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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS
(ODIHR)

REPUBLIC OF MOLDOVA

URGENT JOINT OPINION

ON DRAFT LAW NO. 263

AMENDING THE ELECTORAL CODE, THE CONTRAVENTION CODE AND THE CODE OF AUDIOVISUAL MEDIA SERVICES

Issued pursuant to Article 14a
of the Venice Commission's Rules of Procedure

on the basis of comments by
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I. Introduction

1. On 24 July 2020, the Minister of Justice of the Republic of Moldova, on behalf of the Parliament, requested the European Commission for Democracy through Law of the Council of Europe (hereinafter "Venice Commission") to provide a legal opinion on draft Law No. 263 on Amending the Electoral Code No. 1381/1997, the Contravention Code No. 218/2008 and the Code on Audiovisual Media Services No. 174/2018 (CDL-REF(2020)045, hereinafter "the draft Law").[1] According to the established practice, the opinion has been prepared jointly by the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights (hereinafter "ODIHR").

2. Messrs Richard Barrett, Eirik Holmøyvik and Oliver Kask acted as rapporteurs for the Venice Commission. Mr Vasil Vashchanka was appointed as legal expert for ODIHR.

3. On 6 August 2020 due to COVID-19 restrictions, in lieu of the usual expert visit to the country, online meetings took place with the State Secretary of Justice; the Central Election Commission; the Legal Committee for appointments and immunities of Parliament; the Ombudsperson's office; the Audiovisual Council; representatives of national non-governmental organizations (NGOs); the EU Delegation and experts. This Joint Opinion takes into account the information provided during the above-mentioned online meetings as well as in writing by the authorities and civil society organisations of the Republic of Moldova.

4. This urgent Opinion was authorised by the Enlarged Bureau on 30 July 2020 and was issued pursuant to the Venice Commission's Protocol on the preparation of urgent opinions (CDL-AD(2018)019) on 19 August 2020. It will be presented to the Venice Commission for endorsement at its 124th Plenary Session on 8-9 October 2020.

II. Scope of the Joint Opinion

5. The scope of this Joint Opinion covers only the draft Law officially submitted for review. Thus limited, the Joint Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework governing elections in the Republic of Moldova, nor of the entire Contravention and Audiovisual Media Services codes.

6. The Joint Opinion takes note of positive developments but focuses on areas that require further attention or improvements in the draft Law. The ensuing recommendations are based on relevant OSCE commitments, Council of Europe and other international human rights standards, such as the Venice Commission Code of Good Practice in Electoral Matters,[2] as well as good practices. It takes into account ODIHR and the Parliamentary Assembly of the Council of Europe (PACE) reports on elections observed in the Republic of Moldova and previous recommendations where relevant, as well as, when appropriate, more specific, audiovisual related standards. It is not intended at assessing the conformity of the draft with the Constitution of the Republic of Moldova, related national legislation or decisions of the Constitutional Court of the Republic of Moldova; however, it refers to them when needed.

7. This Joint Opinion is based on an unofficial English translation of the draft Law provided by the Parliament of the Republic of Moldova on 24 July 2020. Errors from translation may result.

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[1] The current version of the electoral code can be found at https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2019)028-e, and the current version of the Code of audiovisual media services at https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2020)046-e.

[2] CDL-AD(2002)023rev-cor.

8. The draft Law contains numerous amendments to the Electoral Code and introduces several revisions also to the Contravention Code and the Code on Audiovisual Media Services. A number of proposed amendments are language-refining and/or technical and do not affect the substance of the revised provisions. The present opinion focuses primarily on the more substantive amendments, especially where the changes address or fall short of addressing prior ODIHR and Venice Commission's recommendations or give rise to concerns.

9. In view of the above, ODIHR and the Venice Commission would like to note that this Joint Opinion does not prevent them from formulating additional written or oral recommendations or comments on the respective legal acts or related legislation in the Republic of Moldova in the future.

III. Executive summary

10. As a preliminary remark, it should be noted that successful electoral reform should be built on at least the following three elements:

1) a clear and comprehensive legislation that meets international obligations and standards and addresses prior recommendations;
2) the adoption of legislation by broad consensus after extensive public consultations with all relevant stakeholders; and
3) the political commitment to fully implement the electoral legislation in good faith.

11. In particular, ODIHR and the Venice Commission stress that an open and transparent process of consultation and preparation of the draft increases the confidence and trust in the adopted legislation and in the state institutions in general.[3] A number of stakeholders in the Republic of Moldova stated that the drafting procedure was rather hasty and disputed the transparency of the process.

12. At the outset, ODIHR and the Venice Commission welcome the Republic of Moldova's efforts to amend its electoral legal and institutional framework, to bring it into compliance with relevant OSCE commitments, Council of Europe and other international human rights instruments as well as good practices. The draft includes some improvements and addresses several prior ODIHR, PACE and Venice Commission recommendations. Positive steps include *inter alia* clearer definitions of "electoral campaign" and clarifications regarding the timeline for campaigning in the second round; additional provisions aimed at preventing the misuse of administrative resources; expanding the range of sanctions that could be applied for violations of campaign rules; the wide definition of the persons entitled to submit complaints or appeals as well of the appealable acts; and reasonably short deadlines, in particular for complaints and appeals.

13. The principle of stability of electoral law must be respected. For any substantial changes to apply to the upcoming local and presidential elections of September and November 2020, they need to be adopted well in advance of the process to allow sufficient time for stakeholders to become familiar with the new provisions and make preparations required for compliance. No legislative changes should be applied to the electoral processes already underway, such as, for example, local elections in certain areas. For the upcoming presidential election, in line with international good practice, those proposed changes that are technical and do not affect "fundamental elements of the election law", could be applied, if they enter into force prior to the beginning of the electoral process for this election.[4]

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[3] Paragraph 5.8 of the 1990 OSCE Copenhagen Document requires that "legislation [should be] adopted at the end of a public procedure…"; on transparency of the legislative process, see Rule of Law Checklist (CDL-AD(2016)007), II.5.

[4] See Guideline II,2,b of the Venice Commission Code of Good Practice in Electoral Matters.

14. In order to further improve the compliance of the draft Law with international obligations, human rights standards and OSCE commitments, ODIHR and the Venice Commission make the following key recommendations:

A. Restrictions on freedom of expression should be drafted and interpreted in conformity with constitutional and international human rights law; in particular:
   1. Prohibitions on participation in campaigning ("electioneering") by non-government, trade unions, charity organisations, as well as during processions and/or religious services, as well as by media, including private ones, if they are maintained, should be reworded to give them a narrower application;
   2. Provisions on hate speech and incitement to discrimination should be reworded in order to avoid overly broad application.
B. The provisions on (misuse of) administrative resources should be further refined, including introducing an effective enforcement mechanism to prevent these violations;
C. Draft amendments need to be re-considered to continue allowing observers to observe all stages of the electoral process;
D. Sanctions should respect the principles of proportionality and equality, in particular those related to election observers and the media and be subject to effective judicial review.

15. Furthermore, ODIHR and the Venice Commission recommend:
A. That access to voter lists by electoral contestants, their representatives and citizen observers incorporate procedures to make such examination meaningful;
B. Not to provide for excessive regulative delegation to the Central Election Commission (CEC), for example on the scope of application of the Administrative Code;
C. To list in the Electoral Code the different actions, inactions and decisions open to challenge by appeal, and to clarify related competencies of the ordinary courts and the Constitutional Court;
D. To detail competences and decision-making powers of different stakeholders in the electoral dispute process and address the decision-making power in electoral disputes in more detail.

16. Other recommendations may be found in the text below and will not be detailed here.

IV. Analysis and recommendations

A. Stability of the electoral law

17. Stability of the electoral law is crucial to ensure trust in the electoral process, and in particular to exclude any suspicion of manipulation of the electoral legislative framework. According to the Venice Commission's Code of Good Practice, and as explained in the interpretative declaration on the stability of electoral law,[5] no changes of principle (related to fundamental elements, for instance the electoral system, the composition of the electoral management bodies (EMBs), and the drawing of constituency boundaries) should be introduced within 12 months of the elections.

18. In the case under examination, the amendments were tabled in June 2020, while local elections are scheduled for early September 2020 and the presidential election is planned for 1 November 2020. Thus, the amendments may be problematic from the perspective of stability if the upcoming elections will be impacted by the changes. Some of the changes, as stated by

[5] See the 2005 interpretative Declaration on the Stability of the Electoral Law (CDL-AD(2005)043).

the authors of the draft, are intended at implementing a decision of the Constitutional Court, which however dates back to 2016; [6] this raises concerns about their timing. As regards the local elections in September 2020, the campaign period of 30 days has already begun. It should be recalled that "any reform of electoral legislation to be applied during an election should occur early enough for it to be really applicable to the election", which in the case of September 2020 local elections will not be possible.[7]

19. It appears that the intention is to apply the amendments, if adopted, to the 1 November presidential election. Articles 45 and 46 of the draft Law will apply specifically to presidential elections and they essentially amend some current rules for parliamentary elections. These changes relate to how the electoral rolls are compiled and accessed, functions of the election agents, prohibition on hate speech and incitement to discrimination, and the use of administrative resources during the election period. With the exception of the new provisions about campaigning by third parties, the other general changes which could have an effect on the electoral process for presidential elections do not appear to significantly impact fundamental elements of the electoral legal framework to infringe upon the concept of stability. Nevertheless, those changes should be applied only if they enter into force before the start of the electoral process (including the compilation of the electoral rolls). In line with international good practice, **the Venice Commission and ODIHR therefore recommend not to apply any legislative changes to the September 2020 local elections, and to apply them to the next presidential elections only if necessary and** if they enter into force prior to the beginning of the electoral process**.**[8]

B. Definitions

20. The draft Law changes a number of definitions in Article 1 of the Electoral Code. In particular, "electoral posters" and "electioneering" are defined more clearly, since pleas and declarations made by electoral contenders are now included in the definition of "electioneering" rather than "electoral posters" as in the current version. The definition of an "electoral bloc" is expanded in the draft Law and now includes also the prohibition for a party/organisation to join more than one pre-election alliance and to nominate candidates separately from the alliance if it joins one. These additional rules go beyond the definition of an "electoral bloc" as such and may be better placed elsewhere in the Code.

21. The definition of an "electoral campaign" is also elaborated in greater detail in the draft Law and specifies that the campaign starts from the moment of registration but not earlier than 30 days before the election day. The revised definition now also clarifies that in the event of a second round or repeat voting in different types of elections, the campaign resumes on the date specified by the CEC. These clarifications should not lead to a restrictive interpretation of the rights of the electoral stakeholders (see in particular, on the right of observers, below IV.F). Moreover, election campaigns should not start at different times for different candidates or political parties. In case of later registration of some candidates (which might be based on some discretion by the election administration) others would have advantages in the media (see also Article 52.4 of the Code).

22. The definition of an "independent candidate" is further elaborated with a provision that such candidates may be nominated and/or supported by a group of citizens. The definition of the "Centre for Continuous Electoral Training" additionally clarifies its status. The definition of "national constituency" is expanded to include, in addition to the proportional component of parliamentary elections, also presidential elections and national referenda. The definition of the

[6] Decision no. 34 of December 13, 2016 "Regarding the confirmation of the election results and the validation of the mandate of President of the Republic of Moldova".
[7] Interpretative declaration, II.5.
[8] See Guideline II,2,b of the Venice Commission Code of Good Practice in Electoral Matters.

"Code of conduct" is extended also to referendum participants. The definition of "electoral contenders" is amended for presidential elections to include also parties, organisations and alliances which nominated candidates, and for local elections to include independent candidates.

23. The draft Law adds a new definition to Article 1 of the Electoral Code: an "appellant" is defined as an electoral law subject who seeks to restore his/her rights violated by electoral bodies or electoral contenders. This definition appears to be unduly narrow, potentially limiting rights of certain categories of electoral stakeholders to appeal if they cannot prove their individual rights were violated.[9] The Electoral Code provides for the possibility to "challenge the decisions of the electoral bodies and the decisions of the Audiovisual Council with respect to the appeals… in the competent court" (Article 71.3). Electoral rights may also be violated by persons other than electoral bodies or election contenders, e.g. by state officials or third parties. **It is recommended that the definition of an "appellant" is revised to include all complainants who allege violations of electoral legislation**. **Similarly, the definition of a "complaint" should be revised to also reflect complaints against the media, state officials and third parties.**

24. The definitions of "Central Election Commission", "permanent residence", "electoral functionary", "initiative group", and "residence" are amended to give these terms greater precision. A new definition of an "operator of the Automated State Information System 'Elections'" is added, as well as a new definition of a "referendum participant".

C. Voter registration and candidate nomination

25. Article 45 of the draft Law proposes to revise the Electoral Code by changing the procedures for scrutiny of voter lists. In particular, electoral contenders, observers and voters may be given access to voter lists with the full details of voters only based on signing a declaration of confidentiality, without the right to make copies, photos, or video recording. This solution appears to seek a balance between granting unlimited access to voters' data for the purposes of verification and transparency, and *the protection of personal data* to prevent their potential misuse. At the same time, if rules are applied in an overly restrictive manner, this may prevent observers and election contestants from detecting potential inaccuracies**. The Venice Commission and ODIHR recommend that access to voter lists should incorporate procedures to make such examination meaningful**, for example, by allowing notes to be taken, especially as the preparation of complaints and appeals might be more time-consuming. The procedure for compiling, verifying and updating voter lists to be developed by the CEC (Article 45.6 as revised by the draft Law) should also regulate access to the voter lists.

26. The revised Article 45 of the Electoral Code should provide more clarity with respect to the complaint procedure regarding voter lists. According to Article 45.3 requests for corrections are submitted by voters or electoral contenders to precinct electoral bureaus (PEBs), which shall promptly transfer them to the CEC (Article 45.4). Denied requests may be appealed to the "respective electoral bodies" (Article 45.5). It remains unclear whether the "respective" body in such cases would be the PEB, DEC (district electoral commission) or the CEC. **It is recommended that this be specified in the law.**

27. The proposed amendments to Article 115 of the Electoral Code, which deals with voter lists for presidential elections, include provisions in the event of a second round. The introduction of such provisions brings additional clarification and it is welcome.

[9] See Paragraph II.3.3.d of the Guidelines of the Venice Commission's Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev2-cor), as well as Paragraph 92 of the Explanatory Report.

D. Campaign

28. The proposed amendments to Article 50 of the Electoral Code, which deals with election agents of the contestants, specify that one agent may represent a candidate in different constituencies, on the condition that the total number of agents in the constituency does not exceed the prescribed limit.

29. Article 52 of the Electoral Code, which deals with campaigning, is amended by the draft Law with a new paragraph 3^1, which prohibits electoral candidates and their election agents from using "hate speech and/or incitement to discrimination." In case of violations, Article 52.5 of the Contravention Code is amended to sanction electoral candidates with a fine from 150 to 250 conventional units.[10]

30. ODIHR and the Venice Commission welcome measures against hate speech and discrimination in electoral campaigns, which might be necessary and have been welcomed by the interlocutors in Moldova. However, care should be taken in the interpretation of these concepts, as a broad interpretation risks interfering with the candidates' freedom of expression as guaranteed by Article 32 of the Constitution of Moldova, Article 10 of the ECHR, as well as Article 19.2 of ICCPR and Paragraph 9.1 of 1990 OSCE Copenhagen Document. The Electoral Code does not define the concepts of "hate speech" and "incitement to discrimination", nor does the explanatory note to the draft Law do so. According to information received during online meetings with stakeholders in Moldova, a law on hate speech currently pending in Parliament is yet to be adopted. According to the case law of the ECtHR, the threshold for sanctioning political statements in the context of an election campaign is a high one, and will typically be reserved to statements that incite ethnic, racial, sexual, or religious hatred, or statements that incite violence or threats to the democratic order.[11] The interpretation and application of the prohibition of "hate speech" and "discrimination" in the Electoral Code and the Contravention Code in the context of electoral campaign should therefore respect the candidates' freedom of expression as guaranteed by the ECHR and the Constitution of Moldova.[12] During an election campaign, candidates could often make negative statements on the political ideas, programmes or personal virtues of competing candidates without entering into the narrow category of statements that qualify as hate speech falling outside the remit of freedom of expression as provided by Article 10 of the ECHR. **The Venice Commission and ODIHR therefore recommend considering re-wording these prohibitions more precisely in line with international human rights law**: i.e., prohibit any advocacy of hatred, based on national, racial, sexual, religious or other characteristics, *that constitutes incitement* to discrimination, hostility or violence (emphasis added).[13] The same consideration applies to the suggested new Article 52.5 of the Contravention Code, as revised by the draft Law (see also below). The Electoral Code could also make an explicit reference to the definition of hate speech contained in Article 1 of the Code on Audiovisual Media Services.

31. The draft Law expands Article 52 of the Contravention Code, which deals with violations during electoral campaigns. The current version penalises campaigning during the period of electoral silence. The proposed revision of Article 52.2-3 provides that "[e]ngaging in electioneering during processions and/or religious services, as well as in the places/premises where they take place", and "[i]nvolvement in whatever form of non-government, trade union, charity organisations in the election campaign", shall be sanctioned by fines on both natural and legal persons. According to the explanatory note, these restrictions on electioneering aim at

[10] One conventional unit is 50 MDL or some 2.5 EUR.
[11] On the application of sanctions for hate speech in the context of an electoral campaign, see *Féret v. Belgium*, 16 July 2009, no. 15615/07, and *Erbakan v. Turkey*, 6 July 2006, no. 59405/00.
[12] See also Article 20.2 of ICCPR and article 4 of ICERD (International Convention for the Elimination of All Forms of Racial Discrimination).
[13] See Article 20.2 of the International Covenant on Civil and Political Rights.

fulfilling a requirement made by the Constitutional Court.[14] During the meetings with different interlocutors in Moldova, experts were informed that these restrictions on electioneering are intended as a measure to prevent indirect financing of candidates and political parties in violation of the limits and terms set by the Electoral Code. While ensuring transparency of private financing of political parties and election campaigns is a legitimate aim that should be pursued,[15] both the wording and scope of Article 52.2-3 are problematic in terms of their coverage, and their clarity and foreseeability.

32. The proposed amendment of Article 1 of the Electoral Code revises a legal definition of electioneering. According to this definition, electioneering would consist of "pleas, declarations, as well as actions consisting in the preparation and dissemination of information, aimed at determining the voters to vote for one or another electoral contender or for one of the referendum options". From this definition it is not clear whether electioneering implies a subjective intention of influencing voters, or that the aim of influencing voters in the sense of the proposed revised Article 1 is to be determined by objective criteria. From the wording, it appears that election authorities will have a wide discretion in defining statements and actions as electioneering. This may include public endorsements or rejections of particular platforms or candidates. Considering this broad definition of electioneering, the proposed Article 52.2 of the Contravention Code effectively prohibits anyone, including high level public officials or persons affiliated with religious bodies, but also any other individual, from making statements in favour or to the detriment of electoral contenders during religious processions and services and on religious grounds.

33. The equally broad wording of Article 52.3, "involvement in whatever form", similarly imposes a blanket ban for all non-government organisations, trade unions and charities to make any statements or actions related to any subject relevant for the election during the formal election campaign period. Since non-government organisations, trade unions and charities often will represent particular groups that have an interest in the outcome of an election or the election of specific candidates or the promotion of specific policies, it appears very hard, if not impossible, to distinguish between the promotion of the organisation's interests in general and the "involvement" in the election campaign. Not only does the proposed amendment prohibit non-government organisations to publicly voice their support for candidates or views on issues discussed in the electoral campaign. The wording may also prohibit non-government organisations to make statements or take actions in the context of monitoring the conduct of the election authorities and the electoral candidates in relation to the legal framework of the elections. In effect, the provision appears to prevent domestic non-government organisations from election observation, which is not consistent with the aim of the provision.

34. The wide-ranging blanket ban on political statements for members of religious bodies and non-government organisations is clearly problematic in relation to freedom of expression as enshrined in Article 10 of the ECHR.[16] It should be borne in mind that such organisations form part of the civil society and should be entitled to express their views in the public debate on matters of public concern, including during electoral campaigns. The proposed formula could lead to unexpected consequences, not least for NGOs observing the election. Third parties, i.e. individuals and organisations campaigning on their own for or against particular election contestants, should not be prohibited from doing so but the law may set provisions for their transparent financing and effective oversight, as well as reasonable spending limits on such

[14] Decision no. 34 of December 13, 2016 "Regarding the confirmation of the election results and the validation of the mandate of President of the Republic of Moldova".
[15] See Guideline 7 of the Guidelines and Report on the Financing of Political Parties (CDL-INF(2001)008) as well as ODIHR Handbook on Observation of Campaign Finance and ODIHR and Venice Commission Guidelines on Political Party Regulation; Guidelines 38-42 of the Code of Good Practice in the Field of Political Parties (CDL-AD(2009)021).
[16] See the assessment of similar provisions in Paragraphs 49-50 of Venice Commission and ODIHR Joint opinion on amendments to the electoral code of Bulgaria (CDL-AD(2017)016).

campaigns.[17] As underlined in the long-standing case law of the ECtHR, there is little scope under Article 10 for restrictions on political speech.[18] Campaigning for elections, as well as supporting electoral candidates, constitutes a core aspect of political speech protected by Article 10 of the ECHR.

35. If the aim of the provisions is to prevent indirect financing of electoral candidates, it would be preferable that the wording of Article 52.2-3 be more precisely circumscribed as to refer to the specific actions and practices that raise concern for indirect financing or other unlawful material assistance. Both Article 41.3.h of the Electoral Code and Article 26 of Law no. 294/2007 on Political Parties already prohibit NGOs, charities, trade unions and religious bodies from financing, providing services free of charge or providing material support to political parties, initiative groups, and electoral campaigns or contenders. These provisions have a more clearly and relevantly defined scope compared to the proposed Article 52.2 and 52.3 in the Contravention Code. Regardless of the approach chosen to combat indirect financing, particular care should be taken so that the measures do not interfere with the freedom of expression of members of religious bodies and NGOs as guaranteed by Article 10 of the ECHR, as well as Article 32 of the Constitution of Moldova. **The Venice Commission and ODIHR recommend reconsidering prohibitions on participation in campaigning, if any, so they do not unduly restrict the freedom of expression.**

36. Organised *transportation of voters* might a be a source of undue influence on voters and is tackled differently depending on the tradition and political environment. It is valid to restrict it when the voters using the transport are expected to support specific parties or candidates, as provided for in Article 52.4 of the draft revised Contravention Code. While a party or NGO supporting the electoral process might assist voters with transport without an expectation about voting intentions, the perception of potential coercion or other type of influence on voters` choice in a particular state or region may be such that organised transport undermines the confidence in the electoral process. The formula chosen in Article 52.4, that a prohibition only applies when voters are transported "in order to get them to vote for one of the candidates" may however be difficult to apply in practice. Given the specific controversy regarding voter transportation in Moldova, it is important that any organised voter transportation is conducted in a transparent manner that respects the voters' freedom to form an opinion and to express that opinion in a free and secret vote

37. The proposed revision of the Article 52.7 of the Contravention Code provides for introduction of further prohibitions aimed at preventing *misuse of public (administrative) resources* in electoral campaigns. In particular, public resources should not be used by candidates through launching or taking part in the launching of infrastructure projects or of procurements financed from the public budget, using public means, equipment and communications for campaign activities or for collecting signatures, or provision of free of charge services by public authorities in the electoral period.

38. These revisions are largely in line with international good practice, but the expansion of the current prohibitions may be in danger of capturing too much.[19] There appears to be no definition of administrative resources. It is unclear whether all the elements of the amended Article 52.7 are to apply since the beginning of the electoral process or during the shorter electoral campaign which is to be limited to 30 days pre-election. In particular it may be problematic to prohibit involvement in launches and procurement during the longer period

[17] See ECtHR judgment *in Bowman v. The United Kingdom*, 19 February 1998, no. 24839/94.
[18] See i.e. *Bédat v. Switzerland* [GC], 29 March 2016, no. 56925/08, par. 49; *Brasilier v. France*, 11 July 2006, no. 71343/01, par. 41; *Feldek v. Slovakia*, 12 October 2011, no. 29032/95; *Sürek v. Turkey* [GC], 8 July 1999, no. 26682/95, par. 61.
[19] See, *inter alia*, on international standards and good practice, Paragraphs II.A.4.1, II.B.1.1 and II.B.1.3 of the Venice Commission's and OSCE/ODIHR's Joint Guidelines for preventing and responding to the misuse of administrative resources during electoral processes.

without clearer guidance for candidates affiliated with government. The second part of the article is focused on public authorities and institutions and is welcome, but again it should provide more clarity if it applies during the longer or shorter period. The sanctions for abuse of administrative resources to be found in Article 75 are quite extensive for candidates but it should be made more explicit if the sanctions also apply to the public bodies and agencies. **The Venice Commission and ODIHR recommend re-drafting the provisions on (misuse of) administrative resources in order to make them more precise.**[20]

39. Article 52.8 provides that "images representing… international organisations shall not be used for electoral advertising purposes. It shall be forbidden to combine colours and/or sounds invoking national symbols of… international organisations". The conformity of such a restriction with freedom of expression could be questioned. See also Article 69.5[1] concerning media.

40. A new paragraph 11, added to Article 52 of the Electoral Code, specifies that the campaign for the second round shall begin the day after the entry into force of the CEC's decision setting the date of the second round. This addition introduces greater clarity into campaign regulations and it is welcome.

41. As a matter of legislative consistency, the penalties provided in the Contravention Code are normally imposed for the breach of provisions contained in the respective subject-matter legislation. With the exception of "hate speech" (see above), the suggested new penalties in Article 52 of the Contravention Code do not appear to correspond to prohibitions in the Electoral Code. The alignment of such prohibitions could be considered.

E. Voting and counting

42. Item 24 of the draft Law proposes new provisions about assisted voting for persons with disabilities (Article 58.1). While the changes appear to be an improvement there is a general difficulty that special provisions which provide for assistance of a third party, even when chosen by the voter, do not properly protect the secrecy of the ballot.

43. The draft Law does not address the issues of allocation, including number and placement, of *polling stations abroad*. This was however a repeated subject in the discussions with the stakeholders in Moldova and a long standing ODIHR and Venice Commission recommendation.[21] The Venice Commission and ODIHR also in this regard refer to the 2017 Joint Opinion on the amendments to the Electoral Code of Bulgaria, that states the following: [22]

> "The trend in recent decades has been for more European states to allow voting from abroad in national elections.[23] While there is no European standard regulating the right for citizens residing abroad to vote in national elections,[24] changes to such existing provisions should nonetheless be subject to the same stability requirements as other provisions on the right to vote. In its case law, the European Court of Human Rights has awarded states a wide margin of appreciation under Article 3 Protocol 1 and has accepted restrictions in voting rights for citizens residing abroad, in particular, with residence requirements. It appears from this case law that the test under Article 3 Protocol 1 concerning voting abroad is whether or not there has been an arbitrary or

[20] See Venice Commission and ODIHR Joint Guidelines on prevention of misuse of administrative resources
[21] See, for example, recommendation 10 from the ODIHR Final report on 2016 presidential election in Moldova.
[22] CDL-AD(2017)016, Bulgaria - Joint opinion on amendments to the electoral code, par. 68.
[23] See for an appraisal of relevant practice CoE/Congress of Local and Regional Authorities, Electoral lists and voters residing de facto abroad, 28 January 2015 (CG/MON/2015(27)8), p. 15.
[24] There is no obligation under Article 3 Protocol 1 of the European Convention of Human Rights for states to allow this; see in this respect *Sitaropoulos and Giakoumopoulos v. Greece* [G.C.], 15 March 2012, application no. 42202/07, par. 75. The same follows from the Code of Good Practice in Electoral Matters, item I 1.1 c. See also the Venice Commission's Report on out-of-country voting (CDL-AD(2011)022), III. A.

unreasonable restriction on the right to vote.[25] PACE has also adopted the view that member states should not place "unnecessary obstacles in the path of the effective exercise of the voting rights of foreign nationals residing on their territories".[26] In other words, while the state is free to decide whether or not to allow voting from abroad, if voting from abroad is allowed, restrictions should be justified. Allowing citizens residing abroad to vote entails organisational challenges, which may justify certain restrictions in the exercise of the right to vote.[27] Limiting the number of polling stations or restricting voting to embassies or consulates may be necessary due to the extra cost and resources required for organising elections abroad."

F. Election observers

44. The draft Law proposes changes to Article 68.6 of the Electoral Code, which deals with observers. Whereas the current version allows observers to carry out their activities before, during and after the electoral campaign, the revised text permits observation "only from the start of the electoral campaign until its conclusion". The electoral campaign, as defined in the revised Article 1 of the Electoral Code, begins for each electoral contender or referendum participant upon their registration by the competent electoral body, but not earlier than 30 days up to the date of the election, and ends on the day preceding the day before the election or on the date of the withdrawal or annulment of the registration. The effect of the restriction is even that accredited election observers cannot monitor the pre-election and post-election period, nor even on election day, if the provision of the draft is applied literally. These periods falling outside the formal election campaign are nonetheless part of the election cycle and are relevant for the context of the election campaign. Such restrictions would unduly limit the scope and comprehensiveness of election observation. **The Venice Commission ODIHR recommend that observer access to all stages of the electoral process is guaranteed**, in line with international standards and good practice.[28]

45. The rapporteurs were informed that the law (presumably Article 68.3) was interpreted as prohibiting diplomatic missions from accrediting local staff as observers. The slightly revised version of this Article could be also be interpreted in this way; this should be considered.

46. Article 75.9 introduces an automatic loss of accreditation for election observers in case of violation of electoral legislation "in any manner", and without consideration of the seriousness of the breach. **This automatic and severe sanction should be reconsidered, and due application should be given to the principle of proportionality.**

G. Media

47. The draft Law introduces a number of amendments in the Electoral Code and in the Code of Audiovisual Media Services relating to media coverage of elections. The draft revised Article 69.4 of the Electoral Code adds the words "shall not engage in electioneering in favour or

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[25] See European Court of Human Rights judgements, *Hilbe v. Liechtenstein* (dec.), 7 September 1999, application no. 31981/96; *Doyle v. United Kingdom* (dec.), 6 February 2007, application no. 30157/06; *Sitaropoulos and Giakomopoulos v. Greece* [G.C.], 15 March 2012, application no. 42202/07, par. 69; *Shindler v. the United Kingdom*, 7 May 2013, application no. 19840/09 par. 105, 116.

[26] See Article 7 of PACE Resolution 1459 (2005) on abolition of restrictions on the right to vote; see also PACE Recommendation no. 1714 (2005) on abolition of restrictions on the right to vote; PACE Resolution 1591 (2007) on distance voting, par. 1, 8; PACE Resolution 1696 (2009) 'Engaging European diasporas', par. 9.1.2.; PACE, Recommendation 1890 (2009) "Engaging European diasporas". See furthermore Venice Commission, Report on out-of-country Voting, CDL-AD(2011)022.

[27] See the Venice Commission's Report on out-of-country voting (CDL-AD(2011)022), par. 75.

[28] See Guideline II.3.2.b of the Code of Good Practice in Electoral Matters, and, more generally, Guidelines on an internationally recognised status of election observers (CDL-AD(2009)059) and ODIHR Election Observation Handbook. See also paragraph 12 of the 1994 Budapest Summit Declaration, where OSCE participating states acknowledged that "ODIHR will play an enhanced role in election monitoring, before, during and after elections".

against any electoral contender and/or candidate or one of the referendum options" at the end of the sentence. This prohibition, which would appear to apply also to private media, could be interpreted in such a manner that it could prevent media outlets from any critical analysis of electoral platforms or referendum issues.[29] **The Venice Commission and ODIHR recommend that any restrictions on freedom of expression be circumscribed precisely and follow international standards in this area.[30]**

48. The draft Law proposes amendments to the Article 70.10 of the Electoral Code, which deals with *opinion polls* during the electoral period. It appears on its face to cover all opinion polls whether compiled by parties, print or audio-visual media outlets. While the current text provides for a notification of the CEC prior to conducting an opinion poll, the revised text allows for opinion polls to be conducted "in accordance with the procedure established by the CEC on the basis of a regulation approved to this effect". A regulation on publication rather that conduct of the poll can have a valid role to restrain the appearance of spurious polls, particularly on polling day. However, these provisions introduce potential for unwarranted interference with freedom of the media. **Requirements for the conduct of opinion polls should be prescribed by law and not left to the discretion of the CEC**.[31] These requirements should not impose greater restrictions than commonly accepted professional standards for opinion polling.[32]

49. The draft law proposes to amend Article 80.6 of the Audiovisual Code introducing a shorter deadline for the publication by the Audiovisual Council of its decisions on complaints during the election period: 24 hours instead of two days, which is welcome. The proposed new Article 84.10^1-10^2 of the Code of Audiovisual Media Services appears to strengthen the sanctioning powers of the Audiovisual Council in line with previous ODIHR recommendations.[33] According to paragraph 10^1, breaches of the duty of neutrality in the media coverage by media service providers and distributors shall be sanctioned with the withdrawal of the right to cover the elections or referendum for a period of seven days, or until the end of the electoral period in case of repeated violations. According to paragraph 10^2, repeated instances of unauthorised election campaign coverage can entail the suspension of the broadcasting licence for media service providers and distributors. However, the vague wording ("violates the obligation of fairness, responsibility, balance and impartiality") of these provisions provides a significant discretion to the Audiovisual Council in identifying violations as well as in imposing significant sanctions, including the suspension of the broadcasting license. The wide discretion, coupled with severe sanctions, increases the risk of abuse. It has to be noted that often a warning or an obligation to allocate more time to other candidates' lists or stakeholders may be an efficient means to balance the campaign. The withdrawal of media activity rights or, as provided in paragraph 10^2, the suspension of the broadcasting license or the retransmission authorisation could be considered carefully as a last resort measure.

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[29] See, for example, Paragraph 20 of the UN Human Rights Committee's General Comment No. 34, noting that "[t]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues and to inform public opinion without censorship or restraint.

[30] Cf. CDL-AD(2019)016, Joint Report of the Venice Commission and of the Directorate of Information Society and Action against Crime of the Directorate General of Human Rights and Rule of Law (DGI), on Digital Technologies and Elections, par. 50, and references to the case-law of the European Court of Human Rights; CDL-AD(2009)031, Guidelines on media analysis during election observation missions, par. 17; CDL-AD(2013)021, opinion on the electoral legislation of Mexico, par. 31.

[31] According to Article 10.2 of the ECHR, the exercise of the freedom to receive and impart information "may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society".

[32] See paragraph 8 of the Recommendation CM/Rec(2007)15 of the Committee of Ministers of the Council on Europe on measures concerning media coverage of election campaigns.

[33] See, for example, Recommendation 28 of the ODIHR Final report on 24 February 2019 parliamentary elections.

50. Decisions by the Audiovisual Council can be appealed to a court according to the current Article 84.15 as well as Article 71.3 of the draft Law but given the short time-span of an election, the law should provide a deadline for the court decision in these specific cases. The proposed wording of the article also limits the foreseeability for media service providers and distributors, which may lead to self-censoring and restrict the sphere for critical journalism in the context of elections. A more proportionate approach would be the development of self-regulatory frameworks which incorporate professional and ethical standards regarding media coverage of election campaigns.[34] **The Venice Commission and ODIHR recommend that sanctions be applied to the media only for violations of clearly defined rules. These sanctions should be proportional and subject to effective judicial review.**

51. Items 33 et seq of the draft Law propose changes about media service providers including a requirement for all such providers covering an election campaign to present a "statement of editorial policy" (Article 70.2). It is unclear what the proposed "statement of editorial policy" should cover. It is clearly necessary that each media provider be required to explain at an early stage how it will comply with the legal requirements such as access by candidates and parties to its services and paid advertising. But it would seem excessive to require a private media outlet to commit itself to a specific policy on treatment of contestants and other electoral stakeholders. The obligation to disclose ownership of the media outlet is in line with previous ODIHR recommendations and is valid in the interests of transparency but is rather a matter for media legal framework rather than electoral campaign rules only.

52. The proposed Article 70.3 of the Electoral Code requires media service providers to hold live election debates during prime-time hours. During the online meetings, several interlocutors claimed that this requirement is challenging for broadcasters to meet due to the logistical problems of having numerous broadcasters scheduling debates with the same candidates during a short time-frame. The principle of the Rule of Law implies that legal provisions be implementable in practice.[35] Should debates in all public media not be possible, it could be envisaged to limit the obligation to organise them to the broadcasters with the broadest audience, which would of course be compelled to provide equal access to the various candidates.

53. The draft proposes to amend Article 70.12 of the Electoral Code to provide that the Audiovisual Council, during the election period, shall monitor and report to the CEC the election coverage in all the programmes of public and private media services with "the highest audience share". This provision is broadly worded, and it does not appear to clearly define the scope for Audiovisual Council's monitoring and reporting.

H. Complaints and appeals

54. The draft Law introduces a number of changes in the Electoral Code's provisions on complaints and appeals (Articles 71-74 of the Electoral Code). In contrast to the current procedure, the draft Law establishes jurisdiction of election bodies over complaints related to actions (inaction) of the election administration (CEC, district election commissions – DECs -, PEBs), the Audiovisual Council as well as against electoral contestants, candidates, initiative groups, referendum participants and media service providers (revised Article 72.1). Decisions of election bodies may be appealed to higher election bodies and then to courts (Articles 71.1-3). The draft Law retains most of the deadlines for election dispute resolution and the possibility to challenge the actions and inactions of the electoral contestants in addition to the appeals against the election administration.

[34] See paragraph 5 of the Recommendation CM/Rec(2007)15 of the Committee of Ministers, cited above.
[35] Cf. Rule of Law Checklist, CDL-AD(2016)007, par. 54.

55. The persons entitled to submit appeals are listed in very general terms. The draft revised Article 1 of the Electoral Code provides that the appellant is an electoral law subject (voter, electoral contender, initiative group, referendum participant or other person whose rights are affected) who claims the defence of his/her rights that have been prejudiced in the process of organising and carrying out the elections, through the actions, inactions or decisions of the electoral bodies or actions or inactions of the electoral contenders. This wide definition of the persons entitled to submit complaints or appeals is welcome and in line with international standards.

56. It is welcome that the appeals may be submitted against actions or inactions by the electoral contenders, candidates on the lists, initiative groups and referendum participants. As electoral rights can be affected by individuals or groups, grounds for complaints might also include inactions and inadequate behaviour by individuals or groups, especially related to the campaigning and financing thereof.

57. The draft revised Article 71.1 of the Electoral Code provides that the detailed procedure for examining the appeals during the electoral period shall be approved by a regulation of the CEC. As the procedural aspects such as the obligation to submit evidence, deadlines for calling the oral session or possibility to call witnesses can influence the outcome of the electoral dispute resolution, it would be preferable to provide the main rules governing the procedure in the law, not in a regulation. In particular, **the Venice Commission and ODIHR recommend providing in the Electoral Code the list of cases where the Administrative Code has to be applied by the election administration and by the Audiovisual Council in the appeal procedure**.

58. The draft Law does not enlist in detail the decisions or actions of the election administration that can be challenged. The persons whose electoral rights are violated would benefit from the elaboration of a more detailed list of appealable decisions, actions and inactions. This would make it possible to declare an appeal against the results inadmissible if the violation took place at an earlier stage of the electoral process (registration of voters or candidates, decisions on the opening/non-opening of the polling stations, campaigning and its financing) and did not lead to an immediate appeal. **The Venice Commission and ODIHR recommend that the most typical cases of actions, inactions and decisions open to challenge by appeal be (non-exhaustively) listed in the Electoral Code.** In addition, the competencies of the ordinary courts and the Constitutional Court adjudicating appeals on the vote counting and other decisions made after the election day should be clarified in order to avoid lack of jurisdiction or parallel competencies and possibilities for the voters and candidates to choose the adjudicating body.

59. The electoral legislation would benefit from a provision to avoid rejection of those appeals that have some formal shortcomings. In these cases, the competent authority should give a (short) deadline to the appellant to bring the appeal in line with the law.

60. Article 73.2 of the draft revised Code does not provide a deadline for decisions on appeal in case of inaction of DECs or PEBs. For the sake of consistency, short and similar deadlines should be provided for the various complaints and appeals procedures (three to five days for each at first instance).[36]

61. The draft Law provides deadlines for the submission and adjudication of the complaints and appeals, mainly in a short time, in conformity with international standards. Appeals against the actions and decisions of the district election commissions and of precinct electoral bureaus shall be examined within three calendar days after being submitted, but not later than on election day. Appeals against the actions / inactions of electoral contenders / candidates on lists / initiative groups / referendum participants shall be examined within five calendar days after

[36] See Guideline II.3.3.g f the Code of Good Practice in Electoral Matters.

being submitted, but not later than on election day. Those appeals submitted on election day have to be resolved on the same day. The first and the second judicial appeals are examined within three days from the receipt of the file.

62. The proposed Article 74.3 foresees that a judicial appeal may be lodged against the court decision within one day after the decision has been pronounced, and against the decision of the Court of Appeal within one day after the decision has been pronounced. It has to be noted that the persons entitled to lodge electoral complaints, primarily the voters and the candidates, should act quickly in order to avoid disruption of the on-going electoral process. At the same time, the appellants should be provided enough time to understand the procedure (especially as it is provided for not only in the Electoral Code, but also in the Administrative Code and concerning the campaigning, in the Code of Audiovisual Media Services). It has to be noted that the appeal has to be reasoned and the appellant has to submit evidence. Thus, especially in more complex cases, the extremely short deadline may hamper the protection of electoral rights. **The Venice Commission and OSCE/ODIHR recommend extending this deadline to three to five days.** The aim to shorten the time required to solve all electoral disputes could be achieved, if necessary, by decreasing the number of instances to deal with the case, e.g. by providing a judicial remedy only in one court instance.

63. Draft Article 72 of the Electoral Code foresees a deadline for submission of appeals against inactions by the election administration, the Audiovisual Council or private stakeholders. The appeal has to be submitted in this case within three days from the inaction. Such deadline is not clear and may lead to a situation where the appeals are not considered in substance due to the vagueness of the law. As the legislation provides for concrete deadlines only for some decision-making, not against inaction, the starting point of such a deadline is often not clear. **It is advisable to provide that in first instance a request (petition) to take action may be submitted without a deadline, unless a concrete deadline is provided in the law.** In that case the deadline for appeal would start from the last day given by the law to the authority to take a decision.

64. The draft Law also adds a new Article 73^1 to the Electoral Code, which provides that an election body, after examining a complaint, may either "admit it in whole or in part and find violations" of electoral legislation, or reject the complaint due to late submission, lack of evidence, or as groundless respectively replacing the contested decision or maintaining it in force. Contrary to Article 100, which provides that the Constitutional Court cancels the elections if the violations of the Code affected the result, new Article 73^1 does not provide more in detail the effect of decisions admitting appeals. This provision should be implemented so that the decisions on appeals have not only ascertaining effect but have to be implemented so that the violation of electoral rights may be eliminated wherever possible. **To ensure effective remedy, it would be advisable to specify that for any violation of electoral legislation, the competent body[37] should take steps to restore electoral rights that have been infringed and impose adequate sanctions.**[38]

65. Whatever the text of the law, effective examination of complaints and appeals in the electoral field is crucial to ensure the respect of the right to free elections as enshrined *inter alia* in Article 3 of Protocol 1 to the ECHR.[39] In this field like in others, implementation of the law is as important as its content.[40]

[37] In general an electoral management body; the Audiovisual Council in the field of media.
[38] See Paragraph 5.10 and 5.11 of the 1990 OSCE Copenhagen Document.
[39] Cf. ECtHR *Political Party "Patria" v. the Republic of Moldova,* 4 August 2020, nos. 5113/15 and others.
[40] Rule of Law Checklist, II.A.7.

I. Legal liability and sanctions

66. Provisions on legal liability (Article 75 of the Electoral Code) are revised by the draft Law, with a new sanction added: the loss of free and/or paid airtime for a period of 24 to 48 hours, which may be imposed only after the application of a warning. The list of gradually escalating sanctions (warning, deregistration of candidates, contravention liability, loss of allocations from the state budget and loss of free and / or paid airtime, for a period of 24 to 48 hours, which can be imposed only after the application of a warning sanction) seems proportionate and dissuasive and has the potential to be effective in line with international standards.[41] The expansion of the range of sanctions is a positive step, insofar as they allow the sanctioning body to choose a proportionate response to the offence. In this respect, concerns have been expressed that the draft Law allows for the cancellation of registration of an electoral contender by an election body, while currently such sanction may only be applied by a court. The Venice Commission and ODIHR take this concern seriously and recalls that cancellation of registration effectively deprives an eligible person of the right to stand for election. If deregistration has been decided before election day, it is unlikely that a decision on appeal will take place on time for the eliminated candidate/party to be in a position to compete fairly.[42] In cases of violations concerning campaign funding, an obligation to return the funds or the loss of state funding appear to be sufficient and proportionate. **Such severe interference with suffrage rights should be the measure of last resort, applied equally to all contenders, only for the most serious violations, and subject to effective judicial oversight, in line with international standards and good practice.**[43] **It is recommended, at least, to provide that any appeal against such a decision automatically suspends it.**

67. The amendments would grant not only the CEC, but also the Audiovisual Council significant sanctioning power, going up to the suspension of the broadcasting license or the retransmission authorisation, without requiring court order (see Article 84.10^1-10^2 of the draft amendments to the Code of Audiovisual Media Services). The decision can be challenged to the court which might bring to legal uncertainty during the relatively short campaign period. It appears that this change in approach is to be taken to achieve consistency with the new administrative code, which is a valid approach, but the provisions should make clear which is the competent court and should apply shortened time frames for the urgency of an electoral process. **The Venice Commission and ODIHR recommend applying sanctions in full conformity with the principle of proportionality and to ensure effective judicial oversight.**

68. The draft Law (proposed Article 71.5 of the Electoral Code) suggests that the examination of the appeals on the financing of political parties' election campaigns shall not be subject to the prescriptive periods stipulated under Articles 72–74. In case the violation can be eliminated before election day (e.g. by returning the illegal campaign funds, limiting the further time for campaigning in the media etc.), the appeals should be considered in the same short timeframe as other appeals.

69. Article 75.5 does not enlist the issues of misuse of administrative resources as a ground for deregistration of candidates. As the misuse of administrative resources is one of the main concerns and has been pointed out in ODIHR and PACE election observation reports, **it is recommended to provide for sanctions for such violations in at least the similar manner as violations concerning the exceeding of a campaign cost ceiling**.

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[41] See Council of Europe Committee of Ministers Recommendation 2003(4) on common rules against corruption in the funding of political parties and electoral campaigns.

[42] Cf. ECtHR *Political Party "Patria" v. the Republic of Moldova,* 4 August 2020, nos. 5113/15 and others.

[43] Paragraph 7.6 of the 1990 OSCE Copenhagen Document calls on OSCE participating States to ensure that contestants are able "[…] to compete with each other on a basis of equal treatment before the law and by the authorities." The Venice Commission Code of Good Practice in Electoral Matters (I.2.3.a) states that "Equality of opportunity must be guaranteed for parties and candidates alike."

J. Other issues

70. Article 8 of the draft Law allows for extending the voting period. Such an amendment is prudent given the Covid-19 pandemic. However, the draft Law gives the election authorities a very wide discretion in deciding the voting period, without imposing any conditions as to which situations may allow for extending the voting period and for how long. The regulation of the possibility to extend the voting period should be more specific or be linked to specific objective requirements in order to prevent the extension of the voting period for political gain. The integrity of election materials, including the security of ballot papers and boxes during the voting process should be ensured.[44]

71. Article 15.2 of the Electoral Code is amended by the draft Law to specify that candidates may not serve as representatives of election contestants in electoral administration bodies. This provision is welcome as it explicitly prevents appointments with a conflict of interest.

72. The amendment to Article 152 would provide for registration of referendum participants which would give the right to participate in a referendum campaign. This can contribute to further transparency and link to provisions on finance. However, the level of detail required by the new article may be excessive as potential referendum participants may be loose *ad hoc* groups not established for regular political activity but only focussed on the issue in the referendum. This should be considered.

[44] Cf. Respect for democracy, human rights and the rule of law during states of emergency: reflections (CDL-AD(2020)014), par. 107.