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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

ADDENDUM

COMMENTS
BY THE MOLDOVAN CONSTITUTIONAL COMMITTEE
ON THE VENICE COMMISSION'S INTERIM REPORT
ON THE CONSTITUTIONAL REFORM
IN THE REPUBLIC OF MOLDOVA
(CDL(99)88)

***The constitutional Committee's Amendments
Concerning the Draft Opinion
On the Constitutional Reform in the Republic of Moldova***

Having closely examined the Draft Opinion on the constitutional reform in the Republic of Moldova, prepared by the group of experts from the Venice Commission (CDL(99)72), the Constitutional Committee of the Republic of Moldova wishes to make the following points :

1. The Constitutional Committee was set up by decree of the President of the Republic of Moldova on 1 June 1999, for the purpose of drafting a law amending the Constitution in order to institute a presidential system of government, in the light of the results of the consultative republican referendum held on 3 May 1999.

2. The reasons for amending the Constitution and changing the system of government have been stated and discussed on several occasions :

- in the Message from the President of the Republic of Moldova to Parliament, dated 3 February 1999 ;
- in the speech made by the President of the Republic of Moldova on 24 June 1999 to the Parliamentary Assembly of the Council of Europe in Strasbourg ;
- during the consultative republican referendum - 22 March 1999 - 22 May 1999 ;
- at the meetings of the Constitutional Committee - 1 July 1999 - 6 September 1999 ;
- at the working meetings of the representatives of the Constitutional Committee, members and experts of the Venice Commission, which took place on :
 - 17-19 September 1999 in Chisinau ;
 - 16 October 1999 in Venice ;
 - 10 December 1999 in Venice.

The Constitution needs to be amended, along the lines indicated above, for the following reasons :

a) the semi-presidential system instituted by the Constitution of the Republic of Moldova on 29 July 1994 :

- does not ensure a proper separation between the legislature, the executive and the judiciary, and the necessary balance between their respective powers and responsibilities. Nor does it make for a unified system of government.
- it leads to diminished responsibility for the results of government.

b) The political balance of power that exists in Moldovan society today and the conflicting principles and ideological agendas of the different political forces have the effect of creating an unstable parliamentary majority, which in turn inevitably leads to unstable

government, ie it produces a succession of political crises, impairing the smooth functioning of the state in the sphere of economic, social, political, legal reform, etc.

c) the lack of governmental traditions, the lack of experience of democratic political pluralism, the absence of strong political parties with firmly established traditions and agendas, the unpredictable swings in political forces, their fickleness and inconsistency and the fact that they have no sense of responsibility all serve to discredit the state authorities and undermine public confidence in democratic principles and institutions ;

d) a change in the Constitution and the introduction of a presidential system, together with a clearer separation of powers, including the responsibilities of Parliament, by identifying political responsibilities for the results of government, would help to consolidate the political forces, and their ideological platforms, and pave the way for a full, responsible expression of political pluralism by the electorate, by creating a more stable political climate and more efficient administration of public affairs.

3. With a view to instituting a presidential system of government, the Constitutional Committee began by identifying the main features of this system :

a) the President of the Republic (the Head of State) is elected by direct, universal suffrage, thereby ensuring that he has the same national representative status as the legislature (Parliament) and is constitutionally independent from the latter ;

b) The President of the Republic is at the same time the head of the executive; the members of the Government are appointed and dismissed by the Head of State;

c) The members of the Government report to the Head of State. Generally speaking, the Government is not politically accountable to the legislature (Parliament), as the latter does not have the right to pass a motion of censure against the Government ;

d) The President of the Republic does not have the right to introduce legislation, but he does have the right to veto legislation. This right can be overridden if at least 2/3 of the total number of deputies in Parliament vote to do so.

e) The President of the Republic does not have the right to dissolve Parliament ;

f) Parliament cannot revoke the President by passing a vote of no confidence, which effectively means that the President is not politically accountable to Parliament ;

g) The presidential system essentially requires a rigid separation of powers, and an independent legislature and executive, with equal status;

h) Co-operation and interaction between these different branches of authority is achieved as much through the President's right to veto laws and the right of the legislature to override this veto by a two-thirds parliamentary majority, and to ratify international agreements (signed by the executive), as through the political parties represented in Parliament, who supported and who continue to support the President.

4. The Constitutional Committee did not propose a 100% presidential system in its first version of the draft submitted to the Venice Commission, in view of the complexity of the heated debates that took place within the Constitutional Committee, based on constitutional theory and practice, and which demonstrated that it was neither practicable nor desirable to simply transplant this system to Moldova, under present circumstances.

5. The President of the Republic of Moldova and the Constitutional Committee have turned to the Venice Commission with a view to working in close, constructive co-operation with this venerable specialised institution of the Council of Europe, to improve the draft law so that it meets democratic European standards of government, ensures the separation of powers, and a proper balance thereof, establishes a long-term mechanism for effective co-operation between the different branches of state power and protects citizens' fundamental rights and freedoms.

The fact that the Committee, at the suggestion of the Venice Commission members and experts, has made four basic changes to the original version, is a clear sign of this commitment.

6. The Draft Opinion submitted to the Venice Commission at its 41st meeting on 10 December 1999 contains the following objections and criticisms, as made by the experts :

a) « several disputable points singled out by the experts from the start of the co-operation are still present in the text of the proposed constitutional reform (point 12) » ;

b) « the system set out in the text of 29 October 1999 [is] a mix of the different presidential and semi-presidential systems existing in the democratic countries which is likely to bring the powers of the President, the Government and the Parliament into conflict and offend against the principle of separation of powers (point 13) » ;

c) « the draft amendment submitted by the Constitutional Committee still contains a number of provisions which, in the framework of a presidential system of government, are prejudicial to compliance with the principle of separation of powers (paragraph 3 of the « Conclusions ») ;

d) « the procedure for constituting the Government raises difficulties as regards its interaction with the Parliament, there being no connection between the Government and the majority in Parliament (letter (c) of the Conclusions) ».

7. These are the main general objections, as the Constitutional Committee understands it, that stem from the specific objections concerning particular sections of the draft.

7.1. Below are details of the concrete objections raised by the experts, followed in each instance by a statement of the Constitutional Committee's position on the subject.

Experts' objection:

Limited involvement of Parliament in the sphere of treaties and foreign policy (point 16).

The position of the Constitutional Committee :

We cannot agree with this. If anything, the proposed draft gives Parliament wider powers in these areas, as compared with the provisions of the current Constitution.

Under Article 66 of the Constitution, Parliament :

- Letter g) shall ratify, denounce, suspend and abrogate the effect of the international treaties concluded by the Republic of Moldova ;
- Letter i) shall supervise the allocation of state loans, the economic or other aid granted to certain foreign states, the conclusion of agreements concerning state loans or credits obtained from foreign sources ;
- under Article 86 paragraph (2) of the proposed draft : « The President of the Republic of Moldova, after having consulted the specialised permanent committee of Parliament, shall accredit and revoke the diplomatic representatives of the Republic of Moldova and decide on the establishment, closure and ranking of diplomatic missions abroad, in the manner prescribed by law. »

Given this, it is difficult to see how Parliament's powers are limited in the sphere of foreign policy compared with the constitutional practice of other states.

The Constitutional Committee is of the opposite opinion - the powers of the Head of State in the sphere of foreign policy are firmly subject to parliamentary control. Parliament also determines the manner in which these powers are to be exercised, through the adoption of legislation.

The experts' objection :

7.2 Parliament's powers are limited as regards the appointment of certain senior officials (point 16 of the draft opinion).

The position of the Constitutional Commission :

- Article 66, letter i) of the draft law provides that Parliament « shall elect, nominate and dismiss state officials, in the manner prescribed by the Constitution and the law » ;
- Article 88, letter f) of the draft law provides that the President of the Republic « shall appoint and dismiss public officials, in the manner prescribed by law. »

It follows from this that Parliament and the President of the Republic exercise powers in the appointment and dismissal of public officials in the manner prescribed by the Constitution and the law, which is adopted by Parliament. How can it be said that Parliament's powers are more limited than those of the President of the Republic in this area ?

The experts' objection :

7.3. Limiting the areas in which laws may be enacted to those listed in Article 72 paragraph (3) is apt to limit Parliament's legislative authority, which scarcely seems justified.

The position of the Constitutional Committee :

The provisions of Article 72, paragraph (3) need to be seen and interpreted in the context of the provisions of paragraphs (4) and (5). The Constitutional Committee has tried to provide, in paragraph (3), an exhaustive list of the areas in which laws may be enacted. Pursuant to letter u), paragraph (3), Parliament is entitled extend, on the basis of an organic law, the areas in which laws can be enacted. It is difficult to see how Parliament's legislative authority can be limited, when Parliament is itself entitled to determine the areas where laws can be enacted.

No other European constitution contains a more detailed list of these areas, or deals with the issue more successfully.

There is, moreover, the practice of applying the Constitution, constitutional conventions and case-law which will either confirm or disprove the effectiveness of these provisions.

The experts' objections, as set out in point 18 of the Draft Opinion :

7.4. Article 72, paragraph (6) enables Parliament to pass a motion of censure against the Government.

- The motion of censure can be passed only on the initiative of the Government and only as part of the procedure for holding the Government accountable to Parliament (Art. 106) ;
- Giving sole authority to the Government to hold itself accountable to Parliament would seem to diverge from the constitutional practice of European states.

Central to all these objections is the key objection, expressed by the experts in point 19 of the Draft Opinion and which relates to Article 82, paragraph (1) of the draft law. The experts do not approve of the fact that « After having consulted the parliamentary majority, the President of the Republic of Moldova shall appoint the Prime Minister and, on the proposal of the latter, the members of the Government ».

From this, the experts conclude that : « There is no provision requiring the latter (the Government) to represent the parliamentary majority, in consequence of which the

Government can have no real foundation on the political forces in Parliament... Plainly, there is no link between the Parliament's legislative activity and the Government's executive power » (same point - 19).

The position of the Constitutional Committee

The Constitutional Committee wishes to make its position quite plain.

The characteristic features of the presidential system of government are set out in point 3 of this document. There is no need to repeat them.

Under the presidential system, the Government is formed by the President of the Republic after consulting Parliament (there are various ways in which this can be done) and is subordinate to the Head of State, politically and administratively speaking. The Government is formed and authorised by the Head of State to implement the presidential programme, which has been approved by the people under the system of universal, direct suffrage, in the same way that Parliament, having obtained the mandate of the people, forms the Government and supervises its activities under the parliamentary, semi-parliamentary or semi-presidential system.

The Constitutional Committee does not subscribe to the view that, if the Government is formed by Parliament, it has the political support of the latter and is supervised and sanctioned (dismissed) by Parliament, which means that this system is good and democratic, whereas if the Government is formed by the President of the Republic, it is subordinate to the latter and is supervised and sanctioned by the Head of State, which means that the system is bad and undemocratic.

Taking these factors into account, under the presidential system provided for in the draft law, Parliament cannot pass a vote of no confidence in the Government on its own initiative because Parliament did not pass a vote of confidence concerning the formation of the Government in the first place. Parliament can only pass a vote of no confidence in the Government as part of the procedure for holding the Government accountable to Parliament (Art. 106).

The Constitutional Committee has already given its opinion on the mechanism for holding the Government accountable to Parliament.

This mechanism is very important for us. It is aimed at transcending disagreements and conflicts between the legislature and the executive and encouraging effective, responsible co-operation between the Government and Parliament with a view to implementing programmes of major national importance.

The procedure for holding the Government accountable will likewise be a mechanism that allows "cohabitation" between the President of the Republic and Parliament, a situation that may arise depending on the results of the presidential and parliamentary elections.

The balance of power between the different political forces, and the political, economic and social orientation of these forces are such that the Head of State and Parliament

may be elected by different political majorities, thus winning an electoral mandate to pursue conflicting programmes.

The procedure whereby the Government may be held accountable to Parliament does not in any way undermine Parliament's status. By applying this procedure, it is possible to achieve :

a) co-ordination and approval of a joint parliamentary/government programme of activities, which effectively means transcending any contradictions, by assuming joint political responsibility for the implementation of the programme and passing a tacit vote of confidence in the Government ;

b) the resignation of the Government and the formation of a new Government, thus eliminating any conflict between the Head of State and Parliament over the nominal structure of the Government or the basic elements of the programme (or draft law).

In both cases, the mechanism plays a positive role and helps to promote effective co-operation between the different branches of authority.

The Constitutional Committee emphasises the need to institute a presidential system, whilst retaining certain features of the semi-presidential or parliamentary system, such as :

a) the right for the executive to issue governmental decrees in order to deal with relations which are not reserved for the legislative sphere alone - Article 72, paragraph (9) ;

b) the Government's right to introduce legislation - Article 73 paragraph (1) ;

c) the right of the executive (the President) to call a legislative referendum - Article 75, paragraphs (1) and (2) ;

d) the institution of legislative delegation which allows the Government to issue ordinances in areas which are covered by legislation, according to the procedures laid down by Parliament and under the supervision of Parliament - Article 105 ;

e) the mechanism for holding the Government accountable to Parliament - Article 106, which would allow :

- express and tacit approval of a programme or of certain draft laws of major importance ;

- rejection of the programme or draft legislation, adoption of the motion of censure, resulting in the Government's resignation ;

- the co-ordination, adjustment and approval of joint programmes that are of major importance for the development of society, thereby eliminating sources of conflict between the executive and legislature, without any risk of undermining the status of the legislature.

8. The problem relating to referendums - point 24 of the Draft Opinion.

The experts' objections :

a) « where the Government, which under the system advocated by the draft is accountable to the President alone (...) does not succeed in compelling the Parliament to pass a law, it may ask the President to have the law approved by citizen vote » ;

b) « ... in the text of the draft presented for examination, and taking into account the other provisions of the law for constitutional revision, this rule which establishes a sort of democracy by referendum, is of concern to the Commission » ;

c) « Indeed, it is open to question whether such a system enabling the executive to take the legislative process out of Parliament's hands may not gravely infringe the principle of separation of powers ».

The position of the Constitutional Committee

- The Constitutional Committee shares some of the doubts expressed by the experts, but believes that the legislative referendum cannot detract from the unique quality of Parliament's legislative authority in view of the fact that, under Article 75, the most important issues can be put to a republican referendum... including draft laws, but not all laws, only those of major importance. Even Parliament might come to the conclusion that a draft law can be put to legislative referendum. We acknowledge the fact that those who are entitled to initiate a referendum and decide how it is to be conducted - Parliament, the President of the Republic and the people - are responsible authorities. There is nothing in the practice of other states to suggest that there is anything wrong with this approach, moreover ;

- The comment to the effect that the Government could bypass the normal legislative process, by asking the President to call a referendum for the purpose of adopting a law is unjustified and exaggerated, in our opinion. The same observation could be made about the possibility of Parliament resorting to a referendum in order to obtain approval for a law, when it has reason to believe that the President would veto this law. These assumptions may be justified if it is felt that the Government and Parliament do not understand what their powers and terms of reference are, or if they exercise them in an irresponsible manner. Taking these considerations into account, we do not see that there is any infringement of the principle of separation of powers.

- We cannot agree with the comment about the dangers of democracy by referendum (plebiscite). On the contrary, it is essential that Moldovan society be actively involved in the democratic machinery of government.

9. Concerning the right to dissolve Parliament - point 22 of the draft opinion.

The experts' objections :

The experts speak of a lack of countervailing powers and view this mechanism, which is designed to ensure a balance between the legislature and the executive, as a means whereby the executive can influence the legislature.

The position of the Constitutional Committee

The Constitutional Committee believes that this instrument serves a useful purpose and plays a very important role in the parliamentary and semi-parliamentary or semi-presidential system. The right to dissolve Parliament is a sensible one and ensures a balance between the Government and Parliament. It applies, or can be applied, in response to a refusal by Parliament to approve a very important programme or draft law tabled by the Government, as the holder of Parliament's vote of confidence, ie in cases where Parliament refuses to take responsibility for the actions of a Government that is of Parliament's own making.

Under the presidential system, the right to dissolve Parliament becomes redundant. Why should it be necessary to dissolve Parliament - the representative authority of the people and the legislative authority of the state - merely because it has rejected a programme or draft law tabled by the Government, which is a presidential administration, a creation of the Head of State ?

According to the proposed draft, there are other ways of breaking legislative deadlock : change of Government ; amendment of the programme or draft law concerned ; legislative delegation under the supervision of Parliament ; dialogue with the parliamentary factions ; referendum, etc.

The Constitutional Committee does not agree, therefore, that the right to dissolve Parliament should be reinstated. The removal of this instrument fundamentally reinforces the status of the legislature in relation to the executive, ensures a rigid separation of powers, eliminates sources of conflict between the different authorities and ensures a clear delimitation of their responsibilities, as well as political stability.

The Constitutional Committee wishes to take this opportunity to express its gratitude to the Venice Commission, and to say how much it values the care and attention, the impartial advice and efficient help provided by the Commission, and which will hopefully continue in the future. For the Committee believes that only in a climate of openness, consensus and professional and civic responsibility will we be able to come up with a draft law amending the Moldovan Constitution that reflects the political, economic, social and psychological realities of Moldovan society and the interests of its members.

The Constitutional Committee believes that the draft submitted to the Venice Commission for opinion contains the necessary ingredients for the democratic, responsible and efficient functioning of the new system of government.

THE CONSTITUTIONAL COMMITTEE
Chisinau, 21 December 1999