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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DRAFT LAW**  
**ON MODIFICATION AND AMENDMENT**  
**TO THE CONSTITUTION**  
**OF THE REPUBLIC OF MOLDOVA**

**Comments by**  
**Mr J. HAMILTON (Member, Ireland)**

1. The opinion of the Venice Commission has been sought in relation to a draft law on modification and amendment to the Constitution of the Republic of Moldova in a letter from the Vice-President of the Parliament of Moldova to the Secretary of the Commission dated 24 May 2000.
2. The proposed amendments relate to parliamentary immunity, the organization of courts of law, the status of and removal of judges, the composition and powers of the Higher Magistrates Council, and the status and powers of the ombudsman.

### **Parliamentary Immunity**

3. The existing provisions concerning immunity for members of Parliament are contained in Articles 70 and 71 of the Constitution which are as follows:

#### **“Article 70**

##### **Incompatibilities and Immunities**

- (1) The quality and rights ascribed to members of Parliament are incompatible with the holding of another remunerated position.
- (2) Other possible incompatibilities shall be established by organic law.
- (3) Except in cases of flagrant infringement of law members of Parliament may not be detained for questioning, put under arrest, searched or put on trial without Parliament’s assent, after prior hearing of the member in question.

#### **Article 71**

##### **Independence of Opinion**

Members of Parliament may not be prosecuted or tried by law for their votes or opinions expressed in the exercise of their mandate.”

4. The proposed amendments would delete the words “and Immunities” from the title of Article 70, would delete paragraph (3) of Article 70, and would insert the word “political” before “opinions” in Article 71.
5. The effect of these changes would be to delete the constitutional guarantee of parliamentary immunity under which members of Parliament may not be detained for questioning, put under arrest, searched or put on trial without the assent of Parliament after first hearing the member of Parliament.
6. The background to this proposal would appear to be the current situation of political crisis in Moldova which has been described in some detail in the Council of Europe’s Report of 23 April 2002 on the functioning of democratic institutions in Moldova (Doc. 9418). This crisis has involved “almost daily” rallies in the capital, Chisinau, organised by the Christian Democrat People’s Party, which are “vigorously anti-communist and nationalist in tone” and are considered by the authorities to be illegal, contrary to public order and a threat to public safety. This has led to a Government response which the Council of Europe’s rapporteurs considered “manifestly disproportionate” and which

included the suspension of the CDPP for one month in January 2002. The Parliament has on two separate occasions voted to lift the parliamentary immunity of a number of deputies from the CDPP.

7. The Venice Commission, in its opinion of 31 March 2000 on the Constitutional Referendum in Ukraine, emphasized the importance of the principle of parliamentary immunity which that referendum proposal had sought to limit. The Commission described parliamentary immunity as “an important safeguard for the independence of Parliament. Parliamentary immunity is an achievement of the 19<sup>th</sup> century, and the independence it is designed to safeguard still is pertinent, particularly in a new democracy.”
8. These observations hold equally true in respect of Moldova. If the present proposal is accepted it will represent a serious diminution in the independence of Parliament and its members. Furthermore, the existing constitutional provision does not confer an absolute immunity, but one which is qualified and may be lifted, and which indeed has been lifted on a number of occasions. Nevertheless, the necessity to seek parliamentary approval to lift immunity, even in a situation where the ruling Communist Party has an overall majority, would appear capable of providing some safeguard for the independence of members of Parliament, since, according to the Council of Europe’s report, the Parliament, when asked in March 2002 to lift the immunity of eight opposition members, agreed only to do so in the case of two, found the evidence insufficient to lift immunity in three other cases, and deferred consideration of the remaining three. (Doc. 9418, paras 35 – 41). It further appears from the report that the current arrangements are to some extent subject to supervision and control by the courts. It remains to be seen whether there would be any continuing role for the courts if the amendment which is now proposed were accepted.
9. It is not clear what is the intention behind the proposal to add the word “political” in Article 71. The existing provision seems intended to safeguard the right to freedom of expression within Parliament – the use of the term “expressed in the exercise of their mandate” would appear to protect parliamentary utterances as distinct from what is said outside parliament. It is a fundamental attribute of the independence of Parliament that members of Parliament should not be answerable to any outside body, even a court of law, for what is said there. For this reason, I think that any attempt to qualify a member’s freedom to express opinions in Parliament or to subject it to possible criminal sanctions would be a step backward from democratic principles.

#### The organization of courts of law

10. The existing Article 115 of the Constitution deals with courts of law and provides as follows:-
  - (1) Justice shall be administered by the Supreme Court of Justice, the Court of Appeal, by tribunals and the courts of law.
  - (2) To hear certain categories of cases special courts may be set up under the law.
  - (3) It is forbidden to set up courts of exception.

- (4) The structure of the courts of law, their areas of competence and the corresponding judicial procedures shall be established by organic law.

11. It is proposed to replace paragraph (1) of Article 115 with the following:-

“Justice shall be administered by the Supreme Court of Justice and courts of law of different levels.”

12. Constitutions vary considerably in the amount of detail they contain regarding the judicial system. It is, however, usual for a constitution to set out in general terms the structure and jurisdiction of at least the most important courts, leaving the detail to be filled in by legislation. Apart from the Constitutional Court, which is the subject of a separate chapter in the Constitution, Title V, the existing judicial system of Moldova has four levels of court, only two of which, the Supreme Court of Justice and the Court of Appeal, are referred to in the Constitution.
13. It is now intended to reduce the number of levels of court from four to three, through the abolition of the Court of Appeal, and the proposal is designed to facilitate this. Three levels of court seem appropriate in the circumstances of Moldova and I see no reason to object to such a reform. However, the text of Article 115 will then say very little about the actual organization of courts. The only court with a constitutional basis will be the Supreme Court of Justice. It would seem desirable, for example, that the Article could set out in general terms what the different levels of court should be and what sort of jurisdiction each would have, so that the system of courts in Moldova would have a constitutional basis.

#### The Status of and the Appointment and Removal of Judges

14. The existing provisions on the status of judges are in Article 116 of the Constitution which provides as follows:
  - (1) Judges sitting in the courts of law are independent, impartial and irremovable under the law.
  - (2) The judges of the courts of law are appointed by the President of the Republic of Moldova following the proposal submitted by the Higher Council of Magistrates. Judges who passed the judicature entry test are appointed in their position for an initial term of 5 years. On the expiry of the 5 year term the judges shall be appointed for a term of office that expires when they reach the age limit.
  - (3) The President and the Judges of the High Court of Justice shall be appointed by the Parliament following a proposal submitted by the Higher Council of Magistrates. They must possess previous work experience in the courts of law of no less than 15 years.
  - (4) Judges may be promoted or transferred at their own consent only.
  - (5) Judges may be punished as provided for under the rule of law.

- (6) The office of judge is incompatible with holding any other public or private remunerated position, except in the area of teaching or scientific research.

15. It is proposed to replace paragraphs (2), (3) and (4) with the following provisions:

- (3) “Judges of the courts of law are appointed, advanced in position, transferred and removed by the Parliament of the Republic of Moldova according to the law, following the proposal submitted by the Higher Magistrates’ Council.
- (4) Age limit for judge activity is established by law.
- (5) Chairmen and deputy chairmen of the courts of law are appointed by the Parliament at the Higher Magistrates’ Council proposal, for four year term of office.”

16. The effect of the proposed changes appears to be as follows:

- (2) Appointment of judges will now be a matter for the Parliament rather than the President, but still following the proposal of the Higher Magistrates’ Council. Since Moldova is a parliamentary rather than a presidential republic, it is not clear what difference this will mean in practice.
- (2) The Parliament will now have a role in the advancement in position, transfer and removal of judges. It is not, however, clear from the text what exactly that role is. The provision of Article 116 (1) whereby judges are “irremovable under the law” remains, so on the face of it there appears to be a contradiction.
- (3) The respective roles of the Parliament and the Higher Magistrates Council are not clear from the constitutional text. Presumably this will be dealt with in an organic law. The council according to Article 123, “performs the appointments, transfer, remove, promotion of judges, as well as the disciplinary actions against them”. Does this mean the Parliament’s role in these matters is purely formal or can it disagree with or overrule the Council? These matters should be regulated in the Constitution.
- (4) The provisions relating to the necessary qualification of High Court judges are being removed. This will now be regulated by law. Again, I think it would be preferable that this remain a matter of constitutional law.
- (5) The provision that judges may be promoted or transferred at their own consent only is being removed. The existing provision is a safeguard for judicial independence and its removal would be a retrograde step.

17. On the whole, the proposed amendments do not clarify the uncertainties in the existing text, which are many. The tendency of the amendments again represents a shift away from regulation in the Constitution towards regulation by law. It would be preferable that matters of such fundamental importance be clearly provided for in the Constitution and be subject to the control of the Constitutional Court.

The Higher Magistrates' Council

18. Articles 122 and 123 at present provide as follows:

**“Article 122  
Composition**

- (1) The Higher Magistrates' Council is composed of 11 magistrates whose mandate is valid for 5 years.
- (2) The following belong by right to the Higher Magistrates' Court (sic) the Minister of Justice, the President of the Supreme Court of Justice, the President of the Court of Appeal, the President of the Court of Business Audit, the Prosecutor General.
- (3) Furthermore, the reunited colleges of the Supreme Court of Justice select by secret ballot three more magistrates, and another three are selected by Parliament from amongst accredited university professors.

**Article 123  
Powers**

The Higher Magistrates' Council in accordance with regulations established in the organization of the judiciary performs the appointments, transfers, promotions of judges, as well as the disciplinary actions against them.

19. The proposal would replace the two Articles with the following text:-

**“Article 122  
Composition**

- (1) The Higher Magistrates' Council is composed of magistrates and titular professors whose mandate is valid for 4 years.
- (2) The following belongs by right to the Higher Magistrates' Council: the Chairman of the Supreme Court of Justice, the Minister of Justice and the Prosecutor General.

**Article 123  
Powers**

- (1) The Higher Magistrates' Council performs the appointments, transfer, remove, promotion of judges, as well as the disciplinary actions against them.
- (2) The organization and functioning of the Higher Magistrates' Council is established by law.”

20. The Higher Magistrates' Council, as already seen in the discussion above concerning the status and appointment and removal of judges, is a key institution, even though the

Constitution does not specify as clearly as it might its precise powers vis-à-vis other organs of government.

21. The changes proposed appear to have the following effect:
- (1) The total number of members of Council will no longer be specified in the Constitution.
  - (2) The Minister for Justice, President of the Supreme Court and Prosecutor General will continue to belong *ex officio* to the Council. The President of the Court of Appeal and the President of the Court of Audit will cease to be *ex officio* members.
  - (3) The provision under which the judges themselves and the Parliament each elect three members is being abolished.
  - (4) The composition of the Council will in future be fixed by law. Apart from the three *ex officio* members, the Parliament will be free to provide for any method of appointment of the others, so long as they are magistrates and titular professors, and will be able to fix their numbers.
  - (5) At present, at least six of the 11 members either are or are elected by senior judges. After the reorganization, it will be possible for the Parliament to secure a majority of the Council elected by themselves.
  - (6) The Council will now have functions referring to the removal of judges. There is no reference to removal in the existing Article 123. This provision appears to contradict Article 116 (1) which provides that judges are irremovable under the law.
  - (7) At present, the Council's powers are to be performed "in accordance with regulations established in the organization of the judiciary." Under the proposal, their organization and functioning will be "established by law", i.e., by a law made by the Parliament.
  - (8) An effect of shifting provisions out of the Constitution and leaving them to be dealt with by law is to deprive the Constitutional Court of jurisdiction over them.
22. It seems clear that the changes proposed in relation to the Higher Magistrates Council would represent a decisive shift away from control by the judiciary over its own affairs towards control by Parliament, and thereby constitute a potential threat to judicial independence of a serious nature.

#### Ombudsman

23. The final amendment proposed is to insert a provision relating to the Ombudsman as follows:-

**"Title V/1.  
Ombudsman**

**Article 140/1.**  
**Status and Powers**

- (1) Ombudsman is an independent state institution that contributes to the observance of the basic human rights and freedoms.
  - (2) Ombudsman is elected by ballot based on the majority of votes cast by members.
  - (3) Ombudsman submits to the Parliament an annual report on his activity.
  - (4) The organization, areas of competence and manner of activity exerting of the ombudsman is established by the organic law”.
24. The insertion of a provision in the Constitution dealing with the Ombudsman is to be welcomed. Unfortunately, the provision is silent as to the necessary qualifications for the post, his or her term of Office, removability or powers, leaving all these matters to be regulated by organic law.