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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**COMMENTS ON
THE ELECTION LAW
OF THE REPUBLIC OF MOLDOVA**

by

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1. Introduction

1.1 Invitation

1. Mr. Pierre Garrone of the Venice Commission asked me on 23 October 2002 to give an opinion on the Election Law of Moldova. I was head of the OSCE/ODIHR Election Observation Missions to the Presidential Elections in Moldova in 1996 and to the Parliamentary Elections in 1998, and I am therefore very interested in seeing further progress on electoral matters in the country.

1.2 Reference Documents

2. I have received a translation of the Election Law. Unfortunately the translation is not always accurate, so my comment may at some instances not turn out to be relevant.

3. I have also received the Constitution and election observation reports from both CoE and OSCE. In addition I have received the Code of Good Practice in Electoral Matters by the Venice Commission, as well as the Language Law and an opinion on the Draft law on political parties and socio-political organisations of Moldova.

1.3 Structure of my comments

4. Some of the recommendations for improvement, which have been offered by the international community earlier, have been included in the law. This indicates a good will of the authorities to make improvements in order of meeting international standards.

5. Nevertheless, there are still issues remaining. In the following I have tried to grade my comments by importance. My main comment is the weak possibility for minorities to be represented in the Parliament due to the election in one constituency only. Together with a comment on the high threshold for representation in the parliament, this is covered in Section 2.

6. Section 3 covers other issues of principle importance.

7. Section 4 includes fairly technical problems out of which some may rather be on the translation than on the Moldovan text.

8. I am aware that some of my comments are not necessarily restricted to an assessment against international standards, but are more of a technical nature. However, the comments of Sections 2 and 3 are of a fundamental nature or at least matters of principle.

2. The Parliamentary Elections - Electoral System and Minority Representation

9. The parliament is has 101 members, all elected in a single constituency in a proportional list (PR) system. The system allows for independent candidates. There is a threshold of 6 % for parties, 9% for blocks (pre-election coalitions) consisting of two parties, and 12 % for blocks of three or more parties. For independent candidates the threshold is 3 %.

2.1 *Constituencies and Minority Representation*

10. Very few countries are electing the Parliament in one constituency only. In Europe the Netherlands represent a prominent exemption. In most other countries there is a degree of geographical representation secured by elections held in a number of constituencies. If a country is rather uniform in terms of population or other relevant criteria, elections in one constituency may work well. It will then be up to the parties to secure the geographical representation when compiling their lists of candidates. However, when minorities are concentrated in certain areas, constituencies can be the most effective instruments for securing reasonable minority representation in the Parliament. The report from the CLRAE Delegation to the Moldovan Local and Regional elections of 23 May 1999 quotes the Venice Commission stating that it is

"necessary for States to take into account the presence of one or more minorities on their soil when dividing the territory into political or administrative subdivisions as well as into electoral constituencies" (Opinion on the interpretation of Article 11 of Recommendation 1201 (1993) of the Parliamentary Assembly of the Council of Europe, CDL-INF (96) 4).

11. The context the issue is discussed in that paper concerns the boundaries of the districts of local government, where the Bulgarians of the district Taraklia have been diluted when being merged into Cahul. However, the argument is just as strong when it comes to the representation of the Gagauz in the Parliament, and it has obvious relevance to the representation in the Parliament from Transdnistria (at the moment the conflict is being resolved) as well.

12. A minority like the Gagauz would under the current system have two ways of being represented: By gaining positions at prominent places at the lists of the countrywide parties or by forming minority based parties. The first alternative does not provide sufficient guarantee for representation from the minority. The second would force the Gagauz to give priority to the minority dimension over the regular political dimension, since there will hardly be room for more than one party with representation in the Parliament, and with the current high threshold even that seems unrealistic.

13. OSCE/ODIHR has therefore both in 1998 and in 2001 recommended introduction of a system based upon constituencies. There are many such systems available, some based upon majority votes, other with proportional representation. Moldova has used a proportional system so far, and it is most likely that one would want to keep this principle. One alternative would then be the German or Albanian system with a combination of single member constituencies and a countrywide (in Germany state-wide) party list election to compensate for a disproportional representation in the Parliament. In this case the voter would cast two votes.

14. A simpler system which require only one ballot would be the one adopted in Bosnia and Herzegovina in 2000 and which is commonly used for example in Scandinavia and in Romania in a slightly different form. The system is based on multi-member constituencies (MMC). The largest share (e.g. 70 -80%) of the members of the Parliament would be elected by a proportional system in the multi-member constituencies, and the rest would be distributed as compensatory seats according to the countrywide results. No threshold should be applied at local level, whereas a threshold could be applied for the compensatory seats.

15. With constituencies following the population characteristics, regular political parties would compete locally on regular political issues, but the candidates would be coming from the constituency and most of them would therefore most likely be of the minority.

16. The second alternative with minority based parties is - as already stated - not a good one. For the representation to be effective, most of the voters would have to vote along the ethnic dimension only. That would mean that the voter would be deprived of the possibility of both voting for a certain political direction and candidates who are members of the minority group.

17. In addition to that, the Law on political parties used to have as a requirement that the party could show more than 5000 members from at least half of the districts of the country. In the new Draft law on political parties and socio-political organisations of Moldova has brought this requirement further. A party representing the Gagauz would therefore fail to register, since they are represented in a concentrated geographical area only. This was in itself a violation of minority rights.

18. To summarise: The party registration rules (possibly) and the high threshold prevent effectively a Gagauz based party of a realistic chance of representation in the Parliament. But even if those obstacles were removed, ethnically based parties running countrywide is not a good solution. The only way to allow for a politically pluralistic representation with parliamentarians of the minority would be to introduce constituencies, which would follow the borders of the main concentrations of minorities. A system based upon PR in MMC with compensatory seats will secure a proportional representation in the Parliament, and it is easy for the voters as well as for the administrators.

19. The introduction of constituencies would not need a change of the Constitution.

2.2 *Thresholds*

20. The thresholds for representation of parties and blocks in the Parliament are extremely high. A six percent threshold on a countrywide support will create a large voter group that will vote for non-represented parties. It will also prevent locally based parties with strong support in a limited area (such as ethnic minorities, but in principle any local party) from representation. The long-term effect will possibly be that voters will concentrate on the main movements, but it is doubtful if such a high threshold is helpful at the stage Moldovan democracy has reached.

21. Even more extreme are the increasing thresholds for blocks. It is probably beneficial for the effectiveness of the Parliament that pre-election coalitions are being formed, and it provides good information to voters. They should therefore be encouraged. It is therefore not easy to understand why the threshold for such blocks needs to be higher than for parties. In that way, the incentive for building larger groups will be reduced, and work contrary to the purpose.

22. Even though the threshold for independent candidates has been reduced from four to three percent, it is still so high that the election of an independent candidate is highly unlikely. In many countries it is difficult (or impossible) for independent to be elected. But as long as the possibility remains, one may consider removing the threshold for such candidates.

23. If constituencies are introduced, the possibility of being elected as an independent candidate may increase, in such cases where the candidate has a strong local support, even though the share of the votes needed to be elected would be higher within the constituency.

3. Other Important Issues

3.1 The Media

24. In many new democracies the media have often been biased in favour of the incumbents. Therefore strict rules on election advertisements have been introduced. The effect has often been that the editors have been so scared of being biased that they have not covered the campaign in a critical manner at all, and left the media outlet's coverage to the parties own commercials transmitted free of charge. Alternatively the editors have covered the incumbents in excess, claiming this is not campaign but covering regular Government business.

25. In Moldova we have mainly observed the first effect, even though there has been violations by giving airtime with campaigning content to incumbents as well. The result is not very informative to voters. This is a symptom of the lack of tradition for independent, critical and neutral editors of public electronic media.

26. The Code of Good Practice in Electoral Matters issued by the Venice Commission does in its Section 2.3 cover both the obligation to treat the competitors equally in some instances but 'proportionally' in other:

"1. *Equality of opportunity* should be ensured between parties and candidates and should prompt the state to be impartial towards them and to apply the same law uniformly to all. In particular, the *neutrality* requirement applies to the *electoral campaign* and *coverage by the media*, especially the publicly owned media, as well as to *public funding* of parties and campaigns. This means that there are two possible interpretations of equality: either "strict" equality or "proportional" equality. "Strict" equality means that the political parties are treated without regard to their present strength in parliament or among the electorate. It must apply to the use of public facilities for electioneering purposes (for example bill posting, postal services and similar, public demonstrations, public meeting rooms). "Proportional" equality implies that the treatment of political parties is in proportion to the number of votes. Equality of opportunity (strict and/or proportional) applies in particular to radio and television airtime, public funds and other forms of backing. Certain forms of backing may on the one hand be submitted to strict equality and on the other hand to proportional equality."

27. Article 46(1) guarantees each competitor equal right in using mass media. However Article 47(3) uses the term equitable about the private broadcasting of debates etc, but even here it is explicitly stated that the time given to each competitor during a debate has to be equal..

28. Article 47(11) does give an indication of the coverage of the Government, Parliament and President, by stating that the broadcasting time offered to their press services may not be used for electoral propaganda. This covers probably the misuse of public information.

29. However, the main problem in the election campaign in the media in Moldova, as well as in many other countries without a long tradition for a free press, is to provide informative, interesting and unbiased coverage of the campaign. The parties own advertisements are obviously not critical, and do not alone give the voters the information they need. Therefore the questions raised by critical and neutral journalists may offer more information. Article 47(4) goes far in preventing such journalism in the fair of giving an advantage to some competitors. One may argue that such a restrictive line is necessary to prevent abuse by incumbents, and a strict rule should be maintained.

30. On the other hand, a campaign is also about political initiatives, and editors are supposed to cover those. The tendency has been that initiatives by Government or the President have been referred by media without a critical approach or without requesting the opinion by the opposition, referring to is as coverage of normal Government business. This is an issue far beyond an election law, but with the detailed regulation of the current law, there should also be a general provision, which gives the editors a possibility to cover political issues brought up during the campaign, with a strictly neutral and unbiased approach. One possibility would be to issue a more detailed Code of Conduct for editors during election period.

3.2 *The Count in the Polling Stations*

31. Article 56 describes the process of the count in the polling station. After having reviewed a high number of protocols from the count, it is safe to say that the entries for number of voters having been issued ballot papers and the number of voters that took part of the elections were not fully understood. The following improvements are recommended:

Article 56

32. (5) should move up to after (2), and be done before opening the ballot boxes, not only before counting the votes.

Article 58

33. c) and d) should be made clearer, because they have often been misunderstood to mean the same thing. This could be done by adding to c) ‘... according to the voters lists’, and adding to d) ‘... according to the total number of ballots in the ballot boxes.

34. A new ‘j) Number of ballots issued by mobile teams’ should also be added.

35. There are no rules for reconciliation at the polling station. A rule should be introduced for the case that d) is a higher number than c) (the ballot stuffing situation), e.g. a recount and an entry in the protocol, and another rule for if d) is substantially lower than c) (e.g. recount if there is more than five percent missing, which is less serious).

36. One should also that $i) + g) + e)$ is close to h).

37. (4) One protocol remaining in the polling station should be posted there immediately.

3.3 *Aggregation and Publication of results*

38. Partial results are being published and that is good. These would in most cases be accurate, at least when it comes to allocation of seats.

39. The verification process should, however, be made more clear. The CEC will receive all the polling station results. In 1998 these were entered into a spreadsheet for checking of the DEC results, and inaccuracies were found. This verification should be explicitly mentioned, as well as the obligation to make the tabulation of polling station results public. This publication does not have to happen within the five days of the official results, but should definitely happen within reasonable time, e.g. ten days. The purpose of this is for observers and the public to be able to check the polling station they observed was entered correctly in tabulation. It is a crucial element of transparency and can remove a lot of suspiciousness against the tabulation process.

3.4 *Invalid elections*

40. Articles 91, 93(3) and 136 provide the turnout criteria for valid elections. It is a question whether there should be a turnout requirement at all in elections. For referenda such requirement is reasonable since a decision is not a necessity. However, for elections it often ends up in a stalemate, and the next attempts do often give even lower turnouts.

41. In Article 92 it seems like the whole election needs to be annulled, but a more practical approach would be to only annul the parts affected by a fault.

3.5 *Voters registers*

42. The accuracy of the voters' lists has decreased over the last election. The number of voters entered into the additional lists increased from 6 % in 1998 to 10 % in 2001 according to OSCE/ODIHR. It is limited to what extent this problem can be solved by legal actions. It depends on the accuracy of a civic register, if one could legally connect the voters' lists to such register.

43. The minimum is, however, that the voters are given a fair chance to scrutinise the lists for their own as well as for other voters' entry. In Article 39(1) and Article 40(1) it is said that the lists will be published at least ten days prior to the Election Day. This is too late for making a printed update, but the list can be amended by hand. Article 40(2) does not give a deadline for a challenge, which probably means all the way up to Election Day. It also does not mention challenging other entries than his own. There should be ways of challenging the voters' lists before they are printed, including other people's entry as well.

44. Article 39(7) it says that the polling station shall issue a certificate to a voter who has moved, but it is not clear if it is the one from where the voter leaves from or where he has moved to.

3.6 *Family Voting*

45. Family voting is wide spread in Moldova. The conditions for giving assistance to voters as per Article 54(1) should be formalised by for example a signature in the voters register.

3.7 *Language*

46. The Articles 48(6) and 162(3) refer to the language law. The law seems to offer due protection of both Russian and Gagauz languages in public documents, and therefore also in election material including ballots.

4. **Other Issues**

4.1 *Substitutes*

47. Article 88 gives the rules for substitutes. I do not know on what basis Constitutional Court had objections to the term, but the actual arrangement seems reasonable.

4.2 *Incompatibility*

48. In 1998 there was a long dispute on the issue of who would have to withdraw from office after having been nominated as candidates to the Parliament. It seems like this has now been resolved.

49. Article 13(2) c) seems to indicate that anyone who has been recently convicted for any crime - even small one - cannot stand for elections. This is unusually harsh, if the sentence does not explicitly remove this important civil right.

4.3 *Repetition*

50. In Part III and V there is a lot of repetition of the general articles from earlier parts, which is unnecessary and may make it difficult to maintain (e.g. Article 74).

4.4 *Hold more referenda at the same time*

51. Article 145(2) seem to prevent two referenda to happen on the same day, whereas Article 162(2) regulates the case when there are more than one simultaneously.

4.5 *Vote to one candidate*

52. Article 10 the translation says that a voter should vote for a single candidate, whereas the correct must be a single competitor. This may be an inaccurate translation.

4.6 *CEC appointment*

53. It may be the translation, but the word 'proportionally' seems wrong in Article 16(9). It should probably be equal shares or similar. It is also not clear who nominates the CEC president, but that probably means that the Parliament makes their own choice.

4.7 *Constitute electoral districts*

54. Article 26 c) and Article 27(1) make a difference between constituting electoral districts and district election councils. However, the districts shall correspond to administrative units of second level, so there seems to be no choice in how to do that. What does then constitute districts involve?

4.8 *Decisions of the DEC*

55. Article 27(7) prescribes that decisions are done by a majority of its members, not by majority of those voting. This seems to be too strict and is not in line with decisions e.g. in CEC. Is that a mistake? Article 32(2) says that half of the committee must be present for a valid vote, which is fine, but it seems like even half of the members need to be in favour of a decision - not more than half of those present and voting.

4.9 *Observers roles*

56. When observers roles are mentioned the word 'assist' is being used, e.g. in Article 63(5). This can be misleading, and observe should rather be used.

4.10 *Confirmation of mandates*

57. Article 90 states that at least 2/3 of the total number of deputies' mandates shall be forwarded to the Parliament. There may be a good reason, but it is not obvious why only at least 2/3.

4.11 *Details on Referenda*

58. Article 152 regulates in detail the internal life of a public initiative for initiating a referendum. This falls into a long tradition in post communist countries but seem unnecessary.

59. On the other hand, a general requirement that the wording of on the ballot paper should be neutral and not favour any alternatives may be helpful (e.g. in Article 162).