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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

CONSOLIDATED OPINION

ON THE CONSTITUTIONAL REFORM IN THE REPUBLIC OF MOLDOVA

On the basis of comments by:

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Final report on constitutional reform in Moldova

I. Introduction

1. In April 1999, following the consultative referendum on the possible amendment of the Constitution of Moldova organised by President Lucinschi, the Committee on the Honouring of Obligations and Commitments by Member States of the Parliamentary Assembly of the Council of Europe, decided to ask the Venice Commission to follow constitutional developments in the Republic of Moldova. The Venice Commission was informed of this decision by letter of 3 May 1999. Furthermore, on 25 May 1999, the Commission was also asked to look at the question of constitutional reform by the Parliament of Moldova.

2. In 1999 the Commission examined draft proposals for constitutional reform prepared by a Constitutional Commission set up by the President of the Republic and a draft law proposed by 39 parliamentarians. These two projects had a different vision of the nature of the reform to be carried out – the first wanted to reinforce the executive by giving additional powers to the President whereas the second proposed to give new powers to the Government. At its 41st plenary Meeting in June 1999 the Commission adopted a first interim report and forwarded it to the Parliamentary Assembly (doc. CDL (99) 88). In this report the Commission expressed the concern that the presidential draft would concentrate too much power in the hands of the President and gave a generally favourable assesment of the draft of the 39 parliamentarians.

3. Following the proposal of the President of the Parliamentary Assembly, Lord Russel-Johnston in December 1999[1], the President and the Parliament of the Republic of Moldova decided to create, in February 2000, a Joint Committee, which would elaborate a single draft of constitutional amendments. This Committee comprised three representatives of the President and three of the Parliament. The two sides had asked Mr G. Malinverni, member of the Venice Commission, to chair this committee.

4 . The Joint Committee met three times in 2000, on 9-10 March, on 26-27 May in Chisinau and on 7-8 April in Strasbourg. The Joint Committee had prepared a draft proposal of the revision accepted by all its members (CDL (2000) 37). In June 2000 this draft was submitted to the Constitutional Court, which has to decide if it is in conformity with the Constitution of Moldova. To date, the Court has not taken a decision on this question.

5. The draft prepared by the Joint Committee constituted a compromise between the Parliament and the Constitutional Committee. Nevertheless, the participants were unable to agree on the following two important points: the right of the President to dismiss the Prime Minister and the organisation of the electoral system. On the first question the Parliament categorically refused to concede this right to the Head of State. As for the electoral system, the parliamentarians considered that this reform should be made at a later date by way of changes to be made to the Electoral code.

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[1] *Press Release of 7 December 1999; Strasbourg, Council of Europe.*

6. At its 43rd plenary meetings in June 2000, the Venice Commission adopted its second interim report on constitutional reform in the Republic of Moldova and forwarded it to the Parliamentary Assembly of the Council of Europe (CDL (2000) 43). The Venice Commission expressed the wish that all parties concerned continue to seek a consensus on the methods of constitutional reform.

7. On 13 June 2000, the Parliamentary Assembly of the Council of Europe asked the Venice Commission to study all projects currently examined by the Constitutional Court and by the Parliament. On 5 July 2000 the Parliament voted a Law on constitutional reform based on proposals of 39 (see above) and 38 members of the Parliament (a proposal for a purely parliamentary system with a President elected by the Parliament) and sent it for promulgation to the President of the Republic. The President vetoed the Bill. On 21 July the Parliament overcame the veto by an overwhelming majority of its members and the Law came into force (with minor amendments to the initial text). The text adopted appears in document CDL(2000)55 rev.

8. The Venice Commission decided to examine this text and not to work on the presidential text, which the legislators would not adopt. At its 43rd plenary meeting the Venice Commission asked Ms H. Suchocka, Mr K. Tuori and Mr J. Jowell to give their opinion on this Law. The text that follows is a consolidated opinion of the rapporteurs. The final paragraphs pay special attention to the relation of the adopted amendments to the proposal made by the Joint Committee (CDL(2000) 37).

II. The Law on Constitutional reform adopted by the Parliament of Moldova.

A. General observations.

9. The Constitution of the Republic of Moldova adopted on 29 July 1994 established a system of governance that is a compromise between a presidential and prime-ministerial system. It would seem inevitable that such a hybrid system would reveal tensions and uncertainties with regard to the respective roles and powers of the President, Prime Minister, Government and Parliament. The principle of separation of powers did not help to ease tensions – on the contrary, it deepened them when each branch started to give interpretation of the extent of its prerogatives.

10. The amendments adopted by the Parliament aim at strengthening the parliamentary traits of the Constitution. This means reinforcing the position of the Government and the Parliament at the expense of that of the President. The model of government shifts away from that of a semi-presidential system towards a parliamentary one. The role of the President is effectively moved from the head of the executive towards that of the head of state. The Prime Minister elected by the Parliament assumes the role of head of the executive.

11. The amendments strive for the effective functioning of the political system through increasing the powers of the Government. The basic solution, which underlies the individual amendments, is in itself fully legitimate. The main issue to be examined is, whether this solution has consequently been adhered to.

B. Particular amendments.

- The new role of the President

12. The weakening of the position of the President is manifested already in the change in the procedures for his/her election and dismissal. According to Art. 78, the President will be elected by the Parliament. Given the fact that the President's powers are to be largely devoid of governmental power, retaining only largely ceremonial and some residual powers, especially in foreign affairs (as a Head of State), these amendments accord with democratic standards.

13. Correspondingly, the dismissal of the President from his office will no more require a referendum but can be decided on by a qualified majority of the Parliament (Art. 89). An amendment of 21 July 2000 permits the President to submit to the Constitutional Court as well as the Parliament, his defence of a charge of impeachment. This additional judicial safeguard rightly accords with the requirements of natural justice.

14. One should positively assess the amendment that one may fill the office of President only for two terms of office (Art. 80, new paragraph 4). Other amendments in the chapter concerning the President are a consequence of a switch to a parliamentary regime.

15. As regards the powers of the President, Art. 83, according to which the President can take part in Government meetings and preside over them, these will be abrogated. This corresponds to the general aims of the amendments adopted. There seems no need, however, to strip the President of power to consult the Government (Art. 83 (2) in the text of the Constitution of 1994). Consultations might be particularly necessary in cases where the President exercises some residual powers (such as the power in foreign affairs set out in Art. 86, see below). Similarly, there is no reason why the Prime Minister should not be required to keep the President informed on matters of special importance (the second sentence of Art. 101 (1) that establishes this procedure is abrogated). The Head of State should not be deprived of the right to obtain information from the Prime Minister, especially in the light of Art. 77, which defines the President's role in the state as the person representing the state and the guarantor of national sovereignty, independence, unity as well as the nation's territorial integrity.

16. The President will also lose his right to initiate legislation (Art. 73) and the revision of the Constitution (Art. 141(1)). The Government, in turn, has obtained the substantially broader right to influence the parliamentary procedure. The new section 3 of article 74 specifies these rights (see below, paragraphs 22, 23 and 24).

17. The President, however, will retain some important powers, in addition to that of designating the candidate for the office of the Prime Minister. These powers include the dissolution of the Parliament in cases defined in Art. 85 and in Art. 78(6). The President's right to dissolve the Parliament does not in itself contradict the basic line chosen in the amendments. Even in a predominantly parliamentary system, there is a need to provide for a way to solve situations of political deadlock, related to, e.g. the formation of the Government. As the Constitutional Court has, according to Art. 135, paragraph 1 f), to ascertain the circumstances justifying the dissolution of the Parliament, the scope for the President's independent political discretion is quite limited. This regards even the situation, where new legislation has been deadlocked for three consecutive months and which also constitutes a reason for the dissolution of the Parliament.

18. According to the Law of 5 July, as amended on 21 July the President will retain the right to take part in the negotiation of international treaties. In most countries with a

parliamentary form of government this is essentially a governmental task and therefore it does not seem to fit into the role of the President as revised by the Law in question. There can be no objection to the President concluding treaties in the name of the Republic of Moldova, or submitting the treaties to Parliament for ratification (provided he has no discretion in the matter). Similarly, there can be no objection to the President accrediting diplomatic representatives.

19. According to the Law, the President will also in the future be the Commander-in-Chief of the armed forces (Art. 87). This role can be justified, at least so long as it is a formal power only and does not carry with it executive responsibility.

20. On the whole, the powers, which the President will have in the future, do not seem to cause problems for the basic line adopted in the amendments and aiming at the strengthening of the parliamentary traits of the constitutional system. The President will mainly figure as a *pouvoir neutre*, to be resorted to in situations of political and/or constitutional deadlock. However, there remains one right, which - perhaps in addition to the President's role in foreign and defence policy - can give the President the possibility to act as an independent political actor, namely the right to call a referendum on matters of national interest (Art. 88, paragraph f).

21. In the formation of the Government, the President designates the candidate for the office of the Prime Minister only after having consulted the groups represented in the Parliament (Art. 98(1)). This will, most certainly, strengthen the government by providing support of the parliamentary majority. At the same time, the President will lose to the Government the right to appoint two judges to the Constitutional Court (Art. 136(2)).

- *Provisions strengthening the executive and defining its relations with the Parliament.*

22. It has been already mentioned in paragraph 16 of this report that the Government acquires a possibility to influence the legislative procedure. The purpose of enhancing the possibilities of the executive power for effective political leadership is, first of all, reflected in the new provisions concerning the use of legislative power. Thus, the Government can establish an order of priority for the examination of bills in the Parliament and also require an urgent procedure (Art. 74(3)). It is difficult to deduce from the constitutional wording how one should understand "*le mode etablie par le Gouvernement*" (the course established by the Government). However, it is manifest that the Parliament has the autonomous right to establish its procedures in a system of the division of powers. The power held by the Government cannot therefore overrule this right of the Parliament.

23. Article 106^{1} that establishes the procedure for engaging the responsibility of the Government, which is inspired by the French model, is conform to democratic standards. It also corresponds to the proposal made in the draft of the Joint Committee.

24. According to Art. 106^{2} the Parliament can also, on the proposal of the Government, adopt a law delegating legislative powers for the purpose of implementing the programme of the Government. The duty to publish delegated legislative instruments is required, but there could be doubts if there is sufficient opportunity for public participation in the making of regulations or sufficient opportunity for the Parliament to be aware of them, or to be able to challenge or amend them.

25. The draft of the Joint Committee gives a more detailed procedure for delegation of powers than the adopted Law. It establishes a mechanism where the Parliament keeps control over the legislative procedure and can intervene at any time during the duration of the powers of the Government to issue by-laws and therefore gives additional guarantees against the misuse of this power by the executive. This control by the Parliament is of great importance as many democratic institutions and customs are in the process of their establishment in post communist countries. It is clear that the basic principle underlying this provision does not elicit any doubts from the legal point of view or represent a threat in most democracies. However, for any society in transition risks of abuse of power should be carefully considered and where possible additional guarantees should be provided in order to prevent them. It should therefore be considered that Article 106² can be revised to correspond to the proposals of the Joint Committee.

26. According to the adopted law legislative initiatives or amendments entailing budgetary consequences can be adopted by the Parliament only after the Government has approved these consequences (Art. 131(4)). This is a very important provision. The Government is accountable for the state's economic policy. The introduction of amendment to the budget by members of Parliament without the Government's acceptance might lead to the collapse of the state's economic policy.

27. According to the new Art. 136 (2), the Government has the right to nominate two judges of the Constitutional Court. Under the system established by the Constitution of 1994, the President's right to nominate two judges was of a different nature because his legitimacy as Head of State was based on his election through direct universal elections. Under the current system the nomination of two judges by the Government risks to compromise the principle of judicial independence.

III. Conclusions.

28. In general, the adopted law on constitutional amendments raises no major problems in the light of modern democratic constitutional standards. The balance of powers is preserved and the aim of strengthening the Government initially set forth by Moldovan authorities is achieved. However, the Venice Commission hopes that these changes will provide a certain constitutional stability. Powers cannot be shifted from one power to another and the Constitution amended in conjunction with every change in the political situation in the country or after a constitution of a new parliamentary majority. The established system has great potential to exploit in creating and reinforcing a genuine and efficient democracy in the country.

29. The constitutional amendments adopted by the Parliament include some of the proposals of the Joint Committee, relating to e.g., the strengthening of the role of the Government in the use of legislative power and the committal of responsibility by the Government before the Parliament. However, there are also differences, which cannot in all cases be explained by the basic line underlying the amendments. Thus, the proposals of the Joint Committee on the nomination of the Government (Art. 82) and on the constructive vote of no-confidence (Art. 106) could have been included in the amendments without contradicting their general aims. As set out above, the Joint Committee proposals in the delegating of legislative powers to the government are more precise. Complementing provisions on referendums, which the Joint Committee included in its proposal for Art 75, are needed even after the adoption of the examined Law of 5 July. The proposals of the Joint Committee concerning the limits of constitutional revision (Art. 142), the law on

constitutional revision (Art. 143) and the promulgation of the laws amending the Constitution (Art. 93(3)) have also retained their pertinence.

30. The Venice Commission hopes that if the Constitutional Court of Moldova gives a positive opinion on the draft of the Joint Committee, the Parliament will consider some of the proposals made in this text. As has been already mentioned earlier their content is not only compatible with the logic of the established parliamentary system of government, but can also render co-operation between different powers more efficient.