REPUBLIC OF ALBANIA
PARLIAMENTARIAN GROUP OF DEMOCRATIC PARTY

OPINION no. 2

ON

THE DRAFT LAW "ON SOME AMENDMENTS TO LAW NO. 8417 DATED 21. 10. 1998 "CONSTITUTION OF THE REPUBLIC OF ALBANIA", AS AMENDED"[1]

(REVISED VERSION OF DRAFT LAW)

TO: EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION)

CC: US EMBASSY IN TIRANË

DELEGATION OF THE EUROPEAN UNION IN TIRANË

COUNCIL OF EUROPE OFFICE IN TIRANË

OSCE PRESENCE IN TIRANË

PREPARED BY:
EXPERTS OF THE PARLIAMENTARIAN OPPOSITION IN ALBANIA

Tiranë, January 17, 2016

[1] This Opinion is prepared on the basis of the draft of the bill (*Albanian version)* distributed to MP-s of the parliamentarian opposition in the Special Parliamentarian Committee, via email of 13.01.2016.

I. INTRODUCTION

As a preamble to the analysis and opinion to be delivered on draft law prepared by the experts appointed only by the parliamentarian majority and its compliance with the standards already elaborated by Venice Commission, we would like to emphasize that the reform of Albanian judicial system should be carried out through the concurrent strengthening of its independence and accountability, in order to make it easily accessible, trustworthy for the public, free of corruption, with a high sense of integrity and efficient in rendering high quality justice.

We are deeply concerned about the rush surrounding the process of revision of amendments, arguing that Venice Commission asks the delivery of the revised draft by January 12, 2016. We also share our concern about the lack of technical care and biased position featuring the process of formulation of the revised draft of constitutional amendments by HLEG[2].

The draft is compiled by HLEG experts, without assuming this task by the Special Parliamentarian Committee[3], but only by representatives of the Socialist Party within the Committee. Conceit and hurriedness to overlook or underestimate the recommendations of the Interim Opinion which are not in the interest of the political party they represent, basic level technical errors in the text of draft law, but also for the delivery of biased political solutions favouring the current majority, are easily observed from this short-term analysis prepared within a time of only two days[4]. We deem that the refusal to draw up a common consensual draft based on Venice recommendations, leads to the conclusion that this draft is not only biased, but it has also not enabled a comprehensive and consensual process, thus failing to build consensus climate required for a stable reform.

In order to have a free reform process and out of the conflict of (political) interests, focus should be shifted not only to the short-term changes (which are likely to generate benefits to the qualified sporadic majority) but also to the long-term changes, establishment of the sustainable mechanisms, which should rather serve the "system" and not "people"! Accordingly, "public interest" should prevail over the “political interest of the moment", this being understood as a party-oriented interest, mainly of the governing majorities. It is prerequisite that this reform process needs to be developed in circumstances under which that majority implementing the changes (either be a consensual majority of all political wings) is fully indifferent to these types of short-term and mid-term benefits.

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[2] The High Level Experts Group (HLEG) composed of experts appointed only with the voting of parliamentarian majority and where the opposition has no representatives.

[3] Between the period August 2015-January 2016, the Special Parliamentarian Committee has held a total of only 2 meetings!

[4] The Special Committee was convened on 15.01.2016 and gave time to the opposition until 18.01.2016 to file its accompanying comments on the draft.

Therefore, it is rather necessary to elaborate the concept so that to fully, deeply, clearly and safely put an end to the short-term and mid-term political interest, with a view that the volition moment implementing these changes is generated from the objective need for perfection of the system. Such a requirement also guarantees the public "inclusive acceptance" of these changes, which successfully overcomes not only the controversies or emotional scepticism to an initiative (mainly of political area), but also the institutional attempts, such as, for instance, the challenge of similar changes. Thus, the useless burden of the Constitution reform process, with doses of scepticism stemming from the sense of using these constitutional amendments as a result of the "internal political game between the parties" hinders their approval (and almost puts an end to this objective), and in the best scenario, when approval is reached, they always remain "crippled" in terms of legitimacy.

All political parties have expressed their confidence that Venice Commission is the authority guaranteeing that Albania is moving toward an effective and proper reform in justice system. The political parties have even shared their belief that Venice Commission standards are the only way for a comprehensive and deep reform in the justice system. Therefore, the role and responsibility of Venice Commission to deliver appropriate suggestions and recommendations and preserve international standards of the organization of justice system, elaborated also in the cases of other states, but even before for Albania, is more than ever important.

The majority representatives and experts, although publicly admitted that Venice Commission Opinion is the only guide for the implementation of this reform, have unreasonably refused to reflect all concerns raised in the Preliminary Opinion of Venice Commission no. 824/2015 dated December 21, 2015. They argued that the Opinion is only a preliminary one and that Venice Commission may change its opinion on a number of issues when drafting its Final Opinion[5]. In the meetings of the group of experts, majority experts even undervalued the written comments in the Preliminary Opinion, explaining to us that from *informal* meetings with the experts and rapporteurs of the Venice Commission, they had found understanding for their solutions, regardless of what was formulated in the Interim Opinion.

We consider this argument as unacceptable, as an alibi of HLEG experts (implying, of the majority) to avoid the Preliminary Opinion recommendations and we expect the Final Opinion of Venice Commission be more objective and specific than its Preliminary Opinion, bringing to the attention of the Albanian authorities, solutions provided also in cases of other states, especially on standards preventing the political capture of justice system, role of parliamentarian opposition as a balance and check mechanism, and above all the "non-entrenchment" of political influence of the current majority on the national judicial system, taking into account the present political reality.

[5] Discussion of HLEG Chairman, Mr. Sokol Sadushi, about the constitutional amendments, during the meeting of working group dated 08.01.2016.

II. ON THE PROCESS OF REVISION OF CONSTITUTIONAL AMENDMENTS

As you are well-aware of, the previous process of the formulation of Draft Amendments for which the Venice Commission opinion was requested, was faulty, since they were compiled not only within a short time and without a common process in defining the policies (the best and the most beneficial solutions), but also because the formulation of these Draft Amendments was carried out unilaterally. The amendments were drafted without an internal process of consultation with the parliamentarian opposition, parliamentarian political groups, justice system stakeholders or civil society representatives (in this framework, see also the position of all stakeholders, including the constitutional institutions of justice system, associations of judges, prosecutors and lawyers, who declare the total lack of transparency, consensus and comprehensiveness in the process)[6]. It was precisely this situation, also observed in paragraph 4 of the Venice Commission Opinion of December 21, 2015, against the background of which we were obliged, beyond our will, to file to the Parliamentarian Committee and Venice Commission, substantial remarks on solutions introduced in the project.

We take this opportunity once again to thank Venice Commission, not only because it could shortly accept and analyse our Opinion (see CDL-REF(2015)043), not only for their consent to hear our representatives in the session of December 18, but above all because in the Interim Opinion (CDL-AD (2015) 045) of December 21, 2015 we noted that the main concerns raised by us were reflected in the Interim Opinion. The Venice Commission has found relevant the concerns raised but has also given highly valuable technical advice and guidelines, which we believe will be further elaborated in the Final Opinion, providing an ultimate solution to these concerns.

In addition, we also considered the approval of the Interim Opinion as a clear meeting

[6] Due to the strong persistence of the parliamentarian opposition and with the intervention of international local stakeholders, between November-December 2015 a number of Round Tables were organized on the Public Consultation with justice system stakeholders, with a view of asking their opinion on the draft. Yet, we regretfully observe that the conclusions of meetings never became public. Further, they were neither reflected in the unilateral draft that is resent to you for opinion.

point that levelled out all deep divergences we have had until that time and as a proper moment to start a shared consensual and unique process in compiling a consolidated draft of the Draft Amendments. This is also compliant with the fifth paragraph of the Opinion, according to which: *Once the Draft Amendments are reviewed in the light of recommendations included in the interim opinion, the Venice Commission will prepare a final opinion of the revised text*". In this way, we also afforded the opportunity to follow the friendly advice given by the President Buquicchio in the plenary session of December 18, 2015, that political parties in Albania should pursue the same consensual process, such as in the case of the decriminalisation reform.

On this basis and only on this basis, we sought for the fulfilment of this both political and legal obligation, to shortly start enriching the initial draft with the guidelines provided by Venice Commission and based only on this document. However, it transpired that on December 29 (*the first day of common technical work for reflection of your Opinion),* a Draft of the Constitutional Amendments was unexpectedly introduced, again unilaterally compiled by the same technical authors that had formulated the initial draft. It was obvious that unfortunately the same faulty, unilateral and majority political-oriented process was replicated to produce a new draft consulted with noone, neither with the opposition, nor with the groups of interest, equally as it was proceeded with the initial draft. This was a clear sign of the malevolent will to not reflect the Venice Commission recommendations and to rebuild a unilateral process adapted only to the parliamentarian majority.

At that time our reasonable request was to jointly realise a direct, clear reading of the text of the Opinion. It would be such a procedure that would concurrently enable not only a more qualified elaboration of the most optimal solutions, but it would also conceive a joint will on political level.

We faced irrational persistence of the other party to impose us the solutions they had prefabricated due to the unilateral/biased reading of the Venice Commission opinion and under their subjective focus. It was quite foreseeable that acting in this way would have no serious reflection of the guidelines and advice contained in the Venice

Commission Opinion. In fact, it has proven so. Even after the unilaterally revised Draft Amendments, the same outline and the same solutions as in the initial draft were maintained. Sensibilities on the political capture of the justice system, abolishment of the basic safeguards and unilateral dominance of the reassessment process and fresh recruitment of the justice senior officials, complication of the large number of units remain a concern and probably are further increased.

The persistence of the other party continued till the end, although we offered them a number of solutions, under the only condition of respecting point per point and in spirit, those sections and paragraphs where Venice Commission has adopted a firm and strict position in its Opinion. In our efforts to reach a sole product in order to present it to the Venice Commission as a consensual and common solution, we reached up to the point that for one of the most sensitive issues, the one related to the system depoliticisation through procedures and formula ensuring the "substantial participation of the opposition" in the constitution of the self-governing bodies of the judiciary, we would find a compromise solution even for a transitional period. With the help of international experts assisting us in this process, on January 9, 2016 we reached the formulation of this compromise solution in terms of this matter. Nevertheless, although they agreed in principle, the following day on January 10, 2016, the majority experts withdrew from that position. This is an additional evidence of the non-principled position of political majority, aiming that through a thorough review of the whole constitutional background of the justice system and implementation of a unilateral process, it takes advantage to secure the political capture of the justice system.

Finally, the result is as follows: **The Draft Amendments submitted for final opinion are an outcome of a unilateral non-consensual process and without taking into account the remarks, additions and rational solutions of the parliamentarian opposition**. We believe that this is probably the most serious flaw that may occur to a constitutional reviewing process, a flaw manifested in each provision, in letter and spirit of these amendments, which in this way do nothing but seriously compromise the purpose of the Reform and the need of the country for such a Reform, jeopardizing the implementation of the scenario You warn under paragraph 98 of Your Opinion. This

would probably be a turning point of regress to the democracy system in the country[7].

We would like to emphasize this is the first time when such key constitutional amendments are drafted in Albania[8] and their preparation is attempted to be unilateral, fully excluding the opportunity for compromise between the political groups and urging the parties to individual versions. This is an indicator of malevolent will of the majority to advance with the Justice Reform and to bring it in line with the international standards. The parliamentarian opposition has not wished and does not wish the submission of several versions of the constitutional amendments to Venice Commission. This is a practice not only new to the Venice Commission activity, but it would unfairly burden the work of experts of this Commission. Furthermore, we could face the fact that all versions be deemed acceptable by the Venice Commission and again the parliamentarian groups would have to find an acceptable solution for all parties. This is the reason why we have not introduced concrete constitutional amendments drafted by the experts appointed by the opposition (although the latter have prepared and submitted to the Special Committee the Strategic Document "Platform in the Justice System in Albania"), since we consider this proposal of majority as an attempt to not move forward with the Justice Reform in the country, which may be realized only through a consensual process.

In the meeting of January 15, 2016 of the Special Parliamentarian Committee on the Justice Reform Implementation, the opposition maintained to present a consolidated and consensual draft on the crucial matters of the reform, in order to not put the Venice Commission experts under a difficult position in a political conflict between the parties in Albania, thus following the friendly advice of the President Buquicchio. Yet, this was unfortunately not accepted by the majority and as a result it was not achieved. In these circumstances, again the process failed to be comprehensive and consensual, leaving the political parties in their extreme positions, where the opposition requires the

[7] Interim Opinion no. 824/2015 – "*98..... we should bear in mind that such a radical solution would be irrelevant in normal circumstances, because it creates huge tensions within the judiciary, destabilizes its work, increases the lack of public trust in the judiciary, diverts the attention of judges from their normal duties, and as every extraordinary measure,* ***it causes the risk of capture of the judiciary from the political party controlling the process***.".

[8] Their voting in the Parliament legally requires the votes of opposition MP-s because the constitutional amendments require 2/3 of votes for approval.

formulation of an only/consolidated draft based on 138 recommendations of the Interim Opinion of Venice Commission, while the majority claims that for those points conflicting with the recommendations, it will once again ask the Venice Commission, with the hope expressed also by the majority representatives and experts that Venice Commission will change the position adopted in the Interim Opinion!

We introduce this brief background on the process, the way how it is organized with exclusion-oriented positions and biased formulations of the Draft Amendments and detecting the true purpose of this process of review of the Constitution, with the sole purpose that once the Venice Commission finds itself *in prima personae*, the existence of this reality, it will take it into account, under a deep analysis, the criticism and elaboration of the eventual solutions it will provide in the Final Report.

III. ON THE CONTENT OF THE NEW DRAFT OF CONSTITUTIONAL AMENDMENTS

The content of the draft unilaterally revised by the majority, of the Draft Amendments has *prima facie* some amendments. However, following their analysis, we observe that the largest and most substantial part of the Venice Commission recommendations is not reflected, thus rendering the new draft incompliant with the recommendations given while some other part is reflected not thoroughly or at variance with the recommendations. We further note that the amendments do not take into account the standards already elaborated by the Venice Commission for other states or for Albania itself[9].

1. As a preamble to all our arguments, we would like to bring to your attention that the majority experts have refused to review the institutional scheme proposed in the Constitutional Draft Amendments, bypassing the finding of Venice Commission according to which:

"10. The purpose pursued by the reform is commendable; however the organizational choices proposed by the Draft Amendments appear to be too awkward and the reform is likely to lead to a highly complex decision making process, with a

[9] In this context, we take into account CDL-INF(1998)009, "Opinion of the Venice Commission on the Latest Amendments to the Law on Main Constitutional Provisions of the Republic of Albania".

number of bodies controlling one another in a complicated system of checks and balances.

65. As a preliminary remark, Venice Commission notes that the Draft Amendments introduce a number of new bodies supposed to control one another. However, this complex institutional scheme may have an unintended consequence: it builds a climate of lack of trust risking to affect the public evaluation of the judiciary, which is already too low. Also, the establishment of so many new bodies will require massive recruitment of legal professionals, while the number of candidates possessing adequate training, experience and independence may be rather limited in such a small country like Albania."

2.1. Articles 2, 8, 9, 10, 11 and 54 provide for rules **on the membership of Albania in the European Union**. Some of these provisions and specifically amendments to article 39, paragraph 2, 65 paragraph 4, 80/a, 122 paragraph 3, 161 paragraph 3 are envisaged to come into force after the adoption of law by the Parliament ratifying the agreement entered into between the Republic of Albania and the European Union on membership (article 55 of the draft law- point 10 of article 179). In the meantime, other provisions provide for the requirement "after membership of Albania in the European Union". Although the formula applied by article 179 is technically more advisable (which as a rule would be a uniform solution to all these provisions) basically both these formula enshrine the latter entry into force of these provisions. The argument introduced for their inclusion in the Constitution is related to the avoidance of the latter amendment to the text of Constitution.

2.2. Regarding these amendments, the Venice Commission Opinion no. 824/2015 states that they are acceptable "*If the Albanian lawmaker maintains to include certain provisions at present (in order not to change the Constitution again in the future)...*".

2.3. As a preamble, we should highlight the draft revised for that section does not reflect this recommendation of Venice Commission because no political evaluation is acquired on these amendments. In our opinion, these provisions are premature for Albania, which has still not opened negotiations with the European Union and most likely, this process will last several years. The membership of Albania in the European Union is a

historical milestone firmly justifying the amendment to the Constitution at any time and notwithstanding the political configuration at the Albanian Parliament.

2.4. We deem that the inclusion of such amendments at this time causes inappropriate technical problems. Although more than 90% of Albanians presently agree with the membership of Albania in the European Union, the situation may change after some years. It is impossible that in the light of the current circumstances, we impose solutions for a remote and unsafe future for a number of reasons. Firstly, the moment of the membership of Albania in the EU will be subject to a wide public evaluation and support in Albania for the measures required to be undertaken. Secondly, the Albanian lawmaker is currently unable to foresee all adequate circumstances and amendments to the Constitution to properly address the level of institutional and social development of Albania, to be verified after some years at the time of membership. Thirdly, the Albanian lawmaker is currently unable to foresee all adequate circumstances and amendments to the Constitution to properly address the level of institutional and social development of Albania, to be verified after some years at the time of membership.

2.5. In conclusion, we deem that such provisions are not only premature, but also inappropriate in terms of the formulation and content for the Constitution of a country being in the phase of Albania in the European integration process. The membership of Albania in the European Union is a desirable event for the Albanian people, however it is an unsafe event of the future and does not only depend on the will of Albanian people and authorities. Therefore, we believe that it is not technically advisable at this time to include these provisions in the text of the Constitution. We do not deem that there is any accepted constitutional ground to insist on their inclusion in the current text of the Constitution.

2.6. Another issue for discussion and related to the European integration process is also the content of article 5, providing for the **conditions of extradition**. In respect of this matter, Venice Commission has not stated a position in its Opinion, considering that other issues are more critical (see paragraph 5 of the Opinion).

2.7. We note that the proposed provision allows extradition, when three requirements are concurrently met, specifically: (i) provision by virtue of international agreements; (ii) by virtue of a judicial decision; and (iii) when provided for in the legislation of the European Union. In our opinion, the third requirement should be applied only in relation to the member states of the European Union. Meanwhile, only the first two requirements should coexist for the non- EU member states. Thus, in our opinion extradition can be allowed only when expressly provided for in the international agreements to which the Republic of Albania is a party or in the legislation of the European Union, in each case by virtue of a judicial decision.

3.1. Article 6 of the draft law provides for the general rule that everyone has **the right to file a complaint against a judicial decision** to a higher instance court, unless otherwise provided by law. This provision is reformulated by the first version, with the concept of reflection of the Venice Commission recommendation in paragraph 16 of the Opinion, which required clarity and accuracy of the norm.

3.2. In our opinion, the new version proposed for the amendment to article 43 of the Constitution, is inappropriate. Currently, this provision has almost the same content as article 43 in force, with the only difference that the case of exclusion from that right is related to the unlike provision in this Constitution. It is clear that unlike provision in the Constitution is specifically related to article 17 of the present Constitution, providing for that: "*Restrictions of the rights and freedoms provided for in this Constitution may be imposed only by law for a public interest or for the protection of the rights of others. The restriction should be commensurate to the situation that has dictated it. These restrictions cannot prejudice the basis of freedoms and rights and in no case can they exceed the restrictions provided for in the European Convention on Human Rights"*. If the purpose of the drafters of this constitutional amendment is to avoid criteria and limitations imposed by article 17 of the present Constitution of Albania, we are then facing the exceedance of limitations imposed by the European Convention on Human Rights. As a result, the change is unacceptable. In each case, the Republic of Albania should abide by its domestic legislation, restrictions and criteria imposed by the European Convention on Human Rights. In conclusion, we deem that the existing prescription/statute of limitations on article 43 should remain intact and as an

alternative, we propose to add a sentence to article 43 with the following content: "This right can be restricted only by law under provisions of article 17 of the Constitution".

4.1. Article 13 of the draft law (amending article 125) provides for the **formula and procedure for the election of Constitutional Court members**. Unlike the initial version, the new norms already propose that the mandate of the Constitutional Court member will be 9 years and not 12 years. Also, the renewal has changed from the four-year cycle to the three-year cycle. In this way, an entirely new hypothesis is built, which requires a new analysis on one side and on the other side, it almost renders useless the analysis conducted by Venice Commission because it deteriorates the extent of political influence.

4.2. We were initially against the separate system for the election of Constitutional Court members. As fairly highlighted in the Venice Commission Interim Opinion no. 824/2015, it is true that the separate system of election among the President, Parliament and judiciary is recognized by the constitutional law theory and is applied in a number of European countries. Also, paragraph 24 of the Opinion addresses the issue of renewal of the Constitutional Court, emphasizing that "*rotation may impact to reduce the risk that a fraction prevails the Constitutional Court, although it is more likely the occurrence of two three- year cycles during the term of a political mandate on duty instead of two four-year cycles*".

4.3. However, in the Albanian reality the system of separate election by three- year renewal already appears to be an improper solution. The three-year renewal significantly increases the influence of a certain political fraction on the composition of Constitutional Court.

4.4. This was probably the reason why Albania decided to change this formula in 1998. We would like to remind that according to the law on main constitutional provisions applied in Albania from the time of establishment of the Constitutional Court until 1998, the system for the election of Constitutional Court members was divided between the President (*4 members*) and the Parliament (*5 members*). This formula failed to ensure

the depoliticization of the Constitutional Court and therefore, it proceeded with a new formula provided for by the constitution drafter in 1998.

4.5. All this historical background of the Albanian constitutional provision put into question the solution offered. This is because according to the new hypothesis introduced, it may occur that with votes of a parliamentarian majority, 2 members of the Constitutional Court are elected in a four- year period (*given that renewal occurs every 3 years, while the Parliament has a four-year mandate),* but also the President of the Republic (*to whom is also granted the opportunity that within a 5 year term, he will be able to appoint 2 members of the Constitutional Court*). Such a situation may create a political connotation of the Constitutional Court in only one four- year mandate of the Parliament, with at least 4 of its members. The situation becomes even more critical, if it potentially occurs that the same parliamentarian majority and the President of the Republic belong to the same political faction or that the parliamentarian majority is also confirmed for a second consecutive governing mandate. The latter situation would create the potential that most of the Constitutional Court members (*6* of its members) would be elected only with the votes of a parliamentarian majority, which would put into question the independence and impartiality of this body.

4.6. Additionally, according to the formula for the appointment of Constitutional Court judges by the parliament, it follows that they may be elected only with votes of 36 MP-s of the Albanian Parliament. This in fact does not seem to be a democratic selection because it prepares the ground that a Constitutional Court judge is appointed only with the support of about 1/4 of MP-s of the Albanian Parliament. This analysis is made, taking into account that the provision does not foresee the required majority for the appointment of judges by the Parliament and therefore the general rule of approval of decisions by the Parliament will be applied, as provided for in paragraph 1 of article 78 of the Constitution, providing for as follows: "*The parliament shall decide with a voting majority, in the presence of more than half of its members, unless the Constitution provides for a qualified majority*". In this case, the appointment by qualified majority is not defined and as result, in the event of the presence in the room/hall of only one more than half of the Parliament members, the judge is appointed by 36 votes.

4.7. The drafters of amendments have previously accepted the inconsistency of such a provision. The Document of the High Level Experts Group[10] "Analysis of the Justice System in Albania" expressly takes note: "*The appointment process is based on the mixed system, simple majority (a minimum of 36 votes) required to approve the candidates from the Parliament, seems to exclude a sort of consensus between the parties. This type of minimum majority is a flaw of the current constitutional provision in terms of the guarantees it should provide favouring the independence and impartiality of the candidates approved. As a result, the lack of mutual control of political parties on the candidates proposed due to the minimum majority required is not in favour of the approval of candidates, who provide a larger number of safeguards for independence and impartiality. Among others, the low threshold of votes required for the appointment of constitutional judge and high court judge has a negative impact on the public confidence in the voting process and the candidate approved*". However, regardless of this finding, the provision for the election of Constitutional Court judges by the Parliament has surprisingly remained unchanged- by 36 votes.

4.8. Regarding this matter, we bring to the attention that Venice Commission has recommended that if constitutional judges are elected by the Parliament, their election should be made by 2/3 and by an anti-deadlock mechanism, and that their mandate cannot be renewable" [CDL-AD(2007)047 §§ 122-123; CDL-AD (2012)024 §§ 35] and [CDL-AD (2013)028]. In another case, Venice Commission stated that "a qualified majority should be required in all voting rounds during the election of Constitutional Court members [CDL-AD (2011)040]. In applying this standard, we should carefully explore the Albanian political experience in defining the majority because we should bear in mind that the parliamentarian composition in Albania has recognized majorities with ruling majorities of 3/5, such as the current legislature for the period 2013-2017[11]. This implies that the qualified majority of 3/5 the Constitution contains in some kinds of parliamentarian procedures has failed in its main objective, in that which is the prerequisite and substantial involvement of the opposition.

[10] "Analysis of the Justice System in Albania" of the High Level Experts Group, June 2015, page. 28
[11] Further, this is not an isolated case because it has also occurred in at least two other legislatures of the Albanian Parliament.

4.9. Public trust is obviously crucial for the Constitutional Court authority and this trust should be built since the process of appointment of constitutional judges. Therefore, a key component is the transparency of appointment process, involvement of the whole political parliamentarian spectrum as representative of social diversity, and even the involvement of other institutional stakeholders. The Venice Commission highlights: "*Transparency in candidacy and voting by 2/3 in the first round and by 3/5 in the second round ensures positive transparency and enhances public trust. This mechanism may be further improved*" [CDL-AD (2014)033]. In one of its other Opinions, the Venice Commission states: "*It is essential to ensure either the independence of Constitutional Court judges, or the involvement of state bodies and different political parties in the appointment process, so that the judges are not regarded only as instruments of a specific political force/party. This is the reason, for instance, why the German Law on Constitutional Court provides for an election procedure by 2/3 of the votes. This requirement is established to ensure the consensus of opposition parties for every candidate running for the position of Constitutional Court judge. The German experience is highly satisfactory. It is advisable that the draft defines the involvement of a wide political spectrum of the political parties in the appointment process*" [CDL-AD (2004)043].

4.10. Another issue related to the separate system of the election of Constitutional Court members is linked with the fact that the Parliament or President, in respect of the appointment of Constitutional Court members, are not bound to the classification of candidates in the list produced by the Justice Appointments Council. In this way, the principle of meritocracy is avoided and there is greater possibility for political manipulation in the process of appointment of Constitutional Court members. Likewise, the revised draft does not mention the standard of plurality of candidates and as a result, it is not clear how many candidates should the Appointments Council transmit.

4.11. The draft has specified only basic requirements for the qualification of candidates but has not set objective measurement criteria (such as the highest professional skills or the highest moral integrity). As a result, the discretion of the Parliament or of President

should be thorough, creating a strong potential to appoint candidates on the basis of the political bias criterion.

4.12. On the other hand, the formula and procedure provided for in point 1 of article 13 of the draft law also raises concerns on the due account to be taken of the fair findings of Venice Commission in the Interim Opinion no. 824/2015 and linked with the need and opportunities of Albania for the establishment of Supreme Administrative Court [12], as well as the existence of the High Appointments Council[13] (*As for these two issues, please assess our comments in the respective provisions*). However, in this connection a key question may be posed: "*Is Supreme Court the proper representative body of the judicial system or we can explore the option of the involvement in procedure for the appointment of Constitutional Court judges, of a more representative body (for instance, the High Judicial Council or the National Judicial Conference)*?!".

4.13. Conversely, we note that the criterion set out in paragraph 3 "candidates should not be convicted for the commission of a criminal offence" is not in line with Article 6/1 of the present Constitution (this provision is added in December 2015 within the framework of the key reform of decriminalization in Albania). It is vital to ensure the compliance between these two provisions, so that two conflicting provisions with each other do not coexist in the Constitution. This finding should be taken into account in the whole text where the same prohibiting criterion is envisaged.

4.14. The prohibiting criterion of political activity continues to be ambiguous and prepares the ground for abuse. Specifically, the new provision is "*candidates.. should not have held political functions at the public administration and steering positions at a political party during the last 10 years prior to the candidacy*". This provision allows the candidacy of former MP-s and of ordinary members of a political party.

4.15. In relation to paragraph 6 of this article, we note that the recommendation given in paragraph 26 of the Venice Commission Opinion no. 824/2015 is not reflected, specifying that: *"26. Finally, paragraph 5 of this article stipulates that " the Constitutional*

[12] See paragraph 37 of the Interim Opinion no. 824/2015
[13] See paragraph 69 of the Interim Opinion no. 824/2015

Court judge remains in office until the appointment of his successor". We recommend that judges should be allowed to remain in office until the settlement of cases where they have started to participate prior to the expiry of their term". The provision in this framework has remained unchanged, although it is quite reasonable that the judge remains in office at least until the termination of cases where he has participated. Meanwhile, we deem as incompatible if the judge continues to remain in office in the circumstances provided for in letters "dh" and "e" of article 127 (according to the amendment proposed in article 15). As a result, when the conditions of non-electability and incompatibility in the exercise of function (*for instance, the case when it is proven that the candidate has "deceived" about job experience*), or when it is proven the fact of incapacity to exercise the duty (in this case he cannot be on that duty, because he cannot exercise it), the Constitutional Court judge cannot continue to remain in office and receive a salary!

5.1. Article 15 of the draft law (amending article 127) introduces the circumstances for the **termination of the mandate of Constitutional Court member**. In our opinion, the circumstance provided for in letter "d"- under the procedures provided for in article 179/b", is inappropriate because this is a transitional one (regulated by the transitional provisions) and cannot be incorporated in the consolidated text of the Constitution. This finding is taken into account in all cases when the draft provides for this circumstance as a ground for the termination of the mandate.

5.2. Meanwhile, it is not reflected the finding made in the Venice Commission Opinion no. 824/2015, according to which: "*27..... the existing provision for the termination of mandate when the judge does not exercise the office without any justifications for more than six months, is deleted from the text of the Constitution. It is not clear why such an amendment is made because this does not seem to be unreasonable basis for the termination of the mandate."* This circumstance is not expressly included even in cases of dismissal from office, provided for in article 128 (as amended by article 16 of the draft law).

6. Article 16 of the draft law (amending article 128) is not compliant with the Venice Commission Recommendation no. 27. This provision specifies that **the**

Constitutional Court judge holds disciplinary responsibility under the procedure regulated by law. In this case, we observe that it is not reflected the finding of Venice Commission in the Opinion no. 824/2015, according to which: *"27... The draft amendments do not address the procedures to be followed during the review of dismissal, as well as the rights conferred to the judges and other post holders threatened by dismissal. Meanwhile, it cannot be expected that a detailed provision is included in the Constitution, an admission of a general principle would be relevant".* The provision does not describe any general applicable principle in this case (as it may be the one of due legal process) but it merely delegates to the law on a discretionary basis.

7.1. Article 19 of the draft law (amending article 131) is not fully compliant with the findings of the Venice Commission Opinion no. 824/2015. This Opinion highlights the fact that the **power of Constitutional Courts to review and repeal sections of the Constitution itself** is a controversial issue and extremely complex, especially when the Constitution does not include the so-called "permanent clauses". In the case in question, the Constitution of Albania does not include "permanent clauses". It is true that the Venice Commission Opinion specifies that "it would be possible to confer to the Constitutional Court at least the power to verify the procedure in which the constitutional amendments are approved"[14], but the use of the term "at least", in our opinion, means that even the option of a broader assessment would be also possible.

7.2. In the circumstances when the Constitution of Albania contains some general principles, then a more appropriate solution would be for the Constitutional Court to be able to evaluate a law reviewing the Constitution, at least even in cases when the constitutional amendment is at variance with the general constitutional principles. For instance, if a ruling majority had the votes to amend the Constitution (2/3 of the votes) and adopted a provision envisaging the dependence of the judiciary from the Government, the Constitutional Court would be able to find that such an amendment conflicts with the general principle of separation and balance of powers enshrined in Article 6 of the Constitution. The removal of opportunity for the Constitutional Court for such an assessment would create a confusing situation, where provisions of the text of

[14] See paragraph 21 of the Interim Opinion no. 824/2015

the Constitution conflict with each other, even with the general principles enshrined therein. In the circumstances when the democratic system in Albania is still fragile, the bestowal of this power to the Constitutional Court is required to set the adequate limits of political abuse.

7.3. On the other hand, the expression in this provision "unless the procedure of adoption of this law is violated" is useless because as reported in the Interim Opinion of the Venice Commission in paragraph 21 thereof, the Constitutional Court has this type of competence in the verification of the regularity of constitutional referendum. In these circumstances, it would be relevant to delete such a provision to leave the situation as it is, unless no problems about this matter have been caused to date. Another option would be the bestowal of powers to the Constitutional Court for the constitutional control of the substance of constitutional amendments regarding the observance of some unchangeable clauses of the Constitution, such as the general principles of state organization.

7.4. Finally, in respect of this provision, the formulation of article 131, letter f) is unclear in terms of the concept of "public act". This concept is unknown in the Albanian legislation, mainly in the one of administrative law. Also, this provision restricts the right to individual complaint "unless provided otherwise by this Constitution". We find this formulation ambiguous and bearing the risk of misinterpretation in practise, bringing the undesired effect of the reform of this norm, which is the increase of individual complaint cases.

8.1. Article 20 (amending article 132) does not foresee the option that the **Constitutional Court decides on suspension of the act it reviews until the finalization of this review,** in cases when the application of the act brings about serious and irreparable consequences. On the other hand, the provision does not foresee that in certain circumstances (*for instance, in judicial cases under review),* the repealed act has a retroactive effect. A general provision could be probably included on this option, delegating the detailed provision by law.

8.2. Regarding this provision, it is unclear why the current wording of paragraph 1 of this provision, "the Constitutional Court decisions have a general binding force and are final" is replaced by "the Constitutional Court decisions have a general effect, are final and enforceable ". We believe that sharing of the concept "compulsory" with the concept "general" “creates confusion, with the *erga omnes* effect of the Constitutional Court decisions.

8.3. Also, the current text of article 132 **has deleted the rule according to which the Constitutional Court is only entitled to the repeal of acts it reviews**. Apparently, it seems as if the aim has been focused on the Constitutional Court reform and to make it a positive legislator. If so, this position is not supported or finds no room in other constitutional provisions.

9.1. Article 23 (amending article 135) is not compliant with the finding no. 37 of Venice Commission and the persistence of the majority is intended to impose to Venice Commission the deletion of finding made. This provision contemplates that "judicial power is exercised by the Supreme Court, Supreme Administrative Court and the courts of appeal and courts of first instance, which are established by law". This provision introduces as a fresh component **the establishment of Supreme Administrative Court** (SAC), which according to the transitional provisions, will start to operate on 01.01.2020. We also support the fact that from the perspective of human rights, administrative justice is a key component in the process of inspection of the public administration performance. However, this fact does not imply that in Albania there is a need for establishment of a Supreme Administrative Court.

9.2. In its Opinion 824/2015, Venice Commission has fairly highlighted the fact that: *“37.....it is not clear whether Albania has adequate human and financial resources to establish a new supreme court, in addition to the specialized lower courts, in particular by taking into account that the system of lower administrative courts has been set up for only a few years and also, the Parliament has already faced difficulties with the filling of vacancies at the existing Supreme Court ”.*

9.3. We confirm the fact that Albania has no adequate human and financial resources to establish a new supreme court, either be in 2020. Albania is financially incapable to provide an appropriate and functional building for the current Supreme Court, judges and personnel of which work under entirely inappropriate conditions, not to imagine the establishment of a new Supreme Court! We deem that the "good" intention of this provision is fully achieved by the existing legislation, according to which the Administrative Section is set up at the Supreme Court, composed of 6 judges examining only disputes in the field of administrative justice. If this Section would have to be strengthened, depending on the financial opportunities and needs, the number of judges of this Section could be increased without the need to set up a new Supreme Court.

9.4. We deem that in view of the right to a due legal process (enshrined in Article 6 of the ECHR), particularly the right to trial within a reasonable time limit, the wisest solution would be to expand the number of administrative appeal courts (because currently there is only one seated in Tirana), or the number of judges at the court of administrative appeal (since there are only 7 judges, who have a too high workload as they examine appeals against all decisions rendered by 6 administrative courts of first instance). A country like Albania, which finds impossible to have more than one Appeals Administrative Court, cannot include in the Constitution the obligation for the establishment of a new Supreme Court , as long as the purpose is achieved with the organization of a Supreme Court into some Sections (it is currently organized in Civil, Section, Criminal Section and Administrative Section).

9.5. The non-provision in the Constitution of the establishment of Supreme Administrative Court would eliminate the findings of Venice Commission on the conflict of powers, as follows: "*38. Also, if two different Supreme Courts are established at the same level, there is a risk of jurisdictional disputes between them. ..... The two courts may not agree which of them will review a specific case but there are also other types of conflicts, such as those when two branches of the judiciary do not put into question the jurisdiction for a specific case but basically apply the same legal provisions in different ways and thus develop different approaches in their case law*"[15].

[15] See paragraph 38 of the Interim Opinion no. 824/2015

9.6. On the other hand, we deem that if at a given time Albania has adequate human and financial resources under paragraph 2 of this provision, specifying that: "*The Parliament may establish by law courts for specific areas but in no case extraordinary courts*", it may decide its establishment by law at any time when it is deemed absolutely necessary. However, a special system of administrative justice needs to be tested in Albania as it has been applied for only 2 years (administrative courts and the Administrative Section at the Supreme Court have started to operate only on November 4, 2013). Depending on the issues to be highlighted in a suitable period, we can reasonably consider if the Administrative Section at the Supreme Court is a proper solution or not, and if the establishment of a new Supreme Court would be necessary.

9.7. Finally, we deem that the establishment of a Supreme Administrative Court is not a matter of minimum standard for the administrative justice, but it is a matter of political opportunity closely linked with the social and institutional development of a country. From this perspective, we deem that supporting such a choice should first of all enjoy wide political support and cannot be favoured as a choice simply proposed at the expert level. For the same reason, we deem that the present commitment to the establishment of a Supreme Administrative Court after some years, bears the same risks as those for the norms belonging to the future membership of Albania in the EU (*see point 2 of this Opinion*). As a result, we deem that the norms citing or regulating the Supreme Administrative Court should be deleted or reformulated across the entire text.

10.1. Articles 24, 25 and 27 (amending article 136 and adding article 136/a) refer to the **appointment and disciplinary responsibility of judges**, in terms of which the Venice Commission, in its Interim Opinion no. 824/2015, has highlighted as one of the most critical issues and deems the relevant recommendation as one of the most important ones (*see paragraph* 137).

10.2. Indeed, the revised draft includes some improved rules on the principles of appointment process and disciplinary responsibility. However, we see this matter as directly linked with the politicization of institutions tasked with the process of appointment and disciplinary responsibility of judges. It refers to the Appointments

Council, High Judicial Council and High Prosecutorial Council, where most of its members are appointed by the parliament by 3/5 (*for more information, please see our comments in point 13 of this Opinion*).

10.3. Article 136, point 2 already amended, provides for [16] the power of the President of the Republic to appoint Supreme Court judges. We note some matters of concern from the content of provision.

10.3.1 Firstly, the President of the Republic is not recognized any role (either be ceremonial or a role to refuse ineligible candidates) in case of the appointment of first instance and appeal judges. At this point, the Interim Opinion of Venice Commission has specified only that: "*There is a need to clarify if and to what extent the President cannot agree with the candidates proposed by the High Judicial Council; such a dispute, in principle, should not be linked with the personalities of candidates and in each case, the decision of the President should be well-reasoned: The President should preserve only the power to reject the candidates that are obviously ineligible*."[17]. The recognition of the role of President of the Republic to reject ineligible candidates should not be excluded. The Venice Commission Opinion CDL-AD (2007)028 emphasizes: "*As long as the President is linked with a proposal made by an independent judicial Council, the appointment by the President does not appear to be problematic*".

10.3/2 Secondly, even in the case of the Supreme Court judges, the role of the President has become too limited. He has already only the right to suspension veto (only once and such a veto loses effect if the High Judicial Council votes against it). *Meanwhile, according to the Venice Commission ".....the President should preserve only the power to refuse the candidates that are obviously ineligible*."[18]. In this way, the President of the Republic is practically not recognized even the role of refusing the candidates, who are obviously ineligible. This new provision may be challenging because the arguments of the President can be such as to put into question the candidate's integrity (his incompatibility with the duty) and notwithstanding that, the

[16] Paragraphs 1 and 2 of the provision
[17] See paragraph 45 of the Interim Opinion no. 824/2015
[18] See paragraph 45 of the Interim Opinion no. 824/2015

candidate is appointed. In this case, it should be taken into account that the President of the Republic is the only authority that may coordinate information, which may be possessed by the intelligence and law enforcement agencies.

10.3.3 Thirdly, the "7 day" constitutional time limit within which the President of the Republic should state his position on the proposal submitted, places him under the circumstances of failure to carry out a real and objective assessment of the candidate's eligibility. It is almost impossible for someone to collect, within a "7 day" deadline, adequate information to assess the integrity (compatibility of the figure) of the candidate. In our opinion, the deadline within which the President of the Republic states his position cannot be included in the Constitution but it should be enshrined by law, taking into account the principle of setting objective time limits and enabling an objective assessment.

10.4. Paragraph 3 of this norm foresees the option that one fifth of the Constitutional Court members may be elected among the distinguished lawyers/legal experts with no less than 15 years of experience as lawyers, professors or lecturers of law, senior legal experts at the public administration or in other areas of law, who have completed the Law Faculty and hold a scientific degree in Law. We deem that the full depoliticisation of Constitutional Court and the fact that appointment of judges of this court will be made by the High Judicial Council, renders unreasonable the appointment as judges, of the lay members. Leaving this quota (1/5) is at variance with the purpose of the provision, which, according to the meaning also established[19] by Venice Commission, is the Constitutional Court depoliticisation.

10.5. In addition, the appointment of judges among the lay members, without having any link with the judiciary, is contrary to one of the fundamental concepts of the Reform, namely, the transformation of the Supreme Court into a career-based court. This purpose is served by rules on the involvement of Supreme Court, specifically in the pyramid of judicial power and under auspices of the High Judicial Council, and the unification of rules on accountability and discipline of senior judges. From this

[19] See paragraph 45 of the Interim Opinion no. 824/2015

perspective, there is no reason why the appointment at Supreme Court should not be a natural vertical process within the system, from bottom to top level, which firmly guarantees their professionalism and impartiality.

10.6. On the other hand, the involvement of lay judges would render almost impossible the objective evaluation of candidates from the High Judicial Council. The uniform and objective evaluation of a candidate with a clean career only in the judiciary appears to be challenging, with a candidate who has worked only as a "legal expert at the public administration", lawyer or professor. The level and nature of performance evaluation is completely different and impossible to achieve objectiveness and equality in the evaluation criteria. In these cases, data on the performance of lay judge candidates would come from other units, which may be interested to reflect an improved situation of the performance, with the will to ensure the promotion of their colleague. Furthermore, the periodic evaluation of job performance for the lawyers, professors or legal experts in different areas is currently not envisaged and as a result, is not carried out. This means that the promotion will be made with data to be subjectively submitted by the candidate, thus hiding data that are not compatible with the candidacy.

10.7. The abolishment of rule on the recruitment of senior lay judges further renders paragraph 4 of this article useless. Further, the criteria and procedure for their election set out in paragraph 5 of this article, should be part of the implementing legislation for all judges.

10.8. Paragraph 5 stipulates that conditions for the continuity of exercise of office are defined by law. The purpose of this provision is unclear, however such a provision means that law may establish requirements for extension of the Constitutional Court judge mandate beyond the 9-year constitutional mandate. If this is the purpose of provision, then such a provision is unacceptable since the mandate is constitutional and as such, the extension of mandate cannot be delegated (continuity of the exercise of office), particularly when the Constitution itself does not foresee the exceptions when this may occur.

10.9. We find technical ambiguities of the norm in article 27 due to a number of reasons. Firstly, it is linked with the principle of prohibition of the limitation of duration in office of the judge, which is already deleted from the text of the Constitution. Secondly, the hypothesis on the removal of judge from office integrate the poor professional performance and the disciplinary breach (letter ç), although the Venice Commission Interim Opinion no. 824/2015 states that these two processes are separate and distinguishable from each other (paragraph 78).

11. Article 29 (amending article 139), **point 2 is not compliant with the Venice Commission Opinion CDL-AD(2007)028**. This provision provides for that the **procedure for appointment of judge at another court after the termination of mandate, is regulated by law**. This seems to be a solution imposing to maintain within the judicial system legal experts/lawyers, who have been appointed as judges at the Supreme Court out of the judiciary. In our opinion, a judge of the Supreme Court coming from out of the judiciary cannot be appointed at a court of lower instance. He should be probably restored to the previous job position as lawyer or legal expert at the public administration but in no way can be part of the judicial system, especially when, to date, their appointment has been made by the Parliament. According to this provision, it is indirectly made possible for the Parliament to appoint judges at the first instance and appeals. In this case, we recall to attention the finding made in the Venice Commission Opinion CDL-AD(2007)028, specifying that: "*It is not appropriate that appointments of ordinary judges be voted by the parliament because the risk that political considerations prevail over the objective merits of a judge, cannot be excluded*".

12. Article 30 (amending article 140) provides for **cases of dismissal of the Supreme Court judges**. It is unclear why the cases of dismissal of the Supreme Court judges differ from the cases of dismissal of judges provided for in article 27 (article 137/a is added). The latest provisions include the circumstances of the dismissal of Supreme Court judges (*see letters* "ç" and "d" of the added article 137/a).

13.1. Article 33 (amending article 147) is fully incompliant with: (i) Recommendation no. 55 of the Venice Commission Interim Opinion no. 824/2015; (ii) CDL-INF(1998)009 "Opinion of the Venice Commission on the latest Amendments to the Law on Main Constitutional Provisions of the Republic of

Albania"; (iii) CDL-AD(2013)007 - Opinion "On draft amendments to the Organic Law of the Courts of General Jurisdiction in Georgia; as well as (iv) CCJE Opinion no. 10/2007 Based on this provision and the transitional provisions, as the Interim Opinion identifies the risk, the majority aims to terminate the mandate of all the existing members and substitute them with persons appointed by the new formula, clearly demonstrating that the purpose of the reform is the political profit of the moment and capture.

13.2. **This provision** provides for the **composition and rules for election of the High Judicial Council** (HJC) members, specifying that 5 out of 11 members of this body are elected by the Parliament on the basis of the proposal of different bodies, as per the discretion of the Justice Appointments Council (JAC). The Parliament appoints them by 3/5 of the votes of its members (paragraphs 4 and 5). In principle, the election of the High Judicial Council members with qualified majority is welcomed, taking into account the purpose of the application of qualified majorities, aiming at inter-party support to important senior officials in terms of the election of non-political candidates. However, the questions posed in this case are: "**In the present political reality in Albania, where the ruling majority possesses alone 3/5 of votes in the Parliament, is any inter-party support ensured (majority-opposition) for the election of these members**?!"; **"Does this majority currently possessed only by the ruling majority, guarantee non-political composition of the High Judicial Council?!"**; **"Is this majority attempting to 'entrench' the political capture of the High Judicial Council and not only!".**

13.3. In response to these concerns, the amendment does not take into account the risk identified by the Venice Commission Opinion no. 824/2015, clearly specifying that: "*55. Venice Commission notes that the current ruling majority has the qualified majority required under the Draft Amendments to elect the lay members of the High Judicial Council. In this framework, the Venice Commission recalls its observation in an opinion related to the Media Council in Hungary:*[20] *"[…] In normal circumstances, the aim of*

[20] CDL-AD(2015)015, Opinion on the Legislation on Media (ACT CLXXXV on Media Services and Mass Media, ACT CIV on the Freedom of Press and Legislation on Media Income Taxes from the Advertisements) of Hungary, §64

imposing the obligation for a qualified majority is to ensure inter-party support for different measures or personalities. However, when the request for the super-majority is introduced upon the initiative of a political group that has such a super-majority, as a rule, instead of providing pluralism and political division of the regulatory body, indeed "entrenches" the influence of this special group within the regulatory body and protects this influence from political changes in the future. [...]. The matter is whether, in the present political context, the procedure for election of lay members of the High Judicial Council ensures a pluralist composition of the Council."

13.4. As regards the parliamentarian majority participating in the appointment process, Venice Commission has highlighted: "*Qualified majorities aim to guarantee a wide consensus at the Parliament, **as they require that the majority seeks a compromise with the minority**. For this reason, qualified majorities are typically required in many sensitive sectors, where the election of state institution officials is evident. However, there is a risk that the requirement for qualified majority leads to a deadlock, which if not timely and properly addressed, may cause a stalemate to that institution. An anti-deadlock mechanism aims to abolish such a stalemate. However, the primary function of the anti-deadlock mechanism is precisely that it should make function the initial procedure, pushing either the majority or the minority to find a consensus, with a view of avoiding the anti-deadlock mechanism. Indeed, the qualified majorities reinforce the position of parliamentarian minority, while the anti-deadlock mechanism corrects the balance backward. It is understood that these types of mechanisms should not act as a factor preventing the achievement of a consensus for the qualified majority at first instance. It should assist the process by encouraging the consensus, if the anti-deadlock mechanism is such that it is not preferred by both the parliamentarian majority and minority. There is no unique model for the anti-deadlock mechanism. An option is the determination of descending majorities consecutively according to the voting rounds but this mechanism has the flaw that the majority may not claim consensus in the first round, being aware that their candidate will prevail in the subsequent rounds* " [CDL-AD (2013)028][21].

[21] CDL-AD (2013)028 - Opinion on the Draft Amendments to Three Constitutional Provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro, paragraph 7

13.5. The drafters of constitutional amendments have preliminarily admitted that the substantial participation of the opposition in the process of the appointment of members of judicial councils is a prerequisite to guarantee the bodies' independence and impartiality. The document "Analysis of the Justice System in Albania" of the High Level Experts Group[22] specifies: "W*hen a candidate member of the HCJ can be chosen with only the votes of ruling majority, bypassing the role of parliamentary minority in the voting process, doubts are cast in terms of independence that should characterize this constitutional institution.*"[23]. However, with 3/5 majority proposed some months later by them in the constitutional amendments, the role of parliamentary minority in the voting process is entirely excluded, raising strong doubts in the independence of HCJ.

13.6. Regarding the participation of the opposition in the process of appointing the members of judicial councils, but not only, Venice Commission has already a widely accepted standard which ensures no political capture of the judicial system. The Venice Commission, in some of its Opinions has stated: ***"A solution should therefore be found, ensuring that the opposition also has some influence on the Council composition. One option would be to require two-thirds (as in Spain)*** *or three-fourths majority for the election of members by Parliament, another to provide that one of the two lawyer members should be designated by the parliamentary opposition. In any case, the presence of members appointed by the opposition but elected by parliament should be ensured while taking procedural safeguards against the risk of a stalemate*" [CDL-INF(1998)009]. Meanwhile, in another its Opinion, it clearly states that: **"Venice Commission is of the opinion that elections from the parliamentary component should be by a two-thirds qualified majority, with a mechanism against possible deadlocks or by some proportional method which ensures that the opposition has an influence on the Council composition"** [CDL-AD (2013)007][24].

13.7. The questions naturally raised in this case are: "Are these standards of Venice Commission worthy for Albania too?!"; "Is it democratic that the whole new justice system structure (thus not only the judicial council) is elected only with the support of

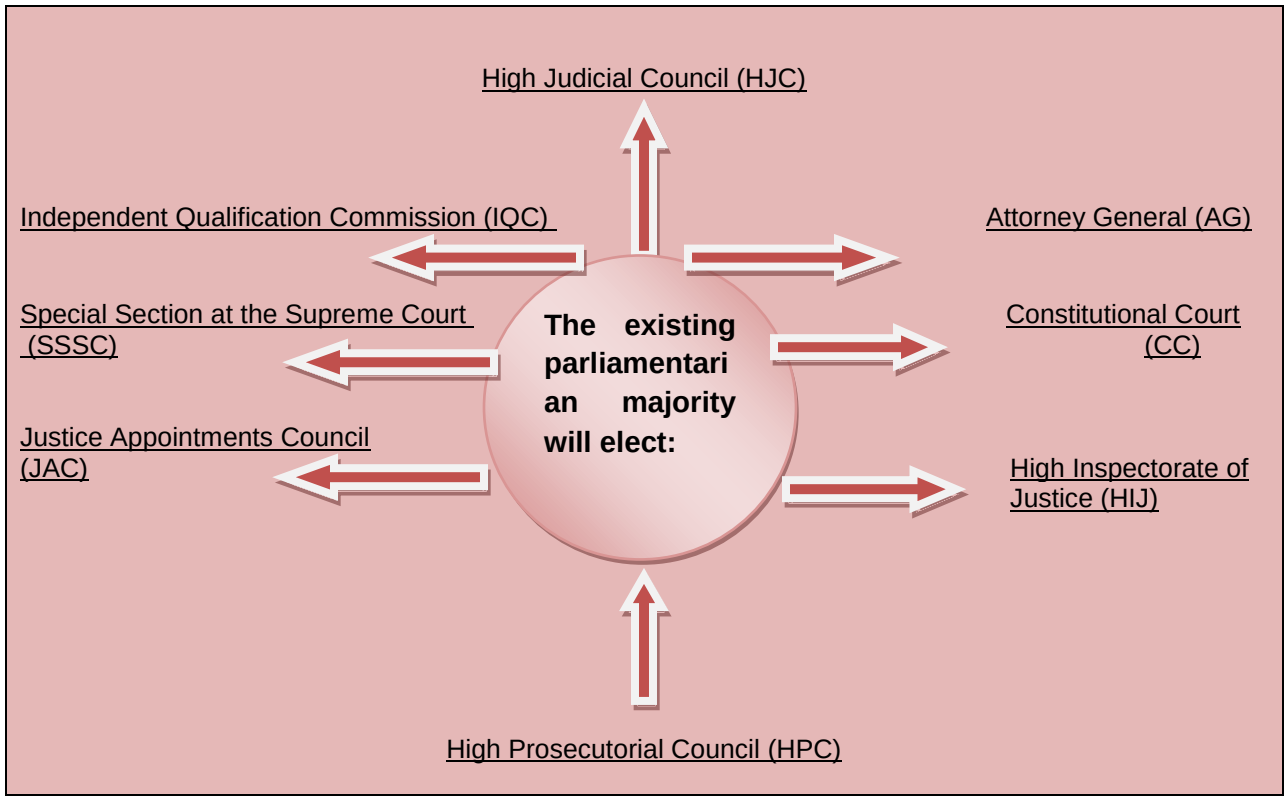
[22] "Analysis of the Justice System in Albania" of the Group of High Level Experts, June 2015, pg. 28
[23] "Analysis of the Justice System in Albania" of the Group of High Level Experts, June 2015, pg. 34
[24] CDL-AD(2013)007 - Opinion "On the Draft Amendments to the Organic Law On Courts of General Jurisdiction of Georgia", para. 52

the ruling majority?!; “Should we have a proportional method guaranteeing that the opposition has a balancing influence on the appointments of high ranking officials of all judicial system?!”.

13.8. We deem it as a necessity in order to eliminate the ‘entrenchment’ of political capture of the entire judicial system in Albania. We are not concerned about an isolated appointment process, with the actual votes of this majority, of any particular official or member. This is about the appointment of all functions in the justice system according to the provisions of amendments, given that amendments provide that along with the establishment of the new constitutional bodies, the termination of the constitutional mandate of all existing bodies takes place (*High Council of Justice; Prosecutorial Council; Attorney General; Inspectorate of the High Council of Justice etc).* Thus, this majority proposes that with its votes (3/5), within 6 months from the entry into force of constitutional amendments, it appoints at least 30 senior officials of the justice system, without mentioning the secondary appointments or the appointments of officials from the vacancies that will be opened from dismissals from the system due to re-qualification. Moreover, it is expected to be concurrently appointed by this ruling majority:

a) 5 out of 11 members of the High Judicial Council;
b) 5 out of 11 members of the High Prosecutorial Council;
c) General Inspector of the High Justice Inspectorate;
d) Attorney General;
e) Constitutional Court judge;
f) 8 members of the Independent Qualification Commission;
g) 6 or more members of the Special Section at the High Court;
h) 3 members of the Justice Appointments Council, even the Chairman of this Council.

13.9. Thus, with the votes of this majority (3/5) an ‘octopus’ is formed that extends its political influences to all justice system bodies. The influence in the self-governing bodies of the system or inspecting bodies has a direct impact to influence judges and prosecutors in the country, as well as on their independence. In these circumstances, isn’t this mechanism that will be installed by constitutional amendments, “a political capture of the justice system in the Republic of Albania?!”.



(Scheme of constitutional bodies elected by the votes of this parliamentarian majority)

13.10. It is true that constitutional amendments provide for that the evaluation of candidates is to be carried out by the Justice Appointments Council and the proposals would come from the lawyers community, 1 member from the notaries community, 1 member from the law professors, 1 member from the professors of the Magistrate School non prosecutor or judge, 1 member; and from the civil society, 1 member. In theory and in a functional democracy such a choice seems to weaken the political interference, and in this regard, the procedures that the secondary legislation shall provide might play a role.

13.11. However, the Albanian reality is totally different because politics has always attempted to keep under control the process for the election of members of justice system bodies. In addition, this process risks to be distorted and practically to be politically controlled. Without any explanation, a power is conferred on these forums to nominate three candidates, which predetermines and restricts the selection of the best

candidates. On the other hand, professional forums in the Republic of Albania, excluding the National Chamber of Lawyers, are not institutionalised, are fragile and do not have a democratic collective decision-making spirit. The extreme case belongs to the member appointed by the civil society, which is totally unorganised and perceived by all that its factions stand behind ruling political fractions. Likewise, it should not be underestimated that, excluding judges and prosecutors, it is common in Albania that a lawyer may be part of several professional communities at the same time (he might be a lawyer, professor at the University, professor at the School of Magistrates and involved with the civil society). Moreover, the appointment of a member for the notaries seems to us quite inappropriate since this profession is far from the developments of the judiciary, leaving apart the dependency relationships of this forum with the executive due to licensing and inspection by the Minister of Justice. Even the appointment of the member from the professors of the Magistrates School being not a judge or prosecutor is critical because the number of such professors is low and predetermines without hard efforts the members that shall be appointed within the Council. Such member is also inappropriate because, upon legal amendments of 2014, this School shifted from the dependency of the High Justice Council to the dependency of the Executive, changing the composition of its Governing Council.

13.12. Moreover, the final appointment in any cases will be carried out by the Parliament, which shall have the opportunity to choose from three nominations for every vacancy. The constitutional amendments provide no guarantee that the Parliament (with the ruling majority votes of 3/5) shall not select the candidate based on its political preferences, or from the perspective of the person that offers more guarantees to be 'subject' to the influence and will of the parliamentary majority that elects him. Moreover, the opinion of the Justice Appointments Council is not mandatory, as fairly reported by the Venice Commission Opinion no. 824/2015, which states: "*58. From the terms of Article 56 it appears that JAC is required to rank the candidates leaving the actual choice to the Assembly. It is thus understood that JAC opinion is not binding on the Assembly; it becomes decisive only if the Parliament fails twice to reach the required three-fifth majority*[25]".

[25] In this case the procedure cannot fail since the actual majority owns 3/5 of the votes.

13.13. Another key aspect to be noted is the fact that this parliamentary majority has the necessary votes (3/5) to adopt the organic laws based on and pursuant to the possible constitutional amendments. According to paragraph 2 of Article 81 of the Constitution, the adoption of laws on the organisation and function of the bodies provided by the Constitution (thus also the organic laws of the self-governance of justice system) is carried out with the votes of 3/5 of all members of the Parliament. We recall to attention that the current majority possesses this majority and as a result no guarantees are offered that the secondary legislation shall eliminate the possibility of the political capture of justice system, or the pluralistic composition of these bodies. Also, we recall here again that the parliamentary majority succeeded to win at the general parliamentary election of June 2013 only 83 mandates! Only some months later it managed to get MPs from the opposition aiming at the establishment of a super majority (currently with 88 MPs), whose only scope is to have the votes required to approve alone the qualified laws (3/5 – 84 MPs), which generally concern the justice system.

13.14. The abuse of this parliamentary majority and the attempt to exercise political influence on the judicial council, through the provision of law, is already proven. Let us bring to your attention that by Law no. 101/2014 "On some changes and amendments to the law no.8811, dated 17.5.2001 "On the organisation and functioning of the High Council of Justice", as amended", it managed to dismiss 2 members of the High Council of Justice appointed by the previous Parliament (long before the end of their term). Although the decision no. 23/2015 of the Constitutional Court deemed these provisions as unconstitutional, the parliamentary majority reached its unconstitutional scope by replacing and leaving on duty the two new members appointed by it.

13.15. In any case, the content of the implementing laws is an "unsafe future event", while the elimination of the possibility of political capture or its entrenchment should be guaranteed at a constitutional level!

13.16. In its opinion no. 10/2007, CCJE has stated its opinion even on the appointment of lay members. According to this opinion: "*Lay members should not be appointed by the executive. ...* ***If in any state any lay members are elected by the Parliament, they should not be members of the Parliament, should be elected by a qualified majority requiring a strong opposition support***" [§ 32].

13.17. Therefore, if it really opted for numerical formulas of parliamentary majorities, it is appropriate that the principal judicial-political concept should be the one of "parliamentary opposition", as clarified by the Venice Commission in its Report "On the role of opposition in a democratic parliament" [CDL-AD(2010)025], defining it as: "*11. The defining characteristic of the "opposition" is that it is not in power, and that it opposes (more or less strongly) those who are. The parliamentary opposition then consists of those political parties that are represented in parliament, but not in government. In most (but not all) parliamentary systems the government will usually enjoy the direct support of the majority. This means that the issue of rights of the parliamentary opposition is first and foremost a question of political minority rights. This may typically include procedural rights of information, representation and participation, speaking and voting rights, the right to present laws and other proposals, rights of supervision and scrutiny of the executive, and protection against mistreatment by the majority. Yet, it does not include the competence to adopt substantive decisions, which in a democratic system rests with the elected parliamentary majority.*".

13.17.1. The argument according to which this is a temporary situation and that in the future the majority of 3/5 guarantees the substantive involvement of the opposition is not only an unconstitutional argument, but above all a non-realistic one, for the three following reasons.

13.17.2. Firstly, the fact that the current majority owns 3/5 of the votes in the Parliament is a temporary situation does not imply that under the "justification" of temporality it should be allowed the political capture of the judicial system and the 'entrenchment' of political influence of the current majority on the new constitutional bodies to be established or reorganized. According to us, this is an essential issue: in a temporary situation, with a temporary majority, permanent officials will be appointed, who will potentially cure permanently the interest of the temporary ruling majority. Thus, the favourable temporary situation for a temporary political wing becomes a permanent situation within the judicial system. This situation has only one name – that of political capture.

13.17.3. Secondly, since it is accepted that the majority of 3/5 possessed by the ruling majority is a temporary situation, then at least a temporary solution should be provided to abolish the unilateral prevalence of the majority in judicial appointments! However,

the problems and risk can neither be overlooked, nor can be seriously evaluated! If the majority's mechanism does not offer solutions to the problem, it should be then mandatory to move towards a new mechanism that guarantees mutual control and participation of the parliamentary majority and parliamentary opposition in the election of members of the constitutional bodies of justice system.

13.17.4. Thirdly, the 2013-2017 Legislature is not the only case when only a ruling majority has the votes of three-fifth members. Albanian political reality has known other cases. Indeed, it is often abused in political rhetoric during discussions about constitution for "participation of the opposition" to "broad political consensus" in Parliament, for "political impartiality and political guarantees" that gives the qualified majority of three/fifth. Incorrectly, it has been declaimed that a numerical majority as it is the case of three/fifth automatically includes consistently the substantial participation of the parliamentary opposition. Indeed, the Albanian parliamentary history on numerical reports in Parliament has often shown that the majority of the three/fifth does not frankly guarantee participation of the parliamentary opposition and other times has pushed majorities to diversionary movements within oppositions, resulting serious consequences for the democratic (missing) legitimacy of the elected according to the following formulas, and sometimes to exceedance of some moral and political limits.

13.18. In conclusion, we consider that given the current political situation in the country, and the parliamentary history in Albania, it would be a suitable solution the finding that the Venice Commission has made in its Opinion on mutual control between the majority and parliamentary opposition, which has specified that: **"*The Venice Commission is of the opinion that members from the parliament should be by a two-thirds qualified majority, with a mechanism against possible deadlocks or by some proportional method which ensures that the opposition has an influence on the Council composition*"** [CDL-AD (2013)007][26].

13.19. This approach would be in line with the previous recommendations that Venice Commission has provided for Albania. We would like to mention here *"CDL-*

[26] CDL-AD (2013)007 - Opinion "On the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia", paragraph. 52

INF(1998)009, Opinion on the latest amendments to the law on major constitutional provisions of the Republic of Albania"[27], where it has stated that:

"19. The Albanian opposition has expressed concern about the high number of members of the Council to be elected by Parliament. In general, it seems legitimate to confer to the Parliament an important role in designating members of the Council. Taking into account the highly confrontational nature of Albanian politics, a concern that all members elected by Parliament may be apt to represent the point of view of the parliamentary majority can however not be disregarded. ***A solution should therefore be found, ensuring that the opposition also has some influence on the composition of the Council. One possibility would be to require two-thirds (as in Spain) or three-fourths majority for the election of members by Parliament****, another to provide that one of the two lawyer members should be designated by the parliamentary opposition. In any case, the presence of members nominated by the opposition but elected by parliament should be ensured while taking procedural safeguards against the risk of a stalemate."*

26. **……..***Taking into account the specific situation in Albania,* ***it seems advisable to take steps to ensure that the parliamentary opposition also has a say in the designation of the members of the Council;*** *if this is respected and if Article 15 is correctly applied,* ***it should provide an effective tool for an independent judiciary in line with those existing in other democratic countries****..".*

13.20. This analysis should be considered in all cases where constitutional amendments provide for the selection of a qualified majority of three-fifth of the members of the justice system (non-attorney members of the High Council of the Prosecutor's Office, the Inspector General of the High Inspectorate of Justice, the Attorney General, the Independent Qualification Commission and the Special Section of the Supreme Court).

[27] This Opinion is mentioned in the preliminary opinion no. 824/2015 in the case of the role of the Minister of Justice. We consider that the recommendations given there for the election of members of the High Judicial Council, are also present and fully valid to be considered.

14. Regarding paragraph 3 of Article 33 (amending Article 147), we have found that it does not provide any criteria for selection of member judges of the High Judicial Council. In this case, the recommendation given by the Venice Commission Opinion no. 824/2015, specifying that: "*61.It would be advisable to add at least certain requirements to the candidates to the positions in the HJC (for both judicial and lay members), in order to ensure that people of certain public standing and professional experience are elected"*, has not been reflected.

15. Regarding paragraph 6 of Article 33 (amending Article 147), we have observed that it does not make any efforts to elect the Chairman of the High Judicial Council (HJC) based on the will of the majority of the Council's members. The rule laid down specifies that: *"The Chairman of the High Judicial Council is elected in the first meeting of the Council from among the lay judges, with the majority of all members. If the Chairman is not elected in the first meeting, the oldest member among the judiciary organizes the election of the Chairman by lot in the next meeting, which takes place openly"*. The problem with this provision is that it does not provide any incentive to find a candidate capable of acquiring the support needed. In this case, we consider that it would be acceptable to use a few rounds to ensure the election of the Chairman of HJC -and if these rounds fail, it may be transferred to *a mechanism against possible deadlocks*. Probably, five candidates can participate in the first round and one candidate would find impossible to ensure six needed votes to be elected the Chairman, in the first round. It makes sense to switch to a second round between the candidates who has acquired the utmost support.

16.1. Article 34 (added Article 147 */* a) provides for **the functions of the High Judicial Council.** In this provision, we consider that it is inappropriate the phrase "except for the judges of the Constitutional Court", used in letters "a" and "b" of paragraph 1. It is understood that the Constitutional Court is not under the auspices of HJC and even more the judges of the Constitutional Court are not included among the "all level judges "! The Constitutional Court is not the level of court system in the country and in this respect there is no misunderstanding. However, if the provision uses the

phrase "with the exception of judges of the Constitutional Court", there should be created the perception as if the CC is the system level of courts within the country!

16.2. Secondly, this norm has well established a "supervisory" competence of the HJC for the rules of ethics. The way this competence has been formulated gives the impression that the HJC exercises control function over the judges, while the draft amendments propose the establishment of the High Inspectorate of Justice. Therefore, not only the eventual overlapping of competencies is created, but also their misapplication in practice is jeopardized. We deem that the most appropriate solution is that inspection of judges remains a function of the HJC, through the Inspectorate that should be organized and function within it, complying with the last sentence of paragraph 75 of the Interim Opinion of Venice Commission.

16.3. Another concern about this norm is related to the participation of the Minister of Justice in the HJC's meeting, which we find nonsensical, even though the draft amendments limit such participation only in matters of strategic planning and budgeting. This norm does not clarify the position of the Minister, hence, whether he has or does not have the right to vote in these meetings. Obviously, the issue of budgeting and strategic planning attracts the interest of the Executive, but also should be highlighted that the increase of members in the HJC elected by the Parliament is a proper measure to fully realize the participation of the power of Parliament and consequently of the Executive. Moreover, as per section 82 of the Interim Opinion, the participation of the Minister of Justice even without the right to vote creates an apparent conflict of interference by the Executive in the Judiciary.

16.4. Finally, we consider that this norm should reflect the recommendation of paragraph 56 of the Interim Opinion, according to which "it is clear that due organization of all these functions will require a sub-body system of the Council, as well as an administration that must be run by a responsible executive reporting to the Council ".

17. **Article 35 (added article 147 / b)** does not include **the circumstances when the mandate of the HJC terminates,** when " the terms of ineligibility and incompatibility

regarding the exercise of the function are confirmed", to ensure harmonization between the provisions of the text of the Constitution. This finding should be considered in other cases where the termination of the mandate has been envisaged (for instance, article 147 / dh).

18.1. Article 36 (added article 147/c) provides for the cases of **dismissal of HCJ members** and the competent body in this case, the Disciplinary Tribunal (DT). This provision should be evaluated in accordance with Article 42 (which adds section 147 / f), defining the composition of DT composed of the Chairman of Supreme Court, two judges of the Supreme Court under law, the Chairman of the Supreme Administrative Court, two judges of the Supreme Administrative Court under law and one prosecutor elected among the prosecutors. DT composition is fixed and not determined on a case by case basis. This makes HJC and DT manifestly in open conflict of interest with one another, all the time. This institutional scheme raises and encourages on the highest level the corporatism within the system and probably constitutes the most essential point to which the proposed institutional organization has failed. This scheme should be seen closely linked with the scheme of the High Inspectorate of Justice, which is analyzed below. Under the scheme proposed by constitutional amendments, the HJC shall decide on disciplinary responsibility (see letter "a" of paragraph 1 of Article 147 / a) of the Chairman and judges of the Supreme Court and the Chairman and judges of the Supreme Administrative Court (6 of 7 members comprising the DT). On the other hand, DT decides on the disciplinary responsibility of the HJC members. This institutional interdependence to one another does not guarantee respect for the principle of accountability.

18.2. Further, due account should be taken to guarantee the independence of the HCJ members, so that eventually the control mechanism will not improperly influence the way how they perform their duty. The proposed scheme, if the Inspector General of the High Inspectorate of Justice inspects the HCJ member about the way how he has voted, means that the HJC is placed under dependence of the Inspector General and as the latter is appointed by Parliament and inspected by the Minister of Justice it is created an inappropriate dependency.

19.1. Article 38 (Article 147/d shall be added) providing for that the **High Inspectorate of Justice** shall be appointed by three fifth of the entire members of Assembly, for a 9 year period, without the right to re-election, out of the ranks of the layers (*i.e., not necessarily judge or prosecutor, it also allows being an individual without any experience in the judiciary*). This solution seems to politicise it and to put the process of inspection of judges and prosecutors of all levels, members of the High Judicial Council, members of the high Prosecutorial Council and Prosecutor General under the authority of the governing majority. The attempt to separate the process of inspection from the process of decision-making regarding the disciplinary liability is to be hailed, however, the independence of this body shall under no circumstances be infringed by the other ports, otherwise, it might bring about an inappropriate intervention with the activity of judges and prosecutors. The international standards require a clear distinction between the two processes, however, not that they have to be carried out by two separate structures[28]. Even Venice Commission in its Opinion no 824/2015 has highlighted that: "75…. *Venice Commission has earlier highlighted that 'the system ensuring a clear separation of tasks between the body being responsible for investigation (High Council of Justice) and the body being responsible to impose disciplinary measures (Disciplinary Body) is in compliance with the international standards29. Venice Commission also considers that 'separation of tasks' does not necessarily require the establishment of an independent separate body in each instance".*

19.2. We hold that the regulation of the establishment, organisation and functioning of this body in the Constitution must not only declare it independent, but also genuinely guarantee the functioning of this body. The purely political dependence which is attributed to the Inspectorate runs counter to the international recommendations regarding the de-politicisation of the judiciary. Thus, the appointment of the Inspector

[28] See opinion no 17(2014) of the Consultative Council of the European Judges and Evaluation Report 2015 of Prof. Anne Sanders, wherewith it has provided 21 recommendations.
[29] CDL-AD(2014)032, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on making changes to the Law on disciplinary Liability and disciplinary Proceedings of Judges of General Courts of Georgia, par 71.

General by the Assembly by 3/5 of the votes, not only puts this structure under political influence, but this majority in the Republic of Albania does not guarantee the substantial participation of the opposition, thus entrenching in this way for 9 years a candidate appointed only with the support of the current majority in parliament (*for more information see the comment on the election of the members of the High Judicial Council*). The ranking made by the Justice Appointments Council is of no effect, as long as the final solution is at the full discretion of the Assembly (only of the parliamentarian majority).

19.3. It is true that Venice Commission in its Opinion no 824/2015 asserted that: *"76..... Next, the composition of this body increases the risk of corporatist approach to disciplinary liability and inspections. This body will be composed solely of judges and prosecutors; the lay element is almost completely absent from the Inspectorate."*, however, this does not imply that the High Inspectorate of Justice be under the authority of the Assembly and not to consist of judges and prosecutors at all.

19.4. At this stage, the evident conflict of interest of the Inspector General of HIJ in the course of assuming inspection functions needs to be clarified. The Inspector General assumes the inspection of judges and prosecutors, whereby he acts as an accuser. In the meantime, the inspector also assumes the function of inspection at HJC, assumed to be in the role of the court in the course of judicial proceedings of judges and prosecutors. In our opinion, this creates a clear conflict of interest and needs to be avoided. And beyond this, even the judge-members of the Disciplinary Tribunal are inspected by the Inspector. Finally, this scheme in our opinion creates, on one side, corporatism and on the other a clear political impact. Under current conditions of Albania where the appointments to HJC, to inspectorate and eventually to the High Court shall be accomplished partially by the current majority, a situation will occur where the political inspection and corporatism within the system will be connected by the join political inclination. This is a very serious shortcoming, aiming at installing the scheme introduced by the constitutional Draft Amendments.

19.5. One of the most delicate issues compromising the newly presented scheme is the fact that the Minister of Justice inspects the Inspectorate. This establishing hierarchical imposing relations between the Minister and the Inspector, thus not only the inspector is being appointed politically by the governing majority, but he is systemically controlled by the Executive. The establishment of the Inspector is and artificial instrument, hiding the extended arm of the Executive within the judicial system.

19.6. On the other hand, **the wording of the amendment does not take account of two appropriate findings of the Venice Commission in its Opinion no 824/2015**, as follows: *"77. The establishment of HIJ should be coordinated with the disciplinary function of the HJC (see Article 41), and with the power of the Minister of Justice to initiate the investigation of disciplinary misconduct against judges (see Article 40). There is the risk that results of the internal inquiry adopted by the HIJ anticipate and condition the decisions to be adopted by the HJC. It will be a task of organic legislation to avoid possible confusions and interferences of activity.... 78. The HIJ is also to be responsible for "inspecting" the courts and prosecution offices. It is not clear what this inspection consists of since it is not mentioned elsewhere in the Draft Amendments. It is not clear whether it is the same as the "evaluation" for which the HJC is responsible. The Venice Commission recommends to keep the investigation of disciplinary violations separate from any process of evaluation which is concerned primarily with competence rather than misconduct, and which reveals very often not a personal misbehaviour but a general malfunctioning of the system."*

20.1. The establishment of the High Inspectorate of Justice shall not manage to unify the entire existing inspectorates into a single inspectorate, different from what Venice Commission finds its Opinion no 824/2015, asserting that: *67. The Venice Commission understands that the creation of the new constitutional bodies would not automatically terminate the mandate of the already existing bodies, for example the Inspectorate already existing within the Ministry of Justice which deals with the inspections within the judiciary , as well as the High Inspectorate of Declaration and Audit of Assets (HIDAA). In the opinion of the Venice Commission, in order to avoid parallelism it is better not to have different bodies with similar or overlapping*

functions…. 75. Venice Commission finds that instead of the three inspectorates existing currently, it is proposed to create an independent inspectorate about to concentrate in his hands the entire investigatory functions. In practical terms, this solution serves economising the human and financial resources and it is going to simplify the system, and consequently, seems to be a positive development."

20.2. The establishment of the High Inspectorate of Justice (HIJ) shall not abolish the High Inspectorate of Declaring and Controlling Assents (HIDCA), since the latter is a body competent for evaluating the legality of the assets of the senior officials of the state, including the judges and prosecutors. HIJ is, under the amendment, not the body competent for investigating into the assets of the judges and prosecutors. The fact that HIDCA will continue to assume its activity is also established in the provisions of the Annex attached to these Amendments (see Article D). We need to recall here the move of the governing majority in 2014 to take HIDCA under its control, by way of changing the law and appointing coercively a new Inspector General. In the meantime, even the other inspection structures will resume assuming heir activity. Specifically:

(i) Inspectorate with the High Council of Justice shall continue to exist due to the powers of the Council for the evaluation of judges, supervision of the ethircal ruels or supervision of the judicial administration (see letters a, ç, and d of paragraph 1 of Article 147/a)*;*

(ii) Inspectorate with the Prosecution Office General will continue to exist due to the powers of the High Prosecutorial Council to evaluate the prosecutors, supervision of the ethical rules and the control of the activity of the prosecutors (see point 2 of Article 148; letter "ç" of paragraph 1 of Article 148/b and letter "c" of paragraph 1 of Article 149/a).

(iii) Inspectorate with the Minister of Justice will continue to exist due to the powers recognised to the Minister of Justice under paragraph 3 of Article 147/a. On the contrary, this Inspectorate is strengthened in its power and upgraded at constitutional level.

21. In Article 40 (Article 147/e shall be added) regarding the **dismissal of Inspector**, we find out that same as in the event of the members of HJC, even the Inspector

General of HIJ is under the circumstances of the permanent conflict of interest with all the members of the Disciplinary Tribunal, which is responsible for his dismissal under the amendment.

22.1. Even though we find an improvement of the **composition of the Disciplinary Tribunal (Article 42 – Article 147/f is being added up), again the amendment reflects partially the findings of the Interim Opinion of the Venice Commission**. In such a case, we find out that its members are under the circumstances of permanent conflict of interest with the members of the High Judicial Council. This puts a question mark to the efficiency of this body in the context of guaranteeing accountability of the HJC members, or regarding the latter to the effect of guaranteeing the accountability of the Chairman and 2 members of the High Court and the Chairman and 2 members of the High Administrative Court. The same problem is posed by the transitory composition of the Disciplinary Tribunal (**point 5 of Article 179 – Article 55**), which until 31/12/2019, instead of 3 member of the High Administrative court shall have in its composition the Chairman of the Administrative Chamber of the High Court, as well as a judge of the Administrative Chamber of the High Court and a judge from the ranks of the judges of the administrative courts of the first and second instance.

22.2. The establishment of the Tribunal does not make sense being of an overwhelmingly composition of judges, while under Article 6 of the ECHR, the complaint in such cases might be filed with the High Court. The amendments proposes the establishment of the Tribunal with 7 members, 6 of which are judges and 1 a prosecutor. The pre-determined number of judges being ex officio creates the situation where the Inspector General starts with the inspection of each of them upon the request of the Minister of justice, while these senior functionaries under the pressure of inspection risk their being impartial.

22.3. In such a case, account shall be taken of the finding made by the Venice Commission in its Opinion no 824/2015, whereby specifying: 10. *The goal pursued by the reform is commendable; however, the organizational choices proposed by the Draft Amendments appear to be too cumbersome, and the reform is likely to lead to*

*a quite complex decision – making process , **with many bodies controlling each other** in a complicated system of checks and balances. 65. As a preliminary remark, the Venice Commission notes that the Draft Amendments introduce several new bodies which are supposed to control each other."*

23.1. Article 43 (amending Article 148) provides for the **organisation of the prosecution office body**. We are of the opinion that the provision contained in paragraph 3 of this provision is not clear, specifying that: "3*. The special prosecution office for the criminal prosecution and the special unit for the investigation into the criminal offences of corruption and organised crime, as well as of the criminal charges against the senior functionaries shall be independent of the Prosecutor General and they shall be established by law*". The perception emerges as if the criminal prosecution and investigation are assigned to different bodies (the first to the special prosecution office and the second to the special unit). Such a determination is, in our opinion, chaotic, since it creates the impression that the investigation is not part of the criminal prosecution and it is not following the same line with the organisation and functioning of the prosecution office.

23.2. This might bring about a misinterpretation of paragraph 1 of this provision, providing for: "*The prosecution assumes criminal prosecution*…". If investigation is not encompassed within the concept of the criminal prosecution (since paragraph 3 uses both concepts and suggests even to assign them to different bodies), then it is not clear which is the competent body for carrying out the investigations in the event provide for in paragraph 1. On the other hand, the separation of these functions is done to clarify the connection which would exist between the Special Prosecution Office and the Special Unit.

23.3. Moreover, the provision made does not reflect correctly the finding made by the Venice Commission in its Opinion no 824/2015, specifying that*: 89. Article 53 (adding Article 148/c) proposes to establish a new Prosecutor's Office of the Special Anti-corruption Structure (SAS). Creation of such special structure may have a positive effect*

on the fight against corruption[30]; it is important that the special prosecutors enjoy at least the same independent status as ordinary prosecutors. The relationship between the Prosecutor General and the Special Anti - corruption prosecutors, however, needs to be considered further. 90. Under Article 53 the prosecutors of the SAS are to be appointed by the HPC for a term of 10 years; it is unclear whether they could be reappointed and whether there are any guarantees as to their employment thereafter. Another question is whether this method of appointment includes the head of the SAS prosecutors' office.

There is no specific provision concerning the appointment and the role of the head of this body despite the obviously pivotal importance of his/her functions. There is a provision for the conduct of investigations by the National Bureau of Investigation (which is not mentioned anywhere else in the Constitution) under the direction of the SAS prosecutors. If this is to be workable the NBI should not itself be subject to any outside direction and its role and competencies be specified, at least briefly, in the Constitution.

23.4. The amendment provides for some restrictions of fundamental freedoms and rights of the prosecutors of the Special Prosecution Office and Special Unit. In this respect, the Venice Commission found that: "*91..... These are probably appropriate provisions given the reportedly high level of corruption in Albania; however, it is not clear why these are the only public officials to which such provisions should apply. Neither the Prosecutor General nor the judges, for example, are subject to any such monitoring on an ongoing basis*. We hold that while at the constitutional level essential special restrictions shall be provided for the prosecutors and the employees in these special structures, it would be necessary to specify their special status with a preferential treatment at the constitutional level. Of specific importance are in this respect the rules on their disciplinary liability, since in the provision contained in paragraph 6 "The prosecutors shall be held liable according to the law", seems insufficient and it does no guarantee the status of the prosecutors and their independence sanctioned in paragraph 1.

[30] See CDL-AD(2014)041, Interim Opinion on the Draft Law on Special State Prosecutor's Office of Montenegro, §74

23.5. Finally, the new norm repeals the existing rule without any explanation (point 2 of the Article 148), according to which “prosecutors are organised and function at the judicial system as a centralised body”. This rule is important since it provides for a unified organisation, to the effect of the efficiency of the prosecution offices at the courts.

24. Article 44 (Article 148/a shall be added) is not in compliance and it has ignored the Recommendation no 55 of the Interim Opinion of the Venice Commission. This provision **provides for the composition and rules of selection of the members of the High Prosecutorial Council (HPC),** with 3/5 of the votes of the Assembly. This norm displays the same set of problems as the case of the High Judicial Council (HJC). In this respect we adhere to the comments made for the provision of HJC, since they are fully valid also for the case of HPC (*see point 13 of this Opinion*).

25. Article 45 (Article 148/b shall be added) fell short of providing a response to the Interim Opinion of Venice Commission, in its paragraph 88. This provision provides for **the functions of the HPC,** among others providing for the HPC to approve the rules for the ethics of prosecutors and supervising their observation. To this effect, we recall the fair finding of the Venice Commission, where the question is raised as follows: “*88. ..... Another question is whether the rules of ethics for prosecutors should be adopted by the High Prosecutorial Council*.” The supervision of the observation of ethics shall in each case a power of the Prosecutor General.

26. Article 49 (amending Article 149) providing for the **Prosecutor General be appointed** by three fifth of the members of the Assembly, from among three candidates proposed by the High Prosecutorial Council. In the meantime, the transitory provisions provide for the possibility of interrupting the mandate of the current Prosecutor General, providing for the possibility of electing the new Prosecutor General within no later than 8 months since the entry into effect of the amendments (see paragraph 7 and 8 of article 179, as amended – Article 55). According to this provision, the election of the Prosecutor General shall be made only based on the votes of the current majority (which we highlight that it has 3/5 of the votes in the Assembly), thus recognising no

essential role of the opposition in this process. At this stage, we recall the approach of the Venice Commission adopted in a similar case, highlighting that: *"14. In its last opinion, the Venice Commission welcomed the proposal to provide for the election and dismissal of the Supreme State Prosecutor by Parliament by a two-thirds majority upon the proposal of the Prosecutorial Council; the Commission recommended however to introduce an anti-deadlock mechanism (CDL-AD(2012)024, § 41)"*[31]

27.1. Article 50 (Article 149/a shall be added) dealing with the **powers of the Prosecutor General**, in our opinion letter 'b' should specify that the Prosecutor General has the power not only to issue general instructions in writing for the prosecutors, but also the right to control the way of their implementation. At the same time, he exemption spelled out in letters 'a', 'b', 'c' and 'ç' connected to Article 148 of the Constitution (which has to do with the functioning of the Special Prosecution Office) is not necessary, as long as Article 148/3 provides for the Special Prosecution Office and Special Unit are independent of the Prosecutor General. In such a case we hold that no misunderstanding emerges, since the constitutional provisions are as a 'unified body', in harmony with each other and complementing each other.

27.2. On the other hand, Prosecutor General is entitled to report to the Assembly about the situation of criminality, which is organically linked to his power for issuing general instructions in writing for the prosecutors. This is one of his key powers. According to the new structure of the prosecution office, the individual prosecutors are recognised a broader independence in the criminal prosecution, which means a maximal restriction of the intervention of the Prosecutor General in the criminal prosecution of concrete cases. The Prosecutor General is, as such, introduced as an administrative director of the system of prosecution and as a liaison between the body of prosecutors and the fight against criminality at macro level. The only instrument in his hands is issuing general instructions. Based on this sole instrument, the Prosecutor General shall be responsible about the impact of his instructions on the fight against criminality. The intentional violation of this obligation or the poor professional performance of the Prosecutor

[31] CDL-AD (2013)028 - Opinion On The Draft Amendments To Three Constitutional Provisions Relating To The Constitutional Court, The Supreme State Prosecutor And The Judicial Council Of Montenegro

General in this respect is not addressed by the Draft amendments, where just Article 52 (adding Article 149/c) deals with the disciplinary liability, thus imposing the same rule as for the other senior functionaries of justices, who are assuming other powers.

28. Paragraph 3 of Article 51 (Article 149/b shall be added), specifying that following the expiry of the 7-year mandate and upon his request, the **Prosecutor General is appointed as judge** at the appeal court; regarding this we specify that it does not take account of the finding made upon Opinion no 824/2015 of Venice Commission, specifying: *"96. ….In addition, it seems to be strange to adopt constitutional amendment aiming at appointing former Prosecutor General as one of the judges of court of appeals."*

29.1. Article 53 (Article 149/ç shall be added) ignored the findings made by the Interim Opinion of Venice Commission, in its point 69. This fact is not acceptable for us, since it is being insisted to establish this body, even by way of providing for various criteria of various functionaries (somewhere the age and some where the seniority in profession), implying the current situation of selecting concrete names, to the effect of political benefit out of the establishment of this body, thus circumventing the principles and becoming selective.

29.2. This provision creates insistently a new constitutional body "**Council of Appointments in Justice**" (CAJ), *ad hoc*, and it has a number functionaries in its composition, tasked to verify the legal, professional and moral conditions and criteria, by way of examining and ranking the lay candidates for members at the High Judicial Council, and the lay candidates for the High Prosecutorial Council, candidates for High Justice Inspector, as well as the candidates for members of the Constitutional Court being appointed by the President of the Republic and the Assembly. We are clearly positioned against the establishment of this *ad hoc* body, due to the six following reasons:

29.3. First, the establishment of this body complicates and aggravates the institutional scheme of the justice bodies. Same as appropriately required by Venice Commission in

its Opinion no 824/2015, the scheme of institutions should be revised and the number of institutions reduced[32]. CAJ is clearly one of the bodies which can be very easily removed,, since its powers may be assigned to the existing bodies or the ones due to the established. Thus as illustration, the power of verification of criteria and conditions for: (i) CC members, it can be done by the latter, or a certain number of its judges; (ii) for the HJC and HPC members, it can be done by these latter bodies or a certain number of their members; (iii) for the Prosecutor General by HPC or certain members; (iv) for the Inspector General of HIJ by the joint meeting of HJC and HPC, or certain members of these bodies. In such a way, the conflict of interests shall be avoided and the reciprocal controls and balances shall be introduced, thus ensuring the avoidance of the corporatist approach.

29.4. Second, this provision has remained almost unchanged, although Venice Commission in its Opinion no 824/2015 highlighted that: *"69. The creation of the JAC complicates the structure of the judiciary and is aimed at reducing the freedom of choice of the constitutional bodies involved in the appointment process. The composition of this body needs to be examined more closely. In the proposed system of appointments the JAC, **a very small elite body, is placed in a very powerful position**. On the one hand, such composition aims at protecting the JAC from political influence; at the same time, it increases the risk of corporatism since members related to the judiciary are in net majority. However, since five members of the JAC are not directly related to judges, they may provide for an element of checks and balances in making the appointments provided that important decisions within the JAC are taken by a qualified majority in order to ensure that "judicial members" cannot simply outvote the non-judicial ones."*
We fully support the concern that a very small elite body be placed in such a powerful position. In this respect, the risk is intensified taking account of the fact that in all the cases the ranking made by JAC serve as a defusing mechanism (where the Assembly fails to reach the necessary majority in the appointment of candidates), thus recognising to this body a pure appointment power, regarding a considerable functionaries in the justice system. This approach may create serious problems in practice, since the same candidates may be evaluated differently, for the application in various institutions, to the

[32] See the findings made in paragraphs 10. 65, 66 and 69 of the Interim Opinion no 824/2015

sole purpose of achieving their distribution to different bodies, according to the principle "to please all".

29.5. Third, the functioning of *ad hoc* structures in Albania have failed spectacularly. The members of these structures very often do not demonstrate the necessary accountability and commitment in assuming their functions, thus considering it as an added 'burden' to their everyday tasks. A clear indicator for this is the part time functioning and ex officio members of the High Council of Justice, being evaluated as not at all a successful model, and one of the constitutional amendments is proposing going over to a new model. On the other hand, the Albanian legislation provides for such a law (Council fo Appointments) at the law for the High Court (verifying the criteria for the judges of the High Court), and it has failed to function and assume its function. In such a case, account shall be taken of that JAC are not accountable for the assumption of this constitutional function and consequently the principle of accountability is not applied.

29.6. Fourth, the proposed composition of JAC creates conflict of interest very often. As an illustration, the Chairman of the High Court, Chairman of High Administrative Court, the most senior judge of the High Court are invited to evaluate and rank the candidates for members of HJC, while this body (i.e., even these members being ranked) is responsible for the evaluation, transfer and taking of disciplinary measures against judges (potentially against the Chairman and member of the High Court and Chairman of the High Administrative Court).

29.7. Fifth, the determination of drafters of the amendments seems to be connected to the transitory regulations on the JAC composition at the moment of the entry of the amendments into effect and the role that this *ad hoc* body shall assume in the process of appointing he entire functionaries of the justice system at the first moment of applying the constitutional provisions, to the effect of political control of the process. Assessing Article 53 (Article 149/ç shall be added) with Article 55 (Article 179 being amended), it emerges that the JAC composition at the moment of the entry into effect of the amendments and staffing for the first time the new or re-formatted bodies, shall be: (i)

Chairman of the Constitutional Court; (ii) Chairman of the High Court and Chairman of the Administrative Chamber of High Court (being the same person); (iii) lay and most senior member of the High Council of Justice; (iv) Prosecutor General; (v) Chairman of National Chamber of Advocates; (vi) the most senior sitting judge of Constitutional Court; (vii) most senior sitting judge at the High Court. All these functionaries are currently in office and identifiable, and for this reason this creates an opportunity for political manipulations. The political preference for selecting the JAC members at the moment of entry of this law into effect is identified clearly even due to the fact that in one case the criterion applied for the selection is 'seniority in office' (case of the Constitutional Court and High Court) and in other cases 'age seniority' (case of the High Council of Justice). This fact is sufficient to understand that the drafting of constitutional amendments has been made taking into account concrete names who are going to be members of this evaluation body and the possibility which exists for its political control. Such a situation is not acceptable, since the Constitution of the Republic of Albania cannot be drafted with 'a list of names attached'!

29.8. Finally, JAC being proposed in transitory provisions (Article 179) contains another serious shortcoming. It shall proceed with the assumption of functions for appointing the senior officials and constitution of new constitutional bodies, thus not having a clear and explicitly obligation that the judges composing it be subject initially to the re-evaluation process. The re-evaluation process shall be assumed by a body appointed by the governing majority and the political orientation of this process, except the Chairman of the Chamber of Advocacy, shall supervise politically the entire JAC members, specifically the transitory period. Not just this, but a transitory member of JAC shall be also the lay member of the High Council of Justice being the oldest in age, who will not be subject to the re-evaluation process at all. In this way, the double opportunity of compromising this process exists. On one hand, the JAC members are vulnerable to the will of the governing majority since they wish to pass the re-evaluation process successfully. On the other hand, the work done by them may be undermined regarding the public trust, if these members subsequently do not pass successfully the process of re-evaluation.

30.1. Article 55 (amending Article 179) proposes some **transitory regulations, which not only ignore the findings of the Interim Opinion 824/2015,** but in some cases they appear to be problematic.

30.2. Paragraph 1 provides for the renewal of the Constitutional Court and it did not change the version submitted for the initial opinion of the Venice Commission. For this provision, Venice Commission in paragraph 24 stated that "*Article 57 of the Draft Amendments contains a transitional provision under which three members will come up for renewal in 2026, one vacancy to be filled by the President, one by the Assembly and one by the courts, but four will be due for renewal in 2030 and only two in 2034. The transitional provision is therefore inconsistent with the terms of article 15 of the draft and needs to be adjusted*." The revised draft not only did not change this transitory provision, but it changed even the rules of composition of CC, sanctioning that it consists of 9 members, with a 9 year mandate and its renewal shall occur once in three years. At the same time, a rule is missing regarding the case of early termination of the mandate of the serving judge.

30.3. **In paragraph 7, the Recommendation of Venice Commission has been ignored and it is being insisted to interrupt the mandate of the Prosecutor General, hoping that Venice Commission will 'change' its opinion.** We want to recall that the dismissal or early interruption of the mandate of the Prosecutor General has been a hot spot of the political debate during these 25 years. However, in the past this process has been argued with the conclusions of the Parliamentarian Investigatory Commissions surrounding insufficiency or irregularities in assumption of office. While the proposal to date is to interrupt the mandate based on a constitutional law, to the effect of political benefit. Paragraph 7 provides for the possibility of interrupting the mandate of the Prosecutor General, providing for: "Prosecutor General shall be appointed within 2 months of the constitution of the High Prosecutorial council, however not later than the date of the end of the mandate of the serving Prosecutor General". At this point we recall that the Venice Commission in its Opinion no 824/2015 has highlighted that: "96. *However, the replacement of the Prosecutor General is definitely*

not a matter of necessity and maintaining the sitting Prosecutor General until the expiry of his mandate would be acceptable."

30.4. In paragraph 8, it is not clear why the participation of the Ombudsman as observer at the meetings of the Council of Appointments in Justice has been foreseen.

30.5. Regarding paragraph 10, we are of the opinion that this rule regarding the entry into effect should be applied for all the provisions pertaining to the European integration, as long as the latter shall remain in the final text.

30.6. The content of paragraph 12 is not normal and not at all appropriate to be included in the text of the Constitution. This is due to the fact that the former judges and former prosecutors are not directly subject to the constitution and consequently cannot fall under the scope of its regulations. The argument provided that the provision has been inserted to make sure that they are subject to the process of evaluation if they run for HIJ inspector in order to prevent the penetration of the system by the judges and prosecutors who have been dismissed is not logical, since they are not protected by the constitutional provisions and as such they may be subject to any evaluation process or prohibition which may be foreseen by law. On the other hand, the respective provision (Article 38) does not provide for the criteria for the selection of the inspectors and consequently it has such a determination delegated to the law. As such, even this rule or intention is purely of a simple law level and not constitutional one.

30.7. Paragraph 13 provides for the judges and prosecutors not having graduated from the School of Magistrates to stay in office and being subject to the temporary evaluation process for the qualification of judges and prosecutors under Article 179/b. This provision is very confusing. Even if the aim of the drafters could have been that, due to adding the criterion of the graduation from the School of Magistrates in the basic text (Article 25 – adding Article 136/a), to foresee that this addendum does not violate the principle of irremovability from office for the existing judges failing to meet this criterion, the way how it has been phrased leaves a lot of room for interpretation/misunderstanding. We think that even without specifying clearly this fact, it

is clear that from the constitutional perspective the judges shall continue to assume their office, since the new added criterion extends its effects only on the judges being appointed following the entry into effect of the amendment and it can never have retroactive effect.

30.8. However, paragraph 13 may be interpreted in the two following ways:

30.8.1. First, subject to the evaluation and re-evaluation process under Article 179/b shall be only the judges and prosecutors not having graduated from the School of Magistrates. This is evidently in conflict with Article 179/b, which does not made any such explicit exemption and it seems as if it proposes that subject to the evaluation process shall be all the judges and prosecutors, regardless whether they have graduated from the School of Magistrates or not. Taking account of the principles that the constitutional provisions cannot be interpreted separated of each other, it is necessary that the wording of paragraph 13 of Article 179 be revised. The exemption of judges and prosecutors from the process of professional evaluation may be legitimate, however, under no circumstances can be legitimised their differentiation regarding the verifications of their assets and integrity, always abiding by the fundamental human rights and freedoms and protective measures for the honest judges and prosecutors.

30.2.8. Second, since the guarantee of the stay in office even in the process of verification is granted only for the judges and prosecutors not having graduated from the School of Magistrates, it seems as if the judges/prosecutors having graduated the School of Magistrates, shall, during the entire evaluation process to its end, be suspended from office and they shall not assume it. Such an interpretation is extensively connected to the provision contained in paragraph 2 of Article 179/b (Article 57), according to which the persons provided in paragraph 1 (even judges and prosecutors) passing successfully the evaluation and re-evaluation process **shall be considered appointed judges and prosecutors**. According to this provision, as long as this process has not been completed they shall not be considered appointed judges and prosecutors (thus, they have been suspended from office)!!!

31.1. It is true that in its Interim Opinion no 824/2015, Venice Commission stated that: "*95. The existing High Council of Justice will end its activity three months after the entry into force of the law and the new High Judicial Council (HJC) will be elected. In the specific Albanian context, given the radical restructuring of the Council and the conferral of substantial additional powers on the newly constituted Council (cf. to the existing Article 147), this situation might be arguably distinguished from that in relation to which the Venice Commission criticised a proposal for the early termination of the mandate of the Judicial Council in Georgia as an interference with the judicial power and an attempt to achieve, under the pretext of a reform, "a complete renewal of the composition of a judicial council following parliamentary elections".* Further to this approach, the constitutional amendments (**paragraph 6 of Article 179**) provides for the High Judicial Council to be established within 6 months since the entry into effect of this law, ordering the interruption of the constitutional mandates of the existing judge members.

31.2. Regarding this point, we wish to highlight that the High Judicial Council is not only vested with some powers (*compared to the High Council of Justice*), but it is deprived of some of them (*illustration, power to inspect*). Thus we are facing the case of balancing the powers. We are of the opinion that there is no reason for the judge members of HCJ to have their mandate terminated, as long as they themselves are of the opinion to continue assuming the office of HJC on full time basis. Regarding this, we bring to your attention that 4 new judge members of the High Council of Justice (HCJ) have been appointed to the office not earlier than mid December 2015. On this occasion, we bring to your attention the approach adopted by Venice Commission CDL-AD(2014)028 "*Opinion on the Draft Amendments to the Law on High Judicial Council of Serbia, paragraphs 71-75*", clearly specifying that: "*75. That's why in such a case, since the Deputy Chairman of HCJ was elected, at least he/she must be upheld in his or her position*". The same solution may be applied even in the event of the newly elected members of HCJ, admitting to retain their position as a member. In such a way, the doubt can be avoided that the early interruption of the mandate of HCJ members consists an intervention with the judiciary and an attempt to achieve under the pretext of reform "an entire renewal of the composition of the judicial council after the parliamentary elections".

32. Article 56 (containing the provision 179/a, which is an amendment already approved by the Assembly of Albania), is in our opinion to be deleted from the contents of the draft-law, since the Assembly has approved it with the same contents, in the context of the reform for decriminalisation.

33.1. Regarding Article 57 (adding Article 179/b) we find out that it sets out the fundamental rules for implementing the **process of evaluation and re-evaluation**, thus laying the necessary constitutional basis for involving the Annex into the text of the Constitution. Regarding this norm, we have some general comments and some specific comments regarding the persons subject to re-evaluation.

33.2. **General comments on re-evaluation**. Initially we need to highlight that we are fully welcoming a concrete, efficient and fast evaluation of all judges and prosecutors of the first instance, second instance and High Court, based on the control of their work, efficiency, speed and abidance by the law and the constitution. At the same time, we want to highlight that we support in each single case strongly any measure aiming at combating corruption in the justice system, in a real and sincere way, and which final aim is the exemplary punishment of each corrupt judge and prosecutor. However, such a process should ensure and establish a fair balance between the simultaneous safeguarding the independence of the judiciary with the relentless fight against corruption.

33.3 The establishment of new, *ad hoc*, structures, having no experience in the respective field, moreover appointed only by the current parliamentarian majority and without any safeguard of independence against politics, we deem that it does not provide a solution to the identified problems and for the relentless fight against corruption. In this context, we cannot support any process aiming at intimidating the judges and prosecutors, and bring no impact in the real fight against corruption. Such processes are not supported by us, since such a procedure undermines deeply the cause of their status (irremovability from office), impairs gravely the status of honest judges and prosecutors, and paves the way for the extreme politicisation of the

judiciary. In this situation, we consider the fact that the professional re-evaluation of the sitting judges has been evaluated in the Joint Opinion of the Venice Commission and the Human Rights Directorate (HRD) of the General Directorate for Human Rights and Rule of Law (DG) of the Council of Europe regarding the law on the Judicial System and Status of Judges and Amendments to the Law on the High Council of Justice of Ukraine, Opinion of the Venice commission no 801/2015 §§71-81 (23 march, 2015), *as a specific case which should be made with very stringent safeguards to protect those judges who are appropriate for assuming their office*.

33.4 Regarding the above, the parliamentarian political parties of majority and opposition should reach a broad consensus regarding this measure, which, very fairly, in paragraph 98 of the Interim Opinion of the Venice Commission, is evaluated to be the most radical and the single criterion for being met jointly is the last sentence of this finding. Ignoring and commitment to circumvent the recommendations no 98 and 127 of the Interim Opinion would put at risk a political consensus for the entire process of evaluation. The implementation of the process of evaluation of judges and prosecutors should be done only if the conditions specified clearly in the Opinion of Venice Commission no 824/2015 are met as follows:

a) The process has to avoid maximally[33]: (i) extraordinary tensions within the judiciary; (ii) destabilisation of its functioning; (iii) boosting public lack of trust with the judiciary; (iv) deviation of the attention of judges from their normal work and above all (v) mechanisms for the political capture of the justice system by the parliamentarian majority, which is trying to install its sole control over the process.
b) Such a process has to aim[34] at identifying the individual judges not being appropriate to keep a judicial position and to be associated with such protective coercive measures to protect hose judges who are appropriate to assume their positions.
c) The process should be strictly short[35] and to be completed within a short time.

[33] Paragraph 98
[34] Paragraph 99
[35] Paragraph 100

d) The personal freedoms and rights provided for in the Constitution, specifically those pertaining to the privacy, burden of proof, inviolability of residence, etc. should be abided[36] by also with regard to the judges/prosecutors, regardless of the restrictions submitted in temporary provisions for the purposes of assuming the evaluation. The restrictions in such a case should not exceed the restrictions permitted by the European Convention of Human rights, since Albania is bound by ECHR and it cannot circumvent the supervision by the European Court of Strasbourg.

e) The re-evaluation process shall be a general measure[37], applied equally to all the judges and prosecutors and not be applied selectively, always associated with certain procedural remedies not connected to any specific issue that any judge might have on his desk.

f) The process has to follow the standards provided for in Article 6 of ECHR[38], recognising the right to complaint against the dismissal decision before an independent and impartial court.

g) The composition of the Independent Qualification Commission or Ad Hoc Chamber[39], as well as the status of their members has to guarantee their genuine independence and impartiality. Since the current majority is currently controlling three fifth of the votes in the Assembly, it would be appropriate for the appointment power to be assigned to an independent body or to an official not being of the same political colour as the current governing majority.

33.5. The outcome of the examination of the Annex to constitutional Draft Amendments (*for more details, you are kindly asked to see the part with comments on the Annex*) is that none of these criteria has been met. Under this circumstances, in absence of the guarantee regarding the conditioned referred to above and identified clearly by the Opinion no 824/2015 of the Venice Commission, the parliamentarian opposition cannot agree to the overall evaluation of the judiciary and prosecution service, and every further Opinion of the Venice commission should be based on this new assumption, regarding the absence of consensus and broad political support for this process for the

[36] Paragraph 105 and 106
[37] Paragraph 107
[38] Paragraphs 108 - 118
[39] Paragraphs 127 and 137

way how I has been conceived in the constitutional amendments, associated also with the impossibility of joint discussion among the political groups in parliament over these extraordinary measures, and avoiding any possibility for consensus so far by the majority[40].

34. <u>Specific comments for the persons under re-valuation</u>. Article 179/b provides for the persons (paragraph 1) being subject to the evaluation process. Regarding these persons we have the following comments:

34.1. The constitutional amendments encompass in the process of evaluation also the chief-inspector and the other Inspectors of the High Council of Justice, as well as the legal advisors at the Constitutional Court and High Court, regardless whether they enjoy the status of the judge/prosecutor or not. We are of the opinion that subject to this provision must be only the officials enjoying the status of the judge/prosecutor and, having this status suspended, are assuming another state office (in one of the positions specified above, under the rules set out by the current legislation). In the meantime, the remaining part of these functionaries, no enjoying the status of the judge or prosecutor and not recruited to the office by the judicial system and not being bodies or officials mentioned/foreseen in the Constitution, cannot be directly subject to a constitutional provision. They are functions set up by law and consequently, any restriction of their status, or process of assets/professional evaluation, should be foreseen by law (it is still possible under the Albanian legislation). The incorporation of the Annex to the Constitution, by way of the transitory regulation made by Article 179/b, providing for the process of evaluation, is done due to the deviations foreseen by the ordinary constitutional process of accountability for constitutional functionaries. Due to this reason, any unification of theirs with functionaries set up by law is inappropriate and meaningless.

34.2. It is clear that this hideous provision aims at implementing paragraph 2, whereby providing for: *Persons listed in paragraph 1 of this article who successfully pass the re-evaluation procedure shall be considered appointed judges and*

[40] See paragraph 100 of the Interim Opinion of the Venice Commission no 824/2015

prosecutors. Persons listed in paragraph 1 of this article who did not act as judges or prosecutors for at least 3 years and who pass the re-evaluation shall undergo a one year training at the School of Magistrates under the conditions set out in the law. After successful completion of the training they shall be appointed as judges or prosecutors. This provision affects Article 136/a and paragraph 4 of Article 148 of the Constitution providing for the process of appointment of judges/prosecutors, since it permits the recruitment of individuals at flagrant violation of existing rules and upcoming rules into the judiciary and prosecution office – outside the education and graduation from the School of Magistrates.

34.3. Where any of them intends to become a judge, he shall meet the general conditions provided for in Article 136/a (Article 25 of the draft), specifying that: "*Judges are Albanian citizens appointed by the High Judicial Council after finishing the School of Magistrates and after a passing a preliminary evaluation of their assets and their background, as provided by the law. Candidates are selected based on a transparent and opened procedure, which ensures a merit based selection of the most qualified candidates having moral and ethical integrity.*" While, if intending to become a prosecutor, he shall meet the general conditions provided for in paragraph 4 of Article 148 (Article 43 of the draft), specifying that: "*Prosecutors are Albanian citizens appointed by the High Prosecutorial Council after finishing the School of Magistrates and after a passing an evaluation of their assets and their background in accordance with the law . Candidates are selected based on a transparent and open procedure, which ensures a merit based selection of the most qualified and reputable candidates.*"

34.4. Their involvement in the judiciary or prosecution office beyond a procedure guaranteeing the transparency and competitiveness based merits is inacceptable and it consists a risk for politicising the judiciary, while marking a backlash in the system of justice in the country. These persons have no reason to be admitted to the School of Magistrates without any competition (as it is the case in each situation) and moreover to go through just 1/3 of the initial training course of the School of Magistrates (which under normal circumstances lasts 3 years). In such a case, account should be taken of

the fact that the overwhelming part of these entities have been employed to respective positions in absence of a competitive, transparent, open and merit based procedure.

34.5. On the other hand, we wish to highlight some of the entities included in paragraph 2 (for illustration Chief Inspector or inspectors at HCJ, or advisors at High Court) have completed the School of Magistrates or enjoy the status of the judge or prosecutor, and in compliance with the law, have their status suspended, since they have been seconded to the offices they are assuming to date. According to the provision contained in paragraph 2, since the provision is referring to the fact of '*assuming the office of the judge and prosecutor*', at the moment of the entry of the law into effect, they shall lose their status of judge and prosecutor, while a number of them shall be obliged to follow again the School of Magistrates, even if they have graduated from there, to the effect of returning to their previous positions in the judiciary/prosecution office! This is an inacceptable and degrading situation, affecting their status gravely.

34.6. The same situation occurs even in the event of former judges and prosecutors. It is entirely inappropriate for them to be included in the circle of persons to be subject to the re-evaluation process, while they are not assuming any public function and consequently they cannot enjoy this constitutional status!

34.7. It is clear even at this instance that through the hideous insertion it is attempted to include these persons in transitory provisions, even they do not enjoy this constitutional status, and consequently they cannot be subject to measures aiming at restoring the public trust with the justice system (certainly consisting of sitting judges and prosecutors), thus aiming at circumventing the criteria set out in Article 136/a and 148, to the effect of returning the former judges/prosecutors of the period of communism back to the office, based on an non-transparent process and not based on merits. At this stage we recall the fact that the aim of this transitory provision is not providing for new conditions or new circumstances for assuming the office of the prosecutor/judge. Since 2008, Albania has a well-established legislation which does not allow the massive

return of the former judges and former prosecutors into the judicial system[41]. In this context, the massive return of former prosecutors/judges, including those of the communist period, to office risks specifically the judicial system seriously and generally democracy in the country. This finding is taken account of even in paragraph 1 of Article A of the Annex attached.

34.8. We also find out that subject to the process of re-evaluation are, strange enough, not the lay members of the High Judicial Council and the lay members of the High Prosecutorial Council. Even the current lay members of the High Council of Justice are not subject to this process while such a member has been vested with the transitory management of the Judicial Council and participates at the Council of Appointments in Justice. At this point, we need to recall that the three current lay members of the High Council of Justice have been appointed by the current governing majority. In this way we evaluate that there is an open tendency to differentiate between the individuals in favour of the majority to the individuals not being as such, thus giving the message that corruption is connected to and should be cleansed only from the individuals not appointed by the governing majority!!

35. Paragraph 2 of Article 179/b provides for: "Persons provided for in paragraph 1 (*referring to the serving judges and prosecutors*[42]) passing successfully the process of evaluation and re-evaluation **shall be considered** appointed judges and prosecutors". In such a case, the perception arises that during the period that the evaluation process is conducted to a final decision by the competent authorities, these persons are not considered to be appointed judges and prosecutors. In such a case the question emerging is: "During this time, what are they considered to be?! – 'Waiting' judges and prosecutors?! – Suspended judges and prosecutors?! – Former judges and prosecutors?!". At the same time, if the judges and prosecutors until the moment that they have not successfully completed the evaluation process are not considered as such, who is going to be considered as judge or prosecutor in the country?!

[41] The law for the organisation of the judiciary (2008) provides for the vacancies in the judiciary to be filled in only at the extent of 10% of them with former judges. This proportion has been established to promote the increase of the number of the judiciary graduating from the School of Magistrates.
[42] Our note

36.1. Regarding the time period set out in paragraph 3 and 4 of Article 179/d, we find out that the process of evaluation and the structures set up in this context shall be active in at least 11 years since the entry of this law into effect. In the meantime, the process may continue for an indefinite period, regarding an unsafe issue belonging to the future, which is accession of the Republic of Albania into European Union. Thus, the process of evaluation shall end after 11 years or on the date of accession of the republic of Albania into the European Union.

36.2. This very long period of time is a potentially dangerous norm, since it establishes the risk of transforming the process of vetting into a permanent de facto regulation, concurrent with the ordinary mechanisms of accountability. In such a case, we find out that one of the criteria set out in the Opinion no 824/2015 of the Venice Commission is not met, clearly specifying that: *100. The Venice Commission believes that a similar drastic remedy may be seen as appropriate in the Albanian context. However, it remains an exceptional measure. All subsequent recommendations in the present interim opinion are based on the assumption that the comprehensive vetting of the judiciary and of the prosecution service has wide political and public support within the country, that it is an extraordinary and a strictly temporary measure…"*

36.3. The 11–year period, or even worse leaving the period to be indefinite, connecting it to the uncertain date of accession of Albania into EU cannot be considered as a strictly temporary measure. Moreover, it is not determined how to proceed if the date of accession of Albania into EU is beyond the 11 year period following the entry into effect of this law, which will be the authority to decide for the continuation of the process or not to the date of accession.

37. Regarding the contents of the Annex "Temporary Evaluation of the Qualification of Judges and Prosecutors", we find out that it is not in compliance with the conditions specified by the Interim Opinion of the Venice Commission. The Annex provisions do not reflect specifically the following conditions:

a) The process has to avoid maximally the mechanisms regarding the political capture of the justice system by the parliamentarian majority which is trying to install its sole control over the process;
b) The process has to follow the standards set out in Article 6 of the ECHR, recognising the right to appeal against the decision of dismissal before an independent and impartial court.
c) The composition of the Independent Commission of Qualification or Ad Hoc Chamber, as well as the status of their members should guarantee the genuine independence and impartiality for them. Since the current majority seems that it is controlling three fifth of the votes in the Assembly, it would be more appropriate that the appointment powers be assigned to an independent body or an official being not of the same political colour as the current governing majority.

38. In Article A of the Annex it has been provided for the restriction specifically of the Articles pertaining to the right for abiding by the privacy, including Articles 36 and 37, provisions regarding the burden of proof and Articles 128, 131 letter f), 135, 138, 140, 145 paragraph1, 147/a paragraph1 letter b); 148/b paragraph1, letter b); Article 149/b paragraph1, letter d), according to article 17 of this Constitution, to the effect of accomplishing the process of evaluation and re-evaluation ex officio. The considerable restriction of these rights, specifically the right to privacy or burden of proof, seems that it does not take account of the findings of the Venice Commission in its Opinion no 824/2015, specifying that: *"99. The Venice Commission has recently had occasion to examine a very similar situation in Ukraine[43]. In that case the Commission's opinion was as follows: However, such measure as the qualification assessment as provided for in transitional Article 6 should be regarded as wholly exceptional and* ***be made subject to extremely stringent safeguards to protect those judges who are fit to occupy their positions".*** In the meantime, it continues as follows: *"105..... Seemingly, the intent behind Article 12 was to ensure that the specific limitations of the rights of the sitting judges, introduced by the Annex, are not contested, and that the transitional provisions contained in the Annex take precedence over the norms of the existing Constitution,*

[43] CDL-AD(2015)007, Joint opinion by the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine,

especially those contained in Chapter II ("Personal Rights and Freedoms"). However, the position which the Constitutional Court might take in this respect is not known: ***after all, constitutional provisions related to privacy, burden of proof etc. are not formally abrogated, they remain in the text of the Constitution and, in the opinion of the Commission, should apply to the judges as well,*** *even with the qualifications and limitations introduced by the transitional provisions for the purposes of the vetting exercise.*

39.1. Paragraph 2 of Article A and Article C of the Annex provide for the evaluation and re-evaluation to be accomplished by the Independent Qualification Commission and the complaints to be examined by the Ad Hoc Chamber of the Qualification at the High Court, providing for their way of organisation and functioning. The draft continues to provide for the members of the Independent Commission of Qualification and the Ad Hoc Chamber of Qualification at the High Court to be elected by the Assembly with 3/5 of the votes, upon the proposal of the Ombudsman (see paragraphs 6 and 7 of Article C). Moreover, paragraph 6 of Article C does not recognise any right to complaint against the decision of the Ombudsman to exclude certain candidates from the competition.

39.2. We highlight again that taking account of the Albanian reality, the Ombudsman is not a structure enjoying reliability regarding his political impartiality, since he has been an individual selection of the current Premier and the current majority, following a political agreement reached among the political forces at the period that the Ombudsman be elected by the parliamentarian opposition of the time (currently parliamentarian majority).

39.3. On the other hand, the Assembly makes the selection of Commissioners from the submitted list, not only through a process which is not transparent at all, but above all without any substantial rule of the parliamentarian opposition. The monitoring of the process by the international observers is almost without effect at all, because the procedure which has been foreseen provides for the selection according to the political will of the current majority. According to the draft, the Assembly makes the appointment of Commissioners with 3/5 (84 votes) of the MPs of the Assembly of Albania, while the

parliamentarian majority disposes in the Assembly of a majority in excess of 3/5 of the votes (at least 88 votes)!!!

39.4. We are of the opinion that the exclusion of the parliamentarian opposition from the procedure of appointment of Commissioners, failure to provide for any independent and balancing filter in this process, the missing obligation of the Assembly to provide arguments for the choice made, as well as the modelling of the procedure as an issue of pure political will (since the candidates are not subject to any reliable or objective procedure of verification of integrity or professionalism/merits), brings about the missing independence from politics, Assembly and Government (current majority) of all the members of the Independent Qualification Commission. The missing independence of such an important structure, determining the destiny of career of all the judges and prosecutors, members of High Court and Constitutional Court, implies inappropriate pressure and impact on the justice system in Albania and practically its dependence on the Government and parliamentarian majority (who elect the Commissioners).

39.5. The failure to change these rules establishes once more the opinion that the sole aim of the proposed amendments is ensuring a selective and political process, which under the alibi of the fight against corruption, ensure a political capture of the justice system. The current majority disposes of 3/5 of the votes in the Assembly and in this framework, it has the full opportunity to appoint as members of the Independent qualification Commission and Ad hoc Chamber of Qualification at the High Court, individuals with clear political underground. In such a case, the failure to change the provision does not take account of the findings made in the Interim Opinion of the Venice Commission no 824/2015, specifying clearly that: *"127. The method of selection of candidates by the 3/5 of the Assembly, at the proposal of the Ombudsman and following a public call for candidates (see Article 61 p. 6) appears reasonable in theory. It is difficult to understand, however, why p. 3 of Article 59 mentions the involvement of the President in the process of selection of the Commissioners, while in Article 61 the nominating power is given to the Ombudsman. Given that the current majority appears to control 3/5 the votes in the Assembly, it would be more appropriate to give the*

nominating power to an independent body or an official who is not clearly of the same political colour as the current governmental majority.
137 The composition of the Independent Qualification Commissions and status of its members should guarantee its genuine independence and impartiality; judges/prosecutors subjected to the vetting should enjoy basic fair trial guarantees and should have the right of appeal to an independent body;

39.6. On the other hand, in a hideous and unacceptable way, just the name of the Appeal Commission (initial draft) to Ad Hoc Chamber of Qualification at the high Court (revised draft). However, the rules of appointment and status of members did no change compared to the initial version. "Judges" of the Ad Hoc Chamber of qualification at the High Court shall continue to be appointed by the Assembly by 3/5 of the votes (*implying only from the parliamentarian majority, without any substantial and balancing role of the opposition in this process*), upon the proposal of the Ombudsman. In such a case, changing the name or accommodating this structure at the building of the High Court (however, without any connection to the latter, since the judges of High Court are proposed to be appointed by the High Judicial Council, avoiding the involvement of Assembly in appointment, since it has been considered as a politicisation opportunity by the drafters of the constitutional amendments!), is not enough that the Chamber have the basic characteristics of a 'court' and to offer fair trial to dismissed judges/prosecutors. In the meantime, under paragraph 4 of Article A, the Ad Hoc Qualification Chamber examines the final complaints as last instance.

39.7. In such a case, we bring to the attention the finding of the Venice Commission in the Opinion no 824/2015, specifying that: "*117. In the Draft Amendments the power to examine appeals against the decisions of the IQC remains with the Appellate Commission[44]. In this case, a formal definition of the Commission as "Independent" will not be sufficient. The legislator will have to ensure that the members of the Appellate Commission enjoy status similar to that of "judges". The Appellate Commission should*

[44] The Venice Commission observes that the Basic Principles on the Independence of the Judiciary, endorsed by the UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 stipulate as follows: "Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review." It may be seen that the UN Basic Principles require examination of appeals by an "independent" but not necessarily "judicial" body.

have sufficient distance from the body making the decision at first instance (for example, the possibility of joint panels with the substitute members of the First Instance commissions, provided now by Article 68 p. 2, should be excluded). The Appellate Commission should also have appropriate powers vis-à-vis the lower instances, for example, the power to transfer abusive proceedings, to require the lower commissions to take specific fact-finding steps or to observe proper legal procedures. Finally, the procedures before the Appellate Commission should correspond to the "fairness" and "publicity" requirements contained in Article 6 § 1 of the ECHR (but not in §§2 and 3 since the latter only concern criminal trials [45] . In essence, the Appellate Commission should have basic characteristics of a "court" and give fair trial to the dismissed judges.

39.8. In such a case, account shall be taken of the fact that under paragraph 2 of Article ç, the possibility of the Constitutional Court to examine the individual complaints of the persons subject to evaluation, being dismissed as a consequence of the evaluation process, has been exempted!!!

40.1. Article B of the Annex is not in compliance with paragraph 132 of the Interim Opinion no 824/2015 of the Venice Commission. In such a provision, a role has been recognised to the Premier for appointing the bodies supervising the process of evaluation and re-evaluation, to the effect of having this process under control. Under paragraph 3, the Premier of the Republic of Albania, in the contest of international law or diplomatic relations, shall appoint the International Monitoring Observers. This selection indicates once more the political partiality of the drafters of the constitutional amendments, since Venice Commission has clearly suggested that this procedure should be accomplished by the President of the Republic. Specifically, in the Opinion 824/2015, Venice Commission stated that: *"132. Article 60 is silent about the manner of appointment of the international observers and the duration of their mandate. Probably, the power to appoint them could belong to one of the constitutional bodies, for example*

[45] See Recommendation CM/Rec(2010/12) of the Committee of Ministers of the Council of Europe to member states on judges, where the CM held as follows: "69. Disciplinary proceedings may follow where judges fail to carry out their duties in an efficient and proper manner. Such proceedings should be conducted by an independent authority or [emphasis added] a court with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction. Disciplinary sanctions should be proportionate."

*the **President**, while the candidates could be nominated by a group of "international partners", coordinated by the European Union. Their mandate should be irrevocable and correspond to the duration of the mandate of the IQC; however, international partners might have the right to request the **President** to revoke international observers, in the case of gross misbehaviour on the part of the latter."* The suggestion of the Venice Commission to involve the President of the Republic in this procedure seems entirely reasonable, taking account of the fact that under the international and diplomatic relations law, it is the President of the Republic accrediting the foreign representatives in the Republic of Albania.

40.2. Regarding the powers provided for in paragraph 4, it is preferable that in letter 'a' International Monitoring Observers shall be entitled not only to take information about the Ad Hoc Qualification Chamber, but also to make their evaluation under the same procedures provided for the judges/prosecutors. In the Joint Opinion of the Venice Commission and the Human Rights Directorate (HRD) of the General Directorate for Human Rights and Rule of Law (DG) of the Council of Europe regarding the law on the Judicial System and Status of Judges and Amendments to the Law on the High Council of Justice of Ukraine, Opinion of Venice Commission Nr. 801/2015 §§71-81 (23 March, 2015), it has been highlighted that the Commission should **consist of judge and lay members with sound integrity, if necessary, with the assistance of foreign persons with the respective qualifications and being independent.**

41.1. In Article DH of the Annex we find out that it has been foreseen for the persons who are subject to evaluation that they have to hand over a statement and be subject to the control of their figure to the effect of identifying those having regular and inappropriate contacts with organised crime members. The members of organised crime are determined based on the evidence disposed of or on the decisions of the Albanian or foreign courts. In such a case, the provision takes account of the finding made by the Venice Commission in its Opinion no 824/2015, specifying that: "*122. ..... It is not clear, however, who defines whether a particular persons is a "member of the organised crime". Should the IQC categorise certain people as such, or this fact should be established on the basis of previous convictions (in Albania or abroad)?*

41.2. In addition to the fact that the amendments have not clarified the concept of ‘regular and inappropriate contact”, thus not specifying the fact that details shall contained in the law, we find out that they provide for the members of organised crime are determined based on the **evidence disposed of** or on the decisions of the Albanian or foreign courts. As such, the question rises in this situation “evidence disposed of by whom?!”, “how have they been provided?!” “are the evidence legitimate?!”; “can a person be considered to be member of organised crime just for the fact that someone owns some ‘evidence’, but this status is not confirmed by any final judicial decision?!”

42.1. Regarding the Article F and G, we find out that in the procedure provided for imposing the disciplinary measure or filing the appeal, Article 6 of ECHR is not observed. The Ad Hoc Qualification Chamber does not offer the guarantees of an ‘independent and impartial court’. Moreover, the Ad Hoc Chamber of the High Court, set up under this revised version of the Draft Amendments, demonstrates the features as an extraordinary court, which is banned under Article 135, point 2, of the Constitution. Concretely, this Ad Hoc Chamber has the following features of the extraordinary court: (i) it is a temporary body with a mandate to the end of the re-evaluation process; (ii) has a restricted mandate for just one case – examining the complaints in the process of re-evaluation; and (iii) examines fact-related situations occurring prior to its establishment, as the presumed corruptive conduct of persons under evaluation is.

42.2. The process of imposing the disciplinary measures against judges and prosecutors, members of the High Court and Constitutional Court, is detailed in these provisions. The process has been structured in two instances and specifically the Independent Qualification Commission (administrative structure appointed by the Assembly) and the Ad Hoc Chamber of Qualification at the High Court (structure appointed also by the Assembly). This entire procedure does not sufficiently guarantee the status of judges/prosecutors, thus intruding inappropriately with the judiciary. The provision of the possibility of dismissal of judges/prosecutors by the political structure (since the members are elected only by the Assembly, with the votes of the parliamentarian majority) consists an open violation of the principle of independence of

the judicial power. In the Joint Opinion of the Venice Commission and the Human Rights Directorate (HRD) of the General Directorate for Human Rights and Rule of Law (DG) of the Council of Europe regarding the law on the Judicial System and Status of Judges and Amendments to the Law on the High Council of Justice of Ukraine, Opinion of the Venice Commission no 801/2015 §§71-81 (23 March, 2015), it is specified that: "*The procedure of such a body should be subject to the rules regarding the necessary guarantee for the individual rights of the affected judges, including also the right to appeal before a court of law*".

IV. CONCLUSIONS

The outcome of the above analysis of the Constitutional Draft Amendments and our Opinion on them is that it is easily found out that the amendments run against the announced objectives, specifically regarding the de-politicisation of the justice system bodies. Our concerns do not pertain to the current political map (being the opposition of the country), but to the anomalies having brought about the current situation of the justice system, where the political intrusion/impacts have undoubtedly been one of the main reasons.

We express our deep conviction that this Opinion shall assist in reflecting the reality of the current situation of Albania and it is going to make its contribution to find out the best solutions for reforming the justice system. We would like that our Opinion pertaining to the constitutional amendments were taken into account and evaluation in advance by the local authorities, in an effort to find the best joint solutions and conducting an all-inclusive process, based on consensus and transparent. But the de facto exemption of the possibility for consensus by the majority obliges us to submit this Opinion directly to the Venice Commission.

At this stage we would like to highlight that sharing the opinion of the Venice Commission regarding any product in the context of Justice reform has been and will remain an essential demand of the parliamentarian opposition, really trusting the contribution of this important international organisation, in strengthening democracy in

Albania and preventing backlash or political capture of the justice system! Coming up with different approaches, rejection by the parliamentarian majority to apply the Recommendations of the Interim Opinion of the Venice Commission in spirit and text and arrogant denial by the same majority of the possibility to draft a joint draft based on the 138 Recommendations of the Venice Commission, as well as the political conflict situation, in our opinion, puts Venice Commission in a position which we, as opposition, tried to avoid right at the outset. We have had and continue to have full trust in the steadiness, professionalism and confirmation/elaboration of the recommendations made not just in the interim Opinion dated 21 December 2015, but also in other Opinions of the Venice Commission. We specifically expect the standard extensively elaborated by you so far in many Opinions, regarding the role of the parliamentarian opposition, as a balancing and checking filter in the process of appointment of the independent bodies of the justice system.

Availing ourselves once more of this opportunity to express our gratitude to Venice Commission for the extraordinary contribution for strengthening democracy in Albania,

With the highest consideration,

DEPUTY CHAIRMAN OF THE PARLIAMENTARIAN AD HOC COMMITTEE

EDUARD HALIMI