



Roman David, professor of sociology, Hong Kong

Comments on the Draft Law of Ukraine “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:

*Academic specialist on transitional justice. An author of *Lustration and Transitional Justice*, which was published by the University of Pennsylvania Press in 2011 and which received the Concept Analysis Award by the International Political Science Association in 2012.*

The Open Dialog Foundation asked me for my opinion on the bill On Purging State Public Authorities in Ukraine. The following comments on a few issues of the proposed law reflect my opinion on the matter. This is not a comprehensive report; such a report would require studying the legislative intent, a brief on existing and pending legislative initiatives, the results of public consultations on the draft, and other information.

1a. The proposed law is a special/transitional public employment law. Given the recent association agreement with the European Union, it may also be useful to consider a permanent public employment law based on European standards. For instance, looking for an inspiration in the German legislation (the Act on Federal Civil Servants and the Act Defining the Scope of Civil Servants' Rights and Duties) would satisfy the present concerns of the drafters, since the legislation postulates the requirement of loyalty to the Basic Law (The Constitution of FRG). The adoption of such a permanent public employment law would bring the Ukraine's state apparatus closer to the EU standards.

1b. The loyalty requirements could be possibly implemented by means of re-appointment: old and new applicants could apply for any public position. Re-appointment is essentially a prospective process, which can be easily implemented as a routine hiring.

2a. The draft law is essentially based on exclusions. One of the conditions for exclusive policies to be beneficial is that they are conducted in a homogeneous country. In heterogeneous countries, exclusions risk exacerbating existing divisions. However, Ukraine seems to be a heterogeneous country. It is

historically split between two diverse political cultures in the East and the West of the country. The recent events in Donetsk and Luhansk region may have further facilitated a loyalty shift of minority citizens away from the Ukrainian state. The implementation of exclusive policies may lead to deepening of these divisions, instead of leading to their overcoming. An inclusive lustration model would appear better suited to serve the Ukrainian situation.

2b. Ukraine will certainly need to face a debate on dealing with the collaborationists with the separatist groups. The debate has to be conducted in view of social consequences that the exclusive measures may take and in much more detail than those specified in Article 16 Paragraph 3 Sections (h) and (i).

3. The use of polygraph is a very questionable and controversial part of the proposal. Any official use of polygraph should be preceded by a debate on its reliability. This could be done by studying the experience with its use in other countries, in particular the United States; and independent testing in two psychological laboratories in Ukraine. It is not unreasonable to assume that the development and improvement of polygraphs has been accompanied by the development and improvement of methods for their deception. Even without deception, it is important to establish the extent to which the polygraph could result in Type I and Type II errors.

4. The conformity to human rights of some provisions of the draft is questionable. For instance, declaring membership in organizations deemed incompatible with the work in state authorities may be seen as the violation of the right not to testify against oneself; and touching the mandate of the people's deputies would interfere with the passive voting rights. An in-depth examination would need to be conducted to determine any eventual violations of European human rights standards (the European Convention on Human Rights and its Protocols, the jurisprudence of the European Court on Human Rights, and the Resolutions of the Parliamentary Assembly of the Council of Europe).

5. The participation of individual citizens in the process of auditing is a double-edge sword. On the one hand, it can result in much needed information about the persons under scrutiny and greatly enhance the legitimacy of the process. On the other hand, the protection of the auditees against unfounded allegations and hearsay need to be granted. Likewise, the protection of the citizens coming forward need to be granted. There have been numerous instances when truth commissions and victims of human rights violations have been brought to court by perpetrators who sued them for defamation.

6. The title of the law may become controversial. "Purges" usually refer to spontaneous, unregulated, or poorly regulated dismissals. The draft obviously aspires to become a law, which would limit the state power to dismiss without any reason.

For more information please contact:

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