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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DRAFT REPORT**  
**ON**  
**THE RECALL**  
**OF MAYORS AND LOCAL ELECTED REPRESENTATIVES**

**on the basis of comments by**

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*\*This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

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## I. Introduction

1. By letter of 7 November 2017, the Congress of Local and Regional Authorities of the Council of Europe (hereinafter “the Congress”) asked the Venice Commission to examine the compatibility of local recall votes, aimed at cutting short the term of office of a local elected representative, with international standards and best practice. The Congress’ request was made in connection with existing regulations and practice enabling voters, in the Republic of Moldova, to recall mayors through popular vote.

2. Ms Tanja Karakamisheva-Jovanovska, Ms Monique Jametti and Mr Josep Maria Castella Andreu acted as rapporteurs for this report. The report was prepared on the basis of contributions by the rapporteurs and available information on relevant national legislation and practice from a number of states. Relevant information was provided, regarding national legislation and practice in over 20 states, by Venice Commission members.

3. *Following its discussion by Sub-Commission on Democratic Institutions (15 March and 20 June 2018, ...) and by the Council for Democratic Elections (20 June 2018 and ...), the present report was adopted by the Council for Democratic Elections at its ... meeting (Venice, ...) and by the Venice Commission at its ... Plenary Session (Venice, ...).*

## II. General remarks

### 1. Scope and subject of the report

4. The present report does not aim to provide an exhaustive account of the different mechanisms by which local elected representatives may lose their mandate. Its purpose is, as requested by the Congress, to examine the very concept of local recall vote as a mechanism of direct participation, its possible justification and acceptability in a society based on representative democracy, as well as the impact it may have on the effective, democratic and legitimate governance of the concerned communities.

5. To do so, the Venice Commission has taken account of existing national regulations and practices in the field in Europe and outside Europe and has reviewed them in the light of the principles of representative democracy.

6. The Commission’s objective is twofold: on the one hand, to assess the advantages but also the risks that entails, in a political system based on representative democracy, the local recall as an instrument for political accountability and a political process based on the direct participation of citizens; and on the other hand, to find out whether it is possible to identify common democratic conditions and safeguards likely to govern the recourse to this tool in those societies having opted to make use of it.

7. The present report, when addressing national legislation and practice, will dedicate some developments to the situation in the Republic of Moldova; however, it is not intended at assessing the specific situation of this country.

8. **Recall** - the actual focus of the present report - is a popular vote that gives the people the power of removal of an elected official. It must be clearly distinguished from **revocation**, which is the power of another body to withdraw a mandate – in principle one it has conferred.

9. Revocation as well as recall are political instruments entailing political responsibility. **Destitution** instead is a sanction following a violation of the legislation, which may be imposed by the body to which the concerned person belongs (**impeachment**), but also by a

judicial or another body (such as the authority exercising the supervision of the municipal bodies' acts).<sup>1</sup>

## 2. International instruments and documents

10. In the preparation of the present report, the Venice Commission has taken into account European and international instruments and documents of relevance for the analysis of the concept of local recall, and further related topics: the free/imperative mandate, the local self-government principles including citizens' participatory rights at the local level. These include in particular:

- European Charter of Local Self-Government (CETS No. 207) and Additional Protocol to the Charter of Local Self-Government on the right to participate in the affairs of a local authority (CETS No. 207);
- Recommendation No. R(96) 2 of the Committee of Ministers to member States on referendums and popular initiatives at local level, and guidelines attached to it;
- Recommendation No. R (98) 12 of the Committee of Ministers to member states on supervision of local authorities' action R (98)12 on supervision of local authorities' action;
- Recommendation Rec(2001)19 of the Committee of Ministers to member States on the participation of citizens in local public life;
- Recommendation CM/Rec(2009)2 of the Committee of Ministers to member states on the evaluation, auditing and monitoring of participation and participation policies at local and regional level, and the CLEAR tool appended thereto;
- PACE Recommendation 1704 (2005) on referendums;
- PACE Resolution 1303(2002), Functioning of democratic institutions in Moldova, par. 8
- the Guidelines for civil participation in political decision making (CM(2017)83-final);
- Congress, Resolution 401 (2016) on preventing corruption and promoting public ethics at local and regional levels;
- Congress, Local Democracy in the Republic Moldova, CPL (12) 9, Part II;
- Congress, Recommendation 113 (2002) on relations between the public, the local assembly and the executive in local democracy;
- Congress, Report, CG34 (2018) 09 final, 27 March 2018, Fact-finding mission on the situation of local elected representatives in the Republic of Moldova;
- Congress, Resolution 420 (2017) and the explanatory memorandum on "Local democracy in the Republic of Moldova: clarification of the conditions surrounding the suspension of the Mayor of Chişinău";
- Congress, Recommendation 436 (2019) Local and regional democracy in the Republic of Moldova
- Report CG36(2019)15, 4 April 2019, Local and regional democracy in the Republic of Moldova
- Report on liability of local elected representatives for acts or omissions in the course of their duties, Steering Committee on Local and Regional Authorities (CDLR),1998;
- the OSCE 1990 Copenhagen Document (on the Human Dimension of the CSCE).

11. Following Parliamentary Assembly Recommendation 1791(2007) and Resolution 1547(2007) on the state of human rights and democracy in Europe, the Venice Commission adopted a Report on the imperative mandate and similar practices at its June 2009 session ([CDL-AD\(2009\)027](#)). The document concluded that at present, imperative mandate *stricto sensu* and recall were unknown in practice in Europe. Even if a few countries among the Council of Europe member states had legislation giving the power to political parties to make members of the elected bodies resign if they change their political affiliation, the basic constitutional principle which prohibits imperative mandate or any other form of policy

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<sup>1</sup> See below ch. VI.3.

depriving representatives of their mandates had to prevail as a cornerstone of European democratic constitutionalism. This will be developed below (chapter IV).

12. The Commission took into account this report as well as its own findings in thematic and country-specific reports on issues of relevance for the present analysis (see specific references in the sections below).

### 3. The basic principles: representative democracy and free mandate

13. Political representation and representative institutions are at the core of contemporary democracies. The principle of free political mandate and its corollary, the prohibition of any imperative mandate, are at the foundations of representative democracy.

14. Having its origins in Roman law,<sup>2</sup> the imperative mandate gave way, throughout history, to the gradual enfranchisement of representatives, and was eventually replaced by a system - the representative government - where "*representatives do not exclusively represent their local electors but an abstract body, the nation, whose will is superior of and different from local constituencies*".<sup>3</sup>

15. The recall of elected officials provides the electorate with a mechanism (through a popular vote) enabling them to remove from office, before the end of their term, i.e. without awaiting the next regular elections, elected officials as a tool for enforcing political accountability.

16. The recall touches upon the very essence of a representative democracy, a system based, by definition, on the principle of representation, where citizens transfer their sovereignty - that is, the right to rule - to their elected representatives who, on behalf of the citizens, make decisions and establish policies in the interest of all. In this system, regular elections, where voters opt for renewing or not the mandates of elected representatives, constitute the main mechanism by which political accountability is realised. Obviously, within this framework, the recall raises the question as to whether and under which conditions voters, while transferring the power to decide to elected representatives, might retain a "right" to decide to recall ("un-elect") those elected representatives in case of dissatisfaction with their work, without waiting for the next regular elections.

17. The **classic theory of political representation**, with its liberal understanding of the concepts of political legitimacy and sovereignty and their source, the nation, is at the origins of the free mandate and is clear on the prohibition of the imperative mandate. Both Burke<sup>4</sup> and Sieyès<sup>5</sup> agreed during the eighteenth century on the free mandate of representatives as a basic

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<sup>2</sup> "The origins of the institution can be traced back to the Roman Republic, where tribunes were occasionally recalled (Qvortrup 2011)." See Welp, Yanina (2018) "Recall referendum around the world: origins, institutional designs and current debates", in *The Routledge Handbook to Referendums and Direct Democracy*, Edited by Laurence Morel, Matt Qvortrup, Routledge. <https://www.routledge.com/The-Routledge-Handbook-to-Referendums-and-Direct-Democracy/Morel-Qvortrup/p/book/9781138209930>, p. 1. See also Qvortrup, M. (2011) *Hasta la vista: a comparative institutional analysis of the recall*, Representation, 47(2), pp. 161-170.

<sup>3</sup> For a brief historical and theoretical background of the imperative mandate, See Venice Commission, *Report on the imperative mandate and similar practices*, CDL-AD(2009)027, par.4-7.

<sup>4</sup> E. Burke, *Speech to the electors of Bristol*, 3 November 1774. See also James Madison's views regarding the representation in "*The Federalist Papers*", London: Dent, 1787-8:1911, p. 45. According to Madison, the power to select representatives and punish them retrospectively through de-selection gives electors a certain influence in enforcing their interests. In between elections, however, the representatives are free to vote in the public policies as they want and not like electors want (the essence of the free mandate).

<sup>5</sup> E. Sieyès on the deputies as representatives of the whole Nation. *Speeches at the National Assembly* 15 and 16 June 1789. *On the prohibition of the imperative mandate. The motion of 8 July 1789*. In *Escritos y Discursos de la Revolución*, CEC, Madrid, 1990, pp. 38, 47 and 58.

characteristic of the political representation.<sup>6</sup> **A distinction has therefore to be made between representatives (members of a deliberative body) and holders of executive functions.** The prohibition of the imperative mandate only concerns the former: **the classic theory of political representation therefore excludes the recall of representatives.** In addition, the notion of deliberative democracy with its focus on the need for political decisions to be the product of fair and reasonable discussion and debate among citizens, suggests that members of deliberative assemblies will reach their decisions at the end of a process of consultation and debate, which is at odds with the notion of imperative mandate.

18. Even if constitutional provisions expressly prohibiting imperative mandate focus on parliamentarians at national level,<sup>7</sup> in a state based on representative and deliberative democracy, the same principles should apply to all representatives, at regional and local level as well as at national level. Revocation and recall of elected representatives therefore appear at odds with the representation principle.

19. On the contrary, such principles do not apply to the executive branch of government, at national as well as subnational level.

20. This report will come back later (chapter V) to the analysis of the compatibility of the recall with the basic principles of – representative and deliberative – democracy, after examining the law and practice in the field, in Europe and beyond (chapter III), as well as the previous doctrine of the Venice Commission (chapter IV).

### III. National experience

#### 1. Introduction

21. In Europe, only a few examples may be found of national legislation allowing early termination of the elected mandate by the way of popular recall, be it at the local or at the central level. As a rule, today's democracies are representative democracies and, as acknowledged by the Venice Commission in its 2009 *Report on the imperative mandate and similar practices*, the imperative mandate "is generally awkward to Western democracies".<sup>8</sup>

22. In general, constitutional law is not in favour of imperative mandate in most countries. In particular, a number of European Constitutions explicitly

1) prohibit imperative mandate in a provision placed in the chapter on the national Parliament (Article 7, section III chapter 1 Titre III French Constitution 1791; among current constitutions, for instance: Article 67 of the Italian Constitution; Article 27 of the French Constitution; Article 38.1 of the German Basic Law; Article 67.2 of the Spanish Constitution; Article 68.2 of the Moldovan Constitution),<sup>9</sup> and

<sup>6</sup> Before the French Revolution, members of the Third State received *cahiers de doléances* or instructions from their constituencies. This is also the tradition in the Diet or Congress of Confederations with delegates or ambassadors of the sovereign states and still remains in the German *Bundesrat*. In the liberal tradition, parliamentarians represent the whole nation or (later in the democratic one) the people. The Parliament as institution represents the people.

<sup>7</sup> See below III.1.

<sup>8</sup> CDL-AD(2009)027 par. 11.

<sup>9</sup> See also the *Statute for members of the European Parliament* (Decision EP 28 September 2005 (2005/684EC, Euratom):  
Article 2.

1. Members shall be free and independent.

2. Agreements concerning the resignation from office of a Member before or at the end of a parliamentary term shall be null and void.

Article 3.

1. Members shall vote on an individual and personal basis. They shall not be bound by any instructions and shall not receive a binding mandate.

2) proclaim that the Parliament represents the people (i.e. Article 147 of the Portuguese Constitution; Article 66.1 of the Spanish Constitution; Article 50 of the Andorran Constitution) and parliamentarians are representatives of the whole country and not of their constituency (Article 7, section III chapter 1 Titre III of the French Constitution 1791; Article 67 of the Italian Constitution; Article 152.2 of the Portuguese Constitution).

3) Some Constitutions also recognise, in the bill of rights, the **fundamental right of citizens to accede to and exercise the public functions and positions**. This happens in the context of the right of suffrage, or of participation in public affairs: Article 51 of the Italian Constitution; Article 23.2 of the Spanish Constitution; Article 25 of the Andorran Constitution, not to mention the French Declaration of Human and Civic Rights of 1789 (Article 6). The reach of such provisions will be developed below.<sup>10</sup>

23. Most legislation as well as practical examples of effective use of recall may be found outside Europe. In particular, recall has a long tradition in (North and South) America.<sup>11</sup>

24. Provisions on recall have existed since the 19<sup>th</sup> century in a limited number of Swiss cantons. In (still rather few) other European countries, as well as in other parts of the world, recall has been introduced - in particular since the 1980s – as one of the possible responses to “*a demand for reinvigorating democracy through more direct citizens' participation*”; the examples of effective application of the mechanism are growing.<sup>12</sup>

25. The number of countries where the recall is allowed is over 25 countries worldwide, with sometimes significant differences as regards both the level of regulation (national or subnational), the level at which it may be applied (national, regional or local), the authorities concerned,<sup>13</sup> and related grounds and procedure.

## 2. National and regional levels

26. There are few European countries where recall at national level is possible. It is provided for in the Republic of Moldova and Romania for the President of the Republic, and for the Parliament as a whole in Latvia and Liechtenstein. In the United Kingdom, since 2015, 10% for the constituents can ask for a vote on the recall of their MP, but only in case of specific wrongdoing (conviction, suspension by the House of Commons)

27. Beyond Europe, recall may be activated against all elected authorities in Bolivia, Ecuador, Venezuela, and in Taiwan. Recall may be activated against MPs in Ethiopia, Kyrgyzstan, Kiribati, Nigeria, Liberia, Panama, Palau and Uganda.

28. A number of entities of federal states also provide for the recall of their own authorities. In Switzerland, this is the case in six cantons: Uri - for all elected authorities -; Bern, Solothurn, Schaffhausen, Thurgau, Ticino - for the canton's Parliament and/or government as a whole; three cantons abolished the recall in the framework of constitutional revisions - Aargau (1980), Basel Landschaft (1984), and Lucerne (2007). Nevertheless, the instrument appears to be of little relevance in practice, the few attempts to recall having failed, usually due to insufficient number of signatures (except for the Parliament of Aargau in 1862). In

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2. Agreements concerning the way in which the mandate is to be exercised shall be null and void.

<sup>10</sup> See chapter V.\*\*\*

<sup>11</sup> “Imperative mandate and recall of representatives are unknown in modern European democracies.” See CDL-AD(2017)012, par. 67.

<sup>12</sup> Serdült, U. and Welp, Y. “*The levelling up of a political institution. Perspectives on the recall referendum*”, in Ruth, S., Welp, Y. and Whitehead, L. *Let the people rule? Direct democracy in the twenty-first century*. ECPR Press., p. 137 and p. 149.

<sup>13</sup> For example, well-known examples of presidential recall may be mentioned, such as those in Venezuela - where Hugo Chavez, former President, faced recall elections in August 2004, while his successor Nicolas Maduro experienced a recall attempt in 2016, or Bolivia - in respect of the President Evo Morales, who survived a recall vote in August 2009.

Germany, the recall of Parliament exists in five *Länder*: Bavaria, Rheinland-Pfalz, Brandenburg, Berlin and Bremen.<sup>14</sup> Similar provisions may be found in the Russian Federation, for members of regional parliaments. A few unitary states also provide for recall at subnational level, such as Croatia – for the country prefects and their deputies, and Poland. Outside Europe – and apart from the countries which allow the recall of all authorities -, recall exists at the level of federate entities for example in the United States where 19 federal states practice recall of elected state officials,<sup>15</sup> and in Canada where British Columbia provides for recall of MPs at provincial level. In Japan, recall is possible for all subnational authorities.

29. In summary, the recall of MPs at national level exists in Europe only in Latvia and Liechtenstein, where it concerns the Parliament as a whole, and – based on specific grounds – in the United Kingdom for individual MPs. It is admitted in about a dozen of countries outside of Europe. Recall of the President is possible in two European states (the Republic of Moldova and Romania) and four other countries. At the level of federate entities or the subnational level too, provisions on recall appear also to concern members of legislative/deliberative bodies more often than the executive. This may be explained by the fact that direct election of the executive branch of government is not the rule.

### 3. Local level

30. According to available information, the recall vote as a mechanism is available at the local level in at least 15 countries, with a different degree of activation in practice. An increased tendency to have recourse to recall, from small municipalities to bigger cities, has been reported.<sup>16</sup>

31. In **Croatia**, (apart from the county prefect) the municipal prefect, mayor, as well as their deputy who has been elected jointly with them, may be recalled through a popular vote, which may be proposed by 20% of the total number of local voters or 2/3 members of the local representative body.<sup>17</sup> At the same time, the legislation expressly states that members of local representative bodies (also elected by the local population) may not be recalled.<sup>18</sup>

32. In **Germany**, two variants of mayors' recall mechanisms are in place in the *Länder*. On the one hand, the fully fledged direct democratic variant, where the local electorate is given not only the right to vote on a recall vote (under certain procedural and majority requirements), but also to initiate the recall procedure (with a certain requirement of signatures petitioning the recall vote). Four *Länder*, Brandenburg, Sachsen, Schleswig-Holstein and North-Rhine Westphalia,<sup>19</sup> have adopted this mechanism for mayors. On the

<sup>14</sup> See: Magsaam, Niels (2014), *Mehrheit entscheidet*, Duncker & Humblot: Berlin p. 511 ff). These *Länder* allow a recall for dissolving the regional Parliament but not a recall of individual members of Parliament.

<sup>15</sup> In 2011, in 17 states out of 50, there were 150 recall attempts (75 led to the recall of the concerned person); most concerned mayors. The most known case is that of 7 October 2003 in California, when the Governor Gray Davis was recalled and A. Schwarzenegger was subsequently elected.

<sup>16</sup> Serdült, U. and Welp, Y. "The levelling up of a political institution. Perspectives on the recall referendum", in Ruth, S., Welp, Y. and Whitehead, L. *Let the people rule? Direct democracy in the twenty-first century*. ECPR Press, p. 143.

<sup>17</sup> The Local and Regional Self-Government Act and the Act on Referenda and Other Forms of Personal Participation of Citizens in Managing the Affairs of State Authorities and Local and Regional Self-Government (Official Gazette nos. 33/1996, 92/2001, 44/2006, 58/2006, 69/2007, 38/2009, 100/2016 and 73/2017) regulate conditions and procedure, i.e. the initiative of the recall, the time limits for the recall, procedural steps, quorum requirements (turnout and approval majority) and judicial control.

<sup>18</sup> Article 30 of the Local and Regional Self-Government Act .

<sup>19</sup> See in particular for the case of Duisburg, in 2012, where the local mayor was recalled following a change in the Local Government Act on 18 May 2011 enabling a citizens' initiated recall procedure. This recall is connected to the Love Parade 2010 when 21 people died and 500 were injured.

See more in Serdült, U. and Welp, Y. "The levelling up of a political institution. Perspectives on the recall referendum", in Ruth, S., Welp, Y. and Whitehead, L. *Let the people rule? Direct democracy in the twenty-first century*. ECPR Press. Forthcoming, p. 146.



other hand, the recall procedure may be initiated indirectly in all the other Länder, except two, by the local council (deciding by qualified majority), while the local electorate only intervenes to finally vote on the recall motion as adopted by the council. In this variant, the recall procedure has been seen as a kind of mix of the representative democratic and the direct democratic principles, where the council “exercises some ‘representative democratic’ check on the local citizens in their exercise of their direct democratic power.”<sup>20</sup>

33. In **Romania**, under the Public Administration Law,<sup>21</sup> the local recall by the vote of the local population may lead to the dissolution of the local council, as a whole, and the removal of the mayor (both directly elected by the population). The vote for the removal of the mayor is organised upon the request of the local population, addressed to the representative of the government (the prefect). The recall may be initiated in case of: failure to promote the general interests of the local community or failure to fulfil the tasks associated with the function of mayor under the law, including the tasks that the mayor is expected to execute in his/her capacity as representative of the state.

34. The **Polish** legislation, including at the level of the Constitution, provides for local referendums, and considers recall as a form of their exercise.<sup>22</sup> Between 2010 and 2014, local recall elections took place in 111 municipalities (about 4,5% of the number of mayors having being under the threat of removal), out of which 16 resulted in the mayor’s dismissal.<sup>23</sup> In 2013, an attempt to recall the mayor of Warsaw failed for lack of sufficient participation in the vote (25% of registered voters instead of 29% required), largely due to the call for boycott of the party in place.<sup>24</sup>

35. In the **Russian Federation**, the federal legislation<sup>25</sup> lists the recall by voters as one of the cases of early termination of the mandate of elected heads of a municipal entity. The grounds for initiating local recall must be established by the Charter of the municipality but should be limited to “specific unlawful acts” (not necessarily criminal acts) established by a court judgment.

36. According to regional statutes, in most of the Entities of the Russian Federation a local recall (seen as a “loss of confidence”) may be the basis for early termination of the mandate of a municipal official. The legislation however varies from region to region and has, in some cases, been recognised as unconstitutional by the Constitutional Court. Nevertheless, the federal legislator has set some rules in this field: voting for the local recall shall be conducted

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See also Vetter, A. (2006) *Modernizing German Local Government: Bringing the People Back in?*, in V. Hoffmann-Martinot and H. Wollmann (eds.) *State and Local Government Reforms in France and Germany: Divergence and Convergence*, Wiesbaden: VS Verlag, pp. 253-268.

<sup>20</sup> See See Wollmann, Hellmut "The directly-elected mayor in the German Länder — introduction, implementation and impact", March 2014, published online at researchgate.net, p. 14 (available at: [https://www.researchgate.net/publication/238098897\\_The\\_directly-elected\\_executive\\_mayor\\_in\\_German\\_local\\_government](https://www.researchgate.net/publication/238098897_The_directly-elected_executive_mayor_in_German_local_government); last accessed May 9th 2018).

<sup>21</sup> Law n° 215 of 23 April 2001, as republished in M.O. no. 123/20 Feb. 2007, See [http://www.cdep.ro/pls/legis/legis\\_pck.htm\\_act\\_text?id=78841](http://www.cdep.ro/pls/legis/legis_pck.htm_act_text?id=78841).

<sup>22</sup> Article 170 of the Constitution of Poland: “Members of a self-governing community may decide, by means of a referendum, matters concerning their community, including the dismissal of an organ of local government established by direct election. The principles of and procedures for conducting a local referendum shall be specified by statute.”

<sup>23</sup> See *Introduction: directly elected mayors in urban governance*, David Sweeting, University of Bristol, UK, in *Directly elected mayors in urban governance, Impact and practice*, Edited by David Sweeting, 2017.

<sup>24</sup> The procedure for the recall of the mayor of Warsaw was led by several opposition parties, several interest groups, and NGOs that tried to remove Hanna Gronkiewicz-Waltz from her office. The procedure was initiated by a NGO of the citizens of Warsaw, by filing a petition against the increased price of tickets in public transport, and against the slow construction of the second line of the subway in Warsaw. These were the two key issues on which the procedure for recall of the mayor was based. The opposition in Poland, even before the recall procedure was initiated, was preparing a ground for the mayor’s removal, due to the fact that her party was a close coalition partner of the Prime Minister party. The recall failed due to the low voter turnout.

<sup>25</sup> Article 24 of Russian Federal Law No. 131-FZ “On Basic Principles of Organization of Local Self-Government in the Russian Federation”.

at the initiative of the population, in accordance with the procedure established by federal legislation<sup>26</sup> and with the local referendum legislation.

37. The Russian Constitutional Court has in its case-law established specific safeguards for the implementation of the recall in line with the Constitution and the local self-government principles. In particular, to avoid a subjective evaluation of the activity of the local officials, the grounds for recall should not allow for extensive interpretation and should be supported by facts to be verified. In the Court's view,<sup>27</sup> it is only by providing sufficiently specified grounds and by allowing the contested official to provide explanations at all stages at the recall procedure, that the respect for the rights of the elected official can be guaranteed and local self-government principles effectively implemented.

38. In **Slovakia**, mayors may be recalled by local popular vote, as provided by Section 13a.3.a of the Law no. 369/1990 Zb. on Municipalities. According to statistics published by the Association of Slovak Municipalities and Towns, between 2005 and 2015, local referendums were organised in 7,1% of municipalities. Of these, 31,6% did concern the recall of mayor and were successful, 10,6% concerned the recall of mayor but were unsuccessful.

39. In **Switzerland**, recall of municipal executives is possible in two cantons: Uri and Ticino. However, recall procedures in Switzerland do not target individual elected politicians, but the local body as a whole. Therefore, they function more as a no-confidence vote rather than an instrument to sanction elected individuals.

40. In the legislation of **Ukraine** there are legal provisions that allow citizens to recall only mayors (but not other local elected representatives) by way of popular vote.<sup>28</sup> There is no official information on practical examples of such votes.

41. Recall of mayors was allowed by past legislation, now abolished, in **Serbia** and in "the former Yugoslav Republic of Macedonia".<sup>29</sup> Attempts to introduce such mechanism have failed in **Slovenia** (in 2017)<sup>30</sup> and in the **United Kingdom**.<sup>31</sup>

42. A special case of recall (with the simultaneous election of a new mayor) may be found in **Spain**, where Article 197.4 of the Organic Law on General Electoral System regulates a special regime for small municipalities, with the so-called system of "concejo abierto". This is an exceptional and traditional system from the Middle Age with direct election of the mayor

<sup>26</sup> Chapter II on *Referendum* of Federal Law No. 67-FZ of 12 June 2002, "On the main guarantees of electoral rights and the right to participate in the referendum of citizens of the Russian Federation", and Art. 22 of Federal Law No. 131-FZ *On local referendum*.

<sup>27</sup> Constitutional Court of the Russian Federation, *Decision of 2 April 2002 on the case of verification of the constitutionality of certain provisions of the Krasnoyarsk Territory Law "On the procedure for recalling a deputy of a representative body of local self-government" and the Law of the Koryaksky Autonomous Okrug on the Procedure for recalling a deputy of a representative local self-government body*.

<sup>28</sup> Relevant substantive and procedural provisions are prescribed by the Law on Local Self-Government in Ukraine No. 280/97 as of 21 May 1997.

<sup>29</sup> In the latter country, the Law of local self-government of 1996, which was applicable until 2002, had one provision which allowed opening the recall procedure through a popular vote only for the actual mayors. It was stipulated that if 50% plus one voter went to the polls and vote for his/her recall, than the mayor mandate ceased. This provision was abrogated in 2002 when the current law was adopted. Since 2002 no changes to the law have been adopted. As of 12 February 2019, the name of the country changed to "North Macedonia".

<sup>30</sup> The Parliament rejected the bill allowing local recall, one month after its initial adoption in the lower house. Resubmitted to the vote, following a negative opinion of the upper house, in which local communities are represented in particular, the law was rejected.

<sup>31</sup> The Recall of Elected Representatives Bill sought to systemize a recall system of elected representatives in England, which included the mayors. However, the bill could make no progress as the 2014-15 session of Parliament has prorogued. Despite the absence of such a mechanism, citizens have petitioned to remove from the office the Mayor of London, in 2017, alleging the crime of treason. According to applicable rules, if the petition receives 100,000 signatures, the Parliament is obligated to debate the proposal. Mayor Sadiq Khan is still in office.

by citizens, without councillors, allowing citizens to initiate and pass a constructive motion of non-confidence.

43. As stated in the introduction, the Congress' request was made in connection with existing regulations and practice enabling voters, in the **Republic of Moldova**, to recall mayors through popular vote. Addressing the Moldovan legislation and case-law in the field is therefore of particular interest.

44. In line with Article 68, para 2, of the Moldovan Constitution stating in the chapter on Parliament, that “[a]ny imperative mandate shall be deemed null and void”, the Moldovan law on the conditions of office of local elected representatives (Law 768 of 2 February 2000) also establishes that “[a]ny imperative mandate shall be null and void” (Section 4, subpara 1). The same law at the same time includes the recall (“d) Recall by a local referendum pursuant to the Electoral Code”) among the reasons for curtailing the term of office of – directly elected - mayors (Section 5, subpara 4). Article 177, para 2, of the Electoral Code sets out the grounds for the mayor's recall: a) failure to uphold the interests of the local community; b) failure to properly exercise the responsibilities of the office prescribed by the law, and c) infringement of moral and ethical norms if this conduct has been “confirmed in the established way”. Recall may be activated at the initiative of a number of local council members and needs to be confirmed by popular vote.

45. In a judgment it delivered in 2012,<sup>32</sup> the Moldovan Constitutional Court interpreting Article 68, para 2, of the Constitution held that “*in line with free representation, the parliamentarian's mandate is irrevocable: voters cannot end it prematurely and the practice of 'blank resignations' is prohibited. Voters cannot, therefore, express dissatisfaction with the way in which a candidate has fulfilled his or her mandate other than by refusing to vote for that candidate again when he or she seeks re-election.*”

46. However, in a decision adopted in October 2017,<sup>33</sup> while it rejected, for admissibility reasons, a request for constitutional review regarding inter alia art. 177 para (2) of the Electoral Code (the grounds for mayor's recall), the Moldovan Court suggested through its considerations, that the provisions of article 68, par. 2 of the Constitution may only be applied to the national Parliament, and that its considerations in the 2012 judgment may not be extended to the local mandate.

47. The Court referred, in its decision, to its own past case law (a decision of 2002)<sup>34</sup> in which it had concluded that, by withdrawing the provision enabling removal of mayors by local popular vote, one of the citizens' rights had been restricted, without the restriction being justified in the Moldovan Constitution. The Court had pointed out in the 2002 decision to *the citizens' right to revoke an elected official for failing to respond to the interests of the collectivity*, right based on: the principle of direct exercise of sovereignty by the people; the right to administration, i.e. to participate in the administration of public affairs directly; the principle of citizens' direct consultation on local issues, all constitutionally protected principles.

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<sup>32</sup> Judgment of Moldovan Constitutional Court of 19 June 2012, on the interpretation of Articles 68 al. 1, 2 and 69 al. 2 of the Constitution (Application nr. 8b/2012), par. 44.

<sup>33</sup> Constitutional Court Moldova, Decision of inadmissibility of the request no. 123a / 2017 on the constitutionality control of Articles 33 and 34 of the Local Public Administration Act and art. 177 par. (2) of the Electoral Code (the mayor's dismissal by referendum), 4 October, 2017.

<sup>34</sup> Constitutional Court of Moldova, Decision no. 13 of 14 March 2002, point 6.

48. Moreover, although it did not take a stand on the constitutionality of the contested articles of the Electoral Code, the Court provided in its 2017 decision a number of elements of reasoning, based also on relevant views expressed by the Venice Commission and the Congress, such as:

- that, to guarantee the free exercise of the local elective mandate, in accordance with the European Charter, the legal provisions regulating the termination of mandate must be interpreted in a restrictive manner and only applied to exceptional cases (CDL-AD(2014)022, §27);
- that the mayor, being a publicly elected authority, is not subordinated either to the local council (which cannot dismiss the mayor except by organising a local popular vote), or to any other public authority of another level (see Congress, report on "Local Democracy in the Republic Moldova", CPL (12) 9, § 65);
- that the law provides for guarantees and safeguards in the local recall procedure: the Electoral Code requires that the decision to hold the local recall vote must include in a substantiated manner, for each particular case, the reasons for the mayor's dismissal; the Central Electoral Commission decision on the date of recall vote needs to contain relevant and sufficient factual arguments to justify the mayor's dismissal, there is judicial review of these two decisions, enabling the court to verify and rule on the merits of the reasons for the mayor's recall, in each individual case.

49. In May 2017, Dorin Chirtoacă was provisionally suspended as Mayor of Chişinău by a court order, in the context of a criminal prosecution triggered against him under different charges relating to corruption. Together with this suspension, a home arrest was pronounced against him. On 19 November 2017, a recall vote was held in Chişinău asking if the general mayor of the municipality of Chişinău should be dismissed, which did not meet the requirement of a turnout of one third of the city's eligible voters. In its Report CG34(2018)09final of 27 March 2018, the Congress concluded that the suspension of the Mayor of Chişinău was a violation of the European Charter of Local Self-Government and expressed concern at the repercussions of the local recall vote targeting the mayor (also see paras 24 to 28 for related case law of the Moldovan Constitutional Court).

50. Outside Europe, recall of local elected authorities mostly exist in (the) **America(s)**.

51. In **Argentina**, the election and mandate of local authorities is regulated in each of the provinces' Constitutions. The institution of recall of local authorities is not contemplated in every province and the requirements and effects may vary. Some of the provinces that regulate the recall at provincial and municipal level are: Buenos Aires, Catamarca, Corrientes, Chaco, Chubut, Entre Rios, La Rioja, Misiones, Neuquén, Rio Negro, San Luis, San Juan, Santiago del Estero and Tierra del Fuego.<sup>35</sup> In the provinces where recall is allowed, the population is enabled to directly file a petition to recall the mandate of the locally elected authorities, the head of the local administration, the municipal governor, and the members of the council (both directly elected by citizens). The recall is regulated as a citizens' right and it amounts to a "no-confidence" vote due to the poor management of the community. The participation in the recall vote is compulsory and the percentage to approve the recall varies depending on the province.

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<sup>35</sup> As an example, the Constitution of Buenos Aires establishes: "*Article 67 - The electorate has the right to require the **recall of mandate** of the elected authorities founded on causes related to their performance, by promoting this initiative with the signature of twenty per cent of the registered voters on the electoral register of the City or corresponding Municipality. The recall request is not admissible for those who have not yet reached a year of mandate, nor for those who have less than six months left for the termination of their mandate. The Superior Court must check these requirements and call for a recall referendum among the ninety days after the request has been presented. The participation in the referendum will be compulsory and it will be binding if the votes for the recall exceed the fifty per cent of the registered voters.*"

52. In **Colombia**, the recall of mayors (directly elected by citizens) was recognised in 1994 as “a political right, by means of which citizens terminate the mandate that they have conferred on a governor or a mayor”.<sup>36</sup> Members of local councils are also directly elected but are not subjected to popular recall. The Colombian Constitutional Court referred to the concept of “programmatic mandate” to distinguish it from the imperative mandate and the free mandate. According to the Court, following article 259 of the Constitution, when they are elected, candidates commit to fulfil a government programme; hence, if the elected official fails to comply with the programme without justification, voters shall logically have the right to revoke that mandate. Moreover, in the eyes of the Court, those entitled to remove the mayor or governor are the *active* electors of the concerned local community “*who participated in the election of the mayor or governor, since it is them - and no one else - who made the choice*”.<sup>37</sup>

53. In **Ecuador**, the recall is established in the national Constitution, recognising in Article 61, among the rights to participation, the right “to recall authorities elected by universal suffrage”, therefore also local mayors and members of local councils, elected by popular vote. Article 105 adds that “all persons, in the exercise of their political rights, will be able to recall elected authorities”. Since 2011, specific rules in the national electoral legislation and the legislation on citizens’ participation regulate the different aspects of the recall mechanism (initiative, conditions and grounds for recall, removal procedure).<sup>38</sup> Under these rules, local voters are enabled to initiate the recall and remove the local authorities directly through their vote. The right to recall is however not unconditional: the electoral legislation provides that, upon registration, candidates (including for the position of mayor), must provide a work plan with general and specific objectives and ways to achieve them. According to the national rules, the grounds for recall may be related to: (a) aspects of the work plan that would have been breached; (b) legal provisions on citizen participation that are considered unfulfilled or violated (c) non-compliance with their functions and obligations established in the Constitution and laws.

54. In **Peru**, the country using most intensively recall votes at the local level in the world,<sup>39</sup> the recall is also constitutionally protected as a citizens’ participatory right (see Article 2.17 and Article 31.1 of the Constitution).<sup>40</sup> Mayors and local councils’ members’, directly elected, are subject to popular recall vote, as stipulated by Article 194.3 of the Constitution. The national legislation further specifies this right and establishes the conditions and procedure for the recall.<sup>41</sup> The National Elections Jury has stressed that one of the requirements related to a popular recall is “*to substantiate the request*”, meaning to give reasonable support to the reasons for recall. This implies giving details on why the concerned authority is questioned, on the shortcomings in the exercise of the function (“*which must have affected notoriously*”).

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<sup>36</sup> Article 6 of Law Nr.134 of 1994 on Mechanisms of Citizen Participation. Law Nr. 131 of 1994 on Programmatic Vote further regulated this mechanism, see at:

<http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=330#>.

<sup>37</sup> See Constitutional Court judgments C-011/1994 and C-180/1994, available at:

<http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=4176#0>;

<http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=5430#0>.

<sup>38</sup> See in particular Constitution (Article 105 and 106), Electoral Law (Articles 199 to 201), National Electoral Council - Rules of Procedure.

See at: <http://aceproject.org/ero-en/regions/americas/EC/ecuador-ley-organica-electoral-codigo-de-la/>

<https://aceproject.org/ero-en/regions/americas/EC/ecuador-reglamento-para-el-ejercicio-de-la/> ; see also “La Revocatoria del Mandato en el Ecuador, Países de la Comunidad Andina y del Continente Americano” [Verdugo, 2007], Available in Spanish at: <http://repositorio.uasb.edu.ec/handle/10644/771>

<sup>39</sup> In Peru between 1997 and 2013, there were over 5,000 procedures of recall against local elected authorities in almost half of the country’s 1,645 municipalities.

See “Recall referendums in Peruvian municipalities: a political weapon for bad losers or an instrument of accountability?” [Welp, 2015], <http://www.tandfonline.com/doi/abs/10.1080/13510347.2015.1060222>.

<sup>40</sup> Article 2, point 17 and Article 31 of the Constitution, see at : <http://www.congreso.gob.pe/eng/?K=362>.

<sup>41</sup> Law Nr.26.300 of Participation Rights and Citizen Control, see Articles 20 to 30.

*their adequate performance*”), and the incidence of such problems on the local management.<sup>42</sup> In 2017, 27 such votes took place, of which 13 were successful.

55. In **Costa Rica**, the Municipal Code reform in 1998, in addition to allowing direct election of mayors, established a new mechanism for mayors’ removal, based on recall.<sup>43</sup>

56. In the **United States**, the recall exists not only at the level of the individual states but also at local level.<sup>44</sup> In at least 29 US federal states, there are specific rules for the removal of locally elected officials, including mayors and members of local councils. Each state that permits the recall has its own internal rules for managing the process.

57. Recall at all levels is allowed also in **Bolivia** and **Venezuela**, as well as in **Taiwan**, and in **Japan** for all authorities at subnational level.

58. Recall (by the electorate) must be distinguished from **revocation** (by another body). There are examples of legislation allowing for the early termination of the mayor’s mandate through revocation, in particular where the mayor is not directly elected by the population, as a result of a no-confidence vote taken by the municipal council. This is for example the case in **Spain**, where it operates as a constructive motion against the mayor (with a vote for a substitute candidate at the same time).<sup>45</sup> Similarly, in **Estonia**, where mayors are not elected by direct vote, but by the municipal council, the council may take a vote of no-confidence both against the mayor and against one of its members.<sup>46</sup> In **Serbia**, while between 2004 and 2008 there was an option to recall a mayor by way of popular vote, under the current legislation<sup>47</sup> the municipal assembly is authorised to revoke mayors. In **Italy** too, according to law 81/1993, in municipalities with more than 15.000 habitants, the directly elected mayor may be forced to an early-termination by a no-confidence vote of the municipal council. However, as a consequence of the non-confidence vote, at the same time the council is dissolved (according to the principle “*aut simul stabunt aut simul cadent*”) and new elections are called for both bodies.

#### 4. Common features

59. National legislation and practical examples of local recall show that a number of common features may be observed:

- the recall by popular vote is provided by the legislation of a limited number of today’s democracies; there is no general trend concerning the authorities which can be recalled: some countries provide for recall at all levels, some at national level only, others at regional or local level, with no (statistical) preference either for recall of executive officials or members of assemblies (representative bodies) or of the assemblies as a whole (Latvia, Liechtenstein);
- Recall is rarely used in practice except in a few countries (Romania for the President of the Republic; for regional and (mostly) local executive authorities, in Europe: Poland and Slovakia; outside Europe: Peru, United States, Ecuador and Japan);<sup>48</sup>

<sup>42</sup> National Elections Jury of Peru, Resolution Nr. 3798/ 2014.

<sup>43</sup> See *Revocatoria del mandato para funcionarios de elección popular en los gobiernos locales*, [Rivera, 2006, Costa Rica], at: <http://www.tse.go.cr/revista/art/2/rivera.pdf>.

<sup>44</sup> Between 1903 and 1989, over 6,000 attempts and 4,000 votes for local recall have been reported (see Serdült, U. and Welp, Y. “The levelling up...” quoted above, p. 143).

<sup>45</sup> Article 197 Organic Law on General Electoral System (LO 5/1985 modified by L.O. 2/2011, de 28 de enero)

<sup>46</sup> See Articles 32 and 46 of the Local Government Organization Act (English version is available <https://www.riigiteataja.ee/en/eli/509012014003/consolide>).

<sup>47</sup> Law on Local Self-Government (“Official Gazette of the Republic of Serbia” no. 129/07, 83/14 – other law and 101/16 – other law).

<sup>48</sup> See Serdült, U. and Welp, Y. “The levelling up...” quoted above, p. 143.

- the recall is, as a rule, associated with the direct election by the voters and there are virtually no examples of recall by electors of officials who are not elected by direct vote; this is true not only for members of legislative or deliberative assemblies – which are commonly elected directly – but also for executive officials, including mayors;
- there are some examples of national/subnational systems where members of regional or local councils, whose mandate is the result of popular vote, may be the subject of recall; in some cases, the recall may concern the regional or municipal council as a whole, in others, individual members of the council;
- where mayors are not directly elected by the local population, preference is given to a system, closer to the logic of a representative system, of a *no-confidence motion*, enabling the local council to decide on the early termination of the mayor's mandate;

60. It may be concluded from the above that the election system for the office of mayor (whether by direct or indirect elections) has a direct impact on the choice of the mechanisms in place in different countries for the removal of mayors, before the end of their term. If the mayor is directly elected by the people, revocation by the municipal council does not seem an option unless it is confirmed by a popular vote<sup>49</sup> or it implies new elections to the municipal council, following its automatic dissolution, as is the case in Italy.

#### IV. Previous Venice Commission work

61. The Venice Commission had several occasions to address issues of relevance for the present report, both in the framework of its thematic work and in a number of country-specific opinions.

62. In its 2009 *Report on the imperative mandate and similar practices*, the Commission concluded by firmly stating that “*the basic constitutional principle which prohibits imperative mandate or any other form of politically depriving representatives of their mandates must prevail as a cornerstone of European democratic constitutionalism*”.<sup>50</sup>

63. The Commission took however note, in its report, of legislative provisions and related practices, allowed by national political and constitutional traditions, which deviate from this principle, and also observed that “*in these countries these practices have been considered consistent with their own constitutions*”. In this context, it also briefly referred to the mechanism of recall by electors and acknowledged, in relation to Ukraine, the difficulty to articulate a direct criticism of such mechanisms, “*since there are precedents in democratic countries*” (para 35). The Commission pointed, in this connection, to a key principle which, in its view, should be a prerequisite for any recourse to recall: when grounds for curtailing the elective mandate imply legal judgments, “*these situations should be better dealt with by neutral and independent legal bodies*”.<sup>51</sup> This is to say that clear distinction needs to be made between cases involving the legal accountability of the elected official, to be established in court, and situations where the political accountability of the official is at issue, and may be settled, as an exceptional measure, by recall.

64. The Commission had already noted, in a previous opinion concerning Ukraine,<sup>52</sup> with respect to parliamentarians' recall by electors, that it would be “*quite unusual to entrust voters with the complex responsibility to evaluate the respect of constitutional and legal obligations by a deputy, as citizen's votes essentially remain the expression of a political*

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<sup>49</sup> The current legislation of Ukraine provides for the revocation of the directly elected mayor by the municipal council in addition to recall by the people. This provision is generally criticised, and its revision is discussed with the Council of Europe.

<sup>50</sup> CDL-AD(2009)027, par. 39.

<sup>51</sup> CDL-AD(2009)027 par. 35; see also footnotes 32 to 35 for the Ukrainian experience.

<sup>52</sup> *Opinion on the Law on Amendments to the Legislation concerning the Status of Deputies of the Verkhovna Rada of the Autonomous Republic of Crimea and of Local Councils in Ukraine*, CDL-AD(2007)018, par. 16-17.

*choice.*” The Commission had concluded that it would be more appropriate to provide for the termination of the mandate *“through a legal procedure, which would comply with the principle of the rule of law and avoid the use of vague concepts likely to result in arbitrary interpretations essentially motivated by political reasons.”*

65. In the opinion it adopted in 2012 on Romania,<sup>53</sup> in relation to a presidential recall, the Commission underlined, as a fundamental requirement for recall processes, that a clear distinction should be made between the legal and political responsibility of the contested office holder. The Commission noted in particular: *“The procedure for suspending the President confuses in a rather peculiar way legal and political responsibility. It tends to make the President politically responsible before the Parliament and the electorate, although the grounds for dismissal are formulated in a way which invokes legal responsibility. The role of the Constitutional Court in the procedure is also rather unclear. If maintained at all, the procedure of Article 95 of the Constitution on the suspension of the President as it stands should be transformed into a clearly legal responsibility, initiated by Parliament but settled by a court.”*

66. As far as the local level is concerned, the Venice Commission has expressed concerns (in relation to legislative provisions on local self-government in Azerbaijan), over the conditions under which the powers of a municipal councillor can be terminated in advance or temporarily suspended.

67. In its view, adequate guarantees should exist both as regards the type of norms regulating the early termination of office and the authority entitled to take the decision. First, it would be advisable that the specific rules for early termination of power or suspension should not be determined by the statute of each municipality as this may result in an inequality of treatment among municipal councillors. A general regulation is required, at national or regional level, in accordance with the distribution of competencies in each country. Second, if the verification of a failure in the concerned councillor’s conduct is required, the termination of the mandate of the municipal councillor cannot be decided by the local council. *“The intervention of the Court is a necessary element of the system [...] This would ensure the free exercise of the functions of local elected representatives in conformity with the European Charter”*.<sup>54</sup>

68. The Commission stressed in its opinion *“the principle that this dismissal of an elective representative is an exceptional measure to be applied only in case of serious failures”* and that *“all procedural guarantees, including the intervention of a court should be expressly guaranteed”*.<sup>55</sup>

69. More recently, in 2017, the Commission examined one of the latest attempts to introduce a recall vote in Europe, a draft law of the Republic of Moldova proposing, in its initial version, the removal of Parliament members through a vote of the electors in their constituency. The Venice Commission welcomed that this proposal had not been retained in the subsequent version of the draft. In its view, in addition to raising potential issues of constitutionality (Article 68.2 of the Moldovan Constitution prohibits the imperative mandate) and contradicting a judgment of the Constitutional Court of 2012 (parliamentary mandates are irrevocable and exercised in the interest of the whole nation), such a mechanism was

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<sup>53</sup> *Opinion on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the Law N° 47/1992 regarding the organisation and functioning of the Constitutional Court and on the Government emergency ordinance on amending and completing the Law N° 3/2000 regarding the organisation of a referendum of Romania*, CDL-AD(2012)026, par. 78.

<sup>54</sup> *Opinion on the draft law on additions to the law on the status of municipalities of the Republic of Azerbaijan*, CDL-AD(2009)049, par. 10-11.

<sup>55</sup> *Ibidem*, par. 27.



also in breach of international standards. The Venice Commission referred in its opinion<sup>56</sup> to the *1990 OSCE Copenhagen Document*, requiring that elected officials be permitted to remain in office “until their term expires”, and “in a manner that is regulated by law *in conformity with democratic parliamentary and constitutional procedures*” (par. 7.9), as well as the *PACE Resolution 1303(2002) on the functioning of democratic institutions in Moldova* (par. 8), and its own 2009 *Report on the Imperative mandate and similar practices*.

70. The Commission noted that the proposed amendment “*would have effectively established a system of general recall of representatives, which in a certain political context, may well function as an imperative mandate.*” The Commission further stated that this “*has to be considered as a political and not a legal procedure*” and that “[i]nvolving courts in such a procedure would put them at risk to be politicised.”<sup>57</sup>

## V. Analysis

### 1. Recall - a specific instrument of direct democracy in a representative system

71. By its very nature an instrument of direct democracy,<sup>58</sup> the recall is part of a set of direct democratic mechanisms of control,<sup>59</sup> agenda setting and accountability beyond elections, which may operate, according to the national legal and constitutional traditions, as a complement to representative democracy (the popular initiative, the referendum, the petition, the recall and the veto). The common feature of all forms of direct democracy is that they are based on the direct power of the voters, as opposed to the power of the elected representatives. What differentiates the recall is that the decision taken concerns the crucial question whether to put an end to the office of an elected official or body before the end of the term. Hence, unlike other types of popular votes, the recall does not invite the voters to take a position on laws or policies but on persons or, more rarely, bodies as a whole. In addition, the direct election of such persons or bodies appears to be a pre-condition to the recourse to recall.

72. In a democracy, politicians are, in principle, primarily accountable to the citizens who elect them. In practice, in contemporary societies, the links are often tenuous and the politicians are increasingly perceived as disconnected from their voters, as they tend to be accountable first to their party leadership and to political decision-makers, and only secondarily to citizens.<sup>60</sup> This has motivated attempts to introduce mechanisms for strengthening the relationship between the electors and the elected officials, and for more effective and direct participation, including regulations on recall, as a means to restore the links between voters and elected officials and to enable voters to provide feedback on the performance of the elected, including removing them as a sanction for a poor record or unethical behaviour (including addiction).

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<sup>56</sup> See *The Republic of Moldova - Venice Commission and OSCE/ODIHR Joint Opinion on the draft laws on amending and completing certain legislative acts (electoral system for the election of the Parliament)* CDL-AD(2017)012, par. 16. The recall initiative required the signatures of at least 1/3 of the voters, and the successful recall, the votes of at least half of the voters of the constituency, but not less than the number of those having voted for the concerned MP. As grounds for recall, the draft law envisaged: failure to observe the interests of the community in the constituency; failure to exercise properly the duties of a member of Parliament stipulated by law; violation of moral and ethical norms.

<sup>57</sup> *Idem*, par. 60.

<sup>58</sup> See CDL-AD(2007)018, par. 3 ; see also CDL-AD(2004)003, par.85-86.

<sup>59</sup> See Yanina Welp, *Recall Referendum Around the World: Origins, Institutional Designs and Current Debates*, in “*The Routledge Handbook to Referendums and Direct Democracy*”, Edited by Laurence Morel, Matt Qvortrup, 2018 – Routledge

<sup>60</sup> See: Derick W. Brinkerhoff, (2001), Taking Account of Accountability: A Conceptual Overview and Strategic Options, March, 2001: [http://www1.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/ipc/wp-14.pdf](http://www1.usaid.gov/our_work/democracy_and_governance/publications/ipc/wp-14.pdf)

## 2. Recall, free mandate and the right to exercise public functions

73. At the same time, the recall, as a political tool, is by its very nature different from the imperative mandate. While the free mandate is a basic foundational principle of political representation, the recourse to recall, in those jurisdictions where it is allowed, only represents a reactive mechanism, which does not have the character of a default rule. Unlike the imperative mandate - where the binding will of the electors forms the permanent framework for the action of elected officials -, the recall only comes into operation as an *ad-hoc* corrective instrument, *when* and *if* it is activated, being the subject of a decision *dependent* on the political *will* of a prescribed *number of voters*, under *specific procedural conditions*.

74. Nevertheless, recall enables voters to put an end to an elective mandate. Therefore, in order not to be at odds with representative democracy and the representative system, based on elections at regular intervals and the free mandate of elected officials until the next elections, where constitutional and/or legislative provisions are open to recall **this should be regulated very carefully and only be used as an exceptional tool, as a complement to other democratic mechanisms which are available in a representative system** – including other direct and participatory democracy instruments, if available.

75. A clear distinction has to be made between recall of members of legislative or deliberative assemblies (bodies exercising representative democracy, such as a parliament or a municipal council), on the one side and recall of elected members of the executive on the other side - in the vast majority of cases a president or a mayor. As already said, the principle of the prohibition of the imperative mandate applies to individual members of elected assemblies, and not to executive positions.

76. The recall of a legislative body or of a municipal council as a whole is of another nature than the recall of its individual members. It cannot be considered as going against the prohibition of the imperative mandate which is essential in a system of representative, deliberative democracy.<sup>61</sup> It is rather a kind of no confidence vote by the people *vis-à-vis* the deliberative body. The nature of such recall is much closer to that of a President or a mayor and the same principles should apply as to its conformity to international standards.

77. As already stated, a number of Constitutions provide for a **fundamental right of citizens to accede to and for the elected officials to exercise their positions**. This can be considered as an expression in national law of Article 25 ICCPR relating to the right to take part in public affairs.

78. For example, in Spain, thanks to the recognition of such constitutional right (Article 23.2), individual appeals by elected officials - parliamentarians or local authorities - are possible before the Constitutional Tribunal (*recurso de amparo*). The Tribunal has a long-standing doctrine protecting the rights of representatives *vis-à-vis* the party or the parliamentary group they belong to. Although this right is not explicitly mentioned in the Constitution, the Constitutional Tribunal built it from the right to “access” to public positions, without having to consider the clause of the prohibition of the imperative mandate (Article 67.2 of the Constitution). Such a right includes, then, not only the “access” but also the “exercise” and the “continuity” in the position.<sup>62</sup> Through this right, not only the position of parliamentarians is protected, but also that of the local representatives, and this without the

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<sup>61</sup> See above ch. III.

<sup>62</sup> See also ECtHR case law on the individual's right to sit as a member of Parliament once elected (*Paunović and Milivojević v. Serbia*, application no. 41683/06, 24 May 2016; *Ganchev v. Bulgaria*, no. 28858/95, Commission decision of 25 November 1996, Decisions and Reports 87, p. 130)

need to extend the prohibition of the imperative mandate (of the parliamentarians, in an original and restrictive interpretation) to local authorities.

79. Constitutional Courts have rejected, based on such provisions, attempts to revoke or recall elected officials, and have stated that the parliamentary mandate is a representative one, on behalf of the whole nation.<sup>63</sup>

80. This leads to addressing the question whether the right to exercise an elected position goes beyond that of the prohibition of the imperative mandate, excluding recall not only of individual members of representative bodies, but also of elected holders of executive positions, including mayors. The quoted case-law focuses on MPs and its applicability to other elective positions is not certain, even if it cannot be excluded. It does therefore not go against the distinction made above between representative and executive positions regarding the admissibility of recall.

### **3. Potential and risks**

81. By definition, the recall constitutes an empowering tool for citizens, enabling them to remove from office politicians who are seen as having badly performed in office and not to have considered the interests of the electorate that has elected them, or who performed in a problematic manner from an ethical point of view. Recall can in principle play a role as a protective and preventive mechanism from corrupt and irresponsible holders of political power.

82. The recall has thus the potential to bring elected officials closer to their voters, and by enabling permanent control of the elected officials, make them more accountable and more responsive to the needs of the people they serve. It could help bridging the democratic gap engendered by often lower levels of participation in elections and motivating public participation and interest in public affairs between elections. By doing this, the recall may also help to check and prevent undue influences or interests in the communities' affairs. From this perspective, the recall is a mechanism to shift the balance of power between the electors and the elected. Recall may also be an instrument to settle conflicts between mayors and local councils, if both are directly elected and prove unable to co-operate.

83. While thus the potential benefits of the recall cannot be overlooked, the risks associated with this procedure are considerable. If not precisely defined and established, the recall can be abused as a tool -by the political parties in the battle against their political competitors - and becomes a political "weapon". Moreover, the recall can be misused by various interest or pressure groups to destabilize the governance and make it inefficient by preventing selected politicians from taking certain steps or decisions because of the danger of being removed by the citizens. As a result, such perspective makes public office less attractive and may lead to irresponsible behaviour. At local level the danger of manipulation is even higher: the recall may be used by the ruling parties at central level to exert a pressure on opposition-led municipality leaders thus reducing both local autonomy and the political pluralism in the country.

84. In addition, there are different risks according to the different forms of recall (national examples show that there are great differences, between the States who know recall, in the conditions and proceedings related to this instrument). For example, a recall in its pure form

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<sup>63</sup> In Lithuania, the Constitutional Court has ruled in a number of occasions that the mandate means that electors have no right to recall a member of the Seimas and his/her freedom cannot be limited by parties, or organisations that nominated them. See also the Judgment of Moldovan Constitutional Court of 19 June 2012, on the interpretation of Articles 68 al. 1, 2 and 69 al. 2 of the Constitution (Application nr. 8b/2012), par. 44; more recently, see Spanish Constitutional Tribunal judgement 123/2017 (in relation with senators appointed by the Assemblies of Autonomous Communities).

(new election before time by the same constituency) initiated by an important number of electors and managed in respect of the conditions for a democratic election process presents different risks than those forms where the recall of a mayor may be initiated not by the electors, but by the local council. Also, as mentioned before, where allowed, the application of the recall instrument to individual local councils' members, despite the clear difference of statute between those individual councillors and the local mayors, is particularly problematic.

85. Further vulnerabilities include, in addition to the often prominent role of money in the recall process, the societal costs it involves, such as the climate of confusion, suspicion and division, which is often engendered by recall initiatives, as well as the risk of, ultimately, undermining the trust of the electorate in people they elected, as well as in politics and representative democracy as a whole.

#### **4. Recall vs. destitution. The distinction between legal and political responsibility**

86. One important aspect to be taken into account, if and when enabling and activating the mechanism of recall, is the necessary and fundamental distinction between legal and political responsibility and the important risk of confusing the two types of responsibility, by making the contested elected official politically responsible before the electorate, when the grounds for dismissal would in fact entail legal responsibility.

87. This distinction is of particular importance in terms of legal certainty and from the perspective of the protection of the fundamental rights of the elected officials. It is relevant for instance when conflict of interests, illegal or criminal actions, abuse of power or corruption are included among the reasons for the recall. Such issues should normally be settled by a court, according to the legislation in force, and not submitted to the people for decision.<sup>64</sup>

88. Destitution implies the removal from a mandate as a result of proceedings brought against mandate holders on the grounds that they have committed an illegal or criminal act. Unlike recall, destitution has no political connotation (or at least should not have any), since it is not a political measure - the fruit of political debate - by which the population would have the possibility to take a decision based on the record of an elected official. Destitution involves well-defined procedures and should not include a popular vote.<sup>65</sup>

89. As regards local government, there are specific tools for the administrative supervision (and related administrative measures), by higher-level authorities, of the legality of the actions of the local elected officials within the scope of their attributions. These may include also, as allowed by European standards, supervision with regard to expediency, but only in respect of tasks which are delegated to local authorities.<sup>66</sup> These mechanisms are not within the scope of the present report but they may lead in extreme cases to removing a mayor from office.

#### **5. Local recall: the requirements of the European Charter of Local Self-Government**

90. As already indicated, few European legal systems provide for recall. Based on national constitutional traditions, exceptions are however admitted, mainly at local level, by constitutions, statutes and doctrine. The question is whether more generally, according to European (and

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<sup>64</sup> CDL-AD(2012)026, par. 78.

<sup>65</sup> See CDL-AD(2009)027, par. 14: "whilst [impeachment] is a judicial proceeding against an elected officer because of some crime, recall is a political process."

<sup>66</sup> Article 8 of the European Charter of Local Self-Government.

international) instruments relevant for local government, the recourse to recall, in particular to mayors' recall, may be deemed acceptable, and what are the conditions and safeguards which are a minimum pre-requirement for its use.

91. The European Charter of Local Self-Government applies the general principles of representative government and representative democracy at local level. Article 7.1, establishing the principle of free mandate of local representatives, is especially worth to be mentioned. It provides: *"The conditions of office of local elected representative shall provide for free exercise of their functions."* Article 7.3 adds: *"Any functions and activities which are deemed incompatible with the holding of local elective office shall be determined by statute or fundamental legal principles"*. The Charter is silent on the potential reasons for ineligibility or incompatibly, leaving to the national legislator the task to draw these limits and conditions, through national legislation and "fundamental legal principles". The Explanatory Report to the Charter interestingly explains: *"this paragraph provides that disqualification from the holding of local elective office should only be based on objective legal criteria and not on ad hoc decisions. Normally this means that cases of incompatibility will be laid down by statute. However, cases have been noted of firmly entrenched, non-written legal principles, which seem to provide adequate guarantees."*

92. Article 3.2 of the Charter once more confirms, at local level as well, the primacy of representative democracy, with all its implications: local self-government *"shall be exercised by councils or assemblies composed of members freely elected by secret ballot...and which may possess executive organs responsible to them. This provision shall in no way affect recourse to assemblies of citizens, referendums or any other form of direct citizen participation where it is permitted by statute."* This shows also that the importance of various forms of direct participation, including referendums, as an additional component of the local governance, or a complement to it, is recognised.

93. Therefore, under the Charter, the representative system of local governance, based on local organs formed of locally elected representatives, and instruments of direct participation, are not mutually exclusive. The Explanatory Report clarifies that, under the right of self-government, *"allowance is also made for the possibility of direct democracy where this is provided for by statute."*<sup>67</sup> This explanation seems to open the door to direct democracy practices, without expressly excluding the early termination of an elective mandate, where these are allowed by the national legal and political traditions.

94. The importance of direct participation of citizens, especially in relation to directly elected local authorities, but also of necessary safeguards for government stability, has been emphasised by the Congress, in its Recommendation 113 (2002)<sup>68</sup> on the application of Article 3.2 of the Charter: *"Where those in charge of the public authority are directly elected by the people, any dismissal must be endorsed by the people. However, these procedures should at the same time carry all the guarantees necessary for stable local government [...]"*

95. Under the Additional Protocol to the Charter,<sup>69</sup> dealing especially with the right to participate in local affairs, this right *"denotes the right to seek to determine or to influence the exercise of a local authority's powers and responsibilities"* (Article 1.2). Article 2 requiring

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<sup>67</sup> The Charter describes the essence of local self-government and contains the main principles, often referring to the internal law of member states to determine the exact content of a rule. However, nothing prevents the judicial authorities of a Contracting State from considering one or other provision of the Charter to be directly applicable and binding, as the Swiss Federal Court did in a judgment of 3 June 2016 (ATF 142 I 216), by which it invalidated, for lack of prior consultation of the concerned citizens, a popular initiative for the merger of several municipalities.

<sup>68</sup> Recommendation 113 (2002)\_on relations between the public, the local assembly and the executive in local democracy (the institutional framework of local democracy), see Appendix §3, let. E.ii

<sup>69</sup> Opened to the signature of the state parties to the Charter in November 2011, 6.XI.2009, entered into force on 1 June 2012.

implementing measures to give effect to this right, refers to “*procedures for involving people which may include consultative processes, local referendums and petitions [...]*” (Article 2.ii.a) and it does not mention the recall.

96. It would be difficult to conclude from the above that the Charter prohibits the recourse to recall of a local representative, including a directly elected mayor, or that it contains clear guidance as to the advisable limits of the recall. It may not be said either that it explicitly authorises recall, since, according to a systematic interpretation of Articles 7 and 3, the Charter permits instruments of direct democracy which are respectful of the free exercise of the representative government.

97. In addition, it is important to point out that, so far ratified by all 47 member states of the Council of Europe, the Charter provides for a variable system of undertakings for its State Parties upon ratification, enabling a non-uniform implementation of its principles at national level. Article 12 allows ratifying States to choose amongst its provisions, at least ten of which shall be selected from among a number of key paragraphs. As a result, states may, for example, opt not to choose Article 3.2 of the Charter (although listed among the key paragraphs). It would thus be questionable, since the Charter itself gives ratifying States the choice to be or not to be legally bound by some of its provisions, to formulate, based on those provisions, standards or principles applicable to all.

98. For the Congress of Local and Regional Authorities, in the resolution on the suspension of the Mayor of Chişinău,<sup>70</sup> “local democracy” is a constituent part of the European democracy: “*This implies that local elected representatives must be able to exercise their functions freely, in fact and in law, in the same way that elected representatives at the national level must be able to exercise theirs in any democratic state*”<sup>71</sup>. “*In electing a mayor by direct universal suffrage, voters are delegating their power of action to the mayor and more generally giving him or her a mandate to represent the community as a whole.*”

99. The Congress quotes (in the report to the above Resolution) the doctrine of the Venice Commission on the recall for parliamentarians,<sup>72</sup> and is of the view that this doctrine – which considers the recall of (individual) parliamentarians as a form of imperative mandate - “should also be applicable *mutatis mutandis* to local elected representatives.”<sup>73</sup>

## **6. Conditions and procedure for recall**

100. It is important, in terms of equality of municipalities and elected representatives, but also for reasons of predictability and stability of the applicable rules, that the general framework for the recall be established by the law, at national or regional level, and not left to the decision of individual municipalities.<sup>74</sup>

101. Even if recognised as a political instrument in the hands of the electors, in the opinion of the Venice Commission the recall process has to be a strictly regulated and institutionalised mechanism. As already said, any confusion between recall – a political institution – and destitution – a legal one – should be avoided. This implies that such regulation addresses procedural aspects rather than the grounds for recall.

102. As far as a mayor’s recall is concerned, beyond local specificities, legislation regulates several basic common aspects of the procedure, which in fact prove to be common to other recall processes as well: the initiative for the recall, the timeframe and/or time limits for the

<sup>70</sup> Report CG33(2017) 23 final, no. 67.

<sup>71</sup> Resolution 420 (2017), no. 5

<sup>72</sup> With a quotation of the Joint Opinion CDL-AD(2017)012 on Moldova’s electoral reform, cit. above.

<sup>73</sup> Report CG33(2017) 23 final, no 68.

<sup>74</sup> Cf. above par. 34.

process; a minimum number of signatures as an activating condition; quorum requirements (turnout and approval majority); the possible involvement of the municipal council and judicial control of the procedure.

103. However, it happens that legislation also provides for grounds for the mayors' recall. Such grounds may be, for example:

- failure to uphold the interests of the local community;
- incompetence in the performance of duties; gross mismanagement;
- failure to perform duties prescribed by the law, neglect of duties (for example, not fulfilling the mayor's obligations);
- failure to implement/violation of legal provisions related to citizen participation;
- unethical behaviour in the service (unprofessional and irresponsible performance of the job), infringement of moral and ethical norms;
- misuse of office and authority (in case of bribery and corruption), conviction for a felony; conviction for a drug-related misdemeanour or a misdemeanour involving a "hate crime".<sup>75</sup>

104. These grounds are usually broad and, in most cases, the petition for recall must mention them. There are however different views as to whether these reasons must be proven, substantiated (as required in some cases by the national law),<sup>76</sup> whether they must be assessed by the authority in charge of reviewing the recall procedure,<sup>77</sup> or whether they must be given at all.<sup>78</sup>

105. The most critical question is whether acts or behaviour of the mayor that should normally be the subject of a judicial decision may be among the acceptable reasons for popular recall. The position of the Venice Commission in this regard is clear: Where allowed by the national legislation, the process of recall should only be initiated as one way - of exceptional nature - of engaging the political responsibility of the targeted elected official; to ensure the required independence and an objective assessment, no decision by the voters should intervene on those matters - such as allegations concerning the commission of certain specific crimes - which (should) fall within the exclusive domain of the courts. In such cases, involving the legal responsibility of the authors of the offences at issue, recall will not be a suitable removal mechanism.<sup>79</sup>

106. In view of the variety of national practices and taking into account the risk of confusion between political and legal responsibility, the best way to address these questions would be not to provide any list, in the legislation, of permissible grounds for mayors' recall. This will be more in line with the political nature of the process, and its understanding as a political act involving the "loss of confidence" on the part of the electors. In order to avoid excessive recourse to recall procedures, which could put into question the stability and the functioning of institutions, legislation should provide for high procedural requirements, in particular

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<sup>75</sup> Conviction for a crime during the term of office appears to be a reason for recall of local elected representatives at least in several US federal states: Alaska, Kansas, Minnesota, Rhode Island, Virginia etc. (Source: National Conference of State Legislatures, July 2011).

<sup>76</sup> See above-mentioned case law of the Constitutional Court of the Russian Federation.

<sup>77</sup> It seems that some provinces in Argentina even prohibit explicitly that the electoral authority judges the motives invoked for the recall.

<sup>78</sup> As pointed out by commentators, the grounds required to initiate the recall are actually the expression of "different models" of representation. "One is based on "dissatisfaction", and accordingly, does not provide basis for accountability (e.g. Peru between 1994 and 2015, Ecuador between 2008 and 2010). The other is based on "programmatic vote" and seems closer to a delegate model of representation" (e.g. some American States such as Georgia, Minnesota or Washington), and sometimes empowers a public body to assess the validity of the reasons (e.g. Ecuador since 2011). See Welp, Yanina (2018) "Recall referendum around the world: origins, institutional designs and current debates", in *The Routledge Handbook to Referendums and Direct Democracy*, Edited by Laurence Morel, Matt Qvortrup, Routledge. <https://www.routledge.com/The-Routledge-Handbook-to-Referendums-and-Direct-Democracy/Morel-Qvortrup/p/book/9781138209930>

<sup>79</sup> On the difference to be made between legal and political responsibility, see above ch. VI.3.

concerning the initiative of the recall and, possibly, its timing – no recall during a certain period after/before elections or the failure of a recall procedure/the rejection of the recall in a popular vote (see the next paragraphs).

### **Initiative**

107. In most cases, legislation provides that the popular recall may be initiated directly by citizens.<sup>80</sup> The number of signatures needed in support of the petition activating the recall should be sufficiently high to prevent too frequent votes on the recall;<sup>81</sup> the necessary percentage of the electorate may be higher in small than in big municipalities.

108. In some systems the initiative belongs to a minimum number of members of the local council (in a number of cases one third). Here again, a rather high threshold – even the majority or a qualified majority of the council – should be required in order to avoid the recall procedure from being an instrument of the political opposition to regularly put into question the position of elected officials. This last case may be seen as being closer to the no confidence motion by the local council, an instrument which is usually characteristic of systems where the mayor is elected by the local council. It has been noted, however, that a recall initiated by the request of part of the council (to be confirmed by popular vote) may apply where, like in the Republic of Moldova, the mayor is elected by the local population directly, and not by the local council. This may be justified by the fact that recall may be needed in situations of conflict between mayor and municipal council, which are more likely in cases of direct election of the mayor.

### **Quorum**

109. One of the main common features of existing recall regulations, as far as the mayor's recall is concerned, is the clear focus on the participatory dimension of the recall. Apart from the number of signatures of voters or of members of the local council required to initiate the process, proper quorums have often to be reached: turnout quorums - a minimum number of voters taking part in the vote - and/or approval quorums - a required majority to approve the mayor's removal.

110. The Code of Good Practice on Referendums is favourable neither to turnout nor to approval quorums.<sup>82</sup> In particular, turnout quorums may encourage opponents to abstain rather than to vote against the proposal.<sup>83</sup> However, this Code is intended as applying to texts submitted to referendum (a specifically-worded draft, repeal of an existing provision, a question of principle or a "generally-worded proposal"),<sup>84</sup> and not to the institution of the recall, which puts into question the elected body itself rather than an act it adopted, as does a referendum. This peculiarity has therefore to be taken into account when addressing the issue of quorums.

111. As a rule, recall thresholds must be sufficiently high to ensure that is not up to a minority having lost the elections to remove a mayor from office. The Russian Constitutional Court has declared unconstitutional legislative provisions admitting recall of a local elected

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<sup>80</sup> See e.g. Argentina, Columbia, Germany, Romania, the Republic of Moldova, the Russian Federation, the United States. In Ecuador, citizens included in the electoral register used in the last elections in the concerned local community.

<sup>81</sup> The number of signatures required for the recall request or petition usually represents a percentage of the votes obtained by the mayor upon election; the range is wide, from 5 or 10% up to 40% of the number of those having elected the mayor.

<sup>82</sup> CDL-AD(2007)008rev-cor, III.7.

<sup>83</sup> CDL-AD(2007)008rev-cor, par. 51.

<sup>84</sup> CDL-AD(2007)008rev-cor, par. 28.



official by a smaller number of votes than those by which this person was elected.<sup>85</sup> The Court considered “*unacceptable that the recall can be implemented mainly by the votes of citizens who have remained in the relevant minority during the election, i. e. who voted for candidates who did not receive the necessary majority.*” The Court stressed that “*at least no fewer citizens must vote for the recall than the persons who elected the official, so that the vote on the recall does not diminish the value of the voters' will expressed during the elections, and the results of election are protected,*” and concluded: “*Otherwise, conditions are created not only for arbitrary, early termination of the powers of specific local government officials, not based on the actual will of the population, but also for narrowing the scope of representative democracy [...].*”

112. While approaches may differ on the exact level of such thresholds, it is suitable to propose significant thresholds for the initiation of the recall procedure as a way to reconcile - to the extent possible - the aim pursued through the recall with the legitimacy and representativeness requirements of a democratic process. A threshold for the approval of the mayors' recall may also be envisaged. A minimum percentage of registered voters could be an option, or a number of voters at least as high as those who voted for the mayor's election.

### **Timeframe**

113. In virtually all countries where the recall is allowed, there are strict rules establishing time limits, during the mayors' term, within which the procedure for recall may be initiated. In this way, a reasonable time for action is left to the elected official in the first part of the term, to prove that he/she is acting in accordance with his/her voters' expectations. These limits range from six months to one year after the start and before the end of the term.<sup>86</sup> There are also jurisdictions where the recall may only be activated in the second half of a term (Bolivia and Venezuela), or where the recall is only allowed once per term (Peru). In Colombia, if, as a result of the voting, the mandate of the local elected is not revoked, it cannot be attempted again in the remainder of the term.

114. One may conclude from such time rules that the purpose is indeed, to provide the elected person with a reasonable period of time for action. This indicates also that, in the concerned systems, the underlying approach to recall is - rightly - that this tool should be of limited use and only intervene as an exceptional solution.

### **Judicial review**

115. The information available to the Venice Commission as regards the judicial review of the different steps and conditions to be observed in the recall procedure (such as time conditions and numerical thresholds), or the availability of judicial appeal for the challenged elected, is limited. Presumably, such remedies, which are indispensable guarantees for a process which is highly sensitive and subject to various possibilities of abuse and manipulation, are available under the general electoral legislation or in the framework of the administrative law provisions. Since recall – contrary to destitution – is a political act which should not be based on specific (legal) grounds, such judicial review should not address substantive issues. On the contrary,

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<sup>85</sup> Decision of 2 April 2002 on the case of verification of the constitutionality of certain provisions of the Krasnoyarsk Territory Law "On the procedure for recalling a deputy of a representative body of local self-government" and the Law of the Koryaksky Autonomous Okrug "On the procedure for recalling a deputy of a representative local self-government body, an elected local government official in the Koryaksky Autonomous Okrug" in connection with the applicants' complaints of Zlobin and Khnaev. See: [http://cikrf.ru/law/decrees\\_of\\_court/pes\\_7p\\_02.html](http://cikrf.ru/law/decrees_of_court/pes_7p_02.html) .

<sup>86</sup> In the Republic of Moldova, the mayor's recall may not be initiated earlier than one year after the beginning of the term, nor later than six months before the end of the term; in Colombia, Ecuador and Peru, the recall is possible only after the first year of the term and before the last year of the term; in Argentina, the recall is usually excluded for the first year of mandate and the last six months.

judicial review of the procedural requirements is essential: in the absence of sufficient judicial guarantees, the recall cannot be considered compatible with international standards.

## **Campaign**

116. On the other hand, when the recall process is activated, the Venice Commission finds that it is essential for the concerned elected official to be provided adequate opportunities to give explanations and make known his/her views on the action (inaction) complained of and the shortcomings having led to the activation of the recall. Such opportunities are presumably provided in the context of the campaign that usually takes place prior to the vote in favour or against the recall.

## **VI. Concluding remarks**

117. In Europe, recall has been rarely used in practice, but has drawn some renewed interest in recent years. Its existence depends on the constitutional tradition and openness of each country to such an instrument. In other parts of the world – mainly the Americas - it is more frequent and used mostly at regional or local level.

118. Successful or failed attempts to remove elected officials by the way of popular vote, as a corrective democratic tool, have mostly been directed against mayors. The Commission focused therefore on this case. It considered the clear differentiation that needs to be made between the position of a directly elected mayor (more similar to the one of an elected president), on the one side, and that, on the other side, of individual elected members of a local council, when it comes to engaging, before the end of their mandate, the political responsibility of such officials. While the principle of prohibition of the imperative mandate is relevant for individual members of local councils,<sup>87</sup> it is not applicable to elected mayors, to the extent that they are single-person executive officials and not individual members of elected collegiate assemblies.

119. European and other international treaties and standards do not either explicitly prohibit or firmly authorise the recourse to recall, and recall exists in the legislation and in the legal traditions of a number of countries, European or not. This is true for mayors and local elected representatives as it is for other authorities. The European Charter of Local Self-Government recognises the free exercise of the functions of the local elected representatives - as does the Congress of Local and Regional Authorities, in its related work - while it remains at the same time open to direct democracy processes, as complementary tools.

120. It cannot be disputed that, by putting an end to an elected office prior to regular elections, the recall goes against the very principle of the free representative mandate for a determined period on which today's democracies are based. In addition, it does not allow politicians to implement their programme established for the duration of an entire term. Its use has therefore to remain exceptional.

121. Another important concern is that, in the context of the crisis of representation, recall could introduce a further threat for the stability of representative democracy. Subject to a variety of factors (such as the level of political culture) and influences, even manipulation by the authorities in some cases, it may be instrumentalised and used for different kinds of interests.

122. In the opinion of the Venice Commission, the recall of mayors may only be seen as an acceptable, though exceptional, democratic tool, when it is provided for by the national or

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<sup>87</sup> On the importance of the prohibition of the imperative mandate as an element of the theory of representation and deliberative democracy, see above par. 17ff.

regional law, if it is regulated very carefully and coupled with adequate and effective procedural safeguards to prevent its misuse. From this perspective, a number of key conditions must be fulfilled:

- The Venice Commission recommends that recall be permitted only in respect of mayors who are directly elected, when and if it is prescribed by the Constitution or the national/regional law; relevant provisions should attempt to find a balance between the need for voters to be able to remove an elected official having lost their confidence, and the necessity to prevent misuse of the process; individual recall of local council members should not be allowed;
- in those situations where the reasons for terminating the mandate imply legal assessments (destitution), the end of the mandate should be the subject of a judicial decision taken in an urgent judicial procedure within the time frame enshrined in the law, and not of a popular vote; therefore, a clear distinction must be made between the legal and political responsibility of elected mayors, and between the institutions of recall, revocation and destitution;
- recall should be used as an exceptional tool and national or regional legislation should regulate it very carefully and only as a complement to other democratic mechanisms which are available in a representative system. Legislation should provide for adequate procedural safeguards, ensuring transparency, legitimacy and legality of the recall process; clearly identify the actors of the process and define sufficiently high thresholds for initiating (number of signatures or of members of the local council) and validating the recall; provide for a clear and reasonable timeframe; and for judicial review of the different steps and conditions in the process.

Draft - reserved