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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

ALBANIA

DRAFT OPINION

ON

DRAFT CONSTITUTIONAL AMENDMENTS ENABLING THE VETTING OF POLITICIANS

On the basis of comments

by

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I. Introduction

1. By a letter dated 2 October 2018, the Speaker of the Parliament of Albania, Mr Gramoz Ruçi requested the opinion of the Venice Commission on the draft law on some addenda and amendments to Law No. 8417, dated 21.10.1998, the Constitution of the Republic of Albania (Constitutional amendments on vetting process, including the assessment of relations of the senior public officials with organized crime), that had been submitted to the Parliament by the joint initiative of the parliamentary groups of the Democratic Party and the Socialist Movement for Integration (hereinafter "the draft law"; see CDL-REF(2018)057 and CDL-REF(2016)064).

2. The Venice Commission appointed Mrs Veronika Bílková, vice-President of the Venice Commission, Mr Oliver Kask, Mr Jørgen Steen Sørensen and Ms Hanna Suchocka, Honorary President of the Venice Commission, to act as rapporteurs for this opinion. Mr James Hamilton, former member of the Venice Commission, was appointed as legal expert.

3. A delegation of the Venice Commission visited Tirana on 19-20 November 2018. The Venice Commission would like to express its gratitude to the Albanian authorities for the excellent organization of the visit and the hospitality shown.

4. The present opinion is based on the English translation of the proposed constitutional amendments provided by the Albanian authorities. The analysis also takes into account the written Observations of the Socialist Group in the Albanian Parliament on the Draft Law as well as a written "Position on the amendment and the mechanism of application"[1] by the Democratic Party Parliamentary Group, as authors of the proposed amendments, documents provided to the rapporteurs following their visit to Albania. The questions posed by the Speaker in the request letter will not be addressed separately but as part of the consideration of the draft text.

1. The present Opinion was discussed at the Sub-Commission on Democratic Institutions (Venice, 13 December 2018) and was subsequently adopted by the Venice Commission at … its Plenary Session (Venice, …).

II. Background

5. On 7 September 2018, the parliamentary groups of the Democratic Party and the Socialist Movement for Integration submitted Draft constitutional amendments on vetting process, including the assessment of relations of the senior public officials with organized crime. The draft would amend three provisions of the Constitution of the Republic of Albania, namely Articles 45, 176 and 179.

6. In Article 45, the first sentence of paragraph 3 stipulating that "*Exempted from the right to be elected shall be the citizens being sentenced to imprisonment upon a formally and substantially final decision, in connection with the commission of a crime, under the rules set out in a law being approved by three fifth of all the members of the Parliament"* would be revised to read as follows:

> *"The nationals who are sentenced by imprisonment based on a final judgment for the commission of a crime or nationals who have contacts with persons involved in the organized crime, according to the rules established by a law adopted with three fifth of all members of the Parliament, shall be exempted from the right to be elected".*

[1] "Stance of the Democratic Party Parliamentary Group on the constitutional amendments on vetting in politics", hereinafter "Position of the authors of the draft law"

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7. The effect of this amendment, therefore, would be to add to the category of persons who are prevented from being candidates for Parliament or other elective positions those nationals who "have contacts with persons involved in the organized crime".

8. Article 176 would be complemented by a new section on "Mechanism of Guaranteeing the Integrity of Public Officials". The section encompasses two provisions: new Article 176/1 and new Article 176/2.

9. Article 176/1 defines the purpose of the control of integrity, which is that of *"protecting and guaranteeing the democratic proper functioning of the Parliament, local governance bodies, constitutional or statutory bodies from the influence or participation in policy making and/or decision-making of senior officials, who have contacts with the persons involved in the organized crime*". It also stipulates that the integrity control shall be carried out based on the principles of due process and the respect for fundamental rights.

10. Article 176/2 gives a list of individuals to be subject to the integrity control. Those include: members of the Parliament, mayors and every director or member of the institutions established by the constitution or by the law, appointed in office by voting from the Parliament, including the function of the Prime Minister or members of the Council of Ministers. The provision also sets the rules for the integrity control. Under these rules, individuals subject to the control would need to submit a declaration, serving for identifying whether they have contacts with persons involved in organized crime. The integrity control is to be based on this background declaration and other evidence, including decisions of the Albanian or foreign courts. The background declaration can be used only in this process and not for purposes of criminal prosecution.

11. If such contacts are established, or the subject does not submit in due time the background declaration, or there are "attempts to make inaccurate declarations" or to hide contacts with organized crime, the presumption shall apply in favour of the measure of prohibition to be elected or appointed in public office, termination of the term of office or dismissal from duty. The individual then has the burden "to prove the opposite." Finally, where the subject does not justify the lawful ownership of his/her property "according to the decisions of the responsible constitutional body", a prohibition on election or appointment or termination of the term of office or dismissal is also to apply.

12. Article 179 would be complemented by a new Article 179/c, providing for the term of office of officials elected or appointed in constitutional and statutory bodies before the entry into force of the law to terminate if it is found that they are "involved in the circle of subjects who have contact with persons involved in organised crime".

13. The proposal is silent as to who would be responsible for carrying out the vetting and in particular whether it would be a judicial body. However, during the visit of the Venice Delegation to Albania, the supporters of the proposal made it clear that it was their intention to provide a mechanism for politicians and officeholders corresponding to the existing vetting process which is being conducted for judges and prosecutors.

14. The draft constitutional amendments foresee the adoption of implementing legislation, a law to be adopted by the qualified majority 3/5 of all members of the parliament, which should set the rules, conditions and authorities to enforce the system of integrity control (see draft Articles 45(3) and 176/2). It is important to understand the intended extent, content and mode of implementation of this control. Although some information on possible implementing mechanisms was provided during the exchanges held in Tirana, and, subsequently, in the "Position of the authors of the draft law", no such (draft) implementing legislation was, however,

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made available to the Venice Commission. This makes the assessment of the proposed constitutional amendments somewhat difficult.

15. The Explanatory report attached to the draft constitutional amendments indicates that the main reason for the introduction of the drafts were data showing that "*cooperation between organized crime and senior public officials is at alarming levels and that culture of impunity against crime-related politicians has been cemented*". Such cooperation, as the report notes, "*poses a serious threat to integrity and functioning of democracy and democratic institutions and to the national security*". The proposed integrity control should help to counter this threat, complementing in this way the previous initiatives adopted in Albania to cleanse the state administration from incompetent, corrupted and/or crime-related individuals (see below).

16. From the various exchanges held by the Rapporteurs during the visit to Albania, it appears quite clear that there is indeed a problem of inappropriate contacts between politicians and criminal elements right across the political spectrum. The question is whether the mechanisms proposed in the draft law are appropriate to deal with it, and in line with existing standards and practice.

III. Legal and constitutional framework. On-going reforms

17. The Constitution of Albania, adopted in 1998 and subsequently amended, contains a comprehensive catalogue of fundamental human rights. Article 45 guarantees the right of every citizen over the age of 18 to vote and to be elected (para. 1). The right to vote is denied to citizens who have been declared mentally incompetent by a final court decision (para. 2). The right to be elected is denied to persons convicted to a prison sanction (para. 3).[2]

18. A general limitation clause (new Article 6/1), establishing the criterion of integrity as a pre-requirement for being elected or appointed to public offices as well as for holding such office, was introduced by an amendment of the Constitution in 2015, as part of the basic principles underlying the Albanian state and the organization and functioning of its institutions. Article 6/1 reads: *"The election or appointment to or assumption of a public function with one of the bodies foreseen in this Constitution or established by law, regardless of the regulation contained in other provisions of this Constitution, shall be prohibited, as long as circumstances are established impairing the integrity of the public functionary, under the conditions and rules provided for by law being approved by three fifth of the entire members of the Assembly."*

19. Also, according to paragraph 1 of Article 179/a "*The mandate of officials elected or appointed in the constitutional organs and the organs established by law, which was obtained prior to the entry into force of this law, shall terminate or become invalid, if it is ascertained that the elected or appointed person falls in the ranks of the subjects which are exempted from the right to be elected, under Articles 6/1 and 45, point 3, of the Constitution.*"

20. The proposed constitutional amendments are intended to complement regulations which are now already contained in the Constitution and several previously adopted legislative acts aimed at cleansing the state administration from incompetent, corrupted, and/or crime-related individuals. These initiatives include the decriminalization reform, the vetting of the judiciary, and the vetting of the police, all processes currently on-going in Albania.

21. The decriminalization reform seeks to introduce, and enforce, criminal responsibility with respect to individuals who have engaged in criminal acts and to remove such individuals from

[2] Further limits on the right to be elected are stipulated in Articles 69(1), 86(2), 109(3), 167(1) and 170(6) of the Constitution.

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the state administration. It relies on two main legal acts, the 2009 so-called Anti-Mafia Law,[3] directed against organized crime, trafficking, corruption and certain other crimes, and the 2015 so-called Decriminalization Law.

22. The Law No.138/2015 on warranting the personal integrity of officials who are elected, nominated or exercise public functions, the so-called "Decriminalisation Law", with the declared aimed at restoring public confidence in the functioning of public institutions and state administration, contains a list of elected and appointed positions (protected positions) which are not available to persons who: a) have been convicted in Albania for one of the criminal offences listed in Article 2(1)(a); b) have been convicted, or prosecuted, for such a crime in the EU member states, the US, Canada or Australia; or c) have been expelled from the territory of any of such countries in respect of any of these crimes or for serious public security violations of the respective State. The Law also contains a quite detailed enforcement mechanism, including rules, institutions and procedure for the verification of integrity (based on a self-declaration by the concerned individuals), as well as time limits for implementation and for the ensuing restriction.

23. As regards the practice, the Explanatory Report to the draft constitutional amendments acknowledges that the decriminalization reform has "brought considerable results", resulting in a number of dismissals and resignations in the course of the two years of its implementation.

24. The vetting of all sitting judges and prosecutors, aimed at removing those corrupt and incompetent among them, is one of the most important parts of a broader reform of the judiciary that Albania has been undergoing in the recent years. The plan to undertake such vetting was first introduced in the draft constitutional amendments on the judiciary adopted in 2015. The Venice Commission provided continuous support to Albania in this process, throughout 2015 and 2016, including by providing two opinions (an Interim[4] and a Final Opinion[5]) on the draft (and draft revised) constitutional amendments submitted to its assessment, as well as an *Amicus Curiae* brief requested by the Albanian Constitutional Court.[6]

25. Based on a law adopted in March 2018, a process of vetting the Albanian police is being carried out by special commissions established by the law.[7] The assessment criteria are the following: personal integrity, professional capacity, and verification of their assets.

IV. International Standards

26. Albania is a state party to all major international human rights instruments, including the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the 1966 International Covenant on Civil and Political Rights (ICCPR). By virtue of Article 122, any ratified international agreement constitutes part of the internal legal system and has priority over the laws of the country that are incompatible with it.

[3] Law No.10 192, dated 3.12.2009 on Preventing and Striking at Organised Crime, Trafficking, Corruption and Other Crimes Through Preventive Measures Against Assets

[4] CDL-AD(2015)045, *Interim Opinion No. 824/2015, on the Draft Constitutional Amendments on the Judiciary of Albania,* 21 December 2015.

[5] CDL-AD(2016)009, *Final Opinion No. 824/2015, on the Revised Draft Constitutional Amendments on the Judiciary of Albania,* 14 March 2016.

[6] CDL-AD(2016)036cor, Amicus Curiae *Brief for the Constitutional Court on the Law on the Transitional Re-Evaluation of Judges And Prosecutors (The Vetting Law),* 12 December 2016.

[7] Over 13.000 employees in the Albanian State Police (ASP), Republican Guard and the Service on Internal Affairs and Complaints (SIAC) will be re-evaluated during a period of four years. The process will undergo three phases: 1/ vetting of over 280 high-rank employees with managerial tasks, by the External Evaluation Commission; 2/vetting of around 3000 mid-career professionals by the Central Evaluation Commission 3/ and final, all other employees will be evaluated during the final stage by a Local Evaluation Commission. To handle departments whose work is not of public nature, a Special Purpose Evaluation Commission was designed.

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1. The right to vote and to be elected

27. Article 3 of the First Protocol to the ECHR guarantees the right to free elections. This has consistently been interpreted to include the right to vote and the right to stand for election.

28. While neither of these rights is absolute and states enjoy a wide margin of appreciation in this area,[8] especially with respect to the right to be elected,[9] any restrictions imposed on voting rights have to meet the following criteria: "*the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate*".[10] The principle of non-discrimination also applies with respect to the right to stand as a candidate.[11] Limitations must be consistent with the principle of the rule of law and the general objectives of the Convention.[12]

29. The European Court of Human Rights (ECtHR) has also consistently held that States enjoy considerable latitude to establish in their constitutional order rules governing the status of parliamentarians, including criteria for disqualification. Though originating from a common concern - ensuring the independence of members of parliament, but also the electorate's freedom of choice - the criteria vary considerably according to the historical and political factors peculiar to each State. None of these criteria should, however, be considered more valid than any other as long as it guarantees the expression of the will of the people through free, fair and regular elections.[13] The Court found a violation of Article 3 of Protocol No. 1 in a case where the procedure for determination of the applicant's eligibility as a candidate in the election had not satisfied the requirements of procedural fairness and legal certainty.[14]

30. For example, it is in principle legitimate to disqualify candidates for breach of electoral laws such as, for example, engaging in bribery or corruption in relation to an election. ECtHR has held however that, as the Convention guarantees the effective exercise of individual electoral rights, in order to prevent arbitrary disqualification of candidates, the relevant domestic procedures should contain sufficient safeguards protecting the candidate from abusive and unsubstantiated allegations of electoral misconduct, and that decisions on disqualification should be based on sound, relevant and sufficient proof of such misconduct, and that the person whose disqualification is sought should have the right to be heard and to have his/her submission taken into account and to be given a reasoned response.[15]

31. It may also be noted that in cases where persons have been barred because of past misbehaviour the Court has regarded a permanent ban as disproportionate.[16] In the *Paksas* case, the Court specifically noted that barring a senior official who had proved unfit for office from ever being a member of Parliament again in future is above all a matter for voters, who are to choose at the polls whether to renew their trust in the person concerned. The Court stated

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[8] ECtHR, *Hirst v. United Kingdom (No. 2),* Application No. 74025/01, Grand Chamber, 6 October 2005, para 60.
[9] ECtHR, *Etxeberria Barrena Arza Nafarroako Autodeterminazio Bilgunea And Aiarako And Others v. Spain,* Applications Nos 35579/03, 35613/0335626/03 and 35634/03, 30 June 2009, Para 50.
[10] *Ibidem,* para 62. See also *Mathieu-Mohin and Clerfayt v Belgium (Application no.9267/81)* Judgment 2 March 1987*,* para 60.
[11] ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina,* Applications Nos 27996/06 and 34836/06, Grand Chamber, 22 December 2009, para 44.
[12] *Zdanoka v Latvia* 2006-IV; 45 EHRR 478 GC, para 115(b) GC.
[13] See *Podkolzina v. Latvia*, no. 46726/99, § 33, ECHR 2002-II; and *Gitonas and Others v. Greece,* judgment of 1 July 1997, Reports 1997-IV, pp. 1233-34, § 39.
[14] *Podkolzina v Latvia, see previous footnote.*
[15] *Abil v Azerbaijan (Application No 16511/06* 21 February 2012 paras. 35 and 39
[16] *Paksas v Lithuania (Application No. 34932/04)* 6 January 2011, paras 103-4

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that this was apparent from the wording of Article 3 of Protocol No.1, which refers to "the free expression of the opinion of the people in the choice of the legislature".[17]

32. Moreover, the Court has so far established the violation of Article 3 of Protocol I in cases related to the deprivation of the voting rights, including the right to stand as a candidate, before conviction, i.e. in respect of individuals subject to preventative measures within a criminal prosecution (*Labita v. Italy*,[18] *Vito Sante Santoro v. Italy*[19]), of individuals placed in custody (*Alajos Kiss v. Hungary*[20]) or of individuals facing bankruptcy proceedings (*Albanese v. Italy*[21]).

2. Exclusion of offenders from Parliament. Key principles

33. In 2015, the Venice Commission adopted, in relation to the debate which was on-going in Albania on the issue of cleansing the Albanian parliament from corrupted politicians, the Report on Exclusion of Offenders from Parliament (hereinafter "the 2015 Report").[22] The Report notes that a considerable number of states impose a ban on persons convicted of criminal offences from being parliament members, and summarises existing rules in a number of states and the principles which in the Commission's view should apply, both as regards ineligibility and loss of the mandate. The Report mainly concludes that:

- it is in the general public interest to avoid an active role of serious offenders in the political decision-making;
- there is no common standard on the cases, if any, in which such restrictions should be imposed; however, the vast majority of the examined states limit the right of offenders to sit in Parliament, at least in the most serious cases;
- if the exclusion of offenders from elected bodies does not happen by the simple functioning of the electoral mechanisms, legislative intervention becomes necessary;
- proportionality limits in particular the length of the restriction (the duration of ineligibility) and requires that such elements as the nature of the offence, its severity and/or the length of the sentence be taken into account;
- ineligibility is most justified during the execution of the sentence and its admissibility decreases with time;
- deprivation of political rights before final conviction is contrary to the principle of presumption of innocence, except for limited and justified exceptions;
- it is suitable for the Constitution to regulate at least the most important aspects of the restrictions to the right to be elected and of the loss of parliamentary mandate (and many states provide for such provisions);
- whereas it may be suitable for legislation to provide for restrictions to operate automatically for the most serious offences or convictions, discretion for the judges in deciding on the specific case may be suitable in less serious cases and, more generally, where the conviction relates to sitting MPs;
- the independence and impartiality of the judiciary are a prerequisite to the proper implementation of restrictions to electoral rights.

34. The conclusions of the *Amicus curiae* brief for the ECtHR in the case of *Berlusconi v. Italy*, adopted by the Venice Commission in October 2017, addressing the minimum procedural guarantees that a State must provide within the framework of a procedure of disqualification from holding office, are also of relevance to the present analysis. In this Brief, the Venice

[17] Ibid, paras.104-110.
[18] ECtHR, *Labita v. Italy,* Application No. 26772/95, Grand Chamber, 6 April 2000.
[19] ECtHR, *Vito Sante Santoro v. Italy,* Application No. 36681/97, 1 July 2004.
[20] ECtHR, *Alajos Kiss v. Hungary,* Application No. 38832/06, 20 May 2010.
[21] ECtHR, *Albanese v. Italy,* Application No. 77924/01, 23 March 2016.
[22] Report on Exclusion of Offenders from Parliament, CDL-AD(2015)036, October 2015

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Commission stated *inter alia* that, in its view, "*disqualification voiding an electoral mandate should not be considered as limiting democracy, but as a means of preserving it.*"[23]

35. Finally, according to the Code of Good Practice in Electoral Matters adopted by the Venice Commission in 2002,[24] deprivation of the right to vote and to be elected involves a number of cumulative conditions: be provided for by law; observe the proportionality principle (conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them); be based on mental incapacity or a criminal conviction for a serious offence; only be imposed by express decision of a court of law.

3. The right to have access to public service

36. The ECHR does not grant the right to have access to public service. As the ECtHR noted in *Glasenapp v. Germany*, "the signatory States deliberately did not include such a right: the drafting history of Protocols Nos. 4 and 7 (P4, P7) shows this unequivocally. In particular, the initial versions of Protocol No. 7 (P7) contained a provision similar to Article 21 para. 2 of the Universal Declaration and Article 25 of the International Covenant; this clause was subsequently deleted".[25]

37. The ICCPR enshrines the right to vote and to be elected and also, this time, the right to have access to public service in its Article 25.[26] In its General Comment No. 25, adopted in 1996,[27] the UN Human Rights Committee notes that "*Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant*" (para. 1). It also stresses that "*[a]ny conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria. […] The exercise of these rights by citizens may not be suspended or excluded, except on grounds which are established by law and which are objective and reasonable*" (para. 4). Focusing more specifically on the right to be elected, the General Comment indicates that *"[a]ny restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements*" (para. 15). With respect to the right to have access to public service, the General Comments states that "*[t]o ensure access on general terms of equality, the criteria and processes for appointment, promotion, suspension and dismissal must be objective and reasonable*" (para. 23).

4. Integrity Checking and Vetting Procedures

38. Integrity checking and vetting procedures are not explicitly foreseen and regulated by any international instruments. They have however been dealt with, and commented upon, by soft law instruments and by case-law. Most comments relate to the classical lustration-type vetting, which seeks to remove from the public offices, individuals who had close ties to the previous non-democratic regimes and, as such, cannot be trusted to serve the new democratic regime or are found unworthy of representing such a regime.

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[23] *Amicus curiae* brief for the European Court of Human Rights in the case of *Berlusconi v. Italy*, CDL-AD(2017)025, para. 11
[24] Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev2-cor
[25] ECtHR, *Glasenapp v. Germany,* Application No. 9228/86, 28 August 1986, para. 48.
[26] "*1.Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:*
(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
(c) To have access, on general terms of equality, to public service in his country."
[27] UN Doc. CCPR/C/21/Rev.1/Add.7, *General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote) The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service,* 12 July 1996.

39. *The Resolution 1096 (1996)28 of the Parliamentary Assembly of the Council of Europe on measures to dismantle the heritage of former communist totalitarian systems* states that lustration measures "can be compatible with a democratic state under the rule of law if several criteria are met" (para. 12). These criteria are the following ones: guilt, being individual, rather than collective, must be proven in each individual case; the right of defence, the presumption of innocence and the right to appeal to a court must be guaranteed; the different functions and aims of lustration, namely protection of the newly emerged democracy, and criminal law, i.e. punishing people presumed guilty, have to be observed; and lustration has to have strict time limits in its enforcement period and the period to be screened.[29]

40. Lustration has been considered by the ECtHR in several cases relating to the relevant legislation enacted in Slovakia (*Turek v. Slovakia*[30]), Poland (*Matyjek v. Poland*,[31] *Lubbock v. Poland*,[32] *Bobek v. Poland*,[33] *Szulc v. Poland*[34]), Lithuania (*Sidabras and Džiautas v. Lithuania*,[35] *Rainys and Gasparavičius v. Lithuania*,[36] *Žičkus v. Lithuania*[37]), Latvia (*Ždanoka v. Latvia*,[38] *Adamsons v. Latvia*[39]) and Romania (Naidin v. Romania[40]).

41. The Court concluded, in these cases, that lustration does not constitute a violation of human rights *per se*, because "*a democratic State is entitled to require civil servants to be loyal to the constitutional principles on which it is founded*".[41] At the same time, the Court made it clear that lustration can violate human rights, when, for instance: targeted individuals do not have sufficient access to classified materials relating to their case; they are denied procedural guarantees; lustration measures apply indistinctly to positions in the public and private sphere; or when the lustration laws remain in force even though they are no longer needed, and/or there is no review of their continued necessity.

42. The Venice Commission has previously considered lustration with respect to the draft lustration laws of Albania[42] and "the former Yugoslav Republic of Macedonia".[43] In both cases, the Commission endorsed, and embraced the approach stemming from the Resolution 1096 of the PACE and the case law of the European Court.

43. More recently, integrity checking and vetting procedures have taken a different form, seeking to cleanse public offices from individuals involved in large-scale corruption or in organized crime.[44] The Venice Commission was again involved in the assessment of some of these initiatives.

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[28] Doc. 7568, *Measures to dismantle the heritage of former communist totalitarian systems,* 3 June 1996.
[29] For details, see the report attached to the resolution 1096 (1996), which also contains Guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law.
[30] ECtHR, *Turek v. Slovakia,* Application No. 57986/00, 14 February 2006.
[31] ECtHR, *Matyjek v. Poland,* Application No. 38184/03, 30 May 2006.
[32] ECtHR, *Luboch v. Poland,* Application No. 37469/05, 15 January 2008.
[33] ECtHR, *Bobek v. Poland,* Application No. 68761/01, 17 July 2007.
[34] ECtHR, *Schulz v. Poland,* Application No. 43932/08, 13 November 2012.
[35] ECtHR, *Sidabras and Džiautas v. Lithuania,* Applications Nos 55480/00 and 59330/00, 27 July 2004.
[36] ECtHR, *Rainys and Gasparavičius v. Lithuania,* Applications Nos 70665/01 and 74345/01, 7 April 2005.
[37] ECtHR, *Žičkus v. Lithuania,* Application No. 26652/02, 7 April 2009.
[38] ECtHR, *Ždanoka v. Latvia,* Application No. 58278/00, 16 March 2006.
[39] ECtHR, *Adamsons v. Latvia,* Application No. 3669/03, 24 June 2008.
[40] ECtHR, *Naidin v. Romania,* Application No. 38162/07, 21 October 2014.
[41] ECtHR, *Vogt v. Germany,* Application No. 17851/91, 26 September 1995, para 59.
[42], *Amicus Curie* Opinion No. 524/2009 on the Law on the Cleanliness of the Figure of High Functionaries of the Public Administration and Elected Persons of Albania, CDL-AD(2009)044
[43] *Amicus Curie* Brief No. 694/2012 on Determining a Criterion for Limiting the Exercise of Public Office, Access to Documents and Publishing, the Co-operation with the Bodies of the State Security, CDL-AD(2012)028
[44] The need for integrity control connected with a vetting procedure was also pointed out by the UN High Commissioner for Human Rights in a document "Rule of law tools for post-conflict states, Vetting: an operational framework" (UN, New York and Geneva, 2006). The role of the vetting procedure was strongly underlined in this

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44. In particular, it adopted two opinions on the 2014 Law on Government Cleansing of Ukraine. In the Interim Opinion,[45] issued in December 2014, the Commission noted that, in addition to the persons linked to the pre-1989 communist regime and the regime of the ousted president Yanukovych, the law also applied to individuals having engaged in large-scale corruption. While it did not reject this approach as such, the Commission considered it "*difficult to accept that in general a person who gets involved in corruption thereby creates a risk in terms of serious violations of human rights justifying the imposition of lustration measures (as opposed to the imposition of criminal sanctions through due criminal proceedings)*" (para. 67). In the Final Opinion,[46] issued in June 2015, the Commission further noted that while the protection of a newly democratic regime from the former elites and the fight against corruption are both to be seen as valuable and legitimate political aims, they "can hardly be achieved through the same means" (para. 111). Finally, the Commission pointed out that "[*l*]*Lustration must never replace structural reforms aimed at strengthening the rule of law and combating corruption, but may complement them as an extraordinary measure of a democracy defending itself, to the extent that it respects European human rights and European rule of law standards*" (para.112).

V. Analysis

45. The proposed procedure for integrity checking/vetting constitutes a restriction on the right to be elected and the right to have access to public service, enshrined in Article 45 of the Constitution, Article 3 of Protocol I to the ECHR and Article 25 of the ICCPR. Such a restriction may be justified, if it pursues a legitimate aim and it is not disproportionate to this aim. Any restriction has to have a clear legal basis and must not violate the principle of non-discrimination.

46. Prior to analysing the proposed amendments in light of these criteria, the Venice Commission has to stress that the conclusions reached in its previous opinions related to the vetting of the judiciary in Albania are not automatically applicable to the intended vetting of the politicians. The judicial branch of the government has various specificities (judges are usually appointed for life, they have to be independent and impartial, they are not directly accountable to the other branches of the government, their position cannot be challenged by the electorate at general elections, their decisions cannot be annulled by anybody outside the judicial system, etc.) which justify a differentiated treatment. Such a differentiated treatment may also be called for with respect to elected positions, on the one hand, and appointed positions on the other hand. In the former case, the right to be elected, which is explicitly granted in the Constitution, the ECHR and the ICCPR, is at stake. Finally, a line needs to be drawn between cases when the exclusion of the persons occurs based on a criminal conviction and those where it occurs on other grounds.

1. Restriction of the rights to be elected and to have access to public service

a. Purpose of the proposed constitutional amendments

47. The restriction on the right to be elected and the right to have access to public service has to pursue a legitimate aim. Neither Article 3 of Protocol I to the ECHR nor Article 25 of the ICCPR contains an exhaustive list of such legitimate aims.

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document as "an important aspect of personnel reform in countries in transition". The document states that the vetting processes to exclude persons who lack integrity (even judges) from public institutions is one of the most important aspects of institutional reform efforts in countries in transition" (in post-conflict countries).

[45] *Interim Opinion No. 744/2014 on the Law on Government Cleansing (Lustration Law) of Ukraine,* CDL-AD(2014)044,

[46] *Final Opinion No. 744/2014 on the Law on Government Cleansing (Lustration Law) of Ukraine,* CDL-AD(2015)012

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48. The Explanatory Report to the draft law indicates as the aim of the legislative initiative decriminalising governance in the country, protecting democracy and democratic institutions, as well as national security. This is a legitimate aim in a democratic society governed by the rule of law, which is already pursued by the existing constitutional provisions excluding convicted offenders and enshrining integrity criteria for the access to and exercise of public office (see Articles 6/1, 45 (3) and 179/a of the Constitution).

49. The issue of close contacts of members of parliament or municipal councils or government officials with organised crime is a long-standing problem in Albania. As shown by the first results of the vetting procedure of the judiciary, the interrelation of the state institutions and organised crime appears to be very high. This hampers trust in the state's institutions and delegitimizes its functions.[47] If organised crime is governing state institutions or at least has an influence on their work, the principles of rule of law cannot be applied in practice. As stated by the Venice Commission in its Rule of Law Checklist, the notion of the rule of law "*requires a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures.*"[48] In a state governed or influenced by organised crime, principles of dignity, equality or legality are set aside

50. Thus, due to the specific circumstances presently in Albania, introducing a special vetting mechanism for public officials appears as a legitimate purpose.

b. Legality and proportionality of the proposed measures

51. Any restriction on human rights needs to have a basis in a legal rule of domestic or international law. This legal basis needs to be accessible and formulated with sufficient precision.[49]

52. Restrictions to the right to be elected and the right to have access to public service also need to be proportionate to the legitimate aim. The national authorities have to demonstrate that the relevant measures may be efficient in pursuing the aim and that they have an added value to the measures which are already at their disposal. Moreover, they have to show that the measures do not curtail the rights at stake to such an extent as to impair their very essence. The absence of any draft implementing legislation which would set the concrete parameters of the vetting procedure, makes it difficult for the Venice Commission to assess the proportionality of the measures introduced within the scope of the vetting procedure.

1. Subjects of the vetting

53. According to the draft constitutional amendments, two categories of persons are subject to the proposed vetting. Both candidates to elective positions at central and local levels (parliament members, mayors, member of local elected councils) and holders of such positions, and candidates and holders of appointed positions - directors or members of institutions "*established by the Constitution and by the law, appointed in office by voting from the Parliament*", including the Prime Ministers and members of the Council of Ministers, shall be subject to integrity control.

[47] See also Afrim Krasniqi, *Decriminalization: Current Situation, Issues, And Expectations,* Konrad Adenauer Stiftung, Tirana, 2018.
[48] Venice Commission, Rule of Law Checklist, CDL-AD(2016)007, para. 15.
[49] See ECtHR, *The Sunday Times v. UK*, Application no. 6538/74, 26 April 1979, para 49.

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54. The *Position of the authors of the draft law* adds the President of Albania to the list of positions, while at the same time stating that the number of public officials to whom the vetting would apply is in fact very low (about 250 public officials). The document seems not to take into account that the proposed vetting includes also candidates to senior positions. At the same time, it is not clear why, given the general goal of cleansing Albanian institutions of corrupt officials, Government members other than ministers and deputy ministers, politically appointed and holding decision-making positions - such as secretaries and under-secretaries of state, or even department directors and deputy-directors - would remain outside the scope of the integrity control.

55. On the other hand, notions such as "institutions established by the law" or "statutory bodies" are not well-defined and may be very wide in scope, thus opening the way for the arbitrary broadening (or narrowing) of the category of subjects concerned by the vetting.

56. Also, it seems that the integrity control would apply indiscriminately to candidates to/holders of public office within the legislative and the executive branches of government, in spite of the different status and nature of the offices at issue. Deprivation of an elective mandate interferes both with the holder's passive electoral right and with the mandate provided by the electorate. Appointed positions are different, since, while there is a right to take part in the conduct of public affairs or to have access to public service under ICCPR, there is no right to be appointed, and, even when appointed by parliament, the holder only benefits from an indirect democratic legitimacy. A clear distinction between both types of offices should therefore be made.

2. Vetting grounds

57. According to the draft constitutional amendments, those will be barred from accessing, or maintaining, any of the protected positions, who: a) have been sentenced by imprisonment based on a final judgment for the commission of a crime (new Article 45(3)) (this corresponds to the current text of the Constitution); b) have "*contacts with persons involved in the organized crime*" (new Articles 45(3), 176/1 and 176/2), or are "*involved in the circle of subjects, who have contacts with persons involved in the organized crime"* (new article 179/c.1); c) do not justify their properties' lawful origin (new Article 176/2).

58. As a rule, criteria for ineligibility or loss of a mandate must be exact and applicable without a wide margin of appreciation, in order to guarantee the implementation of the law in equal and transparent manner. However, key terms in the proposed provisions - in particular, the wording of the second proposed ground - appear as too general and imprecise to be an acceptable constitutional basis for a limitation to a fundamental right.

"Have contacts"

59. No specification is made in the draft amendments as to the nature or the extent of the "contacts". During the visit to Tirana, the rapporteurs were informed by the authors of the draft law that "contacts" were intended to mean "inappropriate contacts" as defined in Article 3(6) of the Vetting Law.[50] Yet, this interpretation is by no means the only one possible. In fact, one may assume that by using a different term than in the Vetting Law ("contacts" rather than "inappropriate contacts"), the authors of the amendments intended to indicate that the two legal acts were meant to cover different situations. Moreover, even if it were established that the two

[50] Both Article DH of the Annex of the Albanian Constitution, regulating the Transitional Qualification Assessment of judges and prosecutors, and Article 34 of the Vetting Law, refer to "inappropriate contacts" as a criterion for the assessment process. According to the definition provided in Article 3(6) of the Vetting Law, "***inappropriate contacts** shall mean even one meeting, telecommunication, or any other type of wilful contact which is not in compliance with the assumption of office, regardless whether a business as defined in no. 11of this article or any other relation is established for the assessee.*"

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terms were meant to be synonymous, it would be questionable whether politicians may be required to limit their contacts in the same way as judges and prosecutors.

60. As the text stands, in the absence of any qualification for the term “contacts”, many questions arise: does the term apply to all politicians’ “contacts” without exception, including those in the framework of their mandate, such as MPs regular interaction with their voters, or (for candidates) during electoral campaigns? can one always be informed that those in his/her vicinity are/have been involved in organized crime? would incidental contacts constitute a basis for ineligibility or loss of the mandate? which is the period to be screened for such “contacts”? which “contacts” should be exempted, e.g. to relatives etc.? And, equally important, is it required for such “contacts” to constitute a crime for someone to lose his or her mandate or to be dismissed (see comments below)?

61. In the absence of precise qualification in the proposed text, the integrity criterion related to “contacts” with organized crime lacks clarity and legal certainty and thus carries the risk of arbitrary - and abusive - interpretation of the scope of the vetting process.

“Persons involved in the organized crime”

62. In a previous opinion on Albania,[51] the Venice Commission has already expressed concerns as to the reference to “persons involved in the organized crime” and its lack of clarity.

63. The Criminal Code of Albania does not contain an autonomous criminal offence of organized crime.[52] Furthermore, the draft constitutional amendments do not indicate whether, for the purpose of the vetting process, “persons involved in the organized crime” would need, or not, to be persons convicted for any criminal acts.

64. Presumably, such persons would need to be defined (in a consistent manner with the Vetting Law) as those convicted for certain specified offences relating to organized crime.[53] At the same time, under the wording of the proposed amendment, “persons involved in the organized crime” appear to be a group in its own right since otherwise a reference to those convicted for certain offenses would have been natural. The language in new Article 179/c seems to confirm this impression (“*if it is found that the elected or appointed person is involved in the circle of subjects, who have contacts with persons involved in the organized crime*”). The individual submitted to the integrity control should thus not only not have personal contact with somebody involved in organized crime but also not be involved in the circle of subjects having such contacts. This could be a sufficient reason for the termination of a mandate. Unless this is an issue of translation, such an approach, providing scope for wide interpretation, would pose a serious threat to the mandates of all public officials whose

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[51] (CDL(2015)052)

[52] It knows the criminal act of organizing and leading criminal organizations (Article 284/a, pertaining to drug-related gangs) and a set of criminal acts committed by an armed gang or criminal organization (Chapter XI), as well as various criminal acts usually attributable to organized crime (Trafficking of narcotics – Article 283/a, Trafficking in adult persons – Article 110/a, etc.). The link between these acts and the broader and apparently non-legal concept of organized crime, remains however obfuscated.

[53] According to the Vetting Law, ““***Person involved in organized crime***” *shall mean any person that has been convicted or part of a criminal trial, whether in Albania or outside the territory of the Republic of Albania, on one of the criminal offences provided in paragraph 1 of Article 3 of the Law no. 10192, dated 3.12.2009 “Preventing and striking at organized crime, corruption and trafficking through preventive measures against assets”, as amended, except the case when he/she was declared not guilty by a final court decision. One shall be as involved in organized crime in the following circumstances too: a) A criminal case have been dismissed by the prosecuting organ because of the death of the person, or in cases when it was impossible to have him/her arrested or in the position of the defendant. b) he/she have been found not guilty by the court because the criminal offence was committed from a person that was impossible to have him/her arrested or in the position of the defendant*”.

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functions involve contacts and interaction with the public and would enable the use of the vetting process for political purpose.

Criminal sentences as ground for vetting. The gravity of the sentence

65. Under the existing framework, the right to be elected and to have access to public office is denied to persons who have been criminally convicted for an offence of a certain gravity. Current Article 45(3) of the Constitution indeed defines the gravity by the sanction (imprisonment) and, rightly, does not provide for a general ban on being elected on all those convicted of criminal offences. Complementing the constitutional provision, the Decriminalization Law, pertaining to the possibility to be elected or appointed to certain public functions, provides a list of relevant criminal offences. It is not entirely clear, however, whether the category of "the nationals who are sentenced by imprisonment based on a final judgment for the commission of a crime", in the first part of the amended Article 45(3), is identical to that, in the previous wording of the same provision (before its amendment in December 2015) , of "[c]onvicts who are serving a prison sentence" or whether the amended wording is meant to apply to persons who have already served their sentence (and are no longer in prison) as well.

66. The deprivation of the right of prisoners to vote has been dealt with by the European Court in numerous cases.[54] The Court has accepted that the right to vote is not absolute and confirmed that states enjoy a wide margin of appreciation in this area. It has however held that blanket bans imposed on prisoners would be disproportionate to the legitimate aims pursued. With respect to the right to be elected, the margin of appreciation of national authorities is wider.

67. States are therefore not prevented from denying the right to be elected to prisoners, or more generally to persons convicted for certain serious crimes, as long as the restriction is not disproportionate. The Commission already expressed the view that a blanket prohibition, where the passive right of suffrage is denied regardless of the nature of the underlying offence, might not be in line with the European Convention for the Protection of Human Rights and Fundamentals Freedoms.[55]

68. Draft Article 45(3), to the extent that it applies to the persons serving a prison sentence and as long as it is interpreted along the lines stated above, seems to meet the criterion of proportionality. The same applies *a fortiori* to the exclusion of such persons from the possibility to have access to other (elected or appointed) public functions. However, in this respect the draft largely corresponds to the current text of the Constitution and provides no added value.

Vetting ground not constituting a criminal offence

69. The situation is different for the proposed new vetting ground related to "contacts" with the criminal world. While it is not clear what is meant by "having contact with persons involved in organised crime", it seems likely that the intent behind the proposal is to "catch" persons who have not been convicted of a criminal offence (i.e. to avoid having suspicious persons nominated as candidates), since persons sentenced to imprisonment are already excluded from standing for Parliament. It also seems likely that the intent is further to "catch" persons

[54] See ECtHR, Prisoners' right to vote, *Fact Sheet,* May 2018.
[55] See 2015 Report on the Exclusion of Offenders from Parliament, CDL-AD(2015)036cor., para. 25. In the Report the Commission further notes that "*if the exclusion of offenders from elected bodies does not happen by the simple functioning of the electoral mechanisms, legislative intervention becomes necessary*" (para. 174). This intervention needs to meet the criteria of legality, legitimacy, proportionality and non-discrimination stated above. An automatic exclusion should only apply to the most serious crimes, while "[*d]iscretion for the judges in deciding on the specific case may be suitable in less serious cases and, more generally, where the conviction relates to sitting MPs*" (para. 180).

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who *cannot* be convicted because the "contact" in question does in fact not constitute a criminal offence.

70. As noted above, contacts with persons involved in organised crime may be of different kinds and are not always illegal. Neighbours, advocates or classmates of persons involved in organised crime could be considered as having contacts with those persons. Even prosecutors or judges might be considered to have such contacts due to their office. A person who has illegal connections with organised crime should be investigated for offences such as involvement in organised crime, corruption, embezzlement or abuse of office and, if convicted, prevented from standing in the upcoming elections.[56] But, when such contacts constitute themselves a criminal offence under the current Albanian legislation, they already come under the scope of the Decriminalization Law (Article 2 listing the offences the commission of which leads to ineligibility to senior public functions) and the amendment provides no added value. If, on the contrary, the contacts are legal and the person does not participate in crimes, he or she should have the right to stand in elections based on the principle of universal suffrage.[57]

71. As described by the Venice Commission in its 2015 Report, the vast majority of constitutional/legislative provisions on ineligibility refer to final convictions for criminal offences. Furthermore, not all convictions for any criminal offense, but only those of a particular nature or carrying certain penalties, lead to ineligibility.[58]

72. While the Venice Commission would not exclude that certain actions, although not constituting a criminal offense, might nevertheless serve as grounds for ineligibility, the proposed new vetting ground goes much further and is capable of a much wider interpretation, without safeguards other than the requirement for a 3/5 parliamentary majority for making the implementing rules. Therefore, in addition to being imprecise, the new ground is also in breach of the principle of proportionality.

Legality of assets

73. While, in the light of the aim pursued by the vetting, this ground seems in principle acceptable, additional information and clarity as to its scope and related verification procedure would have been useful.

Presumption of innocence and the shifting of the burden of proof

74. The Venice Commission also draws attention to the fact that new Article 176/2 establishes the presumption of "guilt", placing the burden of proof on the vetted persons.

75. The Venice Commission has raised the issue on another occasion, in relation to the assessment of Albanian sitting judges/prosecutors: "*The question is whether this shifting of burden of proof is compatible with the presumption of innocence and the right to remain silent and not to incriminate oneself, contained in Article 6 § 2 of the European Convention.*[59]" The Commission's answer, in that particular context, went into the direction of the acceptability of such rules.[60] This being said, coupled with the uncertainty noted as to the

[56] See CDL-AD(2015)036cor. para. 25 and CDL-AD(2006)002 para. 100.
[57] CDL-AD(2002)023rev (Code of good practice in electoral matters, I. 1.1.d.iv).
[58] See CDL-AD(2015)036cor., para. 25
[59] This provision reads as follows: "2. *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law*".
[60] See CDL-AD(2015)045, paragraph 121: "*First, Article 6 § 2 applies to the criminal proceedings, so it would not be normally applicable in cases of dismissals of judges and prosecutors. Second, this guarantee does not cover the exhibition of documents which are at the disposal of the persons concerned. Third, there are multiple examples from other areas of law where a failure to report on certain operations, acts, contacts, etc. entails*

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subjects, grounds and enforcement rules of the proposed vetting, the presumption of "guilt" in the proposed regulation may strengthen the conclusion that the restrictions introduced by the draft constitutional amendments fail to meet the criterion of proportionality and may also potentially give rise to violations of the due process guarantees protected by Article 6 of the ECHR and Article 14 of the ICCPR.

76. In addition, the provision on the burden of proof lacks clarity and would be difficult to enforce, as it would hardly be possible, for the person concerned, to present evidence on the lack of "contacts". In general, it is not clear what it is that the person concerned is required to prove.

3. Timeframe for the vetting. Length of the restriction.

77. No indication is provided as to the periods of the past to be screened. It is worth noting in this respect that, in 2009, with reference to potential measures of lustration in Albania, the Venice Commission stressed that "*activities well in the past will regularly not constitute conclusive evidence for a person´s current attitude or even his/her future*".[61] A similar reasoning may be applicable with regard to the present proposal, which would need, first, to clearly set out the period of reference for the integrity control and, second, to opt for a reasonable approach as to the length of that period.

78. Particular attention is, as a rule, required by the timeframe for enforcing such vetting measures, and the question whether such measures should, according to the categories subject to the vetting, be a temporary and extraordinary or transitional measure (as for the case of judges and prosecutors)[62] or, on the contrary, a recurrent process which has to adjust itself to the dynamics of the electoral and other social and political processes. Politicians' fundamentally different status from that of magistrates is central to the response. Yet, no indication may be found in this regard in the proposed constitutional amendments.

79. Last but not least, there is no indication either of the duration of the disqualification from the right to be elected or of the prohibition on being appointed to public office. It is thus unknown, from the text of the proposed amendments, whether such failure entails a lifelong ban on being elected or appointed to a public office or only for a determined period of time. The Venice Commission has in this respect pointed out that long-time restrictions should only be related "*to very serious crimes - such as crimes against humanity, genocide, terrorism, murder - and crimes in relation with elections, public service or political activity - such as crimes of corruption and serious electoral offences (which go against the democratic nature of elections).*"[63] The absence of any indication on such important matters may hardly be seen as in line with the permissible limitations to the rights affected by the vetting.

2. Implementation scheme

80. Apart from certain general principles and presumptions for the proposed vetting, and the "background declaration" as the key tool in the process, there is little guidance in the draft law on how the integrity control will in practice be enforced, and this, both as regards the issue of "contacts" and the "legality of the assets". In addition to clearer vetting criteria, basic elements of the implementation mechanism, indispensable as constitutional guarantees for the independence and impartiality of the vetting, are lacking in the draft: the

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liability (for example, the fiscal liability attached to the submission of inaccurate or incomplete tax returns). It is reasonable to introduce even more stringent rules for civil servants, including judges and prosecutors."

[61] *See Amicus Curiae* Brief on the Law on the cleanliness of the figure of high functionaries of the Public Administration and Elected Persons of Albania, CDL-AD(2009)044, para 38.

[62] See Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, CDL-AD(2016)009, para. 54.

[63] See 2015 Report, CDL-AD(2015)036cor, paras 151-155.

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institutions responsible for the necessary investigations and the conditions for the collection of evidence; the bodies responsible for making decisions on ineligibility/loss of mandate, which should be independent and impartial (such as those established for the vetting within the judiciary); the deadlines for the vetting and ensuing restrictions.

81. Most importantly, no requirement is established for a court or another independent body to decide on ineligibility/termination of the mandate.

82. New article 176/2 provides that the process will be based on a "background declaration", to be filled by the subjects of the integrity control, as well as "*other evidence, including the decisions of the Albanian or foreign jurisdictions*".[64] No indication is given as to the meaning of "other evidence", nor reference made to other legislative provisions which might provide clarity in this respect. An important safeguard against self-incrimination, namely that the background declaration may only be used for the purpose of the integrity verification and may not be used in criminal proceedings,[65] is to be welcomed in the text.

83. The location of new Articles 176/2 and 176/2 in the Constitution following Article 176 is curious. These Articles would therefore be contained in Part 16 of the Constitution, which deals with "Extraordinary Measures". Article 170 states that extraordinary measures can be taken due to a state of war, state of emergency or natural disaster. None of these conditions seem applicable to the new proposal. There is, on the other hand, nothing in the two proposed new Articles to indicate that they are limited in time or are intended to be other than a permanent feature. There is no procedure either to bring them into force or to discontinue them, and no criteria to determine when they should be in force. It is difficult not to conclude that the intended inclusion of these two Articles in Part 16 is not coherent with the existing constitutional scheme.

84. During the visit to Tirana, several options were mentioned by the authors of the draft law for the enforcement, including using the procedure and entities responsible for the implementation of the Decriminalization Law. More generally, the Rapporteurs were informed that, beyond possible implementation solutions, the purpose was to apply to politicians, *mutatis mutandis*, the vetting scheme already put in place in the judiciary.

85. The Venice Commission has not been asked to assess the rules and procedures established in the "Decriminalization law" (which in fact only applies to persons "convicted with imprisonment with final court decision") and is not in a position to assess whether or to what extent the conditions provided by that law may be suitable for the vetting of politicians as foreseen in the current draft law. Likewise, the Venice Commission has not had the opportunity to study in depth the actual practice of the enforcement of the vetting rules for judges and prosecutors.

86. The Commission may only stress that politicians and other officials may not be subject to the same vetting mechanisms as judges and prosecutors, given the specific features, in terms of status and rights that distinguish the two categories from each other. While judges are appointed for a permanent term and benefit from the principle of irremovability, politicians are elected or appointed for a determined, temporary mandate. It is difficult to envisage applying to politicians, who may wish to seek for more than one mandate, a scheme designed for an extraordinary, and limited in time, vetting process (as foreseen by the Albanian Constitution for judges and prosecutors). On the other hand, integrity imperatives may legitimately be higher for judges and prosecutors, whose work must be

[64] To be based on offences committed abroad, the vetting would also require, in addition to constitutional provisions, specific international cooperation agreements on criminal matters.
[65] See *Amicus Curiae* Brief for the Constitutional Court on the Law on the transitional re-evaluation of judges and prosecutors (Vetting Law), CDL-AD(2016)036, para 52.

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governed by the principles of independence and impartiality. From this perspective, the proposed "contact" criteria, in addition to being unclear, appear excessive for politicians. Finally, a differentiated approach needs to be taken as to the institutions involved in the integrity assessment of the two categories of subjects (elected/appointed officials).

3. Added value of the proposed constitutional amendments

87. Without putting into question the legitimate aim of cleansing the Albanian political class - and indeed keeping an open mind to the needs for further legislative tools - the Commission notes that the proposed amendments do not come into a legal vacuum. The Albanian Constitution has been amended in many parts to create better grounds for fighting corruption, not only in the area of judiciary but also with respect to other citizens, politicians included (see current Articles 6/1, 45(3) and Article 179/a of the Constitution). The Decriminalization Law was adopted with the aim of ensuring trust in public institutions and public administration, as a legislative follow-up to Article 6/1 of the Constitution enshrining the criterion of integrity as a pre-condition for accessing or exercising public office. A series of other relevant laws[66] have been adopted, which are of relevance also to elected and appointed officials. Furthermore, as part of the justice reform, some new institutions have been introduced (although not yet operational) to the Albanian system: among them, the Special Prosecutor's Office against Organized Crime and Corruption and the National Investigation Bureau.

88. At the same time, the current vetting measures in the judicial system and the implementation of the justice reform are of crucial importance. According to the information available to the Venice Commission, despite challenges and constraints, the current vetting procedure for judges and prosecutors is on track and will likely lead to a profound cleansing and renewal of the Albanian judicial system, which should be capable, in the not too distant future, with newly established specialized institutions, to provide effective solutions to the problems of corruption and crime influence facing Albanian governance and politics.

89. It thus is difficult for the Venice Commission, based on the proposed text and in the absence of any implementing draft legislation, while at the same time taking into account the current legal environment and on-going processes in Albania, to clearly determine the added legal value of the draft amendments.

VI. Conclusions

90. Despite its legitimate aim in the current situation in Albania - that of removing offenders and their influence from high-profile governance and political life - the draft constitutional proposal for integrity control of politicians fails to provide appropriate guidance and the safeguards needed, even at the constitutional level, for such a large-scale, complex and sensitive process, with severe implications for the rights of those subject to it. As it currently stands, the vetting proposal lacks legal clarity and legal certainty, both as regards its intended scope, the grounds for ineligibility and loss of mandate, and its implementation mechanism. In many respects, it also raises issues of proportionality.

91. The draft law fails to define certain key elements notably (i) what is meant by having contact with certain persons (ii) what is meant by being involved with organised crime and (iii) what is meant by being involved in the circle of subjects who have contacts with persons.

92. It is unclear what provisions are to govern the vetting procedure. The absence of stated safeguards (other than the requirement for a 3/5 majority) in a proposal that is otherwise in

[66] Law on the Declaration and Audit of Assets and Financial Obligations of Elected Persons and of some Public Officials (Law No. 47/2017); Anti-Mafia Law (Law No. 70/2017)

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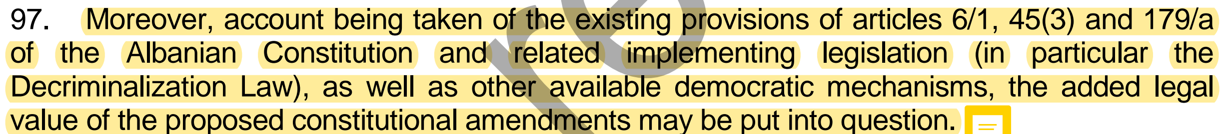
places quite detailed, together with the proposed insertion of two key provisions into the Constitution as “extraordinary measure” gives rise to a risk that ordinary due process procedures may not (be intended to) apply.

93. It is not clear who is to carry out the vetting of public officials and election candidates and whether this will be done by a judicial or other independent body. Also, it is not clear whether any disqualification is to be permanent or limited in time. In these respects legal certainty is lacking. In addition, no safeguards are proposed to avoid the risk that it will be used in a politically-biased or arbitrary manner.

94. In its intended application to elected officials, the draft law is not in compliance with the Article 3 of the First Protocol to the ECHR and the Code of Good Practice in Electoral Matters, as the proposed new vetting ground - having contacts with persons involved in organized crime - provides a very wide possibility to restrict the right to stand in elections regardless of the nature of the “contacts”, does not provide for a court decision or decision by another independent body for the disenfranchisement and the restriction does not have a temporary nature. As it stands, the proposal may actually easily lead to yet more examples of abuse of power.

95. Insofar as the vetting is intended to apply to unelected officials, uncertainty about its scope and the implementation scheme make it difficult to see how applicable Article 6 ECHR rights will be guaranteed by the draft constitutional amendments if enacted in the present form.

96. These uncertainties also make it impossible for the Venice Commission to judge whether the proposal may be considered a proportionate response to what is undoubtedly a real problem in Albania.



97. Moreover, account being taken of the existing provisions of articles 6/1, 45(3) and 179/a of the Albanian Constitution and related implementing legislation (in particular the Decriminalization Law), as well as other available democratic mechanisms, the added legal value of the proposed constitutional amendments may be put into question.

98. It is for the Albanian Parliament to decide on forthcoming steps concerning the proposed constitutional amendments, through constructive dialogue between all political forces and the society at large, in the interest of the Albanian democracy.

99. The Venice Commission remains at the disposal of the Albanian authorities for further assistance in this matter.

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