Strasbourg, 29 September 2009

CDL(2009)132*

Opinion No. 524/2009

Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

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

OF THE REPUBLIC OF ALBANIA

by

Mr Wolfgang HOFFMANN-RIEM (Member, Germany)

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

Table of contents

I. Introduction

1. On February 20th, 2009, the Constitutional Court of Albania (hereinafter referred to as "the Court") requested the Venice Commission to give an *Amicus Curiae* Opinion on the conformity of the Albanian Law on Lustration (Law No. 10034, On the Cleanliness of the Figure of the High Functionaries of the Public Administration and Elected Persons, hereinafter referred to as "the Law") with the Constitution of Albania (hereinafter referred to as "the Constitution"). Five questions were put to the Commission:

- The first question concerns the compatibility of the Law with the rights of the constitutional institutions, particularly with regard to the termination of their mandate.

- The second question relates to the Court's proposition to get an insight into the consequences of a possible incompatibility of the Law with "the laws for the organization and operation of the institutions contemplated by the Constitution" as mentioned in article 81.2 a) of the Constitution.

- The third question deals with any potential conflicts of the Law with the principle of the rule of law, especially the separation of powers.

- The fourth question aims at the compatibility of the Law with the Fundamental Rights as guaranteed in the Constitution, especially the right to stand for election, the right to work and the right of access to public service.

- With its fifth question the Court addresses a problem of judicial bias: Does the fact that a court member is a potential subject of the Law lead to partiality? What are the consequences, if the withdrawal of judges for reasons of bias leads to the Court missing the quorum required for adjudication?

2. The Venice Commission appointed Ms. Suchocka and Messrs. Bartole, Hoffmann-Riem and Mihai as rapporteurs on this issue.

3. Even at this point it should be noted that an all-comprising answer to the questions above would require a detailed knowledge of both the historical and the current political and social situation of Albania as well as its legal system, which cannot be provided under the given circumstances. On the other hand, one can seriously question the constitutionality of several parts of the Law in its current form already on the basis of the material at hand. This draft will focus on these points.

4. The rapporteurs have travelled to Albania for a short visit to gain further information. They – inter alia – met with: The Prime Minister, the Speaker of the Albanian Parliament as well as with 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. As this is an *Amicus Curiae* Opinion for the Constitutional Court of Albania, the intention is not to take a final stand on the issue of constitutionality but to provide the Court with material in terms of the compatibility of the Law with the European Convention on Human Rights (ECHR) as well as elements from a comparative constitutional legislation in order to facilitate its consideration under the Constitution of Albania.

I. Background information on lustration

1. Definition and purpose

6. Lustration (from Latin *lustratio* = purification by sacrifice or by purging) is a practice that aims at removing persons formerly involved with a totalitarian regime from the civil service, if they cannot be trusted to exercise their powers in compliance with democratic principles as they did not show their commitment to or belief in them in the past and do not prove to take an interest or motivation to make the transition to them now.[1] It is a common instrument in societies in transition from totalitarianism to democracy, such as Germany after World War II or *inter alia* East Germany, Poland, Hungary, Croatia, and the Czech Republic after the fall of the Iron Curtain.

7. To establish a democratic state ruled by law, norms compatible with these targets are not sufficient; the key to the achievement of this goal is the law enforcement which is to a great extent determined by a country's political and economic situation and its human resources. The open axiology of liberal and democratic constitutions leaves doubts, "that officials and collaborators of the former regimes would undermine the new democratic, free-market systems created in their countries after the demise" of a totalitarian rule.[2]

8. The ECtHR emphasizes the importance of a loyal civil service for example as follows:

> *"The Court notes, that a number of Contracting States impose a duty of discretion on their civil servants. In this case the obligation imposed on German civil servants to bear witness to and actively uphold at all times the free democratic constitutional system within the meaning of the Basic Law (see paragraphs 26-28 above) is founded on the notion that the civil service is the guarantor of the Constitution and democracy. This notion has a special importance in Germany because of that country's experience under the Weimar Republic, which, when the Federal Republic was founded after the nightmare of Nazism, led to its constitution being based on the principle of a "democracy capable of defending itself" (wehrhafte Demokratie)."*[3]

9. The former President of the Constitutional Tribunal of Poland highlights the influence of a lustration process complying with the requirements of a state ruled by law on the people's attitude to the new order:

> *"The process of transformation and restitution of the freedom is closely linked with the shaping of attitudes and the democratic mentality of average people (…). For this reason it is more important to observe, at the initial point, the rigorous requirements of democratic standards then to execute the penal responsibilities of the former functionaries."*[4]

10. It is essential that the procedure of screening the personnel by all means complies with the principles of a democratic state ruled by law, or to quote the Constitutional Tribunal of Poland:

---

[1] See Council of Europe's Parliamentary Assembly Resolution 1096 (1996) on measures to dismantle the heritage of former communist totalitarian systems, para. 11.

[2] *Roman Boed*, An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice, Columbia Journal of Transitional Law 37 (1999), p. 357 (359); see as well Explanatory Memorandum to the Report on Measures to Dismantle the Heritage of Former Communist Totalitarian Systems (hereinafter referred to as Memorandum), para. 9 and 29.

[3] Vogt v. Germany, judgment of September 2nd, 1995, para. 51.

[4] *Marek Safjan*, supra note 3, p. 20

"While eliminating the communist totalitarian heritage, a democratic state based on the rule of law must use only the formal legal means which could be accepted in the framework axiology of such a state. No other means can be accepted because such a state would not be better than a typical totalitarian regime, which must be eliminated. A democratic state ruled by law has sufficient legal instruments necessary to guarantee justice and to punish the people who committed crimes. A law which is based on the idea of revenge cannot be accepted in a democratic state."[5]

11. It has to be emphasized that the only legal purpose of lustration is to guarantee that governmental power is exercised in compliance with democratic principles thus helping to establish the new political and legal system. This means that lustration as an administrative measure can only under exceptional circumstances and exclusively for a transitional period be compatible with a democratic state ruled by law.[6]

2. History of lustration in Albania

12. In the following, a short history of lustration in Albania will be given. It is mainly based on the assessment provided by *Robert C. Austin* and *Jonathan Ellison*[7].

13. Albania, like many other Eastern-European countries, experienced an anti-communist revolution in 1989/1990. Since 1991 several attempts of de-communization have been made. In 1992 this process became an important political issue on the agenda of the new government, which was controlled by the Democratic Party. However, the first lustration law was struck down by the Constitutional Court.[8]

14. The "Genocide Law" in September 1995 and the "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. On the basis of this law the General Prosecutor ordered the arrest of 24 former senior communist officials.[9] 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 31st 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.

15. 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.[10] Every individual who wanted to run in an election for an important position (positions were listed in article 1) had to first 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.

---

[5] Judgment of May 11th, 2007, as quoted by *Marek Safjan*, Transitional Justice: The Polish Example, the Case of Lustration, EJLS 1 (2007), p. 1 (17).
[6] *Ibid*. p. 17.
[7] *Robert C. Austin/Jonathan Ellison*, Post-Communist Transitional Justice in Albania, East European Politics & Societies 22 (2008), p. 373 *et seq.*
[8] See *Kathleen Imholz*, A Landmark Constitutional Court Decision in Albania, in East European Constitutional Review 24 (1993), p. 23 et seq.
[9] Austin/Ellison, supra note 6, p. 384.
[10] *Ibid.* p. 387.

16. The opposition parties brought complaints challenging the two "Lustration Laws", but the Constitutional Court basically rejected them on 31st January, 1996.[11] Shortly after the government changed and the former opposition came to power the scope of the "Verification Law" was drastically reduced from its previous incarnation.[12] The "Verification Law" expired on 31st December, 2001. In 2008, the adoption of the Law No. 10034, dated 22nd December 2008, is a new (further) step that restarts lustration processes again.

17. All in all, Albania was one of the pioneers in addressing the issue of lustration, but the attempts were either interfered or stopped after a short time. This had a negative effect on the lustration process.

3. The Council of Europe's Guidelines on Lustration Laws

18. 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:

- guilt must be proven in each individual case;[13]
- the right of defence, the presumption of innocence and the right to appeal to a court must be guaranteed;[14]
- the different functions and aims of lustration and criminal law have to be observed;[15]
- lustration has strict limits of time in both the period of its enforcement and the period to be screened.

19. 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"):[16]

> *"To be compatible with a state based on the rule of law, lustration laws must fulfill certain requirements. Above all, the focus of lustration should be on threats to fundamental 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*

[11] A summary of this decision can be found in CODICES, ALB-1996-2-001.
[12] *Austin/Ellison*, supra note 6, p. 393.
[13] Resolution 1096 (1996), supra note1, para. 12.
[14] Ibid.
[15] *Ibid.* para. 11.
[16] Report on measures to dismantle the heritage former communist toalitarian systems, Doc 7568, June 3rd, 1996

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;

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."

20. These Guidelines provide a standard of good practice for laws on lustration in a democratic state ruled by law. References made to these can be found in each of the constitutional court decisions of the Members on lustration legislation.[17] Nevertheless, when applying these Guidelines one has to check whether all parts are essential to a democratic state ruled by law as minimum standards or whether there is a leeway for a lustration law to take a different position without violating the constitution.

II. Concept of the Law

21. The purpose of the Law as defined in its article 1 is "checking the cleanliness of the figure of every public functionary elected or appointed". The "Authority for Checking the Figure" (hereinafter referred to as "the Authority") as dealt with in articles 6 *et seq.* of the Law is created for "verification" of the subjects named in article 3. To have held one of the offices listed in article 4 is "incompatible with the public activity of an official". At the end of the screening procedure a "verification certificate of the moral figure" is issued (article 20). Article 23 states that in consequence for a "verification certificate B", i.e. an incompatibility certificate, anyone running for office will be "disqualified from the further continuation of the procedure or election because of unworthiness of the figure". Every B-certified verification subject already holding office will either have to appeal the verification procedure to a court or resign or will be barred from office within 10 days for "unworthiness of the figure of a functionary"(article 24). According to article 25.2 the identity of all the B-certified officials refusing to resign will be revealed by the Authority on its official page

22. It should be noted that despite the fact that it seems to be the main objective of the law to screen legal offices among the "Subjects of verification" listed in article 3 of the Law not only officials related to the legal sector can be found, but also officials working in finance, education, and the media. Moreover, article 3 l) of the Law grants the opportunity for either the President or the Assembly to appoint subjects for undergoing the lustration procedure. The offices and activities listed in article 4 of the Law are partly enumerated in a rather precise manner while others lack this precision, e.g. article 4 e) "collaborator of the organs of State Security with activity of a political nature…"

III. Consideration of the Law

23. As stated in article 4.2 of the Constitution, the Constitution holds the top rank in the hierarchy of norms in Albania. Therefore, every law has to comply with the Constitution.

1. Termination of the mandate of constitutional institutions

24. The Constitution gives certain guarantees for the mandate of the Deputies of the Assembly. Article 71 embodies provisions for the duration of a deputy's mandate. It is worded as follows:

[17] *E.g.* Constitutional Court of the Czech Republic, judgment of December 5th, 2001; Constitutional Court of the Republic of Latvia, judgment of August 30th, 2000, para. 6; judgment of June 15th, 2006, para. 18.2; Constitutional Tribunal of Poland, judgment of May 11th, 2007.

"1. The mandate of the deputy begins on the day when he is declared elected by the respective electoral commission.

2. 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;
ç. when the mandate of the assembly ends;
d. when he is absent from the Assembly for more than six consecutive month without reason;
dh.when he is convicted by final court decision for the commission of a crime."

25. The Constitution does not call for the provision of any other way to end the mandate of a deputy. Moreover, the provision of Article 70.2 of the Constitution ("Other cases of incompatibility are specified by law.") cannot be understood as justifying a lustration being imposed on deputies, because it has to be interpreted in the context of the previous sentence. That concerns the simultaneous exercise of other public duties and the duty of a deputy. Duties held in the former totalitarian regime are not affected.

26. Similar guarantees are provided by the Constitution for the President of the Republic (article 88), the local councils and mayors (article 109), the judges at the Constitutional Court (articles 125.2, 127), the judges at the High Court (articles 136.3, 139), other judges (article 138) and the General Prosecutor (article 149.1). Of course, there are certain provisions such as articles 90.2, 128, 140 or 149.2 of the Constitution which hold opportunities to end these mandates in case of serious misbehaviour . But they cannot be used to justify the Lustration Law. All these guarantees have in common, that they call for a certain procedure, for instance a decision taken by not less then two-thirds of all Members of the Assembly (article 90.2 of the Constitution) or a decision of the Constitutional Court (article 90.3 of the Constitution). The Lustration Law does not provide for similar procedures. There is no authorization of any actor, esp. not the Authority, to overcome the procedural requirements of the Constitution. Furthermore, the Law is not restricted to procedural changes but provides for material regulations, especially when it comes to the catalogue of functions in its article 4 and the consequences of a "verification certificate B" in its articles 21 et seq. Therefore its approach goes further than just shaping the procedure within the leeway left by the constitution.

27. Hence, article 24.5 of the Law, which holds a termination of the mandates of constitutional institutions in case of a "verification certificate B", is contradictory to the Constitution.

28. This verdict also applies to article 24.4 of the 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 deputies for the sake of the functioning of democracy. Without an amendment to the Constitution, the privilege may not be infringed. A simple law – like the Lustration Law – is not equivalent to an amendment to the Constitution as outlined in article 177 of the Constitution.

29. In relation to a possible amendment, it has to be emphasized that section e of the Guidelines states a prohibition of lustration of elective offices. Moreover, resignation from an elective office is the common way of removal of elected officers in western democracies; examples of someone being barred from office can hardly be found.[18]

2. Consequences of incompatibility with the laws mentioned in article 81.2 of the Constitution

30. Article 81.2 of the Constitution holds 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 contem-plated 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. Addition-ally, this qualified majority applies to a law aiming at an objective, which is not men-tioned 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 requisite, if proposed regulations are restricted to shaping the procedure within the leeway preset in the respective organic law. In case that a law is adopted without the required majority it is incommensurate with the constitution. Therefore, the Lus-tration Law, which was adopted by a simple majority, cannot substantively alter the content of organic laws.

3. Conflicts with the principle of the rule of law

31. The principle of the rule of law supplies several criteria, such as separation of powers, precision of terms and the principle of proportionality. Implementations of these in lustration measures can be found in the Guidelines. In the following the Law is therefore primarily examined in respect of these Guidelines. In this context references are however also made as to the constitutional situation in other democracies and to the case law of Constitutional and Supreme Courts.

a. Separation of powers

32. The Law might be a threat to the separation and balancing of powers guaranteed in article 7 of the Constitution as the Authority, *i.e.* an executive body, is authorised to impose lustration on members of both the legislative and the judiciary.

33. 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."*[19]

34. 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.

35. 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".[20] The

[18] *Cf. Rudolf Steinberg*, Aberkennung des Abgeordnetenmandats im Verfassungsstaat, Der Staat 39 (2000), p. 588 (601).
[19] ECtHR, *Kleyn and Others v. The Netherlands*, judgment of May 6th, 2003, para 193.
[20] CDL(2000)088, para 2.

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.[21] This discretion should go as far "as regards its organisation and performance provided that it acts in compliance with the Constitution".[22]

36. 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.

37. The regulation on the Authority seems to comply with these exigencies. Art. 6.5 of the Law states that 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. 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. The right to appeal the decision to an independent court of law is provided for in article 22 of the Law.

38. **Conclusion:** Hence, the principle of separation of powers is not infringed.

b. Precision of terms

39. 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."*[23]

40. Lustration is a serious encroachment upon an individual's rights. Hence, for any law on lustration to be constitutional it is inevitable to supply a precise definition of the objected connection with the totalitarian system.[24]

41. The catalogue of "incompatible functions" in article 4 of the Law exceeds these limits. Several offices and activities listed here 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, for instance: "every employee of the organs of State Security" in article 4 ç). This term 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 (see below, para 58 *et seq.*) 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, which suffices to disqualify him/her for the functions, mentioned in article 4 of the Law, in a democratic society.

---

[21] *Cf.* Judgement of the Federal Constitutional Court of Germany, December 21st, 1977, Official Digest 47, p. 46 (78).
[22] CDL-AD(2006)032, para. 17.
[23] *Cf.* ECtHR, Vogt v. Germany, judgment of September 2nd, 1995, para. 48.
[24] *Marek Safjan*, supra note 3, p. 18.

42. The formulation of article 4 ç) and article 4 e) is far from attaining a sufficient degree of precision. Hence, they do not meet the requirements of the rule of law.

43. Precision of terms also has to be achieved with regard to the personal scope of a law. Everyone must be able to realize, whether he is or is not affected by a law. Furthermore, everyone must be given the possibility of adjusting his behavior to avoid being within the scope of a law.[25] This requires that the personal scope of a law is defined in a precise manner.

44. 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 uncertain. No criteria are given to guide the decision of the President or the Assembly.

c. Proportionality

45. Finally, the principle of the rule of law includes the principle of proportionality. The verdict of disproportionality applies to measures encroaching upon an individual's rights further than absolutely necessary to achieve the aim pursued by the measure in question.

46. First of all the principle of proportionality leads to certain limits of time, which apply to lustration measures in both the period of their enforcement and the period to be screened. The Guidelines (lit g.) are rather strict concerning this issue (disqualification for office not exceeding a period of five years; lustration measures should end no later than December 31st, 1999). Then again, it depends on the special situation in a scrutinized country whether the period mentioned in the Guidelines is considered too short and may have to be extended.

47. Concerning the period of enforcement of lustration one has to consider the threat posed by the former regime. The ECtHR stated its position on this threat as quoted:

> *"The Court 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."*[26]

48. The answer of the Constitutional Court of the Czech Republic 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."*[27]

49. Neither the ECtHR nor the Constitutional Court of the Czech Republic ruled on the disqualification for office, as both cases concerned the access to public administration. Still,

---

[25] *Cf.* ECtHR, Vogt v. Germany, judgment of September 2nd, 1995, para. 48.
[26] *Ibid.*, para. 59.
[27] Judgment of December 5th, 2001; *cf.* U.S. Supreme Court, Adler v. Board of Education.

the need for loyalty should more or less be the same 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 on whether the right of article 10.1 of the ECHR is affected.[28]

50. 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."*[29]

51. The Albanian law provides for a long period of enforcement and provides for screening at a time far away from the end of the totalitarian regime.

52. The Law was considered promulgated on January 14th, 2009, according to article 84.2 of the Constitution and published in the Official Journal the following day. It would, according to its article 30, be in force from January 30th, 2009, and the Authority would pursue its job until December 31st, 2014, as stated in article 29.1 of the Law. This would be about 19 to 25 years after the collapse of the totalitarian regime.

53. Considering this long period for the enforcement of lustration procedures and the lustration measures already taken, severe reasons have to stand behind a new law on lustration. A possible justification depends on both the historical and the current social and political situation in the respective country. One justification for the restart of lustration procedures almost twenty years after the fall of the totalitarian regime might be that the first lustration law was struck down by the Constitutional Court, and that the second attempt was stopped in relevant parts shortly after the enactment of the law due to a change in government. Therefore there has not been an ongoing lustration process in Albania which covered all persons who might fall into the scope of a lustration law.

54. 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. The longer the objected activities date back, the more significant the personal misconduct in the past and the individual guilt have to be.

55. With respect to these requirements, the Constitutional Court will have to decide whether the substantive scope of the Law as stated in its article 1 and covering the "period 29 November 1944 until 8 December 1990" is respectively is not beyond these limits. The Venice Commission is not sufficiently acquainted with the political system in Albania and especially the functions mentioned in articles 3 and 4 of the Law to make an own assessment.

---

[28] *Cf.* ECtHR, Vogt v. Germany, judgment of September 2nd, 1995, para. 44.
[29] Judgment of December 5th, 2001.

56. **Conclusion:** Article 1 of the Law is disproportionate and hence incommensurate with the rule of law.

57. It has to be highlighted that apart from article 4 a) of the Law ("except for cases when he has acted against the official line or has removed himself from office in a public manner") no exceptions are given and just the fact of having held one of the offices listed suffices to receive a "verification certificate B". This means: 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.

58. With respect to these exigencies the catalogue of article 4 of the Law will have to be scrutinized thoroughly. There is reasonable doubt that a presumption of guilt can be used in all cases covered by the Law. This doubt derives from the inclusion of "every employee of the organs of State Security" in 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" in article 4 dh) as well as articles 4 e), 4 f) and 4 g). Several of these activities seem not to meet the criteria of section h of the Guidelines.

59. Moreover, section k of the Guidelines sets preconditions to be met when imposing lustration on "conscious collaborators", especially the evidence of individual participation "in serious human rights violations". Article 4 e of the Law does not meet these requirements.

60. Dealing with each case individually is substantial in a legal system that adheres to the rule of law; therefore it is a major claim of the Guidelines. All in all, article 4 of the Law has a global approach. Instead of dealing with each case individually, it handles them all without distinction. This deficiency of the law cannot be healed by a judicial appeal (article 22 of the Law). There are no provisions in the 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 court has not been given the right to add new criteria or standards.

61. **Conclusion:** This part of the law is disproportionate and hence incommensurate with the rule of law.

62. Considering the high requirements mentioned above, doubts additionally arise on the personal scope of the Law described in its article 3. Section d of the Guidelines claims "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". 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").

63. 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". Furthermore, 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. At the age of 18 in essence one has the right to start afresh.

64. 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.

65. **Conclusion:** Articles 4 e) and 4 g) of the Law do not comply with the rule of law as far as it includes persons who were under 18 years old when acting in the mentioned capacity.

66. Pondering on the progress in establishing a democratic state ruled by law and thus an eventually expiring need for lustration as well as the capacity for a positive change in attitude and habits of the subject of lustration the exclusion from public offices should be taken into consideration when limiting the scope of the measures. Section g of the Guidelines recommends a maximum time of five years of disqualification. Still, in individual cases this limit may be exceeded due to severe reasons, such as an extraordinary personal misconduct or a massive individual guilt. But this has to be proven in each individual case. Even in these cases a limitless disqualification for office without a chance ever to regain it is disproportionate and thus incommensurate with the rule of law.

67. Neither for article 23.2, i.e. disqualification for the procedure of appointment or election, nor for article 24.5, i.e. disqualification for office, the Law supplies a time limit.

68. **Conclusion:** These articles are disproportionate.

4. Compatibility with Fundamental Rights

69. Certain provisions of the Law are serious curtailments of the Fundamental Human Rights and Freedoms guaranteed in the Constitution as well as in the ECHR and other constitutions. This will be analyzed in the following.

70. An exhaustive evaluation of the constitutionality, especially of the proportionality, of these curtailments would require a more detailed knowledge of the concrete functions of the people concerned. Still, some of these can be given and absolute limits shown.

71. The focus will be on the fundamental rights explicitly mentioned in the request of the Court. 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.

a. Right to stand for election

72. The provisions of article 23.2 of the Law aiming at the elimination of B-certified subjects from election procedures is a serious encroachment of 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.[30] The right to stand for election is also supplied in article 25 b) of the International Covenant on Civil and Political Rights (hereinafter referred to as ICCPR).

73. Furthermore, this curtailment is to be seen as most severe, 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 a certain period of time, depending on how long it takes to come to a final judicial decision. Even if the Albanian Courts is able to decide rather quickly it may take years to come up with a final decision.

74. Although these rights are important, they, are, however, not absolute.[31] Curtailments can be justified under article 17.1 of the Constitution if established by law, "in the public interest or for the protection of the rights of others" and if the curtailment is proportional to the situation that necessitated it.

75. 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."*[32]

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

> *"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."*[33]

77. Article 23.2 of the Law would comply to these reservations if it was formwise constitutional and substantively proportional. Concerning the ample scope of the Assembly

---

[30] ECtHR, *Gitonas and Others v. Greece*, judgment of July 1st, 1997, para. 39.
[31] Ibid.
[32] Ibid.
[33] ECtHR, Zdanoka v. Latvia, judgment of March 16th, 2008, para. 115.

in defining the public interest "unless it is manifestly without reasonable foundation"[34] 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 a legitimate aim.

78. The means chosen in article 23.2 of the Law have to be proportional to the aspired aim. There must be a fair balance between the demands of the public interest and the requirements of the protection of the individual's fundamental rights.

79. 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. Therefore it has priority over the public interest in lustration.

80. If a constitution provides for an exception of this principle (as for instance article 18 of the German Basic Law: forfeiture of basic rights), this requires a formal act where the abuse of fundamental rights must be proven in each individual case. The Albanian constitution does not contain a provision on forfeiture.

81. **Conclusion:** The Law violates the right to stand for election as lustration is imposed on persons seeking elective offices.

b. Right to work

82. 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[35]. Limitations of the right to work have to be established by law and must be proportionate.

83. 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."*[36]

84. Barring B-certified individuals from exercising the functions mentioned in article 3 of the 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 Law is an encroachment upon this right. Although most of the functions mentioned in article 3 of the Law 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 of the Law): Insofar it is not clear whether these positions have to be deemed as part of the public service. As far as the functions are

[34] See, *mutatis mutandis*, ECtHR, *James and Others v. United Kingdom*, judgment of February 21st, 1986, para. 46.
[35] *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.
[36] Judgment of July 11th, 2006, para. 1.

not part of the public service the right to work can be affected by the Law. The following remarks on the right to work are restricted to such positions.

85. 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,[37] 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."*[38]

86. 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.[39]

87. 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.

88. 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.

IV. Right of access to public service

89. Most positions mentioned in article 3 of the 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."*

90. 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.

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

---

[37] *Cf.* Judgment of June 11th, 1958, Official Digest 7, p. 377 (400 *et seq.*).
[38] Judgment of July 11th, 2006, para. 3.
[39] *Cf.* ECtHR, Vogt v. Germany, judgment of September 2nd, 1995, para. 51; Federal Constitutional Court of Germany, judgment of February 21st 1995, Official Digest 92, p. 140 (151).

> *"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 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."*[40]

92. According to article 23.2 of the 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.

93. 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 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 of the Law.

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

5. Problems of judicial bias

95. The impartiality of judges (*nemo iudex in causa sua*) is one of the most eminent principles in a state ruled by law.[41] Conflicts of interest have to be ruled out. Questions of bias can arise both in context with 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.

96. Article 5 of the Law contains a special tradition 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."*

97. 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 withdrawal, and the Court has no opportunity to decide on a discard.

98. Article 5 of the 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

[40] Glasenapp v. Germany, judgment of August 28th, 1986, para. 48.
[41] *Cf.* ECtHR, Kyprianou v.Cyprus, judgment of December 15th, 2005, para 11.

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.

99. 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 Law. According to the President of the Constitutional Court, seven of the nine judges have formerly acted as prosecutors, though he did not reveal whether they have acted in "political processes" (see article 4 f of the Law).

100. 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 is concerned.

101. 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´s 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.

102. Notwithstanding the public discourse on its impartiality the Court has decided on the suspension of the Lustration Law. According to the president of the Court, the Court has discussed – and negated – the question of impartiality of the judges. 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.

103. Problems will arise if members of the Court, who are potential subjects of the 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.

104. 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 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.

105. 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 was obliged to enable the Court to adjudicate on the Law in a constitutional and lawful manner. The law does not provide for a solution to overcome such a possible blockage (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 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 Law from adjudication on its constitutionality. This is contradictory to article 124.2 of the Constitution.

106. 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. This right 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.

107. In search for a solution one has to look at the rationale of excluding a biased judge. The main rationale is: 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.

108. 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 law evidently contradicts the constitution (see above, para. 27). To decide on the unconstitutionality of the relevant provision of the 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.

109. 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 Law.

110. **Conclusion:** The lawmaker has missed the obligation to provide 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. The parliament cannot bypass the Constitutional Court by such a failure. 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 law as far as he/she may be a potential subject of the law, since this part of the 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.

V. Conclusion

111. The results of the analysis can be summarized as follows:

- Articles 24.4 and 24.5 of the Law provide for the termination of mandates of constitutional institutions without amending the Constitution. They are inconsistent with the Constitution.

- Insofar as the Law provides regulations which substantively lie within one of the scopes listed in article 81.2 of the Constitution it lacks the qualified majority required.

- An infringement of the separation of powers cannot be observed.

- Parts of articles 3 and 4 do not meet the criterion of precision of terms. It remains to be determined, whether articles 4 d) and 4 e) of the law meet this criterion.

- The period to be screened as supplied in article 1, the global approach of article 4, the lack of an exclusion of persons under age during the objected activity in article 4 g) and the failure of articles 23.2 and 24.5 of the Law to provide for a time limit are disproportionate.

- As far as elected offices or registration for election is affected, the Law encroaches upon the right to stand for election in a disproportionate manner.

- The limitations of the right to work are disproportionate in several aspects. A further analysis of their proportionality would require a more detailed knowledge of the concrete or aspired functions of the people concerned.

- The right of access to public administration on terms of equality is infringed in a disproportionate and unreasonable manner. As far as other positions than public offices are concerned, the limitations of the right to work are disproportionate.

- The period to be screened and the period of enforcement raise some questions as to their proportionality. On the other hand it has to be taken into account 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. Therefore it may be justified to restart lustration even now.

- Even judges of the Constitutional Court, who may be subject of the Law, are not barred from deciding on the constitutionality of the Law.