Strasbourg, 30 September 2009

**CDL(2009)154***

**Opinion No. 524/2009**

Engl. only

**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**

**Ms Hanna SUCHOCKA (Member, Poland)**

---

**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.*

1. The Venice Commission has been requested by the Constitutional Court in Albania, to give an amicus curiae opinion on the Law No 10034 dated 22.12.2008 “On the cleanliness of the figure of Hugh Functionaries of the Public Administration and Elected Persons.” This law is not the first one in Albania, concerning the lustration. The previous Law no. 8043 dated 30.11.1995 “On Checking the figure of Officials and Other persons related to the protection of democratic Stated (several times amended) exhausted its effects on 31 December 2001. The new Law 10034 as concerns the circle of subjects and the conditions of incompatibility of functions, is more radical than the previous one.

2. Albania is only one of the examples. Problem of lustration involved a serious discussion and controversion in Poland. The Polish Constitutional Tribunal decided 8 times in the cases concerning lustration. The rich jurisprudence of the Polish Tribunal can be very helpful in dealing with the Albanian Lustration Law.

3. The problem of lustration is one of the crucial questions in many post-communist countries. Despite the period of 20 years has passed since the beginning of transformation, the problem is still very actual in many of new democratic countries. The lustration process has been seen as one of the instruments of the realization of the historical justice in new democracies, to pass beyond the non-democratic past and to give a transparency in the public life. “The lustration procedure, understood as a legal mechanism to investigate connections and relations of person holding or aspiring to hold important State offices, or already holding other public offices that entail a particularly high degree of responsibility, and in whom the public pose confidence, must not, as a matter of principle, give rise to doubts both from the perspective of the conformity thereof to the Constitution, particularly to the principle of a democratic state ruled by law.” (K2/07). The problem of lustration is very often treated as purely political one. Law on lustration is seen as one of the instruments of realization of purely political goals. Very often the political approach prevails over the juridical one. Lustration law despite its political nature must be however realized (executed) only by legal means, taking into account all the European standards concerning the state of law and guarantees of human rights. The constitutional principles concerning the state ruled by law and guarantees of human rights cannot be neglected. The double character of the lustration process (political and juridical)involves so many problems and controversies in practice. The current Albanian law is only one of the examples.

4. It was the reason why the Parliamentary Assembly of the Council of Europe adopted the Resolution 1096 (1966) “On Measures to dismantle the Heritage of former Communist Totalitarian Systems”, where is clearly stated that lustration can be compatible with a democratic state under the rule of law, if several criteria are met…. The Parliamentary Assembly set up also “Guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law.” It was stated in this document that :”to be compatible with a state based on the rule of law, lustration laws must fulfill certain requirements. Above all, the focus of lustration should be on threats to fundamental rights and democratization process; revenge may never be a goal of such laws, nor should political or social misuse of the resulting lustration process be allowed.”

5. Goals of lustration were always in the centre of the discussion. It was also a case in the Polish system. The Constitutional Tribunal in Poland (Judgement on May,11$^{th}$ , 2007, file Ref. No. K 2/07) said that in the light of the documents of the Council of Europe “the goal of lustration shall consist, above all, in the protection of democracy against reminiscences of totalitarianism while the secondary goal thereof, subordinated to the realization of the primary goal, shall be the individual penalization of persons who undertook collaboration with the totalitarian regime (while it is at the same time necessary to maintain guarantees

inherent to penal regulations). (…) the lapse of time lessens the threat of blackmail and brings about the natural exchange of staff. Accordingly, based on the European standard (Resolution No.1096), the handling of the totalitarian system envisages, with he lapse of time, temporal limitation and lessening of the force of arguments concerning the possibility of utilizing operations materials prepared by the totalitarian apparatus to blackmail functionaries (on the part of third parties, pressure groups, foreign centres). This circumstance should be taken into consideration while seeking an answer to the question whether, based on substantive grounds, the catalogue of persons subject to lustration should be extended, or rather narrowed with the lapse of time".

This question has been answered in the new Albanian Law by choosing the way of extending the catalogue of persons subject to lustration. Art. 3 of the Law states that "subject to verification, according to this law, are all public functionaries, elected or appointed, who currently exercise or will exercise one of the following functions:

*a. the President of the Republic of Albania;*

*b. the deputies of the Assembly of Albania;*

*c. members of the Council of Ministers, deputy ministers, political functionaries, general secretaries, general directors and directors of the directorates of the ministries [lit. "dikastera" or "offices"; although this is an old, rarely used and not defined word, in the context it probably means the ministries], as well as those equivalent to them in other central state or independent institutions;*

*ç. members of the High Council of Justice, as well as judges and prosecutors at the courts and prosecutor's offices of all levels;*

*d. high functionaries of the Presidency, the administration of the Assembly, the High Council of Justice, the High Court, the Constitutional Court, the General Prosecutor's Office, according to the levels defined in letter "c" of this article;*

*dh. the governors, deputy governors and directors of the Bank of Albania;*

*e. functionaries in the Armed Forces of the Republic of Albania, the General Staff of the Army, as well as officers with the ranks of "General" and "Colonel";*

*ë. prefects, chairmen of the regional councils, as well as mayors of municipalities and communes;*

*f. directors of directorates of the public administration at the regional leve*

*g. in the State Information Service (SIS), in the Military Information Service (MIS) and in every other intelligent [sic] service;*

*gj. in the Guard of the Republic;*

*h. management functions in the State Police up to the level of region and commissariat;*

*i. directors of diplomatic representations;*

*j. members of the Academy of Sciences, rectors, deputy rectors and deans in public universities, as well as directors of high schools and secondary technical-professional schools;*

*k. the General Director, the deputy general directors, the director and deputy director of Radio, the director and deputy director of Television and the directors of the departments of Albanian Public Radio-television; the director, deputy director and directors of the departments at ATA [the Albanian Telegraphic Agency] as well as the members of the steering councils of public media;*

*l. every other person decreed by the President of the Republic or elected by the Assembly.*

The list of institutions, subject to verification seems to be too wide. Especially pp. j-l. The question must arise what concerns the autonomy of the universities as well as role of media.

Also art. 4 involves doubts because of its ambiguity and lack of precision. Precision of terms is crucial for the good law on lustration. In the Albanian Law, art. 4 p. c says on "every employee" of the organs of State Security".. There were different kinds of employees in the structure of State Security organs and not all of them were "the figure of high functionaries". The Polish Constitutional Tribunal said: "Discharging a public function shall entail the realization of tasks in an office(…) Therefore, the determination as to whether a function is public one should focus on a finding whether a given person performs, within a given institution and to a certain extent, the public task assigned to the institution" (K2/07). It should be very precisely described what kind of employees of the former organs of State Security can be describe as public functionaries. Some doubts arise also as regards p. f) "judge or assistant judge in political process". The experience shows that role of judges in political process were also different. There were judges who did not cooperate with the communist system. Their role in the political process was positive. So it must be very precisely described what kind of role of judges in the political process is incompatible with their function in a democratic system. As it was pointed out by President of the Polish Constitutional Court: "For any law on lustration to be constitutional it is inevitable to supply a precise definition of the objected collaboration with the totalitarian system."

6. The new governing coalition in Albania probably saw a danger for democracy resulting from the reminiscences of totalitarianism personalized by the public functionaries which had been involved in the policy making and implementing structures of the violence of the dictatorship of the proletariat for the period 29 November 1944 until 8 December 1990 (art. 1 of the Law), deciding to propose such a law. The new Law was proposed 7 years later after the previous one exhausted. It was a political decision to propose such a law. But as we said before even this kind of law must be treated with legal (juridical) instruments, in the framework of existing constitutional provisions. The new Albanian Law was not adopted in a constitutional vacuum. In was adopted in the situation of existing constitution where the European standards of the rule of law and state of law are strongly set up. As it was stated by the Polish Constitutional Tribunal (K2/07/): "There are matters in which the Constitution prescribes for the legislator a much narrower scope of its political right to put forward a statutory regulation,and almost all statutory regulations require diligent assessment from the perspective of the admissibility of the contents and the adoption thereof. This shall primarily refer to regulating "classical"(personal and political) rights of person and the citizen, since the Constitution envisages the broadest possible scope of freedom for the individual, and all regulations limiting such rights and freedoms must observe specific requirements. Where the content of a statute were to introduce regulations that would encroach on matters specified in the Constitution as barely accessible to the legislator, than, such an infringement of procedure may and should be considered as one that brings about much more serious implications than any other infringement".

7. The Constitution of Albania in Art. 4 states that: 1. the law constitutes the basis and boundaries of the activity of the state, 2. the Constitution is the highest law in the Republic of Albania. In this article there are express two basic principles: 1. principle of the state of law and 2. principle of the system of the sources of law with supreme role of the Constitution. This two

principles are crucial for deciding on the constitutionality of the new Law on Lustration. The new Law should be subordinated to the Constitution. It is a kind of executive Law. Lustration Law does not have the character of organic law, adopted by a special majority. It is not a kind of constitutional law because was adopted by simple majority of votes in parliament. Being adopted in such a way the law should be in conformity with the Constitution. The solution proposed in the Law can not change the provisions of the Constitution, can not differ from the regulations included to the Constitution.

8. Taking this into account we can deal with the questions put to the Venice Commission: "Does the law violate the constitutional guarantees 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?" The position of President is regulated by the Constitution in art. 86-94. The President is elected for 5 years. The Constitution in art. 20 regulates the cases when the president may be dismissed, i.e for serious violation of the Constitution and for the commission of a serious crime. There is also provide a special procedure for the dismissal of the president. The proposal for the dismissal may be made by not less than one-fourth of the members of the Assembly and shall be supported by not less than two thirds of all its members. The decision of the Assembly is sent to the Constitutional Court, which, when it verifies the guilt of the President, declares his dismissal from duty." This is the only way for the end of the mandate of the president. The end of mandate of the President may not be regulated by ordinary law in completely different way than it is provided by the Constitution. There are similar provisions as regards the Members of the Constitutional Court (art. 127) and of the Supreme Court (138-140). In the light of this provisions art. 24 of the Law (adopted by simple majority) when decides on the termination of the mandate in case of a verification certificate B violates the constitutional guarantees of the mandate of the persons mentioned above and is in the contradiction to the Constitution.

9. The situation of deputies involves some doubts. Art. 71 of the Constitution describes in very concrete way when the mandate of the deputy ends or is invalid. There is however art. 70 p. 2 which reads as follows: "Deputies may not simultaneously exercise any other public duty with the exception of that of a member of the Council of Ministers. Other cases of incompatibility are specified by law. As a substance the Constitution opens the way by art. 70, p2 to the lustration of deputies. But in this case the competence to decide on the incompatibility belongs, in the light of the Constitution (art. 131 p. e), to the Constitutional Court, not the Authority provided by the Lustration Law. From this procedural point of view the provision of the Lustration Law is not in concordance with the Constitution and the decision taken by Authority as regards the deputies violates the constitutional guarantees of the mandate of deputies. There is no constitutional regulation concerning the end of mandate of the members of the Council of Ministers. Art. 103 p. 3 states that Members of the Council of Ministers enjoy the immunity of a deputy. In my opinion this formulation does not prevent the member of the Council of Minister from the lustration procedure. In the light of the Constitution the lustration procedure can be open against the member of the Council of Minister, but only in the case when minister is not at the same time a deputy. There arise however some doubts concerning the double standard of the members of the Council of Ministers.

10. What concerns the Prosecutor General there are also concrete condition prescribed by the Constitution (art. 149 p.2) "The General Prosecutor may be discharged by the President of the Republic on the proposal of the Assembly for violations of the Constitution or serious violations of the law during the exercise of his duty, for mental or physical incapacity, and for acts and behavior that seriously discredit prosecutorial integrity and reputation". Even if one can presume that having been one of the high functionaries expressed in art. 4 of the Law was an act "that seriously discredit prosecutorial integrity and reputation" (as listed in art. 149 p. 2 of the Constitution), in the light of the Constitution the only organ who may discharge the Prosecutor General is the President of the Republic. From this, one can say procedural point of view, the Law violates the constitutional guaranties of the mandate of General Prosecutor.

11. In the Albanian Constitution the system of the sources of law is regulated by art. 4 and art. 81 p. 2. Art. 81 p.2 provides a category of so called organic laws, i.e laws approved by qualified majority three-fifths of all members of the Assembly. There are the following laws: a. for the organization and operation of the institutions contemplated by the Constitution; b. on citizenship; c. on general and local elections; ć. on referenda; d. the codes; dh. on the state on emergency; e. on the status of public functionaries; ę on amnesty; f. on administrative divisions of the Republic. There are explicitly enumerated matters which must be regulated by the organic law (voted by qualified majority). Point “a” and “f” are of special importance for our opinion. They concern the status of judges, prosecutors and employees of the public administration. It is clearly stated in the Constitution that no changes may be done in this areas by ordinary law. Albanian Lustration Law is not in conformity with this rule. One of the principles of the rule of law is the hierarchy of the sources of law. For that reason, by the new Law breaking the system of the sources of law, the principle of the rule of law is violated.

12. The Albanian Law on Lustration creates a threat for the farther functioning of the Constitutional Court. Some members of the Court can be potential subjects of this law and for that reason cannot participate in the discussion of the constitutionality of the Law. One can agree with a general rule that judges in order to avoid the conflict of interest can not participate in the discussion on constitutionality of this Law. The ordinary law however can not block completely the functioning of an institution established by the Constitution like the Constitutional Court. It is against the rule of law, that the solutions deriving from the lower law can bring to the impossibility of taking decision by the institution being rooted in the Constitution. This situation should have been solved before, by passing an organic law on the role of Constitutional Court in the lustration procedure, in cases when lustration leads to a conflict of interest with some of judges.