REVIEW

ON AMENDMENT OF THE LEGISLATION THAT REGULATES SETTING UP AND FUNCTIONING OF LOCAL COMMISSIONS FOR MONITORING PLACES OF DETENTION

Author:
Victor ZAHARIA, director, Institute for Penal Reform (IPR)

This report was elaborated within the project „*Strengthening the capacities of local commissions for monitoring the places of detention"*, implemented by the OSCE Mission to Moldova in partnership with the Moldovan Institute for Human Rights.

Chisinau, 2011

I. NORMATIVE-LEGAL FRAMEWORK CONCERNING SETTING UP AND FUNCTIONING OF LOCAL COMMISSIONS FOR MONITORING PLACES OF DETENTION

The Law No. 235-XVI from 13 November 2008 on civil control of human rights observance in institutions that ensure detention of persons (*Official Monitor* of the Republic of Moldova, 2008, No. 226-229, Article 826), hereinafter *the Law*, regulates relations that emerge in connection with the civil control (monitoring) of the activity of institutions that ensure detention of persons and aims at guaranteeing the observance of human rights, as well as the setting up of the monitoring commissions and their main duties and responsibilities.

In order to ensure enforcement of the provisions of the Law No. 235-XVI from 13 November 2008 on civil control of human rights observance in institutions that ensure detention of persons (*Official Monitor* of the Republic of Moldova, 2008, No. 226-229, Article 826), Government has approved the ***Regulation concerning the activity of the commission for monitoring human rights observance in institutions that ensure detention of persons*** (approved by the Government Decision No. 286 from 13.04.2009, *Official Monitor* of the Republic of Moldova, 2009, No. 78-79, Article 337), hereinafter *the Regulation*. The respective Regulation describes the organization, the setting up and the procedure of functioning of the Commission.

This field is regulated by legally binding normative-legal acts. The regulations in this field seem to be clear, as the Regulation concerning the activity of the commission for monitoring human rights observance in institutions that ensure detention of persons explains certain concepts and terms which are used in it (see point 2 from the Regulation). Therefore, the term *„monitoring"* is interpreted as a totality of actions aimed at verification, supervision, assessment and informing the public about the conditions of detention and the treatment of the detainees in the institutions that ensure detention of persons. Also the Regulation explains the meaning of the phrase „*personal interest*", although this phrase can be found also in other normative-legal acts[1].

II. STATUS OF THE LOCAL COMMISSION FOR MONITORING PLACES OF DETENTION

According to the Law No. 235-XVI from 13 November 2008 on civil control of human rights observance in institutions that ensure detention of persons, monitoring of the conditions of detention and the treatment of the detainees is carried out by the monitoring commissions, which are ***permanent bodies, without the status of legal entities***, set up in each administrative-territorial unit of second level, where institutions that ensure detention of persons exist (see Article 3 from the Law). The same provision is also reiterated in the Regulation concerning the activity of the commission for monitoring human rights observance in institutions that ensure detention of persons.

Monitoring human rights observance in institutions that ensure detention of persons is an activity carried out by the representatives of civil society, organized in permanent commissions, and is based on principles of volunteer work, independence, equality and legality (see Article 2 from the Law No. 235-XVI). Regulation concerning the activity of the commission for monitoring human rights observance in institutions that ensure detention of persons adds the principle of „*humanism*" to this list of principles (see point 5 from the Regulation). Although the principle of

[1] See Article 2 from the Law No. 16 of 15.02.2008 on the conflict of interest, published on 30.05.2008 in the *Official Monitor* No. 94-96, Article No. 351.

humanism is pertinent to the activity of the commission, it should have been legally established in the Law and not in the Regulation.

III. SETTING UP LOCAL COMMISSIONS FOR MONITORING PLACES OF DETENTION AND THEIR COMPOSITION

According to the Regulation concerning the activity of the commission for monitoring human rights observance in institutions that ensure detention of persons, the local council of the administrative-territorial unit of the second level elaborates and sends registered letters to all public associations from the respective administrative-territorial unit encouraging them to nominate representatives of civil society in order to examine the possibility of including them in the composition of the Monitoring Commission (see point 8 from the Regulation). In order to ensure transparency and an advanced degree of involvement in the process of setting up a commission, commissions are set up based on a public competition. Therefore, **the following wording is proposed for point 8 of the Regulation**:

(1) „The local council of the administrative-territorial unit of the second level shall organize a public competition in order to encourage nomination of candidates for the position of member of the Local Commission for Monitoring Places of Detention.
(2) Information about the organization and carrying out of the competition, requirements for the candidates, the necessary documents to be submitted, as well as the date of the competition are published in local mass-media at least 30 days before the date of the competition.
(3) The organization and carrying out of the competition is based on the following principles:
a) open competition, by ensuring a free access of any person who fulfils the requirements specified in the Law to participate in the competition;
b) choosing the most competent persons based on their qualifications;
c) ensuring transparency, by providing all interested persons with the information concerning the carrying out of the competition;
d) equal treatment, by applying objective and clearly defined selection criteria without discrimination, so that all candidates have equal chances.
(4) Persons who fulfil in the best way the requirement of having experience in the field and the criteria of independence and impartiality, personal integrity and objectivity are considered selected.
(5) The competition is considered valid if the necessary number of members has been selected following the competition, taking into consideration the obligation to ensure gender equality and representation of ethnic and minority groups in the society.
(6) Information concerning the results of the competition is published in the local mass-media."

According to the Regulation concerning the activity of the commission for monitoring human rights observance in the institutions that ensure detention of persons, ***Proposals of the respective local councils are examined by the public associations during their general assemblies*** (by noting the decisions taken in the respective minutes) ***within 30 days*** from the moment the proposals are received (see point 9 from the Regulation). At the same time, according to the Law No. 837 of 17.05.1996 on public associations, the main governing body of the public association is the congress (conference) or general assembly. The permanent governing body of the public association is a collegial body, which is an eligible body, subordinated to the congress (conference) or general assembly, and which after registration of the public association exercises the rights of the legal entity in the name of the public association and carries out its obligations

in accordance with the Charter[2]. The structure of public associations, the procedure of establishment, the exact name, structure, ***competence and duration of the mandate of the governing bodies,*** of the executive bodies, control and auditing bodies of the association, as well as their headquarters ***are established in the Charter***[3]. Therefore, some public associations could be hesitant to propose candidates to the local commissions for monitoring places of detention because of the inexpedience of convoking general assembly just for this reason.

Taking into consideration the above-mentioned, point 9 of the Regulation is proposed to be amended as follows:
„***Proposals of the respective local councils are examined by the public associations' bodies empowered by the Charter (by noting the decisions taken, on a case by case basis, in the respective minutes) within 30 days from the moment the proposals are received***".

In case point 8 of the Regulation is amended, so that local monitoring commissions are set up based on a public competition, **point 9 of the Regulation will have the following wording**:
„***Public associations' bodies empowered by the Charter nominate persons that meet legal requirements for participation in the competition within 30 days from the moment the competition is announced***".

According to Article 3 paragraph (3) of the Law No. 235-XVI from 13 November 2008 on civil control of human rights observance in institutions that ensure detention of persons, the following persons can be ***members of the monitoring commission***:

- who reached the age of 25 years old,
- demonstrate a honourable behaviour in the society,
- have no criminal records,
- were proposed to this position by a public association that activates for at least 5 years, and where human rights protection is one of the statutory purposes of the association.

The last provision limits *de facto* the possibility of recently constituted public associations, whose members have advanced experience in the field of human rights monitoring and protection, to participate in the process of setting up local commissions for monitoring places of detention. Therefore, although the persons are nominated by public associations, they act in local monitoring commissions in their individual capacity.

In order to exclude an impediment for persons with advanced experience in the field of human rights, but who are members of a recently constituted public association, to be involved in monitoring commissions, **the following wording is proposed for Article 3 paragraph (3) of the Law No. 235-XVI from 13 November 2008**:
„The following persons can be members of the monitoring commission: persons who reached the age of 25 years old, demonstrate a honourable behaviour in the society, have no criminal records and were proposed to this position by a public association, where human rights protection is one of its statutory purposes".

Considering the fact that members of the monitoring commission should prove that they correspond to the principles of legality, impartiality, independence and professionalism, legal interdictions ***to become members of the monitoring commissions*** are justified for the following persons:

- with positions of public dignity,

[2] See Article 5 of the Law No. 837 of 17.05.1996 on public associations, republished based on Article IV of the Law No. 178-XVI of 20 July 2007 on 02.10.2007 in *the Official Monitor* No. 153-156 BIS.
[3] See Article 16 of the Law No. 837 of 17.05.1996 on public associations, republished based on Article IV of the Law No. 178-XVI of 20 July 2007 on 02.10.2007 in *the Official Monitor* No. 153-156 BIS.

- public officials,
- judges,
- prosecutors,
- employees of national defence bodies, state security and public order,
- attorneys, notaries and mediators[4].

According to point 10 of the Regulation, considering requirements provided for in paragraph (3) Article 3 of the Law No. 235-XVI from 13 November 2008, the following documents should be ***attached to the letters of public associations where they include their reasoned proposals:***

- written agreements of the candidates where they consent to become members of the Monitoring Commission,
- their curriculum vitae (CV),
- other relevant information.

Provisions concerning the necessary package of documents seem to be relevant, or, due to the particularities related to the activity of public associations, an express written agreement of the candidate to become member of a local commission for monitoring places of detention is necessary.

Although the Law does not clarify the meaning of the phrase „*other relevant information*", from legal provisions it follows that these are copies of the registration documents of the public association. At the same time, hypothetically speaking, some information which is irrelevant to the process of setting up local commission for monitoring places of detention can be requested or attached as well. From these considerations, **point 10 from the Regulation should specify more clearly the documents that need to be attached**, and it is opportune to replace the phrase „*other relevant information*" with the phrase „***copies of the registration documents of the public association and other relevant information, which is considered necessary by the candidate to confirm his/her compliance with the requirements established for the members of the local commissions for monitoring places of detention***".

In case when public associations do not nominate candidates for the position of member of the Monitoring Commission, ***candidates are proposed by the respective local council, after written consultation with the Centre for Human Rights***. In such case, usually persons with experience in the fields of jurisprudence, psychology and medicine are proposed to the Monitoring Commission. Other persons can also be included in the composition of the Monitoring Commission (see point 11 from the Regulation). Such a provision, which represents an alternative algorithm for identification of members to local commissions for monitoring places of detention and which allows including some dedicated persons in the composition of such commissions with experience in different fields but who are not affiliated to public organizations, should be welcomed.

According to current provisions, ***membership in the Monitoring Commission is suspended***[5] in case of:

a) existence of a final court ruling, by which a member of the commission was sanctioned with administrative arrest – for the period of executing the arrest;

[4] See Article 3, paragraph 6 of the Law No. 235-XVI from 13 November 2008 on civil control of human rights observance in institutions that ensure detention of persons;

[5] See Article 4, paragraph 1 of the Law No. 235-XVI from 13 November 2008 on civil control of human rights observance in institutions that ensure detention of persons;

b) initiating criminal proceedings against a member of the commission – until criminal proceedings are discontinued, criminal investigation is ceased against the person or the sentence concerning acquittal of the respective person remains in force;
c) enrolling into mandatory military service, reduced military service or civil service (alternative service) – until military service is executed.

Therefore, some of the grounds for suspending the membership in the local monitoring commission seem to be relevant.

However, duration of mandatory military service [6] seems to be considerable in comparison with the two years mandate of the member of the commission, and the absence of a member could create some functional deficiencies within the commission. Such an impediment does not exist in case of alternative service. Considering these arguments, **letter c) paragraph (1) of Article 4 of the Law No. 235-XVI from 13 November 2008** on civil control of human rights observance in institutions that ensure detention of persons should have **the following wording**:
„***incorporation in reduced military service[7] or civil service (alternative)[8] – until the service is executed***".

In the same way, **paragraph (2) of Article 4 of the Law No. 235-XVI from 13 November 2008** on civil control of human rights observance in institutions that ensure detention of persons – on the grounds for discontinuing membership within the commission – follows to be **supplemented by letter** „***g) incorporation in mandatory military service***".

At the same time, existence of a sanction in the form of administrative arrest could put under question the honourable behaviour in the society, which is one of the requirements for members of the Monitoring Commission under Article 3. For this reason, **letter a) paragraph (1) of Article 4 of the Law No. 235-XVI from 13 November 2008 should be repealed**. In the same way, paragraph (2) of Article 4 of the Law No. 235-XVI from 13 November 2008 on civil control of human rights observance in institutions that ensure detention of persons – on the grounds for discontinuing membership within the commission – follows to be supplemented by letter „***h) existence of a final court ruling, by which a member of the commission was sanctioned with administrative arrest***".

Membership in the Monitoring Commission discontinues in cases of:
a) expiry of the mandate;
b) resignation;
c) physical death or declaration of the person's death by court ruling;
d) declaration of person's incapacity or limitation of the person's acting capacity;
e) existence of a final sentence convicting the person or applying medical constraint measures against the person;
f) declaration of disappearance of the commission's member – from the moment of delivering a final court ruling.

[6] Military service for militaries who execute mandatory military service lasts for 12 months, see Article 18 of the Law No. 1245 from 18.07.2002 on preparation of the citizens for the defence of their country, published on 10.10.2002 in t*he Official Monitor* No. 137-138, Article No. 1054;
[7] Reduced military service lasts for 3 months, see Article 18 of the Law No. 1245 from 18.07.2002 on preparation of the citizens for the defence of their country, published on 10.10.2002 in *the Official Monitor* No. 137-138, Article No. 1054;
[8] Civil service lasts for 12 months. See Article 5 of the Law No. 156 from 06.07.2007 on organizing civil service (alternative service), published on 07.09.2007 in *the Official Monitor* No. 141-145, Article No. 591;

Local commission for monitoring places of detention is composed of 7 members[9]. This number is appropriate both from the perspective of the amount of work attributed to each member within the commission (unremunerated work), as well as from the perspective of ensuring a diversity of members' experiences. At the same time, it may seem that at the level of rayons, some impediments might exist in identification of 7 civil society representatives, who would be interested in this field. Taking into consideration the dynamic nature of normative-legal provisions, it is not appropriate to amend legal provisions concerning the number of members of local commissions for monitoring places of detention.

Local council approves nominal composition of the Monitoring Commission within maximum 15 days since public associations submit their proposals or local council coordinates candidates with the Centre for Human Rights, by issuing IDs that confirm the membership in the Monitoring Commission (see point 13 from the Regulation). According to the legislation, rayonal council meets in ordinary sittings once in 3 months[10]. Rayonal council can also hold extraordinary sittings whenever necessary, with a proposed agenda, at the request of the chairman of the rayon or at least one third of chosen councillors. It is considered inopportune to convoke rayonal council in an extraordinary sitting just for approving nominal composition of a local commission for monitoring places of detention. Considering the above-mentioned, **the phrase „15 days" from point 13 from the Regulation follows to be substituted with the phrase „3 months"**.

Member of the Monitoring Commission has a 2 years mandate (see Article 3, paragraph (5) from the Law). The mandate can be prolonged for another term if the necessary conditions for appointing the person as a member of the commission are met. Therefore, duration of the member's mandate seems to be optimum, considering how intensively the associative sector is developing and the context of public associations' activity in the Republic of Moldova.

IV. FUNCTIONAL COMPETENCE

Monitoring Commission has the task of verifying and supervising the detention conditions and the treatment of the detainees in the institution that ensures detention of persons, which is situated within the administrative-territorial unit where the commission has been set up. The conclusions of the commission are described in a report on the established facts[11].

It should be noted that the phrase „***the treatment of the detainees***" is interpreted in a different way by different institutions and authorities, including members of the local commissions for monitoring places of detention. **The Body of Minimum Rules for the treatment of detainees and recommendations in this respect**[12] makes reference to a multitude of aspects, such as registration, separation of categories, transfer of the detainees; detention premises, personal hygiene, clothing and bedding, alimentation; medical assistance; work, training and recreational activities, physical activities, library; religion, storing the objects that belong to the detainees; penitentiary staff; discipline and sanctions, means of constraint, reward, information and the right of the detainees to complain, inspection, connections with the outside world, social

[9] See Article 3, paragraph 2 of the Law No. 235-XVI from 13 November 2008 on civil control of human rights observance in institutions that ensure detention of persons;
[10] See Article 45, the Law No. 436 from 28.12.2006 on local public administration, published on 09.03.2007 *in the Official Monitor* No. 32-35, Article No. 116;
[11] See Article 8, paragraph 1 of the Law No. 235-XVI from 13 November 2008 on civil control of human rights observance in institutions that ensure detention of persons;
[12] The Body of Minimum Rules for the treatment of detainees and recommendations in this respect, adopted at the First Congress of the United Nations for preventing crime and treatment of perpetrators, held in Geneva, Switzerland, between 22 August – 3 September 1955, complemented on 13 July 1977;

relations, post-penal help etc. Therefore, the phrase „ the treatment of the detainees" needs to be explained in the legislation, and this can be done through several ways:

a) complementing Article 6, letter a) from the Law No. 235-XVI from 13 November 2008 on civil control of human rights observance in institutions that ensure detention of persons, after the phrase „treatment applied to them", with the phrase „***including registration, separation and transfer of detainees; physical conditions of detention, clothing and bedding, alimentation; medical assistance; work, training and spending free time, discipline and means of constraint and reward, connection with the outside world, social relations and post-penal help, in accordance with internal and international normative-legal acts to which Republic of Moldova is a party***;";

b) either supplementing point 2 of the Regulation with the phrase „***treatment of the detainees – the way of registration, separation and transfer of detainees; ensuring physical conditions of detention, of clothing and bedding, creating conditions for personal hygiene; ensuring alimentation and medical assistance; work, training and spending free time by the detainees, discipline, means of constraint and reward; connection with the outside world, social relations and post-penal help, etc. according to internal and international normative-legal acts to which Republic of Moldova is a party.".***

In order to exclude erroneous interpretations (such as that Regulation enlarges the sphere of application of the law), the first option seems to be more appropriate.

According to the Law, ***Monitoring Commission is entitled to*** (see Article 6 from the Law and point 6 from the Regulation):

a) assess detention conditions of the detainees and the treatment of the detainees;
b) have access without restrictions to any sector of the institution that ensures detention of persons, except of security objects, in any moment of their visit and without prior approval, provided that they observe security rules and regime of the institution;
c) request from the administration of the detention place, as well as from the public administration authorities, all information they consider necessary for the carrying out of the monitoring, except information that represents state secret;
d) talk to the detainees, only upon their agreement, without witnesses or under visual supervision of the administration, if security conditions require this;
e) inform and submit requests to state authorities related to the carrying out of their monitoring tasks concerning observance of human rights in the institution that ensures detention of persons;
f) receive complaints concerning the observance of human rights in institutions that ensure detention of persons both from the detainees and their relatives, as well as from other persons or legal entities;
g) upon the request of the court of law or of the administration of the institution that ensures detention of persons, submit their opinions concerning the possibility of conditional release of the detainee, concerning replacement of the non-executed part of the punishment with a milder punishment, concerning liberation of minors from punishment, liberation from punishment due to the change of the situation, liberation from enforcement of the punishment of seriously sick persons, application of amnesty, as well as, upon the request of the President of the Republic of Moldova, concerning the possibility of applying the act of pardoning.

Although the Regulation reiterates the provisions of the Law, it should be remarked that point 6, letter b) from the Regulation repeats in a blunted manner certain provisions of Article 6, letter b) from the Law, leaving out the phrase „*in any moment of their visit and without prior approval,*

provided that they observe security rules and regime of the institution", which created certain confusions in the activity of some commissions. Therefore, some representatives of administration from certain places of detention requested that the monitoring programme expressly indicates which sector is planned to be visited during certain visit, although such a specification does not result from the Law. A similar situation is also found in point 6, letter d) from the Regulation, which repeats in a blunted manner certain provisions of Article 6, letter d) from the Law, leaving out the phrase „*only upon their agreement, without witnesses or under visual supervision of the administration, if security conditions require this*". Instead, point 6, letter f) from the Regulation, although it repeats the provisions of Article 6, letter f) from the Law, it is supplemented with the phrase „*and to examine*". Although, it is not necessary to amend the respective points from the Regulation, as the regulatory sufficiency is ensured through the provisions of the Law. Therefore, competencies awarded by the Law to the Monitoring Commission allow it to carry out in an efficient manner the monitoring process and fulfil the mission that belongs to it.

Article 6, letter g) from the Law and point 6, letter g) from the Regulation include certain responsibilities of the commissions that do not inherently belong to them. Or, opinions concerning the possibility of conditional release of the detainees before the term, concerning replacement of the non-executed part of the punishment with a milder punishment, concerning liberation of minors from punishment, liberation from punishment due to the change of the situation, liberation from enforcement of the punishment of seriously sick persons, application of amnesty, as well as, upon the request of the President of the Republic of Moldova, concerning the possibility of applying the act of pardoning may be offered only by persons who know specifically each individual detainee, which is not the case of local commissions for monitoring places of detention[13]. Therefore, the proposal is to ***repeal Article 6, letter g) from the Law and point 6, letter g) from the Regulation***.

Monitoring Commissions have the following obligations (see point 7 from the Regulation):

a) to verify and supervise the detention conditions and the treatment of the detainees in the institution that ensures detention of persons;
b) to approve their annual activity plans;
c) to plan and approve the programme of visits on a quarterly basis (monitoring programme);
d) to approve the composition of the monitoring groups;
e) to approve reports concerning the facts established during the visits, submit them to the administration of the institution that ensures detention of persons, and in case of need – to the hierarchically superior body of the given institution, as well as to the Centre for Human Rights and prosecution bodies;
f) to approve the general annual report, which follows to be submitted to the Centre for Human Rights and to the hierarchically superior body of the inspected institutions;
g) to submit its reports and answers to the competent authorities and international organizations authorized to inspect institutions that ensure detention of persons, in accordance with the international treaties to which Republic of Moldova is a party;
h) to respect the integrity of the information received during exercising the responsibilities of members of the commission, as well as the confidentiality of information concerning the identity of persons who provided the respective information;
i) to collaborate with mass-media, as well as with public associations that are active in the field of human rights protection both within the country, as well as abroad.

[13] See point 449, Decision of the Government No. 583 from 26.05.2006 concerning approval of the Statute on enforcement of sentences by the convicted persons, published on 16.06.2006 in *the Official Monitor* No. 91-94, Article No. 676;

Therefore, obligations of the commissions established by the Law are pertinent and not exceed the conceptual activity framework of local commissions for monitoring places of detention.

Also, ***during the carrying out of monitoring no interventions are allowed*** in the activity of institutions that ensure detention of persons, in the operative investigation activities, in the process of criminal investigation, as well as in the administrative or disciplinary proceedings carried out in respect of persons who work in these institutions (see Article 2, paragraph (2) from the Law). Such a limitation is correlated to the mission of the commission and similar regulations are established also for other institutions responsible for human rights protection[14].

V. THE MODALITY OF ORGANIZATION AND FUNCTIONING

According to Article 7 from the Law, Monitoring Commission carries out its activity within sittings and the monitoring groups. ***During the first sitting, members of the Monitoring Commission chose the chairperson and deputy chairperson of the commission*** with the vote of at least 2/3 from its members. According to point 15 from the Regulation, the first sitting of the Monitoring Commission is convoked by the local council within 5 days after the approval of its composition. Therefore, it is opportune to establish a deadline for convoking the monitoring commission in its first sitting, in order to thus avoid situations of unjustified delay in initiating the activity of the commission. The primary responsibility of the local council, which has the mission to facilitate the beginning of the activity of the monitoring commission, is also clear.

We welcome the provision of point 16 from the Regulation that establishes that each member of the Monitoring Commission shall submit a written declaration, which shall include ample information concerning his/her identity, domicile and civil status. Presentation of this ample information during the first sitting of the monitoring commission would allow a repeated evaluation of possible situations of incompatibilities with the quality of member of the monitoring commission, as well as situations of incompatibility in exercising the monitoring[15]. Therefore, the proposal is **<u>to amend point 16 from the Regulation</u>** by substituting the phrase „*shall submit a written declaration, which shall include ample information concerning his/her identity, domicile and civil status*" with the phrase „***elaborates and submits a written declaration, which shall include ample information concerning his/her identity, domicile and civil status, as well as other information that confirms lack of incompatibilities with the quality of member of the monitoring commission or incompatibilities in exercising monitoring of the places of detention***."

According to point 18 from the Regulation, ***chairperson*** of the Monitoring Commission is responsible for the activity of the Commission, and he/she ***exercises the following responsibilities***:

a) represents the Monitoring Commission in relations with individuals and legal entities;
b) elaborates and proposes agenda of the sittings of the Monitoring Commission;
c) convokes and chairs sittings of the Monitoring Commission;
d) signs and issues mandates for the members of the monitoring group to carry out the visits;
e) organizes and ensures a proper activity of the monitoring groups;
f) coordinates the programme of monitoring visits with the hierarchically superior body of the institution that follows to be monitored;

[14] See Article 16 from the Law No. 1349 from 17.10.1997 on Parliamentary Advocate, published on 11.12.1997 in *the Official Monitor* No. 82-83, Article No. 671;
[15] See Article 5, paragraph 1 of the Law No. 235-XVI from 13 November 2008 on civil control of human rights observance in institutions that ensure detention of persons

g) signs decisions of the Monitoring Commission on approval of the reports drawn up based on monitoring visits;
h) draws up the budget related to the annual activity of the Monitoring Commission and ensures sending of the budget for the approval of the Ministry of Finance;
i) sends requests to the local public administration authorities to provide the Monitoring Commission with premises for carrying out its sittings.

Taking into consideration the mission of the local commission for monitoring places of detention, the competencies of the chairperson of the Monitoring Commission and the way of exercising his/her responsibilities are sufficiently regulated. At the same time, the current functioning of local monitoring commissions proves that not all commissions for monitoring places of detention sent their reports to the competent authorities. Therefore, the proposal is **to supplement point 18, letter g) from the Regulation** as follows, after the phrase „*reports drawn up based on monitoring visits*" to introduce the phrase „***and sends them, together with the report, to the competent authorities***".

According to point 19 from the Regulation, in the absence of the chairperson of the Monitoring Commission, his/her responsibilities are exercised by the deputy chairperson. Considering that both the chairperson of the monitoring commission, and the deputy chairperson, are elected from among the members of the commission, with the vote of 2/3 of its members, the deputy chairperson of the monitoring commission has sufficient legitimacy to replace the chairperson in case of his/her absence.

Article 7, paragraph (6) from the Law provides that the secretariat of the Monitoring Commission is ensured by one of its members. Point 17 from the Regulation provides that this person is designated by the chairperson of the monitoring commission. The Law does not establish obligation just for one person to exercise the duties of secretariat during the mandate of the monitoring commission. Therefore, no amendment is necessary to be introduced here, as, depending on the availability of the members of a certain commission, the duties of secretariat may be exercised by the members of the monitoring commission through rotation.

According to point 20 from the Regulation, ***the secretary of the monitoring commission exercises the following duties***:
a) organizes and ensures the carrying out of sittings of the Monitoring Commission;
b) draws up minutes of the sittings;
c) registers correspondence of the Monitoring Commission;
d) registers the mandates issued to the members of the monitoring group;
e) ensures inventory and appropriate keeping of the monitoring files;
f) elaborates and ensures publication of the reports about the activity of the Monitoring Commission on the web site and in mass-media.

There are no collisions in the current provisions concerning delimitation of the role of the chairperson, deputy chairperson and secretary of the commission. At the same time, creation of a web page for each local commission for monitoring places of detention is not opportune. Otherwise, obligation to publish the activity reports on the web page seems to be formulated quite vaguely. From such considerations, the proposal is **to amend point 20 letter f) from the Regulation** as follows: „***elaborates reports about the activity of the Monitoring Commission and sends them for publication on the web pages of the institution of Parliamentary Advocate, local council and in mass-media."***

According to the legislation, the Monitoring Commission is convoked in its sittings at least once per month (point 21 from the Regulation), the sittings are deliberative if they are attended by the majority of the members of the Monitoring Commission (Article 7, paragraph (5) from the Law

and point 22 from the Regulation). The sittings of the Monitoring Commission might be open for the public or closed. Closed sittings take place only in case there is a need to prevent disclosure of data with personal character, of certain information that refers to private life, concerns persons' honour and dignity or because of other circumstances that could damage the interests of persons in detention, public order or morality, as well as other information, which cannot be disclosed in accordance with the legislation (point 23 from the Regulation). Monitoring Commission adopts decisions with the vote of the majority of members present at the sitting. The above-mentioned provisions seem to be reasonable, as they are similar to the regulations and practice of activity of other collegial bodies that function in the Republic of Moldova. At the same time, the subject concerning conditions of detention and treatment of the detainees could represent a public interest. From these considerations, the suggestion is to follow a routine practice and to institutionalize a certain algorithm for fixing the date of the sitting (for example, the first Wednesday in the month), as well as to **supplement point 21 from the Regulation with the sentence** „***Date, hour and place of the sitting, as well as the draft agenda, are made public 5 days before the sitting of the commission takes place***". There is no need to specify how this information will be made public, as local practices of disseminating information are very diverse.

Within 7 working days from the date the sitting took place, the secretary of the monitoring commission draws up the minutes of the sitting (point 24 from the Regulation) that includes (point 25 from the Regulation):

a) agenda, date, hour and place where the sitting of the Monitoring Commission was organized;
b) data about the participants, about missing members and about persons who were invited to the sitting of the Monitoring Commission, but who did not come;
c) speeches of the persons who participated at the sitting;
d) decisions approved by the Monitoring Commission;
e) separate opinions of the members of the Monitoring Commission;
f) other relevant information.

The minutes of the sitting of the Monitoring Commission are signed by the chairperson of the sitting and the person who has elaborated them and are registered in the chronological order for one calendar year (point 26 from the Regulation). These provisions do not need to be amended, as they are similar to the regulations and practice of activity of other collegial bodies that function in the Republic of Moldova.

VI. MONITORING PROCESS

Monitoring Commission is a permanent body (see Article 3 from the Law) and its activity should be consequent. Article 180 of the Enforcement Code[16] regulates civil control as follows: "***Monitoring commissions, which are permanent bodies, without the status of legal entity, carry out civil control (monitoring) of human rights observance in institutions that ensure detention of persons***. The setting up of the monitoring commissions, activity of the institutions that ensure detention of persons, their main duties and responsibilities are regulated by the Law nr. 235-XVI from 13 November 2008 on civil control of human rights observance in institutions that ensure detention of persons".

According to Article 8, paragraph (2) from the Law, Monitoring Commission plans and approves ***the programme of its visits on a quarterly basis*** (the monitoring programme), which is coordinated with the hierarchically superior body of the institution that follows to be monitored.

[16] Enforcement Code of the Republic of Moldova, published on 05.11.2010 in the *Official Monitor* No. 214-220, Article No. 704;

At the same time, according to point 7, letter c) from the Regulation, Monitoring Commission also approves ***an annual activity plan***. From the provisions of the Law and of the Regulation, it follows that the annual activity plan is not coordinated with any institution, and the quarterly programme of the visits is coordinated with the hierarchically superior body of the institution that follows to be monitored. Hypothetically speaking, there may exist only one programme or plan, however the duties of the monitoring commissions are more extensive than just carrying out the visits, so that it is opportune to keep separately the annual and quarterly planning of the visits. Moreover, the content of the monitoring programme does not result from the Law and therefore this programme should include only the date of the visit and the visited institution. Although it is opportune to include details concerning the content of the monitoring visits in the annual monitoring plan, there is no mandatory requirement to include this information in the monitoring programme. Moreover, according to Article 6, letter b) from the Law, monitoring commission is entitled to have access to any sector of the institution that ensures detention of persons, without restrictions, any time during the visit and without prior approval, under conditions of the Law. Considering these provisions, the proposal is **to amend point 7, letter c) from the Regulation** by adding a new phrase „***where the date and the monitored institution are indicated***" after the phrase *„(monitoring programme)*".

The Law also provides for the possibility to carry out some ***unplanned visits.*** Article 8, paragraph (3) from the Law provides that in case of some exceptional situations in the institutions that ensure detention of persons, and upon agreement of the hierarchically superior body of the respective institution, visits may be carried out without prior planning, with the condition that no circumstances are present that would jeopardize the security of the institution or public security at the moment the visits are carried out of. These restrictions to the activity of the monitoring commission in exceptional situations, as well as the requirement to coordinate the visit with the hierarchically superior body of the monitored institution, seem to be proportional to the mission and the role of the local commission for monitoring places of detention, and there are also other bodies responsible for human rights protection that can intervene in exceptional situations without having to coordinate their visits with the hierarchically superior body of the respective institution.

Visits to the institutions that ensure detention of persons are carried out by the ***monitoring groups***, according to the monitoring programme, approved by the Monitoring Commission (see point 28 from the Regulation). In order to carry out verification visits, commission sets up monitoring groups composed of at least 2 members (see Article 9, paragraph (2) from the Law). Current provision concerning the number of members to be included in the monitoring group seems to be adequate; the Law indicates that the monitoring group should be composed of „at least two members", and this allows to include in the composition of the monitoring group even the whole nominal composition of the local commission for monitoring places of detention, in case there is such a need. The task of determining the number of members to be included in the monitoring group belongs to the commission, and this does not have to be coordinated with other institutions.

According to Article 181 of the Enforcement Code "Visiting institutions that ensure detention of persons", the following persons ***are entitled to visit institutions that ensure detention of persons,*** during the exercise of their function, ***without special permission***:

a) Chairperson of the Parliament of the Republic of Moldova;
b) President of the Republic of Moldova;
c) Prime-Minister of the Republic of Moldova;
d) Members of Parliament;
e) Parliamentary Advocate, members of the Consultative Council and other persons who accompany them;

f) General Prosecutor of the Republic of Moldova, prosecutor who exercises control over the enforcement of criminal sentences in the respective territory;
g) competent official of the hierarchically superior body of the institution or body that ensures enforcement of criminal sentences;
h) judge that has examined or who examines criminal case, according to the territorial competence;
i) representatives of international organizations who have this right, according to national and/or international documents to which Republic of Moldova is a party;
j) member of the Committee of Complaints;
k) member of the Monitoring Commission.

Institutions that ensure detention of persons may be visited also by other persons with special permission from the administration of these institutions or from official persons of the hierarchically superior bodies or on the basis of court ruling, and in case of persons under preventive detention – also on the basis of decision of the criminal investigation body or court which examines the criminal case.

The Law (see Article 9, paragraph (1)) expressly establishes that ***access of the members of the monitoring group in institutions that ensure detention of persons*** is carried out based on a monitoring programme, approved according to the provisions of the Law, upon presentation of IDs that confirm the membership in the monitoring commission, issued by the chairperson of the council of the administrative-territorial unit of the second level, and of the monitoring mandate, issued by the chairperson of the monitoring commission, which nominates the persons empowered to carry out the monitoring, as well as indicates the date of the visit and institution that follows to be verified. In order to exclude certain legislative ambiguities, the phrase „chairperson of the council of the administrative-territorial unit of the second level" from Article 9, paragraph (1) of the Law follows to be substituted with the phrase „***chairperson of the rayon***", according to the provisions of the Law on local public administration[17]. For each monitoring visit, members of the monitoring group will submit a declaration on the name of the chairperson of the Monitoring Commission concerning the lack of any incompatibility, the fact that is to be noted in the monitoring mandate, and these declarations follow to be kept in the respective monitoring files (see Article 5 paragraph (2) from the Law and point 33 from the Regulation).

In case of unplanned visits, the head of the institution that ensures detention of persons allows access of the members of the monitoring group on the basis of their monitoring mandates issued under conditions of paragraph (1) Article 9 from the Law and coordinated with the head of the hierarchically superior body of the respective institution. In order to avoid certain deficiencies in identification of the members of local monitoring commissions during their unplanned visits, after the words „based on", Article 9 paragraph 3 from the Law follows to be supplemented with a new phrase „***IDs that confirm the membership in the monitoring commission and***".

According to Article 9 paragraph (4) and (5) from the Law, access to the institution that ensures detention of persons should be allowed in all cases by the head of the respective institution, whose task is to verify whether, during the carrying out of the visit, there are no legal impediments to ensure order and security in the institution and/or there are no other circumstances that could jeopardize the security of the members of the monitoring group and/or of the detainees. In case a special regime is instituted in the penitentiary, the access of the members of the Monitoring Commission is suspended for the duration of the special regime. According to Article 5 paragraph (1) from the Law, member of the Monitoring Commission

[17] Law no. 436 from 28.12.2006 concerning local public administration, published on 09.03.2007 in the *Official Monitor* No. 32-35, Article No. 116;

cannot monitor cases relating to the detention of persons he/she is in relations of affinity or kinship until the forth grade including, whose representative he/she is or was, as well as if he/she has the status of victim, witness or other participant in a criminal, civil or administrative case, where the person deprived of liberty, who is subjected to monitoring, has a procedural status.

According to Article 5 paragraph (3) from the Law and point 34 from the Regulation, in cases provided by Law, as well as in cases when it is established that members of the monitoring group have personal interests in the visit, or persons he/she is in relations of affinity or kinship until the forth grade including are detained in the visited institution that ensures detention of persons, administration of the detention place may refuse, by a reasoned decision, the access of the member of the Monitoring Commission to the institution that ensures detention. It should be mentioned that the Law refers to the possibility and not an obligation to refuse access (the phrase „may refuse"). In case of conflict of interest, refusal of access is an individual one (the phrase „access of the member of the Monitoring Commission"), with reference to a certain member of the monitoring commission and not with reference to the whole monitoring group. Article 5 paragraph (3) from the Law also provides that the respective provision may be contested in administrative court. Therefore, obligation to verify the impediments in accessing the institution that ensures detention of persons, as well as the possibility of the administration of the detention place to refuse by a reasoned decision the access of the member of the Monitoring Commission to the institution that ensures detention of persons, is proportional with the mission and the role of the local commission for monitoring places of detention.

According to point 29 from the Regulation, ***members of the monitoring groups have the following rights within the groups***:

a) to have free access to all institutions that ensure detention of persons from the respective administrative-territorial unit, as well as to any sector or room that belongs to the institution, during the daily activity programme of the respective institution;
b) to have unlimited access to any information concerning treatment and detention conditions of the persons deprived of their liberty;
c) to receive information from officials of the respective institutions concerning the issues that follow to be elucidated during the visit;
d) to have unlimited meetings and personal discussions, without witnesses, with any person who, in their opinion, could offer necessary information;
e) to inform the competent bodies about human rights violations discovered during the carrying out of the monitoring visits in institutions that ensure detention of persons.

Therefore, the Regulation reiterates the provisions of the Law concerning the rights of the Monitoring Commission. At the same time, Article 6 letter b) from the Law allows the access to the institution that ensures detention of persons „*with the condition that security rules and the regime of the institution are respected*" and letter a) point 29 from the Regulation includes the phrase „*during the daily activity programme of the respective institution*", which is a necessary clarification, although, according to the rules of legislative technique, it should be included in the Law and not in the Regulation, as the Regulation cannot limit the spectrum of competencies provided for by the Law of the local commission for monitoring places of detention. Based on these considerations, the proposal is **<u>to amend Article 6 letter b) from the Law</u>** by adding the phrase „***during the daily activity programme***" after the words „access without restrictions".

Although the Law nr. 235-XVI from 13 November 2008 on civil control of human rights observance in institutions that ensure detention of persons does not include regulations concerning the use of equipment, video recording or taking of pictures, certain provisions are found in the Enforcement Code. According to Article 181 of the Enforcement Code, video recording or taking of pictures in institutions that ensure enforcement of punishments in the form

of imprisonment or life detention are carried out with written permission of the administration of the respective institution, except for cases related to persons who are entitled to visit institutions that ensure detention of persons without special permission. Therefore, member of the local commission for monitoring places of detention does not need a special permission from the administration of the respective institution to make video recordings or take pictures. Audio, video recordings or taking of pictures of the convicted persons are carried out with their written consent, except for cases provided for by the Law (Article 181, Enforcement Code). Therefore, there is a deficiency in what concerns the use of equipment, video recording and taking of pictures in institutions that ensure detention of persons. Following these considerations, the proposal is **to amend Article 6 from the Law by adding letter a[1])** in the following wording: „***to carry out video recording, take pictures and use the necessary equipment for assessing the detention conditions without special permission from the administration of the detention place***".

Administrations of the institutions that ensure detention of persons held in custody and arrested persons have an obligation to ensure access of detained persons to independent medical assistance[18]. At the same time, doctors must ensure medical secret[19] and patients have the right to request confidentiality of these information[20]. Information that represents medical secret is subject to certain exceptions, including when this information is requested by the criminal investigation body or by the court of law in relation to carrying out criminal investigation or examination of the case in court with presentation of the necessary justification[21], or upon the request of the Parliamentary Advocate and of the members of the Consultative Council created by the Centre for Human Rights, in order to ensure protection of persons against torture and other cruel, inhuman and degrading treatment or punishment[22]. There are no special provisions for the Monitoring Commissions for monitoring observance of human rights in institutions that ensure detention of persons concerning their access, as exception, to the medical secret, as they exist for the Parliamentary Advocate and Consultative Council of the Centre for Human Rights. In case such a provision will be considered opportune, the above-mentioned normative acts follow to be amended accordingly.

According to point 31 from the Regulation, members of the monitoring groups have the following obligations:

a) to be correct and kind in relations with the collaborators of the institutions of detention they are visiting, with persons detained in these institutions, as well as with other persons;
b) not to disclose confidential information, as well as data of personal character, which were communicated to them during the exercise of their duties, unless the person who provided this information gives his/her consent;
c) to elaborate monitoring programme for each visit;
d) to draw up reports concerning the observance of human rights in visited institutions that ensure detention of persons and to submit them for the approval of the Monitoring Commission;
e) to refrain from any illegal actions that might lead to the destabilization of the situation in the penitentiary institution.

[18] Article 187, point 2), Code of Criminal Procedure of the Republic of Moldova.
[19] Article 13 of the Law No. 264-XVI from 27.10.2005 concerning exercise of the profession of doctor, published in *the Official Monitor* of the Republic of Moldova No. 172-175 from 23.12.2005.
[20] Article 12, paragraph 1 of the Law no. 263-XVI from 27.10.2005 concerning the rights and responsibilities of the patient, published in the *Offical Monitor* of the Republic of Moldova No. 176-181 from 30.12.2005.
[21] Article 12, paragraph 4, point c) of the Law concerning the rights and responsibilities of the patient; Article 13 paragraph 4, point c) of the Law concerning exercise of the profession of doctor.
[22] Article 12 paragraph 4, point c^1) of the Law concerning the rights and responsibilities of the patient; Article 13 paragraph 4 point c^1) of the Law concerning exercise of the profession of doctor.

Though such obligations derive from the Law, they should be expressly introduced in the provisions of the Law. Moreover, some of these interdictions refer to the Monitoring Commission and not just to the monitoring group. Considering the above-mentioned, the proposal is to **introduce a new Article in the Law, 6^1** with the following wording:

„Members of the local commission for monitoring places of detention have the following obligations:

- ***a) to be correct and kind in relations with the collaborators of the institutions of detention they are visiting, with persons detained in these institutions, as well as with other persons;***
- ***b) not to disclose confidential information, as well as data of personal character, which were communicated to them during the exercise of their duties, unless the person who provided this information gives his/her consent;***
- ***c) to elaborate monitoring programme for each visit;***
- ***d) to draw up reports concerning the observance of human rights in visited institutions that ensure detention of persons and to submit them for the approval of the Monitoring Commission;***
- ***e) to refrain from any illegal actions that might lead to the destabilization of the situation in the penitentiary institution;***
- ***f) to immediately inform the institution of Parliamentary Advocate about any serious violations of the rights of the detained persons, established during the monitoring process".***

Based on the results of the visits, the monitoring group elaborates a report, which is approved in the sitting of the Monitoring Commission (Article 7 paragraph (4) from the Law). At the same time, the Law does not establish a deadline for elaborating and approving the report. From these considerations, the proposal is to **amend Article 7 paragraph (4) from the Law** as follows „***Based on the results of the visits, the monitoring group shall elaborate a report, within 30 days from the visit, which shall be proposed for approval in the sitting of the Monitoring Commission***".

According to Article 8 paragraph (4) from the Law, reports elaborated following the monitoring visits are submitted to the administration of the institution that ensures detention of persons, and in case of need – to the hierarchically superior body of the respective institution, which has the obligation to respond to them in maximum 30 days. The Law therefore does not establish a certain deadline for submitting the reports to the interested institutions. Hypothetically speaking, the reports elaborated by the monitoring group, which were not approved by the monitoring commission, could also be submitted to the interested institutions. From these considerations, **Article 8 paragraph (4) from the Law** needs to be amended as follows „***Reports elaborated following the monitoring visits and approved by the commission are submitted to the administration of the institution that ensures detention of persons within 15 days since their approval, and in case of need – to the hierarchically superior body of the respective institution, which has the obligation to respond to them in maximum 30 days***".

According to Article 8 paragraph (5) from the Law, reports of the Monitoring Commission are submitted to the Centre for Human Rights and to the prosecution bodies. From considerations similar to those described above, **Article 8 paragraph (5) from the Law** is proposed to be amended as follows: „***Reports elaborated following the monitoring visits and approved by the commission are submitted to the Centre for Human Rights and prosecution bodies within 15 days since their approval".*** Publication of these reports would be opportune from considerations of public interest, however, certain deficiencies could exist concerning the possibility of their publication, and this could make such legal provision inapplicable.

According to Article 8 paragraph (6) from the Law, ***administration of the institution that ensures detention of persons must examine the reports submitted following the monitoring visit*** and, within 30 days, take the necessary measures aimed at elimination of the identified violations, by also informing in this sense the Monitoring Commission in written form. Such provision creates the context of a continuous dialogue between the civil society actors and administration of the institutions that ensure detention of persons, which aims at improving the detention conditions and treatment of the detainees.

According to Article 8 paragraph (7) from the Law, based on the monitoring visits, the Monitoring Commission annually elaborates a generalized report, which follows to be submitted to the Centre for Human Rights and to the hierarchically superior body of the inspected institution. In point 20, the Regulation includes the deadline for elaborating such a report – 20 January. For a better regulatory clarity and in order to ensure the transparency in the activity of the monitoring commission, the proposal is **to exclude point 20 from the Regulation** and **amend Article 8 paragraph (7) from the Law as follows**: „***Based on the monitoring visits, the Monitoring Commission annually elaborates a generalized report about the activity of the commission, conditions of detention and the treatment of the detainees in the monitored institutions. The report is submitted to the institution of Parliamentary Advocate, to the hierarchically superior body of the monitored institutions and is sent for publication on their web pages, as well as to the local council and mass-media institutions until 30 January***".

According to Article 8 paragraph (8) from the Law, the Monitoring Commission submits its reports, as well as its answers to the competent authorities, ***international bodies authorized*** to verify institutions that ensure detention of persons, in accordance with international documents Republic of Moldova is a party. These provisions create a context of promoting the observance of the rights of persons in detention also through international mechanisms of human rights protection.

The Law does not provide (though it does not prohibit) for extensive possibilities of interaction between local commissions for monitoring places of detention and the institution of Parliamentary Advocate and members of the Consultative Council. Respectively, **the proposal is to add paragraph (3^1) to Article 8 from the Law** in the following wording: „***In case some serious violations of the rights of detained persons are established, the Monitoring Commission must immediately inform about this the institution of Parliamentary Advocate and members of the Consultative Council***". For the same considerations, **the proposal is to add paragraph (9) to Article 8 from the Law** in the following wording: „***Institution of Parliamentary Advocate, as well as other legally created organizations, may offer, under conditions of the Law, methodical and advisory assistance to local commissions for monitoring places of detention***". Though such a provision is not imperative, it offers possibility for interested institutions to develop programmes for support of local commissions for monitoring places of detention in carrying out their duties.

Minimum necessary resources for the activity of the local commission for monitoring places of detention might be very diverse: human resources, consumables, transport costs, costs for premises etc. Point 27 from the Regulation provides that members of the Monitoring Commission exercise their duties on a voluntarily basis, without remuneration. According to Article 10 paragraph (2) of the Law, following written request of the monitoring commissions, local public administration authorities provide them, free of charge, with premises for organizing their sittings. Article 10 paragraph (1) of the Law generally provides that expenses related to the activity of monitoring commissions are covered by the state budget. Respectively, all other costs follow to be covered from the state budget. In the activity of some monitoring commissions,

these costs are more than necessary (for example, transport costs for travelling to the detention place situated outside the rayonal centre). Point 18 letter h) from the Regulation provides that the chairperson of the Monitoring Commission elaborates the budget related to the annual activity of the Monitoring Commission and ensures sending the budget for the approval of the Ministry of Finance. At the same time, Article 3 of the Law provides that monitoring commission is a permanent body, without the status of a legal entity. Therefore, there can be certain deficiencies in the process of obtaining necessary means from the state budget for the functioning of local commissions for monitoring places of detention. From these perspectives, it is necessary to effectively include in the normative-legal framework the manner of ensuring local commissions for monitoring places of detention with the necessary resources. This can be done through one of the following ways: either through allocation of resources through local public administration, or allocation of resources through the institution of Parliamentary Advocate. Both options require amendment of more normative acts than just the Law nr. 235-XVI from 13 November 2008 on civil control of human rights observance in institutions that ensure detention of persons. Taking into consideration the mission, the role and the amount of work of the local commission for monitoring places of detention, it does not seem opportune to provide an administrative apparatus for each commission.