CDL(1993)054e-restr
Strasbourg, 23 November 1993

COMMENTS
on the Institutional Aspects of the Draft Constitution of the Republic of Moldova as Established in Title III

Snezhana Botousharova, PhD (law), Bulgaria

1. The general principles of the draft Constitution concerning the institutionalisation of state power in the Republic of Moldova are regulated in Articles 2 and 6. These are the principles of people's (national) sovereignty and the principle of the separation of powers. The draft Constitution provides for both direct exercising of state power (including through referendum) and through representative bodies defined by the Constitution itself. Clear provisions are made for the separation of the legislative, executive and judicial powers (Art. 6).

2. The title which institutionalises the individual powers is entitled "Public Authorities". The use of different terms in the draft brings forth a question, the answer to which may have not only theoretical but also practical implications namely what is the balance between "national sovereignty" borne by the people (Art. 2, para 1), "state power" which is defined through the ban on its usurpation (Art. 2, para 2), the "legislative, executive and judicial powers" as separated in Art. 6 and the "public authorities".

According to the draft the "public authorities" include Parliament, the President of the Republic, the Cabinet, the public administration and the judiciary. The title on the Constitutional Court is separate from that dedicated to the public authorities and it would hence follow that body is not a public authority . It would perhaps be more appropriate to establish standard criteria for the purpose of defining the public authorities. This would indeed streamline the structure of Title III on the principle of the separation of powers.

3. Parliament is defined as the "supreme representative body with legislative power" in the heading of Art. 59. In the same Article, however, it is described as "the only legislative authority of the state". From the point of view of the classic principle of the separation of powers, it may me more appropriate to say that Parliament is the sole bearer of legislative power. On the other hand, another contradiction arises in view of the right of delegated legislation exercised by the government (Art. 105).

The title describing Parliament is divided into three sections: "Organising and Functioning", "The Statute of a Member of Parliament" and "Legislation".

Some of the issues raised below may require further discussion. One of them is connected with the nature of Parliament as a state body. Would Parliament be a standing body and if so what would the employment status of its members be'?

The next question concerns the mandate of Parliament. As of what moment would the mandate of the Members of Parliament (the four year mandate of Parliament, respectively) commence. As of the time of acknowledging the elections as legal, as of the first meeting, or as of the day of the elections, as is the general practice in constitutional law? It does appear that the draft Constitution operates on the presumption that elections are illegal until proved otherwise, and not vice-versa (Articles 64 and 77).

It may also be considered in view of the significance of the issue and the supremacy of the Constitution, whether it would be more appropriate to provide a more detailed regulation of the length of the mandate of Parliament. Even if a more general regime is adopted under Art. 61, para 1, a Constitutional regulation would appear more stable and secure.

The draft provides an interesting constitutional solution to the problem of the transition between the newly elected and the incumbent legislatures (Art. 61 para 4 and 5). It is possible, however, that the newly elected legislature may have a new, even different political representation that would fix itself different legislative priorities. The platform of the newly formed cabinet would also be important since it may rely on a new legislative program. Thus the text according to which "the bills of the legislative proposals on the agenda of the former Parliament shall be examined by the Parliament of the new legislature" may perhaps require further consideration.

The provisions on the internal structure of Parliament (Art. 62) may also be supplemented by provisions concerning the parliamentary commissions (standing and provisional), regarding their functions, powers, manner of establishing and working procedures.

The fundamental functions of Parliament (Art. 65) deserve particular attention and comment, both each one individually and in comparison with the competencies of the President and the government, and also in view of those of the judiciary. This would permit a better definition of the legislative, executive and judicial functions of state power and the balance between them.

Parliamentary control and the interaction between Parliament and the other public authorities, with Parliament being the dominant party, may also be brought under this section.

Section 2 which is dedicated to the status of the Member of Parliament could also be supplemented with the issues of eligibility and appropriate limitations (such as serving a prison sentence, psychic handicaps, the employment of deputies (will they keep their former jobs and on what terms, remuneration, etc), as well as the grounds for waiving a deputy's mandate and how to do that.

The essence of the statute of the Members of Parliament lies in the free mandate while the imperative mandate is considered null under Art. 67. This is a generally acknowledged constitutional provision found in all modern doctrines and constitutions and puts the draft Constitution of the Republic of Moldova on an equal footing with all similar contemporary instruments. The immunity of the Member of Parliament has also received proper treatment. Immunity can only be waived when two conditions which protect the rights of the deputy are observed: the permission of Parliament should be sought and the Member of Parliament in question must be allowed to present his case before Parliament (Art. 69, para 3).

Section 3 of this Title regulates the types of laws and the legislative process. The constitutional provisions, however, do not address the following issues: would a Parliamentary quorum be required? What would the difference between the two readings be? Would non-organic laws and other acts be passed on first reading? When should the President promulgate a law and when should the law be published?

4. The President of the Republic is the head of state and has significant powers in respect to the executive branch. He is elected directly by all voters. The eligibility conditions for presidential candidates are described in Art. 76, para 2. Would there be any other limitations for candidates serving prison sentences, persons with dual citizenship or for the mentally handicapped? It is not stated when the parliamentary elections should be held: after the expiration of the mandate or prior to the elapse of the four year term, both in the case of a normal completion of the mandate and in the case of its extension. These are possible options beyond those described in Art. 89 on the vacancy of the post.

The procedure of relieving the President of his duties is described in Art. 80. However, the ability of Parliament to approve a proposal on dismissal of the President might make the presidential institution less stable and more dependent on the parliamentary forces. In the Bulgarian Constitution, for instance, it is the Constitutional Court that rules on whether there are sufficient grounds to dismiss a President accused of high treason or of violating the Constitution. This provides for greater independence of the individual institutions.

The mechanism for appointing the government with the participation of both the President and Parliament is very interesting (Art. 81).

The President may dissolve Parliament whenever a cabinet cannot be formed within 30 days or whenever the legislative functions of Parliament are blocked for more than three months. This is indicative of a search for an efficient mechanism and efficient relations between Parliament and the government. What lacks as constitutional provisions is the answer to the question of what cabinet should be appointed after Parliament is dissolved and what power it will have.

A further question arises from the promulgation of the laws by the President and his right of veto. Would laws returned by the President be examined in the general procedure and passed by simple majority, or would there be special rules for adopting such legislation?

Countersigning of laws by the Prime Minister has also been instituted (Art. 92, para 2) which further enhances the principle of the separation and balance of powers.

5. The government which pursues the domestic and foreign policy of the state and controls the public administration (Art. 94, para 1) is obviously a component of the executive power. The draft describes its structure, acts, conditions of incompatibility and the withdrawal of the mandate of its members. Greater stability may perhaps be achieved if Art. 98, which discusses the dismissal of cabinet members, provides more detailed provisions and describes clearly all possible cases.

The issues of the non-confidence vote may also have to be treated in greater detail. Thus, should a non-confidence votte be sought only because of the general program of the government, or because of a specific act, or on a concrete occasion? Can a non-confidence vote be sought in respect to an individual minister, in respect to the Prime Minister only, or in respect of the government as a whole? Can the government or the Prime Minister seek a vote of confidence? Would a period of time be specified during which a non-confidence vote may not be sought for a second time on the same issue? Such a provision would prevent any abuses with non-confidence votes on one and the same problem over a short period of time.

Parliamentary control (Art. 103) in the form of questions and interpellations may also be included in the chapter dealing with Parliament Apart form these two forms of parliamentary control, there are others such as hearings, parliamentary inquiries, etc., which may also be included in the constitutional texts.

6. The judiciary comprises the judicial authorities, the Public Prosecutor's Office and the Supreme Council of Magistracy. It is described together with the principles under which it is organised and operates in Chapter IX of the draft. The generally accepted principles have been adopted such as exercising justice on behalf of the law, the independence of judges, the ban on extraordinary courts, the openness of court hearings, etc.

There appear to be some blank spaces in respect to the organisation of the judicial institutions and the prosecution. Why is there a difference in the mandate of judges and prosecutors. The former hold their office permanently, the latter are appointed for five years. Does the structure of the public prosecutor's offices correspond to that of the judicial institutions?

The right to defense counsel is an important element of justice. In the draft, that problem is addressed in the "Fundamental Rights and Liberties" chapter, Art. 25, para 3 does not specify the moment as of which the accused is entitled to defense counsel: as of the time of the detention, the indictment or the court trial?

The conclusion that can be drawn regarding the institutional part of the draft Constitution of the Republic of Moldova is that the document can serve as an appropriate, modern and scientifically elaborated foundation of a democratic Constitution. Some of the issues raised here, as well as any other questions which may emerge during the analysis of the draft would be addressed in the further work on this project, as well as in individual constitutional and organic laws.