ALBANIAN LUSTRATION ACT, ITS CONSTITUTIONAL AND INTERNATIONAL LAW PROS AND CONS

Vladimír Balaš

Abstract: At the end of 2008, the Albanian Parliament adopted a controversial Lustration Act (Act. No. 10034, of 22 December, 2008) "inspired" by similar legislation introduced in Czechoslovakia in 1991 (Act 451/1991). The Albanian legislation requires i.a. the lustration of members of the executive, legislative and judicial branches. Though boycotted by the opposition, it was passed by simple majority of members of the Parliament and entered into force on 30 January 2009. Author attempts to find out whether Albanian lustration legislation did not contravene universally recognized standards or fundamental constitutional principles. After thorough analysis of relevant Albanian legislation, international law commitments of Albania and of casuistry of European Court of Human Rights, the author of this study submits, he believes that adoption of lustration legislation is feasible and there is nothing in Albania's international commitments and constitutional framework to prevent it. The Lustration Act should meet the basic requirements for an efficient regulation, including namely procedural guarantees and compliance with superior legislation. The extension of the applicability period of the lustration legislation is also no problem; we even believe that under specific conditions of Albania, the time-limit for its applicability (2014) might cause difficulties. However, one can well imagine that the aims that are drawn together under the umbrella of the Lustration Act might be achieved in other ways, by incorporating restrictive provisions in individual laws applicable to the functioning of the government and local self-government authorities. The Lustration Act is likely to undergo some changes and it is not excluded that some of its provisions or the Lustration Act as such will be repealed by Constitutional Court rulings. However, this does not mean that it is not in the interest of the Albanian political leadership, across party lines, to have in place a piece of legislation that would help restore confidence in state institutions, in law, justice and the democratic rule of law in general.

Resumé: Koncem roku 2008 přijal Albánský Parlament Lustrační zákon (zákon č. 10034 z 22. prosince 2008), který byl podle slov albánských představitelů inspirován obdobným právním aktem přijatým v Československu v roce 1991. Albánský lustrační zákon vyžadoval mimo jiné lustraci představitelů zákonodárné, výkonné a soudní moci. Ačkoliv byl bojkotován opozicí, byl zákon přijat prostou většinou členů Parlamentu a vstoupil v platnost 30. ledna 2009. Autor se v tomto článku věnuje otázkám, zda je albánský lustrační zákon v souladu s mezinárodními závazky Albánie, zejména s Evropskou úmluvou o lidských právech. V této souvislosti analyzuje relevantní rozhodovací praxi Evropského soudu pro lidská práva a snaží se dovodit, která hmotněprávní ustanovení lustračního zákona jsou přijatelná,

a která nikoliv. Zároveň se článek zabývá i ústavněprávními otázkami a rozebírán je zejména způsob, jakým byl zákon přijat. Vzhledem k tomu, že lustrační zákon byl v Albánii přijat jako běžný zákon, zabývá se autor tím, zda a do jaké míry respektují jeho jednotlivá ustanovení obecný ústavněprávní rámec.

Key words: lustration Act, European Convention for Human Rights, European Court of Human Rights, general legal principles, decommunization.

On the author: JUDr. Vladimír Balaš, CSc. (*1959) is a Czech lawyer, currently teaching law at Charles University in Prague. Prior to his present position he taught law at the University of Western Bohemia in Pilsen, where he served as dean in 1993-1999, and headed the Institute of State and Law of the Academy of Sciences of the Czech Republic. Mr. Balaš specializes in public international law and comparative constitutional law, and has extensive experience in the theory and practice of international economic law and settlement of international investment disputes.

Introduction

A new political order replacing a totalitarian dictatorship inevitably faces numerous challenges. One of them is the question how to deal with the totalitarian past. There are many options in between drawing a thick line behind the past and a thorough and radical handling of the issue. The lenient as well as radical approaches all have their advocates. There is no general agreement as to the absolute necessity of social catharsis in the process of transition from the totalitarian rule to democracy. It is misleading to ask whether the new political order should deal with the former leadership or, instead, focus on the future. One can hardly convince people about the good intentions for the future without a meticulous dealing with the past

The expression "retroactive justice" that some political scientists use in connection with lustration laws is also inappropriate. These laws are not intended to punish those who were involved or actively assisted in the atrocities committed by the totalitarian regime. Their main purpose is to restore and build confidence in justice and law, including the democratic institutions and the independent judiciary, to safeguard the democratic development and prevent the restoration of the totalitarian rule. Another equally important purpose is to ensure that the country honours its commitments related to collective defence and cooperation with other democratic countries. To ensure that the legislation achieves all these aims, it is necessary to resist any temptation to use lustrations and similar mechanisms to political ends. There is no absolute guarantee against that; however, what can be done is to design a lustration law that fulfils their purpose while meeting the basic applicable requirements of fundamental international treaties and while providing all involved parties with the basic guarantees of due process. The requirements applicable to lustration laws fall into three groups: formal legal (the law should not violate international commitments and constitutional legislation), substantive legal requirements of fair and reasonable legislation, and procedural ones.

Lustrations process is not retroactive justice, nor undermines the rule of law and political stability. On the contrary, the main purpose is to promote democratic values. It is quite clear that to successfully consolidate democracy, it is necessary to remove from power, as thoroughly as possible, all institutions and individuals associated with the past regime. On comparing different national lustration laws, we note the broad range of approaches to "decommunization" in Central and Eastern Europe, the diversity of means used and of periods for which the decommunization measures are kept in place. This is only natural. The degree of repression varied considerably with time and place: each communist country had its periods of tough repression and periods of comparative relaxation. Undeniably, the situation in Albania was very specific. The Albanian communist regime was one of the toughest in the whole Central and Eastern Europe. The strength of this communist repression should be matched with the strength of decommunization measures, including the chosen means and the timeframe for their application. There is no single pattern of dealing with the totalitarian past. The local conditions play the decisive role.

International legal framework – general

Across the world, the ways of dealing with the totalitarian past fall into several broad patterns. To mention only some of them: the cases of Cambodia and the Republic of South Africa, the *ad hoc* international tribunals set up after World War II or the tribunals investigating the crimes committed on the population in Rwanda and former Yugoslavia. However, despite certain similarities, the Albanian case is rather different. The communist past is a problem specific to Central and Eastern Europe. As such, it is addressed by international institutions, organizations and documents of regional nature. Perhaps the most frequent debates on lustration legislation have taken place within the Council of Europe. Lustrations are quite well covered by the case-law of the European Court of Human Rights in Strasbourg (ECHR), and receive some attention within the European Union. One of the fundamental political documents adopted by the Council of Europe is Resolution 1096 (1996) 1 on measures to dismantle the heritage of former communist totalitarian systems. The resolution is considered a political document, since it does not constitute a formal legally binding act. By its nature, it is a soft-law instrument intended simply as a recommendation. However, it is certain that in case a complaint concerning lustration comes up before the ECHR, this resolution would not escape the attention of the Court.

In its first paragraph the resolution notes that the old structures and totalitarian thought patterns have to be dismantled and overcome in order to achieve the stated goals: to re-establish a civilized, liberal state under the rule of law[1] and create a pluralist

[1] The heritage of former communist totalitarian systems is not an easy one to handle. On an institutional level this heritage includes (over)centralisation, the militarisation of civilian institutions, bureaucratisation, monopolisation, and over-regulation; on the level of society, it reaches from collectivism and conformism to blind obedience and other totalitarian thought patterns. To re-establish a civilised, liberal state under the rule of law on this basis is difficult – this is why the old structures and thought patterns have to be dismantled and overcome.

democracy based on the rule of law and respect for human rights and diversity.[2] In its third paragraph, the resolution points to the dangers of a failed transition process and mentions the potential unfavourable international consequences of such development.[3]

The core idea is expressed in paragraph 4.[4] A state that wants to consider itself democratic must address its problems in ways appropriate to the situation. Nowhere, not even in this paragraph, does the resolution say that the shadows of totalitarianism should not be dealt with; it merely urges that the means used to deal with them should be compatible with a democratic state. This is an absolutely legitimate requirement. No judicious person would doubt that the means used to attain a goal are the best indicators of the underlying intention. The reformed society must choose different, democratic methods, act in accordance with the rule of law, and respect the natural rights of individuals as well as the basic procedural and other principles. However, it is questionable whether this requirement can realistically be met in situations where the democratic institutions are not yet fully restored. A good example is the question of confidence in the institution that represents one of the fundamental pillars of democracy under the classic division of powers – the judiciary. Only a judge with a clean past record can be expected to meet the requirement of judicial independence and to observe the standard democratic and legal principles of the rule of law. Accordingly, it is absolutely legitimate for the Albanian lustration legislation to deny any role in democratic institutions to judges who committed the grossest breaches of the most fundamental human rights. Otherwise, the country would not

[2] The goals of this transition process are clear: to create pluralist democracies, based on the rule of law and respect for human rights and diversity. The principles of subsidiarity, freedom of choice, equality of chances, economic pluralism and transparency of the decision-making process all have a role to play in this process. The separation of powers, freedom of the media, protection of private property and the development of a civil society are some of the means which could be used to attain these goals, as are decentralisation, demilitarisation, demonopolisation and debureaucratisation.

[3] The dangers of a failed transition process are manifold. At best, oligarchy will reign instead of democracy, corruption instead of the rule of law, and organised crime instead of human rights. At worst, the result could be the „velvet restoration" of a totalitarian regime, if not a violent overthrow of the fledgling democracy. In that worst case, the new undemocratic regime of a bigger country can present also an international danger for its weaker neighbours. The key to peaceful coexistence and a successful transition process lies in striking the delicate balance of providing justice without seeking revenge.

[4] Thus a democratic state based on the rule of law must, in dismantling the heritage of former communist totalitarian systems, apply the procedural means of such a state. It cannot apply any other means, since it would then be no better than the totalitarian regime which is to be dismantled. A democratic state based on the rule of law has sufficient means at its disposal to ensure that the cause of justice is served and the guilty are punished – it cannot, and should not, however, cater to the desire for revenge instead of justice. It must instead respect human rights and fundamental freedoms, such as the right to due process and the right to be heard, and it must apply them even to those people who, when they were in power, did not apply them themselves. A state based on the rule of law can also defend itself against a resurgence of the communist totalitarian threat, since it has ample means at its disposal which do not conflict with human rights and the rule of law, and are based upon the use of both criminal justice and administrative measures.

be able to meet the requirements spelled out in the introductory paragraphs of the resolution. Time limitation must not be allowed to preserve the *status quo*. Such leniency would open the door for the return of the old structures. In this particular respect, the Albanian lustration legislation, though far from perfect, does not conflict with the Council of Europe resolution; quite on the contrary, it seeks to fully meet its requirements. Paragraph 7[5] of the resolution recommends that crimes committed by individuals during the communist totalitarian regime should be punished under the standard criminal code. Passing and applying retroactive criminal laws is not permitted. Nevertheless, the Parliamentary Assembly of the Council of Europe was very well aware that the application, and even observance, of the national laws that were in force during the totalitarian rule might run counter to the standards recognized in democratic countries under the rule of law. That is why it does not regard as retroactive the application of general principles of criminal law recognized by civilized nations. In general, it puts totalitarian crimes on par with war crimes, crimes against humanity and other crimes for which civilized nations have no statute of limitations. The Council of Europe thus takes a clear stand to protect the general values originating in natural law. This is an important message and the only way to deal with the past.

The Council of Europe resolution further recommends that the prosecution of individual crimes should go hand-in-hand with the rehabilitation of people sentenced for acts which in a civilized society do not constitute crimes, in particular people sentenced for political reasons as well as political opponents of the totalitarian regime sentenced on fabricated criminal charges, since their trials were also mostly politically motivated. The Council of Europe also welcomes the opening of secret service files for public examination. It advises that property, including that of the churches, which was illegally expropriated during the totalitarian rule, should be restituted to its original owners. Unquestionably, these measures are of utmost importance in redressing the wrongs inflicted by the totalitarian regime.

[5] The Assembly also recommends that criminal acts committed by individuals during the communist totalitarian regime be prosecuted and punished under the standard criminal code. If the criminal code provides for a statute of limitations for some crimes, this can be extended, since it is only a procedural, not a substantive matter. Passing and applying retroactive criminal laws is, however, not permitted. On the other hand, the trial and punishment of any person for any act or omission which at the time when it was committed did not constitute a criminal offence according to national law, but which was considered criminal according to the general principles of law recognised by civilised nations, is permitted. Moreover, where a person clearly acted in violation of human rights, the claim of having acted under orders excludes neither illegality nor individual guilt.

Very important provisions are contained in paragraphs 11,[6] 12[7] and 13.[8] According to the Parliamentary Assembly, persons who have not been punished in accordance with paragraph 7 of the resolution, but who nevertheless held high positions in the former totalitarian communist regimes and supported them, should be subject to administrative measures such as those introduced by lustration or decommunization laws. The aim of these administrative 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 respect them now. However, paragraph 12 of the resolution says that the administrative measures must meet certain criteria. The most important one, expressly required by the resolution, is that guilt must be proven in each individual case. Collective guilt is inadmissible.

European Convention on Human Rights and the case-law of the European Court of Human Rights

Lustration cases brought before the ECHR concern mostly violations of the rights enshrined in the European Convention on Human Rights[9] (mainly Articles

[6] Concerning the treatment of persons who did not commit any crimes that can be prosecuted in accordance with paragraph 7, but who nevertheless held high positions in the former totalitarian communist regimes and supported them, the Assembly notes that some states have found it necessary to introduce administrative measures, such as lustration or decommunisation laws. The aim of these 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.

[7] The Assembly stresses that, in general, these measures can be compatible with a democratic state under the rule of law if several criteria are met. Firstly, guilt, being individual, rather than collective, must be proven in each individual case – this emphasises the need for an individual, and not collective, application of lustration laws. Secondly, the right of defence, the presumption of innocence until proven guilty, and the right to appeal to a court of law must be guaranteed. Revenge may never be a goal of such measures, 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.

[8] The Assembly thus suggests that it be ensured that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law, and focus on threats to fundamental human rights and the democratisation process. Please see the "Guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law" as a reference text.

[9] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 with Protocol Nos. 1, 4, 6, 7, 12 and 13. The text of the Convention had been amended according to the provisions of Protocol No. 3 (ETS No. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS No. 55), which entered into force on 20 December 1971 and of Protocol No. 8 (ETS No. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS No. 44) which, in accordance with Article 5, paragraph 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols are replaced by Protocol No. 11 (ETS No. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS No. 140), which entered into force on 1 October 1994, is repealed. Registry of the European Court of Human Rights September 2003.

6,[10] 8[11] and 14[12]) and its Protocol No. I, mainly Article 3[13]. The reasons given and the rights invoked by applicants differ widely, reflecting the diversity of lustration laws in post-totalitarian countries.

The ECHR judgment on Adamsons v. Latvia spells out the basic principles that must be met in order to keep the restrictions within the tolerable range. In connection with Article 3 of Protocol No. I, the Court notes that to be compatible with the Convention, the lustration process must meet certain conditions: lawfulness, legitimate aim, and proportionality of the measure.[14]

[10] Article 6. Right to a fair trial 1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
b. to have adequate time and facilities for the preparation of his defence;
c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

[11] Article 8. Right to respect for private and family life
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[12] Article 14. Prohibition of discrimination
The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

[13] Article 3. Right to free elections
The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

[14] a) *Lawfulness*: The applicant had been prevented from standing for election in application of the sub-section of the Parliamentary Elections Act which disqualified citizens who were or had been serving officers of organs of public security or intelligence or counter-espionage services of the USSR, the SSR of Latvia or a foreign State from elected office. In its final judgment upholding the decision to dismiss the applicant's appeal the Senate of the Supreme Court had refused to entertain the distinction drawn by the applicant between a KGB officer and an officer of the KGB Border Guard Forces, thereby acknowledging that the provisions of the law concerned applied to him. The judgment therefore appeared sufficiently well-reasoned and the conclusions were not arbitrary.
b) *Legitimate aim*: Having regard to the situation Latvia had experienced under the Soviet yoke and the active role played by the KGB, the main State security organisation of the former USSR, in keeping

In Ždanoka v. Latvia case, the ECHR recognized that the reasons for which the applicant was excluded from standing as a candidate to the national parliament could be considered to be in line with the requirements of Article 3 of Protocol No. 1. The Court found the statutory limitations to be neither arbitrary nor disproportionate, confirmed that such measures may be considered acceptable in view of the specific historico-political context, and recognized that national authorities, both legislative and judicial, are best placed to deal with individual cases. The Court merely observed that the national parliament should consider establishing a time limit on the restrictions. The Court concluded that there was no violation of Article 3 of Protocol No. 1.[15]

the totalitarian regime in place and combating all political opposition to that regime, the impugned Elections Act had served the legitimate purpose of protecting the independence of the State, its democratic order, its institutional system and its national security.

c) *Proportionality*: In the light of the particular socio-historical background to the applicant's case, the Court could accept that during the first years after Latvia had regained independence electoral rights could be substantially restricted without this infringing Article 3 of Protocol No. 1. However, with the passing of time, a mere general suspicion regarding a group of persons no longer sufficed and the authorities had to provide further arguments and evidence to justify the measure in question. The legal provision applied in this case targeted former officers of the KGB. Having regard to the wide-ranging functions of that agency, that concept was too broad: taken at face value it could be understood to include all those who had served in the KGB, regardless of the period concerned, the actual tasks they had been assigned and their individual conduct. The Constitutional Court had expressly mentioned this problem. The present case was fundamentally different from the *Ždanoka* case. Unlike in that case, it was not sufficient here simply to find that the person belonged to the group concerned. As that group was defined in terms which were too general, any restriction on the electoral rights of its members should take a case-by-case approach which would allow their actual conduct to be taken into account. The need for such a case-by-case approach grew greater over the years, as the period when the impugned acts were supposed to have taken place grew more distant in the past. The applicant had never been accused of having been directly or indirectly involved in the misdeeds of the communist totalitarian regime, such as repression of political and ideological opposition, informing against people or taking any other measure against them. There appeared to be nothing in the applicant's past to suggest that he had opposed or expressed hostility to the recovery of Latvia's independence and democratic order. Moreover, the applicant had not officially been declared disqualified from standing in elections until much later, after a remarkable ten-year military and political career in Latvia as re-established. Indeed, from his return he had held very important posts before embarking on a parliamentary career. Only the most compelling reasons could justify disqualifying the applicant in such conditions. In the absence of any information revealing new facts about the applicant, his disqualification was clearly at odds with the principle of legitimate trust. The ten-year period during which restrictions provided for in other legal instruments could be applied to former KGB officers was to expire in June 2004. Shortly afterwards, however, Parliament had extended it by another ten years. As neither Parliament nor the Government had explained the reasons for the extension, in spite of the passage of time and the stronger stability now enjoyed by Latvia thanks to its full integration into the European fold, the only possible conclusion was that the extension of the ban had been clearly arbitrary in respect of the applicant. Moreover, the facts of the present case revealed that the Constitutional Court of Latvia had found it possible to adopt a case-by-case approach in respect of another former KGB officer. It followed that the authorities had exceeded their acceptable margin of appreciation and the interference complained of was incompatible with the requirements of Article 3 of Protocol No. 1.

[15] The Court's observations in conclusion

The Latvian authorities' view that even today the applicant's former position in the CPL, coupled

The above quoted ECHR judgments on the justifiability of the restrictions introduced by lustration laws clearly show that the Court's approach is far from stereotyped. Each case is viewed in the national context, national legislation is thoroughly studied and due account is taken of the actions of the competent national authorities in the given case. None of the ECHR judgments can be read as implying that the restrictions are *a priori* inconsistent with the applicable international treaties; in fact, the opposite is the case.

Albanian constitutional framework

Albania is a member of the Council of Europe and a party to the European Convention on Human Rights and the Protocols thereto, as well as to a number of human rights treaties of regional and universal nature. The way the international commitments are reflected in the Albanian constitution is one of the joint elements

with her stance during the events of 1991 (see, in particular, paragraphs 123-24 above), still warrant her exclusion from standing as a candidate to the national parliament, can be considered to be in line with the requirements of Article 3 of Protocol No. 1. The impugned statutory restriction as applied to the applicant has not been found to be arbitrary or disproportionate. The applicant's current or recent conduct is not a material consideration, given that the statutory restriction in question relates only to her political stance during the crucial period of Latvia's struggle for "democracy through independence" in 1991.

While such a measure may scarcely be considered acceptable in the context of one political system, for example in a country which has an established framework of democratic institutions going back many decades or centuries, it may nonetheless be considered acceptable in Latvia in view of the historico-political context which led to its adoption 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 the former regime. The Court therefore accepts in the present case that the national authorities of Latvia, both legislative and judicial, are better placed to assess the difficulties faced in establishing and safeguarding the democratic order. Those authorities should therefore be left sufficient latitude to assess the needs of their society in building confidence in the new democratic institutions, including the national parliament, and to answer the question whether the impugned measure is still needed for these purposes, provided that the Court has found nothing arbitrary or disproportionate in such an assessment. In this respect, the Court also attaches weight to the fact that the Latvian parliament has periodically reviewed section 5(6) of the 1995 Act, most recently in 2004. Even more importantly, the Constitutional Court carefully examined, in its decision of 30 August 2000, the historical and political circumstances which gave rise to the enactment of the law in Latvia, finding the restriction to be neither arbitrary nor disproportionate at that point in time, that is, nine years after the events in question (see paragraphs 61-63 above).

It is to be noted that the Constitutional Court observed in its decision of 30 August 2000 that the Latvian parliament should establish a time-limit on the restriction. In the light of this warning, even if today Latvia cannot be considered to have overstepped its wide margin of appreciation under Article 3 of Protocol No. 1, it is nevertheless the case that the Latvian parliament must keep the statutory restriction under constant review, with a view to bringing it to an early end. Such a conclusion seems all the more justified in view of the greater stability which Latvia now enjoys, *inter alia*, by reason of its full European integration (see paragraph 51 above). Hence, the failure by the Latvian legislature to take active steps in this connection may result in a different finding by the Court (see, *mutatis mutandis*, Sheffield and Horsham v. the United Kingdom, 30 July 1998, § 60, Reports 1998-V; see also the follow-up judgment to that case, Christine Goodwin v. the United Kingdom [GC], no. 28957/95, §§ 71-93, ECHR 2002-VI).

The Court concludes that there has been no violation of Article 3 of Protocol No. 1.

of the constitutional and international law that will be at least briefly examined in this report. Naturally, the most important international human rights instruments binding on Albania are a major factor in shaping the constitutional system, including the safeguards of fundamental human rights and freedoms. The international human rights commitments voluntarily assumed by Albania form a basic international legal framework from which the national legislation must not deviate, and it is important to note that the obligation to avoid deviating is not a mere formality, especially where human rights are at stake – the commitments must strictly be honoured and the approach to them must conform to international law. This means that it is necessary to watch the way the given international legal concept "lives" in the interpretation and application practice of international authorities, especially judicial ones, so as to be sure that national authorities, legislative, executive and, last but not least, judicial ones, apply a similar approach wherever reasonably possible. A comprehensive analysis of the Albanian lustration legislation must take a look on both its international and constitutional legal framework. This is necessary because some national legal acts do not *prima facie* seem inconsistent with international law. In this respect, most of the rules contained in the Lustration Act under review seem consistent at first sight; however, they may prove inconsistent with the constitutional framework, especially as regards the hierarchy of national legislation, the formal requirements applicable to the form and procedure for adopting such legislation, and some other issues. Therefore, let us take a look at the Albanian constitutional framework.

The Albanian Constitution of 21 October 1998 is a modern document obviously inspired by modern European democratic constitutional tradition. We will seek to identify all elements relevant to the analysis of the Lustration Act.

In Part I – Basic Principles – there is almost no relevant provisions, with the possible exception of Article 1 (3) which says that "governance is based on a system of elections that are free, equal, general and periodic"; that, however, does not tell us whether the right to vote can be restricted. Perhaps the most important provision is Article 5, according to which "the Republic of Albania applies international law that is binding upon it". This provision, though at first sight purely declaratory, may be interpreted in accordance with the *ut res magis valeat quam pereat* principle as an instruction to all state authorities, legislative, executive as well as judicial, and to local government bodies, to respect international legal commitments and take them into account in the exercise of power.

The Albanian Constitution is a full (comprehensive) constitution including a catalogue of fundamental human rights and freedoms. There are regulated by Part II, which contains some basic provisions relevant to the legislation under review. The most interesting ones are in Article 17 which says how and when it is possible to restrict the human rights and freedoms safeguarded by the Constitution:

Art. 17

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

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

In the light of this provision, it might seem that the Lustration Act was adopted in accordance with the Constitution. The ECHR does not, in general terms, rule out the adoption of lustration laws and, as noted above, even the Parliamentary Assembly of the Council of Europe agrees that for many reasons it is important to deal with the past and redress the wrongs committed by totalitarian communist regimes. However, what may pose a problem is the question what kind of legislation is needed to restrict the rights, i.e. what majority is required to adopt a law restricting constitutional rights. As we shall see later, it is necessary to examine the relationship between laws of equal force and to determine which of them are special and which are general legislation (for the proper application of the principle *lex specialis derogat legi generali).*

An unquestionably important provision of the Albanian Constitution concerning the right to judicial protection is Article 42 which says that:

The freedom, property, and rights recognized in the Constitution and by law may not be infringed without due process.

Everyone, to protect his constitutional and legal rights, freedoms, and interests, or in the case of an accusation raised against him, has the right to a fair and public trial, within a reasonable time, by an independent and impartial court specified by law.

Chapter III concerning political rights and freedoms safeguards the citizen's active and passive right to vote and lists the applicable restrictions. The right to vote is denied only to people who have been declared mentally incompetent; nevertheless, the language of this provision is rather vague and might cause some problems. The available English translation of the Constitution suggests that while "mentally incompetent" people do not have the right to vote, there is nothing to prevent them from being elected *(but I suppose that this is only an error in the English translation)*. Should this be the case, the problem would have to be eliminated by interpretation using the *a minori ad maius* argument. A person who is not qualified to vote is even less qualified to be elected. In addition, there is a restriction applicable to convicts serving a sentence, who have only the active right to vote.[16] Otherwise, there are no restrictions; the only way to introduce them would be through a constitutional law.

[16] Every citizen who has reached the age of 18, even on the date of the elections, has the right to elect and to be elected. Citizens who have been declared mentally incompetent by a final court decision do not have the right to elect. Convicts that are serving a sentence that deprives them of freedom have only the right to elect. The vote is personal, equal, free and secret.

The Constitution itself provides that laws must be adopted by a three-fifths majority of all members of the Assembly (cf. Art. 81[17]). The positions that cannot be held by deputies or people running as candidates are listed in Article 69. Article 71 (2) lists the reasons for which a deputy's mandate comes to an end or is declared invalid.

Part VII of the Albanian Constitution (Chapter I) provides that normative acts that are effective in the entire territory of Albania are (a) the Constitution, (b) ratified international agreements, (c) the laws, and (d) normative acts of the Council of Ministers (the government). There are standard provisions on the duty to publish normative acts in the Official Journal and provisions stating that laws of lower legal force are issued to implement laws of higher legal force and must conform to these hierarchically superior laws. Chapter II concerning international agreements provides that ratified international agreements (the Albanian Constitution uses the expression *promiscue* when referring both to ratification and parliamentary approval) become part of the legal system upon their publication in the Official Journal. Agreements that are self-executing are directly implemented. In the event of any inconsistency between a ratified international agreement and national law, the ratified international agreement takes precedence (Article 122). The relationship between international and national law, at least insofar as international treaties are concerned, is based on the monistic theory and the language of the Albanian Constitution does not give rise to any doubts.

The provisions most relevant to the legislation under review can be found in the next part of the Constitution – Part VIII – Constitutional Court.

Article 127 lists the situations in which the term of a Constitutional Court judge comes to an end, and Article 128 lists the grounds on which a Constitutional Court judge can be removed from office by a vote of two thirds of all members of the Assembly.[18] The process is somewhat unclear. A question is how to interpret those provisions, e.g., whether a Constitutional Court judge can be removed for acts he hypothetically committed in the past in the service of the totalitarian regime.

[17] Article 81
1. The Council of Ministers, every deputy and 20,000 electors each have the right to propose laws.
2. There are approved by three-fifths of all members of the Assembly:
   a. the laws for the organization and operation of the institutions contemplated by the Constitution;
   b. the law on citizenship;
   c. the law on general and local elections;
   d. the law on referenda;
   e. the codes;
   f. the law on the state of emergency;
   g. the law on the status of public functionaries;
   h. the law on amnesty;
   i. the law on administrative divisions of the Republic.

[18] Art. 128 The judge of the Constitutional Court can be removed from office by the Assembly by two-thirds of all its members for violation of the Constitution, commission of a crime, mental or physical incapacity, acts and behaviour that seriously discredit the position and reputation of a judge. The decision of the Assembly is reviewed by the Constitutional Court, which upon verification of the existence of one of these grounds, declares the removal from duty of the member of the Constitutional Court.

I believe that the only correct answer is yes – past conduct can seriously compromise the judge's authority and reputation.

Similar rules apply to the removal of Supreme Court judges (Article 140). Decisions on the removal of Constitutional Court and Supreme Court judges are reviewed by the Constitutional Court; this gives the Constitutional Court a very special status in the Albanian court system.[19] Other judges, i.e. judges of first instance and appellate courts, are removed by a decision of the High Council of Justice on similar grounds as Supreme and Constitutional Court judges. Article 147 of the Constitution does not specify the quorum nor the majority required for such decisions. Presumably, a simple majority constitutes the quorum and an absolute majority of members present is necessary for decisions on disciplinary issues. Complaints against the decisions of the High Council of Justice can be filed with the Supreme Court that, apparently, decides on them in a plenary session.[20]

Except for the above possibilities, there is no other constitutional way to remove a judge. What might raise some objections is the possibility to punish judges for actions predating the adoption of the Constitution and even the change of the regime. The question of possible retroactive operation of the Constitution or, generally, of a *ratione temporis* limitation on the applicability of its provisions, seems to be only a quasi-problem. The fact that a "control mechanism" appeared at a more recent date does not mean that nobody could have committed acts that, from the present perspective, discredit him as a judge. An analogical example might be the argument used by some war criminals, claiming that since the international tribunal deciding on their guilt and punishment did not exist at the time when they committed their crimes, it has no authority to try them. However, *nullum crimen sine lege* and *nulla poena sine lege* are principles of substantive law, and non-existence of a tribunal at the time when the crimes are committed cannot pose an obstacle to the course of justice. Otherwise, the ICTY would never be able to try and sentence e.g. Mladić, not to mention both post World War II tribunals.

In the conclusion of this chapter, it should be added that according to the Constitution the exercise of certain human rights and freedoms in Albania can be restricted only in the cases described in Part XVI – Extraordinary Measures. According to Article 170, the extraordinary situations warranting such restriction are the state of war, state of emergency and natural disasters.

[19] Art. 140 A judge of the High Court may be discharged by the Assembly with two-thirds of all its members for violation of the Constitution, commission of a crime, mental or physical incapacity, or acts and behaviour that seriously discredit the position and image of a judge. The decision of the Assembly is reviewed by the Constitutional Court, which, upon verification of the existence of one of these grounds, declares his discharge from duty.

[20] Art. 147 (6) A judge may be removed from office by the High Council of Justice for commission of a crime, mental of physical incapacity, acts and behaviour that seriously discredit the position and image of a judge, or professional insufficiency. The judge has the right to complain against this decision to the High Court, which decides by joint colleges.

Historical development of lustration legislation in Albania

Like many other post-totalitarian European countries, Albania has been facing many challenges related mainly to the need to complete the process of political and economic transformation. Unquestionably, one of these challenges is the break with the totalitarian past as a crucial condition for political change. In Albania, the efforts to deal with the past started early, before the first free elections, and it was already at this time that the first criminal proceedings were set in motion. In the preamble to Act No. 7514/1991 adopted in 1991 (which concerned compensations and is not to be regarded as lustration legislation), the Parliament apologized to those who were accused, tried, sentenced and imprisoned, interned or persecuted for political reasons in the past 45 years.[21]

Act No. 7514 did not cover only people living in Albania itself. It declared innocent also those who fled the country during the communist rule and many other categories of persons. All people who had suffered harm or damage were guaranteed extensive rights and entitlements, including compensations for labour in prisons and labour camps.[22]

The Act remains in force and has been modified through several amendments, lastly in 2003. There are problems with its implementation; nevertheless, the victims did receive some compensations on its basis.[23] Act No. 7514 was accompanied by legal acts concerning restitution of property, e.g. Act No. 7501/1991 regulating i.a. the agricultural land reform under which state-owned land was transferred to farmers. This was, however, only a partial reform, in no case intended to remedy the consequences of the 1946 general land reform. The main privatization and restitution legislation followed in 1993, but its implementation was again mostly inconsistent.

[21] Public Debates on the Past: The Experience in Albania by Kathleen Imholz, For the seminar "Past and Present: Consequences for Democratisation", Belgrade, 2-4 July 2004, p. 3 "Even before the DP victory, during the coalition period, there was an attempt to deal with wrongs done under the Communist regime, including the initiation of some criminal prosecutions." In the preamble to law No. 7514, passed at the end of September 1991, Parliament apologized to persons who "were accused, tried, sentenced and imprisoned, interned or persecuted during 45 years for violations of a political nature, doing violence to their civil, social, moral and economic rights," saying that "the first pluralist Parliament of the Republic of Albania … considers it in its honor, as the highest representative of the people, … to ask pardon of these people for the political punishments and sufferings that they underwent in the past."
Kathleen Imholz is an Expert on Law Drafting and Legal Approximation who has been working in Albania almost continuously since April 1991, at present she works as an Expert on Law Drafting and Legal Approximation with the EURALIUS – European Assistance Mission to the Albanian Justice System.

[22] Ibid.

[23] Ibid. p. 4: "From 1993 to 1997, there was some implementation of this law, but to the best of my knowledge, it was erratic. As the issue has recently heated up again, government figures have been released (not undisputed) indicating that several billion lek (in the area of US $20,000,000) were paid to people during that period. The intricacies of the implementation of that law would make for an extremely long paper, and this short discussion has many other subjects to cover."

Laws and measures with similar aims as those adopted to implement the lustration legislation first appeared in Albania in 1992; in this context, reference is usually made to § 24 (1) of the Labour Code, followed by Act No. 7666/1993 of 26 January 1993. This Act is considered the first Albanian lustration law and compared to Central and East European legislations as regards its content and purpose.[24] It had a rather narrower scope – it created a state commission competent to withdraw law licences from former officers or collaborators of the totalitarian secret police (Sigurimi), from people who held various positions in the former Albanian Communist Party, and those who were involved in actions such as border killings. This legislation was abolished by the Albanian Constitutional Court. The subsequent (rather hasty) effort to fill the posts of those lawyers who were to be removed failed as well. It is extremely doubtful whether sufficiently qualified judge or prosecutor can be trained in six months. Senior communist party leaders were tried in 1991-1995 and mostly given prison terms not exceeding ten years.

Act No. 8043/1995 "On the Control of the Moral Figure of Officials and Other Persons Connected with the Protection of the Democratic State" was adopted in late 1995, apparently in an effort to put into place standard lustration legislation. As its adoption coincided with the run-up to the parliamentary elections, some segments of the society perceived it as an instrument in the political struggle; there were several cases where the commission set up by the Act (Mezini Commission) barred people from standing as candidates with reference to the Act. Most of the Mezini Commission's decisions were upheld on appeal by the Albanian Supreme Court. The scope of application of Act No. 8043/1995 was narrowed down by several amendments reflecting Albania's commitments related to Council of Europe membership and by several decisions of the Albanian Constitutional Court.

The political turbulences following a series of scandals in Albania in 1996 and 1997 brought to power the Socialist Party. Obviously, a political entity transformed from the former communists was not particularly eager to see the lustration legislation efficiently applied. However, their government did not repeal the act and left it in force, though with a limited scope, until the expiry date set in the act itself (end of 2001). From their coming to power until the expiry date of the act, only one judge was removed on the grounds of collaboration with the communist secret service.[25]

[24] Ibid. p. 5. Another example was the law passed in January 1993 for a special state commission involving private lawyers. Albania has not had many laws of the type known as "lustration laws," but this was its first. Like Bulgaria's "Panev law" of the early 1990's, which was directed at members of the academic community, law No. 7666 dated 26 January 1993 had a narrow focus. It set up a state commission to remove the law licenses of those who had been officers of or collaborators with the Sigurimi (the Communist Secret Police), had served in various party positions and engaged in certain specific actions, such as taking part in border killings. You will find a complete list of the criteria in Appendix B, which is an article from the East European Constitutional Review that I wrote in 1993, after Albania's new Constitutional Court, established only in 1992, overturned the law.

[25] See also in Kathleen Imholz, Public Debates on the Past: The Experience in Albania, p. 8 and in P. Hradečný and L. Hladký, *Dějiny Albánie* [History of Albania], Nakladatelství Lidových novin, 2008, p. 550.

New lustration legislation

The Lustration Act examined in this report (Act No. 10 034/2008) was adopted at an unfortunate moment and in a rather unfortunate way. Here, I refer mainly to the formal requirements laid down in Albanian legislation for the adoption of laws that are, or might be, inconsistent with the constitutional framework or international commitments. Immediately after its adoption, the Act was denounced by some critics as a weapon in the election struggle. The harsh, ill-considered and formally imperfect step of the Democratic Party was damaging not only to this party itself, but also to the Albania's outlooks of adopting lustration legislation that would benefit the whole country.

Some restrictive measures can be put into place by ordinary laws, while others must be approved by a qualified or constitutional majority. It is more than obvious that neither the sponsors of the existing Lustration Act nor the legislators bothered to go through these formalities, whether deliberately or due to the lack of knowledge. Unfortunately, by allowing this they disqualified themselves to a certain degree, and discredited the effort and the idea that was worth pursuing to the very end. To be recognized as consistent with the constitutional legislation the Lustration Act would need to go through many amendments and repeals, and the restrictions will have to be put into place again in an appropriate manner. The scope of application (impact) of the Lustration Act will play a decisive role in considering whether it is more practical to amend it step-by-step, or rather to replace it with a new act complying with all formal requirements and essential international standards.

Despite any objections that may be raised by those who oppose lustration legislation as such, it is obvious that every sovereign state has the full right to set the basic conditions for the functioning of its institutions. This includes the essential requirements applicable to the senior officials and staff of such institutions. Access to certain positions filled by election or appointment might be limited as well. States must take care to avoid any inconsistency with their national laws of higher legal force and with their international commitments. As long as these standards are met, the international community should not *a priori* reject Albanian lustration legislation. Quite on the contrary.

New Lustration Act (Act No. 10 034/2008)[26] in Albania and its problematic instances

The new Albanian Lustration Act was adopted as an ordinary law by a standard majority. It has five parts including substantive as well as procedural rules. Chapter I contains general provisions; its five articles define the purpose (Article 1) and subject-matter of the Act (Article 2), specify the positions that are subject to lustration (Article 3), list the positions and activities in totalitarian structures which disqualify

[26] Law No. 10 034 dated 22. 12. 2008, On the Cleanliness of the Figure of High Functionaries of the Public Administration and Elected Persons.

an individual from holding the positions specified in the previous article (Article 4), and lay down the rules concerning conflict of interests (Article 5). According to Article 5, an individual whose past record includes any of the positions or activities listed in Article 4 cannot become a member of the "Authority for Checking Figures" – an administrative authority whose status, functions and composition are regulated by Chapter II, Articles 6-12. It is established to screen individuals who hold or apply for public posts, or of any judicial body competent to review the administrative acts of the "Authority for Checking Figures". Chapter III, Articles 13-26, regulates the lustration procedure and the way it is initiated, the duty of heads of the institutions that are subject to lustration to notify the Authority about each appointment or election, the rules for convening the Authority's meetings, its rules of procedure, the rules concerning conflict of interests, the way to obtain the necessary documents, voting, the final result of the verification procedure, the effect of the decision (more precisely, of the certificate issued on the basis of the decision), the possibility of judicial review, transparency and the right of an individual to inspect his/her own secret police files. Chapter IV contains transitional provisions (Articles 27 and 28), which require that the records of the commission set up under the previous lustration law should be made available to the Authority (a new body responsible for lustrations) within a statutory deadline, and that all individuals holding the positions listed in Article 3 of the Lustration Act should be screened within six months. Chapter V (Final Provisions) determines the period for which the Act will be in force and contains provisions related to it entry into force.

According to Article 1, the purpose of the Act is to ensure that every individual appointed or elected to a public position has a clean past record, in particular to make sure that in 1944-1990 he was not part of the structures that implemented the policy of violence and dictatorship of the proletariat or of secret police structures, and also to ensure that individuals who were part of, had senior roles in or cooperated with totalitarian structures do not hold important public service positions. Article 3 specifies the positions that are subject to lustration. It concerns all public officials, elected or appointed, who for the time being hold or will hold any of the positions listed in the Act. The *ratione materiae* scope of the Act is relatively broad, but does not seem to differ much from what is almost a standard in other post-totalitarian countries. Article 4 listing the positions or activities in totalitarian structures that disqualify an individual from holding the public positions specified in Article 3 is a standard as well. It is understandable that, like in the other countries that have adopted lustration legislation, the Albanian legislator tailored the law to local conditions and created a list of disqualifying positions and types of cooperation that is completely relevant to the local conditions.

The Act itself has several weak points that detract from its value and significance and should be corrected as soon as possible. Unfortunately, what also contributes to the loss of value and gives rise to doubts is the time and manner in which the Act was adopted. Generally, the main problem is that the Lustration Act was adopted as an

ordinary law although it interferes with the rights guaranteed by the Constitution. This means that the real issue is not the conflict (or supposed conflict) between the Lustration Act and the international treaties to which Albania is a party, but rather the conflict between the Lustration Act and legislation of superior force – the Constitution. This conflict is apparent already in Article 1. The Lustration Act applies to elected officials, although the Constitution does not foresee any restrictions in this respect. Moreover, it is also questionable whether the Constitution actually gives anybody the authority to restrict the active or passive right to vote on the grounds listed in the Lustration Act. As noted above, this is a purely an Albanian constitutional problem; in the international context (see the ECHR decisions cited above) it is recognized that certain circumstances may warrant a restriction of the right to vote. Even the Albanian Constitution permits the restriction of certain human rights and freedoms (Article 17 of the Constitution)[27]; however, these restrictions must be put into place in accordance with the Constitution. In its introductory provisions, the Lustration Act of 2008 year refers to Articles 78 and 83[28] of the Constitution. This, nevertheless, does not by itself show whether the Act complies with other provisions of the Constitution – it would be more relevant to refer to Article 17. However, even in the absence of such reference, the consistency between the Lustration Act and the Constitution must be examined. I would submit that linguistic interpretation of the Lustration Act might even prove right those who say that the Act complies with constitutional principles and with the *lex superiori derogat legi inferiori* principle exactly because it complies with the dispositions of Article 17 of the Constitution. In this case, the "disposition" is the regulatory part that determines what is to be done if a hypothesis happens. If there exists a public interest or a need to protect the rights of others as required by the hypothesis, it is possible to adopt an act restricting some rights and freedoms. It is therefore up to the legislator to prove that the Lustration Act was adopted in accordance with Article 17 of the Constitution, i.e. on the basis

[27] Art. 17
The limitation of the rights and freedoms provided for in this Constitution may be established only by law for a public interest or for the protection of the rights of others. A limitation shall be in proportion with the situation that has dictated it.
These limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention on Human Rights.

[28] Art. 78
The Assembly decides with a majority of votes, in the presence of more than half of its members, except for the cases where the Constitution provides for qualified majority.
Meetings of the deputies, which are convened without being called in accordance to the regulations, do not have any effect.
Art. 83
A draft is voted on three times: in principle, article by article, and in its entirety.
The Assembly may, at the request of the Council of Ministers or one-fifth of all the deputies, review and approve a draft law with an expedited procedure, but not sooner than one week from the beginning of the procedure of review.
The expedited procedure is not permitted for the review of the drafts contemplated in Article 81,paragraph 2, with the exception of subparagraph a.

of the authority granted to him by this article, and that the restrictions imposed on certain human rights of certain individuals are justified by concerns about the democratic development in Albania and namely by the need to restore confidence in the fundamental institutions of the State, the legislative, executive and judicial powers. Likewise, the legislator must prove that the measures are proportionate to the existing threat.

Another problematic point of the lustration law are the provisions affecting judges. In this case, Article 17 of the Constitution cannot be applied and any attempt to remove judges with reference to lustration might be considered unconstitutional. Due to the legal force of the Lustration Act and its status in the hierarchy of laws, the lustration procedure is likely to cause considerable tensions, and would almost certainly be found unconstitutional by any reasonable constitutional court. A solution would be either to adopt a lustration law as part of constitutional legislation, or to require only the lustration of candidates for judicial appointments. The existing judges would be subject to the constitutional rules that determine when and under which circumstances judges could be recalled. As suggested above, the existing constitutional procedure could be utilised to achieve the very same aim as is declared in the Lustration Act in relation to judges with a past record tarnished by service to the totalitarian regime.

As a side note, we should mention that some of the terms used in the Lustration Act are not clear enough. The expression "collaborators" [Article 4 (e)] might be used in reference to all Albanian citizens who did not speak up against the totalitarian regime, or strictly in reference to secret police informers who were aware, or should have been aware, of the serious harm they might be causing to their fellow citizens. We also consider it necessary to point out that the whole Act is based on presumption of guilt, which is inadmissible in criminal law. The Lustration Act is not, by its nature, criminal legislation. However, this does not mean that it should not be based on proven collaboration with the totalitarian power that violated the fundamental human rights and freedoms of others. Moreover, the fact that an individual appeared as a witness in a political trial does not necessarily mean that he/she committed any wrongdoings or that any wrongdoings can be attributed to him/her without question or proof, and it certainly does not mean that the individual testified freely according his true will. It is quite easy to imagine that the totalitarian power might have used very serious threats or intimidation to coerce people to testify. One must also bear in mind that secret police records (archives and documents) do not necessarily have much informative value and may include references to people who never committed anything morally wrong. The secret police was a professional institution with considerable expertise in document tampering, and its archives are hardly a source of reliable information. It is practically certain that secret police records in post-totalitarian countries could be and were tampered with.

We also have some objections as regards Chapter II of the Act. The Authority's composition and decision-making procedures give rise to doubts. We think that the

way of constituting the Authority guarantees neither its independence nor expertise and, even less, its apolitical character. In our opinion, the provisions of Article 6 (2) and (4) are almost mutually exclusive.[29] The very idea of voting on the fate of the individuals who are subject to lustration, as envisaged in Article 19, calls to mind political tribunals and communist-era "screening commissions", rather that a genuinely independent body. Other problematic or inconsistent provisions appear throughout the text. A question is what will happen when the majority of members of the Authority disqualify themselves from a case on the grounds of bias. The Act is not quite clear about the composition and functions of the Commission [cf. e.g. Article 20 (3)] and about the suspensive effect of applications for judicial review of the Authority's decisions (cf. the language of Article 23 (3)). It is also not clear whether the guarantee of access to the individual's own files will ensure for the side of defence a full equality of opportunities compared with those of the Authority or a court. The Act does neither specify what information should the Authority present to the courts reviewing its decisions.

Reaching a consensus on the choice of a chairman will also be a very difficult process. It may take the members of the Authority quite a long time to agree on a suitable candidate. Moreover, the Act does not set any deadlines for this election. Presumably, this is covered by the "Rules"; however, the text of the "Rules" was not available at the time of writing this report. Regretfully the specific rules on the procedural aspects of the functioning of the Authority are not incorporated in or annexed to the Act.

The quoted provisions suggest that the process of appointing the Authority is rather heavily politicized, which brings the impartiality of this body into doubt. It is a pity that the appointment process does not follow the path outlined in paragraph 5, which enables the civil society to nominate candidates in situations where an agreement on the chairman cannot be reached or where any of the political groups fails to act. In all likelihood, the problem is that "civil society" can be a rather vague expression, and it is also not clear who represents, or may represent, its individual segments. As a matter of fact, this may cause problems also in applying the procedure described in paragraph 4. Again, there are no deadlines and no clear procedures for inviting "civil society" nominations; and it is even less clear who, and through what procedure, would be selected on their basis.

One additional comment on the language of the Article 6: the assumption underlying this article is that the political map of the Albanian Parliament will

[29] Art. 6
2. The Authority is organised and functions in an independent manner, according to the rules defined in this law and in its rules of functioning.
The Authority consists of five members, who are proposed as follows:
two representatives of the parliamentary majority;
two representatives of the parliamentary minority;
the chairman by consensus.

remain unchanged. This is a possibility but not a certainty. Even a minor change can cause problems in determining the parliamentary majority and minority and the way in which the majority and minority parties should communicate on candidates.

Most of the objections raised in the previous paragraph are not as serious as the problems with constitutionality or compliance with international commitments; nevertheless, their clarification is equally important for effective functioning of the Lustration Act. What can pose problems as regards compliance with international instruments is the inequality of arms and lack of clarity about procedural matters. The right to fair and just process is one of the cornerstones of human rights protection on universal and well as regional level. That is why we believe that the Lustration Act should go much more into detail on the procedural guarantees and procedures, in order to eliminate any doubts and thus to avoid any hindrance to its effective application.

Conclusion

Finally, we believe that adoption of lustration legislation is feasible and there is nothing in Albania's international commitments and constitutional framework to prevent it. The Lustration Act should meet the basic requirements for an efficient regulation, including namely procedural guarantees and compliance with superior legislation. The extension of the applicability period of the lustration legislation is also no problem; we even believe that in the specific conditions of Albania, the time-limit for its applicability (2014) might cause difficulties. However, one can well imagine that the aims that are drawn together under the umbrella of the Lustration Act might be achieved in other ways, by incorporating restrictive provisions in individual laws applicable to the functioning of the government and local self-government authorities. The Lustration Act is likely to undergo some changes and it is not excluded that some of its provisions will be repealed by Constitutional Court rulings. However, this does not mean that it is not in the interest of the Albanian political leadership, across party lines, to have in place a piece of legislation that would help restore confidence in state institutions, in law, justice and the democratic rule of law in general.

Albania needs a lustration act. Its adoption is in the interests of the strongest government party as well as of the democratic opposition. The country needs legislation that would boost its credibility. An ill conceived law may undermine it. Moreover, failure to put into place a legislation guaranteeing compliance with the basic security standards of international organizations such as NATO may get the country into serious problems as regards the fulfilment of international commitments. For these and other reasons, it is necessary to either adopt a new Lustration Act, or to modify the existing legislation by a series of amendments, or, alternatively, to incorporate in other relevant laws provisions restricting access to certain positions, to classified information, etc.