Strasbourg, 17 December 2012

CDL-AD(2012)028

Opinion no. 694/2012

Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

AMICUS CURIAE BRIEF

ON THE LAW ON DETERMINING A CRITERION FOR LIMITING THE EXERCISE OF PUBLIC OFFICE, ACCESS TO DOCUMENTS AND PUBLISHING, THE CO-OPERATION WITH THE BODIES OF THE STATE SECURITY

("LUSTRATION LAW")

OF "THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA"

Adopted by the Venice Commission
At its 93rd Plenary Session
(Venice, 14-15 December 2012)

On the basis of comments by
Mr Sergio BARTOLE (Substitute member, Italy)
Mr Wolfgang HOFFMANN-RIEM (Member, Germany)
Mr Lucian MIHAI (Member, Romania)
Ms Hanna SUCHOCKA (Member, Poland)

TABLE OF CONTENT

I. Introduction

1. By a letter of 7 September 2012, the President of the Macedonian Constitutional Court asked the Venice Commission to provide an *amicus curiae* opinion with respect to an application challenging the constitutionality of the Law on determining a criterion for limiting the exercise of public office, access to documents and publishing the cooperation with the bodies of state security (CDL-REF(2012)042rev, hereinafter: 'Lustration Law') pending before the Court.

2. The Lustration Law was enacted in July 2012, after two "abrogating decisions" rendered by the Constitutional Court in 2010 (decision U no. 42/2008 of 24 March 2010) and 2012 (decision U. no. 52/2011 of 28 March 2012), regarding the two previous versions of the "Law on determining of additional condition for performance of public functions"; those decisions focused on the following areas: (i) time frame of the application of the Law; (ii) the scope of persons to which the Law applies; (iii) the right of defense; (iv) public exposure of the names of the involved persons.

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

4. The present *amicus curiae* brief is based on an English translation of the Lustration Law provided by the Constitutional Court; some comments relating to the Law may be due to inaccuracies in the translation. The present brief was adopted by the Venice Commission at its 93rd Plenary Session (Venice, 14-15 December 2012).

II. European standards in the field of lustration

5. The European standards in the field of lustration mainly derive from three sources:

- the European Convention on Human Rights and Fundamental Freedom and the jurisprudence of the European Court of Human Rights;
- the case-law of national constitutional courts;
- Resolutions by the Parliamentary Assembly of the Council of Europe, namely Res. 1096(1996) on measures to dismantle the heritage of former communist totalitarian systems and Res. 1481(2006) on the need for international condemnation of totalitarian communist regimes. PACE Res 1096(1996) pointed to the 'Guidelines to ensure that

lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law' (hereinafter: "the Guidelines") as a reference.

6. The Venice Commission's amicus curiae opinion on the Albanian lustration law[1] is based upon these standards and further adds to them.

7. The essence of these standards can be summarized in the following four key-criteria pertaining lustration procedures:

- guilt must be proven in each individual case;
- the right of defence, the presumption of innocence and the right to appeal to a court must be guaranteed;
- the different functions and aims of lustration, namely protection of the newly emerged democracy, and criminal law, i. e. punishing people presumed guilty, have to be observed;
- lustration has strict limits of time in both the period of its enforcement and the period to be screened.

III. Preliminary remarks

8. As this is an *amicus curiae* brief for the Constitutional Court, the intention is not to take a final stand on the issue of the constitutionality of the Lustration Law but to provide the Court with material with respect to the compatibility of this Law with the European Convention on Human Rights as well as elements from comparative constitutional law in order to facilitate its own consideration under the Constitution of 'the former Yugoslav Republic of Macedonia'. However, since the Constitution of this country shares in the European Constitutional heritage and takes an embracing stand towards international law, namely in its Articles 8, 1st indent[2], 98.2 2nd sentence[3] and 118[4], these comparative materials also contribute to developing and specifying the standards of the constitution.

9. Whereas the Venice Commission is competent to evaluate the Lustration law in matters of international law and, in particular, European standards, the Constitutional Court has the final say as regards the binding interpretation of the Constitution and the compatibility of national legislation with it. The Venice Commission recalls that the interpretation of the Constitution by the Constitutional Court is binding on all national institutions from the administrative, judicial and legislative branches, which are obliged to respect it and adhere to it.

10. While the present amicus curiae brief deals with lustration issues against the background of the Lustration Law 2012, it does not aim to assess "lustration" as such, but is restricted to address the concrete lustration issues under this law on the basis of the principles of democracy and the rule of law which constitute an important part of the European constitutional heritage. However, it should be noted that PACE Res. 1481(2006) calls for a condemnation of the crimes of totalitarian communist regimes in order to raise public awareness and allow for

---

[1] CDL-AD(2009)044.

[2] "The fundamental values of the constitutional order of the Republic of Macedonia are:

- the basic freedoms and rights of the individual and citizen, recognised in international law and set down in the Constitution; (…)"

[3] "Courts judge on the basis of the Constitution and laws and international agreements ratified in accordance with the Constitution".

[4] "The international agreements ratified in accordance with the Constitution are part of the internal legal order and cannot be changed by law".

finally coming to terms with the past. Moreover, it explicitly expressed sympathy, understanding and recognition to the victims of these crimes.

IV. Analysis of the lustration law

11. The President of the Constitutional Court has asked the Venice Commission to devote particular attention to following articles of the Lustration Law, namely:

- art. 1 lines 2,3 and 4, which deal with the content and the purposes of the Law;
- art. 2 which provides for the sources of information of the measures of lustration to be adopted;
- art. 3 paragraph 1 points 17,18, 22, 24, 25, 27, 29 and 30 and paragraph 2 points 1 to 4, with the list the persons subject of the Law;
- art. 4 paragraphs 1 and 2, which states the period of time of the activities liable to be taken into account as basis for the adoption of the lustration measures;
- art. 5 paragraph 1, establishing the Commission competent for the implementation of the Law;
- art. 14 point 2 which provides for the publication of collaborators' names;
- art. 15 paragraph 3, which provides for the registry of the concerned people;
- art. 16 about the relations between the Commission and the interested State bodies;
- art. 18 paragraphs 4, 5 and 7 which define the activities relevant in view of the adoption of the lustration measures;
- Chapter V (articles 26 – 33) which regulates the relevant procedures;
- art. 42 on the entering into force of the Law.

12. Four key-issues may be identified and will be specifically dealt with by the Venice Commission in the present brief: a) the temporal scope of application of the law; b) the personal scope of application of the law; c) the procedural guarantees for the persons to whom the lustration procedures are applied; d) the publication of the names of those persons who are deemed to be collaborators.

13. As a general remark, the Commission finds that the Lustration Law would benefit from increased clarity and precision in the definitions, in order to avoid possible confusion and misunderstandings in their interpretation.

A. The temporal scope of application of the Lustration Law

14. The Lustration Law has been enacted 21 years after the adoption of the democratic constitution on 17 November 1991 and is set to remain in force "for ten years from the day of the election of the composition of the Commission on Verification of Facts". It covers a period from 2 August 1944 to the day of entry into force of the Law on Free Access to Public Information, i.e. 8 February 2006.

1. Time of adoption of the Law

15. The Venice Commission has previously dealt with this issue, in the context of the Albanian Lustration Law, referring to the resolutions and guidelines of the Parliamentary Assembly and to the case-law of the European Court of Human Rights and of several European Constitutional courts. The Commission's analysis was as follows:

> *16. The Parliamentary Assembly's Guidelines […] 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.*

17. 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."[5]

18. 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."[6]

19. 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)[7]*. 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*[8]*.*

20. 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.[9]

21. 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.
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."[10]

[5] ECtHR, Vogt v. Germany, judgment of 2 September 1995, para. 59.

[6] Judgment of 5 December 2001; *cf.* U.S. Supreme Court, Adler v. Board of Education.

[7] Judgment 1/92, 26 November 1992.

[8] Judgment 5 December 2001.

[9] ECtHR, Vogt v. Germany judgment, op. cit., para. 44.

[10] Judgment 5 December 2001.

> *22. In March 2006 the European Court of Human Rights[11] 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.* [12]

16. The Polish Constitutional Tribunal has stated in very clear terms that "*the goal of lustration shall consist, above all, in the protection of democracy against reminiscences of totalitarianism, while the secondary goal thereof, subordinated to the realisation of the primary goal, shall be the individual penalisation of persons who undertook collaboration with the totalitarian regime*".

17. Introducing lustration measures a very long time after the beginning of the democratization process in a country risks raising doubts as to their actual goals. Revenge should not prevail over protecting democracy. It follows in the Commission's view that applying lustration measures more than 20 years after the end of the totalitarian rule requires cogent reasons. The Commission recalls nevertheless that every democratic state is free to require a minimum amount of loyalty from its servants[13] and may resort to their actual or recent behaviour to relieve them from office or refrain from hiring them.

18. It is for the Macedonian 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.

2. Period of the past to be screened

19. Lustration measures have to comply with the yardstick of the rule of law (see PACE Resolution 1096(1996)).

20. With respect to the period within the purview of the Lustration law, the Guidelines indicate that "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)".[14]

21. In the Venice Commission's view, 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 not normally 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.[15]

[11] ECtHR, Ždanoka v. Latvia judgment, op. cit.

[12] Ibid.

[13] ECtHR judgment of 27 July 2004, *Sidabras and Džiautas v. Lithuania*, app. nos. 55480/00 and 59330/00, § 57

[14] Guidelines, Section j.

[15] CDL-AD(2009)044, para. 38.

22. It may be a worthy part of the education of the public to do research on a period, which lies 21 to 68 years in the past (when the Lustration law runs out according to its Article 41 these numbers will add to 31-78 years at least). It can be part of the "awareness raising" PACE has called for in its Res. 1481(2006) and might also share in comforting the victims of the totalitarian regime.

23. However, it should be stressed that the application of lustration measures entails restrictions on the exercise of guaranteed fundamental rights. The ECtHR has stressed that "*Every time 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*".[16] While lustration laws may vary according to the historical developments prevailing in the relevant State, they must be inspired by the principles of rationality and proportionality. The European Court of Human Rights stated that the deprivation of the electoral rights in compliance with Article 3 Protocol 1 may be hardly reconciled with immutability; it cannot be perpetual and requires a new evaluation of the situation of the person concerned after a period of time.[17] This position is connected precisely with the idea that the running of time reduces the weight of the exigencies of defending the newly established democracies, which underpins the legitimacy of the lustration.

24. It follows that basing a decision on deprivation of office on a specific behaviour dating back to - at least - 21 years ago and as much as 78 years ago, may – if at all – only be justified on the basis of most serious forms of offences, in particular massive and repeated violation of fundamental rights, which would also give rise to substantial custodial sentence under criminal law.

25. As concerns the application of lustration measures to the period after the end of the communist totalitarian regime, the Venice Commission stresses that a democratic constitutional order should defend itself directly through the democratic functioning of its institutions, the implementation of the rule of law and the safeguards of human rights protection. First, a democratic government is responsible to the electorate, who may deny re-election. Second, in a state ruled by law it is itself subject to legal and constitutional bindings. Third, crimes committed by members of a democratic government are subject to criminal prosecution. Finally, every democratic state may require a minimum of loyalty of its servants and may relieve them from office otherwise, without resorting to the special instrument of lustration.

26. The Venice Commission notes that the ECtHR has, on one occasion, considered that the application of lustration measures to acts committed after the end of a totalitarian regime was acceptable and did not violate the ECHR. In the Ždanoka v. Latvia case, the central issue was a statutory provision barring persons who, like the applicant, had "actively participated after 13 January 1991" in the Communist Party of Latvia (CPL) from standing in parliamentary elections (in 1998 and 2002). The provision had been enacted by Parliament on account of the fact that, shortly after the Declaration of Independence of 4 May 1990, the party in question had been involved in organising and conducting attempted coups in January and August 1991 against the newly formed democratic regime. After observing in particular that, in the historical and political context in which the impugned measure had been taken, it had been reasonable for the legislature to presume that the leading figures of the CPL held an anti-democratic stance, the ECtHR concluded that there had been no violation of Article 3 of Protocol No. 1. It held in particular that while such a measure could not be accepted in the context, for example, of a country with a long-established framework of democratic institutions, it might be considered acceptable in Latvia in view of the historical and political context which had led to its adoption,

[16] ECtHR, Ždanoka, cited above, § 100

[17] ECtHR, Paksas v. Lithuania, judgment 06/01/2011, para. 110.

and given the threat to the new democratic order posed by the resurgence of ideas which, if allowed to gain ground, might appear capable of restoring a totalitarian regime.[18]

27. The Venice Commission is not aware if any exceptional historic-political circumstances (i.e. movements or activities aiming at disrupting the democratic order or at endangering human rights protection) having occurred in "the former Yugoslav Republic of Macedonia" after the adoption of the Constitution. It should be noted in this respect that "the former Yugoslav Republic of Macedonia" has been a member state of the Council of Europe since 1995 and, as such, it has been monitored for its democratic performance and its compliance with European standards.

28. The Venice Commission further notes that the activities displayed after 17 November 1991 and sanctioned by the Lustration Law (Article 4) are those motivated by "political, ideological and party reasons". It should be stressed in this context that political, ideological and party reasons are normally present in a functioning democracy and may not be used as grounds for lustration measures, as stigmatization and discrimination of political opponents do not represent acceptable means of political struggle in a state governed by the rule of law.

29. It is not for the Venice Commission to assess the legitimacy of the extension of the application of the Lustration Law to acts committed after 17 November 1991, but for the Macedonian Constitutional Court. In this respect, the Commission notices that the Constitutional Court has previously ruled that the temporal extension of the Lustration Law to the period after 1991 was unconstitutional to the extent that it "means the negation of the values and institutions established in the Republic of Macedonia in accordance with the current constitution and the questioning of the functioning of the legal system, that is, the rule of law as a fundamental value if the current socio-political system".[19]

3. Period during which the lustration measures remain effective

30. Pursuant to Article 28 and 29, the lustration measures remain in force as long as the law is in force. Pursuant to its Article 41, the Lustration law runs out and all measures conducted under it cease to have effect ten years after the composition of the Commission on Verification of Facts.

31. The Constitutional Tribunal of Poland has stated 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".[20]

32. With regard to the Albanian lustration law the Venice Commission held:

> *"[T]he principle of proportionality would further require that the length of the disqualification be limited in time and proportional to the individual circumstances. […] 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.*

[18] ECtHR, Ždanoka, cited above, §§ 132-36; Ādamsons v. Latvia, § 113; Paksas cited above, para. 107.

[19] Decision U no. 42/2008.

[20] Judgment 11 May 2007, K 2/07

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."[21]

33. It should be welcomed that all lustration measures are temporary only, and it also seems reasonable to provide for a fixed end of all the lustration process. The Venice Commission notes nevertheless that there is no fixed duration of each lustration measure (five years, for example); all of them will end at the same time (ten years after the composition of the Verification Commission). This means that two persons in a comparable situation may be subject to lustration measures for a different length of time, depending on when the decision is taken, which would represent a difference in treatment deprived of an objective and reasonable justification, hence a discrimination. It would seem more appropriate to provide for a fixed term, with the possibility to shorten it if it would overstep the date of official ending of the lustration process.

B. The personal scope of application of the law

34. Article 3 of the Lustration law provides for an extensive list of positions, whose holders will be subject to lustration measures. As a matter of fact, the provision in paragraphs 1 and 2 uses the very general term "Person". Article 1 line 3 of the Lustration Law instead refers to "holders of public office, public authority and public activity." The terms "holders of public office or public authority" are clear, while the term "holder of public activity" remains a very general, hence inaccurate notion. The term "public activity" is not defined in this Law and it is too wide to be used as a basis for issuing lustration proceedings. Article 14 of the Lustration Law refers to "holders of public authorisation" which is a broader notion than "holders of public authority" as in Article 1.

35. Article 3 includes the head of state, members of parliament, several members of the executive and legislative branches, but also a few non-state positions, e. g. lawyers, persons who have acquired capital in formerly state owned companies, selected employees of commercial broadcasting companies or certain functionaries of political parties and religious groups. Arguably, the automatic lustration procedure under Articles 26, 27.4-5 and 29.1 Lustration law shall be applied for the offices listed in Article 3.1, while those included in Article 3.2 shall only be subject to lustration upon a written request by their company or similar entity. However, a few of the descriptions given in Article 3.1 Lustration law, namely persons who have acquired capital in formerly state owned companies, lawyers and mediators hold neither public offices nor authorities and thus fall out of the scope of Articles 26, 27.4-5 and 29.1 Lustration law, nor are they part of one of the entities provided in Article 30.1. Hence, it remains unclear how they can become subject to lustration measures in the end.

36. With respect to these latter persons, as well as those enlisted in Article 3.2 of Lustration Law, it should be noted that they are not servants of the state; they do not share in governmental power, but are active in the private sector.

37. Pursuant to PACE Res. 1096(1996), "*the aim of [lustration] measures is to exclude persons from exercising governmental power if they cannot be trusted to exercise it in compliance with democratic principles, as they have shown no commitment to or belief in them in the past and have no interest or motivation to make the transition to them now"*.[22]

[21] CDL-AD(2009)044, paras. 110 *et seq.*

[22] PACE Res. 1096(1996), para. 11.

38. According to the Guidelines, "*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; […] 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*'[23]

39. In this regard the ECtHR stated:

> *"Even assuming that their lack of loyalty had been undisputed, it must be noted that the applicants' employment prospects were restricted not only in the State service but also in various branches of the private sector. The Court reiterates that the requirement of an employee's loyalty to the State is an inherent condition of employment with State authorities responsible for protecting and securing the general interest. However, there is not inevitably such a requirement for employment with private companies. Although the economic activities of private sector players undoubtedly affect and contribute to the functioning of the State, they are not depositaries of the sovereign power vested in the State. Moreover, private companies may legitimately engage in activities, notably financial and economic, which compete with the goals fixed for public authorities or State-run companies.*
>
> *In the Court's view, State-imposed restrictions on a person's opportunity to find employment with a private company for reasons of lack of loyalty to the State cannot be justified from the Convention perspective in the same manner as restrictions on access to their employment in the public service, regardless of the private company's importance to the State's economic, political or security interests."*[24]

40. The Polish Constitutional Court stated: "*Lustration shall only serve to eliminate or significantly diminish the threats to the establishment of lasting and free democracy, which the lustrated person poses by means of using the post they hold to engage in acts that could violate human rights or hinder the process of democratisation*".[25]

41. The Venice Commission notes that, consistently with the above principles, in a previous decision the Macedonian Constitutional Court found that the State could not go beyond persons employed in the state bodies and those who are on a decision-making position by lustrating members of the universities, religious communities, media, civic organizations (NGOs): such an enlargement of the personal scope of the Law would result "in the interference by the state" in the work of the concerned persons and would overstep "the constitutional guarantees for citizens of freedom of association for the purposes of exercising and protecting their political, economic, social cultural, and other rights and convictions". Moreover it would also entail the "violation of the constitutional determination for the separation of the church, religious communities and religious groups from the State".

42. The Law should be more precise about the persons mentioned sub points 24, 29 and 30 who could also have functions which meet the criteria of the Law. This should not be the case of persons that have acquired capital in state owned companies pursuant to the Law for transformation of companies which were state owned even if it is possible that they were helped by previous personal connections with officials of the communist state and of its security

---

[23] Guidelines, Section d and f.

[24] ECtHR judgment of 27 July 2004, *Sidabras and Džiautas v. Lithuania*, app. nos. 55480/00 and 59330/00, paras. 57 *et seq*.

[25] K2/07

services. Knowledge of the Macedonian political developments is required to assess the relevant provisions.

43. In its previous decision the Court excluded the application of the lustration to members of the media. This case-law can be correctly interpreted to cover points 1.22 and 2. 1 of Art. 3 as far as positions in the public broadcasting service and in the commercial or non-profit broadcasting companies or institutions are protected by the guarantee of the freedom of expression. This freedom has indeed to be taken into account, since it contains special privileges of the media. Notwithstanding the important function of the media in influencing the public opinion, the freedom of the media, especially of the journalists, has to be protected, so that it is essential, if the Macedonian legislator finds that lustration of certain persons active in the media is necessary, that the law identify precisely the positions in the media which could require the application of the lustration measures. Lustration measures should not be applied in respect of positions in the political parties, in the religious communities and religious groups and in the organizations of public character which are registered in accordance to the law (at least if this last expression includes NGOs).

44. The application of the lustration measures is apparently mandatory in all these cases. This is the justification of the prevalence which has to be recognized to the reasons of the guarantee of the human rights and fundamental freedoms in relation with conflicting public interests even if the protection of democracy is at stake. But if the lustration were not compulsory and depended on the choice of the governing bodies of the concerned private institutions or organizations, the legitimate application of the lustration would require legislative regulation to allow the use of the relevant information by the private subjects interested in it.

45. The Lustration Law provides many limitations not only of the people interested in getting one of the positions listed in that article but also of the relevant rights of the voters and, in the Commission's view, special scrutiny is required with regard to those offices, whose holders and candidates are directly elected by public vote.

46. Pursuant to the Guidelines[26], "lustration should 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)." The Venice Commission expressed the view that "[a]ny exception to this eminent principle should be exceptionally motivated in each individual case on the basis of the particular circumstances".[27]

47. This cautious approach has not been shared by some European countries which adopted lustration acts in the recent past, and Constitutional Courts supported this choice[28].

48. Also the ECtHR in Ždanoka v. Latvia[29] accepted the idea of the legitimacy of lustration measure affecting the electoral rights of the interested people, referring to the wide margin of appreciation as regards Article 3 of Protocol No 1 as well as the very specific historic-political situation in the country and the possible ensuing needs of the society in building confidence in the new democratic institutions. The Court clearly stated that "Article 3 of Protocol No. 1, which enshrines the individual's capacity to influence the composition of the law-making power, does not therefore exclude that restrictions on electoral rights are imposed on an individual who has, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations."

[26] Guidelines, Section e.

[27] CDL-AD(2009)044, para 117.

[28] See, for instance the decisions of the Latvian Constitutional Court August 30th 2000 and June 15th, 2006

[29] ECtHR judgment of 16 March 2006, *Ždanoka v. Lativa*, app. no. 58278/00, paras. 102 *et seq.*, 106, 117, 134.

49. The Venice Commission upholds that voters should, in principle, be free to elect whomever they wish, unless a certain candidate poses a clear threat of overthrowing democracy itself. The Constitutional Court and the national authorities must decide whether the social needs and the historic-political context make the scenario of overthrowing democracy a likely one, even 21 years after the adoption of a democratic constitution. Such democratic constitution might, in addition, be more restrictive in this regard than Article 3 of Protocol No 1.

50. Finally, the Venice Commission stresses that '[t]o 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] Such definition is provided in a very complex and confusing way in Article 4.1 Lustration law. According to the clarification provided to the Venice Commission by a judge of the Constitutional Court, the following conditions must be fulfilled cumulatively:

- the collaboration must have been conscious, secret, organized and continuous;
- the collaboration must have been based on a written document (in terms of written consent of the person who accepts the collaboration);
- the collaborator must have acted as either a secret collaborator or secret informant or via operational liaison;
- the cooperation must have involved operational collection of information which was processed, kept, or used by state security organs;
- the cooperation must have resulted in violation or limitation of rights and freedoms of citizens;
- the collaborator must have benefited from the collaboration – in terms of gaining material (financial) benefits or certain privileges or favours in the employment (such as getting employment, or getting promotion etc.).

51. Despite the fact that this provision is difficult to understand, the Venice Commission notes that the norm contains several clearly distinguishable elements which all need to be satisfied, thus leading to a substantively narrowed scope of collaboration.

52. It remains for the Constitutional Court to assess whether these criteria also sufficiently indicate that the collaborators as defined above pose a current danger to national security if they were to be holders of the enlisted public offices and authorities.

53. The Venice Commission also refers to Article 26 of the Lustration Law, according to which: *"A procedure to determine collaboration with the state security bodies shall be carried out for: - Persons who are candidates for holders of a public office or public authority*
- Persons who are already holders of public offices and public authority;
- Persons who have been holders of public offices and public authorizations within a period determined by this Law."

54. It seems difficult to understand how the last line of Article 26 could comply with the legitimate purpose of *excluding* persons with anti-democratic attitudes or behaviours *from exercising governmental power.*[31]

[30] CDL-AD(2009)044, para. 49.

[31] paragraph 11 of PACE Resolution 1096 (1996).

C. The procedural guarantees for the persons to which the lustration procedures are applied

55. It is settled case-law of the ECtHR that Article 6 of the Convention under its criminal head applies to lustration proceedings.[32] PACE Res. 1096(1996) demands the observance of the right of defence, the presumption of innocence until proven guilty, and the right to appeal to a court of law.[33]

56. According to requirement m) of the Guidelines, "*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.*"

57. The Venice Commission has further required that disqualification from office be suspended during the appeal and the court must be empowered to quash the decision of the lustration commission due to circumstances of each individual case.[34]

58. The Lustration Law entrusts the task of the verification of the facts justifying the application of the lustration measures to a "Commission for the Verification of Facts" which is defined as an "autonomous and independent body". In principle, the relevant provisions appear in conformity with paragraph a) of Resolution 1096 (1996), according to which "*lustration should be administered by a specifically created independent commission of distinguished citizens nominated by the head of state and approved by parliament*". The members of the Commission are elected by a qualified majority of the Parliament; if the election has to be repeated an absolute majority is required (articles 5 and 6). Article 12 of the Lustration Law merely refers to the negative requirements of Commission members; it would seem necessary, in addition, to state explicitly the professional formation and experience which should allow them to perform their office "professionally". Specific incompatibilities are provided (articles 9 and 12).

59. Commission members may be removed only by a deliberation of the Parliament adopted with the qualified majority of two thirds on the basis of the reasons for the expiration of their capacity listed in art. 11. It is not clear whether the conformity of the parliamentary deliberations with the Law and the Constitution may be contested before a judicial authority by the interested people, at least as far as the justification of the adopted measures is at stake. The Law should clarify this point to insure the guarantee of the independence of the Commission.

60. The facts which justify the adoption of the lustration measures regard the existence of a conscious, secret, organized and continuous co-operation with the state security bodies in the time frame established by the Law. They have to be proven by a document which has to give the evidence "that the co-operation was finalized to pass information which was subject to processing, keeping, or using by state security organs, in the form of automated or manual collections of data and files shaped and kept for particular persons by which are violated or limited the basic rights and freedoms of citizens on political or ideological reasons in the communist regime". The same provision shall be applied also in case of similar behaviour in view "of political, ideological and party reasons from 17 November 1991 to the day of beginning of implementation of the Law on free access to information of public character". In both cases, a material benefit or favour has to have been realized (art. 18).

---

[32] ECtHR, decision of 30 May 2006, *Matyjek v. Poland*, app. no. 38184/03, paras. 48 *et seq.*, decision of 24 October 2006, *Bobek v. Poland*, app. no. 68761/01, para. 2.

[33] PACE Res. 1096(1996), para. 12.

[34] CDL-AD(2009)044, paras. 97 and 108.

61. It is evident that the ascertaining of the relevant facts is very complex and their assessment should require investigations which appear to be left in a first step to the bodies in charge of the security and the counterintelligence of "the former Yugoslav Republic of Macedonia" and of its State Archive, which exercise discretion in choosing and selecting the relevant materials. These are the State organs of which the Commission shall require information about the people concerned: they have to answer submitting to the Commission "all relevant data, scripts and other documents" (art. 20). State organs are given a fixed deadline to submit the required information to the Commission (art. 22), which is however very short (twenty-four hours) "when the requests relate to candidates for holders of a public office"(art. 20. 2). This information may be completed by citizens and institutions which a have special obligation to answer to the requests of the Commission (chapter IV).

62. A second step stays in the responsibility of the Commission for the Verification of the Facts ("the Verification Commission"), which is entrusted with the task of determining the collaboration of the people concerned (candidates for holder a public office or holders of public office or public authority). The results of this verification process have to be sent to the organ or the body responsible in the matter for proposing candidates or opening a public call or conducting a procedure for electing and appointing "within seven days from the day of receiving the data by the bodies indicated in Article 20 of the Law" (art. 27).

63. A similar procedure is applied for the verification of the personal status of a person holder of public office or public authority. In this case, at the end of the procedure, the information is sent to the Parliament, to the Government and to the State Election Commission and, obviously, to "the organ and the body for competing and candidature of the person to become a bearer of public office or public authorization"(art. 28). The competent authority can start at this point a procedure for the dismissal of the concerned person when he/she meets the criteria for the lustration.

64. The results of the verification are immediately published on the website of the Verification Commission and are submitted to the Parliament, to the Government and to the bodies in charge of the candidature, but the person who is found to meet the criteria of the lustration has to be previously informed of the discovered evidence. Notwithstanding this element of guarantee, it is evident that the interested person, despite the fact that his or her personal dignity and constitutional rights are at stake, is not called to take part in the verification process (art. 29). Only when appointments in commercial or non-profit broadcasting companies, political parties, religious communities or groups and registered public organization are at stake, a written consent of the person in respect of whom verification is required has to be obtained and enclosed to the request itself (art. 30).

65. The Venice Commission finds that the absence of the person concerned from the procedure before the Verification Commission coupled with the publication of this person's name as collaborator is at variance with the right of defence, notably the right to equality of arms, and the presumption of innocence.

66. In this respect, the Constitutional Court may consider the following comments stated by paragraph 98 of the Amicus Curiae Opinion on the Albanian Lustration:

> *"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 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). […]."

67. Also, if a right of the concerned people to appear before the Verification Commission would be granted, the right to be assisted by a lawyer (attorney-at-law, advocate) has to automatically follow (not only during the court proceedings).

68. It is right that Article 31 paragraph (5) grants the possibility for the concerned person to appeal the decision of the Verification Commission before the competent Court, but there is no legal provision to indicate that until the exhaustion of the – exceptionally short - 8-day deadline to appeal all and any of the effects of the decision made by the Verification Commission shall be suspended by law, and such suspension shall continue until a final and irrevocable verdict of guilt is rendered by the competent court.

69. The provisions regarding the procedural aspects of the verification process and the possible appeal are not very precise about the exercise of the verification powers of the Commission. Many questions arise. For instance, is the Commission allowed to request additional information? Does it have the power of a direct access to the documents of the state security bodies to check the completeness and exactness of the received information? Moreover which are the formalities of the communication of the results of the verification to the people concerned? Which rules of judicial procedure (civil or administrative or criminal even if the lustration is not a matter of criminal legislation?) have to be applied by the court after receiving the appeals and which are the rights of the persons who submit the appeals?

70. In the Venice Commission's view, these aspects of the procedure should be regulated in detail in the Lustration Law in order for the procedure to comply with the principles of the rule of law and of the due process of law.

71. In addition, there are doubts that, when the concerned persons "are candidates for holders of a public office or public authority" (Article 26 line 1), "the state security bodies and other bodies" provided by Articles 2-22, the Verification Commission and the courts dealing with appeals may duly perform their duties and, therefore, make legal and fair decisions, in the light of the numerous persons who must be verified at the same time within the quite short deadlines provided by Chapters III and V of the Lustration Law.

D. The publication of the names of those persons who are deemed to be collaborators

72. Art. 14 quoted above states that the Verification Commission "publishes the names of persons (...) whose collaboration with state security organs is confirmed". One could infer that collaboration is confirmed by the Commission itself, and the publication is done (within three days) after its own decision. Art. 30(3) provides that "The person who was a subject of verification shall be informed in case there is evidence for collaboration with the organs of the state security, and the decision shall be published on the Commission' s webpage, no later than three days from the day of receipt of the results obtained from the verification".

73. The Commission's decision is thus published on the Verification Commission's website before the relevant court decision (the decision of the Commission may be appealed to court within 8 days). Art. 32 (3) states that "The final decision of the competent court upholding the Commission's decision, makes the decision of the Commission final": this means that the final verification is carried out by the court.

74. In the Commission's view, publication prior to the court's decision is problematic in respect of Article 8 ECHR. The adverse effects of such publication on the person's reputation may hardly be removed by a later rectification, and the affected person has no means to defend

himself against such adverse effects. The latter may only appear to be a proportionate measure necessary in a democratic society when the collaboration is finally verified, not before. Publication should therefore only occur after the court's decision.

V. Conclusions

75. The aim of this *amicus curiae* brief prepared at the request of the Macedonian Constitutional Court is not to assess the constitutionality of the Lustration Law, but to provide the Court with material in respect of the compatibility of this Law with the European Convention on Human Rights as well as elements from comparative constitutional law in order to enrich its own consideration of the case. The final say as regards the binding interpretation of the Macedonian constitution and the limitations it provides to the Lustration Law lies with the Constitutional Court. The Venice Commission stresses that such interpretation is binding on all national institutions from the administrative, judicial and legislative branches, which are obliged to respect it and to adhere to it.

76. The Venice Commission has analysed the Lustration Law in respect of four main issues: a) its temporal scope of application; b) its personal scope of application; c) the procedural guarantees for the persons to which lustration measures are applied; d) the publication of the names of persons considered to have collaborated with the totalitarian regime.

77. The Venice Commission has reached the following main conclusions:

a) Introducing lustration measures a very long time after the beginning of the democratization process in a country risks raising doubts as to their actual goals. Revenge should not prevail over protection of democracy. Cogent reasons are therefore required.

   As the purpose of lustration is to bar people with an anti-democratic attitude from office, and as the possibility of positive changes in the attitude and conduct of a person should not be underestimated, applying lustration measures to acts dating back to 21 to 68 years (or even 31-78 years by the time the Lustration Law will expire) may – if at all – be justified on the basis of the most serious forms of crime, in particular massive and repeated violation of fundamental rights which would also give rise to substantial custodial sentence under criminal law.

   Applying lustration measures in respect of acts committed after the end of the totalitarian regime may only be justified in the light of exceptional historic and political conditions, and not in a country with a long-established framework of democratic institutions, as a democratic constitutional order should defend itself directly through the implementation of the rule of law and the safeguards of human rights protection. Political, ideological and party reasons should not be used as grounds for lustration measures, as stigmatization and discrimination of political opponents do not represent acceptable means of political struggle in a state governed by the rule of law.

   As concerns the duration of the lustration measures, it should depend on the one hand on the progress in establishing a democratic state governed by the rule of law and on the other hand on the capacity for a positive change in attitude and habits of the subject of lustration. A fixed duration for each lustration measure should be provided in order to avoid discriminatory treatment of persons in comparable situation on the basis of when the lustration measures are adopted.

b) The application of lustration measures to positions in private or semi-private organisations goes beyond the aim of lustration, which is to exclude persons from exercising governmental power if they cannot be trusted to exercise it in compliance with democratic principles.

   The contested connection with the totalitarian regime must be defined in a very precise manner.

c) The absence of the person concerned from the procedure before the Commission on Verification of the Facts is at variance with his or her defence rights, notably the right to equality of arms. The procedure before the Verification Commission and the appeal procedure should be regulated in great detail in order to comply with the principles of the rule of law and due process of law.

d) The name of the person who is deemed to be a collaborator should only be published after the final decision by a court, as only in case collaboration is finally proven may the adverse effects of publication on that person's reputation be considered to be a proportionate measure necessary in a democratic society.