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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

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Art. 70

Content of the proposed reform:

a) From the article title the words " and immunities" are excluded;
b) Paragraph (3) is excluded

Comments:

The two amending clauses concerning the article title, as well as suppressing paragraph 3 have the same objective: the elimination of the immunities of members of Parliament, vis-à-vis the executive, as well as vis-à-vis the judicial powers.

As such, the proposed reform must be evaluated negatively. Parliamentary immunities are not personal privileges to benefit the members of Parliament, but rather guarantees of their independence and their ability to perform their representative functions, without encroachment or hindrance from other authorities of the State.

Certainly, immunities vis-à-vis the judicial powers may be, and have been subject to criticism, and they have been interpreted in a restrictive way by Constitutional Courts. However, in new democracies, in the initial stages of constitutional development, the presence of such immunities must be considered very advisable, in order to avoid undue interference by the judicial organs in parliamentary affairs, particularly when the independence of the judiciary is still being consolidated.

Immunities vis-à-vis the executive power, referring to detention, arrest, questioning, seizures, or any other interference of the police or security forces in the personal freedom of members of parliament (apart from cases of flagrancy) are a sine qua non requisite to guarantee the independence of the representatives of the people in the performance of their functions.

The proposed reform radically suppresses both types of parliamentary prerogatives, leaving the members of parliament potentially subject to undue prosecution before the courts as well as to harassment by executive agents. It goes against the established constitutional practice of parliamentary democracies, and it seems particularly dangerous in a new democracy.

Art. 71

Content of the proposed reform:

The inviolability of members of parliament for their expressions is reduced to "political" opinions

Comments

The result of the proposed reform would be to reduce the scope of the inviolability (immunity) of members of parliament concerning the opinions expressed in the exercise of their mandate. Such immunity would be reduced to opinions of a "political" nature.

It must be taken into account that parliamentary prerogatives are only justified as guarantees of the independence of the parliamentary representatives; as a result, these prerogatives must

not be considered as personal, unlimited privileges. Concerning the expression of opinions by members of Parliament, the protection of their independence cannot cover those expressions unrelated to their representative functions, which could be considered as detrimental or harmful to public order or private interests (i.e., slander or personal insults directed at individuals). Accordingly, in some Constitutions, certain limits have been imposed on the immunity of members of parliament with regard to comments made during the exercise of their mandates (for instance, in art. 46.1 of the German Fundamental Law).

However, the terms of the proposed reform must be considered too vague, and thus conducive to legal uncertainty as to the actual extension of the freedom of expression of the members of parliament. The meaning of the term "political" is very imprecise; furthermore, very often, in order to perform their duties, members of parliament must refer to non-political issues. It would therefore be advisable to rephrase the amendment, providing members of parliament with immunity for those opinions expressed in the exercise of their mandates, which refer to the performance of the representatives' functions.

Art. 115

Content of the proposed reform

The mention to the Court of Appeals is suppressed.

Comments

No objections raised. It seems advisable to leave it to the legislator to determine the structure of the Court system. The new proposed version allows greater flexibility in designing the Courts' hierarchy.

Art. 116

Content of the proposed reform (general overview)

The appointment of judges, as well as of members of the High Court of Justice is transferred from the President of the Republic to Parliament (paragraphs 2 and 4).
Several constitutional mandates concerning appointment and guarantee of tenure of judges are suppressed (paragraph 2)
The term of the Chairpersons and deputy chairpersons of the courts of law is fixed at four years.

Comments

As long as the appointment of judges derives from a proposal submitted by the Higher Council of Magistrates, it seems of no particular importance whether the formal appointment belongs to Parliament or to the President of the Republic. (Although it may be said that formal appointment by the President of the Republic confers an aura of impartiality lacking in the appointment by vote of the members of Parliament.)

However, stronger criticism must be directed to the proposed reforms contained in the new paragraphs 2 and 4.

According to new paragraph 2, several constitutional provisions guaranteeing the professional capacity and impartiality of judges have been eliminated. Concerning the professional ability of judges, among others, the need for an entry exam prior to the proposal by the Higher Council has been eliminated. In relation to the impartiality of judges a negative aspect of the proposed reform, which should be underscored, is the fact that the strongly guaranteed tenure of judges (appointment until the legal age limit) has been eliminated. Likewise the appointement of chairpersons and deputy chairpersons has been reduced to a four-year term. Additionally, the provision that "judges may be promoted or transferred at their own consent" has been deleted from the constitutional text.

Certainly, although the elimination from the Constitution of requisites for determining the professional capacity of judges (initial exam, initial appointment for a period of five years, the requisite of 15 years of experience to be appointed judge of the High Court) will undoubtedly have a negative effect on the quality of justice, it cannot be considered as contrary *per se* to the principles of the rule of law. In contrast, the elimination of the guarantees of independence of the judiciary related to tenure and irremovability, such as they are now present in the Constitution of Moldova, as well as in most of the European Constitutions, must be considered as a serious threat to the rule of law. Tenure and irremovability of judges are, and must be, commonly considered as the ultimate guarantees of the independence of the Courts, preventing the other powers of the State from removing or transferring (or threatening to do so) those judges which are considered hostile or who refuse to yield external pressure or instructions with regard to concerning cases under their jurisdiction.

Art. 122

Content of the proposed reform

The former three paragraphs of the article are reduced to two. The constitutional reference to the number of members of the Higher Magistrates Council has been eliminated. The mandate of the members of the Higher Magistrates Council has been reduced from five to four years. The constitutional reference to the election of the members of the Council by judicial and parliamentary authorities has been eliminated. The members of the Council by right have been reduced to the Minister of Justice, the General Prosecutor and the Chairman of the Supreme Court.

Comments

Two aspects of the proposed reform must be evaluated negatively:

a) The elimination of any reference in the Constitution to the number of members of the Council and to the way in which they are selected means the legislator will free to choose any system of selection. According to the present constitutional regulation, three members are elected by the Supreme Court, and three by Parliament; of the remaining five members, three are the Presidents of the High Courts (Supreme Court, Court of Appeals and Court of Business Audit) plus the Minister of Justice and the

General Prosecutor. In the new proposed version, the composition of the Council would be open to the discretion of Parliament, even one allowing for the possibility of influencing the Council, on the part of social or political powers. Furthermore, the lack of constitutional constraints would mean that the parliamentary majority could change the system of selection at will at any time.

b) In other respects, the reduction of the number of *ex officio* judicial members of the Council, together with the "deconstitutionalisation" of this organ described above, contributes to a negative evaluation of the proposal, since it reduces the Council's appearance of impartiality.

Art. 123

The proposed reform of article 123 does not present any special problem from the point of view of respect for the rule of law. In any case, the introduction of a new explicit power of the Council, the power to remove judges, which is not expressly included in the present text of the Constitution, should be underscored. This is not a complete innovation, however, since this power could probably be logically derived from the now existing powers of appointment and disciplinary action. However, the condition for the removal of judges as exception from Article 116.1 should be set forth explicitely in the text of the Constitution.

Art. 140

The introduction of the Ombudsman, not previously contemplated in the Constitution, must be considered as a positive part of the proposed constitutional reform.