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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**DRAFT RECOMMENDATIONS
ON THE ELECTORAL LAW AND THE ELECTORAL
ADMINISTRATION
IN MOLDOVA**

on the basis of comments by

Mr Kåre VOLLAN (Expert, Norway)

1. Introduction

1.1 Mandate

1. *The present recommendations were elaborated following resolution 1320 (2003) of the Parliamentary Assembly of the Council of Europe, which invites the Venice Commission to formulate opinions concerning possible improvements to legislation and practices in particular member states or applicant countries.¹ The Venice Commission requested a review, based in particular on the observation reports of the local elections in the Republic of Moldova of 25 May and 9 June 2003. This review, issued by Mr Kåre Vollan (expert, Norway), results in a set of recommendations for amendments of the Election Law. Many of the proposals were also taken from the Opinion on the Election Law of the Republic of Moldova issued by the Venice Commission on 16 January 2003 on the basis of comments by Richard Rose and Kåre Vollan (CDL-AD(2003)001).*

2. *Subsequently, comments of Mr Vollan were submitted for comments to the OSCE/ODIHR and to the rapporteurs from the Parliamentary Assembly of the Council of Europe and the Congress of Local and Regional Authorities of the Council of Europe.*

3. *This consolidated report will be presented at the 8th meeting of the Council for Democratic Elections (Venice, 11 March 2004).*

4. *The main conclusions are presented in Section 5 of this report.*

1.2 Reference documents

5. *The report is based upon:*

- *the Election Law of Moldova (translation) (CDL(2002)141);*
- *the Constitution of Moldova;*
- *the Law on political parties and socio-political organisations (undated translation); (CDL(2002)118);*
- *the report of the Ad hoc Committee of the Parliamentary Assembly of the Council of Europe on the observation of the parliamentary elections in the Republic of Moldova (22–26 February 2001) - Doc. 9037 - 23 April 2001;*
- *the Report on the local elections observation mission to Moldova (25 May and 8 June 2003) (CG/Bur (10) 19);*
- *the Report on the regional elections in Gagauzia, Moldova (16 & 30 November 2003) (CG/Bur (10) 89);*
- *the OSCE/ODIHR Election Observation Mission Report (25 May and 8 June 2003);*
- *the opinion of the Venice Commission on the election law of the Republic of Moldova (CDL-AD(2003)001), based on comments by MM Richard Rose and Kåre Vollan.*
- *comments by the OSCE/ODIHR, 29 November 2003;*
- *comments from the rapporteurs from the Parliamentary Assembly of the Council of Europe and the Congress of Local and Regional Authorities of the Council of Europe (Mr Claude CASAGRANDE);*

¹Point 11.ii.b.

- *the Code of good practice in electoral matters adopted by the Venice Commission, including the Guidelines on Elections (CDL-AD(2002)023rev).*

2. General framework of the last local elections

2.1 Bodies to be elected and the electoral system

6. Elections were held for:

- 32 district (rayon) councils (second level of self-government);
- 898 councils of local self-government, i.e. towns, villages and communes (first level of self-government);
- mayors at the first level of self-government and General Mayors of Chisinau and Balti.

7. Councils were elected using a proportional closed list system, which allows independent candidates. Seats are distributed by a division method, where 1, 2, 3, 4, ... are the divisors (d'Hondt's formula).

8. The mayors and general mayors were elected by a majority vote in two rounds. A run-off was organised in those cases where none of the candidates got more than 50% of the votes in the first round of elections.

2.3 Elections administration

9. The election administration has three layers:

- The Central Election Commission consisting of 9 members.
- The District Election Commissions at level two (rayons).
- The District Election commissions at level one (municipal level).
- In addition there is a District Election Commission in A.T.U. Gagauzia.

10. District Election Commissions have from 7 to 11 members.

11. There is a Polling Station Commission for each polling station of between 5 to 11 members.

3. Assessment of the 2003 local elections

12. The CLRAE and the OSCE/ODIHR both had observation missions covering the two rounds of elections. The reports have, to a large extent, brought to the same conclusions. CLRAE states:

“In the opinion of the delegation of observers, the election campaign did not comply with the criteria of a democratic election as set out in the “Code of good practice in electoral matters” adopted by the Venice Commission, the Parliamentary Assembly and the Congress of Local and Regional Authorities of Europe.”

13. The delegation also states:

“The delegation notes a net decline compared to the 1999 elections.”

14. The OSCE/ODIHR says:

“The administration of the 2003 local elections in Moldova, the legislative framework, and the conduct of voting were generally in accordance with OSCE commitments for democratic elections. However, notable shortcomings observed during the campaign, including allegations of widespread abuse of power by the authorities, were a source of concern and marked a negative development.”

15. In different words, both organisations agree that these elections had more shortcomings than previous elections in Moldova.

3.1 *Voters' lists*

16. Voters who do not find their names on the voter's lists on Election Day may, under certain conditions, be entered into a supplementary voters' list. The number of voters entered into such supplementary lists increased from 6% in 1998 to 10% in 2001 and 12.3% in 2003 according to the OSCE/ODIHR. This indicates voters' lists have not been maintained in such a way that the need for supplementary lists have been reduced. The use of supplementary lists increases the risk of multiple voting and the risk for voters voting in the wrong municipality. The procedure for scrutiny of the voters' lists before the elections should be made more practical. In addition measures for reducing the risk of multiple voting should be introduced.

17. In the end, the accuracy of the voters' list will depend on the accuracy of a civic register, and efforts should be made to increase the quality of such registers in Moldova. In addition the division into polling station areas has to be done well in advance of the elections, and the division needs to be communicated to the voters. The need for allowing people to vote without being registered in the polling station they show up in depends also on the skills of the election administration in drawing precinct boundaries, assigning polling stations to voters, and allowing voters sufficient time to check this information before an election and to correct information where necessary.

3.2 *Right to vote*

18. According to the Law, Article 123 (1), conscripts cannot vote during local elections. According to the same Article, paragraph (2), voters who do not live in the respective district shall not have the right to vote during the same elections. It was probably this last paragraph, which caused the controversy about students' right to vote during the 2003 elections. In Chisinau students would be a significant group and their vote may be decisive there.

3.3 *Registration of parties and candidates*

19. Parties need to be registered in order to propose candidate lists. The Law on Parties and Socio-Political Organisation requires that parties submit to the Ministry of Justice annual membership lists with signatures of at least 5,000 members. In at least half of the 32 rayons, lists need to include at least 600 members.

20. This raises concerns regarding a person's data protection. In a country with a near history of political persecution, it may feel intimidating to have to give the authorities access to the membership lists every year. It also seems unnecessary for the purpose of showing that the party has support. If a party fare well in elections, that should be a sufficient proof for maintaining registration. Furthermore, requiring members to come from all around the country makes it difficult for regionally based parties. For example, such parties may represent ethnic minorities, which are concentrated geographically such as in Gagauzia.

3.4 *The campaign*

21. The campaign was marred by the harassment of candidates and misuse of public funding. Harassment was in the form of candidates being arrested close to elections and a campaign by the government and the president's office against the incumbent mayor of Chisinau. Misuse of public funds is already illegal. Legal procedures against candidates should not be banned, however the timing of arrests, in some cases which had been investigated for years, seems to be clearly politically motivated. In these cases, the clear will of authorities not to misuse their powers is needed to avoid similar cases in future.

3.5 *The media*

22. Many cases of abuse of the electronic media by the president and the government were reported. Election programmes allowed candidates to broadcast their message once, but news and magazine programmes were used for campaigning by the parties in power.

3.6 *The polls*

23. Observers reported a calm atmosphere during the polls, and voting was well organised. However, the capacity of some polling places was low. Had the turnout been higher, this would have created a problem. A large number of polling stations had over 2,000 voters and checking the voters' lists took time. Also only having two booths created bottlenecks.

24. Ballots had to be stamped by a member of the polling station committee after the voter had made his/her choice. This meant that the committee could see the voter's choice in many cases, and, moreover, experience showed that it was often easy to see through the slim ballot papers and to see whom the elector had voted for. Furthermore, some political figures were permitted to deliberately show their ballot on TV, and again family voting was common. This provision and these practices both clearly violate the secrecy of the vote, particularly in the Moldavian context where a well-organised and omnipresent party is able to put much pressure on the whole electoral process. All of these are issues which undermine the fundamental principle of secret ballot.

25. Therefore, it is not sure that the stamp is really necessary for the security of the process, considering that at the same time it contradicts the fundamental principle of the secrecy of the vote. It should be envisaged to avoid this step of the process. Nevertheless, if the stamp is preserved, it is advisable to put it on before the vote itself.

26. In particular during the first round of elections, police was often observed to be inside the polling station, with no apparent security reason. This may feel intimidating to some voters and should be avoided.

3.7 *The count*

27. The count was reported to have been conducted generally without incidents. However, the procedure is a very long and complicated one. In particular, the requirement to annul every unused ballot paper by applying a stamp seems to be unnecessarily complicated. Reducing the number of voters per polling station would also help a lot.

28. On the other hand, the audit trail of ballots and votes is weak and should be strengthened. There is no good procedure for reconciling the figures, and for action, if for example the number of ballots in the ballot box differs from the number of voters who voted according to the voters' lists.

29. Article 58 (4) states that: "one copy of the protocol shall be kept at the electoral committee of the polling station". However, observers reported that they failed to post these for general inspection.

3.8 *Publication of results*

30. Both the district election commissions and the CEC are responsible for totalling the results, and establishing protocols. Past experience shows that scrutiny of polling station results has been weak. Verification of detailed tabulation should be explicitly mentioned.

31. It should also be made clear that the CEC should make public the tabulation of polling station results up to district level. This publication does not have to happen within five days of the official results, but should definitely happen within a reasonable time, e.g. ten days. The purpose of this is so that observers and the public can check that the polling station they observed was entered correctly in the tabulation. It is a crucial element of transparency and can remove a lot of suspicion against the tabulation process.

32. Partial results are being published and that is good. These were accurate in most cases, at least with regard to seat allocation.

4. Proposals for improving the legal framework

33. The following paragraphs detail these proposals along with other improvements.

4.1 *Constituting electoral districts*

34. Article 26 c) and Article 27 (1) differentiate between constituting electoral districts and district election councils of the second administrative level. However, districts correspond to administrative units of second level, so there seems to be no choice in how to do that.

35. Likewise, according to Article 120, the electoral districts of first level are constituted by the District Election Commission of the second level no later than 40 days before the elections, and they have to correspond to the administrative units of the first level.

36. It is not clear what such constitution of the districts involves, since there is no freedom of their definitions. The councils of the first level even have a deadline for their constitution, which according to Article 120 is five days prior to the constitution of the districts.

4.2 *Election commissions*

37. Article 16 (2) vests in the President of the Republic, the Parliament and the Magistracy High Council, the choice in the composition of the Central Elections Commission. There does not seem to be any mechanisms to ensure that the commission is truly independent of political forces. Either one should ensure that the composition is non-political or make provisions to ensure a politically balanced composition. If the elections were decided by majority or plurality vote in the last two bodies, all posts could be in the hands of a single political party. To avoid this, it would be suitable to elect the Commission by a system of proportional representation of political parties represented in Parliament or which obtained at least 1% of votes during the previous parliamentary elections.

38. This representation would be amended after a reform which would reduce the threshold of representation in Parliament.

39. Article 16 (2). Central Elections Commission appointment. It may be the translation, but the word 'proportionally' seems wrong. It should probably read "equal shares or similar". Nor is it clear who nominates the President of the Central Elections Commission, which probably means that the choice is left to Parliament.

40. Article 20 (2). The ability to dismiss members of the Central Elections Commission for deeds incompatible with their position could lead to abuses. It would be preferable to provide a limited and precise list in Article 19 (2), possibly including a list of penal and administrative offences.

41. Article 25 (1). The right to call a meeting should not require a majority in the Central Elections Commission. It should require no more than four, preferably three, members to request a meeting.

42. Articles 27 (1) and 29 (10). The district elections commissions should also be appointed based upon a system ensuring broad political representation. This should also be true for polling stations committees.

43. Article 29 (2). This paragraph allows between 30 to 3,000 voters per polling station. 30 is a very low number, except in very small villages and remote places, categories which must be specified in the Law.

44. 3,000 voters are far too many for one polling station considering the number of staff provided for by law and at the same time could lead to overcrowded situations. Experience also confirms this. Checking voters' lists and polling takes as much time as does the count itself. Either the number should be considerably reduced (e.g. maximum 1,000) or arrangements made for more tables to check the voters' lists and more booths. It would be more advisable to allow between 100 to 2,000 voters.

45. Article 33 (2). The ability to dismiss members of electoral commissions at will, casts doubts on their independence and should be deleted.

4.3 *Registration of parties and nomination of candidates*

46. Parties need to be registered in order to propose candidate lists (Article 41 (2)). The Law on Parties and Socio-Political Organisation requires registered parties to submit annual membership lists, with signatures of at least 5,000 members, to the Ministry of Justice. In at least half of the 32 rayons, the lists need to include at least 600 members.

47. There is a legitimate need in every country to limit the number of parties running for office. The reasons are mainly practical. Ballot papers would be impossible to handle if there were no restrictions, and voters would face a chaotic situation when selecting the list of their choice. When limiting the possibilities, the only criteria to be used should be the support a party has in the electorate. The mechanisms for this vary, but are common to require a certain number of signatures in support of a party in order to allow the party to run for elections. In other countries financial means are being used to discourage parties without support to run. Signatures have the disadvantage of being a register of political opinions. Therefore, in most countries signatures in support of a party need not be party members. It is sufficient that the signatures are in favour of the registration of a party to run for elections.

48. In some countries there is a difference between a party as a legal entity and its registration in order to run for election. The requirements for the first are weak and no more than any NGO, whereas the requirements for running in elections are such so as to show some degree of public support. According to the law on political parties, the party is to be dissolved if the supporter base is reduced.

49. Moldova has gone too far in registering political opinions, in that the membership lists have to be submitted for review every year. It is difficult to find a justification for this. Once a party is registered and has run for elections, the results of the elections could be sufficient evidence of its support. Only the need for renewed registration of such parties, which never gained support during elections, is admissible. Submitting membership lists to the government if a party has won seats in Parliament in a number of municipalities or rayons, seems at best unnecessarily bureaucratic, at worst, abusive.

50. Moreover, the requirement of support across the country discriminates regionally based parties.

51. It is suggested that the registration of parties to run in all elections across the country is made dependent on the submission of a number of signatures in support, but not of actual membership lists. Furthermore, it is suggested to remove the requirement of representation in a minimum number of rayons.

52. It is proposed that the registration is upheld as long as the party has seats in the parliament or gains at least one percent of the votes nationwide in parliamentary elections or elections for rayon councils. For parties running as part of coalitions the requirement should be the representation in the Parliament only.

53. In addition, separate registration for local elections should be allowed, where the number of signatures needed is lower (which would be moreover an improvement for the Gagauzia), but then restricted to the districts the party intends to run.

54. Article 43 (3). Making persons collecting signatures liable for the authenticity of the data included could lead to abuse and/or prevent many people from collecting signatures. Those people collecting signatures could be asked to get signatories to produce a valid means of

identification. Possible sanctions should be precisely defined and in conformity with the principle of proportionality.

55. Article 46 (6). The possibility of changing the lists of candidates up to 5 days before the elections is confusing. In practice, it would be difficult to have the proper list of candidates on the ballot papers. This could also lead to undue pressure and it would be preferable to exclude any possibility of changing the lists, or it could be advisable to keep the possibility of changing the lists until a definite deadline, for instance 40 days before Election Day. This deadline is moreover important to avoid possibilities of last renewals of compositions of coalitions by political parties.

56. Article 48 (3). The order of candidates on the ballot paper should be determined by lot rather than time of registration. At the same time, it is suggested to provide a clear process of lottery in the Code, avoiding the risk that hazard *be helped*.

4.4 *Cancellation or revocation of candidacy*

57. Some provisions in the law, such as Articles 36, 93, and 138, permit cancellation or revocation of candidate registration. These provisions represent two risks. First, there is no formal guarantee that the minimum legal safeguards required by international standards, OSCE commitments, and the Constitution of Moldova, will be applied. Secondly, to the extent that Article 36 would permit post-election cancellation of candidate registration, which would include cancellation of the registration of an elected candidate, this would result in a violation of Paragraph 7.9 of the 1990 OSCE Copenhagen Document.

58. Concerning the first point noted above, since the right to be a candidate is a fundamental human right, the right cannot be taken away without complying with certain legal safeguards. As noted in Paragraph 5.19 of the OSCE 1990 Copenhagen Document, every person is presumed innocent until adjudicated guilty in accordance with certain legal safeguards. This presumption of innocence applies not only to criminal proceedings, but proceedings that seek to revoke, remove, or “cancel” a human right or fundamental freedom.² Further, “in the determination of his civil rights”, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”³ “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights...”⁴ Paragraph 5.16 the OSCE 1990 Copenhagen Document and Paragraph 21 of the OSCE 1989 Vienna Document specifically incorporate these cited provisions for the determination of civil rights, and Paragraph 13.9 of the OSCE 1989 Vienna Document provides that “the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal, include[s] the right to present legal arguments and to be presented by legal counsel of one’s choosing.” Paragraph 5.17 of the OSCE 1990 Copenhagen Document also recognises the right to be given free legal counsel where the person does not

²Although all legal systems apply different “burdens” or “levels” of proof in criminal and civil or administrative proceedings, all legal systems do require that there be proof and mere accusation never is sufficient.

³See Article 6(1) of the European Convention for Protection of Human Rights and Fundamental Freedoms.

⁴Article 10 of the Universal Declaration of Human Rights. See also Article 14 of the International Covenant on Civil and Political Rights (“In the determination ... of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”).

have sufficient means for legal assistance and the interests of justice so require. All of these safeguards are the minimum requirements the law should explicitly provide before revoking a person's human right to passive suffrage.

59. Paragraph (2) of Article 93 bars candidates who have "committed fraud" from participating in repeat elections held two weeks later. Such a rule would also pose problems with regard to the above-mentioned principle of presumption of innocence and fair trial. Actually, it is highly unlikely that the full panoply of legal safeguards available to a candidate will have been exhausted in two weeks, in a manner that is consistent with these principles. This concern also applies to Article 138.

60. Concerning the second point noted above, the second part of Article 36(2) requires that "The Supreme Court of Justice shall examine the applications and issue an appropriate decision within 5 days but not later than the elections day." However, some violations may not be discovered until after the elections. It must be assumed that cancellation would also be possible for these violations. Otherwise, the law would provide for a situation where those caught after election day would not face any sanction under this article. Thus, it must be assumed that paragraph (2) of Article 36 permits post-election cancellation of candidate registration, which would include cancellation of the registration of an elected candidate. Such a rule should not be applied in a way contrary to Paragraph 7.9 of the 1990 OSCE Copenhagen Document⁵ and the case-law of the European Court of Human Rights.⁶ Furthermore, such a severe sanction should be applied in conformity with the principle of proportionality (that is when the illegal donation is quite important): it would be suitable to let it know in the legal provision itself.

61. An additional concern with Article 36 is that it seems very difficult for the Supreme Court of Justice to render a judgment within five days while still respecting the legal safeguards guaranteed to a candidate under Paragraphs 5.16, 5.17, and 5.19 of the OSCE 1990 Copenhagen Document and Paragraphs 13.9 and 21 of the OSCE 1989 Vienna Document.

4.5 *Voters' lists*

62. One of the major problems of elections in Moldova is the number of people added to the supplementary voters' lists increasing the potential for multiple voting and for voting in incorrect districts.

63. The procedure for scrutinising voters' lists should be reformed. Article 39 (1) and Article 40 (1) state that the lists will be published at least ten days prior to Election Day. This does not give enough time for voters to examine them or for new lists to be printed after corrections.

64. Voters should be given a real chance to review preliminary voters' lists well in advance of elections. Such reviews may include the voter him or herself, but even other entries, which may be wrong (like deceased people). Parties should also have a fair chance to review the lists.

⁵"Candidates who obtain the necessary number of votes required by law are duly installed in office and are permitted to remain in office until their term expires or is otherwise brought to an end in a manner that is regulated by law in conformity with democratic parliamentary and constitutional procedures".

⁶See, e.g., *Sadak and Others v. Turkey*, Application Nos. 25144/94, 26149/95, 26154/95, 27100/95 and 27101/95, European Court of Human Rights (11 June 2002) (post-election forfeiture of a mandate is incompatible with the very essence of the right to stand for election and to hold parliamentary office, and infringes the unfettered discretion of the electorate to exercise free and universal suffrage).

After the review period, the lists should be amended before the final lists are distributed. This means that the scrutiny period should start months before an election, not days. Therefore, it is suggested to publish the lists in each place, for instance 30 days before Election Day, to permit voters to check voters' lists. Subsequently, there could be a collection of information, sent to the CEC. Considering this huge task, among other major tasks, authorities are currently invited to start this pre-electoral process as soon as possible.

65. The supplementary voters' lists should not be allowed if a final register can be realised. If a mechanism for supplementary voters' lists is still needed, it should be only tolerated if a mechanism for checking multiple voting should be introduced. Such a mechanism may include issuing of voters' cards, or the introduction of double envelopes for such votes. The double envelope has an outer one with the voter's name and other data, which can be checked against other voters' lists for multiple voting. After the check, the envelope is opened, and the ballot, inside a secrecy envelope, is only opened when the identity envelope is removed.

4.6 *Right to vote*

66. The right to vote is fundamental. Depriving a citizen of this right should be done only in exceptional cases. Article 123 (1) and (2) should be changed in such a way that conscripts, students and others with temporary residency can vote, either for their home municipality by absentee votes, or where they have their temporary domicile.

67. Article 13 provides that a person cannot be elected "whose criminal record is not extinguished". It is not clear what is intended by "extinguished". However, it is assumed that this means a person whose conviction for a crime has not been expunged or pardoned after the person has served the sentence imposed under the conviction. This provision is problematic because it applies regardless of the seriousness of the crime. As soon in the Code of good practice in electoral matters, the deprivation of political rights is admissible only if it is based on a criminal conviction for a serious offence and in conformity with the principle of proportionality.⁷ It should be recommended that Article 13 be amended in order to reflect these principles. The forfeiture should be for an established period of time, likewise proportionate, and restoration of political rights should occur automatically after the expiration of this period of time.

4.7 *Finance provisions*

68. Article 36(1) provides that "the direct or indirect financing, material support in any form of electoral campaigns of candidates to elections as well as the support of electoral competitors by other states, foreign enterprises, institutions and organisations, international and mixed as well as by natural persons who are not citizens of the Republic of Moldova (something is missing in the translation). The pecuniary amounts received in this manner shall be seized and become budget revenue." This article could be applied to prohibit many legitimate activities, such as the organisation of a roundtable on electoral matters or electoral training by an international (non-) governmental organisation, as well as other legitimate observation activities and support of domestic observer groups. In particular, the prohibition of "indirect" "foreign funding" could lead to excessively restrictive measures. Paragraph 10.4 of the OSCE 1990 Copenhagen Document provides that States commit to allow domestic observer groups "to have unhindered

⁷*Code of good practice in electoral matters, point I.1.1.d.iii-iv.*

access to and communication with similar bodies within and outside their countries and with international organisations, to engage in exchanges, contacts and co-operation with such groups and organisations and to solicit, receive and utilise for the purpose of promoting and protecting human rights and fundamental freedoms voluntary financial contributions from national and international sources as provided for by law.” The Code of good practice in electoral matters goes in the same way (point II.3.2). It is recommended that paragraph (1) of Article 36 be amended to ensure that the prohibition on foreign funding cannot be applied to preclude international or domestic observer organisations from full engagement in observation activities, including the training of observers, deployment of personnel, compilation of data, fact finding, and subsequent analyses and reporting, and to ensure compliance with Paragraph 10.4 of the OSCE 1990 Copenhagen Document.

69. Article 38 (9) states that “the bank shall inform the Central Elections Commission and the district electoral council about the financial means transferred on the account of electoral candidate within 24 hours after the transferral”.

70. This provision permits to the CEC knowing types of financial supports that a candidate receives before Election Day. In the Moldavian context, it could lead to dissuade and pressure potential donors. This provision should be deleted.

4.8 *The campaign*

71. Article 46 states clearly that electoral competitors should be treated equally when it comes to State support. Based upon last election’s experience, it is recommended that more specific rules be drawn up. Such rules can either be included in the law or established as instructions given by the CEC.

72. Article 69, which imposes legal liability on a person who “infringes the honour and dignity of a candidate”, is too broad and could be applied in a manner that would violate a person’s right to free speech and expression. This broad prohibition could lead to a violation of Article 10 ECHR, OSCE commitments, and domestic constitutional principles.⁸ It should be recommended that Article 69 be reformulated in a manner that is consistent with the right to free speech and expression.

4.9 *The media, limitations on fundamental freedoms of speech and expression during the campaign*

73. During the 2003 elections the public media showed a clear bias in favour of ruling parties. This is a problem in many new democracies. In Moldova, a certain amount of diversity existed earlier when the majority of Parliament was not always supporters of the President. After moving to a clearer parliamentary system, the media bias seems to be even more noticeable.

74. The main problem of the election campaign in the media in Moldova, as well as in many other countries without a long tradition of a free press, is to provide informative, interesting and unbiased coverage of the campaign. The parties’ own advertisements are obviously non critical in content and do not in themselves give the voters the information they need. Therefore, the questions raised by critical and neutral journalists may offer more information. Article 47(4)

⁸*Id.*

goes a long way to prevent reportages reflecting the meetings of electoral competitors with the voters and similar events for fear of giving an advantage to some competitors. One may argue that such a restrictive line is necessary to prevent abuse by incumbents, and a strict rule should be maintained.

75. On the other hand, a campaign is also about political initiatives, and editors are supposed to cover those. The tendency to date has been that initiatives by Government or the President have been referred to by the media without a critical approach or without requesting the opinion by the opposition, and referring to it as coverage of normal Government business. This is an issue which goes far beyond election law, but with the detailed regulation of the current law, there should also be a general provision, which gives the editors the possibility of covering political issues brought up during the campaign, with a strictly neutral and unbiased approach. One possibility would be to issue a more detailed Code of Conduct for editors during election period. *TV/Radio Moldova* is currently the only nationwide medium, which is in favour of ruling parties. Nevertheless, there is also approximately half of media in favour of opposition parties, and they have consequently access to the media.

76. Article 38(5)(a) prohibits a person who is under the age of 18 years from contributing to a political campaign. This is contrary to Articles 32 and 41 of the Constitution of Moldova and Articles 13, 14, and 15 of the UN Convention on the Rights of the Child.

77. Article 38(5)(d) prohibits the charity funds of religious organisations from being used in political campaigns. This is likely contrary to OSCE commitments, international standards, and domestic constitutional law. The issue of revocation of tax exemption or other state benefits due to political activities is a separate issue. Although the state may revoke special tax treatment as a result of political activities, it cannot simply single out and prohibit a religious organisation from expressing political views and opinions (via campaign contribution support) when such a prohibition is not applicable to all other organisations. Article 38 singles out religious organisations and, as a result, is discriminatory. OSCE participating states commit to “take effective measures to prevent and eliminate discrimination against individuals or communities on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, political, economic, social and cultural life, and to ensure the effective equality between believers and non-believers.”⁹

78. Paragraph (1) of Article 47 limits campaign rights to “Citizens of the Republic of Moldova, parties and other social-political organisations, electoral blocs, candidates and representatives of these candidates”. This limitation is contrary to international instruments¹⁰ and domestic constitutional law (“...aliens and stateless persons shall enjoy the same rights and shall have the same duties as the citizens of the Republic of Moldova.”)¹¹

⁹Paragraph 16.1 of the OSCE 1989 Vienna Document. See also Paragraph 9.4 of the OSCE 1990 Copenhagen Document. See Principle VII, Paragraph 1 of the OSCE 1975 Helsinki Document; Paragraphs 13.7 and 16.1 of the OSCE 1989 Vienna Document; Paragraphs 5.9 and 7.3 of the OSCE 1990 Copenhagen Document; Paragraph 7 of the OSCE 1994 Budapest Document; Paragraph 2 of the OSCE 1999 Istanbul Document; Articles 2 and 21 of the Universal Declaration of Human Rights; Articles 2 and 26 of the International Covenant on Civil and Political Rights; Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 31 of Constitution of Moldova.

¹⁰Notably the Universal Declaration of Human Rights and the OSCE commitments.

¹¹Paragraph 26.1 of the OSCE 1991 Moscow Document; Paragraph 26 of the OSCE 1999 Istanbul Document; Article 19 of the Universal Declaration of Human Rights; Article 10 of the European Convention for the

Paragraph (1) of Article 47 also prohibits “unethical” campaigning. This prohibition is too broad and could be applied in a manner that would violate a person’s right to free speech and expression. This limitation on free expression and speech could prevent a robust and vigorous campaign, which is critical to election campaigning in a democracy. Such a broad prohibition is not in compliance with OSCE commitments, international standards, and domestic constitutional principles.¹² Paragraph (12) of Article 47 has a similar prohibition against “unethical” campaigning that is troublesome as well.

79. Paragraph (7) of Article 47 prohibits the publication of the results of opinion polls during the period ten days before the election. Ten days is excessive and this period of prohibition on opinion polls should be reduced.

80. Paragraph (11) of Article 47 gives an indication that the press agencies of the Government, Parliament and President should not misuse their allocated broadcasting time for electoral propaganda. However it does not cover the editors’ obligation to be extra cautious in their coverage of the incumbents during elections times. This should be included in the law.

81. The Code of good practice in electoral matters adopted by the Venice Commission, covers in its Section I.2.3 the possibility of treating competitors, according to strict equality in some instances, but ‘proportionally’ in other:

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

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

Protection of Human Rights and Fundamental Freedoms; Articles 19, 32, and 41 of the Constitution of Moldova.

¹²*See Paragraph 9.1 of the OSCE 1990 Copenhagen Document; Paragraph 26 of the OSCE 1991 Moscow Document; Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Articles 32 and 41 of the Constitution of Moldova.*

83. Article 47 (1) and (12). Reference to ethic rules is not precise enough and could lead to abuse. Such imprecise restrictions of the freedoms of expression, assembly and association could run counter to Articles 10 and 11 of the ECHR.

4.10 Observers and transparency

84. Article 15, but also Section II, Articles 27 and 28, Article 31. Observers should be authorised to assist at electoral authorities' meetings. Article 15 (2): The grounds allowing refusal of the representatives of the electoral competitors should be specified in the law.

85. Paragraph (3) of Article 59 should be amended to require that copies of the tallies be given to representatives of electoral contestants and observers.

86. Paragraph (3) of Article 60: the elections where the Constitutional Court has to confirm the results (Article 139 (1) e) of the Constitution) should be specified in the law.

87. Article 63 (5). Observers' roles. When observers' roles are mentioned, the word 'assist' is being used, e.g. in Article 63 (5). This can be misleading, and 'observe' should rather be used. More globally, the provisions for observers could be improved. The text of Article 63 could be interpreted that observation will be limited to activities in polling stations on Election Day. Article 63 should be clarified to ensure that full observation of all election processes is guaranteed. Further, Article 63 should clearly state that observers have the right to attend all meetings of election commissions, obtain copies of all decisions, protocols, tabulations, minutes, and other documents, and to observe all election processes, including processes before and after election day.

4.11 The vote

88. Secrecy of the vote is a fundamental principle. This principle was violated in Moldova by the fact that it was possible to see the marked ballot during the stamping of the rear side of the ballot before entering it into the box, by not stopping people from deliberately showing their marked ballot, and by family voting.

89. Article 54 (5) should be changed, so that the stamp is applied before handing the ballot over to the voter. A paragraph explicitly stating that the ballot shall not be displayed before placing it in the ballot box should also be added. Even if its display may seem to be by choice, one cannot rule out pressure on voters to show the right choice before dropping the ballot.

90. Family voting is widespread in Moldova. The conditions for giving assistance to voters as per Article 54 (1) should be formalised, for example by a signature in the voters' list.

91. Paragraphs (4) and (6) of Article 55 allow for mobile voting. Additional safeguards should be introduced for mobile voting.¹³

¹³OSCE, *Guidelines for reviewing a legal framework for elections, XII. Balloting procedures, C. Mobile voting*, p. 26.

92. Article 55 (9) states that the police may be called by the chairman of the polling station to restore legal order. This has been misinterpreted in such a way so as to ensure police presence even if there has been no unrest. The article should make it clear that as a rule police should not be present inside the polling station, and should *only* be called when the situation could otherwise get out of control.

93. Articles 48 (6) and 162 (3) refer to the language law. The law seems to offer due protection of both Russian and Gagauz languages in public documents, and therefore also in election material including ballots. However, the election law has not been issued in an official Russian translation. This should be done.

4.12 *The count*

94. Article 56 describes the process of the count in the polling station.

95. Article 56 (2) states that all unused ballot papers shall be annulled before opening the ballot boxes. This takes a lot of time. The article should be changed to counting, packing and sealing the pack of the unused ballots, immediately after the end of the vote and before opening the ballot box.

96. During elections in Moldova, the difference between the number of voters having been issued ballot papers and the number of voters that took part in the elections have not been fully understood. The following improvements are recommended:

97. Article 56 (5) should move up to after (2), and be done before opening the ballot boxes, not only before counting the votes.

98. Article 58¹⁴ c) and d) should be made clearer, because they have often been misunderstood to mean the same thing. This could be done by adding to c) ‘... according to the voters lists’, and adding to d) ‘... according to the total number of ballots in the ballot boxes. A new ‘j) Number of ballots issued by mobile teams’ should also be added.

¹⁴Article 58. *Protocol and report of the electoral committee of the polling station*

The electoral committee of the polling station shall draw up a protocol, in two copies, comprising:

a) the number of voters included in the electoral lists;

b) the number of voters included in the additional lists;

c) the number of voters who were delivered ballot papers;

d) the number of voters that took part in the elections;

e) the number of ballot papers declared invalid;

f) the number of validly expressed votes for each electoral competitor (for each option regarding the questions subjected to referendum);

g) the total number of validly expressed votes;

[Entry g) introduced by the Law no.268-XIV from 04.02.1999]

h) the number of ballot papers received by the electoral committee of the polling station;

i) the number of unused and annulled ballot papers.

99. There are no rules for reconciliation at the polling station. A rule should be introduced for the case that d) is a higher number than c) (the ballot stuffing situation), e.g. a recount and an entry in the protocol, and another rule for if d) is substantially lower than c) (e.g. recount if there is more than 2% missing, which is less serious).

100. One should also check¹⁵ that i) + g) + e) is close to h).

101. Article 58 (4) should be changed to say explicitly that one copy of the protocol remaining in the polling station should be posted there immediately.

4.13 Aggregation and publication of results, publication of opinion polls

102. Paragraph (7) of Article 47 prohibits the publication of the results of opinion polls during the period ten days before the election. Ten days is excessive and this period of prohibition on opinion polls should be reduced.

103. Articles 59 and 60 should be amended to include the scrutiny of the polling station results. In the past, obvious mistakes have not been dealt with before the results are official.

104. Article 60 should also have a paragraph obliging the CEC to publish the detailed tabulation of polling station results up to district level (and national level for nation wide elections).

4.14 Invalid elections

105. Article 136 provides a turnout criterion for valid elections. It is a question whether there should be a turnout requirement at all for elections. Such criteria may end up in a stalemate, and the re-run of the election often give even lower turnouts.

106. In Article 137 it seems like the whole election needs to be annulled, but a more practical approach would be to only annul the parts affected by a fault (at the level of the polling stations).¹⁶

4.15 Penalties for offences to the code

107. Articles 70-71. It is understood that the criminal and administrative offences mentioned in these texts are developed more in detail in the criminal and administrative offence codes. In case it is not so, therefore the penalties should be clearly stated.

4.16 Appeals

108. Chapter 12, Section 1 (Articles 65-68) seems to deal only with appeals to courts. However, Article 65 also provides for appeals to hierarchic superior authorities. This should be made clearer.

109. Articles 65 through 68, which regulate filing of electoral complaints and appeals, do not provide for a uniform process for the expeditious consideration of electoral disputes. As uniformity and consistency in decisions is important, it is recommended that challenges to

¹⁵ *Id.*

¹⁶ *Code of good practice in electoral matters, point II.3.3.e.*

decisions be filed in only one forum designated by the law – either a court or higher election commission. The option of making challenges in different forums will only lead to “forum shopping” and inconsistency in decisions. It should be recommended that these articles be amended to state a clear and understandable hierarchical complaint process that defines the roles of each level of election commission and each level of courts. It is important that this process be uniform to prevent “forum shopping”.¹⁷ This process should also identify which bodies act as fact finding bodies of first instance and which bodies act as appellate review bodies.

110. Further, in order to comply with international standards, this process should clearly provide the following for voters, candidates, and political parties:

- The right to file a complaint to protect suffrage rights
- The right to present evidence in support of the complaint
- The right to a public hearing on the complaint
- The right to a fair hearing on the complaint
- The right to an impartial tribunal to decide the complaint
- The right to transparent proceedings on the complaint
- The right to an effective remedy
- The right to a speedy remedy
- The right to appeal to an appellate court if a remedy is denied.¹⁸

111. It should also be clarified how Articles 65 through 68 are affected by Articles 89 and 135, which establish the procedures for confirmation of the validity of the results. Article 89 appears to provide for a confirmation process that may operate independently of the dispute process of Articles 65 through 68. This should be clarified. The same concern exists with Article 135 and local elections.

112. Article 61 (3). There should be a minimum period for retaining electoral documents, such as one year from the date of the election, or a fixed number of months from the expiry of the legal right to mount a challenge – and there should certainly be a clause that all documents must be retained indefinitely as long as there is a legal challenge being heard by the appropriate authorities.

¹⁷*Code of good practice in electoral matters, point II.3.3.c. Forum shopping is certain to occur because the legal standards to be applied are not the same in both courts and superior election commissions. Contestations lodged in a court must be considered in accordance with the Civil Procedure Code and Law on Administrative Jurisdiction. This means that some types of evidence and testimony that would be received by a superior election commission may not be received by a court. An example that comes to mind is a video tape of fraud recorded by an NGO or media observer. A superior election commission would likely consider the video tape upon its presentation by a complaining electoral contestant. A court, on the other hand, which operates under strict, technical rules, may require that the person who actually recorded the video tape testify in order to “authenticate” it before the court would consider it. A scenario can be envisioned where two independent candidates are victims of the same fraudulent conduct, and one files a complaint with a court and one files a complaint with a superior election commission. Both independent candidates attempt to present identical evidence, which is accepted by the superior election commission but rejected by the court. One candidate prevails because this candidate filed with a superior election commission. One candidate loses because this candidate filed with a court.*

¹⁸*See, e.g., Articles 8 and 10 of the Universal Declaration of Human Rights; Paragraph 13.9 of the OSCE 1989 Vienna Document, Paragraphs 5.9 through 5.12 of the OSCE 1990 Copenhagen Document, and Paragraphs 18 through 21 of the OSCE 1991 Moscow Document; Code of good practice in electoral matters (CDL-AD(2002)023rev, point II.3.1).*

5. Main recommendations

113. Many of the deficiencies reported during the 2003 elections cannot be corrected just by amending the law. It is crucial that the government and all stakeholders in the elections adhere to the laws and to the principles of creating a level playing field and fair conditions for correct elections.

114. The most important improvement is to remove all doubts regarding an impartial judiciary. Legal steps against candidates should not be able to through shadows of doubt upon the electoral process.

115. There are also a number of areas where the legal framework should be improved. The most important proposals include:

- Better mechanisms to secure the secrecy of the vote, in particular avoid the stamp provision or allow it before the vote itself,
- The representation threshold, underlined in the previous opinion on the election law of the Republic of Moldova of the Venice Commission¹⁹, remains a major concern of the Council for Democratic Elections regarding the preparation of the next parliamentary elections. Small national minorities are *de facto* excluded from any chance of representation in Parliament; it is recommended that the threshold for the representation of independents be lowered, particularly relevant to ethnic minorities,
- A change of the composition of the Central Elections Commission, including a proportional representation of political parties,
- A change of the registration criteria for political parties,
- A better procedure for the scrutiny of voters' lists; at the same time, and considering this huge task, among other major tasks, authorities are currently invited to start this pre-electoral process as soon as possible,
- Better procedures to keep audit trails during the count,
- Clearer obligations for publishing detailed results of polling stations immediately and as part of the full tabulation,
- Introduction of better control of those adding their names to so-called supplementary voters' lists,
- Introduction of good mechanisms allowing persons with temporary residence outside their permanent one, such as soldiers and students, their right to vote,
- More detailed rules for use of public infrastructure during campaigns,
- Better regulation of the editorial coverage of the incumbents in electronic media during the campaign,
- Reduced size of the polling stations to increase the efficiency of voting and counting,
- Limitation of the deprivation of political rights to mental incapacity or a criminal conviction for a serious offence, in conformity with the principle of proportionality.
- Cancellation or revocation of candidacy should take place only in conformity with presumption of innocence, the right to a fair trial and the principle of proportionality.

¹⁹Opinion on the election law of the Republic of Moldova of the Venice Commission, adopted by the Venice Commission at its 53rd Plenary Meeting (Venice, 13-14 December 2002), on the basis of comments by Mr Richard ROSE (Expert, United Kingdom) and Mr Kåre VOLLAN (Expert, Norway) (CDL-AD(2003)001). Please refer to this opinion to have a more comprehensive expertise regarding the representation thresholds.