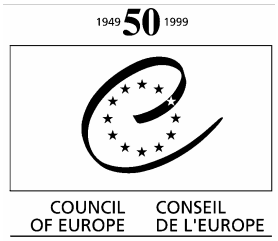

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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

INTERIM REPORT

ON THE CONSTITUTIONAL REFORM IN THE REPUBLIC OF MOLDOVA

adopted by the Venice Commission at its 41st Plenary Session (10-11 December 1999)

based on comments by:
Mr Serhiy HOLOVATY (Member, Ukraine)
Mr Giorgio MALINVERNI (Member, Switzerland)
Mr Vital MOREIRA (Member, Portugal)
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Introduction

1. In April 1999 the Council of Europe Parliamentary Assembly Committee on the Honouring of Obligations and Commitments by Member States decided to have the constitutional developments in the Republic of Moldova monitored by the Venice Commission, which was notified of the decision by letter of 3 May 1999. In addition, on 25 May 1999 the question of the constitutional reform was referred to the Commission by the Parliament of Moldova, which presented the Venice Commission with a draft constitutional revision prepared by 39 of its members.

2. This draft was the subject of a preliminary discussion at the plenary meeting of the Venice Commission from 16 to 18 June 1999 in the light of a report by Mr Moreira (CDL (99) 32 rev,). The Commission's rapporteur regarded the proposal by 39 parliamentarians as complying with European democratic standards.

3. On 1 July 1999, following a consultative referendum on possible amendment of the Constitution, the President of the Republic of Moldova, Mr Lucinschi, signed a decree setting up a National Committee to draft a law for amending the Constitution of the Republic of Moldova (Constitutional Committee).

4. Since September 1999 the Venice Commission has arranged co-operation with the Moldovan Constitutional Committee mandated by the President of the Republic to draw up a scheme of constitutional reform. A delegation of the Venice Commission visited Chisinau on 18 and 19 September 1999 for talks with the Constitutional Committee and the Parliament. This initial encounter was followed by two planning meetings in Venice on 18 October and in Strasbourg on 5 November 1999[1] attended by representatives of the Moldovan Parliament and the Constitutional Committee.

5. In the course of this co-operation, a number of criticised items of the draft reform have been amended by the Moldovan authorities having regard to the recommendations made by the Venice Commission's experts. This particularly concerns the Parliament's budgetary powers and the provisions which could possibly have affected the independence of justice.

6. However, the Commission feels that the draft as it now stands still retains a number of elements which preclude declaring it consistent with European democratic standards.[2]

7. This opinion concerns the drafts for legislation to amend the present Constitution, prepared by the Constitutional Committee and submitted to the Venice Commission during its visit to Moldova on 18 September 1999, as well as the draft amendments proposed by 39 members of the Moldovan Parliament in April 1999.

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[1] *In the space of two months the Constitutional Committee has presented the Venice Commission with 4 successive versions of the draft constitutional amendments, each aimed at instituting a presidential system of government in Moldova*

[2] *By an information note dated 19 November 1999 (document CDL (99) 73), the Constitutional Commission informed the Venice Commission that articles 72, 73(2) and 82 (3) were changed followed the experts' observations. Article 73(2) was modified considerably and no longer creates any problem, however, articles 72 and 82(3) were not significantly changed.*

I. The procedure for amending the Constitution of the Republic of Moldova

8. The Parliamentary Assembly's request that the Venice Commission monitor constitutional developments in the Republic of Moldova came at a time when the President of the Republic of was staging a consultative referendum on the introduction of presidential government in Moldova. The constitutional reform process was then in its early stages and the procedure to be followed unclear, as it still is.

9. The President of the Republic considered himself authorised by Articles 75 and 78 f. of the Constitution to avail himself of his right to call a referendum on a question of national importance, in this case the amendment of the Constitution. Nonetheless, this interpretation seemed to override the provisions of the present Constitution on constitutional amendment. Article 143 paragraph 1 of the Constitution in fact provides *"Parliament has the right to adopt a law for revising the Constitution after no less than 6 months from the date when the revising initiative was submitted. The law shall be passed by a two-thirds majority"*.

10. On 3 November 1999 the Constitutional Court delivered a judgment interpreting Articles 75, 141 paragraph 2 and 143 of the Constitution. The Court confirmed that all constitutional amendments must be made according to the procedure prescribed by Articles 141 and 143 of the Constitution.[3]

II. The draft law for revising the Constitution of the Republic of Moldova put forward by the Constitutional Committee on 29 October 1999

11. The draft put forward by the Moldovan Constitutional Committee on 29 October 1999 is intended to establish a presidential system.

12. It should be noted at the outset that this is the fourth version of the draft examined by the Venice Commission. Since September 1999 the Constitutional Committee has been co-operating closely with the Venice Commission, and several meetings have brought together the drafters and the Commission experts. The Commission welcomes the fact that a number of preliminary observations made by it's experts have been taken into account by the authors of the proposed reform. However, several disputable points singled out by the experts from the start of he co-operation are still present in the text of the proposed constitutional reform.

13. While emphasising its constant position that choosing the form of government is the Moldovan people's sovereign right, the Venice Commission regards the system set out in the text of 29 October as a mix of the different presidential and semi-presidential systems existing in the democratic countries which is likely to bring the powers of the President, the Government and the Parliament into conflict and offend against the principle of separation of powers.

A. <u>General comments</u>

14. The scheme of reform under discussion institutes a presidential system more assertively than the earlier texts. The President heads the executive; the Government acting as an assistant to the President (Articles 82, 83); Parliament cannot be dissolved (Article 85

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[3] *The full text of the Court's decision is reproduced in Appendix I to this opinion.*

being excluded from the text of the project); the sphere of the various types of laws is established by and their approval rests with the Parliament (Article 72); provisions with force of law within the "law sphere" (see para.20 below), adopted by the Government must be passed by the Parliament. The Commission is pleased to note the introduction of the independent institution of Advocate of the People and the maintenance of the Parliament's budgetary power.

15. At several points in the discussions between the Venice Commission's experts and the Constitutional Committee's representatives, the latter stressed that the amendment of the present Constitution was aimed at transforming the semi-presidential system under the present Constitution into a wholly presidential one. According to the Constitutional Committee, a reform along these lines is imperative following the consultative referendum of 23 May 1999 in which the people came out in favour of strengthening the President's powers.

16. The Commission observes that by comparison with the orthodox presidential system as established in the United States, the Constitutional Committee's draft displays substantial differences: calling of referendums on the President's initiative (Article 75); limited involvement of the Parliament in the sphere of treaties and foreign policy, and especially in the appointment of certain senior officials (Articles 66 and 88); commitment of the Government's political responsibility solely on its own initiative (see para. 18 below). Furthermore, the procedure for committing the Government's responsibility in connection with the passage of draft legislation may significantly restrict the Parliament's legislative power (Article 106). All the above differences indicate that the draft under consideration institutes a remarkably strong presidential system.

B. Comments on the specific provisions of the draft

17. Article 61 concerning election of the members of Parliament is amended in the sense of introducing a composite electoral system. This is used by several democratic states and technically this aspect raises no problem. However, for greater surety of political pluralism in the Parliament, it would be advisable to specify that the election of 31 members in multi-seat constituencies shall be conducted by proportional representation.

18. Article 72 paragraph 6 of the draft enables Parliament to adopt a motion of censure against the Government but not, it should be observed, of its own motion. The Government can declare itself accountable (Article 106 paragraph 1 of the draft) and, should the Parliament withhold its approval of a programme or bill proposed by the Government and adopt a motion of censure, the Prime Minister is required to tender the Government's resignation (paragraph 2 (b)). In point of fact, giving the sole authority to the Government to hold itself accountable to Parliament would seem to diverge from the constitutional practice of European democracies.

19. In the same context, another problem arises regarding the appointment of the Prime Minister and the Government. Under Article 82 paragraph 1 of the draft, the President appoints the Prime Minister after consulting the parliamentary majority. It is further stipulated in this article that the members of the Government are appointed by the President at the Prime Minister's proposal (paragraphs 1 and 4). There is no provision requiring the latter to represent the parliamentary majority, in consequence of which the Government can have no real foundation on the political forces in the Parliament. The Government has every

appearance of a body exclusively controlled by and wholly answerable to the President under the terms of Article 82 paragraph 3, except in the event of its deciding to accept responsibility before the Parliament. Plainly, there is no link between the Parliament's legislative activity and the Government's executive power.

20. Article 72 paragraph 3 of the new draft lists the areas in which laws are enacted. This is an uncommon practice in modern constitutional systems. Normally the Parliament, except in the special cases prescribed by the Constitution (for example under the procedure for delegation of authority to legislate) is the sole legislative body and as such empowered to legislate in all areas. Listing the areas is apt to limit this power, which scarcely seems justified.

21. All the political forces in Moldova do indeed seem to agree that the constitutional reform should seek to strengthen the executive power. Instituting a more effective role for the executive in the passage of the State's legislative acts meets the requirements of rationalisation accepted by several present-day democracies. It is perfectly normal for the executive to call for urgent procedure and to set priorities for its legislative bills. This procedure is very highly developed in the French system, for instance; Article 44 of the French Constitution prescribes the procedure of a vote restricted to the text proposed by the Government while Article 49 makes it possible to commit the Government's responsibility in respect of a bill, in which case the text is regarded as carried without a vote unless the National Assembly passes a motion of censure against the Government. If, however, the French National Assembly objects to the Government's policy, it may at any time and on its own initiative pass a motion of censure against the Government. This ensures the democratic functioning of the institutions as the system includes controls and countervailing powers. But the Commission observes that the Moldovan Constitutional Committee's text affords no such controls and countervailing powers.

22. Their absence from the draft also works the other way. Under the Constitutional Committee's proposals (the exclusion in Article 85 of "Dissolution of Parliament" from the Constitution in force), the executive no longer has any means of countering a motion of censure without the right to dissolve Parliament, and this excludes parity between executive and legislature in the exercise of their right to legislative initiative.

23. Article 73 paragraph 2 on legislative initiative, which provides that legislative proposals by members of Parliament shall be placed on the Parliament's agenda with the approval of the Government, is contrary to the principle of the independence of the legislature. Granted, the process of drafting laws in Parliament is lengthy and the Government may wish to limit debate on legislative proposals not relating to priority matters, but restrictions on Parliament's right freely to legislated cannot be imposed by the executive.[4] Admittedly, certain countries have arrangements whereby the Government may secure the power to legislate in a number of areas clearly defined by Parliament in order to respond promptly to situations that demand immediate action. For example, according to Article 38 of the French Constitution, *"the Government may, in order to carry out its programme, ask*

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[4] *According to information recently received by the Venice Commission, the latest version of article 73(3) has been modified to read that only "propositions by deputies which entail the increase or reduction of the budget's financial resources are including in the Parliament's agenda with the Government's approval". This is a positive change.*

Parliament to authorise it, for a limited period, to take by ordinance measures normally within the legislative sphere"; however, Parliament retains control over the process by a mechanism that renders the ordinances null and void if a bill for their ratification is not tabled in the Assembly before the date set by the enabling act. Another factor conducive to parliament-government balance of powers is that the French Government is drawn from the parliamentary majority (which indisputably aids speedier consideration by parliament of proposed laws considered high-priority by the Government). As stated above (para. 18), such is not the case in the system which the Constitutional Committee's draft revision purports to institute.

24. Article 75 of the draft concerning referendum is also liable to interfere with the Parliament's power to legislate. It specifies three types of referendum: constitutional, legislative and consultative. The right to initiate referendums belongs to the citizens, to Parliament and to the President of the Republic. Paragraph 2 of the draft article gives the Parliament and the President of the Republic the right to proclaim referendums. In these circumstances, where the Government, which under the system advocated by the draft is accountable to the President alone (except where it commits its own responsibility before the Parliament), does not succeed in compelling the Parliament to pass a law, it may ask the President to have the law approved by citizen vote. Here, it should be emphasised that any law approved at referendum may only be amended by the same procedure (paragraph 4 of the draft article). The Venice Commisison considers that referendum is a democratic instrument which is used by many European democracies, but in the text of the draft presented for examination, and taking into account the other provisions of the law for constitutional revision, this rule which establishes a sort of democracy by referendum, is of concern to the Commission. Indeed, it is open to question whether such a system enabling the executive to take the legislative process out of the Parliament's hands may not gravely infringe the principle of separation of powers.

25. In adopting the position stated above (especially in paragraphs 23 and 24), the Commission would no means cast doubt on the executive's ability to generate legislation, which is often necessary and moreover commonplace. Nonetheless, it is expedient in a democratic system upholding the separation of powers that the legislature should always retain power to review the executive's legislative output and to decide on the extent of its powers in that respect. The restrictions generally placed on the regulatory function of the President and the executive under presidential systems (*executive orders*, etc.) is an expression of this principle.

26. The chapter on the judiciary in the Constitutional Committee's draft raises no criticism. However, Article 88 indent "m" entitles the President to confer senior ranks on judges. It would be more prudent to vest this authority in the Supreme Council of the Judiciary to avert any risk of the executive influencing judges.

III. The draft proposed by 39 members of the Parliament of the Republic of Moldova

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27 The project of constitutional reform that has been presented by the Parliament of the Republic of Moldova aims at the strengthening of the constitutional position of the executive. The innovations that are sought after are four:

(i) The government gets the power to establish priority for the parliamentary discussion of the governmental projects of legislation, or of other projects laid before parliament which it is interested in, as well as the adoption of an urgent procedure for the parliamentary discussion thereof (art. 74 of the Constitution).

(ii) The government may engage its own responsibility before parliament by the way of the presentation of a political programme, a declaration of general political importance or – most importance of all – a project of legislation, which shall be considered as adopted unless a vote of no confidence is approved by parliament (art. 106^{1});

(iii) The government may legislate through "ordinances", providing that it gets previously a legislative delegation from parliament (art. 106^{2});

(iv) At last, no piece of parliamentary legislation shall be adopted by parliament when it implies the increase of the budget expenses or the decrease of budget revenues without the consent of the government.

28 All of the proposed changes to the Moldavian Constitution have their source in the democratic European constitutions, specifically the French Constitution of 1958. But this circumstance does not spare the necessary study of each one of the proposed changes.

2

29 The power of the government to establish priorities for the projects it is interested in upon the parliamentary agenda comes from art. 48 of the French Constitution. It states that the agenda of both chambers of parliament shall give priority, according to the preferences of the government, to the projects presented by itself or to the projects of the members of parliament that are accepted by the government.

30. There is no reason to think that such an executive privilege runs against the essential rules of parliamentary democracy. Of course provisions should be taken in order that this prerogative of the executive does not eliminate altogether the autonomy of parliament to set its own agenda and to discuss legislative projects other than those presented or supported by the executive, specifically those that are tabled by the opposition parties. But apart from that prevention, one should accept that the government, which has been approved by parliament, is entitled to the actual means that it feels to be necessary to implement its legislative program.

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31. The new article 106^{1} has its recognisable source in the French Constitution too (article 39, §§ 1 and 3). According to it, the government may decide to engage its own political responsibility before parliament upon a political program or declaration or upon a project of law. In that case those documents are considered to have been approved by parliament unless a vote of no confidence is proposed by a certain number of members of parliament and approved against the government.

32. The peculiarities of these rules are twofold: first, the government wins an implicit vote of confidence inasmuch as there is no actual vote of confidence but only the absence of a vote of no confidence; second, this "negative" vote of confidence may involve the automatic approval of a project of law without an actual discussion and vote of it by parliament. This scheme amounts to giving to the government a speedy way of forcing the approval of legislation that otherwise could meet the disapproval of parliament.

33. It is not difficult to raise a few objections against this rule that allows the government to pass important legislation without the need of an explicit approval by the representative assembly. May be that in this we are touching the very frontiers of the parliamentary prerogatives in a representative democracy. But the objections should not be overestimated. The French experience shows that this is not an unbearable sacrifice of parliamentary privilege.

4

34. The delegation of legislative powers by parliament upon the government is nowadays a very common feature of parliamentary democracies.

35. Typically we find two main ways of government legislation. One is the delegation of legislative powers by parliament, for a certain issue and on a temporary basis, and usually without the need for the parliamentary ratification of the law issued by the government. The other sources of government legislation are the situations of urgent necessity, in which there is no previous delegation, but that require parliamentary ratification within a short period of time. This is the system that is adopted for example by the Italian and the Spanish constitutions.

36. The Moldavian project is a very cautious one. The delegation should require:

(i) A request by the government regarding the implementation of its own program of activities (which is submitted to parliament when the government is appointed);

(ii) The approval of the delegation by parliament through an "organic law", that means a law approved according to the specific procedure of article 74(1) of the Constitution, which requires a double vote of the majority of the members of parliament.

(iii) The identification of the subject of the would-be "ordinance" of the government, as well as the time in which the government enjoys the delegated legislative powers;

(iv) The eventual ratification of the ordinance by parliament.

37. Again, the main source of this constitutional proposition is the French Constitution (article 38). Nevertheless one should bear in mind that in France there is a separation between the domain of parliamentary law (art. 34) and the domain of the government regulation (art. 37), in which the government enjoys real primary normative powers, with no need of parliamentary delegation. On the contrary, in the domain of the government regulation parliament is not allowed to legislate. This is not the case in Moldova, where the government has no such para-legislative powers of its own, and where the regulation powers of the

executive are meant only for the implementation of the parliamentary laws. In Moldova every issue belongs to the domain of parliamentary law. Thus, the proposal of constitutional change should be rephrased in order to take account of the different constitutional framework.

5

38. The prohibition of the adoption by parliament of legislation that could involve an increase in the government expenditure or the decrease of the government revenue is also very common nowadays in several constitutions of parliamentary democracies. Constitutional provisions to that effect may be found, for example, in the German Grundgesetz of 1949 (article 113) or the Spanish constitution of 1978 (article 134(6)). But the immediate source of the Moldovan project is once again the wording of the French Constitution (art. 40). This limitation of the parliamentary prerogative is not incompatible with parliamentary democracy. It may be a necessary condition for the ability of the government to get along with its policies, especially under conditions of budget constrictions. There are no reasons whatsoever to condemn this solution.

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39. The aim of the proposed constitutional changes in Moldova is confessedly the strengthening of the executive position in the framework of the constitutional system of government.

40. A strong executive is not necessarily against parliamentary democracy. On the contrary, it is weak executives and government instability that are very often a threat to parliamentary democracy.

41. A fair balance between parliamentary sovereignty and government strength is the main concern of the so called "rationalised parliamentarism" (*parlementarisme rationnalisé*) since the earlier decades of this century, which has been the remedy indicated for the weaknesses of traditional parliamentarism in continental Europe, mainly the political instability brought about by the excessive dependence of the executive from parliament.

42. It needs no emphasis the assertion that parliamentary democracy should "deliver the goods" in order to ascertain its own legitimacy and acceptance. That means essentially to ensure efficient and stable governance of the polity. The "excess of parliament" is very seldom a virtue. Provided that the government remains accountable before parliament and cannot act against its will, parliamentary democracy leaves enough ground for a vast array of provisions with the aim of strengthening the constitutional and political position of the executive within the system of government.

43. No wonder that the changes which are being discussed in Moldova have their main source of inspiration in the French Constitution of 1958, which is without doubt where the executive enjoys the strongest position vis-à-vis the parliament.

7

44. A final remark is necessary to call the attention to the fact that the Moldovan Constitution, although belonging to the family of the parliamentary forms of government, has a few peculiar features that present some similarities with the French *semi-présidentialisme*.

45. It is indeed a parliamentary system of government. There is the political fiduciary relationship between parliament and the executive. The government is appointed according to the parliamentary majority (if there is one). The government needs a parliamentary vote of confidence to be confirmed in office, once appointed by the President of the Republic. Afterwards it can be sent away be the means of a vote of no confidence. On the other hand the President of the Republic may dissolve parliament if it becomes impossible to form an executive within the framework of the existing composition of the assembly or if there is a deadlock concerning the approval of important legislation that could affect the functioning of the State. All these are typical features of the parliamentary system of government.

46. But there is more to it. The President of the Republic is elected by direct popular vote and has a number of important powers of its own, which he can exercise without the need of ministerial countersignature. Among these powers may be counted those indicated in articles 83-88 of the Constitution. Most of these are not common in traditional parliamentary forms of government, where the chief of State, be it a king or a president, has mainly a representative role, not an actual intervention in the political process.

47. Thus, in Moldova (as well as in other European parliamentary democracies like Finland, Austria, Portugal, Ireland, Iceland, etc.) parliament is not the only constitutional organ of the State to represent directly the people. In Moldova, as well as in France, the executive power belongs not only to the government but also to the President. On the other hand the government is not only accountable before parliament but also, in a certain way, before the President.

48. This is an additional reason why the proposed changes to the Constitution of Moldova do fit with the character of the constitutional system of government.

Conclusions

The Venice Commission regrets that the Moldovan authorities have not been able to reach agreement on a single draft for amendment of the Constitution, or on the substance of the reform.

It again points out that the procedure for adoption of constitutional amendments must abide by the provisions of the Constitution in force, as interpreted by the Moldovan Constitutional Court and in accordance with the procedure established by Articles 141 and 142 of the Constitution.

The draft amendment submitted by the Constitutional Committee still contains a number of provisions which, in the framework of a presidential system of government, are prejudicial to compliance with the principle of separation of powers. In particular, the Commission expresses its concern over the provisions in the draft whereby:

a) any legislative initiative by the members of Parliament must be approved by the Government prior to its inclusion in the agenda of the legislative body;[5]

b) the President may bypass the normal legislative procedure through the expedient of submitting a proposed law to referendum;

c) the procedure for constituting the Government raises difficulties as regards its interaction with the Parliament, there being no connection between the Government and the majority in the Parliament.

In general, it seems apparent from the text of the Constitutional Committee's draft that the countervailing powers available to the Parliament against the powers of the President are too weak.

On the other hand, the draft submitted by 39 members of Parliament which is discussed in part III of this opinion could certainly be instrumental in strengthening the Government while raising no substantial criticism as to its consistency with democratic standards.

[5] *This criticism is no longer relevant if article 73(2) is adopted in the new version as proposed on 19 November 1999 (see footnote 4).*

A P P E N D I X

J U D G M E N T

regarding the interpretation of Articles 75, 141 paragraph (2)
and 143 from the Constitution

In the name of the Republic of Moldavia

The Constitutional Court composed of the following judges:

Mr. Pavel BARBALAT,	President,
Mr. Nicolae KISEEV,	Judge – Reporter,
Mr. Mihail KOTOROBAI,	Judge – Reporter,
Mr. Constantin LOZOVANU,	Judge – Reporter,
Mr. Gheorghe SUSARENCO,	Judge – Reporter,
Mr. Ion VASILATI,	Judge – Reporter,

with the participation of Ms. Aliona Balaban, Registrar; the deputies in Parliament Mrs. Anatol Ciobanu and Vasile Nedelciuc – the authors of the application; the representative of Parliament Mr. Ion Creanga – Chief of the Sector-Relations with Public Authorities, Judicial Department of the Parliament Staff; the representatives of the President of the Republic Mr. Mihai Petraky, Chief of Office of the President of the Republic, the senior councilor of the President and Ms. Raisa Grecu, Chief of the Act's Service of the President of the Republic, with the attendance of Mr. Vladimir Solonari, the deputy in Parliament and Ms. Olga Poalelungi, Vice-President of Justice, the representative of the Government, taking into consideration the Article 135 paragraph (1), letter b) from the Constitution, Article 4 paragraph (1), letter b), Article 16 from the Law on the Constitutional Court, the Court has examined at the open plenary session the file concerning the revision of Article 75, Article 141 paragraph (2) and Article 143 from the Constitution.

The applications lodged to the Court by the deputies Anatol Ciobanu and Vasile Nedelciuc on 27 May 1999 and respectively on 6 September 1999, pursuant to the Articles 24 and 25 from the Law on the Constitutional Court, Article 38 and 39 from the Code of the Constitutional Jurisdiction, have been considered as the legal grounds for the file examination.

Following the Judgments of the Constitutional Court from 27 July 1999 and 22 September 1999, the above – mentioned applications have been delivered for examination, colligated in a single file and registered in the agenda.

In the process of the file preliminary examination the opinions of the Parliament, the President of the Republic, as well as of the Government and the Ministry of Justice have been requested.

While analyzing the file issues and at hearing the information provided by the Judges – Reporters, or the arguments brought by the applicants and the opinions delivered by the participants at the process,

the Constitutional Court

h a s a s c e r t a i n e d :

1. In their applications the deputies Anatol Ciobanu and Vasile Nedelciuc, having invoked the Articles 75 and 143 from the Constitution, challenged the Court with regard to review the Article 143, paragraph (1) from the Constitution, which stipulates the fact whether at the initiative to pursue the procedure of revision of the Constitution through a referendum by the President of the Republic there will be need to observe the term of 6 months beginning with the moment of initiation until that of the referendum unfolding. Despite that, the deputy Anatol Ciobanu claimed to the interpretation of Article 141, paragraph (2) from the Constitution providing the case if the President of the Republic is endowed, pursuant to the Constitution, with the power to declare the referendum, or he has only the right to initiate it, in order the Parliament to decide over the matters whether the referendum should be carried out, as well as over the allocation of the financial funds necessary for its holding.

At the plenary session the deputy Vasile Nedelciuc had enlarged the subject of the application, challenging the Court to pronounce itself, over the matter if the President of the Republic has or has not the right to request through a presidential decree the endorsement by way of referendum of the draft – laws on the amendment of the Constitution.

2. For reason of the object of the applications examination, the Constitutional Court ascertained as necessary to use the following provisions of the Constitution:

- art.1, paragraphs (1) and (3), which stipulates that the Republic of Moldavia is a sovereign, independent, unitary and indivisible state governed by the rule of law – a democratic state in which the dignity of a citizen, his rights and freedoms, the open development of human personality, justice and political pluralism represent supreme values, that shall be guaranteed;

- art.2, which stipulates that the national sovereignty belongs to the people of the Republic, who shall exercise it directly and through its representative bodies in the ways provided for by Constitution, and that no private individual may exercise state power in his own behalf, and the usurpation of state power is considered the gravest crime against the people;

- art.5, paragraph (1), which ascertains that the democracy in the Republic is exercised under the conditions of political pluralism, which is incompatible with dictatorship or totalitarianism;

- art.7, pursuant to which the Constitution of the Republic is the supreme law of the country. No laws or other legal acts in contradiction with the provisions of the Constitution may have any legal power;

- art.60, paragraph (1), which ascertains that the Parliament is the supreme representative body of the people and the sole legislative authority in the Republic;

- art.66, letters a) and b), which stipulates that the passing of laws and the declaration of the referendums' holding are the basic prerogatives of the Parliament;

- art.72, paragraphs (1) and (2), which notifies that the Parliament is empowered with the right to pass the Constitutional laws, which are those aimed at revising the Constitution;

- art.75, paragraph (1), which foresees that problems of utmost importance confronting the Moldavian society or State shall be set up by referendum;

- art.77, paragraph (2), which establishes that the President of the Republic is the guarantor of national sovereignty, national independence, of the unity and territorial integrity of the nation;

- art.88, letter f), which notes that the President of the Republic is empowered to request the citizens of the country to express their will by way of referendum on matters of national interest;

- art.135, paragraph (1), letters b) and d), which stipulates that the revision of the Constitution and the acknowledgement of results of republican referendums are exclusively the prerogatives of the Constitutional Court;

- art.141, paragraph (1), letter c) and paragraph (2), which foresees that the President of the Republic may initiate the amendment of the Constitution, and the constitutional law drafts shall be lodged to Parliament, following the Constitutional Court advise issue having been endorsed by at least 4 casting votes of the judges;

- art.142, paragraphs (1) and (2), which stipulates that the constitutional provisions regarding the sovereignty, independence and unity of the state, as well as those regarding the permanent neutrality of the State may be revised only by referendum and that no revision of Constitution shall be allowed if it results in the suppression of the fundamental rights and freedoms of citizens or of their guarantees;

- art.143, paragraph (1), which emphasizes that the Parliament has the right to pass a law for revising the Constitution after no less then 6 months from the date of submission of the mentioned initiative.

3. Upon the opinion of the Constitutional Court, the amendment of the Constitution is therefore aimed at its re-wording, the abrogation of a certain normative acts or the adding of a new text.

The Constitutional Court notices that being considered as a written and systematic establishment or, as a supreme law in the judicial normative system, the Constitution of the Republic is relatively rigid, or in other words it allows the revision, but only for a pre-established technical system referred to the initiative of revising (art.141), the limits of revision (art.142) and its procedure (art.143).

The Constitutional Court holds that the amendment of some provisions of the Constitution, having evaded the stipulations of Articles 141, 142 and 143 from the Constitution, should

constitute as a matter of fact its implicit revision, indifferently of the invoked reasons and the procedure which had been used, that might be regarded as a violation of the Constitution.

4. Article 141 paragraph (1) from the Constitution foresees in an express and limitative way the subjects endowed with the power to amend the supreme law.

Article 141, paragraph (2) from the Constitution stipulates that the constitutional law drafts shall be submitted to Parliament only in case the Constitutional Court issues its advisory opinion endorsed by the voting cast of at least 4 Judges. Following the analysis of the mentioned constitutional normative act the Constitutional Court established that the constituent legislator had foreseen not only the subjects, who could initiate the revision of the Constitution, but also the sole body – the Parliament of the Republic, which is empowered to carry on this revision.

Article 142 from the Constitution sets up the margins of its revision, taking into consideration two important criteria: the object of revision and the circumstances in which the revision has been challenged. Considering the first criterion, the revision may be, in a way a priori deemed inadmissible, because it might have as a result the compromising of the democratic values of the State (no revision may be carried out, if it has a result the abolition of the fundamental rights and freedoms of citizens, or of their guarantees – art.142, paragraph (2), or in other way, the revision may be carried out only following the approval through a referendum based on a majority vote of registered voting citizens of the Republic (the provisions regarding the sovereignty, independence and unity of the state, as well as those regarding the permanent neutrality of the State – art.142, paragraph (1). Pursuant to the second criterion, the revision is deemed inadmissible of the reasons of inopportuneness (the Constitution may not be revised under a state of national emergency, martial law or war – art.142, paragraph (3).

The procedure aimed at revising the Constitution is clearly and exactly established by the Article 143 from the Constitution, this one having been considered as a condition for appropriate functioning of the constitutional bodies.

Thus, the procedure on Constitutional revision ascertains:

a) the body which shall initiate the modification;

b) the body which shall vote for the proposal of modification;

c) the number of voting cast necessary for passing the proposal on Constitutional revision.

Following the analysis of Article 143 from the Constitution it results that the Parliament is the sole body endowed with the power to revise the Constitution, without any other special investiture, thus being entitled in this respect by the wording of Constitution.

The only differences between the debate and the endorsement of a draft law or of a proposal on Constitutional revision, as well as the debate and passing of other laws, shall therefore be:

a) the application being lodged by an expert majority of at least two thirds of deputy votes;

b) the passing of the law on Constitutional amendment after a period of at least 6 mouths from the date when the mentioned initiative had been lodged.

5. The Constitutional Court mentions the fact that the procedure of Constitutional revision blends the specific techniques for a representative democracy (Parliament) with those of the direct democracy (referendum).

The referendum, which is always considered subsequent towards the endorsement by the Parliament of a law draft, or of a proposal for revision, pursuant to the provisions of Article 142, paragraph (1) from Constitution, has therefore the meaning of a suspensive and binding condition towards the decision of Parliament.

According to Article 75 from Constitution, the problems of utmost importance confronting the Moldavian society or State shall be set up by referendum, that is, as a matter of fact the way through which people directly exercises its will. In case the referendum has been referred to a law draft, the Parliament is endowed with the power to declare it in pursuance to Article 66, letter b) from the Constitution, but the President of the Republic, according to Article 88, letter f) from the Constitution, is empowered to request the citizens of the Republic to express their will by way of referendum on matters of national interest.

Thus, the Constitutional Court considers that through the wording of Article 88 from the Constitution, which foresees the right of the President of the Republic to request people of the country to express their will by referendum on issues of national importance, the constituent legislator has stipulated the possibility of the President to address the body of electors only on issues of major importance which our nation might be confronting with at a crucial moment, but not on issues dealing with the approval or decline of a law on Constitutional amendment.

The Constitutional Court establishes that the provisions of Article 75, paragraph (2) from the Constitution, pursuant to which the decisions passed according to the results of the republican referendum have supreme judicial power, it does not impair the procedure on Constitutional amendment laid down by Articles 141-143 from the Constitution, thus shall not stipulate the possibility of revision of some provisions from Constitution passed by the Parliament through any other way than that foreseen by these articles.

6. Having regard to the issue challenged by the author of application Anatol Ciobanu concerning the allocation of financial funds necessary for holding the referendum, the Constitutional Court notices that this one belongs to the competence of Parliament, which, pursuant to Article 72, paragraph (3), letter b) from Constitution, passes the laws aiming at the organization and carrying out of referendum, thus the allocation of financial funds is deemed as a constituent element of the organization and carrying out of referendum.

Having considered the above – mentioned reasons and pursuing the Articles 135, paragraph (1), letter b) and 140 from the Constitution; Article 26, paragraphs (1) and (2), Article 27 from the Law on Constitutional Court; as well as Articles 66, 69 and 70 from the Code of Constitutional Jurisdiction,

the Constitutional Court

ASCERTAINS:

1. The Constitution of the Republic may be amended only by the Parliament, in a direct way or declaring by the latter of a referendum, under the conditions in which the procedure stipulated by Article 66, letter b) and the provisions of Articles 75, 141, 142 and 143 from the Constitution have to be observed.

2. The provisions of the Constitution regarding the sovereign, independent and indivisible character of the State, as well as those referred to the permanent neutrality of State may be revised by Parliament only following the subsequent approval, through a referendum based on a majority vote of registered voting citizens of the Republic.

3. Pursuant to Article 141, paragraph (1), letter c) laid down in Constitution, the President of the Republic is entitled to initiate the procedure on Constitutional amendment, having lodged therefore to Parliament the constitutional law drafts with the advisory opinion of the Constitutional Court, passed by the voting cast of at least 4 Judges.

4. The issues dealing with the allocation of financial funds for carrying out of the referendum have to be solved by Parliament.

5. This judgment shall come into force following the date of its endorsement, it has a final character, cannot be appealed by any way whatever and it shall be published in «*Monitorul Oficial al Republicii Moldova*» (Oficial Gazette).

President Pavel BARBALAT

Kishinev,
3 November 1999, no.57