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Comments on the Ukrainian Draft Law on Lustration

The following publication was first published at the VoxUkraine and was shared with the ODF upon the courtesy of the editorial board.

VoxUkraine is an independent association of Ukrainian economists—academics and practitioners—working in Ukraine and in the West. The goals of VoxUkraine are to promote research-based policy analysis and commentary on economic developments in Ukraine, to formulate a systemic approach to reforms, to provide high-quality discussion platforms, and to integrate Ukraine into the global network of economists and public policy leaders. Members of the association are at the top of the Forbes ranking of Ukrainian economists. You can find VoxUkraine here: http://voxukraine.blogspot.com.

Since June 2014 ODF collects analysis and opinions from variety of international experts on the topic of lustration and verification of state public authorities and immediately shares it with the Lustration Committee of Yehor Sobolev.

The collected set of analysis will be published by 11th September 2014 in a downloadable digital form.

Experts worked both on the first draft of law that was published in June 2014 and was made available for open discussion, and on an updated proposal that was accepted by Verkhovna Rada of Ukraine on 14th of August 2014.

A bad law on lustration law is worse than no law on lustration. In its present form, the Ukrainian draft law on lustration prompts many serious reservations. These reservations arise mainly because the draft law violates key provisions contained in Council of Europe recommendations relating to laws on lustration; because the draft law is in important respects altogether impractical; and because perhaps what Ukraine needs now, as reflected by all surveys of public opinion, is a significant reduction in levels of corruption rather than a post-communist style lustration.

Historical Background

In Eastern Europe, lustration laws that were adopted and that withstood constitutional challenges were passed in Czechoslovakia in 1991, in Hungary in 1994 and in Poland in 1997. Countries that adopted laws—again, all were adopted in the 1990s—that had at least some lustration effects included Albania, Bulgaria, Rumania, Latvia, Lithuania and Estonia. All of these laws had a comparatively narrow and specific focus: all focused on exposing and banning from certain public positions individuals who had been members of communist secret police services or their collaborators or informants; some of these laws also sought to ban functionaries of the Communist Party and related institutions from office.

There were multiple arguments advanced in support of laws on lustration, but perhaps the following were the three most important ones. First was the prophylactic argument, i.e., the argument that because post-communist democracies were extremely fragile and because the public was uneasy about the covert continuation of old communist networks, lustration was a needed means of safeguarding the state and democracy by compelling candidates for office and officials to disclose their personal histories or by creating a discreet bureaucratic procedure to filter out people involved with the secret police or Communist Party structures. Second was the blackmail argument. Proponents of lustration argued that individuals with past associations with the secret police who now held important offices were open to blackmail, thus lustration was presented as a necessary means to protect public safety and democracy by safeguarding public officials against blackmail. The third argument was the public empowerment argument, i.e., the argument that by making public institutions more transparent, lustration would empower citizens and increase public confidence in the new, democratic political institutions.

All of these laws were, to a greater or lesser extent, controversial. Perhaps in part because of this controversy, the Council of Europe decided to confront lustration and to develop standards for laws that imposed lustration.

Council of Europe Standards

In 1996 the Parliamentary Assembly of the Council of Europe considered and articulated both the guiding principles that any law on lustration in a post-communist, Eastern European country should reflect as well as a set of specific "Guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law." Parliamentary Assembly, Doc. 7568, 3 June 1996 (hereafter "Doc. 7568").

In its Resolution 1096 adopted on 27 June 1996 titled "Resolution on measures to dismantle the heritage of former communist totalitarian systems," the Parliamentary Assembly of the Council of Europe explicitly addressed administrative measures such as lustration and stated that lustration should only be performed consistently with the guidelines set forth in its Doc. 7568. These guidelines are important enough to be quoted at some length:

"To be compatible with a state based on rule of law, lustration laws must fulfill certain requirements. Above all, the focus of lustration should be on threats to fundamental human rights and the democratization process; revenge may never be a goal of such laws, not should political or social misuse of the resulting lustration process be allowed. The aim of lustration is not to punish people presumably guilty—this is the task of prosecutors using criminal law—but to protect the newly emerged democracy." Doc. 7568, p. 4.

Consistent with the notion that the aim of lustration is to protect the newly emerged, post-communist democracies, guideline (g) states that "lustration measures should preferably end no later than 31 December 1999, because the new democratic system should be consolidated by that time in all former communist totalitarian countries," and guideline (j) states that "Lustration shall be imposed only with respect to acts, employment or membership occurring from 1 January 1980 until the fall of the communist dictatorship [in the case of Ukraine, 1991]."

Although one can obviously argue that post-totalitarian transition in Ukraine has been slower than anticipated by Europe or that it was set back by unanticipated interruptions, the Council of Europe guidelines nevertheless prompt a fundamental question, is a law on lustration really the appropriate remedy for what ails Ukraine today? Even if, however, it is decided that Ukraine needs a law on lustration, then any such law must comply with Council of Europe guidelines, some of the most relevant of which are:

"(a) *Lustration should be administered by a specifically created independent commission of distinguished citizens nominated by the head of state and approved by parliament;*

. . . .

(c) *Lustration may not be used for punishment, retribution or revenge; punishment may be imposed only for past criminal activity on the basis of the regular Criminal Code and in accordance with all the procedures and safeguards of a criminal prosecution;*

(d) *Lustration should be limited to positions in which there is good reason to believe that the subject would pose a significant danger to human rights or democracy,* that is to say appointed state offices involving significant responsibility for making or executing governmental policies and practices relating to internal security, or appointed state offices where human policies and practices relating to internal security, or appointed state offices where human rights abuses may be ordered and/or perpetrated, such as law enforcement, security and intelligence services, the judiciary and the prosecutor's office;

(e) *Lustration shall not apply to elective offices*, unless the candidate for election so requests—voters are entitled to elect whomever they wish. . . ;

. . . .

(g) Disqualification for office based on lustration *should not be longer than five years. . . ;*

. . . .

(m) *In no case may a person be lustrated without his being furnished with full due process protection, including but not limited to the right to counsel* (assigned if *the subject cannot afford to pay), to confront and challenge the evidence used against him, to have access to all available inculpatory and exculpatory evidence, to present his own evidence, to have an open hearing if he requests it, and the right to appeal to an independent judicial tribunal."* Doc. 7568 (emphasis supplied).

The Ukrainian Draft Law on Lustration

The Ukrainian draft law on lustration is being proposed about two decades after such laws were adopted by Czechoslovakia, Hungary and Poland. The scope of the Ukrainian draft law is very much broader than any of its neighbors. And, despite the draft law's statement in its preamble that it seeks to help "create conditions for the development of a new state government in conformity with European standards," the draft in numerous ways violates the Council of Europe's standards on lustration. The most important ways in which the two diverge may be summarized as follows.

Instead of being administered by a specifically created independent commission of distinguished citizens, as directed by the Council of Europe, the Ukrainian draft law envisions in Article 5 that lustration would be conducted by the head of each agency. This raises all kinds of concerns about possible arbitrariness, selective enforcement, cronyism etc.

The Council of Europe directs that lustration shall not apply to elected offices. The Ukrainian draft law envisions that it shall, and that this vetting will be conducted by the Central Election Commission.

The Council of Europe directs that "In no case may a person be lustrated without his being furnished with full due process protection, including but not limited to the right to council (assigned if the subject cannot afford to pay), to confront and challenge the evidence against him, to have access to all available inculpatory and exculpatory evidence, to present his own evidence, to have an open hearing if he requests it. . . ." The Ukrainian draft law envisions little of any of these protections insofar as it envisions an administrative rather than a judicial-style proceeding.

The Council of Europe directs that disqualification from office as a result of lustration be for no longer than five years. The Ukrainian draft law envisions disqualification for ten years.

The Council of Europe directs that lustration only be used to exclude from public office individuals who pose a significant danger to democracy or human rights. The lustration laws of Poland, Czechoslovakia and Hungary were limited to trying to exclude members of the secret police and their informers and some laws also excluded members of the communist hierarchy. The Ukrainian draft law seeks to exclude a huge number of categories of individuals. These include anyone who occupied any number of offices between February 2010 and February 2014 ranging from the former president to judges, prosecutors and others; anyone who occupied any number of offices between December 2013 to February 2014, including ministers and officials in various security services; a large category of individuals ranging from law enforcement officers who helped repressed protests to "public officials and officers of local self-government bodies who, by commission or omission proposed to impede or impeded exercise by Ukrainian citizens of constitutional right to peaceful assembly. . . ." Draft law, Chapter I, Article 3, Section 3 (f); and persons who prior to August 19, 1991, were high-level Communist Party officials, were agents or officers of various Soviet-era secret police bodies or who persecuted members of the Ukrainian liberation movement during World War II or after. Article 3, Section 4(f).

The draft law is also highly impractical in several ways. Two issues stand out in particular. First, the proposed administration of the law's lustration procedures is extraordinarily complicated, which complexity multiplies opportunities for failure and, what may be worse as far as the proponents of lustration are concerned, discreditation of any effort at lustration. As envisioned by the draft law, the heads of individual agencies will be responsible for the vetting process within their individual agencies (with additional multiple carve-outs: for example, the Central Election Commission will vet elected officials). Each head of an agency will have to submit his/her vetting plan for approval by the National Agency for Public Administration along with that of the Tax Authority. The Cabinet of Ministers will "coordinate" the activities of the agencies in the implementation of vetting procedures. The National Agency for Public Service will control and coordinate the vetting plans to be performed by the individual agencies according to the procedures specified by the Cabinet of Ministers. And, for the purpose of vetting those who perform the vetting, the National Agency for Public Administration shall establish a central vetting commission along with local vetting commissions. Draft law, Chapter II, Article 5.

Second, the draft law envisions that *within three months of adoption*, the Cabinet of Ministers shall draft and propose to Parliament draft laws "on judicial reform, 'On [the] Prosecutor's Office,' 'On the Security Service of Ukraine,' 'On Police,' 'On the National Bureau of Investigation,' 'On the Cabinet of Ministers,' 'On Public Service'. . . ." Draft law, Chapter VI, Section 2. A well-researched and carefully thought out proposed law that reforms the Prosecutor's Office is under consideration by Parliament. Unless the other draft laws referenced in Chapter VI that the Cabinet of Ministers will have to have ready in three months after the passage of the law on lustration are in similar shape, what Chapter VI envisions is not only impractical but could actually be harmful. It is simply impossible to prepare good complex legislation in such a short period of time.

Conclusion

If the main focus of reform activities is corruption reduction, then what is needed is that corrupt public officials be prosecuted rather than lustrated, although the law on labor must be changed to allow for suspension of officials against whom there exists credible evidence of corruption whether or not such officials are under criminal investigation. Furthermore, what is needed is effective anti-corruption mechanisms, both preventive and punitive; a new understanding of what professional ethics by public servants means and why it is urgently required; conflicts of interest rules; and a system of financial

declarations with criminal liability for filing false declarations (the draft law on lustration contains a declarations provision, but it is embedded in the lustration law). Last, but not least, there is information that the president will within the immediate weeks have registered in Parliament a very good draft law on the prevention of corruption that was prepared by the Ministry of Justice with significant input from Ukrainian civil society. Perhaps Parliament might be better served directing its focus in that direction.

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