Strasbourg, 20 October 2015

CDL-REF(2015)043
Engl. only

Opinion No. 824/2015

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT AMENDMENTS

TO THE CONSTITUTION

OF ALBANIA

COMMENTS BY

THE PARLIAMENTARY GROUP OF THE DEMOCRATIC PARTY

REPUBLIC OF ALBANIA
PARLIAMENTARY GROUP OF THE DEMOCRATIC PARTY

OPINION

ON
DRAFT LAW "ON SOME AMENDMENTS TO THE LAW NO. 8417 DATED 21.10.1998 "CONSTITUTION OF THE REPUBLIC OF ALBANIA" AMENDED"[1]

PREPARED BY:
EXPERTS[2] OF THE PARLIAMENTARY OPPOSITION IN ALBANIA

Tirana, 30.09.2015

I. Introduction

In parenthesis of the analysis and opinion given on the draft law prepared by the parliamentary majority, we would like to highlight that the **reform of the Albanian judiciary must be carried out through the concurrent strengthening of its independence and accountability, in order to make it easily accessible, trusted by the public, corruption-free, of high integrity and efficiency in rendering high quality justice.**

This Opinion is prepared within a very short period of 3 days because the draft was submitted to the Justice Reform Commission for the first time on 28.09.2015. The Commission, following the determination and upon request of the opposition, in the late hours of 28.09.2015 decided unilaterally to set the deadline for the preparation of this Opinion on 02.10.2015. The parliamentary opposition was not given any opportunity to express its opinion on the draft law or suggest new solutions[3] or proposals for possible improvements, before submission of the draft to the Venice Commission for opinion. We have to underline that this is the first time in Albania that such deep constitutional amendments are prepared, fully undercover, and the parliamentary opposition or its experts, are not given the opportunity to contribute in their drafting or give related opinion, even though their parliamentary voting requires by law the votes of the deputies of the opposition.

---

[1] This opinion is prepared based on the draft of the draft law (Albanian version) distributed to the deputies of the parliamentary opposition in the Ad hoc Parliamentary Committee, via email on 25.09.2015.

[2] The opinion is prepared by experts ***Mr. Enkelejd Alibeaj*** – former judge, former lawyer, former Minister of Justice and lecturer of constitutional law and ***Mr. Gazment Bardhi*** – former specialist and former Director of the General Directorate of Codification in the Ministry of Justice, currently, Legal Advisor to the Parliamentary Group of the Democratic Party in the Albanian Assembly.

[3] According to the initial agreement in the Ad Hoc Parliamentary Committee for Justice Reform (on 30 July 2015), the parliamentary opposition was given time until the end of September to prepare its opinion on the Justice Reform Strategy adopted by the votes of the majority only in principle (*this period of time was actually given to all the actors of the justice system, but their opinion was not welcomed by the parliamentary majority which moved on with the unilateral drafting of constitutional amendments according to the pre-determined solutions it has alone defined in the Strategy*). The experts of the parliamentary opposition on 15 September 2015 submitted their Programme for Justice Reform consisting of 300 measures, which was sent to the Ad hoc parliamentary Committee (*the same process was followed by other groups of interest and stakeholder of the justice system*). But, this Document (*actually none of the Opinions submitted by the groups of interest and stakeholders*) was never reviewed by the HLGE or the Ad Hoc Parliamentary Committee and the proposed constitutional amendments reflect none of the concerns, suggestions of findings of the parliamentary opposition; instead they are based entirely, only on the solutions pre-determined by the parliamentary majority.

We are deeply concerned for the rush and lack of technical diligence, secrecy and bias characterising the process of drafting constitutional amendments by the HLGE[4]. This conclusion is drawn based not only on the elementary technical errors in the text of the draft law, but also on the provision of biased political solutions which favour the current majority and which are easily observed even during this analysis carried out at short notice. We may identify 2 reasons for such a rush. HLGE is under inappropriate time pressure imposed by the political level in charge of the process of Justice Reform. The second reason may be linked to the preliminary political guarantees given to the HLGE that it does not matter what it is written and how it is written, because it would be appropriate to have a draft law according to the will of the parliamentary majority and it will be approved.

Whatever the reason of this rush, when it comes to the process of drafting the most important law of the state organisation, it would be unacceptable for us to show lack of diligence at technical level, because such mistake will result in two serious consequences. First, such errors prejudice the sustainability of the entire text of the Constitution because of lack of uniformity in the use of language. Second, technical errors create ambiguity of the constitutional norm, which the doctrine and constitutional case-law considers to be an element incompatible with legal certainty, leading to the risk of practical misinterpretation.

Moreover, lack of technical diligence in drafting these norms prejudices even the text of the Strategy prepared by the HLGE which in page 2, *inter alia*, emphasises that the current situation of the justice system is determined by the combined action of several factors. Poor quality of legislation adopted during these 25 years is one of these factors. In many cases, law drafting process in Albania has been nothing more than the import of foreign laws without going through a process of adaptation considering the needs and real potential of the country. As a result of this impact, very often contradictory, of the various legal systems, the Albanian legal system continues to be in the phase of transition, disoriented and incoherent. Various legal models are the source of branches of law. Consequently, the legislation is not harmonised. Concrete instances of lack of harmonisation are variations between provisions contradicting each-other, repetitions, inconsistent treatment of the same institute in various laws, use of ambiguous terminology etc. The consequences of this legal cacophony emerge mostly in the sharp lack of efficiency of the justice system and its competence to render justice.

Below you will find our comments for each of the provisions of the proposed draft law. The comments are structured to refer to every single provision. In addition, we have prepared a list of questions for each of the provisions linked to the problems found in order to focus not only on those concerns, but also finding of the best solutions (according to international standards) to the concerns raised in these questions.

II. Assessment of the concrete provisions of the draft law

1. First, we suggest that in the title of the draft law and in the sentence after the word “decided”, before the word “amendments” to add the words “addenda and” because the draft law proposes not only amendments to the existing rules of the Constitution, but also addition of new rules.

2. Second, in principle we agree with **article 1** to add even “European values” but the proposed location is inaccurate. It is proposed that they should be next to the high values of justice, peace, harmony and cooperation between the nations. Consequently, the proposed location of the European values creates lack of clarity because it seems as if such value do not include justice, peace, harmony and cooperation between the nations.

[4] High Level Group of Experts (HLGE) appointed by the parliamentary majority

Therefore, we suggest that “European values” be added to the phrase “with a pledge to protect human dignity and personhood” which must read “with a pledge to protect human dignity and personhood and also other European values”.

3. Third, **article 2, 7, 8, 11 and 13** providing for relations with the European Union when the Republic of Albania will be a Member State, we deem that such provisions are premature considering the Albanian reality, in addition to the lack of clarity in their wording.

Consequently, in relation to these articles we suggest:

a) Deleting them from the text of the draft law or alternatively define in the transitory provisions another time regime linked to the moment of membership of the Republic of Albania in the European Union;
b) If these provisions will be kept, they must be grouped under a Separate Chapter of the Constitution, under Part VII “Normative acts and international agreements”. This special chapter must be specifically dealing with European Union membership;
c) Text of article 2 of the draft law must be entirely reworded to read as follows “According to articles 121-123 of the Constitution, the Republic of Albania as a Member State of the European Union shall become part of this union in order to secure, together with other states, European values and fulfil the common objectives of preservation of fundamental principles and values of the European Union. Republic of Albania shall delegate to the European Union institutions the competences which are necessary to entitlement of the rights and fulfilment of obligations deriving from membership”.
d) Text of article 7 must be reworded to read as follows: “Albanian citizens shall be represented in the European Parliament by representatives elected by them according to the rules defined by law”.
e) Article 8 of the draft law must be reworded to read as follows: “The Council of Ministers shall report to the Assembly about the draft decisions and draft regulations which adoption make it part of the institutions of the European Union. In such cases, the Assembly may issue resolutions, which serve as a basis for the actions of the Council of Ministers in the European Union Institutions”.
f) Text of article 11 is vague as well. Such a rule must cover issues about decisions and regulations which are recognized by the Republic of Albania in the institutions of the European Union, which are enforced in Albania in compliance with *acquis communautaire*. Moreover, this norm must determine even the obligation of the courts to protect subjective rights based on *acquis communautaire*. Last, such norm must determine even the obligation of public authorities and legal persons exercising public authority to apply *acquis communautaire* directly.

4. Fourth, we do not agree with **article 3** of the draft law. Article 12 of the existing Constitution in paragraph 3 provides for the protection of integrity of the Albanian territory as one of the fundamental elements of the state sovereignty. Consequently, interference in this provision, by conferring the right of the Assembly to the Council of Ministers, without any explanation of the current problem, seems totally irrelevant.
To this end, we suggest deletion of this article, because the explanatory report provides no rational explanation of its need.

5. Fifth, in principle we agree with **article 4,** which adds “sexual orientation” to the hypothesis of prohibition of discrimination. However, we observe that the explanatory report does not explain the need to add this provision. Moreover, it is unclear whether in relation to this provision or other possible hypothesis, the specialised opinion of the Commission for Protection from

Discrimination based on article 32 paragraph 1 letter ë) of law no. 10221/2010 “On protection from discrimination” has been taken.

6. Sixth, concerning **article 5** of the draft law, we observe that its wording is inappropriate as it seems to allow extradition only when foreseen in the European legislation, because of the conjunction “as well as”.

7. In principle we agree for the need to intervene in **article 6.** However we do not agree with the proposed wording because it is unclear and it risks misinterpretation in the secondary legislation and later on in application. Furthermore, the words added to the first sentence “except for the cases where the decision of the court have become final” create confusion because in Albania there are no clear cut concepts of “final court decision” and “final court decision with prejudice” which has recently has called for a unifying decision of the High Court.

We see this issue linked closely to the efficiency of justice. In our Programme we have suggested improvement of this constitutional rule to add filters to the highest courts, in order to reduce their caseload. We think that the most important issue is whether there should be a filter mechanism and who should decide that the case is to be tried by the appeal instance. The filters may be set by margins in the law (type of charge in criminal process or monetary value in civil cases). This may be achieved by giving the discretion to the judge and it concerns various forms of “permitted regulation” which allows the judge to decide the cases that may be appealed, instead of the mechanical application of legal provisions. Based on this analysis, we suggest that article 6 of the draft law be reworded as follows:

“Article 6
The following sentence shall be added to article 43:
“*Such right may be restricted only by law according to the terms of article 17 of the Constitution*”

8. Concerning **article 9,** based on the same reasoning as for paragraph 2 of this opposition, we are of the opinion that such provision is premature and no explanation therefore is given in the explanatory report of the draft law. Moreover, the text of article 9 creates confusion. Being added as a separate paragraph of article 109 of the Constitution, it is difficult to understand whether the phrase in the beginning “This right” refers to the right to participate in local elections of councils and municipality or commune mayors (paragraph 3), or the right to be elected municipality mayor (paragraph 2). Because of this uncertainty, it is impossible to identify whether to keep the word “only” in article 109 paragraph 3 of the Constitution. Last, it is not clear why this addendum to the Constitution is not followed by a review of article 45 of the Constitution, which deals with the right of Albanian citizens to elect and be elected.

9. We disagree with the repeal proposed in **article 10** of the draft law. Article 122 paragraph 3 of the Constitution provides the constitutional basis for some international organization and moreover it serves even for the European Union membership of the Republic of Albania.

10. We disagree with **article 12** of the draft law because it contradicts the social and institutional developments in Albania where the political situation is difficult and the rule of law is not consolidated yet. We consider it completely inappropriate for such a rule to be added by a revised law, thus not be included in the original text of the Constitution. Therefore, we are convinced that this rule is introduced only to keep the concrete constitutional amendments intact.

On the other hand, the Albanian Constitution is among those constitutions which does not consist of a solid core of norms prohibited to be revised. We deem that article 12 of the draft law is manifestly infringing article 124 of the Constitution according to which the Constitutional Court guarantees respect for the Constitution and makes its final interpretation. Moreover, the

institutional history in Albania has been familiar with such cases. In this regard, the Albanian Constitutional Court, by decision no. 57 dated 05.12.1997 rules repeal of the constitutional law no. 8257 dated 19.11.1997. The Assembly, through this law, by qualified majority of the left majority ordered the rotation in the Constitutional Court within 30 days, on the contrary it would be ordered the suspension of the Constitutional Court.

11. We agree with **article 14** of the draft law, which adds paragraph 3 to article 124 of the Constitution for the separate budget and its independent administration by the Constitutional Court. As already said in our Programme, we believe that Constitutional reform for the Constitutional Court must enhance its institutional independence in at least 4 components: (a) administrative independence; (b) financial independence; (c) decision-making independence; and (d) independence of exclusive determination of jurisdiction.

12. Concerning **article 15** of the draft law amending article 125 of the Constitution we consider that its content does not ensure independence of judges of the Constitutional Court for the following reasons:

a) the new formula proposes adherence to the system of appointment of judges while we believe that the road to independence of the Constitutional Court must go through a selective merit-based process.
b) it is unclear why the election of judges of the Constitutional Court must be fragmentised among the President, Assembly and High Court. The automatic appointment separately by each of these bodies, and the removal of the inter-institutional cooperation, avoid mutual check among the institutions involved in this process;
c) prohibition of the right to reappointment/re-election must include even practicing judges, whose mandate is about to end;
d) the new formula is silent about the procedure of the Assembly in appointment of constitutional judges. In this way the draft law is incoherent because in relation to other constitutional functionaries, even in lower hierarchy compared to constitutional judges, an effort is made to foresee that the Assembly decides by qualified majority. On the other hand, lack of provision of the procedure of the Assembly does not ensure substantial participation of the opposition in this process, especially when it is expected for these constitutional amendments to be applied by the existing legislature;
e) The criticism applies to the procedure of the High Court in the appointment of constitutional judges. It makes no sense for the High Court to elect the members of the Constitutional Court, not only because of the conflict of interest with this court (*Constitutional Court reviews decisions of the High Court considering the right of the individual to a due legal process*), but also because the High Court is below the Constitutional Court in the constitutional institutional hierarchy in the country. The election of 3 members from the general assembly of the High Court and High Administrative Court leads to the high risk of control by the parliamentary majority because of the appointment of judges in these courts (on the proposal of the HCJ- a structure easily controlled by the majority) and the low number of participants in the process (number of HC and HAC members is low and easily controlled);
f) while the President and the Assembly are bound to appoint the judges from the list prepared by the Court for Appointments, such an obligation does not apply to the members appointed by the High Court;
g) no improvement of criteria of merit-based appointment of constitutional judges is made, except for the replacement of the current condition “lawyers with high qualification and with work experience not less than 15 years in the profession” with the condition “lawyers of at least 15 years’ experience as judges, prosecutors, advocates, law

professors, senior employees in the public administration, with a renowned activity in the field of the constitutional law, human rights or other areas of law". In this way, it may be said that such conditions are the same. This contradicts the Analytical Document of Constitutional Reform which identifies that one of the fundamental problems of the Constitutional Court is lack of clear criteria for the selection of constitutional judges. Moreover, we believe that experience in profession alone is not an indicator of professional competence;

h) the prohibiting condition "candidates shall not have been sentenced in connection with the commission of a criminal offence" does not cover at all the hypothesis of decriminalization in Albania, which has now become a very serious problem and it is one of the cardinal issues of the opposition;
i) the prohibiting condition "shall not have been involved in the leading forums of the political parties" is incomplete as it does not fully correspond to the need for depolitisation of the Constitutional Court. Institutional experience in Albania shows that certain individuals have been in powerful political position for instance Minister of Justice, without being part of the leading fora of political parties. Moreover, this condition is formulated in a language different from that of article 54 of the draft law which prohibiting condition for the Prosecutor General is "shall not have been in a political position or position in a political party during the last 10 years of candidacy";
j) The explanation given in the explanatory report of the draft law for the extension of the mandate of the constitutional judge to 12 years is superficial (more certainty for independence and stability in decision-making). This explanation has nothing to do with the problems identified in the Analytical Document which on the contrary points out as a problem the prolonged tenure of judges for over 9 years;
k) The term "absolute majority" is used in paragraph 4 of this article is not recognised in the Constitution and needs clarification;
l) The reworded provision provides a solution neither to the improvement of the procedure of selection of constitutional judges nor to the stalemate created for its renewal through rotation;
m) Paragraph 5 of article 125 creates discrepancy with article 127 because it allows a judge whose mandate will be over for faulty actions, to stay in office until the appointment of the successor.

Concerning the criteria of appointment of judges of the Constitutional Court, we suggest that the following should be considered:

a) Manifested values of highest professional competence of elected judges;
b) Prominent experience in public activity;
c) Thorough knowledge of public activity;
d) Diversified professional experience and culture;
e) Highest moral integrity;
f) Maximum competence to be involved, discuss and be engaged in issues of public interest.

Professional experience must consider the risk of recycling through promotion of functionaries, investigators, prosecutors and judges of the communist regime, who must be exempt from any promotion if they have performed these duties during the communist regime.

Concerning the procedure of election of CC members, we suggest that the process be conducted through an institutional interaction mechanism, which includes apolitical and political actors in order to intertwine the professional and merit-based component on the one side and

the public component for provision of democratic legitimacy on the other side. They must be elected by 2/3 of the Parliament with the substantial participation of the opposition [CDL-AD(2007)047 §§ 122-123; CDL-AD (2012)024 §§ 35, CDL-AD (2013)028 and CDL-AD (2011)040]. In applying this standard, it must be carefully studied the **Albanian political experience in defining the majority because we must bear in mind that the parliamentary composition in Albania has seen majorities of considerable 3/5 majority of the existing legislature 2013-2017. This implies that 3/5 qualified majority foreseen in the Constitution for some parliamentary proceedings has failed its main purpose, i.e indispensable involvement of the opposition.**

The procedure of election of CC members must guarantee:

- maximum transparency as of the preliminary phases;
- adequate timely extension for each step of the process;
- detailed publication for each intermediate decision;
- maximum and unprejudiced access of anyone convinced of meeting the criteria;
- administering of the process at first instance by an existing pool of professionals, with diversified composition and free of political influence (ex. HCJ or the CC itself) to manage:
    i. receipt of applications;
    ii. competition exclusively based on Curricula Vitae, documents and interviews;
    iii. assessment for the fulfilment or non-fulfilment of the conditions and the preparation of objective assessment (individual and comparative) among the candidates who meet the qualification criteria;
    iii. completion of respective documentation for each eligible candidate and its delivery to the proposing body.
- at second instance, well-reasoned proposal for selection or non-selection and the respective ranking of elected candidates according to the objective assessment based on standards of moral integrity, thorough knowledge of public activity, diversified professional experience and culture, maximum competence to be involved, discuss and be engaged in issues of public interest, of a minimum number of candidates for each position in the CC, from the group of candidates who have successfully passed the first phase.
- at third instance, public hearings with the proposed candidates with no right to disqualification and approval in any case by 2/3 parliamentary majority, or alternatively, the substantial participation of the opposition, followed by a release mechanism in case of a stalemate.

13. Concerning **article 16** of the draft law, which amends article 126 of the Constitution, we raise the doubt that the new rule for total removal of the procedural immunity (*inviolability*) weakens individual independence of the constitutional judge. The explanatory report based this proposal on two reasons. First, immunity for personal and house search has been an obstacle to the investigation of the prosecutor's office and second, the current form of article 126 of the Constitution creates conflict of interest of the constitutional judge. We consider that the new proposed rule is not properly connected to these two reasons. First the new rule is not satisfied only with allowing the personal and house search, as it allows even the arrest of the constitutional judge. Second, so far there has been no concrete case before the Constitutional Court to prove that it has acted in a situation of conflict of interest.

Last, we consider it relevant to define material immunity (*non liability*) explicitly in the Constitution. However the proposed text seems unclear to us in the phrase "opinions expressed" because it goes beyond the exercise of duty.

14. We do not agree with **article 17** of the draft law amending article 127 because the text creates inadequate confusion to the detriment of security in the exercise of the duty by the judge for the following reasons:

a) the text does not make a clear cut distinction between termination of mandate for reasons independent of the will of the judge and the termination of the mandate for the judge's fault;
b) the text does not consider the hypothesis of dismissal of the constitutional judge even in the case the judge is criminally prosecuted for an obvious crime, even though the guilty court decision has not become final;
c) the hypothesis mentioned in letter "d" gives leeway to abuse because it foresees "punishment by final decision in a disciplinary procedure". The draft law provides for only a declarative rule (article 18) which reads that constitutional judges must assume disciplinary responsibility according to the law. We consider there is a total lack of guarantees for the constitutional judge to be dismissed through a disciplinary process even for extremely minor offences. In this regard, the constitutional judge is fully vulnerable and may be dismissed through a disciplinary proceedings governed easily by the law; vulnerable from a disciplinary body established by law, disciplinary sanction which may be easily introduced in the law. From this perspective, the guarantees are extremely weak compared to those of other constitutional functionaries, in relation to which the establishment of a constitutional body is proposed- Disciplinary Tribunal;
d) paragraph 3 of article 127 does not govern the case when the remaining period of mandate of the judge that has created the vacancy is shorter and does not justify the financial costs and human resources for replacement by a member;
e) paragraph 4 of article 127 is incomplete because the way it is formulated, in conjunction with article 125 paragraph 5, allows the judge, whose mandate ends because of actions committed at his fault, to resume performing the duty until appointment of the substitute judge;
f) the draft law in general and this provision in particular do not foresee the case of suspension of the constitutional judge from duty and the procedure to be followed in these cases.

15. We do not agree with **article 18**, because as it was reasoned above, it weakens the guarantees of the constitutional judge and the image of the judge in relation to the other constitutional functionaries. In the concrete case, it is not foreseen the structure which shall assess the disciplinary violation of CC members, instead this is left to be defined by law, unlike the case of other bodies, where the disciplinary body is foreseen directly in the Constitution as it concerns the guaranteeing of the status of the constitutional judge.

16. In principle we agree with **article 19**, but its wording creates discrepancy with article 127 paragraph 2, according to which the end of mandate of the constitutional judge is declared by decision of the Constitutional Court.

17. In articles **20, 25, 35, 38 and 39** we do not understand the reason of including them in the draft law, because they introduce no changes. It is for this reason that we suggest deleting them from this draft law.

18. We consider that **article 21** of the draft law is incomplete because it does not cover all the situations of conflict of interest of the constitutional judge, as for instance his involvement in political parties' activities, unsalaried. Moreover, this provision, in its current form, allows the constitutional judge, against the payment, to perform other activities which are not linked to his profession.

19. We are against the separate presentation of **article 22 and 23** because they introduce added rules to the same constitutional norm- article 131. As regards letter f) amended, we see two unclear issues. First, the concept "act of the public power, impairing the fundamental rights and freedoms guaranteed by the Constitution" is vague. In the Republic of Albania, as of 2012 up to now the deep reform of administrative law is made and it has introduced new concepts of the administrative act which do not correspond to the concept foreseen in this provision. Similarly, it is unclear whether such hypothesis covers even the act of a private subject exercising public power. Moreover, we consider that the term "individual" is limited because it leaves out legal persons, who according to article 16 paragraph 2 of the Constitution are entitled to the same fundamental rights and freedoms as natural persons. On the other hand, the wording of letter f) does not provide a solution to the case when the condition for exhaustion of domestic remedies may cause irreparable damage to the individual or legal person, as the case of procrastination of trial by the ordinary courts. Last, in letter f) the escape clause used "unless provided by the constitution" is unclear. The explanatory report provides no reasons for its use.

20. We are against **article 23** which adds letter g) and we suggest that it be deleted for several reasons. First we do not agree with the establishment of a High Administrative Court. Similarly we consider that it should not be accepted for the High Court and the Constitutional Court to be in disagreement because they are not bodies of the same nature, within the same hierarchy and they do not belong to the same system. We are convinced that in this case, the decision of the Constitutional Court is final and binding for each public power body, as foreseen in article 132 of the existing Constitution.

21. We do not agree with **article 24** of the draft law amending article 132. We consider that by this amendment the role of positive lawmaker is given to the Constitutional Court and no preliminary study of the situation in Albania is made in this case. Inter-institutional history has shown that there have been several cases of hot debate with the Constitutional Court and allegations for it moving away from its role to the role of the lawmaker. Similarly, we consider that the concept "publication" is already obsolete and does not correspond to the modernisation of society and Albanian state towards digitalisation and electronic publishing. Moreover, we are concerned with the exemption hypothesis of entry into force of the decision of the Constitutional Court, unless provided by the law, because this risks the situation for the Assembly to decide and take the attributes of the Constitutional Court. In this situation, we are of the opinion that it must be the Constitutional Court to order the entry into force at different times of its decision, based on criteria and procedures defined in its organic law rather than any kind of law. Moreover, we consider that the new wording does not determine the obligation of the Constitutional Court to have consistent case-law and refer to ECHR principles in settling the cases. Likewise, we think that the Constitution must define all the other state bodies, including the courts that should apply/follow constitutional interpretation made by the Constitutional Court.

22. Concerning **article 26** of the draft law amending the list of subjects who may approach the Constitutional Court, it must be highlighted that addition to this list of the High Judicial and Prosecutorial Councils is unjustified in the explanatory report of the draft law. It is unclear why the subject "other organisations" has been replaced with "organisations of political parties" and the explanatory report provides no explanation thereof. In this way, civil society access to Constitutional Court is infringed. Similarly these two cases are analysed neither in the Analytical Document nor in the Strategy. We agree with the involvement of Commissioners, but we prefer

for the wording to be more abstract because these are the institutions established by law and not only may we change their title, but we may also add or remove them.

23. Concerning **article 27** of the draft law amending article 135 we are against the establishment of the Administrative Court and deep reform of administrative courts. The Republic of Albania, in November 2013 started implementing the reform of administrative courts and their complete reform at this moment in time is unacceptable. There is no study on effectiveness and problems until now and such a reform is expected to cause only chaos, particularly to the citizens awaiting delivery of service. On the other hand, such new organisation of administrative courts proposed by this draft law is a surprise and rushed because it finds traces neither in the Analytical Document nor in the Strategy. For this reason we suggest that the concept of the High Administrative Court be deleted throughout the text of the draft law.

24. In **article 28** of the draft law we observe discrepancy and vague essential concepts, as follows:

a) The proposed wording does not guarantee for the High Court to become a career court and free from political influence. Appointment as member of the High Court of individuals outside the judicial system creates greater possibility for politization of the High Court;
b) the text of this norms repeats several times the concept “appointment” and several times the concept “selection” which shows that the wording is not made based on a clear system;
c) prohibition of the right to reappointment/re-election must apply even to other practicing judges, whose mandate is about to end;
d) we are against the establishment of the High Administrative Court as argued in paragraph 23 of this opposition;
e) we are against the 12-year mandate of high judges, as argued in paragraph 12 of this opposition;
f) we have the same reserves for the elaboration of appointment criteria, prohibiting conditions (criminal sentences and political involvement) as the ones described in paragraph 12 of this opposition. We believe that experience in profession alone is not an indicator of professional competence. Adding to these reserves, we consider that setting the criterion of 20 years’ experience as prominent lawyer carries the risk of recycling of figures of communist system and prohibiting individuals who have completed the School of Magistrates. Similarly, it is unclear why the criterion 20 years of experience is higher than the criterion of 15 years of experience foreseen for the constitutional judges;
g) in paragraph 2 the expression “conditions for the continuation of the profession as judge shall be provided for by law” is unclear and it questions the principle of irremovability of judge from office defined by article 138 of the Constitution and several international acts;
h) the term “absolute majority” in paragraph 3 is unclear and inconsistent with the text of the Constitution which uses the concept of qualified majority;
i) We are against the content of paragraph 5 which defines high legal education as a condition for appointment of judges. Not only does this wording not correspond to the Analytical Document and Strategy, where the School of Magistrates is presented as a success story, but it is also inconsistent with article 50 of the draft law where the condition of completion of the School of Magistrates is set.

For the High Court reform, we suggest the following:

a) HL must be redesigned as a judicial body not only in the functioning (court of law) but also in the constitution (career court);
b) the objective of HC reform must be first of all professionalism, along with independence and impartiality, and of course even efficiency in the activity. Political influence over the court must be avoided;
c) selection of HC judges must be done exclusively among the ranks of persons who have the status of the judge (practicing judges or judges who serve in other structures outside the judicial system);
d) there should be no differentiated treatment in the type of appointment criteria of HC judges compared to the type of appointment or promotion criteria of first instance or appeal judges;
e) appointment criteria for high judges and also promotion of judges in general must be improved. In this regard, we stick to the proposal on the criteria of appointment of HC judges;

If it will be decided to save tracks from the current system (president office – parliament) for the purpose of elimination of politization of the appointment procedure, the strong and determining role of the High Judicial Council must be introduced, not only as a body managing the initial and main phases of the appointment process, but also as an unblocking/release mechanism.

25. We have same reserves, as in paragraph 13 of this opposition, about **article 29** of this draft law which proposes complete removal of procedural immunity of judges.

26. We do not agree with **article 30** of the draft law expression permitting restriction of stay in office of judges “unless otherwise provided by the Constitution”. This provision allows again future intervention to the Constitution in order to restrict the period of stay in office of judges. According to us this is an infringement of the principle of irremovability in office, as one of the fundamental principles of independence of judges. Similarly, the second sentence in this norm, must clarify that it related only to disciplinary sanctions because the word “sanction” alone allows even the possibility of administrative sanctions by the executive power bodies.

We suggest that the principle of irremovability of the judge and its exemptions be defined explicitly in the Constitution linked to independence of the judiciary (current content of constitutional norm is insufficient). Such cases include compulsory transfer because of reorganisation of the court system, temporary delegation/secondment of judge, cases of disciplinary proceedings or proven cases of incompetence to perform judicial functions properly, independently and impartially (close relations with lawyers or judges handling the same cases). According to us, it is necessary for the reasons of transfer of judges to be clearly defined and the compulsory transfer to be decided by means of transparent procedures developed by the High Judicial Council and such decisions to be able to be appealed.

27. Concerning **article 31** of the draft law amending article 139 of the Constitution, we find that it is not in the same line with the content of article 17 of the draft law amending article 127 of the Constitution. In concrete terms, this norm lacks the hypothesis of termination of mandate because of disciplinary proceedings. Concerning other issues, this norm is fully similar to the content of article 17 of the draft law and we adhere to the reserves mentioned in paragraph 14 of this opposition.

28. Article 32 of the draft law, which adds article 139/a to the Constitution has a structure and content fully similar to article 18 which amends article 128 of the Constitution. It is for this reason that we adhere to the reserves mentioned in paragraph 15 of this opposition.

29. Concerning **article 33** of the draft law which repeals article 140 of the Constitution, we express the concern that lack of the main procedure for dismissal of the high judge in the Constitution is a considerable reduction of his guarantees in office.

30. Concerning **article 34** of the draft law proposing amendment of article 141 of the Constitution, in principle we agree with removal of original jurisdiction of the HC for these cases, but two issues must be pointed out. The first concerns the reason why such original jurisdiction must be removed and linked to the due process, to be entitled by the functionaries, which is fully expressed in the right to appeal to a highest court. On the other hand, removal of original jurisdiction of the HC for these criminal cases bears the risk of the way such cases will be dealt by the lower courts because of high media and political pressure of these cases. Consequently, it is considered that transferring these cases to courts lower than HC requires indispensably strong guarantees for depolitization of the judicial system, its professionalism and integrity to handle these high profile cases.

On the other hand, we are against the deletion from the text of article 141 of the competence to issue unifying decisions for unification or change of the case-law. We deem that such competence must be left with the High Court, because it is the means to guarantee uniform enforcement of law by the judicial power. Similarly, according to us the expression “except those matters falling under the jurisdiction of the Constitutional Court” is excessive and makes the norm confusing, and moreover it creates ambiguity even for the constitutional jurisdiction.

31. In **article 36** of the draft law which amends article 143 of the Constitution we observe that it has the same structure and content as article 21 of the draft law. Consequently, we adhere to the opinion given in paragraph 18 of this opposition.

32. We are against **article 37** of the draft law which repeals article 144 of the Constitution. This constitutional norm declares the principle of financial independence of the courts which is one of the most important components of independence of the judicial power. In the Republic of Albania cases are filed with the Constitutional Court and they are admitted exactly based on this constitutional norm. The argument in brackets “included in article 147” is inaccurate. The draft law, neither in the amendment of article 147 nor in the added article 147/1 defines explicitly the principle of independence of administration of the court budget.

33. The draft law in **article 38** proposes that article 145 of the Constitution not to change. We are concerned with paragraph 3 of article 145 because we deem that it is incomplete when it declares that “Interference in the activity of the courts or the judges entails liability according to law”. Institutional history in Albania has seen cases of flagrant interference in the activity of judges by high political functionaries.

34. Concerning **article 40** of the draft law, amending article 147 of the Constitution, in principle we agree with the reform of the High Judicial Council. However, as regards the concrete proposed wording we have the following concern:

a) Even in this case there is a confusion of concepts because it is unclear whether the system of appointment to the position of the member or the election system will be used. The text is not uniform as sometimes it concerns election and other times appointment;
b) The new formula reduces the number of members from 15 to 11 and there is no rational explanation whether this number, even though on full-time basis, will have the possibility to be effective in fulfilment of the added tasks of the Council, which are added by article 40 of the draft law;
c) 6 members of the Council are elected by the judicial power but the draft law is not clear about the procedure of their election because it delegates it to be governed by law. The

explanatory report explains that the National Judicial Conference will be abolished and we are against its abolishment. Such movement carries the risk of controlled election of members of the Council because it fragmentises the process of election of HCJ members and increases the possibility of political control. Moreover, there is no convincing reason for a HCJ member from the ranks of judges of the High Court to be elected only by the body of judges of the HC. This member must be responsible to maintain independence, accountability and progress even of judges of other levels. On the other hand, abolishment of the NJC weakens self-government of the judicial power and it is contrary to the 2013 GRECO recommendation to Albania.

d) 5 other members of the Council are proposed to be elected by the Assembly by 3/5 through a proposing formula by the National Chamber of Lawyers (1 members), pool of law lecturers (2 members), non-magistrate pedagogues (1 members) and civil society (1 members). Lay members are appointed by the parliament by 3/5 of all the members based on the proposals of the respective structures and opinion of the Justice Appointments Council. This formula creates problems because in Albania, with the exception of the National Chamber of Lawyers, other fora are not institutionalised and they are easily controllable by the power. On the other hand, this mechanism for the election of members of the Council does not guarantee consensus and democratic legitimacy in Assembly, because in the current format of the parliamentary legislature, where the majority has over 3/5 of votes, substantial participation of the opposition is excluded. Third, it is left to the Justice Appointments Council which does not have a proven institutional tradition, to elect the members if the Assembly fails in the process of election of lay members;

e) The balance 6 judges and 5 lay members seems to be in compliance with the European standard, according to which the substantial majority must come from among the ranks of judges. The draft proposes that the chair of the Council be elected from the ranks of lay members, which implies a tie and in case of absences in the meeting, it implies even prevalence of lay members (vote of the chair in case of a tie shall be dominant). Similarly, the draft law does not foresee any provision to exclude the lay members from voting in sensitive cases for the career of judges;

f) No appointment criteria for the members of the Council are foreseen, while the issues of conflict of interest are left open, to be governed by law;

g) There is no coherence in the draft law and there are cases where HCJ members are referred to by the concept “appointed member” instead of the concept “elected member”;

h) Members of the High Judicial Council are not guaranteed independence at constitutional level, but they have disciplinary liability according to the law

i) Paragraph 4 of article 147 is contradictory. On the one side it is defined that the Minister of Justice must be an observer and on the other side he is given an active role, by giving him the competence to start the initiation of investigation for disciplinary violation against judges. This wording gives leeway to imply that such request will be automatically accepted.

35. In principle we agree with **article 41** of the draft law which adds article 147/a to the Constitution to determine explicitly and redefine in the Constitution the responsibilities of the Council. However, we consider that such competences are not clearly and fully formulated. For additional details, see our suggestions below.

36. Article 42 of the draft law adding article 147/b to the Constitution, as regards its structure and content, seems to be similar to article 17 and 31 of the draft law. Consequently, we adhere to the reserves and suggestions given in paragraph 14 and 27 of this opposition. Adding to them, we consider that the hypothesis, “reaches age of retirement” without defining the age explicitly is unclear for the lay members and consequently it may cause improper enforcement in practice.

37. Concerning **article 43** of the draft law which adds article 147/b to the Constitution, we observe that it has the same structure and content as article 18 of the draft law. Consequently, we adhere to the arguments and suggestions given in paragraph 15. Additionally, we observe that it must be made clear the situation of judge members who will have 2 disciplinary regimes overlapped: one regime as a judge and one regime as a member. In this situation, it is not clear the effect that it will have on the career of the judge the disciplinary proceedings against him in the capacity of the member and vice-versa.

38. As regards the arguments and reserves expressed in paragraph 34-37 of this opposition, we suggest that the Constitution must explicitly determine not only the establishment of the Council but it must be defined even the circle of functions, sectors from which the members are coming, and the criteria and procedures for their selection. The Council must have the competence to promote justice efficiency and quality and also strengthen public trust in the justice system. To this end, it must have the task to create the necessary means to assess the justice system, report about the situation of services, and request the respective authorities to undertake the necessary steps for the improvement of justice administration.

Competences of the Council must include minimally:

a) Selection and appointment of members;
b) Promotion of members;
c) Assessment of activity of judges;
d) Handling of issues of discipline and ethics;
e) Professional training of judges;
f) Control and administering of the budget of the judiciary;
g) Administering and management of courts;
h) Protection of image of the judge;
i) Opinions of other bodies of power for judicial system related issues;
j) Cooperation with other national and international bodies;
k) Responsibility towards the public as regards transparency, accountability and reporting;
l) Management of financial resources for administration of justice;
m) Review of complaints against judges and courts;
n) Drafting of an annual report on the situation of the judicial system on its activity to be presented to the parliamentary Law Commission and the public. This report must not serve as a ground for disciplinary responsibility of any HCJ member.

The number of members of the Council must be determined based on the volume of competences, their effective fulfilment and dimensions of the judicial system. The Constitution must foresee that the substantial majority of HCJ membership must come from the ranks of the judiciary, elected by the National Judicial Conference which is the assembly of all the judges of the Republic. The National Judicial Conference must NOT be abolished, instead it must be further strengthened and consolidated. The judge members must be elected by guaranteeing representation of all the levels of the judiciary. For the purpose of depolitisation of the Council and minimizing any risk of damage of public trust in the judiciary, the competition for the

election of judge members must be in compliance with the rules defined by the Council itself. Participation of Parliament, executive or administrative-hierarchical positions of the judicial system must be avoided in the process of election of judge members. Judge members must come to the HCJ through an election process. HCJ members must be elected based on criteria of professional capacity, experience, judicial knowledge, discussion skills and culture of independence. Lay members must be elected among the prominent lawyers, professors of law, who have significant experience in the professional service or citizens of outstanding status. Additional criteria for these members must be defined depending on the type of functions to be assigned to the Council.

In the process of election of lay members of the HCJ it must be guaranteed their political impartiality, by limiting to the parliamentary majority the possibility to influence the composition of the Council. The formula proposed by the Venice Commission guaranteeing substantial participation of political parties in voting, followed by procedural rules in case of risk of blockage, must be review options of the Constitution. HCJ functioning with a mixed composition must not tolerate interference of the parliamentary majority and pressure by the executive and it must be free of any subjection to political-partisan considerations. Some of the tasks closely linked to the status of the judge must be competence of Council membership coming from the ranks of the judiciary. Members of the Council must not be actively involved in politics, must not have a past history as deputies, members of the Government, high officials of public administration or former-functionaries, investigators, judges and prosecutors at the time of communist dictatorship. Minister of Justice must not be a HCJ member.

The formula of replacement of HCJ members must guarantee continuity of activity of the Council, by not replacing all the members at the same time. The tenure of HCJ members must be guaranteed. Changes in government or parliament must not influence the continuity of the mandate of the HCJ elected members. It must be prohibited the immediate reelection of members, by defining the minimum period of such prohibition. HCJ members must be given explicit guarantees for independence and impartiality in the exercise of office. Their remuneration must be in compliance with their position and the workload of the Council.

The President of the Republic, as long as he does not have executive functions, must continue being a HCJ member. He must be exempt from HCJ during the disciplinary process and promotion.

39. Concerning **article 44** of the draft law, which adds article 147/ ç to the Constitution, it has the structure and content similar to article 21 and 36 of the draft law. Consequently, we adhere to the reserves and arguments given in paragraph 18 and 31 of this opposition.

40. Concerning **article 45** of the draft law, which adds article 147/d to the Constitution for the establishment of a new constitutional body- High Inspectorate of Justice, we observe the following issues:

a) Rules for the establishment, organisation and functioning of this body, which even though declared to be independent, do not guarantee its independence;
b) We are against the political subordination of the Inspectorate because the existing wording contradicts the international recommendations for depolitization of the judicial power. Therefore, appointment of inspectors by Assembly with 3/5 of votes, not only does put this structure under political influence, but moreover, this majority in the Republic of Albania does not guarantee substantial participation of the opposition.
c) Participation of the Minister of Justice in the meetings of the Inspectorate, even as an observer, is another element of the political influence in this structure. Furthermore, the provision for the Minister of Justice is contradictory. On the one hand it is foreseen that the Minister of Justice will be an observer, and on the other hand he is given an active

role through the competence to request initiation of investigation for disciplinary violations against high functionaries. Such wording implies that the request of the Minister will be accepted automatically.

d) Another element showing subordination of this structure to political influence is the rule according to which if the General Inspector is not voted by 2/3 of 5 members, he shall be elected by simple majority of the parliament;

e) Another element showing subordination of this structure to political influence is the rule according to which disciplinary responsibility of members of the Inspectorate is delegated to be governed by law, which makes their independence easily vulnerable and inspection of inspectors is conducted by the Minister of Justice. The explanation given in the explanatory report that their inspection must be entrusted to an independent body- Minister of Justice- is completely irrelevant;

f) The drafting for the election of inspectors (3 judges and 2 prosecutors) from the ranks of judges and prosecutors or former judges and former prosecutors creates the conviction that the aim is to re-introduce in the system former judges and former prosecutors of the period of dictatorship. Such conviction is based even on the criterion of over 20 years of experience in these positions. In this way, the candidates from the School of Magistrates are excluded as judges and prosecutors are graduated from this school as of 2000. This is contrary to the Analytical Document and Strategy, where it reads that the School of Magistrates is a success story;

g) Overall the text of the draft law is inconsistent. Even though the Constitution does not provide for criteria for the High Judicial and Prosecutorial Councils, for a body as the Inspectorate, which is party before these bodies and appointed by these bodies, such criteria are defined in the Constitution.

h) Another indicator of lack of consistency of the draft law is the fact that the criteria of the members of the Inspectorate are stronger than the criteria of appointment of members of the Constitutional Court, where constitutional judges must have an experience of 15 years. In this way, it is created the belief that the rules are written to appoint and remove specific individuals, i.e seizing structures;

i) It is not clear how the procedure “proposal by the judges and then ranking by the High Council of the Judiciary, where the draft law itself proposes abolishment of the National Judicial Conference” will be carried out;

j) It is not clear who and how detailed inspection of assets, integrity and background check of candidates for inspectors will be done. The concept “thorough background check” is not clear and gives leeway to abuse in practice;

k) The wording “Upon expiry of the mandate, the members shall return to their previous working positions” is not clear and it seems to have been drafted for certain individuals only. This wording does not solve the situation where officials who currently exercise functions in the structures foreseen to be abolished will be candidates for these positions. Furthermore, this wording is inconsistent with article 40 paragraph 5 and 52 paragraph 2 of the draft law, which reads that the lay members judges and prosecutors who prior to appointment to the Council used to serve full-time in the public sector, shall be returned to the previous job positions or if this impossible, to equivalent positions.

Concerning all the above concerns, we in our Platform have suggested that for the purpose of strengthening independence and autonomy of self-regulation of the judicial system, it must be foreseen to have a single Inspectorate for the judiciary, within the HCJ. The HCJ Inspectorate must be organized in separate sections, responsible for the disciplinary issues and evaluation

of judges, in order to ensure the necessary separation of these two processes. The Inspectorate must be strengthened as a structure within HCJ, by taking the following measures:

- Rigid criteria for recruitment of inspectors;
- Objective and transparent formula for their appointment, but avoiding in any case the political influence of the executive or Assembly, even if indirectly;
- Giving a full and attractive status (in all components) to the inspectors in order to enable the hiring of best human resources;
- Improvement of operating procedures, based on the gained experience, for the purpose of its agility rather than its collapse to zero level.

41. Article 46 of the draft law which adds article 147/dh to the Constitution is similar to article 17, 31 and 42 of the draft law. Consequently we adhere to the reserves and suggestions given in paragraph 14, 27 and 36 of this opposition. Moreover, we observe even in this case that the hypothesis "reaches age of retirement" is unclear as the recruitment rules allow even individuals from outside the judicial system if they are former judges or former prosecutors.

42. In **article 47** of the draft law which adds article 147/dh to the Constitution, the first sentence has a structure and content similar to that of articles 18 and 32. Therefore, we adhere to the reserves given in paragraph 15 of this opposition. The second sentence, must be deleted because, as we have already argued, inspection of inspectors by the Minister of Justice, puts this structure under inappropriate political influence.

43. Article 48 of the draft law which adds article 147/ ë to the Constitution has the structure and content similar to article 21, 36 and 44 of the draft law. Consequently we adhere to the reserves and arguments given in paragraph 18, 31 and 39 of this opposition.

44. Concerning **article 49** of the draft law, which adds article 147/f to the Constitution, we observe the following issues:

a) Creation of new institutions must consider the high risk of political advantage of the current majority as it has the parliamentary majority. Building new institutions carries the risk of excessive institutional fragmentation and even the lack of sound cooperation to achieve the required results. Only a European model to guarantee 100% elimination of the political influence of control of judges and prosecutors could be an issue that may be discussed broadly in consultation tables. We support judicial control over every single decision, by avoiding political influence, which derives from appointment of lay members.

b) The ad hoc functioning seems to transform this body into an extraordinary court, which according to article 135 paragraph 2 of the Constitution is prohibited;

c) The composition of this body seems to contradict the feature of independence that a court should have, not only according to the Constitution, but also article 6 of the European Convention of Human Rights. In concrete terms, this body will consist of 3 members who do not have the status of the judges (Prosecutor General, Minister of Justice, Chair of the National Chamber of Lawyers).

d) Similarly, there are doubts about the independence of this body, when the members coming from the judiciary, by means of these constitutional amendments, are not guaranteed irremovability as they are expected to be subject to the reassessment process;

e) On the other hand, where the Tribunal has no jurisdiction of the Constitutional Court judges, it is not clear the participation of the chair of the Constitutional Court and the

oldest judge of this court. Moreover, the decisions of this tribunal according to article 49 paragraph 5 of the draft law are appealed against before the Constitutional Court;

f) The term “oldest judge” is unclear if it relates to the age or period of service in the concrete position.

45. Concerning **article 50** of the draft law which amends article 148 of the Constitution, in principle we agree with the strengthening of independence of the prosecution. However, several wordings seem unclear to us:

a) Principle of decentralisation according to the law is unclear to us as it does not place any restriction pillar.

b) The wording “subject to the Constitution and laws” in paragraph 2 contradicts article 54 paragraph 4 letter b), which gives to the Prosecutor General the constitutional right to issue general instructions to the prosecutors;

c) The wording of paragraph 4 makes no sense because it foresees that prosecutors are appointed by the High Prosecutorial Council on the proposal of the High Prosecutorial Council.

d) The terminology used throughout the text lacks uniformity and this provision is one such example. Thus, the criteria for appointment of the prosecutors is “completion of the School of Magistrates” (which by mistake in article 4 reads High School of Magistrates), while the criteria for the judges is “high legal education”. Another example is “positive assessment and audit of assets and background check of the prosecutor”, while for the inspectors it foresees “thorough audit of assets, integrity and background check”. It is strange that there is no such criterion for the constitutional judges, High Court judges, members of the High Judicial Council, other judges, High Prosecutorial Council. Moreover, such an audit is not conducted for the chair of the National Chamber of Lawyers, who is involved in key positions in the reformed justice system.

e) Principle of independence or autonomy in organisation of the prosecution service is different from the one applied for the judges. The prosecution service is organised as an independent body while the activity of the prosecutor must be subject to internal hierarchical control.

46. Concerning **article 51** of the draft law which adds article 148/a to the Constitution, for the establishment of the High Prosecutorial Council in principle we agree for the strengthening and bringing of this body at constitutional level. As regards this provision, we observe that it has been drafted based on the same model and spirit as article 40 of the draft law which reforms the High Judicial Council. Therefore, we adhere to all the comments made in paragraph 34 of this opposition. Adding to these arguments, we do not find it reasonable that the number of members of the Prosecutorial Council is the same as the number of members of the Judicial Council, because as proposed in the draft, responsibilities of the Judicial Council are numerous and voluminous compared to those of the Prosecutorial Council. Similarly, it is unacceptable that the hypothesis of termination of mandate and the rule for disciplinary responsibility of the members of the Prosecutorial Council has not been foreseen, contrary to that of the members of the High Prosecutorial Council.

47. In principle we agree with **article 52** of the draft law which adds article 148/b to the Constitution, so that it defines explicitly and redefines in the Constitution the responsibilities of the Council. However, we consider that these competences are not worded clearly and fully.

48. We adhere to the suggestions given in the Programme as regards paragraph 46 and 47 of this opposition.

The Prosecutorial Council must be an independent collegial body. The number of members of the Prosecutorial Council must be determined considering the range and number of functions.

Substantial majority of members of the prosecutorial Council must be elected from among the peers. The elected prosecutor members must represent all the hierarchical structural levels of the system of the prosecution and they must not be assigned to administrative management positions (heads of district or appeal prosecutor's offices) and meet the criteria indicated above for the HC and CC judges related to professional integrity, including the criterion of experience when they have been in functions and positions during the period of communist regime.

In order to ensure democratic legitimacy of this Council, the other members shall be elected by the Assembly among the persons who have the relevant qualification (professors of law and jurists involved with civil society etc). Members of the Prosecutorial Council appointed by the Assembly, must be elected by qualified majority which guarantees substantial participation of the opposition in order to ensure impartiality and eliminate political seizure. A release mechanism must be foreseen for the election of lay members, (non-prosecutors), for example the election by Parliament making use of a proportional system or transfer of the right of election to independent bodies to eliminate political seizure.

Members of the Council may be re-elected provided that a period of at least 4 years has passed as of their previous mandate. In order to guarantee independence, the election of the head of the Council must be done by the members through an election mechanism. The mandate of the members must end only upon its expiry, retirement, resignation or death, or their dismissal for disciplinary reasons.

Meetings of the Prosecutorial Council must be open to the public if the Council does not decide to work behind closed doors, unless for security reasons and other reasons linked to personal data protection which may require closed meetings, and in compliance with the rules of procedure as an exemption.

49. In principle we agree with **article 51** of the draft law which adds article 148/c to the Constitution. However we are suspicious about the need to separate this structure from the prosecutorial body. Further, we observe that the draft law is unclear in this regard:

a) We are in favour of SACS establishment, but if an establishment outside cotnrol of the parlimanetary majority is ensured - a process that does not eliminate from the selection process balancing filters such as the President of the Republic or the parliamentary opposition, since it is only through this balancing filters that political independence of such structures is ensured.
b) While paragraph 4 of article 54 of the draft law explains the separation of this structure from the authority of the Prosecutor General, such separation does not apply to budget issues, strategic planning issues and reporting to the Parliament;
c) We find it irrelevant for the judges and prosecutors to be explicitly under the jurisdiction of this structure, while other functionaries fall under a mobile scheme because of the text "high officials, defined by law";
d) The text of paragraph 3 of this article is unclear in both concept of criteria and procedure;
e) Paragraph 5 about the National Bureau of Investigation, in the situation where the Constitutional Court has already issued a related decision, is inadequate constitutional basis to guarantee the organisation, functioning and professionalism of this structure. Further, there is no legal authorisation for the governing of details. Therefore, we fear that this provision will be applied improperly in practice prejudicing the standards of the due legal process of the individuals;

f) This provision refers for the first time and inadequately to the Anti-Corruption Court of First Instance and Appeal Court. The wording is unclear as they must be included within the judicial power, instead of the prosecution service. As it is, it seems that the courts follow the prosecution service, rather than the other way around.

g) The appointment of the prosecutors at the SACS is competence of the HCP, which as stated above is controlable by the parliamentary majority (5 out of members are appointed directly by the parliamentary majority), dictating them the names of the prosecutors to be appointed to the SACS. In the appointment process, the roles of the President of the Republic or GP are completely excluded.

h) SACS will investigate high officals, precisely those officals competent for their appointment and dismissal, thus being deliberately in fragrant conflic of interest. We draw attention on the fact that it is precisley for this reason that initial jurisdcition powers were removed from the HC.

i) SACS will supervise NBI, which will perform investigations. But the absence of SACS independence, arising from parliamentary majority control of such body through the HCP, implies also a lack of independence of the NBI in performing independent investigations.

j) The activity of SACS will be supervised by HIJ, which is appointed by the Parliament and its activity is controlled by the Government (Minister of Justice). Thus, in practice, the SACS activity will be indirectly controlled by the Minister of Justice.

50. Concerning **article 54,** which amends article 149, we have the following remarks:

a) The formula does not guarantee political independence of the Prosecutor General. 3/5 parliamentary voting in the Republic of Albania does not guarantee substantial participation of the opposition, as it has already been explained in this opposition paper;

b) In principle we are against the body, Justice Appointments Council as a structure which improperly fragmentizes the system and which composition leads to doubts about improper political influence, especially of the executive power;

c) The criteria for the appointment of the Prosecutor General linked to the rule for appointment of the current Prosecutor to the Court of Appeal of Tirana and the explanation in the explanatory report that the mandate of the current Prosecutor must be terminated, make you consider that such criteria are defined for a specific individual. It is unclear why emphasis is put on the outstanding university in the country and abroad, in the situation where in Albania there is no authority to provide for this classification. Further, based on the reformed education system, all the graduates who complete the 4 year education in law are considered to have completed first level post-graduate studies. The second question is whether it is adequate that such functionary simply completed these studies or he/she must have obtained good results.

51. Concerning **article 55** of the draft law, which adds article 149/a to the Constitution, we have the same arguments and reserves as for articles 17, 31, 42 and 46 of the draft law because this provision has a structure and content similar to them. Adding to these arguments, we observe that article 55 of the draft law is one of those cases which shows that the entire text of the proposed amendments lack uniformity. In this provision, without any explanation, the retirement age of the Prosecutor General is set to be 70 years of age, while in other provisions it is 65 years of age or no mention is made of this issue. Moreover, the provision lacks the obligation of a body to inform the assignment body of the end of the mandate. Last, we deem that paragraph 3 of this provision is unclear and confusing. It seems to have been drafted for a specific individual and to be applied only once. Further, the language used in general is different from

that used for other functionaries (who return to previous positions or equivalent positions). Furthermore, it seems that in this way it is pointed out that one of the conditions to be appointed judge of the Court of Appeal is to have been Prosecutor General, despite the failure of this functionary to fulfil the conditions foreseen in the law to be appointed judge.

52. Article 56 is missing in the draft law, and article 55 is followed by article 57.

53. We are against the establishment of the Justice Appointments Council proposed in article 57 of the draft law. We bring to your attention the fact that these amendments propose taking at constitutional level at least 9 new constitutional bodies, not to mention the existing ones which are all subject to reform (High Administrative Court, High Prosecutorial Council, High Independent Inspectorate, Special Anti-Corruption Structure, Anti-Corruption Courts, National Bureau of Investigation, Justice Appointments Council, Disciplinary Tribunal and Independent Qualification Commission). We think that creation of a considerable number of institutions will deepen the Albanian issue of concern, which relates to poor mutual trust in institutions and inter-institutional cooperation and coordination. On the other hand, our greatest concern is political corruption which implies the advantage of the current majority to appoint to these structures trusted individuals. We do not agree that all institutions derive from the Parliament and the formula of their appointment leaves aside the substantial role of the opposition.

Moreover, the Justice Appointments Council is proposed to consist of 11 high officials, where the Minister of Justice will be a full member. We find that contrary to all the international recommendations given to Albania for depolitization of the system and reduction of the role of the Executive, through the Minister of Justice, the draft amendments propose the contrary. In concrete terms, the Minister of Justice takes part in the process of appointment and promotion of high officials (member of the Appointments Council), is full member with the right to request disciplinary investigation in the meetings of the High Judicial Council, High Prosecutorial Council and High Inspectorate. He is a full member in the Disciplinary Tribunal which implies that he decides on the disciplinary measures against judges, and also for the first time ever against all the other high officials of the justice system. Moreover, he verifies even the work of the High Inspectorate.

Concerning the Appointments Council, it is of concern the fact that all other functionaries, currently are not independent because of the reassessment process. The Council is chaired by the chair of the High Judicial Council that according to the draft amendments is proposed to be a lay member, elected by the Parliament. Similarly, rules on transparency of the activity of the Council, access to its documentation by the interested persons and the right of appeal are missing. Such issues are important for the career of functionaries because in several cases the ranking by this Council is automatically submitted for appointment.

54. Concerning transitory provisions (**again numbered as article 57**) we deem that they are of concern because:

- The constitutional mandate of the Prosecutor General and 12 elected members of the HCJ shall be immediately and automatically terminated;
- After the reassessment process, there is a risk of termination of mandate of 9 members of the Constitutional Court, 17 members of the High Court and 383 judges of the court of first instance and appeal, adding even the number of prosecutors at three instances;
- There is no justification and the legal mandate of HCJ inspectors, members of the Prosecutorial Council and judges of the Administrative Appeal Court shall be dissolved by law;

55. Concerning **article 58** of the draft law – the process of assessment and re-evaluation, we observe the following:

- ***General comments on the process of assessment and transitional re-evaluation***

Article 58 of the draft law provides for an Annex to be inserted to the Constitution with the title "Transitional Qualification Assessment of Judges and Prosecutors". According to this part, all judges including here members of the High Court and Constitutional Court, prosecutors, members of the High Council of Justice, the Prosecutor General of the Republic of Albania and their legal advisors **shall be *ex officio* assessed and re-evaluated** in order to re-establish public trust and confidence in these essential democratic institutions.

Firstly, we should highlight that we absolutely welcome a concrete, efficient and rapid assessment of all judges and prosecutors of the first instance and appeal courts, on the basis of their work, efficiency, speed and respecting of the law and Constitution. We would also like to reiterate that we always **strongly support any measure, which aims to fight corruption in the justice system, realistically and truthfully, and as its final goal it should have the exemplary punishment of any corrupted judge and prosecutor.** However, this process should ensure and establish the right balance between the guaranteeing of the judiciary independence and the uncompromised fight against corruption.

Nevertheless, we cannot support any governmental testing, knowledge testing through examinations be oral or written (stipulated by point 3 of Article 8 of the Annex attached to the constitutional amendments). Even in the Joint Opinion by 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 Law on the Judiciary and the 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) underlines" *"Re-evaluation for the transitional period should be focused on the individual performance at work rather than on the examination".*

On the other hand we cannot support any process, which aims to intimidate judges and prosecutors and which does not impact the real fight against corruption. We do not support these processes, as this procedure severely undermines the issue of their status (*their irremovability from office*) and it also opens the way to extreme politicisation of the judiciary itself, as it will be argued as follows.

We would like to stress that judges in the Republic of Albania have been subject to a test of the professional knowledge (written test) in 1999. The result of this professional assessment process was the dismissal of some judges and their substitution with lawyers (*not coming from the School of Magistrate)* who had held political positions *(Ministers, deputy Ministers, senior political officials in the public administration of that time).* We have all the indicia and reasonable doubts (*which will be specified in details below)*, the re-evaluation of judges and prosecutors, members of the High Court and Constitutional Court, or the Prosecutor General, considering the way it has been conceived, even this time does not aim at increasing the professionalism or fighting the corruption in the justice system but at politicising it to its extremes, by placing it under the control of the current parliamentary majority.

A detail to be taken into consideration is the fact that since the year 2000, only the candidates coming from the School of Magistrate, recruited according to a competitive procedure, transparent and entirely based on meritocracy, and supervised by the international bodies exercising their activities in Albania could be part of the Albanian judicial system and prosecution. So far, the School of Magistrate is considered a history of success by all independent international reports or expertise, and it has had a positive impact not only on the de-politicisation of the judicial system but also on increasing the professionalism in the system.

On the other hand, there is currently a periodical professional assessment procedure in place for judges and prosecutors in Albania, which is being implemented independently by the High Council of Justice and the General Prosecution Office. The first round of assessment has been concluded for all first instances and appeal courts judges, while the second round is about to finish.

We believe that a well-conceived system of periodical assessment allows not only for the monitoring of the performance of the judge and its progress with the passing of time, but also for the early identification of problems, such as the high number of cases and their accumulation, which many judges are facing and it should be identified at an early stage. In this context, GRECO in its Fourth Evaluation Round report for Albania recommends: *"... ii) Periodical evaluation of the professional and ethical performance of judges should be done at the right time and should be taken into consideration by ensuring that the evaluation criteria of judges' ethics are objective and transparent, by taking into consideration the principle of judiciary independence."*

As noted above, the findings and the relevant GRECO recommendation does not consider a necessity (nonetheless an indispensability) a general re-evaluation of the skills of the judges and prosecutors, nonetheless when such a thing is claimed to be done in order to set up an effective system for their ethical-professional evaluation. Still it is not explained how will re-evaluation influence specifically the setting up of an efficient evaluation system. On the contrary, GRECO recommendation aims for the perfection of the current system affecting not only the strengthening and the transparency of the evaluation criteria, but it also considers the principle of the judiciary independence as a significant one.

Professional re-evaluation of judges in office is considered in the Joint Opinion by 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 Law on the Judiciary and the 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 *an exception and it should be made subject to extremely stringent safeguards to protect those judges who are fit to occupy their positions.* The Annex of the constitutional amendments, as well as their accompanying report specify that this measure is taken in order to restore public trust and confidence in these important democratic institutions. Specifically, this measure is proposed due to the high level of corruption in Albania, the low level of the quality of work in the justice system as well as due to the non-functioning of the current controlling mechanisms of judges and prosecutors.

We agree that corruption in Albania is a concern, which has not only encompassed the justice system but also the other sectors of public life in the country. Thus, we reiterate, that we **strongly support any measure, which aims to fight corruption realistically and truthfully, with its final goal the exemplary punishment of any corrupted official.** The same punishing mechanism should be applied in any other public sector, including here the central and local government, public procurement, concessions, taxation and customs, etc. Therefore, we deem it as appropriate to empower the current structures, which allow for the investigation and punishment of corruptive acts (in all sectors of public life, including the justice sector), by guaranteeing its independence and status (*especially for structures such as the High Inspectorate for Declaration and Audit of Assets, prosecution, courts, inspecting bodies, etc.).* At this stage, we would like to stress that public trust in public institutions is similarly low, since it is believed that the officials of other bodies in different sectors (including central and local government etc.) are also corrupted.

The setting up of new *ad hoc* structures and without any experience in the relevant field, moreover appointed by the parliamentary majority and without any guarantee of the

independence from the politics, we think that it will not solve the identified problems and the uncompromised fight against corruption!

On the other hand, separating the justice system and the application of extraordinary measures only for this sector seems like a selective intervention, which aims at controlling the justice system rather than fighting the corruption. This is the only reason, why the transitional provisions (specifically point 1 of Article 4 of the constitutional amendments Annex) envisages expressively that at any time during the qualification assessment, an assessee may resign, **their assessment terminates immediately,** regardless of the time of the resignation, either before or during the assessment period.

Further, members of the Constitutional Court become also part of the *ex officio* re-evaluation process. There has not been any case either from the public opinion or from the international independent expertise that there have been accusations or doubts for the involvement of the members of the Constitutional Court in corruptive activities. This important constitutional body has never been mentioned for unfair actions as a result of corruptive acts. Even the current majority has not identified any problems related to corruption in the Constitutional Court. It is true that the media has published only inappropriate interventions of the current Prime Minister, who is suspected of having threatened over the phone certain members of the Constitutional Court. This news published by the media has not been proved and there has not been any official reaction from the Constitutional Court itself. As a result, we consider the provision of re-evaluating *ex officio* members of the Constitutional Court as a follow-up action of intimidating and threatening them. The proposed measure is disproportional and does not meet the need that dictates its application.

All the above reasons raise reasonable doubt that in the case under question, the current majority, to take under control the whole justice system from the first instance courts/prosecutions to the Constitutional Court, is simply using the fight against corruption as an alibi. This attempt, which is materialised through the proposed constitutional amendments by the majority, consist in itself a “coup d’état” against the independent justice system.

- ***General comments on the Annex “Transitional Qualification Assessment of Judges and Prosecutors”***

Firstly, from the point of view of the legislative technique, we consider as *atypical* the inclusion of Annexes or Appendices to the text of the Constitution. The aim of the Constitution is not to regulate in details the processes or institutions, but as the fundamental document of a state, it should only envisage fundamental issues and principles on the basis of which different state bodies are established or function. Inappropriate details, especially senseless and confusing make the constitutional text more like a by-law act, by devaluing entirely the role of the Constitution in a democratic state.

Secondly, the language used in the text is not clear with words or expressions not clearly defined. This fact makes the accurate understanding of the provisions more difficult and creates premises for different interpretation during its application in practice. Moreover, the provisions include sentences, which do not aim at determining the rules but rather express the intentions why these rules are being defined (Article 1). These provisions are rather appropriate for bylaws acts than for a constitutional text.

Thirdly, specific provisions of the law refer to articles, which do not exist either in the current Constitution of the Republic of Albania or they are not even added to the text of the proposed constitutional amendments (for example refer to Article 4, 5, 6, 7 of the Annex, which refer to Articles 184, 188, 189 or 190). Referring to Articles, which do not exist, make it entirely difficult to understand the provisions accurately.

Fourthly, throughout the Annex there is an inconsistency in the labelling of the bodies to be established, giving the impression that there are different bodies. The same body is mentioned as the "Alternative Independent Commission of first instance", then as the "First Instance Commission", or "Extended Appeal Commission" then as "Second Instance Commission", "Independent Qualification Commission of second instance", "Appeal Commission". This overlapping of terms has made the concrete and appropriate structure to be established entirely unclear.

Fifthly, article 58 of the constitutional amendments and then later throughout the text of the Annex, the tern "shall be *ex-officio* assessed and re-evaluated" is being used. However, the draft does not make it clear what is considered as *ex officio* "assessment" or "re-evaluation", and what is the difference between these two processes.

- ***Specific comments on certain provisions of the Annex***

Article 1

In an unprecedented event, paragraph 1 of this provision envisages the limitation of the application of some existing articles of the Constitution of the Republic of Albania, to the extent necessary for the application of the provisions of this Annex. Specifically, it has been suspended (limited) the application of Articles 128 (when members of Constitutional Court are removed from office); 131/f (the right of complaint for the violation of the right to a due legal process); 135 (current organisation of the judiciary); 138 (unlimited time of judges in office); 140 (when members of the High Court are removed from office); 145/1 (the rule that judges are independent and are subject only to the Constitution and the laws); 147/6 (when judges are removed from office) and 149/2 (when Prosecutor General is removed from office). The suspension of these provisions materialise the aim of the constitutional amendments and particularly of the *ex-officio* re-evaluation process of the officials in the justice system, to ignore the independence of justice bodies and to ensure their political control.

These restrictions are so absurd that they suspend even the application of Article 131/f of the current Constitution by denying to the individual the right to address the Constitutional Court for violation of their right to a due legal process. In essence, this restriction actually consist a limitation of the right to a due legal process, which is sanctioned by Article 42 of the Constitution of the Republic of Albania and Article 6 of the ECHR. **This right is not allowed to be restricted by the current Constitution, even in cases of wars or state of emergency** (refer to paragraph 1 of Article 175 of the Constitution of the Republic of Albania)!

On the other hand, **the suspension of the application of Article 145/1 of the current Constitution of the Republic of Albania, which sanctions that judges are independent and are subject only to the Constitution and the law, will take the Albanian judiciary towards a collapse, at least during the period that this suspension shall exist.** Any provision of the Constitution should be interpreted so that it is in compliance with the fundamental constitutional principles. This is due to the reason, as it is accepted by the constitutional doctrine and jurisprudence, any constitution provision has a specific relation to the other provisions, and together they consist an entity. As a result, none of the provisions of the Constitution should not be taken out of its context and interpreted on its own. In this context, we deem that the suspension of the application of Article 145/1 of the law, affect directly Article 42 of the current Constitution of the Republic of Albania, where it is sanctioned: "Everyone, to protect his constitutional and legal rights, freedoms and interests, or in the case of charges against him, has the right to a fair and public trial, within a reasonable time, by **an independent** and impartial **court** specified by law."

The same argument is also relevant for the suspension of other provisions, which guarantee the status of judges or prosecutors and removes the constitutional safeguards for their time in office or the time of the mandate and the constitutional rules for their removal from offices (Articles 128, 138, 140, 147/6 and 149/2). We think that the independence of judges and courts is not an aim in itself. Respecting this principle is an indispensable condition for the protection of human rights and fundamental freedoms. In this sense, this independence is not a privilege but one of the fundamental duties of judges and courts, arising from human rights to have an impartial arbitrage during a conflict, guaranteed by the Constitution. Guaranteeing this standard consist the orienting criterion to evaluate the independence of judges and courts.

This means that during the period of suspension of Article 145/1 and other constitutional provisions guaranteeing the independence of judges and courts (Articles 128, 138, 140, 147/6 and 149/2), **all court decisions rendered by the Albanian courts (whose guarantee to be independent has been suspended) are potentially vulnerable because they do not guarantee to the individual the right to a due legal process, especially the right to be trialled by an independent and impartial court.** At this stage, we would like to highlight that based on a logical and harmonised interpretation of all the provisions of the Annex, it results that the time of the restriction of these provision shall be in effect at least from the 1 January 2016 – 31 December 2019 (a period of time when the process of *ex officio* re-evaluation will take place – refer to point 1 of Article 3 of the Annex)!

Finally, we would like to stress on this issue, that this unprecedented and inappropriate restriction of the independence of judges and prosecutors, comes at a time when important MPs of the parliamentarian majority, potential voters of these constitutional amendments are under a criminal proceeding for having committed serious criminal offences (including an MP of the majority accused of murder, or an MP of the majority accused of intentional serious injury to several citizens). Removing the safeguards for the independence of the judges and courts seriously affects the credibility of these processes and other processes that might take place in the future against politicians or senior public officials, who have been lately accused by the media of being involved in corruptive acts (*the case of the Speaker of Parliament)* or in trafficking in narcotic substances (*the case of the Minister of Interior, accused publicly by a senior police officer, of being involved in leading a criminal group for the international trafficking in narcotic substances).*

Regarding the following sentences of point 1, we note that the rule of excluding from the assessment the officials who substitute others is a clear indicator of the need that the majority has to replace the current officials of the justice system rather than to fight corruption in justice.

With regard to point 3, where it is envisaged the procedure of the President of the Republic of Albania to eliminate candidates who do not meet the criteria to be appointed in the Independent Qualification Commission (IQC), we note that it is not in alignment with the other following provisions of the draft. The process of appointment of the IQC members does not stipulate any procedure or any right of the President of the Republic to verify whether the criteria are met by the candidates or not. According to point 6 of Article 3 of the Annex, this right is rendered to the Ombudsperson. This inconsistency seems as an innocent forgetfulness and an intervention of the last moments to change the procedure, and it is an indicator of the political intervention in the draft presented as the result of the work of some “independent” experts. Now it is publicly known that the President of the Republic is considered by the majority as an obstacle to fulfil its aim to control the justice system. While the Ombudsperson is entirely a label of the Socialist Party, according to an agreement concluded among the political forces at the time of his/her election, where the proposal was left to the opposition of that time (today the parliamentary majority).

Article 2

Point 1 of this provision envisages the establishment of an International Monitoring Operation (IMO), as a cooperation mechanism among the European Commission, United States of America, other international organisational and bilateral international assistance, which is entitled to appoint international observers in both instances of the Independent Qualification Commission. Initially, we would like to unquestionably appreciate the attempt to guarantee the monitoring of the transitional evaluation process by international partners, as an opportunity to check and ensure the transparency and the appropriateness of the re-evaluation process. However, we note that this provision does not entirely guarantee the elimination of risks that the evaluation process has in its entirety, for several reasons:

Firstly, the setting up and functioning of the International Monitoring Operation (IMO) is an uncertain event of the future and as a rule the Constitution does not envisage uncertain rules to be applied, on the contrary it consists of binding rules to be applied. Here we consider the fact that the Constitution of the Republic of Albania shall not oblige or request from the European Commission, United States of America, other international organisations and bilateral international assistance (*this term is also unclear)* the obligatory implementation. Even though these international organisations are entitled to appoint observers, they might not exercise this right. Automatically, the constitutional rule envisaged is turned into an uncertain event of the future, which might never be applied!

This is not an assumption that we are making, on the contrary it is based on a previous tradition in Albania. We would like to remind, that almost the same rule was included in the Annex of Law No 49/2012 “On the functioning of administrative courts in the adjudication of administrative disputes”, where our international partners were entitled to participate in the procedures of examination for the administrative judges, in order to guarantee the proper application of the law during their appointment. A considerable number of our international partners did not accept to exercise the right given by law, with the claim that the appointment of Albanian judges is an internal issue of the Republic of Albania, they did not enjoy the authority to exercise the right given by law and that their role will affect the principle of sovereignty of the Republic of Albania.

Secondly, the role of experts assigned by IMO is simply observatory, researching and advisory without a direct impact on the decision-making of the Independent Qualification Commission. None of the provisions of the Annex envisage that the opinion or the findings of the International Monitoring Operation are binding for the Independent Qualification Commission. The draft, does not present any rule of how it will be proceeded, if the opinion of IMO is different from the final findings of the local structures. We understand that it is difficult to give a decision making role to IMO, taking into account the sovereignty principle of the Republic of Albania. Still, its participation in the process is entirely formal and it does not entirely guarantee that the arbitrary actions of the local structures will be prevented.

Thirdly, the act, which affects the status of judges/prosecutors including here members of the High Court and Constitutional Court, is the decision of the local structures. The IMO opinion does not bring about any impact on the process of removing judges/prosecutors from office.

Fourthly, the draft does not clarify the position and status of IMO. While it has considered to envisage the salary of the Commissioners in the Constitution, the draft does not provide for any reward for the observers, further if the IMO will be a permanent structure, a structure with occasional observation missions, or with a research structure required to act whenever it is informed of a violation (as a rule by the assessee). What if facts are tolerated or removed for certain judges/prosecutors, how will this structure be informed/set into motion and what mechanism shall be in place for the verification of all these cases?

With regard to point 2, providing for international observers “to have a similar qualification with the Albanian commissioners” it is still unclear what is considered “similar qualification”. In this

case, it should be specified whether this similarity has to do with the profession, education, and experience or with the three altogether.

Concerning point 3, it should be clarified or amended the type of "decision" that IMO makes, since it is not envisaged that IMO is given the right to approve any type of decision, apart from the right of verifying, observing and giving opinions.

Point 4 is not naturally or substantially related with this Article, since it does not provide for any rules related to IMO.

Article 3

The structure of the Independent Qualification Commission (IQC) is confusing, not only due to the different terms that are used in the text for the same structure, but also due to the fact that the draft initially introduces the number of the Commission, then it is optional for the Parliament to decide (for the First Instance Commission), and in one case it is expressively stated that the number is defined by law by the Parliament. Specifically, point 1 of Article 3 expressively determines that any IQC shall consist of 2 Public Commissioners, 3 First Instance Commissioners of the three First Instance Commission and 1 Second Instance Commission consisting of three appeal commissioners and at least 3 substitute commissioners. Later the following sentence makes the number of the First Instance Commission optional. The same rule is envisaged by point 4 of Article 2. Meanwhile point 7 of Article 3 determined that within one month from the time of determining the list of candidate, the Parliament shall decide with a simple majority whether to have one, two or three First Instance Commissions and for the number of substitute Commissioners. This lack of alignment hampers a full judgement on these structures.

Further at point 1, the duration of the IQC activity is determined at a Constitutional level (from 1 January 2016 – 31 December 2019), it is also specified that the constitutional duration of the activity of this body shall be prolonged with a law passed by the simple majority. We think that any issue which is considered to be raised to the constitutional level, then it is necessary that for any changes to this rule they should also be raised to the constitutional level, or the Constitution itself shall stipulate the criteria when the prolonging of the duration can be determined by law. Moreover, the term *"simple majority"* is not a term used by the current Constitution of the Republic of Albania. The Constitutions recognizes three types of majority and specifically: (i) majority of votes, with the presence of more than half of the MPs; (ii) majority of votes of all MPs; (iii) qualified majority (3/5 or 2/3 of the MPs).

Point 3 of this Article provides for all commissioners, directors and other personnel, as set by law, must consent to the yearly disclosure of their assets, constant monitoring of their financial accounts and waiver of the privacy of their communication related to their work for a period of ten years. This provision, complemented with the criterion of "high integrity reputation" is not sufficient to ensure the selection of persons who have not been involved in corruptive acts while exercising previously their duties. This provision has focused rather on the prevention of their involvement in corruptive activities in the future, but it does not ensure that these individuals have the required integrity to perform activities, which aim to fight corruption.

These individuals are selected among the judges, prosecutors or lawyers in the administration, thus, from the sectors of that system considered as corrupted. There are not any provisions, which provide for any verification procedure for the candidate's integrity and reputation, moreover, it does not provide for a real verification of their professionalism (e.g. public competition of their knowledge). We think that in order to have the legitimacy to check judges/prosecutors, members of the High Court or Constitutional Court, the Commissioners themselves should at least go through the same assessment process (for instance an examination of their knowledge which certifies their merit/professionalism). In this direction,

finally we think that the appointment and selection of Commissioners will be a formal political process, and it brings about the total dependence on the majority (since the selection will simply be an issue of the majority will).

On the other hand, while it is determined that the financial accounts of these officials and the privacy of their communication will constantly be monitored for 10 years, it does not specify the structure to carry out this task. If this task shall be carried out by the Parliament, then we are facing the risk of the political control of this structure.

With regard to Point 4, which specifies the appointment criteria of the Commissioner, we note that these criteria do not ensure a special and an appropriate qualification to carry out this process, and most importantly it does not guarantee the selections of persons politically unbiased (due to the inputs outside of the judiciary system). The Joint Opinion by 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 Law on the Judiciary and the 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) underlines that the Commission shall consist of **judges and non-judges** of an undoubted integrity, if necessary with the assistance of suitably qualified and independent foreign persons. Analysing the criteria defined by the draft, it is not clear how, for example, a lawyer with an experience of 15 years in the ministry of public administration, has the appropriate capacity to assess the performance of the work record and professional capacity of a member of the Constitutional Court!!!

Further, it is still unclear why is the fact of being a judge/prosecutor/legal advisors in the two years prior to their nomination a restricting criterion, while the same rule does not apply to advocates, notaries, or lawyers in ministries or in public administration! Moreover, the “master” criterion is considered appropriate, as according to the law on higher education, any lawyer who has completed the 4-year education cycle is considered to have completed “master” studies, according to the current concept of the law on higher education. All these details in defining the criteria raise reasonable doubts for a pre-designation of the individuals who will be appointed in these structures. This is due to the fact, that the Constitution should have a coherent system of criteria for the constitutional positions, while the draft presented shows the contrary. The criterion of non-punishment is also differentiated. In this case, there should not be any convictions punished with imprisonment, whereas, an example, for the members of the Constitutional Court the criterion is simply not to have been convicted for a criminal offence.

Point 6 and 7 of this Article determines the bodies, which are involved in the process of verification for the fulfilment of criteria and appointment of Commissioners. Specifically it is envisaged that the whole process shall be carried out by the Ombudsperson and Parliament. We reiterate, taking into consideration the Albanian reality, the Ombudsperson is not a structure that enjoys credibility for being politically unbiased, since it has been an individual election of the current Prime Minister and current majority, based on a political agreement reached among the political forces of that time, where the Ombudsperson had to be appointed by the parliamentary opposition of that time (currently the parliamentary majority).

On the other hand, the Parliament selects the Commissioner from the pool presented, according to a process, which is not at all transparent, and above all without any substantial role played by the parliamentary opposition. The monitoring of the process by international observers does not have any effect, since the procedure itself allows the selection according to the political will of the current majority. According to the draft, the Parliament shall make the appointment of Commissioners with the 3/5 of the votes (84 votes) of the MP of the Albanian Parliament, while the parliamentary majority currently has a majority of more than 3/5 (at least 88 votes)!!!

We think that excluding the parliamentary opposition from the appointment procedure of Commissioners, failure to envisage any balancing individual filter in this process, the lack of the obligation of the Parliament to argue the selections, as well as modelling the procedure as a case of clear political will (since the candidates are not subject to any credible and objective procedure of integrity or professionalism/merit verification), it makes all the members of the Independent Qualification Commission more dependent on the politics, Parliament and Government (current majority). The lack of independence of this significant structure, which determines the fates of the career of all judges/prosecutors, members of the High Court and Constitutional Court means an inappropriate pressure and influence on the Albanian justice system and practically its dependence on the Government and parliamentary majority (who select the Commissioners). This risk is increased even more, if we were to take into consideration point 5 of Article 10 of the Annex, the Appeal Instance Commission is the final instance of examination and does not allow a further appeal of the decision through any judicial means!!! Practically, through this provision and ensuring the political control of its appointed Commissioners, the parliamentary majority will remove form the system any judge/prosecutor, members of the High Court or Constitutional Court who has not obeyed or will not obey in the future its will.

This fact becomes more obvious, in point 6 where any state institution is given the right (thus even the Prime Minister – leader of the parliamentary majority who controls 88 voters of the available in the Parliament), to propose not only candidates but to give its consent for any candidate. The question naturally rises: "***Can the MPs, who have entered the Parliament from this Prime Minister, refuse a candidate proposed by him, or for whom he has expressed his consent?".*** The Albanian reality has showed that it is almost impossible to happen! The voting of candidates for constitutional functions has shown that the votes of MPs are in *block* according to the decision making of the relevant Parliamentary Group and it has never been the case that there has been voting according to the individual opinion of the MPs.

As point 8 is concerned, we deem it as inappropriate both determining in the Constitution the salary as well as its amount of 6 times more than the salary of a first instance judge/prosecutor. It is similarly inappropriate the fact that the Commissioners shall exercise their function for 3 years, while they will continue to receive this salary for 10 years, regardless of the duration of their active mandate. So, even if a Commissioner works only for 1 month at the IQC and then leaves by resignation, they will still receive a salary for 10 years! We believe that if the majority thinks that higher salaries are a barrier to the commission of corruptive acts, as well as the budgetary possibilities of Albania allow such high salaries, then we have found the solution to fight corruption in the justice system – raising the salaries of judges and prosecutors! On the other hand, concerning this point, "For periods of time less than one year, the pension is respectively calculated" does not make sense.

Point 13 envisages that IQC Commissioners are subject to disciplinary liability set out by law, to be determined by the Disciplinary Tribunal. The inappropriate influence on the independence of the Disciplinary Tribunal due to the presence of the Minister of Justice and officials elected by the Parliament, directly affects the guaranteeing of IQC independence.

Point 14 provides for the Commissioners, international observers, Commission staff and their families to *be protected at highest level.* We think that it is entirely pointless and it gives an impression that these officials' life will be at risk due to the officials of the justice system! Such a strong provision may be considered as denigrating and offending for the officials of the justice system who are subject to verification, who are not "a terrorist or criminal organization" but professionals of the law! Such a protection at highest level is not provided for the judges of the Court of Serious Crimes, who render the most severe sentences to the members of the most dangerous organisations of the country!

Article 4

Point 1 provides that at any time during the qualification assessment, an assessee may resign, shall not be assessed any further regardless of the time of resignation, before or during the assessment period. This provision proves that the aim is not to identify cases of corruption and bringing the responsible persons before the law (*the latter is also observed due to the lack of the obligation on the part of the IQC to refer immediately to the prosecution body when it is informed of data or facts consisting a criminal offence)* but the intimidation of judges/prosecutors, in order to open vacancies in the judiciary, in order to include persons who have political relations to the current majority. This aim is clearly presented in the Document "Justice Reform Strategy" approved by the Special Parliamentary Commission on the Justice Sector Reform. Precisely, page 32 (Albanian version), Objective 4, Part IV "Legal training and education" provides for the taking of the measure of including in the law the proportional quota for admissions outside the competition in the School of Magistrate according to the needs of the system and in any case the provision of the obligation to attend the School of Magistrate for at least one year. The application of this measure which extremely politicises the judiciary, has made its way even in the provisions of the constitutional amendments (*Article 28 – point 5 of Article 136 restated, where it is envisaged that judges could only be Albanian citizens, who have a law degree – thus, not only those who have graduated from the School of Magistrate. While for the prosecutors it is expressively envisaged that prosecutors are appointed after having finished the School of Magistrate – refer to Article 50 – point 4 of Article 148 restated).*

The term "Registrar" is used in point 5, which is a function that is not specified in the draft.

Article 5

Point 1 of this Article, allows for the assessment of assets of the officials of the justice system. **Supporting entirely the opportunity for the verification of the assets of judges/prosecutors and the legitimacy of these assets, we think that giving this competence to a newly established structure (IQC) is inappropriate.**
As mentioned in point 2 and 3 of this Article, subjects, which shall be assessed pursuant to the law, since 2004 have been subject to the obligatory declaration of assets to the High Inspectorate for the Declaration and Audit of Assets and Conflict of Interests (HIDAA), a special structure functioning in Albania since 2003. In this context, strengthening the independence, the status and competences of the existing structure (HIDAA) is an appropriate solution in the context of meeting its aim for a complete and comprehensive verification of the assets of judges/prosecutors and the fight against corruption in general, in all sectors of public life.

Point 3 of the draft itself provides for HIDAA to review the declarations of assets by the subject under assessment and to notify IQC on the legitimacy of assets and accuracy of declaration. This is a procedure that HIDAA currently performs and when identifies any inaccuracy or illegitimacy, it informs concurrently the responsible bodies to take disciplinary measures and the prosecution body to initiate criminal proceedings (there are currently some judges and prosecutors under criminal proceeding based on this controlling mechanism). Introducing an additional mechanism and moreover overlapping its competencies with those of the existing structures, is considered as a way to avoid the safeguards that the existing mechanism provides for the judge/prosecutor under assessment. Thus, according to the existing mechanism the disciplinary measure is taken by the judiciary bodies (HCJ or Prosecutor General), as failure to appropriately declare the assets consist the circumstances for taking the measure of removal from office of the judge/prosecutor, while the draft shall render this competence (taking the disciplinary measure of removing from the office the judge/prosecutor) to a structure outside the judicial system and specifically to IQC, which is dependent on the Parliament! The draft even denies the right of an effective appeal in the judicial system of the judge/prosecutor who is removed from office, bringing about a structure appointed by the legislative power (with the votes of the parliamentary majority) which shall decide for the career in the judiciary and prosecution!

With regard to points 5 and 6, where it is envisaged that the assessee, who has assets greater than twice the amount justified by legitimate income, does not declare in time, inaccurately discloses or hides the assets, shall be presumed innocent and the disciplinary measure of dismissal shall be taken, **we bring to your attention that this cannot be an automatic mechanism.** It is not always the case that the findings of HIDAA for hiding the assets or inaccurate disclosure are true and accurate. Currently, neither HIDAA (an exclusive appointment of the parliamentary majority) nor IQC (expected to be set up) are convincingly independent from the politics. Therefore, their findings should be subject to the assessment of an independent body, in view of Article 42 of the Constitution of the Republic of Albania and Article 6 of ECHR. Since the above actions (inaccurate disclosure or hiding of assets) are considered a criminal offence, what will happen in the case of a presumption and the measure of dismissal of the judge/prosecutor has been taken, while the investigation of the prosecution body or the court conclude that this is not the case of an inaccurate disclosure or hiding of assets?!

Article 6

Point 1 of this Article gives to IQC the right to assess if judges/prosecutors, judges of the High Court or Constitutional Court have regular inappropriate contact with members of organised crime. Firstly, we should note that terms “regular inappropriate contacts” or “members of organised crimes” are evasive and unclear terms. So, it is not clear what will be considered as regular contact (contact over the telephone or physical one, contact two or three times, etc.). Moreover, it is not clear what is considered “inappropriate contact” and when, under what circumstances is contact with organised crime appropriate! Furthermore, it is not clear who is considered “member of organised crime”. A person who is referred as “member of organised crime” should they be declared with this term before are after the court declares them with a final decision?

Even in this case, points 3 and 4 presume the judge/prosecutor guilty, if they have contacts, or inaccurately disclose contact with different persons, by taking the measure of dismissal, in this case. **We deem that even in this case, the standard of presumption and the automatic dismissal measure should not be followed.** So far, judges/prosecutors have not had any legal obligation not to have contacts with certain categories of persons, or to keep a record of all their meetings from 1 January 2012. For this reason, we believe that this measure is disproportionate and it has a high potential for its subjective application in practice. As a rule, the measure of dismissal is taken for actions and behaviour related to the position, or actions and illicit behaviour conducted by the judges/prosecutors themselves. Taking the measure of dismissal under any circumstances or for any actions, which have been stipulated by the Albanian legislation so far as disciplinary violations, and giving to this provision even a retroactive effect (from 1 January 2012), seriously undermines the status of judges/prosecutors. We consider that this measure can be taken only if the contact has impacted the correct performance of the work of the judge/prosecutor, or if the contact has led to an unlawful act conducted by the judge/prosecutor.

We would like to bring to your attention that this measure for judges/prosecutors is proposed so that the MPs of the Albanian Parliament vote for it. However, some of the MPs are accused of strong connections with organised crime. Some of them have even been sentenced or accused of international trafficking in narcotic substances or in human beings. On the other hand, this measure is proposed to be voted by the MPs of the Albanian Parliament, who have also been accused by the State Police that they have sheltered in their cars members of organised crime declared internationally wanted, who have used the parliamentary immunity to impede the executive bodies to check the car and arrest the person wanted by the justice bodies. As a result, the question rises: *“Does this Parliament have the legitimacy (with this composition) to*

approve such a measure for judges and prosecutors?" "Can this measure be taken without the Parliament and public administration being firstly decriminalised?"

Article 7

Points 1 and 2 of this Article set out the assessment of the work record performance of judges/prosecutors, members of the High Court or Constitutional Court. We entirely support the professional assessment of judges and prosecutors and the identification of incompetent individuals and with insufficient knowledge, by removing them immediately from the system. However, on this point we would like to bring to your attention that the professional assessment of judges is a mechanism currently functioning in Albania. Thus, we consider as redundant the establishment of new *ad hoc* structures (without any experience in this area) to carry out this assessment. However, the current process of evaluation of judges/prosecutors should be improved and further adjusted in compliance with the international standards.

It is still unclear for us, how the administrative structure to be established will assess the judicial capacities or court decisions, since as a rule, this is a function performed by higher instances of the judicial system itself. Moreover, it is still unclear which "decrees" of the judge/prosecutor shall this structure assess, since these officials of the justice system are not entitled to issue decrees.

On the other hand, it is more absurd the fact that an administrative structure will assess the decisions of the Constitutional Court, the highest authority ensuring the application and implementation of the Constitution. Further, point 2 mentions the relevant inspection service, however we bring to your attention that in the case of the Constitutional Court there is not any inspection service in operation.

We note that the rule in point 5 is not clear. The provision mentions the case when the assessee is inappropriate and cannot be remedied with educational or training measure, still the individual is suspended. In this case, it is not specified what happens during the suspension period and the duration of suspension.

Article 8

Point 3 sets out that the First Instance Commission shall provide the assessee with a hearing, where an oral or written test is included, based on the field of work experience of the assessee. We reiterate that we do not support any governmental testing, testing of knowledge through an oral or written examination carried out by a Commission politically appointed by the parliamentary majority. Even the Joint Opinion by 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 Law on the Judiciary and the 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) underlines: *"Re-evaluation for the transitional period should be focused on the individual performance at work rather than on the examination".* These processed significantly undermine the issue of the status of judges/prosecutors (*irremovability from office)* and also open way to the extreme politicisation of the judiciary itself.

Articles 9 and 10

These provisions detail the process of taking the disciplinary measures against judges/prosecutors, members of the Constitutional Court and High Court. The process is structured in two instances, the First Instance Commission (administrative structure appointed by the Parliament) and Appeal Commission (administrative structure appoint by the Parliament). The procedure in its entirety does not guarantee sufficiently the status of

judges/prosecutors, by inappropriately intervening into the judicial system. The provision of the dismissal of judges/prosecutors by the political structures (*since the members are elected only by the Parliament with the votes of the parliamentary majority*), consist a flagrant violation of the principle of judiciary independence. The Joint Opinion by 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 Law on the Judiciary and the 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) highlights: *"The procedure of this body should be subject to the rules on the necessary safeguards for the rights of the individual judges affected, including rights of appeal to a court of law".*

It is clear that the whole procedure provided by these provisions, referring also to the provision of point 5 of Article 10 (which considers as final the decision of IQC and without any further appeal with judiciary means), it contradicts Article 42 of the Constitution of the Republic of Albania and Article 6 of ECHR. IQC cannot be considered "independent and impartial court" in the meaning of the above-mentioned provisions. Therefore, taking the measure of dismissal by structures out of the judicial system (structures depending on the Parliament) and denying the right to address to independent and impartial courts, consist a flagrant violation of the independence of the judicial power and the fundamental principles of the rule of law. This is the reason that the application of Article 131/f of the Constitution of the Republic of Albania has been suspended, as the drafters of the draft law are aware of the fact that the process does not guarantee the right of the judge/prosecutor to a due legal process.

III. Questions addressed to the Venice Commission on each specific provision

Article 3

The provision of point 4 of Article 12 (proposed in the draft) according to which *"Military forces of the allied states may be deployed or transit the Albanian territory, while the Albanian military forces may be dispatched abroad**, upon the decision of the Council of Ministers according to the ratified international agreements**"*, does it run counter to the provision of point 3 of Article 12 (current provision) providing for "*No foreign military force may be deployed not transit the Albanian territory, while no Albanian military force may be dispatched abroad, **unless by a law approved by the majority of all members of the Assembly***"? Does the fact that in point 4, the normative act made use of is "Decision of Council of Ministers issued in accordance with the ratified international agreements", while in point 3, the normative act applied is "law approved by majority of all the members of the Assembly", while the reference in such a case is made to the "military forces of allied states", a concept not elaborated legally, create ambiguity?

Article 4

Is the provision of Article 18 (being proposed) in compliance with the provision of Article 14 of ECHR and Article 1 of Protocol 12 of ECHR?

Article 5

Is Article 39, point 2 (being proposed) in compliance with ECHR and specifically Article 3 of Protocol 4 and Article 1 of Protocol 7 of ECHR?

Article 6

Is Article 43 (being proposed) in compliance with Article 6 of ECHR and Article 2 of Protocol 7 of ECHR?

Article 9

Is there any contradictory contents between Article 109 point 3/1 (being proposed) and Articles 16 and 45, point 1 of the Constitution?

Article 12

1- Article 131, paragraph 2 (being proposed), depriving the Constitutional Court of its powers to declare a law approved by the Assembly and revising the Constitution as unconstitutional, does this run counter to the current Article 131, letter "a" (Constitutional Court decides on: a) compliance of the law with the constitution…")?

2- Under the circumstances when the provision restricting the controlling powers of the Constitutional Court (according to Article 131 paragraph 2 (being proposed)) was not contained in the original (current) text of the constitution, is this provision an undermining act of the authority of the Constitutional Court?

3- Does Article 131 paragraph 2 (being proposed) run counter to Article 124 point 1, sentence "Constitutional Court guarantees the observation of the constitution…"?

4- Under the circumstances when the Albanian constitution does not contain any group of unamendable provisions, how is the observation of the constitution going to be guaranteed, as long as the Assembly approves a law to revise the Constitution, which may amend for worse the standards regarding the fundamental constitutional principles or fundamental human rights and freedoms or substantial parts of the constitutional organisation and order?

5 – The Albanian constitution in its current situation provides as a guarantee of the revising process of the Constitution the constitutional procedure under its Article 177 as well as the guarantee of the constitutional *a posteori* control under Article 131, letter "a". The elimination of the last resort guarantee, i.e., constitutional control, does this restrict the guarantees of the sustainability of the constitution and in this way the legal security?

Article 15

1- The formulae of election of Constitutional Court members under Article 125/1 (being proposed) provides for the election of 3 members by the President, 3 members by the Assembly and 3 members by the joint meeting of the High Court and High Administrative Court. This formulae, compared to the current formulae (current Article 125), i.e., upon the proposal of the President and consent of Assembly, does this increase or reduce the politicisation of the process of electing these members?

2 – Does the proposed formulae guarantee the minimum standard of the independence of the Constitutional Court?

3 – The election of 6 members (respectively 3 by the President, 3 members by the Assembly with a simple majority), does this recognise any democratic legitimisation for these members?

4 - Article 125/2 (being proposed) providing the orientation that the detailed criteria of the appointment are set out more often in the law and not in the constitution, is it an advisable solution and does it guarantee an objective selection on the professional, moral integrity, beyond the political preferences? Does the risk exist that the "legal criteria" may be overlapping or exceeding the "constitutional criteria"?

5 – The absence of the application, examination and evaluation procedures for candidates by the Justice Appointments Council (Article 149/1 being proposed), does it provide for public reliability in the preliminary process of appointing the members of the Constitutional Court?

6 – The Justice Appointments Council considers and ranks the candidates being proposed by the proposing institutions (Article 149/1 being proposed), thus not making possible a free and open application for candidates. Does this make possible a democratic selective and not pre-determined process?

7 – The members being appointed by the President and Assembly shall be selected from the list drafted by the Justice Appointments Council (Article 125 being proposed). This exclusive and conclusive right, is it not decisive in pre-determining the winning candidates, this narrowing the room for the Assembly and President to make any selection?

8 – In the event of failure of the President or Assembly to elect any of the candidates offered by the Justice Appointments Council, does there a deadlock situation emerge? Which would be an appropriate defusing mechanism?

9 – 3 members are being elected by the joint meeting of the High Court and High Administrative Court. Which is the formulae of election? By what majority? Is there any defusing mechanism in the event of deadlock and not attaining the respective majority?

10 – The provision in Article 125/2 (being proposed) that the selections hall occur "*from the ranks of the lawyers with at least 15 years experience as judges, prosecutors, advocates, professors of law, senior public administration employees, with a renowned activity in the field of constitutional law, human rights and other fields of law*", is it restrictive, under the circumstances when the democratic constitutional system has been established not earlier than 25 years ago?

11 – Does there a risk exist that such criteria (more largely that of seniority in profession of 15 years) create the possibility of forced selection from the circle of the former functionaries of the justice system, having been active in the previous communist system?

12 – The exclusive focus of the criteria on solely the effective professional experience, as judge, prosecutor, advocate, professor of law or senior public administration employee, does this narrow the range of selection, thus predetermining the winning potential applicants? Doe these criteria guarantee the diversification of cultures and experiences of the members of the Constitutional Court?

13- Article 125/2 (being proposed) provides for the "*Judges of the Constitutional Court to be appointed for 12 years, without the right to re-appointment*". Does this provision bring about any essential change compared to the current provision of the Constitution, according to which "*Judges are appointed for 9 years, without the right to reappointment*", in terms of independence and consolidation of the case law.

14 – Is the criterion of "not being committed in the steering forums of political parties" sufficient in selecting the candidates as political representatives, under the circumstances when an applicant may have been assuming political or governmental positions while not being involved formally in steering forums of the parties? Which would be a more appropriate criterion?

15 – The renewal of one third in every 4 years (i.e., the duration of the mandate of the Assembly), does this deepen the possibility of politicising its membership?

16 – In Article 125/4 (being proposed), the Chairman of the Constitutional Court is elected by the absolute majority of the members (i.e., minimum 5 votes in "favour"). Does this formulae create the possibility of a deadlock? Which would be the defusing mechanism?

17 – In Article 125/4 (being proposed), the Chairman of the Constitutional Court is elected for a 4-year period, without the right to re-election. Does this formulation provide for the possibility of re-election of the Chairman after a short period of time (for instance 1 month), since the recently elected may resign for any sort of reason?

Article 16

Does the provision of Article 126 (being proposed) guarantee the exercise of the function in full independence for the members of the Constitutional Court?

Article 17

1 – In Article 127 (being proposed) compared to (current) Article 127, the cause of the end of mandate has been deleted upon "*failure to assume office for more than 6 months*;". Is this a possibility creating an abnormal situation in the functioning of the court?

2- As a cause for the end of the mandate has been foreseen also "*being punished upon final decision in disciplinary proceedings*" (Article 127/1, letter "d"). What sort of disciplinary measure is it about? Is there one or many types of measures? Is the gravity of the disciplinary measure or extent of guilt in the violation taken account of?

3 – In Article 127/3 (being proposed), it has been foreseen that in the event of vacancy, the judge being appointed stays in office until the end of the outgoing member. This "shortened mandate", does it violate the standard of the independence of the judge?

Article 18

1- Article 128 (being proposed), does this eliminate the guarantee of stay in office for the member of the Constitutional Court, thus not providing for explicitly the cases of disciplinary liability, compared to the (current) Article 128, which provides explicitly for them? Should the cases of disciplinary liability be foreseen in the Constitution?

2 – The delegation of setting out the cases of disciplinary liability to the law (dismissal), does this create room for bear and discretionary powers to impose liability on the members of the Constitutional Court?

Article 21

1- Article 130 (being proposed), does it create ample opportunity for the members of the Constitutional Court to be involved in activities (free of charge) thus being in situations of conflict of interests, or which throw doubt on his impartiality in the assumption of his function (for instance, involvement in state administration or political involvement).

2- The amendment affected to the current Article 130, which provides for banning the member of the Constitutional Court to assume any other state, political or private activity, does it consist in lowering the standard of independence and impartiality?

Article 24

1- In Article 132/1 (being proposed) compared to the current Article 132/1, the provision that the decision of the Constitutional Court "*have general binding power*" has been deleted. Does this bring about ambiguity at the extent of *erga omnes* of the legal force of these decisions?

2- In Article 132/2 (being proposed), does there exist a confusion between the concept of entry of the decision into effect (by way of announcement and publication in the official journal) with the concept of extension of the effects of the decision (immediate effects, effects postponed in time or retroactive force)?

Article 27

1 – What is the added value of separating the High Administrative Court, while its jurisdictional scope and function is the same with the one carried out today by the Administrative Chamber of the High Court:

2 – Abolishing the Administrative Appeal Court, does this affect the right to file a complaint with a higher court under the current Article 43 of the constitution or 43 (being proposed), as long as the High Administrative Court examines just points of law and not points of fact?

Article 28

1- Article 136/1 (being proposed) provides for *"Members of the High Court and High Administrative Court be appointed with a mandate of 12 years, without the right to re-appointment".* Does this bring any qualitative amendment to compared to the current provision in the Constitution according to which *"…Members of the High Court stay in office for 9 years, without the right to re-appointment"*, in terms of independence, consolidation of the case law and considering them as effective part of the judicial career?

2 – Does this wording allow the possibility of re-electing the members after a short period (for instance 1 month)? Is this provision also valid for the current members of the High Court, to be appointed as members of the high Administrative Court?

3 – The provision contained in Article 136/2 (being proposed) that the "*Members of the high Court and High Administrative Court are elected from the ranks of judges with at least 15 years experience…*", is it restrictive, under the circumstances when the democratic constitutional system has been established not earlier than 25 years ago, and when the current legal rule has been imposed for 10 years now?

4 – The provision in this Article that "*Members of the High Court and High Administrative Court shall be selected from the ranks of the lawyers with at least 20 years experience, having worked as advocates, law professors, or in the high public administration*…"

takes these two courts out of the judiciary, since it makes possible the recruitment beyond the normal legal rules of the career.

5 – Does this provision create the possibility according to which all the members of these courts can be elected from non-judges?

6 – Inserting the experience of 20 years for non-judge lawyers, under the circumstances when the democratic constitutional system was established not earlier than 25 years ago, does this create the exclusive roof of recruiting into these courts the lawyers having been schooled during the communist system?

7 – Is the criterion "*of not being involved in the steering forums of the political parties*", appropriate in the selection of the candidates as political representatives, under the circumstances when the applicant could have assumed political or governmental positions even without being formally involved in the steering forums of the parties? Which would be an appropriate criterion?

8 - Article 136/2 (being proposed), providing the orientation that the appointment criteria be set out by law and not in the Constitution, is it an advisable solution which would guarantee an objective selection concerning the professional, moral integrity, beyond the political preferences? Does the risk that the "legal criteria" be overlapping or exceeding the "constitutional criteria"?

9- The absence of the application, examination and evaluation procedures for the candidates by the High Judicial Council, does it create public reliability in the preliminary process of appointing the members of the Constitutional Court?

10 - In Article 136/2 (being proposed), the phrase in the third sentence "…*as well as the conditions for the continuation of the assumption of the profession of the judge shall be set out by law*", does this create the possibility of early termination or extension beyond the deadline of the mandate for the judges of these courts?

11 – The election of the Chairman of the High Court or High Administrative Court shall occur by the absolute majority of the members. Does this formula bring about a deadlock situation? What sort of defusing mechanism can made use of?

Article 29

1- The provision of Article 137/1 (being proposed), does it guarantee the assumption of the function in full independence for judges?

2- Article 137/2 (being proposed) providing for the "*Judges shall be disciplinary liable, under the law*", does this lower the standard of guarantees in connection with the irremovability from office and independence of assumption of duty, while the cases of disciplinary liability actually stand at the Constitutional Level (Article 140 in the event of the High Court judges and Article 147/6 of the Constitution for the ordinary judges?

Article 30

1- Article 138 (being proposed) while providing for the "*Time of stay in office for judges can not be restricted, unless provided for differently in the Constitution*", does this lower the standard of irremovability from office for judges, under the circumstances when the current Article does not make possible any exception from this rule?

2 – The provision on the civil liability for judges, under Article 138/2, providing for "*The salary and other benefits cannot be reduced, unless this is imposed as a sanction on judges*", is it in compliance with the standards of responsibility and independence of judges?

Article 31

1- In Article 139/1 (being proposed) compared to (current) Article 139/1, the cause for the end of the mandate "*not assuming office for more than 6 months*" has been deleted. Is this an eventuality bringing about an abnormal situation in the functioning of the court?

2 – The cases for the end of the mandate for the members of the High Court and High Administrative Court in Article 139/1 (being proposed) do not include the case of ending the mandate due to the disciplinary violations (as provided for the Constitutional Court). Is this a provision in compliance with the standards of accountability and responsibility of the judges of

these courts? Is there a disparity between Article 139/1 (being proposed) and Article 139/4 (being proposed)?

3- In Article 139/3 (being proposed) it has been foreseen that in the event of vacancy, the judge being appointed, shall stay in office until he end of the outgoing judge. This "shortened mandate", does it effect the standard of independence of the judge?

Article 33

With the repeal of (current) Article 140 of the Constitution, the cases of disciplinary liability for the judges of the High Court are not explicitly foreseen in the Constitution. Is this a restriction of the standards of independence of the High Court?

Article 34

Under Article 141/2 (being proposed) "*Falling under the jurisdiction of (the High Court and High Administrative Court) shall be the judicial cases being examined by the lower courts, with the exception of the cases belonging to the jurisdiction of the Constitutional Court*". Falling under the jurisdiction of the Constitutional Court, regarding the cases of the constitutional control, cannot be any judicial case. Does this bring about a mix-up among the jurisdictions of the three respective courts?

Article 36

Article 143 (being proposed), does it provide for more ample opportunities for the judge to be committed to activities (free of charge), thus placing him in situations of the conflict of interest or casting doubt on his impartiality while assuming his function (for instance other state-related or political involvement)?

Article 40

1- In Article 147 (being proposed) the number of judges being elected within the HJC is 6, thus reducing it by 2, less than the current composition. The early interruption of the mandate of 2 elected judges, does this consist a violation of the standard of the legal security?

2- The reduction of the HJC members from 15 to 11, does this bring about wider possibilities for the HJC to be subject to external influences (mainly political), thus risking the independence in assuming the function?

3- The relatively small number in the composition of HJC (just 6), does this make them vulnerable to the political influence or other interests?

4- Under the circumstances when the ratio between the judges and lay members is only by 1 member, does this risk that this relationship is effectively toppled, due to the political or other influences?

5- In Article 147 (being proposed) the National Judicial conference has been abolished, which exists as a constitutional authority. Is this a measure which aggravates the self-regulation and consequently the independence of the judicial system?

6- The election of the lay members in a majority of 3/5, does this guarantee a substantial participation of the opposition in the Assembly?

7- The lack of procedures bearing a connection with the free and open application of the candidates from the field of legal profession, law professors, teachers at the School of Magistrates or civil society, does this create the risk of pre-determining the candidacies which are to be offered to the Assembly and the latter shall make the formal pre-determined voting?

8- If the Assembly does not attain the qualified majority of 3/5 in both rounds under Article 147/3 (being proposed), the defusing mechanism under which the one ranking best by the Justice Appointments Council shall will, is it appropriate?

9 – The participation of the Minister of Justice, being vested with the right to request the institution of investigation due to the disciplinary violations against judges, is this a direct intervention with the judicial system?

10 – The exclusion of the President of the Republic from the participation and chairing the HJC, although he does not have executive powers, while the participation of the Minister of Justice is preserved, is this a measure strengthening the political influence on HJC?

11 – Under the circumstances when the HJC members assume this task full time, the provision that the chairman of HJC may be elected only from the lay members, does this weaken the independence of HJC?

12 – The provision that the judge members of HJC shall, after the end of their mandate, return to the previous office, thus not recognising the time of involvement with HJC as part of promotion, does this make them disinterested for participating at HJC? Does this formulae provide for optimal conditions for the independence of theirs?

Article 41

1- Under the circumstances when the range of powers of HJC has widened, the number of 11 members, is it appropriate for effectively assuming these tasks?

2 – Would it be advisable that the issues which are connected to the disciplinary measures for judges be dealt with by the commissions within HJC, which in in these cases consists of panels composed of judges?

3 – Is it appropriate that the members of the High Court and the High Administrative Court be appointed by the President and be proceeded disciplinarily against by the HJC?

4 – Is it appropriate that the rules of ethics for judges be approved by HJC, while they are actually being approved by the assembly of judges (National Judicial Conference)?

Article 42

1- The termination of the mandate of the judge members of the HJC due to a final decision in disciplinary proceedings, does this consist a measure for reducing their independence in the assumption of their function, while, under the current Constitution, such a measure is not recognised?

2 – Rendering such a measure by the Disciplinary Justice Tribunal (Article 147/f being proposed), thus a different body from the one electing him, is it in compliance with the standards on independence of Judicial Councils?

3 – The administrative investigation into these violations by the High Justice Inspectorate (Article 147/d being proposed), does it consist a political intervention with the activity of the HJC members, specifically those elected by the judiciary?

4- In Article 147/3 (being proposed) is foreseen in the events of vacancy, while the member being appointed stays in office until the end of the outgoing member. This “shortened mandate”, does it affect the standard of independence of the judge?

5 – In the event of replacement as above, it has been foreseen that the replacing member “be appointed” and not “elected”. Does this consist a deviation from the process of electing the judge members or lay members under Article 147??

Article 43

Article 147/c (being proposed) providing for the “*Member of the High Judicial Council” shall be held disciplinarily liable under the law*”, does this reduce the standard of guarantees of irremovability from office and independence in assuming the office?

Article 44

Article 147/ç (being proposed), does this provide for more ample opportunities for the HJC member to be committed to activities (free of charge), thus placing him in situations of the conflict of interest or casting doubt on his impartiality while assuming his function (for instance other state-related or political involvement)?

Article 45

1- The establishment of a body due to investigate into the disciplinary liability of the independent constitutional bodies (such as HJC, HPC, Constitutional Court, High Court, judges, prosecutors), does this affect the standard of independence and the self-regulation of the judiciary system?

2 – The election of this body by the Assembly, does this consist an extreme politicisation of the body and consequently of the process of disciplinary inspection?

3 - Inserting very high limits of professional experience (of 20 years for the effective activity as judges or former judges), even higher than the Constitutional Court and High Court, under the circumstances when the democratic constitutional system was established not earlier than 25 years ago, does this create the risk of selecting judges and prosecutors having been schooled during the communist system?

4 – Setting out such a high limit of professional experience, does hit create the risk of pre-determining the winning candidates?

5 – The majority of 3/5 of the Assembly required for their election, does it guarantee the substantial participation of the opposition? The defusing mechanism foreseen in Article 147/d, point 5, is it appropriate?

6- Article 147/d point 9 (being proposed) provides for the participation of the Minister of Justice at the meetings of the High Inspectorate of Justice, and his right to ask for the institution of investigation in connection with the disciplinary breaches against the judges, prosecutors, members of the high Judicial Council, High Prosecutorial Council, Prosecutor General, as well as accomplishment of inspection and verification of complaints. Does this measure politicise the organisation and the assumption of the function of the Inspectorate independently and consequently placing all justice system bodies under strong political impact?

7 – The provision in Article 147/d, point 10 (being proposed) that the members of the High Inspectorate of Justice shall, after the end of their mandate, return to their previous position, not recognising to them the time of participation as part of their carrier. Does this make them disinterested to participate at HJC? Does this formulae create optimal conditions for their independence?

8 – The election of the Inspector General of the High Inspectorate of Justice, referring to the formula foreseen in Article 147/d point 11 (being proposed), i.e., in the event of deadlock in the Assembly by simple majority, does this consist a politicising measure in its organisation?

Article 46

In Article 147/dh point 3 (being proposed) it has been foreseen that in the event of vacancy of the High Inspectorate of Justice, the member being appointed stays in office until the end of the outgoing member. This “shortened mandate”, does it violate the standard of the independence of the judge?

Article 47

1- The accomplishment of the Disciplinary Inspection on the members of the High Justice Inspectorate by the Minister of Justice, does this subject this body entirely to the Minister of Justice, i.e., to the political power?

2- Consequently, are the members of the other bodies politically subject to him since they are inspected by the High Justice Inspectorate, such as the Constitutional Court, High Court, High Administrative Court, High Judicial Council, High Prosecutorial Council, Prosecutor General, judges and prosecutors??

3 – Failure to provide in the Constitution the cases and violations or the Inspection procedure, does this make possible that the subsequent provisions in the law not abide by the due process?

Article 48

Article 147/f (being proposed), does this create ample possibilities that the member of the High Justice Inspectorate, be committed in activities (free of charge) placing him in situations of the conflict of interest, or that cast doubt on the impartiality in the course of assuming the function (for instance, other state-related or political involvement)?

Article 49

1- The composition, selection, organisation and functioning of the Disciplinary Justice Tribunal, does this meet the characteristics of “an independent and impartial court, being constituted based on the law”, referring to the standard of Article 6 of the ECHR);

2 – Does this Tribunal contain the characteristics of the special court?

3 – The composition of the lay members, such as the Prosecutor General, Minister of Justice, Chairman of the National Chamber of Advocacy, do these deprive this body of the characteristics of the "Court", as provided in Article 6 of ECHR?

4 – Pre-determining the members nominally, does this provide the possibility of political capture of the justice system, under the circumstances where the majority of the nominees are appointed by the current political majority and the control (inspection) is accomplished (as stated above) by deeply politicised bodies?

5 – Such an organisation and composition of his body, i.e., with the participation of the Minister of Justice at the Administrative Disciplinary Tribunal, while the Minister is part of the Investigation body (High Inspectorate of Justice) to each of these members, as well as to the constitutional Court, does this affect the due process under Article 6 of the ECHR?

Article 50

1- Does Article 148/4 (being proposed) have a rational meaning?

2- Is the vesting of the prosecution office with other tasks provided for in the law incompliance with the international standards?

3- What does the decentralisation principle imply? Is it connected to the concept of "decentralisation" made use of in Article 13 of the current Constitution?

4 – Failure of providing for in the Constitutions of the cases of disciplinary liability of judges, does this facilitate the creation of discretionary room for providing such cases in the law? Is this a measure reducing their independence?

Article 51

1- The relatively small number in the composition of HPC (just 6), does this make them vulnerable to the political influence or other interests?

2- Under the circumstances when the ratio between the prosecutors and lay members is only by 1 member, does this risk that this relationship is effectively toppled, due to the political or other influences?

3- The election of the lay members in a majority of 3/5, does this guarantee a substantial participation of the opposition in the Assembly?

4- The lack of procedures bearing a connection with the free and open application of the candidates from the field of legal profession, law professors, teachers at the School of Magistrates or civil society, does this create the risk of pre-determining the candidacies which are to be offered to the Assembly and the latter shall make the formal pre-determined voting?

5- If the Assembly does not attain the qualified majority of 3/5 in both rounds under Article 147/3 (being proposed), the defusing mechanism under which the one ranking best by the Justice Appointments Council shall be elected, is it appropriate?

6- The participation of the Minister of Justice, being vested with the right to request the institution of investigation due to the disciplinary violations against prosecutors, is this a direct intervention with the prosecutorial system?

7- The exclusion of the President of the Republic from the participation at the HPC, although he does not have executive powers, while the participation of the Minister of Justice is preserved, is this a measure strengthening the political influence on HPC?

8- Under the circumstances when the HPC members assume this task full time, the provision that the chairman of HPC may be elected only from the lay members, does this weaken the independence of HPC?

9- The provision that the prosecutor members of HPC shall, after the end of their mandate, return to the previous office, thus not recognising the time of involvement with HPC as part of promotion, does this make them disinterested for participating at HPC? Does this formulae provide for optimal conditions for the independence of theirs?

Article 52

1- Would it be advisable that the cases bearing a connection to the disciplinary measures against prosecutors, be dealt with by the commissions of HPC, which consist of panels composed of prosecutors?

2 – Is it appropriate that the candidates for Prosecutor General be proposed by the HPC and approved by the Assembly?

3 - Failure to provide these procedures of application, examination and evaluation of these candidates in the Constitution, does this provide for ample room for politicising the process?

4 – Is it appropriate that the rules of ethics for prosecutors be approved by HPC and not by the assembly of prosecutors?

Article 53

1- The establishment of the Special Anti-Corruption Structure of the Prosecution Office, does this bring about dualism in the Prosecutorial system? Does this run counter to Article 148/1 (being proposed)?

2 – Should the SACS powers expand over the entire state functionaries and not just on the judges and prosecutors, or senior officials, set out by law?

3 – Referring in Article 148/c, point 1, of the "*First Instance Court and Appeal Court of Anti-Corruption*", does this mean that a specialised court shall be set up? What are the terms of definition, organisation, substantial powers? Should such elements be inserted into the Constitution?

4 – Are the criteria set out in Article 148/c, point 3, (being proposed) sufficient for the protection of the "*pureness of the figure*" of the SACS prosecutors" Under the circumstances when HIDA (body controlling the assets and conflict of interests of officials) is appointed by the Assembly by simple majority, does there exist the risk of political influence on these prosecutors and on all the other state officials?

5 – The provision of Article 148/c, point c, (being proposed) recognising the National Bureau of investigation "to perform investigations", does this mean that it can conduct independent investigations from the Prosecution Office and SACS?

6 - Under the circumstances when nothing has been provided in this provision regarding the composition, status, powers, activity of the National Bureau of Investigation, does this body risk of being put under the control of the government and be used for political purposes?

7 – Under the circumstances when the SACS members are considered independent under Article 148/c point 2 (being proposed), to what extent are the standards of accountability and responsibility and conducting criminal prosecution beyond any influence guaranteed?

Article 54

1- Does the formula of appointing the Prosecutor General guarantee substantial participation by 3/5 of the Assembly? Does this formulae pose any eventuality of deadlock? Which would be a defusing mechanism?

2 – The criteria of selection of the Prosecutor General are sufficiently clear as they are set out in Article 149/2 (being proposed).

Article 55

1- Failure to provide for the cases of disciplinary proceedings for the Prosecutor General in the Constitution, does this lower the standard of independence of this institution and create discretionary space in the law?

2 – What is the concept of "*serious disciplinary violation*" mentioned in Article 149, point 2 (being proposed)?

Article 57

1- The justice Appointments Council as provided for in 149/1 (being proposed), does it meet the features of a non-political body?

2 - Pre-determining the members nominally and under the circumstances where the majority of the nominees are appointed by the current political majority, does this provide the possibility of political capture of the entire justice system through the process of appointments?

3 – The absence of the procedures provided for in the Constitution, does this create the space in the law that they be drafted under the political influence of the respective majority?

Article 58

The termination of the mandates of the functionaries referred to in Article 179 (being proposed), does this consist a violation of the standards of the rule of law?

IV. Conclusions

We express our full conviction that this Opinion shall assist in reflecting the existing reality in Albania and it is going to make its own contribution to find out the best solutions for reforming the justice system. We would like our Opinion on the constitutional amendments be taken into account by the local authorities, to the effect of finding the best joint solutions and realising an all-inclusive and transparent process. But the *de facto* exclusion of the opposition from the process (through drafting the constitutional amendments in secrecy and no calling the experts nominated by the opposition), we were obliged to submit this Opinion to the Venice Commission. At this stage, we wish to highlight that obtaining the Venice Commission on any product in the context of the 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 regress and the political capture of the justice system.

Availing ourselves of this opportunity to thank the Venice Commission for the Extraordinary Contribution in strengthening democracy in Albania

With high consideration,

DEPUTY CHAIRMAN OF THE *AD HOC* PARLIAMENTARY COMMITTEE

EDUARD HALIMI