

# The integrity of persons elected, appointed or exercising public functions

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## Abstract

By decision no. 32 of 2015, “On the establishment of a special parliamentary commission for the implementation of the issues in the resolution on the agreement between the majority and the opposition in the Albanian Parliament” was approved the establishment of a special parliamentary commission for the implementation of the resolution<sup>1</sup> adopted on 24 December 2014, which, among other things, foresaw the commitment of the parties involved to work together with consensus, supported by the European Union, on the issue of individuals with criminal records, who hold a public post or seek to be elected or appointed to one, based on European standards and the assistance of the Venice Commission.

On 17 December 2015, Members of the Albanian Parliament adopt by consensus the constitutional amendments and legislative framework which are necessary to introduce in our country a clear mechanism for the exclusion of criminal offenders from public offices.

In this paper we examine regulatory issues relating to the legal framework necessary to guarantee the integrity of public officials, the verification and ascertainment of the prohibition of exercising public functions and the implementation of the prohibitive measures provided for by law no. 138/2015 “On guaranteeing the integrity of the persons elected and/or appointed to, or exercising public functions”, the so called “decriminalisation” law.

**Keywords:** integrity; right of vote; criminal offenses; prohibition of exercising public functions.

## Introduction

On 17 December 2015, Members of the Albanian Parliament adopted by consensus the constitutional amendments, approved by Law no.137/2015 which paved the way for adoption of the adequate legislative framework necessary to introduce a clear mechanism for the exclusion of criminal offenders from public offices.

The article 6/1 of the Albanian Constitution provides that the election or appointment to or exercise of a public function in one of the organs provided in this Constitution or

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<sup>1</sup> For further details, see “Resolution of political agreement between government and opposition in the Assembly of the Republic of Albania”, dated 24.12.2014, pg. 2

established by law, shall be prohibited, in the case of the existence of circumstances that impair the integrity of the public functionary, under the conditions and rules provided for by law being approved by three fifth of all members of the Assembly.

To this regards, at the same day, the Albanian Parliament adopted the law no. 138/2015 "On guaranteeing the integrity of the persons elected and/or appointed to, or exercising public functions" – the so called "decriminalisation" law, (hereinafter law 138/2015), with 130 votes in favour.

Furthermore, on 4 March 2016, the Parliament approved, with 114 votes in favour, no abstentions, and no votes against, the by-laws needed for enforcing the Law no.138/2015. The Decision nr.17/2016 of Albanian Parliament "For determining detailed rules on the implementation of the prohibitions provided in law no. 138/2015 "On guaranteeing the integrity of the persons elected and/or appointed to, or exercising public functions" provides detailed procedures for carrying out verification and taking measures for enforcement of prohibitions, according to law no. 138/2015, detailed rules and deadlines for completing, submitting, administering and publication of self-declarations and inter alia determines the content, effects and model of the self-declaration form.

The purpose of the law no.138/2015 is to guarantee the trust of the public in the functioning of elected State bodies, independent institutions and those established by law, public administration bodies, through preclusion of election or appointment thereof, or removal from public function of convicted persons, persons under security measures or convicted by a non-final decision for commission of crime, as provided for in this law<sup>2</sup>.

This legal framework establishes restrictions/prohibitive measures for each subject who has committed crimes in the past or eventually in the future, will commit crimes and will be punished or is being judged by justice for crimes committed. Based on these decisions taken by the courts or measures issued by judicial authorities or other competent authorities, persons shall be limited to exercise public functions or to be elected for certain periods specified by law.

So, the seventeen-article law aims to protect the smooth democratic functioning of the Parliament, the local government bodies, the constitutional institutions or institutions established by law, the public administration, the Armed Forces, the public order bodies, national security bodies and any other State economic institution or entity, from the influence or participation in policy making and/or decision-making of persons that have been convicted or are under security measures or have been

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<sup>2</sup> See article 1 of Law no. 138/2015 "On guaranteeing the integrity of the persons elected and/or appointed to, or exercising public functions", amended by law no. 38/2016

convicted by a non-final decision for commission of crime, as provided for in the law no.138/2015.

### **The subject of law no. 138/2015**

The article 3 of Law no.138/2015 sets out the circle of subjects that carry the self-declaration obligation.

This process begins with the completion and submission of the self-declaration form, as approved by Decision nr.17/2016 of Albanian Parliament<sup>3</sup>, by the person, subject of law, where he declares the non-existence of circumstances that prohibit his election or appointment in public functions.

The law prohibits persons that have been convicted to imprisonment by a final court decision, inside or outside of the territory of the Republic of Albania, to run for or be elected as members of the Parliament of Albania, mayor or counsellor in the municipal council, and, in any case, cannot acquire a function through a vote by the Parliament, including the function of the Prime Minister or member of the Council of Ministers, or through a vote by municipal or district councils<sup>4</sup>.

The prohibition of candidacy or election or exercising public functions is extended not only to high public function but including even the public functions<sup>5</sup>, as below:

- a) Constitutional bodies or bodies established by law;
- b) Judge or prosecutor;
- c) Deputy Minister or an equivalent position;
- d) Prefect;
- e) Political functions in Cabinets of heads of any constitutional institutions or institutions established by law;
- f) The State Intelligence Service and other intelligence services;
- g) Civil service and diplomatic service, and heads of any level in the public administration at central or local level position outside the civil service;
- h) State Police;
- i) Military man in Armed Forces;
- j) In any management position of companies completely or in majority owned or administered by the State.

<sup>3</sup> See Chapter II of Decision no. 17/2016 of Albanian Parliament "For determining detailed rules on the implementation of the prohibitions provided in law no. 138/2015 "On guaranteeing the integrity of the persons elected and/or appointed to, or exercising public functions"

<sup>4</sup> See article 2 of law no. 138/2015 "On guaranteeing the integrity of the persons elected and/or appointed to, or exercising public functions"

<sup>5</sup> See article 3 of law no 138/2015 "On guaranteeing the integrity of the persons elected and/or appointed to, or exercising public functions"

Meanwhile, competent bodies for receiving, administering and processing self-declaration forms have been designated for each subject aforementioned.

The Central Election Commission is responsible for the administration of self-declaration forms of the deputy of the Parliament of Albania, the Prime Minister or member of the Council of Ministers who is not a deputy and for the mayor or councilor in the municipal council.

Prefect is competent for candidates in public functions appointed by the municipal or district councils;

The chairperson of the Parliament is responsible for the administration of self-declaration of directors or members of constitutional or legally established bodies, elected by the Parliament, as a General Prosecutor, Governor of the Bank of Albania, the President of Republic of Albania, the chairman of Central Election Commission, the Ombudsman etc.,.

The President of the Republic of Albania is competent for the the plenipotentiary representative of the Republic of Albania in other states and international organizations; the Director of the State Intelligence Service; Chair of the Academy of Sciences and Rectors of the Universities; the General Chief of Staff, as well as the commanders of Land, Maritime and Air Forces; any other public functionary appointed by him, with the exception of the Prime Minister and members of the Council of Ministers.

The Prime Minister administers the self-declaration of the Deputy Minister, or equal positions with him, the General Director of State Police or the Prefect.

The nominee or the organ making the nomination, for directors or members of constitutional bodies or created by law that are not elected by the Assembly and for political officials in the governing cabinets of any constitutional institution or created by law.

The Department of Public Administration is responsible for the self-declaration of all Civil Servants and Diplomatic Service, as well as the heads of any level in the public administration at central or local level position outside the civil service;

The General Director of State Police is responsible for the employees of the State Police and the Agency executive of the State Intelligence Service or the head of any other intelligence service is competent for employees of these services.

Regarding the competent authority for the administration of the judges or prosecutors self-declaration, the law has defined as such, the body responsible for the appointment, transfer and promotion of these subjects.

Respectively, the Minister of Defense is competent for the military of the Armed Forces and the Responsible Minister for any management position of companies completely or in majority owned or administered by the State, due to the state of their area of responsibility, defined by decision of the Council of Ministers.

Obviously, these bodies are not obliged only to receive the self-declarations but above all have to verify the declared data/information, as well as to follow the implementation of the prohibitive measures provided for by law, in cases when a subject is ascertained under the conditions of prohibition of exercising public function.

### **Criminal offenses and the period of prohibition of candidacy, election or holding an elected or appointed function**

The legislative framework in question provides restrictions of candidacy, election or appointment in public functions, which are proportional to the degree of social risk of persons, who have committed crimes or will commit crimes in the future and particularly when persons:

1. have been convicted for the actions as follows, by a final court decision, inside or outside of the territory of the Republic of Albania;
2. have been convicted to imprisonment<sup>6</sup>;

Criminal offenses, which are considered as prerequisite for obstacle exercising public functions, are classified in four pillars, where for the first two categories is important the kind of offense committed while for the other two is the severity of punishment given to the subject, that matters.

Especially, the first category includes serious crimes as “Crimes against humanity”, “Intentional Murder”, “Intentional murder in connection with another crime”, “Premeditated murder”, “Murder in other qualifying circumstances”, “Murder of public officials”, “Assassination of State Police employees”, “Murder due to family relationship”, “Sexual crimes”, “Rapture or hostage of the person”, “Trafficking in minors and adults”, “Exploitation of prostitution”, “Crime against constitutional order”, “Actions with terrorist purposes”, “Trafficking in weapons and ammunition”, “Production and sale and trafficking of narcotic drugs”, “Criminal works carried out by armed band and organizations criminal”. The prohibition for candidacy, election or exercising public functions for these persons shall be applicable for life.

This provision is in line with the Venice Commission’s assessment regarding lifetime restrictions. The Commission estimates that long-time sanctions should be limited to very serious crimes – such as crimes against humanity, genocide, terrorism,

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<sup>6</sup> According to the article 32 of Albanian Criminal Law: Imprisonment for crimes is given for a period of five days to thirty-five years. For a criminal offense the punishment of imprisonment is given for a period of five days to two years.

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) and based on the legislation of member states, these restrictions are provided only in very extreme cases<sup>7</sup>.

However, the Albanian legislature regarding the crimes of corruption and serious electoral offences has opted for a shorter period of limitation and not a lifetime restrictions.

The second category, which contains the criminal offenses of corruption and free elections provided for by Chapter X “Criminal acts affecting free elections and the democratic system of elections” of the Albanian Criminal Code, determines that the prohibition for candidacy, election or exercising public functions shall be applicable for 20 years from the moment in which the imprisonment sentence has been served, in accordance with the final court decision.

The third category includes commission of crimes for which the person has been sentenced to no less than 2 years of imprisonment and for them the prohibition of exercising public function is 10 years from the moment in which the imprisonment sentence has been served, in accordance with the final court decision; and the fourth one includes intentional crimes as a falsification of documents, robbery, for which the person has been sentenced to no less than 6 months of imprisonment and the prohibition shall last from the moment in which the imprisonment sentence has been served, in accordance with the final court decision, until the moment of rehabilitation as provided for by Article<sup>8</sup> 69 of the Criminal Law.

Inter alia, it is worth emphasizing that the prohibition of candidacy, election or appointment in public functions is applicable even when a person is convicted by non-final decision by a judicial authority of an EU member state, US, Canada, Australia, or who are under personal security measure and/or an international search warrant has been issued by the authorities of one of these countries, for the commission or

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<sup>7</sup> For further details, see Opinion No. 807 / 2015, CDL-AD(2015)036 European Commission for Democracy Through Law (Venice Commission) “Report on exclusion of offenders from Parliament”, adopted by the Council of Democratic Elections at its 52nd meeting (Venice, 22 October 2015) and by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015) on the basis of comments by Mr Sergio BARTOLE (Substitute Member, Italy) Mr Oliver KASK (Member, Estonia) Mr Jorgen Steen SORENSEN (Member, Denmark) Ms Anna GAMPER (Expert of the Congress of Local and Regional Authorities of the Council of Europe, Austria), pg 30; [www.venice.coe.int](http://www.venice.coe.int).

<sup>8</sup> According to the Article 69 of Criminal Law, they are called unpunished:

A) those who have been sentenced to imprisonment for a period of up to six months or any other conviction And that during two years from the day of serving the sentence no other offense has been committed;

B) those sentenced to imprisonment from six months to five years and over Five years after the serving of the sentence have not committed another offense;

C) those who have been sentenced to imprisonment from five to ten years and during seven years Years after the serving of the sentence have not committed another offense;

Ç) Those who have been sentenced to imprisonment for a period of ten to twenty-five years and over Ten years from the day of serving the sentence have not committed another offense.

attempt to commit one of the criminal offenses provided in the first category, due to the social risk that these criminal acts represent<sup>9</sup>.

The prohibition for candidacy, election or exercising a function shall be applicable until a non-guilty decision is issued in his/her favour. This prohibition shall be valid even if the personal security measure on the person has been removed and the person continues to be criminally prosecuted or tried for the criminal offence for which the personal security measure was initially imposed and a court decision is yet to be delivered.

In this case, the prohibition applicable on them shall be only suspension<sup>10</sup> of exercising public functions, except for cases mentioned in Article 16, paragraph 1 of this law, which the measure applicable will be the prohibition for candidacy, election or exercise of public function, effective for 10 years from the entry into force of this law<sup>11</sup>.

So until the year 2025, a person who is convicted by non-final decision by a judicial authority of an EU member state, US, Canada, Australia, will be prohibited to exercise public functions and after this period will be applicable only the suspension measure.

The prohibition shall remain effective as long as the circumstances for which such prohibition persist. The prohibition shall terminate if the person is found not guilty. If the person is sentenced by final court decision, the relevant provisions of this law shall apply, depending on the type of offence, the sentence and the period of prohibition.

For persons deported from the territory of an EU member state, US, Canada, Australia, the prohibition for candidacy, election or exercising a public functions shall be for:

- i) for life, for deportation based on Article 2, paragraph 1, letter "a";
- ii) 20 years for deportation based on Article 2, paragraph 1, letter "b";
- iii) 10 years for deportation based on Article 2, paragraph 1, letter "c", irrelevant whether the sentence was reduced due to speedy trial or any other similar procedures resulting in sentence reduction;

Under the same conditions are treated even the persons who are deported from the territory of an EU member state, US, Canada, Australia, on the basis of one of the cases provided for in paragraph 1, letters "a", "b" and "c" of this Article, or convicted for very serious and grave violation of public security of the relevant country.

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<sup>9</sup> See article 2 of Law no. 138/2015 "On guaranteeing the integrity of the persons elected and/or appointed to, or exercising public functions".

<sup>10</sup> See article 10, paragraph 5 of law no. 138/2015 "On guaranteeing the integrity of the persons elected and/or appointed to, or exercising public functions".

<sup>11</sup> See article 16, paragraph 1 of law no. 138/2015 "On guaranteeing the integrity of the persons elected and/or appointed to, or exercising public functions".

On this subject, the Venice Commission considers that sentences for crimes committed abroad should in principle lead to the same consequences on the right to stand for elections as sentences pronounced in-country if they comply with the rules on fair trial, as defined in particular in Article 6 ECHR<sup>12</sup>. On the contrary, they should not be taken into account if there are insufficient guarantees that they do. This does not mean that criminal proceedings have to meet the exact same criteria used in the country where a candidate's right to be elected is at stake, but the sentence has to pass the test of fair proceedings by international standards<sup>13</sup>.

It's worth to mention that, each competent authority when have to determine the prohibition period have to take into account that specific institutes of material and procedural criminal law shall have no effect on the application of this law and shall not be calculated for the purpose of shortening the period of prohibition as provided for by law no.138/2015.

We have to mention here the institutes of the sentence reduction due to speedy trial, provided for by Chapter IV, Section II of Albanian Criminal Procedural Law or similar procedure resulting in sentence reduction, the amnesty<sup>14</sup>, the depenalization (abolitio criminis), the pardon<sup>15</sup>, the suspension of conviction<sup>16</sup>; the release condition restrictions, or any other sentence reduction, in accordance with the law.

The legislator has foreseen an exception to this general provision, which consists in case of convictions based on provisions that the Constitutional Court has repealed - after the delivery of the sentence – as provisions in violation with the Constitution in force, at the moment the sentence was delivered.

Article 5 and 8 of the law no.138/2015, amended, provide for the basic procedure for the verification of public officials, which is detailed by the decision no. 17/2016 "For determining detailed rules on the implementation of the prohibitions provided in law no. 138/2015 "On guaranteeing the integrity of the persons elected and/or appointed to, or exercising public functions".

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<sup>12</sup> According to the article 6 of Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4.XI.1950 (European Convention on Human Rights), amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13 provides that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

<sup>13</sup> For further details, see Opinion No. 807 / 2015, CDL-AD(2015)036 European Commission for Democracy Through Law (Venice Commission) "Report on exclusion of offenders from Parliament", adopted by the Council of Democratic Elections at its 52nd meeting (Venice, 22 October 2015) and by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015) on the basis of comments by Mr Sergio BARTOLE (Substitute Member, Italy) Mr Oliver KASK (Member, Estonia) Mr Jorgen Steen SORENSEN (Member, Denmark) Ms Anna GAMPER (Expert of the Congress of Local and Regional Authorities of the Council of Europe, Austria), pg31.

<sup>14</sup> See article 71 of Albanian Criminal Law.

<sup>15</sup> See article 70 of Albanian Criminal Law.

<sup>16</sup> See chapter VIII "Alternatives of Imprisonment sentence" of Albanian Criminal Law.



Persons, subject to this law shall fill and sign on each page, a self-declaration form, where they have to declare the non-existence of circumstances that prohibit their election or appointment. These self-declarations and the data therein can be made public at any time and without restrictions before and after the day of general or local elections, vote in the Assembly or appointment, upon request by interested subjects<sup>17</sup>.

Meanwhile, the law provides that a verification of data declared in the self-declaration forms, shall be performed any time when requested by the specific categories<sup>18</sup> and the request shall contain specific data, facts or circumstances. But, their lack shall in no case prevent the initiation of the verification, in accordance with this law.

The head of the institution who is tasked with receiving the request for verification, no later than 5 days, has to submit this request to the General Prosecutor's Office, as the competent body designated by this law to do all the necessary verifications within and outside the Albanian territory. The conclusions of the verification process shall be communicated to the competent body by the General Prosecutor Office no later than 3 days from completion of verification.

We have to stress here that, the request of verification to the General Prosecutor's Office shall be on the basis of a request or *ex officio*, when the competent authority provides that it possesses data or facts, including widely known facts, which constitute grounds for the application of the prohibitive measures<sup>19</sup>.

In any verification case, the General Prosecutor's office estimates when it is obligatory to use fingerprints and any other biometric data stored in the identification database for Albanian citizens. When fingerprints and/or other biometric data of the person under verification are not available, the body conducting the verification shall ask him/her to submit this data with the State Police within 5 days, in accordance with the procedures of the legislation on identification and issuance of ID documents to citizens. In case of refusal to provide the fingerprints, the person shall be handled as if there exists one of the circumstances that constitute a condition of the prohibition.

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<sup>17</sup> See article 5 of law no.138/2015 "On guaranteeing the integrity of the persons elected and/or appointed to, or exercising public functions".

<sup>18</sup> According to the article 7 of law no.138/2015 : Verification of data declared in the self-declaration forms, shall be performed any time when requested by a) 1/10 of the members of the Assembly, the Speaker of Assembly, the Prime Minister, the Prosecutor General for a member of the Assembly or a member of the Council of Ministers, for an elected in the municipal or regional bodies, and for the member of head of a constitutional body or body established by law and who is elected through a vote by the Assembly of Albania; b) the Prime Minister, any member of the Assembly, the Prosecutor General or any other prosecutor for the minister, deputy minister or other equivalent functions, prefect and any head of institution subordinate to the Prime Minister or a minister, as well as for the head of the State Intelligence Service;

c) the line minister, any member of the Assembly or a prosecutor for managers and members of civil service of any level of the public administration at central or local level, the State Police and the Armed Forces;

2. The request based on this paragraph can be filed with the body that has authority for verification, based on this law, by no less than 500 citizens who have the right to vote. In case of the preliminary verification of candidacies in elections or constitutional bodies or bodies established by law, the right to file a request for rest also on political parties for their potential candidates.

<sup>19</sup> See article 8, paragraph 4 of law no.138/2015 "On guaranteeing the integrity of the persons elected and/or appointed to, or exercising public functions".

The elements of fingerprints and any other biometric data are necessary in cases where individuals have committed criminal offenses with different identities from the one that they hold during the exercise of their public function.

Even though, these persons, at the time of commission or attempt to commit the criminal offence, were using another identity, the above mentioned prohibitive measures will be applied also to them.

### **Ascertained conditions of prohibition for appointed public officials**

In cases when the conditions for implementation of prohibitions provided for by this law are ascertained for categories other than the President of the Republic, members of the Assembly, members of the Council of Ministers, mayors and municipal counsellors, the competent authority shall publicly announce the results of the verification and the mandate or the function shall be terminated immediately based on this law.

Meanwhile, the competent authority for the verification of the subject, part of constitutional bodies or bodies established by law, shall take the measures to publish the results of the verification and termination of the mandate or duty in the first upcoming issue of the Official Journal, in cases of mayors, municipal councilors, etc.

Except for the aforementioned cases, the competent institution shall take measures to notify the person, whose duty terminates, and shall follow the procedures for the enforcement of measures established by this law.

When we have to emphasize that the prohibitions of this law shall apply to all categories of officials that, at the time of its entry into force, hold a mandate or a public duty in accordance with the provisions of this law, if the facts or circumstances that constitute a condition for the application of this law have occurred before the official took on the public function. If the criminal offences and the prohibition period are ascertained, the exercise of public function shall terminate.

To this regard, public officials that are subject to this law, who are currently on duty, shall fill in the self-declaration and submit it to the competent body<sup>20</sup>, no later than 2 months from the approval of the self-declaration form by the Assembly.

In case of refusal to fulfil the obligations provided for in this law with regard to the integrity, the person shall be handled as if there exists one of the circumstances that constitute a condition for the prohibition of his election or appointment in public function.

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<sup>20</sup> Supra, page 4

On 31 May 2016, the Central Election Commission<sup>21</sup>(CEC) decided to strip of their mandates 18 municipal councillors who had not submitted their self-declaration forms in the framework of the Law no.138/2015.

For the above mentioned and as well as when the circumstances for the prohibition of election or appointment are ascertained, the necessary constitutional or legal procedures for the termination of the mandate or the discharge from duty shall be applied<sup>22</sup>.

Also, even when a person, subject of verification refuses to give his/her consent to the verification of any personal data of his/hers, including fingerprints and any other biometric data in the self-declaration form, this person is considered by law as if there exists one of the circumstances that constitute a condition of the prohibition.

The drafting of the law no.138/2015 was made based on the provisions of Legislative Decree (delegated law) of 31 December 2012, n. 235, "Unique text of the provisions on non-candidacy and forbiddance of holding elective and government posts resulting from definitive sentences for uncollected crimes pursuant to Article 1, paragraph 63, of Law no. 190. (13G00006)", the so-called (Legge Severino).

According to the article 1 of this law, persons who have been sentenced for serious crimes such as participation in mafia organizations, terrorism, kidnapping, offenses against public administration involving corruption, as well as when the person has been sentenced not less than two years for intentionally committed offenses and when these offenses are punished up to 4 years or more cannot stand as candidates for the election of the Chamber of Deputies, of the Senate, of the European Parliament, governmental functions involving the Council of Ministers and cannot stay in office as members of these two legislative Assemblies of the Italian Republic.

Moreover, there are also provisions forbidding the election of offenders to local governing bodies and allowing their dismissal if they are sentenced while in office.

The Italian Constitutional Court by the sentence no. 236 of year 2015 reviewed the issue of constitutional legitimacy of Art. 11, paragraph 1, lett. a) of this Legislative Decree and at the end of process declares unfounded the question of constitutional legitimacy of this article.

The matter had been raised by the Court of Campania during the trial promoted by the Mayor of Naples, Luigi de Magistris, against the decree of suspension from office issued against him by the Prefect of Naples, following the sentence pronounced at first instance by the Tribunale di Roma for the offense of "Office abuse".

<sup>21</sup> For further details visit website: <http://www.balkaninsight.com/en/article/two-albanian-mps-and-a-mayor-dismissed-from-office-12-29-pjlfqD79.dpuf>

<sup>22</sup> See article 15 of Law 138/2015

In this case, the Constitutional Court excluded the sanctioning nature of the measures that preclude the maintenance of certain public offices as a result of criminal convictions, stressing that such measures do not constitute sanctions or penal effects of the conviction, but the consequences of not having a subjective requirement for access to the offices concerned or for their maintenance<sup>23</sup>.

### **Political rights and freedoms and the provisions of law no.138/2015**

For the first time, the Albanian Constitution provides the “suspension of the right to vote” (the active right to vote), for persons convicted of certain crimes. Specifically, the article 45, paragraph 3 foresses that are exempted from the right to be elected the citizens who have been sentenced to imprisonment upon a final decision for commission of a crime, under the rules set out in a law approved by three fifth of all the members of the Parliament. In exceptional and justified cases, the law may provide for restrictions of the election right for citizens serving an imprisonment sentence or the right to be elected prior to a final decision being rendered, or the citizens having been deported for a crime or very serious and grave breach of public security.

Actually, the law no.138/2015 provides that persons shall not have the right to vote or elect by direct vote candidates for members of Assembly or candidates for local government units, if they have been convicted to imprisonment by a final court decision, inside or outside of the territory of the Republic of Albania, for the crimes determined in the first category and the criminal offense of corruption and free election and the duration of prohibition shall be until the relevant sentence is served.

A procedure for enforcement of prohibition for voters is also provided. When a citizen is sentenced by a final court decision for one of the offences provided by law the district court that issued the decision shall send a copy of the decision to the General Directorate for Civil Registry, which shall take measures to suspend the right to vote and freeze the electoral record of the citizen in the National Civil Register database. Upon termination of such suspension period, the civil status service shall remove the suspension *ex officio*. During this period, the electoral record of the citizen shall not be included in the list of voters<sup>24</sup>.

To this regard, the Albanian Helsinki Committee has sent an appeal of the Decriminalization Law to the Constitutional Court. The Helsinki Committee has appealed paragraph 4 of Article 12 of the law, considering it to be unconstitutional.

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<sup>23</sup> See sentence no. 236 of year 2015 of Italian Constitutional Court “Provisions on non-candidacy, c.d. “Severino Law”, <http://www.regioni.it/news/2015/11/23/disposizioni-in-materia-di-incandidabilita-c-d-legge-severino-sentenza-n-362015-corte-costituzionale-432247>

<sup>24</sup> See article 12 of Law no.138/2015

In the request it submitted to the Constitutional Court, the Albanian Helsinki Committee expresses its concern about restricting the right to vote and when this restriction is in accordance with the Constitution and the European Convention of Human Rights.

The Constitutional Court of the Republic of Albania<sup>25</sup> on 18 April 2017 considered the matter in question and decided that the request was dismissed but did not yet disclose the reasoning of its decision.

In the case *Hirst v. The United Kingdom*, the European Court stressed that the rights guaranteed under Article 3 of Protocol No. 1 were crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law and also that the right to vote was a right and not a privilege.

However, any limitations on the right to vote<sup>26</sup> had to be imposed in pursuit of a legitimate aim and be proportionate. Any such conditions had not to thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage. Any departure from the principle of universal suffrage risked undermining the democratic validity of the legislature elected and its laws. So it must not be applied automatically to convicted prisoners in prison, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right had to be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No.1.

Even, in the case *Scoppola v Italy*, the European Court stated that the Italian legal provisions defining the circumstances in which individuals would be deprived of the right to vote lacked the “*general, automatic and indiscriminate*” character which led to the finding of a violation of Article 3 Protocol 1 ECHR in the landmark case of *Hirst v. United Kingdom*, emphasizing that blanket restrictions on prisoner voting, which lack scrutiny of proportionality by the legislature, are incompatible with the Convention<sup>27</sup>.

Nevertheless, the fact that the applicant was disenfranchised by legislation, and not by the decision of a judge, did not of itself make the measure disproportionate. Proportionality can be respected also when “the circumstances in which the right to

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<sup>25</sup> For further details, see [http://www.gjk.gov.al/web/NJOFTIM\\_P\\_R\\_MEDIAN\\_1430\\_1-94.php](http://www.gjk.gov.al/web/NJOFTIM_P_R_MEDIAN_1430_1-94.php)

<sup>26</sup> See Case of *Hirst v. the United Kingdom* (NO. 2) (Application no. 74025/01) Judgment Strasbourg 6 October 2005, pg 24, <https://wcd.coe.int/ViewDoc.jsp?p=&id=924847&Site=COE&direct=true>

<sup>27</sup> See, Case *Scoppola v Italy* (No. 3) (Application no. 126/05, 22 May 2012) the Grand Chamber of the European Court of Human Rights, pg 16.

vote is forfeited may be detailed in the law, making its application conditional on such factors as the nature or the gravity of the offence committed<sup>28</sup>”.

At this point, even the Venice Commissions evaluates that leaving the right to vote to individuals who infringed the standards of conduct in a democratic society is less dangerous for democracy than letting them exercise political power, and this justifies the wider margin of appreciation given to the states.

In order for these limitations to be based on the principle of proportionality and not to be subject to the discretion of any state, the Venice Commission has drafted the Code of Good Practice in Electoral Matters which provides for more detailed standards<sup>29</sup> to be fulfilled.

So, the provision may be made for depriving individuals of their right to vote and to be elected, but only subject to the following cumulative conditions:

- i. it must be provided for by law; ii. the proportionality principle must be observed; conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them; iii. the deprivation must be based on mental incapacity or a criminal conviction for a serious offence; iv. furthermore, the withdrawal of political rights or finding of mental incapacity may only be imposed by express decision of a court of law.

## Conclusions

The Albanian Parliament adopted with unanimity the constitutional amendments and legislative framework necessary to introduce a clear discipline for the exclusion of criminal offenders from public offices.

The vast majority of the states recognise the public interest in excluding offenders from Parliament and most of them have adopted legislative measures in order to achieve this result<sup>30</sup>.

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<sup>28</sup> See, Case *Scoppola v Italy* (No. 3) (Application no. 126/05, 22 May 2012) the Grand Chamber of the European Court of Human Rights, pg 23.

<sup>29</sup> For further details, see Opinion No. 807 / 2015, CDL-AD(2015)036 European Commission for Democracy Through Law (Venice Commission) “Report on exclusion of offenders from Parliament”, adopted by the Council of Democratic Elections at its 52nd meeting (Venice, 22 October 2015) and by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015) on the basis of comments by Mr Sergio BARTOLE (Substitute Member, Italy) Mr Oliver KASK (Member, Estonia) Mr Jorgen Steen SORENSEN (Member, Denmark) Ms Anna GAMPER (Expert of the Congress of Local and Regional Authorities of the Council of Europe, Austria), pg5.

<sup>30</sup> Opinion No. 807 / 2015, CDL-AD(2015)036 European Commission for Democracy Through Law (Venice Commission) “Report on exclusion of offenders from Parliament”, adopted by the Council of Democratic Elections at its 52nd meeting (Venice, 22 October 2015) and by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015) on the basis of comments by Mr Sergio BARTOLE (Substitute Member, Italy) Mr Oliver KASK (Member, Estonia) Mr Jorgen Steen SORENSEN (Member, Denmark) Ms Anna GAMPER (Expert of the Congress of Local and Regional Authorities of the Council of Europe, Austria), pg 28 [www.venice.coe.int](http://www.venice.coe.int),

This regulatory framework is expected to further strengthen the rule of law, enhance integrity amongst public officials, and increase citizens' confidence in the functioning of the state and its institutions.

So, it seems that restrictions on the right to be elected should be limited to what is necessary to ensure the proper functioning and preservation of the democratic regime<sup>31</sup>. This functioning would be more seriously endangered by an elected officer than by a simple voter exercising his active electoral rights. The restrictions under consideration, including active and passive suffrage, should not be considered as limiting democracy, but as a means of preserving it.

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<sup>31</sup> Opinion No. 807 / 2015, CDL-AD(2015)036 European Commission for Democracy Through Law (Venice Commission) "Report on exclusion of offenders from Parliament", pg. 28

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