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SCIENTIFIC WORKSHOP ON THE DRAFT CONSTITUTION OF MOLDOVA

(Chisinau, 27-28 May 1993)

Following an invitation by the Moldovan Parliament, a Commission delegation, consisting of Mr Patrick Mooney, Legal Assistant to the Attorney General of Ireland, and Mr Thomas Markert from the Secretariat, attended a Scientific Workshop on the draft Constitution of Moldova (see also CDL (93) 32) in Chisinau.

The report prepared by Mr Mooney for this workshop appears in Appendix I, the report prepared by the Secretariat at Appendix II.

A P P E N D I X II

Topic 2
The political and judicial institutions of a State with the rule of law

SOME COMMENTS ON THE PROVISIONS IN THE DRAFT CONSTITUTION OF THE REPUBLIC OF MOLDOVA CONCERNING THE JUDICIAL INSTITUTIONS[1]

Preliminary remarks

First of all I would like to thank the Parliament of the Republic of Moldova for the invitation to attend this workshop and for the opportunity to make some comments on the draft Constitution of the Republic of Moldova. This draft reflects the will of the people of Moldova to establish a State based on the rule of law, the observance of human rights and democracy and to move towards a market economy. For a newly independent country whose citizens and scholars had hitherto been prevented from the free exchange of opinions with their colleagues in other countries, it is of course extremely difficult to take into account foreign experience when drawing up such a draft. I think that the opportunity for an exchange of views between experts from abroad and from Moldova should therefore be very useful. The European Commission for Democracy through Law of the Council of Europe has held such exchanges of views on draft constitutions with representatives of most of the countries of Central and Eastern Europe and I think that these exchanges have also proved fruitful.

I apologise in advance that some of my observations might be based on my lack of knowledge of the situation in your country and that some of them might be due to misunderstandings. Law is very closely linked to language and even if we correctly translate one legal term to another language, the concept behind that legal term in the other language might be quite different due to a different legal tradition.

The judicial institutions (Articles 108-116 of the draft Constitution)

General remarks

It should be stressed that the chapter in the draft constitution on judicial institutions is based on Article 6 on the separation of state power, in particular Article 6, paragraph 4, providing "justice shall be carried out exclusively by juridical bodies". This is an extremely important and positive provision.

Article 109

i. The chapter on judicial institutions is fairly general and does not try to set out the judicial institutions and their functions in detail. I think this is a good decision since the Republic of Moldova, on its way to a market economy, will have to adapt its present judicial institutions to quite different conditions. Therefore it seems wise not to lay down judicial organisation in detail in the constitution which is a document which can only be amended with some difficulty. It seems therefore justified that Article 109, paragraphs 1 and 2, leaves it to the law whether specialised courts (one could think of labour or social security tribunals) should be set up. It seems however important to mention one additional category of courts since these are both particularly important for a State based on the rule of law and lacking in the Soviet tradition : the administrative courts.

In Western countries, the administrative courts have the main responsibility for ensuring that the administration always acts in conformity to the law and they can, in particular, review the legality of administrative acts concerning individuals following complaints by the individual (or company etc.). As far as I know, the possibility for citizens to apply to the courts against administrative acts was foreseen in Article 58 of the 1977 Soviet constitution, but this provision was never implemented since it is in contradiction with the principles of a communist state. For a state based on the rule of law these courts are however indispensable and in most countries they are separated from the ordinary courts to permit the judges to specialise in administrative law.

To give you some examples when in Western countries a person or body can apply to the administrative courts :

- A person wants to build a house but is refused the necessary building permit by the administration. He is however of the opinion that his project complies with all applicable legal provisions.
- The administration withdraws a driving licence from somebody after an accident. The person concerned thinks that there were insufficient legal reasons for this.
- The administration orders a private enterprise to install anti-pollution devices. The enterprise considers that its emissions are within the legal limit and that there is therefore no legal basis for such a requirement.

It should be noted that in all these cases it may be prescribed that the private individual or the enterprise cannot go to court immediately but has to lodge a complaint with a (usually higher) administrative body. Only if that complaint is rejected, the individual can go to court. The court is limited in its decision to the issue of the legality of the administrative act, it has not to decide on whether the act is opportune or not.

The role of the administrative court is also particularly important since in Western states there is no procuratura in the traditional Soviet sense (see below). The setting up of administrative courts in Moldova would seem all the more appropriate since Article 36 of the draft Constitution foresees the

possibility of complaints by individuals against administrative instruments.

ii. Article 109, paragraph 2, provides that for certain categories of cases specialised institutions can function in conformity to the law. I assume that these specialised institutions have to be judicial institutions, otherwise there would be a contradiction with Article 6, paragraph 4 of the constitution. However, I suggest to put this more clearly and to speak of specialised judicial institutions or specialised courts.

Article 112

Another point I would like to raise is Article 112 concerning the language used in the judicial processes. It is certainly positive that people who do not understand or speak the Romanian language have the right to an interpreter. I am however aware that there are some areas of the Republic of Moldova in which a large part, if not a majority, of the population consists of people of another mother tongue other than the Romanian language. It would be very positive if one could provide that in these areas judicial proceedings may be conducted at the request of one or both of the parties in one of the languages spoken in this area. Article 9 of the European Charter for Regional or Minority Languages of the Council of Europe of which I have brought some copies, though only in French and English, could serve as a model for such a solution. I must admit that many, if not most, Western European States are not so generous as to foresee such a possibility. To allow the use of regional or minority languages before the courts might however be of use for the Republic of Moldova to win the loyalty of the people belonging to these minorities.

Article 116

A very important issue is raised by Article 116 of the draft constitution on the procuratura. There two different wordings are proposed, one by the Commission for the Revision and Finalisation of the constitution draft and one by the Viata Satului group of deputies. In my opinion the wording proposed by the Viata Satului group should not be accepted. It provides for a procuratura according to the traditional Soviet model which should not be maintained as such in a state based on the rule of law. In particular :

- this text foresees that the procuratura has to supervise an exact and uniform enforcement of laws not only by the administrative bodies but also by private enterprise and citizens. It is the duty of citizens and private enterprise to obey the law, it is however not the duty of private enterprise and citizens to enforce the law. It seems therefore wrong to put private and public bodies on the same footing in this respect.

- with respect to private enterprise and individuals, the Ministries, special departments, state services and inspectorates to be set up under Article 102, paragraph 2 of the draft constitution should supervise that everybody obeys the law. This avoids not only a dangerous concentration of power but also allows for the creation of specialised bodies requiring specialised expertise. It should however be added that the present wording of Article 102, paragraph 2, (at least in translation) seems also not satisfactory. In a market economy it is not the task of state departments to guide and co-ordinate private enterprise. The main principle of the economic order is competition and this is not compatible with state guidance and co-ordination. Of course, a certain degree of state regulation is both possible and necessary.

- As regards public bodies, article 102, paragraph 1 of the draft Constitution rightly provides that these bodies have to act on the basis of the law. This (it should be more clearly spelt out that it applies to all public bodies and not only to Ministries) is fundamental for any state based on the rule of law. In Western countries, supervision is normally exercised by the superior hierarchical body. This seems also to be preferable to avoid concentration of powers and to allow specialisation. In the last instance, if there is a conflict, it is for the administrative courts to decide whether the act of the public body was in conformity with the law. As I have stated above, this role of the administrative courts is essential for a state based on the rule of law. It cannot be replaced by the procuratura since the members of the procuratura do not have the same guarantees of independence and impartiality as have judges.

In such a system only a very limited role remains for a procuratura type institution. There may, for example, be a need for a body representing the public interest in procedures before the administrative courts. Courts decide individual cases, a public body may however want to draw attention to the general repercussions of a court decision in an individual case. This role seems however not very important and is decreasing in many countries.

- The traditional - and very necessary - function of the public prosecutor's office is however the investigation and prosecution of crimes. In my understanding of the draft, this task will be given to separate investigation institutions. I think that it is in fact good not to combine the functions of prosecutor and of supervisor of legality (if the supervisory function is fully or partly maintained). To the arguments of concentration of power and specialisation I would like to add here that the citizens will always be loath to have contacts with a body mainly competent for the prosecution of crimes and thereby having a (often quite unjustified) "repressive image". Criminal law and administrative functions should therefore be separated.

To conclude this point, the fact that two versions are proposed shows that a debate is going on on this subject in your country. The proposal of the constitutional commission seems to be preferable not only because of objections against the substance of the other proposal but also since it is more flexible and would allow the judicial institutions of the Republic of Moldova to be duly adapted to a new situation without having to amend each time the constitution.

<u>The constitutional court (Articles 127-133)</u>

General remarks

It is somewhat surprising that the constitutional court does not appear in the draft Constitution's chapter on the judicial authorities but has a title of its own. It might seem more logical, taking into account that article 6 distinguishes between legislature, executive and judiciary, without separately mentioning the constitutional court, to make of this title a section in the chapter on judiciary. However this is not a very important point. More important is that the remark I made above that the rules on judicial institutions should not be too detailed in the constitution does not apply to the constitutional court. Here the main procedures have to be set out in the constitution itself.

Article 127

The draft constitution makes it very clear, and this is very positive, that the constitution is the fundamental law of the country and that it prevails over any other legal texts (Article 7). It is therefore logical that the constitutional courts must have wide powers to ensure that the constitution is also in practice the supreme law of the land. In fact Article 127, paragraph 3, says, inter alia, that the constitutional court guarantees the supremacy of the constitution. It then carries on that the constitutional courts ensures the realisation of the principle of the separation of powers and guarantees the responsibility of the state in respect to the citizen and of the citizen in respect to the State. With respect to the last alternative, I have some reservations since it will usually be for the public administration and for the administrative and criminal courts to ensure that citizens fulfil their duties (which in any case do not have the same legal importance as their fundamental rights). The formula that the constitutional court guarantees the responsibility of the state with respect to the citizen is also not very fortunate, at least in translation, since there are aspects of state responsibility, like for example the compensation of damages afflicted to citizens by state authorities, which should not usually come before the constitutional court. It seems therefore preferable to speak of the respect of human rights and not of the responsibility of the state in general. Since both the separation of power and respect for human rights are part of the principle of the supremacy of the constitution, it might be preferable to change the wording to something similar to : "the constitutional court guarantees the supremacy of the constitution, in particular it ensures the realisation of the principle of the separation of the state powers into the legislative, executive and judicial powers and the respect for human rights by all public bodies".

Article 128

i. Article 128 sets out the main competences of the constitutional court. Its paragraph 2 provides that the constitutional court may be active on its initiative and on the initiative of other bodies foreseen in the law regarding the constitutional court. It does however not seem appropriate to give the constitutional court the power to become active on its own initiative. The constitutional court should be a legal body which is regarded by everybody as impartial and politically neutral. The dangers of a constitutional court seizing itself with an affair and therefore not appearing as politically neutral have become very apparent in at least one country very recently. The constitutional court (like all other courts) should therefore be restricted to strictly legal decisions and be kept out of political considerations as far as possible. The decision whether to take up a case or not will however be a decision which cannot be based on legal decisions only and which will be regarded by everybody as a political decision. It seems therefore not advisable to give the constitutional court the power to seize itself.

ii. If one deletes this right of autoseizure, the question who may seize the constitutional court becomes all the more important. This has to be seen in the context of the various procedures and therefore more detail might be added to the draft constitution.

Of the tasks of the constitutional court mentioned in article 128, paragraph 1, the task mentioned under a), the control of the constitutionality of laws, decrees and treaties, is the most important.

In this respect, one has to distinguish two possibilities of control : preventive control, i.e. control before a law is enacted and repressive norm control, i.e. the constitutional review of enacted laws. Under preventive control state bodies or parts of them like a group of deputies, would have the right to appeal to the constitutional court before the law comes into force and have the constitutionality of the draft reviewed. This type of control, which is practised notably in France, is particularly suited for international treaties since there it is important that the constitutionality is decided before the state assumes international commitments vis-a-vis the other contracting parties.

With respect to ordinary laws, repressive control like it is practised in Germany or Italy, seems preferable since it does not force the constitutional court to decide many questions in advance in abstracto.

How can this repressive control work?[2]

The right to seize the court can also be attributed to state bodies. In addition however, and here lies the main difference with preventive control, one can also give the ordinary courts the power to seize the constitutional court if they have to decide on a case and if the ordinary court is of the opinion that its decision in a case would rest on a law which it considers to be unconstitutional. Since the constitutional court has the monopoly of declaring laws unconstitutional, in that case the ordinary court suspends its proceedings and asks the constitutional court to deliver a decision on the constitutionality of the law.

Furthermore, with the limitation that this is open only to persons directly and presently affected by a law, a right to allege the unconstitutionality before a constitutional court can also be given to private persons. This would have to be seen in the context of constitutional complaints. In countries which allow constitutional complaints by private persons, any private person can allege, after the exhaustion of the usual legal remedies against the act, that an act by a public body violates its fundamental rights protected by the constitution. This usually concerns less laws but administrative acts which would have to be appealed first before the administrative courts and could only afterwards be brought to the constitutional court, on the grounds only that an act of a public body violates one of the fundamental rights guaranteed in the constitution.

This is, at least in theory, the ideal way of protecting the human rights of all individuals and a constitution maker wishing to ensure full respect for human rights should consider this possibility. It should however also be added that it has one significant drawback : constitutional courts having that competence are usually flooded with a large amount of, mostly completely unfounded, complaints. Practical considerations might therefore lead the constitution maker to reject such a possibility. For further details I refer again to the report by Professor Steinberger.

Article 129

Article 129 of the draft provides that six judges will be appointed by Parliament and three judges by the President. This might lead to an undesirable split in the composition of the constitutional court with some judges pro-President and some judges pro-Parliament. It might therefore be better to foresee a uniform way of election for all constitutional judges, for example that they are elected by Parliament upon a proposal of the President or that they are elected by Parliament by a two-thirds majority, thus ensuring that judges of different political persuasions are elected. Another possibility might be to involve the superior council of magistrates as for ordinary judges.

Constitutional judges have to be irremovable and independent as foreseen by the draft constitution. However one might consider to elect them only for a fixed term. In the present draft all judges seem to be elected for life.

Article 133

At least if the constitutional court has also the possibility to decide in the cases of constitutional complaints by private individuals, it needs the power to declare null not only laws and other normative instruments (Article 133) but also other acts by public bodies.

Article 134 (as regards the Constitutional Court)

Article 134 gives the right of constitutional initiative to the constitutional court. This does not seem appropriate since it is too political a task for the constitutional court and since the body interpreting the constitution should not be the body author of the constitution.[3] As regards Article 134, paragraph 3, for the same reasons the right of the constitutional court to comment on the drafts of constitutional laws should be limited to decide whether a proposition violates Article 135 of the constitution and whether the formal requirements under Article 134, paragraph 1, have been fulfilled. All other considerations about the advisability of amending the constitution should be outside the scope of review of the constitutional court.

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[1] *Report prepared by the representative fo the Secretariat of the European Commission for Democracy through Law.*

[2] *For the details I want to refer to the report on Models of constitutional jurisdiction prepared by Mr Steinberger, a former judge at the German Constitutional Court on behalf of the European Commission for Democracy through Law and approved by this Commission. I have brought some copies of this report, unfortunately only available in English, French and Russian.*

[3] *For the same reason the Supreme Court should neither get the right of constitutional initiative under this article nor the right of legislative initiative as foreseen under Article 71.*