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

**OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS**  
**(OSCE/ODIHR)**

**UKRAINE**

**JOINT OPINION**  
**ON THE DRAFT LAW AMENDING CERTAIN LEGISLATIVE ACTS**  
**WHICH RESTRICT THE PARTICIPATION IN THE STATE POWER OF**  
**PERSONS ASSOCIATED WITH POLITICAL PARTIES WHOSE**  
**ACTIVITIES ARE PROHIBITED BY LAW**

**Approved by the Council for Democratic Elections**  
**at its 78<sup>th</sup> meeting (Venice, 5 October 2023)**  
**and adopted by the Venice Commission**  
**at its 136<sup>th</sup> Plenary Session (Venice, 6-7 October 2023)**

**on the basis of comments by**

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**Mr Michael FRENDÓ (Member, Malta)**  
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## I. Introduction

1. By letter of 28 April 2023, the Chairperson of the Monitoring Committee of the Parliamentary Assembly requested an opinion of the Venice Commission on the draft law amending certain legislative acts of Ukraine which restrict the participation in the state power of persons associated with political parties whose activities are prohibited by law (“the draft law”, no. 9081) ([CDL-REF\(2023\)044](#)).

2. By letters of 24 and 28 April 2023 respectively, the First Deputy Head of the Committee on Human Rights, Occupation and Reintegration of Temporarily Occupied Territories of Ukraine, National Minorities and International Relation and the Chairperson of the Committee on Ukraine’s Integration into the European Union requested ODIHR to review the draft law and two alternative drafts.<sup>1</sup> As this Opinion relates to the electoral field, it was prepared jointly by the Venice Commission and ODIHR.

3. Mr Srdjan Darmanović, Mr Michael Frendo, Ms Janine Otálora Malassis and Mr Kaarlo Tuori acted as rapporteurs for this opinion. Ms Marla Morry, Ms Lolita Čigāne and Ms Barbara Jouan Stonestreet were appointed as experts for ODIHR.

4. On 7-8 September 2023 Mr Darmanović, Mr Frendo and Mr Tuori, together with Mr Pierre Garrone and Mr Domenico Vallario from the Venice Commission Secretariat, and Ms Marla Morry, together with Mr. Kakha Inaishvili from ODIHR, had online meetings with the First Deputy Speaker of the Verkhovna Rada, the Chair and members of the Committee on the Organisation of State Power, Local Self-Government, Regional Development and Urban Planning of the Verkhovna Rada (of the parliamentary group “Servant of the People”), members of parliament of the parliamentary group “Platform for Life and Peace”, the Parliamentary Commissioner for Human Rights, the Chair and judges of the Administrative Court of Cassation established within the Supreme Court, as well as with representatives of civil society. The Commission and ODIHR are grateful to the Council of Europe Office in Kyiv for the excellent organisation of these meetings.

5. This Joint Opinion was prepared in reliance on the English translation of the draft law. The translation may not accurately reflect the original version on all points.

6. This Joint Opinion was drafted on the basis of comments by the Venice Commission’s rapporteurs and ODIHR experts and the results of the meetings on 7-8 September 2023. It was approved by the Council for Democratic Elections at its 78<sup>th</sup> meeting (Venice, 5 October 2023) and examined at the joint meeting of the Sub-Commission on Democratic Elections and Latin America on the same day. It was adopted by the Venice Commission at its 136<sup>th</sup> Plenary Session (Venice, 6-7 October 2023).

## II. Background

7. On 24 February 2022, in connection with the war caused by the Russian Federation’s invasion of Ukraine, martial law was introduced in Ukraine. The martial law granted the relevant state authorities the necessary powers to avert a threat, repeal the armed attack and ensure national security, and eliminate threats to Ukraine’s state independence and territorial integrity. Martial law further allows temporary restrictions to the exercise of constitutional rights and freedoms of individuals and citizens, as well as to the rights and legitimate interests of political parties.<sup>2</sup> Subsequently, derogations to the right to free elections and to be elected, among other rights,

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<sup>1</sup> Draft Law no. [9081-1](#) registered by a group of deputies on 7 March 2023; and draft Law no. [9081-2](#), registered by a deputy on 20 March 2023.

<sup>2</sup> See Article 8 of the Law of Ukraine “On the legal regime of martial law” (available [here](#), in Ukrainian only).

guaranteed under applicable international and regional instruments have been notified.<sup>3</sup> Under the existing legal framework, during a period of martial law, national (and local) elections cannot be called or held, whether ordinary, extraordinary or by-elections, with the powers of the President and Parliament extended as needed.<sup>4</sup>

8. Relying on these powers, on 18 March 2022 the National Security and Defence Council of Ukraine ("NSDC") "suspended", for the period of martial law, the activities of 11 political parties. The decision was put into force by Decree of the President of Ukraine dated 19 March 2022, no. 153/2022.<sup>5</sup> Among these parties, the biggest was "Opposition Platform – For life", a party which, in the 2019 parliamentary elections, received 13,05% of the votes<sup>6</sup> and, at the time of the suspension of its activities, held 44 seats in the Verkhovna Rada, resulting in the second biggest faction in the Parliament. On 14 April 2022, the activities of the parliamentary faction of the political party Opposition Platform-For Life were suspended by the Verkhovna Rada of Ukraine with reference to the aforementioned decision of the NSDC. On 12 May 2022 the parliamentary faction was dissolved due to not meeting the minimum level of membership.

9. Following the suspension of these parties' activities, on 3 May 2022 the Verkhovna Rada passed Law of Ukraine 2243-IX On Amendments to Certain Legislative Acts of Ukraine on Prohibition of Political Parties,<sup>7</sup> which allowed for the dissolution of parties in Ukraine found guilty of, *inter alia*, "justification, recognition as lawful, denial of armed aggression against Ukraine, including by presenting an armed aggression of the Russian Federation against Ukraine as internal conflict, civil conflict, civil war, denial of temporary occupation of part of the territory Ukraine"; or for "glorification" or "justification" of actions and/or omissions of persons who have committed or are committing armed aggression against Ukraine and other persons connected to the Russian Federation". The law was signed by the President on 14 May 2022 and entered into force on 18 May 2022.

10. The draft law no. 9081 under examination, prepared by individual members of the Verkhovna Rada, was then registered in the latter on 6 March 2023. Alternative draft laws no. 9081-1 and 9081-2 were registered on 7 and 20 March 2023, respectively. At the session of the parliamentary committee on State building, Local Self-Government and regional and urban development

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<sup>3</sup> It is to be noted that, soon after the start of the war, the Ukrainian authorities also notified to the Council of Europe and the UN Secretary General of derogations to, respectively, the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR). With particular regard to the derogation to the ECHR and its Protocols, on 1 March 2022 Ukraine informed about its intention to derogate for 30 days from several provisions of the ECHR in light of the state of emergency proclaimed in certain regions of Ukraine and the martial law on the entire territory of Ukraine, as last extended on [18 August 2023 for 90 days](#). A [similar notification](#) was simultaneously sent to the UN Secretary General regarding derogations from the ICCPR. Both initial notifications to the Council of Europe and the UN, whose content is the same, referred to specific derogations from the obligations under Articles 3, 8 (paragraph 3), 9, 12, 13, 17, 19, 20, 21, 22, 24, 25, 26, 27 of the ICCPR and Articles 4 (paragraph 3), 8, 9, 10, 11, 13, 14, 16, Articles 1, 2 of the Additional Protocol, Article 2 of Protocol 4 to the ECHR. A [corrigendum notification](#) of 2 March 2022 also mentions Article 3 of the Additional Protocol to the ECHR.

<sup>4</sup> Article 19 of the Law of Ukraine on the Legal Regime of Martial Law prohibits the holding of presidential, parliamentary and local elections during martial law

<sup>5</sup> The decree (available at: <https://www.president.gov.ua/documents/1532022-41765>, in Ukrainian only) was meant to put into effect the decision of the National Security and Defence Council of Ukraine of March 18, 2022 "On Suspension of Activities of Certain Political Parties". To take its decision, the National Security and Defense Council had taken into account, *inter alia*, "[the] direct military aggression by the Russian Federation, [...] anti-Ukrainian political and organisational activities, war propaganda, public statements and calls for a change in the constitutional order by violent means, real threats of violating the sovereignty and territorial integrity of the state, undermining its security, as well as actions aimed at illegal seizure of state power, demonstration of collaborationism, violence, [...] the programmatic and statutory goals containing an anti-Ukrainian position, dissemination of information about the justification, recognition as legitimate, denial of the armed aggression of the Russian Federation against Ukraine, with the aim of ensuring national security and public order during the period of operation in Ukraine of the legal regime of martial law [...]".

<sup>6</sup> See ODIHR, [Ukraine – Early Parliamentary Elections, 21 July 2019, ODIHR Election Observation Mission Final Report](#), p. 35.

<sup>7</sup> Available at: <https://zakon.rada.gov.ua/laws/show/en/2243-20#Text>, Ukrainian only. *Inter alia*, the law amended the Law "on Political Parties of Ukraine", by adding new paragraphs 10 and 11 to Article 5.

session which took place on 20 September 2023, draft law no. 9081 was approved supported by 12 votes (out of 21 MPs present). Alternative draft 9081-1 was rejected.

11. In June-July 2022, proceedings were brought by the Ministry of Justice of Ukraine and the Security Service of Ukraine before the Eighth Administrative Appeals Court in Lviv against sixteen parties pursuant to the new provisions of the Law on Political Parties of Ukraine; as a result, these parties were prohibited and the property, money and assets of those parties were confiscated. The appeals to the Supreme Court lodged by some of these parties, including Opposition Platform – For life, were dismissed.

12. It is not within the remit of this opinion to analyse the amendments to the Law on Political Parties of Ukraine and the grounds that led to the prohibition of these political parties. The Venice Commission and ODIHR will only analyse the draft law in light of relevant European and international standards and OSCE human dimension commitments, as per the request. Given the similarities of the issues raised by the alternative draft laws, unless indicated otherwise, the main findings and recommendations stated in the Joint Opinion are similarly applicable to them.

### III. Analysis and recommendations

#### A. Introduction

13. The draft law lays down an ineligibility to be elected to Parliament (draft amended Article 134.6 of the Electoral Code) and in local elections (draft amended Article 193 of the Electoral Code). The draft law (and alternative draft laws) also provide for a sunset clause whereby all the new provisions being introduced shall cease to be effective ten years after the termination or abolition of the martial law introduced on 24 February 2022. The ineligibility would apply:

- *Ratione personae*: to “[a] citizen who, at the time of the introduction of martial law in Ukraine, was a member of the Parliament of Ukraine, a member of a local council or a village, town or city mayor elected from a party whose activities are prohibited”.
- *Ratione temporis*, it shall cease to be effective 10 years after the termination or cancellation of martial law, by operation of the sunset clause.

14. The Explanatory Note accompanying the draft law states that the latter is “designed to ensure democratic development of Ukraine, protect constitutional order and territorial integrity of the state from military aggression of the Russian Federation” and that its aim is “to counteract the activities [of banned parties] in support of the Russian Federation’s crimes against the people of Ukraine, distort ideological and historical aspects of the confrontation between Ukraine and the Russian Federation, annexation of Ukraine’s territory and other actions aimed at destroying Ukraine as an independent European state.” It is noted that the Explanatory Note does not cite Ukraine’s notifications of derogation from Article 25 of the ICCPR and Article 3 of the ECHR’s Additional Protocol as part of the justification for the proposed restriction on the right to be elected and, in any case, the application of the draft ban continues for ten years after the lifting of martial law.<sup>8</sup>

15. A group of deputies have introduced an alternative draft law (no. 9081-1)<sup>9</sup> which goes further than draft law no. 9081, by extending the scope of the ineligibility to presidential elections, with such restrictions applying to the same above-mentioned elected officials as well as to the members of a parliamentary faction formed by the parties concerned, who have been in office “at

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<sup>8</sup> Restrictions to human rights imposed pursuant to notified derogations from human rights obligations under emergency situations must not go beyond what is strictly required by the exigencies of the situation. This means that the measures in question must be tailored to the exigencies of the situation with regard to their field of territorial application, material content, and duration. Measures that go beyond the condition of strict necessity have to be judged in light of the legal standards applicable in normal times.

<sup>9</sup> Available at <[Картка законопроекту - Законотворчість \(rada.gov.ua\)](https://rada.gov.ua)>.

the time of the beginning of the temporary occupation of certain territories of Ukraine by the Russian Federation [2014]<sup>10</sup> and until the full restoration of Ukraine's state sovereignty".<sup>11</sup> The draft law no. 9081-1 also prohibits the aforementioned elected officials to be appointed as members of the Cabinet of Ministers of Ukraine or to enter the civil service for positions of category "A"<sup>12</sup>.

16. The ban of political parties as collective entities, although not so frequent in democracies, is a relatively well-known topic and almost all democratic systems recognise and regulate some form of ban of the parties that are perceived as a threat to the democratic system. The Venice Commission and ODIHR have addressed this issue, *inter alia*, in the Joint Guidelines on Political Party Regulation.<sup>13</sup> The issue was also specifically addressed by the Venice Commission, in the Guidelines on prohibition and dissolution of political parties and analogous measures.<sup>14</sup> The Venice Commission has also been repeatedly called in the past to assess legislation providing ineligibility to be elected in the case of electoral and criminal offenders. It has also provided a comparative report on the subject.<sup>15</sup> The Venice Commission expressed the view that the withdrawal of the right to serve as a representative due to criminal conviction for serious offences should be considered as a means of preserving democracy and the voters' trust in it.<sup>16</sup> The case under consideration is, however, different. The individuals affected by the draft law have not been convicted of any criminal offence. The Venice Commission and ODIHR are therefore called to assess a draft law which introduces restrictions that will be effective during ten years after the termination or abolition of the martial law introduced on 24 February 2022, on the ground of membership in a prohibited, to the right to be elected of certain individuals who – at the time of the introduction of martial law– were holding an elective office for that party.

## **B. Relevant international and regional treaties, standards and OSCE commitments**<sup>17</sup>

17. The right to participate in public affairs is enshrined in Article 25.b<sup>18</sup> of the International Covenant on Civil and Political Rights (complemented by Article 2(1) on the prohibition of discrimination),<sup>19</sup> Article 3 of Protocol No. 1<sup>20</sup> to the European Convention on Human Rights;

<sup>10</sup> While it is not possible to determine from the wording of the draft law no. 9081-1 ("at the time of the beginning of the temporary occupation of certain territories of Ukraine by the Russian Federation") the starting point of the application of the restrictions and whether this refers to the invasion of Ukraine on 24 February 2022 or the annexation of Crimea by the Russian Federation in February and March 2014, the Explanatory Note refers to 2014. Still the lack of clarity in the draft law on the applicable period diminishes legal certainty.

<sup>11</sup> Another alternative draft law (no. [9081-2](#)) was also introduced by an individual MP, with an even broader personal scope of ineligibility extending to "[a] citizen who, at the time of the introduction of martial law in Ukraine, was the President of Ukraine, a member of the Cabinet of Ministers of Ukraine, an MP, a local council member, or a village, settlement, or city mayor elected from any political party that has been operating in the territory of Ukraine since the declaration of its independence"; the analysis and requirements presented in the Joint Opinion are similarly applicable to this alternative draft law.

<sup>12</sup> Senior Corps of Civil Service.

<sup>13</sup> [CDL-AD\(2020\)032](#), §§ 106ff.

<sup>14</sup> [CDL-INF\(2000\)001](#).

<sup>15</sup> Venice Commission, [CDL-AD\(2015\)036cor](#), Report on exclusion of offenders from Parliament.

<sup>16</sup> Venice Commission, [CDL-AD\(2017\)025](#), Amicus curiae brief for the European Court of Human Rights in the case of Berlusconi v. Italy on the minimum procedural guarantees which a state must provide in the framework of a procedure of disqualification from holding an elective office, § 11.

<sup>17</sup> On the international standards applicable to the right to vote and be elected, see, for example, Venice Commission, Report on Term Limits; Part II, Members of Parliament, and Part III, Representatives elected at Sub National and local level and executive officials elected at sub national and local level, [CDL-AD\(2019\)007](#), §§ 13ff.

<sup>18</sup> Article 21.

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

[...].

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

<sup>19</sup> Ukraine ratified the Covenant in 1973, available in: <https://indicators.ohchr.org/>.

<sup>20</sup> Right to free elections.

Article 21<sup>21</sup> of the Universal Declaration of Human Rights and the 1990 OSCE Copenhagen Document.<sup>22</sup> In the specific case of the European Convention on Human Rights, the European Court of Human Rights has held that the right to free elections relates to the right to vote, and the passive aspect, namely the right to stand as a candidate for election.<sup>23</sup> Article 25 ICCPR is of particular relevance for eligibility to be elected in presidential and local elections, which are not covered by Article 3 of Protocol No. 1 to the ECHR. In its General Comment on Article 25 of the ICCPR, the Human Rights Committee points to the connection between passive and active electoral rights: the effective implementation of the right and the opportunity to stand for elective office ensures that persons entitled to vote must have a free choice of candidates. The General Comment also emphasises that any restrictions on the right to stand for election must be justifiable on objective and reasonable criteria and that persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation.<sup>24</sup> The General Comment further underlines that political opinion may not be used as a ground to deprive any person of the right to stand for election.<sup>25</sup>

18. Furthermore, the United Nations High Commissioner for Human Rights has stated that “participation is a hallmark of democracy”<sup>26</sup>, additionally, it has considered that “wide-reaching restrictions or deprivations of electoral rights may not be compatible with guarantees of equality and non-discrimination under international law”.<sup>27</sup>

19. The amendments proposed by the draft law introduce a restriction to the right to free elections enshrined in Article 3 of Protocol No. 1 to the ECHR and Article 25 ICCPR, more precisely to the passive aspect of universal suffrage (the right to be elected).<sup>28</sup>

20. The right to stand for elections is not absolute. In its advisory opinion on the assessment, under Article 3 of Protocol No. 1 to the Convention, of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings,<sup>29</sup> the European Court of Human Rights reminded essential elements of its case-law on the limitation of the rights guaranteed by this provision:

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The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

<sup>21</sup> 1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

2. Everyone has the right of equal access to public service in his country.

3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

<sup>22</sup> CSCE/OSCE, [Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE](#), 29 June 1990, paras. 6-7 and 24, whereby OSCE participating States committed “[t]o ensure that the will of the people serves as the basis of the authority of government, the participating States will (...) respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination” (para. 7.5) and that any restriction on rights and freedoms must “be strictly proportionate to the aim of th[e] law” (para. 24).

<sup>23</sup> ECtHR, *Tănase v. Moldova* [GC], 27 April 2010, no. 7/08, § 155.

<sup>24</sup> United Nations. Human Rights Committee. CCPR/C/21/Rev.1/Add.7. 27 August 1996. General Comment 25, § 17. Cf. Venice Commission, CDL-AD(2018)010, Report on Term Limits - Part I – Presidents, § 66.

<sup>25</sup> United Nations. Human Rights Committee. CCPR/C/21/Rev.1/Add.7. 27 August 1996. General Comment 25, § 17.

<sup>26</sup> United Nations. Human Rights Council. A/HRC/30/26. 23 July 2015. Promotion, protection and implementation of the right to participate in public affairs in the context of the existing human rights law: best practices, experiences, challenges and ways to overcome them. Report of the Office of the United Nations High Commissioner for Human Rights, § 4.

<sup>27</sup> United Nations. Human Rights Council. A/HRC/30/26. 23 July 2015. Promotion, protection and implementation of the right to participate in public affairs in the context of the existing human rights law: best practices, experiences, challenges and ways to overcome them. Report of the Office of the United Nations High Commissioner for Human Rights, § 8.

<sup>28</sup> See Venice Commission, Code of Good Practice in Electoral Matters, [CDL-AD\(2002\)023rev2-cor](#), I.1.

<sup>29</sup> [Request no. P16-2020-002](#) by the Lithuanian Supreme Administrative Court, 8 April 2022.

### **“b) The concept of “implied limitations”**

81. In *Selahattin Demirtaş* ([*no.2*][GC], no. [14305/17](#), 22 December 2020), §§ 387-88), the Court underscored the principle of implied limitations: (...)

(...)

388. The concept of ‘implied limitations’ means that the traditional tests of ‘necessity’ or ‘pressing social need’ which the Court uses in the context of its analyses under Articles 8 to 11 of the Convention are not applied in cases concerning Article 3 of Protocol No. 1. Rather, the Court first sets out to ascertain whether there has been arbitrary treatment or a lack of proportionality. Next, it examines whether the limitation has interfered with the free expression of the opinion of the people (see *Mathieu-Mohin and Clerfayt*, [2 March 1987, no. 9267/81], §52, and *Ždanoka*, [[GC], 16 March 2006, no. 58278/00], §115).”

### **c) Legitimate aim**

82. Unlike Articles 8, 9, 10 and 11 of the Convention, Article 3 of Protocol No. 1 does not itself set out a list of aims which can be considered legitimate for the purposes of that Article (see *Tănase*, [[GC], 27 April 2010, no. 7/08], §164).

(...)

The Court also specified that where an immediate threat to democracy or independence had passed, measures that were concerned with identifying a credible threat to the State interest in particular circumstances based on specific information should be preferred to operating on a blanket assumption that a certain category of persons posed a threat to national security and independence.

### **d) Impact of the political and historical context**

86. In *Tănase* (cited above), the Court acknowledged that any electoral legislation must be assessed in the light of the historical and political context of the country concerned, but that restrictions on electoral rights should be individualised as time passes.

(...)

“159. [...] in *Ādamsons v. Latvia* (no. [3669/03](#), §§ 123-28, 24 June 2008), the Court emphasised that with the passage of time, general restrictions on electoral rights become more difficult to justify. Instead, measures had to be ‘individualised’ in order to address a real risk posed by an identified individual.”

The Court also specified that where an immediate threat to democracy or independence had passed, measures that were concerned with identifying a credible threat to the State interest in particular circumstances based on specific information should be preferred to operating on a blanket assumption that a certain category of persons posed a threat to national security and independence.

87. Regarding the time-limit for restrictions on electoral rights, the Court held in *Ždanoka* (cited above):

“135. It is to be noted that the Constitutional Court observed in its decision of 30 August 2000 that the Latvian parliament should establish a time-limit on the restriction. In the light of this warning, even if today Latvia cannot be considered to have overstepped its wide margin of appreciation under Article 3 of Protocol No. 1, it is nevertheless the case that the Latvian parliament must keep the statutory restriction under constant review, with a view to bringing it to an early end. Such a conclusion seems all the more justified in view of the greater stability which Latvia now enjoys, *inter alia*, by reason of its full European integration. Hence, the failure by the Latvian legislature to take active steps in this connection may result in a different finding by the Court (see, *mutatis mutandis*, *Sheffield*



and *Horsham v. the United Kingdom*, 30 July 1998, § 60, *Reports* 1998-V; see also the follow-up judgment to that case, *Christine Goodwin v. the United Kingdom* [GC], no. [28957/95](#), §§ 71-93, ECHR 2002-VI).

#### e) Procedural safeguards

88. For the purpose of supervising the compatibility of an interference with the requirements of Article 3 of Protocol No. 1, the Court must scrutinise the relevant domestic procedures and decisions in detail, in order to determine whether sufficient safeguards against arbitrariness were afforded to the applicant and whether the relevant decisions were sufficiently reasoned (see *Abil v. Azerbaijan*, no. [16511/06](#), § 34, 21 February 2012)."

21. In its examination of compliance with Art. 3 of Protocol No. 1, the Court has thus applied two main criteria: whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people. The Court has also underlined "the need to assess any electoral legislation in the light of the political evolution of the country concerned, which means that unacceptable features in one system may be justified in another."<sup>30</sup>

22. In the case *Ždanoka v. Latvia*, the Court also emphasised that "active participation" is a way of conduct giving rise to the restriction of the right to stand for elections<sup>31</sup>. In a later case, *Ādamsons v. Latvia*,<sup>32</sup> it insisted on an individualised approach of the measure taking into account their actual conduct. In *Etxebarria and Others v. Spain*, it did not find a violation of Article 3 of Protocol 1 in a case where the applicants' candidatures had been annulled on the grounds that they were pursuing, with a different political party, the activities of the three political parties which had been declared illegal and dissolved on account of their support for violence and for the activities of the ETA, a terrorist organisation. The Court found that the national authorities had had considerable evidence enabling them to conclude that the electoral groupings in question wished to continue the activities of the political parties concerned. It insisted on the fact that the authorities had taken decisions to cancel applications on an individual basis.<sup>33</sup>

23. The case-law of the European Court on Human Rights makes a distinction between the restrictions on the right to vote and the right to stand for election. "Stricter requirements may be imposed on the eligibility to stand for election to parliament, as distinguished from voting eligibility".<sup>34</sup> At the same time, the Court has stated that the right to be elected is "inherent in the concept of a truly democratic state".<sup>35</sup>

24. Concerning the deprivation of the right to vote and to be elected, the Code of Good Practice in Electoral Matters states:

- i. provision may be made for depriving individuals of their right to vote and to be elected, but only subject to the following cumulative conditions:
- ii. it must be provided for by law;

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<sup>30</sup> Venice Commission, [CDL-AD\(2019\)007](#), Report on Term Limits; Part II, Members of Parliament, and Part III, Representatives elected at Sub National and local level and executive officials elected at sub national and local level, referring to ECtHR, *-Mohin and Clerfayt v. Belgium*, 2 March 1987, no. 9267/81, § 52 and *Ždanoka v. Latvia* [GC], 16 March 2006, no. 58278/00, §§ 103-104 and 115.

<sup>31</sup> ECtHR, *Ždanoka v. Latvia* [GC], 16 March 2006, no. 58278/00, § 126.

<sup>32</sup> ECtHR, *Ādamsons v. Latvia*, 1 December 2008, no 3669/03, § 125.

<sup>33</sup> ECtHR, *Etxebarria Barrena Arza Nafarroako Autodeterminazio Bilgunea and Aiarako and others v. Spain*, 30 June 2009, nos 35579/03, 35613/03 and 35626/03, § 53.

<sup>34</sup> ECtHR, *Melnychenko v. Ukraine*, 19 October 2004, no. 17707/02, § 57. See also Venice Commission, [CDL-AD\(2002\)023rev2-cor](#), Code of Good Practice in Electoral Matters, § 6.

<sup>35</sup> ECtHR, *Podkolzina v. Latvia*, 9 April 2002, no. [46726/99](#), para. 35.

- iii. the proportionality principle must be observed; conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them;
- iv. The deprivation must be based on mental incapacity or a criminal conviction for a serious offence.
- v. Furthermore, the withdrawal of political rights or finding of mental incapacity may only be imposed by express decision of a court of law.<sup>36</sup>

25. The latter requirement must be read together with the case-law of the European Court of Human Rights, which accepted a voting ban that applied only to persons convicted of certain well-determined offences or to a custodial sentence exceeding a statutory threshold.<sup>37</sup>

26. The United Nations Human Rights Committee in its General Comment No. 25 has issued a series of applicable guidelines. First, it recognises the right to be voted and to have access to public service guaranteed by Article 25 of the ICCPR;<sup>38</sup> additionally, any restrictions on the right to stand for election must be justifiable on objective and reasonable criteria, particularly, persons should not be excluded by unreasonable or discriminatory requirements such as by reason of political affiliation;<sup>39</sup> finally, political opinion may not be used as a ground to deprive any person of the right to stand for election.<sup>40</sup>

27. The Venice Commission and ODIHR are aware that Ukraine has notified derogations to several rights under the ICCPR and the ECHR, including Article 3 of Protocol no. 1 to the ECHR and Article 25 of the ICCPR (see footnote 3 above). Article 4(1) ICCPR and Article 15 ECHR allow for derogations to “*the extent strictly required by the exigencies of the situation*) and the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation shall be duly taken into account.<sup>41</sup> The UN Human Rights Committee in its General Comment no. 29 has underlined that the duration of the measures derogating from the ICCPR should be limited to the extent strictly required by the exigencies of the situation.<sup>42</sup> The OSCE 1991 Moscow Document provides that “the state of public emergency will be lifted as soon as possible and will not remain in force longer than strictly required by the exigencies of the situation” (§ 28.3). As underlined by the Venice Commission, “*emergency measures may only be in place for the time the State experiences the exceptional situation*” and “*they must be terminated once the exceptional situation is over*”.<sup>43</sup> The Venice Commission further noted that in principle, “*the state of emergency has to be terminated as soon as the emergency can be addressed by the ordinary legal mechanisms, even though at that moment some restrictions might still be necessary, on a smaller scale*”.

28. It must be noted that Article 19 of the Law of Ukraine on the Legal Regime of Martial Law prohibits the holding of presidential, parliamentary and local elections during martial law. Thus, the draft law appears to aim for restrictions that will in practice only be applied after the martial

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<sup>36</sup> Venice Commission, [CDL-AD\(2002\)023rev2-cor](#), Code of Good Practice in Electoral Matters, I.1.1.d.

<sup>37</sup> ECHR *Scoppola v. Italy (no. 3)* [GC], 22 May 2012, 126/05.

<sup>38</sup> United Nations. Human Rights Committee. CCPR/C/21/Rev.1/Add.7. 27 August 1996. General Comment 25, § 1.

<sup>39</sup> United Nations. Human Rights Committee. CCPR/C/21/Rev.1/Add.7. 27 August 1996. General Comment 25, § 15.

<sup>40</sup> United Nations. Human Rights Committee. CCPR/C/21/Rev.1/Add.7. 27 August 1996. General Comment 25, § 17.

<sup>41</sup> ECtHR, *Brannigan and McBride v. the United Kingdom*, no. [14553/89: 14554/89](#), 26 May 1993, § 43; *A. and Others v. the United Kingdom* [GC], no. [3455/05](#), 19 February 2009, § 173). See also UN Human Rights Committee, [General Comment no. 29 on Art. 4 of the ICCPR](#) (2001), para. 4. For a comprehensive perspective of the limitation of human rights during states of emergency, see Venice Commission, [CDL-AD\(2020\)014](#), *Report – Respect for democracy, human rights and the rule of law during states of emergency: reflections*.

<sup>42</sup> See also UN Human Rights Committee, [General Comment no. 29 on Art. 4 of the ICCPR](#) (2001), para. 4.

<sup>43</sup> Venice Commission, [CDL-AD\(2020\)014](#), *Report – Respect for democracy, human rights and the rule of law during states of emergency: reflections*, para. 13. See also UN Human Rights Committee, [General Comment no. 29 on Art. 4 of the ICCPR](#) (2001), para. 2, which expressly states that measures derogating from Art. 4 of the ICCPR “must be of an exceptional and temporary nature”.

law is lifted, while the derogations which are justified by the introduction of martial law should in principle no longer be in place when martial law ends or would in principle no longer be “*strictly required by the exigencies of the situation*”. The draft law provides for a sunset clause whereby all the new provisions being introduced, including the restrictions on the right to stand for election, shall cease to be effective ten years after the termination or abolition of martial law introduced on 24 February 2022. The temporal scope of application of such limitations, as suggested in the draft law, appears unduly long. Also,

29. While states have a legitimate right to introduce effective measures protecting national security and sovereignty, safeguarding principles of democracy, rule of law and human rights, there may be concerns regarding the introduction of new provisions that will remain in force long after the end of the martial state. Such provisions should therefore be analysed from the perspective of their longer term application, even in time of peace, when derogation will no longer be applicable. Accordingly, the Venice Commission and ODIHR will analyse the draft law under the “classic” proportionality test, while recognising that in the close aftermath of the end of martial law, certain limitations could potentially be justified for the limited period of time, allowing for progressive adaptation.<sup>44</sup>

30. Based on the above, any restrictions to the right to stand for election should be prescribed by law, pursue a legitimate aim, be justifiable based on objective, reasonable and non-discriminatory criteria, be proportionate, with sufficient procedural safeguards afforded to the individual to protect against arbitrariness. Any restrictions on electoral rights should be individualised and assessed against a given country’s political and historical context.

### **C. Prescribed by law**

31. In order to be compatible with the ECHR, any interference with Article 3 of Protocol no. 1 to the ECHR shall in the first place be prescribed by law, meaning that it should be sufficiently clear and foreseeable. The principle of foreseeability entails that an average person should be able to be aware and foresee, at all times and to a reasonable degree, consequences stemming from their actions to regulate their conduct accordingly.<sup>45</sup> In principle, legislation should not have retroactive effect and exceptions to this rule should be clearly outlined in legislation, strictly limited to compelling public-interest reasons and only if in conformity with the principle of proportionality.<sup>46</sup> For instance, it has generally been considered acceptable in the context of lustration “that people who held important posts in the ruling party and its repressive apparatus, or whose participation in repressive acts is proven, are subsequently banned from public service.”<sup>47</sup> Moreover, prohibiting “the members of a local council, village or even small town elected from a party whose activities were prohibited after the beginning of the temporary occupation of Ukraine”, who may have been oblivious of the prohibited nature of the activities of their party or may have decided to leave their party after the beginning of the temporary occupation, from entering the civil service for positions of category “A” seems to be an unreasonable restriction.

32. Regarding the introduction of new provisions disqualifying a candidate in presidential elections, or on being a prime minister or minister, the UN Human Rights Committee has for instance considered that when the law-making process introducing such restrictions was highly linked in time and substance to other proceedings, in the specific case impeachment proceedings against an individual, the said restrictions lacked the necessary foreseeability and objectivity and thus amounted to an unreasonable restriction under Article 25 (b) and (c) of the ICCPR.<sup>48</sup>

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<sup>44</sup> ECtHR, *Baş v. Turkey*, no. [66448/17](#), 2020, § 229.

<sup>45</sup> ECtHR, *The Sunday Times v. the United Kingdom* (No. 1), no. [6538/74](#), 26 April 1979, § 49. See also Venice Commission, [CDL-AD\(2016\)007](#), Rule of Law Checklist, § 58.

<sup>46</sup> Venice Commission, [CDL-AD\(2016\)007](#), Rule of Law Checklist, § 62.

<sup>47</sup> Explanatory Memorandum of the 1996 PACE Guidelines, [Doc. 7568](#), § 31.

<sup>48</sup> See UN Human Rights Committee, [Communication no. 2155/2012](#), Views / adopted by the Committee at its 110th session, 10-28 March 2014, § 8.4.

33. Several interlocutors, and in particular non-governmental organisations and opposition parties, highlighted in online meetings with the Venice Commission and ODIHR that the draft law would run against the Constitution. The Venice Commission and ODIHR stress that it would be for the Constitutional Court of Ukraine, once fully operational, to resolve the alleged conflict of norms and to interpret the extent to which the draft law may be compliant with the Constitution. It is of a great importance to ensure that these concerns are properly addressed throughout the legislative process.

#### **D. Legitimate aim**

34. Article 25 of the ICCPR provides that the right to take part in public affairs, including the right to be elected, shall not be subject to “unreasonable restrictions”, and any limitation must be justifiable on objective and reasonable criteria.<sup>49</sup> Article 3 of Protocol 1 to the ECHR does not include an explicit list of legitimate aims, such as Articles 8-11 of the Convention, nor does the Court apply the tests of “necessity” or “pressing social need”. Yet, as the Commission summarises in its 2019 report on term-limits, the aim a state pursues must be compatible with the principle of the Rule of Law and the general objectives of the Convention.<sup>50</sup> As noted earlier, the Explanatory Note accompanying the draft law cites as the latter’s aims the protection of democratic development, constitutional order, and territorial integrity of the state, also referencing national security, all in the context of the ongoing war.

35. The Venice Commission and ODIHR consider that the aims pursued by the draft law should be considered as legitimate. The draft law has been issued in a very unique historical situation. The war caused by the Russian Federation’s invasion of Ukraine is threatening the life of the Ukrainian nation and its existence as a democratic polity. The European Court of Human Rights has accepted limitations to the right to be elected in situations which were much less dangerous for the survival of the democratic state; for example it has recognised that the setting up of self-protection mechanism to preserve the democratic order, for instance by excluding from the legislature any senior officials who had committed gross violations of the Constitution or breached their oath provided for in the Constitution constituted a legitimate aim.<sup>51</sup> The Court also recognised the legitimacy of the aim of ensuring loyalty to the State or the integrity of public office holders and public trust in public institutions, in the case of the judiciary.<sup>52</sup>

36. The Venice Commission and ODIHR therefore find it legitimate, in principle, for the Ukrainian authorities to restrict “the right of persons associated with parties whose activities are prohibited for reasons of national security and countering the spread of totalitarianism to be elected as members of the Ukrainian Parliament, local councils or village, town or city mayors”.<sup>53</sup> In this regard, the Venice Commission and ODIHR consider that the Ukrainian authorities legitimately aim at protecting, *inter alia*, the State’s independence, the democratic order and national security.

#### **E. Proportionality**

37. However, it remains to be ascertained whether the measures proposed in the draft law are proportionate and exempt of arbitrariness. As underlined in paragraphs 25-27 above, should the contemplated restrictions be limited to the duration of martial law or shortly after, in light of the

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<sup>49</sup> United Nations. Human Rights Committee. CCPR/C/21/Rev.1/Add.7. 27 August 1996. General Comment 25, § 15.

<sup>50</sup> Venice Commission, [CDL-AD\(2019\)007](#), Report on Term Limits; Part II, Members of Parliament, and Part III, Representatives elected at Sub National and local level and executive officials elected at sub national and local level, § 16.

<sup>51</sup> ECtHR, [Advisory Opinion on the assessment, under Article 3 of Protocol No. 1 to the Convention, of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings](#), 8 April 2022, § 83.

<sup>52</sup> *Ibid.* §§ 84-85.

<sup>53</sup> Excerpt from the explanatory note to the draft law.

derogations notified by Ukraine to the Council of Europe and the UN,<sup>54</sup> the proportionality requirements to be met would then in principle be more lenient and focus on whether the measures taken do not go beyond the extent strictly required by the exigencies of the situation. However, the limitation of the right to be elected goes for ten years after the end of martial law, so after the end of the derogation period and therefore, the “classic” proportionality test should be applied.

38. Regarding the proportionality of restrictions to political rights, the European Court of Human Rights has underlined the need to assess any electoral legislation in the light of the political evolution of the country concerned, which means that unacceptable features in one system may be justified in another.<sup>55</sup> The margin of appreciation is wide, but it is not all-embracing.<sup>56</sup> Although a state enjoys considerable latitude in establishing the criteria governing eligibility to stand for election, which may vary in accordance with the historical and political factors specific to each State, they should have a common origin in the need to ensure both the independence of elected representatives and the freedom of choice of electors: if past activities of certain politicians broadly disqualify them from holding public elected office, the voters should be capable of coming to this conclusion themselves and not voting for these politicians in future elections if they run for office. In addition, the country's laws should ensure that electoral campaign manipulation, misinformation and foreign interference is maximally mitigated by clear, transparent and properly enforced political and campaign finance and campaign conduct (including for on-line campaigns) regulations. The introduction of ineligibility provisions where a state bars certain individuals from running for public office may be seen as an act of discrimination, if not based on objective, reasonable and non-discriminatory criteria, in line with the fundamental principles of a democratic state.

39. The Supreme Court of Ukraine has upheld the decisions to ban a number of political parties on the basis of legislation allowing such dissolution if they are found guilty of *inter alia*, “justifying, recognising as legitimate, or denying the armed aggression, including by describing Russian Federation’s actions using any different term; or for “glorification” or “justification” of actions and/or omissions of persons who have committed or are committing armed aggression against Ukraine and other persons connected to the Russian Federation”.

40. However, the Venice Commission and ODIHR consider that a clear distinction has to be drawn between the political parties that have been prohibited and dissolved and the rights of individuals who militate or have militated within that political party. The prohibition of the party should not directly affect the rights of all these individuals.

41. While the grounds relied on by the Ukrainian authorities and judicial bodies for banning or upholding the ban of the political parties may also, by extension be applicable to individuals seeking electoral office with the same illegitimate aims, the law proposes to render ineligible to be elected all individuals who have militated in such political parties for the sole reason of having held elective functions as MPs, local council members or village, town or city mayors under the banner of that party.

42. As appears from the case-law of the European Court of Human Rights and the Code of good practice in electoral matters, the principles of proportionality and prohibition of arbitrariness imply the individualisation of the measures taken.

43. The restriction provided for in the draft law has a broad application *ratione personae*, insofar as it would apply in general to members of banned political parties who held an elected office at the time of the introduction of martial law. The question has therefore to be raised whether that

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<sup>55</sup> ECtHR, *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, no. 9267/81, § 52; *Ždanoka v. Latvia* [GC], [GC], 16 March 2006, no. 58278/00, §§ 103-104 and 115.

<sup>56</sup> ECtHR, *Hirst v. the United Kingdom* (No. 2) [GC], 6 October 2005, no. 74025/01, § 82.

restriction constitutes a proportionate measure. The restriction applies automatically – without further assessment of the individual conduct by an independent and impartial body or decision of a court - on the sole bases of the party membership and holding of a specific position. The restriction also applies indiscriminately, without distinguishing between the party's elected members who may have actively contributed to the illegitimate acts attributed to the political party, from those elected representatives who took a neutral stance on the issue. This means that the restrictions on the right to be elected apply to a group of people, without an individualised assessment of their active involvement in the illegitimate activities of the prohibited parties.<sup>57</sup>

44. The Venice Commission has highlighted that “[t]he exercise of political power by people who seriously infringed the law puts at risk the implementation of [the] principle [of legality], which is on its turn a prerequisite of democracy, and may therefore endanger the democratic nature of the state. It is therefore justified to restrict their right to be elected”.<sup>58</sup> It is necessary to acknowledge that, unlike ordinary party members who do not take part in the decision-making process of the party, nor in the exercise of the party's everyday policies, and may well be unaware of the party policies in detail, the elected representatives of a political party who sit in the national legislative body are in principle at the very core of party policies and activities, although there is always a possibility that there might be MPs or other elected office-holders from that party who may have actually opposed the party's decisions or even taken individual actions in opposition to the party's position. It should also be noted that there may be a difference between members of parliament and members of a local council or a village, town or city mayors, who may only be remotely involved in the decision-making process of the party. It should therefore be acknowledged that not all persons affected by the law are necessarily responsible for the decisions and actions which led to the dissolution of the party. The draft law does not provide for individualised decisions and considers a whole group as collectively responsible for these violations. This leads in practice to a general, automatic and indiscriminate application of restrictive measures, thus going against the principles of proportionality and prohibition of arbitrariness guaranteed in particular by Article 3 of Protocol 1 to the ECHR and other international treaties and standards in the field of elections.

45. The issue of proportionality also needs to be examined in the context of the severity of the restrictive measures to be imposed on these persons. In this respect, as noted earlier, the European Court of Human Rights has made clear that an indefinite ban from running for political office is in any case a disproportionate measure. In one case,<sup>59</sup> it held that increasing a 10-year legal restriction on being elected by an additional 10 years without justification given by Parliament or the Government was manifestly arbitrary. The draft law proposes a restriction which will only end ten years after the end of martial law – a long duration which cannot be determined precisely as long as martial law is in force. With regard to the 10-year ban following the lifting of martial law, the Explanatory Note justifies this period as necessary following the exit of Russian troops from Ukraine “to allow for the completion of the country's reconstruction and the formation of a system to counter threats to Ukraine's sovereignty and territorial integrity, as well as violent changes to the constitutional order by Ukrainian citizens through participation in political parties”. In addition, applying a standardised measure to all concerned persons can itself be seen as a disproportionate measure in light of the fact that there may be varying levels of culpability for, and thereby threat from, individuals determined responsible for the actions that led to the banning of their party. As such, establishing a range of measures that are proportionately applied in an individualised manner would be more appropriate.

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<sup>57</sup> ECtHR, *Ādamsons v. Latvia*, no. [3669/03](#), 24 June 2008, § 125.

<sup>58</sup> Venice Commission, [CDL-AD\(2015\)036cor](#), Report on exclusion of offenders from Parliament, § 168.

<sup>59</sup> ECtHR, *Ādamsons v. Latvia*, no. [3669/03](#), 24 June 2008.

46. Moreover, since the ineligibility to be elected applies *ex lege*, it is not possible to legally challenge the exclusion of the right to stand for election on its merits, contrary to the principle of access to justice, one of the pillars of the Rule of Law.<sup>60</sup>

47. The potential “interference with the free expression of the opinion of the people” also links restrictions on the eligibility to the freedom of expression, guaranteed in Art. 10 ECHR. Electoral campaigns are most important contexts for expressing and advocating political opinions. The same considerations are relevant for all the elections covered by the electoral code.<sup>61</sup>

48. In conclusion, the legal basis for the imposition of such a limitation of the right to stand for election is too wide to be proportionate to the legitimate aims pursued.<sup>62</sup> The restriction on the right to be elected, in order to ensure a proper balance between the legitimate defence of democracy and the protection of individual political rights, must be limited to those persons who had an active participation, or, in an official or otherwise verifiable documented manner, expressly condoned, in the actions that led to the banning of the parties for instance, concretely endangering the democratic system of the country, territorial integrity or national security and must be assessed on an individual basis with adequate procedural safeguards, including the possibility to challenge the decision (see below). A preventive measure applied to these persons would be justified on the ground of such active participation or documented expression, since one may anticipate that they would continue to pursue or support illegitimate aims and therefore represent a threat.

49. This reasoning applies in addition to draft law No. 9081-1, which extends the scope of the ineligibility to presidential elections for those elected officials of the parties concerned who have been in office “at the time of the beginning of the temporary occupation of certain territories of Ukraine by the Russian Federation [2014] and until the full restoration of Ukraine’s state sovereignty”.<sup>63</sup> The collective restriction of the right to stand for election would not appear to be based on objective, reasonable and non-discriminatory criteria, contrary to the requirements of Article 25 of the ICCPR. While restrictions of local – and presidential – electoral rights do not in principle fall under Article 3 of Protocol No.1 to the ECHR, they should be examined under the anti-discrimination clause of Article 1 of Protocol No. 12, which includes a general prohibition of discrimination, not limited merely to Convention rights.<sup>64</sup> This article forbids discrimination in the enjoyment of any right set forth by law on any ground, including political or other opinion.

50. Similarly, the alternative draft’s ban for the elected officials of the prohibited parties to enter public service (category “A” positions), without individual assessment of the behaviours of the said persons would appear disproportionate. UN Human Rights Committee’s General Comment 25 stresses that “*the conditions for access to public service positions, (...) restrictions which apply and the processes for appointment, promotion, suspension and dismissal or removal from office as well as the judicial or other review mechanisms which apply to these processes*” must be

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<sup>60</sup> Venice Commission, [CDL-AD\(2016\)007](#), Rule of Law Checklist, II.E. This principle is protected by the procedural aspect of Article 3 of Protocol No. 1 to the ECHR.

<sup>61</sup> On a possible violation of Article 10: the ECtHR has held in *Hirst v. the United Kingdom* (No. 2) [GC], 6 October 2005, no. 74025/01, § 89 : “The Court considers that Article 3 of Protocol No. 1 is to be seen as the *lex specialis* as regards the exercise of the right to vote and (...) finds that no separate issue arises under Article 10 of the Convention”: This applies also to the right to be elected: ECtHR, *Ždanoka v. Latvia* [GC], 16 March 2006, no. 58278/00, § 141; *Etxeberria Barrena Arza Nafarroako Autodeterminazio Bilgunea and Aiarako and others v. Spain*, 30 June 2009, nos. 35579/03, 35613/03 and 35626/03, § 70.

<sup>62</sup> ECtHR *Kiliçgedik and others v. Turkey*, 14 December 2010, nos. 4517/04, 4527/04, 4985/04, 4999/04, 5115/04, 5333/04, 5340/04, 5343/04, 6434/04, 10467/04 and 43956/04), § 48.

<sup>63</sup> While restrictions of local – and presidential – electoral rights do not in principle fall under Article 3 of Protocol No. 1 to the ECHR, they should be examined under the anti-discrimination clause of Article 1 of Protocol No. 12, which includes a general prohibition of discrimination, not limited merely to Convention rights (ECtHR, *Selygenenko and others v. Ukraine*, 21 October 2021, nos. 24919/16 and 28658/16). This article forbids discrimination in the enjoyment of any right set forth by law on any ground, including political or other opinion.

<sup>64</sup> ECtHR, *Selygenenko and others v. Ukraine*, 21 October 2021, nos. 24919/16 and 28658/16.

clearly defined.<sup>65</sup> In any case, as per the general principle laid down in General comment 25 “any restrictions must be objective, reasonable, and non-discriminatory”.<sup>66</sup>

## F. Procedural safeguards and effective remedy

51. Moreover, the European Court of Human Rights has stressed the need to afford sufficient procedural safeguards against arbitrariness in the framework of the process of the domestic authorities making such individual assessments.<sup>67</sup> This includes the right to be heard, the right to present evidence, the right to be represented by a lawyer, the right to defence, the right to a sufficiently reasoned decision, and the possibility to contest the decision to an independent judicial body. As there is no individual assessment of each case, the person concerned will not be heard nor be provided with a reasoned decision that would be subject to judicial review nor have access to an effective remedy for the violation of the right to stand for election. In short, the restriction on the right to be elected must be assessed with adequate procedural safeguards, including the possibility to challenge the decision.

52. It is noted that the CEC is the implementing body charged with the compilation of the list of persons that will be ineligible within six months of the entry into force of the law. While the rationale (and justification) to confer the compilation of the list upon an independent body is positive in principle, it might prove complex and problematic to implement in practice. The CEC’s primary function is to administer elections in an independent and impartial manner and this new task may have an impact on the public perception of CEC’s impartiality and independence and on its ability to fulfil its mandate and conduct elections in an effective and credible fashion. This new competency is politically sensitive (with a risk of politicization) and the impartiality of the CEC might be questioned at some point. As a comparison, in countries where lustration laws have been applied previously, courts or special commissions, but not election management bodies, have been responsible for deciding which persons would have their rights restricted. It might then be considered to vest an existing institution (or to set up a specialized body resourced with the necessary staff) with the task to carry out this role.

53. There should be clear and effective mechanisms in place, including judicial oversight and an effective legal redress in case an individual wants to appeal the CEC decision to include them on the list. Strong procedural guarantees would be necessary, as provided in international treaties and by OSCE Commitments and standards, to ensure everyone’s right to “effective means of redress against administrative decisions so as to guarantee respect for fundamental rights and ensure legal integrity”.<sup>68</sup> This commitment also grants an “effective means of redress against administrative regulations for individuals affected thereby” and by providing “the possibility for judicial review of such regulations and decisions”.<sup>69</sup> To ensure effective legal redress, the rules regarding the inclusion on the list should foresee appeal venues and any restriction on political rights be finally determined by a Court.

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<sup>65</sup> United Nations. Human Rights Committee. CCPR/C/21/Rev.1/Add.7. 27 August 1996. General Comment 25, §§ 23-24.

<sup>66</sup> United Nations. Human Rights Committee. CCPR/C/21/Rev.1/Add.7. 27 August 1996. General Comment 25, § 4.

<sup>67</sup> See *Political Party “Patria” and others v. Republic of Moldova*, 4 August 2020, nos. [5113/15](#) and 14 others; *Miniscalco v. Italy*, 17 September 2021, no. [55093/13](#); *Galan v. Italy* (dec.), 17 June 2021. See also *Podkolzina v. Latvia*, 9 April 2002, no. [46726/99](#), in which the court stated that that the principle of effective guarantee of rights requires that the procedure for assessing a candidate’s eligibility should provide sufficient safeguards to prevent arbitrary decisions.

<sup>68</sup> See paragraph 5.10 of the [1990 OSCE Copenhagen Document](#). See also [CDL-AD\(2016\)007](#), Rule of Law Checklist, § 62.

<sup>69</sup> Under Article 2.3(a) of the [ICCPR](#) States obligated themselves “[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.” See also paragraph 15 of the UN [Human Rights Committee’s General Comment No. 31](#). In addition, Article 13 of the [ECHR](#) guarantees an effective remedy before a national authority to everyone whose rights and freedoms are violated, notwithstanding that the violation has been committed by people acting in an official capacity.



#### IV. Conclusion

54. By letter of 28 April 2023, the Chairperson of the Monitoring Committee of the Parliamentary Assembly requested an opinion of the Venice Commission on the draft law amending certain legislative acts of Ukraine which restrict the participation in the state power of persons associated with political parties whose activities are prohibited by law. A similar request was submitted to ODIHR by the First Deputy Head of the Committee on Human Rights, Occupation and Reintegration of Temporarily Occupied Territories of Ukraine, National Minorities and International Relation and the Chairperson of the Committee on Ukraine's Integration into the European Union. As this Opinion relates to the electoral field, it was prepared by the Venice Commission and ODIHR.

55. This law, if adopted, would lead to the restriction of the right to be elected, as enshrined, *inter alia*, in Article 3 of Protocol No. 1 to the ECHR and Article 25 ICCPR. It would apply to members of a prohibited party who held an elected office, during the period of martial law introduced on 24 February 2022 and for ten years after its termination or cancellation. While recognising that in the close aftermath of the end of martial law, certain limitations could potentially be justified for the limited period of time, allowing for progressive adaptation, the temporal scope of application of such limitations, as suggested in the draft law, is unduly long. Since the proposed provisions will remain in force long after the end of the martial state, they should therefore be analysed from the prospective of their longer term application, even in time of peace, when derogation will no longer be applicable. Accordingly, the Venice Commission and ODIHR have analysed the draft law and alternative drafts under the "classic" proportionality test.

56. In light of the unique historical situation which Ukraine is facing, the Venice Commission and ODIHR are of the view that the draft law legitimately aims, in principle, at protecting, *inter alia*, the State's independence, the democratic order and national security. However, it applies automatically on the sole basis of the party membership and holding of an elected office, and indiscriminately, without distinguishing between those party members who have actively contributed to the illegitimate acts attributed to the political party, and thus, if elected, would pose a threat to democratic order and national security, and those who were only performing "neutral" duties. The restriction affects a large group of persons, making them collectively responsible for the illegitimate activities of the party they belong to, thus lacking individualisation and therefore due process guarantees. This goes against the principle of proportionality and could lead to arbitrariness.

57. The Venice Commission and ODIHR therefore recommend to the Ukrainian authorities, if they wish to disqualify certain members of prohibited parties:

- introducing adequate criteria and an effective individual assessment that would limit restrictions of the right to be elected only to those elected officials of the party whose activities have endangered the national security and the integrity of the democratic State, through their actions and expressions, and/or actively pursued illegal goals of the prohibited parties, and therefore, if elected, would pose a threat to the democratic order and national security of Ukraine;
- once the martial law has been lifted, limiting the effect of the restriction to the shortest possible period of time with ensuring that the longer ineligibility is maintained only for individuals presenting the most serious threat to the democratic order and national security and subject to decision of the relevant courts on their individual liability;
- affording to these persons the full range of procedural safeguards in the assessment process, including a sufficiently reasoned decision and the possibility to challenge the limitation of rights by providing an opportunity to seek judicial review of the decision to deprive them of the right to stand for election.

58. The implementation of these recommendations is essential to avoid upsetting the balance between the legitimate aim of the protection of the State's democratic order and national security and the need to ensure a level playing field, without disproportionately undermining the essential role played by all political actors in ensuring pluralism nor threatening the representative nature of the legislature.

59. The Venice Commission and ODIHR remain at the disposal of the Ukrainian authorities for any further assistance.