

## IFES Comment

# IFES Ukraine Comment on Recent Venice Commission Opinions on New Ukrainian Legislation

23 October 2023

## Introduction

On October 6-7, 2023, the Venice Commission of the Council of Europe held its 136<sup>th</sup> plenary session in Venice and adopted **opinions on two draft laws and one adopted law of Ukraine** prepared at the request of different entities of the Verkhovna Rada, or Parliament of Ukraine. One of the opinions was prepared jointly with the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Co-operation in Europe (OSCE).

- The joint opinion on draft law no. 9081 “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” (Draft Law no. 9081) was requested by letter to the Venice Commission on April 28 by the Parliamentary Assembly of the Council of Europe, and by letter to ODIHR on April 24 and 28, 2023, by the Human Rights and European Union Integration committees of the Parliament of Ukraine, respectively.
- The Venice Commission’s opinion on draft law no. 7424 “On amendments to article 51 of the rules of procedure of the Verkhovna Rada on the political liability of members of parliament associated with political parties whose activities have been suspended” (Draft Law no. 7424) was requested on May 26, 2023, by Ruslan Stefanchuk, Chairman of the Parliament of Ukraine.
- The Venice Commission’s urgent follow-up opinion to the opinions on the law of Ukraine no. 3277-IX of July 27, 2023, “On amendments to certain legislative acts of Ukraine to clarify the provisions on the competitive selection of candidates for the position of judge of the constitutional court of Ukraine” (Law no. 3277-IX) was requested on September 5, 2023, by Ruslan Stefanchuk, Chairman of the Parliament of Ukraine.

All three law texts were examined for compliance with relevant European and international standards. The Venice Commission plenary session unanimously adopted the opinions on October 6, 2023.

## Executive Summary

The two draft laws analyzed by the Venice Commission and ODIHR deal with the topic of lustration and could, if enacted, profoundly impact Ukrainian citizens’ right to free elections enshrined in the Constitution of Ukraine and European and international conventions.

Draft law no. 9081 envisages that incumbent members of Parliament, mayors, and members of local councils elected on the list of political parties that have been banned by courts (so-

called pro-Russian parties) will be ineligible to stand for election for a period of 10 years after the lifting of martial law.

Draft law no. 7424 suggests amending Article 51 of the Rule of Procedure of the Parliament of Ukraine allowing the parliament to restrict the rights of MPs from prohibited parties (i.e., Opposition Platform for Life) to take part in plenary sessions, hearings, committees, and subcommittees of parliament.

These two acts pursue complementary lustration aims. Draft law no 9081 suggests barring certain incumbents from running for future office for 10 years, while draft law no. 7424 envisages measures to curtail the mandates of certain incumbent MPs to limit their ability to influence the legislative process in Parliament.

Although the Venice Commission (and ODIHR) found both lustration laws, in principle, to be pursuing legitimate aims, they noted that the proposed restrictions on the right to be elected (the right to stand and to fully exercise the elected mandate) apply to a group of people without an individualized assessment of their active involvement in the illegitimate activities of the prohibited parties. Both opinions offered recommendations to improve the draft laws, calling, among others, for ensuring that the persons affected by the law would be provided an individual assessment and sufficient procedural safeguards such as judicial review of their case and the right to appeal.

Although it was not in their remit to assess compliance with the Constitution of Ukraine, the Venice Commission and ODIHR in their opinions on the two draft lustration acts commented on the issue of their constitutionality noting that several Ukrainian interlocutors had raised such concerns. Regarding Draft Law 7424 called for the Constitutional Court of Ukraine, once fully operational, to resolve the alleged conflict of legal norms and interpret the extent to which the draft law may comply with Article 81 of the Constitution on the early termination of an MP's mandate.

Law no. 3277-IX – on a new mechanism for selecting judges for the Constitutional Court of Ukraine – was examined favorably by the Venice Commission in an urgent follow-up opinion. The law had previously been subject to extensive review by the Venice Commission. The parliament of Ukraine implemented most of the then-offered recommendations in July this year, so it now complies with international standards and best practices. Hence, identifying and appointing international and national members for the Advisory Group of Experts to assist the Ukrainian Parliament in selecting candidates for Constitutional Court judges is expected to begin soon.

IFES Senior International Adviser Harald H. Jepsen took part in the deliberations of the Council for Democratic Elections which comprises representatives of the Parliamentary Assembly of the Council of Europe, the Congress of Local and Regional Authorities of the Council of Europe, and the OSCE/ODIHR. He also attended the plenary session of the Venice Commission on behalf of IFES.

## **Outline of the Venice Commission and ODIHR opinions**

- 1) Draft Law 9081 “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”. It was tabled in Parliament on March 6, 2023, by Halyna Yanchenko and other Servant of the People MPs (including the chair of the

Humanitarian Policy and the International Relations committees, respectively) and one MP from Holos.

The Venice Commission and ODIHR prepared a [Joint Opinion](#) on this draft law.

As the Joint Opinion notes, draft law 9081 is de facto a lustration act that introduces restrictions on the passive suffrage right of a member of the Parliament of Ukraine (MP), a member of a local self-government council, and a village, town, or city mayor from a party whose activities are prohibited. The draft law contains a sunset clause whereby the restrictions on passive suffrage rights will cease to be effective 10 years after the termination of martial law in force since February 24, 2023.

The Joint Opinion considers the draft law 9081, in principle, to be pursuing a legitimate aim: “Given the exceptional historical situation in which Ukraine now finds itself, the Venice Commission and the ODIHR believe that the draft law is legitimately aimed at protecting, among other things, state independence, the democratic system and national security.”

However, the Venice Commission and ODIHR found that the law contradicts Ukraine’s international obligations as a signatory to the European Convention on Human Rights and the International Covenant on Civil and Political Rights: “[the draft law] is automatically applied on the sole basis of party membership and that the person held an elected office, and indiscriminately, without distinguishing between party members who are actively involved in illegal actions attributed to the political party, and therefore, if elected, would pose a threat to the democratic order and national security, as well as those who performed ‘neutral’ functions.”

The Joint Opinion encouraged the Parliament of Ukraine to find a better 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.”

The Venice Commission and ODIHR offered three recommendations to the Ukrainian lawmakers. First, they recommended introducing adequate criteria and an effective individual assessment that would limit restrictions of the right to be elected only to those party officials whose activities have endangered the national security and the integrity of the democratic state and therefore if elected would pose a threat to the democratic order and national security of Ukraine. Second, to limit the restriction’s effect to the shortest possible period and ensure longer ineligibility only for those who present the most severe threat to the democratic order and national security based on a court decision on their individual liability. Finally, to afford the persons affected by the law the full range of procedural safeguards including an opportunity to seek judicial review of the decision to deprive them of the right to stand for election.

The Venice Commission and ODIHR did not assess draft law 9081 for compliance with the Constitution of Ukraine but noted that Ukrainian civil society and opposition parties had raised concerns about its constitutionality during consultations with the experts preparing the joint opinion.

- 2) Draft law no. 7424 “On amendments to article 51 of the rules of procedure of the Verkhovna Rada on the political liability of members of parliament associated with political parties whose activities have been suspended”. Draft Law 7424 was tabled in parliament on June 1, 2022, by MPs Batenko, Fris, and others (predominantly independent MPs affiliated with former MP Ihor Kolomoyskyy’s UKROP Party).

Draft law no. 7424 was introduced by individual members of the Parliament of Ukraine on June 1, 2022. It adds a new paragraph eight to Article 51 of the Rules of Procedure of the Parliament (entitled “Observance of discipline and ethics by People’s Deputies at the Plenary Session”), intended to regulate the “political liability” of MPs whose political activities have been suspended.

The new paragraph would entitle the Parliament 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 (and now dissolved) of the right to participate in, among others, plenary sessions, hearings, and committees and subcommittees of the parliament.

In its [Opinion](#) on the draft law, the Venice Commission found that such a decision would *de facto* strip MPs from the now-dissolved Opposition Platform for Life political party and its parliamentary faction of their parliamentary mandate. Therefore, it assessed the draft law as an act that would *de facto* deprive MPs of their parliamentary mandate because of their (previous) political party affiliation.

The Venice Commission emphasized that the MPs in question have neither been convicted, nor charged, for committing a criminal offense and that, if adopted, the draft law would not offer the individuals affected by the law procedural guarantees of judicial review and the right to appeal.

The Venice Commission found that the stipulated action amounts to an interference with the electoral rights of MPs and the people’s choice of legislature as guaranteed in Article 3 of Protocol 1 to the European Convention on Human Rights (ECHR).

Additionally, the Venice Commission shared the concern raised by several interlocutors, in particular Ukrainian civil society organizations and opposition parties, that the draft law if adopted would run against Article 81 of the Constitution of Ukraine which already foresees an exhaustive list of grounds for terminating a parliamentary mandate early. It stressed that “ultimately it would be for the Constitutional Court of Ukraine, once fully operational, to resolve the alleged conflict of norms and interpret the extent to which the draft law may comply with Article 81 of the Constitution (...)”.

The Venice Commission believes that a parliamentary representative's mandate remains personal and should not be linked inexorably to the existence of a party, whether in Parliament or outside it – i.e., MPs are supposed to represent the people and not their parties.

Considering the unique historical situation that Ukraine is facing, the Venice Commission holds that the draft law legitimately aims, in principle, at protecting, *inter alia*, the State’s independence, democratic order, and national security. However, the analysis of the draft law carried out by the Venice Commission “shows that the severity of the sanctions, the lack of an individual assessment, the unlimited application of the stipulated measures, and the lack of due process guarantees carry the risk of its arbitrary and disproportionate implementation.”

- 3) Law no. 3277-IX “On amendments to certain legislative acts of Ukraine to clarify provisions on the competitive selection of candidates for the position of judge of the Constitutional Court of Ukraine”. The draft law was tabled on May 25, 2023, by Servant of the People MPs (including the Chair of the Legal Policy Committee) and adopted on July 27, 2023.

In its urgent follow-up [Opinion](#) on Law no. 3277-IX, the Venice Commission assessed favorably three new amendments to the Law adopted by the Parliament of Ukraine on 27 July

and promulgated by the President of Ukraine on 19 August 2023. It concluded “with satisfaction that the key recommendations it had formulated (...) have been followed in the Law adopted on 27 July 2023”.

The Law aims to set up an independent body called the Advisory Group of Experts (AGE) to assist the three appointing bodies in assessing the moral qualities and legal competence of candidate judges of the Constitutional Court of Ukraine. The six-member AGE which will include three members elected by international organizations is part of a new mechanism for selecting judges of the Constitutional Court of Ukraine expected to ensure the highest level of independence and impartiality of the Court.

The Venice Commission informed that “it may now proceed with the selection of one member and one substitute member of the Advisory Group of Experts”.

### **IFES Comment**

IFES Ukraine considers that the recent law amendments adopted by the Parliament of Ukraine and the favorable opinion of the Venice Commission on these amendments are bringing Ukraine a step closer to begin filling the vacant judges’ positions on the Constitutional Court and thereby overcoming the long-lasting impasse of the Court.

IFES agrees with the findings and conclusions of the Venice Commission (and ODIHR) in their three opinions.

**For more information about the topic of lustration in Ukraine see the following articles:**

- 1) “Lustration as part of transitional justice. What should be considered to avoid mistakes?”, authored by Oleksandr Kliuzhev, available via the [link](#).
- 2) “Russia’s Willing Collaborators: Ukraine Needs a Measured Lustration Policy to Strengthen Security and Rebuild Democracy”, authored by Geoff Dancy, Kathryn Sikkink, Mykhailo Soldatenko, and Patrick Vinck, available via the [link](#).

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