Decision no.9, dated 23.03.2010

(V – 9/10)

The Constitutional Court of the Republic of Albania, consisting of: Vladimir Kristo, President, Fehmi Abdiu, Kujtim Puto, Xhezair Zaganjori, Petrit Plloçi, Vitore Tusha, Sokol Sadushi, Admir Thanza, Sokol Berberi, members, with secretary Blerina Çinari, took under examination in open judicial session on 07.05.2009 the case with Act. No.5/2, pertaining to:

A P P E L L A N T S:

A GROUP OF DEPUTIES OF THE ASSEMBLY OF THE REPUBLIC OF ALBANIA, represented by Shega Ligori and Arian Salati, with authorisation.

THE NATIONAL ASSOCIATION OF PROSECUTORS, represented by Dashamir Kore, with authorisation.

THE ALBANIAN HELSINKI COMMITTEE, represented by Vasilika Hysi, with authorisation.

INTERESTED SUBJECTS:

THE ASSEMBLY OF THE REPUBLIC OF ALBANIA, represented by Lulzim Lelçaj, with authorisation.

THE COUNCIL OF MINISTERS, represented by Viktor Gumi and Marsida Xhaferllari, with authorisation.

PRESIDENT OF THE REPUBLIC, absent.

THE HIGH COURT, absent.

THE HIGH COUNCIL OF JUSTICE, absent.

THE GENERAL PROSECUTOR, absent.

T H E O B J E C T:

a) The declaration of law no.10034, dated 22 December 2008 "On the cleanliness of the figure of high functionaries of the public administration and elected persons" as incompatible with the Constitution of the Republic of Albania;

b) The suspension of implementation of the law until the announcement of the final decision of the Constitutional Court.

LEGAL BASIS: Articles 3, 4, 7, 30, 34, 45, 71, 81, 87, 90, 92, 98, 107, 115, 116, 124, 127, 128, 131; 134, 135, 137, 138, 139, 140, 145, 147, 149 and 169 of the Constitution of the Republic of Albania.

THE CONSTITUTIONAL COURT,

after it heard the *rapporteur* of the case, Sokol Berberi; the representatives of appellants, a group of deputies of the Assembly of Albania, the Association of the Prosecutors of Albania and the Albanian Helsinki Committee, who sought for the complaint to be accepted; the representatives of the interested subjects the Assembly of the Republic of Albania (Assembly) and the Council of Ministers (CoM), who sought for the complaint to be rejected; it was advised with the "*Amicus Curiae"* opinion of the Venice Commission, as well as after it examined the case in its entirety,

F I N D S:

I

1. On 22 December 2008, the Assembly approved law no.10034 "On the cleanliness of the figure of high functionaries of the public administration and elected persons" (Law on the cleanliness of the figure or the Law). The law was approved by a simple majority of the deputies. The object of this law is the definition of the high state functions and subjects who are incompatible with the public activity of the official because of having been a member, director or collaborator in the policy-making and

implementing structures of the violence of the dictatorship of the proletariat or the former State Security, for the period 29 November 1944 up to 8 December 1990, of the cases of incompatibility, the procedures of verification and the consequences of these procedures (article 2).

2. A group of deputies of the Assembly, the National Association of Prosecutors (NAP) and the Albanian Helsinki Committee (AHC) have been addressed to the Constitutional Court with complaints for the declaration of the Law on the cleanliness of the figure as incompatible with the Constitution of the RA, as well as the suspension of implementation of this law until the announcement of the final decision of the Constitutional Court.

3. Based on article 1, point 2 of law no.8577, dated 10 February 2000 “On the organisation and functioning of the Constitutional Court” and article 57 of the Code of Civil Procedure (CCP), the Meeting of Judges of the Constitutional Court decided to join the examination of the cases presented by the appellants, because of their having the same object.

4. ***The group of deputies has set out these arguments in support of the complaint:***

4.1 Certain provisions of the law make it a norm to have a new reason for the discharge of the organs provided for by the Constitution, violating the higher constitutional orders. In this way, these regulations violate the independence of such institutions as: the President of the Republic, the Assembly, the Constitutional Court, the High Court, the organs of local government, as well as the judiciary and the prosecutor’s office as a whole (articles 65, 70, 71, 90, 109, 115, 125, 127, 136, 138, 139, 140, 145, 147, 149).

4.2 The regulations of the Law also go beyond the legal guarantees provided for in several supermajority laws (otherwise called “organic laws”), which require a qualified majority of the deputies for approval. In this way, affecting the principle of the legal organic reserve, the special norms of the law conflict with article 81, point 2 of the Constitution. The unconstitutionality of the provisions of the law under examination is also reflected for the functions that are provided for in articles 3 and 4 of the law on functionaries who enjoy the status of civil servant. The law on the status of the civil

servant is a law that requires a qualified majority (3/5 of all the members of the Assembly).

4.3 The principle of the separation and balancing of the powers, provided for by article 7 of the Constitution, is also seriously violated because: The Authority of Checking the Figure has been converted into an organ with super-constitutional competences, being recognised as competences that belong to the President of the Republic, the Council of Ministers, the Constitutional Court, the High Court, the High Council of Justice and the General Prosecutor. This Authority, referring to the procedure of its election according to the law, does not meet any standard in connection with its independence from politics and the executive power. Article 23/3 of the law, which provides that the procedure of paragraph 2 is not suspended upon an appeal to court until the decision of the court shall have become final, is an interference in judicial competences. The prohibition of suspension of the procedure causes an immediate and irreparable injury. Giving the Authority for Checking the Figure competences of a constitutional nature creates conflicts of competences among powers, in the meaning of article 131/ç of the Constitution.

4.4 The right to work, provided by article 49 of the Constitution, is violated for these reasons: The law on the cleanliness of the figure imposes restrictions on the right to work, failing to respect the requirements provided by articles 17 and 18 of the Constitution. The law does not meet the criteria of the public interest, in the meaning of being indispensable in a democratic society, and the restrictions imposed by it are not justified in a reasonable and objective manner. The law seriously violates the recognised principle of the right not to have a collective punishment. Punishment is individual, after all the accusations have been analysed and proven, respecting a due legal process. The law deprives citizens who fall in the field of action of its article 3 of any kind of possibility to be rehabilitated to the democratic society.

4.5 Human dignity and private life are violated for these reasons: Article 25 of the law conflicts with article 3 of the Constitution, according to which, among other things, human dignity is the basis of this state, which has the duty to respect and protect it. This article also violates article 35 of the Constitution and article 8 of the European Convention on the Human Rights, which provide that no one is obligated, except when

required by law, to make public data that are related to his person; the restriction is not justified by any public interest, is not reasonable and is not proportional.

4.6 The law violates the principle of no punishment more than once for the same criminal offence, guaranteed by article 34 of the Constitution.

4.7 The right to be elected provided for by articles 45 and 68 of the Constitution is violated: Article 14 of the law on the cleanliness of the figure provides that the Central Election Commission does not register a candidate if that person does not submit a verification certificate.

5. The National Association of Prosecutors claims that several articles of the law violate the lawful rights and interests of prosecutors and has set out these reasons in support of the complaint:

5.1 Articles 3 and 4 of the law violate the principle of constitutionality, the principle of legality and the state ruled by law in the aspect of legal certainty sanctioned by articles 4, 6, 7, 15, 17, 18, 30, 49, 81 and 149 of the Constitution. The prosecutors near the courts and the prosecutors of all levels have acquired their legal status to be prosecutors in conformity with expressed constitutional norms and those of the respective organic law, which is a supermajority law. In addition, the law violates the recognised principle of the state ruled by law, a principle that prohibits the giving of collective punishments.

5.2 The exercise of the constitutional and legal activity of the prosecutors cannot be restricted or interrupted in violation of the clear determinations given in article 149 of the Constitution and with the provisions of the organic law approved by three fifths of all the members of the Assembly. According to article 3 of the law that is the object of examination, prosecutors at the courts of all levels are also subjects of verification.

5.3 Article 4 of the law conflicts with article 18 of the Constitution, where it is defined that “no one may be unjustly discriminated against for such reasons such as sex…economic condition, education etc.” .

5.4 The law may not define the manner and cases of discharge of prosecutors from duty, because this conflicts with article 149, points 2 and 3 of the Constitution, which sanction that the General Prosecutor is discharged by the President of the Republic on the

proposal of the Assembly, or [that] other prosecutors are appointed and discharged by the President of the Republic on the proposal of the General Prosecutor.

5.5 The restrictions imposed by the law do not respect the conditions required by article 17 of the Constitution: such restrictions violate the fundamental rights and freedoms of citizens defined in articles 18 and 49/1 of the Constitution.

5.6 The removal of prosecutors from duty for incompatibility also violates the principle of the presumption of innocence, sanctioned in article 30 of the Constitution.

5.7 Article 6 of the law, which foresees the "Authority of Checking the Figure", is openly in violation of the Constitution, because it recognises to this organ extra-constitutional and legal competences and does not guarantee impartiality and independence in the procedure of its election. These regulations also conflict with the principle of the separation and balancing of powers sanctioned in article 7 of the Constitution.

5.8 The way how the Authority of Verification of the Figure performs its activity, as well as the verification certificate provided by article 20, point 1, letter "b", conflict with article 42 of the Constitution, which requires a fair trial and a due legal process.

5.9 Because of incompatibility according to article 4, the prosecutors are also affected in the right of running in the elections for the organs of local government or the Assembly, a right that is guaranteed and protected by article 45 of the Constitution.

6. The Albanian Helsinki Committee claims that the Law on the cleanliness of the figure violates a series of constitutional rights, giving these arguments:

6.1 Articles 13, letter "c" and 14, points 2 and 3 of the law, in which it is provided among other things that the CEC should not register the interested persons as candidates if they do not submit the verification certificate, violate one of the fundamental rights of citizens, the right to be elected, violating in this way article 45 of the Constitution.

6.2 Article 18 of the Constitution, in which equality before the law and the prohibition of discrimination are sanctioned, is also violated because this law imposes restrictions that do not reflect the elements and requirements of article 17 of the Constitution. The restrictions provided by law are not proportional and essential in a democratic society under consolidation and also conflict with the orientations of the Council of Europe.

6.3 The law that is the object of examination also conflicts with the laws that regulate the organisation and functioning of the organs provided in the Constitution and which were approved by three fifths of all the deputies (articles 6 and 81, point 2, of the Constitution).

6.4 The law on the cleanliness of the figure provides for a new cause for the interruption of the mandate for deputies, persons chosen in court and the prosecutor's office, who have been chosen on the basis of the Constitution and laws approved by three fifths. In this way, the law violates the guarantees of the constitutional institutions.

6.5 Providing a new cause for the removal from work, the law violates the rights of those appointed to the public administration on the basis of the law on the civil service and the Labour Code, approved by three fifths of the members of the Assembly.

6.6 Nor does the law exempt from verification about the cleanliness of the figure subjects who were subjected to verification according to the prior law. In this way, the law violates the principle of non-punishment twice for the same issue and on the same facts.

6.7 Article 4, letter "dh", dealing with incompatibility, also mentions those convicted by final criminal decision for the criminal offences of defamation, false denunciation or false testimony in political judicial processes. Such a formulation is incomprehensible, because, in political processes, such punishments can also be taken as positive for the convicted persons, while the law that is the object of examination considers them elements of incompatibility. Even letter "g" of this article, which provides for denouncers or witnesses of the accusation in political judicial processes, constitutes a generalising and collective evaluation, because all those persons are considered guilty *a priori*, notwithstanding that fact of what they denounce, thus violating the principle of the presumption of innocence. Responsibility is individual, not presumed and not collective, and a person cannot in any event be assumed to have testified in a false manner or to have made a false denunciation.

6.8 The provision of article 5 is arbitrary, because an ordinary law, such as the law under examination, cannot order or instruct someone not to be part of the judicial bodies that will examine this law or questions related to its implementation, of persons who are in conditions of incompatibility as defined by the law. In the exercise of their functions,

the courts apply the Constitution, their organic law and the Code of Civil Procedure, which expressly define the cases of exclusion of a judge from a judicial panel.

6.9 Article 21 of the law under examination, in which it is said that "…the verification certificate according to letter "b" of article 20 of this law has full probative force over the fact of the cleanliness of the figures of every elected or appointed public functionary" conflicts with article 42, point 2 of the Constitution, which sanctions the right to a due legal process.

7. Appellants have also asked for the **suspension of the law** with the claim that the consequences that come from implementing it affect not only important state [and] social interests, but also those of individuals. According to them, the implementation of this law may bring about a blockage of the constitutional institutions through the ending of constitutional mandates, removal or failure to qualify for elected or appointed positions.

8. The representatives of interested subjects the Assembly and the Council of Ministers sought for the rejection of the complaint before the Constitutional Court, setting out:

9. The representative of the Assembly:

9.1 The Constitutional Court has been put into motion and is proceeding in this constitutional adjudication without guaranteeing the respect for the universal and constitutional principle of impartiality in the adjudication. The members of the Constitutional Court are subjects who, on the basis of the law under examination, are subjected to the process of verification. Under those conditions, based on article 36, point 1, letter "b" of the law "On the organisation and functioning of the Constitutional Court", a judge may not examine a case that is directly related to his person.

9.2 Appellants ask for the whole law to be declared unconstitutional, but in fact, in their argumentation they limit themselves only to one of its articles, article 24, which they read linked to articles 3 and 4 of the law.

9.3 The law does not establish a new cause for the discharge of the organs provided in the Constitution. The constitutional reasons for discharge of an official are related to acts committed by him during the exercise of the constitutional or legal function. The contested law shows facts and circumstances that are related to the period

before the beginning of the mandate, related to his being one of the subjects provided by article 4 of the law. Showing these facts cannot in any event make the law unconstitutional.

9.4 The law does not have as its object the adjudication or evaluation of the actions of the constitutional organs nor of high officials of the state, and as such, objectively, it does not cause a violation of the independence of those organs.

9.5 The law does not expand the competence of the ordinary courts when it takes appeals from the subjects of this law under examination. It is true that the Constitution provides immunity as a protective instrument for several categories of high officials, but immunity does not exclude them from being subject to administrative or judicial jurisdiction. The provision of the law that those officials shall be subjected to the above jurisdictions does not constitute a violation of the independence of the constitutional organs that they represent.

9.6 The law does not conflict with article 81/2 of the Constitution. Notwithstanding that the law provides a category of subjects that are verified, this process is not part of the provisions of the organic laws of the constitutional institutions, because it does not have any component of their organisation and functioning as its object.

9.7 The law does not violate the principle of the separation and balancing between the powers. The law does not give the Authority of Verification of the Figure any constitutional competence, but attributes to this Authority a simple administrative competence. The final act that this authority issues is not an order, it has an administrative nature, it reflects the legal fact of the existence of the circumstances provided by the law and, furthermore, it can be controlled by the courts. In addition, the law does not cause any kind of conflict of competences between the powers or state organs. The competences of the Authority are clear and provided by law. No other constitutional or legal organ has the verification of the figure of state officials in its competence.

9.8 The law provides a process of the collection of facts and circumstances, supported in official documentation, but at the same time, it guarantees a due legal process. The persons who are verified take part actively in the verification process. All

necessary access is created for them to learn about the documentation, to submit their claims as well as the right to turn to the court.

9.9 The right to be elected is not violated. The verification of the cleanliness of the figure of persons who run in elections and the consequences that come from it are in full conformity with article 17 of the Constitution. And if we accept that the consequences of such verification constitute a restriction of the fundamental human rights and freedoms, they were made by law, for a public interest and to protect the rights and freedoms of individuals. The restrictions established are in addition proportional to the situation that has dictated them. The law includes limited categories of officials, the period over which the process of verification extends has been provided with reasonable time limits and has a temporary action.

9.10 The right to work is not violated. Appellants are wrong when they consider the appointment of a person to a public function to be a constitutional right.

9.11 The law does not violate human dignity and private life. The verification process is confidential and creates all the standards of safekeeping of the information.

9.12 The suspension of implementation of the law under examination was done by the Court on its own initiative, and this decision-making was not subjected to a due legal process, the adversary principle was not respected. Furthermore, this law does not entail consequences that affect state [and] social interests or those of individuals.

10 The representative of the Council of Ministers:

10.1 A law on the cleanliness of the figure is one of the instruments that have been used by every formerly Communist society to repair the past. Every society has the right to know its historical past in order to know its own identity, and at the same time, to try to repair its negative consequences. In this process, this law is an element of transparency of the public space and a fundamental moral condition for healthy public self-knowledge.

10.2 The law relies on several constitutional principles, such as, the implementation in reality of the principle of the cleanliness of public life and the right of every citizen to have access to the activity of his own state, the freedom of historical research, state security, the protection of the constitutional order and the values of a democratic society, as well as the permanent requirement of justice as an entirety.

10.3 The approval of a special model of “lustration” is left out and should be considered constitutionally as exclusively belonging to the legislator and its autonomy in the exercise of legitimate power. In principle, a constitutional court cannot assess the purposes or means approved by the legislator, in the political point of view of the word.

10.4 There is no addition at all of a new category in the list of the conditions that declare the end of the mandate of the constitutional institutions. On the contrary, the law on the cleanliness of the figure elaborates procedurally just one aspect of the serious violation of the figure, that of discrediting acts and conduct of those organs, provided as one of the reasons for the end of the mandate of “an official of the institution in question”.

10.5 The law does not conflict with article 81/2 of the Constitution, which has defined in an exhaustive list the laws that are approved by 3/5 of all the members of the Assembly. Only the laws that establish rules for the organisation and functioning of the constitutional institutions are included in article 81 of the Constitution. This means that the provision does not include every law that mentions the constitutional organs or every law that materially elaborates the concepts that are used in the organic laws.

10.6 Article 90 of the Constitution, providing a serious violation of the Constitution as one of the causes of discharge of the President, is not violated. In a case when the President of the Republic declares that he does not wish to resign from his function, although he has been shown to have been included in one of the duties/qualities incompatible with the cleanliness of the moral figure, then he has seriously violated the Constitution, because he is not obeying the laws of the country, he does not respect the fundamental rights and freedoms of his citizens and he is not serving the general interest and the advancement of the Albanian people.

10.7 The law does not conflict with articles 65/1, 70 and 71/2 of the Constitution, which refer to the end of the mandate of a deputy. The importance of moral cleanliness to the function of a deputy is not given only from the constitutional norms, but also from the provisions of the law “On the status of the deputy”. A deputy is the representative of the people in the highest legislative organ; he acts in the name of the Constitution and the laws and is held to his oath as a deputy.

10.8 Appellants do not submit any argument for the claim of a violation of articles 109/1 and 115 of the Constitution, which are related to the organs of local government. This claim is baseless, on analogous reasoning to that for the President of the Republic.

10.9 The law does not conflict with articles 125/1, 127 and 128 of the Constitution, articles that refer to the end of the mandate and the discharge of a judge of the Constitutional Court. According to article 128 of the Constitution, a judge of the Constitutional Court can be discharged for acts or conduct that seriously discredit the position and figure of the judge. In a case when a constitutional judge declares that he does not wish to resign, although it has been proven that he was included in one of the duties/qualities incompatible with the cleanliness of the moral figure, this surely constitutes an act or conduct that seriously discredits his position and figure.

10.10 With the same reasoning, this law does not conflict with article 140 of the Constitution either, which provides the cases of discharge of a judge of the High Court, nor with article 147 of the Constitution, which provides the cases for the discharge of judges of the courts of appeal and the courts of the judicial districts.

10.11 Nor does the law conflict with article 149 of the Constitution. Prosecutors do not enjoy constitutional protection, and based on the organic law, they are discharged from duty when they commit actions that seriously discredit their figure. We are before such a case when a prosecutor declares that he does not wish to hand in his resignation, although it has been proven that he was included in one of the duties/qualities incompatible with the cleanliness of the moral figure.

10.12 The right to work is not violated. In all the countries of Eastern Europe, the restrictions put on employment have been provided by law and constitutes a protection of significant public interests, at the same time respecting the principle of proportionality. Similarly, the European Court of Human Rights (ECtHR) has declared in its jurisprudence that the restrictions imposed on members or employees of the former committees of state security will be considered necessary to enable state security, well-being as well as the defence of the rights of other individuals.

10.13 In connection with the claim of a violation of private life, the publication of the names according to the process of “lustration” should not be considered as such. In

fact, this process represents the realisation of article 23 of the Constitution, which guarantees the right to be informed.

II

A. In connection with standing

11. The appellant, the group of deputies, has standing in this constitutional adjudication based on articles 131, letter "a" and 134, letter "c" of the Constitution. This subject (no fewer than one fifth of the deputies) has the right to put the Constitutional Court into motion for control of the constitutionality of a norm, for reasons of a public interest without being restricted by a concrete subjective interest.

12. The National Association of Prosecutors (NAP) and the Albanian Helsinki Committee (AHC) have standing in this constitutional adjudication based on article 134, point 1, letter "f" and point 2 of the Constitution. According to this provision, "organisations" are subjects that exercise the right to initiate adjudications of control of the constitutionality of a norm in a conditioned manner, having standing only for issues that are related to their interests. In this sense, they must show the direct connection between the mission for which they were created or the activity that they perform and the consequences that come from the provisions that they seek to declare as incompatible with the Constitution. (*See Constitutional Court decisions no.9 dated 19.03.2008 and no.17 dated 25.07.2008)*. The NAP and the AHC have standing *ratione personae* to address the Court because both subjects are "organisations" in the meaning used by the article of the Constitution cited above, registered as a legal person in the Court of the Tirana Judicial District. In addition, they have succeeded in showing, based on their charters (statutes) and acts of foundation, the direct connection between the mission for which they were created and the consequences that come from the provisions of the law under examination, which they seek to declare as incompatible with the Constitution.

13. In connection with the category of interested subjects who are called to a case with a public interest, the Court has also said before that it is in its discretion to determine those subjects. In this connection, the Court is led by the interest that calling them has to contribute to the decision-making of this Court on the case under examination. The assessment of the standing of the interested subject is based not only on the interest of the subject, but also of the constitutional adjudication. In this view, those subject who,

because of their activity or the circumstances, may contribute to the examination of the case being adjudicated have standing as interested subjects, notwithstanding whether they are summoned to the trial at the request of appellant or even by the Court on its own initiative. (*See Constitutional Court decision no.29/2009*). In the case under examination, on the basis of those criteria, the Court has determined and called the interested subjects.

B. In connection with the request for suspension of the law on the cleanliness of the figure

14. In addition to their claims of the incompatibility with the Constitution of the provisions of law no.10034, dated 22.12.2008 "On the cleanliness of the figure of high functionaries of the public administration and elected persons", appellants have also set out legal arguments related to the consequences that the immediate application of the law might bring to state and social interests, or those of individuals, before the taking of a final decision by the Constitutional Court.

15. According to appellants, a very serious damage, reparable only with great difficulty, is caused by the immediate implementation of the law to important state interests; conflicts of competence are obviously created between the constitutional organs and an authority created by an ordinary law; the exercise of the constitutional activity of the President of the Republic, the Assembly, the Council of Ministers, the Constitutional Court, the High Court, the High Council of Justice, the General Prosecutor, as well as all other institutions of the public administration, is affected or restricted by the activity of the Authority of Checking Figures; an institutional vacuum is created, up to the blockage of the constitutional activity of the state organ; work relations end for high state functionaries, who have a constitutional status.

16. The Constitutional Court has evaluated the reasons set out by appellants in connection with the request for suspension of the law, in the meaning of article 45 of its organic law, as justified causes to argue for the prevention of the consequences that might come to the normal functioning of the state of law as well as the fundamental rights and freedoms of individuals, and on this reasoning decided to suspend the law until the rendering of its final decision.

C. In connection with the request for the exclusion of several members of the Constitutional Court from examining the case on the claim of an avoidance of a conflict of interests

17. The interested subjects, Assembly and Council of Ministers, have claimed that several members of the Constitutional Court should not take part in the examination of the constitutionality of this law in order to avoid a conflict of interests, since they may be possible subjects of the law on the cleanliness of the figure. According to them, the impartiality of the judicial body, as a fundamental and universal principle in every adjudication, including a constitutional one, implies the impartiality of every judge.

18. In the framework of the constitutional principles that stand at the foundation of a due judicial process, the Constitutional Court has said in its jurisprudence that respect for the principle of impartiality enables the creation of the trust that the judges should enjoy in a democratic society and in a state ruled by law. The impartiality of the judges *(nemo iudex in causa sua*) requires that justice not only be done, but that it be seen to be done. In a democracy, the legality of the role of the judge depends not only on his being, but on his appearing to be impartial and independent, his role in an essential manner being *passive* and *above the parties. (See Constitutional Court decision no.23/2008).*

19. The principle of impartiality requires, among other things, the establishment of legal mechanisms and procedures that aim at avoiding the conflict of interest. For this purpose, law no.8577, dated 10.02.2000 “On the organisation and functioning of the Constitutional Court of the Republic of Albania” (hereinafter referred to as the CCt law) provides in article 36 that a judge of the Constitutional Court should resign from examining a case when: a) he has taken part in the drafting of the act that is the object of examination; b) because of ties of family relations, or other ties with the participants in the adjudication, his objectivity is put into question; c) in any other case when serious reasons of impartiality are proven. Requests for resignation of the judge may arise both in the case of concrete control, as well as in the case of the abstract control of laws. The resignation of a judge from the examination of a concrete case, before the case passed to the plenary session, is approved by the President of the Constitutional Court. Later, it is decided by a majority of the votes of the judges participating in the process. According to

article 37 of the law mentioned above, *"The participants in the adjudication have the right to ask for the exclusion of a judge at any phase of the adjudication, when one of the cases provided in article 36 of this law exists and the judge does not resign from examining the case"*.

20. The law on the cleanliness of the figure contains a special provision referring to judges, which aims at avoiding the conflict of interest: *"No person who is in the conditions of incompatibility of functions according to article 4 of this law…may be part of the judicial panels that examine this law or issues related to its implementation"*. This provision excludes the judge without referring to his/her removal or resignation. A judge who has been excluded by law from the examination of a case has no possibility to decide about his/her resignation, and the Court does not have the possibility to decide on his/her exclusion.

21. The Court considers that, in order to evaluate whether one of the cases for the acceptance of the request for the exclusion of one or more judges exists, it should rely on the regulations of the CCt law, without taking into consideration the provisions of the law on the cleanliness of the figure. The CCt law was approved according to article 81/2 of the Constitution by three fifths of all the members of the Assembly (a supermajority law), while the law on the cleanliness of the figure was approved according to the general rule provided by article 78 of the Constitution. The Constitution gives supermajority laws special legal force in comparison with the ordinary laws of the lawmaker. For this reason, in the hierarchy of acts, supermajority laws are ranked before the ordinary laws of the Assembly (*see Constitutional Court decision no.19, dated 03.05.2007).*

22. The court considers that the provisions of article 36 of the CCt law do not require as an essential matter "evidence" about the fact of the inclusion of one or more judges in one of the categories defined in article 4 of the law on the cleanliness of the figure; it is sufficient if there are data that might raise serious concerns about the violation of impartiality. The purpose of norms similar to articles 36 and 37 of the CCt law is not the protection of judges from claims of partiality, but the protection of the legitimacy of the Constitutional Court as an impartial organ. For this reason, a convincing suspicion of partiality should be sufficient for the acceptance of a request for the exclusion of a judge or judges.

23. As a preliminary matter, the Constitutional Court takes into consideration the situation that might be created if several members of the Constitutional Court, who might be subjects of the law on the cleanliness of the figure, are excluded from examining the case at the request of the interested subjects. According to article 133/2 of the Constitution, the Constitutional Court decides by a majority of all its members. On the other hand, article 32 of the CCt law requires that no fewer than two thirds of its members (six members) should be present in a plenary session of the Constitutional Court. The exclusion of judges would lead to the failure to reach the necessary number for the examination of the case by the Court in plenary session (the quorum) and consequently, it would be blocked from continuing the examination of the constitutionality of the law on the cleanliness of the figure.

24. In including the members of the Constitutional Court in the category of subjects that would be subjected to verification according to article 3, letter “d” of the law on the cleanliness of the figure, the lawmaker should have considered the need to avoid an institutional blockage, and for this reason should have made special constitutional and legal regulations that would make it possible for this Court to control the constitutionality of the laws. The Assembly did not provide a solution to get around such a possible blockage, a blockage that among other things would bring the consequence that the law on the cleanliness of the figure would not be subjected to adjudication about its constitutionality. This is in conflict with article 124 of the Constitution. In principle, this position has been addressed by analogy in prior decisions of this Court (*See decisions no.21, dated 01.10.2008 and no.4 dated, 02.06.1995*). Under those conditions, an adjudication related to the request for the exclusion of several judges should be supported on an assessment of the importance of the impartiality of the judges, but also on the need for the control of the laws of the Assembly by the Constitutional Court.

25. In connection with the legal issues that have been raised in this constitutional adjudication, the Court assesses whether the adjudication of those issues permits space and discretion for the judges, to that extent that they might be inclined to hold an impartial position. In the examination of the constitutionality of the law on the cleanliness of the figure, there might be claims which can lead to different evaluations as to their constitutionality or not, while some others have a clear basis, without having the need to do any evaluative adjudication.

26. One of the claims of appellants is related to the termination of the mandates of the constitutional institutions, according to the provisions of the law on the cleanliness of the figure. In this case, we have to do with an open violation of the constitutional guarantees. The judges of the Constitutional Court are members of one of the institutions protected by the Constitution. As will also be argued below, the law on the cleanliness of the figure, in this respect, is obviously contrary to the Constitution. To judge the unconstitutionality of the respective provisions of this law in relation to the termination of the mandates is not a question of discretion or the personal judgment of the judge. For this reason, the possible partiality of the judge cannot affect his decision. So far as concerns the other provisions as to which the constitutional control has been requested, there is no conflict of interests so long as the judge will not be a possible subject of those provisions of the law on the cleanliness of the figure. Consequently, serious reasons for partiality are not verified.

27. Based on the above arguments, the Court considers that the request to exclude several judges of the Constitutional Court from examining the constitutionality of the law on the cleanliness of the figure is not supported. For this reason, the judges of the Constitutional Court are not prohibited from examining and deciding on the case that is the object of the adjudication.

III

A. The legislation on the cleanliness of the figure (lustration) in Albania

28. For the evaluation of the case that is the object of examination, the Court takes account of the historical context in Albania, which has also imposed the taking of measures to face the Communist past in Albania. After the fall of the Communist regime, as in all the countries of Central and Eastern Europe, attempts were made in Albania to break from the totalitarian past. Those attempts were expressed in a series of legal, institutional and financial measures that are included in the concept of “transitional justice”. One of the instruments used in this framework is legislation on the cleanliness of the figure (lustration).

29. Through law no.7514, dated 30.09.1991 “On the innocence, amnesty and rehabilitation of formerly politically persecuted and convicted persons,” the Albanian Parliament declared legal and political positions about the treatment of politically

persecuted and convicted persons as well as aspirations for building a free and democratic society that respects and protects the basic human rights. In the preamble of this law, among other things, it was accepted that "…during 45 years, many Albanian citizens were accused, tried, convicted and imprisoned, interned or persecuted for violations of a political nature, violating their civil, social, moral and economic rights". Also in this part, the Parliament "…gives innocence to former political prisoners and politically persecuted people" and in the name of the legal state, asks for the pardon of those people for the political convictions and the sufferings that they endured in the past.

30. Law no.7666, dated 26.01.1993 "On the creation of a commission for re-evaluating licences for the exercise of advocacy and for an amendment to law no.7541, dated 18.12.1991 "On advocacy in the Republic of Albania" had for its object the cleaning of the figure in the service of advocacy. This law prohibited the exercise of advocacy by persons who had been former officers of State Security and their collaborators; former members of the committees of the Party of Labour of Albania, as well as employees for their apparatuses in the centre, the districts and the regions; former leaders of the state organs in the centre and the districts; former employees of the prisons and camps of serving punishment. In addition, the prohibition was also extended to persons who had finished studies in the Faculty of Law on the basis of education of the higher school of the party; who had been former chairmen of the offices of the cadre of all levels; who had taken part as investigator, prosecutor or judge in special political staged processes; who had performed high management functions in the central organs of justice; who had used physical or psychological violence during investigations or other actions; who had taken part in border killings. The prohibition of exercising advocacy for a person affected by the law was five years. An appeal could be taken to the High Council of Justice against a decision taken according to this law.

31. The constitutionality of the law mentioned above became the object of examination in the Constitutional Court on the basis of a complaint of the Parliamentary Group of the Socialist Party. The Constitutional Court declared the law in question unconstitutional. Among other things, this court said that re-evaluating the licences for exercising the profession conflicted with the constitutional provisions about the judicial system, which provide that advocacy was a free profession and consequently self-administrable. Further on, the Court took the position that the prohibitions of the law

violated the democratic criterion of an individual evaluation and not a collective one of the figure and qualities of the lawyers, the constitutional right to choose a profession and place of work, as well as the principles of the separation of the powers and the presumption of innocence (*see Constitutional Court (CCt) decision no.8, dated 21.05.1993).*

32. In 1995, two laws were approved related to the cleanliness of the figure: law no.8001, dated 22.09.1995 "On genocide and crimes against humanity committed in Albania during Communist rule for political, ideological and religious motives" (Genocide law) and law no.8043, dated 30.11.1995 "On the control of the figure of officials and other persons related to the protection of the democratic state" (Law for the verification of figures). The Genocide law had the purpose of accelerating the criminal cases that were related to crimes against humanity for political, ideological, class and religious motives organised and committed by the Communist state; prohibiting former high directors in elected, executive and judicial political functions during the Communist system, as well as collaborators of State Security who might have been elected to the central and local organs of power or appointed to the high administration of the state, the judicial system and the mass media, up to 31 December 2001.

33. The purpose of the law for the verification of figures was assuring the cleanliness of the democratic life of the Albanian state in the period of the post-Communist transition. According to this law, the organs and functions that would be subjected to verification of the figure were: the President of the Republic, elected persons, leading functions in the executive and in the state administration, directors in the Armed Forces and the police forces, assistant judges, judges, prosecutors and the judicial police. In addition, directors and editors in State Radio-Television and the Albanian Telegraphic Agency would also be subject to verification; journalists and employees with a high duty in newspapers with a circulation of over 3000 copies; leading functions in economic communities, state financial institutions and those of insurance, as well as in state banks; rectors and directors in universities and higher schools. In summary, in order to serve in the above functions, the person should not have been, during the entire period 28.11.1944 up to 31.03.1991, a director in the political structures of the Party of Labour, an elected person [or] director in the executive or in the state administration, an officer and collaborator of State Security or any analogous foreign service, a false witness or

denouncer in political processes, an investigator, prosecutor or judge in special political processes.

34. The Parliamentary Group of the Socialist Party and the Parliamentary Group of the Social Democratic Party submitted a complaint to the Constitutional Court for the declaration of the two above-mentioned laws as unconstitutional. By a decision dated 31.01.1996, the Constitutional Court rejected as a whole the complaints of those two subjects (with the exception of the claim of unconstitutionality of the provision that provided that journalists of newspapers were subjected to control and the provision according to which the Minister of Justice was permitted to make a request for the verification of the chairmen of parties and political associations) (*CCt decision no.1/1996*). According to the Court, the two laws defined reasonable boundaries and responded to the moral requirements of a democratic society in Albania.

35. According to the provisions of the law on the verification of figures, a state commission consisting of seven members was created for its implementation. A person who was subjected to verification could appeal to the Court of Cassation against a decision of the Commission within seven days from the day of communication. The Commission created according to the law exercised its activity up to the end of the year 2001.

36. Starting from the year 1996, a number of amendments were made to the law for the verification of figures, which principally narrowed the field of its action. Thus, by law no.8151, dated 12.09.1996, elected officials and candidates for election to the organs of local power were excluded from verification of the figure. The second amendment, in May 1997 (law no.8280, dated 13.05.1997) narrowed the circle of positions and qualifies held during the Communist system that were considered as a hindering condition for serving in the public functions defined by law (unlike the initial law, the fact that a person had been elected to political functions that were not high, to executive functions, judge, prosecutor of investigator etc. during the Communist system did not constitute a hindering condition…).The last two legal amendments (laws no.8232, dated 19.08.1997 and no.8280, dated 15.01.1998) restricted the field of action of the law even further and made several interventions in the procedures of functioning and decision-making of the

Commission for the control of the figure. The law on the verification of figures, according to the initial provision, ceases its effects on 31 December 2001.

37. On 22.12.2008, the Assembly approved law no.10034 “On the cleanliness of the figure of high functionaries of the public administration and elected persons”, which is the object of this constitutional adjudication.

B. International and constitutional standards in connection with the legislation on the cleanliness of the figure (lustration)

38. In order to examine the case that is the object of examination, the Court bases itself on the constitutional and international standards that should be respected by the lawmaker in taking legislative measures for the cleanliness of the figure (lustration). In essence, those documents require that lustration laws shall be in conformity with the principles of the state ruled by law (article 4 of the Constitution) and for this reason, shall meet several requirements. Above all, lustration should be focussed on threats that might come from its implementation to fundamental human rights and democratic processes; vengeance can never be the purpose of those laws, and also, the social or political misuse of the results of the lustration process should not be allowed. The purpose of lustration is not the punishment of individuals who are assumed guilty, but the protection of the new democracy that has been born. In a more detailed manner, these requirements are:

38.1 The process of lustration should be administered by an independent commission, specially created, the composition of which should include outstanding citizens.

38.2 Lustration should be used only to eliminate or significantly reduce the threats that might come from the subjects of lustration toward free and functioning democracy, because of the use by the subjects in question of a specific function that is included in a violation of human rights, or because it blocks the movement of the democratic processes.

38.3 Lustration should not be used for convictions, punishments or vengeance; a conviction for prior criminal activity can be imposed only on the basis of the regular Criminal Code and in conformity with all the procedures and guarantees of criminal prosecution.

38.4 In order to be in compatibility with the principles of the state ruled by law and of democracy, the prohibitions for functionaries of the Communist regime should be based on the criterion of the drawing out of individual responsibility about every particular case and not in a collective manner;

38.5 Lustration should be limited only to the functions as to which there are sufficient reasons to believe that they might present a real danger to human rights and democracy, that is, specific state functions that have real responsibility for the drawing up or implementation of the policies of the Government and practices that are related to internal security, or specific state functions that might order and/or commit abuses with human rights, such as, for example, intelligence services, security services and law enforcement agencies, the judiciary and the prosecutor's office.

38.6 Lustration should not be implemented for elective functions except when this is requested by the candidate himself – voters have the right to elect whomever they desire.

38.7 Lustration should not be implemented for functions in private or semi-private organisations, because there are few functions in those organisations that might present a danger of the violation of or a threat to the fundamental human rights and democratic processes.

38.8 The time period for the prohibition of exercise of the specific functions should be limited on rational bases, because the capacity for positive changes in the behaviour and customs of an individual should not be underestimated.

38.9 Individuals who have ordered or assisted in the performance of serious violations of human rights may be excluded from the function; in cases when an organisation has committed serious violations of human rights, a member, employee or agent will be considered to have taken part in those violations if they performed high functions in those organisations, unless it can be proven that they have not taken part in the planning, direction or execution of those policies, practices or actions.

38.10 No individual will be subjected to the process of lustration only because he was connected with or performed activity for an organisation that was lawful at the time of creation of this connection or the performance of that activity, for personal opinions or beliefs.

38.11 The lustration of “conscious collaborators” is permissible only so far as concerns individuals who actually took part, together with government functions (such as intelligence services) in serious violations of human rights, who actually damaged others and who knew, or should have known, that their behaviour would cause damage.

38.12 Lustration should not be implemented over an individual who was under 18 years of age at the time of inclusion in the respective activity, who voluntarily opposed and/or abandoned membership, employment or the connection with the respective organisations before the transition to the democratic regime, or who acted because of obligation.

38.13 In no case should an individual be subjected to the lustration process without having all appropriate defence, including, but not limited only to, the right of counselling (offered [free] if the subject cannot afford payment at all), the right to be notified of and to contest the data used against him, to have access to all available data, whether exculpatory or tending to show guilt, to present his data, to have an open hearing if he asks for it, as well as the right to appeal to an independent judicial organ.

38.14 The right of every person to access to official documents and the data collected about him, as well as the right to ask for the correction of expunging of untrue or incomplete data or data collected in violation of law (article 35 of the Constitution), should not be limited for any category of individuals, except when the conditions of article 17 of the Constitution are fulfilled.

38.15 The legal interventions for lustration should devote special importance to the implementation of the constitutional principle of proportionality, which should be understood not only as a constituent part of the constitutional principles that protect the rights and freedoms of the individual, but also as a principle that contains a vital element of the concept of the state ruled by law.

39. Cases related to legislative measures on lustration have also been the object of examination by the European Court of Human Rights (ECtHR) so far as concerns the compliance of these measures with the European Convention on Human Rights (ECHR). Attention can be drawn to following cases: Turek *against* Slovakia; Matyjek *against* Poland; Luboch *against* Poland; Bobek *against* Poland; Žičkus *against* Lithuania; Ždanoka *against* Latvia and Adamsons *against* Latvia.

40. The Constitutional Court also takes account of the legislative measures for lustration taken in a number of countries, such as the Czech Republic, Lithuania, Latvia, Estonia, Bulgaria, Hungary, Germany, Poland, Romania, Serbia as well as the respective jurisprudence of the constitutional courts, in cases when such laws have become the object of judicial control.

IV

A. In connection with the claim that the law on the cleanliness of the figure, by defining a new cause for the termination of the mandate of the organs provided by the Constitution, violates the constitutional guarantees of those organs.

41. Appellants claim that certain provisions of the law make a norm of a new reason for the discharge of the organs provided by the Constitution, violating the superior constitutional orders. In this way, those regulations violate the independence of institutions such as the President of the Republic, the Assembly, the Constitutional Court, the High Court, the organs of local government, as well as the judicial organs and the prosecutor's office as an entirety (articles 65, 70, 71, 90, 109, 115, 125, 127, 136, 138, 139, 140, 145, 147, 149).

42. The second paragraph of article 4 of the Constitution has declared that "The Constitution is the highest law in the Republic of Albania". The declaration of the superiority of the Constitution, setting it at the pinnacle of the pyramid of legal norms, constitutes a fundamental aspect of the principle of the state ruled by law. This principle obligates all the organs of public power to exercise their competences only in the framework and on the basis of the constitutional norms. The legal acts that are issued by those organs should be compatible with the higher legal acts, both in the formal meaning as well as in the substantive sense (see CCt decisions *29/2005, 3/2006, 19/2007)*.

43. A natural part of the constitutional regulations is taken up by norms related to the mandate of the most important organs of the state. In particular, those norms create the necessary guarantees for the exercise of the mandate according to the constitutional concept. On the one hand, those guarantees consist in specific, exhaustive reasons for the end of their mandate and on the other hand, in special procedures for the end of the

mandate/mandates. These procedures are constituent elements of the constitutional status of the organs and institutions provided by the Constitution, which means that substituting for these specific procedures, others that provide less defence weakens their status. Based on the above, the Court evaluates the regulations of the law on the cleanliness of the figure in relation to the guarantees enjoyed by the state organs according to the Constitution.

44. The Constitution provides that the President of the Republic, who does not have responsibility for acts performed in the exercise of his duty, may be discharged only for serious violations of the Constitution and for the commission of a serious crime, by no fewer than two thirds of all the members of the Assembly, on the proposal of no fewer than one quarter of them. The decision is examined by the Constitutional Court, which declares the discharge of the President when his fault is verified (article 90 of the Constitution).

45. On the basis of the law on the cleanliness of the figure, the function of the President is subject to verification (article 3). In article 4 of this law, among other things, it is defined that: "...the cleanliness of the moral figure of the President" is incompatible with the fact if he held one of the duties/qualities provided in this article during the period 29 November 1944 up to 8 December 1990. If, after the verification of the function of the President, the Authority of Checking the Figure issues a "B" verification certificate (article 20), and the High Court, after the end of the judicial procedures, leaves the decision of the Checking Authority in force (article 22), if the President does not wish to resign from the function, his labour relations are interrupted on the motivation of "unworthiness of the figure of the functionary" (article 24).

46. The interested subject Council of Ministers has claimed that by "serious violations of Constitution" we should understand the inability of the President to meet the commitments undertaken during his oath (Article 88, paragraph 3 of the Constitution), and according to its point of view, the failure to resign in the case of issuance of a "B verification certificate constitutes a serious violation of the Constitution. Consequently, after the procedure followed according to the law on the cleanliness of the figure, the procedure provided in article 90 of the Constitution should immediately be followed.

47. The Court considers that the procedure provided in the law on the cleanliness of the figure is clearly different, and less protective, than that provided by the

Constitution for the mandate of the President. The constitutional procedure for the discharge of the President represents a guarantee for the independence of this organ. This guarantee would be worthless if the deputies and the Constitutional Court were to depend on a “B verification certificate”. The law on the cleanliness of the figure cannot infringe on the essence of the constitutional protection enjoyed by the President of the Republic.

48. The constitutional provisions related to the end of the mandate and the discharge of the judges of the Constitutional Court (articles 127-128) and the judges of the High Court (articles 137-140) are in essence the same. They can be discharged by the Assembly by the vote of two thirds of the deputies for violations of the Constitution, commission of a crime, mental or physical incapacity or for acts and behaviour that seriously discredit the position and figure of the judge. The decision of discharge should then be examined by the Constitutional Court. The General Prosecutor may be discharged only by the President of the Republic, on the proposal of the Assembly, for violations of the Constitution or for serious violations of law during the exercise of his functions, … for acts and conduct that seriously discredit the position and figure of the Prosecutor (article 148).

49. The interest subject Council of Ministers has claimed that a constitutional basis exists for the lustration measures connected to the judges of the Constitutional Court, the High Court and the General Prosecutor. According to it, by decision no.75, dated 19.04.2002, the Constitutional Court took the position that the expression “acts and conduct that seriously discredit the position and figure,” mentioned in articles 128, 140 and 149/2 of the Constitution, includes in itself a series of elements that may be identified case by case by the respective organ, which takes a decision for the discharge of the judge of the Constitutional Court, the High Court and the General Prosecutor. Those elements are related to irregular and unworthy acts and conduct that those high functionaries commit during the exercise of duty. Those actions or failures to act, which are analysed on the basis of the circumstances of their performance, the subjective moment as well as the damage that they bring to society and the state, should be of that nature that they make impossible the further performance of the constitutional functions by those subjects. According to the interested subject, the law on the cleanliness of the figure does not add any new category to the list of conditions for the declaration of the end of the mandate of the constitutional institutions at issue. It elaborates, in a procedural

manner, only one aspect of the serious violation of that figure, that of the discrediting acts and conduct of those organs. That is, the lustration law only makes an implementation of the respective provisions of the Constitution and the organic laws. As such, the law does not have a normative character at the level of the constitutional provisions, but only a procedural nature according to which a formulation (the constitutional reason) for ending the mandate is brought to life.

50. The Court considers this claim of the interested subject Council of Ministers to be unsupported. It draws attention again to the specific nature of the procedure of the discharge of judges of the Constitutional Court and the High Court. The Constitution expressly provides for the need of review by the Constitutional Court of an Assembly decision of discharge. The law on the cleanliness of the figure cannot avoid that guarantee. In addition, the Constitution provides that only the President may discharge the General Prosecutor. The Court stresses that, in that case, the constitutional basis for discharge is related only to the conduct of the persons during the mandate and does not refer to a prior mandate or duty.

51. The deputies (members of the Assembly) are also subjects of verification according to the law on the cleanliness of the figure (article 3/b). This law provides for the interruption of the mandate of the deputy according to the same legal procedure determined for the functions analysed above. In article 71, related to the end of the mandate of the deputies, the Constitution provides: “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, 70 paragraph 2 and 3 is ascertained; ç) when the mandate of the Assembly ends; d) when he is absent from the Assembly without a reason for more than six consecuitive months; dh) when he is convicted by final court decision for the commission of a crime. Article 70/2 of the Constitution provides that “Deputies may not simultaneously exercise any other public duty, with the exception of that of a member of the Council of Ministers. *Other cases of incompatibility are specified by law*“. The last sentence should be interpreted in the context of the prior sentence, which has to do with the exercise at the same time of other state duties and the duty of deputy. Article 3/3 of law no.8550, dated 18.11.1999 “On the status of the deputy” provides that “Other cases of incompatibility of the mandate of the deputy, in addition to those provided in article 70

point 2 and 3 of the Constitution, are equivalent to those of a member of the Council of Ministers, provided by article 103 of the Constitution". The latter constitutional provision specifies that a minister "...cannot exercise any other state activity nor be a director or member of the organs of profit-making companies".

52. The Court stresses again the importance that the constitutional guarantees have for the exercise of the respective mandate of the deputy. Even if it were to be accepted that article 70/2 of the Constitution permits the taking of lustration measures, in articles 70/3 and 131/e the Constitution requires, for the purpose of creating a protective mechanism, that issues related to the eligibility and incompatibilities in the exercise of the functions of the deputies, as well as the verification of their election, should be decided by the Constitutional Court. The law on the cleanliness of the figure clearly violates these constitutional guarantee.

53. Even the members of the Council of Ministers are subjects of verification according to the law on the cleanliness of the figure (article 3/c of the law). They enjoy the immunity of a deputy (article 103/3 of the Constitution) and may be discharged by the President of the Republic on the proposal of the Prime Minister. The decree of the President is examined later by the Assembly (article 98). The Court stresses that, even so far as concerns the discharge of the members of the Council of Ministers, the procedure provided by article 98 of the Constitution cannot be avoided, although the beginning of the procedure of discharge according to this provision is a constitutional and political competence only of the Prime Minister.

54. The arguments given above are also valid for the other constitutional organs and functions (the organs of local government), so far as a clash is found between the guarantees that the Constitution and organic laws recognise to those organs in connection with the discharge/end of their mandate and the procedure provided by law on the cleanliness of the figure in this connection.

55. For the above reasons, the Court appraises that article 24/5 of the law on the cleanliness of the figure, which provides for the interruption of the mandate of the President of the Republic, the members of the Constitutional Court, the High Court, the General Prosecutor, the deputies and members of the Council of Ministers, in cases of issuance of a "B verification certificate", violates the constitutional guarantees of their

mandate and consequently is in violation of the principle of constitutionality and the state ruled by law.

B. In connection with the claim that the regulations of the law on the cleanliness of the figure violate the legal guarantees for judges, prosecutors and employees of the public administration provided in several supermajority laws (organic laws), which require a qualified majority of the deputies (article 81/2 of the Constitution) for their approval.

56. Appellants claim that the regulations of the law violate the legal guarantees provided in certain supermajority laws (otherwise known as "organic laws"), which require a qualified majority of the deputies for approval. In this way, affecting the principle of the organic legal reserve, the particular norm of the law conflicts with article 81, point 2 of the Constitution. The unconstitutionality of the provisions of the law under examination is also reflected for all the functions provided in article 3 and 4 of the law for functionaries who enjoy the status of civil servant. The law on the status of the civil servant is a law that requires a qualified majority (3/5 of all the members of the Assembly).

57. The Court observes that, according to article 78 of the Constitution, the Assembly, as a general rule, approves laws by a majority of votes in the presence of more than half of all members, except for the cases when the Constitution provides a qualified majority. A list is provided in article 81, point 2 of the Constitution of the laws that should be approved by three fifths of all the members of the Assembly. In this list, among other things, are included: "a) laws on the organisation and functioning of the institutions provided by the Constitution"; "c) the law on general and local elections"; "e) the law on the status of public functionaries". This obligation is also extended to the laws that amend the content of those laws.

58. The Court said above that the principle of the state ruled by law obligates all the organs of public power to exercise their competences only in the framework and on the basis of the constitutional norms. Legal acts issued by those organs should be compatible with the higher legal acts, both in the formal meaning, as well as in the substantial sense (*see CCt decisions 29/2005, 3/2006, 19/2007).*

59. The Constitution gives supermajority laws special legal force in comparison with the ordinary acts of the lawmaker. For this reason, in the hierarchy of acts, they are listed before the ordinary laws of the Assembly (*see Constitutional Court decision no.19, dated 03.05.2007).* Respect for the hierarchy of normative acts is an obligation that comes from the principle of the state ruled by law and coherence in the legal system.

60. In this sense, the Constitutional Court stresses that the relations between the organic laws (approved by a qualified majority of the Assembly) and the ordinary laws (approved according to the general rule) can be seen in two different ways: as relations between the sources of law established at different levels in the hierarchy of norms (laws that are approved by a qualified majority stand higher than those approved by a simple majority); or as a relation based on the principle of the distribution of legislative competence.

61. In a democratic state ruled by law, the judge fulfils a very important function. His role and that of the courts in such a state is that while exercising the function of giving justice, they should assure the implementation of the norms expressed in the Constitution, the laws and other legal acts; they should guarantee the rule of law and the protection of human rights and freedoms. Taking account of this role, the Constitution, as well as a number of international documents, provide a series of guarantees about the status of the judge, among which is his immovability from duty without justified causes (article 138). In the service of that guarantee, the Constitution-maker has also provided the procedure and the exhaustive [list of] cases when a judge may be discharged.

62. According to article 147 of the Constitution, a judge can be discharged from duty by the High Council of Justice, among other things, for acts and conduct that seriously discredit the position and figure of the judge. According to the law on the organisation of the judicial power (law no.9877, dated 18 February 2008) and the law on the organisation and functioning of the High Council of Justice (law no.8811, dated 17.05.2001, amended), a judge may be discharged from duty only in the case of serious disciplinary violations, applying the disciplinary procedures before the High Council of Justice that are provided by those laws in a specific manner.

63. According to the law “On the organisation and functioning of the prosecutor’s office in the Republic of Albania” (no.8737, dated 12.02. 2001, amended), prosecutors may be discharged from duty when they are convicted of the commission of a serious

crime, when they are declared incompetent, or because of a disciplinary punishment that is a result of a disciplinary procedure conducted by the Council of the Prosecutor's Office is applied.

64. As was also mentioned above, the interested subject Council of Ministers claims that the law on the cleanliness of the figure elaborates in a procedural manner only one aspect of the serious violation of the figure, that of discrediting acts and conduct. According to the CoM, this law only makes an application of the respective provisions of the Constitution and the organic laws, and as such, it does not have a normative nature, but only a procedural nature.

65. The Court considers this argument of the interested subject unsupported as well. The special procedures provided in the organic laws are fundamental elements of the constitutional and legal guarantees for judges and prosecutors, guarantees that the law on the cleanliness of the figure avoids, substituting the "B verification certificate" for a decision of the High Council of Justice and the Council of the Prosecutor's Office". By changing the procedure provided in the Constitution and the organic laws, the law on the cleanliness of the figure violates and weakens the protection provided for them. The Court stresses that the choice made in the Constitution and the organic law to entrust questions of the discipline and discharge of judges and prosecutors to the High Council of Justice and the Council of the Prosecutor's Office so that their immovability shall be preserved, that is, also their independence, cannot permit another administrative authority to impose a binding decision on those two institutions.

66. In connection with civil servants, according to the respective law (law no.8549, dated 11.11.1999) they may be removed from the civil service if specific disciplinary measures have been taken against them by the competent organ in cases of failure to fulfil duties, for breaches of work discipline and the rules of ethics, as well as in other cases provided by that law (article 25). The administrative procedures should guarantee the right of the person against whom the measure of removal is taken to be heard, to defend himself and to appeal. An appeal against the disciplinary measure of removal may be addressed to the Civil Service Commission. The Court considers that the special procedures provided in the organic law for the civil service also are fundamental elements of the constitutional and legal guarantees for civil servants, which the law on the cleanliness of the figure does not take into consideration. Changing the procedure

provided in the respective organic law, the law on the cleanliness of the figure violates and weakens the protection provided for them.

67. For the above reasons, the Court reaches the conclusion that the law on the cleanliness of the figure, which is a law approved according to the ordinary procedure, cannot be treated as an interpretation and application of the respective provisions of the Constitution and organic laws. This law conflicts with the guarantees that the Constitution and the organic laws recognise to the respective state organs.

C. In connection with the claim that the regulations of the law on the cleanliness of the figure, so far as concerns the establishment, functioning and decision-making of the Authority of Checking the Figure, violate the requirements that come from the principle of the state ruled by law and the principle of the separation and balancing of the powers.

68. Appellants claim that the law on the cleanliness of the figure, so far as concerns the creating, functioning and decision-making of the Authority of Checking the Figure, serious violates the state of law and the principle of the separation and balancing of the powers provided by article 7 of the Constitution. The law gives this Authority super-constitutional competences, it interferes in judicial competences and does not meet any standard in connection with its independence from politics and the executive power.

69. The principle of the separation and balancing of the powers is declared in article 7 of the Constitution, according to which "[t]he system of government in the Republic of Albania is based on the separation and balancing between the legislative, executive and judicial powers". The Court has said that this formulation means that the legislature, the executive and the judiciary are separated, effectively independent, and that there should be a balance between them. Every institution of a power enjoys competence according to this purpose. The concrete content of this competence depends on the fact of which power the institution belongs to, on its place amon the other institutions, on its relations with the other state power institutions. No other organ or institution, in the composition of one of the three powers or not, cannot intervene in the treatment and resolution of issues that, as the case may be, would constitute the central object of activity of the other constitutional organs or institutions (*see Constitutional Court decisions* no. 11 dated *02.04.2008; no. 19 dated 03.05.2007).*

70. The law on the cleanliness of the figure provides that for the implementation of this law, the Authority of Checking the Figure is created, which should be organised and function in an independent manner (article 6). This Authority, according to the law, consists of: a) two representatives of the parliamentary majority; b) two representatives of the parliamentary minority; c) and the chairman, who should be elected by consensus. The Court considers that taking into account that all the candidacies are approved by the Assembly and that, when consensus is not achieved or in the inability of an election, the Assembly approves the member between two candidacies proposed from civil society, the procedure for the creation of this organ does not guarantee its functioning in an independent manner.

71. The Court observes that the Authority of Checking the Figure, according to law, begins the procedure of verification of cleanliness on its own initiative, on the request in writing of the head of the institution or on the request of the subject himself (article 13). The discretion of the Authority, as a rule, is limited: it verifies, on the basis of the documents, the existence of facts in connection with the verified subject. But in addition, in order to take a position, this organ has to interpret several expressions and terms of the law (such as, for example, “when he has acted against the official line”, “collaborator”, “political process”). The verification certificate for the verified subject is valid when at least three members of the Authority have voted “pro” (article 19).

72. The Court has made the assessment above that the interruption of the mandate of several constitutional organs and the discharge of judges, prosecutors and civil servants according to the law on the cleanliness of the figure, does not comply with the Constitution and the respective organic laws. The issue whether the regulations of the law on the cleanliness of the figure, so far as concerns the Authority of Checking the Figure, conflict with the requirements that come from the principle of the state ruled by law and the principle of the separation and balancing of the powers, is clearly related to the arguments that were given above by the Court on the first two claims.

73. In connection with the procedural guarantees, the Court notes that, according to the law, during the procedure of verification conducted by the Checking Authority, a subject who will be verified is not required to be present or to testify. Even according to the provision of article 20, point 2 of the law, an official who does not accept the result of the verification issued by the Authority is not given the possibility to explain his position

in the presence of the members of this organ. The Court considers that, in principle, giving the interested official of the possibility to appear before the Authority so as to give his reasons would have been a suitable means for permitting the interference in the rights of that person to be proportional (in particular in the absence of the effect of suspension by the judicial appeal: see below).

74. In article 22 of the law on the cleanliness of the figure, the possibility is provided for the verified subject to appeal the verification certificate in the court of the judicial district. The Court notes that, with the exception of persons who are currently in office, the effects of the verification certificate are not suspended by appealing judicially. In this way, the law takes away the possibility for the court to suspend the effects of the certificate if it considers it reasonable. Consequently, the decision of the Authority remains in force for the entire time before the court decides. This prohibition raises a serious concern so far as concerns the interference in the activity of the court.

75. The Court considers that the regulations of the law related to the competences of the Authority of Checking the Figure, evaluating as a whole the decision-making procedures and the effects of the verification certificate, go beyond and are in conflict with the competences that the Constitution has entrusted to several constitutional institutions and organs as well as the respective procedures provided by the Constitution and the organic laws.

76. The Court judges that the law creates a serious concern about the principle of the separation and balancing of the powers guaranteed by article 7 of the Constitution, in the sense that an executive organ is authorised to impose the cleansing of the figure over members of the legislature and the judiciary.

77. For the above reasons, the Court reaches the conclusion that the regulations of the law on the cleanliness of the figure, so far as concerns the creation, functioning and decision-making of the Authority of Checking the Figure, violate the requirements that come from the principle of the state ruled by law and the principle of the separation and balancing of the powers.

Ç. In connection with the claims that the law on the cleanliness of the figure restricts several constitutional rights, such as the right to be elected, the right to

work and the right of access to the public administration, failing to respect the conditions required by articles 17 and 18 of the Constitution.

78. Appellants claim that the law on the cleanliness of the figure restricts several constitutional rights, such as: the right to be elected, provided by article 45 of the Constitution, the right to work provided by article 49/1 and the right of access to the public administration. While appellants accept that those rights can be restricted, they claim that in the restrictions that have been made the lawmaker has not respected the criteria defined in articles 17 and 18 of the Constitution: that of the public interest in the meaning of it being essential in a democratic society, its justification in a reasonable and objective manner, and proportionality. In addition, they claim that this law has created the bases for a form of collective legal and moral responsibility, based only on the function that the subjects of this law have performed, without identifying "guilt" for concrete actions of violation of the fundamental human rights and freedoms.

79. Initially the Court considers it necessary to take note of the constitutional criteria that should be respected by the lawmaker in a case of limiting the fundamental human rights and freedoms. According to article 17 of the Constitution, restrictions of the constitutional rights and freedoms may be imposed if they meet several conditions: they shall be established by law, for a public interest or for the protection of the rights of others; they should be in proportion to the situation that has dictated them (the principle of proportionality); they should not violate the core of the rights and freedoms; and in no case may they exceed the restrictions provided in the European Convention on Human Rights (ECHR). That is, this constitutional provision requires the evaluation of whether the legal interference of the state is essential, depending on the nature of the right, the nature of the public interest that is to be protected, the concrete circumstances that dictate an intervention at a minimum and as less harmless as possible from the viewpoint of human rights *(see CCt decision 39/2007, 41/2007)*.

80. By referring to the ECHR, the Constitution has given this document the value of a constitutional standard so far as concerns the restriction of human rights. The lawmaker cannot impose restrictions that exceed those provided by the ECHR, but it is not hindered, through legislation, from expanding the space of the rights and freedoms and giving them a broader dimension to the realisation of protection of the individual (*see CCt decision 24/2007)*. In this sense, the Court also takes account of the jurisprudence of

the European Court of Human Rights (ECtHR), which has *given life* to the standards of the ECHR through its implementation in concrete cases. The ECtHR has said that "whenever a state tries to support itself on the principle of a 'democracy capable of protecting itself' in a manner so as to justify interference in human rights, it should evaluate with great care the purpose and consequences of the measures that it undertakes, in order to assure that it reaches the balance mentioned above" (ECtHR, Ždanoka *against* Latvia).

81. The prohibitions established by the law on the cleanliness of the figure as a consequence of the issuance of a B verification certificate constitute restrictions of several fundamental rights guaranteed by the Constitution, as well as the ECHR and other international agreements ratified by the Republic of Albania. The Court judges those restrictions in relation to the requirements that they should meet according to the standards brought out above.

82. The Court considers that the law on the cleanliness of the figure has a lawful purpose. The ECtHR has also taken this position, expressing its view that the protection of the independence of the state, the democratic order and national security is a lawful purpose, in conformity with the principle of the state ruled by law and the objectives of the Convention (ECtHR, Ždanoka *against* Latvia)**.**

83. In connection with the criterion of proportionality, the Court notes that this criterion should be seen in relation to the circumstances [of] the case. For this reason, the Court brings out below several general elements that should be taken into account during the specific evaluation of proportionality.

84. The Court considers that the law on the cleanliness of the figure leaves no space for the examination of individual cases, but treats them together, without making any distinction. The sanctions are determined on the basis of formal criteria: merely the fact that a person was in one of the functions mentioned in article 4 of the law suffices for him to receive a B verification certificate. This means that "guilty" is not proven in every individual case, but is presumed. According to the law, the only case of discharge of the person from responsibility is when he has "acted against the official line or has removed himself from office in a public manner" (article 4, letter "a"). The international standards referred to above require that the presumption of "guilt" may be made only for former high officials of the institutions of the dictatorship who have committed serious violations

of human rights, who must prove their innocence by declaring that they have not taken part in the planning, direction or implementation of such a politics, practice or act. No other person under the rank of a high official of those institutions can be the subject of lustration measures, except when his individual “guilt” is proven in an impartial trial. The process of proving includes both the motive as well as his concrete participation in a violation of human rights.

85. From this point of view, the prohibitions of the law for persons who were “employees of the organs of state security” (article 4/ç, article 4/d), “sentenced by a final criminal decision … for the criminal offence of defamation, false denunciation or false testimony in political processes” (article 4/dh), as well as those provided in letters “e”, “f” and “g” of article 4 of the law on the cleanliness of the figure do not respect the standard for avoiding collective responsibility.

86. The deficiencies of the law on the cleanliness of the figure cannot be completed through judicial appealing (article 22 of the law). This law does not have provisions that give the court the competence to declare a verification certificate invalid because of the circumstances of every individual case. Except when it is otherwise provided, the court decides whether the decision for the issuance of a verification certificate has been given in conformity with the law on the cleanliness of the figure. The Court does not have the right to add new standards or criteria.

87. The principle of proportionality also requires that the time, which has passed between the inappropriate conduct and the evaluation of the danger or threat that the conduct has for the state, should be taken into account. As defined in article 1, the law on the cleanliness of the figure goes back very far in time, including the “period from 29 November 1944 until 8 December 1990”. The Court notes that while the existence of the threat or danger to the creation of free democracy has been accepted by Albania in the past, today, after many years and parliamentary and local elections, the existence of the threat and danger is doubtful, and the reasons that would justify a general act of lustration are not very clear, especially if the lustration is related only to the formal participation of the persons in activities of the Communist regime and does not require personal responsibility for the violation of human rights and other individual conduct. The representatives of the interested subjects the Assembly and the Council of Ministers did not give a convincing justification concerning this aspect.

88. In the Court's judgment, strong reasons should exist to justify the issuance of a new law on lustration eighteen years after the fall of the Communist regime and seven yeas after the end of the term of the prior legislation, as well as for the provision that it will continue to be applicable for such a long time.

89. The principle of proportionality requires that the period of exclusion shall be limited and shall take the individual circumstances into consideration. The length of time of exclusion from a public function should depend, on the one hand, on progress in establishing a democratic state ruled by law and on the other hand, the possibility for a positive change in the conduct and position of the subject of lustration. The Court observes that the sanctions provided by the law on the cleanliness of the figure are imposed for an indefinite time. It stresses that, since the purpose of lustration is to remove persons with anti-democratic conduct from office, the time period during which the checking will extend should be limited, because the activities performed in the past do not constitute conclusive evidence of the individual's current conduct or conduct in the future.

90. On the other hand, the Court takes into account the standards of the Council of Europe, which recommend a maximum time of five years from the disqualification. This restriction may be exceeded for various reasons in individual cases, such as, for example, for very bad personal conduct or individual guilt, but the exceeding should be justified in every concrete case. Even in those cases, the Court considers that an indefinite exclusion from the public function without having the possibility to regain it raises the problem of proportionality.

a) The right to be elected

91. In article 23, point 2, the law on the cleanliness of the figure provides that a verified subject to whom a "B certificate of verification" has been issued is disqualified from the continuation of the procedures of election. This prohibition of the law violates the right to be elected guaranteed by article 45 of the Constitution and article 3 of Protocol no. 1 of the ECHR. The right to run in elections is also guaranteed by article 25 "b" of the International Convention on Civil and Political Rights (referred to below as the ICCPR).

92. In the Court's judgment, this restriction of the law constitutes a serious interference, since judicial appealing about the conclusions of the Authority does not suspend the effects of the verification certificate according to article 23/3 until the "decision of the court has become final". In this way, the right to run in an election can be denied until the courts take a final decision for the resolution of the case.

93. The right to run in an election is a fundamental right, but not an absolute one. Interventions may be justified according to article 17.1 of the Constitution if they are done by law, for a public interest or for the protection of the rights of others and if the intervention is proportional in relation to the situation that makes the intervention necessary. Furthermore, they should be in conformity with the ECHR (article 17.2 of the Constitution). In connection with this issue, the ECtHR says: *"In their internal legal orders, the Contracting States condition the rights to vote and to run in elections on the circumstances, which in principle are not excluded by Article 3. They have a wide margin of appreciation in this field, but it is for the Court to determine at the end whether the requirements of Protocol no.1 have been respected; it should be convinced that the circumstances do not restrict the rights in question up to that amount that their core is damaged and they are deprived of their effectiveness; that they have been imposed for a legitimate purpose and the means used are not disproportional."* (Adamson against Latvia, par. 116)

94. The Constitutional Court considers that the constitutionality of the restriction of the right to be elected according to article 23/2 of the law on the cleanliness of the figure should also be evaluated in relation to the conditions mentioned above. The Court accepts that the exclusion of a category of persons from electoral functions, who cannot be trusted to exercise their competences in conformity with the principles of the democratic state ruled by law, is a "public interest" within the meaning of article 17 of the Constitution and a legitimate purpose in the meaning of the ECHR.

95. But the Court stresses again that the "public interest" should respect the proportionality of the interference. Similar, it should be stressed that the standards of the CoE do not recommend lustration measures for elective functions "except for cases when this is required by the candidate himself". The right of voters to elect whomever they desire is the basis of a democracy. Every exception from this recognised principle should be motivated in every individual case on the basis of special circumstances.

96. For the above reasons, the Court reaches the conclusion that the law on the cleanliness of the figure restricts the right to be elected not in conformity with the conditions required by article 17 of the Constitution and the ECHR.

b) The right to work

97. The right to work, which is expressed through the right to choose a profession and a place of work, is guarantee by article 49 of the Constitution, by article 6.1 of the International Convention on Economic, Social and Cultural Rights (ICESCR). Restrictions of the right to work should be imposed by law, should be proportional and should not touch the core of that right.

98. The right to work, according to article 49/1 of the Constitution, includes the selection of a profession, a place of work and system of professional qualification, for the purpose of securing the means of living in a lawful manner. The choice of a profession, as provided by the constitutional provision, is a right of the individual in the sense that he is dedicated to an activity to secure the means of living. This right of the individual to benefit from lawful work also gains importance from the social point of view, because work as a profession is also a value for the contribution that it brings to society as a whole (*see CCt decision no.20/2006).*

99. The right to work is defined by the ECtHR as: *"the choice of a profession, a place to work and a system of professional qualification, for the purpose of securing the means of living in a lawful manner. The choice of a profession, as is provided by the constitutional provision, is a right of the individual in the meaning that he is dedicated to an activity to secure the means of living. (...) The right to work and freedom of a profession mean every lawful activity that brings income and which does not have a specified time limit, except for cases when there is a special legal regulation. In this sense, the action of the state organs that brings direct consequences that impede the professional activity is a violation of this freedom to act. The guarantee that the Constitution gives an individual in connection with the right to work and the freedom of choice of a profession has the purpose of protecting them from unjustified restrictions imposed by the state"*. (Decision dated 11 July 2006)

100. The right to exercise a profession can be restricted by reasonable regulations that may be attributed to considerations of the *general good*. The freedom to *choose* a profession, nevertheless, may be limited only for the sake of a *mandatory public interest*;

that is, if after a careful examination, the lawmaker decides that a general interest should be protected, then he may impose restrictions to protect that interest, but only up to that level that the protection cannot be realised by a less severe restriction of the freedom to choose. In a case when the violation of the right to *choose* work is inevitable, the lawmaker should always use regulatory means that are less limiting with respect to the fundamental right.

101. If the lawmaker conditions the right to start a professional activity on the fulfilment of several specified criteria, thus violating the right to *choose* a profession, in this case the regulations for the general good are legitimate. But those restrictions should be made only when such actions are absolutely necessary to protect in particular important interests of the community and the restrictive measures should, in all those cases, be chosen to contain the smallest possible infringement.

102. Restrictions on the freedom to choose a profession are often necessary to protect the public from various dangers and damages. Even in those cases, the restrictions should be justified and based on objective criteria. On the other hand, those restrictions should be done on specified criteria that have been made known, so that the candidates for the various professions should have the possibility from the beginning to know and evaluate whether they have possibilities to compete or not.

103. To evaluate the restriction of the right to work, the Court also takes into consideration the jurisprudence of the Federal Constitutional Court of Germany. The latter has said: *"According to doctrine, practising a profession may be restricted by reasonable rules that may be attributed to assessments of the general good. The situation changes when the state turns into a controller of the objective conditions of acceptance into a place of work. In those cases, the restrictions are permissible only for very limited and well-defined reasons. In general, the lawmaker may set such conditions only when they are necessary to point out the possible dangers that might affect interests of a fundamental importance in the community." (Decision of 11 July 2006).*

104. The exclusion of persons who have received a "B verification certificate" from the exercise of the functions mentioned in article 3 of the law on the cleanliness of the figure, as is defined in articles 24/4 and 24/5 of the law, violates this right, since the exclusion is a result of receiving a "B verification certificate". In addition, that right is

also violated in the case of exclusion from the procedures of appointment and election, according to the provisions of article 23/2 of the law.

105. The need for an "A verification certificate" is not a regulation about the manner of exercise of a profession, but an objective condition for acceptance into a particular place of work. In this sense, the imposition of this condition requires convincing reasons of the public interest. The purpose of lustration to secure the faithfulness of the respective services for the public in a democratic state, that is, assisting in the creation of this new order, is a legitimate reason with a common interest.

106. The proportionality of this restriction depends both on the kind of connection or collaboration as well as the function held by the particular subject. The broader the collaborative activity was and the more important the function held, all the more is there a chance that the restriction will be considered as proportional.

107. In order to assess the constitutionality of the restriction of the right to work, the Court holds to the arguments that were given above in relation to the requirements that come from the principle of proportionality. From this point of view, it comes out that the lawmaker has not succeeded in justifying the need for this restriction and has not established a mechanism that would avoid collective responsibility and would assist the finding of equilibrium in each individual case.

108. For the above reasons, the Court reaches the conclusion that the law on the cleanliness of the figure restricts the right to work without respecting the requirements of article 17 of the Constitution and the ECHR.

c) The right of access to the public service

109. Many of the functions mentioned in article 3 of the law on the cleanliness of the figure are related to public service in a broad sense. In connection with this service, the Constitution provides in the second paragraph of article 107 that "*Employees in the public administration are selected by competition, except when the law provides otherwise"*. Such a norm in essence is equal to a guarantee of access to public services under equal conditions.

110. The ECHR does not guarantee the right of access to public services, but this right has been accepted in international law. The Universal Declaration of Human Rights of 10 December 1948 and the International Convention on Civil and Political Rights of

16 December 1966 provide respectively that: "...every person has the right of access, under conditions of equality, to the public functions of his own country" (article 21, par. 2) and every citizen has the right "... to be accepted, under general terms of equality, to perform public functions in his country" (article 25/c).

111. According to article 23.2 of the law on the cleanliness of the figure, access to public services depends on an "A verification certificate" so long as the function is included in the listing provided in article 3 of the law. This condition excludes a person affected by a competitive selection, thus violating the right of access to public services, while individuals who receive a "B verification certificate" are *a priori* excluded.

112. On the other hand, article 25 of the ICCPR permits "reasonable restrictions" to be established. Although this leaves a broad margin of interpretation, the requirement of reasonability is not met by the law on the cleanliness of the figure because of the wide range of persons who are excluded from public functions, without a reference to the circumstances of the individual case and without being subjected to showing individual responsibility, according to the provisions of article 4.

113. Furthermore, article 107/2 of the Constitution permits exceptions from the general rule of competition as long as they have been provided by law. In a state ruled by law, such legal provisions should be supported in a reasonable and objective manner. The Court holds to the arguments that were given above in connection with the proportionality of the restriction of the right to work, to reach the conclusion that the law on the cleanliness of the figure also violates the right of access to the public services in violation of the requirements of article 17 of the Constitution.

114. Based on the above analysis, the Court reaches the conclusion that the law on the cleanliness of the figure that is under examination conflicts with the constitutional guarantees and principles referred to above, and consequently, it should be repealed.

FOR THESE REASONS,

Constitutional Court of the Republic of Albania, in reliance on articles 131, letter "a", 134 letters "c" and "f" of the Constitution and article 72 of law no.8577, dated 10.02.2000 "On the organisation and functioning of the Constitutional Court of the Republic of Albania", unanimously,

D E C I D E D:

- The repeal of law no.10034, dated 22.12.2008 “On the cleanliness of the figure of high functionaries of the public administration and elected persons” as incompatible with the Constitution of the Republic of Albania.

- This decision is conclusive, final and enters into force on the day of its publication in the Official Journal.