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Opinion on Ukraine's Draft Law "On Purification of Government"

The following publication is a part of an ongoing project of the Open Dialog Foundation aimed at support of the lustration reform in Ukraine.

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.

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One of the main postulates made by the people gathered on Kiev's EuroMaidan was to completely change the style of governance in Ukraine. The unclear arrangements and connections between the authorities, officials and business were to be replaced by transparent structures to be made part of the rule of law. The replacement of officials/satraps with ones working for society are elementary changes in any systemic transformation. The actions undertaken by the new Ukrainian authorities demonstrate that they are making every effort to approach the issue in very serious manner. One of these elements is to be the screening of existing staff, within the executive branch, the legislative authorities and the judiciary. Removal of the most compromised officials is supposed to lead, as I understand it, to the appointment of staff that perform public functions with pro-social and pro-civic orientation and, additionally, acting within the limits of, and with full respect of the law. The overall concepts of such processes are usually beyond dispute. Problems are typically in the details though.

The draft act, as presented to me for consultation, could certainly, in its general concepts, lead to the implementation of the postulations of the people who were ready to risk their lives, for several winter months, to effect an actual and not just an apparent change. As already mentioned, problems and controversies arise when one comes to the details. Especially in a situation in which Ukraine is now, it is essential to be particularly attentive throughout the process of creating new law, and in particular when this law is to have an actual impact on the shape of the future structures of the rebuilt state.

I would wish to consider the draft act presented to me from the viewpoint of the theory of law and from the dogmatic perspective too. The aims the legislators had in mind are clear and the provisions of the proposed law demonstrate a determination to have them implemented. However, several major issues are encountered in the process. The first of these is the development of civil society which does not exclude anyone. This does not mean, in the slightest, abandonment of the process of settling accounts with the past or dealing with the crimes perpetrated by officials working for the previous authorities. This means the creation of civil society based on reconciliation.

As demonstrated by Article 3, the catalogue of entities to be screened will be very extensive. This brings about another problem. Is it possible, within the existing legal system and with the use of ordinary remedies, to conduct effective screening of the people who are to be covered by the future law? The other question which arises at this point is whether there is public trust, sufficiently strong, in the current institutions, to enable the acceptance of their decisions. It is to be noted that they may be often considered by society as too lenient or not commensurate with the offences. Very often, the level of acceptance is inversely proportional to the extent of the people's wrath. The experience in our part of Europe to date, shows that the application of ordinary remedies raises social discontent or contestation of the changes by society. On the other hand, the application of ordinary methods makes it possible to avoid a phenomenon which is very threatening in transitory periods and which consists in a populist approach to law which yields measurable short-term benefits but over time it becomes burdensome even for its followers. Such a situation can be observed particularly in the case of corruption offences which are to be covered by the proposed law too. Post-Soviet societies demonstrate a noticeable inclination to both demand effective prosecution and severe punishment of corruption, but, on the other hand, tend to accept behaviours which favour corruption. At some point, too restrictive anti-corruption regulations may lead to a vicious circle of penal populism.

There is yet another question that arises in such circumstances: as to whether, in the face of uncertainty relating to the effectiveness of existing regulations, extraordinary regulations should perhaps be adopted? In the case of Ukraine, there are grounds for taking such steps. These include the serious international problem of the Crimea, fighting in the country's eastern regions and strong internal influences which undermine the trust in public servants and raise questions about the advisability of relying on the state's existing structures. However, adoption of such a course of action involves quite realistic threats. Above all, it is the current social and political situation in Ukraine that does not favour their application. The author of this opinion is not aware of either plans or ideas President Poroshenko has about how to stabilise and reunify the eastern districts with the rest of the state. However, proposals voiced in the media to extend the self-governance of the eastern districts, possible amnesty, etc. do not provide a good background for the application of extraordinary legal solutions. Where the past is present through the law and transitive justice is applied thus leading to reconciliation and forgiveness, no regulations should be introduced which would carry the risk of further divisions within society and further inflammation of the conflict. Such regulations could ideally be adopted with practically full consent of the people to the course of action to be adopted.

Proceeding to analyse the particular institutions, I would wish to emphasize again the need for settling accounts with the past in order to build a new legal order based on the principles of liberal democracy. Adoption of inappropriate methods for that may lead to consequences contrary to what was intended.

Let me focus on an analysis of the provisions of the draft law.

The introduction or the definitions used in Article 1 do not raise any major concerns. Article 2, and its paragraphs 3 and 4, and the rules for the screening generate some doubts though. Paragraph 3 refers to the complexity of the legal, political, socio-economic, informational and other measures to be taken. It is in fact, an open catalogue of permitted actions. In such circumstances, the absence of clear and precise

statements on what such actions are about does not help at all. As regards legal measures, it is a question whether these include screening and certification or, for instance, also referral of the case concerned to a state court to decide on criminal liability or liability in damages for the actions or omissions. The same applies to the other measures. Neither is it advisable, from the western point of view, to combine political measures with legal ones. Any political steps should result from legal measures, for instance dismissal from a position AS A RESULT of a sentencing judgement passed by an independent court.

Paragraph 4 concerns the prioritisation of preventive measures. The legislators probably mean preventive measures in the meaning of penal law. These are very often provided for in codes which regulate the criminal procedures of states. In order to avoid potential abuse, it would be essential to specify what preventive measures are meant. Perhaps it would also be worthwhile inserting a subparagraph in Article 1, to define them.

Article 3 provides a catalogue of people to be screened. It in fact comprises all people presently performing public functions in Ukraine. Whilst the list itself does not raise any major concerns, some hesitations may refer to the legality of putting certain parties before the screening committee. The question arises whether it legally possible to screen Ukraine's President for instance. Article 108 of the Ukrainian Constitution lists the circumstances in which the President's term of office is to be shortened and these include the impeachment procedure. The relation to the procedure of screening and certification will be demonstrated further in this opinion.

The concerns mentioned in the preceding paragraph deepen when reading Article 4. Adoption of the administrative procedure is one of possible paths to be followed and applies, for instance, to access to information in the archives of the Gauck Institute. In such a case, however, information is based on the materials gathered in the Institute's archival resources. The procedure does not determine the scale of offences or innocence. This is mere provision of information about the person concerned. The concepts proposed in Article 4 can be applied but on certain conditions. Above all, they should be assessed for their effectiveness and feasibility. This relates to the question of the screening, if any, of the President, the Chair of the Supreme Council, the Chair's deputies, etc. In my view, the application of the procedure provided for in Article 4 to the President is not practicable. For the other parties mentioned in clause a), it would involve the risk of an allegation of breach of the principle that no one is a judge in his own case. It is hard to imagine, from the viewpoint of the rule of law, the screening of the Prime Minister by Deputy Prime Ministers and of the Chair of the Supreme Council by the Chair's Deputies. A similar situation occurs for the parties specified in clause b). As regards the parties mentioned in the other clauses, the screening and certification are feasible. As far as the parties listed in the first two clauses are concerned, a thought should be given to setting up a two-instance judicial body. As regards the procedure for the remaining parties, the fact of default one-instance procedure is certainly problematic. Default is mentioned because there is no information in the text of the proposed law on the possibility of filing an appeal against the commission's decision with a second-instance commission or filing an administrative complaint with a state court of law.

Article 5 is about strictly technical matters but its provisions may raise considerable interpretative concerns. There are major inconsistencies and legal gaps there relating to the preceding articles. First and foremost, it follows from the provisions of the proposed law that the application of a lie detector is obvious to the legislators. Even though legal prudence is observed consisting in the test with the use of a lie detector being voluntary, there is no possibility of continuing the procedure where consent is expressed with a parallel refusal to be tested with the use of a lie detector. In the current wording of the law, refusal to be tested with the use of a lie detector torpedoes the whole procedure and hence in accordance with Article 5(5), such a person should be qualified as not screened. Such a legal concept would certainly not be approved of by the European Court of Human Rights. The question arises

whether alternatives to lie-detector testing should be considered. It should most likely take the form of a statement made under the penalty of criminal liability, and hence it becomes necessary again to conduct the screening procedure before a court. There is also the problem in paragraph 5 of the parties listed in clauses a) and b) of Article 3 not being subjected to the screening procedure. There is no mention of the liability of such parties for their failure to comply with the obligation to be screened. As already mentioned, the circumstances under which the President's term of office may be shortened are defined precisely in Ukraine's Constitution. Its Article 111 sets out the procedure for removing the head of the state from the office. The procedure is launched as a result of an offence, but failure to undergo the screening procedure may not be considered to constitute an offence. Consequently, even if he does not subject himself to the screening procedure, the President cannot be removed from his office because failure to undergo the screening is not listed among the circumstances referred to in Article 111 of the Constitution.

The articles following Article 11 of the draft law relate to the concepts adopted in the regulations under consideration. The consequences to be drawn against the parties who are subject to the screening, as well as the procedure envisaged in Article 11 of the draft law, are the effects of prior regulations. The ineffectiveness of the lustration act vis a vis the parties mentioned in clauses a) and b) of Article 3 is apparent again. Further regulations on the prohibition to occupy certain positions and potential dismissal from work or change of position also follow from the provisions discussed above, down to and including Article 5. The rewording and the application of a procedure other than administrative one should involve a thorough analysis of the detailed provisions contained in the other articles.

Also Chapters III, IV and V of the draft law deserve particular attention and should be discussed separately. Chapter III regulates the involvement, if any, of community organisations in the screening process. In addition to the general concepts, this chapter also contains some provisions and imprecise notions which may potentially lead to abuse and controversies. It is Article 13(3) that may raise concerns. This might be an error in translation, but the role of non-governmental organisations – defined in the text of the law in a manner typical of the former Eastern Bloc as community organisations – should be to exercise community control over the implementation of the law and the screening process, using the forms of control envisaged under the law. A thought should be given in the paragraph concerning community control to setting up a special procedure for access to such information.

In discussing Chapter IV, it is advisable to recall the problems covered at the beginning of the opinion. Such acts of law should be adopted with the observance of particular prudence in the context of allegations of political revenge. Any lustration involves such claims. The role of the legislative power, however, which has clear intentions, is to minimise them by focusing, in the process of establishing the law, on the elimination of institutions which may provoke such allegations. Regrettably, the chapter of the draft law under consideration is its weakest part, and liable to attacks from opponents. Major concerns are raised by Article 16 too. Its serious weakness is the deadline set out therein. Indeed, involuntary screening of people performing certain functions only during the term of office of President Victor Yanukovych and the applicability of the constitution written by his political circles (subparagraph 1), and, in addition, particular emphasis on the validity of special acts of law aimed at criminalising anti-presidential protests (subparagraph 2), may easily provoke allegations of political revenge. The author of this opinion does understand the harmfulness to the civil society of Ukraine of the actions of the former President. However, in a mature and predictable democracy, the emotional element is highly undesirable in the legislative process. Adoption of such catalogue of parties classed as unscreened in Article 16 may render social consensus impossible for many years to come, especially in the light of a polarisation of Ukraine's society which is already strong. Furthermore, this catalogue stigmatises the people responsible for the current condition of the state. If it is to be kept, this item should be modified in the direction of screening all parties performing public functions since Ukraine regained

independence. In this way, the legislators and the ones conducting the screening procedure would demonstrate that they mean, above all, a comprehensive and transparent review of the activities of all political elites in Ukraine throughout the period of existence of the independent state.

Conclusions

The development of such a draft law clearly demonstrates that Ukraine is ultimately beginning to head in the right direction. And it is not reorientation of its international interests that is meant. The draft lustration law, as presented for consultation, proves that the Ukrainian state has entered the path leading towards the development of liberal democracy based on standards which are universal for the so-called 'Western World'. One of its essential elements is also the building of a system of the rule of law. The building of such system, in turn, requires the effective settling of accounts with the activities of the ones previously in power, especially if such activities were not convergent with the interests of the society as a whole. However, the legislative process aimed at creating the legal framework for the account settlement must be particularly cautious. This should be demonstrated primarily through the focus on potential areas of abuse. Regrettably, the draft law, as presented, is not free of these. The gaps as well as regulations which may raise open revolt of a large part of society have been mentioned herein. Let me recall some of them. Above all, the screening and certification need to be reconsidered. The one-instance procedure as well as the application of administrative regulations, despite the clear ban on abuse of position do not seem to be appropriate in the context of the overall social and political situation in Ukraine. It is a separate issue whether the conduct of the procedure with respect to certain persons is feasible at all. A major problem is also the potential non-compliance of the act with Ukraine's Constitution. The rush in its adoption is fully understandable but, as already mentioned, acts of law which may raise some unrest in society should be well drafted in the first place, that is without gaps, a potential for abuse or populism. In the process of adopting such laws, it is worthwhile sometimes to step into the opponents' shoes and think whether the particular wording of a provision will win the trust of the opponents or whether it will deepen their feeling of being endangered. Regrettably, the draft law, as presented, contains both these element.

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