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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE LAW ON THE CLEANLINESS OF THE FIGURE OF HIGH FUNCTIONARIES OF THE PUBLIC ADMINISTRATION AND ELECTED PERSONS

OF THE REPUBLIC OF ALBANIA

by

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1. The Constitutional Court of Albania requested the opinion of the Venice Commission on some questions concerning applications submitted to the Court by a group of deputies of the Albanian Assembly with the object " Declaration of law no. 10034 dated 22.12.2008 " on the cleanliness of the figure of high functionaries of the public administration and elected officials " as incompatible with the Constitution of the Republic of Albania and the suspension of the implementation of the law until a final decision from the Constitutional Court ".

2. The law which is the object of the applications at stake is evidently a piece of legislation aimed at the lustration of some branches of the Albanian State in view of " checking the cleanliness of the figure of every public functionary elected or appointed, in connection with his participation in the policy making and implementing structures of the violence of the dictatorship of the proletariat, as well as in the structure of the former State Security, for the period 29 November 1944 until 8 December 1990 ", according to art. 1 of the law. A lustration policy is not a novelty in the Albanian legislation: after the fall of the communist regime three laws were adopted in the matter, the law n. 7666 dated 26.2.1993 " on the creation of a Commission to evaluate licenses for the exercise of advocacy ", the law n.8001 dated 22.9.1995 " on genocide and crimes against the humanity committed in society during the communist regime for political, ideological and religious motives " and the law n.8403 dated 30.11.1995 " on checking the figure of officials and other persons related to the protection of the democratic state ". The last law was amended between 1997 and 1998, and exhausted its effects on 31 December 2001, the results are summarized by Mark S.Ellis in his paper " Purging the past: the current state of lustration laws in the former communist bloc published in " Law and contemporary problems " 1997, 185 - 187. Therefore the new law is aimed at reopening a process of lustration by affecting the holders of important positions in the organization of the Albanian State. The importance of the case suggested to the Constitutional Court to agree to the request of the complaining deputies and to suspend the implementation of the law until the entering in force of its final decision.

3. The request of the Albanian Constitutional Court implies five questions on specific items. Therefore it does not apparently touch the problem of the conformity with the Constitution of the law as such, that is as taken into consideration in all its complexity. At least other two main points deserve special attention when we look at the overall text of the law. First of all there is the question of the time of the adoption of the law eighteen years after the fall of the communist regime and seven years after the exhaustion on the previous legislation in the matter. Moreover, secondly a special attention has to be devoted to the object of the law (see its art. 2) as far as it does not deal with the personal direct participation of the interested persons in the violence of the dictatorship of the proletariat or of the former state security, but states the incompatibility with their present public activity of the formal membership, directorship or collaboration of those persons in the policymaking and implementing structures of the violence. As a matter of fact both questions deserve a preliminary attention because the relevant answers condition the development of the reasoning on the five questions submitted by the Court to the Venice Commission. Therefore the present contribution to the opinion of the Commission will deal with the mentioned preliminary problems before examining the five specific cases in view of opening the way to a clear understanding of the matter.

The time of the adoption of the law

4. In a document adopted in 1966 (resolution 1096) the Parliamentary Assembly of the Council of Europe refers to "guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a State based on the rule of law ", which were presented in a report submitted to the Assembly about measures to dismantle the heritage of the former communist totalitarian systems "doc. n. 7568 3 June 1996 ". Among other

requirements of lustration laws these laws should not have effects longer than five years and the document introduces the general suggestion that the relevant measures should preferably end in all ex communist states not later than 31 December 1999.
5. Taking into account the importance of the body which adopted this document, it could be interesting to have a look at the jurisprudence of some Courts in Europe in the matter. For instance, the Constitutional Court of the CSFR had already in 1992 stated that the provisions of the relevant federal legislation prescribing a limited time for the effects of the lustration measures had to be approved because it was foreseen "that the process of the democratization (of the country) will be accomplished "in a short period of time (by 31 December 1996) (judgement 1/92 26 November 1992). In more recent time the Czech Constitutional Court partially overruled this line of thinking and said that the relevance of the time restriction on the validity of the lustration laws has to be balanced with the consideration of the exigencies of security and stability of democratic systems: therefore the Court accepted the amendments of the lustration laws aimed at removing their restricted validity in time. It noted that "determination of the degree of the development of democracy in a particular state is a social and political question, not a constitutional law question, which it is not able to review ", but the Court strongly supported the idea of a reform of the legislation at stake (judgement 5 December 2001).

6. The European Court of human rights in March 2006 (appl. n. 58278/00 Zdanoka v. Latvia) apparently shared this more recent position recognizing that a " state may be required to take specific measures to protect itself " even by restricting the electoral rights of people connected with the old communist regime more than ten years after the fall of the Wall. But the Court did no refrain from analysing the question in the light of the principles and provisions of the ECHR and did not deal with the political question exception. We'll come back to this problem in the following pages.

7. It is generally accepted that the lustration measures have to be in compliance with the yardstick of the rule of law (resolution 1096 (1996)). Therefore the Constitutional Tribunal of Poland (judgement 11 May 2007 file ref. n. K 2/07) stated inter alia that a lustration act, based on the principles of a state ruled by law shall specify the time period of the prohibition on discharging functions on rational basis "since one should not underestimate the possibility of positive changes in the attitude and conduct of a person. Lustration measures should cease to take effect as soon as the system of a democratic state has been consolidated ".

8. This suggestion is especially useful in dealing with the present Albanian case of a new lustration legislation which is adopted after seven years of the end of the effects of the previous legislation in the matter. Even if we accept the idea that the necessity of a lustration legislation is a political (and not constitutional law) question, it is evident that the principles of rationality and proportionality require special attention in establishing the existence of a communist danger in a society which in the last elections permitted the victory of the incumbent openly anti – communist majority and other political parties refuse any connection with the past regime. Moreover, if Albania wants to practice the theory of "democracy defending itself ", the Albanian legislator should not restrict its attention to the communist danger but should take into consideration the more recent dangers of terrorism and transfrontier criminality.

The object of the law

9. In art. 2 the Albanian law at stake the object of the lustration measures "is the determination of the subjects and high state functionaries who are incompatible with the public activity of an official because of being a member, director or collaborator in the policy – making and implementing structures of the violence of the dictatorship of the proletariat or the former State security for the period 29 November 1944 up to 8 December 1990 ".

10. If we compare this definition with the more specific provisions of art. 4, we understand that former collaborators of the communist regime are mainly interested by the lustration measures

because of their formal attachment to a political or high ranking office of the communist party or of the Albanian state at that time. Art. 4 a) only allows the exception of persons who acted against the official line or removed themselves from office in a public manner. At the same time art. 4 dh) explicitly affects persons sentenced by final criminal decision for crimes against the humanity or for the criminal offences of defamation, false denunciation or false testimony in political processes; moreover sub e) it touches collaborators of the organ of the state security with activity of a political nature which is related to political criminal offences; and sub g) it regards denouncer or witness for the prosecution in political judicial processes. But, as a matter of fact, the remaining provisions of art. 4 don't take in consideration the exigency, underlined by the mentioned resolution n.1096 (1996), that "guilt, being individual, rather than collective, must be proven in each individual case ": "this emphasizes the need for an individual, and not collective, application of lustration laws ".

11. The recent judgement of the Czech constitutional court (2001) recognizes that, according to this suggestion, "a common feature of the lustration laws passed in Europe during the 90s is the fact that they concentrate on an individual's position and/or behaviour under totalitarianism and draw negative consequences for him from them in terms of his direct involvement in public life in the present democratic state ". On this basis it accepted the lustration measures of temporary nature deriving the individual's attitudes to the democratic establishment from the individual actions and behaviours of the people concerned. Correctly the constitutional tribunal of Poland adopted a stricter line and stated in 2007 that "prohibition on discharging a function may be imposed against persons who gave commands to perform acts that constituted a grave violation of human rights, performed such acts themselves or overwhelmingly supported them ", underlining the exigency of the precise definition of the "conscious collaborators "who shall be lustrated.

12. The individualization of the effects of the lustration legislation requires that decisions affecting a person have to be the object of supervision by the domestic judicial authorities as far as they imply a deprivation of individual rights personally guaranteed by the Constitution. Only the European Court of human rights in the recent case Zdanoka v. Latvia denied that "the requirement for individualization.. is…a precondition of the measure's compatibility with the ECHR. But the Court thinks that he purposes of the Latvian legislation at stake were not the punishment of those who had been active in CPL but were, instead, " the protection of the integrity of the democratic process by excluding from participation in the work of a democratic legislature those individuals who had taken an active and leading role in a party which was directly linked " (not to the past regime but) " to the attempted violent overthrow of the newly established democratic regime " in 1991. Therefore the Court underlines the exigency that the justification of the lustration legislation is elaborated taking into account the specific situation of the concerned state. In the case of Latvia special relevance has to be given to the events of 1991. Those events clearly showed the intention of some political forces to overthrow the move toward the national independence supported by a large majority of the Latvian population in a contemporary referendum.

13. It is reasonable to put the question of the extension of such reasoning to Albania where the political system insured in the past years the alternation of the political parties in the power and the frequent change of the holders of the governing bodies of the State.
In any case, even if the Zdanoka line is accepted, the questions submitted by the Albanian Constitutional Court remain open especially in consideration that they regard the compatibility of the lustration legislation with specific internal constitutional rules which don't coincide with the international law principles in the matter.

Case 1

14. Does the law violate the constitutional guarantee of the mandate of the President of the Republic, members of the Constitutional Court, members of the Supreme Court, deputies, members of the Council of Ministers and General Prosecutor?

15. The Albanian Constitution provides for special rules on the constitutional position of these high officials of the State. These rules concern, on one side, the peculiar relation between their personal responsibility and their activity and, on the other side, their dismissal or other modalities of the end of their mandate. All these rules are covering items of substantial interest and of procedural relevance. Provisions which could be used as a basis of the new lustration legislation are mainly missing and, therefore, we can say that it does not mainly have a constitutional coverage: the time for lustration is apparently finished for the Constitution, notwithstanding the fact that it was adopted when the lustration measures were actually in force.

16. According to art. 90.2 the President of the Republic, who is not responsible for actions carried out in the exercise of his duty, may be dismissed only for serious violations of the Constitution and for the commission of serious crime by a vote of the Assembly supported by not less than two thirds of all its members on the basis of a proposal submitted by not less than one fourth of the deputies. The decision is scrutinized by the Constitutional Court which declares the dismissal of the President when it verifies his guilt. There is no space for a lustration procedure aimed at the dismissal of the President according to the law at stake.

17. The constitutional provisions concerning the judges of the Constitutional Court (art. 126 – 128) and the judges of the High Court (art. 137 – 140) are substantially similar. They can be removed by the Assembly by two thirds of all its members for reasons which are different from those of the lustration measures and regard in any case the behaviour of the concerned persons during their mandate. In any case the decision of the Assembly is reviewed by the Constitutional Court which declares the removal from the office. Also the other rules dealing with the end of the mandate of these judges cannot be a base for lustration measures as far as they concern the age of the interested people, their incapability of acting (with a clear reference to civil law rules), their resignation or their behaviour during the mandate.

18. The responsibility of the deputies is covered by special rules (art. 73), while only one provision concerning their incompatibilities could be used to justify the extension to them of the lustration legislation as far as art. 70.2 allows the law to provide for “other cases of incompatibility “in addition to those explicitly introduced by art. 69 – 70. But, according to art. 131 e) issues related to the eligibility and incompatibility of the deputies (as well as of the President of the Republic) are decided by the Constitutional Court and the law forgets this provisions.

19. The members of the Council of Ministers enjoy the immunity of a deputy. Moreover they can be dismissed by a vote of the Assembly (art. 104 – 105). As far as the Constitution is silent about the requirement for the election to this office, it could be possible to extend the lustration legislation to the Ministers. But we’ll come back on the point of the sources of law competent in the matter as well as with regard to the position of the deputies.

20. Eventually the General Prosecutor may be discharged only by the President on the proposal of the Assembly for reasons concerning his activity and behaviour that seriously discredit prosecutorial integrity and reputation, but this provision does not apparently deal with requirements for his appointment: it interests his staying in office with regard to events happened during his mandate.

21. As a matter of fact only deputies and members of the Council of Ministers could be affected by lustration legislation. In other cases there is not a constitutional basis for extending this legislation to the President of the Republic, the judges of the Constitutional Court and of the

High Court, and the General Prosecutor, that is for them a constitutional justification is missing. Moreover the relevant procedures are directly ruled by the Constitution and there is no space for a further question concerning the compliance with the rule of law by the legislation which we are talking about.

22. I mean that the lustration rules concerning President of the Republic, judges of the Constitutional Court and High Court and General Prosecutor look already unconstitutional even if we don't take care of the specific question about their compliance with the rule of law because: a) they don't have a constitutional justification and b) they don't comply with the constitutional rules concerning the personal responsibility and dismissal or end of the mandate of the persons concerned.

23. Is the lustration termination of the mandate justified in the case of the deputies? And is the principle of the rule of law violated as far as they are interested?

24. It is well known that lustration should not be applied to the elective offices unless the candidate for the election requests it: "voters ", document n. 7586 says, "are entitled to elect whomever they will (the right to vote may only be withdrawn from a sentenced criminal upon a decision of a court of law – this is not an administrative lustration, but a criminal law measure) ". But recently Zdanoka v. Latvia took a different position. In any case the constitutionality of the provisions at stake is apparently dubious if we adopt the yardstick of the rationality and proportionality: so many years after the fall of the communist regime the frequent elections held in Albania have offered to the voters many occasions for the screening of the Albanian political personnel: year after year the irrationality of the continuity or of the adoption of a new lustration legislation has been getting more and more evident. The idea of the Czech Court envisaging a "democracy defending itself "does not apply in this case. The Albanian legislation looks at the past, but the electors in the past elections operated themselves a process of lustration and the previous lustration legislation produced the results summarized in the article of Mark S.Ellis mentioned in the introduction of this opinion.

25. I'll deal in the following pages with to the question concerning the compliance of the Albanian law with the rule of law.

Case 2

26. Which is the relation between the present law and the organic laws which stipulate the constitutional and legal guarantees of the judges, prosecutors, employees of the public administration? If there is a conflict - and the rapporteurs are not in the position of verify the existence of this conflict, because they did not received a translation of the relevant organic laws - can we say that the law at stake is unconstitutional?

27. As a matter of fact, the constitutional rules are frequently incomplete, they don't provide all the necessary provisions to implement the principles they state. Therefore they have to entrust other sources of law to rule on the relevant matters in conformity with the constitutional rules and completing them. This is the case of the provisions of the Albanian Constitution: according to art. 81.2 special laws for the organization and operation of the institutions contemplated by the constitutional rules have to be approved to implement the principles of the constitution. These laws shall be approved by three-fifths of all members of the Assembly. Therefore, if there is a conflict between the relevant "organic "laws and the law we are dealing with, the provisions of the lustration act have to be considered as unconstitutional. Apparently the relation between organic laws and ordinary laws (approved by a simple majority of the Assembly) can be interpreted as the relation between sources of law which stay at different levels of the hierarchy of the sources of law: the laws which are approved by a special qualified majority shall prevail on those laws which are approved by a simple majority. But we can also construe that relation according to the principle of the distribution of the legislative competences: laws which are approved by simple majority invade the competence of the laws approved by a special qualified

majority if their provisions deal with items reserved to the competence of the organic laws and conflict with their rules. Both the approaches deserve attention but the second one is preferable because it clearly emphasizes that the ordinary legislation is not allowed to deal with the items which are in the competence of the organic laws. The simple hierarchy of the sources of law does not exclude the concurring competence of different sources of law on the same items.

28. Rebus sic stantibus, there is no matter for the question concerning the justification of the violation because the Constitution does not authorize or justify the derogation to the distribution of the competences between the sources of law on the basis of any justification.

Case 3

29. In principle an answer can be given to this question only if we think that the lustration law does not conflict with the constitution with regard to cases 1 and 2. Notwithstanding the fact that in our opinion the lustration law is not in conformity with the constitution from many points of view because it violates, inter alia, the principle of rationality and proportionality, the guarantees of constitutional figures at stake and the distribution if the competences between the different sources of law, we'll deal with case 3 looking at the question in the perspective of the principle of law.

30. It is evident that the competences of the Authority for lustration are conflicting with the competences of the bodies which are entrusted by the constitution with the power of dealing with the constitutional status of the holders of the constitutional bodies of the State. Moreover the rules of the law conflict with the relevant procedural rules provided for the decisions concerning the status of those figures by the constitution.

31. The composition of the Authority (ex art. 6.4 it consists of two representatives of the parliamentary majority and two representatives of the parliamentary minority with a chairman chosen by consensus) is more similar to the composition of an arbitration body than to a neutral and independent quasi judicial body. The relevant procedure does not require the presence or a hearing of the people concerned. Even in the case of art. 20.2 of the law the official who does not accept the verification results adopted by the Authority, is not given the possibility to explain his position in the presence of the members of the lustration body. Only sub art. 22 the way of a judicial appeal is open, but the law does not state the possible reasons of the appeal and it is not clear if the appeal has the effect of suspending the implementation of the verification results in cases not covered by art. 24. 2-3 (for instance, elections). Therefore it is dubious that the procedural rules of the law comply with the principles of the rule of law.

Case 4

32. With regard to the limitations of the political constitutional rights, the right to work and the right of access in the public administration the problem of their proportionality is under discussion. The topic is strictly connected the problem of the admissibility of the lustration measures. As the document n. 7586 of the Parliamentary Assembly reminds us, "lustration may only be used to eliminate or significantly reduce the threat .. to the creation of a viable free democracy ". The subject of the lustration has to be in a position where he could be able to "pose a significant danger to human rights or democracy ", but should not be affected in connection with election to public offices. Correctly the decision K 2/07 of the Constitutional Tribunal of Poland insisted for an appropriate application of the principle of proportionality, understood not only as a constitutive part of the constitutional principles that don't allow for the limitation of rights and freedoms of the individual, but also as a principle that constitutes an inherent component of the concept of a democratic state ruled by law.

33. As a matter of fact the constitutionality of lustration legislation cannot be in principle excluded. But it has to have a relation of connection with the threats and dangers for the

establishment and the continuity of a democracy: that is, there is to be a relation of proportionality between the lustration measures and the mentioned threats and dangers. The evaluation of this relation of proportionality has to be made by the relevant State's legislative and administrative bodies, but a constitutional judge is allowed to check the exercise of this margin of appreciation when the principle of proportionality is largely bypassed.

34. In the case of Albania the existence of threats and dangers was widely accepted in the past, that is in the years immediately following the fall of the communist regime. In the present time, after many years and many political and local elections, the existence of threats and dangers appears more dubious and the reasons able to justify a general lustration act are not so evident specially if the lustration is only connected with the formal participation of the interested persons in the activities of the communist regime and does not require a personal responsibility for the violation of human rights and other criminal behaviours. The present political situation in Albania where a majority which strongly supports an anticommunist political line stays in power with the adhesion of the voters, suggests that the presence of ex-communist figures in the political life is not probably any more a danger and a threat for the democracy.

Case 5

35. Are the incumbent constitutional judges allowed to participate in the discussion and in the vote about the present applications, if they are potential subjects of the lustration law? Is there a conflict of interests? Is it possible an "institutional blockage "?

36. A tentative answer can be given on the basis of the law "On the organization and functioning of the Constitutional Court of the Republic of Albania ". Art. 16.2 Of this law states that "the judge of the Constitutional Court cannot be investigated without the consent of the Constitutional Court ". At the moment the implementation of the lustration act is suspended and there is not any investigation concerning personally a constitutional judge. The general and abstract provisions of the law don't affect individually any person. Therefore there is not space for a conflict of interests which implies that the addressee of a specific measure is clearly indicated and mentioned. Only in the future it will be possible to understand if and which constitutional judges are interested by the lustration measures. It is true that, according to the lustration law, the starting of the verification procedure depends on the initiative of the people concerned (art. 13), who are supposed to have a knowledge of their personal situation, but the presence of this rule in the law does not automatically imply the existence of a conflict of interests, specially in the absence of the required consent of the Court.

37. Moreover it is unthinkable that the Assembly can bypass the Constitutional Court by creating potential conflicts of interests affecting the constitutional judges. The system of the constitutional guarantees of the Court and of the personal position of the judges provided for by the Constitution (art. 126-128) and by the law on the constitutional Court (art. 9-10, 16, 25, 34-35, 36-37) is built to avoid the "blockage "of the Court and to give to the constitutional bodies of the State the power to intervene in case of difficulties.

Post scriptum

38. It could be helpful to note that art. 16 of the Italian *Norme integrative per i giudizi davanti alla Corte costituzionale* (Supplementary rules concerning the proceedings before the Constitutional Court) states that the rules dealing with the abstention and the refusal of the judges cannot be applied in the constitutional process before the Constitutional Court. This choice is frequently justified taking in consideration the general relevance of the interests which are at stake before the Court, the political nature of the cases and the peculiar authority of the body itself.