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**The opinion on the draft Law 'On Purification of Government' presented on 12 June, 2014.**

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*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 14<sup>th</sup> of August 2014.*

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In any emerging democracy, settlement with the past constitutes an important element. One of the primary tasks of this settlement is to prevent future violations of human rights. It is worth pointing out that settlement with the past is executed through the introduction of criminal responsibility for the crimes of the authoritarian regime, learning about and understanding the harm suffered by the society, offering compensation to the victims and their families, commemoration of the past crimes and reform of malfunctioning institutions; its element is also verification aimed at removing from power the people who betrayed democratic values, or revealing their past.

One of the social postulates of the EuroMaidan is lustration, which has not, thus far, been known as a political term in Ukraine. The Social Lustration Committee of Ukraine, headed by Yegor Sobolev, formulated the draft of the statute 'On Lustration of State Administration', which is to provide a legal basis for the lustration process in Ukraine. The goal of this statute is to determine a legal and organisational framework in order to carry out the verification and certification of public institution employees.

The Office of the United Nations High Commissioner for Human Rights (OHCHR) noted as follows: "[Public] Institutions that abused human rights and defended the partisan interests of a few need to become institutions that protect human rights, prevent abuses and impartially serve the public. Dysfunctional and inequitable institutions that created fear need to turn into efficient and fair

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institutions enjoy civic trust.” One of the elements of reforming these institutions is verification, which is designed to assess the person in the context of the concept of righteousness, i.e. respect for human rights and the rule of law in public institutions.

Righteousness should be the basic requirement for employees, as violations of human rights, a lack of professionalism and financial dishonesty undermine citizens’ confidence in institutions, and prevent reconciliation”.

Each society has its own characteristics. Hence, there are many models of verification. However, it should be noted that verification is a deliberate process and can also be considered an obligation under international law. Federico Andreu-Guzman stated that the preamble to the Universal Declaration of Human Rights of 1948, which requires respect for, and observance of human rights and fundamental freedoms, also includes an obligation to counter violations of these rights. Also, it should be noted that the United Nations Human Rights Committee in its reports regarding the situation in particular countries, repeatedly indicates verification as a means of countering human rights violations.

Verification is used for various reasons. Firstly, it is applied in order to reform public institutions. Secondly, it is intended to prevent future human rights violations. Thirdly, it can also be used as a punitive measure. Moreover, verification may also be, as stated by the Hungarian Constitutional Court, “a form of public disclosure of the nature of the previous regime, a means of compensation and, at the same time, a symbol of irreversible changes.”

The Law ‘On Lustration of State Administration should include the legal framework of the verification process.

Verification should clearly specify:

- Verified entities
- Verification criteria
- The commencement and duration of the verification process
- The verification procedure

Precise regulations stipulated in the Law must be consistent with constitutional and international standards. Verification should include liability of the individual and provide for a fair verification process.

Within the framework of the verification, collective responsibility should be avoided, as this formula may be considered as contradicting art. 25 of the International Covenant on Civil and Political Rights (ICCPR), which pertains to access to public service on general terms of equality. Collective responsibility not only violates the principles of the rule of law and due process of law, but it is also ineffective, as it may lead to removal of the people who are not responsible for human rights violations, and admit to public offices those responsible for them.

In addition, verification procedures should be fair and promote the rule of law. ICCPR in its art. 3 provides for the right to legal protection, manifested by the right to appeal from the decision of dismissal from work or non-employment which is discriminatory to an individual. Regardless of the type of process and persons under verification, the verification should protect the rights of the persons subjected to it, and, in particular, it should provide for the notification of the persons in advance in the case of charges being presented to them, and the right to appeal to an independent body must be granted. Verification carried out in violation of fundamental rights of an individual not only does not support, but also undermines the rule of law and citizens’ confidence.

The review process should additionally apply all elements of due process of law, as required in the process of lustration. These include, among others: the right to defence, the right to confront and

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challenge the evidence used against the person subjected to verification, the right to bring their own motions for evidence and the right to appeal to an independent judicial tribunal.

Such a process should be commenced in due time and, in principle, it must be public, while parties should be informed about the decision rendered, and receive their justification. The principle of the presumption of innocence and the burden of proof lying on the verification body are of fundamental importance. Only persons (including judges) appointed to the position in breach of the required procedures and the then existing procedures of substantive law, may be dismissed from work by law without the necessity to be tried in fair proceedings.

In the process of re-employment, the principles of due process may not be fully applied - there is no right to be elected, however, the candidate can appeal against a discriminatory decision, denying his or her employment. The person is also entitled to become familiarised with the charges brought against him and respond to them. An impartial process must be conducted by two separate bodies, with one of them examining the evidence pertaining to the candidates, and the second rendering a decision concerning the candidate.

The issue concerning the verification of judges is particularly delicate due to their virtue of independence. Basic Principles on the Independence of the Judiciary stipulate that states cannot apply any form of discrimination in the process of the appointment of judges (although they may restrict access to justice to their citizens only). Judges accused of abuse of their power have the right to a fair and efficient trial carried out in the interests of their good reputation. A decision unfavourable for the verified person may be appealed through an independent body. In the case of judges, both the body collecting evidence and the body rendering a decision must be independent and impartial judiciary bodies.

In view of the aforementioned remarks, I would like to proceed to a thorough analysis of the draft Law 'On Lustration of State Administration'.

Article 1 contains definitions of the terms used in the Law. It explains the meaning of the following terms: certification, verification, polygraph, appointment, psycho-physiological interviews and persons subject to verification. Still, the explanation of the term 'verification body' is lacking. It is important to stress here that the notions: certification, polygraph and psycho-physiological interview are only briefly mentioned in articles 4,5,6 and 22. There is no detailed description of the rules of certification, and there are also no reasons given for the introduction of psychophysical interview. Moreover, the application of psychophysical interview may raise doubts of a legal nature in the case of elective and independent offices (e.g. judges).

Article 2 set out the main principles of verification rules which are consistent with the recommendation of OHCHR and United Nations Development Programme (UNDP).

Article 3 lists the types of persons subject to verification. The scope of persons subject to verification seems to be broad and from the point of view of Polish experience, it is likely to result in a lack of possibility of carrying out the verification within a reasonable timeframe. The delay could cause a serious threat to the fundamental rights of the individual, the right to personal and legal security, as well as lead to abuse and discrimination of persons subjected to verification.

Article 4 specifies the verification bodies. The presented proposal is of decentralised character. The adoption of this form may result in a similar effect to the German one, where the process was carried out independently in each institution and where the composition of the verification bodies, in the course of the procedure and its results significantly differed. It should also be noted that in the countries, which are in the process of transition, the chances of self-reforming a public institution are often slim.

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Article 5 names the documents which are necessary for the verification and certification. The lack of specification of the form in which the curriculum vitae (CV) must be drafted, raises doubts. The lack of uniformity will cause problems with the proper interpretation of the submitted biography by the person who is the subject of verification.

Another issue is the scope of the information provided in the property statement. These regulations evoke fear regarding their potential undue interference in the privacy of the persons remaining in certain relationships with the persons who, are in certain relationships with the person subjected to verification, but still, they do not fall in their category. It must be mentioned that such a broad property statement seems necessary, since a transfer of personal property to close relatives in order to conceal it is a common practice. However, this approach assumes that every public officer fulfils his or her duties for his or her own benefits, subsequently attempting to conceal the obtained benefits, and for this reason it is necessary to verify, even indirectly, the property statements of his or her relatives or the people associated with the person in some other way. It seems that the proposed solution is controversial from the point of view of the protection of privacy of third parties. Information provided by the officer regarding events from the life of the person's siblings, grandsons etc. is likely to result in family conflicts, especially if members of the officer's family acquired particular goods or positions through their own effort. Publicly binding their achievements with the fact of belonging to the officer's family, can be perceived as discreditable to their own position, or even embarrassing for them. There are also cases when purchasing a flat, or taking a job in particular locality indirectly reveal the family situation or life plans of a specific person (e.g. divorce or an intention to get married). Thus, making the information required in property statement public is likely to violate the privacy of a person who does not hold perform public functions.

The phrase in article 5: "In a case where a person subject to verification who is applying for a position, does not give consent to his or her verification, the verification in his or her regard shall not be carried out and the issue of his appointment or preparation of a motion regarding his appointment for a specific position shall not be considered" does not raise any doubts.

Moreover, it must be noted that a technical mistake has been found in article 5, as it includes repeated paragraphs at the beginning and end.

Article 6 names the periods of time for verification and certification. Such a broad scope of persons subject to verification and the proposed criteria of verification are likely to result in the failure to meet reasonable deadlines.

Article 7 discussed the organisation of the verification procedure. This article imposes deadlines on the public authorities for providing the information about the person subject to verification. It seems that with such a broad scope of persons subject to verification, these deadlines cannot be met, or they will lead to employment increase in the public authorities to which inquiries will be directed. Moreover, there are no specified entities whom verification bodies can address, or the scope of information which the verification body can request.

There is no article 8 in the draft.

Article 9 describes to whom the report about the verification results should be addressed. This article also introduces the term 'special verification', but fails to explain what it is.

Article 10 describes the form in which the opinion about the verification results should be drawn up. This article takes into account the possibility of becoming familiarised with such an opinion by the person subjected to verification and responding to the opinion. Remarks made by the person subject to verification in writing are handed to the certification bodies. In the proposed law, the procedure of appeal to an independent body has not been described, which is likely to result in accusation of a lack of

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the principle of due process of law. Regardless of the type of the process and the persons subjected to verification, the verification must protect the rights of the persons subjected to it, especially by providing them with notification about the charges sufficiently in advance, the right to respond to the charges presented and the right to appeal to an independent body.

Article 11 discusses the results of verification. Similarly to the previous article, there is no description of the due course of an appeal in this article. This article also refers to the issue of the verification of judges; still, (as was the case in previous articles) it does not provide for an opportunity to file an appeal against the negative decision to an independent body. In case of judges, both the verification body and the body rendering the decision should be an independent and impartial judicial body.

Article 12 refers to the restrictions concerning the misuse of public office by persons participating in undertakings related to the verification and certification of the persons subjected to verification. In this article, once more a technical mistake has been found, as the article refers to non-existing stipulations: "Violation of the provisions of this article provides a basis for a dismissal of the persons referred to in the first paragraph of this article from the office held as a result of the oath infringement with deprivation of those persons of their right to hold offices described in article 3 point (1) within 10 years from the date of their dismissal". Attention has to be drawn to the fact that it is not clear which first paragraph of the law should be considered, and the Law does not provide any information about any oaths whatsoever.

Articles 12 and 13 pertain to participation of society in the course of verification and certification. Disclosure of the verification procedure gains social acceptance and confidence. Classification of the procedure should be avoided whenever possible.

Article 15 guarantees legal protection to the persons carrying out the verification and the persons assisting in the verification procedure.

Article 16 specifies the grounds for denial of verification. It provides an exhaustive reference to the positions and public functions, which contributed to the establishment of the authoritarian regime. This catalogue must be carefully drafted and it must not raise any doubts regarding its interpretation. This provision may give, in particular, reasons for dismissal of the president of Ukraine Petro Poroshenko who in 2012 held the position of Minister of Trade and Economic Development (see art. 16 point 1, sub point (b) of the draft law 'On Lustration Of State Administration'). Moreover, art. 16, point 1, sub points (a) and (b) should define which of the managerial positions in communist organisations were meant by the legislator. At the same time, art. 16 point 4 does not take into consideration the persons, who served, worked or collaborated with the military security bodies of the state (GRU). Simultaneously, art. 16, point 4 sub point (c) raises doubts regarding the specification of the persons who were secret agents. Being aware of the experience of other countries, including Poland, it has to be noted that the special services provided more categories of collaboration. The form of the contacts with the state security bodies should be described differently here.

Article 17 describes the consequences of failure to subject to verification.

Article 18 bears the following title: "Liability of employees and systematisation of the information about verification". Unfortunately, this title is not adequate to the content included in this article.

Articles 19-21 are lacking.

Article 22 provides grounds for dismissal of persons who were not subjected to certification. The article does not provide for the course of appeal in case of a negative decision regarding the persons subjected to verification.

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Article 23 speaks about restrictions with regard to the persons subjected to verification who were dismissed from the positions held.

Article 24 and 25 indicates who holds control over the implementation of the Law. Apart from parliamentary control, social control is also anticipated.

The closing part of the draft law provides for the date of entry into force of the law, as well as the need to develop and submit the following statute projects: the reform of the judiciary, the Prosecutor's Office, the Security Service of Ukraine, the police, the National Bureau of Proceedings, on the Council of Ministers of Ukraine and the state service, which will be conformed to the principles of European law.

In principle, it has to be acknowledged that the Law 'On Lustration of State Administration' is necessary. The functioning of such a law finds its justification in normative acts of the Council of Europe and in the case law of the European Court of Human Rights. The solutions included in the draft which pertain to the verification procedure, require detailed changes; in the current form, they must be assessed critically. The draft should also include provisions which guarantee respect for the rights of the persons in regard to which the decisions are to be issued. This will help to avoid the filing of complaints with the European Court of Human Rights.

Let a quotation of the Polish Constitutional Court ruling, handed down in 1998 serve as a conclusion of the above presented analysis: "Firstly, it must be stated that the procedure of lustration, understood as legally determined mechanism for the purpose of examination of the relations and correlations of persons holding or applying for the highest state offices or holding other public functions, involving particularly high responsibility, and at the same time social confidence, in principle, cannot raise any doubts, both with regard to its consistency with the constitution [of the Republic of Poland], especially the concept of the rule of law in a democratic state, stipulated in article 2, as well as with regard to international standards."

Compliance with international standards is confirmed by Resolution 1096 of the Parliamentary Assembly of the Council of Europe on measures to dismantle the heritage of former communist totalitarian systems. Learning that some Member States have found it necessary to introduce administrative measures, such as lustration or de-communisation laws, consisting in the removal of persons from offices involving governmental power with regard to whom there can be no certainty that they will perform their duties in accordance with democratic principles, as they have shown no commitment to the rules in the past and have no interest or motivation to proclaim the rules, the Assembly states that, in general, such measures can be compatible with the idea of a democratic state under the rule of law only if they, while being compliant with the requirements of a state based on the rule of law, are directed against the threats to fundamental human rights and the democratisation process. The cited resolution lists a number of important criteria for this kind of regulations. It emphasises the need for applying 'lustration' laws individually, rather than collectively. Secondly, the right to defence, the presumption of innocence until proven guilty, and the right to appeal to a court of law against any decision must be guaranteed. Elsewhere, the resolution underlines that a democratic state based on the rule of law must respect fundamental rights and freedoms, such as the right to a fair trial and the right to be heard, even with regard to those who, while in power, neglected these very rights. The Assembly considers inadmissible political or social misuse of the lustration process. At the same time, it emphasises that the aim of lustration is not to punish people presumed guilty - this is the task of prosecutors using criminal law - but to protect the newly emerged democracy.

Finally, when drafting any laws regarding verification, it is worth remembering that: "Threats connected with a failed transition process are manifold. At best, oligarchy will reign instead of democracy, corruption instead of the rule of law, and organised crime instead of human rights. At worst, the result could be the "velvet restoration" of the totalitarian regime, if not a violent overthrow of the fledgling

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democracy. In that worst case, the new undemocratic regime of a bigger country can also present as a danger to its weaker neighbouring countries. The key to peaceful coexistence and a successful transition process lies in reaching (developing) a balance which ensures justice without, at the same time, seeking revenge.”

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