



Dr Pavel Žáček, government consultant, Czech Republic

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.

About the author:

Dr Pavel Žáček is a Czech academic and government official. He was the founder and the first Director (2008–2010) of the Czech Institute for the Study of Totalitarian Regimes.

The draft Act "On Lustration" attempts to resolve, in a rather complicated manner, the issue of screening, protecting and improving the Ukrainian state and public administration. In my view, a basic defect of the said draft is that it does not contain an article on positions in, and powers of, the Ukrainian National Agency for Public Administration which will probably be the most important authority in the entire lustration procedure. Likewise, the question remains whether the draft resolves all nuances of official and employment relationships to which the Act may pertain (see requirements set out in Article 2).

Also, having regard to the aims of the Act as formulated exceptionally briefly in its preamble, a special issue is also the compliance with European legal standards. I am convinced that the draft should be formulated precisely because it has been created primarily for the purpose of protecting public administration against criminal structures, partially with links abroad, or against remnants of Soviet totalitarian structures which violate and do irreparable damage to human rights and the rights of ordinary citizens of Ukraine.

Note should be made in advance of increased bureaucracy which this rather complicated system will be generated under conditions of more tightened security measures which are clearly needed where documents are kept for the required duration.

In that connection, I am certain that the basic systemic requirement is to separate lustration (screening) of the Ukrainian security apparatus from the remaining part of public administration. I am of the opinion that lustration (screening) of security services staff (possibly apart from the police) should be the responsibility of the information services, but in no event, a body of public administration. A draft Act

might provide for general conditions to be set for information services or the police or enable heads of services to apply exceptions in extraordinary and duly documented cases, relating to national security for instance (Article 3).

The complexity of the entire procedure, the need to work with a number of other institutions of public administration, collection of the required documents, communication with the society concerned, if any, within the presumed scope of the lustration (at its initial phase in particular) will certainly prevent the screening from being conducted over 30 or 45 days. A more realistic period of time is 90 days minimum (Article 6).

The people to be subjected to the screening (Article 3) are security service officials and staff whom I would propose to exclude, as opposed to the head and the head's deputy, from the powers of the Ukrainian National Agency for Public Administration (see above).

At the same time, note should be made of the complications involved in restricting directly elected representatives – deputies to Ukraine's Supreme Council and representatives of local governments. Unlike public administration bodies, their legitimisation follows from the procedure of democratic elections. The Act could have better formulated the obligation for the particular political parties to lustrate their candidates early and publicise the results of such lustrations.

In parallel, it is necessary to point to the fact that unlike elected representatives, administrative staff of Ukraine's Supreme Council or of representative bodies whose activities may be very restrictive during certain phases, are not to be lustrated. Neither does lustration apply to representatives of state media, not even those in managerial positions. The owners of private media should at least be given the possibility of lustrating, if required, at least their managerial staff.

Even though the draft Act offers the lustrated people a chance to present their remarks if they do not agree with the result (Article 9), it does not provide, however, for the possibility to appeal against the lustration decision. It would not be unreasonable to identify selected courts of law to deal with these specific issues.

The screening results (Article 10) do not include an option under which a manager or an employee appointed or designated to their position in the past and who are subject to lustration, fail to meet the lustration requirements, have to be dismissed or transferred to another position; the Act will certainly not apply to newly appointed people only.

It is also necessary to ask the question whether this Act, which sets out new conditions for public administration, may be combined with the obligation to institute legal criminal proceedings. This should rather be contained in an anti-corruption law or some other similar act of law.

The draft Act does not specify in any detail the form of the lustration certificate mentioned in Article 14 and Article 18. In my view, it should contain a reference to the applicable paragraphs of the Act, both for positive and negative results.

It is a political and constitutional right of Ukraine's Supreme Council to specify in detail, the subjects of screening who will not pass the screening process (art. 15). This pertains to probably the most important part of the Act which states clearly whether the proposed solution aims at improving the quality of public administration, detaching it from politics while separating it from criminal structures and removing the former totalitarian apparatus which violated, within the then prevailing Soviet system, human rights and the rights of the individual or whether the point is purely political revenge.

As for the former protection from the period before 19 August 1991, I would extend the category of KGB employees or secret agents to include all KGB's operating executive bodies or officers who violated human rights and the rights of individuals (Article 15/4c).

If a person is dismissed from his or her position due to the result of the lustration procedure, the question remains whether it is necessary to deprive them of the right to perform any function for another 10 years. Won't this provision be challenged by the Constitutional Court or European courts? The lustration certificate (or no screening) will prevent them, after all, from performing their functions whilst this Act is in force.

For more information please contact:

Agnieszka Piasecka, the project coordinator: agnieszka.piasecka@odfoundation.eu