



**Updated amendment recommendations
to the law of Ukraine 4359a “On Purification of Government”**

The most serious weakness of lustration in Ukraine is the act itself. Regrettably, many of the recommendations made by international experts have not been taken into account, and the act “On Purification of Government” should, in our view, be significantly modified, especially in the area of enforcement of individual accountability in the verification process and the creation of a dedicated independent institution.

Presented here is a summary of the guidelines and proposed amendments divided into mandatory for application and those that are conditional.

Among mandatory guidelines for changes into the law are:

1. A decentralised mechanism for the lustration and absence of an independent institution responsible for its conduct involves a risk of chaos and lack of actual control by the Ministry of Justice over the process and also favours corruption. In accordance with the guidelines in Resolution 1096 of the Council of Europe, such an independent body should be established¹. Among arguments against creation of the independent body was the need to save the budget money, which does not hold ground due to number of the new institutions that the new government wants to create. Second argument brought was the need to change constitution which also does not hold ground because there is a legislative possibility to create a new institution within the executive power but with special independent status granted. Examples are: SBU and National Agency for State Service;
2. The part of the law providing for automatic termination of employment of a category of people for merely occupying certain positions raises concerns in the context of the application of individual accountability to the law as a universal principle. Only during early stages of Czech and German lustration pre 1996 (when the Resolution was adopted) such automatic dismissal was applied. Currently in each of the states that either went through or go through lustration verification for particular guilt is applied. This can involve cooperation or employment at the former state security services of USSR, secret collaboration with such, violation of human rights by particular action of the public administration worker or the representative of juridical profession (i.e. judge or a prosecutor), involvement in corruption schemes etc. general provision is that verification for particular guilt is mandatory to be applied due to obligations of Ukraine to implement Rule of Law standards of the EU;
3. It is advisable to involve elected positions into the scope of lustration due to unique Ukrainian electoral regulations that in some cases make it unclear who will actually get the mandate after the elections. Although Estonia cancelled the verification of the elected positions due to the verdict of the European Court of Human Rights, that said that elections are enough to verify candidates. Poland still keeps elected positions subjected to mandatory lustration;

¹ <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=7506&lang=EN>

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4. As to the verification of judges it is advisable to widen scope of their disciplinary accountability for corruption or violation of human rights in terms of “crime in the court” (wrongly applied justice) for the longer period of time than only Yanukovych administration. It is advisable to make it factual though because the lobby of the judges and prosecutors tries to use every possible excuse to avoid verification and any accountability. However it may be assumed that 50% of the judiciary are people that never mended the law by applying verdicts harmful for the citizens, the corporative solidarity makes it practically impossible to effectively implement any instruments of self – purification of their circles. Whichever the case if the law “On purification of government” is to be applied for the judiciary it has to review their work for actual guilt and not for holding the position itself. Finally the High Council of Justice foreseen as responsible for disciplinary accountability of the judiciary is strongly politically dependent because its members are politically appointed, therefore they are fragile to issue verdicts that favour any political group of interest that finds access to them. The very mechanism of appointing members paralyses the work of the High Council of Justice cause it is enough to delay it to make any limited disciplinary accountability of judges practically impossible to be ever applied. Therefore it is recommended that the judges be reviewed in the process of lustration, but by an independent external body to be established;
 5. Revision of the law for any unclear juridical terms, any collision with other laws during practical implementation is strongly advised.

As to conditional advice from the experts collected during recent months:

1. Wishing to meet the requirements of Resolution 1096 (1996)² of the Council of Europe, concerning, inter alia, the guarantee of the possibility for a person who has been negatively verified to appeal in court, the law sees administrative court as the competent court to hear such matters. It is to be considered whether in an extraordinary situation in which the state is undergoing a period of transformation, it would be advisable to set up a Lustration Court consisting of judges appointed to pass such judgments who have been specially trained in such matters;
2. Historical matters should be separated from current affairs. Facts of collaboration, if any, with the security services of the USSR, of being a conscious, intentional and secret collaborator, might perhaps require an amendment to the law on the Institute of National Remembrance of Ukraine (Instytut Pamyati Naroda) which would be provided with the applicable archives from the SBU and equipped with prosecutorial powers as regards violations of human rights, crimes and collaboration with the intelligence and security services of USSR. The fact itself of doing work for such a structure as the basis for dismissal and prohibition of work raises the consultants’ concerns. The basis for negative verification may be concealment of the fact of collaboration or reasonable doubts concerning a suspicion of their perpetration of crimes against citizens of the Ukrainian Socialist Soviet Republic, however on the other hand consultants understand the need to secure the state from certain category of people that cannot be trusted, therefore in case of holding position in the former intelligence and security services of USSR, KGB and GRU included, automatic dismissal should take place;
3. Timeframe of verification should be realistic;

² <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta96/eres1096.htm>

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4. It should be considered whether or not the law violates rights for privacy of third parties;
 5. Any declarations or forms used in the process of verification should be included as appendices to the text of the law.

On a positive note, the consultants appreciate the provision for public control of the verification – this is a very important issue and not dealt with in any of the countries undergoing systemic transformation, except the Truth and Reconciliation Commissions functioning in African states, including South Africa.

Provided by the following list of experts:

- Paweł Wojciech Osik – defence attorney, member of the Human Rights Commission of the Supreme Bar Council of Poland;
- Dr Pavel Zacek – founder and first president of the Institute for Study of the Totalitarian Regimes in Prague;
- Dr Radosław Peterman – vice president of the Lustration Department of the Institute of National Remembrance of Poland;
- Professor Roman David – specialized in the research of application of the instruments of transitional justice, Lingnan University, Hong Kong;
- Artur Bilski – attorney, member of Clifford Chance Poland, PhD candidate of the Faculty of Law, University of Warsaw, Poland;
- Anne Soulleliac – attorney, advisor of the French Bar Council, specialized in human rights;
- Filip Cyuńczyk, PhD Candidate at the faculty of Social Sciences, University of Białystok, Poland.