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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

REPUBLIC OF MOLDOVA

DRAFT OPINION

ON THE PROPOSAL BY THE PRESIDENT OF THE REPUBLIC TO EXPAND THE PRESIDENT'S POWERS TO DISSOLVE PARLIAMENT

on the basis of comments by:

Ms Veronika BÍLKOVÁ (Member, Czech Republic)
Mr Philip DIMITROV (Member, Bulgaria)
Mr Serhiy HOLOVATY (Member, Ukraine)
Mr Kaarlo TUORI (Member, Finland)

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I. Introduction

1. By letter of 14 March 2017, the President of the Republic of Moldova, Mr Igor Dodon, requested the Venice Commission to prepare an opinion on his proposal of 1 March 2017 to amend Article 85 of the Constitution of the Republic of Moldova and to provide the President of the Republic with additional powers to dissolve Parliament (CDL-REF(2017)026).

2. Ms Veronika Bílková (Czech Republic), Mr Philip Dimitrov (Bulgaria), Mr Serhiy Holovaty (Ukraine), and Mr Kaarlo Tuori (Finland) acted as rapporteurs for this opinion.

3. On 18-19 May 2017, a delegation of the Commission, composed of Mr Dimitrov and Mr Holovaty, accompanied by Ms Granata-Menghini and Mr Dikov from the Secretariat, visited Chișinău, and met with State officials and other local stakeholders and experts. The Venice Commission is grateful to the President's office for the excellent organisation of the visit.

4. The present opinion was prepared on the basis of contributions by the rapporteurs and on the basis of translations of the proposal made by the President to Parliament. Inaccuracies may occur in this opinion as a result of incorrect translations.

5. *This opinion was adopted by the Venice Commission at its … Plenary Session (Venice, … 2017).*

II. Background

6. The 1994 Constitution of the Republic of Moldova provided for essentially a semi-presidential regime of government. In 1999 President Lucinschi initiated a consultative constitutional referendum aimed at strengthening the position of the President. The majority of voters supported the proposal;[1] however, Parliament went in the opposite direction and, instead, passed a reform that curbed the President's executive powers. In particular, the President lost the power to initiate constitutional amendments; he would not chair the meetings of the cabinet anymore. New Article 78 removed the direct election of the President via popular vote, and replaced it with an indirect election of the President by Parliament with 3/5 vote; in case when even repeated elections failed to secure the election of a president, Parliament was to be dissolved.

7. The new system provided stability as long as the President belonged to the same party which controlled the qualified majority in Parliament; however, after 2009, due to the repeated inability of Parliament to reach a 3/5 vote to elect a President, dissolutions became recurrent. In an *amicus curiae* opinion prepared at the request of the Constitutional Court of the Republic of Moldova, the Venice Commission recognised that the then existing system "open[ed] the way to continued constitutional crisis".[2]

8. In March 2016 the Constitutional Court partly reversed the constitutional reform of 2000, re-empowering Moldovan citizens to elect the head of state directly. This ruling however did not reinstate the presidential powers that had been taken away in 2000.[3] Direct presidential elections took place in October and November 2016. President Igor Dodon was elected at the second round.

9. On 1 March 2017, the President drafted a proposal for amendment of the Constitution, expanding the powers of the President of the Republic to dissolve Parliament (see below).

[1] Due to low turn-out the result of the referendum was not formally validated.
[2] CDL-AD(2011)014, *Amicus Curiae* Brief on three Questions Related to Article 78 of the Constitution of the Republic of Moldova, § 38
[3] See http://constcourt.md/ccdocview.php?tip=hotariri&docid=558&l=en

10. Under Article 143 of the Constitution the President has no power to initiate constitutional amendments; this power belongs either to the Government, or to a group of at least 34 MPs, or to 200,000 citizens (see below). President Dodon failed to secure the 34 votes necessary to put his proposal on the agenda of Parliament. Consequently, on 28 March 2017, he issued a decree calling a "consultative referendum", scheduled for September 2017. One of the four questions[4] to be put to the referendum (question number two) is the following: "Would you be in favour of giving the President additional constitutional powers to dissolve Parliament and organise early parliamentary elections?".[5] President Dodon explained to the Venice Commission delegation that, if at the referendum the majority of the voters express the opinion that the President's powers of dissolution should be expanded, he would try again to secure the support of at least 34 MPs in order for constitutional amendments to be initiated in Parliament. The President pledged to take into account the Venice Commission's opinion in the preparation of his possible future proposal.

11. On 3 April 2017, the Liberal Party challenged the presidential decree calling for the referendum before the Constitutional Court. The Constitutional Court has not suspended the decree pending its examination of the case.

III. Analysis

12. The present opinion examines the new grounds for dissolution of Parliament formulated by the President in his proposal of 1 March 2017. It also analyses the procedure that is being followed to further this proposal.

13. To assess the substance of the President's proposal, the Venice Commission will examine several other comparable European constitutional orders. The Commission stresses, as it has previously done, that "each constitution is the result of balancing various powers. If a power is given to one state body, other powers need to be able to effectively control the exercise of this power. The more power an institution has, the tighter control mechanisms need to be constructed. Comparative constitutional law cannot be reduced to identifying the existence of a provision the constitution of another country to justify its democratic credentials in the Constitution of one's own country. Each constitution is a complex array of checks and balances and each provision needs to be examined in view of its merits for the balance of powers as a whole."[6]

A. Substance of the proposal

1. General remarks

14. Article 85 of the Constitution in force reads as follows:

> "1. In the event of the impossibility to form the Government or of blocking up the procedure of adopting the laws within 3 months, the President of the Republic of

[4] The other questions concern various topics unrelated to the dissolution of Parliament: the reduction of the number of MPs from 101 to 71, public guarantees for debts accrued by private banks as a result of financial machinations, and the introduction of the "History of Moldova" course in the school curriculum instead of the "History of Romanians".

[5] The text in Russian (official translation) is formulated as follows: "*Поддерживаете ли Вы предоставление Президенту Республики Молдова дополнительных конституционных прав по роспуску нынешнего Парламента и организации досрочных парламентских выборов?*" At the meeting with the President the delegates of the Commission learned that the reference to the "current Parliament" in the Russian translation of the Decree is a mistake, and that the original text in Romanian speaks of the dissolution of Parliament in general, and not of the "current" Parliament.

[6] CDL-AD(2017)005, Turkey - Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017, § 45

Moldova, following the consultations of the parliamentary fractions, may dissolve the Parliament.
2. The Parliament may be dissolved, if it has not passed the vote of confidence for setting up of the new Government within the term of 45 days from the first presidential request and only after the decline of at least two requests of investiture.
3. The Parliament may be dissolved only once in the course of a year."

15. In addition to these grounds for dissolution of Parliament, the proposal introduces the following new grounds (in new § 2-1):

(a) dissolution after consultations with parliamentary factions;
(b) dissolution in case where Parliament fails to implement, within 12 months, the results of a consultative referendum;
(c) dissolution in case where a referendum on the dismissal of the President from office fails;
(d) dissolution in case where Parliament fails to adopt the budget within two months.

16. Furthermore, proposed new Article 85-1 would enable the President of the Republic to call a referendum on dissolution of Parliament. If the proposal to dissolve Parliament fails, the President is automatically removed from his position and a new President should be elected.

17. As follows from the information note[7] and from the exchanges the rapporteurs had with the President's office in Chișinău, the President's proposal is based on several premises. The first is that the population is generally favourable to the increase of powers of the President. The second is that the increase of the dissolution powers logically followed from the 2016 decision by the Constitutional Court which reintroduced the direct election of the President by the population (even though the Constitutional Court has never mentioned it). Finally, the third is that the involvement of the Constitutional Court in the process of dissolution represents a sufficient safeguard against possible abuses.

18. The Venice Commission underlines at the outset that whether or not there is currently popular support for the idea of having a more powerful president is a political question that does not fall under the mandate of the Commission.[8] It is important to ensure, however, that any reform going in this direction should be coherent with the logic of the Constitution and with the best practices of other European democracies. The powers of the Head of State to dissolve Parliament must be carefully examined with due regard to the overall constitutional design of the State.[9]

19. The Venice Commission stresses that through the 2000 reform, the Republic of Moldova has become a parliamentary republic, where the President, while being the Head of the State, is not, at the same time, the head of the executive, and has only few executive competencies.[10]

[7] See CDL-REF(2017)026

[8] This support certainly existed in 1999: see CDL-INF(2001)3, Co-operation between the Venice Commission and the Republic of Moldova on constitutional reform, Interim report on the constitutional reform in the Republic of Moldova, § 21.

[9] See, for example, CDL-AD(2016)029, § 59

[10] The President has the right of legislative initiative (Article 73), and may initiate referendums (Article 75), except those regarding constitutional amendments. He is *ex officio* the Commander-in-Chief of the armed forces (Article 87), but his discretion in this sphere is limited by the need to have a counter-signature of the Prime-Minister. The President may temporarily suspend acts of Government which he deems unconstitutional until the case is decided by the Constitutional Court (Article 88 p. (i)); he designates a candidate for the office of Prime-Minister, but seemingly only if that candidate enjoys the confidence of the majority in Parliament (Article 98); he approves the appointment of ministers in the case of the vacancy of office or reshuffling of the Cabinet, but only on proposal of the Prime-Minister (Article 98 § 6), he has a right of suspensive veto on legislation, which is easy to

His role should therefore be distinguished from the position of prime-ministers in traditional parliamentary regimes (like in the UK), or from the position of executive presidents in semi-presidential regimes (like France), let alone super-presidential regimes (like Russia). Most of the interlocutors the rapporteurs met in Chișinău, including the President, expressed their adherence to the model of a parliamentary republic. Hence, any new powers given to the President should be compatible with this model. If a shift towards a semi-presidential or presidential regime were instead wished for, a thorough revision of the Constitution, establishing appropriate checks and balances, would be necessary through the procedure of constitutional amendment foreseen under the Constitution.

20. In the majority of parliamentary regimes, the Head of State plays a role of arbiter, or *pouvoir neutre*, detached from party politics. These are not empty words: while no one can prevent the Head of State from having his or her own political views and sympathies, his or her mandate is limited. The main functions of the Head of State within this model are to represent the State in external relations, to participate in the appointment of certain key State officials, to guarantee the functioning of the state institutions, but not to define the actual political direction of the country – this is the role of Parliament and of the Executive. The President is an important element of the political system, but is not partisan. The dissolution powers of the President in a parliamentary regime are defined by the President's neutral position: in times of institutional crisis, the President assumes the important function of dissolving Parliament in order to overcome the stalemate by appealing to the people and to reinstate the smooth functioning of the constitutional machinery.

21. Dissolution of Parliament can be found in virtually all European parliamentary constitutions. The concrete constitutional designs, however, differ in function of who the holder of the dissolution powers is (the head of state, the head of the government, Parliament itself, the people, etc.) and how much discretion is granted to this holder. From the viewpoint of the legislative technique, there are two options: the Constitution may contain either a general dissolution clause (for example, Article 88 of the Constitution of Italy) or a list of specific cases (amounting to a crisis in the functioning of the democratic institutions) in which dissolution is possible in order to prevent a political stalemate: a prolonged absence of a Government, non-adoption of a budget, lasting absence of quorum in Parliament, etc.

22. The current Constitution of the Republic of Moldova follows the second option and provides for semi-automatic dissolution powers, in the following specific cases: prolonged inability to pass bills,[11] and impossibility to form a Government or lack of confidence in the Government.

2. Article 85, new § 2-1 point (a)

23. By contrast, by virtue of new § 2 point (a) of Article 85, the President of the Republic of Moldova would be empowered to dissolve Parliament "following the consultations of parliamentary factions". This provision would thus grant the President, in addition to the existing specific powers of dissolution, a general dissolution power, limited only by the procedural obligation to consult parliamentary factions.

24. The President's proposal thus combines two legislative techniques which are otherwise virtually never used cumulatively, those of the discretionary dissolution power (new § 2-1 point

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overcome (Article 93). Finally, he has some other prerogatives typical for the heads of the state (attribution of ranks and decorations, accreditation of ambassadors, right of pardon, etc.). In sum, the President is not the head of the executive and is not responsible for the Government; the Government is answerable to Parliament.

[11] The Venice Commission understands that the expression "blocking up the procedure of adopting the laws within 3 months" in current Article 85 does not mean the rejection of a bill introduced by the President (which would be a dangerous interpretation) but the inability of Parliament for whatever reason to examine those bills (for example, due to the lack of quorum).

(a)) and the right to dissolve in specific cases (existing Article 85 of the Constitution and proposed subsequent points of new § 2-1, plus new Article 85-1). The provision that grants the President a discretionary dissolution power makes the other grounds listed in the proposal entirely superfluous. It could be even taken to mean that the general power of dissolution is not linked to the times of institutional crisis (which are covered by the specific cases of dissolution) but adds the possibility for the President to dissolve Parliament for purely political reasons, for example if s/he disagrees with a policy choice made by Parliament and wants new elections. Such interpretation of the President's power to dissolve Parliament changes the neutral role of the President and turns him into a political player. This is not compatible with the logic of a parliamentary regime.

25. Even outside the case of combination of general clause and specific cases of dissolution, the Venice Commission is of the view that discretional dissolution powers in the hands of the Head of State may be dangerous in countries lacking an established democratic tradition and where it has not been part of the traditional legal order (as is the case in several constitutional monarchies such as Liechtenstein, Luxembourg, Monaco or the Netherlands) and where it is not subject to certain restrictions (as is the case in Denmark or Ireland),[12] precisely because it risks being interpreted as a tool of party politics. The Venice Commission has expressed criticism of broad discretionary dissolution powers even in relation to a semi-presidential regime: *"as the deputies of the Verkhovna Rada get their mandate directly from the voters for a certain period of time, there should be compelling reasons for a pre-term termination. The suggested Article 95 (1)* [which was similar to the draft article 85 § 2 (a)] *would lead to dissolutions also in situations where dissolution could be avoided".*[13]

26. Regarding the argument that popular mandate necessarily calls for broader dissolution powers, the Venice Commission notes that the election of the President by popular vote does not require turning the President into a political counter-player of Parliament. It is true that election by popular vote tends to enhance the position of the President, but there are multiple examples of constitutional regimes where a popularly elected President still plays the role of a *pouvoir neutre* and does not enjoy wide powers, and where the necessary checks and balances are provided by parliamentarism. These include Austria,[14] Ireland or Finland, for example. (Reference to French example in the information note[15] is misdirected: the French president indeed enjoys discretionary dissolution powers, but the French system is semi-presidential and not parliamentary.)

27. Even more relevant in the context of the Republic of Moldova are those new parliamentary democracies which have more recently joined the EU and have a directly elected President with limited executive prerogatives[16] and some additional ones in moments of a parliamentary

[12] See CDL-EL(2007)023, pp. 2-3.

[13] Although Ukraine is a semi-presidential, not a parliamentary regime: see CDL-AD(2008)015, Opinion on the Draft Constitution of Ukraine, § 45. See also CDL-AD(2009)030, Opinion on a Draft Constitutional Law on the Amendments to the Constitution of Georgia, §§ 17 et seq.

[14] In Austria, although the power of the President to dissolve Parliament may look like a discretionary one (see Article 29), it is a matter of constitutional tradition that such decisions are taken on the (mandatory) advice of the Prime-Minister. More generally, "reliance on mostly unwritten conventional rules can be found in several well-established and stable parliamentary democracies, such as Australia, Canada, Denmark and the Netherlands. A literal textual reading of the constitutions of these countries would appear to grant nearly unlimited powers of parliamentary dissolution to the head of state […], although, in practice, the prime minister advises on the exercise of the dissolution power, and the prime minister's advice is normally (with noted exceptions) binding." See International IDEA, "Dissolution of Parliament" (by Elliot W. Bulmer), 30 May 2016, pp. 10 - 11, at http://www.idea.int/publications/catalogue/dissolution-parliament

[15] CDL-REF(2017)026, page 3

[16] Indeed, the executive prerogatives of the President in these countries vary, but they remain quite limited. Even when the President can take part in the Government's sessions (ex: Czech Republic,

crisis, namely Bulgaria, Czech Republic, Lithuania, Poland, Romania, Slovakia and Slovenia. In all the above countries the President's dissolution powers are limited to a number of specific situations and are thus not discretionary but semi-automatic. All above constitutions have a closed list of specific situations for dissolution; these situations relate to the inability of Parliament to form a Government, to a vote of non-confidence in the Government (or non-adoption of a law to which the Government attached confidence or a program of the Government), or to the inability of Parliament to exercise law-making functions (absence of quorum, long adjournments, failure to adopt a budget). See, in particular, the Constitution of Bulgaria, Article 99; the Constitution of the Czech Republic, Article 35 para. 1; the Constitution of Lithuania, Article 58; the Constitution of Poland, Article 98 para. 4, Article 155 para. 2; the Constitution of Romania, Article 89; the Constitution of Slovakia, Article 102 and Article 106 (the latter concerns the failure to recall the President at the plebiscite – on this see below); the Constitution of Slovenia, Article 111 and 117. This is a constitutional pattern that has been adopted by more and more (first four, and now one by one seven altogether) of the countries that in the past quarter of a century had [re]established democratic governments, which gives additional grounds to consider it a recommendable practice. In sum, *popular mandate alone* does not transform a Head of the State into a head of the executive, and does not require conferring on him discretionary dissolution powers.

28. As regards the protective role of the Constitutional Court, the Venice Commission notes that indeed, under Article 135 § 1 (f) of the Constitution the Constitutional Court has the power to "ascertain the circumstances justifying the dissolution of the Parliament"; however, if the President has full discretion under new § 2-1 (a), the Constitutional Court's role would be limited to checking whether the mandatory consultations with parliamentary factions have taken place. Thus, this provision cannot be seen as an effective safeguard against possible abuses.

29. In sum, the Venice Commission is of the opinion that adding a broad discretionary power of the President to dissolve Parliament (Article 85, new § 2-1 point (a)) is ill-advised and should be reconsidered. The proposed discretionary power of dissolution threatens to pose Parliament and the President against each other and provoke unnecessary constitutional and political conflicts.

3. Article 85, new § 2-1, points (b), (c) and (d)

a. *Point (b) of new § 2-1*

30. The second additional ground for dissolution is introduced by new § 2-1, point (b). Under this provision the President may dissolve Parliament if the latter "fails to implement, within 12 months, the will of people expressed through a consultative referendum". This provision is problematic from several points of view. First of all, it introduces to the Constitution the notion of a "consultative referendum". There is a tension between this provision and current Article 75 § 2 of the Constitution that implies that the results of a republican referendum are binding ("have supreme legal power"). If the Constitution is to provide for a "consultative" referendum, Article 75 should be amended.

Lithuania, Poland) his or her impact on the decision can be only moral. In Lithuania, in the absence of the Prime Minister, if he or she has not nominated a deputy, the President appoints a deputy among the ministers, but for not more than 60 days. In Poland, the President or a certain number of deputies may initiate a procedure for seeking a criminal responsibility from a minister for his or her activities. In Slovakia the President has been empowered since 1999 to dismiss ministers on a proposal from the Prime Minister. However this prerogative is not as significant as it looks: if the Prime Minister does not rely on Parliament, the dismissal of an unwelcome minister by the President would give him or her only a temporary solution. If the parliamentary majority supports the Prime Minister, a possible refusal by the President to remove the unwelcome minister would have only a short-term effect. All the above mentioned data show that in these constitutional systems the executive functions of the President are limited; such functions rather belong mostly to the Prime Minister and his/her Government. This should be taken into account with respect to the guarantees for the division of power.

31. Second, this provision is self-contradicting: if a referendum is "consultative", it should normally have no legal effects. It would be illogic to sanction Parliament by dissolution for the failure to assume a legal obligation that it does not have. Of course, the MPs may, and indeed should, feel compelled to act upon the results of a consultative referendum. However, the natural sanction for non-respecting these results remains a political one, to be expressed by the electorate on the occasions of the following elections.

32. Most importantly, it is unclear who would interpret the results of a "consultative referendum" and decide whether or not Parliament has fully implemented them. The current referendum is a perfect illustration of this: question number two (about the extension of the President's dissolution powers) is so vague that it may be implemented in many different ways. Giving the President the power to decide whether the ensuing action by Parliament fulfils the public's expectations equals to granting him or her very broad discretionary political powers. This is incompatible with the logic of a parliamentary system.

33. For these reasons, the ground for dissolution under point (b) of new § 2-1 is ill-advised too.

b. *Point (c) of new § 2-1 of Article 85, and new Article 85-1*

34. The third additional ground for dissolution concerns situations where "the referendum on the dismissal of President from office ended with a negative result or the Constitutional Court confirmed the non-validity thereof". This provision should be analysed together with new Article 85-1 that makes it possible to dissolve Parliament by means of a referendum initiated by the President.

35. During the rapporteurs' visit to Chișinău, the President's office explained that these provisions are designed to counter-balance the power of Parliament to initiate the dismissal of the President through a referendum. Indeed, the Constitution provides for two ways of removal of the President from office – impeachment for a serious crime (Article 81 § 3 of the Constitution) and removal for "committing serious offenses infringing upon constitutional provisions" (Article 89), the latter requiring a referendum. The wording of Article 89 is not entirely clear; the rapporteurs were explained that this second case of removal might be compared to a sort of a "no confidence" referendum.

36. Such reading of Article 89 is open to doubt, because this provision speaks of the "offences against the Constitution", i.e. identifiable unconstitutional acts (though admittedly not qualified as "crimes"). This is not the same as simply making disputable – but not unconstitutional – policy choices. The President, by contrast, under new Article 85-1 would receive the power to initiate a referendum on dissolution *for any reason*, even where Parliament acted in compliance with the Constitution. Thus, rather than counter-balancing the power of Parliament to seek the removal of the President, Article 85-1 may effectively disturb the balance of powers by further strengthening the powers of the President vis-à-vis Parliament.

37. Even assuming that Article 89 amounts to a "no confidence" referendum, the introduction of a symmetric discretionary counter-power of the President to initiate such referendum in respect of Parliament is not necessarily the right solution to a possible crisis. The Venice Commission has previously stressed that *"[…] referendums are not an appropriate means for solving a short-term political crisis. The referendum risks prolonging the crisis since after a successful referendum new elections will be required. The procedure makes the President an active player in the political power-game and lays the ground for open political controversies between the Verkhovna Rada and the President."*[17]

[17] CDL-AD(2008)015, § 46

38. It is true that "no confidence" referendums may be found in some European constitutions.[18] However, as stressed above, the Venice Commission does not support them.[19] Dissolution of Parliament and recall of the President because of a mere political disagreement between them is pregnant with dangers of repeated referendums and recurrent early elections. It paves the way for a competition between a personality and a collective institution. The reason why such a situation is avoided by most constitutions is that one way or another such a competition for trust can invite demagogical behaviour (which a person can do better than an institution) and creates risks for the institutional system not only on the particular occasion but also in the long run.

39. In sum, instead of giving the President the power to seek dissolution of Parliament through a "no confidence" referendum, it could be envisaged to revise the conditions in which Parliament may suspend the President and call for a recall referendum. The Venice Commission has previously expressed the view that "the lack of specific procedures to implement the recall procedure creates potential for political discretion and confusion between political and legal responsibility of the President".[20] In the case of Romania, the Venice Commission pointed out that the procedures regulating the dismissal of the President "may have been politically motivated rather than based on a sound legal basis".[21] The Venice Commission reiterates that "the absence of specific procedures and of clear legal criteria to recall the President of the Republic of Moldova may pose a risk in that sense. In practice, the recall procedure is a political one, not based on any clear legal criteria, which might be assessed by the Constitutional Court, and it is up to the Parliament to decide on the reasons for it."[22] The Venice Commission has made several recommendations to remedy this problem, and these recommendations are still of relevance. It could also be envisaged to remove the power of Parliament to recall the President. Or, at least, it may be specified that Parliament may seek dismissal of the President through a referendum only where it may be demonstrated that the President is guilty of specific "offences against the Constitution" (which are not at the same time criminal offices and do not therefore fall under the "impeachment" heading), and not merely where the political stance of the President is different from that of a parliamentary majority. It is important to distinguish between legal and political responsibility. The most appropriate moment for the population to express no confidence in the parliamentary majority or in the President is at the next election.

c. *Point (d) of new § 2-1 of Article 85*

40. Finally, according to point (d) of new § 2-1, the President would have the right to dissolve Parliament when it "failed to adopt the Law on the State budget in a period of two months following the beginning of the financial exercise". In a previous opinion, the Venice Commission had "no objection in principle"[23] against such scenario of dissolution, which exists, for example, under the constitutions of Croatia (Article 104), Estonia (Article 119), and Poland (Article 225). However, in another opinion the Commission also noted that "a period of two months may be

[18] For example, Article 102 § 1 (e) of the Slovak Constitution provides that "the President shall dissolve the National Council of the Slovak Republic in the case that after a plebiscite on the recall of the President, the President has not been recalled". See also Article 95.1 of the Romanian Constitution, Articles 14 and 49 of the Latvian Constitution, and Article 11 of the Icelandic Constitution.

[19] The Venice Commission is aware that in Judgment no. 7 of 4 March 2016 the Constitutional Court restored the text of Article 89 of the Constitution, as it was before the reform of 2000, which provided for the removal of the President through referendum. However, constitutionality of this provision does not necessarily mean that it is a desirable mechanism to resolve political crises in the country context.

[20] See CDL-AD(2016)021, Republic of Moldova - Joint Opinion on the draft law on changes to the electoral code, § 21, with further references.

[21] CDL-AD(2014)010, Opinion on the Draft Law on the Review of the Constitution of Romania, § 157, with reference to an earlier opinion of 2012.

[22] CDL-AD(2016)021, §§ 21-22

[23] CDL-INF(2000)014, Implementation of the constitutional referendum in Ukraine, § 24.

objectively too short" to examine "complex and/voluminous draft laws".[24] The rapporteurs were informed that in the past several years the State budget was always adopted with a significant delay; in view of this, the 2-month time-limit may be unrealistically short. This ground for dissolution should anyway be harmonized with Article 131 § 3 of the Constitution which provides that if the budget is not adopted within the time-limits set for the "budgetary exercise", the budget of the previous year is provisionally applied.

B. Procedural aspects

41. In its Report on Constitutional Amendment, the Venice Commission stated as follows:[25]

> *"[…] [The] main arena for procedures of constitutional amendment should be the national parliament, as the institution best placed to debate and consider such issues. […]*
>
> *Recourse to a popular referendum to decide on constitutional amendment should be confined to those political systems in which this is required by the constitution, applied in accordance with the established procedure, and should not be used as an instrument in order to circumvent parliamentary procedures […]".*

42. As regards the procedure of the "consultative constitutional referendum" initiated by the President of the Republic of Moldova, the Venice Commission notes that, first, the legal basis for such kind of referendum is unclear, and, second, the manner in which this particular initiative for constitutional amendment is conducted may be unconstitutional.

43. The referendum called by the President's decree of 28 March 2017 is, according to its title, a "consultative" one. At the same time, question number two, if answered in the affirmative, may eventually (under certain conditions which will be discussed below) lead to the amendment of the Constitution. Some of the interlocutors the rapporteurs met in Chișinău stressed that the President had no right to initiate a "consultative constitutional referendum".

44. At the outset the Venice Commission notes that the constitutionality of the President's decree on referendum is now being examined by the Constitutional Court of the Republic of Moldova, at the request of the Liberal Party. Any remarks made in the present opinion regarding the constitutional and legal validity for the upcoming referendum should not be seen as prejudging future findings of the Constitutional Court.

45. The Constitution of the Republic of Moldova gives the President the right of legislative initiative (Article 73). However, the President does not have the power to initiate amendments to the Constitution – this power was specifically removed in 2000. Now the amendment procedure may be initiated either by the Government, or by 1/3 of all MPs, or by a popular request supported by 200,000 voters (Article 141). Under Article 141 § 2, "draft constitutional laws shall be submitted to Parliament only alongside with the advisory opinion of the Constitutional Court adopted by a vote of at least 4 judges". Amendments require a 2/3 majority of Parliament (Article 143).

46. Certain amendments to the Constitution require approval by a referendum (Article 142 § 1). This referendum, as the Constitutional Court explained in its Judgment no. 16 of 29 March 2001, is post-legislative, i.e. it is organised *after* the relevant revision is approved by Parliament. In other cases a referendum is optional, but still should be initiated by one of the actors enumerated in Article 141 of the Constitution. The President is not amongst them.

47. Indeed, Under Article 88 (f) the President "may request the people to express their will on matters of national interest by way of referendum"; however, this provision does not say

[24] CDL-AD(2004)044, Interim Opinion on Constitutional Reforms in the Republic of Armenia, § 49.
[25] CDL-AD(2010)001, §§ 240 and 242

whether these "matters of national interest" include possible constitutional amendments. Moreover, the Constitution does not provide for a consultative referendum at all. All "decisions adopted as a result of republican referendum", according to Article 75 § 2, have "supreme legal power", i.e. are binding.

48. At the legislative level, the Electoral Code of the Republic of Moldova[26] in its Article 143 distinguishes four types of republican referendum: constitutional referendum, legislative referendum, referendum aimed at dismissing the President, and consultative referendum. The subject of a constitutional referendum is the revision of the Constitution. The subjects of consultative referendums "are matters of national interest that are brought for consultations with the public that will require further, final decisions by competent public administration bodies" (§ 4). The Electoral Code therefore suggests that "consultative referendum" and "constitutional referendum" are two different procedures.[27]

49. In a judgment of 3 November 1999, interpreting Article 75, Article 141 § 2 and Article 143 of the Constitution, the Constitutional Court addressed the possibility of initiating by the President of a "consultative constitutional referendum".[28] The Court held, in particular that "the constituent legislator provided for the possibility of the President to address the electorate only for major problems *that the nation may face at a given moment*, *but not on the approval or rejection of a law amending the Constitution*" (italics added). The Constitutional Court also held that the referendum on constitutional amendments should be held *after* the adoption of the draft amendments by Parliament and should be binding (p. 5 of the judgment).[29]

50. On 6 July 2010 the Constitutional Court, in its Opinion no. 3, interpreted the Constitution as permitting to hold a referendum on the amendments to the Constitution, under condition that the referendum is initiated by one of the actors listed in Article 141 of the Constitution (see § 45 above). Finally, in Judgement no. 1 of 22 September 2014 the Constitutional Court held, in p. 39, that only those referendums which are explicitly *required* by the Constitution and which are conducted *after* Parliament adopts a draft law amending the Constitution, have binding force.[30] This phrase may imply that other referendums on the amendment to the Constitution are not binding, i.e. there may be a "consultative constitutional referendum". However, in view of the findings of the 1999 judgment of the Constitutional Court, it is unclear whether such "consultative constitutional referendum" may be initiated by the President, since he is not amongst the actors listed in Article 141.

51. In sum, the current proposal to amend the Constitution emanates from the President, who is not constitutionally entitled to initiate constitutional amendments. His first attempt to secure parliamentary support for his proposal has failed. Should now the referendum take place and the response to question number two be affirmative, the President will, in principle, present again his proposal to the MPs trying to secure the support of at least 34 of them. This time, the President will benefit from the political pressure, which the result of the referendum will exercise on Parliament. In substance, the President is attempting to initiate constitutional amendments indirectly. The Venice Commission doubts that the President's indirect initiative to amend the Constitution is compatible with the substance of Article 141 of the Constitution.

[26] CDL-REF(2017)020, Republic of Moldova - Electoral Code (2016)
[27] Under Article 144 of the Electoral Code (Initiating Republican Referendum), § 1 point (c), the President may initiate a republican referendum. Under Article 146 § 1 (a) of the Code issues brought to the republican referendum include "revision of the Constitution of the Republic of Moldova".
[28] See http://constcourt.md/ccdocview.php?tip=hotariri&docid=271&l=en
[29] This approach was later confirmed in Judgment no. 16 of 29 March 2001, p. 4 – see http://constcourt.md/ccdocview.php?tip=hotariri&docid=205&l=ro (also available in Russian)
[30] See http://lex.justice.md/viewdoc.php?action=view&view=doc&id=355237&lang=2

52. That being said, it belongs to the Constitutional Court of the Republic of Moldova to settle this controversy and decide whether the President has the right to initiate the "consultative constitutional referendum". The Venice Commission encourages the Constitutional Court to do so before the referendum is held; otherwise the examination of this question would be a purely theoretical exercise, while problems of legitimacy of the referendum may arise.

C. The entry into force of the constitutional amendments

53. The Venice Commission recalls that "to the extent that constitutional amendments strengthening or prolonging the power of high offices of state are proposed, the motivation should be to improve the machinery of government as such – not the personal power and interests of the incumbent. A sound principle would therefore be that such amendments (if enacted) should have effect only for future holders of the office, not for the incumbent".[31]

54. In the context of the Republic of Moldova, this means that any changes expanding the dissolution powers of the President should become effective as from the term of the next President.

IV. Conclusions

55. The President of the Republic of Moldova has sought the opinion of the Venice Commission on his proposal to add in the Constitution several grounds for dissolution of Parliament by the President. At the meeting in Chișinău, the President pledged to take into account best European practices, in pursuing his proposal. This is certainly worth praise. The Commission has examined the proposed new cases of dissolution, and has reached the following conclusions.

56. Through the 2000 reform, the Republic of Moldova has become a parliamentary republic, where the President, while being the Head of State, is not, at the same time, the head of the Executive, and has only few executive competencies. In parliamentary regimes, the Head of State plays a role of arbiter, or *pouvoir neutre*, detached from party politics. The President's power to dissolve Parliament is defined by his or her neutral position and is designed to prevent institutional deadlocks by appealing to the people.

57. The Venice Commission stresses that, as the European practice shows, the re-introduction of the direct popular election of the President in March 2016 does not necessarily call for the expansion of his/her dissolution powers. The Venice Commission recalls that the March 2016 decision was to a large extent motivated by the need to avoid repeated dissolutions of Parliament, not to multiply them. As the comparative analysis shows, most of the new European democracies which have parliamentary regimes have opted for listing the specific cases when the President may dissolve Parliament, as opposed to inserting a general clause of discretionary dissolution. Specific cases are also listed in the current Constitution of the Republic of Moldova.

58. Not only does cumulating the existing specific cases of dissolution (and the proposed new ones) with a general clause render the former superfluous – it could even be interpreted as giving the President the power to use dissolution as a tool for party politics, in contradiction with his role of *pouvoir neutre* in the current parliamentary regime. It may provoke unnecessary political conflicts. Consequently, new § 2-1, point (a) of Article 85 (dissolution after consultations with parliamentary factions), is ill-advised.

59. Point (b) of new § 2-1 (dissolution in case where Parliament fails to implement, within 12 months, the results of a consultative referendum) is self-contradicting: "consultative"

[31] CDL-AD(2010)001, Report on Constitutional Amendment, § 145

referendums should not have a binding legal force for Parliament. In addition, giving the President the power to decide whether or not the ensuing action by Parliament fulfils the public's expectations equals to granting him or her a very broad discretionary political power, which is incompatible with the President's role as *pouvoir neutre* in a parliamentary regime.

60. Point (c) of new § 2-1 (dissolution in case where a referendum on the recall of the President fails) and new Article 85-1 (which permits the President to initiate a referendum of no confidence in Parliament) do not represent an appropriate counter-balancing mechanism against the power of Parliament to initiate a "no confidence" referendum in the President, because they oppose to the broad potentially discretionary power of Parliament an equally broad discretionary power of the President, which would open the way to institutional conflicts. The Venice Commission has previously made recommendations aiming at improving the procedure of recall of the President by Parliament. Another option would be to remove the possibility of a "no confidence" referendum altogether.

61. Point (d) of new § 2-1 (dissolution for failure to adopt the budget) may be justified, but the 2-month time-limit risks to be, in the Moldovan context, unrealistically short.

62. Any new powers of the President related to the dissolution of Parliament (if finally approved through the constitutional procedure) should become effective as from the mandate of the next President.

63. As regards the multiple procedural questions which arise in connection with the presidential decree of 28 March 2017, the Venice Commission is confident that the Constitutional Court of the Republic of Moldova will give a thorough and timely answer to all of them.

64. The Venice Commission remains at the disposal of the Moldovan authorities for further assistance in this matter.