



# **WRITTEN OPINION**

of Promo-LEX Association  
on the Request of the  
Constitutional Court of October  
22nd, 2019

**November 15th, 2019**

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**WRITTEN OPINION**  
**of Promo-LEX Association**  
**on the Request of the Constitutional Court of October 22<sup>nd</sup>, 2019**

**Context**

On October 16<sup>th</sup>, 2019 a group of MPs filled a referral to the Constitutional Court for the interpretation of the provisions of art. 72 para. (3) letter a) of **the Constitution** in the context of the amendment of the case-law of the Constitutional Court by the Judgment of the Constitutional Court no. 11/2019, on the one hand, as well as the removal of the mixed system and return to the proportional one in accordance with the Law no. 113/2019, on the other hand)<sup>1</sup>. Thereby, the Constitutional Court was asked to answer the following question: “in the context in which the Parliament of the Republic of Moldova adopted the Law no. 113/2019 [under which, the mixed electoral system has been removed, while the proportional one revived] that came into force on August 17<sup>th</sup>, 2019 and, at the same time, given the Judgment of the Constitutional Court no. 11/2019, which is going to be the electoral system taken as a basis for conducting the early parliamentary elections where such shall be held?”

Therefore, on October 22<sup>nd</sup>, 2019 the Constitutional Court requested the Promo-LEX Association to submit a written opinion on the aforementioned referral.

By means of the present Opinion, Promo-LEX provides its views on the following issues:

- The Parliament's exclusive competence to decide on the electoral system.
- Regulatory levels and stability of the electoral law within the context of international standards.
- Stability of the electoral law within the context of the Law no. 113 of August 15<sup>th</sup>, 2019.
- Amendment versus revival of the electoral system.

The Promo-LEX Association will set out its views neither on the admissibility of the request nor on the competence of the Constitutional Court to examine the referral.

***The Parliament's competence to decide on the electoral system***

According to art. 72 of the Constitution of the Republic of Moldova, the Parliament is endowed to adopt constitutional, organic and ordinary laws, the electoral system, in addition to other aspects, being also governed by these organic laws. Pursuant to art. 74 para. (1) of the Constitution, organic laws shall be adopted by the vote of the majority of the elected members of Parliament, following at least two readings, whilst the ordinary ones are adopted by vote of the majority of present members of Parliament. In accordance with art. 76, the law shall be published in the Official Gazette of the Republic of Moldova and shall come into effect either on the date of their publication or on the date specified in its text.

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<sup>1</sup> Referral no. 180b of 16.10.2019 on the interpretation of the article 72 para. (3) letter a) of the Constitution. Go to the link: <https://bit.ly/2XehP1F>

Thus, the Constitution provides for the right of the people, as the holder of national sovereignty, and the people's elected representatives, i.e. the Parliament, as the legislative body, to approve and amend the electoral system in accordance with the constitutional provisions on the universal, equal, direct, secret and freely expressed suffrage as well as in accordance with the procedures for voting and publication.

No other restrictions or limitations are provided for in the Constitution. Moreover, there are several judgments<sup>2</sup> and rulings, under which the Constitutional Court decided that the Parliament is in the position to **adopt any type of ballot** or method of awarding the MPs mandates, the legislative body being left with the choice to decide which of the following electoral systems has to be applied therein: majoritarian, proportional or mixed. The option for one variant or another and its entrenchment in the electoral law depends on the social-political situation in the country, on the level of development of the political system in the society.

Furthermore, by Decision of 12.07.2010<sup>3</sup>, the Constitutional Court reiterated that **fixing the electoral threshold, the method of awarding the MPs mandates, the citizens' participation rates in any types of elections, the conditions for validity of the results** thereof are **opportunity issues, which fall under the exclusive competence of Parliament**, not referring to constitutionality ones.

Contrary to the case-law we referred to earlier, by the Judgment of April 26<sup>th</sup>, 2019, having examined the referral filled therein, the Constitutional Court interpreted the provisions of arts. 61 and 72 of the Constitution<sup>4</sup> holding that **"the Parliament is in the position to amend the electoral system** within time intervals shorter than a complete legislature, **but without being given the opportunity to implement the system thereof in the context of the early parliamentary elections."** "Both amendment and implementation of the electoral system before the early parliamentary elections presents risks of interference in the unhindered exercise of electoral rights, implicitly in the legitimate expectation of the citizens to vote and in the legitimate expectation of the candidates in the parliamentary elections to put forward their candidacies in a particular manner and subject to certain conditions."

We believe that the amendment of the case-law of the Constitutional Court in the matter of limiting or conditioning the activity of the Parliament to change the electoral system, are likely to mislead and create precedents of differentiated interpretation of the same constitutional rules. In this respect, it is worth mentioning that neither the provisions of the Constitution have been amended, nor other new circumstances, except the change of the electoral system, have occurred - factors that could have led the High Court to take a decision different than the previous ones.

Even if the opinions of the Venice Commission are non-regulatory, we show that the Commission has consistently ruled, in several opinions that the election or change of the electoral system is the sovereign decision of the state through its political system. States have great discretion in choosing the electoral system, provided by international conventions and standards, guaranteeing in particular compliance with universal, equal, free and secret voting. However, the electoral system cannot be seen in isolation, but must be seen in the context of the political traditions, the legal and constitutional rules of the state, the party system and the territorial structure. Subsequently, the specific national context of the Republic of Moldova, led the Venice Commission and the OSCE/ODIHR, both in 2014 and 2017, to be critical regarding the introduction of the mixed electoral system, which raised concerns, including "regarding the excessive involvement of the business people in the electoral process." Similar concerns have been raised by civil society organizations as well as by the authors of this opinion.<sup>5</sup> The concerns of the Promo-LEX Association have been borne out in the context of observation of the electoral campaign for the parliamentary elections of February 24<sup>th</sup>, 2019, when according to the observers, compared to the presidential elections of October 30<sup>th</sup>, 2016 number of cases qualified as use of administrative resources increased more than 8 times (from 65 to 536), while the cases of offering electoral gifts increased about 7 times (from 27 to 188)<sup>6</sup>.

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<sup>2</sup> Judgment 15/1998, Judgment 35/2000

<sup>3</sup> Decision of the Constitutional Court no.1381 of 12.07.2010 rejecting the referral filled by a group of MPs for reviewing the constitutionality of points 65, 67 and 68 art. I of the Law no.119 of June 18<sup>th</sup>, 2010 "Amending and supplementing the Electoral Code no.1381-XIII of November 21<sup>st</sup>, 1997" (Official Gazette 129-130/18, 27.07.2010) Go to the link: <https://bit.ly/32QwAbW>

<sup>4</sup> Establishing that the method for organizing and conducting the elections is laid down in the organic law.

<sup>5</sup> Statement of Promo-LEX on the Amendment of the Voting System of the Members of Parliament. Go to the link: <https://bit.ly/2Qlvu5C>

<sup>6</sup> Final Report. Promo-LEX OM Parliamentary Elections of February 24<sup>th</sup>, 2019. p.54-55. <http://bit.ly/2lEmk0k>

## ***Regulatory levels and stability of the electoral law within the context of international standards***

According to the Code of Good Practice in Electoral Matters<sup>7</sup>, the fundamental elements of the electoral law, in particular the electoral system itself, the composition of election commissions and the creation of electoral districts should not be changed at least a year before the election, **or** they should be written in the constitution or formulated in a document having a higher status than that of an ordinary law.

Being an important element of the credibility of the electoral process, the Venice Commission adopted an Interpretative Declaration on the Stability of the Electoral Law. It contains a description of some aspects of the principle mentioned above:

- this principle does not prevail over other principles of the Code of Good Practice in Electoral Matters,
- the principle of stability of electoral law should not be invoked to maintain the situation contrary to the standards of European electoral heritage, or to prevent the implementation of the recommendations formulated by international organizations.
- **This principle applies** to the fundamental rules of the electoral law only, **when they are set forth in ordinary law.**
- In particular, the fundamental rules are as follows:
  - a) the electoral system itself, in particular, the rules for converting votes into mandates;
  - b) rules for determining membership in electoral commissions or other bodies organizing elections;
  - c) creation of electoral districts and rules for the distribution of mandates between these electoral districts.

The Venice Commission also emphasizes that, as a general principle, any reform of the electoral law that is implemented during the elections should be carried out early enough for this to be actually applicable to the elections.

Thus, applying the Interpretative Declaration to the context of the Republic of Moldova, we note that the approval of amendments to the electoral system through organic law is consistent with international standards, and the frequency of amending the fundamental rules of the electoral law is being ensured by the conditions and the process of approval of the organic law - i.e. the Electoral Code (at least two readings, by vote of the majority of present members of Parliament).

Nevertheless, the Promo-LEX Association, as an organization monitoring the national elections, in the reports of the Observation Missions, in order to organize and conduct a transparent electoral process, to ensure that voters and electoral competitors are informed, constantly highlights, cases in which the electoral law is being amended not early enough before the elections. The wording "not early enough" shall mean the time period in which the instruments subordinated to the Electoral Code are being adopted or brought into line with the Electoral Code, in compliance with the principle of transparency in decision-making. The adjustment or adaptation of the instruments subordinated to the law, as a rule, also take place during the election period, when the rules of conduct and, accordingly, the rules for sanctioning, must be clear and predictable.

For this reason, Promo-LEX recommends that the Parliament of the Republic of Moldova, including during local elections, establish a certain period of time (e.g., from the beginning of the electoral period or from the date on which elections are scheduled), during which it would be prohibited to amend the existing legal and regulatory framework, including the one subordinated to the Law.

Additionally, we would like to point out that the Venice Commission has set a deadline of one year before the elections, without making any difference between ordinary or early elections. According to the Opinion<sup>8</sup> of the Venice Commission, in the event that, after a change in the electoral system, **early elections** are organized, the new system should be applied **no earlier than one year after such changes are adopted.**

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<sup>7</sup> Adopted by the European Commission for Democracy through Law at its 52nd Plenary Session (Venice, 18-19 October 2002)

<sup>8</sup> Republic of Moldova - Joint opinion on the draft laws on amending and completing certain legislative acts (electoral system for the election of the Parliament), adopted by the Council for Democratic Elections at its 59th meeting (Venice, 15 June 2017) and by the Venice Commission at its 111th Plenary Session (Venice, 16-17 June 2017)

## ***Stability of the electoral law within the context of the Law no. 113 of August 15<sup>th</sup>, 2019***

We draw your attention to the final provisions of the Law No. 113 of August 15<sup>th</sup>, 2019, which amended the electoral system, according to which the law entered into force on the day of its publication in the Official Gazette of the Republic of Moldova - on August 17<sup>th</sup>, 2019. However, according to Article VI, if the mandate of an MP elected in an uninominal constituency is declared vacated at least 180 days prior to the expiration of the term of office of the Parliament by the tenth convocation, partial parliamentary elections shall be conducted, which shall be held in accordance with **the legislation in force prior to the adoption of this law**, excluding legal relations related to the requirement to submit the integrity certificates on election campaigning and identity documents of the voter, which are to be governed by the legislation in force applied in a proper manner.

Thus, the situation of parallel regulation of the same legal relations but which refer to different elections is formed. Taking into account the exhaustive list of legal relations highlighted in the final provisions, Promo-LEX has identified a number of amended rules that have not been and will not be applied during the new/partial parliamentary elections. The most important ones are:

- authorization/prohibition of financing of election campaigns by citizens of the Republic of Moldova from incomes received outside the country;
- a three-year ban on financing or material support, in any form, of political parties, initiative groups, election campaigns by legal entities that carried out activities financed from public money (funds);
- the amount of donation ceilings for the election campaign from natural persons as well as from legal persons;
- availability and accuracy of data from electoral lists, including those on electoral candidates.

*We believe that the preservation of the general provisions regulating the same legal relations for 3 years, but within the framework of different voting generates the existence of by-laws, which should also be applied in parallel, as they can disorient voters, election candidates and officials and adversely affect the accuracy and predictability of the electoral process.*

Moreover, it is worth mentioning that although the law on the amendment of the electoral system was adopted and published in August 2019, i.e. three and a half years before the next ordinary parliamentary elections of 2023, we believe that due to the continuous holding of new/partial parliamentary elections (in uninominal constituencies) the principle of the stability of the electoral law is not able to ensure the credibility of the electoral process, as well as the relevant information and electoral education of the voter.

In this context, we would like to reiterate that Promo-LEX Association proposed the Parliament to refuse to hold partial elections and to use only the results obtained by the candidates during the voting on February 24<sup>th</sup>, 2019. Thus, Promo-LEX proposed that the mandate of the MP of the tenth convocation elected in an uninominal constituency, but remaining vacant during this convocation, be transferred to the next candidate on the list of the same political party or electoral bloc. If the political party or the electoral bloc does not have alternate candidates, the MPs' mandates are redistributed to the other parties or electoral blocs in the manner laid down in art.96 paragraph (5) of the Electoral Code, taking into account only the votes received in the national constituency. The mandate of the independent MP of the tenth convocation, which remained vacant during this convocation, shall be granted under Article 96 paragraph (5) of the Electoral Code, taking into account only the votes received in the national constituency<sup>9</sup>.

### ***Amendment versus revival of the electoral system***

The authors argue that there is no mandatory requirement for the observance of the one-year term from the date of adoption to implementation thereof, including the fact that the adoption of Law no. 113/2019, especially the Title III "Parliamentary Elections", **did not change the electoral system in the sense of this definition by the Venice Commission acts, but rather achieved the revival of the proportional electoral system**, which has been functioning in the Republic of Moldova since 1994. The revival of the legal provisions is also justified by the similarity of the content of Title III "Parliamentary Elections" with the existing provisions before the adoption of the Law No. 154 of July 20<sup>th</sup>, 2017 and the fact that the

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<sup>9</sup> Opinion of the signatory organizations on the draft law no. 36 of 29.03.2019 amending and completing the Electoral Code (second reading), go to the link: <https://bit.ly/33Pp8zh>

replacement of one electoral system, adopted in disregard of the generally accepted standards, by an electoral system, in compliance with these standards, does not in any way imply the amendment of the electoral system in the light of the acts of the Venice Commission.

We cannot agree with this interpretation, as the mixed electoral system was applied during the parliamentary elections of February 24<sup>th</sup>, 2019, all the by-laws were amended, and the citizens who have the right to vote were informed about the amendments to the electoral system and exercised their right in accordance with the new system.

We also point out that neither the national legal framework nor international standards make no difference between the amendment of the electoral system and returning to an electoral system or revival thereof, as any transition from one electoral system to another is a change in the electoral system, if the latter has been applied at least once. Thus, we believe that it is not possible to agree with the reasons put forward by the authors of the referral in order to deny the recommendations on the observance of a one-year period from the adoption of the new electoral system to the actual elections.

As a comparison, we show that on March 4<sup>th</sup>, 2016 the Constitutional Court issued the Judgment on constitutional review of certain provisions of the Law no. 1115-XIV of July 5<sup>th</sup>, 2000 amending and supplementing the Constitution of the Republic of Moldova (*modality of electing the President*) [Complaint no. 48b/2015], by which the Court declared as unconstitutional the provisions of the law on constitutional review as regards the procedure of electing the President of the Republic of Moldova by the Parliament by a 3/5 majority of the number of MPs and revived the provisions on the election of the President by direct suffrage in a free and secret ballot, in the version before the unconstitutional amendment<sup>10</sup>. The elections of the President of the Republic of Moldova were held on October 30<sup>th</sup>, 2016, that is, eight months after the revival of the Constitutional provisions. The precedent on the revival of the constitutional provisions 8 months before the election of the President of the Republic of Moldova indicates that the Parliament cannot be obliged to observe a one-year term from the moment of the amendment of the electoral system, and even more so to implement the new electoral system only during the ordinary elections.

**In conclusion, the Promo-LEX Association believes that:**

- The Parliament is in the position to decide upon the electoral system and implicitly on the terms of its entry into force and its application, which is a matter of relevance and not a matter of constitutionality.
- The case-law of the Constitutional Court was amended under the Judgment of April 26<sup>th</sup>, 2019, limiting the right of the Parliament to change the electoral system.
- The precedent on the revival of the constitutional provisions 8 months before the election of the President of the Republic of Moldova shows that the Parliament cannot be obliged to observe a one-year term from the moment of the amendment of the electoral system, and even more so to implement the new electoral system only during the ordinary elections.
- International Standards on the stability of the electoral law, including on the adherence to a one-year period from the adoption of the new electoral system, are non-regulatory, however, the establishment of a certain period (e.g., from the beginning of the pre-election period, or from the date on which an election date has been set) during which changes to existing legislation, including by-laws, will be prohibited, is appropriate and necessary to ensure the predictability and transparency of the electoral process.
- The principle of the stability of the electoral law is not able to ensure the credibility of the electoral process, as well as the relevant information and electoral education of the voter, in the context of the ongoing holding of new/partial parliamentary elections (in uninominal constituencies).

**Best regards,**

**Pavel POSTICA** / \_\_\_\_\_ /

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<sup>10</sup> Judgment of the Constitutional Court no. 7 of 04.03.2016, go to the link: <https://bit.ly/2CjUHyZ>