considered as adopted unless a vote of no confidence is approved by parliament (art. 106^1);

(iii) The government may legislate through "ordinances", providing that it gets previously a legislative delegation from parliament (art. 106^2);

(iv) At last, no piece of parliamentary legislation shall be adopted by parliament when it implies the increase of the budget expenses or the decrease of budget revenues without the consent of the government.

All of the proposed changes to the Moldavian Constitution have their source in the democratic European constitutions, specifically the French Constitution of 1958. But this circumstance does not spare the necessary study of each one of the proposed changes.

2. The power of the government to establish priorities for the projects it is interested in upon the parliamentary agenda comes from art. 48 of the French Constitution. It states that the agenda of both chambers of parliament shall give priority, according to the preferences of the government, to the projects presented by itself or to the projects of the members of parliament that are accepted by the government.

There is no reason to think that such an executive privilege runs against the essential rules of parliamentary democracy. Of course provisions should be taken in order that this prerogative of the executive does not eliminate altogether the autonomy of parliament to set its own agenda and to discuss legislative projects other than those presented or supported by the executive, specifically those that are tabled by the opposition parties. But apart from that prevention, one should accept that the government, which has been approved by parliament, is entitled to the actual means that it feels to be necessary to implement its legislative program.

3. The new article 106^1 has its recognisable source in the French Constitution too (article 39, §§ 1 and 3).

According to it, the government may decide to engage its own political responsibility before parliament upon a political program or declaration or upon a project of law. In that case those documents are considered to have been approved by parliament unless a vote of no confidence is proposed by a certain number of members of parliament and approved against the government.

The peculiarities of these rules are twofold: first, the government wins an implicit vote of confidence inasmuch as there is no actual vote of confidence but only the absence of a vote of no confidence; second, this "negative" vote of confidence may involve the automatic approval of a project of law without an actual discussion and vote of it by parliament. This scheme amounts to

giving to the government a speedy way of forcing the approval of legislation that otherwise could meet the disapproval of parliament.

It is not difficult to raise a few objections against this rule that allows the government to pass important legislation without the need of an explicit approval by the representative assembly. May be that in this we are touching the very frontiers of the parliamentary prerogatives in a representative democracy. But the objections should not be overestimated. The French experience shows that this is not an unbearable sacrifice of parliamentary privilege.

4. The delegation of legislative powers by parliament upon the government is nowadays a very common feature of parliamentary democracies.

Typically we find two main ways of government legislation. One is the delegation of legislative powers by parliament, for a certain issue and on a temporary basis, and usually without the need for the parliamentary ratification of the law issued by the government. The other sources of government legislation are the situations of urgent necessity, in which there is no previous delegation, but that require parliamentary ratification within a short period of time. This is the system that is adopted for example by the Italian and the Spanish constitutions.

The Moldavian project is a very cautious one. The delegation should require:

(i) A request by the government regarding the implementation of its own program of activities (which is submitted to parliament when the government is appointed);

(ii) The approval of the delegation by parliament through an "organic law", that means a law approved according to the specific procedure of article 74(1) of the Constitution, which requires a double vote of the majority of the members of parliament.

(iii) The identification of the subject of the would-be "ordinance" of the government, as well as the time in which the government enjoys the delegated legislative powers;

(iv) The eventual ratification of the ordinance by parliament.

Again, the main source of this constitutional proposition is the French Constitution (article 38). Nevertheless one should bear in mind that in France there is a separation between the domain of parliamentary law (art. 34) and the domain of the government regulation (art. 37), in which the government enjoys real primary normative powers, with no need of parliamentary delegation. On the contrary, in the domain of the government regulation parliament is not allowed to legislate. This is not the case in Moldova, where the government has no such para-legislative powers of its own, and where the regulation powers of the executive are meant only for the implementation of the parliamentary laws. In Moldova every issue belongs to the domain of parliamentary law. Thus, the proposal of constitutional change should be rephrased in order to take account of the different constitutional framework.

5. The prohibition of the adoption by parliament of legislation that could involve an increase in the government expenditure or the decrease of the government revenue is also very common nowadays in several constitutions of parliamentary democracies. Constitutional provisions to that effect may be found, for example, in the German Grundgesetz of 1949 (article 113) or the Spanish constitution of 1978 (article 134(6)). But the immediate source of the Moldovan project is once again the wording of the French Constitution (art. 40).

This limitation of the parliamentary prerogative is not incompatible with parliamentary democracy. It may be a necessary condition for the ability of the government to get along with its policies, especially under conditions of budget constrictions. There are no reasons whatsoever to condemn this solution.

6. The aim of the proposed constitutional changes in Moldova is confessedly the strengthening of the executive position in the framework of the constitutional system of government.

A strong executive is not necessarily against parliamentary democracy. On the contrary, it is weak executives and government instability that are very often a threat to parliamentary democracy.

A fair balance between parliamentary sovereignty and government strength is the main concern of the so called "rationalised parliamentarism" (*parlementarisme rationnalisé*) since the earlier decades of this century, which has been the remedy indicated for the weaknesses of traditional parliamentarism in continental Europe, mainly the political instability brought about by the excessive dependence of the executive from parliament.

It needs no emphasis the assertion that parliamentary democracy should "deliver the goods" in order to ascertain its own legitimacy and acceptance. That means essentially to ensure efficient and stable governance of the polity. The "excess of parliament" is very seldom a virtue. Provided that the government remains accountable before parliament and cannot act against its will, parliamentary democracy leaves enough ground for a vast array of provisions with the aim of strengthening the constitutional and political position of the executive within the system of government.

No wonder that the changes which are being discussed in Moldova have their main source of inspiration in the French Constitution of 1958, which is without doubt where the executive enjoys the strongest position vis-à-vis the parliament.

6. A final remark is necessary to call the attention to the fact that the Moldovan Constitution, although belonging to the family of the parliamentary forms of government, has a few peculiar features that present some similarities with the French *semi-présidentialisme*.

It is indeed a parliamentary system of government. There is the political fiduciary relationship between parliament and the executive. The government is appointed according to the parliamentary majority (if there is one). The government needs a parliamentary vote of confidence to be confirmed in office, once appointed by the President of the Republic. Afterwards it can be sent away be the means of a vote of no confidence. On the other hand the President of the Republic may dissolve parliament if it becomes impossible to form an executive within the framework of the existing composition of the assembly or if there is a deadlock concerning the approval of legislation. All these are typical features of the parliamentary system of government.

But there is more to it. The President of the Republic is elected by direct popular vote and has a number of important powers of its own, which he can exercise without the need of ministerial countersignature. Among these powers may be counted those indicated in articles 83-88 of the Constitution. Most of these are not common in traditional parliamentary forms of government, where the chief of State, be it a king or a president, has mainly a representative role, not an actual intervention in the political process.

Thus, in Moldova (as well as in other European parliamentary democracies like Finland, Austria, Portugal, Ireland, Iceland, etc.) parliament is not the only constitutional organ of the State to represent directly the people. In Moldova, as well as in France, the executive power belongs not only to the government but also to the President. On the other hand the government is not only accountable before parliament but also, in a certain way, before the President.

This is an additional reason why the proposed changes to the Constitution of Moldova do fit with the character of the constitutional system of government.