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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

AMICUS CURIAE OPINION

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

OF ALBANIA

Adopted by the Venice Commission
at its 80th Plenary Session
(Venice, 9-10 October 2009)

On the basis of comments by

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Mr Wolfgang HOFFMANN-RIEM (Member, Germany)
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I. Introduction

1. On 20 February 2009, the Constitutional Court of Albania requested the Venice Commission to give an amicus curiae opinion on the conformity of the Albanian Law "On the Cleanliness of the Figure of the High Functionaries of the Public Administration and Elected Persons" (hereinafter referred to as "the Lustration law" – CDL(2009)124) with the Constitution of Albania (hereinafter referred to as "the Constitution").

2. Five questions were put to the Commission:

1) Does the law violate the 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? If yes, is the termination of the mandate justified? Is the principle of the rule of law violated?

2) Does this law (approved by simple majority) violate the constitutional and legal guarantees stipulated by the respective organic laws (laws approved by a qualified majority of 3/5 of the deputies according to Article 81§2 of the Constitution) of the judges, prosecutors, employees of the public administration? If yes, can this violation be considered as justified?

3) According to the procedure of the creation, functioning and decision making process of the Authority for Checking the Figures, does the regulation of this law guarantee the requirement of the rule of law? Is there a conflict of competencies between some constitutional bodies and the authority of checking the figures? If yes, can this derogation be justified and is it in compliance with the requirements of constitutionality and the rule of law?

4) Are the limitations of the political constitutional rights, the right to work and the right of access to public administration justified? Are these limitations proportional?

5) The issue arises that some members of the Constitutional Court, due to the fact that they are potential subjects of this law, cannot participate in the discussion of the constitutionality of the law, in order to avoid the conflict of interest. Does this claim hold even in a case of the abstract control of a law (approved by a simple majority)? If the withdrawal or discard of some judges can bring to the impossibility of taking a decision and thus to an institutional blockage, can this situation be considered justified?

3. Ms. Suchocka and Messrs. Bartole, Hoffmann-Riem and Mihai acted as rapporteurs on this issue.

4. On 29-30 April 2009 the rapporteurs travelled to Albania in order to gain further information. They met inter alia with: the Prime Minister, the Speaker of the Albanian Parliament, the Deputy Speaker (as a representative of the opposition), the Minister of Justice, the Head of the Committee on Legal Issues and the Head of the Committee on Electoral Affairs.

5. The present opinion, which was drafted on the basis of comments by the rapporteurs (CDL(2009)132, 133, 134 and 154), was adopted by the Venice Commission at its 80th Plenary Session (Venice, 9-10 October 2009).

II. History of lustration in Albania[1]

6. Albania experienced an anti-communist revolution in 1989/1990. Since 1991, several attempts of de-communization have been made. In the preamble to Law 7514, passed at the end of September 1991, Parliament apologised to persons who "were accused, tried, sentenced and imprisoned, interned or persecuted during 45 years for violations of a political nature, doing violence to their civil, social, moral and economic rights", saying that "the first pluralist Parliament of the Republic of Albania considers it in its honour, as the highest representative of the people, … to ask pardon of these people for the political punishment and sufferings that they underwent in the past".[2] In 1992, after the elections of 22 March which were won overwhelmingly by the Democratic Party, this process became an important political issue on the agenda of the new government.

7. The first lustration law (Law No. 7666 of 26 January 1993) was directed at private lawyers. It provided for the creation of a commission for the re-evaluation of licences to practice law issued up to the effective date of the law. This commission was chaired by the Minister of Justice, who proposed the other members subject to the approval of the Supreme Court of Justice. The law added to the law on advocacy the provision that "there shall not be licensed to work as advocates: a) former officers of State Security and collaborators with it; b) former members of the Committees of the Labour Party of Albania as well as their employees in the central office, districts and regions; former directors of state organs in the centre and in the districts (ministers, vice-ministers directors of divisions as well as chairmen, vice-chairmen and secretaries of executive committees in the districts and regions); c) former employees of prisons and internment camps; d) those who have finished the Faculty of Justice on the basis of higher education in the special party school as well as the former chairmen or personnel offices at all levels; e) those who have taken part as investigator, prosecutor or judge in special or staged political trials, as well as those who have performed high management functions in the central organs of justice; f) those who have used physical or psychological force during investigations or other acts, as well as those who have taken part in border killings". A decision of disqualification would prevent practicing law for five years. It was possible to appeal to the Supreme Council of Justice against a decision taken under this law.

8. The Re-evaluation Commission met on 20 April 1993 and decided to revoke the licenses of 47 lawyers. On 30 April 1993, the Parliamentary Group of the Socialist Party brought a complaint to the Constitutional Court, alleging that this law was unconstitutional.

9. On 21 May 1993, the Constitutional Court declared the law in question unconstitutional and struck it down in its entirety[3]. The Court held *inter alia* that the creation of the re-evaluation commission was contrary to the constitutional law on the judicial system which provided that advocacy was a free profession, to be self-administered. Possible mistakes in granting licences had to be redressed by the council of judges. Further, the Court found that by subjecting the licensing solely to the lawyers' conduct during a specific period of time the law suppressed the democratic criterion of individual evaluation of the lawyers' qualities, which was in breach of the constitutional right to work. In addition, by providing for disqualification on the ground of the commission of crimes, the law breached the principles of separation of powers and of presumption of innocence.

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[1] *Robert C. Austin/Jonathan Ellison*, Post-Communist Transitional Justice in Albania, East European Politics & Societies 22 (2008), p. 373 *et seq.; Mark S. Ellis,* Purging the past: the current state of lustration laws in the former communist bloc, Law and Contemporary Problems, Vol. 59, no. 4, 1997, p.185 et seq.

[2] *Kathleen Imholz*, The experience in Albania, in: Past and Present: Consequences for Democratisation, 2004, pp. 35-36.

[3] *Kathleen Imholz*, A Landmark Constitutional Court Decision in Albania, East European Constitutional Review, Vol. 2, Number 3, Summer 1993, pp. 23-25.

10. The Law on Genocide and Crimes against Humanity committed during the Communist Regime for Political, Ideological and Religious Motives ("Genocide Law") in September 1995 and the Law on the Verification of the Moral Character of Officials and Other Persons Connected with the Defence of the Democratic State ("Verification Law") in November 1995 were the next attempts aiming at a law-based lustration process in Albania. The purpose of the "Genocide Law" was to assist and accelerate the prosecution of perpetrators of "crimes against humanity" committed under the auspices of the communist regime.

11. On the basis of this law the General Prosecutor ordered the arrest of 24 former senior communist officials.[4] This law also provided some lustration measures. Persons who were convicted of being authors, conspirators, or executors of crimes against humanity and who had held certain positions prior to 31 March 1991 were to be banned from being elected or appointed to positions in any higher levels of the government, the judicial system, and the media until 2002.

12. The "Verification Law" led to the creation of a committee responsible for screening potential and actual members of the government, police, judiciary organs, educational system and media to determine their affiliation with communist-era government organs and the state police. The Verification Committee acted independently, only its composition could be changed by parliament.[5] Every individual who wanted to run in an election for an important position (positions were listed in article 1) first had to be reviewed by this committee and could be restricted from running for such a position until 2002. The findings and decisions were not made public, which led to a certain criticism.

13. The Albanian Socialist Party's Parliamentary Group and the Albanian Social Democratic Party's Parliamentary Group brought complaints challenging these two laws, but the Constitutional Court basically rejected them on 31 January 1996 (with the exception of the provisions that subjected journalists at private newspapers to screening and of the provision whereby the Minister of Justice was allowed to make a request for the verification of the leadership of political parties and associations).[6] The Court found that the law in question set reasonable limitations that respond to the demands of the moral law of the democratic society of Albania.

14. The Verification Committee banned 139 candidates (45 were members of the Socialist Party, 23 were Social Democrats, 11 were from Democratic Alliance, 13 from the Republic Party, 3 from the Democratic Party and the remaining from minor parties) from participating in the parliamentary elections of 26 May 1996. 57 of them appealed to the Court of Cassation, which overturned seven of these decisions.

15. The Socialist Party, previously in the opposition, won the elections of 26 May 1996; the scope of the "Verification Law" was subsequently drastically reduced from its previous incarnation.[7] The Socialist Party won also the elections of 24 June 2001. The "Verification Law" expired on 31 December 2001.

16. The parliamentary elections of 3 July 2005 were won by the Democratic Party. On 22 December 2008, Law No. 10034 "on the cleanliness of the figure of the High Functionaries of the Public Administration and Elected Persons" was adopted by parliament.

17. On 31 January 2009 a group of deputies of the Assembly, the Albanian Helsinki Committee and the National Association of Prosecutors challenged the law before the Constitutional Court and also sought its suspension.

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[4] *Austin/Ellison*, supra note 1, p. 384.
[5] *Ibid.* p. 387.
[6] A summary of this decision can be found in CODICES, ALB-1996-2-001.
[7] *Austin/Ellison*, supra note 1, p. 393.

18. On 16 February 2009 the Constitutional Court granted the suspension of the law pending the decision on its constitutionality.

III. The Council of Europe Guidelines on Lustration Laws

19. In its Resolution 1096 (1996)"on Measures to dismantle the Heritage of former Communist Totalitarian Systems", the Council of Europe's Parliamentary Assembly stated that lustration "can be compatible with a democratic state under the rule of law, if several criteria are met". These criteria primarily are:

a. guilt must be proven in each individual case;[8]
b. the right of defence, the presumption of innocence and the right to appeal to a court must be guaranteed;[9]
c. the different functions and aims of lustration and criminal law have to be observed;[10]
d. lustration has strict limits of time in both the period of its enforcement and the period to be screened.

20. To safeguard that any lustration measures taken are compatible with the principle of the rule of law and "focus on threats to fundamental human rights and the democratization process" the Council of Europe's Parliamentary Assembly set up the following "Guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law" (hereinafter referred to as "the Guidelines"):[11]

"To be compatible with a state based on the rule of law, lustration laws must fulfil certain requirements. Above all, the focus of lustration should be on threats to fundamental human rights and the democratization process; revenge may never be a goal of such laws, nor should political or social misuse of the resulting lustration process be allowed. The aim of lustration is not to punish people presumed guilty – this is the task of prosecutors using criminal law – but to protect the newly-emerged democracy.

a. Lustration should be administered by a specifically created independent commission of distinguished citizens nominated by the head of state and approved by parliament;

b. Lustration may only be used to eliminate or significantly reduce the threat posed by the lustration subject to the creation of a viable free democracy by the subject's use of a particular position to engage in human rights violations or to block the democratisation process;

c. Lustration may not be used for punishment, retribution or revenge; punishment may be imposed only for past criminal activity on the basis of the regular Criminal Code and in accordance with all the procedures and safeguards of a criminal prosecution;

d. Lustration should be limited to positions in which there is good reason to believe that the subject would pose a significant danger to human rights or democracy, that is to say appointed state offices involving significant responsibility for making or executing governmental policies and practices relating to internal security, or appointed state offices where human rights abuses may be ordered and/or perpetrated, such as law enforcement, security and intelligence services, the judiciary and the prosecutor's office;

[8] Resolution 1096 (1996), on measures to dismantle the heritage of former communist totalitarian systems, para. 12.
[9] Ibid.
[10] Ibid. para. 11.
[11] Report on measures to dismantle the heritage of former communist totalitarian systems, Doc. 7568, 3 June 1996.

e. Lustration shall not apply to elective offices, unless the candidate for election so requests — voters are entitled to elect whomever they wish (the right to vote may only be withdrawn from a sentenced criminal upon the decision of a court of law — this is not an administrative lustration, but a criminal law measure);

f. Lustration shall not apply to positions in private or semi-private organisations, since there are few, if any, positions in such organisations with the capacity to undermine or threaten fundamental human rights and the democratic process;

g. Disqualification for office based on lustration should not be longer than five years, since the capacity for positive change in an individual's attitude and habits should not be underestimated; lustration measures should preferably end no later than 31 December 1999, because the new democratic system should be consolidated by that time in all former communist totalitarian countries;

h. Persons who ordered or significantly aided in perpetrating serious human rights violations may be barred from office; where an organisation has perpetrated serious human rights violations, a member, employee or agent shall be considered to have taken part in these violations if he was a senior official of the organisation, unless he can show that he did not participate in planning, directing or executing such policies, practices, or acts;

i. No person shall be subject to lustration solely for association with, or activities for, any organisation that was legal at the time of such association or activities (except as set out above in sub-paragraph h), or for personal opinions or beliefs;

j. Lustration shall be imposed only with respect to acts, employment or membership occurring from 1 January 1980 until the fall of the communist dictatorship, because it is unlikely that anyone who has not committed a human rights violation in the last ten years will now do so (this time-limit does not, of course, apply to human rights violations prosecuted on the basis of criminal laws);

k. Lustration of "conscious collaborators" is permissible only with respect to individuals who actually participated with governmental offices (such as the intelligence services) in serious human rights violations that actually harmed others and who knew or should have known that their behaviour would cause harm;

l. Lustration shall not be imposed on a person who was under the age of 18 when engaged in the relevant acts, in good faith voluntarily repudiated and/or abandoned membership, employment or agency with the relevant organisation before the transition to a democratic regime, or who acted under compulsion;

m. In no case may a person be lustrated without his being furnished with full due process protection, including but not limited to the right to counsel (assigned if the subject cannot afford to pay), to confront and challenge the evidence used against him, to have access to all available inculpatory and exculpatory evidence, to present his own evidence, to have an open hearing if he requests it, and the right to appeal to an independent judicial tribunal."

IV. The relevant case-law of the European Court of Human Rights (ECtHR)

21. Lustration measures have been adopted in a number of countries, such as Czechoslovakia, Lithuania, Latvia, Estonia, Bulgaria, Hungary, Germany, Albania, Poland, Romania and Serbia.

22. The European Court of Human Rights has been called upon assessing the legislation (or part of the legislation)[12] of some of these States with several provisions of the European Convention on Human Rights.

23. The following cases may be noted: Turek v. Slovakia (on repercussions on the applicant's personal life and social relations of the continued existence of security records, of a negative security clearance and of the outcome of the lustration proceedings)[13]; Matyjek v. Poland (concerning the secret nature of the lustration proceedings, document confidentiality and the procedures governing access to the case file)[14]; Luboch v. Poland (on the refusal by the domestic courts to call three crucial witnesses on the applicant's behalf in the course of lustration proceedings)[15] Bobek v. Poland (fairness of lustration proceedings); Žičkus v. Lithuania (fairness of lustration proceedings)[16]; Ždanoka v. Latvia and Adamsons v. Latvia (disqualification from running as a candidate in parliamentary elections)[17].

V. The relevant case-law of European Constitutional courts

24. A research in the Venice Commission database CODICES indicates six pertinent decisions by the following European Constitutional Courts: the Czech Republic (judgment 1/92 of 26/11/1992; judgment 9/01 of 5/12/2001); Latvia (ref. 2005-13-0106, 15/06/2006); Poland (judgment P3/2000 of 14/06/2000, judgment SK10/99 of 4/12/2000 and judgment K 2/07 of 11/05/2007). The summaries of these decisions are available at the CODICES website[18].

VI. Preliminary remarks concerning the Albanian law on lustration

25. The Venice Commission considers that two questions deserve special attention at the outset, because the relevant answers condition the development of the reasoning on the five questions submitted by the Constitutional Court. These questions are the time of the adoption of the law and the object of the law.

A. The time of the adoption of the law.

26. The Albanian Lustration law was promulgated on 14 January 2009 and was published in the Official Journal the following day. According to its article 30, it was to enter into force on 30 January 2009, and the Authority was to perform the screening until 31 December 2014, as stated in article 29.1 of the Law. The law would therefore be applied about 18 to 25 years after the collapse of the totalitarian regime. In addition, this law was enacted seven years after the expiration of the previous legislation on the matter.

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[12] The relevant legal provisions are contained in the judgments.
[13] ECtHR, Turek v. Slovakia judgment of 14 February 2006.
[14] ECtHR, Matyjek v. Poland judgment of 24 April 2007. See also Chodynicki v. Poland (Application no. 17625/05, dec. 2.9.08
[15] ECtHR, Luboch v. Poland judgment of 15 January 2008.
[16] ECtHR, Žičkus v. Lithuania judgment of 7 April 2009.
[17] ECtHR, Ždanoka v. Latvia judgment of 16 March 2006; Adamsons v. Latvia judgment of 24 June 2008.
[18] http://www.codices.coe.int/NXT/gateway.dll?f=xhitlist&xhitlist_q=%5BField+E_Alphabetical+Index%3Alustration%5D&xhitlist_x=Advanced&xhitlist_s=&xhitlist_hc=&xhitlist_d=&xhitlist_xsl=xhitlist.xsl&xhitlist_vpc=first&xhitlist_sel=title%3Bpath%3Bcontent-type%3Bhome-title%3Bitem-bookmark&global=hitdoc_g_&hitlist_g_hitindex=

27. The Parliamentary Assembly's Guidelines (see para. 20 above) set out, among other requirements, that lustration laws should not have effects longer than five years, and they also introduce the general suggestion that lustration measures should preferably end in all ex - communist states no later than on 31 December 1999. This has to do with the threat which is posed by such former regimes.

28. In this respect, the ECtHR stated that it "*proceeds on the basis that a democratic State is entitled to require civil servants to be loyal to the constitutional principles on which it is founded. In this connection it takes into account Germany's experience under the Weimar Republic and during the bitter period that followed the collapse of that regime up to the adoption of the Basic Law in 1949. Germany wished to avoid a repetition of those experiences by founding its new State on the idea that it should be a "democracy capable of defending itself". Nor should Germany's position in the political context of the time be forgotten. These circumstances understandably lent extra weight to this underlying notion and to the corresponding duty of political loyalty imposed on civil servants*."[19]

29. The position of the Constitutional Court of the Czech Republic as to whether the public interest to actively defend the state's democratic establishment is of a "timeless nature" was this: *"A democratic state, and not only in a transitional period after the fall of totalitarianism, can tie an individual's entry into state administration and public services, and continuing in them to meeting certain prerequisites, in particular meeting the requirement of (political) loyalty."*[20]

30. The court of the Czech Republic thus adopted a different view from that of the Constitutional Court of the Czech and Slovak Federal Republic, which in 1992 had found 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 democratization (of the country) will be accomplished in a short period of time" (by 31 December 1996)[21]. The Czech Constitutional Court instead 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: the Court thus accepted the amendments to the lustration laws aimed at removing their restricted validity in time. It noted that "the determination of the degree of 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 ". The Court however strongly supported the idea of a reform of the legislation at stake[22].

31. Both the aforementioned cases before the ECtHR and the Constitutional Court of the Czech Republic concerned access to the public administration and not the disqualification for office. In the Venice Commission's view however the need for loyalty should be similarly interpreted in matters of both people holding an office and those aspiring to do so. If the ECtHR distinguishes the cases it is only because it makes a difference as to whether the right under article 10.1 of the ECHR is affected.[23]

32. The conclusions of the analysis as given by the Constitutional Court of the Czech Republic are:

> *"1. Promoting the idea of "a democracy able to defend itself" is a legitimate aim of the legislation of each democratic state, in any phase of its development.*
> *2. The requirement of political loyalty of persons in state administration and public services is considered an undoubted component of the concept of "a democracy able to defend itself.*

[19] ECtHR, Vogt v. Germany, judgment of 2 September 1995, para. 59.
[20] Judgment of 5 December 2001; *cf.* U.S. Supreme Court, Adler v. Board of Education.
[21] Judgment 1/92, 26 November 1992.
[22] Judgment 5 December 2001.
[23] ECtHR, Vogt v. Germany judgment, op. cit., para. 44.

3. The specific degree of loyalty required depends on the historical, political and social experiences of each individual state and on the degree of threat to democracy in the given state."[24]

33. In March 2006 the European Court of Human Rights[25] adopted a similar position, accepting 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*." The Court, however, did not refrain from analysing the question in the light of the principles and provisions of the ECHR and did not deal with the political question. [26]

34. It is generally accepted that lustration measures have to comply with the yardstick of the rule of law (see PACE Resolution 1096(1996)). The Constitutional Tribunal of Poland 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 a 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* ".[27]

35. The Venice Commission is of the view that there must be cogent reasons to justify enacting a new lustration law eighteen years after the fall of the communist regime and seven years after the expiry of the previous legislation, and for foreseeing that it will continue to apply for so long.

36. The Albanian authorities gave reasons for this choice. They underlined that the first lustration law of 1993 was struck down by the Constitutional Court, while the Genocide law and the Verification law of late 1995 were only applied in a much reduced manner once the Socialist Party regained power. When the Democratic Party returned in power in 2005, a large debate started about whether to make public all the files of the secret police, and three proposals for lustration laws were put forward, before the law under consideration was adopted.

37. According to the Albanian authorities, this shows that the lustration process has not been fully accomplished yet, while the Albanian society still feels that it is necessary to clean the ranks of the State.

38. The Venice Commission wishes to stress that, as the purpose of lustration is to bar people with an anti-democratic attitude from office, the time period to be screened will have to be limited, since activities well in the past will regularly not constitute conclusive evidence for a person's current attitude or even his/her future behaviour. That is the reason for the basic time-limit given in section j of the Guidelines. It follows that the longer the objected activities date back, the more significant the personal misconduct in the past and the individual guilt have to be. In addition, 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 parties, and where other political parties refuse any connection with the past regime.

39. 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 trans-frontier criminality.

40. In the light of the above, the Venice Commission is of the view that it is for the Constitutional Court to scrutinize with special attention the articulation of the specific reasons which have been given by the authorities to enact lustration legislation so many years after the end of the communist regime.

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[24] Judgment 5 December 2001.
[25] ECtHR, Ždanoka v. Latvia judgment, op. cit.
[26] Ibid.
[27] Judgment 11 May 2007, K 2/07

B. The object of the law.

41. Article 2 of the Lustration law identifies the object of the lustration measures as being "*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*".

42. This provision in conjunction with the more specific provision of Article 4 reveals that former collaborators of the communist regime are mainly concerned 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; art. 4 e) concerns collaborators of the organ of the state security with activity of a political nature which is related to political criminal offences; and art. 4 g) regards denouncers or witnesses for the prosecution in political judicial processes.

43. However, the remaining provisions of art. 4 do not take into consideration the need, underlined by Resolution 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* ".

44. The aforementioned judgment of the Czech Constitutional Court of 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, the court accepted the lustration measures of temporary nature, which link an individual's attitude towards the democratic establishment with his/her individual actions and behaviours.

45. Correctly, in 2007 the Constitutional Tribunal of Poland adopted a stricter line and stated that "*the 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*", stressing the need for a precise definition of the "conscious collaborators "who would be the object of lustration measures.

46. The individualization of the effects of the lustration legislation requires that decisions affecting a person must be the object of a screening by the domestic judicial authorities as far as they imply a deprivation of individual rights guaranteed by the Constitution. It is true that the European Court of Human Rights, in the case Zdanoka v. Latvia denied that "*the requirement for individualization (…) is (…) a precondition of the measure's compatibility with the ECHR*.[28] The Court, however, considered that the purposes of the Latvian legislation in question was not the punishment of those who had been active in CPL but, 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 underlined the need to elaborate the justification for the lustration legislation 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 referendum.

[28] ECtHR, Ždanoka judgment, op. cit. § 114.

47. The Venice Commission finds it doubtful that such reasoning may be extended to Albania, where the political system has ensured in the past years the alternation in power of the political parties and the frequent change of the holders of the governing bodies of the State.

48. The Venice Commission further considers that the object of the law as stated in Article 4 is problematic in respect of the requirement of precision of terms, which is a requirement of the rule of law. The Venice Commission recalls that, as the ECtHR states, *"the level of precision required of domestic legislation - which cannot in any case provide for every eventuality - depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed."*[29]

49. To the extent that lustration measures affect significantly certain fundamental rights, for any law on lustration to be constitutional it is inevitable to supply a precise definition of the objected connection with the totalitarian system.[30]

50. The catalogue of "incompatible functions" in article 4 of the Law appears to exceed these limits. Several offices and activities listed in that provision are enumerated in a rather precise manner. Yet, others lack the accuracy needed. Although described in a rather precise manner, some have an extremely wide range of application: the terms "every employee of the organs of State Security" in article 4 ç), for example, can cover even the secretary or the cleaner. Doubts regarding precision arise as well on articles 4 d) and 4 e): they are partly described in a precise - though broad – manner, while other parts are outlined using imprecise terms. If the scope is broad, this raises at least questions of proportionality. Moreover, the precision of the term "related" in article 4 e) of the Law leaves the quality of this relation to speculation. It is up to the Constitutional Court to decide whether the functions mentioned in the Law can justify a kind of presumption of a close link of the person involved to the totalitarian regime sufficient to disqualify him/her from the functions mentioned in article 4 of the Law, in a democratic society. The formulation of article 4 ç) and article 4 e) is far from attaining a sufficient degree of precision.

51. Precision of terms also has to be achieved with regard to the personal scope of a law. Everyone must be able to realize whether or not they are affected by a law. Furthermore, everyone must be given the possibility of adjusting their behaviour to avoid being within the scope of a law.[31] This requires that the personal scope of a law be defined in a precise manner.

52. The meaning of article 3 l) of the Law ("*every other person decreed by the President of the Republic or elected by the Assembly*") is overbroad.

53. Finally, the Venice Commission finds that the personal scope of the Law described in its article 3 also raises serious issues in respect of the need for lustration measures to be limited "to positions in which there is good reason to believe that the subject would pose a significant danger to human rights or democracy" (see section d of the Guidelines).

54. The Venice Commission finds that there is reasonable doubt whether this may be presumed in relation to all persons mentioned in the Law in

- article 3 dh) ("the governors, deputy governors and directors of the Bank of Albania"),
- article 3 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") and
- article 3 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").

[29] ECtHR, Vogt v. Germany, judgment, op. cit., para. 48.
[30] *Marek Safjan*, Transitional Justice: The Polish Example, the Case of Lustration, EJLS 1 (2007), p. 18.
[31] ECtHR, Vogt v. Germany judgment, op. cit., para. 48.

55. The Venice Commission further recalls that section I of the Guidelines states that "*lustration shall not be imposed on a person who was under the age of 18 when engaged in the relevant acts*". 18 is the initial voting age in Albania as stated in article 45.1 of the Constitution. The idea of these regulations is that only grown-ups are fully liable for their activities. To exclude someone from office for activities he has committed while still under age would be contrary to this basic principle.

56. Considering the offices listed in article 4 of the Law, there is no reason to believe that anyone could have held them while still under age. But this does not apply to article 4 g) of the Law which is worded: "denouncer or witness for the prosecution in political judicial processes". As long as a denouncer or witness could have been under age it has to be secured by law he will not be subject of lustration due to this. The problem is basically the same concerning the "collaborator of the organs of State Security" and the "voluntary collaborator" in article 4 e) of the Law.

57. In conclusion, the Venice Commission finds that the scope of application of the law raises serious issues in terms of compliance with the standards of the rule of law.

VII. The five questions put by the Albanian Constitutional Court to the Venice Commission

A. Does the law violate the 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? If yes, is the termination of the mandate justified? Is the principle of the rule of law violated?

58. The Constitution holds the top rank in the hierarchy of norms in Albania, as is stated in its article 4.2: every law has to comply with it.

59. The Constitution provides certain guarantees for the mandate of the most important State institutions. These guarantees consist on the one hand in the provision of specific, exhaustive reasons for termination of their mandate, and on the other hand in special procedures for termination of the mandate. The Venice Commission wishes to underline in this respect that such procedures are constituent elements of the constitutional status of the State institutions in question: this means that replacing the specific procedures with other, less protective ones diminishes the status of the institutions.

60. The Constitution provides that 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 crimes 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/her guilt (art. 90.2 of the Constitution).

61. The procedure foreseen in the Lustration law is clearly different and less protective than the constitutional one.

62. The Albanian authorities argue that "serious violations of the Constitution" consist of the failure of the President to meet the commitments undertaken by the official oath (Article 88 para. 3 of the Constitution); the failure of the President to resign from office in case of issuance of a B-certificate in his/her regard represents, in their view, a serious violation of the Constitution. Accordingly, after the lustration procedure, the procedure foreseen in Article 90.2 would be duly followed.

63. The Venice Commission stresses that the relevant constitutional procedure for dismissing the President represents a guarantee for his or her independence only insofar as a majority of deputies considers that there has been a breach of the Constitution, and insofar as the Constitutional Court assesses that this is really the case. This guarantee would be null and void, if the deputies and the constitutional court were bound by the b-certificate. The Lustration Law cannot discharge of substance the constitutional protection of the President of the Republic.

64. The constitutional provisions concerning the dismissal of the judges of the Constitutional Court (art. 127-128) 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 violation of the Constitution, commission of a crime, mental or physical incapacity or acts and behaviour that seriously discredit judicial integrity and reputation. The removal decision then must be reviewed by the Constitutional Court.

65. The General Prosecutor may be discharged only by the President upon the proposal of the Assembly for reasons connected with acts and behaviour that seriously discredit prosecutorial integrity and reputation; this provision does not concern the requirements for his appointment: it interests his staying in office with regard to events happened during his mandate.

66. The Albanian authorities argue, on the basis of the case-law of the Constitutional Court of Albania, that there exists a constitutional basis for lustration measures in respect of judges of the Constitutional Court, the High Court as well as the General Prosecutor. The Constitutional Court of Albania has found that the sentence "acts and conducts discrediting the figure seriously" in Articles 128, 140 and 149/2 of the Albanian Constitution includes a series of elements which may be identified on a case-by-case basis by the relevant authority making the decision for the dismissal of the judges of Constitutional Court, High Court and Prosecutor General. These elements, according to the Court, are connected to inappropriate and unworthy acts and conducts that these senior functionaries commit in the course of their duty, for reasons connected to it or bearing no connection to it. These acts or omissions being analysed based on the circumstances of their commission, the subjective moment as well as the damage caused to the society and state should be of the nature that make the continuation of accomplishment of constitutional functions by these persons impossible (Decision of Constitutional Court of Republic of Albania no 75, dated 19.04.2002).

67. According to the Albanian authorities, the Lustration law does not add up any new category to the list of conditions declaring the termination of the mandate of the state institutions at issue. It only provides a specific interpretation and a specific procedure for a ground of termination of the mandate which exists in the constitution. The Lustration law therefore merely implements the relevant provisions of the Constitution and organic laws, and, as such, does not have a normative character at the level of the constitutional provision, but only a procedural nature according to which a definition (constitutional cause) for the termination of the mandate is put in place.

68. The Venice Commission is not convinced by this interpretation. It recalls the constituent nature of the procedure of dismissal for the status of the judges of the Constitutional Court and of the High Court. The Constitution explicitly provides for the need of the removal decision of the Assembly to be reviewed by the Constitutional Court (see para. 64). The Lustration Law cannot remove this guarantee. Moreover, the Constitution provides that the President exclusively may discharge the General Prosecutor (see para. 65) which is incompatible with the Lustration law. In addition, the Venice Commission stresses that the constitutional ground for dismissal in question only concerns the behaviour of the persons concerned *during their mandate* and does not refer to previous one.

69. As concerns the Deputies of the Assembly, Article 71 of the Constitution on the duration of their mandate provides that "*The mandate of the deputy ends or is invalid, as the case may be: a. when he does not take the oath; b. when he relinquishes the mandate; c. when one of the conditions of ineligibility or incompatibility contemplated in articles 69 and 70, paragraphs 2 and*

3, is ascertained; c. when the mandate of the assembly ends; d. when he is absent from the Assembly for more than six consecutive months without reason; dh. when he is convicted by final court decision for the commission of a crime."

70. Article 70.2 of the Constitution foresees that "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* (emphasis added)." Arguably, the latter sentence has to be interpreted in the context of the previous sentence, which concerns the simultaneous exercise of other public duties and the duty of a deputy. Article 3.3 of the law "on the status of MPs" provides that "the other cases of incompatibility of the mandate of the MP, in addition to those foreseen in Article 70.2 and 3 of the Constitution, are equivalent to those of the member of the Council of ministers, provided for in Article 103 of the Constitution". The latter provision mentions "any other state activity" and "director or member of the organs of profit-making companies".

71. Even assuming that Article 70.2 opens the way to lustration measures, according to art. 131 e), "i*ssues related to the eligibility and incompatibilities in exercising the functions (of the President of the Republic and) of the deputies, as well as the verification of their election, are to be decided by the Constitutional Court.*" The Venice Commission recalls what it has stressed in connection with protective procedures (see para.59 above).

72. Members of the Council of Ministers, who enjoy the immunity of a deputy, can be dismissed by the President of the Republic upon the proposal of the Prime Minister. The President's decree needs the approval of the Assembly (Art. 98).

73. In the Venice Commission's opinion, as the Constitution is silent about the requirements for the election to this office, it would be possible to apply lustration measures to the Ministers. However, it has to be underlined that the procedure foreseen by the Constitution needs to be followed.

74. **In conclusion, the Venice Commission considers that article 24.5 of the Lustration Law, which provides for the termination of the mandate of the President of the Republic, the members of the Constitutional Court, the members of the High Court, the General Prosecutor, the Deputies and the Ministers in case of a "verification certificate B", violates the constitutional guarantees of their mandate. It is therefore contrary to the principle of constitutionality and thus the rule of law.**

75**. A similar conclusion is to be reached in connection with article 24.4 of the Lustration Law**, insofar as it expects an immediate resignation from duty from a person who has received a "verification certificate B". The resignation is not a voluntary one: if the person does not resign, article 24.5 of the law is applicable. Although resignation is a form of ending a mandate as stipulated in the Constitution [e.g. article 71.2 b)], any direct or indirect coercion to resign is contradictory to the idea of the constitutional guarantees of the mandate: This guarantee is a privilege which protects the incumbents for the sake of the functioning of democracy. Without an amendment to the Constitution, this privilege may not be infringed. An ordinary law – like the Lustration Law – is not equivalent to an amendment to the Constitution as outlined in article 177 of the Constitution.

76. As concerns the justification of the lustration measures, the Venice Commission will address this matter in connection with the fourth question (see paras. 105-131 below).

B. Does this law (approved by simple majority) violate the constitutional and legal guarantees stipulated by the respective organic laws (laws approved by a qualified majority of 3/5 of the deputies according to Article 81§2 of the Constitution) of the judges, prosecutors, employees of the public administration? If yes, can this violation be considered as justified?

77. The Venice Commission is also called upon assessing whether the Lustration law, which is an ordinary law, violates the constitutional and legal guarantees stipulated in the organic laws in relation to judges, prosecutors and employees of the public administration.

78. In this context, the Venice Commission recalls that the relation between organic laws (adopted by a qualified majority of the Assembly) and ordinary laws (adopted by a simple majority) may be seen in two different manners: as a relation between sources of law which are placed on different levels of the hierarchy of norms (the laws which are approved by a qualified majority prevail over those which are approved by simple majority); or as a relation based on the principle of the distribution of legislative competence: ordinary laws invade the competence of organic laws if they deal with matters which are reserved to the organic laws and are in conflict with the content with the latter. Both approaches are possible, but the second approach, in the Venice Commission's view, may be preferable to the extent that it emphasises clearly that ordinary laws cannot deal with matters which are reserved to organic laws whereas the simple hierarchy of the sources of law does not exclude the concurring competence of different sources of law on the same matters.

79. Article 81.2 of the Albanian Constitution provides a list of laws which can only be approved by a majority of "three-fifths of all members of the Assembly". It includes, according to article 81.2 a) "the laws for the organization and operation of the institutions contemplated by the constitution" and article 81.2 c) "the law on general and local elections". This also relates to laws which amend or change the content of these laws. Additionally, this qualified majority applies to a law aiming at an objective, which is not mentioned in article 81.2 of the Constitution, as long as it also provides regulations which substantively lie within one of these scopes. On the other hand, a qualified majority is not required, if the proposed regulations are restricted to shaping the procedure within the leeway preset in the respective organic law.

80. According to Article 147 of the Constitution, a judge may be removed from office by the High Council of Justice for acts and behaviour that seriously discredit the position and image of a judge". Under the law on the organisation of the judicial power in the Republic of Albania[32] and the Law on the organization and functioning of the High Council of Justice[33], the discharge from duty of a judge is only possible on account of serious disciplinary violations following a disciplinary procedure before the High Council of Justice which is regulated in detail by those laws.

81. According to the law on the organisation and functioning of the prosecutor's office in the Republic of Albania[34], prosecutors may be discharged from office when they are punished for the commission of a criminal offence, when they are found to be incompetent, or in application of a disciplinary sanction pursuant to a disciplinary procedure before the Council of the Prosecutor's Office.

82. According to the Albanian authorities (see para. 67 above), the Lustration Law does not create any new category to the list of grounds for the termination of the mandate of constitutional institutions, but only provides a specific interpretation for one such ground which already exists in the constitution. The law therefore merely implements the relevant provisions

[32] Law No. 9877 dated 18 February 2008
[33] Law No. 8811, dated 17.05.2001, amended by Law No. 9448, dated 05.12.2005, "On some amendments and supplements to Law No. 8811, dated 17.05.2001, "On the organization and functioning of the High Council of Justice".
[34] No. 8737 of 12 February 2001 as amended by law no. 9102 of 10 July 2003

of the Constitution and organic laws, and, as such, does not have a normative character at the level of the constitutional provision, but only a procedural nature according to which a definition (constitutional cause) for the termination of the mandate is put in place. The authorities also add, as they have in relation to the lustration of the President, that the procedure foreseen by the Constitution and the organic laws would be duly followed *after* issuance of a b-certificate.

83. The Venice Commission has already stated that it is not convinced by the theory of the Albanian authorities. It notes in addition that, even assuming that the provisions of the organic laws at issue might be interpreted in the manner suggested by the Albanian authorities, the specific procedures foreseen in the organic laws are constitutive elements of the constitutional and legal guarantees for the judges and prosecutors, which the Lustration Law would instead deprive of all meaning by substituting the b-certificate for the decision of the High Council of Justice and Council of Prosecutor's office. By purging the procedures foreseen in the constitution and the organic laws of substance, the Lustration law affects and diminishes the protection afforded by them.

84. The Venice Commission stresses that the choice made by the Albanian Constitution to entrust two independent bodies - the High Council of Justice and Council of Prosecutor's Office – with matters of discipline and removal of judges and prosecutors in order to safeguard their irremovability, hence independence, cannot be made nugatory by imposing on these two bodies a binding decision made by another administrative authority.

85. In conclusion, in the opinion of the Venice Commission the Lustration law, which is an ordinary law, cannot be considered as a mere interpretation and implementation of the relevant provisions of the Constitution and of the organic laws. It follows that the Lustration law has encroached upon the competence which the Constitution reserves for organic laws, thus violating the Constitution.

86. As concerns public employees, under the relevant organic law[35] they can be dismissed if the appropriate, specific disciplinary measures have been taken by the competent body on account of failure to fulfil the official duty, violation of work discipline or deontological rules, or other reasons contemplated by the organic law. The Venice Commission is not sufficiently familiar with the question of whether the possible grounds for dismissal of public employees may be stretched beyond the failure to perform their tasks, nor with the rules on administrative procedure, and it is therefore not in the position to express a view as to whether the Lustration law conflicts with the organic law on the status of civil servants.

87. Among the organic laws enlisted in the Constitution one can as well find the "law on general and local elections". Although the Venice Commission is not sufficiently familiar with its regulations, it points out that the provisions of the Lustration law applying to elective offices might be in conflict with this organic law.

C. According to the procedure of the creation, functioning and decision making process of the Authority for Checking the Figures, does the regulation of this law guarantee the requirement of the rule of law? Is there a conflict of competencies between some constitutional bodies and the authority of checking the figures? If yes, can this derogation be justified and is it in compliance with the requirements of constitutionality and the rule of law?

88. The Venice Commission has already found that the termination of mandates of certain state institutions and the dismissal of judges, public prosecutors and civil servants under the Lustration law is at variance with the Constitution and the relevant organic laws, notably by providing different and less protective procedures. The Venice Commission has further been asked to express a view as to whether the provisions in the Lustration law on the Authority for Checking the Figures conflict with the principle of the rule of law. This question is clearly linked to the two previous ones.

[35] Law no. 8549 of 1 November 1999 on the status of the civil servant.

89. Indeed, the competences of the Authority for lustration clearly overlap and conflict with the competences of the bodies which are entrusted by the constitution with the power of dealing with the status of the holders of the constitutional bodies of the State. Moreover, the rules of the Lustration Law overlap and conflict with the procedural rules provided in the Constitution and in the relevant organic laws for the decisions concerning the status of those figures.

90. The Venice Commission notes in particular that the Law might be a threat to the separation and balancing of powers guaranteed in article 7 of the Constitution to the extent that the Authority, i.e. an executive body, is authorised to impose lustration on members of both the legislative and the judiciary.

91. The separation of powers is not stated in the ECHR, or as the ECtHR put it:

"Although the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in the Court's case-law (see Stafford v. the United Kingdom [GC], no. 46295/99, § 78, ECHR 2002-IV), neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction. The question is always whether, in a given case, the requirements of the Convention are met."[36]

92. Though there is a consensus that the principle of the separation of powers is mandatory in a state ruled by law, it may be implemented in different ways. The rule of law does not require a strict separation of powers but only "the existence of separated, mutually checking and balancing legislative, executive and judicial powers".[37] The overlapping of powers is constitutional as long as the relevant substantive decisions on lawmaking are taken by act of parliament and the discretion left to the executive body is reasonably narrow.[38] This discretion should go as far "as regards its organisation and performance provided that it acts in compliance with the Constitution".[39]

93. The creation of an "independent commission of distinguished citizens", not of a special lustration court, with its members "nominated by the head of state and approved by parliament" is postulated in section a) of the Guidelines. Still, as far as lustration measures are imposed on either the judicial or the legislative branch, it is necessary to warrant the control of these decisions by an independent court of law.

94. The composition of the Authority (pursuant 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. However, pursuant to Art. 6.5 of the Lustration law, the members of the Authority are approved by the Assembly. They have to meet the criteria listed in articles 7 a) to 7 dh), to secure their integrity.

95. The Venice Commission further observes that, on the one hand, the Authority's discretion is restricted: it relates to the consideration of the evidence given in the concrete case, but also to the interpretation of some vague terms (like: collaborator, political process). On the other hand, substantive decisions such as the definition of objected activities, the nomination of persons to be screened and the results of the lustration procedure are made by the Assembly.

96. As concerns the procedural guarantees, the Venice Commission notes that the procedure before the Authority 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

[36] ECtHR, *Kleyn and Others v. The Netherlands*, judgment of 6 May 2003, para 193.
[37] CDL (2000)088, para 2.
[38] Judgment of the Federal Constitutional Court of Germany, 21 December 1977, Official Digest 47, p. 46 (78).
[39] CDL-AD (2006)032, para. 17.

members of the lustration body. In this respect the Venice Commission observes that the possibility for the interested person to appear before the authority in order to explain him or her reasons would, in principle, be an appropriate means of allowing for the interference with this person's rights to be proportional (in particular in the absence of a suspensory effect of the appeal: see below). However, in the case of the Lustration law, the problematic issue appears to be a more fundamental one: the lustration measures are applied as a consequence of the formal attachment to a political or high ranking office of the communist party or of the Albanian state at that time: under these circumstances, the possible impact on the decision of the appearance of the interested person before the Authority is clearly reduced.

97. It is true that the right to appeal the decision to an independent court of law is provided for in article 22 of the Lustration law. The law however does not state the possible reasons of the appeal. The Venice Commission further notes that with the exception of persons who are already in office, the appeal does not have a suspensory effect. The law specifically rules this out, thus taking away even the possibility for the court to declare the suspension of the decision if it sees fit. As a consequence, the decision of the Authority may be in effect for a long period of time before it is decided by a court. This, in the opinion of the Venice Commission, is problematic.

98. In conclusion, the Venice Commission considers that the rules of the Lustration law on the competences of the Authority are at variance with the principle of the rule of law.

D. Are the limitations of the political constitutional rights, the right to work and the right of access to public administration justified? Are these limitations proportional?

a. General principles

99. The Venice Commission recalls that according to the European and international standards, limitations of (non absolute) fundamental rights are possible, provided that they pursue a legitimate aim and are proportionate to it.

100. The need for legality and proportionality to a legitimate aim is foreseen also in Article 17 of the Albanian Constitution, which reads:

1. Limitations of the rights and freedoms provided for in this Constitution may be established only by law, in the public interest or for the protection of the rights of others. A limitation shall be in proportion to the situation that has dictated it.

2. These limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention on Human Rights.

101. The sanctions imposed by the Lustration law as a consequence of the issuance of a b-certificate amount to interferences with certain fundamental rights guaranteed in the Constitution as well as in the ECHR and other international treaties. The Venice Commission has been requested to assess whether these interferences are justified, notably proportional. It recalls in this respect that the ECtHR has said that "*every time that a State intends to rely on the principle of "a democracy capable of defending itself" in order to justify interference with individual rights, it must carefully evaluate the scope and consequences of the measure under consideration, to ensure that the aforementioned balance is achieved*".[40]

102. The Venice Commission will confine its analysis to the rights mentioned in the request of the Constitutional Court, but it underlines that infringements of fundamental rights might as well occur on the freedom of teaching, the freedom of the media and the right on informational self-determination on one's data as well as the rule of equality.

[40] ECtHR, Ždanoka v. Latvia judgment, op. cit. para. 100

103. As concerns the legality of the interference, the Venice Commission refers to its view expressed above that the Lustration law is in conflict with the Constitution: this conclusion is sufficient to conclude that the interferences are not legitimate in that they are not in accordance with the law.

104. Regarding the legitimate aim, the Venice Commission recalls that the ECtHR has expressed the view, that the protection of the State's independence, democratic order and national security is a legitimate aim, compatible with the principle of the rule of law and the general objectives of the Convention.[41]

105. As concerns the proportionality, the Venice Commission recalls that the assessment of the proportionality of interference must be carried out in the light of the particular circumstances of each case. The Commission will therefore only provide general elements which will need to be taken into account when carrying out the specific proportionality assessments.

106. First of all, the Venice Commission has already noted that the Lustration law does not leave room for consideration of each case individually, but addresses all cases globally, without distinction. Sanctions are imposed on the basis of formal criteria, the only exoneration of responsibility which is possible under the Lustration law being that the individual in question "has acted against the official line or has removed himself from office in a public manner": the mere fact of having held one of the offices listed suffices to receive a "verification certificate B". This means that "guilt" is not to be proven in each individual case, but will be presumed. Section h of the Guidelines states that a presumption of guilt may only apply to senior officials of organizations, which committed serious violations of human rights. Even they have the right to prove their innocence by showing they "did not participate in planning, directing or executing such policies, practices or acts". No person below the rank of a senior official of such an organization may be a subject of lustration measures, unless his individual guilt is proven in a fair trial. This proof includes both his motivation (section l of the Guidelines) and his concrete participation in the violation of human rights.

107. In the light of the above, the interference with the rights of, for instance, "every employee of the organs of State Security" (article 4 ç), article 4 d)) and "a person sentenced by final criminal decision (…) for the criminal offences of defamation, denunciation or false testimony in political processes" (article 4 dh) as well as articles 4 e), 4 f) and 4 g)) might be disproportionate if based on a presumption of guilt. The same is true for the imposition of lustration on "conscious collaborators", especially the evidence of individual participation "in serious human rights violations".

108. This deficiency of the Lustration law cannot be healed by a judicial appeal (article 22 of the Law). There are no provisions in the Lustration law empowering the court to hold the verification certificate invalid due to circumstances in individual cases. Unless specifically provided for the court may only decide whether the decision on the certificate was rendered according to the provision of the Lustration law: the courts have not been given the right to add new criteria or standards.[42]

109. Secondly, the principle of proportionality would require that the time which has elapsed between the reprehensible conduct and the appraisal of the alleged danger or threat for the state be taken in consideration.[43] As stated in its article 1 the Lustration law looks back deep in the past covering the "period 29 November 1944 until 8 December 1990". The Venice Commission observes that while the existence of threats and dangers to the creation of a viable free democracy was widely accepted in Albania 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

[41] ECtHR, Ždanoka v. Latvia judgment, op. cit. para. 118.
[42] ECtHR, Adamson v. Latvia, op.cit., para. 116.

[43] Ibid.

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, especially 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 support of the voters, might suggest that the presence of ex-communist figures in the political life is probably not a danger and a threat for the democracy any more. A special justification in this respect should be provided by the authorities.

110. In the third place, the principle of proportionality would further require that the length of the disqualification be limited in time and proportional to the individual circumstances. In the third place, the Venice Commission notes that the sanctions under the Lustration Law are imposed for an indefinite length of time. Yet, the duration of the exclusion from public offices should depend on the one hand on the progress in establishing a democratic state ruled by law and on the other hand the capacity for a positive change in attitude and habits of the subject of lustration.

111. Indeed Section g of the Guidelines recommends a maximum time of five years of disqualification. While in individual cases this limit may be exceeded due to severe reasons, such as an extraordinary personal misconduct or a massive individual guilt, such extension must be justified in each individual case. Even in these cases, a limitless disqualification from office without a chance ever to regain it raises serious doubts as to its proportionality.

b. Right to stand for election

112. The provisions of article 23.2 of the Law aiming at the elimination of B-certified subjects from election procedures constitute an interference with the right to be elected as guaranteed in article 45 of the Constitution and article 3 of Protocol No. 1 of the ECHR, which implies subjective rights for both the right to vote and the right to stand for election. The right to stand for election is also guaranteed by article 25 b) of the International Covenant on Civil and Political Rights (hereinafter referred to as ICCPR).

113. This interference is a very severe one, as a judicial appeal on the findings of the commission does not suspend the verification certificate according to article 23.3 of the Law until "the judicial decision is final". Hence, the right to stand for election may be denied for as long as the courts do not reach a final decision in the case.

114. The right to vote and the right to stand for elections are fundamental rights, but not absolute ones. Interferences may be justified under article 17.1 of the Constitution if they are in accordance with the law, "in the public interest or for the protection of the rights of others" and if the interference is proportionate to the situation that necessitated it. Moreover, they have to be in compliance with the ECHR (article 17.2 of the Constitution). Concerning this matter, the ECtHR states:

"In their internal legal orders the Contracting States make the rights to vote and to stand for election subject to conditions which are not in principle precluded under Article 3. They have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate."[44]

115. Still, the ECtHR sets standard "less stringent than those applied under articles 8 to 11" of the ECHR:

[44] Ibid.

"In examining compliance with Article 3 of Protocol No. 1, the Court has focused mainly on two criteria: whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people. In this connection, the wide margin of appreciation enjoyed by the Contracting States has always been underlined. In addition, the Court has stressed the need to assess any electoral legislation in the light of the political evolution of the country concerned, with the result that features unacceptable in the context of one system may be justified in the context of another. (…) The Court's test in relation to the "passive" aspect of the above provision has been limited largely to a check on the absence of arbitrariness in the domestic procedures leading to disqualification of an individual from standing as a candidate."[45]

116. Interference under Article 23.2 of the Law would comply with these reservations if it was in compliance with the constitution and the law, and proportionate. As was said before, the exclusion of those persons from elective offices, who cannot be trusted to exercise their power in compliance with the principles of a democratic state ruled by law, and thus the establishing of a democracy is certainly "in the public interest" within the meaning of Article 17 of the Constitution, and a legitimate aim within the meaning of the European Convention on Human Rights.

117. As regards the proportionality of the interference, the Venice Commission refers to its arguments above. In addition, it is to be noted that Section e of the Guidelines prohibits lustration measures on elective offices "unless the candidate for election so requests". The voters' right to elect whomever they wish is the basis of a democracy. Any exception to this eminent principle should be exceptionally motivated in each individual case on the basis of the particular circumstances.

118. In conclusion, the Venice Commission finds that there are several elements which indicate that the Lustration law could interfere in a disproportionate manner with the right to stand for election of persons seeking elective offices.

c. Right to work

119. The right to work is guaranteed in article 49 of the Constitution as well as in article 6.1 of the International Covenant of Economic, Social and Cultural Rights and several constitutions of the member states[46]. Limitations of the right to work have to be established by law and must be proportionate.

120. The right to work is defined by the ECtHR as *"the selection of a profession, a place of work and the system of professional qualification, with the purpose of securing the means of living in a lawful manner. The selection of a profession, as contemplated by the constitutional provision, is a right of the individual in the sense that he dedicates himself to an activity in order to secure the means of living. (…) The right to work and the freedom of profession means every lawful activity that brings income and which does not have a determined time period, except where there is a special legal regulations. In this sense, the action of the state organs that brings direct consequences hindering professional activity is a violation of this freedom of action. The guarantee that the Constitution gives an individual in connection with the right to work and the freedom of profession has the purpose of protecting them from unjustified restrictions by the state."*[47]

121. Barring B-certified individuals from exercising the functions mentioned in article 3 of the Lustration law, as stipulated in articles 24.4 and 24.5 of the law, affects this right, as disqualification is the result of a "verification certificate B". Moreover, exclusion from procedures of appointment and election as stated in article 23.2 of the Lustration law is an encroachment

[45] ECtHR, Ždanoka v. Latvia judgment, op. cit., para. 115.
[46] *E.g.* article 12 of the German Basic Law; article 19.16 of the Constitution of the Republic of Chile; Chapter 1 section 18 of the Constitution of Finland; article 30 of the Constitution of Georgia.
[47] Judgment of 11 July 2006, para. 1.

upon this right. Although most of the functions mentioned in article 3 are functions of public officials, others are related to positions in university, high school and secondary technical-professional schools or in the media (articles 3 j, k): insofar it is not clear whether these positions have to be deemed as part of the public service. As far as the functions are not part of the public service, the right to work can be affected by the Lustration law. The following remarks on the right to work are restricted to such positions.

122. Concerning the jurisdiction of the Court, a special doctrine on infringements of the right to work, which in fact specifies the proportionality and traces back to the Federal Constitutional Court of Germany,[48] can be found:

"According to the doctrine, practising a profession may be restricted by reasonable regulations that can be attributed to considerations of the general good. The situation changes when the state turns to control the objective conditions of acceptance into a work place. In those cases, restrictions are permissible only in very narrow and defined terms. In general, the legislator may set such conditions only when they are needed to point out risks that are highly likely to occur to interests of a fundamental importance in the community"[49]

123. The need of a "verification certificate A" is not a regulation on the way of practicing a profession but an objective condition of acceptance into a specific workplace. Therefore, compelling reasons of public interest are requested. The aim of lustration to secure the loyalty of services relevant to the public in a democratic state thus helping to establish this new order is an urgent reason of common interest.[50]

124. The proportionality of this limitation depends as much on the kind of connection or cooperation as on the function held by the concrete subject. The more severe the collaborative act and the more important the function held the more it is likely the limitation will be seen as proportional.

125. Considering these special exigencies, the analysis of the proportionality outlined above may, *mutatis mutandis*, be applied hereon. This especially refers to the need to prove guilt and to provide for balancing in each individual case.

d. Right of access to the public service

126. Most positions mentioned in article 3 of the Lustration law are related to the public service in a broad sense. As far as the public service is concerned many constitutions will not refer to the general right to work but to a right of access to public service on equal terms. Such a right cannot be found explicitly in the Constitution, though article 107.2 of the Constitution stipulates:
"Employees in the public administration are selected by competition, except when the law provides otherwise."

127. This provision must be understood as a reference to a competition, which is fair and where the best will be appointed. Such a norm equals a guarantee of access to public service on equal terms.

128. The ECHR does not guarantee a right of access to public service, while such right is acknowledged in international law. The ECtHR states:

> *"The Universal Declaration of Human Rights of 10 December 1948 and the International Covenant on Civil and Political Rights of 16 December 1966 provide, respectively, that "everyone has the right of equal access to public service in his country" (Article 21 para. 2) and that "every citizen shall have the right and the opportunity ... to have access, on*

[48] Judgment of 11 June 1958, Official Digest 7, p. 377 (400 *et seq.*).
[49] Judgment of 11 July 2006, para. 3.
[50] ECtHR, Vogt v. Germany judgment, op. cit., para. 51; Federal Constitutional Court of Germany, judgment of 21 February 1995, Official Digest 92, p. 140 (151).

general terms of equality, to public service in his country" (Article 25). In contrast, neither the European Convention nor any of its Protocols sets forth any such right. Moreover, as the Government rightly pointed out, the signatory States deliberately did not include such a right: the drafting history of Protocols Nos. 4 and 7 (P4, P7) shows this unequivocally. In particular, the initial versions of Protocol No. 7 (P7) contained a provision similar to Article 21 para. 2 of the Universal Declaration and Article 25 of the International Covenant; this clause was subsequently deleted."[51]

129. According to article 23.2 of the Lustration law, access to public service depends on a "verification certificate A" insofar as the function is listed in article 3 of the law. This condition excludes the person affected from a selection by competition and thus infringes the right of access to public service. B-certified individuals are *a priori* excluded.

130. On the other hand, Article 25 ICCPR only supplies a prohibition of "unreasonable restrictions". Although this leaves a wide margin of interpretation, the requirement of reasonableness is not met by the Lustration law due to the broad scope of persons excluded from public office without a reference to the circumstances of the individual case or the proof of individual guilt in article 4.

131. Furthermore, article 107.2 of the Constitution allows limitations of the competition as long as they are established by law. In a state governed by the rule of law, these legal provisions must be proportional. The analysis of the reasonableness outlined above may *ceteris paribus* be applied hereon.

E. The issue arises that some members of the Constitutional Court, due to the fact that they are potential subjects of this law, cannot participate in the discussion of the constitutionality of the law, in order to avoid the conflict of interest. Does this claim hold even in a case of the abstract control of a law (approved by a simple majority)? If the withdrawal or discard of some judges can bring to the impossibility of taking a decision and thus to an institutional blockage, can this situation be considered justified?

132. The impartiality of judges (*nemo iudex in causa sua*) is one of the most eminent principles in a state ruled by law.[52] Conflicts of interest have to be ruled out. Questions of bias can arise in relation to both concrete cases and the abstract control of a law. If there is evidence of a serious partiality of a judge, he has to withdraw from the adjudication of the case in question, as fixed in article 36 of the Law No. 8577, On the Organization and Functioning of the Constitutional Court of the Republic of Albania (hereinafter referred to as CCL). If he/she does not withdraw, on request of the parties involved he/she will have to be discarded by the Court, as stated in article 37 CCL.

133. Article 5 of the Lustration law contains a special provision referring to judges: "*No person who is in the conditions of incompatibility of functions according to article 4 of this law … may … be a part of judicial bodies that examine this law or cases related to its implementation*." This provision excludes the judge without reference to his/her withdrawal or discard. A judge who has already been excluded by law from sitting on a case has no chance to decide on his/her own withdrawal, and the Court has no opportunity to decide on a discard.

134. As was said above, Article 5 of the Lustration law raises serious questions of constitutionality. Since the Lustration law has been adopted with a simple majority, it cannot alter or amend the CCL, which is an organic law. Since article 5 of the Law contradicts articles 36/37 CCL it is unconstitutional and can thus not be implemented. Therefore the question of judicial bias has to be decided solely on the basis of articles 36/37 CCL.

[51] ECtHR, Glasenapp v. Germany judgment of 28 August 1986, para. 48.
[52] ECtHR, Kyprianou v.Cyprus judgment of 15 December 2005, para. 11.

135. In the public discourse in Albania, allegations are being made that some of the judges of the Constitutional Court fall into the scope of article 4 of the Lustration law. Several of the nine judges appear to have formerly acted as prosecutors but it is unclear whether they have acted in "political processes" (see article 4 f of the Lustration law).

136. The legitimacy of the decision of the Constitutional Court on the Lustration law could be attacked if there are any indications of a doubt as far as the impartiality of one or more of the judges are concerned.

137. The "evidence" asked for in article 36.1 b of the CCL does not require evidence that the judge definitely falls into one of the categories of article 4 of the Law; it is sufficient that some indicators may cause serious concerns as far as impartiality is concerned. The aim of norms like articles 36/37 CCL is not to protect the individual judge from accusations of bias but to protect the legitimacy of the Constitutional Court as an impartial body. Therefore the plausible suspicion of impartiality should be sufficient for a withdrawal or a discard.

138. Notwithstanding the public discourse on its impartiality, the Court has decided on the suspension of the Lustration law after it ruled, at the hearing of 14 April 2009, that contrary to the allegations of the Assembly there was no conflict of interest for the judges of the Constitutional Court in assessing the constitutionality of the Lustration law. Since the Court is not prevented from raising this question again and since no interested party is prevented from requesting a discard in the course of the proceedings in the future, the issue has not been finally settled.

139. Problems will arise if members of the Court, who are potential subjects of the Lustration law, withdraw voluntarily or are discarded by the Court on request of the parties involved: Article 133.2 of the Constitution rules that a decision of the Court requires the majority of its members. According to article 32 CCL a plenary session of the Court has to be attended by at least two-thirds of its nine members.

140. If the exclusion of judges results in the Court failing to achieve the necessary quorum, the Court will be blocked from deciding on the constitutionality of the Lustration law. A solution to this problem will have to be based on the consideration of both the importance of the impartiality of judges and the need for control of acts of parliament by a Constitutional Court.

141. Considering both the inclusion of the Court in the catalogue of “subjects of verification” in article 3 d) of the Law and the fact that an institutional blockage has to be avoided, the legislator ought to have enabled the Court to adjudicate on the Lustration law in a constitutional and lawful manner. Regrettably, the Assembly did not provide for a solution to overcome such a possible blockage by previously or at least simultaneously amending the CCL (e.g. by a rule allowing to substitute members, for instance by judges of the High Court). The Assembly was obliged to provide for a solution especially in the light of article 5 of the Lustration law: the Assembly ran the risk of blocking a decision of the Constitutional Court on the constitutionality of the law. Such a block "exempts" the Lustration law from adjudication on its constitutionality. This is contradictory to article 124.2 of the Constitution.

142. If the Assembly does not provide for a solution by amending the CCL or the Constitution, a solution must be found by the Court itself by way of interpretation of the relevant norms. The authorization of the Court derives from the necessity to make sure that no law is exempt from constitutional review, including laws that relate to the position of judges. In search for a solution, one has to look at the rationale of excluding a biased judge. The main rationale is the following: if there is a leeway in deciding a case, the judge shall not be tempted to fill it in his/her favour. In dealing with the constitutionality of the Law there may be some parts involved where different opinions on the constitutionality are conceivable, while others are clear, without any need for a value judgment.

143. As far as the decision on the termination of mandates of constitutional institutions is concerned, there is no leeway. Judges of the Constitutional Court are members of the body of

one of the institutions protected by the Constitution. Thus the Lustration law evidently contradicts the Constitution (see above, paras 68, 74 and 74). To decide on the unconstitutionality of the relevant provision of the Lustration law is not a matter of discretion or personal value judgement. Therefore a potential bias of the judge cannot affect his decision. Consequently, there is no evidence of serious partiality. The judge is not forced to withdraw from adjudication; the Court is not entitled to discard him, if he does not withdraw by his own free will. In such a situation the aim to avoid a situation where the Court will be blocked from adjudication on the law is superior to any other interests involved (see *mutatis mutandis* Venice Commission, Opinion on two draft laws amending Law no. 47/1992 on the organisation and functioning of the Constitutional Court of Romania, CDL-AD(2006)006, § 7).

144. As far as other provisions are concerned there is even no conflict of interest insofar as the judge will not be a potential subject of this part of the Lustration law.

145. In conclusion, in the opinion of the Venice Commission the lawmaker has failed to meet its obligation to provide, through an organic provision, for the ability of the Court to examine the constitutionality of the Lustration law even in cases of lustration leading to a conflict of interest with some of the judges. The Assembly cannot 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 CCL (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. Looking at the rationale of regulations excluding biased judges from adjudication, one solution applies: no member of the Court is barred from deciding on the constitutionality of the Lustration law as far as he/she may be a potential subject of it, since this part of the Lustration law is evidently unconstitutional. The judge will not have to make value judgments or to exert discretion in order to come to this result. Hence, there is no risk of serious partiality.

VIII. Conclusions

146. The protection of a state's independence, democratic order and national security is a legitimate aim, compatible with the rule of law and the general objectives of the European Convention on Human Rights.

147. A democratic state is entitled to require civil servants to be loyal to the constitutional principles on which it is founded.

148. The Venice Commission is aware of the fact that the need for lustration is one of the crucial questions in Albania, as in many post-communist countries. Despite the period of twenty years which has passed since the beginning of the democratic transition, the issue is still very topical in many new democratic countries, where the lustration process has been regarded as one of the means of bringing about historical justice, in order to overcome the non-democratic past and to bring transparency to public life.

149. The Venice Commission recalls however that lustration procedures, despite their political nature, must be devised and carried out only by legal means, in compliance with the Constitution and taking into account European standards concerning the rule of law and respect for human rights. If this is done, then lustration procedures can be compatible with a democratic state governed by the rule of law.

150. The Albanian law "on the cleanliness of the figure of high functionaries of the public administration and elected persons" was not adopted in a constitutional vacuum, but in a context where the existing Constitution provides for solid foundations of a democratic state governed by the rule of law and sets out strong guarantees for human rights protection. The Lustration law must be analysed against this background.

151. The Venice Commission, in reflecting on the five questions which the Constitutional Court of Albania has put to it, has taken into particular consideration two features of the Lustration Law: in the first place, the fact that it has been adopted approximately twenty years after the end of the communist regime due to the fact that former attempts to perform lustration have been stopped either by the Constitutional Court or – after a short period of application of the law – by a new government.

152. The second feature of the Lustration law which the Venice Commission has considered to be relevant is the fact that the objective and personal scope of application of the Lustration law is very broad and imprecise, while it leaves little or no room for consideration of each case individually. This raises issues in respect of both the principle of legality and the special constitutional procedures which guarantee the status of the most important institutions of the State.

153. The Venice Commission also considers it appropriate to address in a general and preliminary fashion the question of the constitutional and legal guarantees of the mandate of the most important State institutions as well as of judges and prosecutors. These guarantees consist on the one hand in specific, exhaustive reasons for termination of their mandate, and on the other hand in special procedures for these terminations. Such procedures are constituent elements of the constitutional status of the State institutions in question: this means that replacing the specific procedures with other, less protective ones diminishes the status of the institutions. Similarly, depleting the procedures foreseen in the constitution and the organic laws of their substance by substituting the decisions of the relevant bodies for the decision under the Lustration law affects and diminishes the constitutional and legal protection afforded by them.

154. The first question put by the Constitutional Court was the following:

> 1) Does the law violate the 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? If yes, is the termination of the mandate justified? Is the principle of the rule of law violated?

155. The Venice Commission finds that the provisions of the Lustration law on the termination of the mandate of the President of the Republic, the members of the Constitutional Court, the members of the High Court, the General Prosecutor, the Deputies and the Ministers in case of a "verification certificate B", violate the constitutional guarantees of their mandate and are therefore contrary to the principle of the rule of law.

156. The second question put by the Constitutional Court was the following:

> 2) Does this law (approved by simple majority) violate the constitutional and legal guarantees stipulated by the respective organic laws (laws approved by a qualified majority of 3/5 of the deputies according to Article 81§2 of the Constitution) of the judges, prosecutors, employees of the public administration? If yes, can this violation be considered as justified?

157. In reply to this question, the Venice Commission finds that the Lustration law, which is an ordinary law, cannot be considered as a mere interpretation and implementation of the relevant provisions of the Constitution and of the organic laws. It follows that the Lustration law has encroached upon the competence which the Constitution reserves for organic laws, thus violating the Constitution.

158. The third question put by the Constitutional Court was the following:

> 3) According to the procedure of the creation, functioning and decision-making process of the Authority for Checking the Figures, does the regulation of this law guarantee the requirement of the rule of law? Is there a conflict of competencies between some constitutional bodies and the Authority of Checking the Figures? If yes, can this

derogation be justified and is it in compliance with the requirements of constitutionality and the rule of law?

159. In reply to this question which is clearly linked with the first two questions, the Venice Commission considers that the rules of the Lustration law on the competences of the Authority are at variance with the Constitution and the principle of the rule of law.

160. The fourth question put by the Constitutional Court was the following:

4) Are the limitations of the political constitutional rights, the right to work and the right of access to public administration justified? Are these limitations proportional?

161. In reply to this question, the Venice Commission finds that there are several elements which indicate that the Lustration law could interfere in a disproportionate manner with the right to stand for election of persons seeking elective offices, the right to work and the right of access to the public administration.

162. The fifth question put by the Constitutional Court was the following:

5) The issue arises that some members of the Constitutional Court, due to the fact that they are potential subjects of this law, cannot participate in the discussion of the constitutionality of the law, in order to avoid the conflict of interest. Does this claim hold even in a case of the abstract control of a law (approved by a simple majority)? If the withdrawal or discard of some judges can bring to the impossibility of taking a decision and thus to an institutional blockage, can this situation be considered justified?

163. In the opinion of the Venice Commission, the law-maker has failed to meet its obligation to provide, through an organic provision, for the ability of the Court to examine the constitutionality of the law even in cases of lustration leading to a conflict of interest with some of the judges. However, it must be ensured that the Constitutional Court as guarantor of the Constitution can function as a democratic institution: the possibility of excluding judges must not result in the inability of the Court to take a decision. As in the present case the question of whether the termination of the mandate of the judges of the Constitutional Court under the Lustration law is rather clear, there is little risk of a biased decision: it follows that the judges of the Constitutional Court of Albania are not barred from ruling on this matter.