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**COMMENTS ON THE REGULATION OF HUMAN RIGHTS
IN THE REVISED DRAFT CONSTITUTION OF THE
RUSSIAN FEDERATION (CDL (93) 31)**

by
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COMMENTS
ON THE REGULATION OF FUNDAMENTAL RIGHTS AND FREEDOMS
IN THE DRAFT CONSTITUTION OF THE REPUBLIC OF MOLDOVA

I. GENERAL COMMENTS

1. The first chapter of the Draft Constitution lays down the general principles of the State order. Some of them are directly related to human rights.

a) The Draft establishes a high degree of "absolutization" of human rights by laying down: i) the principle of superiority and - as it seems to result from article 7 - direct applicability of the Constitution, including constitutional rights and freedoms, ii) the priority of international treaties, Moldova is a party to, over the domestic laws (statutes), iii) the principle according to which the constitutional norms on rights and freedoms are to be interpreted in conformity with the Universal Declaration on Human Rights, the International Covenants and other treaties (better to add: "human rights" before treaties) to which Moldova is a Party (art. 16 § 1).

b) Article 4 establishes the principle of equality of citizens before the Law. One can have the impression that the drafters did not intend to touch upon other dimensions of equality. The present regulation can make difficult for the court to interpret the equality principle also as a source of norms related to justice. Moreover, the Draft does not contain any other provision enabling the courts to interpret the law in the light of this principle (justice).

One also can wonder whether paragraph 1 of this article is situated in a proper place. It expresses the duty of the State to respect and protect a person, which is not related to the equality that much. Perhaps, this idea would suit better article 10.

And finally, it is worth of considering whether the First Title should not contain a general principle of equality only, which could be applied in various dimensions, and whether the present language giving the rationale for the right to equal treatment

should not be placed within the Title related to human rights.

c) the Draft lays down the principles of democracy and political pluralism in article 5. It seems that instead of saying (art. 5 § 3) that the parties shall be founded and carry out their activities accordingly to law it would be better to proclaim first the freedom of political parties. The more that art. 32 dealing with political parties speaks exclusively about the freedom to join political parties and does not mention the freedom to create such parties.

d) Article 9 contains principles related to property. A reader is attracted by truly liberal content of this provision. On the other hand the present language of art. 9 § 2 is rather vague. The sentence "No property shall be used to the detriment of person's rights, his liberty and dignity." allows for a great variety of interpretations. Probably, a further specification of this concept might be helpful.

One can also wonder whether the regulation of the right to property should not be more integrated. Now, it is laid down in spite of art. 9 in article 38 (protection of private property) and in article 118 and 119. Some elements of this right are repeatedly touched upon.

e) A specific feature of the Moldovan Draft Constitution is the content of article 10 which is entitled: "Responsibility of the State before citizens and the society". Certainly, a number of contemporary constitutions contain provisions related to the State responsibilities. However, it seems to be seldom to list a number of "State's duties" which concern various spheres of life. This list is opened by the duty "to defend the sovereignty, the independence and the territorial integrity of the Republic of Moldova". The next on the list is the State's duty "to protect and guarantee the human rights". This sequence seems to be understandable if one takes into account that - as we learn from the current developments as e.g. in Somalia or some parts of the former Yugoslavia - a disintegration of a state means as a rule a collapse of the necessary structure for the protection of human rights. Also some other duties of the State are related to the status of an individual (e.g. concerning democracy, rule of law, social protection and decent living standard, environment).

Conclusion: the general principles of the Draft Constitution establish a proper framework for the protection of human rights and freedoms.

2. Human rights are regulated in the second title of the Draft Constitution. Taking into account the number of the articles devoted to the legal status of an individual we arrive at about 30 % out of the total number of the constitutional provisions. It indicates the importance which the drafters attach to this subject

3. The second title of the Draft Constitution "The Man, the State, the Society" embraces "General principles" (first chapter), civil and political rights and freedoms as well as economic, social and cultural rights (second chapter "The Fundamental Rights and Liberties"), and "Fundamental Duties" (placed in the third chapter).

4. Provisions of the first chapter speak about: the obligation to interpret the constitutional norms in conformity with the international human rights law (see point: 1"a"), admissibility of restrictions on the application of individual's rights and freedoms, citizenship, rights of aliens, extradition, and the principle of the judicial protection of individual's rights and freedoms.

4.1. Doubts arise if it is the best solution when the constitutional legislator frames only generally for which reasons restrictions can be imposed on the applicability of rights and freedoms. The Draft Constitution contains two general norms dealing with this subject. One is the regulation in art. 16, the other in art. 49. Some specific comments are required in this context: firstly, the systematic interpretation allows the conclusion that the drafters accept the imposition of restriction on all rights and freedoms for reasons mentioned in article 16 § 2 or in article 49. This would be inconsistent with the international and European standards which clearly determine which rights and for which reasons could be limited. The proposed formula leads to a situation in which all the possible reasons of limitations might be applied in regard to all of the rights and freedoms. This could open the way to misuse of power by both the legislative and the executive; secondly, it is understandable that the law-makers make use of the so called general clauses

(unspecified legal terms, unbestimmte Rechtsbegriffe). However, the use of such categories is always risky because it opens the way to a very flexible interpretation of legal provisions which contain such clauses. It could be particularly dangerous in regard to limitations of individual's rights and freedoms. That is why the use of them should be rather exceptional which is not the case in the discussed draft; thirdly, the list of the reasons for which restrictions can be imposed on the rights and freedoms includes "general prosperity" next to "public order". This first notion is particularly vague and doubts arise whether it would not be better to delete it (also in the light of international standards which do not know it).

4.2. The combination in one article (18) of the "one-citizenship-principle" with the protection granted by the State to the citizens abroad seems to be unfortunate. These are two different matters.

5. One can assume that a more clear distinction is required between subjective rights and freedoms on the one hand and State obligations or moral norms on the other. Otherwise general doubts could arise as to the legal meaning (direct applicability) of the norms laid down in this title.

In this context also another question is to be raised. As it was stated in point 1 "a" the Draft establishes a high degree of absolutization of rights and freedoms by laying down the superiority of the Constitution, by putting international human rights treaties in the hierarchy of legal sources between the Constitution and ordinary statutes, and by establishing the principle that the constitutional norms are to be interpreted in conformity with the international bill of human rights. However, the Draft strikes by the great number of provisions which are very general and make the real content of the rights and freedoms dependent on the under-constitutional regulation (e.g. articles 22, 27, 32 § 5, 37 § 4, 38 § 2). Even taking into account the mentioned rules of interpretation and the very interesting, exceptionally occurring in the contemporary constitutions, principle of the hard core of a human right, which cannot be interfered with (Wesensgehaltsgarantie), making constitutional regulations dependent on statutory regulation constitutes a serious weakening of the protection of an individual.

5. The Draft contains a rich catalogue of economic, social and cultural rights. In some cases the impression arises that the distinction between subjective (enforceable) rights on the one hand and obligations of the State or aims of the State's policy should be more transparent (e.g. art. 43 - 48). The regulation could also be more concise (e.g. repeated provisions concerning the protection of children and youth).

6. The Draft Constitution contains also a special chapter devoted to the duties of the citizens. It is a composition of duties which could be interpreted in legal terms with the provisions expressing moral obligations only (e.g. "The fidelity to the country is sacred" - article 50 § 1).

The controversy concerning the regulation of citizen's duties in the constitutions is well known. But, there is no ideal solution. Following countries' own tradition and preferences the constitutional legislator may arrive at various conclusions. However, the question of constitutional duties is as much sensitive as the problem of limitations of rights and freedoms. At this juncture, two problems should be raised:

i) it seems that it could strengthen the legal value of the planned Constitution when a separation between norms establishing legal duties and moral obligations would be more consequent;

ii) a serious problem is related to article 53. This provision should express -it can be assumed - the idea according to which one making use of rights and freedoms is bound to responsibility towards the society. On the other hand, this provision should reflect a general interdependence between the fulfillment by individuals of their obligations and the condition of rights and freedoms. Not putting these concepts into question, it seems to be hardly justifiable to keep the language of article 53 § 1 and § 3. For, they can be interpreted in a way which would undermine rights and freedoms laid down in the Constitution making the access to them dependent on the fulfillment by an individual of his/her duties. It is also doubtful whether citizen's duties "derive directly from the guaranteed rights and liberties". § 3 goes even further saying *inter alia* that the observance of legitimate interests of other citizens is obligatory.

II. SPECIFIC COMMENTS

1. Taking into account the ongoing discussion on the protection of minorities it is to be pointed out that clear constitutional guarantee in this regard is strongly recommended.
2. The Constitution does not make any distinction between aliens (citizens of foreign states and stateless persons) who stay temporary in Moldova and residents of Moldova. Consequently, all aliens do not enjoy political rights and cannot acquire land property. Perhaps, the mentioned distinction would be advisable.
3. It seems that making the defamation of the country and its people forbidden and punishable (art. 28 § 3) better suits the ordinary legislation (if it is necessary).
4. It is unclear in which way and for what purpose the State should ensure "observance of the rights and legitimate interests of the political parties and the political organizations" (article 32 §4). If it should happen in way of establishing proper legal rules only one can wonder if a proclamation of the freedom of political parties would not be sufficient and better suit the requirements of a constitutional regulation.
5. The right to information (article 33) is outlined quite broadly. However, the use of the word "correct" information creates feeling of uncertainty: who should define what is a correct and what an incorrect information.
6. Article. 38 § 7 is probably wrongly translated.
7. Probably, it is the question of translation but the rational of art. 39 § 2 is unclear.
8. One can wonder if art. 39 (7) according to which parents have a priority in choosing the sphere of education of their children is consistent to the international standards (Convention on the Rights of the Child). If this provision should guarantee the right

of parents *vis-vis* the State to bring up their children it would be understandable. But the present language suggests that children irrespectively their age should follow the decision of their parents in this respect. Such a categoric formulation would go very far.

9. The principle contained in article 40 § 4: "All people without any discrimination shall enjoy the right of an equal wage for an equal work." better corresponds with the economy run by the State than with the market economy proclaimed by the Constitution.

10. Article 46 § 2 seems to be located in an unfortunate place. There is no direct connection between the protection of handicapped persons and the general rule according to which "No individual can be subjected to a forced medical treatment for the cases foreseen by the Law".

11. Should the language of art. 47 § 1 indicate that a married couple alone (without children) does not constitute a family?

12. Article 48 § 2 repeats partially article 45.

13. The duty to protect environment and historical heritage (article 55) seems to be rather a moral than legal obligation.

14. The constitutional complaint is not proposed by the Draft. Taking into account the role of the Constitution (article 7) and of the international human rights law (article 8 and 16 § 1) the establishment of this instrument seems to be required.

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