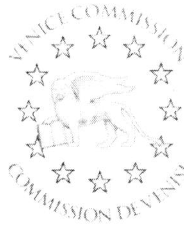

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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

REPUBLIC OF MOLDOVA

PROPOSAL
BY THE PRESIDENT OF THE REPUBLIC OF MOLDOVA
TO SUPPLEMENT THE CONSTITUTION
IN ORDER TO ENLARGE POWERS
OF THE PRESIDENT TO DISSOLVE PARLIAMENT

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Draft

LAW
on supplementing the Constitution of the Republic of Moldova

Single article. The Constitution of the Republic of Moldova, adopted on 29 July 1994 (repeatedly published in the Official Gazette of the Republic of Moldova, 2016, No. 78, art. 140), shall be supplemented as follows:

1. Article 85 shall be supplemented with para. (2^1) with the following wording:

"(2^1) The President of the Republic of Moldova may dissolve the Parliament in the following cases:

a) following the consultation of parliamentary fractions;

b) the Parliament failed to implement, within a period of 12 months, the will of people expressed through a consultative referendum;

c) the referendum on the dismissal of the President of the Republic of Moldova from office ended with a negative result or the Constitutional Court confirmed the non-validity thereof;

d) the Parliament failed to adopt the Law on State Budget in a period of two months following the beginning of the financial exercise."

2. The Constitution shall be supplemented with Article 85^1 having the following wording:

"Article 85^1. Dissolution of the Parliament through referendum

(1) The President of the Republic of Moldova is entitled to propose the dissolution of the Parliament, according to the provisions of Art. 85 para. (3) and (4) of the Constitution. As a result of this proposal, the President shall initiate by a decree a republican referendum on the dissolution of the Parliament. If more than half of the votes cast during the referendum are in favour of the dissolution, the Parliament is considered to be dissolved and new elections are to be organised within a maximum period of three months following the date of dissolution of the Parliament.

(2) If more than half of the votes cast during the referendum are against the dissolution of the Parliament, the President is considered to be dismissed from his/her position, and new elections shall be organised within a period of 2 months."

PRESIDENT OF THE PARLIAMENT

INFORMATIVE NOTE
in respect of the Draft Law on Supplementing the Constitution of the Republic of Moldova

Conditions which served as basis for the development of the draft Law

The Draft Law on Supplementing the Constitution of the Republic of Moldova was developed in the context of constitutional rearrangements induced by the Judgement of the Constitutional Court No. 7 of 4 March 2016 regarding the manner of electing the President of the Republic of Moldova.

Hence, transition to the direct form of election of the Head of the State entails the need to establish some conclusive mechanisms to balance the interaction of constitutional institutions, thus ensuring Constitution's coherence.

In this context, deriving from the spirit of the Constitution, the undisputable need to ensure good functioning of all state institutions still remains, especially in respect of institutions that need constitutional mechanisms for mutual interaction. Such a constitutional harmony may be achieved only based on a well-reasoned system of checks and balances.

Referring to the case-law of the Constitutional Court, in its Judgement No. 17 of 12 July 2010, the Court held that the prerogative of the Head of the State to dissolve the Parliament represents a constitutional guarantee, allowing the settlement and unblocking of an institutional crisis.

In the same judgement, the Court mentioned: "According to Art. 1 para. (2) of the Constitution, the form of manner of electing of the Head of the State determines the form of government: parliamentary republic or presidential republic, and places the Head of the State, from legal viewpoint, on a certain level as related to the Parliament, and, particularly, to the people.

In a presidential republic, the Head of the State is elected by citizens and, from legal viewpoint, is placed on the same level as the Parliament, holding wider prerogatives, as a result of the fact that his mandate comes from the entire nation, all the people [...], and hence, the empowerment with wider prerogatives, as through the mandate provided to the Head of the State, the nation has delegated to him a part of its sovereignty".

The direct election of the President cannot be further perceived as an electoral formalism, as this democratic instrument is merely a practical manifestation of the principle of people's sovereignty, directly enshrined in Art. 2 of the Constitution. Thus, as long as the majority of the population expressed its vote of confidence to the Head of the State, his legitimacy and representativeness remain to be indisputable.

The election of the Head of the State by the people ensures a level of representation which is identical to that of the Parliament.

As a matter of fact, representativeness serves as basis for democracy and legitimates the right of the representatives to decide instead and on behalf of the nation.

Therefore, despite of being elected by the majority of the population, the President of the Republic of Moldova remains dehydrated of constitutional instruments specific for a sovereign elected by the people. This deficit of competences not only generates a precedent which is inadequate for a democracy,

where the Head of the State elected via direct vote does not have prerogatives, but also distorts the system of interinstitutional checks and balances.

Perceived in light of Constitutional provisions, the current relations between the Head of the State and the legislative body are governed by compromises. As a matter of fact, Parliament has at its disposal a huge range of constitutional and legislative instruments to check and balance the activity of the President, who in turn, has limited possibilities of intervention and balance.

Such counterbalance methods as dismissal, dissolution, and removal remain to be indispensable for a modern legal system. Although being of radical nature, they were accepted and maintained in all democratic systems.

The quintessence of the suggested constitutional novelty is based on the instruments to check and balance the activity of the legislator offered to the Head of the State.

The solution of the current provision of art. 85 of the Constitution makes the Members of the Parliament almost irremovable during the period of their mandates. The process of maturation of parliamentary groups would evolve more rapidly if the Head of the State has more legal instruments to dissolve the Parliament. It is frequently found that the Members of the Parliament do not fulfil their parliamentary duties assigned to them as representatives of the electorate and they do not separate their personal interests from the obligations deriving from the mandates held.

In this respect, we consider it imperative to rethink the institution of dissolution of the Parliament, so as to make more efficient and, last but not least, to ensure a better functioning of the institutional scaffolding in the Republic of Moldova.

The main provisions of the draft Law and the emphasise of new elements

This draft Law envisages supplementing the Constitution with Art. 85^1, which establishes a new mechanism for the dissolution of the Parliament through referendum, initiated by the Head of the State, and operated some changes regarding the grounds for dissolution of the Parliament stipulated in art. 85 which currently provides two strictly determined conditions:

- impossibility to form the Government;
- blocking up the procedure of adopting the laws for a period of 3 months.

As a matter of fact, the last ones are characteristic exclusively for the parliamentary form of government. In the parliamentary regime, the major criterion is the principle of governmental responsibility, and the right to dissolve the Parliament represents its counterpart. Presence of those two mechanisms and the efficiency of their application are the conditions of a balanced parliamentarianism.

Hence, the newly proposed grounds refer to strategic areas of interaction as conditions for the dissolution of the legislative body by the Head of the State:

1. Following the consultation of parliamentary fractions [art. 85 para. (2^1) let. a)]

As a result of the fact that at present the manner to elect the President of the Republic of Moldova was modified by reviving previous constitutional norms, presenting the characteristics specific to a presidential regime, the conclusion may be

drawn that the powers of the President of the Republic of Moldova could be similar to those in the states with genuine democracy, such as, for instance the French Republic.

Thus, the French Republic is a parliamentary regime in which the executive power collaborates with the legislative power within a well-defined system of separation of powers. Unlike the presidential regimes (such as the ones in the United States of America, Brazil) in which the two powers are strictly separated, each of them having means of pressure over the other one: the National French Assembly may overthrow the government through a motion of no-confidence, and the President may dissolve the National Assembly. Unlike other parliamentary regimes (such as in the United Kingdom, Germany), in the case of the French Republic, it is imposed in an optimal way for the parliamentary majority and the President to be on the same part of the political spectrum, the situation in which the Prime Minister is also responsible, in a practical way, before the President who may request his/her dismissal. In case of cohabitation, usually the government is responsible for the internal policy of the country, while the President is responsible for the external representation of the state.

Election of the President through universal vote provides the Head of the State a considerable political importance, as he/she may appoint and dismiss the Prime Minister depending on his/her performance. The Government is responsible before the Parliament and the President has the power to dissolve it, and in crises situations may be vested with special powers.

2. The Parliament failed to implement, within a period of 12 months, the will of people expressed through a consultative referendum [art. 85 para. (2^1) let. b)]

Through the corroborated interpretation of Art. 2 with Art. 75 of the Constitution, the referendum was enshrined in the constitution as a modality through which people have the possibility to exercise directly the national sovereignty, expressing the will related to problems of national interest or which have special importance for the state: *National sovereignty resides with the people of the Republic of Moldova, who shall exercise it directly and through its representative bodies in the ways provided for by Constitution* [Art. 2 para. (1) of the Constitution]. Art. 75 provides expressly: *The decisions adopted according to the results of the republican referendum shall have supreme legal power.*

Article 142 of the Electoral Code provides that "the decisions adopted based on a republican referendum have supreme legal power upon their confirmation by the Constitutional Court and have binding effect everywhere on the territory of the Republic of Moldova".

Thus, the hypothesis in which the subject of a consultative referendum, when the voters are asked to express their opinion, and which implies the need of legislative or constitutional rearrangements, supported by the majority of the population but ignored due to political reasons by the legislative body, generates an abusive blocking of the democratic procedures and instruments. The effects of the

consultative referendum cannot be denied by the legislative body, which should have the obligation to implement them.

Therefore, this situation cannot be excluded from the list of actions subject to the most radical form of inter-institutional counter-balances.

Under comparative aspect, a relevant document for the effects of the consultative referendum is the Decision of the Constitutional Court of Romania no. 682 of 27 June 2012 regarding the objection of unconstitutionality of the Law amending and supplementing the Law no. 35/2008 on electing the Chamber of Deputies and Senate and amending and supplementing the Law no. 67/2004 on electing local public administration authorities, the Law on local public administration no. 215/2001, and the Law no. 393/2004 on the statute of locally elected officials.

According to the above-mentioned Decision, the constitutional control institution of Romania held that:

"[...] The criticised law violates the constitutional provisions of Art.1 para.(3), according to which "Romania is a rule of law state [...]", of Art.2 – Sovereignty and of Art.61 – Role and Structure (of the Parliament), as it enshrines a legislative solution contrary to the will of the people expressed during the national referendum of 22 November 2009 .

The Court establishes that on 22 October 2009, the President of Romania, after consulting the Parliament, issued the Decree No. 1.507 on the organization of a national referendum, published in the Official Gazette of Romania, Part I, No. 714 of 22 October 2009, calling upon the Romanian people to express its will regarding two issues of national interest: transfer to a unicameral Parliament and reducing the number of parliamentarians to maximum 300 persons.

Regardless of its nature, the – decisional or consultative – referendum, just like the national referendum from 2009, represents a modality for exercising national sovereignty.

As situations might exist when the matter in relation to which the people are asked to express their will affects the interests of elected representatives (just like the case of reducing the number of MPs or reducing the allocations for MPs), the Venice Commission in the document entitled Guidelines on the Holding of Referendums, adopted at its 68th Plenary Session (13-14 October 2007), mentioned that the effects of legally binding or consultative referendums must be clearly specified in the Constitution or by law. At the same time, the referendums on questions of principle or other generally-worded proposals should preferably not be binding. If they are binding, the subsequent procedure should be laid down in specific rules.

The fact that such a subsequent procedure is not laid down in case of the consultative referendum does not transpose in lack of effects deriving from this referendum. It would not be even admissible in a rule of law state for the people will, expressed by a wide majority (in this case, 83.31% of the votes validly cast), to be ignored by the elected representatives of the people.

Likewise, in case related to the effects of the consultative referendum, the Supreme Court of Canada stated that the "existing Canadian constitutional order cannot stay indifferent before the clear expression of a clear majority of the citizens

from Quebec [...]" expressed on the occasion of such a referendum. (Renvoi relatif à la sécession du Québec, 1998, R.C.S. 217, par.92).

The experience of democratic states also reveals the fact that people's representatives are substantially linked with the results of popular consultations. Thus, for instance in Norway, a consultative referendum in 1972 led to reject the joining of the European Communities, in the context in which the majority of Members of Parliament were actually in favour. In Denmark, a consultative referendum allowed for the Single European Act, which initially was rejected by the Danish Parliament, to be ratified. Hence, even though theoretically, the elected representatives of people are free to decide distinctly from the people's will, in practice they are bound by this will.

From this perspective, the element distinguishing a consultative referendum from a legally binding one is not, in principle, the matter related to respecting or not the popular will – this will cannot be ignored by the elected representatives, as it is an expression of the national sovereignty –, but the nature of the effect of the referendum (direct or indirect). Unlike the binding referendum, the consultative referendum produces an indirect effect, as it requires the intervention of other bodies, most of the times of the legislative body, so as to enforce the will expressed by voters.

This interpretation is also based on the principle of constitutional loyalty, derived and interpreted through corroboration of constitutional provisions of Art. 1 – Romanian State, Art.2 – Sovereignty and Art.61 – Role and Structure (of the Parliament) – a principle, which in this case, imposes that the authorities with decision-making competences in the areas related to the matter subjected to referendum (in this case the Parliament) to take into consideration, to analyse and to identify modalities to implement in practice the will expressed by people. Another vision regarding the effects of the consultative referendum would reduce it to a purely formal exercise, just an opinion poll.

Based on these considerations, the Court holds that the regulation of certain provisions intending a legislative solution which fails to respect the will expressed by the people during the aforementioned consultative referendum is in contradiction with the constitutional provisions of Art.1, 2 and 61".

3. The referendum on the dismissal of the President of the Republic of Moldova from office ended with a negative result or the Constitutional Court confirmed the non-validity thereof [art. 85 para. (2^1) let. c)]

In the opinion of constitutional scholars, the power of the President is inversely proportional to the power of the parties. And this implies granting of prerogatives to the Head of the State within the entire governing system.

The dissolution of the Parliament is the logical result of a failure, a legal balancing tool between the President and the Parliament for the purpose of solving the political and governmental crises.

The norm proposed in art.85 para. (2^1) let. c) will fill in the constitutional gap and will be able to avoid the situations similar to those which occurred in 2007 in Romania, when as a result of suspending the President of the country and of

invalidating the Decision of the Parliament as a result of the referendum on the dismissal of the President, a difference was pregnantly manifested between the will of the voters and the parliamentary will. In such a situation, the Parliament should have been dissolved – a natural solution in a consolidated democracy. This did not happen due to lack of certain constitutional regulations.

Under art. 149 of the Electoral Code, the referendum for the dismissal of the President of the Republic of Moldova may be initiated exclusively by the Parliament. Hence, the intention of the Parliament to dismiss the President denotes a legal conflict of constitutional nature emerged in the environment of interaction between the two institutions.

The proposed amendment is based on the suggestions of the Constitutional Court, on the opinions of the Venice Commission and on the European practice. The aim is to introduce for the Parliament a system checks so as not to enforce art. 89 of the Constitution in an abusive manner.

As a comparison, the case of Slovak Republic (Parliamentary Republic) and Austria (Parliamentary Republic) may be presented – member states of the European Union, in which the dismissal of the Head of State, elected via a popular vote, occurs when the citizens validate the dismissal of the Head of State, provided a quorum is met.

By virtue of the Constitutions of these two countries, the procedure for holding the President politically liable in Austria and Slovak Republic represents an element of the system of checks and balances of the powers in the state. As in both countries the Head of the State is elected directly, the dismissal of the president should be also approved via a referendum. The failure of the referendum on the dismissal of the president implies the dissolution of the legislative body, i.e. of the Parliament of the Slovak Republic and respectively, of the Federal Inferior Chamber in Austria. Moreover, in Austria, the rejection by referendum of the dismissal of the Head of the State also means the re-election of the President, meaning the beginning of a new mandate. It should be mentioned that this element of the system of *checks and balances* was also proposed in the *Stanomir Report* regarding the modification of Romanian Constitution as a possible modality for ending the conflict between the Head of the State and the Parliament.

4. The Parliament failed to adopt the Law on State Budget in a period of two months following the beginning of the financial exercise [art. 85 para. (2^1) let. d)]

The economic mechanism represents the basis of the economic activity of a state, while the tools of the economic leadership are setting the ensemble of objectives determining the management of financial resources. Therefore, the state budget represents the basis of the country's financial system, due to the weight it represents, and the role it has in the operation of fiscal and Customs systems, as well as that of economic planning and prediction.

The state budget expresses in a monetary form the economic relations which appear in relation to its formation and repartition, the level and evolution of the gross domestic product, but also to the fulfilment of the state's functions.

Therefore, it is inacceptable to admit some situations in which the Parliament fails to succeed, due to simple lack of political understanding, in adopting within legal deadlines the Law on the State Budget. In this respect, it is necessary to establish a system of constitutional sanctioning for ignoring the timely deadlines provided to the legislative body according to the provisions of the Law on Public Finance and Budgetary-Fiscal Responsibility.

Following the analysis of the process of adoption by the Parliament of the annual budget laws over the last 10 years, it may be noted that these laws were adopted with big delays as compared to the beginning of the annual financial exercise. For instance, the Law on the State Budget for 2011 was adopted on 31 March 2011, the Law on the State Budget for 2015 was adopted on 12 April 2015, and the Law on the State Budget for 2016 was adopted on 1 July 2016 etc.

The example of Estonia is relevant, which in Art. 119 of the Constitution provides: "If the Parliament fails to adopt the national budget within two months since the beginning of the financial exercise, the President of the Republic shall announce extraordinary elections of the Parliament".

This ground for dissolving the Parliament is also found in the Hungarian Constitution (Parliamentary Republic), which stipulates: if the Parliament fails to adopt the State Budget for the current year by 31 March, the President may dissolve the Parliament and simultaneously announce new elections. In this situation, the President of the Republic shall be obliged to ask the Prime Minister, the Speaker of the House and the parliamentary groups for their opinions.

5. Dissolution of the Parliament through referendum (art. 85^1)

This instrument is an innovation in the constitutional environment and suggests a counter-balance of the right of the Parliament to initiate a referendum on the dismissal of the President: establishing the right of the President to initiate the dissolution of the Parliament.

As of today, the Constitution does not contain express provisions which would allow the people to sanction the legislative power for violation of its obligation to be their representative. Moreover, the Republic of Moldova has unequivocal precedent of committing abuse of the right and negligence of the people's will (e.g.: referendum from 1999).

It is common ground that the President elected by people has a double role: a) representative of the nation; b) mediator of powers in the state both in the relations between the powers, as well as in his relation with the people.

Taking into account his role and constitutional essence, it is obvious that a President in a parliamentary republic elected by the people represents the most appropriate person to initiate a referendum procedure to sanction the Parliament for neglecting the will of the people.

Thus, the amendments proposed in Art. 85^1 aim to re-establish the link between the people and its representatives and to make the political powers accountable when they do not anymore represent the will of the people.

Moreover, in case of the referendum on the dissolution of the Parliament, the revocation of the President from his position serves as a check if the referendum ends with a negative result.

As compared to Austria and Slovak Republic, exemplified above, the system of checks and balances between the state powers functions in a reverse direction in Latvia (parliamentary republic, the president of the republic is elected by the Parliament). In this case, the Head of the State may initiate the dissolution of the Parliament, but the decision must be taken through a referendum by the voters. If the plebiscite does not validate the presidential initiative, the Head of the State is lawfully dismissed from his position (Art. 48 of Latvian Constitution).

Economical-financial reasoning

No additional costs are necessary for implementing the Draft Law on supplementing the Constitution of the Republic of Moldova.