



**REPORT:  
PURIFICATION OF GOVERNMENT,  
OR VETTING UKRAINIAN STYLE.  
THE FIRST YEAR'S EXPERIENCE**



**This publication provides a summary of the implementation of the process of purification of government in Ukraine and attempts to assess the successes and failures of the new Ukrainian authorities in this field**

The Open Dialog Foundation was established in Poland, in 2009, on the initiative of Lyudmyla Kozlovska (who is currently the President of the Management Board). The statutory objectives of the Foundation include protection of human rights, democracy and rule of law in the post-Soviet area. Particular attention of the Foundation is focused on the largest CIS countries: Kazakhstan Russia and Ukraine.

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## 1. INTRODUCTION

***“There are real problems that prevent the Ukrainian state from coming out of the most difficult crisis, but the problems are being hushed up in the West. I talked to many, including those present here, when the lustration law came into effect. In private, they said it was an awful law that should be cancelled urgently”, Sergei Lavrov, Minister of Foreign Affairs of the Russian Federation, stated on 7 February, 2015, during the Munich Conference on Security. [1]***

This publication is a continuation of previous publications developed by experts of the Open Dialog Foundation: International expertise on the draft law of Ukraine ‘On Purification of Government’ [2], ‘Summary of Legislative Work on Lustration Act No. 4359 ‘On Purification of Government’ [3] and ‘Current Challenges of Lustration in Ukraine’ (issued together with the Public Lustration Committee). [4] In this publication, the author focuses holistically on the issue of purification of government (vetting) in Ukraine, understood in a comprehensive way, including the aspect of verification of the body of judges.

The Foundation would like to thank our partners and sponsors: The Public Lustration Committee, USAID Fair Justice Project and The European Union Advisory Mission Ukraine (EUAM Ukraine) for their support, without which our work would not be possible.

We would also like to thank all the experts for their *pro bono* cooperation with us from the very beginning of the project: Professor Adam Czarnota, Professor Roman David, Dr. Pavel Zack, Radosław Peterman with the Polish Institute of National Remembrance, Lawyer Paweł Osik and Artur Bilski from the Faculty of Law and Administration at Warsaw University along with many others who have contributed to the implementation of our activities.

The aim of this study is to attempt to assess the implementation of Ukrainian vetting in the context of the current political and legal situation and attempt to answer the question as to what extent these laws meet the expectations placed upon them.

## 2. UKRAINIAN VETTING: GENERAL ASSUMPTIONS OF THE OPERATION OF LAWS ‘ON PURIFICATION OF GOVERNMENT’ AND ‘ON RESTORING CONFIDENCE IN THE JUDICIARY’

The circumstances, leading to the creation of the Law ‘On Purification of Government’ [5], aimed at financial statement audits and determining whether individuals worked or cooperated with the authorities of the Soviet special services, were presented in the paper ‘Summary of Legislative Work on Lustration Act No. 4359 ‘On Purification of Government’ [6], which also, in an abbreviated form, mentions the Law ‘On Restoring Confidence in the Judiciary’ [7], under which judges of common courts are subjected to verification.

It is worthwhile reminding ourselves, however, that the vetting process, implemented for the first time in the history of Ukraine after the fall of President Viktor Yanukovich’s government and the subsequent political breakthrough, is based on four dimensions:

1) The first is the ban on holding public office for a period of 5 to 10 years for officials in decision-making positions in all state institutions at the central, regional and local levels, who held their positions for at least one year during the government of Viktor Yanukovich, and who failed to leave their positions on their own request (resign) in the period currently known as ‘The Revolution of Dignity’ (Maidan; EuroMaidan).

2) The second dimension is the financial statement audit, which is designed to ascertain whether assets actually owned correspond with declared incomes.

3) The third dimension is verification of whether a person subjected to vetting was a KGB agent, an employee of security bodies in the Ukrainian Soviet Socialist Republic, a member of the management of the Communist Party of the Ukrainian SSR at the level of the head of the district unit of the party or a member of the Komsomol.

4) The fourth dimension (also regulated by a separate law) is the verification of the body of judges as regards issuing verdicts against participants of mass public protests during the Revolution of Dignity.

According to the Law ‘‘On Purification of Government’’, the financial statement audit and the verification of the persons’ career history during the communist era is carried out simultaneously, and the whole process is carried out in a decentralised manner.

Responsibility for carrying out both processes lies with the management of the specific state institution in which persons subject to vetting are employed. The internal Human Resources department sends a request to the State Financial Inspectorate to confirm whether the assets owned correspond with the income declared, and to the Security Service of Ukraine (SBU) to verify the records preserved in accordance with the criteria set out in the Law. Following the receipt of a response, the manager of the institution decides whether to retain the employee in the said position or to dismiss him (and in the case of candidates applying for the position – to reject their applications). The verification results are then transmitted to the Lustration Department of the Ministry of Justice, which is now responsible for keeping a centralised register of persons subjected to vetting and the overall supervision of the process of lustration across the country.

A negative lustration ruling may be appealed against in the administrative court.

According to current legislation, the vetting of judges of common courts is subject to both laws. This is one of the major defects, which will be discussed in more detail in the final part of this study. The Law ‘‘On Purification of Government’’ imposes an obligation to dismiss judges who convict (including handing down sentences of imprisonment) to participants of Euromaidan. The procedure to ban a judge from professional activity is consistent with the existing legal situation and requires a decision issued by the High Qualification Commission of Judges and the Supreme Council of Justice before the case is referred to the President of Ukraine for approval.

The law ‘On restoring confidence in the judiciary’ is also intended to support the broadly understood reform of the judiciary in Ukraine (which is considered one of the most dysfunctional structures in the country), even if it only focuses on the period between 30 November, 2013 and 23 February, 2014.

An element which is a very specific part of an attempt to support the purification of the body of judges was the election of new presidents of courts of general jurisdiction, provided for by law. The election was held by the General Meetings of judges of specific courts (with votes cast in a secret ballot). Elections were held in May 2014. In 60% of cases, the previous presidents of courts were re-elected.

Moreover, the Temporary Special Committee for Verification of Judges’ (in org. Тимчасова спеціальна комісія з перевірки суддів судів загальної юрисдикції) task is to review judgments handed down against protesters, in order to verify whether judges have breached the oath of judges or substantive or procedural rights in order to cause material and deliberate harm to defendants.

The Commission should be composed of at least 9 members, including two retired judges, recommended by the plenum of the Supreme Court, at least 4 representatives of civil society recommended by the Government Plenipotentiary for Fight against Corruption, and at least 4 representatives of the civil society recommended by the Supreme Council (in practice, it happened that the size of the Commission differed from the number prescribed, sometimes falling short of the full composition).

The Commission officially gathers at the Supreme Council of Justice once every few weeks at public hearings. Following these meetings regular reports are published.

Importantly, members of parliament are not subject to vetting. Therefore, vetting cannot become an instrument for cleansing the political scene of the most discredited figures linked to the regime of Yanukovich (such as Serhiy Kivalov, Yuriy Boyko, and Serhiy Kluyev), who, as independent MPs or members of the faction of the Opposition Bloc continue to treat the Verkhovna Rada and parliamentary immunity as protection against justice for offences committed.

### 3. TIME FRAME FOR THE VETTING PROCESS IN UKRAINE

According to a decree, published on 16 October, 2014, by the Cabinet of Ministers (the government), which concerns a plan for carrying out vetting on the basis of the Lustration Act, the first stage of the process, including 'automatic dismissal' from office, and the vetting of individuals currently holding positions in government offices, was scheduled for a period of two years. [8] The consequent obligation of automatic dismissal from the position has not, as yet, been fulfilled in the case of certain categories of persons covered by the law, which is discussed later in this publication.

**A detailed schedule of vetting has been appended to this publication (*ZaiNecznik 1*).**

On **11 November, 2014**, the Public Lustration Council was established at the Ministry of Justice. It includes a group of investigative journalists and individuals who contributed to the struggle for human rights and the fight against corruption. [9]

The Council's role is to supervise the work of the Ministry of Justice in carrying out the process of vetting in Ukraine. The Council also has advisory powers.

In the period of its activity, in order to support the activities of the Ministry, the Council sent 155 inquires to state institutions, requesting public information or explanations; thus far, only 8 remain unanswered.

The President of Ukraine has an extraordinary power of vetting clemency with regard to persons whom the Security and Defence Council, operating alongside him, appoints as necessary for fulfilling functions connected with the conflict in the Donbas (officially, Ukrainian forces operating within the framework of the so-called 'Anti-terrorist operation' - ATO). [10]

General terms and conditions of the vetting of property has been developed by the Ministry of Finance and they set the legal framework for verification of the assets held. [11]

Working on the basis of the Law 'On restoring confidence in the judiciary', according to the original plan, the Temporary Committee for the Verification of Judges was to conclude its activities by the end of June 2015.

### 4. THE IMPLEMENTATION OF VETTING IN UKRAINE: CURRENT STATUS AND BIGGEST CHALLENGES

As of 6 October, 2015, in a register kept by the Lustration Department of the Ministry of Justice are the names of 772 individuals [12] who are banned from holding public office for a period of 5 to 10 years as a result of the implementation of the law. The register also includes 86,730 people who are currently employed and 48 candidates for public offices. These numbers are updated on a weekly basis.

The current state of implementation of the laws and the biggest challenges are described in general terms in the Foundation's previous publications, as mentioned in the introduction. [13]

Basically, it can be concluded that vetting in public administration offices and ministries at central, regional and local levels is being implemented with significant resistance, but is, however, progressing; the most important problem is the attitude of the highest authorities of the state towards the vetting law, as well as the offices responsible for document verification.

The Public Lustration Committee, which from the beginning, as a social organisation, has actively supported the vetting process in Ukraine, keeps some additional records in order to monitor the implementation of the law.

The first of them concerns the 50 top-ranking state officials, who so far, have not been dismissed in accordance with the provisions of the law, or were dismissed only following strong pressure from the media and civil society activists. [\[14\]](#)

The second register is intended by the organisation to detail the names of people subject to a ban from holding public office. [\[15\]](#) This is a register based both on the data from the central government and verification of the information obtained from reports of the society, and contains names of both dismissed persons and those who presently occupy the positions.

According to information from activists, the lustration law is mostly neglected by the Presidential Administration of Ukraine and the General Prosecutor's Office - despite the replacement of part of the management [\[16\]](#) and the partial implementation of the provisions of the law. [\[17\]](#) All persons from the list of 50 top officials, subject to vetting, who were dismissed, left their positions only under heavy pressure from the media and from society.

A striking example that illustrates the attitude of those authorities towards the law is the recent appointment of Grigoriy Ostafiychuk to the post of a principal investigator of the Security Service of Ukraine. [\[18\]](#) This individual has been issued with a false certificate detailing a positive outcome of the vetting process, issued by the General Prosecutor's Office of Ukraine, where his wife holds the position of Deputy Chief of Human Resources. [\[19\]](#)

Aware of the vetting obligation, the Ukrainian president failed to verify whether the person is subject to the criteria of the law, or - as shown by activists of the Public Lustration Committee – chose to ignore it with full consciousness at the moment of decision-making.

Additionally, on 3 July, 2015, President Poroshenko took advantage of the prerogative of clemency towards Oleksandr Tereshchuk, a former head of Kiev police, who, according to information obtained by activists, was complicit in the issuing of orders to open fire on protesters during Maidan. [\[20\]](#)

The situation is also problematic in the judicial system. We have previously written about the vetting of judges in detail in an earlier report [\[21\]](#). However, special attention should be paid to some cases such as that of Judge Anton Chernushenko. The initiator of the criminal case against the judge was the Chernihiv Province Prosecutor's Office. The judge is suspected of accepting bribes for issuing sentences, including, in particular, the adoption of direct instructions to hand down particular rulings against participants in the Revolution of Dignity. Telecommunications analysis showed that the judge was being sent text messages with clear instructions (which he subsequently fulfilled). Ukraine's General Prosecutor's Office announced that the messages had been sent to him by his son between January 2013 and June 2015.

On 30 June, 2015, in accordance with a decision of the parliament, Judge Chernushenko was stripped of his immunity. MEPs also agreed that he should be arrested. MPs from the Opposition Bloc were opposed these decisions, as they considered that such actions against a corrupt judge 'undermined confidence' in the judiciary. However, before he could be arrested, the judge managed to flee abroad. [\[22\]](#) This case serves to testify to the complete lack of readiness of the structures of justice for systemic reform and the far-reaching impunity enjoyed by its representatives.

Vetting is carried out on the basis of information received from the State Financial Inspectorate (in Ukrainian: Державна фіскальна служба України) both centrally and through its regional branches. According to the Ministry of Justice, abuses are committed more and more frequently during the implementation of the law, which results in the filing of a lawsuit with the court by the person subjected to vetting, and the individual winning the case, which, in turn, influences society's perception of the process.

The judgment handed down by the Kharkiv Administrative Court of Appeal on 4 June, 2015, serves as an example of this. The ruling reinstated to a position, a person previously dismissed, as it transpired that, with regard to this person, the regional branch of the State Financial Inspection had incorrectly implemented a statement on the negative outcome of the vetting of property (case No. 820/3263/15).

According to the regulations regarding the verification conducted on the basis of the lustration law, a person subject to it has the right to submit additional explanations and provide additional documents corroborating his/her words, and the body responsible for verification should ensure such a possibility. The above-mentioned person was not provided with such an opportunity.

Meanwhile, as the case cited above proves, when reviewing judicial decisions, one can observe a tendency to apply an extremely inconvenient interpretation of the law with regard to persons subject to it, as well as direct violations of regulations as regards decisions issued (case No. 820/3263/15).

While the institutions responsible for the verification of documents issue decisions in violation of the regulations, the persons subjected to lustration display a great ingenuity, to say the least, in respect to means of avoidance.

The most well-known high profile case regards Deputy Head of the Kiev branch of the State Financial Inspection, Hanna Ignatenko, who forged an explanatory letter from the Ministry of Justice, exempting her from the obligation to be subjected to verification. In fact, the Lustration Department only provides explanations as regards interpretation of the law, and is not authorised to issue statements excluding persons from being subjected to the sanctions of the law. The subsequent investigation revealed fraud, but at the same time, a spectacular search, which received broad media coverage, was carried out at the Lustration Department, and data stored on the organisation's computers was scrutinised. [\[23\]](#)

Further proof that all is not well exists in the fact that the incumbent President of the State Financial Inspection, Roman Nasiro, at the same time continues to be a member of the Verkhovna Rada, thus openly ignoring the law on public service. [\[24\]](#) This is, indeed, a manifestation of a larger systemic problem in the country, but this fact, in particular, perfectly illustrates the attitude of this institution towards the law.

In the Border Guard, the lustration law is widely ignored. At the meeting of the Supreme Council Committee for Prevention and Combating of Corruption, the management of the Border Guard submitted a list of 22 names of generals reportedly dismissed from work under the Lustration Law, although, in truth, it was they themselves who resigned, or who had been transferred to other positions, and their cases had virtually no connection with the vetting. It has to be underlined that only senior management (i.e. the director of the institution and his deputy) is subjected to the so-called 'automatic vetting'. And so, the list of those persons was too long. The current leadership of the State Border Service does not fall under the rules of automatic dismissal. [\[25\]](#)

However, in an attempt to avoid vetting, workers of this institution travel to the so-called 'ATO zone' for just a few days, and, following receipt of documentation confirming that they are participants in military operations, they are officially exempted from the vetting process. [\[26\]](#)

In cases involving judges, which are run by the Temporary Special Committee for the Verification of Judges, 32 decisions have been issued so far concerning 63 judges. For a long time, the work of the Temporary Commission was paralyzed due to the absence of the Supreme Council of the Judiciary in its full composition, which, however, after the implementation of legislative changes, launched its activities on 9 June, 2015. [\[27\]](#)

The Commission transferred 47 cases to the Supreme Council of the Judiciary for consideration regarding the banning of judges from carrying out professional activities. In 12 cases, the Commission considered the violations as 'less serious' and further transferred disciplinary cases for consideration to the High Qualification Commission of Judges. In 4 cases, the Council dismissed the hearing.



In total, based on the consideration of 2,192 complaints from citizens, the Commission accepted 309 cases involving 311 judges for consideration. [\[28\]](#)

The Supreme Council of Justice is examining over 900 such cases. So far, it has issued 1 request to ban a judge from conducting professional activities. [\[29\]](#)

It is hoped that the process for the vetting of judges will be accelerated. The process is facilitated by the newly elected President of the Supreme Council of Justice who is a supporter of vetting and the banning judges, who are unworthy of office, from their professional activities. [\[30\]](#)

This is confirmed by the outcome of the latest meeting of the SCJ of 1 October, 2015, which adopted the Temporary Special Commission recommendations regarding the expulsion of judges for violation of the judges' oath. [\[31\]](#)

At the same time, the system must find a way to formally remove from office, judges who joined the self-proclaimed separatist 'republics' and perform their duties in courts of the so-called DPR and LPR (the Supreme Council of Justice says it is not able to determine how many such cases there are). According to the statement by the new President, it is the General Prosecutor's Office that should conduct investigations into such cases. [\[32\]](#)

It is worth mentioning that the Deputy General Prosecutor David Sakvarelidze, appointed on the initiative of the President of Ukraine, (and responsible for the implementation of reform of the prosecutor's office in Ukraine), and his colleagues have faced great resistance from the old system including attempts to block the reform initiatives, including accusations of corruption relating to the acceptance of funds which were officially provided as International Technical Assistance by the USA for the provision of training in the methodology of conducting competitions for new prosecutors. [\[33\]](#) It should be added that General Prosecutor Viktor Shokin's deputies - Volodymyr Huzyr and Yuriy Stolyarchuk - were known for their links with the former president Viktor Yanukovich and should not have been appointed to the positions they hold as they fall under the sanctions of the law.

So perhaps, despite the best efforts of new heads of the Supreme Council of Justice, if they do not have the power to conduct investigations, and the resistance of the old system remains strong, in the near future we should not expect a decision in this particular category of cases (of judges who have gone over to the so-called DPR and LPR).

## **5. LEGAL SITUATION SURROUNDING THE LAWS AND RECOMMENDATIONS OF THE VENICE COMMISSION**

### **5.1. The vetting law and the recommendations of the Venice Commission**

Works on amendments to both laws were carried out for two reasons. They included both objective factors, having their source in the imperfections of the laws and unrealistic assumptions, and the instruments used by the circles wishing to block the vetting process as it conflicted with their interests. These groups, which derived largely from the wide entourage of Viktor Yanukovich and the former Party of Regions as well as the Communist Party, attempted to take advantage of the complaint to the Constitutional Court, as well as to refer the laws for consideration by the Venice Commission (the Council of Europe's advisory body).

On 17 November, 2014, the Supreme Court addressed the Constitutional Court of Ukraine with a request that the Law 'On Purification of Government' be reviewed as it may constitute a violation of the independence of judges and a violation of citizens' constitutional right to equal access to jobs in public administration. [\[34\]](#) In January, 2015, MPs, including a large number of former members of the Party of

Regions, addressed the Constitutional Court. The Constitutional Court halted its decisions indefinitely. [\[35\]](#)

The circumstances surrounding the referral of the law 'On Purification of Government' to the Venice Commission for expert assessment were described in a previous publication by the Open Dialog Foundation. [\[36\]](#)

On 16 December, 2014, the Venice Commission produced its initial guidelines on amendments to the content of the Law. A lack of knowledge about the mechanisms of the functioning of the Commission and the significance of its recommendations has brought about a situation in which, on the one hand, opponents of the lustration in the Verkhovna Rada (members of the former Party of Regions, the Communist Party and some independent MPs) used the recommendations as a basis to conclude that "the law is not in line with international law and should be cancelled". [\[37\]](#), [\[38\]](#) On the other hand, some journalistic circles spread allegations that the Commission is a tool in the hands of the disgraced former deputy of the Party of Regions Serhiy Kivalov [\[39\]](#), who was member of the party until January 2015. [\[40\]](#)

It is worth mentioning that the Commission changed its, initially very critical, conclusions following the receipt of the draft amendments to the law and the visit of the Ukrainian delegation: Yehor Sobolev and Leonid Yemets – members of the Verkhovna Rada, Pavel Petrenko - Minister of Justice and Tetiana Kozachenko - Director of the Lustration Department at the Ministry of Justice , co-author of the Law. The Commission also made a pledge to cooperate on the fine-tuning of amendments to the law. [\[41\]](#)

The proposed changes include, among others, the establishment of an independent body to supervise vetting and penalisation for ignoring the law or deliberate violation of its provisions. [\[42\]](#) It is also proposed to exempt judges of courts of general jurisdiction from the lustration concerning judgments issued by them, and that they be subjected solely to the provisions of the law regarding the vetting of their property.

The fruits of cooperation between the Commission and the Ukrainian side are the recommendations published on 19 June, 2015. [\[43\]](#) In the final conclusions, the Venice Commission grants Ukraine the right to find its own balance between so-called automatic vetting and universally binding legal principle of individual responsibility for acts committed.

Also, recognising the concept of "democracy having the right to defend itself" which is used commonly as an argument in defence of solutions of the transformation era, involving the release a wide range of officials, the Commission encourages reflection on whether the current list of positions exempted by the Law is adequate. The Commission has consistently maintained the opinion that the vetting of judges should be carried out fully by the Temporary Special Commission for Verification of Judges and encourages an individual approach to responsibility for corruption.

The most important conclusion is the clear recommendation to centralise the vetting process. The mere establishment of a central, independent institution for its supervision is insufficient, as there is no guarantee that this process will be effective given such a broad range of cases, without developing transparent and precise instruments for the enforcement of the provisions of the Law, with control carried out from beginning to end by the planned institution (currently, one of the most important shortcomings of the vetting process is the lack of any instruments of enforcement for the Lustration Department of the Ministry of Justice with respect to the state institutions which carry out the process of vetting).

As of 28 September, 2015, the Verkhovna Rada had registered a number of alternative versions of amendments to the law. Project No. 2695 was registered, among others, by MPs Yehor Sobolev and Leonid Yemets. Other projects were proposed, among others, by MP Yuriy Derevianko, Oleh Osuhovskiy and members of the Radical Party. In addition, ideas were raised by the opposition Bloc which is striving

to establish a vetting body at the President of Ukraine [\[44\]](#), and deputy Yevhen Dedyko who is seeking to exempt senior officer corps from vetting. The Public Lustration Committee unambiguously labels the ideas of the Opposition Bloc and MP Dedyko “attempts to paralyze Ukrainian vetting”. [\[45\]](#)

The amendments, registered recently, have not been the subject of a serious and open political debate in any of their versions. All the texts are available on the website of the Verkhovna Rada of Ukraine. [\[46\]](#), [\[47\]](#), [\[48\]](#)

On 20 October, 2015, the Constitutional Court scheduled the first hearing on the constitutionality of the Law for 22 October, 2015. The Constitutional Court also announced that it intends to hear the conclusions of the Supreme Court and interrogate a total of 47 members of the Verkhovna Rada (including members of the former Party of Regions, who filed the motion to examine its compliance with the Constitution). [\[49\]](#) The surprisingly short period between the announcement of a hearing, and the hearing itself evoked strong criticism from civil society, particularly, from activists of the Public Lustration Committee, an element of MPs (with Yehor Sobolev at the helm), the media and government officials who feared that the Constitutional Court would quietly go about implementing its actual cancellation, by taking advantage of the lack of preparedness of the supporters of vetting. In this situation, on 22 October, 2015, a pro-lustration rally was held near the seat of the Constitutional Court, and the controversy surrounding the case has been highly publicised in the media. Finally, the Constitutional Court announced the suspension of the hearings for an indefinite period. [\[50\]](#)

## **5.2. The Venice Commission and a legal assessment of legislative proposals in the sphere of the judiciary**

The following brief chronology, due to time constraints on producing the document, presents the changes proposed after 23 February, 2014 only.

It should be noted that the recent position of the Venice Commission, announced on 23 October, 2015 does not apply to the Law ‘On restoring confidence in the judiciary’, but the draft amendments to the Constitution relating to the judiciary. The Law ‘On restoring confidence in the judiciary’, adopted on 8 April, 2015 [\[51\]](#), was the first law referred for assessment to the Venice Commission which related to Ukrainian justice within the timeframe discussed by us. The Commission finally recognised the Law when preparing an opinion to the Law ‘On Purification of Government’ (ie. The Vetting Law), which was briefly presented above. At this point, it also needs to be stated that the Commission recommends that the issue of verification (vetting) of judges be left for the Law ‘On restoring confidence in the judiciary’ and the Temporary Special Commission for Verification of Judges. As of now (26 October, 2015), the future of the Commission and its activities is uncertain, as its statutory operating time has expired and there was no political will to extend it.

In terms of a broadly understood rule of law, the Venice Commission assessed the bill on the reform of the prosecutor’s offices and the proposed amendments to the Constitution on judicial reform and decentralisation. All existing opinions are available on the official website of the Commission. [\[52\]](#)

Regarding the reform of the judiciary, which conceptually is related to the contents of this report, the Commission provisionally assessed the amendments made to the law ‘On the judicial system and the status of judges’ [\[53\]](#) and the proposed amendments to the Constitution for judicial reform. [\[54\]](#)

In this area, in Ukraine, there are two competing projects: one proposed by the Constitutional Committee, in which the team dealing with the reform of the judiciary is headed by the Deputy Head of Presidential Administration of Ukraine Oleksiy Filatov, and the second is a project proposed by Ukrainian activists associated with the Resuscitation Reform Package, supported by the Vice-President of the Verkhovna Rada, Oksana Syroid. The Venice Commission formally received texts prepared by the

Constitutional Committee, but in consultations during the meeting of the Committee held on 22-23 October, 2015, alternative ideas were also considered with the participation of all interested parties (experts Roman Kuybida and Mykhailo Zhernakov and experts on the judiciary were also present on behalf of the RRR).

In summary, it can be said that in its position, the Venice Commission draws attention to the following issues:

- Too many decision-making levels should be avoided in terms of overseeing the appointment, dismissal and disciplinary punishment of judges which is meant to lead to greater transparency of the entire system and, above all - to eliminate political influence, including from the President of Ukraine. In a perfect situation, the majority of such cases would be taken on by Supreme Council of Justice, reformed and endowed with public confidence; also, the need to depoliticise the office of the General Prosecutor was underlined;
- Full replacement of the body of judges of Ukraine (more than 8,000 judges) is not enforceable on the basis of a single decision (this could seriously disrupt the functioning of the judiciary) and may infringe the fundamental principles of the rule of law (the principle of division and separation of powers; independence of the judiciary), apart from under the most exceptional of circumstances. According to the Commission, it is permitted, however, while deciding on the reorganisation of the courts, to announce open competitions for all judges working in court according to new and specific statutory rules. Persons holding judicial positions should also have the opportunity to participate in the competitions. If an individual does not agree to the new criteria, they should have the right to retire;
- The Commission has additionally stated, as indicated above, that the judicial body can be entirely and swiftly replaced in extreme cases i.e. in the case of so-called 'constitutional discontinuity', that is, when a change of power takes place in the absence of legal continuity with the previous system, following a violation of territorial sovereignty or as a result of the overthrow of the regime. At the moment (despite the Dignity Revolution and the overthrow of Viktor Yanukovich) it remains a matter of debate whether, and to what extent, Ukraine meets these criteria, because the state was, and still is, a democracy with legal continuity over the period of the last 25 years.

The position of the Venice Commission was met with a moderately optimistic response from the Ukrainian pro-vetting environments, including the authors of this report.

## 6. DISCUSSION

Often, the question is asked: Why was it only the period of governance of Viktor Yanukovich that was chosen as the basis for vetting accountability? Accusations of 'political revenge on opponents' appear, especially in the context of the obvious fact that corruption is a systemic problem in Ukraine, and is not associated with a particular political group, but rather concerns the whole of the political elite including the government. The fact is also, however, that during the time of Yanukovich, corruption mechanisms were successfully formalised and centralised; vertical pyramids of dependency were created, and a type of 'price lists', along with the principles of distribution of illegal material benefits at different levels, were issued. In addition, the vetting law is only temporary supplement to anti-corruption legislation which should finally start to become effective in Ukraine.

The selection of the particular list of positions subject to 'automatic' exemption can be logically justified by the high degree of involvement of the people in the former regime by performance of specific duties.

Recognising the right of the state to apply such solutions, one should, however, balance the range of positions subject to 'automatic dismissal' from work. A list which is too narrow would result in maintaining in the positions, people who might obstruct reform and transformation in the country due to blackmail (they might be subjected to due to unrevealed offences committed by them in the past), or deliberate action against the State. If, however, it is too wide and includes positions in case of which it is impossible to prove a high degree of decision-making involvement in the activities of the former regime, the risk of increasing social discontent increases (due to a huge number of persons working in the bureaucracy apparatus), and is rising higher even now (also due to a sense of disillusionment with the lack of efficiency of the lustration process or socially perceptible changes).

It is also clear that the creation of a decentralised system of vetting leads to problems in its implementation. This can be explained in part by the ill will of officials and also, in part, by the unclear provisions of the Law and associated laws which cannot be unambiguously interpreted. It seems desirable to clarify all vague concepts and describe the competencies of the new proposed lustration office so that troubles in its further implementation are avoided.

## 7. EVALUATION OF EFFECTIVENESS

It is difficult to say whether the lustration law in its current form works effectively.

On the one hand, it is clear that public officials are gradually surrendering to the idea and the provisions, and the vetting register includes more and more names of vetted officials who openly express, less and less frequently, their opposition to the sanctions of the law.

In time, a broad consensus regarding the changes in legislation has been reached between action groups working towards judicial reform and the vetting of judges and state officials. The initial lack of coordination of actions resulted in conflicting provisions in the law, thus creating a further reason to criticise both laws.

Unfortunately, the current model of lustration in Ukraine does not work to the extent expected by its authors. The main problem is the aforementioned lack of a centralised and independent body and the vetting system, which prevents proper supervision over its implementation. This, combined with the lack of respect for the law by the highest representatives of the authorities, puts the ultimate success of Ukrainian lustration into question.

**Still, the functioning of vetting as such seems to be an undisputable issue. It has been successfully introduced after more than 20 years of attempts and political failures. The change in personnel it prompted may help in the recruitment of new non-corrupt and non-demoralised staff in public service. The best (albeit perverse) recommendation justifying the need for vetting in Ukraine and demonstrating its importance seems to be that contained in the words of the head of the Russian Foreign Minister Sergei Lavrov, cited at the beginning of this publication. The statement evokes concern, and it places vetting amongst the most serious problems preventing Ukraine from exiting the crisis.**

It is worth mentioning at this point that 30,000 candidates applied for service in the new patrol police, while demand has been identified at only 2,000 jobs at this stage. Also, in the judiciary, there are many young assistants, clerks and assistant judges who are potentially able to replace the 'old' judges. This shows that one of the strongest arguments against vetting: a lack of adequate personnel (which also appeared in Poland) is invalid. The state needs specialists, but the situation in which it found itself after the Revolution of Dignity, shows that Ukraine can count on many young, educated people, ready to serve their country. Secondly, the experience of lustration in the Czech Republic shows that new staff can always be trained and shaped in terms of ethical standards expected of civil servants and judicial staff. In this context, vetting may become (and it is now becoming) a continuation of changes initiated during

Maidan – not only does it eliminate the demoralised and corrupt staff from public life, but it also promotes new attitudes and enables the creation of a new generation of public servants.

## **8. VETTING IN NUMBERS (compiled from the records of the Ministry of Justice of Ukraine)**

The lustration law entered into force 379 days ago (on 16 October, 2014).

The persons subject to lustration law (approximate numbers): 700,000-1,000,000 (according to estimates of the Public Lustration Committee/Prime Minister of Ukraine Arseniy Yatsenyuk).

Persons occupying positions in public service currently subjected to the process of lustration: 86,730 (representing 8.7% of all persons subject to the law).

Individuals banned from holding public office: 772 (no information exists which would allow any categorisation – e.g. determining the number of prosecutors, police officers etc.).

Persons currently applying for positions subject to the process of lustration: 48,148.

Of the 50 top civil servants (from the Presidential Administration, Government, General Prosecutor's Office, the management of regional administration) subjected to the 'automatic vetting', 29 were dismissed from work.

The number of judges recommended for dismissal on the basis of proposals from the Temporary Special Commission for Verification of Judges: 1 of 47 analysed cases (proceedings which have been conducted so far).

A total number of judges in Ukraine: 8,000.

## **9. RECOMMENDATIONS**

The most important recommendations include the creation of a fully independent institution in charge of vetting as well as providing a centralised means for its implementation.

The abovementioned registers require improvement, namely:

- Register of the Lustration Department of the Ministry of Justice [\[55\]](#);
- registers kept by the Public Lustration Committee [\[56\]](#).

Their main disadvantage is their total lack of possibility of classifying information by region, institution or sector (public administration sector), which makes it impossible to carry out statistical tests without contacting the institution.

Although the register kept by the Public Lustration Committee provides information on the number of people subjected to vetting in different regions, it is, however, unclear who these people are and based on which criteria of the law they were selected. It would be advisable to introduce clear categorisation in this regard. Of course, the register is administrated by a social organisation having no official obligation to implement the provisions of the law, but it fulfills an important function and, if improved, it could become an important tool for scientific research – this aspect was emphasised by analysts dealing with the issue.

As regards the aforementioned problems with coordinating legislative actions, it is also necessary, at the stage of creating amendments to the law, to provide for their coordination with the work of the Ukrainian Institute of National Remembrance. The Law 'On Access to the Archives of Repressive Bodies of the Communist Totalitarian Regime of 1917-1991' [\[57\]](#) provides for the transfer of archives from the years 1917-1991 (including those currently administered by the SSU) to the Ukrainian Institute of National Remembrance (UINR). The transfer, classification and professional interpretation of the

documents will not be a short-term process, and, therefore, it is advisable to seek a compromise between the stakeholders and provide for this in the amendments to the law, so that verification of documents be carried out after they are collected, digitalised and classified by UINR specialists.

As a result of the analysis of the draft amendments to the law No. 2695, registered in the Verkhovna Rada [\[58\]](#), it also seems necessary to develop a clear competition procedure for the appointment of the president of the new independent vetting institution, and a procedure for his dismissal.

It would be best to rewrite the law along with legal acts of a lower rank, according to the following logic:

- The preamble should contain clear justification for the creation of the law and the intentions of the legislator;
- Article 1 - definitions of all terms undefined in other legal acts, should be given;
- In a subsequent part - a clear list of positions subject to the vetting process should be listed;
- Then – a limited and clear list of positions subject to the so-called. automatic vetting should be given;
- Then – a list of positions subject to the financial statement audits should be given (the financial criterium does not apply in the case of so-called ‘automatic vetting’),
- In a subsequent part - clear and precise definition of the procedure for the financial statement audit – it should not leave the field for arbitrary interpretation;
- The powers, competence and the mechanism of appointing and dismissing the president of the planned independent central institution for vetting should be described in a separate, clear law;
- The rights of a person subject to lustration, along with the procedure for appealing against a decision, must be clearly defined.

In the existing law, there are few provisions which, if not deleted, may jeopardise the entire procedure: these are all provisions regarding the possible application of a dual ban on access to jobs in the public service and the declaration in which the person subject to lustration has to determine whether the sanctions of the law are applicable for her/him; these provisions grossly violate the European Convention on Human Rights, and, more specifically, Art. 6 referring to the right to a fair trial, which, amongst other things, provides for the principle of avoiding self-incrimination - as repeatedly pointed out by experts.

## **10. THE ROLE OF THE OPEN DIALOG FOUNDATION**

Within the framework of the monitoring of the project and the rendering of support for the reform of the justice sector and vetting, the Foundation takes an active role in the expert support of the legislative work, also supporting talks between the Ukrainian side and the Venice Commission.

Alongside the ongoing analytical work, participation in the meetings of the Public Lustration Council at the Ministry of Justice, Parliamentary Committee for Preventing and Combatting Corruption and individual meetings, in the years 2014 and 2015, we organised, in collaboration with our partners (including Public Lustration Committee, USAID Fair Justice Project and the European Union Advisory Mission), a total of 8 events (including conferences, expert discussions, study visits and training seminars).

We collect and pass on recommendations to the law drafted by international experts cooperating with us; we also conduct an information campaign about its importance among parliamentarians of EU member states and the OSCE, Members of the European Parliament and at forums of other international institutions supporting the reform process in Ukraine.

Today, we begin a project, aimed at raising public awareness regarding vetting in the regions of Ukraine. For this purpose, we are planning to organise an extensive media campaign. We also monitor the processes occurring in the area of introduction of the rule of law in Ukraine to a greater extent.



## Annex 1

### THE TIME FRAME OF LUSTRATION ACCORDING TO THE PLAN OF THE MINISTRY OF JUSTICE

**In the period between December 2014 – February 2015** [59], lustration was to be carried out with regard to: the Prime Minister of Ukraine; First Deputy Prime Minister; Deputy Prime Ministers; ministers; central apparatus of the Presidential Administration of Ukraine; the leadership of the central bodies of executive power, which are not part of the Cabinet of Ministers of Ukraine; Central Election Commission, the National Council of Radio and Television; the management and employees of the state regulation commissions in the sphere of natural monopolies and committees governing ICT services, securities market and financial services; Director of the Foreign Intelligence Service, Head of the State Security Bureau, Director of the National Office for Administration (in Ukrainian: Державне управління справами), Head of the Secretariat of the Cabinet of Ministers of Ukraine, Government Plenipotentiary for Anti-Corruption Policy; Director of the National Bank of Ukraine and heads of local branches of state administration [60].

**Later, in the period between November 2014 – January 2015**, lustration was to be carried out with regard to: executives and employees [61] of the central branch of the Ministry of Justice of Ukraine, heads and deputy heads of local units of the Ministry of Justice of Ukraine, the management and all executives and employees of the central branch of the Ministry of Internal Affairs and the State Financial Service, managers and deputy managers of local units of the State Financial Service, Director of the Security Service of Ukraine, his first deputy and deputies, all executives and employees of the central branch of the SSU, Director of the State Court Administration, heads of local units of the National Courts Administration and the General Prosecutor of Ukraine and his deputies.

**Then, in the period from December 2014 to February 2015**, according to the assumptions of the legislator, lustration will be carried out with regard to members of the Supreme Council of the Judiciary and the High Qualification Commission of Judges of Ukraine. In practice, however, the new Supreme Council of the Judiciary has not been established so far; the issue is discussed in a more detail in the chapter 'Challenges And Problems Connected With The Implementation'.

**Until December 2015**, the vetting of judges of courts of general jurisdiction will be carried out, according to assumptions.

**In the period between March 2015 – May 2015**, lustration was to be carried out with regard to: all civil servants who are not part of the Cabinet of Ministers of Ukraine: first deputies and deputies of ministers; first deputy and deputies of Director of the National Bank of Ukraine; first deputy and deputies of Director of the Foreign Intelligence Service; deputies of the head of the Government Plenipotentiary for Anti-Corruption Policy; first deputy and deputies of Head of the Presidential Administration of Ukraine; first deputy and deputies of Director of the National Office of Administration; first deputy and deputies of Head of the Secretariat of the Cabinet of Ministers of Ukraine; heads of structural units of the ministries, local government units, heads and deputy heads of local structures of the Interior Ministry in the Autonomous Republic of Crimea, heads and deputy heads of town, county and municipal councils, separate police sub-units, provincial, district and municipal branches of the Ukrainian Security Service, prosecutors, deputies and their deputies in prosecutor's offices of provincial, district, municipal, regional and military level, as well as in the city of Kiev and Sevastopol; and directors of defence industry enterprises.

**In the period between April 2015 – June 2016**, lustration will be carried out with regard to all other executives and employees of the structures listed above in all central and local branches.

**In the period from June 2015 – December 2016**, lustration will be carried out with regard to all other executives and employees of local state administration and local government, except for elective positions.

**In the period from March 2015 – December 2016**, lustration of the Armed Forces of Ukraine, except for mobilized people, is planned.

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59. The Cabinet of Ministers of Ukraine / A decree. On approval of the plan for vetting under the Law of Ukraine 'On Purification of Government' - <http://zakon4.rada.gov.ua/laws/show/1025-2014-p>
60. In Ukraine, the territorial administration is divided into local government bodies (with limited privileges) and local government structures.
61. Ukrainian legislation makes a specific distinction between persons occupying important positions (executives) and employees. The first category applies to persons holding managerial decision-making positions in state bodies and their apparatus, the second refers to all civil servants. However, the definition of these two terms is unclear and leads to numerous inaccuracies. See: [http://www.zhitomir-region.gov.ua/doc/korupciya/roz\\_sector\\_oda\\_1\\_1.pdf](http://www.zhitomir-region.gov.ua/doc/korupciya/roz_sector_oda_1_1.pdf)