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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

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

OF THE REPUBLIC OF ALBANIA

by

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

1. The Constitutional Court of Albania (hereinafter, the "CC"), by a letter of its President dated 20 February 2009, asked the Venice Commission to provide an *amicus curiae* opinion in a case concerning the constitutionality of Law no. 10034 of 22.12.2008 "*on the cleanliness of the figure of high functionaries of the public administration and elected officials*" (hereinafter, the "Lustration Law").

2. The Lustration Law has been challenged as unconstitutional through a complaint filed on 30.01.2009 by a group of deputies of the Assembly of the Republic of Albania, the Albanian Helsinki Committee and the National Association of Prosecutors.

3. The same complaint has asked the CC to suspend the implementation of the Lustration Law until a final decision on the merits of the case will be rendered by the CC. This suspension claim was accepted by the CC, with the majority of votes of its judges, on 16 February 2009 pursuant to Article 45 of Law no. 8577 of 2000 on the organization and operation of the CC, holding that in the case at hand there are "justifiable causes for arguing for the prevention of the consequences that might come to the normal functioning of the state of law and the fundamental rights and freedoms of individuals."

4. The CC submitted the following five questions to the Venice Commission:

"1) Does the law violates the constitutional guaranties of the mandate of the President of the Republic, members of the Constitutional Court, members of the Supreme Court, deputies, members of the Council of Ministers and General Prosecutor? If yes, is the termination of the mandate justified? Is the principle of the rule of law violated?"

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

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

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

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

5. By the time of the drafting of these comments, Professor Sergio Bartole (member – Italy) had prepared an "Opinion on the Albanian lustration legislation" and Professor Wolfgang Hoffman-Riem (member – Germany) had also prepared a "Draft *amicus curiae* opinion on the Albanian Law on Lustration". I have carefully reviewed these two excellent materials which are consistent each other in respect of their most important considerations and

conclusions. The differences between the two materials are not major and they can be easily clarified and conciliated after the meeting with the Albanian authorities.

6. Under such circumstances, there remain few aspects that can be originally touched upon at this stage by the present comments. Nevertheless, further contributions will be possible after the meeting with the Albanian authorities.

7. Thus, it is obvious the provisions of Article 24 paragraphs (4) and (5) of the Lustration Law are inconsistent with various constitutional provisions that establish guarantees of the mandates of - at least - the President of the Republic, judges of the Constitutional Court, judges of the Supreme Court, deputies of the Assembly and General Prosecutor. The effect triggered by these legal provisions would be the termination of such mandates in other ways than the ways accepted by the constitutional provisions; therefore the envisaged legal provisions are void.

8. According to the letter sent by the President of the CC, the Lustration Law was adopted by the simple majority of the deputies' votes. Taking into account the scope of the Lustration Law, it comes out that such legislative procedure is clearly in contradiction with the constitutional provisions of Article 81 paragraph (2) letters a) and c) of the Constitution, which requires a qualified majority of at least 3/5 of the deputies' votes. In other words, the Lustration Law should have been adopted as an "organic" law but not as a "simple" ("regular") law. Therefore its provisions cannot modify the legal provisions of the existing "organic" laws which they aim to contradict.

9. The creation, functioning and decision making process of the Authority for Checking the Figures seems not to infringe the principle of the separation of powers, because Article 22 of the Lustration Law provides the right to appeal to a court of law. However it is still necessary to clarify whether this is an effective access to justice since Article 23 paragraph (3) prohibits the suspension by the court of the certificate issued according to Article 20 paragraph (1) point b) until a final decision will be rendered by the court on the merits of the case. From another perspective belonging to the principle of rule of law and in the light of the EctHR relevant judgments, the precision of the terms used by various provisions of the Lustration Law is at least questionable. However, it could happen the translation provided to the Venice Commission is not accurate in all respects; therefore further clarifications need to be obtained during the meeting with the Albanian authorities before making a final assessment on this aspect.

10. The constitutional right to work is obviously limited by the Lustration Law in a way that does not observe the principle of proportionality. On the other hand, the existence in the Constitution of Albania of a right of access in the public administration is questionable; therefore a serious and grave consequence (as it clearly is the statement of the unconstitutionality of a law) should be avoided to be taken by the CC for such a reason.

11. Finally, the obligation that is incumbent to the judges of the CC to carry out their constitutional duties (*inter alia*, to participate and vote in cases as the case at hand is) prevails on any suspicions regarding their possible bias. In other words, the constitutional activity of a state body cannot be stopped by a law passed by the legislative power.