Strasbourg, 11 June 2015 CDL(2015)029*

Opinion No. 807 / 2015 Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT PRELIMINARY REPORT

ON EXCLUSION OF OFFENDERS

FROM PARLIAMENT

on the basis of comments by

Mr Sergio BARTOLE (Substitute Member, Italy)
Mr Oliver KASK (Member, Estonia)
Mr Jorgen Steen SØRENSEN (Member, Denmark)

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

CONTENTS

I. Introduction

1. On 23 December 2014, an agreement between the majority and the opposition in Albania took place, putting an end to the boycott of Parliament by the opposition. Among the areas requiring reform, the issue of the exclusion of offenders from Parliament was addressed. This could lead to a legislative reform introducing a new cause of ineligibility to be elected, to be preceded by a public round table involving both the majority and the opposition as well as international experts.

2. On 22 April 2015, the Chairman of the Special Committee to address the issue in the resolution for agreement between the ruling majority and the opposition in the Assembly of the Republic of Albania asked the Venice Commission for co-operation, in addressing the issue of people with criminal records who hold or seek to be elected or appointed to a public office.

3. Before organising specific activities in co-operation with the Albanian authorities, the Council for Democratic Elections and the Venice Commission decided to prepare a report including comparative data on the issue and focusing on access to Parliament. This preliminary report was prepared on the basis of comments by Messrs Bartole, Kask and Sørensen.

4. The question whether persons convicted should be allowed to be Members of Parliament is an issue in many countries, although not very highly discussed at the international level as the number of cases is usually low. Still, as the practices vary, it is of general interest to state the situation in the Venice Commission Member States in order to provide help for countries where the issue gets more attention.

5. In a *first part*, the report will address the issue of the standards applicable in Europe, especially from the point of view of the limitation of the right to be elected, as well as the kind of legislation which is most appropriate.

6. In a *second part*, the present document will make an overview of the legal situation, in the Council of Europe member states as well as in a few other selected states, concerning the possibility to prevent sentenced people from standing for Parliament, on the one side, and to exclude elected members of Parliament from this body if sentenced, on the other side.

7. Not only constitutional provisions, but also ordinary legislation will be quoted when available, in particular from countries with no constitutional provision in the field, such as Finland, France, Germany, Sweden and the United Kingdom – as well as Australia, Brazil, Canada, Kenya, the Republic of Korea and the United States.

8. A number of national contributions, including practical examples of the application of rules in the field, were received from members of the Venice Commission and will be taken account of in this report.[1]

9. The report will deal successively with exclusion (of offenders) from standing for Parliament and loss of the parliamentary mandate.

[1] Contributions were received from Albania, Armenia, Bulgaria, Chile, Croatia, the Czech Republic, Denmark, Estonia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, the Republic of Korea, Latvia, Malta, Mexico, Moldova, Monaco, the Netherlands, Peru, Romania, San Marino, Serbia, Slovakia, Slovenia, Sweden, "the former Yugoslav Republic of Macedonia", Ukraine and the USA.

10. In a *third part*, it will address the specific situation in Italy, where legislation was recently changed and practice – in particular concerning the case of a former President of the Council - led to much attention.

11. In a *fourth part*, the report will deal with possible conclusions to be inferred from the standards of the Council of Europe in the field of restrictions to the right to be elected, as well as from the comparative material available.

12. Parliamentary immunity issues are not at stake here. They were addressed in the Report on the Scope and Lifting of Parliamentary Immunities adopted by the Venice Commission at its 98th plenary session.[2]

13. The present report was adopted by the Council for Democratic Elections at its … meeting (Venice, …) and by the Venice Commission at its … plenary session (Venice, …).

II. International standards

A. Ineligibility to be elected

14. Article 3 of the First Additional Protocol to the European Court of Human Rights implies the (active) right to vote as well as the (passive) right to be elected. This was made clear by the European Court of Human Rights.[3]

15. At least the principles and values discussed in ECtHR case-law on the right to vote have to be observed.[4] "Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates. The exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of Article 3 of Protocol No. 1.

16. Ineligibility must first be based on clear norms of law.[5] It must pursue a legitimate aim. However, a "wide range of purposes may … be compatible with Article 3".[6]

17. The principle of proportionality must also be observed. In this respect, the "margin of appreciation is wide" for members states, but it "is not all-embracing".[7] It is, of course, this issue which has been most contentious in the case-law of the Strasbourg Court.

18. "[T]he Court accepts that stricter requirements may be imposed on the eligibility to stand for election to parliament, as distinguished from voting eligibility".[8] This assertion was made with a specific reference to the Code of Good Practice in Electoral Matters drafted by the Venice Commission. The case-law concerning the right to vote may therefore not always apply automatically to the problem of ineligibility, especially when applying the proportionality test to the restrictions. So the margin is even wider when it comes to ineligibility than to deprivation of the right to vote. However, a rule under which any person with a criminal conviction would be ineligible would not be in compliance with Article 3.

---

[2] CDL-AD(2014)011.
[3] See, for example, ECtHR *Tănase v. Moldova* [GC], 7/08, 27 April 2010, § 154ff; *Ždanoka v. Latvia* [GC], 58278/00, 16 March 2006, § 102; *Hirst v. the United Kingdom (no. 2)* [GC], 74025/01, 6 October 2005, § 57.
[4] See, for example, the above-mentioned *Hirst (no. 2)* case; *Scoppola (No. 3) v. Italy* [GC], 126/05, 22 May 2012; *Anchugov and Gladkov v. Russia,* 11157/04 and 15162/05, 4 July 2013.
[5] On the conditions for restrictions to the right to stand for elections, see for example *Tănase*, § 154ff.
[6] *Hirst (no. 2),* § 74.
[7] *Hirst (no. 2),* § 82.
[8] *Melnychenko v. Ukraine*, 17707/02, 19 October 2004, § 57; cf. *Paksas v. Lithuania* [GC], 34932/04, 6 January 2011, § 96.

19. According to the Court, "the Contracting States may decide either to leave it to the courts to determine the proportionality of a measure restricting convicted prisoners' voting rights, or to incorporate provisions into their laws defining the circumstances in which such a measure should be applied. In this latter case, it will be for the legislature itself to balance the competing interests in order to avoid any general, automatic and indiscriminate restriction".[9]

20. The Code of Good Practice in Electoral Matters drafted by the Venice Commission provides for somewhat more detailed standards:[10]

"i. provision may be made for depriving individuals of their right to vote and to be elected, but only subject to the following cumulative conditions:
ii. it must be provided for by law;
iii. 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;
iv. the deprivation must be based on mental incapacity or a criminal conviction for a serious offence;
v. furthermore, the withdrawal of political rights or finding of mental incapacity may only be imposed by express decision of a court of law."

21. Following the recent case-law of the European Court of Human Rights, the just mentioned paragraph I.1.1.d of the Code of Good Practice in Electoral Matters should not be taken literally.

22. The Venice Commission also stated that "[i]t is not uncommon that due to a criminal conviction for a serious offence, individuals are deprived of the right to stand for election. However, it can be regarded as problematic if the passive right of suffrage is denied on the basis of any conviction, regardless of the nature of the underlying offence. Such a blanket prohibition might not be in line with the European Convention for the Protection of Human Rights and Fundamentals Freedoms.)…. On the other hand, it might be not appropriate not to include (or not to implement) any restriction to eligibility to be elected for criminals at all…" [11]

23. A more thorough study on restrictions to stand in local elections has been carried out by the Congress of Local and Regional Authorities of the Council of Europe[12] but differences compared to parliamentary elections might be possible, as Article 3 of the First Additional Protocol to the ECHR is not applicable to these elections.

24. The Congress recommended that the Committee of Ministers invite the governments of member States to review their domestic legislation with regard to local and regional elections, in order to ensure that those countries that currently apply an automatic ban on standing for election following certain criminal convictions, review their legislation in order that any decision of ineligibility require a specific judicial decision of limited duration, and proportionate to the seriousness of the offence committed, in conformity with the case-law of the European Court of Human Rights.[13]

[9] *Scoppola (No. 3) v. Italy*, 126/05, 22 May 2012, § 96.
[10] CDL-AD(2002)023rev, I.1.1.d.
[11] CDL-AD(2006)018, paragraphs 78-79, with a reference to the Opinion on the Law on Elections of People's Deputies of the Ukraine, CDL-AD(2006)002, paras 16 and 100.
[12] Criteria for standing in local and regional elections (CG/2015(28)7PROV), paras 72-97.
[13] Recommendation 375 (2015) of the Congress, paragraph 19(vi).

B. Loss of mandate

25. The passive aspect of Article 3 of the Additional Protocol to the European Convention on Human Rights is not limited to the right to be elected *stricto sensu*. Incompatibilities between a seat in Parliament and, in the case under consideration, dual citizenship, were also considered as a violation of this provision.[14] It can be inferred from this case-law that the loss of a mandate after taking office could infringe the right to free elections.

26. This implies that such termination should be based on clear norms of law, serve a legitimate aim and be proportionate.

III. Overview of national legislation

A. Exclusion from standing for Parliament

1. Regulatory level

27. The majority of constitutions of Council of Europe Member States do not provide for explicit constitutional provisions concerning parliamentary candidates. Several countries such as Georgia, Ireland, Italy, Moldova, Monaco, Portugal, Slovakia, Slovenia,[15] Spain, and Switzerland, state that cases of non-eligibility and incompatibility with an office of MPs should be determined by law. Nonetheless, about one third of the Council of Europe countries have more detailed constitutional provisions concerning parliamentary candidates. These provisions set forth various restrictions that prevent convicted persons from running for elections. It may already be underlined at this stage that none of the countries under consideration addresses as such the issue of convictions taking place abroad.

2. According to the nature of the offence

28. For clarity's sake, legal orders may be divided into a few categories when addressing the issue of ineligibility to be elected due to criminal sentences for candidates for Parliament. It is possible to distinguish countries in which ineligibility is based on the nature of the offence from those where the nature of the sanction is decisive.

a. Concerning the nature of the offence, a number of countries provide for ineligibility to be elected for:

- Electoral offences

29. In **Cyprus**[16], **France**, **Malta,**[17] the **Netherlands** and the **United Kingdom** (corrupt or illegal practices) legislation provides for prohibition to run for elections when the candidate has committed an electoral offence. Namely, in Cyprus, the Constitution provides that a citizen can be disqualified from candidacy to parliamentary elections "by a competent court for any electoral offence".[18] In the same way, in Malta the persons convicted of any "offences connected with the election of members of the House of Representatives" shall be disqualified from being elected.[19] In **France**, such limitation is provided by Article L45-1 of the Electoral Code, that states that a person declared ineligible by an administrative court

[14] *Tănase v. Moldova* [GC], 7/08, 27 April 2010.
[15] However, in case of Slovenia, even if Paragraph 2 of Article 82 of the Constitution provides that the eligibility of persons to be elected as PMs "shall be regulated by statute", such a legal provision was never adopted after the adoption of the Constitution in 1991.
[16] Constitution of Cyprus, Article 64c.
[17] Constitution of Malta, Article 54.
[18] Constitution of Cyprus, Article 64c.
[19] Constitution of Malta, Article 54.

judgment or another judgment[20] cannot become a parliamentary candidate. The French Electoral Code provides for similar sanctions in case of false electoral campaign accounts.[21]

30. In the **Republic of Korea**, under the Constitution and the current law, a person who committed an offence linked to elections or the exercise of a public mandate can be excluded from standing for Parliament. This includes persons who committed an election crime; a crime provided for in the provisions of Articles 45 and 49 of the Political Fund Act; as well as crimes in connection with the duties while in office as President, member of the National Assembly, member of a local council, and head of local government.[22] The ineligibility to be elected applies: during ten years after the end of execution of an imprisonment sentence (or an exemption from its execution); during ten years too after a suspended sentence became final; during five years have not passed after the sentence to a fine exceeding one million became final.

- *Selected offences*

31. In **Cyprus,[23] Denmark,[24] Iceland[25] and Turkey,[26]** citizens who have been convicted for an offence involving moral values such as honesty, worthiness, honour and reputation cannot be candidates to Parliament. The Constitution of Turkey excludes eligibility to be elected of persons guilty of financial crimes ("embezzlement, corruption, bribery, theft, fraud, forgery, breach of trust, bankruptcy") of crimes against the state ("smuggling, conspiracy in official bidding or purchasing, offences related to the disclosure of state secrets, involvement in acts of terrorism, or incitement and encouragement of such activities, even if they have been pardoned.[27] The Constitution of Malta adds bankruptcy to the moral values mentioned above, which would prevent a person from becoming a parliamentary candidate. Denmark prevents a person from being candidate to Parliament if he/she committed any "act which in the eyes of the public makes him/her unworthy to be a [MP]"[28].

32. In **Iceland**, Act No. 24 from 16 May 2000 Concerning Parliamentary Elections to the Althing provides that a person who does not possess his or her full civil rights cannot stand for Parliament.[29] A person who has been convicted for "an act that is considered heinous by public opinion" is not considered to possess his and her full civil rights.[30] Additionally, Iceland goes further by providing that an "unblemished reputation" is needed to run for elections.[31] Article 5 of Act No. 24/2000 on Parliamentary Elections clarifies when a conviction for a punishable offence results in a blemished reputation where one no longer possesses full civil rights. An individual who has been convicted by a court of law for committing an act that is considered heinous by public opinion is no longer considered to have "unblemished reputation". Paragraph 2 of Article 5 subsequently explains when an act is considered heinous by public opinion, i.e. the defendant in a criminal case must have reached the age of 18 when the offence was committed and the resulting sentence must have been at least four years of prison without probation. The same goes for someone who is placed under security

[20] Under Articles L118-3 and L118-4. The same provisions apply for judgments under Articles LO 136-1, LO 136-6.
[21] Articles L118-3, LO136-1 and LO136-3.
[22] Articles 129 through 132 of the Criminal Act and Article 3 of the Act on the Aggravated Punishment.
[23] Constitution of Cyprus, Article 64c.
[24] Constitution of Denmark, Article 30.
[25] Constitution of Iceland, Article 34.
[26] Constitution of Turkey, Article 76.
[27] Constitution of Turkey, Article 76.
[28] Constitution of Denmark, Article 30. For more details, see Article 4 of the Parliamentary Election Act.
[29] Act No. 24 from 16 May 2000 Concerning Parliamentary Elections to the Althing states on the right to vote and eligibility in Article 5.
[30] Act No. 24 from 16 May 2000 Concerning Parliamentary Elections to the Althing deals with the right to vote and eligibility in Article 5. Additionally, the rules on restoration of civil rights are in provisions 84 and 85 of the Icelandic Penal Code No. 29/1940.
[31] Constitution of Iceland, Article 34; Article 4 of the Act No. 24/2000 on Parliamentary Elections.

measures after not being sentenced for insanity.[32] On the contrary, an individual who is convicted to a sentence of 3 months with a period of conditional suspension of two years is not considered to have "blemished" reputation and is eligible to be elected to the Althingi.

33. In **Canada**, the Parliament of Canada Act and the Canada Elections Act provide for ineligibility criteria. Under section 65 of the Canada Elections Act, a person convicted of a corrupt or illegal practice within the previous five years or a person currently serving a prison term cannot be a candidate to parliamentary elections. Section 502 of the Canada Elections Act provides a list of offences and clarifies for how long the person is disqualified.

34. A provision of analogous nature may be found in **Turkey**. Persons convicted of "smuggling, conspiracy, [...] disclosure of state secrets, of involvement in acts of terrorism, or incitement and encouragement of such activities [...], even if they have been pardoned" [33] may not run for the elections.

35. In the **Netherlands**, the Criminal Code also provides rules for the additional penalty of deprivation of rights, including to right to be elected.[34] This additional penalty can only be attached to conviction and punishment of specific crimes, named in the law. They are mainly situated in Title I (Crimes against the security of the state) and Part XXVIII (Offences committed while in office) of the Criminal Code.[35] Sr. In addition, in case of the offences described in the articles Z1, Z2 and Z3 of the Elections Act, if the convicted will be imprisoned for at least one year, deprivation of the right to vote can be imposed. The deprivation of the right to vote and to be elected has been applied on a large scale after World War II to members of the *Nationalist Social Movement* (NSB). The latest information from the Electoral Council shows that some of these people are still alive. Since the deprivation of the right to vote was for life, they are still not able to stand as a candidate or vote.

36. Furthermore, as political parties are considered to be private organisations and should take the form of an association, they can be prohibited under Article 2:20 of the Dutch Civil Code. Article 140 of the Criminal Code stipulates that it is a crime to continue the work of an organisation that is prohibited and dissolved by the court. If it is proven that a candidate is attempting to continue the activities or the political programme of a previously banned political party, it is possible to use this provision to prosecute the candidates or leaders of this party individually. Two parties were banned and declared dissolved under the Decree on dissolution of treacherous organisations. This decision was taken by the Dutch government in exile in London. In 1944, the NSB and its related and other Nazi and fascist organisations were banned. The decision also stated that all organisations that aimed to continue the efforts of one or more of these organisations to seek conflict within the Dutch society should be regarded as associations against public order. Under this provision the National European Social Movement was also banned in 1953. In 1978, the Nederlandse Volksunie was prohibited, because of its racist nature and its resort to violent means to reach its goal. Its founder tried to participate in the next election under a different party name (lijst Glimmerveen), but was prohibited to do so in certain regions of the country. This is the only instance where a candidate was refused the right to run for elections based on the prohibition of a party of which he was the leader. On 18 November 1998, the Amsterdam District court banned and dissolved the CP'86, another right wing party that often used racial languages and motivated its followers to use violence against foreigners.

[32] See Article 15 and 62 of the Icelandic Penal Code No. 19/1940. This applies to persons who were, at the time an act was committed, totally unable to control their actions on account of mental disease, retardation or deterioration, or on account of impaired consciousness or other similar condition

[33] Constitution of Turkey, Article 76.

[34] Article 28 paragraph 1.

[35] more specifically the articles 92-103, 105, 108- 112, 115, 116, 121-124, 129, 355-357 (Sr).

- *Offences in general*

37. In **Latvia**, the Saeima Election Law of 25 May 1995 provides that persons are not to be included in the lists of candidates and are not eligible to be elected to the Saeima (Parliament) if they have been convicted of an intentionally committed criminal offence - except in cases when they have been rehabilitated or their conviction has been expunged or vacated.[36]

38. Some countries provide for more general provisions. In **Albania**, "convicts who are serving a prison sentence have only the right to vote" so no right to be elected.[37]

39. In **Israel**, a person who was convicted of committing an offence is ineligible to be a candidate for 7 years under Article 6(1) of the Basic-Law.

40. In **Peru**, a person who has criminal records cannot be elected MP.

41. In **Chile**, according to the Constitution, the status of Chilean citizens[38] grants voting rights and the rights be elected. It is lost "due to a felony crime sentence"[39] or "due to a sentence for crimes that the law defines as terrorist behaviour and those related to drug trafficking, and that have, also, earned felony sentence"[40]. Therefore, if the status of citizen is lost or the right to vote of a citizen is suspended a person cannot be eligible for Parliament nor maintain his membership to it.

3. According to the nature of the sentence

42. Ineligibility to be elected may also depend on the nature of the sentence pronounced, possibly combined with the nature of the offence

43. In **Armenia**[41], **Austria**[42], **Azerbaijan**[43], **Bulgaria**[44], **Latvia**[45], **Lithuania**[46], **Luxembourg**[47], **Montenegro**[48], **the Netherlands**[49], **Poland**[50], **Turkey**[51], **Slovakia**[52] and **Ukraine**[53], a citizen convicted to a prison sentence cannot be a parliamentary candidate. In **Azerbaijan, Luxembourg** and **Ukraine**, the Constitutions specify that the above mentioned prohibition concerns convictions for crimes only. In **Malta**[54], a person cannot become a parliamentary candidate if he/she is serving a sentence of imprisonment exceeding twelve months. It should be noted that sentences that are required to be served consecutively shall be regarded as separate sentences if none of them exceeds twelve months, but if any one of them exceeds that term they shall be regarded as one sentence.

[36] The Saeima Election Law of 25 May 1995, Article 5.
[37] Constitution of Albania, Article 45(3).
[38] Constitution of Chile, Article 13.
[39] They shall recover it in accordance with the law once their criminal liability has expired.
[40] Constitution of Chile, Article 17. They may request their reinstatement to the Senate after serving their sentence.
[41] Constitution of Armenia, Article 30.
[42] Constitution of Austria, Article 26 paragraph 5.
[43] Constitution of Azerbaijan, Article 85.
[44] Constitution of Bulgaria, Article 65.
[45] The Saeima Election Law of 25 May 1995, Article 5.
[46] Constitution of Lithuania, Article 56.
[47] Constitution of Luxembourg, Article 53 paragraph 1.
[48] Constitution of Montenegro, Article 87.
[49] The Criminal Code (Sr), Article 28(1) provides rules for the additional penalty of deprivation of rights.
[50] Constitution of Poland, Article 99 paragraph 3.
[51] Constitution of Turkey, Article 76.
[52] Act on election to the National Council of the Slovak Republic (no. 333/2004 Collection of Laws).
[53] Constitution of Ukraine, Article 76.
[54] Constitution of Malta, Article 54.

44. In **Germany**, the Criminal Code automatically adds the prohibition to stand in public elections to the conviction for a felony to a term of imprisonment of not less than one year; when the judge pronounces a sentence of less than one year, he or she may pronounce the deprivation of the right to be elected as an accessory penalty only for specific offences.[55]

45. In addition, the German Basic Law (Grundgesetz) and the Federal Constitutional Court Act (BVerfGG) empower the Federal Constitutional Court to deny a person its right to be elected in case of forfeiture of basic rights.[56] Persons may forfeit their basic rights if they abuse the freedom of expression, in particular the freedom of the press, the freedom of teaching, the freedom of assembly, the freedom of association, the privacy of correspondence, posts and telecommunications, the rights of property, or the right of asylum in order to combat the free democratic basic order.[57] There is no decision of the Bundesverfassungsgericht known in which the Court has ever used this competence.

46. The case of Friedrich Cremer, member of the Social Democratic Party and of the Parliament in Bavaria, is one of the few cases in which a MP had to leave the Parliament because of a criminal conviction. He was found guilty by a Bavarian criminal court for acting as an agent for a foreign intelligence service and was condemned to an imprisonment of two years and six months. In addition, the same court deprived him of the ability to be elected in public elections for three years. The Court was convinced that he had met agents of the intelligence service of the German Democratic Republic (GDR) several times between 1974 and 1979 and thereby supported the activities of the Ministry for State Security of the GDR. After the decision of the criminal court, the Bavarian parliament voted for the exclusion of Mr Cremer from the Parliament and the loss of his rights as a MP. Friedrich Cremer appealed to the Federal High Court of Justice (Bundesgerichtshof) and the Federal Constitutional Court (Bundesverfassungsgericht), however without success.

47. In **Poland**, not only the prison sentence but any "deprivation of liberty" as well will prevent a person from becoming a parliamentary candidate.

48. In this country, like in Turkey and Ukraine, only deprivation of liberty concerning intentional offences will be taken into account.

49. The following practical example can be quoted concerning Ukraine.

50. In the **United Kingdom**, persons serving a prison sentence for more than one year cannot be elected for the time of pursuance of the sentence, under the Representation of the People Act.

51. In **Romania**, the Criminal Code provides for deprivation of electoral rights as an ancillary punishment. pursuant to Articles 54 and 55 in conjunction with Articles 65 and 66 and with the Criminal Code. According to Article 54 of the Criminal Code, „An ancillary punishment consists in the deprivation of certain rights, from the date when the sentence is final until the punishment by deprivation of liberty is executed or considered as executed."[58]

52. In **Australia,** a person convicted and under sentence or subject to be sentenced[59] for an offence punishable by imprisonment for one year or longer is disqualified from standing for elections.[60]

[55] German Criminal Code, § 45.
[56] Article 39 para. 2 BVerfGG.
[57] Article 18 Grundgesetz
[58] Article 54 of the Criminal Code (Sr), to be read in conjunction with Articlers 55, 65 and 66.
[59] See below ch. III.A.5.
[60] Transparency International's study http://bit.ly/1DhILeM.

53. The situation in **Italy** will be studied more in detail below.[61]

4. Other restrictions

54. No constitutional provision concerning persons being prosecuted but not convicted exist in the constitutions of the 47 Member States of the Council of Europe. On the contrary, in **Australia**, a person subject to be sentenced for an offence punishable by imprisonment for one year or longer is disqualified to stand for elections.

55. There is yet another possibility to regulate the right to stand for election for convicted persons. It is possible to allow them to take part in elections with an obligation to declare publicly the information on conviction, *e.g*. by adding to posters a sentence on the conviction. This is the case in **Lithuania** for previous convictions already served.[62]

5. No restriction

56. On the contrary, in **the United States**, "the constitution does not establish any disqualification criteria, including for serious crimes. Voters are the ones to decide whether they want to elect someone with criminal records or not."[63]

57. In **Finland**, offences do not lead to ineligibility any more, since the amendment of the Criminal Code of 1995. Nor do they in **Slovenia** and **Sweden**.

6. General restrictions or case-by-case decisions?

58. In case the right to stand for elections is restricted, two main types of systems are used: 1) the restriction is provided for in a general manner by law, stipulating the conviction, type of sentence or offence which leads to the deprivation of the right to be elected; 2) the restriction is decided by a court as a punishment on a case-by-case basis.

59. 1) The first category (automatic deprivation of the right to be elected) includes an important number of countries.

60. For example, in **Estonia**, Article 58 of the Constitution[64] leaves it open to the legislation to decide on the ban to take part in elections (including the right to stand in elections) for persons convicted for a crime and sentenced to imprisonment. However, there is no margin of appreciation: the *Riigikogu Election Act*[65] provides for a general ban in, irrespective of the crime committed or the length of imprisonment.[66]

61. In **Kyrgyzstan**, persons who are being held in places of confinement, as well as persons whose previous convictions have not been expunged or served, have no right to be elected.[67]

62. In **Lithuania**, persons who have not fulfilled punishment imposed by a court judgment may not stand as candidates in elections.[68] The same applies to persons who have been impeached.[69]

---

[61] Ch. III.
[62] Election Code of Lithuania, Article 98(3).
[63] Transparency International's study http://bit.ly/1DhILeM See also: for Senatorshttps://fas.org/sgp/crs/misc/RL34716.pdf page 7-8; for Members of the House https://fas.org/sgp/crs/misc/RL33229.pdf.
[64] https://www.riigiteataja.ee/en/eli/ee/rhvv/act/530102013003/consolide.
[65] https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/520012015018/consolide, Article 4(6).
[66] No court practice on the matter is available.
[67] Election Code, Art 3(3) and 3(4).

63. In **Moldova**, individuals who are sentenced to prison (deprivation of liberty) by a final court decision and who serve their sentence in a penitentiary institution, as well as individuals who have active criminal records for deliberately committing crimes, are denied the right to stand as a candidate in elections.[70] According to the Penal Code[71] the judge can impose, as an ancillary punishment, the interdiction to hold some positions for a term from 1 to 5 years and in cases expressly provided in the special part of the Penal Code for a term from 1 to 15 years.

64. In **Greece** the Constitution (Article 53) provides that persons convicted for some felonies listed in the electoral law are denied the right to be elected.

65. In **Iceland**, Article 5 of Election Law provides that persons who have been convicted by a court of law for committing an act that is considered heinous by public opinion, are automatically deprived (*inter alia*) of the right to be elected.[72]

66. In **"the former Yugoslav Republic of Macedonia",** a person does not have the right to be elected if he or she has been sentenced by a final court decision to unconditional imprisonment above six months and the sentence has not yet started or if he or she is serving an imprisonment sentence for a criminal offence.[73] Since the first democratic parliamentary elections (1990), there has been one case of exclusion from standing for Parliament on account of a criminal accusation. Namely, in 2004, a MP from VMRO/DPMNE was accused for war crime, done during the 2001 conflict, when he was Minister of Interior. He was released after his trial before the Tribunal in The Hague.

67. In **Turkey**, persons sentenced to imprisonment for more than one year (with the exception of conviction for negligence) are ineligible to stand for election, as well as persons convicted of specific serious criminal offences listed in the law.

68. Similar restrictions also exist *inter alia* in **Albania**[74] and in **Armenia**.[75,76] In **Germany**, as already they apply to convictions for a felony to a term of imprisonment of not less than one year.

69. 2) On the contrary, several countries provide for a *specific decision to be made* concerning the deprivation of the right to be elected. The most classical example is **Germany** – for sentences inferior to one year.[77] In the **Netherlands**, to be eligible for Parliament, a candidate must not have been disqualified from voting,[78] which can be the result of a judicial sentence.[79] The same rule exists in **Luxembourg** for persons sentenced for minor offences. The legislation of the **Republic of Korea** provides that the eligibility of a person is suspended or forfeited according to a decision by court or pursuant to other Acts.[80] Legislation can therefore combine automatic deprivation in some cases and case-by-case decisions in others.

---

[68] Art 56(2) of the Constitution; Article 2(3) of the Election Code.
[69] Election Code, Art 2(4).
[70] Electoral Code Article 13(2)c.
[71] Article 65.
[72] See above.
[73] Election code, Article 7(3).
[74] Article 45(3) of the Constitution: "Convicts who are serving a prison sentence have only the right to vote".
[75] Article 2(3) of the Electoral Code
[76] Other examples are given under III.A.2-3.
[77] Article 18(1) of the Federal Election Law.
[78] Constitution of the Netherlands, Article 56.
[79] Constitution of the Netherlands, Article 54.2.
[80] The Public Official Election Act, Articles 18, 19 and 264.

B. Loss of the parliamentary mandate

70. More than 40 % of the countries under consideration have constitutional provisions regarding the loss of MP mandates and others deal with the issue at legislative level. The study of other legislative acts of selected countries *(see above*) has revealed additional useful information on the issue. Moreover, grounds concerning the loss of parliamentary mandates may vary, but can again depend on the nature of the offence or the nature of the sentence. In other countries, they will apply in the same situations as ineligibility to be elected. This will be addressed below, including cases which do not (fully) fall into the mentioned categories.

1. According to the nature of the offence

a. Electoral offences

71. In **Cyprus**[81], **Finland**[82] and **Malta**[83], a MP loses his/her mandate if he/she is convicted for an electoral offence. In **Italy**, Act no. 175/2010 has introduced a new ground for ineligibility: electoral offences.

72. In the **Republic of Korea**, under the Constitution and the current law, a MP can be dismissed following the invalidation of the election due to election crimes if the sentence exceeded one million won.[84] For example, since the 2012 parliamentary elections, eight members of the National Assembly were excluded following a final sentence exceeding such amount of fines for violation of the Public Official Election Act. Typical cases are (a) illegal spending of election expenses, (b) unlawful election campaign, and (c) publication of false facts. The most recent example is Mr Ahn's, a former member of the National Assembly, who was excluded due to the final sentence on the allegation of his election manager's illegal spending of election expenses on March12, 2015. The sentence was six months imprisonment suspended for two years. He was found guilty and at the same time excluded from the National Assembly.

b. Offences considered as (particularly) immoral

73. As previously highlighted concerning parliamentary candidates,"an offence involving dishonesty or moral turpitude" in **Cyprus** can cause the loss of a MP's mandate;[85] similar provisions exist in **Finland** where the Constitution provides that "if the offence is such that the accused does not command the trust and respect necessary for the office of a Representative", the Parliament may terminate the mandate.[86]

c. Other offences and cases

74. In **Brazil**, a Deputy of Senator shall lose his office if he is criminally convicted by a final and unappealable sentence.[87] Since 2010, the law "disqualifies those convicted of racism, homicide, rape, drug trafficking and misuse of public funds by a second-level court (even if an appeal is still pending), as well as those whose resignation were motivated to avoid impeachment, from holding political office for a period of eight years. Politicians engaged in

[81] Constitution of Cyprus, Article 64c.
[82] Constitution of Finland, section 28.
[83] Constitution of Malta, Article 55.
[84] Public Official Election Act, Article 264.

[85] Constitution of Cyprus, Article 64c.
[86] Constitution of Finland, section 28.
[87] Article 55 (VI) of the Constitution.

vote-buying, abuses of power and electoral manipulations are also considered ineligible for a period of eight years".[88]

75. In **Canada**, there are several relevant legislative provisions regarding removal from office. Under section 31 of the Constitution Act, a senator loses his/her seat because of bankruptcy or if convicted of treason, felony, "or any other infamous crime".

76. In **Portugal**, deputies cease to hold office if they are convicted by a court for a crime committed in the exercise of their duties and are thus sentenced, or for membership of an organisation that is racist or has a fascist ideology.[89]

77. In **Moldova,** the Constitution provides the possibility to withdraw the mandate of the MP, without providing the grounds for withdrawal,[90] but there are no implementing provisions in the present legislation. Nonetheless, all these provisions were never applied and no MP was dismissed, as there were not cases of the conviction of MP in the Republic of Moldova. There was a case of conviction of the MP by a foreign court but the process of recognition and enforcement of this decision in Moldova started only after the respective MP resigned. It has to be note that, in its decision no. 2 of 20 January 2015 on the interpretation of Article 1 paragraph 3 in conjunction with Article 69 and 70 of the Constitution (immunity and termination of mandate of MPs), the Constitutional Court stated that "In case of conviction of a member of the Parliament for crimes committed with intention and/or conviction to prison (imprisonment) by a final and binding court decision, including of the foreign states, its mandate cannot be withdrawn but ceases ex officio (by the effect of law)".

2. According to the nature of the sentence

78. In **Albania,**[91] **Armenia,**[92] **Azerbaijan,**[93] **Bulgaria,**[94] **Estonia,**[95] **Finland,**[96] **Georgia,**[97] **Germany,**[98] **"the former Yugoslav Republic of Macedonia",**[99] **Slovakia,**[100] **Turkey**[101] and **Ukraine,**[102] a MP loses his/her mandate when he/she faces any kind of judicial sentence. In

[88] Transparency International's study http://bit.ly/1DhILeM.
[89] Art 160(1) of the Constitution.
[90] Constitution of Moldova, Article 69 paragraph 2.
[91] Constitution of Albania, Article 71 paragraph 2.
[92] Constitution of Armenia, Articles 65 and 67. It should be mentioned that there have also been a few cases when the National Assembly gave consent for involvement of MPs as defendants (accused) and on their arrest, but their powers were not terminated on the discussed basis.
[93] Constitution of Azerbaijan, Article 89.
[94] Constitution of Bulgaria, Article 72 paragraph 1.
[95] Constitution of Estonia, Article 64 paragraph 2.
[96] Constitution of Finland, section 28.
[97] Constitution of Georgia, Article 54 paragraph 2.
[98] German Criminal Code (*Strafgesetzbuch*, briefly StGB), section 45.
[99] Constitution of the former Yugoslav Republic of Macedonia, Article 65. First, from the first democratic parliamentary elections in 1990 to the last in 2014, there has been one case of exclusion from standing for Parliament on account of a criminal accusation. Namely, one of the MPs from VMRO/DPMNE in 2004 was accused for war crime, done during the conflict from 2001 when he was Minister of Interior. After trial before the Court in the Hague, he was released. Second, in 2001, a deputy from DPA (Democratic Party of Albanians) publicly announced that he was leaving the Parliament and joining NLA (National Liberation Army) as a commander in Vitina (Kosovo). The Parliament, by a two-thirds majority vote of all Representatives, revoked him. He was put on the "American Black List", created by Bush administration. After several month war activities, before the end of inter-ethnic conflict, he was amnestied under the Law on Amnesty and again became a deputy, now through DUI (Democratic Union for Integration).
[100] Constitution of Slovakia, Article 81a. Additionally, according to § 57 of the Law on Rules of Procedure of the National Council of the Slovak Republic (no. 350/1996 Coll.) disqualification of MPs in general must be deliberated by the Mandate and Immunity Committee and subsequently submitted to the National Council for a decision. Since MPs are disqualified by the very fact that a judgement on criminal conviction becomes final, the decision of the National Council in this case can only be of declarative nature.
[101] Constitution of Turkey, Article 84.
[102] Constitution of Ukraine, Article 81.

the **Republic of Korea**, a member of the National Assembly who violated the general criminal law and was sentenced to a non-suspended sentence shall also be excluded.[103] There have been two cases of exclusion following a conviction for crimes against other pieces of legislation than the Public Official Election Act or the Political Funds Act. One of them is the following: In the Tear Gas Powder Case (Supreme Court Decision 2014do1894 decided June 12, 2014), the Defendant, Sun-dong Kim, was a National Assembly member affiliated with the Unified Progress Party. For the purpose of obstructing a National Assembly plenary session concerning the U.S.-South Korea Free Trade Agreement ratification, the defendant detonated a CS tear gas powder grenade behind the speaker's podium in front of the chairperson's seat, then threw the tear gas powder remaining inside the canister to the National Assembly Vice-speaker, who was presiding over the session. As a result, the defendant was indicted for carrying a dangerous item and committing acts of violence against National Assembly members. Furthermore,the defendant was the person in charge of his party's accounting, and was also indicted for violating the Political Funds Act.

79. The above mentioned countries' law provides for different formulations. For example, in Estonia, the judicial conviction is referred to as "a guilty verdict", in Georgia – as "a final judgment of conviction", in Turkey as "a final judicial sentence" and in Ukraine – as "a guilty verdict".

80. The following example can be quoted concerning the latter country On 28 June 2000, Ukrainian MP Pavlo Lazarenko was convicted by the Geneva *Tribunal de Police*, under Article 305-bis of the Swiss Criminal Code, on two counts of crime of money laundering, and sentenced him to one-and-a-half years of imprisonment, and also a fine of 10.696.732,8 CHF. His MP mandate was prematurely terminated specifically on the ground of entry into force of his criminal conviction, following a Resolution by the Verkhovna Rada Ukraine (Parliament of Ukraine).

81. A bigger margin of appreciation is given to the judge by the Constitution of Sweden, namely, the MPs may be deprived of their mandate in case they have proven themselves manifestly unfit to hold a mandate by reason of a criminal act. A decision in such a case shall be taken by a court of law.[104] Further, criminal acts that, according to general provisions in ordinary criminal law, could cause imprisonment for two years or more could also result in the deprivation of a MP's mandate. The ordinary courts deal with these cases in the first instance. Ordinary prosecutors initiate these cases, but the court dealing with a criminal case against a MP has the right to initiate the matter of a deprivation by its own initiative. The courts have to deal with these cases with expediency. Under the present constitution, from 1974, there are at least two cases where MPs have been deprived of the seats in Parliament by court decisions. In the first case a MP was found guilty of two acts of severe fraud and the second case concerned criminal acts by a MP who committed assault, unlawful threat and molesting, also of a sexual nature. The decisions in these two cases were taken by appeal courts.

82. In **Greece**, Article 51 paragraph 3 of the Constitution provides that "the law cannot abridge the right to vote except in cases where a minimum age has not been attained or in cases of legal incapacity or as a result of irrevocable criminal conviction for certain felonies". Following such convictions, if a MP is deprived of his/her right to vote, he/she will lose his/her seat in Parliament.[105] For example, Dimitrios Tsovolas, a former Minister of the Economy of the A. Papandreou Government from 1987 to 1989, received a sentence within

[103] National Assembly Act, Article 136, and Public Official Election Act, Article 19.
[104] Constitution of Sweden, section 11.
[105] In 1992, Dimitrios Tsovolas, a former Minister of Economy in Papandreou Government from 1987 to 1989, lost his seat in Parliament after receiving a small sentence during the "Koskotas scandal" and therefore losing is right to vote.

what at the time was known as the “Koskotas scandal”. Since he was deprived of his right to vote (for a very short period), he lost his seat in Parliament. He was reelected in 1994 as the leader of his own party (Dikki). The trial of the leaders of “Golden Dawn” (a neo-nazi party, which obtained between 6% and 7% in the 2012 and the 2015 Greek elections) is forthcoming. If convicted, they will probably lose their parliamentary seats. For this to happen, according the wording of the Constitution, an “irrevocable” conviction is necessary, *i.e.* after an appeal against their conviction by the competent Court of Appeals is rejected by the country’s Supreme Court.

83. In **Canada**, under section 750 of the criminal code, a MP (Senate or House) loses his/her seat only if convicted to an indictable offence and sentenced to a two years or more prison term. As persons imprisoned in correctional institutions are disqualified from being candidates in elections, a MP sentenced to a prison term for less than two years could remain in Parliament but could not run for re-election.[106]

84. In **Albania**, **Armenia**, **Azerbaijan**, **Bulgaria**, **Finland**, “**the former Yugoslav Republic of Macedonia”** and **Slovakia**, along with the judicial sentence as the general ground for the loss of MPs’ mandates, the Constitutions specifically mention that commission of a crime would also cause the loss of a MP’s mandate.

85. As an example, in **Armenia**, MPs Hakob Hakobyan, Myasnik Malkhasyan, Sasun Mikayelyan and Khachatur Sukiasyan (who had resigned from office during the procedure) were sentenced to different terms in prison. On 17 September 2009, based on the law of the Rules of Procedure of the National Assembly, a protocol on the termination of the powers of these MPs was signed by the Chairperson of the National Assembly The protocol was sent to the Central Electoral Commission which confirmed it. A similar case involved MP Mr Vardan Oskanyan. After pre-trial investigation, the criminal case was dismissed. As the mere fact of being a defendant in a criminal case is not a ground for dismissal of a MP, Mr Vardan Oskanyan was not dismissed from the National Assembly.

86. In “the former Yugoslav Republic of Macedonia”, in 2001, a deputy from DPA (Democratic Party of Albanians), publicly announced that he was leaving the Parliament and joining NLA (National Liberation Army), as a commander in Vitina (Kosovo). The Parliament, by a two-thirds majority vote of all Representatives revoked him. He was put on the "American Black List", created by the Bush administration. After several months of war activities, before the end of the inter-ethnic conflict, with he was amnestied, and again became a deputy.

87. In **Bulgaria**, the loss of mandate will take place only when the person had the intention of committing the crime, or for “an unsuspended prison sentence”.

88. In **Italy**, according to Act no. 175/2010, a person declared guilty and convicted to 1 to 5 years of imprisonment may no longer hold a parliamentary mandate. A little different formulation is provided in **Malta**. Here MPs will lose their seat in case of existence of any circumstances which, if they were not a member of the House of Representatives, would cause them to be disqualified from elections.[107] In other words, among others (see above) the judicial sentence providing for imprisonment will cause the loss of the mandate. The Constitution allows the convicted MP not to vacate the seat until thirty days have elapsed. This period can be further extended (but shall not exceed 150 days) by the Speaker of the House of Representatives in order to enable the convicted MP to appeal.[108]

[106] http://www.parl.gc.ca/Content/LOP/ResearchPublications/2012-38-e.htm#txt2.
[107] Constitution of Malta, Article 55.
[108] Ibid.

89. In **Croatia**, the Act on the Election of Representatives to the Croatian Parliament has always entailed a provision stipulating that the MP's mandate ceases prior to the expiration of the period he or she has been elected for if he or she is sentenced by a legally valid court decision to an unconditional sentence of imprisonment longer than 6 months.[109] The Croatian Parliament, at its session of 13 February 2015, passed the Act on Revisions and Amendments to the Election of Representatives to the Croatian Parliament Act (Official Gazette No. 19 of 20 February 2015). Article 8 amended Article 9 of the Elections Act so to prescribe also the requirements for excluding offenders from standing for Parliament.[110]

90. In its Decision/Declaration No. U-VII-5293/2011 of 12 November 2011, the Constitutional Court of the Republic of Croatia took a position on the issue whether a person convicted for a war crime can be the “holder of the list”.[111] The Court stated that “the fact that the 'Elections Act does not contain any prerequisites or restrictions or prohibitions with respect to determining the list holder but that this is the free right of political parties' does not automatically mean that “prerequisites”, “restrictions” or “prohibitions” may not be inherent in the objective order of values laid down in the Constitution of the Republic of Croatia”.[112]

91. In **Ireland**, the Electoral Act 1992 provides that a person serving a sentence of imprisonment of more than 6 months imposed by an Irish court is disqualified from sitting in Dáil Éireann (lower house of Parliament).[113] When members of the Dáil are convicted whilst in office, they vacate their seat once the time limit for appeal is up or the appeal is lost.[114] In practice, there is no recorded case of members of the Dáil losing their seat because they have been sentenced to a period of imprisonment. of the Dáil losing their seat because they have been sentenced to a period of imprisonment. One person, elected in 1957, might have fallen into the category for disqualification. He was apparently in prison between 1957 and 1962 for offences committed during the IRA "border campaign". It might be that as this Sinn Fein candidate never took his seat, the issue never became "live". There have been, however, a relatively large number of Dail members who have been sentenced to periods of imprisonment whilst in office, but who received sentences below the required six months imprisonment threshold. Liam Lawlor, imprisoned three times in 2002 for contempt of court, addressed the Dáil whilst serving a sentence of imprisonment; he had been transported to the Dáil by the Prison Service. There is no prohibition on persons convicted in the past, regardless of the nature of their conviction or where they were convicted, serving in Dáil Eireann. For example, two current Sinn Fein Dail members have both served substantial prison sentences in this jurisdiction. It might also be noted that there is a long history of republican prisoners imprisoned in the United Kingdom being elected to Dáil Éireann. Most recently, 1981 hunger strikers Kieran Doherty and Paddy Agnew were elected to the Dáil in the 1981 general election, Kieran Doherty dying whilst in office.

92. In **Latvia**, the Rules of Procedure of the Saeima[115] provide that a member who has been convicted of a criminal offence shall be deemed expelled from the Saeima as of the date

[109] Act of the Election of Representatives to the Croatian Parliament, Article 10.

[110] These amendments to the Elections Act were introduced in the Croatian legal order after some sensitive cases of standing for elections or participation in elections of persons who were sentenced by a legally valid court decision for serious criminal offences appeared in the practice. The Constitutional Court has addressed the issue in Decision/Declaration No. U-VII-5293/2011 of 12 November 2011

[111] Croatia has a proportional electoral system based on closed lists. A ballot paper does not state the names of all candidates, but it states the name of political party and the name of one person only, the so-called "holder of the list".

[112] It is, however, necessary to note here that Croatia has a proportional electoral system based on closed lists. A ballot paper does not state the names of all candidates, but it states the name of the political party and the name of one person only, the so-called "holder of the list". The Constitutional Court's decision concerns such "holder of the list", who was in Croatia sentenced for committing a war crime.

[113] Electoral Act 1992, section 41(j).

[114] Electoral Act 1992, section 42.

[115] Law of 28 July 1994, Article 18.

when the sentence comes into force. A member may be expelled from the Saeima by a decision of the Saeima if, upon approval of his/her mandate, it is established that he/she: 1) has been elected in violation of the provisions of the Saeima Election Law (in connection with criminal convictions – Article 5, point 2, 3, 4 and 7.);2) has committed a crime in a state of diminished responsibility or, after committing the crime, has become mentally ill, which made him/her incapable of taking a conscious action or controlling it.

93. For example, after the 9th Saeima election, a case of counterfeiting of votes came to light in Balvu region. The mandate of J.Boldāns was approved by the Saeima, which agreed to the continuation of prosecution. J.Boldāns never started to work in the Saeima, and was later expelled after a convicting decision of October 20th 2008.

94. It has to be noted that, in general, provisions on the termination of mandates of MPs are contained in Constitutions, and sometimes repeated in the election laws.[116]

3. When a case of ineligibility arises

95. National law may provide that MPs lose their mandate, automatically or following a specific decision, if they are in a situation which would lead to ineligibility to be elected. This is the case (at constitutional level) in **Albania**,[117] **Bulgaria**[118], the **Czech Republic**[119], **Iceland**[120] and **Slovakia**,[121] as well as in **Chile**.[122] In the latter country, a MP who loses a general requirement of eligibility shall lose his/her office. Therefore, if a MP is sentenced for a felony crime, he/she will lose his/her position. For instance, in 2005, a senator (Mr Jorge Lavandero) was found guilty of sexual abuse (a felony crime) and, as a consequence, his dismissal operated *ipso iure*.

96. The **Estonian** Constitution[123] provides the termination of a MP's mandate in case of entering into force of a conviction – which would have led to ineligibility to be elected in case it had been passed before the elections. Similar provisions are to be found in the Status of Members of Riigikogu Act.[124] In practice, there have been until now two cases of termination of mandate based on criminal conviction, both of them for corruption or bribery. There are still two more pending cases with judgements not entered into force yet. The sanctions have been imprisonment on probe. In none of the cases a question on the proportionality of termination of mandate of MP has been raised.

97. In **Germany**, the Federal Electoral Law (*Bundeswahlgesetz*) excludes MPs from the Bundestag if they lose one of the prerequisites for permanent eligibility.[125] This law requires that they must not have been deprived by judicial decision of eligibility to stand for parliament or of qualification to hold public office.[126] Additionally, a person cannot be elected if she/he is disqualified from voting,[127] and a person shall be disqualified from voting if she/he is not entitled to vote owing to a judicial decision.[128]

---

[116] *E.g.* Election Code of Bulgaria, Article 271.
[117] Constitution of Albania, Article 71(2)(c).
[118] Constitution of Bulgaria, Article 72(1).
[119] Constitution of Czech Republic, Article 25.
[120] Constitution of Iceland, Article 50.
[121] Constitution of Slovakia, Article 81a paragraph c. See also: the Act on election to the National Council (no. 333/2004 Coll.), the Constitutional Act on the Protection of Public Interest in the Performance of Offices by Public Officials (no. 357/2004 Z.z.) and the Act on Rules of Procedure of the National Council (no. 350/1996 Coll.).
[122] Constitution of Chile, Article 60, paragraph 7.
[123] Article 64(2).
[124] https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/516042015001/consolide, Article 8.
[125] German Federal Electoral Law (*Bundeswahlgesetz*, briefly BWahlG), § 46 para. 1 No. 3
[126] German Federal Electoral Law (*Bundeswahlgesetz*, briefly BWahlG), § 15.
[127] German Federal Electoral Law (*Bundeswahlgesetz*, briefly BWahlG), § 13
[128] German Federal Electoral Law (*Bundeswahlgesetz*, briefly BWahlG), § 13 No. 1

98. The loss of membership of the Bundestag does not occur automatically, but there has to be a resolution of the Council of Senior Members (Ältestenrat) of the Bundestag, if eligibility has been lost as a result of a judicial decision. However, the Council of Senior Members does not control the judicial decision, but takes note of it and decides about the date when the convicted MP has to leave the Bundestag. The eligibility norm refers to regulations under Section 45 of German Criminal Code (*Strafgesetzbuch*, briefly StGB). The regulations concerning MPs of the Länder correspond to those on the federal level.[129]

99. In **Lithuania**, the MP's mandate will be terminated in case the candidate did not follow the rules provided for disclosure of prior conviction.[130]

100. In **Romania** too, cessation of the term of office occurs in case of loss of electoral rights as regulated in the Law on the Statute of deputies and senators.[131] The regulations of the two Chambers of Parliament contain similar provisions.[132] In that case, the day of mandate termination is confirmed by the National Assembly immediately upon the receipt of information on the reasons for a MP's mandate termination. This applies also in case a sentence is pronounced abroad. Since the 2006 the Constitution was adopted, there has been no example of a dismissal of standing MPs from Parliament on the basis of a criminal conviction.

101. In the **Netherlands,**[133] if a court decides to impose the exclusion of active and passive suffrage as an additional penalty, it will notify the Chairman of the House of Parliament, the commissioner of the King (provincial level) or the mayor (municipal level). Due to the loss of the right to vote, the representative in question will no longer meet the criteria for holding the office and a procedure to expulse him or her from the office will be started.

4. Other cases

102. A number of legal orders provide for a combination of (some of) the criteria already quoted, but may also include specific rules.

103. In **Israel**, under current law, MPs may not be removed from their position by a decision of parliament. Internal disciplinary proceedings may result in suspending a member from participating in discussions, but that member is permitted to vote even during the suspension. However, recently the Knesset (Parliament) has discussed a proposal to amend the "Basic-Law: The Knesset", to empower the Knesset to dismiss a member who acted or expressed views in contradiction with the State's fundamental values, even if that member was not convicted in criminal proceedings and committed no offence. This proposal has not (yet) been adopted.

---

[129] Baden-Wuerttemberg (Section 47 Electoral Law of Baden-Württemberg); Bavaria (Article 56 Electoral Law of Bavaria); Berlin (Section 6 Electoral Law of Berlin); Brandenburg (Section 41 Electoral Law of Brandenburg); Bremen (Section 34 Electoral Law of Bremen); Hamburg (Section 11 Electoral Law of Hamburg); Hesse (Section 39 Electoral Law of Hesse); Lower Saxony (Section 7 Electoral Law of Lower Saxony); Mecklenburg-Western Pomerania (Section 59 Electoral Law of Mecklenburg-Western Pomerania); North Rhine-Westphalia (Section 5 Electoral Law of North Rhine-Westphalia); Rhineland-Palatinate (Section 58 Electoral Law of Rhineland-Palatinate); Saarland (Section 41 Electoral Law of Saarland); Saxony (Section 45 Electoral Law of Saxony); Saxony-Anhalt (Section 7 Electoral Law of Saxony-Anhalt); Schleswig-Holstein (Section 49 Electoral Law of Schleswig-Holstein); Thuringia (Section 46 Electoral Law of Thuringia).

[130] Election Code, Article 98(3).

[131] Law no. 96/2006 on the Statute of deputies and senators, Article 7.

[132] Regulation of the Senate, Article 188, published in the Official Gazette of Romania, Part I, no. 948 of 25 October 2005. On the websites of the two Chambers of the Romanian Parliament it may be seen the list of Deputies/Senators who ceased their term of office before the end of the parliamentary term, as well as the way of their cessation. See: http://www.cdep.ro/pls/parlam/structura.de?leg=2012&cam=1 and http://www.cdep.ro/pls/parlam/structura.de?leg=2012

[133] See ch.II.A.2.

104. There is a difference between MPs and ministers regarding the consequences of filing an indictment. The relevant provisions regarding ministers - set in the "Basic Law - The Government" -, are similar to those quoted above regarding members of parliament. Nevertheless, the Supreme Court ruled that ministers are dismissed from their position once being accused of committing serious offences, and may be back in office only if and when acquitted in court. However, this ruling was not applied to members of parliament. Thus, ministers who are indicted are dismissed from office but continue to serve as members of parliament. The underlying rationale is that parliament members are elected officials, and thus should be removed from office only after conviction, whereas ministers, who hold executive powers, should be subject to a higher standard to enhance public confidence in government.

105. In the **United States**, on the one hand, "the status and service of that Member [a Senator[134] who has been indicted for or convicted of a felony] is not directly affected by any federal statute, constitutional provision, or Rule of the Senate"[135]. Indeed, "Members of Congress do not automatically forfeit their offices even upon conviction of a crime that constitutes a felony"[136].

106. On the other hand, "the status and service of that Member [a Member of the House[137] who has been indicted or convicted of a felony] is not directly affected by any federal statute or Rule of the House of Representatives. No rights or privileges are forfeited under the Constitution, statutory law, or the Rules of the House merely upon an indictment for an offense, prior to an establishment of guilt under our judicial system. Internal party rules in the House, however, now require an indicted chairman or ranking Member of a House committee, or a member of the House party leadership, to temporarily step aside from his or her leadership or chairmanship position, although the Member's service in Congress would otherwise continue"[138].

5. Procedural issues

The procedure concerning the loss of mandate is often rather complex and may involve the intervention of Parliament.

107. In **Belgium** and **Kazakhstan**, a MP is automatically disqualified and loses his/her seat if deprived by a court decision of his/her civil and political rights, whereas in **Germany**, **Hungary** and **Slovenia**, a MP convicted by a court does not automatically lose his/her seat: the court conviction must be followed by a decision of Parliament.[139] In **Denmark**, the Parliament (Folketing) can expel a MP who has been convicted of an offence that makes him/her unworthy to retain a seat.[140] In **Slovenia**, a MP is automatically disqualified unless the Parliament decides otherwise.[141] In "**the former Yugoslav Republic of Macedonia"**, the procedure of exclusion of offenders from Parliament is determined by the Rules of Procedure of the Parliament.

108. In **Chile**, a final decision declaring that there are merits for a cause (not a conviction) leads to the suspension from office of a MP, who will be submitted to the competent judge**.**

---

[134] For more details, see https://fas.org/sgp/crs/misc/RL34716.pdf.
[135] https://fas.org/sgp/crs/misc/RL34716.pdf page 1.
[136] https://fas.org/sgp/crs/misc/RL34716.pdf page 1.
[137] For more details, see https://fas.org/sgp/crs/misc/RL33229.pdf.
[138] https://fas.org/sgp/crs/misc/RL33229.pdf page 1.
[139] http://www.ipu.org/PDF/publications/mandate_e.pdf page 24.
[140] http://www.ipu.org/PDF/publications/mandate_e.pdf page 25.
[141] http://www.ipu.org/PDF/publications/mandate_e.pdf page 26.

109. In **Romania**, as already stated,[142] the day of a MP's mandate termination is confirmed by the National Assembly immediately upon the receipt of information on its reasons.

110. In the **Republic of Korea**, a member of the National Assembly violated some provisions of the Constitution or committed other illegal acts can be dismissed by the disciplinary action of the Special Committee on Ethics, with the approval of the two-third majority of all the members.[143] This last case is extremely rare. Indeed, only one member, Young-sam Kim, who later became President (1993-1998), was excluded by this procedure under the military dictatorship on October 4, 1979 on the allegation that he was a master-mind in collusion with the strike against the government.

111. Furthermore, in the **United Kingdom**, following the parliamentary expenses scandal, the Recall of MPs Bill was introduced to the House of Commons in September 2014. The legislative process is ongoing. Clause 1 of the bill sets out the processes by which a MP would trigger the recall process: custodial prison sentence, suspension from the House ordered by the Committee on Standards, providing false or misleading expenses claims. Clauses 7 to 11 set out rules surrounding the petition. Clause 15 confirms that the MP seat becomes vacant in case of successful petition.

112. It appears from the examples given that there is more often discretion concerning the dismissal of MPs from office than ineligibility to be elected. This is partly linked to the fact that a number of countries provide for a parliamentary procedure for such dismissal.

113. Finally, some states know a recall process. Several **US** States provide for such a process in their state constitution or in their legislation.[144] In **Kenya**, under sections 45 to 48 of the Elections Act 2011, parliamentarians can be recalled by the Parliament: (1) if they are found to have violated the provisions of Chapter Six of the Constitution; (2) if they are found to have mismanaged public resources; or (3) if they are convicted of an offence under the Elections Act.

IV. Case study: Italy

A. The legal and factual context

114. According to Article 1 of the Legislative Decree (delegated law) of 31 December 2012, n. 235, persons who have been sentenced to serve more than two years in prison for the crimes specified there, are not allowed a) to stand as candidates for national election of the Chamber of Deputies and the Senate of the Republic, and b) to stay in office as members of these two legislative Assemblies of the Italian Republic. On the basis of this provision, Article 3 of the same legislative text provides for the immediate deliberation of the removal from their office of the Senators and of the Deputies who are sentenced according to the mentioned Article 1. There are also provisions forbidding the election of offenders to local governing bodies and allowing their dismissal if they are condemned when in office.

115. The implementation of the mentioned Article 1 and of the following ones of the mentioned Legislative Decree has raised hot discussions, having regard to their possible effects on the development of the political life and of the relations between the political parties in Italy, especially if they were supposed to have effects interesting persons elected before their entry in force with regard to previous crimes. But, as a matter of fact, at the time

[142] Ch. III.B.3.
[143] National Assembly Act, Articles 155 and 163.
[144] For more details, see for Senators https://fas.org/sgp/crs/misc/RL34716.pdf page 7-8; for Members of the House https://fas.org/sgp/crs/misc/RL33229.pdf.

of their entering in force the mentioned rules about the “incandidabilità” (ineligibility to be elected) of the offenders to the legislative Assemblies and their exclusion from the Chamber and the Senate, and the extension of these provisions to the candidates to local government governing bodies and members of these bodies were not considered unconstitutional by the majority of the judges, and were immediately applied in the frame of the local government institutions.

116. The Constitutional Court and administrative judges which had dealt with similar questions in the past, shared the idea that it is not irrational to provide for the “incandidabilità” of offenders sentenced in relation with particularly serious crimes, even if committed before the entry into force of the relevant legislation. The purpose of such a legislative choice was construed as the result of the decision of avoiding the presence in the elected assemblies of persons who have been judged morally unworthy: the sentence by which they are condemned to serve in prison was interpreted as an element of negative qualification. The conclusion was that what is a stake is not a sanction comparable with criminal and administrative sanctions, and – therefore – it is not covered by Article 7 of the European Convention for the protection of human rights and fundamental freedoms.

117. On this basis, the Council of State, for instance, rejected the proposal of submitting to the Constitutional Court the question of the constitutionality of the application of the rule of the “incandidabilità” in view of the removal of members of the Parliament elected before the entering into force of the rule itself (sentence 6.2.2013 n. 695 concerning provisions of the mentioned Legislative Decree n. 235/2012). The retroactive effect of the rule – the judge said - does not conflict with the Constitution as far as it may be considered as not being a sanction.

118. The rule implying the “incandidabilità” of offenders condemned for crimes committed (and the removal of those previously elected) before the entry into force of the rule itself was, therefore, applied in many cases. However, the constitutional question was reopened when the former President of the Council of Ministers, Senator Silvio Berlusconi, was sentenced by the Tribunal of Milan to serve in prison for years with relation of a fiscal crime. The Court of Appeal of Milan and the Court of Cassation confirmed the sentence which became final. Therefore the internal bodies of the Senate of the Republic started the necessary procedure aimed at the removal of Mr Berlusconi, according to the opinion that the sentence had created the condition for depriving him of his status of member of the Assembly. After a long debate, taking into consideration also papers submitted by the concerned person, who informed the Senate of his decision of submitting the case to the European Court of Human Rights, the Electoral Committee of the Senate proposed to the plenary Assembly, and this body approved the dismissal of Mr Berlusconi from his office of senator (October 2013).

119. In the meantime, while the Court in Strasbourg has not yet decided the *Berlusconi* case, and some judicial bodies followed the reasoning of the Senate excluding that the dismissal (or the suspension, in case of a sentence which is not yet final) of an elected public official was a retroactive sanction, other judges have submitted the relevant constitutional questions to the Constitutional Court. In particular, the Court of Appeal of Bari adopted on January 27th, 2014 (N.R.G. 1748/2014), a decision requiring the Constitutional Court to judge – *inter alia* - about the conformity of some provisions of the mentioned decree with the act of delegation approved by the Parliament, having regard a) to the difference of treatment between the members of the Parliament and the regional councillors, and b) to the extended effect of criminal sentences on the status of member of an elected Assembly (in the case at stake, a suspension following a not yet final sentence affecting a regional councillor) even in presence of crimes committed before the entry into force of legislative decree n. 235/2012. According to the opinion of the judge of Bari the suspension or recall of an elected member of an Assembly condemned to serve in prison for at least two years is rationally justified by the purpose of avoiding the presence in a democratic deliberative body

of a person who is morally unworthy. However, the application of this administrative sanction – the Court of Appeal said - cannot infringe the constitutional guarantees of the electoral rights, and it cannot specifically be adopted in violation of the principle which forbids the application of a criminal sanction for crimes committed before the entry into force of the law providing for the relevant sanction. With regard to this last specific point the judge considered the existence of a doubt of unconstitutionality and explicitly made reference to Article 7 of the European Convention for the protection of the human rights and fundamental freedoms, asking for a decision of the constitutional judge on the merit.

120. On October 30th, 2014, the first section of the Regional administrative Tribunal of the Campania Region (n. 04798/2014) also submitted to the Constitutional Court questions concerning the legislative decree n. 235/2012 in a case concerning the suspension of the Mayor of the town of Naples. The reasoning of this judge started from the qualification of the suspension as a sanction, even if he did not deny that the purpose of the concerned legislation was the exclusion from the democratic representative elected bodies of the State, Regions and local government of those persons who are affected by dishonourable criminal sentences, in view of insuring a functioning of these bodies coherent with the principles of democracy, fairness, integrity and transparency. If the measure affecting the status of the sentenced person is construed as a sanction, it has to comply with the constitutional principles of the criminal system of law and cannot be applied in a retroactive way. Therefore, a provision authorising the dismissal or the suspension of a public official condemned for a crime committed before the entry into force of the law providing for the dismissal or for the suspension should be considered unconstitutional. The judge of Naples asked a judgement of the Constitutional Court mentioning the possible violation of the relevant constitutional principles.

B. Elements of appreciation

121. The Constitutional Court has not yet decided both cases mentioned above. However, it is not by chance that the President of the Court talked in his last press conference of 2014 about sentence n. 104 adopted on April 14th, 2014, which declared as unconstitutional a legislative rule providing for the retroactive application of an administrative sanction because of the violation of the principle of non-retroactivity of criminal law. The Court explained that there is no specific constitutional provision on the matter, but it shared the idea of the European Court of Human Rights that there is a general implicit principle of law which extends to all the punitive measures the principles applicable to the criminal sanctions. However, this decision of the Italian constitutional judge does not regard the delicate matter of the balance of rights and interests in the electoral field.

122. With regard to Italian electoral legislation, reference could, instead, be made to the already quoted *Scoppola v.Italy (n. 3)* case*,* a judgement of the Grand Chamber of the European Court of Human Rights adopted on May 22th, 2012, according to which people serving in jail can have their electoral rights restricted in specific cases. The proportionality of this measure can be ensured by the legislation itself without the necessary adoption of a *case-by-case* decision of the competent judge. The conclusions of the Strasbourg judge underline the importance of the role of the legislator in shaping the rules in the electoral field. In the *Scoppola* case the coexistence of different interests – those concerning the exercise of the personal electoral rights of the prisoners and those relevant in view of the implementation of the criminal sentence – is the result of a balance directly operated by the legislator. As a matter of fact, both groups of interests regard the personal status of the concerned people, even if the interest in the implementation of the criminal sentences pertains to the defence of the superior value of the observance of the criminal law. The fairness and integrity of the electoral process are affected in a very limited measure as far as the vote of very few electors is concerned.

123. In the case at stake, it could be argued that the presence and the participation of a convicted member in the work of one of the legislative Assemblies or of the local governing bodies has a major relevance because he is not only a voter but he is also allowed to take part in the formation of the will of the relevant body through his activity in the discussion and evaluation of the single items of the agenda. He may submit proposals and see them discussed and approved. It is easy to understand that the relevance of the personal interests and rights of the individual members of a democratically elected body, and their interests in keeping the seat gained at the election or their right to run in an electoral competition, have to be balanced with the public interest in a correct and fair functioning of the public institutions.

V. Analysis

124. The following elements can be inferred from the standards of the Council of Europe, as well as from the comparative material made available to the Venice Commission

125. As stated by the case-law of the European Court of Human Rights, restrictions should be limited to what is necessary to ensure the proper functioning of democracy, which would be more seriously endangered by an elected officer than by a simple voter exercising his active electoral rights. They should not be considered as limiting democracy, but as a means of preserving it.

126. Another issue, which is now pending before the Italian Constitutional Court, is to know whether it is admissible to provide for ineligibility to be elected or loss of mandate for crimes committed before the entry into force of the relevant legislation. This depends in particular on whether such sanctions have to be considered of a criminal nature in the sense of Article 7 ECHR.

A. Ineligibility to be elected

1. In general

127. Ideally, democratic decision-making should guarantee that those persons who are considered by most voters as not in a position to decide on the legislation have to stay in opposition and are left out of the government, and voters would exclude offenders. The Venice Commission notes however that, in practice, there is a general public interest to avoid an active role of offenders in the political decision-making; the choice of the voters may be biased, in particular if they ignore that a candidate has been convicted, or be submitted to pressure, especially in case of corruption or organised crime. The vast majority of the states addressed in this report recognise such public interest.

128. In countries using closed list electoral systems, it is not possible for the voters to leave individual offenders aside – in particular in the absence of efficient rules on the inner democracy of political parties. This would more easily justify restrictions to passive electoral rights.

129. It can also be argued that imprisoned persons cannot take part in parliamentary sessions, communicate freely with other MPs or with voters. That might be an additional reason to restrict the right to be elected for convicted persons.[145] However, the principle of

[145] The Estonian Supreme Court noted in its judgement of 2 October .2013 in case 3-4-1-44-13, para. 13, dealing with a complaint by convicted a person sentenced to imprisonment which had been denied the right to stand for local elections: „Although not all the fundamental rights of convicted person sentenced to imprisonment are restricted, it entails a restriction of those fundamental rights whose prerequisite is liberty. Membership in a municipal council requires participation in the meetings of the council, at least.; usually and as an assumption for

proportionality has always to be respected: the severity of the offence, its nature and/or the length of the sentence have to be taken into account. This could also lead to admitting more easily restrictions of passive electoral rights during detention than afterwards. The Venice Commission considers that, in serious cases, it may however be admissible to restrict these rights after a prisoner's release, but they should not last for lifetime. In practice, lifetime restrictions are provided only in very extreme cases.[146] Convicted persons may change their attitude or behaviour and it should then be up to the voters to decide whether they should be elected.

130. It may be more difficult to decide on the limitations for those having served the sentence only recently. Here too, voters should in principle be free to decide whether the person is in a position to serve as a MP in spite of the offence committed. However, in the opinion of the Venice Commission, the restriction to the right to stand for elections should not always be considered as disproportionate. Once again, legislation has to take into account the limits of democratic decision-making. For crimes against humanity, genocide, terrorism, severe crimes of corruption etc. it might be appropriate to restrict the right to stand for elections for a long time.

131. The deprivation of liberty is an important element in the proportionality test, but not the only one. In some cases, restrictions might be applicable also in case a person is convicted and sentenced to imprisonment on probe or pardoned.

132. In case a person is not yet convicted, the principle of presumption of innocence would go against the deprivation of political rights. Some exceptions could however be legitimate and proportionate, e.g. for crimes stipulated in the Rome statute of the International Criminal Court.

2. Specific cases

133. In the Commission's opinion, in case a criminal conviction takes place during elections, the law should foresee the consequences for the candidacy. In case convicted persons are not allowed to stand as candidates, the consequence should be similar to any other kind of loss of the right to stand in elections (such as death): whether or not the candidate's name is deleted from the ballot, votes given to this person should be considered as invalid or counted only for the list.

134. The constitutions and legislations do not provide directly for the loss of candidacy rights due to convictions in *foreign countries*. Internal legislation on the *exequatur* procedure in criminal law or international treaties binding on the state concerned determine whether and when foreign judgments have to be recognised. Convictions by the International Criminal Court have to be recognised with the same consequences as convictions by domestic courts if the state has ratified the Rome statute. As soon as a foreign conviction is recognised, it appears legitimate that it be followed by the same consequences on political rights as a national one. National (or international) legislation should also clearly define the competent authority.

---

efficient work it also implies participation in other meetings, meetings with voters, communication with local entrepreneurs and other duties and meetings which require liberty. In doing so, the council member can freely decide which activities and meetings with members of the council are needed to carry out his/her tasks. An essential part of the custodial sentence is that a person cannot move around freely. Hence, it is not unreasonable to exclude imprisoned persons the right to stand in municipal elections."

[146] *E.g*. in Germany, Basic Law, Article 18.

B. Loss of mandate

135. In case the conviction enters into force after the elections and the person has already assumed office, voters have in general not been informed on the offences he or she has committed. The democratic nature of the elections is therefore not hampered if the mandate is terminated. This could make the termination of a mandate following a criminal conviction more easily admissible than the ineligibility to be elected.

136. In case a MP is *accused* of having committed a severe crime, there may be a public interest to avoid participation of that person in parliamentary proceedings. An impeachment procedure could be provided. The Finnish Constitution[147] provides for such a kind of dismissal procedure for MPs who have essentially and repeatedly neglected their duties as representatives. There is no restriction for those persons to stand at the next elections.

137. The Venice Commission considers that the termination of the mandate of a MP who has been sentenced and whose conviction entered into force before elections is justified if this was a cause of ineligibility to be elected. This should in particular happen when the sentence was passed abroad, and national authorities did not know about it.

C. In which kind of legislation and how should the issue be addressed?

138. In the Commission's opinion, since the issue is about a restriction of fundamental rights and the organisation of public power, which are constitutional issues *par excellence*, it is justified to address it in a constitutional provision, as this is the case in more than 40 % of the states under consideration. It is however also legitimate to deal with it in ordinary legislation. Rules of this nature would probably usually be better placed in electoral rather than in criminal legislation as they concern a specific issue rather than a general issue of criminal law. Most legislative provisions made available to the Venice Commission are actually electoral law ones.

139. It may be suitable for legislation to provide in a general way in which cases the right to be elected must be restricted, at least for the most serious offences and convictions. Most countries under consideration provide for such a rule, which the case-law of the European Court of Human Rights does not find in contravention with the Convention as long as it respects the principle of proportionality. In other cases – as in some of the states under consideration -, a margin of discretion of the judge would be more appropriate.

140. Still more discretion is suitable in cases where *sitting MPs are convicted* for criminal offences (whether for offences committed before or during their membership). In such cases – where there is a specific need to decide on the right to remain as MP and the issue may be particularly contentious – it would seem more appropriate that the question of ineligibility be decided as part of the court decision in the actual case.

VI. Conclusions

141. On the basis of the applicable European standards, as developed in particular by the European Court of Human Rights when applying Article 3 of the First Additional Protocol to the European Convention on Human Rights, and of information collected on the legal situation in more than thirty states, the Venice Commission has reached the following conclusions.

[147] Article 28.

142. Ineligibility to be elected is a restriction of the right to free elections: it must therefore be based on clear norms of law, pursue a legitimate aim and observe the principle of proportionality. There is a general public interest to avoid an active role of offenders in the political decision-making. Proportionality limits not only the cases in which a restriction is admissible, but also the length of the restriction; it requires that such elements as the nature and severity of the offence and/or the length of the sentence be taken into account.

143. The loss of parliamentary mandate must also be considered as a restriction to the right to free elections and must accordingly be submitted to the same conditions.

144. There is no common standard on the cases, if any, in which such restrictions should be imposed. However, the vast majority of the states examined limit the right of offenders to sit in Parliament, at least in the most serious cases.

145. The Venice Commission considers that the deprivation of political rights before final conviction is contrary to the principle of presumption of innocence, except for limited and justified exceptions. In practice, exceptions are applied in only a few states under consideration.

146. The Commission also considers that, whereas national legislation does not address the issue of convictions abroad as such, these should have the same effect as convictions in-country as soon as they are given effect through the applicable exequatur procedures.

147. Finally, the Commission finds it suitable for the Constitution to regulate at least the most important aspects of the restrictions to the right to be elected and of loss of parliamentary mandate, and indeed many states provide for such provisions. Other rules would probably be better placed in electoral rather than in criminal legislation. This is at any rate the case in most of the countries studied.

148. Whereas it may be suitable for legislation to provide for restrictions to operate automatically for the most serious offences or convictions – as is the case in most states under consideration -, discretion may be suitable in less serious cases and, more generally, where the conviction relates to sitting MPs.