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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

REPUBLIC OF MOLDOVA

AMICUS CURIAE BRIEF FOR THE CONSTITUTIONAL COURT OF THE REPUBLIC OF MOLDOVA

ON

THREE LEGAL QUESTIONS CONCERNING THE CONSTITUTIONAL REVIEW OF THE LAW-MAKING PROCEDURES IN PARLIAMENT

on the basis of comments by

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Contents

I. Introduction 3
II. Background 3
A. Request and the case pending before the Constitutional Court of the Republic of Moldova 3
B. Constitutional and legal framework 3
1. The law-making procedure in Parliament in the Republic of Moldova 3
2. The reviewing competences of the Constitutional Court of the Republic of Moldova regarding normative acts of Parliament 4
III. Analysis 4
A. First question 4
B. Second question 9
C. Third question 10
IV. Conclusion 11

I. Introduction

1. By letter of 21 December 2020, the President of the Constitutional Court of the Republic of Moldova, Ms Domnica Manole, requested the Venice Commission to provide an *amicus curiae* opinion on three questions concerning the constitutional review of the law-making procedures in Parliament.

2. Mr P. Dimitrov, Mr C. Pinelli and Mr J-C. Scholsem acted as rapporteurs for this *amicus curiae* brief.

3. This amicus curiae brief was drafted on the basis of comments by the rapporteurs and was adopted by the Venice Commission at its ….. online Plenary Session on …..

II. Background

A. Request and the case pending before the Constitutional Court of the Republic of Moldova

4. The *amicus curiae* request relates to the proceedings brought before the Constitutional Court of the Republic of Moldova by a group of MPs from the parliamentary opposition concerning two laws passed in two readings by Parliament on 3 December 2020: Law no. 218 concerning some powers of the President of the Republic of Moldova regarding the Intelligence and Security Service, and Law no. 217 regarding the transfer of real estate from the public property to the Embassy of the United States of America.

5. According to the applicants, the laws in question were adopted in violation of the legislative procedure established by the Rules of Procedure of Parliament. The alleged flaws were the following:

- the draft Laws were voted in the final reading the day after the registration;
- the draft Laws were distributed wrongly for approval to a parliamentary commission;
- the deadline for issuing an opinion by relevant authorities on the draft Laws was disregarded;
- the right of the deputies to present proposals to the concept paper describing the legislative proposal for examination in the first reading was violated;
- MPs were deprived of the right to ask questions and to speak in the plenary session;
- the right of the MPs to propose amendments within 10 days after the adoption of the draft Laws in the first reading was restricted;
- in the second reading, the draft Laws were not debated, and
- the draft Laws were voted in violation of the voting procedure.

6. The three questions formulated below (see Section III) concern the power of the Constitutional Court to examine those alleged procedural flaws from the constitutional perspective and as to their compliance with the Rules of Procedure of Parliament.

B. Constitutional and legal framework

1. The law-making procedure in Parliament in the Republic of Moldova

7. According to Article 64 of the Constitution of the Republic of Moldova, the structure, organisation, and operation of Parliament shall be determined by internal regulations. This provision is complemented by Article 72 (3) c) of the Constitution, which prescribes that the law regulating the organisation and functioning of Parliament is an organic law.

8. The passing of laws and decisions by Parliament is governed by Article 74 of the Constitution of the Republic of Moldova. According to para. 1, organic laws are adopted by the majority of all elected deputies after consideration in at least two readings, whereas the adoption of ordinary laws and decisions requires the majority of MPs present at the session.

9. Section II, Chapter 2 (Articles 47 to 75) of the Rules of Procedure (the RoP) of Parliament – which were adopted as an organic law in 1996 – establishes the conditions, requirements, and structure of the legislative procedure.

10. According to Article 3 para. 1 of the Law on Legislative Acts, the main principles of law-making which govern the work of Parliament of the Republic of Moldova, are (a) constitutionality, (b) observance of fundamental rights and freedoms, (c) legality and correlation of competing norms, (d) appropriateness, coherence, consistency, stability and predictability of legal norms, (e) transparency, publicity and accessibility, and (f) respect for the hierarchical order of normative acts.

2. The reviewing competences of the Constitutional Court of the Republic of Moldova regarding normative acts of Parliament

11. Article 135 para. 1 letter a) of the Constitution provides that the Constitutional Court exercises, upon appeal, the review of constitutionality of laws and decisions of Parliament, decrees of the President, decisions and ordinances of the Government, as well as of international treaties to which the Republic of Moldova is a party.

12. The constitutional competencies of the Constitutional Court for reviewing normative acts of Parliament are further developed in Article 4 para. 1 (a) of the Law on the Constitutional Court, which stipulates that the Constitutional Court shall, upon appeal, entertain the constitutional review of laws, regulations, and decisions of Parliament. Article 4 para.1 (a) of the Constitutional Jurisdiction Code establishes that while exercising the constitutional jurisdiction, the Constitutional Court shall carry out, upon appeal, the review of constitutionality of the laws, regulations, and decisions of Parliament. Article 62 para. 1 of this same law foresees that the Constitutional Court by a judgment shall rule on the constitutionality of laws, regulations and decisions of Parliament.

III. Analysis

A. First question

Whether the text "exercises, upon complaint the control of the constitutionality of laws" from article 135 (1) letter a) of the Constitution may be interpreted as it would allow the Constitutional Court to verify the constitutionality of a law in the light of alleged flaws in the procedure for passing it? Is the principle of parliamentary autonomy absolute?

13. Besides few countries where apex courts have no power to review and strike down an act of Parliament at all,[1] all constitutional courts which do have this power can also examine the law-making procedure. However, the forms and extent of the "procedural scrutiny" vary.

14. In most countries, some aspects of the parliamentary procedures (quorum, qualified majorities, number of readings, right to legislative initiative, competences of the two Chambers, etc.) are stipulated directly in the constitution, and as such can be the object of constitutional

[1] For example, in the Netherlands where the Constitution states that "[t]he constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts" (Article 120). In the United Kingdom the principle of parliamentary sovereignty and absence of a written Constitution renders difficult for the courts to exercise judicial review on the acts of Parliament.

review. As to the details of parliamentary procedures, they are normally regulated in the Rules of Procedure or standing orders of each chamber.

15. Few constitutions go further than that and describe law-making procedure in greater detail – this is the case in Greece[2], Italy[3] or Brazil,[4] for example. In such legal orders, the Constitutional Court (or an equivalent body) has a clear mandate to assess the law-making procedure on the basis of the more or less precise and detailed legal rules formulated directly in the Constitution.

16. Certainly, more common are those legal systems where the rules governing the law-making procedure are established in the Constitution in a rather general fashion, leaving to ordinary legislation or to the rules of procedure of Parliament the task of developing the specific rules in more detail. Andorra, Armenia, Austria, Bulgaria, Iceland, Kosovo, Peru, and Spain are among these countries. In these countries, the control of constitutionality of the law-making procedure is still possible, but for want of many detailed and precise rules formulated directly in the Constitution, the Constitutional Court has to infer them from the more general constitutional principles by means of interpretation.

17. In several legal systems, constitutional courts go further and examine the law-making procedure not by itself, on the basis of the constitutionally entrenched procedural rules, but because of the effect of the procedure on the quality of the contested substantive policy (most often related to human rights issues). Examples for this approach can be found in the case-law of several apex courts (for example in the South Africa,[5] Germany,[6] etc.). The apex courts in those countries consider that their mandate to resolve fundamental rights cases implies a power to look at the procedure which led to the adoption of statute.[7] Thus, it is possible that a law can

[2] An exhaustive description of requirements for passing laws is enshrined in Articles 73, 74, 75 and 76 of the Greek Constitution.

[3] After having enumerated the institutions entrusted with the function of initiating a parliamentary bill (Article 71), Article 72 of the Italian Constitution states the requirements of the law-making process.

[4] The requirements for passing laws are described in Articles 61, 62, 63, 64, 65, 66, 67, 68, and 69 of the Brazilian Constitution.

[5] In its decision "Doctors for life" the South African Constitutional Court undertakes a constitutional review of the law-making procedure to resolve a substantive issue before it. The Constitutional Court specifies that "a statue may be invalid for at least two reasons. It may be invalid because its provisions are in conflict with a right in the Bill of Rights. Or it may be invalid because it was adopted in a manner that is inconsistent with the provisions of the constitution". Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC), 17 August 2006, para. 16; see also para. 38).

[6] In the case of the Federal Constitutional Court of Germany, the review of the constitutionality of legal provisions comprises both the formal (procedural) and the substantive (rights based) requirements of the Basic Law. When reviewing the formal compatibility of a law with the Basic Law, the Federal Constitutional Court of Germany assesses whether competent legislative bodies have enacted the law and whether the legislative procedure set out in the Basic Law has been adhered to. Examples for this approach are the so called "Hartz IV decision" of the Federal Constitutional Court in which it ruled not only that the provisions on standard benefits for adults and children envisaged in the "Hartz IV Legislation" were unconstitutional because its incompatibility with the fundamental right to the guarantee of a subsistence minimum derived from the principle of human dignity enshrined in Article 1 of the German Basic Law, but also they were unconstitutional, because of the lack of the procedure used by the law-giver to determine the subsistence minimum; see, German Federal Constitutional Court Decision of 9 February 2010 1 BvL 1, 3, 4/09. In two more recent cases, the German Constitutional Court ruled that the amendments to certain tax provisions were unconstitutional due to flaws in the legislative procedures in the course of which they had been adopted. See the Order of the Second Senate of of the German Federal Constitutional of 11 December 2018, BverfGE 150, 204 and the Order of the Second Senate of 15 January 2019, BverfGE 150, 345, [CODICES: GER-2019-1-001].

[7] In its *amicus curiae* brief related to the postponement of elections motivated by constitutional reform in Kyrgyzstan, the Venice Commission stressed that the observance of the Constitution in the law-making process cannot be understood only in formal terms, but it also has to embrace substantive considerations: "All parliamentary procedures are designed to balance two opposite principles: on the

be declared unconstitutional when this law stifles the informed debate and the democratic exchange of views in Parliament and notably the principle of protection of political minorities, derived from the Constitution, even if the precise procedural forms of such debates are not specified in the Constitution in clear terms.

18. In sum, the power of a constitutional court to ensure that the constitutional provisions on the law-making procedure (explicit or implicit) are complied with is relatively uncontested, since it is a part and parcel of the assessment of the constitutional validity of the laws, which necessarily includes both procedural and substantive aspects.

19. As to the second limb of the question put by the Constitutional Court of the Republic of Moldova– concerning the extent of the parliamentary autonomy – it is difficult to give a short answer to it. Parliamentary autonomy means essentially the power of Parliament to set its own rules (the doctrine of *interna corporis*), implement them and resolve disputes resulting from their application internally, without involvement of any external body. The extent of this autonomy is defined differently in different countries.

20. Some countries with old democratic tradition continue to follow, with some variations, the tradition of a near absolute parliamentary autonomy (United Kingdom, Belgium and Denmark, for example). This near absolute approach to parliamentary autonomy is manifested *inter alia* in the impossibility for the courts to review the internal rules of Parliament. In Belgium, the latter do not have the status of law, since a law requires the consent of the King (and his ministers) and it is considered that judicial review of these internal rules would cause an interference with the autonomy of Parliament.

21. The parliamentary autonomy is less absolute in other legal orders. In France the Constitution of the Fifth Republic, in contrast to the preceding constitutions, provided that internal regulations of parliamentary assemblies have to be subjected to the judicial review of the *Conseil Constitutionnel*.[8] The aim of this approach was clear: the founders of the regime wanted to prevent the assemblies from escaping the new constitutional restrictions applicable to them by

one hand the principle of an expeditious and effective exercise of legislative power; and on the other hand, the principle of open discussion, deliberation and participation of all political forces" (CDL-PI(2020)015, Kyrgyzstan - urgent *amicus curiae* brief relating to the postponement of elections motivated by constitutional reforms, para. 59). The Venice Commission based its reasoning on a case decided by the Italian Constitutional Court in which the parliamentary procedure of the approval of the annual budgetary law was reduced to a discussion lasting few hours in one of the two chambers of Parliament. The Italian Constitutional Court highlighted "the need that the role of Parliament under the Constitution within the law-making procedure be respected not only nominally, but also in substantive terms". See Italian Constitutional Court, Decision n° 17 of 2019, para. 4.1.

[8] Article 61, para. 1 of the Constitution of 4 October 1958.

manipulating their internal regulations. Other legal orders where internal rules of parliament are subject to some constitutional review are, for example, Italy,[9] Latvia[10] and Moldova.[11]

22. The idea of parliamentary autonomy is reflected in some of the provisions of the Constitution of the Republic of Moldova. Article 64 (1) of the Constitution states that "the structure, organisation and functioning of Parliament is established by internal regulations." At the same time, these regulations take the form of law, and even of organic law (Article 72 (3) c)), the voting of which is more difficult than ordinary law (Article 74 (1) and (2)). How far this autonomy goes in the Moldovan constitutional order is a question for the Constitutional Court to decide. From a purely legalistic perspective, if the rules of procedure of parliament are considered as a "law", and if the Constitutional Court has the power to assess the constitutionality of the laws, the Constitutional Court must have the power to examine the constitutional validity of the rules of procedure as well, as any other law submitted to it.

23. However, in some legal orders the rules of procedure of Parliament are often considered to "have the power of a law" without being a "law" (meaning "statute") *strictu sensu*. This is the reason why they generally are voted in a different way (from statutes). This special status of the rules of procedures in some countries has led to their express withdrawal from the reviewing competency of the constitutional courts.

24. The Venice Commission recalls that the division of powers is not a mere theoretical concept, but rather a practical device for implementing the premise "power to stop power", i.e. to achieve checks and balances among the state powers. Therefore, no "autonomy" can be absolute. As with every general principle, its limits are set by logic and common sense in every particular situation. Parliaments set their rules of procedure autonomously; however, if those rules diverge from constitutional principles, they can certainly be an object of constitutional review, at least indirectly, as it will be shown below.

25. Construing parliamentary autonomy as absolute may lead to Parliament to become a "judge in its own case". That may be detrimental to the rights of the parliamentary minorities. The Venice Commission noted this paradox in an opinion on Romania (2012): "If only the majority can decide on the observance of parliamentary rules, the minority has nowhere to turn for help if these rules are flouted".[12] That being said, subjecting all internal regulations and disputes with Parliament to

[9] In a case dealing with a taxation law approved by a Parliament's Committee despite the fact that tax-related laws were excluded by the Chamber's Standing Orders from such kind of approval, the Italian Constitutional Court made it clear that although its scrutiny over violations of parliamentary procedures was restricted to those that could be directly related to constitutional provisions –leaving to parliamentary autonomy those violations to procedures provided only by the RoP–, the Court could review a law, which was adopted in violation of the Rules of Procedure, if this violation also amounts to a violation of constitutional provisions. Thus, rendering parliamentary autonomy (or *interna corporis acta*) as not absolute under the Constitution in force. See, Italian Constitutional Court, Decision nº 9/1959.

[10] Regarding its jurisdiction, the Constitutional Court of Latvia claimed explicitly that the internal executive norms of Parliament may be subject to constitutional review. To do so the Court overruled an objection that internal regulations of Parliament are not subject to constitutional review, referring to a previous case where the principle of separation of powers was clearly established. See [CODICES: LAT-2002-1-002].

[11] In its case-law, the Constitutional Court of the Republic of Moldova held that parliamentary regulatory autonomy cannot be generalised; the supremacy of the Constitution represents a general binding principle, which also covers Parliament and means that it cannot pass legislative acts and approve regulations on parliamentary procedure contrary to the principles and dispositions of the Constitution. Parliament enjoys a degree of latitude in decision-making over issues related to its internal organisation and functioning for which specific provision is not made in the Constitution – see, [CODICES: MDA-2013-3-005].

[12] See CDL-AD(2012)026, Opinion on the compatibility with constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania, para. 22.

an external judicial scrutiny (by a constitutional court or another similar institution) and not setting any limits to this review also presents certain drawbacks, since it replaces parliamentary autonomy with judicial supremacy.

26. The Venice Commission has previously acknowledged that both approaches – with a stronger or weaker autonomy of parliament – are possible, from a comparative perspective. In particular, the Venice Commission noted that disputes about parliamentary procedures may be resolved internally i.e. by the bodies of parliament, but another solution may also be designed, which "would be to entrust the function of the dispute resolution to an external body – a constitutional court or another similar high judicial authority. This model is less respectful of the autonomy of Parliament, but better guarantees the independence of the adjudicative body. Certainly, it is important to make clear which measures of Parliament may be reviewed by the Court or other external body, and which are not subject to such review". In sum, mechanisms of internal dispute resolution in Parliament, not involving any external review, are acceptable. [13]

27. Even if the internal procedural rules of Parliament are not reviewable, the laws adopted on the basis of those rules are still subject to constitutional review. If a law has been adopted in a procedure prescribed by the rules of procedure but clearly contrary the Constitution, the constitutional court may and must strike down this law on procedural grounds and thus *disregard* internal rules of procedure as unconstitutional.[14] Furthermore, as it will be demonstrated below, in certain situations a constitutional court may *give effect* to the rules of procedure by applying constitutional principles.

28. In conclusion, "constitutional review" necessarily involves the review of the law's compliance with the substantive requirements of the Constitution and with the procedural requirements thereof.[15] The fact that many constitutions (not only that of the Republic of Moldova) usually do not say it explicitly does not imply that procedural review should be excluded. Otherwise, gross violations of the Constitution (such as a law approved by less than the majority of the present members of the chamber) can go unchecked (in this case, Article 74 (2) of the Constitution of the Republic of Moldova). As to the principle of parliamentary autonomy, in some countries a constitutional court can verify compliance of the internal rules of procedure with the Constitution directly, but even where it is impossible, a constitutional court may always *indirectly* address the question of constitutionality of a particular procedural rule applied in the process of adoption of this law and declare it unconstitutional *de facto*.

[13] In Belgium the assemblies had to judge on the validity of elections of their members. This solution that has been declared contrary to the European Convention of Human Rights by the European Court of Human Rights (the ECtHR) – however, the ECtHR did not dismiss the very idea that Parliament may examine such disputes but rather concentrated on the details of the procedure and on the composition of the body which decided this dispute and on the independence of its members in the specific context of this case – see the ECtHR, 10 July 2020, *Mugemangango v Belgium*, No. 310/15.

[14] In this sense the Venice Commission has claimed that "[a] simple legislative act, which threatens to disable constitutional control, must itself be evaluated for constitutionality before it can be applied by the court. Otherwise, an ordinary law, which simply states "herewith, constitutional control is abandoned - this law enters into force immediately" could be the sad end of constitutional justice. The very idea of the supremacy of the Constitution implies that such a law, which allegedly endangers constitutional justice, must be controlled – and if need be, annulled – by the Constitutional Tribunal before it enters into force." See CDL-AD(2016)001, Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, para. 41.

[15] See for instance the decision of the Constitutional Court of Poland in which it ruled that an act which is not adopted in accordance with the provisions of Constitution (due to infringement of the legislative procedure) should not be signed by the President, who is obliged to observe the fulfilment of the Constitution. [CODICES: POL-1997-3-017]. See also the decision of the Constitutional Court of the Czech Republic in which it argued that although the content of the Rules of Procedure is not constitutionally defined, there is no doubt that the basic principles of dealing with and contact between legislative bodies (and within the government) cannot deviate from the constitutional framework. [CODICES: CZE-2002-3-011].

B. Second question

Whether the Constitutional Court may verify the constitutionality of the procedure for passing a law in terms of compliance with the rules on parliamentary procedures established by Parliament's Rules of Procedure, which has the status of law, or only in terms of compliance with the rules expressly established by the Constitution? Is there a European consensus on this matter?

29. Normally, the competence of a constitutional court should be circumscribed to the revision of the compatibility of a law with the Constitution. While it is true that constitutional provisions are usually formulated in broad terms, other laws cannot be a valid instrument to back the constitutional court's analysis – unless the Constitution or an organic law on the constitutional court explicitly mandates this court to verify the compatibility of the current legislation with some infra-constitutional norms of a higher status than the current legislation. However, this does not seem to be the case in the Republic of Moldova.

30. It follows, in a nutshell, that it is not the task of the Constitutional Court to ensure the proper application of the Rules of Procedure (the RoP) in the law-making procedures. The interpretation of certain constitutional provisions, however, may lead to a result which is consonant with the rules set out in the RoP. So, without enforcing the RoP *de jure*, the Constitutional Court may give effect to the RoP *de facto*.

31. A constitution should be interpreted as a whole, in the light of the principles of the rule of law and pluralism having the paramount value. Such very general principles are also contained in the Constitution of the Republic of Moldova. For example, Article 1(3) of the Constitution states that "governed by the rule of law, the Republic of Moldova is a democratic State in which … political pluralism represent supreme values that shall be guaranteed". Article 5 (1) of the Constitution stresses that "democracy in the Republic of Moldova shall be exercised under the conditions of political pluralism, which is incompatible with dictatorship or totalitarianism". These provisions may arguably be interpreted as implying more specific procedural rules. For example, Article 34 of the Constitution defines the right of access to information on public affairs; that may imply the right of the MPs, as representatives of the people, to have such access. Indeed, the process of deriving specific procedural rules from the general principles has its limits.

32. If the Constitutional Court finds that a specific rule contained in the RoP is dictated by one of the constitutional principles, it may strike down a law as unconstitutional for non-compliance with those principles and the rule of the RoP at the same time. The RoP nonetheless often develop specific details on the basis of what is required by the constitutional principles - or rather choose one of many possible solutions to implement the constitutional principle.

33. For example, the RoP of Parliament of the Republic of Moldova provide that MPs have a right to propose amendments within 10 days after the adoption of the draft laws in the first reading. The right to introduce amendments may be seen as a constitutional requirement derived, for example, from the right of legislative initiative which belongs to all MPs (Article 73 of the Constitution). However, whether this right is to be exercised within 10, 7 or 5 days after the adoption of the law in the first reading cannot be clearly established on the basis of the Constitution itself. It is a policy choice dictated by expediency and not by the constitutional requirement. The Constitutional Court must be able to identify the situations where this right of amendment has been *clearly disregarded* and strike down the legislation on this basis. However, it is not the Constitutional Court's role to ensure compliance with the specific time-limits set in the RoP. In sum, the Constitutional Court can give effect to the RoP, but only under condition that it can demonstrate that the breach of a particular provision of the RoP also amounted to a violation of one of the fundamental constitutional principles regarding the law-making procedure.

34. Finally, it cannot be excluded that the RoP may regarded not as an ordinary piece of legislation (which may be changed at any moment by implicit amendment) but as a sort of an entrenched law, which binds the legislature unless it is explicitly amended following the same procedure as provided for its adoption. This solution has been advocated by the Venice Commission in the Parameters on the relationship between majority and opposition.[16] Construing the status of the RoP in this manner is not entirely impossible in the Republic of Moldova. Article 1 para. 3 of the Constitution provides that "the Republic of Moldova is a democratic State governed by the rule of law […]". One of the central elements of the rule of law is the principle of legal certainty. Legal certainty does not exclude that the rules of political process may be changed, but any such change must be done in a transparent and predictable manner, and not on an *ad hoc* basis. Following this reasoning one may conclude that not abiding by a specific rule established in the RoP without first amending this rule is contrary to the principle of legal certainty, and, thus, unconstitutional. This logic may permit the Constitutional Court to give direct effect to certain provisions disregarded in a particular case by Parliament. As a consequence, while Parliament may have a large autonomy if it decides to change the RoP explicitly, and does it in a proper procedure, the Constitutional Court may be much stricter if Parliament simply disregards one of its own *important* rules in adopting a specific piece of substantive legislation.

35. It belongs to the Constitutional Court of Moldova, however, to decide whether it wants to go in this direction and elevate the RoP to the quasi-constitutional status.

C. Third question

Whether there may be established, on the one side, some central elements of parliamentary procedures in the case of passing of laws, the violation of which would lead to finding a law to be unconstitutional and on the other hand some secondary elements of the same procedure the violation of which would not affect the constitutionality of law.

36. The answer to this question is, to a certain extent, given in a previous paragraph. The Constitution, as the fundamental yardstick, permits to distinguish between elements of the law-making procedure with constitutional importance (which may be enforced by the constitutional jurisdiction) and those other elements where the legislative body has discretion (which should not be enforced by the constitutional jurisdiction unless this competency is specifically given to the reviewing court by the law or by the Constitution itself). The constitutional court or an equivalent body must decide on a case-by-case basis whether violations of the law-making procedure must be considered essential (i.e. determined by the Constitution) or not (left at the discretion of the legislator).[17]

[16] CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, paras. 36 and 38.

[17] For instance, the Supreme Court of Mexico established in its case-law a threefold criteria for assessing if a breach to the law-making procedure has to be considered as an essential violation: (1) the legislative procedure must respect the channels that allow both parliamentary minorities to express and defend their opinion in a context of public deliberation. Highlighting the rules regulating the composition and quorum in the chambers and to those other regulating the aim and unfolding of the debates; (2) The deliberative procedure must lead to the correct application of the established voting rules; (3) Both parliamentary deliberation and voting should be public. See Ruling on Action of Unconstitutionality 53/2017 and its cumulative 57/2017, p. 54. On the other hand, an example of non-essential breach to the law-making procedure can be found the case-law of the Constitutional Court of Austria. The Court ruled that not respecting the formal requirement established in para. 44 of the Rules of Procedure of the National Council, namely that a bill must be passed by the plenary of the National Council unless a period of 24 hours expired since the delivery of the committee report, does not affect the constitutionality of the law. See VfGH 13.03.2004, G211/03, p. 32 and 33.

37. Needless to say, the very attempt to define the scope of parliamentary autonomy by formulating *in advance* which particular rules of the law-making procedure can be violated and which of them should not be violated leads to the paradoxical distinction between rules-to-keep and rules-to-neglect. The Venice Commission has previously called for the entrenchment and stability of the procedural rules: ideally, the RoP should be adopted by a qualified majority and must not be "changed implicitly on an ad hoc basis, even if the qualified majority (necessary for the amendments to the RoP) is in favour of a particular course of action in a particular case. Every change of the Rules should be properly discussed and adopted – preferably by a qualified majority – as a formal amendment to the Rules before a specific action in a particular case is taken. […]".[18] However, while "essential" rules can be enforced externally, by the Constitutional Court, with reference to the constitutional principles which they reflect, "non-essential" provisions of the RoP cannot be invoked by the Constitutional Court. The application of those provisions, and the examination of any disputes related to them, must remain within the competency of the internal bodies of Parliament.

IV. Conclusion

38. The three questions put before the Venice Commission by the Constitutional Court of the Republic of Moldova concern the powers of the Constitutional Court to review the law-making procedure and, more specifically, the question of the relevance of the internal Rules of Procedure of Parliament (RoP) in such a review. The Venice Commission has reached the following conclusions.

39. It is clear that a constitutional court may exercise procedural review of the legislation with reference to the specific rules of law-making entrenched in the Constitution. Many constitutional courts go further, and construe general principles contained in the Constitution as implying some specific procedural rules. A constitutional court may disregard provisions of the RoP if they deviate from such rules, either directly stated in the Constitution or inferred from the general principles thereof.

40. The constitutional review exercised by a constitutional court (or another equivalent jurisdiction) must always be based on constitutional norms. As a rule, a constitutional court should not rely in its analysis on norms that are not constitutional, but of a lower (legislative) level, unless the Constitution itself or an entrenched legislation explicitly gives the court this competency.

41. A constitutional court may, at the same time, give a *de facto* effect to certain rules contained in the RoP if it decides that these rules are dictated by the Constitution. However, it should not try to enforce each and every rule contained in the RoP, because the Constitution may sometimes only set a minimal standard and let the legislator choose amongst different possible ways of putting this standard into practice. If a procedural fault is of such an import as to be characterised as an unconstitutionality, the constitutional court must intervene. At the same time, it is evident that more technical rules of internal regulations must be left to parliamentary appreciation.

42. The Venice Commission remains at the disposal of the Constitutional Court of the Republic of Moldova for further assistance in this matter.

[18] CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, paras. 37 and 38.