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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT
AMICUS CURIAE BRIEF
FOR THE CONSTITUTIONAL COURT OF MOLDOVA
ON THE INTERPRETATION OF ARTICLES 78.5 and 85.3
OF THE CONSTITUTION OF MOLDOVA

on the basis of comments by

Ms Angelika NUSSBERGER (Substitute Member, Germany)
Mr Jean-Claude SCHOLSEM (Substitute Member, Belgium)
Mr Kaarlo TUORI (Member, Finland)

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Introduction

1. *The Constitutional Court of Moldova, by letter from its President dated 7 December 2009, 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 allege could give rise to uncertainty with respect to the timing of the dissolution of Parliament by the President of the Republic. The content of these provisions is as follows:*

“Article 78 - The Election of the President

...

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

“Article 85 - Dissolution of Parliament

...

(3) The Parliament may be dissolved only once in the course of a year.”

2. *The Constitutional Court submitted the following three questions to the Venice Commission:*

- *Does Article 85.3 of the Constitution apply to the situations covered by Article 78.5 of the Constitution?*
- *How should the words “in the course of a year” contained in Article 85.3 be interpreted: as meaning a calendar year (i.e. 1 January to 31 December) or as meaning within a year, counting from the dissolution of Parliament (i.e. June 2009 to June 2010)?*
- *If the President of the Republic is not elected during the presidential election held after repeated elections, taking into account Article 85.3, within which timeframe does the President in office have to dissolve Parliament and set a date for the election of a new Parliament, once the circumstances set out in Article 78.5 have occurred: starting from the date of the repeat presidential elections or starting from the last dissolution of Parliament?*

3. *The present amicus curiae brief was adopted by the Venice Commission at its * Plenary Session (Venice, * 2010), on the basis of comments by Ms Angelika Nussberger (Germany) and Messrs Jean-Jacques Scholsem (Belgium) and Kaarlo Tuori (Finland).*

Background

4. Article 78.3 of the Constitution of Moldova regulates the election of the President by a three-fifths vote of the members of Parliament and not directly by the people. This provision was introduced in 2001 on the basis of a constitutional amendment and is now a part of Chapter V on “*The President of the Republic*” of Title III “*Public authorities*” of the Constitution.

5. The solution found in Moldova is not a unique one, from a comparative constitutional law point of view, however it does have its peculiarities. In the majority of European countries, the Presidents are elected directly by the people.¹ There are, nonetheless, many countries in which

¹ Cf. the regulations in Austria, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Finland, France, Ireland, Lithuania, Poland, Portugal, Romania, Russia, Serbia, Slovakia (after a pre-election by the National Council on the basis of a three-fifths majority), Slovenia and “The former Yugoslav Republic of Macedonia”.

the President is elected by Parliament.² In some countries, the election requires an absolute majority,³ whereas others go as far as to require a qualified majority.⁴ Malta is the only country in which a relative majority in the first round is considered to be sufficient.

6. As a rule, constitutions provide for regulations to deal with subsequent rounds of presidential elections, in case the required quota is not achieved in the first round. In Moldova, the number of candidates is reduced to two in a subsequent round; yet the requirement of a three-fifths majority remains unchanged.⁵ Hence, when after the regularly held parliamentary elections of April 2009, the Parliament of Moldova was unable to obtain a three-fifths majority either during the first or second round of presidential elections held respectively in May and in June 2009, Parliament was dissolved (on 15 June 2009) in accordance with Article 78.5 of the Constitution.

7. Repeat parliamentary elections were then held on 29 July 2009, followed by a further two failed attempts to elect a new President of the Republic (Article 78.3) in November and December 2009, which in theory should have led to another dissolution of Parliament under Article 78.5, which states *“If the President of the Republic of Moldova is not elected even after repeated elections, the current President shall dissolve the Parliament and shall set the date for the election of a new Parliament”*. However, this provision may be affected by Article 85.3, which does not allow for more than one dissolution of Parliament per year.

8. The question, therefore, is whether Article 78.5 derogates from Article 85.3, insofar as despite the formal prohibition introduced by the latter, the failure to elect a President of the Republic calls for immediate elections. Or, whether on the contrary, Article 85.3 affects the application of Article 78.5, insofar as a dissolution must occur, but that it must nevertheless respect the one-year rule contained in Article 85.3. In this case, the elections cannot be called before June 2010, since the last dissolution took place on 15 June 2009.

Question 1: Does Article 85.3 of the Constitution apply to the situations covered by Article 78.5 of the Constitution?

9. Article 85 is a part of Chapter V on *“The President of the Republic”* of Title III *“Public authorities”* of the Constitution of Moldova and is aimed specifically at the right of the President of the Republic to dissolve Parliament.

10. However, the text of the Constitution itself does not provide any clear guidance as to the applicability of Article 85.3 in case of a repeated failure to elect a president. A purely textual interpretation of the Constitution is insufficient to answer this question, but a broader constitutional approach will have to be adopted in order to address this issue.

11. In Moldova, Parliament may be dissolved not only if it fails to form a government (which is quite a common regulation in constitutional law), but also if it fails to elect the President of the Republic. Combined with the high quota required for the election of the President, this regulation provides for relative instability of Parliament, unless there is a strong and stable political majority (which is not the case in Moldova).

² Albania, Czech Republic, Estonia, Greece, Hungary, Italy, Latvia and Turkey.

³ Czech Republic, Estonia and Latvia.

⁴ Albania (three-fifths majority), Hungary (two-thirds majority), Turkey (two-thirds majority), Greece (two-thirds majority) and Italy (two-thirds majority).

⁵ Similar solutions (upholding the quota and envisaging the dissolution of Parliament in case the majority required is not attained) can be observed in Albania (Article 87 of the Constitution) and Greece (Article 32 of the Constitution). In other systems, the President can be elected by an absolute (e.g. in Turkey, Article 102 para. 3 of the Constitution) or a relative majority in the second or in a later round of elections (e.g. Italy, Article 83 para. 3 of the Constitution, Hungary, Article 29 B para. 4 of the Constitution).

12. The will to elect a President by a qualified majority can easily be understood, especially when powers are so extensive. Other constitutions provide for similar mechanisms. But, these constitutions avoid the vicious circle of elections in which Moldova could enter in the absence of consensus between political powers. For instance, in Italy, if a two-thirds majority of the two chambers combined is required in principle, in the third round of the elections, an absolute majority is sufficient to elect a president (Article 83 of the Constitution of Italy).

13. The Greek Constitution seems to come closest to Moldovan constitutional law. But in Greece, 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). A constitutional revision, perhaps following the Greek example, might be recommended for Moldova.

14. Article 85.3 and 85.4 of the Constitution of Moldova limit the power of dissolution and the former sets out, more specifically, that Parliament may only be dissolved once a year and is clear and categorical. It does not distinguish between different situations in which Parliament can be dissolved, but defines a general rule. This is the position adopted by Article 10 of Law no. 1234 of 22 September 2000, as modified by Law no. 49-XVIII of 30 October 2009.

15. This rule can be found in a number of European constitutions, for instance in the last paragraph of Article 12 of the Constitution of the Fifth Republic (France), which seems to have been used as a model by Moldova. This rule is often translated by the French adage « *Dissolution sur dissolution ne vaut* » (Dissolution after dissolution is not worthwhile). In his thesis on the dissolution of parliamentary assemblies, Ph. Lavaux considers this rule as a “*fundamental principle that is common to all systems*”⁶. The aim is essentially to fight the abuses linked to repeated dissolutions, such as those that occurred in France in 1830 under Charles X, or, those that occurred during the Weimar Republic.⁷

16. It is clear that Articles 85.3 and 78.5 of the Constitution of Moldova aim to solve a dilemma. On the one hand, it is the task of Parliament to elect both the President and Government. If it fails to fulfil this duty, the citizens must be given the chance to elect new members of Parliament better apt to fulfil this constitutional duty. On the other hand, every political system needs stability. The dissolution of Parliament is detrimental to stability, and as matters stand, in case of a final failure to elect a president, the President in office will have to dissolve Parliament. Article 78.5 aims at securing that the state possesses functioning constitutional bodies, which also reflect the current support of the various political forces.

17. With respect to Article 85.3, the objective of which is to guarantee political stability, it might be asked if, based on a contextual interpretation, this provision has to be read narrowly. In such a reading, it would only relate to the circumstances of parliamentary dissolution enumerated in Article 85 (failure to form a government, legislative deadlock, rejection of a presidential request for a vote of confidence). Such an interpretation might be based on the fact that Article 78, regulating the election of the President, does not contain any explicit restriction on the timeframe of parliamentary dissolutions. Yet, both Articles are part of the same section of the Constitution and both contain regulations on the President. Furthermore, Article 85.4 explicitly

⁶ Ph. Lauvaux, *La dissolution des assemblées parlementaires*, Economica, Paris, 1983, p. 222

⁷ Ph. Lauvaux, *op. cit.*, pp. 170, 229-230, 246 et 270. See also : J. Gicquel, *Droit constitutionnel et institutions politiques* (Constitutional law and political institutions), Montchrestien, Paris, 1991, 11th edition, pp. 659 and 660. The author writes : « *Si l'on admettait le contraire, avec le procédé des dissolutions à jet continu, comme en 1830 sous Charles X ou dans l'Allemagne d'Hindenburg, le Chef de l'État s'érigerait en supérieur du suffrage universel, en cassant, ni plus ni moins, sa décision.* » (If one admits the contrary, with these continuous dissolutions, as in 1830 under Charles X or in Hindenburg's Germany, the Head of State would elevate to the status of Head of universal suffrage, no more no less in breaching his decision).

refers to Article 78.5 and thus establishes a link between the two Articles, but at the same time Article 85.4 provides for an exception in case of a failure to elect a president, which Article 78.5 does not do.

18. Therefore, it seems to be clear that the aim of Article 78.5 is to ensure that the state has functioning constitutional bodies and that of Article 85.3 is to guarantee political stability. But, if there is a continuous circle of repeat elections, then neither of these objectives can be achieved. Therefore, a certain degree of political stability should be introduced to at least move closer to achieving these objectives.

19. The conclusion, therefore, is that Article 85.3 must be applied even to cases covered by Article 78.5.

Question 2: How should the words “in the course of a year” contained in Article 85.3 be interpreted: as meaning a calendar year (i.e. 1 January to 31 December) or as meaning within a year counting from the dissolution of Parliament (i.e. June 2009 to June 2010)?

20. The wording of Article 85.3 “*The Parliament may be dissolved only once in the course of a year*” can be understood in two different ways: (1) it can either be read as relating to the calendar year and thus comprise the time period from 1 January up to 31 December, or (2) it can be understood as defining a time period that starts running on the day of the dissolution of Parliament.

21. As has been explained above, the *telos* of the provision is to guarantee stability and the uninterrupted functioning of the legislative body. If the time period “*once in the course of a year*” were related to the calendar year, dissolutions of Parliament could occur in short intervals e.g. just before the end of the calendar year and again right at the beginning of the next calendar year. Such an interpretation would lead to arbitrary results; the time period of parliamentary stability would be dependent on the period of the year in which the dissolution takes place. However, if the beginning of the time period starts running from the day on which the dissolution of Parliament takes place, then stability will always be guaranteed for at least one year. This reading is therefore more in line with the idea behind Article 85.3. It must be underlined that the entire philosophy behind the system leads towards such a solution and the constitutions that expressly provide for such a delay, an example is the French Constitution, have always been interpreted in such a way.

22. Article 85.3 may appear to be unclear, but there is no doubt as to the solution to this issue. In any case, if we were to interpret the rule as a calendar year, we would reach, as stated above, arbitrary results: nothing would prevent repeated dissolutions at very short intervals, depending on when they occur during the year. Hence, the year should be counted starting from the last dissolution of Parliament.

Question 3: If the President of the Republic is not elected during the presidential election held after repeated elections, taking into account Article 85.3, within which timeframe does the President in office have to dissolve Parliament and set the date for the election of a new Parliament, once the circumstances set out in Article 78.5 have occurred: starting from the date of the repeat presidential elections or starting from the last dissolution of Parliament?

23. According to Article 61 (on Parliament elections) of the Constitution, the election of members of Parliament will be held no later than 3 months from the end of the previous mandate or from the dissolution of the previous Parliament. This regulation is clear in fixing the dates of parliamentary elections. There are no specific rules that differentiate between the

various situations by which Parliament may be dissolved. Re-elections must always take place within a certain period of time that is linked to the moment of the dissolution of Parliament. The aim of the provision is to prevent long periods in which there is no functioning legislative body.

24. Therefore, the answer to this question seems clear: Article 85.3 states that “*The Parliament may be dissolved only once in the course of a year*». It is therefore the repeated dissolution at short intervals that is prohibited and it is the last dissolution that should be the point of departure.

25. It should also be underlined that Article 85.3 covers all cases of dissolution, not just the one covered by Article 78.5, but also those referred to in Article 85.1 and 85.2. A uniform interpretation of all these possibilities is important and should be applied, which means that the period of one year starts from the date of the last dissolution of Parliament and not from the date of the failed presidential election.

Conclusion

26. The Venice Commission is of the opinion that:

- Article 85.3 of the Constitution applies to the situations set out in Article 78.5 of the Constitution;
- that the words “*in the course of a year*” set out in Article 85.3 should be interpreted as meaning one year, counting from the last dissolution of Parliament;
- that the President of the Republic should dissolve Parliament not earlier than a year counting from the last dissolution of Parliament.

27. In the light of the circumstances in Moldova, the Venice Commission is of the opinion that a constitutional reform is needed in order to prevent political stalemates from happening again in Moldova in the future. Frequent dissolutions of Parliament that follow one another at short intervals of only a few months each also create obstacles for political negotiations that are necessary for a successful constitutional reform.

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