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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

UKRAINE

OPINION
ON THE DRAFT LAW ON AMENDMENTS
TO ARTICLE 51 OF THE RULES OF PROCEDURE OF THE
VERKHOVNA RADA
ON POLITICAL LIABILITY OF MEMBERS OF PARLIAMENT
ASSOCIATED WITH POLITICAL PARTIES WHOSE ACTIVITIES
HAVE BEEN SUSPENDED

Adopted by the Venice Commission
at its 136th Plenary Session
(Venice, 6-7 October 2023)

on the basis of comments by

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I. Introduction

1. By letter of 26 May 2023, the Chairman of the Verkhovna Rada of Ukraine requested an opinion of the Venice Commission on the draft law on amendments to Article 51 of the Rules of Procedure of the Verkhovna Rada on political liability of members of Parliament associated with political parties whose activities have been suspended (“the draft law”) ([CDL-REF\(2023\)039](#)).
2. Mr Srdjan Darmanović, Mr Michael Frendo, Ms Janine Otálora Malassis and Mr Kaarlo Tuori acted as rapporteurs for this opinion.
3. On 7-8 September 2023 Mr Darmanović, Mr Frendo and Mr Tuori, together with Mr Pierre Garrone and Mr Domenico Vallario from the Secretariat, had online meetings with the first Deputy Chair 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 the civil society. The Commission is grateful to the Council of Europe Office in Kyiv for the excellent organisation of these meetings.
4. This 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.
5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the meetings on 7-8 September 2023. It was adopted by the Venice Commission at its 136th Plenary Session (Venice, 6-7 October 2023).

II. Background

6. On 24 February 2022, in connection with the military aggression of the Russian Federation against Ukraine, martial law was introduced in Ukraine. The martial law granted the relevant state authorities the necessary powers to avert a threat, repel the armed aggression 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.^{1,2}
7. 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.

¹ See Article 8 of the Law of Ukraine “On the legal regime of martial law” (available [here](#), in Ukrainian only).

² It is to be noted that, soon after the start of the military aggression, Ukrainian authorities also notified to the Council of Europe and the UN Secretary General 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](#). A [similar notification](#) was simultaneously sent to the UN Secretary General regarding derogations from the International Covenant on Civil and Political Rights. Both initial notifications to CoE and the UN, which content is the same, referred to specific derogations from 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.

153/2022.³ Among these parties, the biggest was “Opposition Platform – For life”, a party which, in the 2019 parliamentary elections, received 13,05% of the votes⁴ 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.

8. 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,⁵ 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.

9. The draft law under examination, prepared by individual members of the Verkhovna Rada, was then registered in the latter on 1 June 2022. According to the information provided by domestic interlocutors during online meetings, the draft law has not been either put on the agenda or discussed further since then. Moreover, pursuant to the explanatory note, a long and profound discussion of the proposed norms in parliamentary committees revealed different positions on the issue of assessing the compliance of this draft law with the norms of the Constitution of Ukraine and generally recognised standards of parliamentary activity.

10. 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; 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.

11. It is not within the remit of this opinion to analyse the amendments to the Law on Political Parties of Ukraine and the new grounds that led to the prohibition of these political parties. The Venice Commission will only analyse the draft law in light of relevant European and international standards.

³ 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 [...]”.

⁴ See ODIHR, [Ukraine – Early Parliamentary Elections, 21 July 2019, ODIHR Election Observation Mission Final Report](#), p. 35.

⁵ 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.

III. Analysis

12. The draft law adds a new paragraph eight to Article 51 of the Rules of Procedure of the Verkhovna Rada (entitled “Observance of discipline and ethics by People's Deputies at the Plenary Session”), with the intention of regulating the “political liability” of members of Parliament whose political activities have been suspended.⁶

13. The new paragraph would entitle the Verkhovna Rada to deprive an MP who is (or was) a member of a parliamentary faction whose activities have been suspended by a decree of the President of Ukraine of the right to participate in: (a) plenary and solemn sessions of the Verkhovna Rada; (b) parliamentary hearings; (c) meetings of the Conciliation Board; (d) committees and subcommittees; (e) temporary investigative and temporary special committees; and (f) other parliamentary bodies.

14. Such a decision would be taken at the proposal of an MP or a parliamentary faction, having heard the opinion of the Committee responsible for the rules of procedure, which should prepare an opinion as a matter of urgency, i.e. no later than three days of receipt of the application. The draft law does not provide any criteria that should guide the Committee in issuing its opinion or the Plenary of the Verkhovna Rada in taking its final decision. Furthermore, no procedural rights for the MP(s) under examination are explicitly provided in the text of the draft law or elsewhere in the Rules of Procedure. The application of the draft law is unlimited in time and there appears to be no mechanism of appeal. Lastly, the final decision of the Verkhovna Rada on the limitation is taken by a majority of votes of its constitutional composition,⁷ following a discussion held under a shortened procedure.⁸

15. In light of the abovementioned, the Venice Commission notes that, while the draft law does not explicitly provide for the loss of the parliamentary seat, a decision of the Verkhovna Rada on the “political liability” of an MP would result in the deprivation of all the main parliamentary rights of such an MP: the right to attend sessions, the right to vote, freedom of speech and all other representation rights. The Venice Commission is therefore of the opinion that such a decision would amount to a *de facto* stripping of the parliamentary mandate.

16. The Venice Commission has been repeatedly called in the past to assess legislation providing the loss of parliamentary mandate in the case of electoral and criminal offenders. It has also provided a comparative report on the subject.⁹ The Venice Commission has expressed the view that the withdrawal of the right to serve as a representative due to criminal conviction for serious

⁶ Insofar as the draft law and the opinion refer to “suspended” political parties, the Venice Commission notes that the word “suspended” was used at the time of introduction of the draft law (1 June 2022) since the political parties under consideration had not been prohibited yet. It is the understanding of the Venice Commission, following online meetings with domestic interlocutors, that the draft law would indeed apply, *mutatis mutandis*, to now “prohibited” political parties.

⁷ The constitutional composition of the Verkhovna Rada is 450 deputies, so 226 deputies are needed to take a decision on the “political liability” of the MPs. The Venice Commission was informed during the online meetings that in 2019, the Verkhovna Rada of Ukraine was inaugurated with 26 vacant seats due to the inability to hold elections in temporarily occupied Crimea and parts of Donbas. As of today, there are 404 MPs left in the Rada, mainly due to exits of MPs from the Opposition Platform for Life party. 47 MPs gave up their mandate or lost it since 2019 of which 27 of the vacant seats were since replaced.

⁸ Under Article 31 of the Rules of Procedure, the shortened procedure for discussion of issues at the Plenary Session of the Verkhovna Rada consists in a limitation of the number of MPs who can take the floor to discuss the issue.

⁹ Venice Commission, [CDL-AD\(2015\)036cor](#), *Report on exclusion of offenders from Parliament*.

offences should be considered as a means of preserving democracy and the voters' trust in it.¹⁰ The case under consideration is however new. The MPs that might be potentially affected by the draft law have neither been convicted, nor charged, for committing a criminal offence. The Venice Commission is therefore called to assess a draft law that would *de facto* deprive MPs of their parliamentary rights because of their (previous) political party affiliation.

17. The Venice Commission will therefore examine the draft law in light of the European Court of Human Rights's jurisprudence on the loss of parliamentary mandate.

A. Interference with the right to sit as an MP: general considerations

18. Article 3 of Protocol No. 1 to the European Convention on Human Rights ("ECHR") enshrines a characteristic principle of an effective political democracy, and is accordingly of prime importance in the Convention system. Free elections and freedom of expression, and particularly freedom of political debate, form the foundation of any democracy.¹¹ Democracy in turn constitutes a fundamental element of the "European public order", and the rights guaranteed under Article 3 of Protocol No. 1 to the ECHR are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law.¹² Political rights of participation are further enshrined in Article 25 of the International Covenant for Civil and Political Rights (ICCPR), which, together with Article 3 of Protocol no. 1 to the ECHR,¹³ enshrines the principle of equal treatment of all citizens in the exercise of their electoral rights.

19. Depriving MPs of their parliamentary mandates amounts to an interference with their electoral rights guaranteed in Article 3 of Protocol 1 to the ECHR. Such Article guarantees not only the individual's right to stand for election but also, once elected, the individual's right to sit as a member of Parliament.¹⁴ The rationale behind this rule is that the substantive right to free elections protected by Article 3 of Protocol No. 1 to the ECHR would be an empty shell if the legal protection of that right did not extend to the elected representatives in carrying out their duties on behalf of the voters.¹⁵

20. Depriving lawfully elected representatives of their mandate to serve in parliament due to their political affiliation also amounts to an interference with the people's choice of legislature.¹⁶ Indeed the Venice Commission has previously found that the sole legitimate sanction which an elected member may incur must stem from the electorate. It is for the electorate not to return the member on expiry of his/her mandate if s/he has not conscientiously discharged it.¹⁷ A parallel might be drawn with the Venice Commission's findings on the recall of elected representatives and the prohibition of imperative mandate. The Venice Commission in fact considered that recall of

¹⁰ 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.

¹¹ ECtHR, [Mathieu-Mohin and Clerfayt v. Belgium](#), no. 9267/81, 2 March 1987, § 47.

¹² Among many others, ECtHR, [Selahattin Demirtaş v. Turkey \(no. 2\) \[GC\]](#), no. 14305/17, 22 December 2020, § 382.

¹³ ECtHR, [Partija "Jaunie Demokrāti" and Partija "Mūsu Zeme" v. Latvia \(dec.\)](#) (in French only), nos. 10547/07 and 34049/07, 29 November 2007.

¹⁴ The Venice Commission has indeed noted that in international human rights law, exercising the mandate as a lawfully elected representative of parliament is a corollary of the right to stand for election. See Venice Commission, [CDL-AD\(2019\)029](#), *Amicus curiae brief for the Constitutional Court of Ukraine on Draft Law 1027 on the early termination of a Deputy's mandate*, § 11.

¹⁵ ECtHR, [Sadak and Others v. Turkey \(no. 2\)](#), nos. 25144/94 and 3 others, 11 June 2002, § 33, and EComHR, [M. v. the United Kingdom](#), no. 10316/83, 7 March 1984. See also Venice Commission, [CDL-AD\(2015\)036cor](#), cited above, §§ 28-29.

¹⁶ [CDL-AD\(2019\)029](#), cited above, § 26.

¹⁷ Venice Commission, [CDL-AD\(2002\)012](#), *Opinion on the draft revision of the Romanian Constitution*, § 27.

elected representatives goes against the very principle of the free representative mandate for a determined period on which today's democracies are based and would contradict the prohibition of the imperative mandate, an essential characteristic of a system of representative and deliberative democracy.¹⁸

21. While the rights guaranteed by Article 3 of Protocol No. 1 to the ECHR are not absolute and there is room for "implied limitations", the margin of appreciation of which States dispose in this sphere is not all-embracing. To comply with the requirements of Article 3 of Protocol No. 1 to the ECHR, the restrictions imposed should not curtail the right in question to such an extent as to impair its very essence and deprive it of its effectiveness; they should meet the requirements of lawfulness, they should pursue a legitimate aim; and the means employed should not be disproportionate. In particular, such restrictions must not "thwart the free expression of the opinion of the people in the choice of the legislature".^{19,20}

22. Such legal considerations are deeply intertwined with the role the political opposition plays in a democracy. The Venice Commission has previously stated that political opposition inside and outside of parliament is an essential component of a well-functioning democracy.²¹ Accordingly, the preservation of the rights and prerogatives of MPs is a question going to the heart of democracy.²² All MPs should have the same individual rights irrespective of whether they belong to the ruling majority, to the opposition, or are independent.²³

B. Prescribed by law

23. In order to be compatible with the ECHR, any interference with Article 3 of Protocol no. 1 to the ECHR shall be prescribed by law.

24. The Venice Commission notes that the procedure leading to the *de facto* stripping of the mandate would be provided in the Rules of Procedure of the Verkhovna Rada. Despite the fact that it previously held that it is legitimate to deal with the loss of mandate in ordinary legislation,²⁴ the Venice Commission notes that the Constitution of Ukraine already foresees an exhaustive list of cases of early termination of a parliamentary mandate.

¹⁸ Venice Commission, [CDL-AD\(2019\)011rev](#), *Report on the recall of mayors and local elected representatives*, §§ 13-20. See also Venice Commission-OSCE/ODIHR, [CDL-AD\(2020\)032](#), *Guidelines on Political Party Regulation (second edition)*, § 131 ("[...] According to a generally accepted democratic principle, the parliamentary mandate belongs to an individual MP, because he/she receives it from voters via universal suffrage and not from a political party. [...]")

¹⁹ ECtHR, [Paksas v. Lithuania \[GC\]](#), no. 34932/04, 6 January 2011, §§ 96-97.

²⁰ The Venice Commission is aware that Ukraine has notified derogations to several rights under the ICCPR and the ECHR, including Article 3 of Protocol no. 1, see footnote 1 above. In this regard, it notes that, under derogation, the proportionality test employed is different (Article 4(1) ICCPR and Article 15 ECHR refer "*to the extent strictly required by the exigencies of the situation*") and that 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. However, as it will be noted below in paragraph 35, the limitation of parliamentary rights seems to be unlimited in time and might therefore go beyond the derogation period. Accordingly, the Venice Commission will analyse the draft law under the "classic" proportionality test. 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*.

²¹ Venice Commission, [CDL-AD\(2019\)015](#), *Parameters on the relationship between the parliamentary majority and the opposition in a democracy: a checklist*, § 2, quoting PACE [Resolution 1601\(2008\)](#), *Procedural guidelines on the rights and responsibilities of the opposition in a democratic parliament*.

²² CDL-AD(2019)029, cited above, § 17.

²³ CDL-AD(2019)015, cited above, § 40.

²⁴ CDL-AD(2015)036cor, cited above, § 165.

25. In particular, the Commission notes that Article 81 of the Ukrainian Constitution provides that “[t]he authority of a People's Deputy of Ukraine shall terminate prior to the expiration of his or her term in office in the event of:

- (1) his or her resignation through a personal application;
- (2) a guilty verdict against him or her entering into legal force;
- (3) a court declaring him or her incapacitated or missing;
- (4) termination of his or her citizenship or his or her departure from Ukraine for permanent residence abroad;
- (5) his or her failure, within twenty days from the date of the emergence of circumstances leading to the infringement of requirements concerning the incompatibility of the deputy's mandate with other types of activity, to remove such circumstances;
- (6) his or her failure, as having been elected from a political party (an electoral bloc of political parties), to join the parliamentary faction representing the same political party (the same electoral bloc of political parties) or his or her exit from such a faction;
- (7) his or her death”.

26. Several interlocutors, and in particular non-governmental organisations and opposition parties, highlighted that the draft law would run against the Constitution, notably its Article 81. At this stage, the Venice Commission stresses 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 Article 81 of the Constitution on the early termination of an MP's mandate.

27. Insofar as the foreseeability of the draft law is concerned, the Venice Commission will consider the absence of guiding criteria to perform the (individual) assessment of the “political liability” of MPs in its examination of the proportionality of the measure in section D. below.

C. Pursuant to a legitimate aim

28. Article 3 of Protocol No. 1 to the ECHR does not contain a list of “legitimate aims” capable of justifying restrictions on the exercise of the rights it guarantees. To be legitimate, the aim the restriction pursues must be compatible with the principle of the rule of law and the general objectives of the Convention.²⁵

29. The Venice Commission considers that the aim pursued by the draft law should be considered as legitimate. The draft law has been issued in a very unique historical situation. The Russian Federation's full-scale military aggression is threatening the life of the Ukrainian nation and its existence as a democratic polity.

30. The Venice Commission therefore finds it legitimate, in principle, for the Ukrainian authorities to aim at restricting activities of “*persons who aim to undermine the unity and state sovereignty of Ukraine, promoting the idea of the so-called "Russian world", which poses a particular public danger [...] in order to ensure stable political and organisational work of the Parliament, protection of the state interests of Ukraine, security of the sovereignty and territorial integrity of the state*”.²⁶ In this regard, the Venice Commission considers that the Ukrainian authorities legitimately aim at protecting, *inter alia*, the State's independence, the democratic order and national security.

D. Proportionality of the means employed

31. Turning to the assessment of the proportionality of the interference, the Venice Commission considers at the outset that the nature and severity of the interferences are factors to be taken

²⁵ Among many others, ECtHR, [Ždanoka v. Latvia \[GC\]](#), no. 58278/00, 16 March 2006, §115.

²⁶ Excerpt from the explanatory note to the draft law.

into account when assessing their proportionality.²⁷ In this regard the draft law would impose harsh measures on the MPs who belong(ed) to the suspended political parties, including members who may have left the party before its suspension. As outlined above, in fact, in the opinion of the Venice Commission the deprivation of the right to participate in: (a) plenary and solemn sessions of the Verkhovna Rada; (b) parliamentary hearings; (c) meetings of the Conciliation Board; (d) committees and subcommittees; (e) temporary investigative and temporary special committees; and (f) other parliamentary bodies, would amount to a *de facto* stripping of the mandate. There seems to be no possibility, in the draft law, of limiting only some of the listed rights rather than the whole set of rights.

32. Insofar as the foreseeability of the interference is concerned, the Venice Commission notes that in the procedure before the Verkhovna Rada, the latter “may” decide to deprive an MPs of his/her representation rights. It therefore seems that, at least in principle, the deprivation of parliamentary rights stems from an individualised decision. However, the draft law does not provide any criteria that could guide the decision of the Committee in charge or the Plenary. Such a lack of criteria would result in the deprivation of the parliamentary rights of all the MPs who belonged to the suspended political parties, regardless of their personal political activities and of their active involvement in the illegitimate activities of the suspended parties.

33. In light of the above, the Venice Commission finds that, while *prima facie* accompanied by some sort of individualised decision-making, the measure under consideration is of a general nature. Indeed, the lack for individualised decisions would make current or former members of suspended political parties collectively responsible for the illegitimate activities of the party they belong to, leading in practice to a general, automatic and indiscriminate application of restrictive measures, contrary to the principles of proportionality and prohibition of arbitrariness guaranteed by Article 3 of Protocol 1 to the ECHR and other international treaties and standards in the field of elections.²⁸

34. The Venice Commission is of the view that the mandate of the representative remains personal and should not be linked inexorably to the existence of a party, whether in Parliament or outside it. Indeed MPs are supposed to represent the people and not their parties.²⁹ This is a cornerstone of pluralist democracies: a parliamentarian represents the people and of the nation as a whole and not just a part, or a specific group of people or a territorial part of the country.³⁰

35. The Venice Commission is further concerned by the fact that the limitation of rights seems to be unlimited in time. In assessing the proportionality of a general measure restricting the exercise of the rights guaranteed by Article 3 of Protocol No. 1 to the ECHR, the Venice Commission recalls that the European Court of Human Rights found that decisive weight should be attached to the existence of a time-limit and the possibility of reviewing the necessity of the measure in question. The need for such a possibility is linked to the fact that the assessment of the issue must have regard to the historical and political context in the State concerned; since this context is capable of evolving, not least in terms of the perceptions which voters may have of the circumstances that led to the introduction of such a general restriction, the initial justification for the restriction may subside with the passing of time.³¹

²⁷ *Sadak and Others v. Turkey* (no. 2), cited above, § 39.

²⁸ In its [General Comment no. 25](#), the United Nations Human Rights Committee has found that the grounds for the removal of elected office holders should be established by laws based on objective and reasonable criteria and incorporating fair procedures, see § 16.

²⁹ Venice Commission, [CDL-INF\(2001\)11](#), *Consolidated Opinion on the Ukraine Constitutional reform project*, p. 2.

³⁰ *Ibidem*.

³¹ 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](#), Request no. P16-2020-002, 8 April 2022, § 90, with further references.

36. The lack of sufficient procedural guarantees in the decision-making is another source of concern. The Venice Commission has previously found that in the context of a procedure of disqualification from holding an elective office, procedural guarantees should include the pluralistic composition of the parliamentary committee tasked with the preparation of the case; its nature as standing committee; the right of the MP to submit arguments, to appear before the Parliament in person and to be assisted by an attorney; the holding of a public hearing and a public decision.³² The possibility to apply to a court should not be seen as a necessary requirement if the procedure before Parliament meets these requirements.³³ However, the Venice Commission was referring to cases where the decision by Parliament had to be seen as a measure of implementation of the disqualification decided by a judge or by statute.³⁴ In the case under consideration, on the contrary, there would be no prior court decision and the Parliament itself would be called to decide on the restriction of rights (on the basis of criteria that need to be defined in the law). In such a case, the Venice Commission considers that a full array of procedural guarantees, including the right to appeal to an independent judicial authority the decision of the Parliament, needs to be guaranteed.

37. The Venice Commission considers it important that even in the extraordinary situations of wartime judicial review should be retained, in order for the application of laws and/or measures intended for the security of the country not to be utilised in a “settling of scores” outside the aims of the very same laws/measures.

38. Based on the foregoing, the Venice Commission considers that in the absence of clear criteria, a time limitation and adequate procedural guarantees, neither the (apparent) individual assessment nor the involvement by a parliamentary committee can be considered as sufficient guarantees against arbitrariness and disproportionality. The Venice Commission considers that the draft law shall not be adopted as it stands, as it is at odds with the principles of representative democracy and rule of law.

39. To avoid upsetting the balance between the legitimate aim of the protection of the State’s independence, 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, including the opposition, in ensuring pluralism nor threatening the representative nature of the legislature, the Venice Commission recommends:

- introducing adequate criteria and an effective individual assessment that would limit restrictions of parliamentary rights only to those MPs whose activities have endangered national security and public order, through their actions and expressions, and/or actively pursued illegal goals of the prohibited parties;³⁵
- introducing the possibility for the Committee and the Plenary of limiting only some of the listed rights (and not all in block), ensuring a relation with the nature of the activity which is prohibited and the specific risks of participation;
- limiting the applicability *ratione temporis* of the law, as the context that led to the introduction of this draft law is capable of evolving;
- affording a full array of procedural guarantees to the MPs, including the possibility to challenge the limitation of rights before an independent judicial authority.

E. Interference with other Convention rights

40. The Venice Commission considers that the draft law, by preventing the MPs from expressing their views in Parliament, also interferes with the freedom of expression, as guaranteed by Article

³² CDL-AD(2017)025, cited above, § 27.

³³ *Ibidem*, § 28.

³⁴ *Ibidem*, § 25.

³⁵ Although the Venice Commission notes that in similar situations the criminal code would already cover most of these (illegal) conducts.

10 of ECHR. There is undoubtedly a link between Article 10 of the ECHR and Article 3 of Protocol No. 1 to the ECHR, namely the need to guarantee respect for pluralism of opinion in a democratic society through the exercise of civic and political freedoms.³⁶

41. The Venice Commission recalls that a democracy should not fear debate, even on the most shocking or anti-democratic ideas. It is through open discussion that these ideas should be countered and the supremacy of democratic values be demonstrated. [...] Persuasion through open public debate, as opposed to ban or repression, is the most democratic means of preserving fundamental values.³⁷

42. In this regard, the European Court of Human Rights has consistently underlined the particular importance of freedom of expression for Members of Parliament, this being political speech par excellence. In particular, the Court has attached importance to the protection of the parliamentary minority from abuse by the majority.³⁸ At the same time, the Parliamentary Assembly has underlined that freedom of speech is not unlimited and that hate speech as well as calls for the violent overthrow of democratic institutions are not protected. Politicians have an even greater responsibility, due to their high visibility, to refrain from such abuses.³⁹ Similarly, the Court has found that any remark directed against the Convention's underlying values would be removed from the protection of Article 10 by Article 17.⁴⁰ Interferences with the MPs' freedom of expression are therefore possible in view of their institutional role (in particular to prevent forms of expression such as direct or indirect calls for violence). However, such interferences call for the closest and strictest scrutiny.⁴¹

43. Having found above that the draft law, as it stands, disproportionately interferes with the rights under Article 3 of Protocol no. 1 to the ECHR, the Venice Commission finds that it is not necessary to analyse in detail the interference with the MPs' freedom of expression. The considerations made above with regard to the proportionality of the interference with Article 3 of Protocol no. 1 to the ECHR apply in fact *a fortiori* to the interference with the freedom of expression, where the margin of appreciation of the States is considerably stricter.⁴²

IV. Conclusions

44. The Venice Commission has been requested by the Chairman of the Verkhovna Rada of Ukraine to prepare an opinion on the draft law on amendments to Article 51 of the Rules of Procedure of the Verkhovna Rada on political liability of Members of Parliament associated with political parties whose activities have been suspended. Such a draft law, if adopted, would considerably limit the parliamentary rights of MPs in office who were members of political parties that have been suspended (now dissolved) in Ukraine.

45. Free elections and freedom of expression, and particularly freedom of political debate, form the foundation of any democracy. Democracy in turn constitutes a fundamental element of the "European public order", and the rights guaranteed under Article 3 of Protocol No. 1 to the ECHR are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law.

³⁶ *Ždanoka v. Latvia [GC]*, cited above, § 115.

³⁷ Venice Commission, [CDL-AD\(2008\)026](#), *Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred*, § 44.

³⁸ A summary of the ECtHR's jurisprudence on freedom of expression of members of parliament can be found in *Selahattin Demirtaş v. Turkey (no. 2) [GC]*, cited above, §§ 242-245.

³⁹ Parliamentary Assembly of the Council of Europe, [Resolution 2381\(2021\)](#), *Should politicians be prosecuted for statements made in the exercise of their mandate?*, § 3.

⁴⁰ ECtHR, [Seurot v. France \(dec.\)](#), no. 57383/00, 18 May 2004.

⁴¹ ECtHR, [Pastörs v. Germany](#), no. 55225/14, 3 October 2019, § 38.

⁴² *See a contrario, Ždanoka v. Latvia [GC]*, cited above, § 115.

46. The Venice Commission is of the opinion that the interference with the MPs rights provided for in the draft law is a serious one and would amount to a *de facto* stripping of their mandate. It is the first time that the Venice Commission has to analyse the loss of parliamentary mandate because of (previous) political party affiliation.

47. The loss of mandate interferes with the MPs' right to sit as an elected parliamentarian, a corollary of the right to free and fair elections enshrined in Article 3 of Protocol No. 1 to the ECHR. Restriction to this right are possible. However, they should not curtail the right in question to such an extent as to impair its very essence and deprive it of its effectiveness; they should pursue a legitimate aim; and the means employed should not be disproportionate. In particular, such restrictions must not thwart "the free expression of the opinion of the people in the choice of the legislature".

48. In light of the unique historical situation which Ukraine is facing, the Venice Commission is 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.

49. However, an analysis of the draft law shows that the severity of the sanctions, coupled with the lack of a real individual assessment, the unlimited application *ratione temporis* and the lack of due process guarantees carry the risk of its arbitrary and disproportionate implementation.

50. Accordingly, the Venice Commission considers that the draft law should not be adopted as it stands, as it is at odds with the principles of representative democracy and rule of law. Should the legislator intend to pursue the draft law, the Venice Commission recommends:

- introducing adequate criteria and an effective individual assessment that would limit restrictions of parliamentary rights only to those legislators whose activities have endangered national security and public order, through their actions and expressions, and/or actively pursued illegal goals of the prohibited parties;
- introducing the possibility for the Committee and the Plenary of limiting only some of the listed rights (and not all in block), ensuring a relation with the nature of the activity which is prohibited and the specific risks of participation;
- limiting the applicability *ratione temporis* of the law, as the context that led to the introduction of this draft law is capable of evolving;
- affording a full array of procedural guarantees to the MPs, including the possibility to challenge the limitation of rights before an independent judicial authority.

51. This would be essential to avoid upsetting the balance between the legitimate aim of the protection of the State's independence, democratic order and national security and: (i) the need to ensure a level playing field, without disproportionately undermining the essential role played by all political actors, including the opposition, in ensuring pluralism nor threatening the representative nature of the legislature and, (ii) the basic principle underlying the freedom of expression according to which a democracy should not fear debate, even on the most shocking or anti-democratic ideas.

52. The Venice Commission remains at the disposal of the Ukrainian authorities for any further assistance.