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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

AMICUS CURIAE BRIEF

ON THREE QUESTIONS RELATED TO ARTICLE 78

OF THE CONSTITUTION

OF THE REPUBLIC OF MOLDOVA

**Adopted by the Venice Commission
at its 87th Plenary Session
(Venice, 17-18 June 2011)**

On the basis of comments by

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I. Introduction

1. Despite repeated dissolutions of parliament, several attempts to elect the president and an attempt to modify the Constitution through referendum, the political and institutional stalemate in Moldova, resulting mainly from the constitutional provisions on the procedure of the election of the President (Article 78), remains unresolved, and the President of the country still has to be elected.

2. In late 2009, the Constitutional Court of Moldova requested the Venice Commission to provide an *amicus curiae* brief concerning a case brought by a group of deputies of Parliament on the interpretation of Articles 78§5 (the Election of the President) and 85§3 (Dissolution of Parliament) of the Constitution of Moldova, which they alleged could give rise to uncertainty with respect to the timing of the dissolution of Parliament by the President. In its *amicus curiae* brief (CDL-AD(2010)002), the Venice Commission considered that the rule in Article 85§3 also applies to the circumstances of parliamentary dissolution under Article 78§5 (i.e. a failure to elect the President), and that it should be interpreted as meaning that the Parliament may be dissolved only once within a year counting from the last dissolution of Parliament. The Commission also underlined the need to amend the constitutional provisions on the election of the President in full compliance with the requirement of the current Constitution. It considered that such a constitutional reform would prevent political stalemates from happening again in Moldova in the future.

3. In early April 2011, a group of deputies introduced a request before the Constitutional Court for the interpretation of Article 78 of the Constitution of Moldova notably, with respect to the procedure for the election of the President.

4. On 19 April 2011, the Constitutional Court of Moldova requested the Venice Commission to give an *amicus curiae* brief on the issues raised in the constitutional complaint brought by the group of deputies. Three questions were put to the Commission:

A) May Parliament be repeatedly dissolved due to the same reason: non-election of the President?

B) Must the procedure of electing the President of the Republic of Moldova foreseen by Article 78 of the Constitution be repeatedly applied after early elections of a new Parliament, dissolved because of the impossibility of electing the Head of State?

C) May Parliament develop by an organic law a mechanism which would institutionalize a procedure meant to ensure the election of the Head of State and would not admit repeated dissolution of the Parliament?

5. Messrs. Bartole, Scholsem, Tanchev and Tuori acted as rapporteurs on this issue.

6. The present opinion, which was drafted on the basis of comments by the rapporteurs, was adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011).

II. Background

7. Under the terms of Article 78 of the Constitution:

“(1) The President of the Republic of Moldova shall be elected by the Parliament by secret vote.

(2) Any voting citizen of the Republic of Moldova over 40 years of age who has been living permanently in the country for at least 10 years and speaks the official language of the country may be elected President of the Republic of Moldova.

(3) The candidate obtaining three fifths of the votes of the elected deputies is elected President. If none of the candidates obtained the necessary number of votes, a second ballot shall be held between the first-placed two candidates, determined in the descending order of the number of votes obtained in the first ballot.

(4) If after the second ballot none of the candidates obtained the necessary number of votes, the election shall be repeated.

(5) If the President of the Republic of Moldova is not elected even after repeated elections, the current President dissolves the Parliament and sets the date for the election of a new Parliament.

(6) The procedure for the election of the President of the Republic of Moldova is stipulated by an organic law¹.

8. According to Article 90 of the Constitution:

“ ...

(4) In conformity with the stipulations of the law, the elections for a new President shall be organised within 2 months from the date when the presidential office of the Republic of Moldova becomes vacant.”

9. The April 2009 election, which was won by the PCRM*, was followed by street demonstrations in the capital Chisinau. During May and June 2009, the Parliament of Moldova was unable to reach the three-fifths majority necessary to elect the President of the State. Hence, in June 2009 the Parliament was dissolved, in conformity with Article 78§5 of the Constitution. Early elections were organised in July 2009. With the new parliamentary polls PCRM lost their majority and the Liberal Democratic Party of Moldova formed a coalition government with the Liberal Party, the Democratic Party of Moldova and the “Moldova Noastra” Alliance, named the “Alliance for European Integration”.

10. In September 2009, Mr Voronin resigned as President of the State, and was succeeded by Mr Ghimpu on an acting basis. In November and December 2009, it again turned out that no candidate could obtain the three-fifths majority required for electing the President.

11. In September 2010, the governing coalition attempted to modify the relevant constitutional provisions through referendum. However, the referendum to introduce direct election of president by people was declared invalid due to low voter turnout. Following the failure of the referendum, the Parliament was again dissolved on 28 September 2010.

12. After this second dissolution of the Parliament, the new parliamentary elections were held in November 2010. The newly elected Parliament has not yet tried to elect the new President of the state. Currently, the Speaker of the Parliament continues to occupy the post as a second interim President of Moldova.

13. In January 2011, the Constitutional Court of Moldova was called upon to decide on the complaint by a group of MPs concerning the interpretation of Article 90§4 of the Constitution i.e., the time-line for organising the presidential elections during the interim office of the President. In its decision of February 2011, the Court found, *inter alia*, that by appointing the second interim President of the State, the Moldovan Parliament established “*a unique legal situation: the interim office of the interim President, a situation not covered by the Constitution or by legislation*”¹. It thus considered that it is not within its competence to determine the time line for the organisation of the presidential elections. Relying on Article 78§6, it called upon

* Party of Communists of the Republic of Moldova (PCRM).

¹ See Decision on the interpretation of Article 90§4 of the Constitution of Moldova, No. 2 of 8 February 2011, Official Gazette 31/4, 22/2/2011, paragraph 5, point 5.

Parliament to find the proper solution to resolve these issues, “*observing the constitutional principles*”².

14. It remains unclear however, for how long the presidential elections may be postponed.

15. Besides the issue of the date of the next elections, the main question is whether the presidential elections are to be organised following the procedure provided by Article 78 of the Constitution knowing that they may result in yet another dissolution of Parliament. In such a case, Parliament would be dissolved for the third time in three years, and this, for the same reason. Or, whether on the contrary, before launching the election, Parliament could introduce “a mechanism which would institutionalize a procedure meant to ensure the election of the Head of State and would not admit repeated dissolution of the Parliament”.

16. The three questions put before the Venice Commission are interrelated. As the answer to the second question influences the development of the reasoning on the last question submitted by the Constitutional Court, they will be addressed jointly.

III. The three questions put by the Constitutional Court of Moldova to the Venice Commission

A) May Parliament be repeatedly dissolved due to the same reason: non-election of the President ?

17. Dissolution of Parliament is regulated by Article 85 of the Constitution. The latter provides for this possibility when:

“(1) an impossibility has been reached to form the Government;

(2) when a situation has been encountered whereby the passing of the new legislation has been deadlocked for three consecutive months;

(3) within forty five days from a first presidential request for a vote of confidence to form a new government a second such request has been rejected by the Parliament”.

18. In addition, Parliament will be dissolved

“if the President of the Republic of Moldova is not elected even after repeated elections” (Article 78§5).

19. The text of the Constitution does not specify either the identification of the presidential candidates in the “repeated elections” or how many times the elections can be repeated. The reference to “repeated” elections in Article 78§5 might seem to allow the repetition of the same election with the *same candidates* – those who received the highest number of votes in the initial ballots. On the other hand, according to Article 10 of the Organic Law “*Repeat elections shall be conducted within 30 days of the ordinary election that failed to elect the President of the Republic of Moldova, in accordance with the procedure established by the law*”. This wording, including the deadline of 30 days, can be interpreted as requiring the presentation of a *new* presidential candidates.

20. As to the question of “repeated” elections, the wording of Article 10 of the Organic Law³ implies that the repeated elections to elect the President can be organized by Parliament only one single time. If not successful, Parliament must be dissolved. This reading is also supported

² *Ibidem.*

³ According to Article 10 “(1) Repeat elections shall be conducted within 30 days of the ordinary election that failed to elect the President of the Republic of Moldova, in accordance with the procedure established by this law. (2) If the repeat elections fail to elect the President of the republic, the incumbent President shall dissolve the Parliament and establish the date of parliamentary elections”.

by the Constitutional Court of Moldova⁴. On the other hand, the Venice Commission assumes that “repeated elections” imply the organisation of another two ballots⁵.

21. In conclusion, Parliament will be dissolved whenever after two initial ballots and one repeated election none of the candidates has obtained the required three-fifths majority of votes of the deputies of Parliament.

22. Indeed, according to Article 78, the “current President“ does not have a choice: he “*dissolves*” Parliament each and every time when the conditions set up by paragraph 5 are fulfilled. This is proved by the fact that in other cases the Constitution uses the expression “may dissolve”. The wording adopted by the Constitution can be easily understood knowing that the “current President“ only has a temporary and restricted mandate that is to say, ensuring the organisation of the election of the new President and guaranteeing the political stability of the country⁶. Article 90§4 further restricts his power requiring the calling of the election of the new President “ within two months from the date when the presidential office becomes vacant “.

23. Constitutions generally provide for certain restrictions on dissolutions of Parliament. The aim of these is to prevent political instability and fight abuses linked to repeated dissolutions. The Moldovan Constitution is not an exception to this rule. According to Article 85 of the Constitution, Parliament may be dissolved only once in the course of a year (§3) and it may not be dissolved during the last six months of the mandate of the President of the Republic (with the exception of the situation provided for in Article 78§5) or during a state of emergency, martial law or war (§5). Similar restrictions on dissolution can be found in other constitutions⁷.

24. With regard to dissolution after a failure to elect the President, Article 78§5 does not include any restriction on a repeated dissolutions.

25. In the light of the above, it seems clear that the text of the Constitution not only allows but requires that Parliament is dissolved repeatedly if it proves unable to elect the new President of the country. In theory, it could thus be dissolved for the same reason for an indefinite number of times.

B) Shall the procedure under Article 78 of the Constitution be applied after elections held due to a failure to elect the President ?

C) May Parliament develop by an organic law a mechanism which would institutionalize a procedure meant to ensure the election of the Head of State and would not admit repeated dissolution of the Parliament?

26. As previously mentioned, since these two questions are interdependent, the Commission will consider them jointly.

27. Being the main provision of the Constitution regulating the procedure for the election of the President, Article 78 must be the starting point for the analysis.

28. According to its paragraph 3, a majority of three-fifths of the deputies is required to elect the President of the Republic. Should none of the candidates obtain “the necessary number of votes”, a second ballot shall be held to choose from the first placed two candidates, determined in the descending order of the number of votes cast for them in the first ballot “. If after the

⁴ See decision on interpretation of Article 78 §§ 3 and 5, n°45, of 8 December 2000, p. 3.

⁵ See Article 10§1 above, footnote n°3.

⁶ See CDL-AD(2010)002, para. 17

⁷ In 14 States, Parliament may not be dissolved during the last 3 or 6 months of the office of the President, during a state of emergency, martial law, war, state of defense: Andorra, Bulgaria, Czech Republic, Georgia, Germany, Kyrgyzstan, Lithuania, Moldova, Montenegro, Portugal, Russia, Serbia, Slovakia, Ukraine. In 4 States, it may be dissolved only once in the course of a year: Andorra, Greece, Moldova, Spain (see CDL-AD(2007)037add4, Note on the Issue of Dissolution of Parliament).

second ballot, none of the candidates has obtained “the necessary number of votes”, the election shall be repeated (Article 78§4). While this provision allows for the continuation of the electoral procedure, it does not explicitly state whether exactly the same procedure must be applied after the early elections of Parliament due to the impossibility to elect the President.

29. In its decision of February 2011 on the time-line for conducting the presidential elections during the interim office of the President (see above, para.14), the Constitutional Court of Moldova found that based on Article 78§6, certain procedural issues linked to a unique legal situation not regulated by the Constitution should be regulated by Parliament, including through an organic law, provided that the constitutional principles are respected⁸.

30. The Venice Commission agrees with this reasoning of the Court. It also considers that, in order to facilitate the effective election of the President, some further procedural adjustments linked to various stages of the procedure for the election of the President could be clarified through an organic law. These concern notably, the question of whether new presidential candidates can be presented for a vote during the “repeated elections” and how many; whether there might be more than two ballots or more than one repeated elections; the relevant deadlines etc.

31. A much more delicate question is whether, on the basis of the same reasoning, it would be possible, by means of an organic law, to depart from the rule in Article 78§3 requiring a three-fifths majority for the election of the President after the first (or second) dissolution due to the failure to elect the President.

32. In the Venice Commission’s opinion, the question of the majority required for the election of the President is an *issue of substance*, a fundamental criterion for the validity of the election itself. A criterion explicitly provided for by the Constitution and by the Organic Law. As such, it appears to be among the constitutional principles which should be respected also in the case of this new situation (i.e. new elections organised after dissolution due to a failure to elect the President), as required by the Constitutional Court in its decision of February 2011.

33. In principle, a textual interpretation of Article 78 would be preferable: the reference to the “the necessary number of votes” and to the necessity of “repeated elections” in paragraph 4 clearly indicates the will to extend the three-fifths majority requirement also to presidential elections organised after the early elections of a new Parliament due to the impossibility to elect the President.

34. It should also be recalled that pursuant to the Constitution, organic laws are passed “by majority vote based on at least two ballots” (Article 74§1). In the hierarchy of norms, organic laws stand below the Constitution and may not contradict it. Therefore, in principle, an organic law should not be allowed to deviate from the three-fifths majority requirement for the elections of the President. The most appropriate way for introducing reforms concerning the majority required for the election of the President is through a constitutional amendment, adopted in conformity with the procedure provided for by the Constitution itself.

35. Such reading of Article 78 corresponds to the general objective of the Constitution of Moldova, which is to ensure that the main political forces in the country arrive at a compromise and a broad agreement as to the person of the President of the State. Indeed, the functioning of constitutional bodies of a state should reflect the widest support possible of the various political forces in the country.

36. This textual interpretation raises the question as to *how many times* the same procedure for the election of the President can be repeated. As in the case of dissolution of Parliament, it would seem that the procedure under Article 78 can be repeated an indefinite number of times.

⁸ *Ibidem*.

37. Such reading reveals an inherent contradiction in the Constitution of Moldova: while constitutional provisions on the procedure for the election of the President should secure the good functioning of constitutional bodies, by allowing for an indefinite repetition of elections and dissolutions, in the present situation they prevent their effective functioning, and open the way to continued constitutional crisis. Furthermore, their strict application leads to a cumulation of the functions by the Speaker of parliament, who also exercises the function of the President *ad interim*, and this for a much longer period than the one stipulated in the Constitution⁹.

38. Indeed, contrary to other constitutions providing for similar mechanisms for the election of the president, the Constitution of Moldova does not contain any rule allowing the vicious circle of elections and dissolutions in case of the absence of compromise between the main political parties to be avoided, thus ensuring both the proper functioning of the state institutions as well as the stability of the constitutional system in the country. This kind of provision exists for instance in Greece where only one dissolution is allowed in case of a failure to elect a president by a qualified majority (two-thirds and then three-fifths). After this one and only dissolution, the conditions for a majority are progressively reduced, until a mere relative majority is required between the two best placed candidates. This rule ensures that after the elections, a president will effectively be elected (Articles 32.4 and 41.5 of the Constitution of Greece)¹⁰. A constitutional amendment, perhaps following the Greek example, may be recommended for Moldova.

39. The Venice Commission is aware that due to the fact that the Constitution of Moldova fails to provide guidance on how to deal with the current exceptional circumstances in the country, the textual interpretation of Article 78 may bring unsatisfactory results. This is because it leads to repeating the same procedure for election of the President all over again, and thus at a vicious circle of elections and dissolutions. Having in mind the incapacity of the Parliament to elect a compromise candidate and thus avoid a continuation of the crisis, it may be appropriate to revert to a functional interpretation of the Constitution: Looking at the Constitution as a whole and the specific objective of Article 78, which is to ensure the effective functioning of constitutional bodies, there should be a limit to these repetitions in order to prevent abuses linked to repeated dissolutions and to provide the necessary guarantee of a political stability in the country. The political and institutional deadlock in the country needs to be addressed with the outmost urgency.

40. The Venice Commission notes that only the national constitutional court has the authority to provide a final interpretation of the Constitution. It therefore falls to the Constitutional Court of Moldova to decide whether, under the present circumstances in the country, it can be justified to move away from a textual interpretation of Article 78 of the Constitution and put the emphasis on the general constitutional context, and allow for an organic law to regulate also the question of the majority requirement for the election of the President after dissolution because of a failure to elect the President. The better legal solution would clearly be to amend the Constitution, as suggested earlier by the Venice Commission.

IV. CONCLUSION

41. The Venice Commission is of the opinion that:

- Article 78§5 allows repeated dissolution of Parliament if it proves unable to elect the new President of the country;
- It is possible and even desirable, in order to facilitate the effective election of the new President, to clarify some procedural aspects of the election procedure through an organic law.

⁹ That is, two months from the date when the presidential office becomes vacant (see Article 90§4).

¹⁰ See CDL-AD(2010)002, para. 13.

42. As to the substantive requirement of a three-fifths majority for the new elections of the President organised after dissolution because of a failure to elect the President, the Commission is of the opinion that the most appropriate solution is to amend the relevant constitutional provisions explicitly, in accordance with the provisions of Title VI of the Constitution or to find a political compromise within the Parliament itself on the appropriate presidential candidate. The Venice commission can support either of the two solutions.

43. It is up to the Constitutional Court of Moldova to decide whether it is justified, under the present circumstances in the country, which the Constitutional Court of Moldova has considered unique, to proceed on the basis of a textual interpretation of Article 78 or rather to follow, based also on the comparative experience of other countries, a functional interpretation of the Constitution in order to avoid the continuing constitutional crisis (see above, paras. 38-39).

44. The Venice Commission encourages the political parties in Moldova to assume their governance responsibility and find the way to come to an agreement on the presidential elections.

45. The Venice Commission remains at the disposal of the Moldovan authorities for any further assistance that they may need in this matter.