



Strasbourg / Warsaw, 18 December 2023

CDL-AD(2023)049
ODIHR-492/2023

Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

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

REPUBLIC OF MOLDOVA

**JOINT *AMICUS CURIAE* BRIEF ON THE INELIGIBILITY OF PERSONS
CONNECTED TO POLITICAL PARTIES DECLARED
UNCONSTITUTIONAL**

**Approved by the Council for Democratic Elections
at its 79th meeting (Venice, 14 December 2023) and
adopted by the Venice Commission at its 137th Plenary Session
(Venice, 15-16 December 2023)**

On the basis of comments by

Mr Srdjan DARMANOVIĆ (Member, Montenegro)

Mr Michael FREND (Member, Malta)

Ms Janine OTÁLORA MALASSIS (Substitute Member, Mexico)

Mr Kaarlo TUORI (Honorary President of the Venice Commission)

Ms Smaranda SANDULESCU (ODIHR, Expert)

Ms Barbara JOUAN STONESTREET (ODIHR, Expert)

Opinion co-funded
by the European Union



Table of contents

I.	Introduction	3
II.	Background and scope of the joint <i>Amicus curiae</i> brief	3
III.	Analysis and recommendations.....	6
A.	Can the criteria established in Article 16 para. (2) lit. f) of the Law be considered justified, from the perspective of the right to be elected?	6
1.	Introduction	6
2.	Prescribed by law	7
3.	Legitimate aim.....	8
4.	Proportionality and absence of arbitrariness.....	9
B.	Can the prohibition to run for elections applied to suspected, accused or indicted persons provided for in article 16 para. (2) lit. f) point 1 of Law no. 280 be assimilated with a declaration regarding the guilt of the candidate in the sense of article 6 § 2 of the European Convention on Human Rights?	10
C.	Does the Law no. 280 provide sufficient procedural guarantees able to prevent arbitrariness in the case of candidates who were prohibited from running in the elections?.....	12
IV.	Conclusion	14

I. Introduction

1. By letter of 3 November 2023, the President of the Constitutional Court of the Republic of Moldova requested an *Amicus curiae* brief on the ineligibility of persons connected to political parties declared unconstitutional.

2. More precisely, in relation to a case pending before it, the Court asked for the following questions concerning the Law No. 280 of 4 October 2023 amending the Electoral Code (“the amendments”, [CDL-REF\(2023\)052](#)):

1. *Whether the criteria established in article 16 para. (2) lit. f) of the Law can be considered justified, from the perspective of the right to be elected?*
2. *Whether the prohibition to run for elections applied to suspected, accused or indicted persons provided for in article 16 para. (2) lit. f) point 1 of Law no. 280 can be assimilated with a declaration regarding the guilt of the candidate in the sense of article 6 § 2 of the European Convention on Human Rights?*
3. *Whether the Law no. 280 provides sufficient procedural guarantees able to prevent arbitrariness in the case of candidates who were prohibited from running in the elections?*

3. As this *Amicus curiae* brief is intrinsically related to the Joint Follow-up Opinion of the Venice Commission and ODIHR to the Joint Opinion on amendments to the Electoral Code and other related laws concerning ineligibility of persons connected to political parties declared unconstitutional,¹ which assesses the amendments, it was prepared jointly by the Venice Commission and ODIHR.

4. Mr Srdjan Darmanović, Mr Michael Frendo, Ms Janine Otálora Malassis and Mr Kaarlo Tuori acted as rapporteurs of the Venice Commission for this *Amicus curiae* brief. Ms Smaranda Sandulescu and Ms Barbara Jouan Stonestreet were appointed as experts for ODIHR.

5. This Joint *Amicus curiae* brief was prepared in reliance on the English translation of the amendments. The translation may not accurately reflect the original version on all points.

6. This Joint *Amicus curiae* brief was drafted on the basis of comments by the Venice Commission’s rapporteurs and ODIHR experts. It was approved by the Council for Democratic Elections at its 79th meeting (Venice, 14 December 2023) and examined at the meeting of the Sub-Commission on Democratic Elections on the same day. It was adopted by the Venice Commission at its 137th Plenary Session (Venice, 15-16 December 2023).

II. Background and scope of the Joint *Amicus curiae* brief

7. At its 136th Plenary Session (6-7 October 2023), the Venice Commission adopted a Joint Opinion of the Venice Commission and ODIHR on previous amendments to the Electoral Code and other related laws concerning ineligibility of persons connected to political parties declared unconstitutional ([CDL-AD\(2023\)031](#)), which stated:

“58. The Law which provides for the ineligibility to be elected in presidential, parliamentary and local elections, for five years, of members of the executive body of a party declared unconstitutional and members of such a party who hold an elected office, restricts the right to stand for election as enshrined, *inter alia*, in Article 3 of Protocol 1 to the ECHR and Article 25 ICCPR.

¹ [CDL-AD\(2023\)048](#).

59. While this restriction may respond to the legitimate aim to defend the Constitution and the integrity of the democratic State, it applies automatically on the sole basis of the party membership and holding of a specific position, and indiscriminately without distinguishing between party members who may have actively contributed to the illegitimate acts attributed to the political party, from those who were only performing neutral duties or were unaware of the potential unlawful acts committed by the party. 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.

60. The Venice Commission and ODIHR therefore recommend to the Moldovan authorities, if they wish to prevent certain members of parties declared unconstitutional from holding certain elected offices:

- introducing adequate criteria and an effective individual assessment that would limit restrictions of the right to be elected only to those members and/or elected officials of the party whose activities have endangered the Constitution and the integrity of the democratic State, through their actions and expressions, and/or actively pursued the (illegal) goals of the unconstitutional parties;
- 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.”

8. On 3 October 2023, the Constitutional Court of the Republic of Moldova admitted an appeal by five independent Members of Parliament of the (former) Şor Party that was found to be unconstitutional on 19 June 2023 and declared Article 16(2)(e) of the Electoral Code (which had introduced the ineligibility to be elected discussed in the previous Joint Opinion adopted in October 2023) unconstitutional. It stated that “the contested ban is not based on objective criteria, is general and is not sensitive to particular circumstances”; that “the challenged provisions do not provide an effective remedy against possible decisions of the electoral bodies based on this reason for rejecting the registration of candidates for the elections and are not accompanied by sufficient safeguards to ensure protection against arbitrariness”; and are therefore “disproportionate to the legitimate aim pursued”.

9. On 4 October 2023, the Parliament of the Republic of Moldova adopted, in two readings held on the same day, new amendments, including a new Article 16(2)(f) of the Electoral Code, which provides for new causes for ineligibility to be elected following a declaration of unconstitutionality of a political party by the Constitutional Court. The law introducing the amendments was promulgated on the same day by the President of the Republic of Moldova. The Venice Commission and ODIHR were not in a position to analyse these amendments in the Joint Opinion adopted in October 2023. They will be within the scope of the present Joint Follow-Up Opinion.

10. In the morning of 4 October 2023, the Commission for Exceptional Situations of Moldova adopted a decision (Decision No. 86) prohibiting similar categories of persons from standing which corresponded in substance to the law adopted by the Parliament later on the same day, in effect ensuring the application of the prohibition to stand before the law was promulgated. At that time, there were two days left before the deadline for the registration of candidates, 6 October. The Statement of Preliminary Findings and Conclusions of the International Election Observation Mission of the Local Elections in Moldova concluded that “[a] control mechanism over the decisions of the Commission would ensure the principle of checks and balances, especially

during elections” and that “certain decisions that impacted the right to stand and freedom of expression would benefit from a more elaborate motivation.”²

11. The amendments to the Electoral Code that were adopted on 4 October 2023 (including Article 16(2)(f)) provide for new grounds of ineligibility for persons who on the date of the pronouncement of the decision of the Constitutional Court regarding the declaration of the unconstitutionality of a political party:

- 1) are suspected of, accused of, indicted or convicted for the committing of the offences that have been mentioned by the Constitutional Court as an argument in the context of the declaration of the unconstitutionality of the political party;
- 2) have been excluded from a previous election as a result of having broken the electoral law, and this fact has been considered as an argument upon the declaration of the unconstitutionality of the political party;
- 3) are guilty of having committed acts that led to their introduction in the lists of international offences of certain international organizations or states, and this fact has been considered as an argument upon the declaration of the unconstitutionality of the political party;
- 4) have performed other acts which, without expressly falling within the actions provided for in points 1) – 3), were mentioned as arguments in the decision of the Constitutional Court declaring the political party unconstitutional.

12. Such restrictions on the right to be elected will be in force for three years from the date of the decision of the Constitutional Court on the declaration of unconstitutionality of the political party (new Article 16 (2¹)). With a view to enforcing the restriction, the General Police Inspectorate, the National Anticorruption Centre, the Security and Intelligence Service and the General Prosecutor’s Office, together with the specialized prosecution offices, shall submit to the Central Electoral Commission the information regarding the individuals who fall under the referred criteria (new Article 16 (2²)). The Central Electoral Commission, on the basis of the submitted information, shall draw up the list of individuals who fall under the scope of the restriction. The restriction will not apply to persons who, meeting any of the criteria, can submit evidence proving, unequivocally, that, before the declaration of the unconstitutionality of the political party, they had tried to determine the party to quit the actions that led to its being declared unconstitutional or they had dissociated publicly from these actions (new Article 16 (2³)). Those falling under the first paragraph criteria can also provide evidence of their acquittal or dismissal of prosecution charges against them (new Article 16 (2⁴)).

13. On 3 November 2023 – two days before the local elections -, the Commission for Exceptional Situations of Moldova, an executive body headed by the Prime Minister, adopted another decision (Decision No.92) by which “*The registration of candidates nominated by the political party ȘANSA (Chance) in the general local elections of 5 November is cancelled. The CEC through the electoral councils will immediately inform all polling stations’ electoral bureaus, which by the end of November 4 at the latest, will stamp all ballots with the word "Withdrawn" for all electoral contestants from the Chance Party.*” The decision was allegedly based on a report from the Security and Information Service, concerning alleged threats to national security, links of Chance Party with the former Șor party, and significant campaign finance violations. This decision has a very wide scope since it led to the blanket deregistration of more than 8000 candidates. While it is not within the scope of the present Joint Follow-Up Opinion to analyse the aforementioned decision and mandate of the Commission for Exceptional Situations, the Venice Commission and ODIHR underline that any restriction of the right to be elected has to be in conformity with the rules of international law, as further developed below.

² See International Election Observation Mission - Republic of Moldova, Local Elections, 5 November 2023, [Statement of Preliminary Findings and Conclusions](#), p. 5. The Prime Minister, who presides over the Commission for Exceptional Situations of Moldova, informed the ODIHR Election Observation Mission on 31 October that a draft law to ensure legislative control over the Commission is being prepared by the government.

14. The Venice Commission and ODIHR will examine the matter submitted by the Constitutional Court of the Republic of Moldova and will answer the questions posed by it exclusively on the basis of European and other international standards and OSCE Commitments. The interpretation and application of the Moldovan Constitution falls to the constitutional court. Moreover, taking a stance on the case before the Constitutional Court falls outside of the remit of the Venice Commission and ODIHR.

III. Analysis and recommendations

A. Can the criteria established in Article 16 para. (2) lit. f) of the Law be considered justified, from the perspective of the right to be elected?

1. Introduction

15. Contrary to the ineligibility dealt with in the previous Joint Opinion, the one at stake does not indifferently address a group of persons exercising an executive function within the political party declared unconstitutional or holding an elective position on behalf of the unconstitutional political party. It aims at individualising the sanction by applying it on the basis of the individual behaviour of its addressees and whether such a behaviour was considered as “an argument in the context of the declaration of the unconstitutionality” pronounced by the Constitutional Court. Moreover, it reduces the duration of the ineligibility from five back to the three years that had been proposed in the original draft of the previous legislation.

16. The Venice Commission and ODIHR consider that the withdrawal of the right to be elected as a representative due to a criminal conviction for serious offences should be considered as a means of preserving democracy and the voters’ trust in it.³ Although the legislation now refers to certain individualised behaviours, the amendments still go further than criminal convictions pronounced by a court by, *inter alia*, mentioning not only persons “convicted”, but also those “suspected”, “accused” or “indicted” (if noting that “suspected”, in Moldovan law, implies a certain legal status based on an order of a prosecutor). Furthermore, the amendments also apply to those who “are guilty of having committed acts that led to their introduction in the lists of international offences of certain international organisations or states” (Article 16(2)(f) third sub-item) or “have committed” other acts, not falling under other categories mentioned in Article 16(2)(f), that have been considered as an argument when declaring the unconstitutionality of the political party (Article 16(2)(f) fourth sub-item). This will be analysed in more detail below.

17. Articles 16(2³) and 16(2⁴) also specify the circumstances under which prospective candidates who meet one of the four criteria can be exempt from the ban if they can submit evidence “proving, unequivocally, that, before the declaration of the unconstitutionality of the political party, they have tried to determine the party to quit the actions that led to its being declared unconstitutional or they have dissociated publicly from these actions” or “proving the dismissal of prosecution against them or their acquittal in the criminal action brought against them for the offence”. They also need to submit the said evidence in addition to the necessary registration documentation (Article 68(1¹)).

18. The relevant international and regional treaties, standards and OSCE commitments⁴ applicable to the deprivation of the right to vote and to be elected are included in Article 3 of

³ Venice Commission, *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*, [CDL-AD\(2017\)025](#), §§ 11 and 12. Cf. Venice Commission, Code of Good Practice in Electoral Matters, [CDL-AD\(2002\)023rev2-cor](#), I.1.1.d.iv.

⁴ 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.

Protocol No. 1 to the European Convention on Human Rights (ECHR) (for parliamentary elections), Article 25.b of the International Covenant on Civil and Political Rights (complemented by Article 2(1) on the prohibition of discrimination); Article 21 of the Universal Declaration of Human Rights; the Code of Good Practice in Electoral Matters and the 1990 OSCE Copenhagen Document.⁵ This has been detailed in the previous Joint Opinion⁶ and will not be repeated here. Before analysing the legislation under consideration, the Venice Commission and ODIHR will only remind that the limitations to those rights have to be prescribed by law; to respond to a legitimate aim; to respect the principle of proportionality; and that procedural safeguards and an effective remedy have to be ensured.⁷ As consistently stated by the European Court of Human Rights, “the Contracting States enjoy a wide margin of appreciation in imposing conditions on the right to vote and to stand for elections”,⁸ however, this margin of appreciation is not all-embracing.⁹

2. Prescribed by law

19. 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.¹⁰ In this respect, the decision of the Constitutional Court declaring the Şor Party unconstitutional was very detailed and pointed to particular acts, committed by particular persons, as grounds for the declaration of unconstitutionality. Thus, this decision could provide a basis for an individualised approach for the persons affected by the restriction. However, the criteria set in the amendments for imposing the limitation on the right to stand are not always adequately legally defined: in particular, the four sub-items of Article 16(2)(f) refer to behaviours which have been mentioned (or considered) “as an argument in the decision of the Constitutional Court on the declaration of the unconstitutionality of the political party”. This formulation appears as excessively broad and vague.

20. In relation to the first sub-item, with respect to convicted individuals, it is also important to note that Article 16(2)(c) already deprives those sentenced to imprisonment (deprivation of liberty) by final court decision or those who were sentenced for deliberately committing crimes from the right to stand as candidate. In addition, Article 16(2)(d) of the Electoral Code read together with Article 65 of the Criminal Code of the Republic of Moldova already provide the possibility for a court to deprive a convicted individual of the right to occupy certain functions, as principal or complementary penalty. This means that these provisions overlap or potentially duplicate with part of Article 16(2)(f), which may create confusion detrimental to the principle of legal certainty and foreseeability.

⁵ 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).

⁶ [CDL-AD\(2023\)031](#), §§ 27ff.

⁷ See, for example, 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 by the Lithuanian Supreme Administrative Court, 8 April 2022.

⁸ See, for instance, ECtHR, *Political Party “Patria” and Others v. The Republic of Moldova*, nos. 5113/15 and 14 others, 4 August 2020, § 32.

⁹ ECtHR, *Hirst v. The United Kingdom* (No. 2) [GC], no. 74025/01, 6 October 2005, § 82.

¹⁰ ECtHR, *The Sunday Times v. the United Kingdom* (No. 1), no. 6538/74, 26 April 1979, § 49. See also Venice Commission, Rule of Law Checklist, [CDL-AD\(2016\)007](#), § 58; and ODIHR, [Guiding Principles of Democratic Lawmaking and Better Laws](#) (9 October 2023), Principle 16.

21. Moreover, the second sub-item of Article 16(2)(f) broadly refers to the exclusion from previous elections and does not set the period of time during which the exclusion from previous elections for violation of the electoral legislation would be considered. Moreover, the provision does not mention the type of violations, the intentionality and the level of gravity necessary to justify such a general exclusion.

22. In addition, the law foresees ineligibility also in the case of introduction in the lists of individuals subject to international sanctions adopted by foreign States or organisations, outside of judicial procedures in the Republic of Moldova (third sub-item). International listing processes have been subject to criticisms due to the (frequent) lack of legal certainty, procedural inadequacies and due process deficiencies, and the fact that often, domestic implementing measures pertaining to persons on such list do not provide for access to judicial review of the said measures pertaining to persons on such list nor adequate minimum safeguards.¹¹

23. Finally, the catch-all formulation provided for by the fourth sub-item of Article 16(2)(f) (applying the restrictions to individuals who “have committed acts that, without falling expressly under the actions provided for in points 1)–3), have been mentioned as arguments considered in the decision of the Constitutional Court on the declaration of the unconstitutionality of the political party”) is rather vague and may cover a large variety of situations implying a possibility of arbitrary application of the restrictions. It does not define the evidence needed in order to prove that the persons in question have committed the action and does not allow their clear individualisation and of the alleged offences committed.

24. The Venice Commission and ODIHR therefore doubt of any sub-item of Article 16(2)(f) being in line with the principle of foreseeability, which is part of legal certainty.¹²

25. Finally, as per newly introduced Article 16(2)(f), individuals who, on the date of the Constitutional Court’s decision declaring a political party to be unconstitutional, i.e., 19 June 2023 in the case of the Şor Party, fall within one of the four categories foreseen in the amendments may be deprived of the right to stand for election for a 3-year period from the date of the decision on unconstitutionality. This means that at the time of the decision of unconstitutionality, which is the starting point of the period of ineligibility, the said individuals could not foresee the consequences of their behaviour. The Venice Commission and ODIHR recall that, 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.¹³

3. Legitimate aim

26. Art. 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, the aim a state pursues must be compatible with the principle of the Rule of Law and the general objectives of the Convention.¹⁴

27. As stated in the previous Joint Opinion, “[t]he stated aim to defend the Constitution and the integrity of the democratic State, by preventing a political party from taking power unconstitutionally, as expressed in the decision of the Constitutional Court which led to the

¹¹ See e.g., UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 2010 Report on Ten areas of best practices in countering terrorism, UN Doc. A/HRC/16/51 (2010), Practice 9.

¹² Venice Commission, [CDL-AD\(2016\)007](#), II.B.3.

¹³ Venice Commission, [CDL-AD\(2016\)007](#), Rule of Law Checklist, § 62.

¹⁴ 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](#), § 16.

prohibition of the political party Šor, is legitimate and may justify restrictions to the right to be elected. Similarly, the stated aim to implement a decision of a Constitutional Court would also *prima facie* constitute a legitimate aim if such was mandated by the decision”.¹⁵ The aim of the measure is legitimate, since it can be equated to “protect(ing) the integrity of the democratic process by excluding from participation in the work of a democratic legislature those individuals who had taken an active and leading role in a party which was directly linked to the attempted violent overthrow of the newly-established democratic regime”.¹⁶ In addition, the ineligibility included in the amendments, as it is related to the participation in activities that generated the unconstitutionality of a party, may be intended to prevent those persons who have put the constitutional order at risk from being elected to public office. In this regard, the European Court of Human Rights has recognised that the setting up of self-protection mechanisms 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.¹⁷

4. Proportionality and absence of arbitrariness

28. It remains to be ascertained whether the measures to be found in the amendments are proportionate and exempt of arbitrariness. In this respect, it may be reminded that the Constitutional Court considered the previous version of the law as not accompanied by sufficient safeguards to ensure protection against arbitrariness, and therefore disproportionate to the legitimate aim pursued.

29. The Venice Commission and ODIHR also recall that a clear distinction has to be drawn between the political party that has been declared unconstitutional and the rights of individuals who militate or militated within that political party. The prohibition of the party does not directly affect the rights of all these individuals.

30. In assessing the proportionality of a general measure restricting the exercise of the rights guaranteed by Article 3 of Protocol 1 to the ECHR, the European Court of Human Rights attaches decisive weight to the existence of a time-limit.¹⁸ The limitation of the deprivation of the right to be elected to a duration of three years – instead of five years, which the Constitutional Court considered as unjustified - has to be welcomed and should limit the risk of sanctions disproportionate in time. However, 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 seriousness in the behaviour of individuals determined responsible for the actions that led to the banning of the party. Moreover, no possibility is given to them to ask the exclusion from standing for elections to be lifted before the next elections. The Venice Commission and ODIHR recommend that the duration of the sanctions be modulated according to the seriousness of the behaviour under consideration as elaborated below.

31. The Venice Commission and ODIHR recall that the principles of proportionality and prohibition of arbitrariness imply the individualisation of the measures. This requires introducing adequate criteria and an effective individual assessment that would limit restrictions of the right to be elected only to those members and/or elected officials of the party whose activities have

¹⁵ [CDL-AD\(2023\)031](#), § 41.

¹⁶ ECtHR, *Ždanoka v. Latvia* [GC], no. 58278/00, 16 March 2006, § 122.

¹⁷ 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 by the Lithuanian Supreme Administrative Court, 8 April 2022, § 83.

¹⁸ 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 by the Lithuanian Supreme Administrative Court, 8 April 2022, § 90, with further references, in particular ECtHR *Paksas v. Lithuania*, [GC], no. [34932/04](#), 6 January 2011, § 109.

endangered the Constitution and the integrity of the democratic State or have received a criminal conviction for a serious offence.¹⁹

32. The restrictions on the right to be elected introduced by the amendments seem to be based on more individualised criteria, insofar as the ineligibility is linked to the past individual behaviours when such behaviours have been considered as an argument by the Constitutional Court for declaring a political party unconstitutional. This would in principle be in accordance with the European Court of Human Rights' assessment in *Ždanoka v. Latvia*,²⁰ which is relevant insofar as it dealt with a restriction on the right to stand for election on the basis of membership to certain political groups, and it was stressed that the conduct giving rise to the restriction was to have had an "active participation" in those groups.

33. At the same time, while the amendments seem to aim at narrowing the personal scope of the sanction of ineligibility, the breadth of the foreseen restrictions raises concerns, especially without the mention of the existence of gradual limitations on the prohibition to stand for elections. In particular, when imposing sanctions, the newly introduced Article 16(2)(f) does not distinguish between the different legal situations/status of the persons concerned and the level of gravity and intentionality of their behaviours/actions. As a consequence, individuals suspected of certain offences, but not prosecuted and convicted for them would be treated the same way as those convicted and sanctioned (first sub-item).

34. As ruled by the European Court on Human Rights, there is a violation of Article 3 of Protocol 1 to the ECHR in the event a restriction is applied to the right to be elected without sufficient and relevant evidence.²¹ Despite the improvements brought by the new amendments which apparently individualise the measure, the possibility to apply ineligibility to "suspected, accused or indicted" persons is too broad, because the restriction on political rights can be applied without sufficient evidence of the implication of the persons concerned in the commission of the acts that led to ineligibility. Deprivation of the right to stand for election of persons not yet convicted could be legitimate and proportionate only in exceptional situations, e.g., for crimes stipulated in the Rome statute of the International Criminal Court.²²

35. Also in light of the remarks made above with regard to the foreseeability of the interference, the Venice Commission and ODIHR doubt that the amendments strike a fair balance between the legitimate aim pursued (see paras 26-27 above) and the protection of the right to sit as an elected person.

B. Can the prohibition to run for elections applied to suspected, accused or indicted persons provided for in article 16 para. (2) lit. f) point 1 of Law no. 280 be assimilated with a declaration regarding the guilt of the candidate in the sense of article 6 § 2 of the European Convention on Human Rights?

36. Article 6(2) ECHR provides that "Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law", which is also reflected in the wording of Article 14(2) of the ICCPR. To qualify a procedure as "criminal" in the sense of Article 6 ECHR, the European Court of Human Rights has developed the so-called "*Engel* criteria", recently confirmed as follows in the *Vasile Sorin Marin* case: "[T]he first criterion is the legal classification

¹⁹ [CDL-AD\(2023\)031](#), § 60.

²⁰ ECtHR, *Ždanoka v. Latvia* [GC], no. 58278/00, 16 March 2006, § 126.

²¹ ECtHR, *Political Party "Patria" and Others v. The Republic of Moldova*, nos. 5113/15 and 14 others, 4 August 2020, § 38. On the prevention of arbitrariness, see also *Miniscalco v. Italy*, 17 September 2021, no. [55093/13](#), § 96.

²² Venice Commission, [CDL-AD\(2015\)036cor](#), Report on exclusion of offenders from Parliament, § 156, according to which the deprivation of the right to stand for election of persons not yet convicted could be legitimate and proportionate only in exceptional situations, e.g. for crimes stipulated in the Rome statute of the International Criminal Court, § 96.

of the offence under national law, the second is the very nature of the offence and the third is the degree of severity of the penalty that the person concerned risks incurring. The second and third criteria are alternative and not necessarily cumulative. However, this does not exclude a cumulative approach in cases where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge”.²³

37. On this basis, the established case-law of the Court considers that Article 6 – in particular under its criminal limb - does not apply to a procedure that will decide on the ineligibility to be elected, even for life,²⁴ at least if it is not ancillary to a criminal sanction. This is without prejudice of the presumption of innocence of any person suspected, accused or indicted of criminal offences during all stages of criminal proceedings. In the context of criminal proceedings, the Venice Commission has considered that the deprivation of the right to stand for election of persons not yet convicted is contrary to the principle of presumption of innocence, except for limited and justified exceptions.²⁵

38. When there are concurring procedures, e.g., a procedure for declaring a person ineligible to stand for election on the basis of Article 16(2)(f)(1) and a criminal proceeding against a suspected, accused or indicted person, which is pending, the decision on ineligibility may raise an issue under Article 6 § 2 of the ECHR if supporting reasoning amounts in substance to the determination of the person’s guilt in the criminal procedure.²⁶ However, as held by the ECtHR, “the imposition of civil or other forms liability on the basis of a less strict burden of proof in parallel proceedings is not incompatible *per se* with the presumption of innocence”.²⁷

39. Like the measures analysed in the previous Joint Opinion, the ones introduced by the amendments are intended at enforcing a preventive mechanism following the declaration of unconstitutionality of a political party. The ineligibility to be elected provided for by the amendments is intended to have a preventive character and not a punitive one, and therefore cannot be assimilated to a criminal charge in the sense of Article 6 ECHR. As long as all authorities’ decisions or public statements do not pronounce themselves or infer the determination of guilt, the ineligibility to stand for election on the basis of Article 16(2)(f)(1) is not *per se* incompatible with the presumption of innocence.²⁸

40. In light of the above, although the principle of presumption of innocence enshrined in Article 6 § 2 ECHR does not in principle apply in procedures that decide on the ineligibility to be elected, the presumption of innocence is of relevance if the procedure deciding on the ineligibility to stand for elections on the basis of Article 16(2)(f)(1) occurs in parallel with criminal proceedings. The measure providing for the ineligibility to be elected would not *per se* be incompatible with the presumption of innocence, unless in substance, the disqualification decision would infer the determination of guilt of the candidate.

²³ ECtHR, *Vasile Sorin Marin v. Romania*, no. 17412/16, 3 October 2023, § 41.

²⁴ ECtHR, *Miniscalco v. Italy*, 17 September 2021, no. [55093/13](#); §§ 51ff, and references, in particular *Paksas v. Lithuania*, [GC], no. [34932/04](#), 6 January 2011, §§ 65ff; *Pierre-Bloch v. France*, 21 October 1997, no. 24194/94.

²⁵ See also Venice Commission, [CDL-AD\(2015\)036cor](#), Report on exclusion of offenders from Parliament, § 156, according to which the deprivation of the right to stand for election of persons not yet convicted could be legitimate and proportionate only in exceptional situations, e.g. for crimes stipulated in the Rome statute of the International Criminal Court, § 96.

²⁶ See e.g., ECtHR, *Ismoilov and Others v. Russia*, no. [2947/06](#), 24 April 2008, § 167.

²⁷ See, for example, *C. v. the United Kingdom*, no. [11882/85](#), Commission decision of 7 October 1987, DR 54, p. 162, and *Erkol v. Turkey*, no. [50172/06](#), 19 April 2011, § 37.

²⁸ See ECtHR, *Alenet de Ribemont v. France*, no. [15175/89](#), 10 February 1995, § 36. In this judgment, the Court pointed out “that the presumption of innocence may be infringed not only by a judge or court but also by other public authorities.” See also ECtHR, *Böhmer v. Germany*, no. [37568/97](#), 3 October 2002, § 54: “The presumption of innocence will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court or the official regards the accused as guilty.”.

C. Does the Law no. 280 provide sufficient procedural guarantees able to prevent arbitrariness in the case of candidates who were prohibited from running in the elections?

41. 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.²⁹ There is a risk, based on the declaration of unconstitutionality of a political party, that the ineligibility to stand for elections is confirmed without sufficient evidence that the persons concerned actively contributed to the illegitimate acts attributed to the political party that led to the declaration of unconstitutionality. The mere fact that the person's behaviour was referred as one of the arguments by the Constitutional Court should not be enough. As provided by international obligations and OSCE commitments, strong procedural guarantees are necessary, 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", including "the possibility for judicial review of such [...] decisions".³⁰ This applies to the decision of the Central Electoral Commission to include an individual in the list of Article 16(f), implying ineligibility to be elected.

42. The amendments under review aim to address the lack of effective remedy pointed out in the previous Joint Opinion by providing for the respective mechanisms by, among others, envisaging a possibility for affected persons to appeal the respective decisions of the electoral bodies to the court. The amendments also provide for the submission of evidence to prove that, before the declaration of the unconstitutionality of the political party, the individual tried to determine the party to quit the actions that led to its being declared unconstitutional or they have dissociated publicly from these actions (new Article 16 (2³)). The Venice Commission and ODIHR welcome that, in the context of verifying the evidence presented by the candidate, the Central Electoral Commission shall carry out a hearing in satisfaction of the fundamental principle of *audi alteram partem* and that the person shall be entitled to the presence of legal counsel (Article 68(5¹)).

43. Article 16(2²) states that, with a view to enforcing the restriction provided for in para. (2) letter f), the General Police Inspectorate, the National Anticorruption Centre, the Security and Intelligence Service and the General Prosecutor's Office, together with the specialised prosecution offices, shall submit to the Central Electoral Commission the information regarding the individuals who fall under the criteria stated in para. (2) letter f), with the express mention of the respective criterion. The possibility for the Central Electoral Commission to rely on documents provided by the Security and Intelligence Service could lead to the use of secret documents and may affect the ability of the individuals to exercise their right to counter the evidence presented against them. In this respect, the Venice Commission and ODIHR recall that "[e]specially where a power of the executive is exercised in secret, the risks of arbitrariness are evident".³¹ Thus, it becomes particularly important for the procedural safeguards to be fully respected in order to avoid arbitrary decisions. The authorities informed the Venice Commission and ODIHR that Article 222(3) of the Administrative Code provides: "If a participant in the process invokes the secret nature of the documents, administrative files or information, or if the court is of this opinion, then, through a judicial decision susceptible of appeal, it shall be decided to what extent the participants in the process will be granted access to the file (...)". This provision should

²⁹ 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 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.

³⁰ See paragraph 5.10 of the [1990 OSCE Copenhagen Document](#).

³¹ ECtHR *Malone v. the United Kingdom*, no. 8691/79, 2 August 1984, § 67; *Muhammad and Muhammad v. Romania*, no. 80982/12, 15 October 2020, § 35.

be interpreted in conformity with the principle of proportionality, and access refused only when absolutely necessary.

44. The analysed amendments imply that, if the Central Electoral Commission considers that the behaviour of a person meets one of the criteria referred to in Article 16(2)(f), there is an implicit presumption that they committed illegitimate acts that justify their ineligibility. A person who is found to meet at least one of the criteria for ineligibility, in order to avoid this sanction, has to submit evidence proving “unequivocally” that, before the declaration of the unconstitutionality of the political party, they have tried to determine the party to quit the actions that led it to be declared unconstitutional or they have dissociated publicly from these actions; or evidence proving the dismissal of prosecution against them or their acquittal in the criminal action brought against them (Article 16(2³⁻⁴)). The Venice Commission and ODIHR note, in the first place, that the required standard of proof is put to the level of being “unequivocal”. “Unequivocal” seems to require a higher level than “beyond reasonable doubt” (as in criminal law) or “on the balance of probabilities” (as in private law), and to rather mean “with certainty”. Proving “unequivocally” is very difficult and could therefore lead to the impossibility in practice for the individual to provide such evidence and potentially to arbitrary and/or disproportionate decisions. This is particularly true when proofs have to be brought about intra-party life: in the intra-party life and decision-making process, individuals very often change their beliefs and behaviours depending on the political environment and dynamics of the political process. The Venice Commission and ODIHR consider that procedural guarantees should be ensured at the two stages of the process – inclusion in the list of persons under Article 16(2)(f) and possible exculpation -: individuals must have a genuine opportunity, first, to contest filling the conditions of Article 16(2)(f), and second, in case they fill them, to refute the evidence against them; the standard of proof should be lowered to only require from the person evidence that brings into question the truth of the presumed facts. Further, the fact that an individual had changed their position – prior to the Constitutional Court’s decision - from in favour to against the criticised party actions should be taken into account.³²

45. In light of the foregoing, it may be acceptable to introduce a mechanism of disqualification to stand for election whereby the competent authorities or courts will merely *verify whether a particular individual belongs to the category or group* fulfilling the conditions of Article 16(2)(f), providing that the said individual is genuinely able to challenge the existence of such conditions in the first place. This may be preferable to empowering the authorities to investigate if these individuals had tried to determine the party to quit the actions that led it to be declared unconstitutional or they had dissociated publicly from these actions, which could be very intrusive.³³

³² On the admissibility of the reversal of the burden of proof, see ECtHR. *Ždanoka v. Latvia* [GC], no. 58278/00, 16 March 2006, § 124. On the burden of proof, see also Venice Commission, Joint Guidelines on freedom of association, [CDL-AD\(2014\)046](#), § 241, according to which “[t]he burden of proof for violations leading to sanctions should always be on the authorities. This includes providing adequate evidence to support the claim of a violation leading to sanctions”.

³³ As underlined by the European Court of Human Rights, “*the Convention does not exclude a situation where the scope and conditions of a restrictive measure may be determined in detail by the legislature, leaving the courts of ordinary jurisdiction only with the task of verifying whether a particular individual belongs to the category or group covered by the statutory measure in issue. This is particularly so in matters relating to Article 3 of Protocol No. 1. The Court’s task is essentially to evaluate whether the measure defined by Parliament is proportionate from the standpoint of this provision, and not to find fault with the measure simply on the ground that the domestic courts were not empowered to ‘fully individualise’ the application of the measure in the light of an individual’s specific situation and circumstances*” (see ECtHR. *Ždanoka v. Latvia* [GC], no. 58278/00, 16 March 2006, § 125). The Court also noted that in the context of disqualification to stand for election, certain special public-law measures could be introduced to regulate access to the political process and in the context of the disqualification procedure, “*doubts could be interpreted against a person wishing to be a candidate, the burden of proof could be shifted onto him or her, and appearances could be considered of importance*” (ECtHR. *Ždanoka v. Latvia* [GC], no. 58278/00, 16 March 2006, § 124).”

IV. Conclusion

46. In reply to the questions put by the Constitutional Court of the Republic of Moldova in relation to a case concerning Law No. 280 of 4 October 2023 amending the Electoral Code (“the amendments”), providing for the ineligibility of persons connected to political parties declared unconstitutional, the Venice Commission and ODIHR have reached the following conclusions.

1. *Can the criteria established in Article 16 para. (2) lit. f) of the Law be considered justified, from the perspective of the right to be elected?*

47. While the amendments may respond to the legitimate aim to defend the Constitution and the integrity of the State, the restrictions imposed are not in line with Article 3 of Protocol 1 to the ECHR and Article 25 ICCPR as they do not seem to be fully foreseeable nor to fully respect the principle of proportionality.

48. They seem to be based on more individualised criteria than in previous legislation, insofar as the ineligibility is linked to the past individual behaviours when such behaviours have been considered as an argument by the Constitutional Court for declaring a political party unconstitutional. At the same time, while the amendments seem to aim at narrowing the personal scope of the sanction of ineligibility, the breadth of the foreseen restrictions raises concerns, especially without the mention of the existence of gradual limitations on the prohibition to stand for elections.

49. The Venice Commission and ODIHR conclude that these restrictions do not seem to be fully foreseeable nor to fully respect the principle of proportionality.

2. *Can the prohibition to run for elections applied to suspected, accused or indicted persons provided for in article 16 para. (2) lit. f) point 1 of Law no. 280 be assimilated with a declaration regarding the guilt of the candidate in the sense of article 6 § 2 of the European Convention on Human Rights?*

50. The ineligibility to be elected provided for by the amendments is intended to have a preventive character and not a punitive one, and therefore cannot be assimilated to a criminal charge in the sense of Article 6 ECHR. Although the principle of presumption of innocence enshrined in Article 6 § 2 ECHR does not in principle apply in procedures that decide on the ineligibility to be elected, the presumption of innocence is of relevance if the procedure deciding on the ineligibility to stand for elections on the basis of Article 16(2)(f)(1) occurs in parallel with criminal proceedings. The measure providing for the ineligibility to be elected would not *per se* be incompatible with the presumption of innocence, unless in substance, the disqualification decision would infer the determination of guilt of the candidate.

3. *Does the Law no. 280 provide sufficient procedural guarantees able to prevent arbitrariness in the case of candidates who were prohibited from running in the elections?*

51. The analysed amendments imply that, if the Central Electoral Commission considers that the behaviour of a person meets one of the criteria referred to in Article 16(2)(f), there is an implicit presumption that they committed illegitimate acts that justify their ineligibility. It may be acceptable to introduce a mechanism of disqualification to stand for election whereby the competent authorities or courts will merely verify whether a particular individual belongs to the category or group fulfilling the conditions of Article 16(2)(f), providing that the said individual is genuinely able to challenge the existence of such conditions in the first place, and if the standard of proof to rebut the presumption is lowered to only require from the person evidence that brings into question the truth of the presumed facts.

52. The Venice Commission and ODIHR would also like to welcome the introduction of a hearing by the Central Electoral Commission, as well as the introduction of the opportunity to seek judicial review of the decision of deprivation of the right to stand for election, and of the opportunity to present evidence to the electoral bodies to dispute the determination about their activities. However, they also underline the risk of arbitrariness which could arise from the use of secret documents.

53. The Venice Commission and ODIHR remain at the disposal of the Constitutional Court of the Republic of Moldova for further assistance in this matter.